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Wolfgang Fikentscher

Law and Anthropology

Outlines, Issues, and Suggestions

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"… anthropological approaches to the law are very likely
to become the foundation of jurisprudence in the new century"

Manfred O. Hinz, Jurisprudence and Anthropology,
26 Anthropology Southern Africa 114–118 (2003), at 114

anthropology is "… the most scientific of the humanities,
the most humanist of the sciences …"

Eric Wolf, Anthropology. Englewood Cliffs, NJ 1964: Prentice Hall, at 988

"A nation's strength is in its culture"

Johan Vilhelm Snellman (1806–1881), Finnish politician and philosopher,
founder of Finnish currency, modern economy and Finnish as Finnland's language,
Senator and Chief of Financial Administration when
Finnland was under Russian rule, in a conversation with Czar Alexander II

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PREFACE

This book represents a new approach: It discusses the relationship between law and anthropology by focusing on recent developments and ongoing debates. Inevitably, this approach falls short of covering all aspects pertaining to the social science of legal anthropology. Therefore, the text indicates where the student of legal anthropology may find more information on what is traditionally considered the substance of both law and anthropology. Of special interest here are normative issues of cultural anthropology, especially when they border on law, politics, religion and economics.

What the book is about

There are three main aspects to this text: First, the outline and structure of the entire field of legal anthropology is presented in a new light, by separating a general part containing overarching contexts ("Part One") from special fields such as family, contracts, and torts ("Part Two"). Secondly, I discuss several contemporary themes, for instance the multiplicity of legal systems, organizational issues, and the role of ethnicity in the United Nations. Thirdly, traditional questions of legal anthropology are critically assessed, for example the degree to which law-related behavior may be explained with biological anthropology, and how a legal-anthropological market theory relates to economic liberalism. The subtitle of the book therefore contains "outlines", "issues", and "suggestions".

Often, academic authors begin their text with one or a few practical examples or stories. In addition to the many examples used throughout this text to illustrate theoretical principles, Chapter 16 IV. and V. provide programmatic applications (applied legal anthropology). There, at the conclusion of the book, these issues are connected to suggestions that arise from the preceding chapters.

I have identified two strands of these very concrete issues: Overall, globalization fosters cross-cultural contact *between* the approximately 200 nation states of this world. At the same time, *within* each of these nation states, diversity, non-discrimination, ethnic equality, and inter-religious harmony identify the problems discussed in this book. Chapter 13 combines the two strands procedurally

Literature

There is a shortage of books on the relationship between law and anthropology.. Leopold Pospíšil's "Anthropology of Law" (1971, several reprints) is rather a handbook that for the most part speaks to the initiated reader but not to the beginner. Pospíšil's "Ethnology of Law" (1978; 1985; now out of print) is a very readable introduction for all students, including the novice. His "Sociocultural Anthropology" (2004) pursues similar goals as I do here, in that the anthropology of law reaches into neighbouring normative fields (political science, religion, economy). However, Pospíšil's most recent book again addresses mainly the initiated reader.. Laura Nader's 1969 volume "Law in Culture and Society" was reisued in 1997. Its contributions are valuable readings but its structure evidences a less than systematic approach. The same may be said of Sally Falk Moore's "Law and Anthropology: A Reader" (2004). Norbert Rouland's "Anthropologie juridique" (1988, translated by Philippe G. Planel into English in 1994 with the title "Legal Anthropology" (1994) is rich in detail and information, yet with its special interest in the relationship between state and law reveals its originally in-

tended audience: the French student of legal anthropology. In 1992, Peter Sack and Jonathon Aleck edited a collection of articles on "Law and Anthropology". Martha Mundy edited a book "Law and Anthropology" (2002) containing a collection of chapters and articles on various topics. "Exotic No More: Anthropology on the Front Lines" by Jeremy MacClancy is a welcome reflection on anthropology's general modernity, for law and beyond. Christopher C. Fennell and Lee Anne Fennel published "Sources on anthropology and law" in 2003. In their book "Anthropology and Law" (2003), J. Donovan and H.E. Anderson III call for more attention to the fields and identify a number of pending issues. My own book "Modes of Thought – A Study in the Anthropology of Law and Religion" (1995, 2nd revised ed. 2004) concentrates on modes of thought as a basic topic of anthropological culture comparison. But it does not include other subjects of the anthropology of law. In its attempt to focus on *recent issues of outlining, substantiating and critically assessing* the anthropology of law, the present book may serve as an introduction to the current state of the field.

Overview of the contents. Earlier versions

In short, this book bases cultural and, in particular, legal anthropology on a combination of V. Gordon Childe's two "revolutions" (the neolithic and the urban) with Karl Jaspers' axial age. From this combination follows, directly or indirectly, the presentation of all propositions: superaddition, economic universals, family structures, human rights, conflict of laws and legal pluralism, societal orders, etc. Regarding four normative fields of sociocultural anthropology, this combination facilitates: (1) in law, a science of values helping grant subjective rights of having and obtaining; (2) in political science, individual and collective human rights; (3) in religion, individualism; and (4) in economy, the individual – because superadditive – market with its invisible hand as a solution to the private-public-interest issue and therefore as a power control.

In one respect, the following text is more than just an introduction to legal anthropology (or, synonymously, anthropology of law). A textbook on the anthropology of law would have to confine itself to the discussion of legal issues of anthropology. After more than twenty years of teaching on graduate and college level I have learned that students and researchers of anthropology of law are not satisfied with the mere presentation of legal issues, because questions of general anthropology – thus going beyond law – cannot be left aside when legal anthropology is to be discussed meaningfully. This holds true with respect to the anthropological methods of analysis, for example the emic-etic distinction, to name a prominent example (see Chapter 6), or the attributes of culture in a wider context (see Chapter 5). Often, the anthropologically interested lawyer must be an anthropologist first before turning to legal questions. Therefore, I decided not to write a book on the anthropology of law, or legal anthropology, but on law *and* anthropology. The reader will find an introduction into a number of fields and subfields of general anthropology, and also, in the relevant context, the application of anthropological generalities to law. A certain disadvantage of some of the legal anthropological works quoted above is an overly fixation on *legal anthropology.* A focus on anthropology *and* law seems to me a more efficient approach.

The present book grew over the years of offering classes and seminars on law and anthropology in Munich and Berkeley since 1986. These courses were held with the support of mimeographed readers. The readers in Berkeley, compiled in part with Robert D. Cooter and Jeremy Waldron, and consisting of one, two or three volumes depending on the scope of the class, were prepared for classes in 1991, 1992, 1994, 1995, 1997, 1998, 1999 and 2000. Beginning in 1997, I have been sole author. Over the years, the readers developed into the direction of a textbook. Finally, the reader of 2000 contained so many comments that I re-

garded it mature enough for becoming a book. I worked on the book between 2001 and 2008, parallel to a certain amount of fieldwork among American Indian tribes and in Southern Africa, as well as my teaching load in Munich. It was clear from the beginning that the book was not to contain a full survey on law and anthropology as it is intended in class, but was to be designed only to bring the actual issues, themes, and my thoughts concerning them.

Similar to the course readers, but in no way identical, the book comes in three parts. Part One takes up subjects of law and anthropology in general. Chapter 1 assesses the systematic position law and anthropology hold in the framework of the social sciences, and Chapter 2 reports historic developments of both law and anthropology, and of the schools of anthropology and their different views of the law. To the uninitiated reader, these first two chapters may not mean much since they demand some prior introduction into at least one social science. They also require some interest in the system and history of scientific investigation as such. These two chapters offer few practical examples. In class, undergraduates do not like these assignments and often give up by dropping the course before the real matter begins. On the other hand, those who stay may be rewarded by some knowledge in the science of science and in its historical dimension. I have often wondered whether it might be advisable to move these – necessary – things to a later place in the course. But their introductory nature speaks against this. So all I can do is ask the reader for patience, or just to skip these two chapters until interest has grown enough to return to these essentials. Chapter 3 attempts to unfold the conceptional world of anthropology as far as needed for law. The interested reader may be curious to learn the language, the jargon, of the field. Chapter 4 discusses the theory of the forums, law being one of them, to be distinguished from the forums of the morals, of religion, of habits and etiquette, etc. Chapter 5 is devoted to various aspects of culture (in the singular) and the cultures (in the plural). Culture still is the central concept of anthropology and its subcategories. This chapter is long and offers some difficulties, both for students, readers, and eventual teachers, as well as for this presentation in an issue-driven book. I have included some examples to help to understand the context. Chapter 6 treats the analyses, the methods, of anthropology with a special view of the forum of law and justice. Chapter 6 starts with a critique of ethnocentrism by the use of modern examples, including the much debated ones on the "export of democracy", and Kant's theory of "eternal peace" by having democracies. My observation is that students like this chapter. It deals with challenging, even mind-boggling, mental operations. They concern the pressing question of how to understand, as member of one culture, another culture. Often it is this chapter on analyses when the student of the anthropology of law (or any value-centered ought-science) begins to become engaged in the subject. Chapter 7 is a survey of physical (or better: biological) anthropology and its importance for the law. Biological anthropology will be a novel subject of study in a book on the anthropology of law. However, there is a link between cultural and biological anthropology that can be illustrated by a reference to law: It is a 4-function theory of biology for law. This theory could be expanded to other social norms. Later in the book it will be shown that this bridge between biological and cultural anthropology can be applied to certain forms of human organizations (Chapter 9). Therefore this chapter is also an introduction into the science of behavior, ethology.

The distinction between a general part of legal anthropology (Chapters 1 through 7) and a special part (Chapters 8 through 13) is new and orients itself at the separation of general principles and specific areas of cultural anthropology. Part Two of the book presents the substantive branches of the anthropology of law: Family and kinship (Chapter 8), extra-family human order, especially organizations (Chapter 9), the anthropology of exchange, reciprocity, distri-

bution, market and other economic topics (Chapter 10), the anthropology of possession, ownership and inheritance including cultural property (Chapter 11), the anthropology of wrongdoing, torts, crimes, and sanctions (Chapter 12), and the anthropology of legal procedure including mediation, jurisdictional and conflict of laws issues (Chapter 13). With its subchapter on conflict of laws in culture anthropology, Chapter 13 enters a new field of study which, to my knowledge, has been covered in court decisions and a number of articles, but which still awaits systematic presentation. National and tribal conflict of laws is a subject matter that, if handled circumspectly, is able to generate and develop respect for national and tribal identity, because it may cause courts all over the world to study and apply the law of a nation or tribe when rules of conflict of laws point, by applicable nexuses, to the applicable substantive tribal customary or code law. If the preceeding examination of jurisdiction had also pointed to a tribal court, this tribal court will decide under tribal law – its own or of another tribe, and may hereby confront foreign courts with the embarassment of having to reject the recognition of a foreign decision for reasons of local public policy.

In Part Two, the law student, especially the Continental one, will discover a sequence of presentations he may be used to, or may have heard of, in the civil law systems: Family and inheritance law, and the law of moral persons, contract, property, torts, procedure, jurisdiction and conflict of laws are branches of civil law.

Part Three of the book is devoted mainly to divers specific cultures. Chapter 14 deals with American Indian tribal law, customary and code, and Indian jurisdiction and conflict of laws. The reason of this preference, among many other possibilities, for American Indian legal anthropology is simple: It is the legal world that constitutes one of my "fields", that is, the laws of predominantly Southwestern tribes, and in particular Pueblo laws. The legal situation of the tribes in my other field, the aborigines of Southern Taiwan, received their reservation status from the Japanese who in turn copied for these ancient peoples the US-American reservation system. Nobody can cover all the cultures of the world – about 10000 in history and presence –. So every anthropologist has to limit her or his studies to one, two or – rarely – three fields . More is hardly feasible. Thus, what is being said in Chapter 14 has to be taken *pars pro toto,* and *mutatis mutandis.* Chapter 15 is to render a brief report on the role of indigenous peoples in the international world of today, most of all in the United Nations. Much cannot be said. The subject belongs to the law of nations, so that Chapter 15 is only meant to open a view through a window onto the many other cultures which might furnish as subjects to cross-cultural investigations. Chapter 16 closes the book with a few remarks on applied anthropology. Most international problems exist because they themselves are not properly set, most of all anhropologically: Kosovo, Iraq, Iran, Pakistan, Myanmar are examples. Familiarization with comparative culture may help to solve them.

The subtitle of the book reads "Outlines, Issnes, Suggestions." Outlines in this context means systems, dichotomies, surveys, tables, didactic or systematic portrayals of textures, charts, checklists, and the like. A list of these outlines can be found on p. 19. "Issues" and "Suggestions" about them relate to recently much debated issues of law and anthropology, and here lies the focus of the book. An exemplary list of these topics of *actual* importance could have been presented in this foreword. However, this would have both been redundent with regard to the sketch of the contents of Chapters 1 through 16 above.

The purpose of this book is not to broadly repeat what is known long since of classical cultural anthropology, whether concerning law, economics, politics, religion, or its other fields. Every chapter attempts to focus on topics that concern recent contemporary debates. Therefore, at the beginning of each chapter, these novelties – or at least some of them – are mentioned to stimulate the interest of the reader. To reiterate these novel issues here, in the preface,

would surely overburden it. Reference should therefore be made to the opening paragraphs of each following chapter.

Some aspects newly introduced into cultural anthropology may be found in various places throughout the book, such as the phenomenon of "youth bulge", or non-ethnic anthropology.

Central concepts

The organization of the book interrogates the concept of *cultural* anthropology. It is in different parts of the book that the question will have to be answered what after all *cultural anthropology* is. This depends on the concept of *culture* (Chapter 3 I and Chapter 5), on the distinction between cultural and *biological* anthropology (with its relationship to the concept of *nature*, Chapter 7) and on the questions of leadership and societal organization (Chapter 9 I.). At these junctures, it becomes evident that culture as such answers certain human needs, and that there are only three basic human needs that culture has to address, in other words, to "regulate" (against nature).

The wisdom that culture can be reduced to three tasks that have to be tackled against the natural flow of things comes to the fore when, for example, in constitutional law the separation of powers is subjected to scrutiny: what functions do the powers within a society have to serve, for what do they exist? Iran has two powers; clerus and government. The US, following Montesquieu, has three powers: legislature, executive, judicature. Taiwan R.o.C. has four powers: legislature, executive, judicature, and public control. The Keresan speaking Pueblos in New Mexico have eight powers, the Tewa speaking Pueblos nine. Regardless of the number of separated powers, reduced to their purposes, all cultures count merely three cultural tasks to regulate: family matters circling in last resort around incest avoidance, regulation of societal and economic might, and the relationship with the supranatural, that is, to "religion" or "belief system". This reduction of cultural functions to three is possible because several separate powers may serve the same cultural tasks.

For the structuring of any book on cultural anthropology, this means that it might be expected that its contents should *at least* cover three subjects, on family matters, leadership in society, and belief systems. The present book contains general aspects in Part One, and special fields in Part Two and here, in Part Two, the reader will find two chapters on family and leadership (Chapters 8 and 9). However, since the present book is no introduction to cultural anthropology in general, but only to the anthropology of law and related forums, and family matters and leadership are chiefly legal themes, and belief systems are not, the cultural subject of the latter is only touched upon in Part One at different places, for instance in Chapter 3 (on concepts) and in Chapter 4 (on human responsibilities).

Facts and Values

The reader will notice a dilemma in which every speaking or writing cultural anthropologist finds oneself. His or her primordial task is to present the researched facts as complete and precise as possible. Then comes a point where the speaking or writing anthropologist may wish to develop a theory of the typification and categorization of the reported facts. This is the threshold from facts to evaluation. Here, the style may change from "ises" to "shoulds". Often the "shoulds" dictate needs and ways to choose from the material. Immanuel Kant characterizes this distinction between these tasks as between pure and practical reason, Max Weber as between observing and understanding sociology, Clifford Geertz as between "thick description" and interpretation, the legal methodologists as between descriptive and prescriptive rationale of a decided case, and the cultural anthropologist between anthropological comparison and applied anthropology. In the following text, the step from comparative survey of observed facts to their critical evaluation will not be indicated. To meet eventual "pure" and "practical" demands,

Chapter 1 II. 8. offers a theoretical treatment of the nature of anthropological concluding. Chapter 16 IV, V. on applied anthropology presents a summary of "prescriptive" thoughts .

Fieldwork

The results of fieldwork among Northamerican Indians and Taiwanese aboriginal peoples, and from other travels, for example to Windhoek, Namibia, are in this book not reported *in extenso*. For this, other publications are better suited. When already published, they are quoted. Only in rare occasions, for sake of giving examples, personal experiences are referred to, if possible in an anecdotal manner, and whenever feasible, in direct speech.

Footnotes. Translations

Of endnotes it is said that they interrupt the reading flow least. But consulting them requires the use of three hands. Therefore, this book has footnotes. Its precursors, the law and anthropology class readers, also used them. In a monograph, they serve different purposes. When a line of argument is presented, sidesteps into fields related to the discussion would distract the reader and weaken the point to be made. These sidesteps supporting the argument were made into footnotes. Also, readers may wish to learn where they can find additional literature, including related topics and in-depth treatments of subjects merely alluded to in this book. Unless otherwise indicated, all translations between English and German are mine.

ACKNOWLEDGMENTS

While writing this book, I had input and assistance from many sides including legal and anthropological experts, tribal judges and attorneys, students, researchers, friends, and professional institutions. To all of them I owe my sincere thanks. It is not possible to list them all. Some who were especially helpful may be mentioned here:

To those who, in seminar and lectures, shared my efforts to find a way through the anthropology of law, politics, religion, and economics go my principal thanks. They include students from the US (Berkeley, CA; and Ann Arbor, MI), the People's Republic of China (Nanjing), the Republic of China on Taiwan (Taipei), Spain (Barcelona), Poland (Poznan and Cracow), Czechia (Prague), and Germany (Munich, Frankfurt/Main, Dresden, and Berlin). For several decades, the outlines, issues and thoughts of comparative law and of cultural anthropology (legal, political, economical, religious) contained in this book have been raised and touched upon, and for the last twenty years systematically researched, debated, and summarized, often repeatedly. In academic journals such as annals, proceedings, university and faculty reports the articles often end with a "should" or "ought to be done in the future". What literally hundreds of students contributed to the following lines goes beyond any theoretical "should" and "ought". The broad range of student feedback was especially gratifying because it reflected many diverse perspectives based on personal backgrounds and life experiences.

Kai Fikentscher, PhD., Associated Professor of ethnomusicology and anthropology of music at Ramapo College of New Jersey, collaborated in editing and finishing the book manuscript. He contributed ideas and perspectives from cultural-anthropological as well as historical contexts. He also helped shape the organization of the book and corrected my English. Overall, his contributions approached co-authorship. Our collaboration began in 1978 when he helped complete a monograph on Hugo Grotius (*"De fide et perfidia: Der Treuegedanke in den 'Staatsparallelen' des Hugo Grotius aus heutiger Sicht"* (On Trust and Disloyalty: The Concept of Trust in the 'Parallelon Rerumpublicarum' by Hugo Grotius in Modern Perspective), Bavarian Academy of Sciences, Munich 1978. Joint cultural-anthropological efforts continued in a co-authored article *"Kulturanthropologie: Ansätze zu einer erneuten Standortbestimmung"* (Cultural Anthropology Redefined). The article is part of the proceedings volume of the Bavarian Academy of Sciences, entitled *"Begegnung und Konflikt – eine kulturanthropologische Bestandsaufnahme"* (Contact and Conflict: A Cultural Anthropological Stock Taking), No. 120, Munich 2001: Commission C.H. Beck Verlag, 9–32. To the same volume, he contributed the article "Music as Counterculture: Hip-hop, House Music, and the Black Public Sphere", loc. cit. 240–252. The present book continues our cooperation in the field of cultural anthropology. While the responsibility for the contents of the book rests with me, his contributions are in the areas of collaboration and editorship.

I am indebted to researchers of Max-Planck Institute for Intellectual Property, Competition and Tax Law, Munich, who discussed issues of folklore and traditional knowledge protection with me: Professors Silke von Lewinski and Josef Drexl, as well as Allison Felmy, Matthias Leistner, Rupprecht Podszun, Peter Ganea and Klaus Dieter Beiter; to my colleagues on the Commission for the Study of Cultural Anthropology of the Bavarian Academy of Sciences (Munich), Professors Knut Borchardt, Theodor Göllner, Thomas O. Höllmann, Peter

Landau, Ernst Pöppel, and Detlev Ploog†; to my friends Guntram Rahn, and Keebet and Franz von Benda-Beckmann as well as their guest speakers and collaborators at the Max-Planck Institute of Social Anthropology (Halle) and to Petra Carl of the Human Science Center of the University of Munich who was helpful in solving administrative issues.

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Klaudia Kochanek, Susanne Weingärtner, Anne-Kathrin Bauer, Sebastian Kuck, Josef Parzinger, Thomas Ramsauer, and Lukas Weidner helped preparing manuscripts, seminars and classes, and organizing the newly established library of legal anthropology at Ludwig-Maximilians-University, Munich.

During my research in Taiwan R. o. C., Shiow-ming Wu and his family provided invaluable assistance. Special thanks go to my longstanding fieldwork companion Robert D. Cooter, and to his wife Blair Dean, for their encouragement, advice, friendship, and hospitality.

Munich, June 2008 Wolfgang Fikentscher

LIST OF CASES

LIST OF ILLUSTRATIONS

Every effort has been made to trace the copyright holders of the images contained in this book and we apologize in advance for any unintentional omissions.

TABLE OF ABBREVIATIONS

A.D.	Anno Domini = C.E.)
A.H.	After Hegira (= 622 A.D.) (the Prophet Mohammed's move from Mekka to Medina)
AJCL	American Journal of Comparative Law (Ann Arbor, MI)
AJIL	American Journal of International Law (Washington, D.C.)
APEC	Asia-Pacific Economic Cooperation
ARSP	Archiv für Rechts- und Staatsphilosophie (law journal)
å.s.	Abbreviation for aleyhi's-selam, arab.: Peace be with Him (to be added to the name of a messenger of God, esp. Mohammed, å.s.)
ASEAN	Association of Southeast Asian Nations
b.	born in the year …
B.C.	Before Christ (= Before Common Era)
B.C.E.	Before Common Era
BGB	Bürgerliches Gesetzbuch (German civil code)
BGH	Bundesgerichtshof (German Supreme Court)
BR	Bayerischer Rundfunk (Bavarian Broadcast)
BVfG	Bundesverfassungsgericht (German Constitutional Court)
C.C.	Code Civil (French civil code)
C.E.	Christian Era = Common Era
Ch.	Chapter
d.	died in the year …
DIE ZEIT	(German weekly)
Diss.	Dissertation (German doctoral thesis, often without a publisher)
DStR	Deutsches Steuerrecht
EC	European Community, EEC European Economic Community
e.g.	exempli gratia = for example
esp.	especially
et al.	et alii = and other authors
EU	European Union
EuGRZ	Europäische Grundrechtezeitschrift
FAZ	Frankfurter Allgemeine Zeitung (German daily)
FS	Festschrift (Essays in honor of)
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int	Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil (Max-Planck, Munich)
GS	Gedächtnisschrift (Essays to the memory of)
ib.	ibidem = same place
id.	idem = same author
IIC	International Review of Intellectual Property and Competition Law (law journal, Max-Planck, Munich)
IMF	International Monetary Fund

Int'l ..... International
IPrax ..... Praxis der Internationalen Privat-und Verfahrensrechts (law journal, Bielefeld)
iwd ..... Informationsdienst des Instituts der deutschen Wirtschaft Köln
J. ..... Journal
JITE ..... Journal of Institutional and Theoretical Economics
JURA ..... law journal (Berlin)
KAS ..... Konrad Adenauer Stiftung e.V., Berlin
lat. ..... latin
loc. cit. ..... locus citatus = same reference
MDR ..... Mitteldeutscher Rundfunk (Middle German Broadcast)
NATO ..... North Atlantic Treaty Organization
NNC ..... Navajo Nation Code
n.d. ..... no publication date or year available available
No. ..... Number
n.p. ..... no place of publication available
NUCC ..... Navajo Uniform Commercial Code
NZZ ..... Neue Zürcher Zeitung
op. cit. ..... opus citatum = in the same work
p. ..... page(s)
resp. ..... respectively
Rev. ..... Review
scil. ..... scilicet (lat.) = to wit, namely, to be added
Südd. Ztg. ..... Süddeutsche Zeitung, Munich (also SZ)
transl. ..... translated by
UCC ..... Uniform Commercial Code (USA)
UNCTAD ..... United Nations Conference on Trade and Development
Univ. ..... University
vol. ..... volume
WTO ..... World Trade Organization
ZBG ..... Zivilgesetzbuch = Swiss Civil Code
ZgS ..... Zeitschrift für die gesamte Staatswissenschaft
ZKM ..... Zeitschrift für Konfliktmanagement
Ztg. ..... Zeitung (daily)

Other abbreviations: See Table of Abbreviations in the Modern Language, Association of America International Bibliography

PART ONE: ANTHROPOLOGY OF LAW IN GENERAL

Chapter 1: Anthropology of law as a science

Chapter 1 redefines the position of legal anthropology within the social sciences. A new definition of law for anthropological purposes is sought, and in this context authority as an indispensable conceptional element of law is discussed in a new light with a focus on the relationship of law and justice. Legal pluralism will show two separable dimensions. Among the social science aspects of anthropology, empirical thinking and guidance by models are being contrasted and related to Pre-socratic, Platonic and Kantian epistemology.

I. Definitions. Issues and tasks. Approaches. Types of Cases. Study and background books

1. Anthropology, ethnography, and ethnology of law

Anthropology is the social science that studies cultural and biological characteristics, both universal and specific of humans, and of human groups, in empirically descriptive, analytically evaluative, comparative, and practically applicative manner. In short: Anthropology teaches scientifically arranged knowledge of the human being, obtained in an empirically concluding way.

Anthropology differs from sociology in mainly two respects: The anthropologist focuses on the human being in the singular (Greek: anthropos = man) and sees human agglomerations as being derived from the single person, wheras the sociologist starts from society which is one of those agglomerations. Anthropology is essentially interested in human culture and cultures (see Ch. 1 I 3 and Ch. 3), while sociology investigates human society in its various aspects (Stagl 1997), culture being one of them ("cultural sociology", *Kultursoziologie*) – The term "social anthropology" has a limited technical meaning: it is the British style of anthropology between the "functionalism" of the 1920s and the "American-British Compromise" of 1945ff. (see V. 1., 3., below). In a wider sense "social anthropology" can be used to characterize any society-related interest of cultural anthropology. As such, the term is imprecise.

Ethnography deals with the collection of data about peoples. Ethnology *(Völkerkunde)* aims at scientific evaluation and presentation of the collected ethnographic data. If ethnology concerns traditional elements of a single people such as the typical layout of its residences, its dialect, rural costumes, or local habits of making music, it is called folklore *(Volkskunde)*. Whenever ethnológical (including folklore) studies are being used for broader comparative cultural work such as "the meaning of property in various cultures", "family systems", "witchcraft", "hunting tools" or "tribal forms of government" we can speak of anthropology.

Another example: The ethnographer describes the details of the extensive funeral rituals in a given African tribe. The ethnologist uses this material and discusses whether this type of funeral ritual conforms to a certain kind of ancestor worship as the prevalent tribal religion. The anthropologist may study *liminality,* i.e. the phenomenon that many cultures have age classes, and that in the development of a person from child to senior these age classes are being passed in transitional steps usually accompanied by a liminal ritual (e.g. baptism, confir-

mation, marriage, the last rites),[1] and thus the anthropologist is interested whether these funeral rituals are proof of a habit of practiced liminality *beyond* physical death which would point to a belief in some kind of afterlife. Of course, there are no clearcut lines between the three scientific activities.

Anthropology *of law,* or legal anthropology, is the field of anthropology where the focus is on normative aspects of cultural and biological human life that are based on the two (law defining) elements of authority and sanction (see Ch. 1 III, Ch. 4). While the following chapters will concentrate on recent legal issues which are at the center of current anthropological discussion, the wider background of anthropology in general cannot be altogether neglected. Thus, the anthropology of law will find itself embedded in more general themes of anthropology such as religion, customs¸ behavior, and neurology. This is the main reason why the title of this book mentions "law and anthropology," not "anthropology of law."

2. Issues

Below is a partial overview of fresh issues of anthropology of law. Examples of relevant literature will follow.

It is often said that that the contrast between the rich countries of the industrialized North and the poor nations of the "third world" is the cause of international trouble and strife. If this proposition is true, how can the contrast be bridged and third world poverty overcome? If it is not true (since there seem to be considerable resources in third world countries), what are the causes of the divide? Is it the lack of finance management skills? A lack of trust? Deficiencies of law? This "poverty issue" will serve as an ever-present background theme of what is to follow.

a. Another modern anthroplogical issue is federalism. In countries such as Afghanistan and Somalia, powerful clans seem to have the final say in poltical matters. Can they – or should they – be persuaded to cooperate in order to form a nationwide government? How? After all, what is a clan? In other parts of the world, it is not clans that are hard to convince that some kind of federal cooperation is necessary, but ethnic groups, such as in Basque country, or religious rifts such as in former Yugoslavia. How is this "federalism issue" connected with the poverty issue, above?

b. "Modernization" is a multi-faceted keyword in many areas of the world. Broadly speaking, it refers to the conflict between local national, religious, or ethnic tradition on the one hand and technical or other civilizational achievements of a Western rationalized life style on the other. Is it a desirable goal to "modernize Islam", or should a Muslim country live according to the standards inherited from former generations? Again, the "modernization issue" seems to be somehow related to poverty and federalism. But how? And to put it in more general terms: does anthropological explanation suffice, or should there be intervention by "applied anthropology?"

c. Next to these and other fundamental anthropological issues there are numerous grave problems to be solved, many of the them in daily court practice. If in a family law case state law conflicts with local usages, often religious, what is to prevail? In a murder case, can the defendant sucessfully point to the custom of feudal revenge that obliged him to kill? Traditional and religious ideals and attitudes often contradict the norms secular courts have to follow. Is there a way to solve this conflict of normative forums?

d. In a murder case, the defendent, a native of Sicily, makes the allegation that it was his duty to kill the victim. The "duty" rises from the fact, he claims, that a clan member of the

1 From lat. limen (boundary). See Chapter 9 V., below.

victim had killed his brother. Therefore, under the traditional rules of feud that are being obeyed in his home region since centuries, the act of his killing should be regarded as justified. For, without his act of revenge, he would have lost his honor and respect among family and friends. Will the judge deem this "ailtural defense" valid? (For cases of this type see, e.g., Guido Calabresi (1987); Renteln (2004)).

e. A similar situation is this: Under the rules of conflict-of-laws, it may occur that a national court is bound to apply foreign law. A German judge may have to decide a case according to Spanish real estate law. Must he, in doing so, follow Spanish local administrative customary practices which to some extent implement Spanish real estate law, or should he disregard such non-legal practices? In more general terms: Does applying a foreign law imply to have to submerge in the foreign culture and bring it to bear on the outcome of the case as well?

f. There are, what E.T. Hall (1959; 1963; 1964; 1966; 1974;1976) once called "cross-cultural blunders", i.e., misunderstandings that follow from the ignorance of foreign cultures. For example, a German-Japanese joint venture failed when, after successful negotiations, the German side insisted on a contract in writing. Development aid projects have failed because the planners mistook pastoralists for sedentary cultivators (Cernea 1985). Admiring the fine porcelain used by the host is good custom at a Japanese tea ceremony, but an offense at an Arabic coffee table. Giving a clock (not a wristwatch) to a Chinese as a present may be understood as a warning of his imminent death. Presenting boots to a Chinese means "go away" and may be a serious insult. In these cases, the Chinese partner may insist on being permitted to pay a price for the clock or the boots, a counter-gift that need not represent an equivalent value. Even a merely insinuated reciprocity might remove the insult so that it is highly advisable to consent to the "deal" (on *belated* reciprocity see Chapter 10 II. 6. d., below).

g. In the work place, conflicts between employees from different cultures are frequent. The EU established a project "Quak". The project is administered by the Institute for Fair Conflict Management and Mediation, Cologne/Germany. A training as intercultural "conflict pilot" including subsequent coaching was offered for DEM 350 (Phone 0221–4 30 59 10) (Die Zeit No. 46 of Nov. 9, 2000). Generally, what has become known by "intercultural communication" has received attention in the media.

h. Peace and public order within an area or even within a nation state may be threatened by intercultural strife. In many Western states, groups from different cultural background make use of liberal and democratic constitutions to stage intercultural conflicts. Examples are Muslimic-Israelian conflicts, Turkish-Kurdish issues of minority status, the claims of Moluccan citizens in the Netherlands, Basque separatism, etc.

i. Peaceful international relations are often challenged when peoples from different cultures raise their claims for better treatment, less discrimination, or non-dominaton by others. An especially obvious aspect of these problems is international terrorism, such as the attacks on the World Trade Center in New York and the Pentagon in Washington. D.C., on Sept. 11, 2001. Apart from terrorist attacks, clashes of cultures for understandable or questionable reasons are frequent in a globalized world.

j. Peace-keeping missions of the United Nations as a rule require not only military, financial, or humanitarian (such as food deliveries) preparations but also anthropological studies of the cultural situation in the area. For example, knowledge of kinship structures such as clan power, religious leadership and existing economic distribution systems can be of decisive influence on the success of the mission.

k. The issues of anthropology thus far mentioned imply what is called cultural anthroplogy. But also physical anthropology comes into the range of objects to be studied. Research at the Psychiatric Department of the University Hospital Eppendorf (UKE) at Hamburg/Germany

has shown that there is a significant correlation between migration and schizophrenia. Immigrants treated in that department suffer from schizophrenia in 42% of all cases wheresas the percentage of patients settled in Germany is 27% (Süddeutsche Zeitung No. 112 of May 15/16, 1996, Umwelt …, p. IV). Migration is a field of study of cultural anthropology. In this case, its link to physical anthropology is obvious (for more examples see Ch. 7).

3. Theory, research, and applied anthropology

In real-life situations, the study of anthropology is at least part of the appropriate approaches to solutions. However, setting all practical intentions aside, the mere theoretical interest and the pursuit in researching other cultures, comparing them, and hereby gaining a better understanding of one's own, is a worthwile undertaking. After analyzing another culture, a culture-related institution or behavior, or the background in culture-determining human modes of thought, often the interest in drafting plans of how to deal with that subject of study presents itself. This practical application of anthropological theory and research is called applied anthropology.

The survey of legal-anthropologically relevant data delivers the following main types of issues: A group of issues concerns misunderstandings in court proceedings involving the implementation of a nation's own law, or of a foreign law, and between private, in particular business, partners. Another group of issues deals with conflict management at the work place, in national politics, international politics, and on United Nations or some other international organizational level. A third group is related to the interface of cultural and biological anthropology.

These and other modern issues of legal anthropology, and ways to solve them, should be familiar to legal practitioners in the 21st century. It is not difficult to name some legal jobs for which an anthropological education is of particular help: Anthropology forms part of general human education, comparable to being versed in one's own tongue, to learning at least one second language, knowing the basics of math, and becoming familiar with the essentials of political history including the origins of democracy. The world is composed of different cultures. To respect them implies acquiring some knowledge about them, and inversely, knowing their characterics is to pay them due respect. Hence, the anthropologist's job is to add to general education.

More specifically, a modern lawyer who almost certainly will be involved in international work, has to learn the rules of conflict of laws, and in order to apply them, comparative law. To understand comparative law, this lawyer needs to know comparative culture.

Modern economists will have encountered similar challenges, and so have politicians, diplomats, business managers, merchants and traders. While it is advantageous for them to know anthropological fundamentals, for members and employees of international organizations such as United Nations, International Monetary Fund, UNESCO, UNCTAD, NATO etc. as well as of regional bodies such as the European Union, ASEAN or APEC anthropology is indispensable. This is no less true for every kind of work in foreign aid.

In order to make available this anthropological input to up-to-date legal-economical, political, diplomatic, or foreign aid work, etc., a certain number of academic anthropologists (a critical mass) is necessary. Therefore, colleges and universities provide for curricula in anthropology and hire specialists to teach them. Since anthropology is a social science based on empirical observation – field work – academic teaching of anthropology is always combined with a good deal of practical research. Arm-chair anthropology is always admissible but not the rule. Thus there is increasing demand for full time teaching and research personnel in anthropology in all its fields and geographic areas. These specialists can be asked for advice

whenever political, economical, legal, foreign aid or United Nations activities are being planned and more than one culture will be concerned. Some of the large organizations doing business in the international arena such as governments and international organizations should hire their own full-time anthropologists. The same applies to Non-Governmentral Organizations (NGOs) active in foreign cultures.

In sum, speaking of "jobs" anthropology offers three tracks of professional relevance: It enables every professional to do better work in any kind of international or intercultural contexts; it asks for hired academic teaching and research staffs who are also available to advise political and business oganizations; finally, in sizeable organizations these consultants may be "in-house" employees. All three types of anthropologists contribute to friction-less culture-related work, thus promoting inter-cultural peace and understanding, and last but not the least helping to reduce financial loss which so often has been caused by cross-cultural blunders. For all these practical purposes, the study of anthropology is at least a part of the appropriate approaches to solutions to inter-cultural and cross-cultural problems. However, setting all practical intentions aside, the mere theoretical interest and the pursuit in researching other cultures, comparing them, and hereby understanding one's own, is a worthwhile undertaking.

4. Two approaches to the anthropology of law

There are two theoretical approaches to the anthropology of law. One originates in sociology, the other in comparative law. Of course, there may be more approaches besides those two, such as from ethology, neurology, education, or religious, political, or philosophical studies. Sociology and comparative law may provide for the most easy access, however.

Sociology of law is an established subject area of sociology with a long literary tradition. Mentioning older authorities, for example Max Weber, Theodor Geiger, Julius Stone and Niklas Luhmann, Zürich sociologist Manfred Rehbinder places sociology of law as a "dash-science" in the middle between social sciences of law and sociology. Following H. U. Kantorowicz, Rehbinder assigns to law three objects of study, the value-oriented search of legal philosophy for justice, the ought-directed normativity of legal dogmatics, and fact-centered study of "the life of the law" in legal sociology whose task is to study "the context of law and society."

The aim of sociology to deal with "the context of law and society" can be paralleled to the anthropological study of the context of law and culture. However, since anthropology is also concerned with human universals, there is anthropology independent from a certain culture. We will see that cultural anthropology may deal with institutions and contexts such as gas stations, hospitals, soccer fan clubs, stock exchange, or political strategies. A positive parallel to sociology exists with respect to the dichotomy of genetical and operational approach: Both sociology and anthropology assume that society and culture contribute to the creation of the law, and that law operates to shape society per culture.

Starting from sociology as the science of human life in society (in Max Weber's and Niklas Luhmann's tradition), Manfred Rehbinder distinguishes two tendencies: a trend of sociology to build a theory of social action of the individual, and another trend to build a theory of social systems. Anthropology refrains from building general theories of human actions.[2] It rather describes what humans do in their respective cultural environment, and if there should be value judgments, they refer to the consequences of such behavior which can be productive or

2 Francis Snyder (1981), at 45, convincingly states that legal anthropologists have so far made relatively few contributions to social theories of law. The reason is the basically observational attitude of anthropologists compared with the primarily model building sociologists.

counterproductive with regard to the cultural standards chosen in the first place. Anthropology never builds theories of social systems, for the simple reason that many cultures do not use the concept of system. Systems are mental tools of "Western" thinking. Anthropologists try to avoid ethnocentric thinking, including Western.

Thus, a sociologist of law who transcends from mere fact-finding to evaluation and normativity, focuses on culture rather than society (see Ch. 3), keeps an eye open for non-cultural universals, refrains from model building for individual social acts and social systems, and avoids ethnocentrism, should be called an anthropologist of law.

The other easy approach to anthropology is from comparative law. Starting from law (as E.E. Hirsch and F.K. Beutel do), anthropology of law covers not only facticities of life of the law but also extends into legal values (see Ch. 3 I) and into the normativity of legal dogmatics such as into correlational analysis (see Ch. 6). Knowing at least the base lines of other legal "systems" is essential in today's world. They are called "legal systems" even when they do not meet the standards of a system according to Greek logic. Most law schools teach courses in comparative law, starting from introductory presentations of certain foreign laws, and proceeding from there to their comparison. These international additions to the teaching of the own law (which of course is the main task of a legal education) give valuable assistance to later legal practice. Some of the students of comparative law often ask for more and deeper treatment, with regard to the cultural background of the foreign laws.

Questions originating in comparative law may include: Why does Muslim law (the *sharia*) outlaw interest taking? What are the issues behind Afghan government forming? Why has ASEAN trouble in accepting the international system of protection of intellectual property? Is it poverty that characterizes many third world countries, and what could be done about it? What does it mean that Japanese economy, after years of brillant performance, has difficulties in finding a new legal orientation? These questions go beyond legal norms. They seek information about the cultural setting of the foreign laws. Anthropology of law sets out to answer them. Seen from this angle, anthropology of law is an extension of comparative law, namely, comparative culture of law. (That there is more to anthropology than culture when it comes to human universals has already been observed).

5. Anthropology of law and morals

The two approaches to legal anthropology from sociology and comparative law demonstrate the rather close interfaces between anthropology of law and other social sciences, and the humanities. The closest contact is probably the one with the science of religion, not only comparative religion, but also dogma and ethics. The reason is that in many cultures religious and legal norms are related, similar, or even identical. Examples are Islam, Hinduism, and some animist religions (in the wider sense).

The same may be said of the relationship between the sciences of morals and customs on the one hand and of legal anthropology on the other. In a secularized version, philosophy may restate norms of religion, morals, and customs. Compared with philosophy, anthropology may appear more "technical" since it prefers empirical observation over speculative reasoning. Economic rules often interrelate with legal issues. Political science is a neighboring field in many respects as issues of decolonization, migration and living in an enclave readily show.

Hence, anthropology is a social science of a rather fundamental nature. It intersects with a number of other social sciences and in doing so tends to widen and deepen, confirm or refute, the results of those other social sciences by testing them against the standards of observed cultural or universal behavior.

6. Types of cases

Types of cases in the anthropology of law are numerous. Three types of cases stand out: conflicting normative forums; attempts at development and modernizaton; and cases of cross-cultural blunders.[3]

a. Cultural barriers play no minor role in court proceedings. In assault cases, the defendant may invoke his traditional clan duty to take revenge (see above 1. 2. c, d, and Ch. 14 below). A terrorist may – rightly or wrongly – may refer to his obligation to engage in jihad, the Muslim way of engagement for belief. Marxist class struggle theory may have caused many a socialist freedom fighter to do things non-Marxist law does not permit, for example to shoot at people who try to climb the Berlin Wall. Religious usage may invite to take peyote and thereby violate a federal or state drug law. Tribal custom may require the killing of animals which are protected under endangered species laws. All these are cases in which a duty prescribed in one forum, say state law, is in conflict with convictions or obligations under another normative forum, say religion, or customary law. These situations will be discussed in Ch. 4. Guido Calabresi has devoted a classical study to these conflicts.[4] A variation of these cases involve anthropologists in the field who come to observe practices they strongly object in view of their own cultural upbringing, such as infanticide, female circumcision, torture, or forced abortion, while being prevented from interfering through their professional obligations and bound just to observe and report what they see.[5]

b. There are many reports on misguided foreign aid because cultural circumstances had not been taken into consideration in a timely manner. Albert O. Hirschman lists a number of failed projects.[6] M. Cernea gives further examples from Africa where nomads were forced to become settled farmers which did not work out, and furthermore violated hunting right of non-sedentary groups.[7]

c. Finally, countless are the (sad) jokes where some cultural ignoramus offends the host, business partner, or any polite listener, by saying or doing things intolerable under the local cultural norm. Insisting on a contractual stipulation "western style", misjudging sacred feelings, mentioning or committing things that are taboo etc. are unnecessary burdens on international and intercultural contacts that often ruin a relationship sometimes just opened through considerable psychological or financial investment.

II. Literature

This book makes reference to four types of literature: (1.) introductory works; (2.) classic literature for a more in-depth look into the anthropology of law; (3.) specialized bibliograhies at the end of each Chapter; and (4.) the material quoted throughout the text in footnotes.

1. Introductory works

The following list of books is a guide to introductory *study works.* It contains treatises, articles and surveys in the field of legal anthropology. These study works will be quoted in this book by name, year, and – if necessary – page(s) only.

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3 E. T. Hall (1989).

4 Calabresi, Guido, 1987 Ideals, Beliefs, Attitudes, and the Law. New Haven, CT, 1987: Yale University Press (Germans transl.: Ideale, Überzeugungen, Einstellungen und ihr Verhältnis zum Recht, by P. Martin, foreword by W. Fikentscher). Berlin 1990: Duncker & Humblot.

5 As for the ethical standards of anthropological work, see Chapter 16 II, below.

6 Hirschman (1967); also I.2.f, above.

7 See Chapter 16 III, below.

Beer, Bettina & Hans Fischer (2006). Ethnologie: Einführung und Überblick. 6th ed. Berlin: Reimer
Bohannan, Paul (1992). We, the Alien: An Introduction to Cultural Anthropology. Prospect Heights: Waveland
Bohannan, Paul (1995). How Culture Works. New York: Free Press
Cooter, Robert D. & Wolfgang Fikentscher (1998). Indian Common Law: The Role of Custom in American Indian Tribal Courts, 46 American J. of Comparative Law 287–330, 509–580
Cooter, Robert D. & Wolfgang Fikentscher (2008). American Indian Law Codes: Pragmatic Law and Tribal Identity, 56 American Journal of Comparative Law 101–146
Donovan, James M. and H.E. Anderson III (2003). Anthropology and Law. New York: Berghahn
Fikentscher, Wolfgang (1995/2004). Modes of Thought 2nd ed. 2004 (1st ed. 1995). Tübingen: Mohr Siebeck
Fikentscher, Wolfgang (2004). Culture, Law and Economics: Three Berkeley Lectures. Bern & Durham, NC: Stämpfli & Carolina Academic Press (CAP)
Fischer, Hans, Ethnologie, see Beer & Fischer
Greverus, Ina-Maria (1987). Kultur und Alltagswelt. Frankfurt/Main: Lizenzausgabe. Schriftenreihe des Instituts für Kulturanthropologie und Europäische Ethnologie der Universität (orig. 1978, Munich: C.H. Beck)
Gruter, Margaret (1993). Rechtsverhalten: Biologische Grundlagen mit Beispielen aus dem Familien- und Umweltrecht. Cologne: O. Schmidt
Harris, Marvin (2003), co-author Orna Johnson. Cultural Anthropology. 6th ed. Boston: Allyn & Bacon. German ed. after the 2nd ed of 1987 (1989): Kulturanthropologie: Ein Lehrbuch, transl. by S.M. Schomburg-Scherff. Frankfurt/Main: Campus
Hoebel, E. Adamson (1954, paperback reprint 2006), The Law of Primitive Man: A Study in Comparative Legal Dynamics, Cambridge, Mass.: Harvard Univ. Press
Kohl, Karl-Heinz (2000). Ethnologie: Die Wissenschaft vom kulturell Fremden. 2nd ed. (1st ed. 1993). Munich: C.H. Beck
Kottak, Conrad Ph (2004). Cultural Anthropology, 10th ed. (1st ed. 1974) New York: McGraw-Hill
Lampe, Ernst-Joachim (1970). Rechtsanthropologie: Eine Strukturanalyse des Menschen im Recht. Berlin: Duncker & Humblot
MacClancy, Jeremy (ed.)/2002). Exotic No More: Anthropology on the Front Lines. Chicago: Univ. of Chicago Press
Masters, Roger D. (1992). The Sense of Justice: Biological Foundations of Law. Newbury Park: Sage
Moore, Sally F. (ed.) (2004). Law and Anthropology: A Reader. Oxford. Blackwell
Moore, Jerry D. (2004). Visions of Culture: An Introduction to Anthropological Theories and Theorists. 2nd ed. Lanham, New Xork etc.: Rowman & Littlefield: Altamira
Mundy, Martha (ed.) (2002). Law and Anthropology. Cambridge: Cambridge Univ. Press
Nader, Laura (1990). Harmony Ideology: Justice and Control in a Zapotek Mountain Village. Stanford: Stanford Univ. Press
Pospíšil, Leopold (1971). Anthropology of Law: A Comparative Theory. New York: Harper & Row (later printings 1974, 1987, 1995 by HRAF Press, New Haven, CT). German edition (1982): Anthropologie des Rechts: Recht und Gesellschaft in archaischen und modernen Kulturen, transl. By Ch. Schäfer & E. Blenk-Knokke. Munich: C.H. Beck
Pospíšil, Leopold (1985). Ethnology of Law, 2nd ed. (1st ed. 1978) Menlo Park, CA: Cummings Publ.
Pospíšil, Leopold (2004). Sociocultural Anthropology. Boston: Pearson Custom Publ.
Roberts, Simon (1981). Ordnung und Konflikt: Eine Einführung in die Rechtsethnologie. Stuttgart: Klett-Cotta
Rouland, Norbert (1995). Anthropologie juridique. 2nd ed Paris: Presses univ. de France (1st ed. 1988). Also in: Coll. «Que sais-je?» (1990): L'anthropologie juridique. Paris: Presses univ. de Paris ; engl. transl. by Philippe G. Planel (1992): Anthropology of Law, Stanford: Stanford Univ. Press, (1994), London: Athlone Press; ital. transl. (1992) by Aluffi Beck-Peccoz: Antropologia giuridica, Milano: Giuffre
Sack, Peter (1992). Law and Anthropology. Dartmouth: Aldershot
Stagl, Justin (1997). Ethnologie und Soziologie: Abgrenzungsprobleme und Identifikationssymbole, 122 Zeitschrift für Ethnologie, 131–143
Vivelo, Frank Robert (1978). Cultural Anthropology. Handbook. New York: McGraw-Hill; German ed. by Justin Stagl: Handbuch der Kulturanthropologie: Eine grundlegende Einführung, 2nd ed. Stuttgart 1995
Wesel, Uwe (1979). Frühformen des Rechts in vorstaatlichen Gesellschaften. Frankfurt/M. Suhrkamp.

2. In-depth-study literature

This section contains a *bibliography* of *books and articles for in-depth study* of the anthropology of law. The bibliography serves as as guide to general literature in the field. It mentions classic books and articles as well as books and treatises which should be to conculted in the course of any serious legal anthropological work. In addition, it lists books and articles which, while focusing only on certain aspects of the field, are relevant to the development and study of legal anthropology as a whole. These works will be referred to in abbreviated form like the study books listed under a. above.

Appiah; Kwame Anthony (1992). In My Father's House: Africa in the Philosophy of Culture. New York & Oxford: Oxford Univ. Press

Appiah, Kwame Anthony (2007). Der Kosmopolit. München: C. H. Beck (anti-"clash", critical of ethnicity)

Banks, Marcus (1966). Ethnicity: Anthropological Constructions, London: Routledge

Benda-Beckmann, Franz and Keebet von, see von Benda-Beckmann

Benedict, Ruth Fulton (1934), Patterns of Culture. Boston & New York: Mentor Books, with a foreword by Franz Boas (many reprints)

Bennet, J. W. (ed.) (1998). Classic Anthropology: Critical Essays. New Brunswick & London: Transaction (orig. 1960)

Blok, Anton (1978). Antropologische Perspektiven, Muyderberg: Coutinho (German ed.: Anthropologische Perspektiven – Einführung, Kritik und Plädoyer – Stuttgart 1985: Klett-Cotta.

Bohannan, Laura, and Paul Bohannan (1953). The Tiv of Central Nigeria. London: International African Intitute

Bohannan, Paul (1989). Justice and Judgment Among the Tiv. London & Oxford: Oxford Univ. Press (1st ed. 1957)

Brague, Rémy (2007). The Law of God: The Philosophical History of an Idea. Chicago & London: Univ. of Chicago Press (transl. from French by Lydia G. Cochrane)

Calabresi, Guido (1987). Ideals, Beliefs, Attitudes, and the Law, New Haven: Yale Univ. Press (German ed. Berlin 1990: Duncker & Humblot, with a foreword by Wolfgang Fikentscher)

Canaris, see Larenz

Canby, William C., Jr. (2004) American Indian Law in a Nutshell, 4th. ed. St. Paul, MN: Thomson-West

Clinton, Robert N. and Rebecca Tsosie, with the collaboration of Carole Goldberg (2004). American Indian Law: Native Nations and the Federal System. 4th ed. New York: Matthew Bender

Cohen, Felix S. (1941). Handbook of Federal Indian Law, (Washington D. C.: Government Printing Office, an internal government document); 1958; the history of new editions is complicated: (Washington, D. C.: Government Printing Office, revised edition by Department of the Interior in support of termination policy); 1971 (Albuquerque, University of New Mexico Press, reprint, facsimile edition of the original text of 1941); 1982 (Charlottesville, VA: Michie, reprint); 1986 (Lawrence, KS: Five Rings Corp. Wheat Law Library, reprint); 1988 (New York: William S. Hein & Company, reprint); 2005 ("2005 edition"; Charlottesville, VA: Michie; Nell Jessup Newton, Robert Anderson, Carole Goldberg, John LaVelle, Judith V. Royster, Joseph William Singer, Rennard Strickland (eds.), and 29 contributing authors: Bethany Berger, Kenneth H. Bobroff, Jo Carillo, Gavin Clarkson, Richard Collins, Barbara Creel, Christine Zuni Cruz, Bruce Duthu, Philip Frickey, David Getches, Lorie Graham, Sarah Krakoff, Robert Laurence, Stacy Leeds, Valerie Phillips, Vicki Limas, Melody McKenzie, Richard Monette, Frank Pommersheim, G. William Rice, Lindsay Robertson; Patricia Sekaquaptewa, Alex Tallchief Skibine, Dean Suagee, Melissa Tatum, Gloria Valencia-Weber, Kevin Washburn, Mary Christina Wood, Kevin Worthen. It is planned to publish an up-to-date version every other year)

De Waal, Frans (1996). Good Natured. The Origins of Right and Wrong in Humans and Other Animals. Cambridge, MA: Harvard Univ. Press

Douglas. Mary (1966). Purity and Danger. London: Routledge & Kegan Paul (2nd ed. 2002, with a new preface by the author)

Ellickson, Robert C. (1991). Order Without Law: How Neighbors Settle Disputes, 2nd ed. Cambridge, Mass: Harvard Univ. Press

Epstein, A. L. (ed.) (1967). The Craft of Social Anthropology, London etc.: Tavistock

Evans-Pritchard, Ewald Evan (1940). The Nuer: A Description of the Modes of Livelihood and Political Institutions of a Nilotic People. Oxford: Clarendon (reprints 1950, 1968)

Evans-Pritchard, Ewald Evan (1965). Theories of Primitive Religions. Oxford: Clarendon

El Fadl, Khaled Abou (2004). Islam and the Challenge of Democracy, Joshua Cohen & Deborah Chasman (eds.). Princeton & Oxford: Princeton Univ. Press

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3. Chapter bibliographies

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4. Footnotes

Footnotes refer to ideas on the sideline and may bring additional literature in full quote. Quotes and cites from the Bible refer to the English titles of books from the Old and the New Testament, or specific psalms, gospels, and letters.

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III. Anthropology of law as a social science

Eric Wolf once remarked of anthorpology that "the whole field is coming apart."[8] What he meant was that as a field of science, or – in case it has never been a science – at least of scholarly studies, anthropology today lacks the coherence which is needed to identify any field of academic effort. His reasons were based in part on claims of other sciences such as sociology and history, in part on internal discrepancies between cultural and biological "anthropology", and again in part on a fuzziness of study objects which could no longer be found in ethnic contexts alone but increasingly also in non-ethnic life worlds such as poverty, illness, urban living, or international relations.

Even at his time, Eric Wolf's postmodern skepticism was not shared by many teachers and researchers of anthropology. Obviously, the field still exists. However, Eric Wolf is right in that it seems to be in need of a new definition of scope and contents. This subchapter intends to point to some aspects how this need might possibly be addressed. The first question to be raised is whether anthropology is a science, and if yes, whether it is a social science (1.). The second focus is on empiry. Is anthropology an empirical social science, or is it not? (2.). Thirdly, the relationship of anthroplogy to kindred social sciences, for instance sociology, ethology, and cultusal studies has to be determined (3.). A fourth issue concerns anthropological reasoning and concluding, in other words, the nature of the anthropological judgment, especially in legal terms (4.–6.). Finally, what does anthropology in general, and legal anthropology in particular, *as social science,* purport to discover? (7.).

1. The concept of science against the background of the Leibniz-Hume-Kant debate

The term "science" has different meanings in the Anglo-American tradition and on the European continent. The rebirth of critical thinking in the wake of humanism and Renaissance during the "long" sixteenth century developed into two distinct directions. The background of this split between the English and the Continental European traditions of philosophizing is the difference between English and Continental scholasticism: in England, Platonic epistemology was maintained in view of the intended integration of Greek antiquity into Christianity from the twelfth century onward (Thomas Beckett, John of Salisbury, Anselm of Canterbury, Ranulf of Glanville, William Ockham), whereas on the continent Aristotelian gnostic teleology prevailed (details and references in W. Fikentscher (1975 a), Ch. 5, and (1975 b) Ch. 11 I). In England, an empiricist skepticism proposed that from a perceived is no conceptual ought can be derived. The most important names of this philosophical line are Francis Bacon (1561–1626) and David Hume (1711–1776). From this vantage point, an evaluation cannot be scientific. On the Continent, Gottfried Wilhelm Leibniz (1646–1716) represents an influential philosophy based on deductive conceptualities. Along this line, evaluations are open to scientific treatment. Immanuel Kant (1724–1804) in his "critical period" developed a philosophical methodology able to bridge to two differing positions so that, in his words, perception without concepts need no longer be blind, and concepts without perception need no longer be empty.

Kant's "trick" was the synthetical a priori in the application of practical judgment (see below 2.). This approach opened the road to scientific evaluations for moral ends. But while Kant's critical philosophy was in part substantively influential in Anglo-American philosophy, it did not change anymore its general concept of science. To this day, the term "science" re-

8 Eric Wolf, They Divide and Subdivide and Call It Anthropology, New York Times, of November 30, 1980; see also S.B. Ortner (1984) and W. Fikentscher (1995/2004), 87.

mains reserved to empirical thinking, and thus speculative philosophy, in the Anglo-American world, is not called scientific, evaluations remaining "guesswork". By contrast, Continental philosophy regards evaluations scientifically accessible.

Hence, in the Anglo-American world, the main distinction runs between empirical science and non-empirical (= speculative) non-science (Alfred North Whitehead, 1861–1947). On the continent, where evaluations are a matter of science, the traditional distinction runs, according to Wilhelm Dilthey (1833–1911) between *Naturwissenschaften* (natural sciences) and *Geisteswissenschaften* (mind sciences, humanities), a distinction which is presently under discussion again. We shared the postulate that it should be retained (Kai Fikentscher and Wolfgang Fikentscher, 2001). This leads to the following terminological difficulty, which affects anthropology:

On the Continent, the natural sciences are restricted to the (empirically-based) sciences of inanimate and animate nature, whereas the mental sciences *(les humanités)* encompass philosophy and other (non-empirical) humanities as well as the social sciences such as law, economics, sociology, and anthropology which being social sciences work empirically. In the Anglo-American tradition, the sciences consist of the sciences of inanimate and animate nature (bio- or life sciences) and the social sciences, in sum all empirically working sciences ("bio" and "social"), whereas the humanities, unlike the French *humanités,* are limited to non-empirical (= "speculative") tasks. Thus, on the Continent, anthropology is a science as are the other cultural sciences *(Kulturwissenschaften),* but in the UK, USA and other academis traditions following them, not. The reason for this terminological split is, as has been said before, a difference in the acceptance of evaluations (traced to and derived from Kant's synthetical apriori) as being scientific, in other words, in the reception of Kant's critique of practical reason.

2. History and system. Diachronic vs. synchronic research

To understand the work of anthropologists, another orientation in what is called the science of sciences may be helpful. It concerns the relations between history, system, and comparison. In one of his first lectures (on legal method) as recently appointed (1803) professor in Marburg, Friedrich-Carl von Savigny (1779–1861) taught that every legal issue can be understood either as historical, or as systematic. Karl Larenz (1991), 10 note 1, quotes Wesenberg to this effect (G. Wesenberg, ed. 1951, Kollegmitschrift of F. C. von Savigny's class on legal method of winter 1802/03 by Jacob Grimm. Unaware of von Savigny's remark, other authors in other social sciences throughout the 19th and 20th century made similar distinctions.[9] The most influential terminology was introduced by the Swiss linguist Ferdinand de Saussure (1857–1913) in his Cours de linguistique générale (final version 1916). De Saussure called the systematic approach synchronic, and the historical diachronic. In this sense, anthropology is both a synchronic and diachronic science. To illustrate, the names given (in anthropological research) to family members in the various cultures form a system of six basic types, but how these types have historically been developed is another question (see Ch. 8).

A particularly interesting contribution comes from Guido Adler (1855–1941), the Austrian musicologist, in his article "Umfang, Methode und Ziel der Musikwissenschaft", Vierteljahresschrift für Musikwissenschaft I, 1885, 5 ff. In musical science, he distinguishes the systematic (systematic musicology) and the comparative approach to an issue, and within the com-

9 W. Fikentscher, Les rapports du droit privé et de son histoire (L'élément historique en droit privé), in: Facoltà di giurisprudenza dell' università di Pisa (ed.), Studi in memoria di Lorenzo Mossa, vol. II, Padua 1961: CEDAM, 181–189; advance publication as monograph by CEDAM 1960; reprinted in W. Fikentscher (1977 a), 685–692.

parative approach he again distinguishes comparison over time (historical musicology) and comparison in space (ethnomusicology). He does not give a particular terminology to his tripartite distinctions, and so his proposal went largely unnoticed although it fits all social sciences. It also serves to understand anthropological issues, and so Kai Fikentscher and I (2001, 22 dd.) proposed also to use it in anthropology. The systematic approach may be called synchronic, the historical diachronic, and the culturally comparative syncritic, from Greek *synkrisis* = comparison. De Saussure's duality of synchronic and diachronic misses the point that geograhic comparison does not necessarily produce a system.

3. Anthropology and related fields

Anthropology is related to other social sciences. Here follow some brief characterizations which do not intend to build a complete structure of the social sciences. This would be a task of the "science (or theory) of sciences" *(Wissenschaftstheorie)*.

a. Anthropology is a *comparative* science (the subtitle of L. Pospíšil's book "Anthropology of Law" reads: "A Comparative Theory"). Thus, it describes commonalities among and distinctions between ethnic groups or other (non-ethnic) human life worlds (such as the cultures of urban, youth, hospital, or airport societies), and may draw theoretical or practical inferences from such comparisons. In this comparative work, anthropology resembles comparative philosophy,[10] comparative culture, comparative law (a well established field, regularly taught at law schools), comparative religion, comparative moral theory, comparison of economic systems, comparison of political systems, etc.

b. Interestingly, comparative *sociology* is almost non-existant since Max Weber's death (1920), perhaps because the main interest of modern sociology is the study of what is assumed to be universals of human societies, such as "civilization" or – even more abstract – "structure" or "system" (Talcott Parsons, Niklas Luhmann). Deducing from general concepts such as "civilization", "structure" or "system", modern sociology starts from a rather ethnocentric, namely, Western position and is thus not equipped, and often not utilized, to engage in the study of non-Western cultures which often lack civilizational, structural, or systematic properties (see Ch. 3). Therefore, anthropological work after Max Weber often includes sociological issues, such as political or other societal forms of human ordering. Recently, some sociologists have felt this cross-cultural deficit on the sociological agenda and have tried to resume sociological work where Max Weber's culture-comparative studies ended. But as sociology and anthropology have since then developed very different methodologies, and anthropological results after 1920 often have gone unnoticed by sociologists, misunderstandings occur. It is timely to convene anthropologists and culture-comparing sociologists and other social scientists to study each other's methods and combine their efforts. This is all the more urgent since anthropologists have branched out from classical ethnic studies to include institutional and other non-ethnic "life world" issues as objects of study.

c. Until progress has been made in promoting this inter-science contact, the following characteristics have to be kept in mind (cf. I.1 and 4, above): (1) Sociology starts from human aggregations – societies –, anthropology from the single human being (anthropos = man, including male and female). (2) Sociology is traditionally an ethnocentric social science and uses concepts developed from Western society, whereas anthropology tries to avoid ethnocentric reasoning. (3) Sociology is principally not interested in cultures other than Western, while anthropology's focus are the many-faceted cultures of this world. (4) Methodologically, soci-

10 E.g., Paul Masson-Oursel,. Comparative Philosophy, London 1926: Routledge & Kegan Paul. Treatments of comparative philosophy are rare.

ology does not distinguish the emic (outside) – etic (inside) view on the phenomena to be studied, for anthropology this distinction and its problems are central, for details, see subchapter V in this Ch. 1.

d. Ethology *(Verhaltensforschung)* is the science of animal and human behavior. It is a subfield of biology. Thus, *human ethology* is the biology of human behavior. Primarily, it is not interested in the human cultures, their properties and differences, but it rather works a-cultural. In other words, it is mainly interested in human universals, not in cultural or other life-world specificities.

However, in biological anthropology, human behavior occupies a large share of the questions to be investigated: What does it culturally mean that man began to have fire? How do the properties of the brain affect the abilities of an pianist to produce music? Does the human behavioral apparatus influnce what humans may or may not do? Are there legal consequences to be drawn from the premenstrual syndrome? Questions such as these are frequent, and often only the combination of cultural and behavioral approaches lead to satisfactory answers to an anthropological problem.

In cultural anthropology, ethnology and anthropology are nececessarily interlinked when "nature-nurture" issues are involved, such as in the context of "purity and danger", or in connection with the religious type of the cult of the dead or similar issues of aninimist soul beliefs.[11] The following is a preview on Chapter 7 IV. where the four-function theory is discussed in more detail:

There are four distinct functions of biology for the social sciences as far as they work empirically:[12] There are two constraining and two liberating functions. (1) Constraining function No. I holdss that social sciences should not recommend actions that run outright against biology. Thus, a law that prescribes anarchy – a desire of many 1968 students – has little chances of being obeyed since the human mind is programmed to follow some regularity, and Lenin's attempt of 1919 to prohibit inheritance was given up only two years later. Constraining function No. II advises the normgiver to listen to substantive biological counsel. Environmental protection offers examples.

The liberating functions turn the thrust around: Biology does not inhibit cultural possibilities, rather biology invites to use cultural possibilities not yet culturally envisaged. Liberating function No. I points to cultural opportunities hitherto hidden behind neglect or even outlawed as "holy cows" that should not be molested.[13] A Polynesian king's son drowned during a fishing expedition. The king prohibited future boat building. His subjects almost starved since on that island fishing was the main food source. The human brain is neurologically equipped for critical thinking about the true, the good, and the esthetically pleasing (see 4. b., below). Political systems that dictate the non-use of critical thinking are biologically wrong. In utilizing biological opportunities, liberating function No. II suggests to avail oneself of substantive alternatives offered by nature. African wilddogs hunt large prey by dividing tasks among themselves for they are bound to cooperate. Wolves hunt not only under such a principle of division of labor, but even assumes changing roles within this division: some hide,

11 See W. Fikentscher, The Soul as Norm: Reflections on an Ojibway Burial Site, in: Krawietz, Werner (Hrsg.), Sprache, Symbol und Symbolverwendungen in Ethnologie, Kulturanthropologie, Religion und Recht, Festschrift Rüdiger Schott, Berlin 1993, 457–465; also in: The Ethology of Law, Festschrift in Honor of Margaret Gruter, hrsg. v. Roger D. Masters (New York, etc. 1994) 108–116; idem (2004 a) 223–227.

12 McGuire & W. Fikentscher, A Four-Function Theory of Biology for Law, 25 Rechtstheorie 1–20 (1994).

13 That the holy cows of India may be protected for sound economic reasons – a claim raised by anthropologists, see Ch. 10 – is a different question. "Holy cow", in a disparaging sense, became a designation for unnessary, obsolete regulation.

some attack, and the roles may change during the next hunt (communication A. Kortlandt 1971). Human cultures that do not apply the principle of division of labor, or that apply it but only with roles fixed on specialists, perform less effective that wilddogs and wolves. Of course, nature need not be imitated, and for cultural reasons often should not be so. But nature may serve as model and ought from time to time be culturally reassessed.

e. In the 1960ies, Stuart Hall (b. 1932), a Jamaica born British sociologlist, started research in a a field he called Cultural Studies". He was appointed director of the Centre for Contemporary Cultural Studies at the University of Birmingham. Focus of his work was the culture of migrants, working class people, and underprivileged citizens, and the "hybridization" their individual culture underwent. From there, Cultural Studies spread to the US where the new field absorbed academic interest in gender, race, diversity and non-discrimination and related media research, and to France where, in the 1980ies and 1990ies post-modernist deconstructionism and post-Marxism were en vogue. In Germany, Cultural Studies met with unsatisfied interest in comparative culture, which since 1920 (Max Weber's death) was underresearched in sociology as well as since 1933 in sociocultural anthropology. Called in German (too broadly) *Kulturwissenschaft* (in the singular, to distinguish it from the even broader term *Kulturwissenschaften* as headtitle for culture-oriented humanities) Cultural Studies took up the British, US, and French impulses and reflected them against the background of the ongoing German discussion of the meaning of *Geisteswissenschaften* (humanitèes, humanities). The difference between Cultural Studies and cultural anthropology lies in the latter's empirical methodology (emic-etic, evolutionism, diffusionism, multiplicity, functionalism, componential analysis, modes of thought, etc.) for the comparison of *cultures.*[14]

4. Anthropological epistemology

As a social science, anthropology uses certain ways of concluding. This subsection reflects on anthropological reasoning. It is useful to start with a general remark on reasoning as such. It owns its essence to the Parmenideian-Platonic-Kantian epistemology:[15] Evolutionary and cultural origins of heuristics that influence law-making mirror evolutionary and cultural origins of non-heuristically made law. This research leads to the origins of thinking and judging, and thus to Pre-Socratic and Platonic teachings.

a. *Parmenides.* As far as we know, Socrates' indirect teacher, the philosopher Parmenides, is the creator of the theory of judgments that forms part of Western (Greek) logic. In ancient Greece, the axial age did not lead to a total religion of world denial, as in Middle, South and Far East Asia, but to a total religion of active participation in this world in view of probable failure of destiny. The defense organization against probable failure was the Greek polis. The polis was characterized by being an entity which is more than the sum of its citizens, corresponding to the mathematical principle of superaddition, or "oversum", a non-English word

14 Stuart Hall, Cultural Studies: Two paradigms, 2 Media, Culture, and Society, 52–72 (1980); idem, Ausgewählte Schriften, 4 vol. Hamburg 2004: Argument Verlag; Scott Lash, Power after Hegemony, 24 Theory, Culture, and Society 55–78 (2007); Hartmut Böhme, Was ist Kulturwissenschaft? Eine Einführung, www.culture.huberlin.de/lehre/Kulturwissenschaft/pdf; with extensive literature; H. Böhme, P. Matussek & L. Müller, Orientierung Kulturwissenschaft, 3. Aufl. Reinbek 2007: Rowohlt; Klaus P. Hansen, Kultur und Kulturwissenschaft: Eine Einführung, 3. Aufl. Tübingen 2003: Francke.

15 See W. Fikentscher, The Evolutionary and Cultural Origins of Heuristics That Influence Lawmaking, Background Paper No. 6, 94th Dahlem Workshop on Heuristics and the Law 2004, Christoph Engel and Gerd Gigerenzer (eds.), Berlin & Cambridge, Mass. 2006: Freie Universität & MIT Press, 207–237; idem, Group Report: What is the Role of Heuristics in Making Law?, in: 94th Dahlem Workshop (as before), 239–257 (with Jon Haidt, Rapporteur, sowie Susanne Baer, Leda Cosmides, Richard A. Epstein, Eric J. Johnson, Jeffrey J. Rachlinski, Clara Sattler de Sousa e Brito, Indra Spieker genannt Döhmann).

translated from German *Übersumme*.[16] The invention of the polis brought the superadditive entity in juxtaposition to its parts, the citizens.

This generated the distinction between the private and the public sphere, *oikos* and *polis,* in Thucydides, and in Latin: res publica and res privata.[17] A person takes on the role of the individual as a member of a superadditive unit. Simply put, the individual is placed in front of an ideal object. Parmenides was the first who, in a similar reasoning, confronted the individual and the object, and he connected both by a third element, thinking. By thinking about an object, the individual ends up with a judgment. Parmenides distinguished three judgments that are possible for a human being: True/untrue, good/bad and pleasing/ugly. Socrates/Plato built upon this an ontology and an epistomology, and demonstrated the process of making a judgment about an object by use of dialog. Thus, the Socratic dialog as taught by Plato, consists of Parmenideian judgments by more than one person. Therefore, the Socratic dialog is a product of the axial age. This makes Parmenideian judgment and its use in a dialog foreign to cultures that were not exposed to the axial age.

To illustrate, the people addressed by the Prophet Mohammed, å.s., were speaking in an pre-axial-age manner, outside of Parmenideian judgments, because the home countries of these people were not hellenized. After the Prophet Mohammed, å.s., had revealed the Koranic truths to His followers, Islamic philosophers discussed and in part accepted Greek philosophy of Aristotelian provenance. However, the Aristotelian theory of judgment is neither Parmenideian nor Platonic. Rather, Aristotelian theory of judgment is entelechical, that is object-dependent and object-determined, and thus not based on a critical bipolar (Parmenides) or tripolar (Plato) distance to the object, with open-ended appreciation of its qualities. Actually, the Aristotelian way of forming opinions based upon the "entelechian" essence of things leads back to pre-axial-age reasoning, without Parmenideian judgment and without Socratic/Platonic dialog. "Entelechy" holds – in a pre-axial-age approach – that things carry their "soul", meaning , purpose, and importance within themselves, visible for everyone without the critical distance of a judgment. Here is the reason for the difficulties in Western-Muslim exchanges: Islam does not use Parmenideian judgment or Platonic dialog. This has nothing to do with Christianity or other religions, except that Judaism developed theories of judgment and dialog similar to Pre-socratic epistemology during the Babylonian Exile, and Christianity followed Judaism in this, as in so many other respects.[18] The real opponents to Islam are not other religions, but Parmenides and Plato.[19]

b. *Kant's Theory of Judgment.* The theory of judgment as the gist of Western thinking was refined by Immanuel Kant. The main advantage of Kant's theory of judgment is its openness for logical judgments of evaluation. In other words, after Kant evaluations are not excluded from the logic of judgment. The often heard statement: Law cannot be a matter of logic because law involves evaluation, is wrong in view of the Kantian theory of logical judgment. In order to include evaluations in the theory of logical judgment, Kant distinguishes analytical and synthetic judgments. Analytical judgments are deductive and do not produce new insights ("It's raining, you will get wet"). Synthetic judgments open new insights ("this lecture

16 For a detailed discussion, see W. Fikentscher, W. (2004 a) 157–188, 355–401.

17 Fikentscher, W., Oikos und Polis und die Moral der Bienen, eine Skizze zu Gemein- und Eigennutz, Festschrift Arthur Kaufmann, Munich 1993, 71–80.

18 Ezechiel Ch. 18; Isaya Ch. 41.4. 6. 23; 43.1; 61.1 2; 63. 7ff. (individual judgments, responsibilities, and questioning for reality); for the Christian reception, see W. Fikentscher (2004 a), 397–401.

19 W. Fikentscher (2004 a), 411ff., 417, 464: "Rome is afraid of Athens……"; by introducing concepts of time and cooperative organization into Sharia, Islam – instead of forcefully establishing paradise – today approaches the epistemology of the Greek Tragic Mind.

is boring, it makes me sleepy"). Then, Kant squares the distinction between analytical and synthetic judgment with the distinction between a piori and a posteriori judgments. This leads to four possibilities: analytical apriori, analytical aposteriori, synthetical apriori, and synthetical aposteriori judgments. Next, all four possibilities can be applied to the three Parmenidean judgments about the true, good, and the esthetically pleasing. Out of the number of these possible judgments (in theory: twelve), one is called, by Wolfgang Stegmüller, the fateful question of all philosophy: The (individual) synthetical judgment a priori about good and bad. For the following, we will concentrate on this judgment and neglect the eleven others.

David Hume (1711–1776) remarked that however many times a human act is repeated, it will never flow from this repetition a judgment, good or evil, about the moral quality of this act. This exclusion of the judgment about good and evil from empirical observation removes the moral judgment from science and consequently qualifies the morally good as a matter of individual assessment. The exclusion places morals outside science. For Kant, this meant a challenge that needed a response: Kant holds moral (and thus right/wrong) judgments a priori to be possible, thus opening the road to a scientific treatment of morals and of right and wrong. For the lawyer this implies that law can be a science. Thus, the term legal science can only be used against the historical background of Kantian epistemology. The limitation of the concept of science to judgments of truth in Anglo-American culture is evidence of a limited reception of Kant's theory of judgment and of the extensive discussion (cf., W. Fikentscher 2000) that followed Kant's dogma. In this sense, and in the wake of Justice Oliver Wendell Holmes's (in so far Humean) legal philosophy, in Anglo-American law evaluations are, essentially, guesswork; put negatively, from a Kantian perspective they are unscientific.

Psychologically, the more profound Kant's theory of judgment is internalized, the less is there a need for "holding" values to be heeded without convincing reasoning. To the extent that Kant's access to scientific handling of values is not accepted, an epistemological lacuna concerning evaluations opens up. This lacuna can be addressed in two alternative ways:
either by mere guessing including the use of heuristic associations and hunches;
or by a reliance on extra-legal value data in some natural-law manner. These natural-law references can be made to history, sociology, psychology, politics ("overcoming law"), economy ("economic analysis of law"), biology (socio-biology), or any other "realities."

Thus, also in the Anglo-American common law sytem, the methodological mainstream, represented, e.g., by Benjamin N. Cardozo's "Nature of the Judicial Process", which was in turn influenced by Friedrich Karl von Savigny and Francois Gény, is in agreement with the Continental method of subsumption and thus treats law as a matter of logical conclusion.[20]

However, the scientific treatment of evaluation remains an open problem in Anglo-American law. Because of an only partial reception of Kant's theory of judgment, legal evaluation, that is, judgments about just or unjust, escape scientific treatment within the law and must rely on an incessant series of "realisms" that serve as value suppliers: Justice Holmes' historical and sovereign-power-oriented realism was followed by sociological realism (Roscoe

20 Benjamin N. Cardozo, The Nature of the Judicial Process (see note 12, supra); idem, Growth of the Law, New Haven 1924. Charles Sanders Peirce's pragmatism and relational logic (that adds view-enlarging "abduction" to induction and deduction from an anti-nominalist, gnostic-realist point of view) did not influence mainstream Anglo-American rule technique as presented, e.g., by Cardozo, at least not directly. There was, of course, Peirce's influence on Holmes through the meetings of the "Metaphysical Club" in Boston, see W. Fikentscher, (1975 b), 282 note 29; and there is an influence of Peirce on Arthur Kaufmann and his *Gleichsetzungslehre* (literally: law-and-fact-setting-in-one theory) as developed against the backdrop of a philosophy of relational-ontological hermeneutics, Fikentscher, loc cit. (1976), 751–753, and personal communications Arthur Kaufmann.

Pound), psychological realism (Jerome Frank, Oliphant, Rodell, Petrazycki, Jerome Frank, Albert Ehrenzweig and Harold D. Lasswell), the great realist movement of the late 20s throughout the 30s (Karl N. Llewellyn, Alf Ross and others), a Catholic natural law realism (Francis Lucey, S.J.), political realism (Critical Legal Studies), economic realism (economic analysis of law by Richard Posner and others), biological realism (socio-biology in the last quarter of the 20th century, neuroscience at the beginning of the 21st, and behavioral realism in the employment discrimination discussion), etc. Anglo-American law runs the risks attached to the gathering of values from fields outside the law seen as needed to decide legal cases. But this is borrowed science, not heuristics.[21] Unlike the realist movements in the USA, a legal science about just and unjust is possible against the background of the Kantian theory of judgments, and this has been the mainstream in Continental legal history since Kant.

Among the Pre-socratic philosophers who tried to reduce the singular phenomena of this world to as few basic units as possible ("atoms", movement, war, the four "elements" fire, water, air, and earth, etc.), Xenophanes (6th to 5th century B.C.) reduced what can be found in this world to basic element of "thinking" and monotheism. His student, Parmenides (± 540 – ± 470 B.C.) confronted subject and object and related them to one another by critical thought, in form of judgments about the true, the good, and the beautiful. Socrates (470–399 B.C.) could not meet Parmenides in person but developed his philosophy further to a thinking about ideas as existing objects (truth, the good, and the beautiful; cf., Plato's Parmenides dialog). Plato (427–347 B.C.) combined the Parmenideian judgment of a subject concerning an object with Socrates' theory of ideal objects and proposed dialog as means of approaching the ideas. Kant (1724–1804 A.D.) resumed the three Parmenideian judgments and subjected them to the tetralogy of divisions which results when analytical v. synthetic judments and a-priori v. a-posteriori judgments are crossed. This derivation makes scientific judgments about values possible, and thus, e.g., a science of law (see c., below). It pays to go one step further: Scientific evaluations, such as for deciding a legal case, meet hermeneutical upper and lower points of return, and in this manner succeeds in achieving the appropriate hermeneutical frame between generalization and specification which is necessary for evaluating conclusions (W. Fikentscher 1977a, 194–202; idem 2000, 560–567).

To conclude: Western (Greek/Judaic/Christian secularized) law generally follows Greek logic and systematic methodology, characterized by inductions and deductions and subsumption under principles and rules that are made and applied by individuals as members of super-additive entities. The desire for treatment under a law that is equal for every individual participant is so strong that rules and principles are felt to be needed, so that shared preferences and thus prescriptive values become indispensable. Western law, in its main stream, cannot solely and not even for its main part resort to heuristics. Nevertheless, time and again in legal history theorists warn against exaggerated constructivism and the poverty of imagination that goes along with Parmedian, Platonic, and Kantian theories of judgment. The German saying: *"Ein Narr ist der Mensch, wenn er denkt, ein Gott, wenn er träumt"* (a fool is man when he thinks, a god when he dreams) is sometimes heartfeltly spoken also by jurists. Usually, these admonitions are welcomed but so far they do not deflect continental and Anglo-American common law from its logical-systematical course.

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21 W. Fikentscher, Ein juristisches Jahrhundert, 19 Rechtshistorisches Journal (2000), 560–567; idem, The Evolutionary and Cultural Origins of Heuristics That Influence Lawmaking, Background Paper No. 6, 94th Dahlem Workshop on Heuristics and the Law 2004, Christoph Engel und Gerd Gigerenzer (eds.), Berlin & Cambridge, Mass. 2006: Freie Universität & MIT Press, 207–237; idem, Juristische Heuristik?, Festschrift Claus-Wilhelm Canaris, vol. 2, Munich 2007: C.H. Beck, 1091–1106.

Philosophically, the plea for heuristics as an acceptable epistomological tool is one aspect of the scientism debate. The scientism debate concerns the question whether values can be handed scientifically. The scientistic position holds that the answer is no. Kant thought yes, from the viewpoint of his categorical imperative as the core concept of the *synthetic judgment a priori* on moral issues. For non-Kantians, such as David Hume or Martin Heidegger, values and preferences remain holdings and conjectures. Heuristics is the beatification of guessing because it purports that for a conclusive distinction between good and bad a short-cut holding is, under certain conditions, an acceptable and even efficient method.

It follows that, as to law, a delineation between Greek logic and heuristics remains clear cut. While concessions from both sides are permissible and made, nevertheless, heuristics remain the opposite of Greek logic.

c. Specifically, for anthropological reasoning, consequences are:

(1) Reasoning in general can be done analytically or synthetically. Analytical reasoning works with logical deductions that do not produce new insights ("two times four equals eight, thus four times two also equals eight"). Synthetical judgments produce new insights ("whoever offends the law will be punished").

(2) Another distinction is between a-priori (non-empirical) and a-postiori (empirical) judgments. Anthropology uses empirical observation, one of the starting points when anthropology was defined above (I.). This implies that anthropology must rest, at least in part, on inductive judgments that lead from the experienced observation of the particulars to more general rules. In Kantian terminology, it uses judgments a posteriori ("bottom-up judgments"). On the other hand, anthropological rules, once derived from experience have to be tested against reality, such as that in cultures there are no more than six basic family systems (see Ch. 8), and that there is a distinction to made between religious types and total religions (see Ch. 3). Otherwise these rules cannot be said to be scientifically "true", that is, proven beyond reasonable doubt. Anthropology thus makes statements of truth, and the sentence "this is (or at least for the moment and for our purposes appears to be) true" is called a proposition, or holding, or judgment. Thus anthropology is also concerned with ideas (some call them ideals), for example truth. Once something like truth is accepted as an acceptable possibility, judgments can be made that are based on truth. Such judgments "top-down" are called deductive, or in Kantian terms, judgments a priori.

(3) As to contents, humans can only make three kinds of judgments: of truth, of good (= adequate, fitting, just, fair, appropriate), and of beauty. These three possible judgments can also be called the truth-related, the moral (or justice-related), and the esthetic judgment.

(4) About these three contents-related judgments, two questions can be asked: The ontological questions asks *whether* the true, the good, and the beautiful *exists* (or has existed). The epistemological questions asks, *how* the true, the good, or the esthetically pleasing can be *experienced* and *learned*.

d. As mentioned, of the foregoing four distinctions, analytical – synthetical, a priori – a posteriori, the three kinds of judgments, and ontology – epistemology, Immanuel Kant made a system:

There are analytical judgments a priori, logical deductions from pre-established assumptions, of the kind: "If birds and mammals belong to two different taxonomic units of zoology, and if bats are mammals, they cannot be birds." It is said that analytical judgments a priori are only possible in matters of truth, not of good or bad, and not of esthetics.

There are analytical judgments a posteriori, but they do not seem to be very important. They amount to simple "therefore-conclusions": "It's raining, therefore we are getting wet", "this shape is a circle, therefore it is round".

There are synthetic judgments a priori. In the realm of truth (Kant: "pure reason"), the deductions of physics belong to this category, and a detective uses these kinds of judgments to find out "who-done-it." – In the realm of good and bad ("practical reason"), Kant's assertion that synthetic judgments a priori are possible is of the utmost philosophical, and scientific-theoretical, importance. When Kant started philosophizing, the then known philosophical world knew two opposing moral doctrines: Gottfried Wilhelm Leibniz' teachings of prescriptive concepts (which lack, for their proof, empirical observation), and David Hume's holding that no way leads from empirically observed behavior, even if it is repeated agaim and again, to a prescriptive ought. In the Anglo-American world, Hume's stance has prevailed until today, so that "science" means natural science, and evaluations, for example in the humanities or in the social sciences (including law and anthropology), are unscientific. This stance led to, among other consequences, the seemingly never-ending succession of "realisms" in US-American law, the realisms of observed history (O.W. Holmes), sociology (Roscoe Pound), psychology (Jerome Frank's "Law and the Modern Mind"), behavior including ethnographical findings (Karl Llewellyn and others),[22] "law as fact" of Scandinavian legal realism,[23] political fiat (critical legal studies),[24] economy (economic analysis of law, law and economics),[25] biology and biological behavior,[26] to mention only the most prominent realisms.[27] Of the Leibniz-Hume dilemma, Kant observed that concepts without (empirical) perception *(Anschauung)* are empty, and (empirical) perception without concepts is blind. To settle the issue, he proposed this solution: There exist "categorical imperatives" from which judgments of good and bad can scientifically be deduced, and they have to be deduced to raise the (very frequent) synthetical moral judgments apostiori beyond value-free and hap-hazard pragmatism. Under the influence of this argumentation, since Kant, philosophy on the European continent and philosophies influenced by it, have accepted that scientific work with values is possible. In US anthropology, those who feel unsatisfied by mere realist data collection, because of the absent Kant reception in the social sciences need to find other ways out of the Leibniz-Hume dilemma. One of the most prominent examples in recent time is Clifford Geertz' "interpretationism."[28] – In his third Critique, the critique of judgment, Kant points to the close relationship of the moral and the esthetic judgment, however without postulating esthetic categorical imperatives.[29]

Finally, there are synthetic judgments a postiori, and they are the best known ones. About truth, they conclude in the usual manner that characterize the natural sciences: From experience we know that a mix of hydrogene and oxygene may explode and form water. In the social sciences, these judgments pragmatically conclude that experience may lead to morally accept-

22 W. Fikentscher, Die Erforschung des lebenden Rechts in einer multikulturellen Gesellschaft: Karl N. Llewellyns Cheyenne- unPueblo-Studien, in: U. Drobnig/M. Rehbinder (eds.), Rechtsrealismus, multikulturelle Gesellschaft und Handelsrecht, Karl N. Llewellyn und seine Bedeutung heute, Berlin 1994: Duncker & Humblot, 45–70.

23 E.g., Alf Ross, Towards a Realistic Jurisprudence: Criticism of the Dualism in Law, Kopenhagen 1946: idem, Tu-Tu. 70 Harvard L. Rev. 812 (1956/57).

24 E.g., James Boyle, Critical Legal Theory, New York 1994: NY Univ. Press.

25 E.g., Richard Posner, Overcoming Law, Cambridge, Mass. 1995: Harv. Univ. Press.

26 E.g., E.O. Wilson, Sociobiology, Cambridge, Mass. 1975.

27 G. Casper (1968); N. Reich (1968), W. Fikentscher (1975 b), 231ff.; the Hume-Kant background of the realisms is stated in W. Fikentscher, Ein juristisches Jahrhundert, 19 Rechtshistorischen Journal 560–567 (2000), and idem (2004 b), 14–17.

28 Geertz (1973).

29 Immanuel Kant, Kritik der Urteilskraft (1790), here quoted from G. Lehmann (ed.), 7th ed. Ditzingen 1986: Reclam.

able or inacceptable results. In esthetics, empiry may induce and explain copying, or rejection of esthetic models.

5. Ontology and epistemology. An anthropology of Knowledge

In general, at least in most Western thinking traditions, these possible judgments make use of the distinction between ontology and epistemology in one way or the other. The distinction builds upon the belief that the reality of things is not necessarily identical with what we see of them. In Plato's cave metaphor, Socrates compares humans to people who sit in a cave, looking at its rear wall, and dimly and disfiguredly see the shades and reflexions of the real things outside of the cave. A similar view is held by the Navajo Indians who believe that inside of the things we see (for example a mountain), invisible there is the real thing (the real mountain). Mainstream Islam, and Marxism, reject this difference between perception and existing things, and thus episteme, the drive, or need, of learning to know.[30] By contrast, Platonism recognizes both possibility and desirability of learning reality, and proposes, in addition to individual thinking and investigation, the exchange of views between conversation partners as a promising way of approaching the truth even at the risk of never completely reaching it.[31]

Thus, under Plato's and Kant's influence, Western thinking is thrust upon dialog. A dialog consists of (as a minumum) two participants A and B who try to approach a result C which is not yet at hand but may be found through an exchange of the opinions of A and B about C. A dialog is not limited to showing alternatives, but aims at a result which can be a compromise or an extreme position: a judgment upon which the participants can agree. This shows a *method* to achieve an *objective,* that is, in philosophy, an epistemological and an ontological element, of the dialog.

With respect to the very different meaning of Knowing and knowledge in the various cultures, here opens it self a new discipline: the anthropology of Knowledge *(Wissensanthropologie).* It relates to *Wissenssoziologie* by starting from human cultural diversity, instead of inherent "structures" of (Western) society in the Durkheimian and Weberiontradition.

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30 In present Iran, groups of thinkers opposing the ruling orthodox clergy call themselves "epimologists"; they claim that doubt and dialog are legitimate tools of human thinking, Boroujerdi, Mehrzad, The Encounter of Post-revolutionary Thought in Iran with Hegel, Heidegger, and Popper, in: Mardin, Serif, Cultural Transitions in the Middle East. Social, Economic and Political Studies of the Middle East (ed. C. A. O. van Nieuwenhuijze). vol. 48. Leiden 1994: Brill, Chapter 10, 236–259. Among the epistemological circle of philosophers, Abdolkarim Sorush seems to play an important role. See text near note 355 and note 359 below.

31 Cf., W. Fikentscher, The Evolutionary and Cultural Origins of Heuristics That Influence Lawmaking, Background Paper No. 6, 94th Dahlem Workshop on Heuristics and the Law 2004, Christoph Engel and Gerd Gigerenzer (eds.), Berlin & Cambridge, Mass. 2006: Freie Universität & MIT Press, 207–237. Another point can only be mentioned here because it belongs to a more profound study of Kant's philosophy than can be presented in the above context: It was Ernst Cassirer who saw the need to give Kant's philosophy a cultural turn, Oliver Müller, Das Deutsche ist europäisch, DIE ZEIT No. 2 of January 4, 2007. However, Cassirer overlooks the cultural specificity of Parmenides', Plato's Descartes' and Kant's theories of judgment. This means that "introducing" culture into the Kantian epistemology requires to step in time and theory behind Parmenides, Plato, Descartes, and Kant (an insight I owe to Markus Müller). A second reason why Cassirer misses his goal is that he took Goethe's concept of contemplation *(Anschauung)* for his concept of culture. But Goethe's concept of contemplation is far removed from Kant's (and originally Hume's) concept of contemplation as experience. Goethe writes in the tradition of axial-age gnosticism – Kabbala – Maimonides – Ebreu – Spinoza (of whom Goethe said that nobody influenced him more than he and Linné), a tradition which explains contemplative experience as ontological *sharing* in the object ("wär' nicht das Auge sonnenhaft …", "wer immerstrebend …", Hölderlin: "… an das Göttliche glauben, die allein, die es selber sind", etc). This is exactly non-Parmenideian and non-Kantian, but epistemological gnosticism, and thus no possible way to "culturalize" Kant.

Another question concerns the oral or written presentation of method and target: Plato (427–347 B.C.E.), the Greek philosopher, was the first to warn against dressing ideas, including laws, into written language.[32] He thinks that the "matter itself" deserves learning, studying, and debating, but not being written down.[33] To write things is preventing the "spark" of knowing, and letting "the spark" grow and nourish itself.[34] His own writing, Plato says, is only less than ideal of rendering,[35] and certainly less important than his teaching (in the form of dialogues). To pin down serious things means to leave them to human malevolence and foolishness.[36]

6. The role of writing

The philosophical attitude behind this critique of the activities of writers and interpreters of text may be the gnostic conviction of the relatedness of thinker and subject matter of his/her thinking, a living kindred that cannot be fixed in letters.[37] It is interesting in this context that Native American nations that refuse to put down their law in writing are therefore in good philosophical company. They also could quote in their favor the German jurist Friedrich Carl von Savigny (1779–1861). He not only opposed the creation of a German Civil Code that then was proposed to codify and simplify the Roman judge-made law *("usus modernus")* of his time as premature and necessarily unscientific,[38] he also influenced German law-making to this today by proposing the whole of the law as a composite of regulation of legal relations *(Rechtsverhältnisse),* thus reducing every legislation to exactly this: indicating the pertinent legal relation and stipulating its requirement and sanction. Therefore, German statutes never have an introductory chapter of "definitions". In Savigny's thinking, definition only tends to confuse what the regulation of a legal relationship is about: the contents of a legal concept is a function of the legal relation, nothing more, so that it depends on the regulation of the legal relation and has to be interpreted in only this context. When, after 1945, the US and British occupation powers promulgated occupation law to be applied by German judges, the latter were at a loss what to do with the definitorial introductory chapters. For example, the Western Allies antitrust statutes *prohibited* cartels and defined the "cartel" in an introductory definition as an *agreement in restraint of trade.* What exactly does the law say, asked the German judges: the prohibition of an agreement in restraint of trade, or a cartel as a concept that might require more than that? The parties' counsels litigated partly under the provision, partly under the definition. Most judges simply disregarded the definitions – following the Savigny

32 Platon, Werke in acht Bänden, ed. Gunther Eigler, vol. 5, bearbeitet von Dietrich Kurz, griechischer Text von Leon Robie, Auguste Diez, und Joseph Souilhé, deutsche Übersetzung von Friedrich Schleiermacher und Dietrich Kurz, Darmstadt 1990: Wissenschaftliche Buchgesellschaft (Sonderausgabe), Briefe, 7th letter, 366 et seq., 344 c.

33 Seventh letter, 341 c.

34 Seventh letter, 341 d.

35 Seventh letter, 341 c, d.

36 Seventh letter, 344 c; Phaidros, 275 b, 276 a, 277 d and e, 278 c.

37 Seventh letter, 344 a. Another reason for Plato's aversion of putting down knowledgre and learning in writing may be his central philosophy of approaching truth through dialogue. In his Phaidros dialogue, Plato ties the strict process of approaching truth through dialogue to the previous acceptance by the dialogue partners of an oversum, a superadditive state of mind of having a discursive unit for the participants of the exchange, Phaidros 264 c, 265 e, 266 c, 274 c, 277 b. Outside of this oversum, and thus outside of strict dialogical approach to truth, Plato acknowledges the art of rhetoric as admissible procedure of discovering arguments of persuasive quality, but not of providing conclusive judgments, Phaidros 260 e–263 c; Second Letter, 313 c/d; Seventh Letter 342 a–345 c.

38 F.C. von Savigny, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, Heidelberg 1814; English translation: Hayward, Of the Vocation of Our Age for Legislation and Jurisprudence, 1831.

tradition. Native American tribal codes, where they exist, sometimes begin with definitorial chapters, sometimes not. This is one of the examples where Indian law does not necessarily follow the Anglo-American tradition,[39] but its own. Plato and Savigny, of course, do not count among its authorities.

7. Judgments (= propositions) in anthropology

Anthropology as a social science makes use of several kinds of judgment. (a) It (rarely) uses analytical judgments a priori (logical deductions without an expansion of knowledge), for example when it is said that Indians are Native Americans, so that since Navajo are Indians, they are Native Americans (syllogism modus barbara). (b) Analytical judgments a posteriori (therefore-judgments without expansion of knowledge) are more common. They are of the kind: Navajo courts follow the rule of lex fori so that they apply Navajo law. Also, system-building in anthropology cannot proceed without analytical judgments a posteriori since these systems are built from empiricial observation. (c) Synthetical judgments a priori are, as we have seen, Kant's solution to the opposition of Leibniz' conceptual dogmatism and Hume's empiry, and are used – in the Kantian tradition – whenever judgments of truth ("the Anazasi settlements dissolved in the 14th century"), justice ("genocide is a crime"), or beauty ("Mimbres pottery shows the most refined designs in Northamerican Southwest archeology") are made. (d) The bulk of anthropological judgments belongs to the synthetical a posteriori category: "Observation demonstrates that moieties may have endogamous, exogamous, or agamous meaning, that is, where they exist people have to marry outside their moiety, inside their moiety, or the moities have nothing to do with marriage" (judgment of truth); "the treatment of this minority is unjust" (moral judgment); "fine art should not try to represent objects in motion, or otherwise the human brain will react disprovingly" (esthetic judgment).[40]

For anthropology, and other social sciences, combined judgments are common. For example, sociology is a social science which empirically works with inductions and deductions, and thus strongly operates with sysnthetic judgments a posteriori. When sociology is applied to a field that is characterized by synthetic a prioris in the Kantian sense, such as religion, this leads to sociology of religion as an area of study, and in this area combinations of (at least) synthetic judgments a posteriori and a priori often apply. The same comes to pass in the anthropology of beliefsystems, morals, law, etc.: An empirically evaluating science concerns synthetic a prioris in matters of belief, ethics, justice, etc.

8. The nature of anthropological reasoning

From this survey (1.–7.) follows the nature of anthropological reasoning, its power, and its limitations. Three additional remarks are in order:

Platonic and Kantian thinking patterns are culture-specific (Western, "Tragic-Judaic-Christian Mind"). Anthropologically, it is not admissible to transplant these patterns into other modes of thought such as Hindu, Islamic, or Buddhist. Other modes of thought than Western have developed their own theories of judgment, sometimes, as mentioned before, non-epistemological, dialogless, replacing attributes such as true, just, and beautiful through descriptions of activities,[41] or in other ways. A consequence of the theory of the modes of

39 Other examples: free proof, no consideration but mere agreement, specific performance. More on Native American law, esp. code law, in Chapter 14, below.

40 See note 29, supra.

41 W. Fikentscher (1995/2004), 354, 438.

thought is that in order to discover the ways other cultures think means to disregard Parmenides, Plato, and Kant. The confrontation of orthodox clergy and epistemologists in today's Iran, mentioned above, is proof of this need to "deconstruct" Western thinking, including Greek logic, to pre-Platonic and pre-Kantian building blocks. This cannot be done, however.[42] It must suffice to identify the issue and to watch for culture-specific pitfalls when talking of human thinking. The anthropology presented in this book is thus Western post-Kantian.

In British and US-American intellectual cultures, as mentioned, the "categorical imperative" as a consequence of Kant's bridging of the gap between Leibniz and Hume (in other words, the synthetic a priori), has never been fully accepted. Hume's dictum that empirically observable repetitions of acting properly do not establish a norm that one should act well is still widely en vogue, with the consequence that valuations are unscientific guesswork. As indicated before, this is why in these cultures "science" is limited to natural science,[43] and why social sciences are said to step beyond science once they engage in values. The Continental-European freedom of working with values as a scientific engagement is lacking. As pointed out, the consequence of this is the succession of positivisms in US legal and related "sciences", and since working with legal values is unscientific results drawn from non-legal empirical sciences are said to shape the law: Oliver W. Holmes' law made from history, experience, and sovereign power; Roscoe Pound's law made from sociology; Jerome Frank's and others'law made from psychology; Karl N. Llewellyn's and others' law made from behavior; the Scandinavian legal realists' law made from fact ("Law as Fact"); the Critical Legal Studies Movement's law made from politics; the economic positivism postulated by economic analysis of law and "law and economics"; the sociobiologists and legal behaviorists law made from biology, etc.[44] Consequently, legal doctrinal developments such as the ones listed here lack the combined judgments in the sense described before (8.) here claimed for anthropology.

In anthropology itself, the US-American reluctance of dealing with synthetic a prioris in Kant'sense (in other words: with scientific evaluation) has led Clifford Geertz to add to mere empirical ethnography and anthropological observation an evaluative effort he calls "interpretation".[45] Geertz found that compiling facts cannot meet the full purpose of anthropology. His proposal to "interprete" data has ist pros and cons. It replaces to some degree the Continental-European synthetic a priori of practical reasoning in that it opens the road to scientific evaluation, however without being able to draw the indispensible clear line between data and evaluation,[46] and at the cost of overexpanding the meaning of the linguistic category of interpretation, resp. its metaphorical use. An interpretation of cultures has both less scope and less precision than an evaluation of cultures.

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42 Cf., Felix Klein-Franke, Die klassishe Antike in der Tradition im Islam, Darmstadt 1980: Wissenschaftlioche Buchgesellsxhaft; also W. Fikentscher (2004 a), 437f.; an attempt: idem, Market, Property, Organization, Judgment: The Thinking of Superadditive Objects, Panel contribution, Gruter Institute for Law and Behavioral Research Conference "Sensory Systems and Judgment in Law", Squaw Valley, CA, June 12–17, 2003 (unpublished).

43 See above II 1.

44 See note 26, above.

45 Geertz' interpretationism (1973).

46 There is the danger that empiricism is conturelessly swallowed by "interpretation".

9. Results of Chapter 1 III

To sum up:

a. Anthropology is in part a natural science (more precisely a life science), and in part a social science. Therefore, anthropology applies two kinds of judgments, analytic and synthetic.

b. Within its synthetic manner of concluding, anthropology starts from empiry, and it tries from there to obtain generalizations, which in turn are applicable by deductions. Thus, the generalizations are hypotheses meant to be verified or falsified.

c. Anthropology is no field of philosophy. But it may be operated upon with philosophical methods. Among them is the ontology-epistemology distinction and the theory of judgments.

Often, anthropology works with combined judgments (for instance, in legal anthropology). Here lie its main difficulties, but also its charm. This is also the reason why anthropology so often appears to furnish "click- experiences" *(Aha-Erlebnisse)*.

IV. Anthropological meaning of law

Chapter 3 will deal with the basic concepts of the anthropology of law. Of course, one of these basic concepts is law as such. Thus, law as an anthropological concept ought to be discussed in Chapter 3. Yet, what law means in anthropology is so important, also for Chapters 1 and 2, that it is preferable to bring the subject of law already here. It is a central concept for this book and deserves to be clarified in the beginning. Chapter 3 will only refer to this subchapter III. The wider concept is "social norm"; it includes law.

1. The issues

As a minimum, there are three issues that ought to be addressed in connection with the anthropological meaning of law, the practical importance of defining law for anthropological and legal reasons (2.), a workable definition of law for the purposes of anthropology (3.), and the theory of legal pluralism.[47]

2. Legal and other social norms

When a case impinges upon more than one legal system, such as a cross-border marriage, the adoption of a Nigerian child by an Ohio couple, or a US-Moroccan joint venture, the rules of a subfield of the legal science, called "conflict-of-laws", helps to identify the applicable national law. This may lead to the situation where a court of one country has to apply the law of another country. Usually, the parties' attorneys will be interested and helpful in finding out the proper law and its substance. Also, some legal systems expressly obligate their courts to look for the applicable law. For example, sec. 293 of the German Code of Civil Procedure provides for that foreign laws need to be proved only if they are not known by the court, and that the court in finding out such laws is not limited to what the parties bring as the allegedly applicable rules.[48]

In such a case, the validity of a marriage, an adoption, a contract, etc., may depend on the performance of a ritual. To the Western party that ritual may look religious. Does a provision of the kind of sec. 293 of the German Code of Civil Procedure refer to foreign religions? Or to foreign laws only? The latter is the general opinion. But what is law in such a case, and

47 See 4., and IV. infra.

48 Instead, the court may rather use other sources and instruct or order what it deems necessary. In practice, often experts of foreign laws called by the court will be heard. Details in Chapter 13 IV.

therefore relevant for the decision of the case, and what irrelevant religion? Only legal anthropology can give good reasons to decide these issues.

The examples show that besides law there exist other social norms, which may be of religious, moral, habitual, of etiquette, political etc. nature. This gives rise to a theory of the forums, or social norms.[49]

3. Towards an anthropological definition of law[50]

One of the first issues in legal anthropology is the question: What is law? Law is thought justice, not necessarily spoken justice. What follows is an attempt to define law for the aims of legal anthropology. Earlier opinions and theories will be reported and discussed. Defining law for anthropological purposes leads to the concept of legal pluralism (see IV. below).

a. In legal anthropology, the number of definitions of law is substantial. It is not possible to assemble and describe all given definitions of law which are offered by the authorities. A collection will serve as a starting point to describe what is meant by a definition of law. Leopold Pospíšil,[51] while not pretending to be exhaustive either, has compiled the following list of theories on "law":

(1). One theory states that "primitive peoples" know no law at all, but follow "social rules, which, by and large, everybody obeys." Pospíšil quotes: E. Sidney Hartland, Primitive Law, Port Washington 1970: Kennikat Press (orig. London, 1924); W.H.R. Rivers, Social Organization (New York, 1924); L.T. Hobhouse, Morals in Evolution (London, 1906); M.J. Meggitt, Desert People A Study of the Walbiri Aborigines of Central Australia (Sidney, 1962), from whom the quotation in the text above is taken, (page 250); Pospíšil's argument against this non-law theory is based upon the observation of reality: law can be found in all "primitive people" (a discussion: W. Fikentscher (1975a), 91–104, see also Restatement (1971), note 996, below).

(2). A second point of view sees law as social control by the courts of a political organization.[52] It is not difficult to see that this definition is too narrow since often courts and political organizations are lacking.[53]

(3). A third legal theory is what may be called the "folk-system theory" which stresses the point that law can only be comprehended through the frame of thought of the people whose legal structure is being studied.[54] This folk-system theory, or synonymously, the participants view of their culture, does not, if applied strictly, permit comparison.[55]

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49 See the discussion in Chapter 4 below.

50 The original source for the following text are the pages 16–26 of a monograph: W. Fikentscher, Modes of Thought in Law and Justice: A Preliminary Report on a Study in Legal Anthropology, Proptocol of the 56th Colloquy of the Center for Hermeneutical Studies, Berkeley, CA: Graduate Theological Union and University of California, Berkeley (1987). In the first edition of Modes of Thought (1995), p. 28, for reasons of brevity a mere reference was made to these pages. For the 2nd edition of the Modes of Thought (2004, XXIV ff.), a revision was necessary. For the present publication, a second revision is in order which reflects new publications and my further studies of the subject, mainly in connection with the role of supernatural authorities and sanctions.

51 Leopold Pospíšil, The Ethnologie of Law (Menlo Park, California, 2nd ed., 178, reprint 1985; out of print), 8 ff.

52 E g., F. James Davis, Henry H. Foster, C. Ray Jefferey, & E. Eugene Davis, Society and the Law: New Meanings for an old Profession, New York 1962: Free Press).

53 Pospíšil, Ethnology, 8.

54 The most important representative of this "folk-system theory" is Paul J. Bohannan, e.g., in: Justice and Judgement among the Tiv (London, 1957), 4. Bohannan created the term "folk-system." See also S.J.L. Zake, Approaches to the Study of Legal Systems in Non-literate Societies, Ph.D., Dissertation, Northwestern University, 1962, quoted from Pospíšil, op. cit., 9. The theory is older: It dates back to the Dutch anthropologist C. van Vollenhoven, and has become the guideline of much of Dutch anthropologists' and ethnologist's work

(4). The next group Pospíšil calls "legal pessimists": its proponents claim that law cannot be defined at all.[56]

(5). He then quotes those writers who try to define law as a concept by a *single* criterion.[57]

b. He himself thinks that the concept of law in legal theory and likewise in legal anthropology is defined by five criteria, one "formal": the abstract rule; and four "inherent": authority, *obligatio,* intent to generalize, and sanction.[58]

c. Based on these types, and others given in general jurisprudence, it is not difficult to go beyond Pospíšil's topical list and to systematize definitions of law in the following way: There are clearly distinguishable non-comparative theories and comparative approaches. To the first group of non-comparative definitions of law two subgroups must be counted. In the first, those writers are "non-comparativists" who claim that every legal culture has its own idea, phenomenon or concept of law. To use Bohannan's language, this is the theory of the "folk-systems." Following P.E. de Josselin de Jong, it is the theory of the "participants' view of their culture." If these writers want to be consistent, they cannot but admitting that every legal culture has its own concept of law so that a comparison of concepts of law cannot logically take place. A second sub-group does not compare either: To it belong the writers who try to transpose their own concept of law into the legal culture to be studied, a group of theories, which might be called "transposing theories." A third group of non-comparativists, those who think that in certain legal cultures, especially the "primitive" ones, there is no law at all, cannot be counted here because they might be interested in what is law at home but are not concerned about law abroad. Thus, only the folk-system theories and the transposing theories must be studied a bit further:

As mentioned earlier, Paul Bohannan believes that it is not possible to define law, its content and its structure from outside. That "participants' view of their culture" is also the approach of many Dutch anthropologists and those following them. Since C. van Vollenhoven demanded, "het oostersche oostersch te zien" (to look on the Eastern things the Eastern way), this group of anthropologists thinks it necessary to view a legal order only from the inside, to measure it with the yardsticks of its own concepts, to apply a conceptuality from within, and to use the system, the division and ordering of the law to be studied for studying exactly that law, including its own concept. Any kind of "ethnocentrism" is rejected. Carried to an extreme point this theory bars any kind of comparison between laws and legal orders. P.E. de Josselin de Jong, therefore, makes the workable proposal never to neglect the partici-

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(Leyden school), more recently by P.E. de Josselin de Jong, de Jongmans, P.C.W. Goedkind, J.F. Holleman, and others; for quotations see Fikentscher (1975 a), 61; (1977 a), 87; P.E. de Josselin de Jong speaks of the "participants' view of their culture" (Dutch: "de visie der participanten"); see, esp., P.E. de Josselin de Jong, De visie der participanten op hun cultuur, Bijdragen Taal-, Land-en Volkenkunde, 112: 2 (1956), 149.

55 This is also the criticism by Pospíšil, op. cit., 9.

56 For example, Max Radin, "A Restatement of Hohfeld," Harvard Law Review 51 (1938) 1141, 1145. Pospíšil thinks that the mistake of the "legal pessimists" consists in viewing law as a phenomenon. This not being the case, but seeing in law a (nominalist) concept rather than a phenomenon, Pospíšil holds that a conceptualization of law should be possible; a discussion: W. Fikentscher (1975 a), 95f.

57 For example, Barkun's definition of law as a system of manipulable symbols functioning as a representative, or model, of social structure, Michael Barkun, Law Without Sanctions (New Haven, Conn., 1968), 92. Similarly, Pospíšil adds, A.R. Radcliffe-Brown uses a single criterion when he defines law as a physical sanction within a politically organized society (in: Structure and Function in Primitive Society: Essays and Addresses, London 1952: Cohen & West, 212). However, Pospíšil holds that law must be defined by more than one criterion.

58 For details, see below b); among the group of other writers who think that multiple criteria define law, Pospíšil names Llewellyn and Hoebel, Pospíšil, Ethnology of Law, 12.

pants view even where the transposition of foreign concepts and tools of investigation are necessary to reach results that make sense.[59] It will be seen that the folk-system theories conform to step One of the synepeia analysis as developed in Chapter 6 below.

The opposite approach is made by what is called here the "transposing theories". It consists in injecting one's own concepts and theories about law into the foreign civilization, and, so to speak, abusing them as a yoke to tame the data found. It need not be missionary shortsightedness to "justify" this approach, it may even be rational reflection that commands the use of the tools, i.e., one's own concepts and systematic notions, to make the conclusions to be reached conceivable for "our people at home."

To enter into a critique, it may be remarked that this kind of dealing with legal problems of others is not satisfactory. The "transposing theories" do not make comparison possible, either. They "compare" only with the eyes of someone who uses her own "folk-concepts" to classify her findings in the other "folk" she studies, but this is not a comparison. Even if the "folk-concepts" of the researcher are put in "quotation marks"and are "enlarged" to "fit comparative purposes" it is not at all certain that the "fellow to be compared" and third persons will understand them. However, this should be a minimum claim for every comparison. In short, transposition of concepts is not the same as comparison of concepts. Nonetheless, this method of transposing one's own concepts of law is widely applied.[60]

It is obvious that the idea of law to which the transposer is clinging, and which is carried into the foreign context, will differ according to the general possibilities of understanding law. Thus, three main ways of transposing a concept of law are available: It may be a natural law ideal, i.e. some definition of law as a "phenomenon," capable of shaping reality according to legal guidelines; it may be some social data theory in law attributing to law the mere function of the word, a concept in the well known nominalist manner;[61] and there may be the third approach for which Rudolf Stammler may be quoted, trying to define law as a controlling instrument of reality, and following a middle way between reality-shaping natural law and law-shaping reality.[62] The transposing theories violate the principles of step One of the synepeia analysis (see Chapter 4 below) that every mode of thought should stick to its own premises and consequences; on the other hand, they do not enter synepeia analysis Step Two.

d. Comparative theories acknowledge a plurality of definitions of law in different cultures. All *comparative theories* attempting at defining law must cope with the problems of defining comparison.[63] A comparison is the statement that at least two different items have common

59 P.E. de Josselin de Jong, see note 54, above; idem, "The participants' View of Their Culture" in W.G. Goedkind, Anthropologists in the Field (Assen, 1967), 101f.; idem, Contact der continenten. Bijdrage tot het begrijpen van niet-westerse samenlevingen (Leiden, 1969), 138f.

60 On the (allegedly) inescapable need to use one's own concepts: Max Gluckman, in: FS E.A. Hoebel, 7 Law and Society Review 611ff. (1972/73); idem, The Ideans in Barotse Jurisprudence, Manchester 1965: Manchester Univ. Press; on tribal traditional knowledge and indigenous resources submitted to Western concepts of intellectual property in: S.v. Lewinsky, (ed.), Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore, The Hague etc. 2004: Kluwer. Transposing theories work "ethnocentrically", see Chapter 4, below.

61 A follower of modern legal nominalism is Glanville L. Williams, The Controversy Concerning the Word 'Law,' ARSP 38 (1949/50), 50; perhaps on a similar line, but less outspoken, Pospíšil, Ethnology of Law, 10.

62 See, e.g., Glanville, L. Williams, preceding note, and the summary in German of his article, loc. cit.

63 See, for example, Konrad Zweigert, "Zur Methode der Rechtsvergleichung," 13 Studium Generale (1960), 193f., with an introduction to the philosophical problem of comparison. Other comparatists are L. Pospíšil, Lloyd A. Fallers (1969 at 5f.); Laura Nader (1969, 1997). All lawyers trained in comparative law tend to be interested in comparative legal culture and legal think-worlds; an exception is Ernst Rabel's school of comparative law, still followed in the Max-Planck-Institute for Foreign and International Private Law, Hamburg, W. Fikentscher (1975a), 10–13.

features and, to the extent of this commonness are subject to a generalization (the so-called *tertium comparationis*). At the same time, comparison is bound to state the non-common features of the compared items, and thus of a particularization.[64] As mentioned, Pospíšil distinguishes, among the comparative theories, single-criterion theories and multiple-criteria theories. That a comparative approach in defining law is unlikely to end up with a *single* criterion can be easily understood. So the multiple criteria theories attract our sympathy.

But how are the single or multiple criteria to be identified? Again, Pospíšil's approach of crystalizing one "formal" plus four "inherent" criteria of law out of a multitude of criteria should be discussed. This will help to reach a definition of law on Level Three of synepeia analysis.

In the opening chapter of his book Ethnology of Law, Pospíšil explains his own "folk-system." "Through trial and error the concepts are changed and become adjusted to the necessities of cross-cultural inquiry".[65] In refuting Bonannan's claim for a reduction to non-comparable "folk-systems," Pospíšil argues that it is possible to start, e.g., with the English language (or with any other language) and to enlarge its concepts by trial and error to fit for comparative purposes:[66] Accordingly, then, folk-legal concepts would be the meanings the natives give to categories that they may or may not provide with a term. Anthropologists study these concepts as given facts. On the other hand, analytical concepts are constructs of the ethnologists (or any other scientists), designed for analytical and comparative purposes, whose justification lies not in their phenomenal existence in the outer world (in ethnographic data, for example) but in their heuristic value of achieving results with ethnologist's tools. For purposes of easy communication they must be provided with appropriate terms. Since they are only convenient labels for concepts, they need not belong to a newly devised language. The reader of this book will not be forced to master a new medium of communication".[67]

4. Pospíšil's definition of law

a. After extensive research in numerous (60) legal systems, Pospíšil arrives at four substantive elements (indicated above under a.) which, to his mind, define "law":
(1) Law is manifested in a decision made by a legal authority;
(2) law contains a definition of the relation between the two parties to the dispute *(obligatio);*
(3) law has an intended regularity of application;
(4) law is provided with sanctions.

b. A review of these four points shows that two of them may be questioned.[68] A criticism of the four criteria ought to include the following aspects: The first element prerequisite to

64 See the discussion of the comparative approach and of the issue of generalization v. particularization in W. Fikentscher, note 21, above, 565 ff.; idem, Ein juristisches Jahrhundert, Rechtshistorisches Journal 19 (2000), 560–567; in a similar vein: Marshall Sahlins, Culture in Practice: Selected Esays; New York 2000: Zone Books, and the review of Sahlins' book by K.-H. Kohl, FAZ of December 28, 2001.

65 Pospíšil, Ethnology 5 (see note 51, above).

66 Cf., for this linguistic aspect of the comparison, Ernst W. Müller, "Problematik des Gebrauchs juristischer Kategorien bei der Aufnahme und bei der Kodifizierung von Eingeborenen," in Hans Doele (ed.) Deutsche Landesreferate zum IV. Internationalen Kongress fuer Rechtsvergleichung in Hamburg 1962 (Berlin-Tuebingen, 1962), 55; for the linguistic-logical aspect, see, for example, Pospíšil, Anthropology of Law. A Comparative Theory (New Haven, 1971; several reprints), 275 f.; also Chapter 4, infra.

67 Pospíšil, Ethnology, 7.

68 Pospíšil, Anthropology of Law, a Comparative Theory (New Haven, 1971), 44 f.; for a more detailed discussion of Pospíšil's theory see Fikentscher 1975 a: 100; 1977 a: 90 f.

law, according to Pospíšil, is (existing) authority.[69] There is so much persuasive force in the examples of early and religious law systems, given by Pospíšil, that law seems to be, in fact, hardly conceivable without a deciding and, if necessary, executing authority. But some doubts still remain. Does the requirement of authority (according to Pospíšil vested in "leadership") not put too much weight on just *natural* data, in place of culural (and therefore human) consideration and evaluation? And what about the law of nations? The law of nations, international public law *(Völkerrecht),* is somehow similar to ethnological situations described by Evans-Pritchard, Sigrist, and others, as being – on a higher level – "leaderless." The consequences are, according to these writers, "acephalous" societies and nations lacking a law of nations. Yet, there is law governing them.

Still, the element of authority need not be disregarded. It is only necessary to understand by authority the right thing: The law of nations also recognizes an authority, namely, holding valid, by the community of nations, certain minimum requirements and standards in international life. Surely, this is not what Pospíšil considers to be authority and leadership. However, authority may be often a person, an organ, or a group of specialists who apply legal rules, but that is not always the case. In particular, in order to reach an understanding of phenomena like small-group societies, law of nations, church law, etc., authority can also be understood as the setting and validation of guiding and regulating values in a given group (for example between countries within the framework of the law of nations). Authority need not be vested in a person or persons. It consists – regardless of being administered by single persons, a group of persons, or all who participate in the authorization – in the acknowledgement of the necessity of reality-changing values. In this sense, the element of authority as a prerequisite to law is beyond doubt. If – certainly in the minority of cases – there are no particular persons charged with applying the authority of law in this sense effectuating legitimate change of what otherwise would be the course of things, a group of persons, or in extreme cases, all of them, may have this "office." This has nothing to do with the speculations that in early civilizations the group, the society, or a similar generality governed itself. The point is rather that there must be a "division of labor" between those who *apply* the law and those who *obey* it. This division of labor calls, in general , for specialized persons, but it is not certain how big this circle of persons can be. It may include, as has already been remarked, in marginal cases the whole group. But the division of labor remains.

Authority in this sense means the formation and implementation of law – based upon the concept of validity *(Geltung)* – by a separation of law-executing power from "man as such". This guarantees the heteronomity which is necessary to make law an external binding force.

In other words, it is not so much *authority* which is a constituent of law. The crucial element is that law by virtue of its validity is *authorizing* someone. On closer inspection, it is therefore the *authorizing characte* or *activity,* the *"authorizingness"* – sit venia verbo –, not the authority itself, which is an essential constituent of law. This holds true for law in every think-way, or mode of thought. Yet, nothing has been said so far about quality, origin, legitimation etc. of that authority. The element of "authorizingness" distinguishes law, by the same token, from moral norms, i. e. norms which, without being law, prescribe a certain behavior, but which cannot be applied with authority. Nonetheless, moral norms are norms, they can be sanctioned, but they lack the element of "authorizingness". To illustrate, if someone does not behave himself as he should, according to social norms, he will most probably be "cut

69 Cf., Pospíšil, The Ethnology of Law, 30f.; idem, Anthropology of Law, 44. See, for the following, Fikentscher (1979 a) "De fide et perfidia"; idem, Blöcke and Monopole in der Weltpolitik, Munich 1979: Olzog, 14f.; and Chapter 9, below.

off" or in extreme cases, boycotted. This shows that moral norms possibly have sanctions. But there is no authority behind the "cutting off," behind a possible boycott, which, as the bearer of a task, can be considered to be separated from the society. The division of labor is missing. There are distinctions from other social norms ("forums"). As we will see when we will discuss "obligatio" and "sanction", the "authority" which is being "authorized" must not be supranatural (such as a deity). It must be this-wordly. Otherwise, law cannot be distinguished from religious norms.

"Obligatio", Pospíšil's the second element, is used to characterize the *iuris vinculum*, which is appropriate to establishing a legal relation between certain persons. By *"obligatio",* two parties (private or public) are tied together by a legal decision, Pospíšil says (Ethnology 30f.). But is this not already included in the fourth element, sanction, which will be described below? The compelling force of *"obligatio"* is the very nature of sanction. And the other element of *obligatio,* the attachment of a legal tie to two parties, is doubtful for – at least some – fragmented societies:

If *obligatio* means establishing a given relation between the parties to a dispute, it would not fit for example in Hinayana-Buddhist and Confucian law where, in principle, no legal relations exist between the disputing persons. In classical Chinese court procedure both "parties" face the judge only and not each other. They are no parties to the dispute, they do not even talk to each other; law is applied "vertically", as Chie Nakane would say about Japanese legal culture.[70] In Tibetan legal procedure, the judge even receives the parties at different times for their depositions (communication Rebecca French).[71] There is therefore, no *obligatio* between those who in this way have to obey the law. According to Pospíšil, one might say that there is however *obligatio* between the Chinese judge on the one hand and the defendant on the other. But then, one cannot explain why the judge in many cases reacts to the plaintiff's claim. A second *obligatio* between plaintiff (or accuser) and judge becomes necessary. The judicial decision is however not binding fo the plaintiff. He only gives rise, in some cases, to a trial. Therefore, *obligatio* can only be used for the relation between judge and defendant. But then it is lacking in the legal relation which should be attached by way of *obligatio* between two persons, the parties to the dispute.

For this reason, it is at least difficult and somewhat artificial to use the element of *obligatio* in some vertically organized legal cultures – and they are numerous. "Vertical" *obligatio* is nothing more than sanction, *Rechtsfolge*. The element of *obligatio,* thus, does not fit – according to comparative observation – to cultures far distant from European models. *Obligatio* is, apparently, a concept too "Western" to be applied to legal cultures recommending, in law and religion, egolessness or no-binding.[72]

Pospíšil uses *obligatio* also to separate law from the impact of religious norms that, if applied, do not evoke a real change in the observable world. There are social norms that threaten an impious person with hell, cause somebody to be cursed, or announce another supranatural sanction which will punish an evildoer, such as: If you break this taboo you will become deaf. According to Pospíšil, this taboo is – in case its breach does not trigger the pre-

70 Chie Nakane, Japanese Society (New York, 1970; revised edition Middlesex, England, 1973; reprint, 1974), VI, 6, 42 *et seq*. Needless to say that her views might be contested, at least for some periods of Chinese law, in which Nakane is not interested. But strictly vertical application of legal commands are certainly conveicable. Where is *obligatio* then?

71 Rebecca Redwood French, The Golden Yoke: The Legal Cosmology of Buddhist Tibet, 2nd ed. Ithaca & London 2002: Cornell University Press, offers details. This practice is also reported for certain parts of China.

72 Cf., Bukkyo Dendo Kyokai (Buddhist Promoting Foundation), The Teaching of Buddha (Tokyo, 1977, 26th revised edition) 144, 272, 588, 592.

dicted effect – a religious norm, not a legal rule, because there is no *obligatio* as *iuris vinculum* between two persons. Again, it is just as clear to say that in case nothing happens, there is no sanction and therefore no law. If for some supranatural reason the taboo-breaking were really to result in deafness, a legal norm has, by way of sanction, validly been applied to the offender; and if the taboo and its (effective) sanction were, explicitly or by mere influence on the public conscience, applied by an authorized person or a group of persons, like priests, we are, as Pospíšil rightly states, in the field of church law or religious law.

It seems more persuasive, then, to merely speak of sanctions, not of *obligatio* and include supranatural enforcement (which is not infrequent in tribal societies) in the category of sanctions. The result is that *obligatio*, at least with special regard to some legal cultures, is not a necessary element for the definition of law. However, now it is of importance that authority, or authorizing, Pospíšil's first element in defining law, has above been restricted to this-wordly leadership. Other-wordly authority, plus other-wordly sanctions would bring a norm into the legal domain that says: "Whoever does not believe in a monotheistic God goes to hell". Yet, such a statement belongs to religion.

Regarding the third element proposed by Pospíšil, the *intent of general application,* the *intent to generalize,* it does not fit any legal order or legal theory that applies law case by case in a non-generalizing way. Harun el Raschid und King Solomon administered law in single cases. Every case was a law unto itself. The same was the philosophy of Justice Oliver Wendell Holmes, Jr.: there are no rules applicable to a plurality of cases. The same holds true for the "phénomène Magnaud", and for the legal philosophies of Georg Cohn and Fritjof Haft. And in Hubert Rodingen's "near-range" world, there would be no intent to generalize at all, and there should not be.[73] One cannot say that all these applications and theories of law "are no law.". Of course, Holmes must be regarded as a man of law even if one does not share his legal theory (see a discussion in W. Fikentscher (1975b), 151–222). Under the terms of a step-by-step comparison, by which according to Pospíšil and many others, Western concepts are extended to non-Western with the help of "quotation marks" or by "Begriffshypothesen" (Martin Kriele), the intent to generalize seems to be a convincing element of law. However, under a comparative approach, metatheoretically taking into consideration attitudes towards law in possibly all civilizations and thinkways, the element of the intent to generalize is untenable.

It would not help much to object that – "in reality" – there is an intent to generalize even where, in observable practice, the "folk ideal" of law is opposed to generalizations. If one is ready to discard folk ideals and concepts in this way, one is consequently bound to say that Holmes, Magnaud, Cohn and Haft are simply wrong. However, this transposing method applied to one's own concepts of right and wrong is here rejected, and the right to measure "Eastern" understandings of laws with the yardsticks of Western "reality" concepts is denied. From a comparative viewpoint law embraces even those legal systems for which single-case justice is regarded typical. According to Pospíšil (loc. cit.), the formal element of law, preceding the four "inherent" elements, are abstract rules, and sometimes abstract principles. This formal element cannot be upheld as a valid part of a definition of law once general application, or the intent of it, have been rejected as valid "inherent" element.

Lastly, the fourth element, *sanctions,* is necessary for every kind of law. Sanctions must be accepted as necessary constituents of a comparative definition of law. That – this-worldly

73 Rodingen, Pragmatik der juristischen Argumentation (Freiburg/München, 1977), 157; as to the other examples (Kadi-justice, Holmes, phenomène Magnaud, G. Cohn, F. Haft) see the materials in Fikentscher, (1975a:), 464; (1975b:), 38f.; 151 *et seq.;* (1976:), 304, 380, 444, 755; (1977 a), 200.

and other-wordly – sanctions may also be applied in the moral sphere, no matter how it might be defined (with or without including norms derived from behavior, etiquette or custom), is no argument against it. The example of being ostracized by the social community which can lead to a total seclusion, a heavy moral sanction, may be quoted again. Morals lack the authority which is behind the law. The moral forum and the legal forum are not the same.

Most societies distinguish the fora (or forums) of morals and law, and many of them know more fora, for example, religious and political ones. This relates to the difficult and very controversial question whether there is law in every society, from the beginning of mankind; or whether very early and native societies only know moral norms from which the forum of law separates itself on a later stage of development and social differentiation; or finally, whether in early societies, at least, there existed so-called "mononorms", which served at the same time as moral *and* legal norms. My own position in this dispute cannot again be stated in further details here (on the theory of fora, see Ch. 4, below; Fikentscher 1975a: 103). He who postulates, as Pospíšil does persuasively, that law exists in every human society from the beginning of mankind can, for example, distinguish moral norms as rules aiming at the desirable from legal rules characterized by necessity and strictness. He can stress the role of authority as lacking in a sentiment of morals, but present in law. The theory of mononorms must refrain from such distinctions. Leaving this issue open for a moment, the point is here, that the theory of fora, as stated in the "Methoden des Rechts" (1975a), is no possible objection to sanction as a constituent of law.

Between the theory of mononorms and the theory of fora the following distinction is to be noted: The theory of mononorms states that the earliest human societies lived without law and authorities, but equal under norms which at the same time served the moral *and* the legal functions. The ideological background of the theory of mononorms, a theory propagated in the first line by Marxist authors like Pershits, is the ideal of a stateless and lawless society (Friedrich Engels). The theory of fora does not aim at an idealized society but thinks possible the existence of very early societies which lived under moral-societal norms only, but did not yet know specifically legal norms because the claim of authorizingness, necessary for law in the sense just described, had not yet been raised. The theory of fora consequently deems possible, in very early societies, political authorities not equipped to set or enforce, nor being controlled by, *law*. Law then came into existence by separating a second forum from general societal morals, by forming a legal authority. The dispute whether law existed from the very beginning of mankind or whether it later grew as a second forum next to the moral forum, corresponds strikingly to the theological issue whether man was, from the moment of his creation onwards, a religious being (or whether religion is a later attribute to human civilization). According to one's own standpoint, now law, morals, or religion can be taken as the original normative ordering of man. A theological tradition, running from Henry Maine and Edward B. Tylor to Wolfhart Pannenberg, "Christliche Rechtsbegründung," Handbuch der christlichen Ethik, A. Hertz, W. Korff, T. Rendtorff and others (editors), (Basel-Wien, 1978), vol. 1, 323, states that religion became existent together with man, and that law has developed from religion. From an anthropological standpoint this is doubtful as long as "religion" is to be understood as something connected with "holy feelings"; see Ch. 3 IX below; Fikentscher 1975a: 85; Horst Nachtigall, Völkerkunde (1972, 1974 edition), 54. From religion as a feeling of holiness there is to be distinguished a wider concept of religion in the meaning of a world view of being tied or not tied to metaphysical motivation of behavior, a concept without which man was not able at all to make normative evaluations, neither moral nor legal, Fikentscher 1975a: 405. Thus, totemism, (as well as, e.g., scientific Buddhism, or

the Greek Tragic Mind) is "religion" only in the second, wider meaning, being as such independent from "holy feelings." (This is said here with respect to Pannenberg's remark, op. cit., 331, note 36; African material in Gerhard Kubik, Totemismus, Berlin 2003: Reimer.)

Sanctions distinguish law (and moral/customary norms) from religion. Religion may make use of authority or of authorities, which is often the case. But it lacks, as such, sanctions. Where, however, religious sanctions are imposed – as when, e.g., the breaking of a taboo is punished with death – there is, as Pospíšil states, "religious law", "church law", and therefore law.

The foregoing discussion of the four elements, or criteria, of law, as proposed by Pospíšil, is intended to show the fallibility of a trial-and-error method which builds comparison on looking around, and enlarges one's own concepts to meet, if the data material is sufficient, heuristic needs. The pitfall consists in explaining the data or measuring them with the yardstick of one's own "reality", often neglecting them as the example of the single-case justice shows.

5. A new definition

The case is made, thus, to place comparison on a metatheoretical level, at least in the sciences of evaluation, on the metatheoretical level of synepeia analysis, and on this metatheoretical level to compare all presumptions and consequences with each other. This means that law has to be situated right in the middle of a system of cultural think-ways. The proof that cross-cultural comparison *ends* with "discovering the other" (the level of Synepeics II) has not been established.

a. This opens the arena for the requirements of a definition of the concept of law. If it is tenable that law can be understood *systematically* and *historically,* and that law consists of a connection of *values* and *methods* directed towards *justice* (Wolfgang Fikentscher, 1977a, chapter 31–32), then it is not only possible to develop the idea of law in the Roman, Anglo-American and Middle-European legal systems, but also in all others. It has been said in the *Methoden des Rechts* that the basic characteristic of the Roman, Anglo-American and Middle-European legal systems is the search for values "from outside", values therefore, that can be debated, that can be sought, that pose epistemological problems. This attitude has been called "extraposing." But also the non-extraposing cultural think-ways are able to teach values, to investigate them scientifically, to know them and to prescribe them.

b. From this distinction, another one can been derived, namely, that extraposing civilizations tend to be organized, whereas non-extraposing ones tend to be fragmented. Therefore, fragmented societies often work with less reliance on systems and history than the organized ones. History and systems may in rare cases even imperceptibly be reduced to zero. However, for defining law in highly fragmented societies, there still remain the other two elements, value and method.

Thus, if law is an *evaluation* of reality in the direction of justice, applied *methodically* in *system* and *time,* and if fragmented societies have a relatively fragile relationship to system and time, law is still "thought justice", *i.e.* an evaluation (of an ethological decision) methodically applied (even to a single case without the intention of universal application).

This is possible, because value and time need not coincide, – a value is a value, even if it does not last for a long while but merely is expressed in a single ethological decision. Fragmented think-ways work with less interest in system and less sense of time, but they also know law as an evaluation with the aim of changing reality based on the fixing of values and being the result of possibly conflicting values. The setting of a value with the aim of changing reality always requires a medium outside of the value itself, a "medium of communication",

for example, language, gestures, or, as in an example of Pospíšil, the sharpening of an arrow to indicate to the onlooking public that a legal decision has been made (Pospíšil, Ethnology, 29). Also a word by Harun al Raschid or by a Tibetan judge to *one* "party" (who need not be a "real" party because it does not form the part of a court audience) and the mediation between fighting Nuer by the leopard chief described by Evans-Pritchard are communicative media. There is always enough *method* to communicate the value.

c. In sum, the four element definition of *law as developed,* in vol. IV of the *Methoden des Rechts,* made up of *values,* and *method,* applied in a *system* and in the course of *time,* remains valid also for both organized and fragmented societies. The four points, value, method, system and time, may differ in weight in organized and fragmented societies, system and time factors often weighing less in fragmented ones. It follows that the definition of law as a result of methodically applied evaluation in system and time is fit for comparative use. It is by changing the weight of the different four factors, that legal societies can be characterized. This should be noted as a provisional result of a comparative definition of law.

d. Law is meant to change reality. When law is only to describe reality, we do not need it. In other words, law is an ought. So far, law, for legal anthropology, can be defined as a set of authorizing sanctions, being the result of *values methodically* applied in order to change reality in *system* and *time,* with varying weight on these four factors according to the given legal culture, being, to be sure, always an authorizing sanctioned evaluation. The *prescriptive* nature of law should be given closer consideration than anthropological literature has done up to now. It is related to the problem of custom as regular behavior versus custom as a *norm*. This distinction has direct impact on an anthropological definition of law. P.E. de Josselin de Jong illustrates that if one understands custom as regular behavior, and binding norms as law, there is no place for something in between, like "customary law," *Gewohnheitsrecht*. This is quite convincing, if "custom" is given only the task of describing "regular behavior."[74] But "custom" can also mean a moral or legal norm. Then there is "something in between." In the same context it should be remembered that law can be understood as "is" or "ought," as "Sein" or "Sollen," as fact or norm. But if this is so why cannot custom also be understood either as "is" or "ought"? Of course, it can. What should also be kept in mind when speaking of law is that law is not merely behavior derived from "conforming to ideals of a given group," but that law means social control in a normative sense, *aiming at the realization of justice as value.* Law implies an "ought," not only in contrast to the desireable or to the non-binding, but in contrast to descriptive regular behavior. If Pospíšil wished to fit this element into his *"obligatio"* one should accept it: Law is an ought.[75]

6. Definition of law, summarized

We may therefore reduce the law-defining elements to two: authorizing and sanction, and to expressly include (in a definition of law) its normative character, in the sense of an "ought" encompassing all sorts of endeavors to change reality in the directionof justice as a value.

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74 P.E. de Josselin de Jong, "Recht, Gewohnheit, Gewohnheitsrecht" in Fikentscher-Franke-Koehler, Entstehung und Wandel rechtlicher Traditionen (Freiburg i.B., forthcoming); in the book Contact der continenten (Leiden, 1972), 51, the author himself distinguishes "to conform to the ideal norms" of a group, and norms meaning "social control." They are not the same. The former is, in the terms of German law, "Verkehrssitte," the latter "gute Sitte." Pospíšil implicitly mentions the problem in his criticism of the "non-law-theories." See also Fikentscher 1975a: 98, n. 118, and the examples from Native American law in Cooter and Fikentscher (1998a, b), 326–330.

75 A discussion of the is-ought problem goes beyond the purpose of this paper. See, e.g., Hans Albert, Traktat über rationale Praxis (Tübingen: Mohr, 1978) esp. 482, n. 24, with references.

a. Since the first step of synepeia analysis – the identification of a "folk law"- is concerned with the presentation and evaluation of the consequences of one's thinking, and not with the absolute right or wrong of the results of that thinking, the synepeical definition of law (on level I) cannot imply that law (so understood) is just. The result of synepeical inquiry may very well be that if you start with a certain "think-way" in law, the outcome is flagrant injustice, and that therefore this specific way of reasoning in law does not, or maybe does not want to, or cannot, reach the results which had – sincerely or pretendedly – been envisaged by the parties, the law personnel, or the general public.

Yet, because of the evaluation of consequential thinking it would be wrong to ban the idea of justice from the synepeical definition of law altogether because if this were done, synepeia analysis could not serve its task as a critical tool (as the third step of the analysis). Thus, for example, criminal gangs can exercise social control over their members by their leaders. Hence, there is "authority" and "leadership" in gangs, and certainly "sanctions". Values (if negative ones) are also realized, methodologically in system and time. Yet, what a gang sets up to maintain inner discipline is far from being *law*.[76] Justice is lacking, because the discipline is to serve unjustified goals (so that the gang leaders' belief in their activities as "just" would be no defense).

In this way, the four law-forming elements, value, method, system and time are integrated into the definition of law through its "ought"-character, each element differing in weight according to the given cultural think-way. It is in the *ought* that the quest for justice is firmly rooted.

b. In summary, law is, anthropologically, an (1) *authorizing* (2) *sanctioned* (3) *ought* based on the result of (4) *values* (5) *methodically* applied in (6) *system* and (7) *time*, with the weight of the four latter factors changing according to the given legal culture. The requirement of "authorizingness," "sanction" and "ought" define what law *is*. *Justice, implied in the ought,* defines the *purpose* that law is meant to *serve.* And the four requirements, values, method, system and time, explain from what elements law *comes into being.*

In this way the proposed analysis of "synepeics" (or: synepeia analysis) can produce both a culture-inherent and -dependent as well as a "comparative" definition of law, "comparative" in a *metatheoretical* sense. The implication is that there are and always will be dozens of *theoretical* definitions of law (think-way defined, or established according to other criteria of distinction). But on a metatheoretical level, there is that comparative definition. And on the highest, global level there remains the legal right to freely ask for values.

c. Then, what is justice? Justice gives law its direction. In the debate about global human rights, the distinction between culture-dependent and mode-of-thought dependent human rights will play a role (see Chapters 7 V,. and 15 VI.). There are culture-dependent human rights, such as the US-constitutional right to jury. More encompassing are modes-of-thought dependent human rights, such as the right to property. On a third, highest level, there is the human right to freely ask for, submit to questioning, and discuss, values, a right that includes the freedom to change one's religion. The admissibility of open critique plays an important role. The issue of world-wide standards of justice is being debated in two contexts:
(1) Whether there are universal human rights;[77] and

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76 Cf., otherwise, Pospíšil, Ethnology, 56. But: Remota iustitia quid sunt regna nisi magna latrocinia? (Aurelius Augustineus, De civitate Dei, 1st vol., book IV, opening sentence): If you eliminate justice, what will distinguish kingdoms from big robber gangs?

77 W. Fikentscher 1998, and 2004, 291–312; M.-B. Dembour, Human Rights Talk and Anthropological Ambivalence: The Particular Context of Universal Claims, in: O. Harris (ed.), Inside and Outside the Law, London 1996: Routledge. H. Bielefeldt, Philosophie der Menschenrechte, Darmstadt 1998: Primus; H. Steiner and

(2) whether there are building blocks to be gained from a biological research of the sense of justice in the human brain.[78]

What here has been said in terms of human rights, can just as well be said in terms of justice. Thus, there is culture-dependent justice (and a "sense" for it), secondly a modes-of-thought dependent justice (and a "sense" for it), and on the global level justice related to that right to tolerantly engage in the pursuit of values (and a "sense" for it).

Thus, the substantive contents of what is considered just underlies, in part, the relevant culture, and on the middle level, the influence of the relevant mode of thought: An other-worldly mode of thought such as Hinayana Buddhism will draw its standard of justice from the degree of attained detachment from this world, an animist mode of thought will look at congruence between behavior and respect of family and environment, and a Muslim will regard as just what corresponds to a correctly bargained for reality.[79] Globally, just is what enables freely asking and engaging for values, under the condition of tolerance for the tolerant.

d. A different issue is *internalization* of justice. In anthropology, the degree to which just law is internalized draws the borderline between authority-derived and custom-derived law. If law has been decided upon in public assembly, or by acceptance among the patricians, or comparable representative bodies – a procedure frequent in axial-age world-attached Tragic and similar modes of thought – the issue of internalization is moot, because self-decreed law need not be internalized, just remembered.[80] For the anthropology of societal links and for issues of leadership in society this is of importance.[81]

V. Legal Pluralism

1. Issues

In the foregoing subsection it said that according to many theorists law requires authority or rather an "authorization". This raises the issue of the involved authority-granting, or authorizing, partner. Is it the state? Many peoples whose law is being studied by anthropologists are not organized in what may be called a state even though the term is used in a wide sense. Tribesmen who govern themselves by consensus do not live in any kind of state. Or are the people themselves the authorizing body? This would exclude dictatorships from having law since their mark is that the people do not participate in the making of the law by a dictator. Maybe they live under a traditional, customary law, and now the dictator superimposes that customary law by dictates of his own. It is probable that the people will try to make a practical mix of the inherited rules and the new dictates, and thus be under *more than one law.* If there are religious prescripts of legal nature, there may be three bodies or layers of – possibly conflicting – laws. There may also be an overlap of time periods of validity of those custom-

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P. Aston, International Human Rights in Context, Law, Politics, Morals. Text and Materials, 2nd ed. Oxford 2000: Oxford Univ. Press; K. Wiredu, An Akan Perspective on Human Rights, in P.H. Coetzee and A.P.J. Roux (eds.), Philosophy from Africa: A Text with Readings, 2nd ed. Oxford 2002: Oxford Univ. Press, 313–323.

78 See Chapter 7, below. Roger D. Masters and Margaret Gruter (eds.), The Sense of Justice: Biological Foundations of Law. Newbury Park etc. 1992: Sage; W. Fikentscher, The Sense of Justice and the Concept of Cultural Justice: Legal Anthropology, in: Masters and Gruter, op. cit., 106–127.

79 Cf., Lawrence Rosen 1984.

80 See Herodotus, The Persian Wars. Translated by George Rawlinson. Introd. by Francis R.B. Godolphin. New York 1942: The Modern Library, Book VII No. 103, 104 (the "Demaratos topos"); W. Fikentscher (2004), 28–32: "We have a law . . ."

81 See the next section (V.), esp. under B. 2.

ary, politically prescribed, and religious laws so that at least some members of that society or group live under four or five legal orders; etc. These situations have received the characterization of "legal pluralism" or "multiplicity of legal systems" (there are more terminological proposals).

In anthropology, the attempts to obtain a workable definition of law thus lead to the other question of what is called legal pluralism. A great number of publications and theories have developed around this much debated subject. Its close connection with the definition of law justifies its discussion already here and in this context.

Anne Griffiths (2002, see next footnote) says: "Legal pluralism has generated a great debate about the meaning and scope of the concept of 'law' within the fields of sociology, anthropology, and legal theory. The term and the concepts it encompasses cover divers and often contested perspectives on law, ranging from the recognition of differing legal orders within the nation-state, to a more far reaching and open-ended concept of law that does not necessariliy depend on state recognition for its validity".

The following presentation of the issues of legal pluralism do not concern sociology or anthropology in general, only law (the third field quoted by Anne Griffiths) and anthropology of law. Furthermore, most arguments will drawn rather from legal practice than from legal theory. Few, if any, theorists of legal pluralism mention the practice under the legal rules known as "conflict-of-laws". Conflict-of-laws, often synonymously called international (resp. interlocal, interzonal, etc.) *private* (resp. public or criminal) *law* ("IPL", German: "IPR"; French: "Droit international privé"; etc.) is a field of law encompassing rules that do not decide cases. Rather, the norms of conflict-of-laws decide which law applies to a case that may be brought under more than one law (a Swiss-French married couple wants a divorce; a US-Japanese joint venture fails and must be dissolved; etc.). *Every* legal order has of necessity *its own* set of conflict rules, promulgated, customary, or judge-made, because laws coexist in this world. Thus, conflict rules are national, not international (although the may be internationally uniformized or harmonized, but this does not change their national character) Once a conflict rule has prescribed the application of a legal order for solving a cross-border case, the substantive norms of that legal order will be used by the judge to decide the case. It is obvious that cases producing issues of legal pluralism, need to be decided under conflict rules, and because of said necessity they always can be. It will be shown in Chapter 13 IV. how this works out in practice. A second question is whether legal pluralism points to another legal doctrine besides conflict-of-laws. It will be demonstrated that it does. The doctrine is called "sources of law". Anne Griffiths' remark mentions this dual doctrinal importance when she says that legal pluralism has something to do, on the one hand, with "differing legal orders", and with state-independent validity of law on the other. Conflicts-of-laws and sources of law are a lawyer's main headings under which legal pluralism ought to be discussed. Both themes are not immediately interrelated to one another.

2. An incomplete history of the discussion so far

A full documentation of all the discourses on legal pluralism cannot be ventured here. A concise and therefore necessarily incomplete survey must suffice[82] It is said that the term plural-

82 On the history of the concept of legal pluralism, see Spicer, Edward H., Plural Society in the Southwest, in: Edward H. Spicer & R.H. Thompson (eds.), Plural Society in the Southwest, New York 1973: Weatherhead Foundation, 21–76; M.B. Hooker, Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws, Oxford 1975: Clarendon; Rüdiger Schott, Justice versus the Law: Traditional and Modern Jurisdiction Among the Bulsa of Northern Ghana, 21 Law and State, Tübingen 1980, 121–133; idem, (short version of this article in:) Anthony Allott & Gordon R. Woodman (eds.), People' and State Law, The Bellagio Papers, Dordrecht 1985,

ism was first used in 1939 by the economist J. S. Furnivall to describe multiracial societies that have developed in the wake of colonialism; his field of study was what is today Indonesia.[83] In anthropology of law, John Gilissen and Pierre van den Berghe seem to be among the first who spoke of legal pluralism.[84] In law, legal pluralism was coined to identify the situation where the same person, or the same group of persons, sees itself exposed to more than one legal order all of which claim to exercise normative power over that person or group.

However, the phenomenon of an existing plurality of legal systems applicable to one and the same person or group of persons in one and the same case is much older than the terminology "legal pluralism". One of the best presentations of the history of this phenomenon in contained in the fourth chapter of the book "Anthropology of Law" by Leopold Pospíšil.[85] Pospíšil starts from the overwhelming power of the Roman law tradition in Europe which led jurists and politicians to think in terms of the equation "one (politically defined) society – one law". So strong was this tradition until the fifties of the twentieth century that sociologists and anthropologists tended to deny the existence of law where it could not be attached to a given politically defined society, even when the actual findings of those sociologists and anthropologists in observed reality spoke in favor of multiple legal systems within a society.[86]

229–231; Sally Engle Merry, Legal Pluralism, 22/5 Law and Society Rev. 869–896 (1988); F. von Benda-Beckmann, Comment on Merry, 22/5 Law and Society Rev. 897–901 (1988); idem, Rechtspluralismus: Analytische Begriffsbildung oder politisch-ideologisches Programm?, 119 Zeitschrift für Ethnologie, 1–17 (1994); idem, Citizens, Strangers, and Indigenous Peoples: Conceptual Politics and Legal Pluralism, 9 Law and Anthropology 1–42 (1997), 7–9; idem, Who's afraid of Legal Pluralism?, 40 Journal of Legal Pluraliusm and Unofficial Law 37–82 (2002); K. von Benda-Beckmann, Legal Pluralism, Tai Culture VI/1 and 2, 2001, 11–17; idem, Transnational Dimensions of Legal Pluralism, in: W. Fikentscher (ed.), Begegnung und Konflikt (2002),33–40 (on international and transnational impact on legal pluralism); Masaji Chiba, Legal Pluralism: Toward a General Theory Through Japanese Legal Culture, Tokyo 1989: Takai Univ. Press; idem, Legal Pluralism In and Across Legal Cultures, In: Sack, Wellmann, & Yasaki (eds.), Monismus oder Pluralismus der Rechtskulturen? Anthropologische und ethnologische Grundlagen traditioneller und moderner Rechtssysteme, 1991, 283–306; Michael Saltman, The Demise of the"Reasonable Man": A Cross-Cultural Study of a legal Concept, New Brunswick, NJ 1991: Transaction Publ.; Peter Sack, Wellmann & Yasaki (eds.), Monismus oder Pluralismus der Rechtskulturen?: Anthropologische und ethnologische Grundlagen traditioneller und moderner Rechtssysteme, Berlin 1991: Duncker & Humblot; Chris Fuller, Legal Anthropology, Legal Pluralism, and Legal Thought, 10 Anthropology Today 9–12 (1994); Norbert Rouland, Legal Anthropology, Stanford 1994, 42–66 and 73–81; K. M. Hazlehurst, Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia, and New Zealand, Avebury 1995: Aldershot; E.-J. Lampe, Was ist "Rechtspluralismus"? in: E.-J. Lampe (ed.), Rechtsgleichheit und Rechtspluralismus, Baden-Baden 1995: Nomos; Gordon Woodman, Legal Pluralism and the search for Justice, 40/2 Journal of African Law 152–167 (1996); Warwick Tie, Legal Pluralism: Toward a Multicultural Conception of Law, Dartmouth 1999: Ashgate; Volkmar Gessner, Rechtspluralismus, und globale Bewegungen, Zeitschrift für Rechtssoziologie 2002, 277ff.; Anne Griffiths, Legal Pluralism, In: Reza Banakar & Max Travers (eds.), An Introduction to Law and Social Theory, Oxford 2002: Hart Publ., 289–311; Emanuel Melissaris, The More the Merrier? A New Take on Legal Pluralism, 13 Social and Legal Studies 57–79 (2004); F. and K. von Benda-Beckmann (2007); to my knowledge, there is not yet written an encompassing historical treatment of the growth and development of the concept of legal pluralism. I am indebted to Urs Cipolat and Barbara Darimont who collected literary sources of legal pluralism.

83 N. Rouland, at 47.

84 John Gilissen, Introduction à l'ètude comparée du pluralisme juridique, in: John Gilissen (ed.), Le pluralisme juridique, Brussels 1971, 7–77; Pierre van den Berghe, Pluralism, in: John Honigmann (ed.), Handbook of Social and Cultural Anthropology, Chicago 1973: Rand McNally, 959–977. Another early source: John W. Berry, Rudolf Kalin & Donald Taylor, Multiculturalism and Ethnic Attitudes in Canada, Ottawa 1977: Minister of Supply and Services.

85 Also of 1971, the year of Gilissen's article. In "Anthropology of Law", Pospíšil uses earlier fieldwork, published in 1958–1961, see references, infra.

86 Pospíšil quotes Barton 1919, 1949; Hogbin 1934; Lips 1947; Radcliffe-Brown 1952; Howell 1954; Spencer 1959; van den Steenhoven 1961.

These researchers and theorists concluded that there was either no law, or that that there was law with as many exceptions as there were multiple legal systems minus one (the most eminent one). Pospíšil lists anthropologists who noticed multiple law but, according to him, failed to explain the underlying idea.[87] He then discusses the works of the theorists who discovered, and elaborated on, the idea of the mutual independence of society and law.[88] Building upon Llewellyn and Hoebel in their "Cheyenne Way", but simplifying their terminology and turning from single or amassed cases to legal principles as substance of the law, Pospíšil sees as law the matter that forms the contents of the systems of authoritative social control of any human group. This implies a leadership of that group. Since a person usually belongs to several groups, she necessarily belongs to several legal orders, and since as a rule these groups are hierachically ordered, the typical multiplicity of legal orders is hierachical and thus insofar deserves the name "legal level". Thus, a person may at the same time belong to the legal systems of her household, lineage, clan, moiety, nation, etc. These legal levels may simultaneously coincide, complement each other, or be in conflict.[89]

Hence, since at least 1971, two strands of theorizing legal pluralism seem to run parallel: The discussion of that kind of legal pluralism which, grown mainly from colonialism and decolonization, subjects persons to a multiplicity of legal orders in a more of less pathological way (unofficial law, "true law", subversive law), and of a legal pluralism which is healthy and necessary, its multiplicity following from the very nature of the law ("living law"). Recent publications on legal pluralism tend to categorize Pospíšil's "legal level" theory as a subspecies of legal pluralism as a whole.[90] This does the "legal level" theory no full justice because of its older history, deeper philosophical grounding and wider scope.

The further development of the discussion of legal pluralism came under the influence of a new view on the "kinds" of legal pluralism which was introduced by John Griffiths.[91] John Griffiths distinguishes two types of legal pluralism. What he calls legal pluralism in the weak sense acknowledges that the state is the final legal authority, and therefore is the only institution able to deterimine what is law. When there are certain groups in that state such as religions, ethnic groups, professional associations (guilds, merchants) which the state thinks should be recognized, the state may integrate in its law normative traditions of such groups, admitting "their law" as state law, and thus decentralize its own legal power into a pluralty of law. Legal pluralism in the strong sense occurs, according to J. Griffiths, when instead of regarding the state as the only source of law it is recognized that a given society encompasses a number of sub-groups, and that every sub-group has its own law so that there is a coexistence of differing legal orders within one socio-political space. For J. Griffiths, only the second type of legal pluralism – legal pluralism in the strong sense – represents an alternative to the stateorientated tradition of conceiving law. He himself favors legal pluralism in the strong sense.

Later authorities have contributed that any type of legal pluralism makes little sense since the power attached to any legal system is too different in strength as to make plural legal sys-

87 M. Mauss 1906; Evans-Pritchard 1940; Malinowski 1959; L. Nader 1963.

88 Otto von Gierke (1868) in his theory of the cooperative (Genossenschaft); Eugen Ehrlich 1913 (living law as against promulgated law); Max Weber 1922 (society versus "socialization of law"; Llewellyn and Hoebel 1941 (with difficult terminology). Pospíšil is not of this opinion so that for him multiplicity of culture also means multiplicity of societies; this is overlooked by John Griffiths (see note 96, at 15).

89 p. 146ff. (in the German edition); see also *Vorwort zur deutschen Ausgabe* p. 15.

90 E.g., Anne Griffiths, Legal Pluralism, in: Reza Banakar and Max Travers, An Introduction to Law and Social Theory, Oxford & Portland Oregon 2002, 289–310.

91 John Griffiths, What is Legal Pluralism?, 24 Journal of Legal Pluralism and Unofficial Law 1–55 (1986).

tems comparable;[92] that the effective presence of state law as a social fact should not be overlooked by the followers of legal pluralism in the strong sense;[93] that the "two perspectives range along a continuum" and thus do not represent a strict dichotomy but rather contrast abstract legal theory (weak) and ethnographic search for reality (strong legal pluralism);[94] that in times of globalization a disengagement of law and state along the lines of what is called here strong legal pluralism cannot be denied;[95] that state-independent creation of law may be rooted in corporate identity;[96] that systems theory is able to redefine legal pluralism;[97] that territory is not the only category providing for plurality, and law not the only category of what may be plural;[98] that legal pluralism is of central importance for understanding the anthropology of law;[99] etc.

In 1973, Sally Falk Moore introduced the term "semi-autonomous social field" for describing the social unit in which there is self-generated and self-maintained law. This term has found wide acclaim.[100] Without taking sides in the debate, Moore reconfirmed the position of legal pluralism in the strong sense. However, as will be seen (under 3.), "field" is too nar-

92 J. F. Collier and J. Starr (eds.), History and Power in the Study of Law: New Directions in Legal Anthropology, Ithaca & London 1989.

93 G. Woodman, Ideological Combat and Social Observations: Recent Debate About Legal Pluralism, 42 Journal of Legal Pluralism and Unofficial Law 21–59 (1998).

94 Anne Griffiths, see note 76, supra, at 289.

95 W. Twining, Globalization and Legal Theory, London etc. 2000, 52; Kottak, 76 f.; Bohannan, 293 ff.; B. de Sousa Santos, Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition, London 1995. On the parallel disengagement of state and economy: S. Sassen, De-nationalization: Some Conceptula and Empirical Elements, 22(2) PoLAR 1–16 (1999).

96 Munroe G. Smith, Some Development in the Analytic Framework of Legal Pluralism, in: L. Kuper and M. G. Smith (eds.), Pluralism in Africa, Berkeley 1969; idem, Corporations and Society, London 1974.

97 Gunther Teubner, The Two Faces of Janus: Rethinking Legal Pluralism, 13 Cardozo Law Review 1443–1462 (1992); idem, Die zwei Gesichter des Janus: Rechtspluralismus in der Spätmoderne, In: Liber Amicorum Josef Esser, Tübingen 1995: Mohr Siebeck, 191–214; idem, 'Global Bukowina': Legal Pluralism in the World Society, In: G. Teubner (ed.), Global Law Without a State, Dartmouth 1997: Dartmouth Publ., 3–28.

98 C. Greenhouse, Legal Pluralism and Cultural Difference: What is the Difference? A Response to Professor Woodman, 42 Journal of Legal Pluralism and Unofficial Law, 61–71 (1998).

99 Norbert Rouland, op. cit. The so-called cultural defense, primarily in criminal law cases, is a less conspicuous but nevertheless highly important variation of legal pluralism. The number of cases is increasing in which the defendant alleges to belang to another culture in which the act for which he is indicted is legal, permitted, even required. Blood feud, vendetta, honor killings, rapes or mutilations (cf., Mukhta Mai 2006), extortions, non-treatment of wounds or diseases, etc. are said to be justified because this "is the law at home". The defendant claims to confronted with two contradicting cultures. For these cases, and proposals to solve them, see Alison Dundes Renteln, The Cultural Defense, Oxford 2004: Oxford Univ. Press; idem, In Defense of Culture in the Courtroom, in: Rick Shweder, Martha Minow & Hazel Rose Markus (eds,), Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies, New York 2002: Russel Sage, 194–215; idem, The Use and Abuse of the Cultural Defense, 20(1) Canadian J. of Law and Society 47–67 (2005).

100 S. F. Moore, Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study, 7 Law and Society Review 719–746 (1973), also in idem (ed.), Law as Process: An Anthropological Approach, London 1978: Routledge & Kegan Paul, 54–81; consenting, e. g., Franz & Keebet von Benda-Beckmann (2007), at 121; however, it is not clear what is meant by "semi-"; is not autonomous enough? Already Pospíšil uses in the same sense – more cautiously – the terminology "semi-autonomous and autonomous groups" when he describes, in Anthropology of Law (1971), the multiplicity of legal orders in the same state or society. The discovery of plural or multiple legal systems in a given culture is Pospíšil's, idem, Multiplicity of Legal Systems in Primitive Societies, 12 Bulletin of the Philadelphia Anthropological Society, No. 3, 1–4 (1959); idem, Legal Levels and Multiplicity of Legal Systems in Human Societies, 2 The Journal of Conflict Resolution, No. 1, 2–26 (1967). For details of the history of the related concepts (multiplicity, semi-autonomous field, legal levels, and pluralism, etc.) see the discussion of legal pluralism in Chapter 1 above, and L. Pospíšil, Corrections of a Reappraisal of Leopold Pospíšil, 46 Journal of Legal Pluralism and Unofficial Law, 115–120 (2001).

row a metaphor. It refers to territory, and thus does not cover multiplicity of laws in terms of belief systems, constitutional ranking, or time. Generally, from a lawyer's point of view it may be said that "weak" legal pluralism is debated when the approach to legal pluralism is made from international private law (broader: from collision law); the "strong" sense is being addressed when, in Pospisil's sense, legal pluralism (or multiplicity) is viewed as an issue of source of law. Moreover, being an issue of the theory of the sources of law, legal pluralism is connected with the definition of law itself.[101] Legal pluralism appears to have a close connection to the anthropological definition of law as a product of authority and sanction, as "authorized sanction". This close connection between legal pluralism and anthropological definition of law throws new light on legal pluralism itself. In short, legal pluralism touches upon two different areas of law, collision law, and the sources of law that help to define law. These two traditional areas of legal science have little in common.

3. Legal pluralism as a consequence of the conflict of laws

The best known sub-field of all possible collisions of law (geographic, temporal, constitutional ranking, religious, etc.) is the *geographic* conflict of *private* laws *(droit international privé)*. To illustrate, when a citizen of Ohio residing in Brazil owns real estate in France, and her children are nationalized Germans and Italians living in Switzerland, the probate officer wants to know whether Ohio, Brazilian, French, German, Italian or Swiss law (which all differ as to the inheritance in real estate) is called to decide who is the heir. To solve this kind of issues, conflicts-of-law rules of every legal system (which again all differ from country to country) assign a transborder case that arises in its jurisdiction to a certain national applicable law by what is called "nexuses". A nexus may be nationality, domicile, residence, place of the wrong, language of the contract, intent of the parties, place of the court where the case might be pending (lex fori), public interest, prevailing interests of the parties, etc. The conflict may not only arise between possibly applicable laws of nations states. There is also interlocal, interzonal, intertribal and other regional conflict of law possible (and frequent). In the medieval Frankish empire the general conflicts rule was: *Quislibet vivit sua lege* (everybody lives under his own law): the Franks under Frankish, the Gauls under Gallic, the Bungundians under Bungundian, the Visigoths under Visigoth, and the church under church law, etc. The nexus was "tribal" membership or belonging.

A lesser prominent, but in some areas of the world no less important sub-field of conflict-of-laws refers to religious diversity. When a Muslim and a Christian marry, each confessional organization applies the own conflicts rules concerning validity, effects and termination of that marriage (which may lead to different results). Nexus may be membership, descent, personal option, etc.

Another sub-field of conflicts-of-law refers not to place or personal attributes, but to time. Almost every parliamentary act will indicate on which day it will enter into force, and how cases that have arisen before that date should be handled. "Grandfather clauses" belong to this category. The usual nexus is priority.

Conflicts of law may also arise with reference to the rank of validity of a legal norm ("collisions of rank"). In the old German Empire the general rule was: Professional laws (such as a guild's statutes) overrule town laws, town laws supersede regional laws, and regional laws set aside the empire's laws. Since 1871, the German rule has been the exact opposite: imperial law supersedes state law, and state law local law. Today, Art. 31 of the Constitution lets federal law prevail over state law. Art. 31 thus is a conflicts-of-law rule concerning the rank of valid-

101 See notes 50, above.

ity of a legal norm. The same holds true for Art. 249 EC-Treaty that provides for the general superiority of EC law in relation to the law of the member states.[102] The nexus of such conflicts-of-laws rules concerning ranking may refer to concepts of federalism, size of territory, territorial subdivisions, personal attributes such as ethnic membership, qualification of norms as secular or religious, etc.

In order to find the applicable law in a case that touches upon more than onr legal order, all conflicts-of-law rules have to be examined. If territorial conflicts-of-laws rules coincide with other conflict-of-laws rules such as religious, time-related, or rank-related, it is to be determined which set of conflicts rules overrule the others. Since all legal systems own their conflicts rules – even where such a rule has still to be discovered or deduced from history, tradition, legal comparison, etc., because the case is new – there is in theory a sure way to find the applicable law and then decide the case accordingly. The "semi-autonomous" social field is always a fully autonomous field as far as the field goes, and what that field looks like is determined by the applicable norm of conflicts-of-law. This norm may be hard to detect, but it is there. It may be still in force, or having become obsolete, for example abrogated by customary law under the rules that in that place govern the coming into force of customary law.

Not many lawyers are experts of conflict-of-laws, or collision law. As a result, there may be the impression that a certain situation is to be judged by a multiplicity of applicable laws. But this may rather be the result of inexperience or inactivity, than the occurrence of a legally unavoidable deadlock. Another apparently frequent reason for a seemingly inescapable multiplicity of applicable – and as the matter stands conflicting – laws is intentional disrespect of available conflicts rules. This disrespect may in turn be provoked by a sense of justice that deems the available conflicts rule as leading to unjust results by imposed "foreign" law.

In sum, situations of legal pluralism in the conflict-of-laws sense often occur for lack of knowing – or the fact of disregarding – the competent conflicts rule. Thus, in the typical case of an African decolonized country, a case may at first glance fall under the scope of local secular, religious, and promulgated parliamentary law that has been decreed "European style" "colonialism-minded" in the capital far away. There may be also a constitutional or legal provision that in such cases the promulgated law will prevail. The parties and the local court know it all, but disregard the centralized law, both materially and conflicts-of-law-wise. Then the local court will have to decide between the local secular and the religious norm. If both parties belong to the same religion, it may sensibly resort to religious law. If there is a religious diversity, particularly between the parties themselves, a wise judge will resort to the secular provision and base his or her judgment on this.[103]

4. Legal pluralism as an issue of source and definition of law, and of cultural identity

A different world opens when the discussion turns from the daily mundane perplexities of conflict-of-laws to the lofty heights of legal philosophy, by asking the questions how law comes into existence and what kind of norm law is. Legal pluralism asks these two questions. However, not the full breadth of legal philosophy need be taken into consideration. Again, more with practice in mind than theory, the starting point is the anthropological question: What is – for theoretical and applied anthropology – the *law?* The answer given is: authorized sanctioned human behavior.[104] The element of sanction is not difficult to define. However, what "authorizing" means, is hard to determine. To illustrate: Five friends, stamp collectors,

102 Subject to certain exceptions, especially in the civil rights sector.

103 Additional difficulties may arise by the possibilities of an appeal. See Laura Nader (1991).

104 See subchapter III, supra.

meet every Friday to swap stamps. Asked whether they have a chairman, they answer: "We all are "the chairman", we have no binding rules, and we could change from Friday to another day of the week any time". Among them, there may be sanctions, for example exclusion for cheating, but nobody authorizes anybody. Compare the stamp collectors to Knud Rasmussen's reports from Inuit land. Five Inuit live with their families in a desolate polar area. One commits rape and openly threatens to go on, and as a seal hunter he violates accepted rules of good behavior. Four of them secretly agree to kill the perpetrator, and one of them assumes the role of the executor. He kills the wrongdoer in the manner customary in such a case: Shooting from behind, to take the victim by surprise. The five (!) Inuit had authorized themselves to have a rule, because the criminal knew what he was risking. The five Inuits are at the same time the law-subjected citizens, and the "chairmen", that is, authority. The stamp collectors could agree on a by-law: Whoever fails to present at least ten stamps on Friday, should quit the club. If this should happen and the other four ask the rule breaker to leave, they apply their by-law, and it makes no difference whether all four demand this, or one of them as their "speaker". In these examples, the Inuit have law. The stamp collectors own law only if they split themselves into each having two roles: law subjects and authority.

Where there is law, by authorizing sanctions, there is also law in the sense of the plurality of laws. For the doctrines of legal pluralism, law does not change its character. The stamp collectors are not only exposed to what they authorized to be their Friday by-law, but also to their private law rules about associations, state and federal, supranational, etc. The Inuit are subjects of Greenland law, formerly, in Rasmussen's time, of Danish law, etc. Thus, legal pluralism is part of both examples. Seen in the source-of-law way, legal pluralism is a confirmation of the earlier developed theory of law in anthropology. It is a matter of proof whether in a given case authority has been granted, and the second stamp collector example is to show that (at least in these small-scale cases) the authority may even be granted to all the grantors. In the majority of cases, the number of those who authorize a rule to be law, or join such authorization, will be much greater. But it need not be large for the idea of the law. It follows, that authorization, or joining authorization of others, determines who is a subject of a law. Law can grow from holding a rule to be law.[105] Being a subject, constitutes identy. Therefore, legal pluralism in its source-of-law meaning, is a contribution to cultural identity research. People who construe their own cultural identity have their own law. Inversely, their law reinforces their identity (see note 55, above, on the Demaratos topos). Whenever another law exists in the territory where these people live, they may easily be exposed to legal pluralism (in the "strong sense", as John Griffiths would probably say).

This explanation has much in common with the traditional theory of customary law.[106] To become customary law, a rule has to be obeyed for a longer period of time *(usus longaevus)* and in addition it must be carried by the general belief that it should be the law *(opinio necessitatis, opinio iuris)*. The general belief can also be expressed a "internalization" (see Chapter 5 VII., below, and Pospíšil (1986, 60; 1982, 248ff.). The second requirement is what is meant here by authorization: to be held as the rule that of necesity is to govern a case. This very requirement contributes to define what law is and at the same time establishes law in the ("strong") sense of pluralism. The "general belief" or "internalization" delineates the group of believers and in this way the number of perinent legal subjects. To delineate in this sense

105 At the bottom of this question who may be the subject of possessing a rule for law lies the anthropological issue of identity: Who is somebody? For this, see Chapter 5 IV. 2; W. Fikentscher (1995/2004) 244 (Native American identity).

106 See R.D. Cooter & W. Fikentscher (1998); W. Fikentscher (1976), 691–701.

means to give cultural identity to that group (see Chapter V III). The opinio *necessitatis vel iuris,* the internalization, and the confirmation of cultural identity coincide and are three aspects of the same phenomenon. Therefore, legal pluralism in that second meaning is a central topic of cultural anthropology.

Thus, in sum and in brief, it may be said that legal pluralism is a term that covers two different things: conflict of laws, and the context of identity, sources of social norms, and internalization.

It follows as a matter of course that the definition of law in anthropology disproves the assumption that all law has to emanate from the state. In other words, the followers of "weak" legal pluralism are forced to draft a theory of law, for anthropological ends, different from the position taken in this book. It would have to propose the idea of a law "from above", instead of the idea of the law "bottom up". Plausibly, for anthropological, in particular ethnographic, reasoning, the latter is the only usable.

VI. The structure of anthropology: branches, fields, and subfields

Nearly all writers of anthropological texts use different systems of anthropological subdivisions. This is understandable because every text follows its own purpose, and the purpose suggests the outline. For the writer, this permits to draft an outline and inner structure of anthropology every time a text is envisaged. Below are the commonly used outlines of anthropology, and the places allocated to law in each:

1. A division for international usage

Anthropological libraries, journals, and some text books tend to use a five-fold subdivision: Archeological, sociocultural, linguistic, biological (or physical), and applied anthropology.

For a general survey, this appears sufficient. The word combination "sociocultural" in this context is to indicate the so-called "British-American compromise" that was entered into after World War II when the British tradition of functional, so-called "social", anthropology, with its slowly evaporating flavor of administering a colonial empire, and the US-American ("Boasian") tradition of anti-colonial, comparative, "cultural" anthropoloy began to merge for want of any meaningful future distinction.

2. The German tradition

Older German handbooks and surveys sometimes use the following divisions:

(1) Biological (= medicinical, physical) anthropology, subdivided in
  (a) heredity and genetics,
  (b) human physique,
  (c) evolution, and
  (d) races
(2) philosophical anthropology (there is no generally recognized interior subdivision; the general subject is human self-understanding from different philosophical points of view)
(3) pedagogical anthropology
(4) psychological anthropology, and
(5) theological anthropology (structured similarly to philosophical anthropology).

With the exception of biological anthropology, the other branches traditionally do not insist on empiry, but proceed in a manner that in a broad sense could also be called "philosophical". The disadvantages of non-empiry in the metaphysical area (to use this old counterconcept to "physical") was felt increasingly. Maybe in order to mend this defect, "historical

anthropology" branched off philosophical anthropology because the science of history cannot work but with empirically investigable data. In part, one might call this approach empiry in historical disguise. Thus, pursuing "historically" researched philosophical interpretations of human issues became an important field of anthropology in the German language. A survey is provided by Julika Funk, in her article on anthropology and historical social research (25 Historische Sozialforschung, No. 54–138 (2002).

The following three ways of subdividing anthropology concern the (3.) segments used in the social science of anthropology, (4.) in the teaching at US departments of anthropology, and (5.) how this book attempts to proceed. Of course, all three approaches can only render an approximative average to the many outlines currently in use, each for good and often very different reasons.

3. A qualitative division for scientific purposes

a. *anthropology.* A basic distinction is between the branches of non-empirical and empirical anthropology. Non empirical anthropology covers the history of anthropology, philosophical anthropology, and interdisciplinary links of anthropology, for example to sociology, or political science. Empirical anthropology comprises cultural and biological (= physical) anthropology. Cultural anthropology comprises four fields (Kottak: subdisciplines): anthropological archeology, sociocultural anthropology ("the British-American comprimise"), linguistic anthropology, and culture personality; two important fields of biological anthropology among others are human ethology, and cognitive anthropology.

The broad field of sociocultural anthropology can be subdivided into the following subfields:

(1) kinship, descent, alliances;
(2) economic and ecological anthropology;
(3) anthropology of law;
(4) political anthropology and ideology research;
(5) anthropology of religions and cults;
(6) folklore;
(7) anthropology of genders;
(8) symbols and masks (note the link to linguistic anthropology);
(9) modes of thought (note the link to cognitive anthropology);
(10) methods of sociocultural anthropological research, including vitae research (= study of the life of individuals).

b. *ethnology (Völkerkunde).* Frequently, the question is asked how anthropology, ethnology, and ethnography relate. The ethnographer gathers the data of a tribe, people, nation, or cultural institution or field such as a suburb (e.g., favela), hospitals, or apologies in international politics. The ethnologist focuses on a certain tribe, people, nation, of cultural institution; thus, she or he works with that culture, frequently in more than one aspect, for example in that tribe's etc. law, economy, ceremonies, and traditional stories. It is expected of an ethnologist to become an expert on at least one, sometimes of more than one whole tribe, people, nation, or institution. The anthropologist uses the ethnographer's and ethnologist's findings in order to compare them with the objective of stating human universals and specifics as subject matters. For this, she or he often does not have to pay attention to the plural cultural aspects of the whole tribes etc. to be compared (unlike the ethnologist). An anthropologist may write an article or a book on role of the maternal uncle in Southwestern Native American tribes, the concept and importance of gift-giving among Philippine tribes people, secret societes in West Africa, or economics of the commons among Mongolian herders. Thus, ethnographer

and ethnologist concentrate their research interests on a given group or groups of people, whereas the anthropologist studies cultural or biological universal or specific traits (resp. other contents of culture).

Due to the influence of linguistics (Wilhelm von Humboldt, his work of the Kawi language), German *Völkerkunde* was for some time restricted to non-literate peoples. Literate peoples were a subject of linguistic studies. This contributed to the dearth of empirical interest in literate peoples, and the strength of philosophical anthropology and of folklore (see below). That restriction, however, diminished in the middle of the 20th century.[107]

Needless to say the work of ethnographers, ethnologists, and anthropologists might interlink. An anthropologist should always be a good ethnographic fieldworker. Otherwise she or he will be called an "arm chair anthropologist". An ethnologist needs ethnography like a carpinter wood and tools. Some ethnologists refuse to be called anthropologists because they dislike "constructed" comparisons and generalizations. This often is a sincere and worthy self-limitation. An anthropologist should at least know and understand the methods and working manners of an ethnologist if that anthropologist does not have the time or patience to delve into an entire culture including its process through history. Ideally, an anthropologist should be an experienced ethnologist in at least one of the tribes, peoples, nations, etc. the materials from whom she or he is using for a subject matter related study.

In most countries, folklore *(Volkskunde)* is treated as a sub-field of sociocultural anthropology. However, in Europe it developed rather independently from anthropology and ethnology *(Völkerkunde)*.[108] Folklore is the study of cultural characteristics of one certain people, such as traditional music, dialects, forms of settlement and agriculture, styles of houses, fairy tales, marriage customs, etc.[109] Since some time, European folklorists began to compare peoples. Hereby, they move into the direction of general anthropological work so that today that independence is waning. Thus, also in Europe, folklore is gradually becoming a sub-field of anthropology. Much of this new comparative work today is called "European ethnology".

Noticeable is also a turn of sociology to comparative work, similar to that of folklore. Emile Durkheim and Max Weber still researched non-European cultures in a comparative way. After Weber's death in 1920, sociology "turned from people to society, and from society to system" (Helmuth Schelsky), and thus focused on ethnocentric Western abstractions.[110] Challenged by the European unification and interest in developing and transient countries, also sociologists took up comparative studies in foreign societies (often without paying due attention to available anthropological and ethnological material.[111]

The whole systematic outline developed above under (a) for anthropology can be used for ethnology as well. Thus, there is cultural and biological ethnology (examples for the latter: herbal medicines of a Papua New Guinea tribe; the fore disease as an alleged connection between a tribe's health and its ceremonial cannibalism); ethnological archeology, sociocultural ethnology, etc.

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107 See, e. g., Wilhelm E. Mühlmann, Geschichte der Anthropologie, Frankfurt/M. 1968: Athenäum; Marschall (1990); Kohl (2001); Feest & Kohl (2001); J. Funk (2002).

108 See the remark on W. v. Humboldt's influence, above; cf., Rolf W. Brednich (ed.), Grundriss der Volkskunde: Einführung in die Forschungsfelder der europäischen Ethnologie, 3rd ed. Berlin 2001: Reimer.

109 See, e. g., Alan Dundes, The American Concept of Folklore, 3 Journal of the Folklore Institute 226–249 (1968).

110 A survey on this development: Helmut Schelsky, Systemfunktionaler, anthropologischer und personfunktionaler Ansatz der Rechtssoziologie, in: R. Lautmann, W. Maihofer & H. Schelsky (eds.), Die Funktion des Rechts in der modernen Gesellschaft, 1 Jahrbuch für Rechtssoziolgie und Rechtstheorie 37–89 (1970).

111 The problem for these writers is to bridge the gap between Max Weber's death and the end of the 20th century.

c. *Ethnography*. It deals with the details of a cultural trait or complex and is aided by on-the-spot research (for examples interviews, or excavations). It is detail-oriented and leaes generalizations to ethnologists and anthropologists. As a method, ethnography has to be disguished from survey research.[112] Survey research works with samples, cohorts, exemplary results, average calculations, stochastic methods and other *pars pro toto* methods. It need not be less reliable, but it must work with estimations to a much higher degree than ethnography. In anthropology, survey research is infrequently applied, whereas ethnography is much preferred. Sociologists and political scientists have to work with broader generalizations and therefore prefer survey research.[113] What has been said of ethnology applies to ethnography: The entire systematic outline developed under a. for anthropology can be used for ethnography. Thus, there is cultural and biological ethnography; archeological ethnography, sociocultural ethnography with all the sub-fields.[114]

d. *Dressed in definitions:* Anthropology studies cultural and biological human characteristics, universal and specific, and of human groups in descriptive, evaluative, comparative, and applicative manner. Ethnology focuses on the knowledge of cultural and biological characteristics of a tribe, people, nation or a comparable human group. Ethnography centers on cultural and biological single data needed for anthropological or ethnographic work.

4. Segments for teaching anthropology (curricular programs)

Much of what is taught of anthropology in a university setting depends on the size of the institution(of anthropology, ethnology, etc.), and also on its tradition and general intentions. Moreover, the curricula on the undergraduate and graduate levels tend to differ. For example, the Anthropology Department of Yale University, New Haven CT, USA, offered the following courses (undergraduate = u), grouped together in the indicated way (includes two double mentions):

a. Anthropological archeology and prehistory: Field techniques; historical archeology; method and theory; prehistory, protohistory and ancient civilizations; analyses (faunal, lithnic techniques, etc.).

b. Physical anthropology: Introduction to physical anthropology (u); genetics and evolutionary theory (paleoanthropology) covering five courses on primate evolution, hominid evolution, primate functional anatomy incl. human, human evolution, and human skeleton analysis; primate ecology and social behavior covering three courses on primate ecology, primate social behavior, and cultural ecology; demography (= human variation and populations genetics) covered in two courses on anthropological demography, and anthropological genetics.

c. Sociocultural anthropology: Introduction to cultural anthropology (u); field methods; history of ethnological theory; kinship, descent, alliances; anthropology of genders (u); anthropology of religions and cults; modes of thought; cultural ecology; musical ethnology and folklore; anthropology of law; political anthropology and ideologies; economic anthropology; linguistics and sociocultural anthropology.

d. Linguistic anthropology: language and ethnography; (survey on) linguistic anthropology; structuralism in linguistics and anthropology; field methods in anthropological linguistics; linguistics and sociocultural anthropology; speech and social interaction; language and thought; sociolinguistics; ethnographic semantics; linguistics and writing systems.

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112 See, e.g., Kottak 32, 49–55.

113 See Chapter 16, below, on a desirable *rapprochement*.

114 Laura Nader (2002).

The printed curricula indicate that the following prerequisites have to be met before the study of anthropology may be taken up: languages of the scholarly field, and for the intended field work; mathematics and statistical methods; drafting and working with quantitative models.

5. The outline used in this book

The division of anthropology used in this book is primarily directed by the different treatment biological (= physical) anthropology will receive in the following text. Biological anthropology is not regarded merely as a field on the same systematic level as archaeological, sociocultural and linguistic anthropology. Instead, biological anthropology finds itself placed side by side to cultural anthropology so that every sub-field of cultural anthropology is mirrored by a corresponding sub-field of biological anthropology, and vice versa. This generally comes closer to reality and reminds the student of the fact that every subcategory of cultural anthropology has its counter-piece in biological anthropology, and that the opposite is also true. This should be understood as a recommendation: always tackle an anthropological problem from the two sides, cultural and biological (including behavioral). A survey is shown in the following chart:

Anthropology, an integrated system
Anthropology (empirical)

cultural anthropology	biological (= physical, = physiological anthropology
I. A. *archeological anthropology*	I. B. *evolutionary anthropology* (incl. general and primate ethology)
II. A. *sociocultural anthropology*	II. B. *human ethology*
1) culture (concepts of culture, acculturation, culture change, etc.); annex: field methods	1) human ethology of universals (e. g. attack and defense gestures)
2) cultures	2) human ethology of cultures (e. g. proxemics, yes – and – no expressions, behavioral stereotypes)
a) ancient Egypt	
b) tribal cultures	
aa) North and South America	
bb) Africa	
cc) Austronesia	
c) East and South Asia, exp. Hinduism, Buddhism, Confucianism	
d) Greece/Judaism/Christianity	
e) Islam	
f) secular totalitarians, esp. Marxism, Nazism	
3) culture personality	3) psychological antropology culture-personality relatec behavoir
III. A. *linguistic anthropology*	III. B. *cognitive anthropology of language*
IV. A. *modes of thought*	IV. B. *modes of behavior* (e. g. modes of cognition, ascetism, dialogue behavior)
V. A. *applied* anthropology	V. B. *ethological* (esp. environmental) *aspects of applied anthropology*
Anthropological Philosophy	
anthropological philosophy in general (non empirical)	*anthropological aspects of philosophy of nature* (non empirical)

VII. Anthropological systems theory

Systems theory concerns the use and meaning of systems in the sciences and humanities. A salient subject of systems theory deals with Complex Adaptive Systems (CAS). CAS theory examines, among other aspects, the change of systems over time and thus the use of systems for observing evolutions. Culture as a holistic concept ("culture as such", culture in the singular) is a CAS, as are the different cultures that can be found in history and today in this world.[115] Hence, anthropological systems theory investigates conditions and developments of order and disorder of cultures.

Anthropological systems theory opens the way to study culture and cultures with the tools of systems research. One practical result is the discovery of criteria for the right to be recognized as a cultural minority. From this derive the status of a recognized minority within the UN and the solution to other problems (details in Chapter 15). One issue of special importance for the anthropology of law is an answer to the question what defines a community which is able to have law in the sense of the doctrine of legal pluralism, as far as the sources of law are concerned (see supra, IV), in other words: From which point of coherence can a group of people claim to be a band, tribe, nation or other entity having its own law? Systems theory offers reasons to decide this issue one way or the other. It is a new field of theoretical anthropology worthy of attention.[116]

A general view in systems theory is that everything was less complex earlier, and is becoming more complex across time. Empirical anthropological observation shows that this assumption is misleading. The animist mind demonstrates considerably more complexity than the modern Western mind, not only in relation to other-worldly conceptions and envisioned entities, but also in matters of family and general livelihood. Mary Douglas' book on "Purity and Danger" (1970) uses many examples implicitly showing a higher complexity of life in early societies compared with more "modern" ones. Collectivism operates on a more complex level than individualism because the person has to be mindfuk of more interpersonal relationships. In law, over time many regulations become indeed more complex and need more words to get expressed. But also the opposite tendency can be observed: In Germany, during the 19th century the customary law of Roman tradition had, in several fields of the law, a much higher degree of complexity than the codification in the German Civil Code of 1900, one of the legal policies of which was to overcome "unnecessary" doctrinal disputes. Thus, anthropology seems to indicate that in history simplicity and complexity in legal and societal systems can alternate.

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115 W. Fikentscher, Santa Fe Working Paper 98–10–087, Santa Fe Institute, Santa Fe, New Mexico 1998.

116 Cf., W. Fikentscher, Cultural Complexity: Legal Ethnographical Observations, Festschrift Bernhard Grossfeld Heidelberg 1999: Verlag Recht und Wirtschaft, 197–225; idem, Wirtschaftliche Gerechtigkeit und kulturelle Gerechtigkeit, Heidelberg 1997: C.F. Müller, 43–45.

Chapter 2: History, schools, and names of anthropology of law

The materials for this Chapter are mainly taken from Marschall (1991), Kohl (2001), Feest & Kohl (2001), Ortner (1984), Gottowik (1997), from my class readers (see Preface, above) and W. Fikentscher (1995/2004), 77–92. Apart from interest in, and observation of, current events in the anthropology of law, there was no additional research of my own.[117] References may be found in Chapter 1 II or in the bibliographical subchapter III. below. In Chapter 2, the presentation of schools, directions, and names in cultural anthropology as well as a report on the crisis of ethnographic representation in the 70ies and 80ies try to follow new paths.

I. The history of anthropology in general, and of the anthropology of law in particular

1. Precursors

The expression "anthropology" for the scientific study of the human cultural and biological condition was first used, as far as we know, in the late 16th century by systematizers and curriculum planners at Continental European universities and other educational institutions. The Age of Discoveries gave rise to the question whether "savages" were human beings, what distinguished them from the European discoverers and conquerors, why they looked and behaved differently, etc.[118] After Christianity had spread across most of Europe and started to influence the New World, writers tried to comparatively relate the human condition to its natural and cultural surroundings, mostly from a religious, or religion-critical, point of view.[119] Late Spanish scholasticism debated whether Indians – the Indios of the newly discovered Americas – were beings with human qualities, and therefore had rights and duties: Fernandez de Oviedo (1478–1557); Bartolomé de las Casas (1475–1566); Bernardino de Sahagún (1499–1540);[120] Michel de Montaigne (1533–1592). Against universalist and categorical tendencies of the baroque philosophers, Johann Gottfried Herder (1744–1803) developed his encompassing life work on the history of human culture. He attempted to research the human soul in history and peoples.[121] Georg Forster (1754–1794) was one of the first who identified as a problem the contrast between ethnographic observation and participation in local cultures on the one hand and scientific building of knowledge about them on the other, preempting Malinowski's "participant observer" by more than hundred years. His critique of both the compilation of unrelated facts and unproved speculations is an early version of Clifford Geertz' reasoning of "interpretationism". Forster also muses about Europe's singular position in world history. His works were of immediate influence on Alexander von Humboldt (on him see 6., below).[122]

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117 All sources cited before are listed in Chapter 1II 2.

118 Pa. M./Ed., Anthropology, in Encyclopaedia Britannica, 15th ed. Chicago etc. 1974, vol. 1, p. 986.

119 Erdheim, in Marschall (1990), 19.

120 On Sahagún see, e. g., Kohl (2001), 103.

121 On Herder and his *Ideen zur Philosophie der Geschichte der Menschheit 1784–1791* (Ideas on the Philosophy of History of Mankind) Eberhard Berg, in W. Marshall (1991), 51 ff.

122 Dieter Heintze in Marshall (1991), 86.

2. Missionaries

An up to now often untapped source of early anthropology are the reports of Christian missionaries of their contacts with "heathens". Of course, these reports are written from the vantage point of missionary mandate and zeal, and are tinted by success or failure in that regard. But they may be a valuable contribution to the knowledge of the conditions of indigenous life at the time of first contact with Europeans.[123] Sometimes these missionaries abandoned their task for which they had been sent out, or added personal ethnological engagement to their mandate, and familiarized themselves with indigenous languages, habits, and modes of thought. While these early ethnologists risked to becoming disciplined by their clerical superiors, their reports and judgments are of special weight today.[124]

3. Adventurers

Another value arises from reports consisting of notes and collections of early adventurers who traveled to distant parts of the world for curiosity's sake, sometimes as (or under the disguise of) traders or cartographers, sometimes in combination with scientific interests, and sometimes, as in the case of some missionaries, commissioned by political authorities. Marco Polo's (1254–1324) travel from Venice "to China" (whatever may have been the final point of his journey), Christopher Columbus' crossing of the Atlantic, and Lewis' and Clark's expedition to the Pacific coast are well-known examples. In 1788, the Association for Promoting the Discovery of the Interior Parts of Africa was established in London. Some of the early adventurers did not survive their dangerous travels, such as Eduard Vogel (1829–1856) and Moritz von Beurmann (1835–1863). Others became famous by their meticulous reports of hitherto unseen lands and peoples, for example Carsten Niebuhr (1733–1815) who travelled Arabia and surrounding lands and was financed by the Danish Crown. Gustav Nachtigal (1834–1885), commissioned by King Wilhelm I. of Prussia, visited African kings in the Sahara and then turned East to reach the Nile.[125]

4. Herder and Klemm

To understand the slow rise of anthropology and ethnology as scientific endeavors, it is convenient to observe the circles of unrest and pacification in post-Reformation Europe since the middle of the 16th century. The 16th century – the "long" one – had been replete with religious, political, and scientific upheavals and revolutions. The 17th century became a time of baroque order, discipline, and scientific categorization. In philosophy, Gottfried Wilhelm Leibniz' (1646–1716) conceptualities and monade theory served as models for educated categorical thinking. In France, the encyclopedists, and in Great Britain, the thinkers of human individuality and society (Richard Hooker, John Locke, David Hume) engaged in what has become known as "the age of enlightenment", a movement that found its center in the standing of the individual in a well-ordered, freely accessible world.

But then *Sturm und Drang* (Storm and Stress) resumed. Johann Gottfried Herder (1744–1803) generated intellectual unrest directed against baroque orderliness. Herder, in a reaction to fashionable dry reductionism, discovered culture, culture as a human being's place in his-

123 Erdheim, in Marschall (1990), 35 ff.

124 An example: the Franciscan friar Bernardino de Sahagún (1499–1540) who learned the native Nahuatl, tried to let the Indios describe their world view in their own anguage and terms, and wrote, from the material he gathered, about the destroyed Aztec culture; Mario Erdheim in Marshall, 33–40; Kohl 102 ff.

125 On Niebuhr: Ulrike Stohrer, in Feest & Kohl, 341–346; on Nachtigal: Ulrich Braukämper, in Feest & Kohl, 332–336.

tory, geography, and language, in all their variations. Culture became a synonym to an individual's physical and mental homestead. Herder's influence on his contemporaries was so strong that to them Leibniz' concepts seemed to lack perception *(Anschauung)* and experience *(Erfahrung).* Increasingly, the baroque state in its uniformity was sensed as a mistaken answer to thr demands of human cultures. The upcoming age of romanticism, poetic *Sturm und Drang,* and the information piling up since the age of discovery, contributed to the spread of the concept of culture in Europe. In 1868, the first French ethnological society was established in Paris, in a late answer to a program drafted by the Société des Observateurs de l'Homme (founded in Paris 1799).[126] Under Herder's influence, Gustav F. Klemm (1802–1867) wrote a ten-volume treatise "Allgemeine Cultur-Geschichte der Menschheit" *(General history of culture of humankind),* Leipzig 1843–1852. E.B. Tylor (on him II. 1. d., below) used Klemm's and thus Herder's concept of culture.

5. German idealism: Kant and Hegel

Immanuel Kant (1724–1804) wrote an influential critique to Herders cultural theory. From a contemporary vantage point, this methodological dispute concerned, for the first time and in full awareness, the never ending contrast, in cultural anthropology, between the search for inherent, philosophically definable rules from which to draw detailed conclusions (Kant's view), and empirical research for singular and detailed data, as starting points for a scientific treatment by way of generalizations and specifications.[127]

G.F.W. Hegel (1770–1831) found only words of despise for peoples of African cultures.[128] To him, Africa is the "land of children, which on the other side of the day of self-conscious history is veiled into the black color of night".[129] Obviously, Africans did not fit into his gnostic-evolutionary philosophical program to combine history and systematic thought, and the "children" were too far, in mind and matter, from his idealization of the Prussian state.

6. A. and W. von Humboldt

Alexander von Humboldt (1769–1859) was one of the most successful and renowned travellers and discoverers of his time. The Humboldt Basin in the North American Rocky Mountains and the cold Humboldt Current off the South American Pacific coast are two of his discoveries. He spoke of the peoples he met on his travels with respect, unlike many of his contemporaries who behaved and wrote in a more or less arrogant way when they reported about the nations and tribes they encountered along their way through newly discovered

126 Kohl 104; Justin Stagl, Zur Entwicklung der Ethnologie, in: Hans Fischer & Bettina Beer (eds.), Ethnologie, Einführung und Überblick, 5th ed. Berlin 2003, 33–52, at 44.

127 I. Kant, Rezension zu Johann Gottfried Herders Ideen, in: Werke in 12 Bänden, W. Weischedel, ed., Frankfurt/Main 1977, vol. 12, 779–806, esp. 791; on this still today ongoing dispute, Jerry D. Moore, 363 ff; and Eberhard Berg, in Marschall, on Herder, 67. See also the discussion of universals and specifities, see note 514, infra. It is noteworthy that Kant himself, by tracing his way between David Hume's rule-skeptical empiricism and G.W. Leibniz` rule conceptuality, by resorting to a radical modernization of Parmenides` theory of judgment, had proposed a solution to that dispute. But now, confronted with Herder`s search and love for the details, Kant missed philosophical consistency, and thus seems to side with Leibniz, against Hume. See the discussion of Kant`s theory of judgments, Chapter 1, above.

128 G.W.F. Hegel, Vorlesungen über die Philosophie der Geschichte, ed. Theodor Litt, Stuttgart 1961, 155–158; a discussion: Franz Martin Wimmer, Rassismus und Kulturphilosophie, a manuscript, Wien 1989, 10; here, Wimmer includes a comparison of Kant's, Hegel's, and Anton Wilhelm Amo's theories about certain ethnological findings.

129 Cited from Wimmer, 81. Hegel expressly refers to Africa's "lack of history". For details, see Wimmer loc. cit. (foregong note); W. Fikentscher, Methoden vol, III (1976), 455–486.

land. Often this land was claimed for a European country as colony or area of future exploitation.[130] Whereas Alexander von Humboldt concentrated on geography, fauna, flora, and geology, his brother's Wilhelm v.H. (1767–1835) main interest were languages. This interest became a guiding factor for German ethnology and linguistics till today:

7. German Volkskunde, and a preview on "European Ethnology"

In Germany, ethnology developed a different focus through the influence of the linguistic studies of Wilhelm von Humboldt and other linguists of the growth of languages in the light of their written sources. In particular, W. v. Humboldt's book on the Kawi language set new standards for linguistic research.[131] The influence of linguistic studies of ethnologically interesting societies became so strong that German ethnology focussed on illiterate cultures.[132] It was not before the second half of the 20th century that German ethnology began to include literate societies and thus returned to international usage. This was one of the reasons for the separate development of *Völkerkunde* (= ethnology) from cultural anthropology. In turn, this separate development accounts for what Christoph Engels calls a "lack of theory" of German ethnology.[133] It is the essence of anthropology to provide for such "theory".

The general relationship between anthropology and ethnology has been discussed above in, Chapter I 1, and V 3: Ethnology deals with specific peoples, whereas anthropology is a comparative theory. However, there are differences in national scientific traditions. The birth hour of Western European ethnology is said to be the foundation of the Societé de l' Ethnologie at Paris in 1859. The French meaning of ethnology includes the study of foreign tribes and peoples, typically as parts of European colonies, or otherwise of exotic origin.

The Anthropological Society of London was founded in 1863. The Berlin Society for Anthropology, Ethnology and Prehistory followed in 1869, the Anthropological Society of Vienna in 1870, the American Anthropological Association and the American Association of Physical Anthropologists in 1902.[134]

In the 20th century, sociology developed from a social science of living nations to an abstract science of societies as systems (Talcot Parsons, Niklas Luhmann).[135] Sociological models were taken from Western societies only. In the mean time, west of Germany socio-cultural anthropology developed. Thus – said *cum granu salis* –, German ethnology (today no longer being restricted to illiterate societies) corresponds to international sociocultural anthropology, and "European ethnology" as it is presently taught in Germany to an internationalized sociology.[136]

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130 Kohl 105, mentioning also Adelbert von Chamisso and Heinrich Barth as likeminded and sensitive discoverers.

131 W. v. Humboldt, Über die Kawisprache auf der Insel Java (A. v. Humboldt § J.K.E. Buschmann, eds), 3 vol Berlin 1836–1840: Deimmler.

132 Horst Nachtigall, Völkerkunde. Eine Einführung, Frankfurt/Main 1974.

133 Chr. Engel, Learning the Law. Preprints of the Max-Planck Institute for Research on Collective Goods, Bonn 2004/2005 = http://ssrn.com/abstract=539982.

134 Frank Miele (2001) at 24.

135 Schelsky, see note 110 above.

136 An indication of the difficulties in translating the technical terms in this context is the difference between the German and the English title of the Max-Planck Institute (MPI) in Halle/Germany: its German title is *MPI für ethnologische Forschung* (for ethnological research), its English title MPI for Social Anthropology.

II. Traditions and schools

This is not the place to trace the complex *history* of anthropological theory – anthropology understood – as throughout in this book – in the sense of an empirical social science. Neither the history of philosophical (speculative) anthropology (better called: anthropological philosophy) can be reported here. There are both numerous historical works of anthropology and chapters dealing with the history of this science contained in the great treatises and introductory works (*e.g.,* by Bidney, Bohannan, Harris, Kottak, Kroeber, Linton, Lowie, M. Mead, Thomas, Wesel, K.-H. Kohl and others). However, it appears that a true history of anthropology that takes into consideration the scholarly developments in the different countries concerned – Germany, France, Great Britain, United States, Russia, Netherlands, Sweden, to name the countries which became home to various schools – has not yet been written. To some degree, Franz Boas' remarks in his preface to Ruth Benedict's *Patterns of Culture* (1934) present a readable description of the history of anthropology that, while painted in broad strokes, is still rathet valid today.

This explains, at least to some degree, why the history of comparative ethnology and anthropology has been almost exclusively concerned with certain particulars (often belonging to material culture), but less with the ideational side of cultural anthropology (for example, the modes of thought). Only occasionally are differences in conceptual approaches to problems touched upon, for example when Leopold Pospíšil (1971, 134) mentions the "principles for the particular structure of the society and for the particular content of its culture" (in 1982a, 179: *"Prinzipien …, die der besonderen Struktur der jeweiligen Gesellschaft und für die besonderen Inhalte der Kultur maßgeblich sind");* or when Ernst Rabel (1927) speaks of "national ways of thinking" *(nationale Denkarten);* or when Margaret Mead directs her anthropological interest towards what is going on inside of a person's head. But apart from the "primitive mind" approach, modes of thought as such have rarely been included in anthropological research, or are quickly discarded as "unscientific". There is hadly a logos-oriented Herodotus or Anonymus Jamblichi to be found in all the schools and doctrinal traditions of anthropology or ethnology. Most modern anthropologists and ethnologists, for that matter, often keep on neglecting ideational cultural barriers, instead of simply being amazed that other people apparently follow other patterns of thinking and reasoning, patterns that may go beyond "cultural traits" in the established sense. This critique needs to be illustrated with references to some anthropological schools and their literature. The following is a brief (and necessarily incomplete) sketch of the various *schools of anthropology,* and their common interests and differences since the first half of the 19th century. The failure of the crusades to reestablish Christian rule of the Holy Land resulted in the separation of Europe from the East. There is probably no other period in history where traditional ties between the East and West were so radically severed than since the rise of the Muslim empires. Religious fervor and mercantile interests prodded Portuguese, Spanish, Dutch, and English sea captains to sail around the Islamic barrier. This "sailing-around-the-barrier" attitude modeled European thinking about the rest of the world since that time.

The specific character of this attitude becomes clearer when European expansion is compared with Greek discoveries of, and confrontation with, the Orient during the time of classical *polis* during the axial age (see Chapters 5 I and 9 IV): the Greeks were startled by the realization that the Egyptians, Persians, and Skyths followed different patterns of *thinking and reasoning.* Herodotus wrote glosses on Egyptian religion and coined the term of the Persian *logos.* He and the Anonymus Jamblichi compared Greek trust and obedience to law with Persian atti-

tudes towards wealth and power, a difference in behavior inferred by both writers (Fikentscher 1975a, 249; 1979: 90; idem 2004b, Ch. I; *cf.* Ch. 9 II 4, *infra;* am modern, but non-comparative and ethnocentrical restatement of the role of trust for contracting is offered by Erin O'Hara 2008).

However, when the Portuguese and the Spaniards conquered and missionized Latin America on their way to India, and the Dutch settled at the Cape of Good Hope, they were not interested in understanding other cultures. Their concern, along with their successors, was trade and influence. This limited comparative interest did not change much in modern times when one regards some or all of the subjects for possible comparison available in culture. Progress has been made only in such clearly defined fields as language, music, or law. Colonialism raised interest in the "colonized" cultures, but mostly for the egoistic objective of more efficient rule. Nevertheless, some ethnologists and anthropologists (to be mentioned soon) wrote admirable studies of foreign cultures.

The five main research directions of anthropology may be characterized as follows:

(1.) Evolutionists, since the middle of the 19th century;
(2.) Historical-comparative directions (since about 1890);
(3.) Functionalists, materialists, ecologists, structuralists (since about 1920);
(4.) Special directions, and the crisis of cultural anthropology (mainly after 1945);
(5.) Philosophical and other non-empirical anthropologies

The ascriptions to one of these five groups are of course schematic, and they may intersect. They cannot do justice to many writers and researchers. Multiple ascriptions are possible. Not all important authors can be named. Thus, the enumeration is far from complete.

1. The evolutionists. Diachronic and synchronic research

Modern anthropology began under the influence of Darwin (1809–1882) with the evolutionary analysis of the path of human societies and cultures. The concept of evolution was used to construct a history of human culture based on archeological fragments. In the terminology of F. de Saussure (1857–1913), evolutionary thinking is *diachronic,* the opposite of which is the *synchronic* analysis of systems and their structure at a given moment in time (for the general applicability of this distinction to the social sciences, see W. Fikentscher 1960).

a. Study of "primitives"

This first phase of anthropological study was followed by a period of reconstruction of historical connections between cultures based upon studies of distribution and diffusion of special features. This kind of work was supplemented by archeological evidence.[137] The field of anthropology opened up with the study of "primitive" or other exotic peoples by travelers, poets, missionaries, adventurers, merchants, and others who thought it worthwhile to record their experiences. Out of the large number of writers in this genre, three might be noted for the influence they had on later anthropologists: R.H. Codrington, who wrote on the Melanesians; Frank Cushing, who reported his *Adventures in Zuni* (recently reprinted); and Henry P. Junod, who earned fame for his *Life of a South African Tribe.* This first phase of anthropological literature might be called *life descriptions* of distant peoples in exotic areas.

137 A great collector of such evidence: Baron Erland Nordenskjöld, see e., below.

b. Bachofen, Maine, Morgan, Lennan

A subsequent period in anthropological literature is characterized by a more or less uncompromising devotion to evolutionary theory. The *evolutionary period* has its early stage, its variations, and its epigonic forms. In 1861, the evolutionary breakthrough started the era of "modern" anthropology. In this year the Swiss J.J. Bachofen (1815–1887) published *Mutterrecht* (Mother-right, maternal law), and Sir Henry Summer Maine (1822–1888) *Ancient Law* (1861). The thread of tradition from earlier empiricists, from David Hume and Montesquieu, to Bachofen and Maine is tenuous, due to the publication of Darwin's *The Origin of Species* (1859) and the growing interest in natural sciences and linguistics which preceded it. The American Lewis Henry Morgan (1818–1881) wrote a profound study of the "League of the Ho-de-no-sau-nee, or Iroquois", later more simply called League of Iroquois (1851).

c. Adolf Bastian

Adolf Bastian (1826–1905), a German, and John Ferguson McLennon (1827–1881), a Scotsman, continued this empirical-evolutionary trend in the discipline of anthropology as a social science. McLennon studied and published on the issue of patriarchy vs. matriarchy. Bastian (1868, 1884, 1895, 1896; see Fiedermutz-Laun 1990) is usually categorized, in historical accounts of anthropology, as an indefatigable traveler and collector whose interest was to discover human universals and their cultural variations. One of his ideas was that peoples possess their own cultures and thus become buildings blocks of cultural anthropology. He stressed the role of migration of peoples and their cultures. Most of his many book titles reflect this interest and make the books appear early studies on the counterpoint between culture and cultures. However, the material Bastian presents is so overwhelming and his categorical work so sketchy – he likes the word *prolegomena* (introduction) – that in most instances the reader is left alone to decide what is universal and what not (Fiedermutz-Laun 1990:121: the theory gets lost in details). This does not take away from Bastian's keen sense of observation, his compilatory energy, and his ingenueity in comparing seemingly very distant findings (*e.g.,* the thunder god in 1895 (I) 178, or thinking in units in 1895 (II) 306ff.; in more general terms in 1896, 1). Bastian demonstrated the importance of fairy tales for "elementary thoughts" (1895 (I) X) and of insisting on the plurality of the concept of soul (1895 (I) 12). It has been said above that the term *anthropology* was used during the last decades of the 19th century (and is partly still used) in Germany only for biological anthropology. However, Bastian (1868, 4) remarks that "historical research fails to recognize the assistance given to ethnology by anthropology". "Working on the borderline of the corporeal and the mental" enables the researcher to claim the "certitude of an exact natural science". Bastian does not consequently (Greek: synepeically, see Chapter 6, below)) distinguish between thinking and metathinking about culture and cultures.

d. Spencer. Tylor. Steward. White. Service

Herbert Spencer (1820–1903) combined biology and sociology into a "descriptive" evolution. Sir Edward Burnett Tylor (1932–1917) introduced "culture" as a central anthropological theme. His two seminal books are "Primitive Culture" (1871) and "Anthropology: An Introduction to the Study of Man and Civilisation" (1881). Later evolutionists – some say "neo-evolutionists" – are Leslie Alvin White (1900–1975), Julian H. Steward (1902–1971), and Elman R. Service (1915–1996). The interest of these evolutionists lies in how human society and civilization developed, not in how different human groups came to think differently. These anthropologists conceived of "stages" in human development.

e. British and Swedish diffusionists

One of the prominent fields of interest became *diffusionism*. "Evolution by migration" could be an appropriate title for the several "diffusionist" schools. British diffusionism held that cultural patterns and traits such as tattooing or the plow, were invented in one place and then diffused from there to other parts of the world: Egypt was believed to be the main source of such cultural migration. Together with W.R.H. Rivers (1864–1922) and W.J. Perry (1887–1949), Grafton Elliot Smith (1871–1937) founded the "Heliolithic School" that placed Ancient Egypt at the center of cultural diffusion. A stricter empirical treatment of the diffusion of "units of culture" was employed by the "Swedish School", best known through the work of Baron Erland Nordenskjöld (1877–1932) who stressed the importance of verifying migrations with archaeological data. He himself was a renowned researcher of artifacts. Franz Boas (in Benedict 1934a, preface) notes that the first broad evolutionist designs were followed by more intensive study of the influence of the different evolutionary trends upon one another, accompanied by much detailed research and archeological fact-finding.

The migration of *ideas,* however, such as the possible influence of Nestorianic Christianity to explain the elements of grace and redemption in Mahayana Buddhism, has to my knowledge not been a subject of diffusionist research. William H. McNeill's (1917 -) theory of cultural centers and cultural slopes marks only a beginning. Archeological data, difficult to collect as they may be, are still easier to obtain than data on migratory belief systems and diffusing modes of thought.

f. German diffusionists. Kulturkreis-Lehre

Fritz Graebner (1877–1934) co-authored his paper on *"Kulturkreise"* and *"Kulturschichten"* in 1905.[138] According to this rather constructivistic – but still influential – doctrine, "primitive" peoples can be subdivided into a limited series of culture types depending upon modes of livelihood, descent patterns, basic religions and convictions, etc. According to Graebner, every "primitive" society receives its cultural elements from such archetypes through migration, transmission, or simple acceptance, thus explaining similarities between peoples of Melanesia, California, and West-Africa. Cultural innovation and inventiveness is rated rather low within this theory. Similarities are thus explained by diffusion. Such a theory would imply considerable migratory movements in early times because certain cultural traits, such as pyramids or bow and arrow find themselves at geographically sometimes very distant places.

g. The Anthropos School

The "Anthropos" School of Austria, with the convent of *Societas Verbi Divini* – S.V.D. – at St. Gabriel at Mödling near Vienna as its geographic center, is represented by missionaries and ethnologists such as Fathers Wilhelm Schmidt (1868–1954), Robert von Heine-Geldern (1885–1968), Paul J. Schebesta (1887–1967), Martin Gusinde (1886–1969), and Wilhelm Koppers (1886–1961). These writers relied to some degree on the *Kulturkreislehre* as a "non-evolutionist" and non-Darwinian point of reference (see also Albrecht Schneider 1976).

When the Nazis entered Austria in 1938, members of the Anthropos School became victims of religious persecution. Wilhelm Schmidt retreated to Switzerland. After World War II, the ethnological and publication-directed traditions (and the journal "Anthropos") were resumed at St. Augustin, near Bonn, Germany, while the missionizing center remains in Mödling. Gusinde is still considered an undisputed authority for Tierra del Fuego peoples. -

138 Graebner & Ankermann, Kulturkreise und Kulturschichten in Afrika, 37 Zeitschrift für Ethnologie 43–90 (1905).

The best known work published by this school is Wilhelm Schmidt's *Vom Ursprung der Gottsidee* (on the origin of the idea of God), 12 volumes 1926–1955. Schmidt also published articles in the Journal "Anthropos" beginning 1908.

2. Historical-comparative directions

There are some early German and Dutch compilers and comparatists. A first group may be called:

a. Comparative-Ethnological Legal Universalists: Wilutzki, von Dargun, Post, Bernhöft, F. Meyer, Kohler

A group of legal ethnologists entered the academic scene who were interested in the compilation and positivist comparison of societies. Most prominent was the polyhistor Josef Kohler (1849–1919). Albert Hermann Post (1839–1895), Lotar von Dargun (1853–1893), P. Wilutzky (he published between 1880 and 1903), Felix Meyer (1852? – 1928), and the Dutch Georg Alexander Wilken (he published between 1882 and 1894) may be counted to this group. Theodor Waitz (1844–1864, in Marburg) wrote his influential six-volume *"Anthropologie der Naturvölker"* (Anthropology of the Nature Peoples) in the tradition of Klemm's ten-volume treatise on the basis of more recent material, collecting material among North-American Indians and elsewhere. Waitz made a claim for identical moral standards of humankind.

German ethnological jurisprudence had its own journal, the *Zeitschrift für vergleichende Rechtswissenschaft,* founded in 1878 by Franz Bernhöft (1852–1933) and Georg Cohn (1845–1898?). In its third year, Josef Kohler joined the editorship. The journal still flourishes (but of course has long since left behind positivism and description (for details see Rüdiger Schott's history of German ethnology, 1982). Schott is critical of the German post-war ethnology of law development. He adds: "Anglo-American colleagues who seem to master the most exotic idioms for their ethnographic fieldwork … are apparently unable to acquire a reading knowledge of German …"). This group of authors of comparative law expanded their comparatist interest to ethnological dimensions. Differing in methods and intensity of research "in the field", their main interest was directed in finding cultural universals relating to law. Sebastian Kuck who closed a gap concerning biographical and bibliographical research in this group called these writers the "comparative-ethnological universalists".[139]

b. Ihering, Frobenius

Rudolph von Ihering (1818–1892) remarked in one of his later letters to Bernhard Windscheid that he had finished his work on the dogmatics of the law *("mit der Dogmatik habe ich für immer abgeschlossen");* his subsequent literary efforts would be devoted to the prehistory of the Indoeuropeans and what they must have had as their law.[140] Ihering speculates on an Indoeuropean original law, so his work cannot be counted as an ethnohistorical study. It rather confirms Ihering's earlier approach to law as an elaboration of behavior-guiding norms under

139 S. Kuck, Die Anfänge der deutschen Rechtsanthropologie: Die vergleichend-ethnologische Universalrechtsschule, Regtensburg 2001: Roderer; Kohler, active author in many legal disciplines, was not – as often asserted – the founder but over 25 years co-editor of Zeitschrift für vergleichende Rechtswissenschaften and wrote for it 280 articles, most on ethnology, Kuck 147. In this sense, he was universal; still, he favored cultural specificities instead of looking for generalities. Bernhöft held a middle position between researching details and sweeping generalities (Kuck 152).

140 Rudolf von Ihering, Vorgeschichte der Indoeuropäer, aus dem Nachlass herausgegeben von Viktor Ehrenberg, Leipzig 1894: Breitkopf & Härtel. See also Helene Ehrenberg (ed.). Rudolf von Ihering in Briefen an seine Freunde, Leipzig 1913: Breitkopf & Härtel, 419–421, 425–430; the sentence on dogmatics is on p. 429.

exigencies ("purposes") of daily life, Ihering's "realistic method".[141] The unfinished book on the "Indoeuropeans" is proof of Konrad Zweigert's statement that Ihering is one of the founders of modern comparative law.[142] It should be added that he is also one of the founders of comparative legal culture.

Leo Frobenius (1873–1938) condensed the massive material he gathered as an untiring ethnological traveler into a "culture morphology" that is still quoted as an example of ethnological general theory.

c. Frazer. Haddon. Sociological positivism and its influence on ethnology

More compilatory work was undertaken by the English scholars Sir James George Frazer (1854–1941) – the great collector of myths, and Alfred Cort Haddon (1855–1940) who felt that fieldwork should be a prerequisite to ethnology and anthropology. These compilations cannot avoid a certain positivism. Positivist sociology becomes of influence. Doubters and problematizers have a background different from the one of the evolutionists and diffusionists who appear to be influenced by the sociology of Max Weber, Georg Simmel, Emil Durkheim, and Marcel Mauss (on him P. Centlives 1990). These sociologists all took interest in "primitive" societies. Their work influenced historians and social scientists on both sides of the Atlantic.

Sharing its fate with *Völkerkunde,* German philosophical anthropology (see 9., below) now began to diverge from the other schools and embarked upon its own path. Comparative sociology for some time joined the international anthropological mainstream and revitalized it, notable through Max Weber's studies in the comparative sociology of religion. However, later modern systems sociology became an entirely separate discipline. Both developments, the growing independence of German philosophical anthropology and the turn of sociology towards systems theory empoverished the comparative study of cultures. Scholars were often tempted to limit themselves to the observation and description of the attributes of a single culture. Observed cultural traits sometimes appeared so disconnected that in the end there was no common thread *("geistiges Band")* to pull together the peculiarities. By relying on compilation and positivism, evolutionism reached its latest phase

d. Thurnwald

Richard Thurnwald (1869–1954) wrote on "Die Denkart als Wurzel des Totemismus" (1911), a book in which he defined the totem as a legal tool by which property, a family history and other items of belonging are assigned to a group of people, usually a clan. The publication offers a sober contrast to competing theories of totemism of his time which often mix religion, taboo sanctions and occult ideas into a hodge-podge of mysteries. Thurnwald, a practising lawyer with a common sense for procedure also wrote *"Die menschliche Gesellschaft in ihren ethnologischen Grundlagen"* (Human society in its ethnological foundations), 5 vol., 1931–35. He created the concept of forager *(Wildbeuter).*

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141 Cf., W. Fikentscher, Methoden III, 239, 249–255, 271, 275.

142 K. Zweigert, Iherings Bedeutung für die Entwicklung der rechtsvergleichenden Methode, in: Franz Wieacker & Christian Wollschläger (eds.), Iherings Erbe, Göttinger Symposium zur 150 Wiederkehr des Geburtstags von Rudolpf von Ihering, Göttingen 1970: Duncker & Humblot, 240ff.; W. Fikentscher, op. cit 152.

e. Comparative sociologists (Durkheim, Weber)

British social anthropologists were much concerned with structural analysis (the "school of structural functionalism"). American cultural anthropologists exchanged arguments over the diachronic versus the synchronic method, but never developed a strict dogmatic contrast.

The reason for this cultural openess to history might be rooted in the fact that, in one way or another, human beings are historical beings, so historical evolution will always play a part in an anthropological view of man. Thus it can be observed that anthropological scholarship has never been completely opposed to the idea of evolution, also in the case of another approach to anthropology-related work which claims to be non-evolutionary: the comparative sociology of Max Weber (1864–1920) and Emile Durkheim (1858–1917) and their followers.

f. Boas

Franz Boas (1858–1942), a German-born anthropologist who worked in the United States after 1888, attacked both the evolutionary and the diffusionist schools as proponents of mere compilation and positivist ethnography. For him, all cultures stand in history and space as entities in their own right, and are equal in standing, and comparable. As early as 1911, he warned against anthropological misuses of the concept of race (1911a; 1961: 324–330). Taking note of the fact that many cultures were disappearing, Boas accepted historical components to ethnological theory without believing in evolutionism. He assumed that similar cultural phenomena may have developed in different environments for very different reasons.

Boas had great influence over a large group of anthropologists, but he always remained open to the creativity of his students. It is not possible to assign Boas' followers to a specific "school". They are too different in method and interests to be lumped into a single group of authors. Yet, all "Boasians" follow their teacher in his culture-centered, historical-comparative approach by which he founded modern comparative cultural anthropology (a tribute: Pierpont 2004).

Boas' position was not only anti-evolutionict, it was also anti-functionalist, cf. 3., below. To understand his contribution to anthropology, these two opposite camps have to be regarded. Boas was a contemporary of a group of anthropologists who became influential during the '20s and '30s of the past century, especially in Great Britain. Their work is associated with the problems posed by late colonialism. It is based on synchronic analysis, and ignores the assumptions of the evolutionists, diffusionists, and compilationists. Its scientific tendency is anti-evolutionary. Therefore these antievolutionists were called functionalists and structuralists Their interest was not in how things develop through time, but how cultures work at a given moment in time. Functionalists hold that there are functions to be fulfilled by culture. In a wider sense, Leslie White's (on him, see 1 d, above) concept of culture promotes the welfare of the social whole and may be called functionalist. The main – British – functionalist approach does not search for the purpose of culture or cultures as such, but focuses on the functioning of the elements of a given culture. This "functionalist school" is said to originate in the work of Bronislaw Malinowski (1884–1942) (*cf.,* R. Girtler 1981; on functionalism see 3. below).

According to Boas, however, cultures do not serve functions. They are "purposeless" institutions. Franz Boas' central objective in his historical-comparative approach was the understanding of cultures as historically discrete and conceptionally independent units. In Boas' view, this approach made possible certain generalizations about specific cultures and their contrasts with other cultures. In this regard, Boas acknowledged the contribution of Ruth Benedict's book *Patterns of Culture* (for which he wrote that preface, which is a *compte-rendu* of the historical-comparative method that he himself had proposed). Benedict adopted this

method to penetrate "the genius of a culture". It is this "genius" to which Benedict refers as a "configuration", which in turn is a loose translation of the world *Gestalt* that had come into use in psychological *Gestalttheorie.* "Configuration" is to be understood as the "one dominating idea" inherent in a given culture. Boas, in this preface, draws attention to the fact that Benedict's method for discerning "fundamental attitudes" is not functional in the sense of the British structural-functionalist school. He takes the opportunity of writing the preface to distinguish his own historical-comparative view from the functionalist-materialist inquiry of Malinowski and other functionalists. Boas felt that "fundamental attitudes" or "configurations" were inherent to cultures and rather resistant to culture change.

According to Franz Boas (ibid.) the intensified study of cross-cultural influence led to a double development (he refused): the trend of applying the evolutionary method to a universal history of civilization in light of the diffusionist studies; and the growing interest in single, unrelated cultural units with their own particular histories and attributes. Boas is not clear on which universalists and "post-evolutionists" he had in mind. Most likely he was referring to the works of Max Weber, Emile Durkheim, Marcel Mauss, and their followers.

It is easier to guess what he meant by the fragmented approach to unrelated cultural units, because at this time the German tradition had turned to pure ethnology *(Völkerkunde),* and voluntarily limited itself to non-literate societies. Modern works on ethnology in the tradition of *Völkerkunde* include Nachtigall (1974), R. Schott (1968), Schmied-Kowarzik and Stagl (1981), H. Fischer (ed.) (1983, 2nd ed. 1988), E. W. Müller et al. (ed.) (1984), Bargatzky (1985), and J. W. Raum (1989). The broader anthropological approach that also includes literate societies, Spencerian "descriptive sociology", continued to exist on the British and U. S.-American side with ramifications in the Netherlands, France, Sweden, and some other countries. As has been remarked, the self-imposed limitation led to a German deviation from the international mainstream. Franz Boas' own central objective of his historical-comparative method was the understanding of cultures as historically discrete and conceptionally independent units. In Boas' view, this approach made possible certain generalizations about specific cultures and their contrasts with other cultures.

g. Ruth Benedict. Margaret Mead

His student Ruth Benedict (1887–1948) probably came closest to Boas' intentions, while adding modern psychological insights. Boas acknowledged the remarkable contributions by Ruth Benedict to cultural anthropology. Benedict took this approach to penetrate "the genius of a culture". It is this "genius" to which Benedict refers as a "configuration".

In the broad Boasian manner of identifying and comparing cultures, but going one or two steps beyond this, Margaret Mead in part used functional analysis when she studied female adolescence in Samoa (on advice given by Boas), and tried to show (1928) that adolescent anxieties were a phenomenon dependent upon Western cultural attitudes and not inherent in the adolescent stage of psycho-biological development, because they did not appear among Samoan youth. In Mead's approach, "function" implies a cross-cultural explanation for behavior. The merits of this advanced approach are not diminished by the fact that Mead's results *in concreto* were later subject to doubt.

h. The US-American comparative school and its offshoots, including specialists and modernists. Influence in other countries

The other "founder" of the American *historical-comparative* line of anthropological research is Clark Wissler (1870–1947). Boas' and Wissler's influences can be seen in the works of Alfred Louis Kroeber (1876–1960), Leslie Spier (1893–1961), Robert H. Lowie (1883–1957), and Edward Sapir (1884–1939, on him K.P. Koepping). These latter three devoted their special interests to the individual and to culture personality. In turn, they influenced Ralph Linton (1983–1953), Fay-Cooper Cole (1881–1961), Frank G. Speck (1881–1950), Ruth Benedict (1887–1948), Margaret Mead (1901–1978), Clyde Kluckhohn (1905–1960), A. Irving Hallowell (1892–1974), Fred R. Eggan (1905–1991), E.A. Hoebel (1906–1993), G.P. Murdock (1897–1985), John W.M. Whiting (1908–1998), A.F.C. Wallace (1923), Leopold Pospíšil (1923), and others.

A special branch of this historical-comparative line is formed by a group of anthropologists who directed their work towards the study of culture change and acculturation: Robert Redfield (1897–1958), Melville J. Herskovits (1865–1963), Ralph Linton (1893–1953), Homer G. Barnett (1906–1985), Oscar Lewis (1914–1970), Meyer Fortes (1906–1983), Elman R. Service (1915–1996); see, *e.g.,* 1971, 1975, Elizabeth Colson (1917–2003), Paul R. Brass (1936-), and others (*cf.,* Malinowski 1945). Some of the more specialized branches of anthropology, such as culture change, have benefited from this. Pioneers in studies of culture change are Barnett, Herskovits, Redfield, Kroeber, Vogt (1951) and Wissler; and to this list of authors about culture change Elizabeth Colson and P. Bohannan (1995) ought to be added.

Another specialized branch is culture personality, a field connected with the names of Leslie White (1943), Leslie Spier, Robert H. Lowie, Ralph Linton (1945, 1949), Ruth Benedict (1946), A.F.C. Wallace (1952b, 1956c, 1961a, 1965a, 1968, 1970), S.F. Nadel 1956, A.L. Kroeber, Clark Wissler, Julian Steward, Fielding Ogburn, Bill Williamson, E. Sapir (1934), Margaret Mead (on her N.V. Zanolli 1990), Irving Hallowell, Clyde Kluckhohn, E.T. Hall, Elisabeth Colson, and others.

i. "Yale Ethnographers"

Any survey of the main schools and directions of anthropology should mention the "American Anthropological School of Formal Analysis" or "Yale School" or "the New Ethnographers". This method of *componential* and, in the case of normative judgments, *correlational* analysis will be discussed in Chapter 6 on the "analyses". "Yale ethnography" grew in the 50^{ies} and 60^{ies} of the 20th century against the background of Boas' and his followers' culture-comparative anthropology.

3. Functionalists and the British-American compromise. Materialists. Ecologists. Structuralists

The so-called British functionalism sees foreign cultures, particularly the cultures subsumed under the former British colonial empire, in its workings, governmental, social, economic, legal, religious, etc. The names at the beginning of functionalism during and after World War I are Bronislaw Malinowski (1884–1942) and Alfred Reginald Radcliffe-Brown (1881–1955). The third author is Evan E. Evans-Pritchard (1902–1973). Functionalism also fostered important regional studies (W. C. Benett; Audrey I. Richards; G. Willey; A. Cass; E.J. Thompson; F. Rainey; I. Rouse, J.B. Griffin; R. Heizer; and Louis Dumont).

a. Malinowski

Malinowski was born and raised in Krakow, in the traditions of Polish aristocracy and intellectualism. In 1910 he began postgraduate work in London. Several field trips took him to Australia and New Guinea. From the materials gathered during two stays with the Trobriand Islanders of about a year each (between 1915 and 1918) he wrote "Argonauts of the Western Pacific" (1922). His description of the Kula trade is one of the lasting studies in economic anthropology. Malinowski's "Crime and Custom" (1926) is a discussion of human behavior and its normative regulation.

Malinowski taught in London and after 1941 at Yale. Malinowski's way of doing ethnography by living with the people he studied became a model for later generations. He created the term "participant observer", and he tried to be one as best he could. In living among the Trobrianders as their participant observer, he never "went native". "Going native" in cultural anthropology became the opposite concept to being a "participant observer". "Going native" describes an ethnologist or anthropologist who while being engaged in field studies gets so much involved in local habits and life style that she or he looses that critical distance to the subjects and objects of observation which is indispensible for rendering a scientific record. It is unknown who coined this expression."Going native" sometimes happens when the researcher marries into the tribe under research, or otherwise builds up strong ties of friendship and confidentiality, for example by accepting a tribal office. Having gone native sometimes means to meet a difficult fate. Malinowski masterly managed walking that tight rope between getting familiar with the cultures he studied and guarding the critical observer's objectivity. One of the most instructive introductions to Malinowski' life and work is Jerry D. Moore's chapter on the man.[143]

b. Radcliffe-Brown

A.R. Radcliffe-Brown (1881–1955) is to cultural anthropology what Emile Durkheim is to sociology: the believer in and researcher of rules, structures and functions inherent in the culture to be observed. Radcliffe-Brown rewrote his doctoral thesis on "The Andaman Islanders" after having discovered Durkheim so that the book was belatedly published in 1922. Like Durkheim, Radcliffe-Brown tried to find the inner structures – he called them the social structures – that hold a society together. To him, history was too much subject to conjecture and imprecision, and Boas' interest in specificities risked getting lost in details.[144]

c. Evans-Pritchard. Functionalism. "The British-American compromise"

In E.E. Evans-Pritchard, Franz Boas' deep humanity and respect for other cultures, B. Malinowski's elegance and sincerety, and Radcliffe-Brown's focus on rules and principles in such a fact-laden field as anthropology, combine and culminate. In his Nuer and Azande studies, Evans-Pritchard starts from the single person, not from inherent generalizations, yet cultural complexes such as segmentation and witchcraft gain conceptual color and persuasion. Together with Meyer Fortes he edited a seminal work on "African Political Systems" (1940). The book contains valuable information onAfrican governmental forms before decolonization in the years 1945ff. thoroughly and for ever changed the political landscape of Africa. "African Political Systems" found a continuation in John Middleton's and David Tait's book on "Tribes Without Rulers" (1958). Both books can be used together. The high standard of

143 J.D. Moore (2004), 134–146.
144 Stefan Seitz, in: Feest & Kohl (2001), 371–376.

the first remains unequaled. In one of his latest publications, Clifford Geertz remarked that Evan-Pritchard's texts read as if they were a movie about a near-by object.[145]

Functionalism is opposed to evolution, especially in its diffusionist offshoot, and invests little interest in historical development and comparison. Functionalist analysis does not adequately deal with cultural change. There can be no doubt that most cultures are in a state of flux, if not a state of evolution. Change does not necessarily need to have evolutionary undertones, but even aimless change is a stumbling stone from a purely functionalist perspective.

There have always been scholars in anthropology who share a pro-evolutionist view (Lewis Henry Morgan (1818–1881), E.B. Tylor (1832–1917), Leslie White (1900–1975), on him C.E. Guksch 1990), Marshall Sahlins (1930), E.R. Service (1915–1996); and those who offer theories on culture change such as Henry Summer Maine (1822–1888), Homer G. Barnett (1906–1985), Clark Wissler (1870–1947), Arthur R. Kroeber (1876–1960), Melville J. Herskovits (1895–1963), Robert Redfield (1897–1958), Elizabeth Colson (1917–2001), and J.N. Steward (1902–1971, on him J.W. Raum 1990). Moreover, change is a given in all archeological research. With respect to legal anthropology, a theory on cultural change has been developed by Leopold Pospíšil (1971, 1978c, 1982 a) (a summary of the theories on culture change will be given in Chapter 5). But change and evolution escape the attention of functionalism.

After 1945, both streams, American cultural-comparative anthropology and British functional social anthropology merged to what is today called sociocultural anthropology, or "The British-American Compromise". The Americans accepted, at least for the time being, British (Durkheimian) implied-rule generalizations, and the British in turn agreed to Boasian plurality: there was no empire any more to defend and to explain (cf., Layton 2006; Jerry D. Moore (2004) 217–219).

d. The "materialist" tradition (Sahlins, Harris, Kottak u.a.). The structuralists

A special "functionalist" view is pursued in economic anthropology. Representative of the economic approach in anthropology is M. Sahlins' (1930) book *Stone Age Economics* (1974). Sahlins' position has been characterized as "neoevolutionist". However, Sahlins' later work took a turn away from functionalism in a materialist sense and more towards an ideational point of view. Other studies in economic anthropology include books and articles by L. Pospíšil 1963, M. Harris, M. Gruter (1976, 37), W. Fikentscher (2004), and M. Rössler (2005).[146]

A structuralist in his own right is Claude Lévi-Strauss, whose penetrating structuralist findings set standards for anthropologists and sociologists around the world (for a detailed, critical discussion see W. Fikentscher 1975a: 62, 134ff.). Lévi-Strauss influenced among others, the Dutch anthropologists, *e.g.,* P.E. de Josselin de Jong, who became a critic of structuralism (1956, 1980, 1982), and the Belgians Luc de Heusch, who defends a moderate structuralism in his book on sacrifices (1985), and Maurice Corvez. Michael Oppitz (1975: 329), defines: "Structural anthropology is a science that starts from the hypothesis of a logical arrangement of social phenomena" *(die strukturale Anthropologie ist also eine Wissenschaft, die von der Hypothese eines logischen Arrangements der sozialen Phänomene ausgeht);* see also K.R. Andriolo (1981).

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145 Clifford Geertz, Works and Lives: The Anthropologist as Author. Stanford 1988; Stanford Univ. Press (in his article on Evans-Pritchard). The German translation by Martin Pfeiffer has the title: "Die Künstlichen Wilden – der Anthropologe als Schriftsteller" –, Munich 1990: Hanser.

146 A survey: W. Fikentscher, Intellectual Property and Competition – Human Economic Universals or Cultural Specificities?: A Farewell to Neoclassics, International Review of Industrial Property and Copyright (IIC) 2/2007, 137–165.

The situation in the 60s and 70s was characterized by a strong representation of the functionalist-structuralist-materialist tradition on the one hand, and a linguistic influence on anthropology on the other. The latter led to what became known as symbolic anthropology. The materialist tradition held sway in France through Lévi-Strauss and his followers, whose anthropological structuralism was influenced by Roman Jacobson's structural linguistics. In Great Britain materialism was represented by the "structuralists" Edmund R. Leach, Mary Douglas, Stanley J. Tambiah, and others. The American counterpart to these trends was cultural ecology, affected by an "evolutionary" trend (Marshall Sahlins, Elman R. Service), and by an approach that looked towards system theory (Marvin Harris, Roy A. Rappaport). A third category formed which might be called "structural Marxists" (Louis Althusser, Maurice Godelier, Emmanuel Terray, Jonathan Friedman), and a fourth by the "political economists" in anthropology (Emmanuel Wallerstein, G. Frank).

e. Influences from linguistic anthropology and symbolism. Clifford Geertz and his followers. Literacy theories

E. Sapir's student Benjamin Whorf demonstrated that the relationship between thought and language parallels the relationship between thought and culture (1956), thus influencing the science of linguistics through his anthropological experience.[147] In the confines of the present book, linguistic anthropology – an important and somewhat neglected field – cannot further be pursued, however.[148]

It would be interesting to know whether Sapir or Whorf had personal or reading contact with Ludwig Wittgenstein, whose second philosophy of reality as language points in the same direction.[149] Drawing from very different theoretical sources, both Whorf and Wittgenstein hold that the limits of human speech define the limits of human thinking, whereagainst the basic tenet of the present book is that the modes of thought define the limits of human thinking but lay bare the possibilities of meta-thinking (see also the Foreword, *supra,* and VI. 2., final paragraph, *infra*). One can only speculate about roots of Sapir's and Whorf's "linguistic relativity principle" in W. v. Humboldt's linguistic studies.[150]

Anthropology's answer – probably premature – to the *linguistic revolution* (which had received momentum from the Sapir-Whorf hypothesis) was symbolic anthropology. Clifford Geertz – who introduced hermeneutics to anthropology (1973a, a review 1988) more than any author before him – and David M. Schneider opted for a more cultural orientation, while Victor Turner (1967, 1969, 1982, 1986) and G. Cronk (1973) adopted a rather "social" and "symbolic" stance.

Other studies on symbols in philosophy and anthropology were undertaken by A. N. Whitehead (1927), Tillich (1955), E. R. Leach (1961), and Stanner (1965). P. E. de Josselin de Jong and E. Schwimmer (1982) gave a *compte-rendu* of symbolic anthropology in the Netherlands. Jürgen Heermann's book (1983) is a German example.

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147 Benjamin Lee Whorf, Sprache, Denken, Wirklichkeit. Beiträge zur Metalinguistik und Sprachphilosophie, Reinbek 1963: Rowohlt.

148 See, e. g., Dell H. Hymes, Language in Culture and Society: A Reader in Linguistics and Anthropology, New York 1997: Harper Collins; idem (ed.), Language in Culture and Society, Newe York 1966: Harper & Row: idem, Reinventing Anthropology, New York 1969: Pantheon (reprint 1999); Volker Heeschen, Humanethnologische Aspekte der Sprachevolutionin: Joachim Gessinger & Wolfert von Raden (eds.), Theorien vom Ursprung der Sprache, vol. 2 Berlin 1989: de Gruyter, 196–248.

149 See Wolfgang Stegmüller 1978, 526 (in Chapter XI).

150 See text near note 82, above; cf., also, Reinhard May, Problematik des chinesischen Rechtsverständnisses, 66/2 ARSP 193–206 (1980), at 199; and W. Fikentscher (1995/2004), 341, 354.

A subspecies of symbols is writing. Thus, the influence of writing systems became of importance for anthropology. In 1968, Jack Goody took up the subject of the role of literacy and "literality" for traditional and other societies (1968, 1968/90 with a list of Goody's publications, at 9). It is difficult to follow Goody's result that there is no concept for "religion" in non-literate societies. In at least 20 non-literate tribes of the North-American South West Bob Cooter and myself found a concept for religion which, rendered in English, is "way". "Way" includes the creation stories and much of what we call "ethics" and "law" (cf. David P. McAllister, Enemy Way Music, Cambridge, Mass. 1954: Harvard Papers). For reflective discussions of "how to write" ethnology, or anthropology, Geertz 1988/1990, and Kohl 1993, 119ff. may be mentioned.

4. The modern Austrian and Dutch schools

The ethnological and anthropological "Dutch" or "Leyden" school which, preoccupied with materials from the former Dutch colonies, contributed among other theoretical discoveries the "participants' view of their culture" as a non-ethnocentric approximation of field data. K. and F. von Benda-Beckmann and F. Strijbosch (eds., 1986) set out to continue the tradition of Dutch anthropology of law in a modern methodology (see also F. von Benda-Beckmann 1970, 1976, 1979a, 1979b, 1981, 1986; K. von Benda-Beckmann 1983, 1985; and John Griffiths (1984, 1985, 1986a, 1986b; a center of converging ideas is the "Journal of Legal Pluralism and Unofficial Law").

Founded on a modernized, secular, historical and comparative basis, a new Austrian tradition was raised in 1986 through the journal "Law and Anthropology" which favors subjects of the protection of ethnic groups and non-dicscrimination. The "Journal of Legal Pluralism and Unofficial Law" (John Griffith *et al, ed.*), published in Groningen, Netherlands, and "Law and Anthropology" (Richard Potz, René Kuppe et al., ed.), published in Vienna, working on related fields of minority protection, may be named as two new European contributions for continued research in the anthropology of law, both looking back to older traditions at Leyden and St. Gabriel but free from the older dogmas of evolutionism, diffusionism, functionalism, or structuralism.

5. Anthropologists of law

Anthropology of law became a divers subfield of some – not preponderant – interest. Writers and keywords in this subfield are (doing no justice to the full range of the authors' works, nor attempting a full list of writers): Karl N. Llewellyn (1893–1962), see his seminal book "The Cheyenne Way" 1941 (with E.A. Hoebel); Max Herman Gluckman (1911–1975), see above; Leopold Pospíšil (see above.); Paul Bohannan (1920), renowned for his studies among the Tiv, where he observed, among other discoveries, the "economic spheres"; Laura Nader (Zapotek studies and collections); Rüdiger Schott (Bulsa, theoretical issues); Sally Falk Moore (Chagga and Meru in Tanzania, Inca in South America, theory, editions, collections); P.E. de Josselin de Jong (customary law); Franz von Benda-Beckmann (Indonesia, legal pluralism), see above; Keebet von Benda-Beckmann (Indonesia, legal pluralism), see above; John Comaroff (Southern Africa, dispute settlement, marriage, theory); Jean Comaroff (Southern Africa, migration, decolonization, theory); John Griffiths (legal sociology, native law, symbols); Norbert Rouland (law and state, legal pluralism); Shalini Randeria (globalization, environment, India); Peter Sack (Australian aborigines, theory); Martha Mundy (Yemen, theory of modern state), Jeremy MacClancy (non-tribal anthropology, also of law); Richard Potz (religious law, minorities); René Kuppe (Brasil, human rights, minorities); Melanie Wiber (environment, agri-

culture); Anne Griffiths (Botswana, Scotland, legal pluralism); Rebecca French (Tibet, methods); Sally E. Merry (children, urban and gender issues, human rights, mediation); Ellen Hertz (legal-economic and legal-political issues, poverty law, anti-discrimination law, theory); Bertram Turner (Morocco); Trutz von Trotha (legal behavior); Hagen Hof (legal behavior, ethology of law). The – non-exhaustive – examples show a heterogeneity that asks for a more systematic treatment.

6. Marxists. Postmodern authors and the "crisis". Eric Wolf, Sherry Ortner, Marshall Sahlins

A surprisingly large share of American anthropological writing since the late 60s seems to be influenced by Marx. It is up to every American anthropologist to which degree he or she wants to engage in propagating Marxist totalitarianism. But insofar as one relies on Marx, one propagates enforced conscience and political dictatorship, because Marx' method hinges on the distinction between *exchange value* and *use value,* and use values can only be dictatorially be prescribed, see Ch. 10, *infra.* Even Marxism viewed as *method only* postulates dogmatically-closed criticism and, consequently, the suppression of those who doubt. It should have been self-evident that with the introduction of Marxism, the "shared discourse" would come to an end. Shared discourse is an *exchange of value* conceptions, a *market* and meeting place of opinions. This is what Marx tried to prevent.

Authors who assign weight to economic factors in shaping a culture are Marvin Harris and, from a Marxist point of view, Maurice Godelier and C. Meillassoux. Uwe Wesel (1985: at 48, 51, 191 and 277) thinks that economy and forms of government are of central importance. and C. Ph. Kottak describes his position as "materialist". Friedrich Engels' fame as the founder of speculative Marxist ethnology remains untouched, although the number of his followers has dwindled drastically. The single-cause reduction of a given culture to economics, once taught by Marx and Engels – see the references in Wesel 1985, 51, 98 and 191 –, no longer finds many followers.[151] The text near footnotes 156 and 178 points to the modes of thought as shaping all elements of culture including its economy, rather than being determined by economic circumstances.

In 1973 and 1983, Clifford Geertz published his two boks on interpretationism in cultural anthropology. Geertz was dissatisfied with ethnographic description of facts. Unaware of Kant's synthetic judgment a priori, and in the tradition of David Hume, he added evaluations to ethnographic fact-finding he called "interpretations" (see text at notes 28 and 45, above). In this light, Geertz' interpretationism was not the ignition for the postmodern crisis (however, see Gottowik 1997). The "crisis" began with Dell H. Hymes' "Reinventing Anthropology", New York 1972 (Pantheon; 1974: Vintage), Roy Wagner's "The Invention of Cultures" of 1975 (reprint 1981), Johannes Fabian's "Time and the Other" (1983), and James Clifford' and George E. Marcus' "Writing Culture" (1986). This general criticism of traditional method claimed that ethnographic presentation was caught by self-reflective preconditions. An extended discussion followed which sometimes goes under the headline of anthropological postmodernism. Systems and generalizations became suspect, a fresh start from the factual bottom seemed in order. One of the discarded generalizations was Marxist "method".

Is there perhaps causality between Marx' influence and the Eric Wolf's remark on the field's "coming apart"? Sherry B. Ortner (1984) wrote a concise survey on anthropological theory since the 60s, of which the foregoing paragraphs are a condensation. She agrees with Eric Wolf (1980) that American anthropology as a "field is coming apart", losing a "shared

151 See also Rüddenklau 1981.

discourse", a shared set of terms, a shared language (Ortner, at 126). However, in two regards Ortner sees a new beginning: a concentration on "practice" (for this aspect she quotes Pierre Bourdieu, Marshall Sahlins, Antonio Gramsci, Michel Foucault, Anthony Giddens, Bruce Kapferer, Jack Goody and others), and a concentration on reorientation in history.[152] One form of practice is process (Sally Falk Moore 1978).[153] (On French post-modernity see Ch. 11, below). In a steadily broadening line of thought, culture change (see Chapter 5 VII.) and, derived from this, "culture in flux", certainly were ideas behind "culture as a process" and finally "practice".

7. German Historische Anthropologie

Historical Anthropology is a term with many meanings. Also recent history of biological anthropology uses it. Being considerably older, German Historical Anthropology might be seen as a precursor of the crisis after 1974. In Germany, Historical Anthropology *(Historische Anthropologie)* became a field of research that utilizes historical data as quasi-empirical material, thus preventing undue generalizations and categorizations. In this sense it has already been mentioned.[154] History became an empirical study object for cultural anthropology because the disadvantage of merely classificatory, non-empirical work became obvious. In order to address this flaw, some "historical anthropology" however entered the scene of a largely speculative, "philosophical" anthropology. There are several serial publications and a number of monographs and collective works. The relationship to strictly empirical ethnographic research and its ethnological and cultural anthropological evaluation has to my knowledge not yet been systematically studied.[155]

8. Modes of thought, "mind-sets", "world views", "mentalities", others

In order to get a better sense of the about 10 000 cultures thatv are estimated to have existed or to exist on this planet, a grouping according to culture-defining modes of thought *(Denkarten)* has proven to be useful for anthropological study. Whereas the older anthropology was satisfied by dividing all cultures in just two groups, developed and primitive,[156] modern anthropology accepts a larger number of modes of thought to which the several cultures can be assigned. In earlier publications, the proposal was made to distinguish at least the following cultural modes of thought:

(1) pre-axial-age modes of thought (synonymously: animism in the wide sense);
(2) Hinduism;
(3) Buddhism, sub-divided into Hinayana and Mahayana Buddhism;

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152 More on Ortner and Moore, see III., below. "Practice" is becoming a key word in neighboring sciences, too, Riesebrodt (2007).

153 See Ch. 1 II.1.a.

154 See text near footnote 93.

155 A good biographical survey: Julika Funk, Focus: Anthropology, Historical Social Research – Historische Sozialforschung, vol. 25 (2000), No. 54–138; a collection of articles: Wolfgang Fikentscher, Herbert Franke u. Oskar Köhler (Hrsg.), Entstehung und Wandel rechtlicher Traditionen, Institut für Historische Anthropologie, Band 2, Freiburg i.B. 1980; two modern works: Wolfgang Reinhard, Lebensformen Europas, eine historische Kulturanthropologie, München 2004: C.H. Beck; Wolfgang Reinhard & Justin Stagl (eds.), Menschen und Märkte, Studien zur historischen Wirtschaftsanthropologie, Veröffentlichungen des Instituts für Historische Anthropologie Vol. 9, Vienna, Cologne & Weimar 2007: Böhlau.

156 Lévy-Bruhl, H., La mentalité primitive, Paris 1922: Alcan (English translation: Primitive Mentality, New York 1966: Beacon Press); idem, Les fonctions mentales dans les sociétés inférieures, Paris 1951: Presses universitaires de France.

(4) the Greek Tragic Mind which, in combination with Judaism and Christian traditions, developed into modern "secular" Western thinking;
(5) Islam; and
(6) modern totalitarians.[157]

157 Mainly in W. Fikentscher (1995/2004); also W. Fikentscher (1987). The "founder" of the anthropological sub-field of modes of thought was Henri Lévy-Bruhl who in 1922 published a much-cited book on primitive mentality. For about thirty years, Lévy-Bruhl was virtually the only source to address when an anthropologist wanted to study culture-comparative thinking. Then, the mid-fifties of the last century produced more recent material which increased over the years. The characterization "primitive" was gradually dropped in anthropological discussions of mentalities. Instead of "primitive," newer terminologies used the qualifications "early," "animist," "primal" (in comparative religion), "natural," "original", or "culture-specific." Also, other names were used to replace mentality, such as thinks-ways, frames of thought, thought-ways, worldviews, mind-sets, mindscapes, thought patterns, etc. Presently, all these terms are in use for essentially the same concept, with a preponderance of the designation "modes of thought". Cultural modes of thought are manners of thinking which are typical for a specific culture, as a middle type (W. Fikentscher), not as an ideal type (M. Weber). Departments of anthropology frequently offer classes or seminars on modes of thought, such as Yale where Harold Scheffler made this field a regular course.

Modes of Thought are not identical with religions. There are far more religions than modes of thought. Of course, there is an interactive connection between modes of thought and religions, as with other cultural traits and copmplexes such as education, traditions, social habits, and etiquette. A non-exhaustive list of anthropological writings about the modes of thought includes (in historical order):

Lévy-Bruhl, Henri. 1922. La mentalité primitive. Paris: Alcan (several reprints and translations into other languages; Lévy-Bruhl wrote a number of articles and books on this subject).

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9. New developments in Europe. Collections

In Europe, Ina-Maria Greverus (1978; 1987), wrote on anthropology of "everyday life", and J. Stagl (1974) did a study on cultural anthropology and society (see also the contribution to F.R. Vivelo (ed.)). Other German works concentrated on summaries and surveys (W. E. Mühlmann and Ernst Müller 1966; W.E. Mühlmann 1968; H.G. Gadamer and P. Vogler 1972/73; E.-J. Lampe 1985, 1986; Schott 1992; H. Fischer 1992). Roland Girtler (1979) included a description of methods in his survey on anthropology. Wolfgang Rudolph (1973) redefined the position of ethnology in the field of sciences and, together with Peter Tschohl, wrote a short systematic treatment of anthropology (Wolfgang Rudolph/Peter Tschohl, *Systematische Anthropologie* (1977). Eugen Lemberg (1977) covered the anthropology of ideological systems. Hans G. Kippenberg and Brigitte Luchese edited a work on magic and the related problems of the understanding of the thinking of others (1978). Wilhelm E. Mühlmann (1904–1988) authored *Geschichte der Anthropologie,* Bonn 1986.

The Dutch author Anton Bock published a book on anthropological "perspectives" (1978) which also appeared in German (1985). Karl-Heinz Kohl's modern, redefined concept of ethnology (1993) has already been mentioned. In his book, German ethnology now takes a step into the direction of British-American-French-Dutch socio-cultural anthropology. In France, Norbert Rouland (1988, 1990, 1991) offers profound introductions. The survey shows that the present tendencies focus on overview and specialization. A general statement of some validity is that the present European situation is – in disregard of the British-American compromise – characterized by a tension between a historical-comparative and a functionalist, and moreover between a materialist and an ideationalist approach.

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Hinz, Manfred O. and Helgard Patemann, Progress and Self-created Modernity: Two Concepts Discussed, Paper presented at the Conference on 'The Concept of Progress in Different Cultures', Windhoek, Namibia, 10–11 September 2004 ("frames of thought").

10. Anthropological philosophy. Anthropological theology

All schools and literary traditions of anthropology mentioned so far claim to work on an empirical basis (*cf.,* Redfield 1926). This does not apply to what is erroneously called "philosophical anthropology" or, in the language of its country of origin *"Philosophische Anthropologie"*. In the German tradition, for reasons explained above, anthropological work became focussed on *Völkerkunde* (of non-literate peoples) and physiological anthropology.

But there also grew another "philosophical anthropology", exemplified by the works of Oswald Spengler, Wilhelm Dilthey, Georg Simmel, Max Müller, Max Scheler, A. Portmann, Hans Leisegang, Werner Sombart, J. v. Uexküll, Helmuth Plessner, Arnold Gehlen (see Elfriede Üner, Der explizite und implizite Diskurs zwischen Max Weber und der "Leipziger Schule" – ein Arbeitsbericht, in: Karl-Ludwig Ay & Knut Borchardt, Das Faszinosum Max Weber: Die Geschichte seiner Geltung, Konstanz 2006: UVK, 219–239, 234); and in our time H. E. Hengstenberg, W. Kamlah, Walter Schulz, G. Haeffner (2000), W. S. Haas, E. König, D. v. Hildebrand, Erich Rothacker (1966), Walter Ehrlich (1957), Walther Bruning (1960), Hans Blumenberg (1966/1974–1976, 1986a, b); G. Cronk (1987), W. Pannenberg (1983, 2004), O. H. Pesch 1983), G. Langemeyer (1995), G. B. Langemeyer (1998), W. Broeker (1999), L. Scheffczyk (2001), Ch. Wulf (2004), G. Weiler (1994), N. Koopman (2005), Hans Ryffel and E. J. Lampe (some remarks: Fikentscher 1977a, 41f.); see also van Vucht Tijssen 1989, and the contributors to Gadamer/Vogel (eds.), vol. III and IV.[158] Among the aforementioned authors, there are several theologians, and their anthropologies tend to aim at religious statements: Haeffner, Pannenberg, Pesch, G. Langemeyer, Broeker, Scheffczik, Ch. Wulf, G. Weiler, and N. Koopman.

Anthropologists of religion are William Robertson Smith (1846–1894) and Adolf E. Jensen (1899–1965). Jensen wrote *Mythos und Kult bei den Naturvölkern* 1951; his *Kulturmorphologie* is related to the studies of Leo Frobenius, see above.[159] Recent theological anthropologies have been authored by Wolfhart Pannenberg (1968, 1983 and 1995), Otto Pesch (1983), and Gerd Haeffner (1989, 2005).

In general terms, authors of anthropological philosophy and theology – designations to be preferred to philosophical or theological anthropology – are interested in philosophical subjects such as the questions of truth, creation, humanity, environmant, morals, and aesthetics, and their respective epistemologies, to be investigated from an anthropos-(man-) centered vantage point. This investigation is always speculative, not empirical.

For example, Hans Blumenberg, a contemporary author of anthropological philosophy, asks for "basic patterns of rationality in history" *(Grundmuster der Rationalität in der Geschichte)* and assumes that the "life share" of world experience is shrinking (1966/1974–1976, 1986a: 3: "slimmed-down experience" (abgemagerte Erfahrung)). But his statements are made on the basis of purely western, ethnocentric thinking and lack any culture-specificity. So are his concepts, for instance, of time. For empirical culture-comparing anthropology, this has little relevance.

Günter Dux, to mention a second name of modern German anthropological philosophy, engages in culture comparison (1978, 1982, and especially 1989), *e.g.,* with regard to the time concepts of the Maya, Hopi, Judaic, and Chinese cultures. However, from an empirical approach to anthropology, it is not easy to follow Dux' proposition that there is a "development to higher degrees of autonomy, and hereby freedom" (1982: 51), a "virtual line of further development of primitive forms" (1982: 104), of a "decrease of primitivity by self-reflexion"

158 See Ch. 1 II 2.b.
159 See II. 2. b. above.

(1982: 107), of "history as a learning process" (1982: 248), of a "behavioral logic *(Handlungslogik)* within the anthropology of time" (1989: 36ff.), or a "developmental logic of the structures of history" (1989: 368).

Already Max Weber speculated that there is a development from the dark, mystic, and primitive up to structure, insight, logic, and rationality. He never offered a proof for this – typically gnostic – assumption. This is not to say that anthropological philosophy or theology are a futile exercises. They have to say a lot about the essence of humanness, ontologically, epistemologically, and as contents of a value-guiding belief system. But they should not be confused with anthropology as a social science.

For many years, some of these philosophers and theologians remained out of touch with other Western European and American anthropologists. Consequently, their work stayed insular. In the United States, Edgar Bodenheimer (1908–1991), a legal philosopher trained in the civil as well in the common law, made German philosophical anthropology letter known. A rather rare example of an autochthonous US-American "philosophical anthropologist" is George Herbert Mead (1934, 1938; on his "objective relativism", see, *e.g.,* Cronk 1987; D.L. Miller 1973). Another example may be the circumspect study by the economist Werner Sombart "Vom Menschen: Versuch einer geisteswissenschaftlichen Anthropologie", 3rd. ed. Berlin 2006: Duncker & Humblot.

Ernst-Joachim Lampe has edited a work which emphasizes the distance between German "philosophical" and other anthropologists (1985a; see also Heyen, 1984, on Ryffel). In his definition of legal anthropology, Lampe (1986) sees anthropology as a philosophy that draws its strength of reasoning from natural sciences, and particularly from evolutionary theory. For Lampe, legal anthropology is therefore a part of legal philosophy which operates not only as a metaphysical theory but also as a legal science. This science is understood as a methodologically reviewable interrelationship between law and the natural and cultural organization of man. However, in Lampe's remarks the alternative of empiricism and non-empiricism remains open, and it is hard to conceive that it can be left this way. His attempt to bridge the gap is noteworthy, but incomplete.

It follows that anthropological philosophy ought rather be regarded as a branch of philosophy, sharing its methodologies with philosophy. Philosophy, unlike social science, proceeds by way of non-empirical generalizations and particularizations despite the fact that its data may have been experimentally obtained in natural sciences. Starting with empirically obtained material does not change anthropological philosophy into an empirically reasoned science and therefore a social science, however. Still, this does not mean that anthropological philosophy should be excluded from anthropological teaching The point should be made that this approach cannot produce cultural-anthropologically valid statements. The same may be said about anthropological theology: it deduces from models, albeit holy ones. But it does not offer empirically researched (for example observation-based) statements of truth, moral theory, or esthetics.

On the other hand, it is permitted, even necessary, to point out that different cultures have different conceptions of time and of space so that the philosophical debate is vain unless culture-specific, and philosophical generalities about time and space are open to re-examination; to say that, from an anthropological point of view, government in Paul's letter to the Romans, chapter 13. 1–7, is the government of a Greek or Roman city state or province and means accountable officials of a superadditive unit ("the whole is more than the sum of the parts") with membership rights and duties, whereas government in Luke 22, 25–26 means an oriental despote under the chiefship model (see Chapter 9, below); that Father Wilhelm Schmidt's, S.V.D., plea for an original monotheism neglects the pre-axial-age concept of a *deus otio-*

sus;[160] that the charity performed by the Good Samaritan was a hellenistic culture trait, and thus the parable might have been an offense to pious Jewry and is only reported by Paul/Luke, and not in the other gospels;[161] that Psalm 121, 1–2 contains a criticism of the mountain spirits who are to be placed under God the Creator's rule (because the first words here are probably a question).

Religious texts should be open for historic, linguistic, cultural, and also anthropological research. This does not impair speculative sciences which deductively argue from preconceived beliefs, models, revelations, visions, world views etc., each in their own right. Rather, empiricism controls and thereby even reinforces speculative deduction.

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Chapter 3: Basic concepts

Dealing with basic concepts of legal anthropology in Chapter 3, the presently much discussed (and practically important, see Chapter 13 V. 1.) a focus is on the issue of ethnicity and cultural identity. Furthermore, Chapter 3 offers a freshly organized presentation of what may be called the issue of civilizational stages, in preparation of Chapter 9 where correlations between organizational, economical, religious and thought-modal traits are discussed. In Chapter 3, definitorial and functional aspects of basic concepts of anthropology are separated. For example, big man society, lineage, ramage, and clan structures are presented as such, and not as forms of government (unlike Bohannan 1992). Also, we will look at religions and other normative belief systems, and base this discussion on Leopold Pospíšils distinction between religious types and total religions. As a new component in this context, the concept of the so-called "axial age" asks for closer consideration.

I. Culture and Cultures

Culture is an attribute of a society. Thus, a society *has* one or more cultures, and a culture *characterizes* or *shapes* society. One can speak of of both a society's culture and cultures, and of a culture's society and societies. This is important for understanding the multiplicity (or: plurality, pluralism) of cultures,[162] and correspondingly of societes.[163] One and the same person can belong to more than one culture, and to more than one society. For example, a student may belong to the *levels of cultures* of her campus, its city, that city's country and that country's part of the world (Harvard, Boston, US, Western mind-set), as well as to *vertically* neighboring or for other reasons adjacent cultures (home country Iran, guest country Germany, scholarship donor Europe). The societies sheltering these horizontally or vertically multiple cultures may again be in multiple ways composed (see II., below).

1. Definition

At this point, a host of issues involving culture and cultures arise. One of them is the definition of the concept of culture as applied by mainstream cultural anthropology. Yet, finding a mainstream is not easy. Specialists have listed more than 100 definitons of *culture.* Still most frequently quoted is Edward B. Tylor's definition of 1881: "Culture is that complex whole which includes knowledge, belief, arts, morals, law, custom and other capabilities and habits acquired by man as a member of society."

A cautiously modernized version would include more attributes than those listed by Tylor, It would reflect time, and try to integrate biological patterns of regularity. The definition would read then as follows: Culture is the attribute of a society that refers to the patterns of conduct of its participants – traditional but open to change – in situations concerning knowledge, belief, art, morals, law, custom or other mentally reflected themes.[164]

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162 The theory of the plurality of cultures is of basic importance to the concept of culture, see Chapter 1 I, above, and in this Chapter I. 2., below. There follows a brief summary in the present context of defining culture.

163 For details, see W. Fikentscher (1995/2004, XXIV ff., esp. XXXVIII–XL; 23 note 11; 25 f., with the authorities. The definition distinguishes between culture and society, but it links these two concepts together in a way similar to Tylor's (1881, see p. 95, infra), Murdock's (1932), Redfield's (1955, at 13), and Pospíšil's (1986 b). It retains the "activist" (conduct) element discernible in most of the definitions of culture.

164 W. Fikentscher, MoT 2 d, 23, The word "social" preceding the word "situations" is omitted here because "society" has been already mentioned at the beginning of the sentence and, to be precise, the rather clumsy phrase "social or societal or both" would have to be used.

2. Holistic sense of culture

Cultural anthropology applies the term "culture" in two distinct senses: Used "holistically", that is, in the singular, it describes the ability to correcht nature, an ability generally assigned to human beings and not animals. A being can be said to have culture when it is able to say: I am aware of nature, and can do without my natural drives. I can even act against them and behave non-natural by controlling nature. Culture in this sense is used in the singular. Its opposite is nature. The decisive line between nature and culture is crossed when the being whose culturability we test, becomes aware of nature and can distinguish it from what it plans to do. *"Ich kann auch anders"* (I can do it in a manner different of what my environment including myself tells me) generates culture. This "I can do it differently" opens the myriads of possibilities, the explosion of variations,[165] that gives human evolution a distinct quality.[166] Ultimately, it seems to be an issue of quantity according to which culture can be distinguished from nature: the quantity of developmental possibilities. This is not startling because the massiveness of cultural behavioral possibilities compared to natural ones amounts to that "turn from quantity to quality". Some may call it narrow, but a distinction between the two remains.

Culture in this sense of opening the field for a-natural behavior is sometimes called the holistic concept of culture.[167] It tries to encapsulate the whole of the human condition across time and space and as expressed in its livelihood. Holistic (from Greek; holos = whole, encompassing) is a culture (in the singular) because it encompasses human behavior, feelings, relating to the environment, sense for justice, religion, and beauty, etc.

Other authors opt for different tests to define culture. Paul Bohannan thinks that culture exists wherever there is use of tools and meanings.[168] However, Darwin's Galapagos finches use thorns and little sticks to harvest worms, and apes use all kinds of tools to get food, or attention and respect.[169] The use of tools would include many an animal in the realm of culture. Bohannan adds meanings which need to be active in the human mind to create culture. He ties these meanings to symbols, and defines symbols as carriers of meaning.[170] According to Bohannan only human are able to understand the meanings of symbols and operate with them.

However, this second criterion would seem to include finches and apes, because symbols are well observed by some animals, often more intensely than by humans. When a cow sees a stick in the hand of the farmer, it knows that it has to find its way in a certain direction, for example the stable. A scare-crow is a well observed and obeyed symbol for "don't gather your food here, or else I'll get my rifle." Understanding meanings of symbols cannot be a relevant culture test. Meanings independent from nature's bounds is what define culture, but then it is

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165 Murray Gell-Man, The Quark and the Jaguar, London 1994: Abacus, p. 70f. A discussion: Cultural Complexity, SFI Working Paper No. 98–10–087, Santa Fe Institute, Santa Fe, New Mexico 1998 Note that Gell-Man concludes a change of quality from an increase of quantity. A similar view is expressed by Konrad Lorenz' who speaks of a "fulgurization", of a flash-like increase, of variation.

166 Bohannan (1991), 11: "Culture is what makes human animals human."

167 Kottak (2004), 4, 28, 34; see also Thomas Glas, note 255, below.

168 loc. cit.

169 de Waal (1991).

170 Op. cit. 9, 14, 22. Symbolist cultural anthropology is a line of argument in itself, see, e. g., Clifford Geertz (1973); Victor Turner, The Forest of Symbols, Ithaca, NY 1967: Cornell Univ. Press; idem, The Ritual Process. Structure and Anti-Structure, Ithaca, NY 1977: Cornell Univ. Press; Jan Assmann, Aleida Assmann & Chr. Hardmeier (eds.), Schrift und Gedächtnis: Beiträge zur Archäologie der literarischen Kommunikation, 2nd ed. Munich: Fink (1sr ed. 1983); Jack Goody, The Logic of Writing and the Organization of Society, Cambridge 1986: Cambridge Univ. Press.

no longer the meaning but the independence from the evolutionary paths of nature that sustain the difference.

The chosen definition of culture in the holistic sense uses the word *patterns* in order to stress the point that culture involves some ethological regularity. On the other hand, culture cannot be restricted to traditions but is always open to change.[171] The inventory of cultural themes ("knowledge, belief, … etc.") is taken from E.B. Tylor's classical definition, but is enlarged by the open (yet to a certain degree self-defining) concept of "other mentally reflected themes" to underline the fact that there may be more themes than those listed by Tylor that comprise the contents of culture. The term "mental … reflect(ion)" is included because culture is certainly involved in the general thinking patterns of humans. Of course, one can speak of a materialistic culture, or of material components and fundamentals of culture. However, culture always involves its participants' reflections upon the material conditions under which they live. This is what is meant by saying that culture involves thought (and therefore, also in view of plurality and variability, *modes* of thought).

While everyone needs her or his culture as a spiritual homeland, actual reflection by every participant in a culture is obviously not required, but it is important that themes of culture be somehow reflected as a postulate for the definition.[172] The fact that themes comprise the components of the definition demonstrates the limiting nature of cultural decisions: culture carves a set of themes out of the almost infinite number of possibilities of conduct, for example in the case of taboos.[173]

By limiting cultural possibilities, the resulting selection of themes also calls for a corresponding emphasis. The above definition of culture avoids the notion of the individual because of the great disparities in that concept within various cultures; instead, it uses the neutral term *participant*. "Participant" and "society" are not unrelated, but rather the participant is involved in social situations. In a simplified form the definition can be restated as follows: Culture is a set of reflected limitations of human conduct related to a particular society. Culture regulates human conduct in three respects: Every culture has to provide rules to regulate incest, the "big man" problem (rich and influential vs. poor and "low class"), and the relation to the supernatural. Not a single culture has been observed that does not deal with these three basic cultural problems.[174]

Cultures can be compared. This means that there have to be criteria for comparison and they include categories of which cultures are composed. Otherwise no comparison is possible. The theory that deals with these components of cultures is called the Structures of Cultures. It will be discussed in connection with the attributes of culture in Chapter 5 I. below.

3. Plurality of Cultures. Subcuktures. Counterculture

A second way of using the word culture is to speak of cultures in the plural. Giving the word culture a pluralist sense, changes its meaning. While the opposite of holistic culture ("culture in the singular") is nature, the opposite of culture in the plural is society (for the concept, see II., below).

There are authors who prefer merely to speak of *cultures* instead of *culture.* The leading advocate of the multi-cultural approach is Franz Boas (1858–1942), who, in reacting to cultural

171 Murdock 1956; Bohannan 1994.

172 On the themes of culture, see MoT (1995/2004), 24. and Chapter 5 I below.

173 See W. Fikentscher (1975 a), 60–79; (1977 a), 195f.; Bourdieu (1987); Geertz (1973); Bischof (1985), 576; Ortner (1984), 152; B. Whorf's similar view on the role of language, see text near note 131, above.

174 W. Fikentscher (1995/2004), note 12.

evolutionism, insisted on the equality and comparability of all cultures despite the fact that similar cultural traits may have in reality developed into various cultures for different reasons. Boas and his followers thus opened the way for cross-cultural comparison. Their *Erkenntnisinteresse* was to promote cross-cultural understanding and tolerance. For the "Boasians" Leslie Spier, R.H. Lowie, Ruth Benedict, Margaret Mead and others, cross-cultural data collection is an important part of the anthropologist's work. This multi-cultural program of the Boas school points to the importance of the various modes of thought underlying culture.[175]

With the widespread acceptance of Boas' comparative approach, speaking of the *many cultures* has become commonplace. No anthropologist would deny that in history and presence about 10 000 cultures could be identified and compared if somebody would attempt to solve this superhuman task. Many authors speak of culture *and cultures* in a combinatory way. Examples are Ruth Benedict (1887–1948) combines plural and singular even in the title of her classic "Patterns of Culture" (1934). Ralph Linton (1893–1953) uses the *Gestalt* ("configuration") idea which Benedict applied to *cultures* to identify "personality configurations" (1945); Edward Sapir (1884–1939) holds that culture is intrinsically the organization of feelings and ideas which constitute the individual, and that therefore the true *locus* of culture is in the interaction *between* individuals (1924). George Peter Murdock (1887–1985) follows Herbert Spencer (1820–1903) and Alfred Louis Kroeber (1876–1960) in conceiving of culture as something "superorganic", a tentatively equilibrated open system of traits and institutions (1932). A. F.C. Wallace (1923) holds that culture is not shared values, motives or goals, nor even cognitive patterns, but a shared contact "making possible the maximal organisation of motivational diversity" (1970, 23). Melville Jean Herskovits (1895–1963), whose definition of culture as "the man-made part of the environment" (1949: 17) is so broad that it almost turns the holistic approach into its opposite. Herskovits was mainly interested in the concept of separate *cultures.*

A purely holistic approach is hardly able to justify research into characteristics of cultures (such as, e.g., the modes of thought that characterize the various cultures). One should envisage a compromise between the holistic and the multi-cultural approach to make the study of culturally defined traits and complexes worthwile. For example, Leslie Alvin White proposes to separate the role of culture (of mankind) as a whole, serving and promoting the welfare of the individual, from specific aspects of this whole, that is, the cultures of the various tribes and peoples. White's proposal to build a complete field of "culturology" upon this distinction (1968) did not find many followers, however. In legal anthropology, Rüdiger Schott (1985) demonstrated the immutability of legal culture inherent within the multitude of legal cultures, thereby avoiding the strict opposition of culture and cultures. Clifford Geertz (1973) thought that culture should be defined objectively, as a phenomenon that exists in the outside world and not merely in human minds. This approach, too, combines the holistic and multicultural attitudes. The same result holds true for those theories which deal with "kinds" of culture, *e.g.* Oscar Lewis' "culture of poverty" (1951, 1959), or what may be called "constituents" of culture. Some types of such "constituents" are worth mentioning: "cultural traits" (Boas: traits similar in different cultures for different reasons); "traits of cultural generality" (M. Sahlins); "cultural things" (Marvin Harris 1964: 7); "cultural subsystems" (Meyer Fortes 1940, 1953); "cultural universals" (B. Malinowski, R. Linton, M. Mead, I. Eibl-Eibesfeldt), and "culturally built-in structures" and "time-scales" (M. Gluckman 1954, 1955). The extension of research into the kinds and constituents of culture is an attempt to extend cultures beyond their limits, for example, to establish "culture areas" (Clark Wissler 1927, 1940).

175 A modern approach: Greverus, esp. at 71 ff.; a good survey: Bohannan and Glazer 1988).

Speaking of a multitude of *cultures* promotes a basic insight into what *culture* means: Developed by Leopold Pospíšil (1971/1974/1982 a/1987), the theory of the plurality of cultures implies that culture – and society – cannot be fixed to a certain level or degree of human amassment, for example the nation state. Rather it that cultures – and their societies – can be found at various levels of social or political integration. John Griffith's criticism (1986, 5) of this theory of cultural multiplicity overlooks that, for Pospíšil, culture and society share this multiplicity (Rouland 1988:85). One may speak of, for example, a *world culture,* of a culture of the African or European continent, of the Nuer people, of the Swiss, of the canton of Neuchatel, of the city of Fribourg, of the University of Fribourg, or of the Faculty of Law at the University of Fribourg. The Human Relation Area Files list about 330 cultures on this planet (see Chapter 15 II., below). Most of these cultures belong to the "Nuer" or "Swiss" level in the foregoing system. Cultures on this level form the main interest of anthropologists, ethnologists, and ethnographers. Then there may be a *world society,* an African society, the Nuer society, a Neuchatel society, and so on. Cultures and societies at various levels have different degrees of consistency, but this does not invalidate the overall theory. Cultural themes may be strong on one level and weaker on others: the impact of a mode of thought is a cultural theme. One important mode of thought, for example, the Marxist, has had a relatively insignificant impact on the shaping of what may be called "the" Marxist culture or "the" Marxist society, but it has had considerable influence on the more integrated levels *e.g.,* Russian society, and also Belorussian society, or on the cultures of the city of Minsk, or of the Tübinger Stift (a Protestant dormitory at the University of Tübingen). One of the many advantages to the theory of the plurality of cultures is that it provides a firm basis for the study of culture change, the transfer of cultural themes, and acculturation. Thus it seems that Marxism, for example, has been much more enculturated in some student dormitories of the Western hemisphere than in all Russia. The above theories also serve to trace cultural influences.

Against the background of Boas' opinion that every culture stands on its own and exists for its own sake, and Pospíšil's theory of the plurality of cultures (in this sense), distinguishing between culture and subculture, or counterculture, must be logically wrong. Sub- and countercultures are cultures, and that suffices. However, the two terms are in frequent use, in musicology more than in other social sciences, but not limited to musicology. Generally, in sociology, anthropology, and cultural studies a subculture is being defined as a group of people with a culture differentiating them from the larger, dominant culture to which they belong. If characterized by an internalized and openly expressed opposition to that culture, the subculture may be described as counterculture (e.g., Dick Hebdidge 1979; George McKay 1996; Rupa Huq 2006). The mention of "the larger" and the "sub"-culture as a culture "belonging" to another culture helps solving the problem of definition: Sub- and a countercultures are cultures in the full sense as every other culture. As such, they are exposed to cultural pluralism as every other culture, so that the rules of legal pluralism as developed above apply. If *in addition* a relationship between the two cultures shows regular and typefied tensions between large and small, oppression and being oppressed, mainstream and marginalization, overt and covert, official language and slang, average dress and "masquerade", etc., this relationship may be identified as sub- or countercultural. It is a name for a type of plural-cultural relation. The sign at the shop or restaurant door "No shirt, no shoes, no service" tells of the presence of such a subcultural relationship: the members of the subculture prefer wearing no shirts and shoes, the mainstream reciprocates by "no service". In acculturation theory, sub- and countercultures may indicate reaction (see Chapter 5 VI. 3.).

4. Modes of Thought

Modes of thought can serve to classify cultures. The 10 000 cultures which ethnographers estimate to have existed and contemporaneously exist on this planet do not live unrelated to one another. They can be formed to groups. It may fairly be said that all South and East Asian cultures are in one way or the other related to Hindu and Buddhist philosophies through their tendencies to be critical of this world and its sufferings. Western cultures have grown from the Pre-socratic and classical Greek way of looking at this world in an evolutionary and "activist but tragic" manner, in subsequent combination with the Judaic and Christian monotheisms of an active god.[176] The Islam-influenced cultures can readily be combined to the strict and non-evolutionary monotheism of Islam. Marxist cultures focus on use values as being unfit for dialog, and on the ensuing need to define them (including cost) by dictatorship of cooptative cadres, etc.

In anthropology, a mode of thought is a mind-set that connects human data perception with mentally reflected behavior in a culture-shaping way that is predominantly covert.[177]

Empirically, there are to be found ten to fifteen modes of thought behind the many cultures, using the cultures as their deployment throughout reality. Modes of thought are composed from elements. Thus, their number is not closed, rather they can be artificially invented.[178]

If a mode of thought claims world dominance, this a legitimate concern of the members of the other modes of thought as prospective victims of that claim. They are permitted to defend themselves and their modes of thought. Are there other concepts similar in content to culture and cultures which may serve our definitorial purposes here? This brings us to a discussion of identity, ethnicity (4.), and society (II., below).

5. Identity and ethnicity

The concept of identity is important for the determination of a given culture. There can be talk of a culture only when enough people identify themselves with that culture. Since culture is a core concept for anthropology, identity studies have become long since an integral part of anthropological literature.[179]

As a rule, identification – by language, religion, geography, history, ancestry, or physical traits (Kottak 84), or several of these elements – creates the ethnicity that may make an ethnic

176 See the description of the step from the Greek Tragic mind to Judaic and Christian self-and-world assuredness in Paulus, Letter to The Romans, ch. 7.

177 W. Fikentscher (195/2004), 21.

178 For more details of the modes of thought, W. Fikentscher (1995/2004); see also note 140, above.

179 A selection of recent examples: C. P. Kottak, 85–88; idem & K. A: Kozaitis; On Being Different Diversity and Multiculturalism in North American Mainstream, New York 1999: McGraw-Hill; F. Barth (ed.), Ethnic Groups and Boundaries: The Social Organization of Cultural Difference, London 1969: Allyn & Unwin; J. Friedman, Cultural Identity and Global Process, Thousand Oaks 1994: Sage; Ernest Gellner, Nationalism, New York 1997: NYU Press; Günther Schlee, Identities on the Move: Clanship and Pastoralism in Northern Kenya, Manchester & New York 1989: University Press & St. Martin's Press, reprint Nairobi & Münster 1994: Gideon S. Were Press & LIT-Verlag; idem, Interethnic Clan Identities, Ethnicity, Centrisms and Biases, 63 Afrika 591–600; idem, Wie Feindbilder entstehen: Eine Theorie religiöser und ethnischer Konflikte, Munich 2006: C. H. Beck; idem & Karin Werner (eds.), Inklusion und Exklusion: Die Dynamik von Grenzziehungen im Spannungsfeld von Markt, Staat und Ethnizität, Cologne 1996: Rüdiger Köppe; idem, in an interview by Christian Mayer, "Ethnische Pluralität löst keine Kriege aus", MaxPlanckForschung 2/2007, 39–43; see also the works produced by the *Sonderforschungsbereich* No. 586 "Differenz und Integration" under directorship of Günther Schlee, Max-Plank Institute for Social Anthropology, Halle/Germany (focusing, e. g., on nomadism), http://www.nomadsed,de/projects.html.; on the practical importance of anthopological identity for court procedures, see Ch. 13 V, 1., 2., below. – On the context of identity, ethnocentrism, and exoticism see Chapter 6, below.

group unique and different from others, seen either from the inside of that group, from the outside, or from both sides. For practical purposes, in cultural anthropology, one of these sides should be enough for "identification", but the writer should make clear the chosen point of view. As long as this is done, ethnicity and identity are parallels.

There are at least two exceptions, however: (1) Ethnicity may not be enough to justify anthropological identity. Then, identity is "ethnicity plus", and the "plus" may consist in a constitution such as in Switzerland and Belgium being countries combining several ethnic groups to a single identity, or in historical scissions such as the distribution of Germans, Italians, French, Jews, Kurds and many other ethnia over a number of countries (the diaspora phenomenon). (2) The other exception may be called "non-ethnic identities". They may be found in non-ethnic cultures, for instance suburbs, airports, stock markets, hospitals, and gas stations, or in cases of political identifications. When in 1963 John F. Kennedy said at the Brandenburg Gate: *"Ich bin ein Berliner"* (I am a Berliner), he meant to say that politically he felt to be a citizen of the artificially divided city. Ethnically he remained a national of the US. An anthropology of fan-cultures (heavy metal, hip hop, etc.) may combine both: an institution and ethnicity (cf., Erika Lee Doss 1999; Lisa A. Lewis 1992). Both exceptions show that the concept of anthropological identity may be wider than the one of ethnicity.

In his ethnological conflict research, Günther Schlee (2006, see note 179) offers an interesting theory on the correlation between ethnicity and identity: At first, for reasons of better defense, more efficient agriculture, gaining more intertribal respect, or for other reasons, an ethnic group tries to be as encompassing as possible ("we are your bone and flesh", 2 Samuel 5.1; "We are all Iroquois", Hiawatha is said to have addressed the five tribes in pre-Columbian time): The identity expands. Later, once the unit has been stabilized, a smaller in-group begins to regard themselves as the "genuine ones" among that larger entity. Descent, knowledge of rites or texts, special skills or abilities, purity standards (cf., Mary Douglas, 1966/2002, 157ff.) etc. are used to form a core group of the "real ones": The identity shrinks. Differences are increasingly asserted. Then, among the carved out "genuine" participants, an even smaller group of the "truly real ones" may attach itself to additionally invented identity attributes, and so on. Schlee here finds one of the reasons why enmity may be particularly strong between the most similar and the most intense related, while contrary to widely held opinion ethnical and religious differences as such hardly contribute to intercultural strife.

II. Society

In an anthropological context, society is the body of human beings which is composed of two elements:

(1) an agglomeration of participants, and
(2) an objective criterion (or criteria) of any sort which lend(s) commonality to that agglomeration.

For example, a population in the sense of behavioral groupings of beings (Chapter 9 I. 1., below) is a society because the haphazard agglomeration of the participants is defined by the *reason* why they are agglomerated in this way.[180] Of course, most societies will be more structured and show more inner ties than a mere population in the behavioral meaning. A society of human beings is the population within which most human behavior takes place.

180 The (extreme) example of a population in Ch. 9 I 1. are the animals that happen to be washed ashore or having arrived flying at a newly born volcanic island.

For cultural anthropology, societies are important as foundations and carriers of culture (see I., before 1., above). Therefore, most sociological definitions of society mention the idea of functioning as a carrier for further purposes. Thus, culture is the *attribute* of a *society* that refers to the patterns of conduct of its *societal* participants. The abovegiven definition combines objective and subjective elements designating culture as an attribute of society so that there can be talk of both a society's culture, and of a culture's society. By this attribution a correlative function is implied between society and culture.

In other words, *society* is the aggregate of participants within which most human behavior takes place in an either ego-related *social* or a non-ego-related *societal* contexts. This distinction between social and societal – proposed by Pospíšil – will be observed throughout this book. The distinction indicates that the composition of society is made up of social (= ego-related) and societal (= objective) structures, and it implies that the term "social" suggests some consistency and narrowness of the aggregate (a cinema audience is no social, but a societal entity).

The definition of society presented above avoids Murdock's (1932) reference to "organized" clusters because there are societies without organization (in the true sense of the word), *e.g.,* any vertical society that works without organs (*cf.* Fikentscher (1975 a) 125ff.). The word *context* is included to show that a society is the empirical framework for culture. The structural inside aspect of a society is, in anthropology, open and not defined in a special sense. Therefore concepts such classes, membership, community, collectivity etc. are not elements of the definition. These qualifications may play a role on a more specific level, though. Society is culture's frame, in a twofold sense: projected horizontally, the frame renders a culture *diverse* which results in in a culture's diversity; projected vertically, the frame lets a culture appear manifold which results in a plurality or multiplicity (Pospíšil) of a culture.

The separation of society *(Gesellschaft)* and community *(Gemeinschaft),* the latter characterized by personal links as in a family or club, is anthropologically irrelevant because it has no culturally categorical meaning.[181] Again, on a more specific level, for example in ethnological studies of family or tribal sodalities, the differentiation may occur in connection with other cultural traits. But as such *society vs. community* is not an anthropological issue.

Durkheim's importance for sociology follows from his assumption that there are inherent general rules that govern societies, similar to behavioral universals in humans. For Durkheim, these laws of societies have to be discovered and studied for the interpretation of societies. Many sociologists pay tribute to Durkheim's thinking by using models. Anthropologists would say that such rules and models lack empirical verification. Maybe, herein lies the most incisive difference between sociological and anthropological work.[182]

III. Civilization. Civilizational stages

Civilization is a term which in anthropology is generally used for designating a certain kind of culture. A civilization involves urbanization, regardless of urban development or form (Max Weber: "Western, oriental, archaic"; see, however, the broader use of the term by Redfield (1955): civilization as a composite of a "great" and a "little" tradition). A city is defined by its

181 Cf., Ferdinand Tönnies, Gemeinschaft und Gesellschaft: Grundbegriffe der einen Soziologie, 1st ed. 1887, 2nd ed. Berlin 1912, (9th ed.) Stuttgart 1981: Enke, Ausgabe der Wisenschaftlichen Buchgesellschaft. The important but controversal book is not free from a German mysticism of internalized "community" (instead of technical-political society).

182 Similarly, Pospíšil (1971), who compares Durkheim's sociologal rule mysticism with Otto von Gierke's group will mysticism.

reliance on an agricultural hinterland, because not all supplies needed for the maintenance of city life can be produced by the urban dwellers alone. A civilization therefore implies a certain division of labor between the city population and the inhabitants of the rural surroundings (Pospíšil).

Civilization can be used in a positive sense ("a high civilization", "civilized people", "civil (or civilized) society", "les principes généraux de droit reconnus par les nations civilisées" = art. 38 Statute of the International Court of Justice, The Hague, etc.). Civilization can also be used in negative, pejorative sense ("allergies and diabetes are a civilizational diseases"). Any judgmental connotation of the words "civilized" or "educated" as opposed to "uncivilized" and "savage" is of no anthropological interest and is avoided here, as is the term "primitive" (see, however Lévy-Bruhl 1922, 1927; Hallpike 1979). Every civilization has its intrinsic educational and other values. Also, for studies of history, the concept of civilization may remain indispensable.[183]

The word can also be used in a neutral valuation ("urban civilization includes separation of labor", "clash of civilizations"[184]). In this book, civilization is used neither with a positive nor with a negative connotation, but in a neutral, descriptive sense. This requires a substantive explanation of what "civilization" is to mean. In Latin, *civis* is the citizen, and he lives in a *civitas,* a city. The adjective is *civilis,* civil. In anthropology it is most useful to tie the concept of civilization to city culture. Therefore, applied in a neutral, technical sense, civilization, for anthropological purposes, should not be separated from urban culture. This does not imply that forager and farmer societies are uncivilized because every positive or negative meaning of "civil" is excluded.

The link of civilization to city life merits for a look at the theories of *civilizational stages.* Almost every ethnologist and cultural anthropologist uses her or his own concepts and terminology of what here is called the theory of civilizational stages. There is neither consent on such stages, nor has been – as far as can be seen – a comparative study on the theories brought forward up to now. The theory of civilizational stages could also be discussed in the context of evolutionism (see Chapter 2 II). But one need not believe in evolutionist allegations such as diffusionism in order to observe and state some cultural development in the history of mankind. Since statements of stages in the cultural development of mankind are usually being discussed in terms of "less civilized" to "more civilized" – a linear thinking which is quite outmoded –, it may be permitted to mention this discussion of developing civilizations in the present context of "civilization."

For dedicated evolutionists, a step-by-step evolution of human beings is centerpiece of their science. They could be called the *one-phase* or *no-phase* theorists because they believe in one continuous growth. Various proposals have been made, but none stuck, and one-dimensional evolutionary cultural anthropology – whether diffusionist or weaker in form – faded away around 1900.[185] Theoretically, both followers of the American comparative school ("Boasians") and British and other functionalists and social anthropologists ought to deny any evolution: The first oppose evolutionism (at least in principle), and the second any diachronic sequence. However, practically all anthropologists concede the influences of civilizational developments, certainly not monocausal or rule-governed, but still in a practical, empirically

183 Arnold J. Toynbee, A Study of History, 12 vol. 1934–1954; Jared Diamond, Guns, Germs. And Steel, London 1998: Vintage.

184 Samuel P. Huntington, The Clash of Civilizations and the Remaking of World Order, New York 1996: Simon & Schuster.

185 See the description of the schools of cultural anthropology in Chapter 2, above.

grounded sense. It can simply not be denied that the scratch plow preceded the turning plow, not vice versa, that the latter was technically developed from the former, and that this had substantial demographic importance because many more people could be fed. Here follows a survey on the theories on civilizational development in phases. Completeness cannot be achived, neither can justice be done to every author. Guesswork and speculation prevail. One can observe that authors indeed vary in the the number of civilizational steps, or stages, from *two* to *four.*

Few authorities see only *two* steps. Most writers apply a tripartite system of civilizational development. And an important group distinguishes four civilizational stages:[186] Wilhelm Schmidt (1868–1954), the renowned religious anthropologist, is one of the few who content themselves with two stages, *Altvölker* (old peoples) with their *Urkultur* (arch-culture), and modern peoples, and he distinguishes only these two steps to support his theory of original monotheism.[187] Richard Thurnwald (1869–1954) who invented the term *Wildbeuter* (forager) contrasts this type of early man with *Hochkulturen* (high cultures) of later periods. He was careful not to firmly typify phases in between and rather sees a broad field of non-linear evolution and development between the one end and the other, being reluctant to give the stage in between a fixed conceptual name.[188] Another author who considers merely two stages is Lucien Lévy-Bruhl (1857–1939); he introduced the concept of primitive *mentalité* as opposed to modern *mentalité.*

Most cultural anthropologists identify *three* stages. Adolf Bastian (1826–1903) distinguishes nature peoples *(Naturvölker),* half cultures (*Halbkulturen,* basic organization, but no script), and cultured peoples *(Kulturvölker).*[189] Henry S. Maine (1822–1888) separates family societies, tribal societies, and territorially defined ("state") societies. Edward B. Tylor (1832–1917) distinguishes savagery, barbary, and civilizations.[190] Many anthropologists follow Tylor's tripartite system.[191] In the literature of civilizational stages, one of the most frequently quoted theorizers (besides E.B. Tylor) is another tripartitionist, V.(Vere) Gordon Childe (1892–1957).[192] He distingushes foragers (hunters, gatherers, and fishers, characterized by the attribute that they all do not reproduce in the full sense- but see note 193 below); reproductionists (animal breeders, nomadic or sedentary, and early farmers such as "horticulturalists"); and those who – instead of doing all kinds of work for their livelihood – separate labor and through this become both specialists and city founders and dwellers. The turn from foraging to reproducing is called by Childe *neolithic* revolution (around 12000–10000 years ago), the turn from reproducing all items of livelihood to separation of labor and flocking together in cities *urban revolution* (around 8000 years ago). As a general compass, Childe' tripartite scheme is useful because it combines livelihood and form of society.

It is applied in this book (more in Chapter 5). Regarding the term civilization this means it will be restricted to periods of labor-separated country and urban life. For the theories of so-

186 See also Chapter 2. II. 1 ff.

187 In his work *"Der Ursprung der Gottesidee"* (The origin of the idea of god), 12 vol, 1926–1956; on W. Schmidt and his theory: W. Fikentscher, Deus otiosus – Deus activus: Religionsanthropologische Überlegungen zum Thema Gott und Zeit, in: Gruber, Hans-Günter und Benedikta Hintersberger, Das Wagnis der Freiheit: Theologische Ethik im interdisziplinären Gespräch, Festschrift Johannes Gründel zum 70. Geburtstag, Würzburg 1999: Echter, 69–87.

188 R. Thurnwald, *"Die menschliche Gesellschaft in ihren ethno-soziologischen Grundlagen"* (The human society in its ethno-sociological foundations), 5 vol., Berlin & Leipzig 1931–35: de Gruyter.

189 See Ch. 2 II.1.c., above.

190 See Ch. 2 II.1.d., above.

191 Brigitta Benzing, Edward Burnett Tylor, in Feest&Kohl (2001), 492–497, at 497; Ch. 2 II.1.d. and 2.e, above.

192 On him, see Ch. 5 I. 1, below.

cietal power *(Herrschaft)* and personhood (including human rights), the triade foraging, reproduction, and urban separation of labor will be of great importance; it gives rise to the theory of societal inertia which explains tricky and so far unsolved issues of governance (see Chapter 9, below).

Strictly speaking, the term "civilizational stages" would have to be replaced, in Childe's system, by a wider term, because foraging and reproduction become "pre-civilizational." The imprecision may be acceptable, but should be noted. That in the aforementioned "positive" connotation of civilization foragers and reproductionists may be higly decent, fair, and educated people, remains undisputed.

To the three stages of foragers, reproductionists, and labor-separated civilizations, a unique theory adds a stage, called "harvester peoples", to be placed between the foragers and the reproductionists (Harvester people theory, *Erntevölker-Theorie*).[193] This would lead to a four-stage pattern. However, the only defender of the harvester peoples theorie, Julius Lips, did not envisage four stages. Lips saw that foragers use different methods of collecting from nature: Some simply hunt by running using clubs, some use more sophisticated gear such as nets, spears and traps, and some try to intensify natural growth (by only partial harvesting, aid in natural seeding, forest farming, low-heat burning, or plant tending, etc.) In his fieldwork and writings, Lips concentrated on what he called the harvester peoples, by which he thought of foragers who develop a special interest in certain crops and therefore are tending without really cultivating them. A widely known example are the Chippewa (who call themselves Ojibway) who live around the Great Lakes in North America. They gather the wild rice which grows in shallow water, using canoes. In order to ensure future harvesting the wild rice, they hit bundles of the gathered wild rice on the canoe's railing so that mature kernels fall into the water and sink to the bottom. Of Australian aborigines it is said that they tend certain trees in a favorable way to have the trees' produce during the following season. (Also negative tending is possible: Early Germans used to eradicate taxus because its berries are poisonous to both animals and men).

In some regions of the world, hunters and gatherers may have invented techniques of foraging with foresight so that planned harvesting results. This looks indeed like a link between mere hunting, fishing, and gathering, and planned reproductive activities such as horticulture and cattle raising. But a full-grown economic phase of human evolution did not develop from this. Harvesting Peoples' techniques rather seem to be a dead-end road in the progress of economic know-how. Yet, they – and their discoverer Julius Lips – should be mentioned.

The group of anthropologists who distinguish *four* independent stages can claim to include two major names in the field, Elman Service (1915–1996) who disguishes bands, tribes, chiefdoms, and states,[194] and Conrad Phillip Kottak who accepts Service's model and uses it for his influential text book.[195] Both authors separate tribes and chiefdoms, among other criteria, by the chief's power which in tribes is said to be weak, and in chiefdoms strong. Moreover, they regard chiefdoms as a transitory civilizational stage between tribe and state so that chiefdom does not function as a real civilizational step. Another problem with this four-stage system is the concept of state because the state takes very different forms which depend on factors of

193 Julius Lips, Vom Ursprung der Dinge, Leipzig 1951: Volk und Buch Verlag Leipzig; idem, Die Erntevölker, eine wichtige Phase in der Entwicklung der Menschheit, Berlin 1953: Akademie-Verlag. Such transient stage would mean a bridge between big man and chief, for this see Ch. 9 II.3.n., below.

194 Elman R. Service, Origins of the State and Civilization: An Evolutionary Perspective, New York 1975: MacGraw-Hill.

195 Kottak 242 ff.

the axial age and of societal inertia. The theory of societal power as developed in Chapter 9 attempts to solve this riddle.[196]

IV. People

The term *people,* as a concept of cultural anthropology, can have various meanings. It usually connotes a large group of participants sharing, for the most part, five elements: a common history, language, phenotypic similarity, area, and common name. On the subjective side, there is the sense of belonging to a unit. The problem of segmentary peoples where things may be different, will be discussed in Chapter 9.[197]

V. Nation. Tribe. Clan. Lineage. Ramage

Nation and tribe are used interchangeably. In Canada, the Indian tribes call themselves "The First Nations." The Navajo have their Navajo Nation Code.[198] The word tribe is sometimes disliked by the people concerned because they think it could be understood as indicating cultural backwardness. ("tribalism"): Other ethnic groupe are proud of being "tribes", and some authors even predict that the future of world civilization belongs to the tribes. A *nation* or *tribe* may be identical to a "people", or, together with other tribes, it may form a sub-unit of a people. As a rule, a tribe is composed of lineages, clans, or both.[199]

A *lineage* is a *descent group* based on the belief in a *demonstrated* (= recitable by name) *descent* from the same *apical ancestor* (Latin: apex = top). If the apical ancestorship is *stipulated,* that is, assumed to be of supranatural character, the descent group is called a *clan* ("we descend from the eagle", "from the sun forehead", "from the oak tree", "from the squirrel", "from the bear", "from that mountain", "from the flute", etc). The clans are called accordingly.

When the ancestorship is real, as a rule by blood relationship, the historical head is called the *demonstrated apical ancestor,* and descent group *lineage.* Lineages and clans (and their ramified conceptuality) will be discussed in detail as central concepts of family and kinship.[200]

A *ramage* is a branched-off (sub-)lineage. It shares with the main lineage its demonstrated apical ancestor, but each ramage has its own (sub-)ancestor.[201] Thus, ramages create a system of lineages and sub-lineages fit for government of lineages one over the other. There is inequality between the lineages. Paul Bohannan says that a ramage system is well on the way to toward chiefship.[202] But chiefship is a form of societal order (see Chapter 9). Families, lineages and clans are forms of (widely understood) family ties. Of course, in tribal practice both societal and family orders are close, but they should conceptually be distinguished because in tribal life the former do not necessarily follow the latter or vize versa.

Pre-axial-age societies are shame societies, not guilt societies (see Chapter 11). There is not yet a worldwide good-bad dichotomy. Shame societies do not assign individual membership roles and responsibilities to their participants. A wrong is committed by a family, lineage or clan member, and the family, lineage or clan has to account for it. Therefore, belonging to familiy, lineage, and clan is essential for a human's social acceptance, survival, and protection.

196 See Chapter 9 IV.
197 See Chapter 9 II.
198 Cooter & Fikentscher (2007).
199 See Chapters 3 and 8.
200 Chapter 8 II 5 and 6.
201 Bohannan (1992), 157ff.
202 Bohannan, at 158.

In many societies, for this the *clan* is of paramount importance. Hence, feuds are often fought between clans. When a member of the Navajo nation (= people) and within that nation of the raven clan, happens to come, or be brought, to another nation, that person will be happy to find the other nation also having a raven clan. The "host" raven clan will shelter the raven man in a way similar to the help given to a raven clan member of the own nation. The foreign raven man will be granted protection, food, and given guidance to get back to his own people.

This interethnic assistance for members of a like-named clan is explained, by some ethnologists, on the assumption that the clan societal order must historically be older than the later nation-building: first clans, then nations. However, this assumption misjudges the nature of the clan as artificial, metaphoric family tie. In our example, *the raven* is the stipulated apical ancester of humans. Since this relationship is (etically speaking) artificial, and thus the clan a family metaphor, the raven people in the home nation must logically be artificially related to the raven people in the guest nation: There is only one sun in the sky, one sun forehead, one moon, one flute and one raven, because these entities are "stipulated".

VI. Moiety, Phratry

1. Moieties

A moiety (from French; moitié = the half) is a half-tribe. Moieties do not exist as a general rule, but only in certain cultures. Where they exist, they usually assign every tribal member to either one or the other moiety so trat no moiety-free members are to be found. Sometimes, the moieties live at separate or marked-off locations within the tribal settlement (e.g., in San Ildefonso Pueblo, New Mexico, a tree), sometimes no special localities are reserved for members of moieties.

Moieties may serve to establich endogamous or exogamous marriage rule and thus regulate incest taboos. Polynesian moieties are reported to work this way. The Pueblo moieties in New Mexico have nothing to do with courtship.[203] They exist as constitutive elements of the Pueblo as a societal unit.[204] Moreover, they serve as elements of Pueblo religion and various societal ends. Elsewhere, theory and practices of the moiety system are told.[205] Moieties represent one of the most remarkable examples of the role of dualism in societies (such as twin gods, twin mythologies, societal strata, two-party systems, etc).

To reiterate, culture seems to have not more than three societal tasks: to regulate incest, power, and the relationship to the supranatural (see also Chapter 8 I. 9.). The three institutions performing these three tasks are families, lineages and clans (incest control), societies and sodalities (power control), and shamans, caciques, medicine men, religious leaders (who have access to supranatural things). In this structure which may be said to be typical for early societies, the moieties are the controllers of the controllers: they control families, lineages and clans; they limit the power of societies and sodalities; and they control shamans, medicine people, caciques, etc. It follows that moieties are no kin metaphors (such as clans, phratries,

203 R. Fox, Eggan; L. White, Ortiz (1969), Fikentscher (2004) 276–285; it is customary that after marriage one tribal member joins the moiety of the other. There are no moiety-less tribal members.

204 See the San Ildefonso story at Ortiz (1969) 135; W. Fikentscher (2004 a), 277 (moieties as examples of cultural dualism), 282–284 (decision-making in a moiety).

205 W. Fikentscher (2004), 171, 249, 272–285, 292, 434. On dualism in a German town: Gertrud Hüwelmeier, Hundert Hahre Sängerkrieg: Ethnografie eines Dorfes in HessenBerlin 1997: Reimer, a review: Andreas Platthaus, FAZ No. 248 of October 25, 1997, 11.

and brotherhoods), and they should not be. Wherever they exist, they ensure the unit of the tribe. Often one can see three kivas, as symbols, as it were: One kiva for each moiety, and one for the tribe.

Moieties can have many functions: incest avoidance, marriage prescripts, societal and social ties, organization of religious, traditional, or sports events, peace-keeping, ethnic bridge-building, anti-witchcraft accusations mechanism, etc. In many ways, moieties provide each tribal group an ideological and political homestead, by offering a system of half-tribes. For example, in the Tewa Pueblos they serve to placate the antagonism between the older (pre-neolithic) hunters' and gatherers' tradition and the younger (post-neolithic) horticulturalists and early farmers. By alternating tribal government based on the changing seasons, the Tewa speaking Pueblos developed a dynamic and adaptable way to share public power, and to balance societal segments in a pacifying manner. The structurally important part of the cultural trait of having society-related moieties is the establishment of the concept of public office, applied in tribal practice by the exercise of teibal government for limited but reiterating periods of time, similar to the Ancient Greek *polis* and the Frankish cooperative constitution. The picture becomes clear when this Tewa system is compared with the neighboring Keresan speaking Pueblos: In Tewa, the *cacique* who leads each moiety – the highest ceremonial office holder as the animist "chief penitent" – is moiety-born and holds a time-limited periodic office within an organization, a superadditive entity. In Keresan, the *cacique* is society-born and a person.

Dualism as constituent of societal leadership can also be found in the two-party systems of developed democracies such as USA and, to a lesser degree Great Britain, Canada, and Australia. Where democratic superaddition is so internalized in the citizens' minds that a majority understands the necessity to boil down the many possible opinions to two opposing views between which there can be decided by yes or no, there political leadership will be determined by the working of a two-party system. In turn, the two-party system needs primaries in order to prepare the vote between the two main candidates. In a multi-party democracy such as Germany, therefore the essence of the institution of primaries will not be understood, hence the helplessness and incompetence of German media's reports on US primaries. The reverse of the "boiling down" to that dualist alternative is the multitude of political opinions to be found in the country and fed into the primaries. The topics which will engage US interior and exterior politics of the US can be gathered and predicted for the next four to five years by simply watching the US primaries and listing the points of views raised there: other topics will hardly play a role. For world politics, the most influential items on that list are the to be expected discontinuities of US politics which encourage and enable nations without a four-years cycle of elections to pursue their anti-US strategies.

2. Cultural duality. Phratries

A few cultures use a dual pattern of their societal structure similar to, but not identical with the moiety system. Clans may flock together and combine to a more or less permanent unit. If in a tribe, for example, three clans combine to form unit A and three others combine to form unit B, the existence of the two units A and B may look like moiety duality. But the two units are no moieties which can be told from their clan-defined inside structure. Such clan-composed units are called *phratries.* They are super-clans, sometimes for exogamous marriage rules, at other places for political reasons. An example for phratries is the Keresan-speaking Pueblo of Santa Ana in New Mexico.

An explanation of the Santa Ana phratries is this: The Tewa pueblos north of Santa Ana have moieties because there hunting for larger animals in still wooded terrain continued even

after the introduction of Mexican agriculture from the south. But under the influence of a gradually warming climate, the south and the west turned so arid that the hunt for larger animals faded away when agriculture came. Therefore, moities as representations of the hunting and the farming parts of the population as tension-reducing tribal institutions made sense among the Tewa, but no longer among Acoma, Zuni, and Hopi. There, in the more arid west and south the clans had to serve that purpose, whereas in Tewa the clans became more and more obsolete after the moieties worked to strengthen the nuclear families.

The location of Santa Ana (both the old and the new part) is exactly between the Tewa and the southern pueblos of Acoma, Zuni, and Hopi, Santa Ana had and has clans. But the Tewa moiety system also seems advantageous. Santa Ana had forests for hunting larger animals and must have had similar inner-cultural tensions as the Tewa speaking pueblos. As a consequence, Santa Ana might have glued together two groups of clans so that half tribes similar to moieties resulted, mainly for political reasons, not so much for having marriage rules. This explanation is the exact opposite of Robin Fox' result (The Keresan Bridge, 1967) who holds that the two systems (moieties to the north, clans to the south) developed in both directions from a Keresan center in the middle (a theory that Fox later partly withdrew with regard to Alfonso Ortiz' criticism). The explanation offered here sees the Santa Ana phratries as a rather unique result of a combination of ecologically and societally conditioned types of tribal order. This explanation takes climate change and cultural diffusion from the south into account, and it contains another more basic facet of anthropological theory: as a rule, mixed cultural forms are results, not causes.

3. Moieties as parts of a system of separate powers

Lineages are true blood-related families, whereas clans and phratries are family-metaphors, and thus offer artificial family ties. By contrast, moieties are neither families nor family-metaphors. They derive their *raison d'être* not from family conceptions, but from historically grown tribal interest groups, such as hunters and gatherers on the one side, and horticulturalists and early farmers on the other.[206] For tribal interior politics, moieties often serve as *controlling instances* directed against the influence of (wealthy, powerful) families, lineages, and clans. The stronger the moieties, the less witchcraft accusations (in former times an available instrument in inter-families warfare) occured.[207]

4. Moiety as part of a superadditive unit

Of the many human attempts to ensure peace and to create reasons for peaceful behavior, the moiety is one. The concept of moiety makes use of duality, of the conception of two things belonging together. Thus, a moiety is a superadditive entity (more in Chapter 9): The product of the two things belonging together is a new, a third thing. That is to say, the whole is more than the sum of the parts. Once the idea of the whole which is more than the sum of the parts is conceived, and thus superaddition understood, it is not difficult to add more than two to this entity (three, four, a dozen). The result is a cooperative (in the country-side), and a polis or corporation (in the city *as civitas*). Anthropologically speaking, a corporation is multilaterally unfolded duality. For applied anthropology this suggests to focus on duality first in countries such as Afghanistan and Kongo, and only then police organization, independence of the judiciary, and internal revenue service.

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206 On winter and summer moieties in the pueblos see A. Ortiz, R. Fox, and W. Fikentscher, loc cit.

207 See A, F. Bandelier, 1971. The Delight Makers. San Diego, New York, London 1971: Harcourt Brace Jovanovich Publ. (orig. 1890); W. Fikentscher (2004 a) 227ff., 279.

VII. Extended Family, Nuclear Family, Household

1. Extended family

Extended families include the nuclear family plus ego's more distant relatives such as uncles, aunts, cousins, etc. The precise definition depends on tribal tradition which – if a case has to solved – has to be ascertained under locallaw in the particular case. In some (not all) Navajo chapters, the establishment of an oral will requires the presence of the extended family listening.

2. Nuclear family

The nuclear family usually consists of the parents and their children.[208] But additional qualifications may occur due to more or less strict matri- or patrilinearity.[209]

3. Household

A household consists of the extended or nuclear family enlarged by servants, parents or inlawssupported by the younger generation, and other persons living with the family. As a legal concept, the household is sometimes used in family, labor and social security law (e.g., in Hopi law).

VIII. Race

Although the term *race* has been refuted as having no scientific basis it is still used for analytical purposes in physical anthropology. William S. Laughlin (1963) defines race "as a population which differs significantly from other human populations in the frequency of one or more genes" and gives some instructive examples. After having been a subject of major – often speculative – interest in the 17th, 18th and 19th century, in today's socio-cultural anthropology race is no longer a workable concept. Franz Boas (1911b, 1931) was one of the first who argued against race as acceptable subject of study in what became sociocultural anthropology (see also Winthrop 1991: 227). Luigi Cavalli-Sforza presented materials from biological anthropology eliminating the justification of using racial criteria in anthropology.[210] On criminal abuses committed in connection with anthropological studies and experiments and the role of the German Kaiser-Wilhelm-Gesellschaft during the Hitler regime herein, in-depth studies and historical materials have been published.[211]

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208 See Chapter 8 I.

209 See Chapter 9 I.

210 L.L. Cavalli-Sforza, Paolo Menozzi, & Alberto Piazza, The History and Geography of Human Genes, Princeton 1994: Princeton Univ. Press; L.L. Cavalli-Sforza, Consanguinity, Inbreeding, and Genetic Drift in Italy, Princeton 2004: Princeton Univ. Press.

211 Präsidentenkommission (ed.), Geschichte der Kaiser-Wilhelm-Gesellschft im Nationalsozialismus, Berlin 2007: Max-Planck-Gesellschaft München; Achim Trunk, Biochemie im Krieg: Adolf Butenandt und sein Institut 1939 bis 1945: Munich 2004: Jahrbuch 2004 der Max-Planck-Gesellschaft; Wolfgang Schieder and Achim Trunk (eds.), Adolf Butenandt und die Kaiser-Wilhelm-Gesellschaft: Wissenschaft, Industrie und Politik in "Dritten Reich", Göttingen 2004: Wallstein.; Doris Kaufmann, Wissenschaft im Nationalsozialismus, In: Max-Planck-Gesellschaft (ed.), Ethos der Forschung/Ethics of Research, Ringberg Symposium Oktober 1999, Max-Planck Forum No. 2, Munich 1999, 11–23; Reinhard Rürup Schicksale und Karrieren, Göttingen 2008; GP, Gedenkbuch für die vertriebenen Wissenschaftler, 2/2008 MaxPlanckIntern 3f. see also note 542, below.

IX. Belief System. Religion. Myth

1. Belief system

A belief system is a world view that provides guidance for conduct by accepted metaphysical (*i.e.* unempirical) values. It usually, but not necessarily, uses a cosmology and a code of ethics often but not always related to one another. The expression *belief system* includes religion and other metaphysical conduct-motivating world views such as totemism (which in its pure form is not so much a religion as a setting of secular norms since it lacks religion's ordering force as an imaginary relationship between human beings and a remote object) or Marxism which, in order to motivate revolutionary behavior, uses as its central concept the unempirical, non-operational notion of *use value,* a concept which like a totem does not serve as remote object in the religious sense. [212]

2. Religion

Religion has been defined by religious authorities as well in the social sciences in manifold ways. W. Fikentscher (1995/2004), Chapter 7 I 1 discusses a number of definitions and makes a proposal for choosing one of them for the study of culture-defining modes of thought. In the present context, for sake of brevity, reference is made to that study. A graph on definitorial possibilies and a brief explanation follows on p. 125.

As shown in the survey, religion is best defined for anthropological ends when it is related to some object to which, by humans, non-cultural ordering power is being attributed.[213] Of importance is the distinction between pre-axial age *religious types* (such as totemism, deus-otiosus beliefs, dream time, cult of the dead, ancestor worship, animatism, witchcraft, sorcery, idolatry, masks and symbols, animism (in the narrow sense), fetishism, magic and taboos, shamanism, divination, causality-conscious self-blame, polydaemonism, polytheism, culture-specific and therefore non-total monotheism) and post-axial age *total religions* or *belief systems* (characterized by claiming general explanations of humanity and world, such as the Greek Tragic mind (= the religion of the *polis*), Confucianism, exilic Judaism, Christianity, Brahmanism-Hinduism, Buddhism, Islam, Bahá'i, modern totalitarisms such as use-value-defined Marxism and "blood-and-soil" defined national socialism). With few exceptions, religious types are non-competitive among each other and therefore do not struggle with one another. In fact, they can often easily be combined, both with each other, and from their own point of view, with total religions. This is why Eastern religious types as a rule are tolerant of each other and, from their side, of total religions, such as Shintoism (a type of ancestor worship) and Buddhism. Total religions tend to be mutually and also in relation to religious types exclusive, such as Islam and Judaism.[214]

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212 W. Fikentscher (1995/2004) 27, 192–199 (following Richard Thurnwald). Totem and idol are not the same. Both are solutions to the human desire to form concepts. But totem is a ascription of normative relation to humans, and idols are ascriptions of normative relations to objects of nature and environment. In other words, a totem creates a forum for humans, an idol creates a forum for nature. Or briefer: An idol is a totem for natural things. On Marxism as a belief system focusing on use value determination by the cadres, W. Fikentscher (1976), Chapter 28.

213 Idem (1995/2004) Ch. 7 I 1, following L. Pospíšil's proposal.

214 Günther Schlee, Wie Feindbilder entstehen: Eine Theorie religiöser und ethnischer Konflikte, Munich 2006: C.H. Beck, rates ethnic and religious causes for conflict generally low and rather sees them as consequences of resource-related envy or identity-related strategies. For a broad overview and many details, see Julia M. Eckert, Anthropologie der Konflikte: Georg Elwerts konflikttheoretische Thesen in der Diskussion, Bielefeld 2004: transcript Verlag.

some theories on belief systems/religions	belief systems									
	total relig.	types of religious belief = religious types								
	post-	pre-axial age								
	states	proto-states	predominantly herders & farmers		predominantly hunters & gatherers					
	post-axial-time belief systems	a) Polydaemonism b) Polytheism	a) Animism proper b) Fetishism	a) Magic (incl. magical use of totems & idols, shamanism b) Divination	Idolatry (without magic)	a) Animatism & taboo b) Witchkraft	Cult of the dead and ancestor warshipping	Deus otiosus, eternal dream time, etc. (distant objects)	Totemism (or mythos) and taboo (neither awe-inspiring nor related to distant objects)	
Religion according to: Geertz, Bellah										use of images, symbols
Religion according to: Bürkle Otto, Nachtigall; Riesebrodt (cf. Fikentscher 1975a, 85; Pospíšil: "non-empirical")										awe, warshipping, strong emotions
Religion according to: A. F. C. Wallace of 1966, 102; cf. Kottak 321; Goody 1961										rites, myths
Religion according to: Max Weber										religious formulators (prophets, priests, shamans, demagogues)
Concept of "religion" used in this book										ordering of the non-cultural
Concept of belief systems used in this book (Pospíšil: belief in a "system")										behaviour guidance by accepted values
Concept of primal religion = animism in the wide sense, as opposed to (the Tylorian) animism in the narrow sense										nature-culture tension

Whether monotheism can be categorized under religious types has not yet been solved. Pospíšil does not mention monotheism among his examples of religious types. Monotheism is certainly one of the prominent forms of total religions, and thus of post-axial provenance. It may surprise that a clear case of monotheism dates back to its defender and propagator Amenhotep IV. Akhenaten *(Echnaton)* who reigned as Egypt's pharao between 1365 and 1349 B.C.E. His Great Hymn to Aten, the sun god as creator and supporter, is an impressive confession of mon otheistic belief. The translation by Miriam Lichtheim in Bartlett's Familiar

Quotations, Justin Kaplan, gen. ed. (16th ed. Boston 1992 Little, Brown, p. 5) speaks of the "sole god", congruent to the sole god mentioned by Suti and Hor, two architects of Akhenaten's predecessor Amenhotep III. a generation earlier. To reserve monotheism conceptionally to the axial age would mean to historically move the axial age back in time by 800 years. The reductionism contained in the step from polytheism to monotheism speaks in favor of this redating. However, the typical facets of the axial age, the connection of dogmatics and ethics, the replacement of clan and tribal ethics by abstract good-bad standards, a theodicee ("is God just?"), and a worldwide claim of validity cannot be found in Akhenaten. Therefore, the majority of reasons point to monotheism as an exceptional form of religious type. Pater Wilhelm Schmidt's *"Ursprung der Gottesidee"* (Ch. 2 II 1) in pursuit of that work's main idea may offer more examples, and several *"dei otiosi"* may have also be conceived as sole gods (Ch. 2 II., near III.).

However, important as the distinction between religious types and total religions is, there are influences going back and forth between them. When as part of the axial age enlightenment pre-axial-age religious types gave way to total religions, many older conceptions were introduced into the new religious world and got adapted there. For example, animist fertility spirits reappeared as Christian saints, such as Sta. Margalida on the Balearic Islands. Moreover, it should be remembered that all religious types might have had there own, specific understanding of (collective) guilt, shame, and unfortunate events such as suffering and disaster. These understandings may also have been of influence on a later total religion. For example, animist purity rites can become essentials of a total religion in form of food and other taboos. This context is important for the analysis of any concrete existing religion.

In view of the foregoing, religion may be understood as a reflection on a culture-like order for nature.[215] Thus, religions (pre-axial types and post-axial belief systems) are the (rational or irrational) order-establishing explanation of a relationship between human beings and an (often remote) object conceived by them. This object typically represents or offers behavioral guidance. This definition of religion and of belief system is wide enough to embrace religious types such as mere nature-generated awe and fear without any belief in a higher being[216] and non-magical totemism,[217] as well as total belief systems such as modern atheism and use-value geared (and thus as to its contents cadre-defined) Marxism.[218]

Religion implies a *natural* or nature-related *("super-natural")* world organized by *its own* rules, and the belief that these natural or super-natural rules may be meaningful for man as a

215 As developed in W. Fikentscher 1975 a: 79 ff.; see also Bohannan (1992), 250 ff. on cults.

216 When Knud Rasmussen asked an Inuit in what Inuit believe, the answer was: "We don't believe, we fear."

217 R. Thurnwald, Die Denkart als Wurzel des Totemismus, Sonderabdruck aus 42 Correspondenzblat der Deutschen Gesellschaft für Anhropologie, Ethnologie und Urgeschichte, No 8/12, Salzburg 1911; a discussion W. Fikentscher (2004 a) 211–220.

218 Only total religions pose the problem of tolerance. Religious types have no difficulties of being combined with one another, or with a total religion, and quite often they are. However, followers of total religions may feel to be obliged to missionize (cf., Matthew 28. 19, 20) and then tend to step on other religions' turf, both "type" or "total" (contra: Matthew 10.14). When St. Augustine was asked by contemporary church leaders whether Christian missionary work permits – or excludes – the use of violence in spreading the gospel, he answered that in Luke 14.23 the master asks his servant to force people to join the dinner *(compelle intrare)* from which it follows that forceful mission is permissible. Millions of tortured and killed people were the consequence. St. Augustine was mistaken because he followed the erroneous translation, in the Vulgata, of the Greek original *anagkein* into the Latin *compellere. Compellere* is taken from Latin farmers' language and means to drive livestock, for example, into a stable. *Anagkein* probably means to put one's arm around the shoulder of another in order to persuade that person to go into a certain direction; cf., H. Frisk, Griechisches etymologisches Wörterbuch, vol. I, Heidelberg 1960: Carl Winter, 101.

guide of conduct in the following way: Man is defined by (reflected) culture, and culture by definition implies "non-natural" norms; looking back on nature, man discovers "nature norms" and their relevance for himself, and this relevance he may take to be binding or not binding. The acceptance of this relevance is, for anthropological purposes, the essence of religion. Accordingly, man may or may not use, inversely, nature's norms to check or control the cultural norms by speaking of *natural law.*[219] Evaluation thus involves making ethological decisions[220] based upon cultural (but naturally and religiously influenced) exigencies.

There should be no confusion between the source of religion, which is outside of culture, and the role religion plays within culture. Once people come to terms with what culture tells them to do with nature, a realization, which one may give the name *religion,* has occurred. Religion in this way becomes part of that general whole called the culture of man. Religion is included within the definition of culture (belief), and the anthropology of religion is part of socio*cultural* anthropology.

The source of religion, the reason why there is religion at all, does not derive from an awareness that people are cultural beings, or that nurture is different from nature. The source of religion is the awareness of the fact that what surrounds people, nature, is distinct from culture, and that people must strike a deal with nature by using their cultural abilities. Thus, religion is a function of culture because once culture develops, the nature surrounding human beings, the environment, the "non-culture," had to be evaluated. People could master culture, they therefore could no longer take the events and forces of nature for granted: There had to be an explanation for what could not be mastered. The this-wordly contrasted to the other-wordly. In short, religion is culture's reflection on uncontrollability of nature. The ensuing explanation produces religion's dogma, and the dogma the ethics, of most religions. As the graph above demonstrates, most definitions of religion are narrower tha the one chosen here (cf., Bürkle 1996). But anthropological empiry requires such a broad definition. Otherwise belief ystems such as Inuit "mere fear", (magic-free) totemism, pure idolatry without magic cultless animism, and modern atheism are out of reach for anthropological study of religion.

3. Myth

Myths are educative knowledge under conditions of aliterality (cf., Chapter 9 II 3, below). Myths are wisdom whenever stories are not written down but orally transferred from generation to generation. As such, myths have nothing esoteric, magic, or secret about them. They simply consist of communications handed to the next generation, for its benefit, education and entertainment. A myth contains educative or otherwise useful knowledge in an illiterate environment. Often, it is dressed in the form of creation stories.[221] A totem pole of an Alaskan or Northwestern tribe (Tsimshian, Haida, Tlingit, etc.) tells the story of a clan, a lineage, or an individual.

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219 Fikentscher (1975 a) 88.

220 Op. cit. (1975 a) 78.

221 A different approach is taken by G. Frazer (1959, orig. 1890), M. Eliade (1978, orig. 1976), and Kurt Hübner, Die Wahrheit des Mythos, Munich 1985: C. H. Beck; and of course by writers of esoteric literature; similar to the "unmythical" point of view above: Carl-Friedrich Geyer, Mythos: Formen – Beispiele – Deutungen, Munich 1996: C. H. Beck & Leipzig 1996: Reclam; a psychological approach: Wolfgang Schmidbauer, Mythos und Psychologie, Munich & Basel 1999: Ernst Reinhardt; for sources see, besides G. Frazer, Thesaurus Cultus et Rituum Antiquorum, Los Angeles, CA 2004: J. Paul Getty Museum/UNESCO.

X. Law. Justice

These two concepts have been discussed in Chapter 1, above. Law (in the sense of *ius,* not stature) is thought – not necessarily spoken – justice. To restate the methodological results from Chapter 1: Law is an (1) *authorizing* (2) *sanctioned* (3) *ought* based on the result of (4) *values* (5) *methodically* applied in (6) *system* and (7) *ti me,* the relative weight of the four latter factors changing between one another according to the given culture. The elements of "authorizingness," "sanction" and "ought" define what law *is. Justice,* implied in the ought, defines the *purpose* that law is meant to *serve.* The four requirements: values, method, system, and time explain from what elements law *comes into being.*[222] Since this definition of law *includes* the element of justice, it is not positivistic (in the sense of a positivism defining law as being conceptually separated justice).[223]

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222 See Fikentscher 1987b: 16–25, and (2004 a), prefatory note IV. 1,2; on law and justice cf. also Pospíšil 1982: 296–345; Fikentscher 1977a: 639–660; Schott 1992; S. Roberts 1979.

223 R. Zippelius, Rechtsphilosophie, 5th ed. Munich 2007: C. H. Beck; § 2 I.1, with literature; W. Fikentscher (1976) 82, 292ff.

Chapter 4: Social norms (the theory of law, morals, custom, etiquette, habits, religious norms, political force, conscience as fora)

The Forum Romanum was the place of litigation and adjudication in old Rome. A Roman citizen was held responsible on the Forum. Literally forum means "a place outside", a plaza, a place between the houses. The plural is fora, or forums. Social norms address humans and ask obedience from them. Thus, social norms establish fora, or platforms, on which a human being is held responsible under the standards of the applicable norm. A court of justice is such a platform when the social norm is one of law. It may be said that every kind of social norm has its own forum, the law the legal forum, morals the moral forum, personal convictions the forum of the conscience, etc. Hence, this field of cultural anthropology may also be called the theory of the fora.[224]

The issue of social norms, well-known in moral theory, has not yet been much discussed in cultural anthropology. Chapter 4 develops a theory of social norms by identifying them with the fora on which humans can be held responsible. Five questions will be discussed:

(1) The question whether all societies have law was answered in the affirmative in Chapter 1 III. A related question is whether there are other norms, similar to law, such as moral norms, habits, customs, or political instructions. Could all these "oughts" be named by one word, for example "social norms"? Are there societies that have only one category of such "social norms" and do not distinguish between customs, habits, and law?

(2) Whenever we find that there are more than one kind of such social norms, we should try to list them all. How many kinds of norms that steer life in human society can be identified? Is this list a closed or an open one?

(3) If several of these social norms co-exist, can they confiict with each other? If so, this would mean that a human being may be confronted with conflicting norms and duties. What does this imply for the human being which sees herself addressed on several such conflicting "fora"?

(4) If there are multiple fora such as law, habit, custom, etiquette, religion, conscience, political authority, etc., how do these fora relate to each another? What are their differences and criteria for definition? Is there a ranking possible, for example "religion first" and only then all the others, or "law first", or "morals first"?

(5) Historically, what may be said to be the oldest forum? In other words, which social norm can claim to have the "primate"? Was there first religion only (as Henry S. Maine, Ancient Law, 1861, conjectured), or was law first; or habit and usage? In this context, the theory of the "original mononorm" will have to be considered, as it was developed by Marxist thinkers, and accepted by German National Socialists.

Social norms are difficult to define (I.). Their kinds and number are not well understood either. Most societies distinguish the fora of morals and law, and many of them know more fora, for example, religious and political ones. A remark already made in the context of the definition of law, may serve as an example (Chapter 1 III.): Sanctions distinguish law, morals and customary norms from religion. Religion may make use of authority or authorities. But it lacks, as such, sanctions. Where, however, religious sanctions are imposed – as when, e.g., the breaking of a taboo is punished by death – there is, as Pospíšil states, "religious law",

224 Volker Heeschen, Humanethologische Aspekte der Sprachevolution, in: J. Gessinger & W. von Rahden (eds.), Theorien vom Ursprung der Sprache, vol. 2 Berlin 1988: de Gruyter, 221, 232; the following paragraph is a revised version from W. Fikentscher (1995/2004), XXXIII.

"church law", and therefore law itself (II). A series of issues grows from social norms, such as conflicts between social norms and possible preponderances, the debate about the primate ("which kind of norms was first in human evolution?"), their precise delineation, and the possible or factual transitions from one kind of norm to another This relates to the controversial question whether there has been law in every society, from the beginning of mankind; or whether very early and native societies only know moral norms from which the forum of law emerges at a later stage of development and social differentiation; finally, whether in early societies, at least, there existed the mentioned uniform social norm, which served at the same time as moral *and* legal norms (III.).

I. Social norms

The term "social norm" has been used in both a wider and a narrower sense. In a wider sense, it includes legal norms since they gear society in a way comparable to the norms of morals, customs, etiquette, etc. In a narrower sense, the term excludes law but still includes other fora.[225] Henceforth, "social norm" will be used as including the norms of law, because law is a socially relevant and often effective body of norms. For the theory of judgment, law counts on "practical reason" no less than other kinds of "ought" prescripts. The juxtaposition of "informal" social norms and "formal" legal rules misses the correct criterion since there are quite formal non-legal norms such as strict religious commands, and informal rules of law such as burden sharing in case of contributary negligence although there is no duty against oneself. Rules of law should be counted among social norms because for many purposes the different kinds of social norms have to be distinguished with precision especially since they easily transgress from one kind to another. Indeed they border so closely to each other, as the following examples show, that excuding legal rules from the body of social norms seems impractical and arbitrary. The proximity of the social norms is, by the way, one of the reasons why this book is not called "Legal Anthropology" or "Anthropology of Law", but "Law and Anthropology": for practical reasons, in anthropology norms of the law are to be distinguished from norms of the morals and customs, from norm of religion, etc. Talking of law alone makes not much sense, since the other fora are often close in function. Thus, for anthropological ends norms of law are to be counted among social norms.

II. Kinds of Social Norms

There is no easy way to count the number of kinds of norms do existing in human societies. Western traditions distinguish the norms discussed in subchapter I. But when a Confucian Chinese says that in Chinese tradition there is no real distinction between "must" and

225 Some authors who include law in the concept of social norms are: J. Ensminger & J. Knight, Changing Social Norms: Common Property, Bridewealth, and Clan Exogamy, 38 Currrent Anthropology 1–24 (1997); L. Bernstein, Social Norms and Default Rules, 3 Southern California Interdisciplinary Law J. 59 (1993). Authors not regarding legal norms as social norms: Robert D. Cooter, Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization, 79 Oregon Law R. 1 (2000); Robert C. Ellickson, Law and Economics Discover Social Norms, 27(2) Journal of Legal Studies 537–552 (1998); Eric A. Posner, Law and Social Norms, Cambridge/Mass. 2000: Harvard U.P.; Richard A. Posner, Social Norms and the Law: An Economic Approach, 87 American Economic Review 365 (1997); idem, Social Norms, Social Meaning, and Economic Analysis of Law: A Comment, 27(2) J. of Legal Studies 253–266 (1997); Christopher Fennel, Sources on Social Norms and Law, www.anthro.uiuc.edu87/faculty/cfe (as of Dec. 8, 2006), who expressly distinguishes between informal social norms and formal legal rules.

"should", or a Paiwan aboriginal from Southern Taiwan that "it never occurs that the rule to respect one's neighbor's right in the fruits of a planted tree is not obeyed, you simply don't do this", or the ethnologists find that in many tribes it is "brave" to challenge the spirits' demands, there may be quite different kinds of norms and prescripts in use than "Westerners" are used to. Hence, the list of culturally distinguishable norms is open-ended. Other cultures may have other types of "ought". Here follows a Western inventory.

1. Norms of Law

Legal norms have been defined above in Chapter 1 III. 3. c. as being characterized by authorizingness and sanction. Legal rules require authorization of persons in charge (of administering the law), and the sanction to be executed. By contrast, religious norms, though represented by an authority (such as a shaman, a mullah, a priest, a pope, etc.), lack sanction (again: if there are sanctions of religious norms like excommunication under canon law, this is religious *law*). Inversely, if there is no authorizing, but at least possible sanction, one speaks of custom, or morals, or ethics.[226] This leads us to recognize law as one of several ought-mechanisms, or fora. A table:

	morals	religion	law
authority	no	yes	yes
sanction	yes	no	yes

This simple tripartite distinction looks easy, and it may be applied as a rule of thumb. For example, if in the context of an adoption of a child from an African tribe by European or North American parents the pertinent "Western" rules of conflict of laws point to the tribal law, and the social norms of that tribe require a sacrifice of a chicken for making the adoption valid, the question arises whether the sacrifice belongs to local law or local religion. Only if it belongs to law, the sacrifice must be performed. Otherwise conflict of laws do not point to it. If it appears that the tribal spirits require the performance of the rite for traditional reasons but no sanctions accompany its ommission, a conflict of law does apply. While cases of this sort are frequent, the rule of thumb has its limits. One reason is that in many early or traditional societies sanctions include supranatural ones, such as curses leading to death or illness,[227] shamanic performances, persecution by Erynniae or similar goddesses of revenge, etc. In anthropology of law, there is no valid reason to exclude supranatural ("superstitious") sanctions from the register of sanctions.[228] If supranatural sanctions are sanctions in the meaning of the law, not *every kind* of authority can be accepted as constituent factor of law, because once the au-

226 Unlike other social sciences, anthropology does not distinguish between customs, morals, and ethics, but uses these terms interchangeably. In the social sciences, there is no established terminology of these nonlegal and at the same time non-religious norms. In divinity, some writers identify ethics with prescriptive, postulative normativity, and morals with a more descriptive attitude towards good behavior. In law, good mores serve as extra-legal standards of desired behavior whereas customs signify what is usual and generally accepted. Anotherr important distinction in law is custom as non-legal prescript to which law refers as valid standard of behavior (custom as fact referred to by law) and custom "raised" to valid law (= customary law). See Cooter and Fikentscher (1998), at 329; Edward Coke established that reasonableness of a custom is a question of law, for the court, and not a question of fact, for a jury, Rowles v. Mason, 2 Brown 192, 123 E.R. at 892 (1611), a discussion by David L. Callies; Custom and Public Trust: Background Principles of State Property Law, 30 The Environmental Law Reporter 10003-10023, at 10009. But this does not imply that custom as such is of legal, and not of factual nature.

227 Example: bone pointing among the Walbiri, see note 642, below.

228 See John Comaroff & Jean Comaroff, Policing Culture, Cultural Policing: Law and Social Order in Postcolonial South Africa, 29/3 Law and Social Inquiry 513–546 (2004).

thority is also of supranatural character, law and religion can no longer be distinguished as different kinds of social norms. In the statement."If you do not obey god, you will go to hell", both sanction and authority are supranatural, and the norm would resort under law. This is an undesirable result since it makes an important distinction between social norms impossible. Therefore, the proposal is here that if sanctions may be supranatural, authority must be secular.

Of course, these categorizations are often applied to empirical findings in an ethnocentric way. It may very well be that in a given tribal setting supranatural sanctions administered by supranatural beings are regarded as law. But observation of this phenomenon from the outside requires categorization for comparison's sake. This is the reason and a justification of the distinctions proposed. No wrong should be done to the observed culture.

It will be remember that *Obligatio* as second element of law in anthropology poses its problems (see text near note). Now a solution for these problems can be offered: The meaning of *obligatio* is a this-wordly tie of the legal relationship in order to exclude supranatural elements from law so that law and religion can be distinguished (see Chaper 1 III., above). *Obligatio* was rejected as valid element of law with a view to those cultures that dislike human bondage to this world. It appears that *obligatio* serves the same purpose as the rejection of supranatural authority in cases of supranatural sanctions. But the proposal made above is more flexible: It accepts supranatural sanctions and asks for this-worldly authority only in those cases where sanctions are supranatural. Pospíšil's intention to distinguish between law and religion is fulfilled, but the reality of supranatural sanctions remains valid.

2. Ethics, Morals, Customs

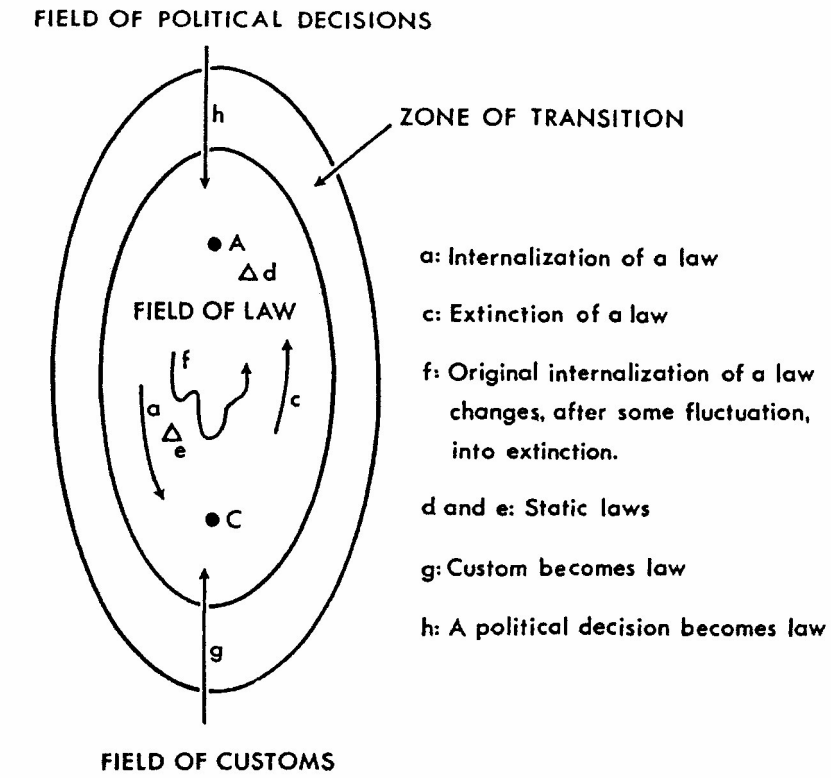
Customs, religious duties, morals, political orders, etc., are also fora. There is no fixed system of these other normative settings. An additional issueis the inconsistency of terminlogy, in the social sciences, in philosophy, and in theology. To address this topic, I propose to distinguish "is" and "ought". From regularity, there follow habits. Habits are a matter of "is", not of "ought". Habits are facts, open to proof in court. Habits as such do not have moral or binding legal force. They are outside of the authorized sanctions of what we have called the law. If somebody violates a habit, she or he may be criticized but not punished. Sometimes habit-breakers become respected innovators. The first farmer who used a plow instead of a digging stick discarded a habit.

Habits can be divided into more "serious" and important customs (such as the rule that the first to arrive at a four-stop intersection should go first) and the less "serious" rules of etiquette (such as sending a birthday card). If habits (mainly customs, but the same can be said for etiquette) are reinforced by the conception that they *should be* observed but not authoritatively enforced, we enter the moral (or ethical) forum. Now customs become a must (see the remark to Malinowski, below). A misbehaving individual may be shunned, or ostracized, so that she or he will be exposed to a (moral) sanction. But there is no authority in charge of inflicting a sanction upon the perpetrator. Common sanctions for breach of morals are boycott, ostracism, refusal to talk, act if someone wasn't there, etc.[229] Such reactions may be very effective and painful. Sometime in the 19th century, Mr Boycott, a harsh Irish tax collector, had to emigrate to the United States. So the story goes. He did not break any law, he broke a moral code. From a certain day on, Mr. Boycott found nobody in Ireland who wanted to talk to him.

229 M. Gruter & Roger Masters (eds.), Ostracism: A Social and Biological Phenomen, New York 1986: Elsevier. M. Gruter & Manfred Rehbinder (eds.), Ablehnung – Meidung -Ausschuß, Berlin 1986: Duncker & Humblot.

Habits (customs and etiquette) may change into law whenever people become convinced that such behavior not only *ought* to be observed (as in the case of morals) but also ought to be enforced by some authorized person, persons, institution, or entity. Then morals take the form of law, and custom, etiquette, as kinds of habit, become customary law. Customary law grows from the conviction of the people who agree to live under that law.

However, the ought may also come from a very different direction, for example, from the orders of a political leader. The way from politics to law is comparable to the way from habits to law, but the source is different. To compare both developments, Pospíšil designed the following graph:



Part of Pospíšil's explanation reads: "... customary and authoritarian law ... may be depicted as two foci, C and A ... Laws of a traditional nature which do not fit completely the characteristics of the two ideal types (at the two foci) are placed between them, and laws whose legal characteristics are weakly differentiated from the neighboring nonlegal categories are near these categories, just inside the zone of transition" (1971, 194).

Malinowski held that customs usually are self-evident and therefore strictly followed by the people as a matter of course, but that law quite often is subjected to doubt and dispute, and therefore requires for a decision. Unlike law, custom for Malinowski means a psychological must, a ... social machinery of binding force" (p. 55). By contrast, law has to be ascertained.

3. Habits, Etiquette

Examples are applauding after a concert, letting the lady walk on the right side (the knight's sword was on his left and should not get entangled in her gown), letting the lady walk on the inner side of the walk way and not expose her to the dangers of by-passing cars, not sitting down at a table where already somebody is sitting (US), sitting down at the table where somebody is already sitting (Bavarian country inn), write a thank-you letter after an invitation to dinner (US, Northern Germany), not writing a thank-you letter for a dinner invitation but only for an invitation to stay overnight (Southern Germany, Austria), no-tipping (Switzerland), tipping (rest of the world),[230] etc. This is just a list of examples, not a definition in re: law.

4. Religious Norms

The delineation of law and morals has been described above (1.). As a rule of thumb, religion requires an authorized entity which adminsters norms, but – except for religious *laws* – sanctions are absent. Religions are *belief* systems (the wider category), and believing means to hold something for being or not being the case.

The distinction between law and religion is well understood in pre-axial-age societies. One of the questions I used to ask on my visits to the Pueblos in New Mexico between 1986 and 2003 referred to the inner organization of the Pueblo. My question was who appoints or nominates the director of the local irrigation system, the "ditch boss". In all but one Pueblos where I asked this question I received a straightforward answer. In one Pueblo my conversation partner told me that my question was not permissible and could not be answered because it concerned religion. I apologized, and from then on I asked all conversation partners to warn me as soon my questions should approach the realm of religion too closely, instead of law. This was always accepted and followed.

Regarding the conceptualities and subdivisions of religion, reference may be made to subchapter IX 1. and 2., above (religion as a concept), and to an earlier publication (1995/2004, 190ff.

5. Habits and craft practices of a religious nature

In many cultures certain activities, such as agricultural events (the first calf, the last bundle of harvested grain, beginning to plow, etc.), boat building, migrations, marching, making music, dancing, etc., combine customs and religion. B. Malinowski (in Crime and Custom in Savage Society. London 1926) mentions several examples, among them boat building. These examples show that fora may combine social norms, for example custom and religion. Where fora combine, there may, but need not, be a conflict.

6. Political prescripts

Another forum is politics. Political leaders may order their subjects how to act or omit. They may do this without expectation of internalization.[231] Such political instruction of how to behave form the opposite of norms growing from habits and morals. Leopold Pospíšil drew a graphic table that illustrates the influences of political authority and custom on law:[232] He comments A standes for political authority, C for customary law; g means that custom as fact becomes customary law, and h and a describe the development from political fiat to internalized law.[233]

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230 R. von Ihering, Das Trinkgeld, 52 Westermanns illutsrierte deutsche Monatshefte 83ff (1882).
231 Cooter on Internalization (in Fennel collection).
232 See 2., above.
233 (1982), 249.

7. Conscience

Another forum is human conscience. Conscience can be internalized other fora, for example religion, or political prescript, or exist quite independent from a forum. Its meaning and role, especially in relation to religion, cannot be discussed here.[234]

III. Fora Issues

1. Conflicts between fora (examples)

A human being may be subjected to different and even conflicting norms. The history of religions ar full of such conflicts. When during the Babylonian Exile King Nebuchadnezzar of Babylon (605–562 B.C.E.) ordered the Jewish officials Shadrach, Meshach and Abednego to be punished because they did not obey the King's orders, the three Jews answered that they would rather follow their own Jewish religious duties than obey (Daniel 3,13–18). The disciples Peter and John answered the Synhedrion in a similar manner that it is better to obey God than men (Acts 4, 19). Moral familiar duties caused Hamlet to become a rebel. Also, valid laws may contradict each other. Many tragedies center around conflicting fora.

a. The *conscientious objector* refuses to get drafted to military service and rather runs the risk of being punished because his conscience commands him to stay away from situations in which he might be forced to kill a person. He understands the Fifth Commandment "Thou shalt not murder"in this way. One forum, the legal order of the nation to which he belongs conflicts with another forum, to wit, his personal conscience.

b. The legal principle of the *civil marriage* (marriage as a contract under civil law) was introduced during the French Revolution. In Germany, as in many other states, opposition to this principle was strong, most of all from Catholic citizens, since they understood marriage as a religious ceremony, or even a sacrament. The issue was among the most bitterly fought in Germany's and Switzerland's *Kulturkampf* (Culture Fight) during the years 1871 and 1887. The legal and the religious social norms were in conflict.

c. Do *siblings* owe one another financial support when in need? Legal systems differ in their answer to theis question. Swiss law requires siblings to help each other. In Germany, the law is silent, but nobody doubts that a moral obligation to do so exists.

d. *Religion* may impose the duty to keep one day a week holy and stay at home. But what about the parents who on this day should be visited as good custom requires? Religious and ethical duties may oppose each other.

e. Former German Chancellor Helmut Kohl was obliged under the German law to tell the truth to parliament when involved in a case of illegal subsidies to his party. But he had given his word of honor to friends that he would keep silent about the financial source: law conflicted with his *code of ethics.*

f. Sophokles' tragedy of Antigone confronts political instruction with religious-traditional-familial duties: *Political norm* conflicts with *good mores.*

g. In times of political crisis, law may require the purchase of public bonds. Good custom and family morals teach to invest your money in real estate or other valuables in favor of your children or other family in order to secure their future. And religion asks you to give your money to the poor: The choices to be a "just" person are *threefold,* and in conflict with each other.

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234 Thomas Aquinas, Summa Theologiae, Ia–IIae, quaestio 19, art. 5–6.

h. *Immoral law.* The Nazis required children to denounce their parents when they criticized "the Party" or Hitler's government. Some children followed the heinous law, not their moral duty to protect their parents, and thus caused their own parents to be arrested.

i. *Turkish women* may be obliged by religious rule or custom to wear the veil in public, but law prohibited the veil in universities (until 2006).

j. The *Bible* mentions conflicting fora in many contexts: As mentioned, Peter, the apostle, said that "we must obey God rather than any human authority" (Acts 5.29; cf. Daniel 3, 18). Jewish law and Christian liberty conflict about circumcision, (e.g. Romans 3.1). Religious duty and reasonable secular law need not contradict each other (Matth. 22, 21 – God and Cesar)). There are less examples in the *Koran* because according to its teaching God's will is all-pervading so that, e.g., custom has to give way (Surah 5. 103f.). If religious duty conflicts with the moral duty to help others, the Koran follows the Bhagavad-Gita morale that one's own salvation is more important than assistance given to the weaker (Surah 5, 105; cf. W. Fikentscher 1995/2005, 164, 361; for the opposite Christian position see, e.g., Romans 15.1; 1st Corinthians 8.9, 9.22; 2nd Corinthians 22.29: 1st Thessalonians 5.14).

k. Legal pluralism (Ch. 1 V., above) is a conflict between two or more legal fora.

2. Acting in a forum conflict situation

These and other examples demonstrate that conflicts between social norms are frequent, if not the rule. It is not far from the truth that there is hardly any duty which canot enter in conflict with another duty. The mode of thought of the Greek Tragic mind offers great literary treatments of such collisions. There is no general rule how to solve tragic clashes, no fixed scale of higher and lower duties. Thomas Aquinas teaches that acting in good conscience, after careful examination of the opposing duties, is better than obeying the pope and justifies the sinner.[235] Martin Luther's recommendation is to act, not to forbear, after having evaluated the alternatives, according to the rule of "pecca fortiter" (you may sin, when you act, but act with resolve).[236] There seem to be no clear ranking among social norms, and no clearly more or less valuable ones. A hierarchy of moral values, with a prime at the top and lesser degrees below does not exist, or is, at least, not easily discernable. Social norms of different kinds exist side by side and are able to contradict, or support each other.[237] Any sensible and deliberate decision of an individual who in case of conflicting fora prefers one forum to another deserves respect, provided the preferred forum is tolerant of other fora and develops an at least rudientary sense for tragic. The law sometimes pays tribute to such a decision by sentencing the defendant to a symbolic $1 fine. Another way is to distinguish between unlawfulness and guilt. This book offers no appropriate framework for an in-depth discussion of these kinds of conflicts. Criminal law, philosophy, moral theory and theology of morals are competent fields of research.

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235 See before; against Petrus Lombardus who taught that the pope's opinion derogates conscience.

236 Johannes Heckel, Lex Charitatis, eine juristische Unersuchung über das recht in der Theologie Martin Luthers, Abhandlungen der Bayerischen Akademie der Wissenschaften, Phil.-Hist. Klasse N.F. No. 3, Munich 1953, 2d, ed Cologne-Vienna 1973, Martin Heckel ed.

237 An early study: J. Matter, Über den Einfluss der Sitten auf die Gesetze und der Gesetze auf die Sitten, Freiburg 1833: Herder (transl from French by F.J. Buss).

3. The question of a historical primate: Which type of social norm was first?

Traditional ethnologists and theorists of theology often assume that the forum of religion is the oldest and the original. They claim that other norms emerged later from the religious ones by way of diversification or transfer to mundane issues. Other authorities assert that the law was present in all societies from the beginning of mankind (Pospíšil; Malinowski). Malinowski's theory says that the human beings became "human" by understanding that there must be met a "fundamental function … to curb certain natural propensities, to hem them in and control human instincts …" (Malinowski, Crime and Custom, 64) and thus started out with what we call law (and, if sanctions are not authorized, morals).

On the other hand, one may ask whether early man might have felt that nature is subjected to controls of a different kind, and whether this is the basic quest for religion. This theory would have to argue that law, morals and religion, as normative fora, started at the same time. It were indeed be strange if the humans would discover law for themselves without asking whether nature, as their nourishing and threatening environment, does not follow similar or different prescripts, and who might be the one or ones establishing them. An earlier study discusses these issues (W. Fikentscher (1975 a), 60ff. and for the following 91ff., 100–104).

a. Some anthropologists claim that among humans religion was the first social norm among humans: Henry S. Maine,[238] E.B. Tylor,[239] Wilhelm Schmidt,[240] William Robertson Smith,[241] and Wolfhart Pannenberg.[242] Generally speaking, according to these theories, moral and legal norms are later developments, mainly due to secularizing influences, but coming from a religious source.

b. Another opinion holds that there is no society without law, so that there must have been law from the very beginning of mankind.[243] But what about morals and religious norms at this early period?

c. The structuralist view postulates that in the beginning there was the structurally inherent normativity, and all the later developments of moral, legal, and religious norms are differentiations of that given structure.[244]

d. A peculiar theory concerning the primate of norms was developed by the Soviet legal theorist and anthropologist A.I. Pershits.[245] Pershits sees a "mononorm" as the original social norm that contains moral and legal norms in one. Religious norms are non-existent. The

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238 Henry S. Maine, Ancient Society (1861), 14, 28, 113ff; A.S. Diamond, Primitive Law, London etc. 1935, 49ff., opposes Maine by returning to reasons, cited by Montesquieu and Bentham, carefully rejected by Maine. Other critics of Maine, pointing to various reasons: Patrick H. Novell-Smith, Religion and Morality, in Paul Edwards (ed.), Encycl. of Philosophy, vol. 7, New York & London 1967: Collier, Macmillan & Free Press, 150ff.; Henri Bergson, Les deux source de la morale et de la réligion, Paris 1932; W.G. de Burgh, From Morality to Religion, London 1938; Alexander MacBeath, Experiments in Living, London 1952; W. Fikentscher (1975 a) 93.

239 On him in this respect, Brigitta Benzing, Edward Burnett Tylor, in Feest & Kohl (2001), 492–498, at. 495.

240 Wilhelm Schmidt S.V.D., Der Ursprung der Gottesidee, 12 vol, 1926–1956.

241 On him Hans G. Kippenberg, William Robertson Smith, in: Feest & Kohl (2001), 429–436, at 431, 435.

242 W. Pannenberg, Christliche Rechtsbegründung, in: A. Hertz, W. Korff, T. Rendtorf et al. (eds.), Handbuch der christlichen Ethik, Basel & Vienna 1978, vol. 1, 323ff., at 331; idem, Anthropologie in theologischer Perspektive. Goettingen 1983: Vandenhoeck & Ruprecht).

243 In this vein, in particular L. Pospíšil (2004) 487; Pospíšil leaves open the issue whether in this early humanity-defining phase there may have been other fora besides law such as morals or religion.

244 Claude Lévi-Strauss, Social Structure, in: A.L. Kroeber (ed.), Anthropology Today, Chiocago 1953: Chicago University Press, 524–553; idem, Structural Anthropology, New York 1963: Basic Books.

245 A.I. Pershits, The Primitive Norm and Its Evolution, 18/3 Current Anthropology 409–413 (1977); cf., Piers Vitebsky, Rethinking Soviet Anthropology, 5 Anthropology Today No. 5, 23–24 (1989).

separation of legal and moral norms occurred later in history, in order to facilitate the expropriation of the working class by capitalists. According to Pershits, the ideal state would lead back to the mononorm and thus to abolition of law as an ought.[246]

e. Later, a similar approach was taken by Adolf Hitler. At the "Imperial Party Day" (Reichspartitag") at Nuremberg in 1935, Hitler pronounced: "From now on, there is no distinction anymore between law and morals."[247] The political aim of Pershits' mononorm and Hitler's legal-moral "uni-norm" is the prevention of comparability and hence control of one social norm by another, especially of laws by morals. A-moral laws are the intended political consequences. From a multi-forum point of view, a-morality means immorality. Both the Marxist and the Nationalsozialist doctrines are consequential: In Marxism, the guiding value is use value which can only be determined and administered by dictatorship. This dictatorship is, since value-related, totalitarian. In National Socialism, "blood and soil" *(Blut und Boden,* popular-ironic abbreviation: *"Blubo"*) takes the place of use value. Thus, both central values, use value and blood and soil, are foreign-determined and one-dimensional ones, and do not tolerate co-existing or conflicting values. Socialism that defines itself on the basis of use values aims – if involuntarily or innocently – at totalitarian dictatorship. Use values can only be determined by political fiat of the cadres, and they not only are hierarchically prescribed economic data (dictatorship) but also politically guiding data for correct and competent consciousness (totalitarianism). There are "leftist" politicians who think that democracy and socialism can be combined to form a "democratic socialism". If that socialism is use-value socialism, democratic socialism is no thinking possibility because democracy requires the individual Parmenideian judgment.

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246 Whether the Socialist Revolution would end in the abolition of law (E. Pashukanis), or whether a legal system could be made instrumental for the Revolution (Petri I Stu ka; Wyshinsky: "socialist legality") was a debate in the late 1920ies which by Stalin was decided in favor of the second opinion, W. Fikentscher (1976) 569–573, with more literature.

247 Paul Nerreter, Allgemeine Grundlagen eines deutschen Wettbewerbsrechtes, Berlin 1936: Vahlen, Motto; a discussion: Pospíšil (2004), 491.

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Chapter 5: Theories of culture and cultures

Chapter 5 on the attributes of culture and cultures is structured according to the influence of the axial age. The term has already been mentioned in Chapter 1 II. 4. and Chapter 3 III, IX. 2., above. What does axial age mean, and how is it related to other theories of cultural development? A new approach is offered as to the role of time concepts for the distinctions between cultures. By sketching circles of cultures (in particular the modes of thought that shape cultures) some modern issues find discussion, for example the question of whether in view of recent developments it is still appropriate to speak of "East and South Asian cultures", why Islamic difficulties with the concepts of time and unit interconnect, and why identity as a concept of cultural anthropology is so important. The forms of cultural neighborhood – peaceful or hostile –, culture change, minorities, and migration present interesting novel issues. On acculturation, in view of some disrespect that concept is encountering today, a modernized conceptualization is on offer. Law (primarily), economics, religion, and politics furnish the examples.

So far, culture has been defined (in Chapter 3 I 1 and 2, in relation to other definitions) as the attribute of a society that refers to the patterns of conduct of its participants – traditional but open to change – in contexts concerning knowledge, belief, art, morals, law, custom or other mentally reflected activities or states. The present Chapter 5 is devoted to the anthropological attributes of culture. While concerned with themes around culture and relating to culture from an anthropological point of view, it does not amount to a complete theory of culture.[248] Rather, various aspects are discussed as important contributions to the content of culture or as influenced by it. The inventory of these aspects is certainly not complete. While future developments may demand a study of additional or different cultural themes, the following culture-related subjects are considered below:

(I) Structures of cultures; (II) Surveys on culture and cultures. Human Relations Area Files (HRAF). Axial age, the modes of thought, and the law; (III) The theory of culture and cultures. Cultural holism and pluralism. Cultural time concepts. (IV) Person. Individualiy, Identity. Culture personality. Vita research; (V) The circles of culture, based on the modes of thought (pre-axial age; East and South Asian; Tragic Mind; Judaism, Christianity; Islam;

248 This is the intended task of another social science, Cultural Studies. From the literature: John Clarke, Stuart Hall, Tony Jefferson, & Brian Roberts, Subcultures, Cultures, and Class, in: Stuart Hall & Tony Jefferon (eds.), Resistance Through Rituals: Youth Subcultures in Post War Britain, London: Harper & Collins, 9–74; Simon During, Cultural Studies (ed.) The Cultural Studies Reader, New York 1993: Routledge; Stuart Hall, David Morley, & Kuan-Hsing-Chen, Critical Dialogues in Cultural Studies, London 1996: Routledge; Stuart Hall & Paul Du Gay, Questions of Cultural Identity, New York 1996: Sage; Paul Gilroy, Stuart Hall, Lawrence Grossberg, & Angela McRobbie, Without Guarantee: In Honour of Stuart Hall, Scranton, PA 2000: Verso & W. W. Norton; Roger Bromley, Udo Göttlich & Carsten Winter, Cultural Studies: Grundlagentexte zur Einführung, Lüneburg 1999: Klampen; Austin Sarat & Jonathan Simon (2003) (includes references to law); a list of Stuart Hall's publications: http://www.mona.uwi.edu/library/stuart hall.html. It should be noted that Cultural Studies grew from studies of minorities, identity, subcultures, and class studies. Among the authors, Stuart Hall, Birmingham, was a chief figure since the late 1950ies. Later Cultual Studies spread to US, France, Germany, and some more countries. Raymond Williams, Paul Gilroy and others joined the group (see publications above). – Between Cultural Studies and cultural anthropology:, there are several distinctions. Cultural Studies work less comparatively and empirically, but more politically and focused on subcultures, class, minorities, and gender. The field of Cultural Studies (translated into German as *Kulturwissenschaft)* (in the singular) is a young and dynamic field compared to cultural anthropology, and its final contours are still shaping up.

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Modern-totalitarian); (VI.) Acculturation; (VII.) Culture change; (VIII.) Culture transfer. Receptions. Transplants. Internalization. Legal families of law; (IX.) The anthropology of borders, corridors, trails; and trading routes; (X.) Forms of cultural neighborhood (in situations of national borders, enclaves, and "mixes" or "melting pots". (XI.) The anthropology of minorities. (XII) Migration; section XIII sums up these aspects by several lines on cultural justice with a preview on Chapters 7 and 16. Section XIV. contains a bibliography.[249] The sequence follows partly moving from the more general to the more specific, as well as from the advantage of using known concepts in later contexts.

I. Structures of cultures

Sociocultural anthropology uses a distinct terminology in which *theme* has a central role. Themes are parts of the general theory. Cultural themes may be overt or covert.

1. Overt themes

Overt themes are quantifiable, and they can be observed. They can be objects for investigations. Their discovery may take time, but should in general be feasible within a year or less, depending on experience, accessibiity, and intensity of observation. Overt themes are either ideational or behavioral.

Ideational themes can be non-value-laden, or value-oriented. For instance, a non-value-laden ideational theme of culture is the feeling of respect for a big man or a chief. Value-oriented ideational themes are characterized by either positive evaluations such as the esteem of a cross-cousin marriage, or negative evaluations such as incest taboo. We will see that valued cross-cousin marriage and tabood incest may move close to each other (Chapter 8).

Behavioral themes can be grouped in four categories: (a) Cultural *functions.* They may serve special functions of cultures such as purity, identity, or defense. Food taboos or care of the elderly are further examples of special functions. Culture as such may also serve functions. It has already been remarked that three general functions of culture are the control of incest and comparable issues, of power, and of other-worldly relationships. The last general function if applied to animism calls for a person in whom the relationship to the other-world can be focused, because the animistic this-worldly nature-culture tension is this-worldly – hence person-bound –, but the focus is the other-world. Under a general functional point of view, this person is the shaman. In the shaman, the cultural task of maintaining relations to the other world personalizes itself as far as animism is concerned. Thus defined, shamanism can be traced in most religious types with all their varying forms, from ancestor worship over magic to divination.[250] (b) Cultural *purposes.* They are closely related to cultural functions but restricted to aims and goals nearer at hand such as the raising of animals for religious sacrifices or sport events, e.g., cock fights, bull fights. (c) Cultural *patterns* (Ruth Benedict: "configurations"). They concern whole entities of cultural life styles such as nomadism, segmented society, superadditive societies, or trading nations (e.g., Chinook, Phoenicians, Franks). (d) The two most used terms are "cultural traits" and "cultural complexes". A *trait (Merkmal, Kultur-*

249 Sections I., II. and III. are introductory and concern aspects of culture and cultures already addressed from different aspects in earlier chapters.

250 This may explain the observations and speculations found in Mircea Eliade, Schamanismus und archaische Ekstasetechnik, Zurich & Stuttgart 1956: Rascher; Horst J. Helle, Religionssoziologie: Entwicklungen der Vorstellungen vom Heiligen, Munich 1997: Oldenbourg; idem, Religionssoziologie des Schamanismus, Einsichten, University of Munich, 1997/2, 46–48. Totemism and shamanism may be found combined, but not necessarily.

merkmal) is any content-related characteristic of a culture, for example the wearing of the leopard skin by the Nuer "leopard skin chief", the number of colors known in a given culture, or the terms for types of snow A cultural *complex* is a combination of several cultural traits such as blood feud, compensation to avoid blood feud *(Wergeld),* or liminality expressed by an initiation rite or a wedding ceremony. Adding up a larger or smaller number of traits makes a complex and thus no sharp line between trait and complex can be drawn.

2. Covert themes

Cultural themes of covert character can be understood only after an extended period of participant observation. Examples are gender-specific ways of speaking or tacit behavior, the underdog feeling in certain agricultural populations, a sensibility for certain kinds of humor, and (as a rule) modes of thought. Fairytales and local taboos are other sources of covert cultural themes. Careful familiarization with local or regional habits, "dos" and "don'ts", conversation with elders, and personal friendships may help the researcher to enter the world of covert cultural themes.

II. Surveys of culture and cultures. Human Relations Area Files (HRAF). Axial age, modes of thought, and law

There are several kinds of cultural surveys. The writers who drafted them did so for rough orientation. Thus, none of these surveys should be used in a schematic, unflexible way.

1. "Raw structures"

A categorization of cultures can refer to what may be called "raw structures". Cultural evolutionism prefers them. Thus, most of the early cultural anthropologists identify three stages. Adolf Bastian (1826–1903) lists natural peoples *(Naturvölker),* half cultures *(Halbkulturen),* and cultured peoples *(Kulturvölker).*[251] Possibly influenced by Bastian's theory of the "psychic unity of man", Lewis H. Morgan (1818–1881) developed his three-stage evolutionary scheme of social progress (savagery, barbary, civilization) in "Ancient Society" (1877). Henry S. Maine (1822–1888) separates family societies, tribal societies, and "state societies". Edward B. Tylor (1832–1917) separates savagery, barbary, and civilizations in a manner similar to Morgan, and a number of anthropologists follow both.[252] V. Gordon Childe distinguishes, as we have seen, foragers, reproducing cultures, and urban society, the latter typified by division of labor. Childe' tripartite scheme was regarded the most useful for this book.

2. HRAF

Other methodologists of comparative culture are more interested in the details of every culture and prefer categorizing them by matrixes of cultural traits. Results produced by this method may be called "fine structures". The best known system is the Human Relation Area Files. The HRAF are a microfiche and (now) internet survey on 700 cultures and 300 traits and complexes of these cultures, which makes 210000 entries. On the HRAF, their idea and history, Chapter 15, below, gives a report in the context of the study of specific cultures.

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251 See Chapter 2 II. 1. c, above.

252 On Morgan, Maine, and Tylor, see Chapter 2 II 1. b., above. Followers of Morgan are, e.g., Joshua McIlwain and C. Lyell, but others such as John Lubbock disagreed; on them and Morgan's influence in general, Burkhard Ganzer, Lewis Henry Morgan, in: Wolfgang Marschall (ed.) (1990), 88–108, 106ff.

Only partly based on the HRAF are Alan Lomax' (1915–2002) cantometric and choreometric surveys which attempt to relate musical organization to social organisation by establishing correlations between, for example, vocal and other qualities with class stratification, gender, and sexual mores.[253]

3. Pre- and post-axial age cultures

An important criterion of distinction between cultures is what since Karl Jaspers has been called the "axial age". It is the period of human history when many religions emerged which still today exist: Zoroastrism (resumed by Manicheism), the Upanishads and other teachings leading to modern Hinduism, Taoism, Buddhism, Confucianism, the Pre-Socratic philosophies and the Greek Tragic Mind (sometimes called "polis religion"), Judaism of the Babylonian Exile (later referred to by Christianity and Islam). With reference to earlier publications, this is not the place to extensively discuss "axial age" again.[254]

A more detailed presentation of this concept is found in Chapter 9 IV where the anthropology of government will be examined. The axial-age religions and the modes of thought shaped by those religions are of paramount impact on human styles of societal order, forms of government, and sources and contents of law. Here in Chapter 5 I., where kinds of culture and their traits are to be reported, the focus is on the cultural meaning of the axial age.

Axial age is the time in human history when animistic belief systems on a broad scale became subject to doubt, particularly in ethical respect. In *pre-axial times* human beings related to nature in a tribe- or nation-specific manner ("animism in a wide sense"). The axial age turned this ethical plurality into a generalized good-bad dichotomy. A reason may have been

253 By the way a nice example of sociological homology. Alan Lomax, Folk Song Style, 61 American Anthropologist 927–954 (12/1959); idem, Folk Song Style and Culture, New Brunswick 2000: Transaction Publishers.

254 Axial-literature is not numerous. A collection: Erwin Rohde, Psyche, Seelenkult und Unsterblichkeitsglaube der Griechen, Freiburg 1890: Mohr (10ed. 1925) *("Wendezeit");* Karl Jaspers, Die Achsenzeit, in: Ernst Schulin (ed.), Universalgeschichte, Cologne 1974: Kiepenheuer & Witsch, 96–106; (orig. 1949) the contributions in 104/2 Daedalus 1975, among them B.I. Schwartz, A. Momigliano, Eric Weil, and Louis Dumon; Shmuel Noah Eisenstadt 1986; 1987; 1992; Stefan Breuer, Kulturen der Achsenzeit: Leistung und Grenzen eines geschichtsphilosophischen Konzepts, 45 Saeculum I, 1–33 (1994); Johann P. Arnason, East Asian Approaches: Regiion, History, and Civilization, 57 Thesis Eleven 97–112 (1999/1); W. Fikentscher (1975a), 50, 90, 94, 103–107, 170f., 270ff. (use of the concept of axial age for comparative cultural studies and in legal methodology); idem (1977a), 413, 420–439.; idem (1995/2004, XL ff., 170ff., 190); idem, Power Controlling Societal Order, Economy, Religion, and the Modes of Thought: Kritik/Critique to Shmuel Noah Eisenstadt "Culture and Power – A Comparative Civilizational Analysis", 17/1 Erwägen Wissen Ethik (EWE)/Deliberation Knowledge Ethics, 31–34 (2006); idem, Axial Age: Terminology and Impact, Erwägen Wissen Ethik (EWE)/Deliberation Knowledge Ethics 17/3, Appendix, 427–429 (2006), with an answer by S.N. Eisenstadt, The Basic Characteristic of Axial Civilizations, at 429–432); J. P: Arnason, S.N. Eisenstadt, & B. Wittrock (eds.), Axial Civilizations. Leiden 2005: Brill; Robert N. Bellah, What is Axial About the Axial Age?, 46/1 Archives Européennes de Sociologie, 69–89 (2005) = 46 European Journal of Sociology, 69–89 (2005); Hann & Group (2006), 3, 24f. with a list of recent books and articles. The main difference between the other authors' and my own approach is that the other writers focus on similarities and dissimilarities of axial age phenomena *within* the various cultures against the background of the issue of ascertaining or disproving the concept of axial age as such, and my starting assumption is animism in the broad sense from which vantage point it is easier to study *from outside* how axial age phenomena have changed the landscape of cultures worldwide. My main result is that the axial age consists in a generalization of formerly tribe-or-nation-specific ethical standards with the consequences of replacing religious types by total religions (in Pospíšil's terminology) and thus constituting historical and contemporaneous culture-relevant modes of thought. On the ensuing importance of the axial age for the types of human organization see Chapter 9 IV, below, and the literary dispute with Eisenstadt, cited above.

the demographic fact that more contacts arose between clans, tribes and nations, by commerce, migration, traveling, or warfare, and people discovered that other people have different spirits and gods and different allegiances to them in terms of good and bad. By way of comparison, clan, tribal and national standards of good and bad and their authorities rooted in creation stories began to falter. Conquering *the other,* of course, solved the problem by subjecting the defeated to the ethical principles of the victor. But many contacts may not have lead to conquest. Unsure of what the applicable ethical standards are to be, clan, tribal and national spirits and gods became confronted with (and possibly got wholly or partly obsolete by) a worldwide good-bad ethics and its profound religiously-dogmatic, societal and legal consequences.

Historians roughly associate the axial age to the period between 650 and 400 B.C.E. It was the time of which we in hindsight say that it was the period of many religious foundations. Several of them have been mentioned before. It is indeed striking that within this relatively short period of 250 years so many religions traditionally see their "foundation" or locate their revered "founder". Probably, some of these "religious founders" were not more than personalized dogmatic revolutions (comparable to Sigmund Freud's "Moses") which necessarily became triggered by that ethical good-bad secularization, which may be called the "new ethics". The "founders" of axial age religions include the legendary Zoroaster (about 630–560 B.C.E., others say around 950 B.C.E.), the Brahmanic authors of the Upanishads and of the Bhagavad-Gita, Lao-tse, Confucius, Menzius, Buddha, the organizers of the synagogue during the Jewish exile and possibly identical with the Isaiah group of prophets (Isaiah 43, 19) and/or the group of returnees to Jerusalem in 537 B.C.E. under Jesua, and the pre-Socratic philosophers and the politicians who defined the ("Tragic") Greek *polis* religion. It is self-evident that the axial age as awareness of non-clan, non-tribal, transnational, worldwide (Deutero-Isaya: "up to the isles"), and for purposes of comparison *secular* and simplified, good-bad ethics influenced culture and cultures.

The axial age as described by modern philosophers and historians geographically encompasses the then known world, reaching from Gibraltar to Japan, and from Scythia to the upper Nile. The question has been raised how Pharao Ekhnaten's monotheism (1,400 B.C.E.) may relate to the axial age. The answer is that Egyptian pre-axial-age monotheisms is not singular but consists in a not infrequent form of *deus otiosus* and thus belongs to pre-axial-age animism in the broad sense as a numerical extreme of polydaemonism and polytheism. Another critical question refers to Christinanity and Islam, both more than five hundred respectively one thousand years after the axial age. Can they be said to belong to, or at a minimum to be influenced by, the axial age? Both Christianity and Islam expressly recollect exilic Judaism, through references to Isaya-tradition and other Abrahamic-Davidian connecting points.

It is to be acknowledged that a culture outside of this "Old World," may experience its own axial age at any time, outside those 250 years and even today and in the future. Pre-axial age societies have become rare. To understand and to respect them is a noble duty of missionaries from other religions, and for governments from the economically and politically dominant cultures. It is here where, in the present world, the reasons lie for the differences of religions, and for the different societal, legal, economic, and political models. The axial age has created the total (= world and life explaining) religions and the typical behavioral patterns of their followers. In many religions, their dogmatics determine their ethics. However, the axial age phenomenon seems to be a case where this sequence turned around: In dogmatic respect, based on the arsenals of animistic traditions, post-axial age religions look like variations of attempts to find *dogmatic* reasons for the axial-age enlightenment of having discovered a general *ethics* of good versus bad.

In *post-axial-age societies,* cultures are diversified by total religions and their ethical standards. Childe's two revolutions point the way of interpretation of these cultures. Yet, one can speak of three consecutive "revolutions", the neolithic, the urban, and the axial age. Humans began to mentally reflect and doubt guiding rules for their behavior independently from the supra-natural. While pre-axial age "religious types" were defining the belief systems of single tribes or nations, post-axial age "total religions" could not but address the whole world, resulting in the question of means and ways to deal with people who hold different worldviews.

This also applied to the domain of law. Theophrastos' collection of *polis* laws, the *jus gentium* of the Roman *praetor peregrinus,* the Frankish rule of *quislibet vivit sua lege,* Hugo Grotius' replacement of the Empire through *fides* among the sovereigns, the rules of conflict-of-laws, and the International Competition Network (ICN) are a few attempts at dealing with the issue.

III. Theory of culture and cultures. Cultural holism and pluralism: Cultural time concepts

The meanings of the term culture and the distinction between its "holistic" use ("in the singular") and its pluralistic sense ("in the plural") has been discussed in Chapter 3 I. Here follow more examples to show the role of this distinction for cultural themes.

1. Culture

The term culture in the singular is used in the sense of attributing a characteristic to a person or a group of persons, for example when it is said: "This kind of pottery evidences the high artistic culture of the Mimbres society of the Northamerican Southwest", or "Meditation is an important part of Buddhist religious culture". The Latin word *cultura* means plantation, cultivation, or care, in contrast to *natura*.[255] The original intention of the expression *cultura* is to describe a human activity dealing with *natura,* the natural environment as it is grown by itself. In a wider sense, *cultura* is used by Cicero. He compares the cultivation of a piece of land with the philosophical education of a person.[256]

Thus, the literal meaning of culture is the result of a cultivating and educational human activity in the singular. The historical period of discoveries, beginning in the 15th century, raised the issue whether the aborigines who inhabited the newly discovered lands are beings who belong to the realm of nature (hence the German term *"Naturvolk"*) or whether they also have culture. Together with the growing conviction that aborigines are humans and not just parts of nature, the term culture had to be used in the plural.[257]

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255 From *colere* = to plant, to raise and take care of crops. Hans Fischer & Bettina Beer, Ethnologie, 5th ed. Berlin 2003: Reimer, 60ff. The following lines on culture in the singular and in the plural and the quotes attached owe much to the unpublished paper by Thomas Glas, Kultur vs. Kulturen: Kulturpluralismus und Kulturholismus, unter besonderer Berücksichtigung des Phänomens eines Ethnozentrismus, University of Munich, seminar paper, Winter 2006/07.

256 Marcus Tullius Cicero, Gespäche in Tusculum (Conversations in Tusculum), Stuttgart 1997: Reclam, 10ff.

257 For doing this important step, both Roland Girtler (Kulturanthropologie, 2nd ed. Vienna & Muenster 2006: LiTVerlag, 19ff.) and Thomas Glas (see note 255) point to the influence of René Descartes' *Traité de l'homme* (1648). The modern development that led to E.B. Tylor's (holistic *and* plural use of culture) has probably started with Johann Gottfried Herder, see Chapter 2 I 4, above.

2. Cultures

When used in the plural, cultures are the constituent parts of what is called cultural pluralism. Cultural pluralism opens the fields of study of cuilture comparison – there are literate and illiterate cultures, shame cultures and guilt cultures, risk-aware and risk-apathetic cultures, etc. –, culture transfer and culture transplants (see VII. below), cultural legal pluralism, culture shock, foreign aid, missionizing, peace-keeping and peace-restoring, etc. Today, the use of the word culture in the plural is a matter of course ("there are more than 6000 African cultures south of the Sahara"; "in history and presence the world has seen at least 10000 cultures"). In cultural anthropology, the theory of the modes of thought ("behind the cultures") is an attempt to enable culture comparison without being flooded with these numbers.[258]

3. From history to system and return

The interface between culture in the singular and culture in the plural is an interesting example of the context of history and system.[259] Humanist usage during the 15th and 16th century still limited culture to the single person, so that the almost contemporaneous early age of discoveries had to solve the problem whether the "savages" in the newly discovered parts of the world were parts of nature or of culture. As soon as it could no longer be denied that those "others" were humans, they had culture, claiming the same ethnocentrism as the discoverers. The realization that there were many cultures produced a systemical expansion.

Over time, this led to the inevitable question of what all these cultures had in common. The commonalities of culture had to be determined. For this, a holistic view, an encompassing approach to its attributes became necessary. E.B. Tylor was among the first who defined culture in a holistic way.[260] In turn, this holism made comparison possible. Moreover, such a comparison could be done over space and time. A system had produced a historical perspective and understanding.

4. Time concepts. Aspectivity and perspectivity. Links between time and space

Notions of space, personal relation to objects, concepts of personality and individuality, time, and many more cultural traits and complexes can be studied culture by culture. Often the distinctions are obvious and striking, sometimes they are hidden and, because of their covert character, can be understood only after long years of participant observation. Since these types of comparisons of cultures cannot be made of all the 10000 cultures of this world, it may be permissible to reduce that great number to a more manageable number of what has been called "modes of thought". Typically they bind a smaller or greater number of cultures together. A mode of thought is a theme of cultural anthropology that connects human data perception with mentally reflected behavior in a culture-shaping way. In different cultures, data are perceived, reflected and acted upon differently. Many implications are conceivable when one attempts to collect those data and the resulting reflections. Then, those notions of space, relation to objects, concepts of personality and individuality etc. can be compared – not culture by culture, but – mode of thought by mode of thought.[261] The objects of comparision in that earlier publication were, in particular, cultural attitudes towards space, time, risk, risk-

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258 See Chapter 3 I, and in this Chapter (5) IV.

259 For details on this context in the science of science, see e.g. W. Fikentscher (1977 a), 3–103; also Hans Fischer & Bettina Beer, Ethnologie, 5th ed. Berlin 2003: Reimer; Carl August Schmitz (ed.), Kultur, Frankfurt/Main 1963: Akademische Verlagsanstalt (2nd ed. 2001); and Girtler (see note 242 above), 19ff.

260 See Chapter 3 I.

261 See W. Fikentscher (1995/2004) for details.

influenced ethics, conceptual unit-building and ensuing social ordering, accentuation of activitiers or attributive descriptions ("the-shield-of-Achill" issue).[262] Of course, culture comparison could be extended to many more objects. The list of properties characterizing specific cultures and the modes of thought which shape these cultures is only one of many possibilities, and it is necessarily incomplete. The properties that are mentioned here are interesting for the lawyer, but not only for him, political scientists, psychologists, theologians, and sociologists might as well profit from their examinationn.

All this has been developed in detail and with references to the authorities in the modes-of-thought book to which reference has here to be made. What has been said about the modes of thought necessarily fits for cultures, since the modes of thought are middle- (not ideal-)typical human mind-sets behind cultures, shaping the particular character of each (examples: most East and South Asian cultures are influenced by a world-view of detachment; pre-axial-age cultures are not thinkable without specifically strong ties to nature, environment, family and family metaphors; etc.). In the following parts of this Chapter 5, several aspects discussed in the book on the modes of thought will have to be resumed in the context of culture and cultures theory. But a general reiteration will not be given.

Of the many culture-specific properties, *time* is a central cultural theme, and is used here to illustrate culture comparison with the aid of at least one complex. Time is a telling indicator of culturalspecificity. The main cultural attitudes towards time[263] are presented in the following chart of some cultural understandings of time:

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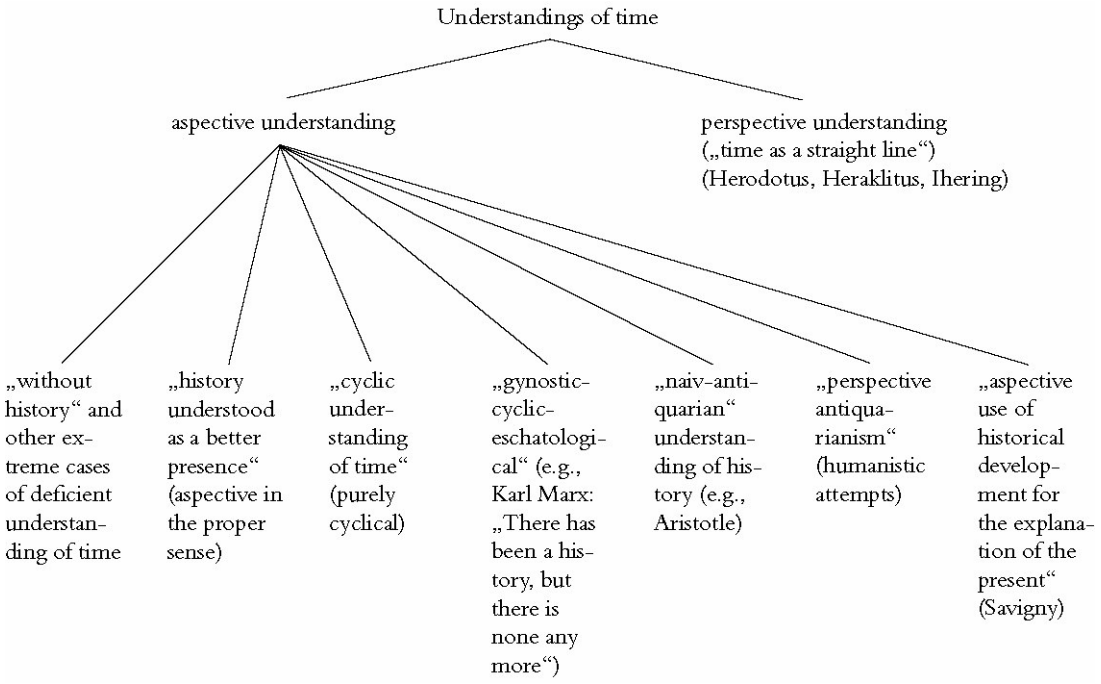
262 Ibidem, 181 ff. (in general), 238 ff. (hunters' and gatherers' modes of thought), 289 ff. (modes of thought of cultivators), 292 ff. pre-axial-age modes of thought in general), 334 ff. (East and South Asian modes of thought), 394 ff. (Greek Tragic Mind, Judaism, and mainstream Christianity modes of thought), 419 ff. (Islam as a mode of thought), 452 ff. (modern totalitarian modes of thought).

263 Fikentscher 1977 a, 19 ff., 61 ff. There, the understandings of time and system are paralleled. In the methods book; the chart is used again, slightly extended, in Fikentscher (1995/2004) on p. 181 f. E. T. Hall, The Hidden Dimension, Garden City, NY, 1966: Doubleday, (1970); idem, The Dance of Life, New York et al. 1983: Doubleday, gives a lucid description of culture-specific space and time concepts. See also E. R. Leach 1961 c; Yaker 1956; Piaget 1970 a, c; 1983; Rommetveit 1979; Rayner 1982; Hamburger (1967), Holländer (1984), Brunner-Traut 1963, 1976, 1980, 1990; Bernhard Grossfeld, Zeit, 89 Vergleichende Rechtswissenschaft 498–514 (1990); and Gell 1996. R. M. Pirsig (1991, at 383) says: "The Hopis have no word for time." This remark is reminiscent of the debate on the alleged absence of the future tense in the Hopi language. The Sapir-Whorf hypothesis holds that in Hopi no future tense exists and that therefore the conception of future things and events in Hopi meets difficulties: Edward Sapir, Language: An Introduction to the Study of Speech, New York 1921: Harcourt, Brace & Co.; idem, Anthropology and Sociology, in: W. Ogburn & A. Goldenweiser (eds.), The Social Sciences and Their Interrelations, Boston 1927: Houghton Mifflin, 97–113; Benjamin L. Whorf, Language and Logic, New York (1941): Wiley; idem, Language, Thought, and Reality, in: J. B. Caroll (ed.), Language, Thought, and Reality: Selected Writings of Benjamin L. Whorf, Cambridge, Mass. 1956: MIT Press; idem, The Hopi Language. Chicago University Library, Microfilm Collection of Manuscripts on Americam Indian Cultural Anthropology no. 48 (undated). Contra (the Hopi have a future tense and can think in terms of the future) Ekkehart Malotki, Hopi Time: A Linguist Analysis of the Temporal Concepts in the Hopi Language, Berlin 1983: Mouton cf., idem, Hopi-Raum: Eine sprachwissenschaftliche Analyse der Raumvorstellungen in der Hopi-Sprache, Tübingen 1979: Narr. The book "Modes of Thought" (1995/2004) was written to show, among other results, that the Sapir-Whorf hypothesis ought to be turned around: human language can express only what a human mode of thought, and – more narrowly – a human culture, is able to contain. For cultures, the same result was reached, seemingly independently, by Daniel L. Everett, Cultural Constraints on Grammar and Cognition in Piraha: Another Look at the Design Features of Human Language, 46/4 Current Anthropology, 621–646 (2005); to him, see Kate Douglas, Lost for Words, New Scientist of March 18, 2006, 44–47; and Rafaela von Bredow, Leben ohne Zahl und Zeit, Der Spiegel 17/2006, 150–152; both stressing the radicality of the new sight; see also Katharina Kramer, Wo die Vergangenheit vorne liegt, Geo Wissen No. 36 (2005), 168 f. Everett's and my observation refute not only the Sapir-Whorf hypothesis (or rather turn it around: speech follows thought) but also, at least to some de-



The chief differences between cultural time concepts lie in the time-reflecting person's aspective of perspective view on time. The dichotomy of aspective and perpective concepts of time is taken from comparative studies of space. In all pre-axial-age cultures, and some post-axial age ones, orientation in space is of an *aspective* nature (Emma Brunner-Traut, who wrote the seminal publications in this field). In aspective presentation, there is no outside vantage point, neither the "true" perspective that depicts objects in a logical-systematic ways (using a vanishing point and, in case of a sculpture, a center of gravity), nor the "parallel" perspective that permits pictorial story-telling (such as in Chinese and Japanese art). In aspective presentation, the important aspects of an object are depicted "disproportionately" large, the unimportant aspects are small. As in most early medieval altar canvasses, kings, princess, and sponsors are modeled tall, their wifes somehow smaller, and the servants tiny.[264] The psychologist William Hudson presented the following pictures of an elephant to Bantu people in his home land South Africa, and later to many other African ethnic groups):

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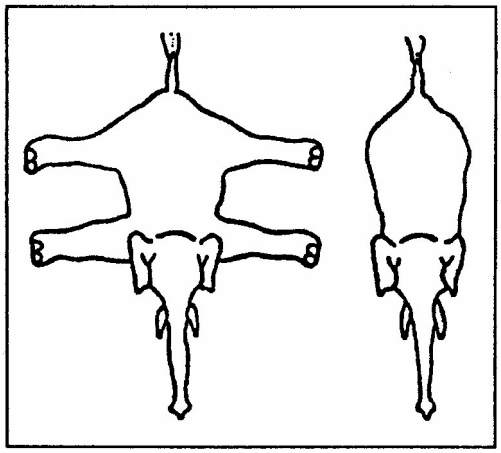
gree, Noam Chomsky's "universal grammar". – In a conversation of 1999, I asked a Hopi law professor and friend, Patricia Sekaquaptewa, who is right, Sapir and Whorf, or Malotki. Here is the answer. The question, whether the Hopi language has a future tense and future things can thus be expressed or not, is wrong in itself. The Hopi language designates reality not as static data or givens, but describes everything as being in flux and development, in a continuum that moves on, sometimes faster, sometimes slower. This includes, of course, the consciousness of future, presence, and past. But these stages in time are not being addressed in separate grammatical forms.

264 Brunner-Traut 1990; *cf.* Hallowell 1955: 184 ff.; 203 ff; horse statues (*Laibungstiere*) from Assur show five legs instead of four because they could be viewed from the front and from the side, Barthel Hrouda 2003: 7, 27.



Aspective and perspective of an elephant

When the drawing on the right was shown (or another "perspectively correct" drawing showing the elephant from a side angle, or from the front) the Bantu observer could not decipher it. The other drawing on the left, however, was recognized as an elephant at once.[265] Point-of-gravity centered sculptures are a discovery of the (acial-age) Greek *polis* culture. Similarly, Greek pottery since 500 B.C. begins to show "true" perspective. The point of gravity is the *inner* vanishing point. The concept of the *polis* as a political unit that is more than the sum of its parts (namely, its members) is accompanied in the fine arts by the use of the vanishing point and the point of gravity, and in the sciences by the use of the concept of system. It follows that aspective art is not limited to animism. It is a general feature of all pre-axial age and some post-axial age cultures

Aspectivity refers a unilinear bipolar look of an observing person (= the one pole) upon an object (= the other pole) without comparative looks to the right or left or other directions. Thus, aspective is an alternative to perspective. Perspective means a plurilinear comparing look that places the regarded object in a critical context to its surroundings, and hereby makes the object meaningful. A second characteristic of aspective is its tendency, to give the depicted object meaning, to attribute to the object properties that are important to the observer. By contrast, perspective is a circumspect look of an observing person upon an object from a tripolar vantage point, relating the object to its environment and thereby describing the object's characteristics and relationships in their importantce to the environment. The observing person is the one point, the object the second, and at least one point related to the object the third point. In perspective, this third point may be the vanishing point at the horizon, or the point of gravity within a statue.

This leads back to the dichotomy between aspective and perspective orientation in time. In animist, Old Egypt, cyclical (Hindu, Buddhist), gnostic-eschatological, naïve-antiquarian, ad-

265 Deltgen 1978: 31, quoting New Scientist, 1972; on the boundaries and direction awareness of the Pueblo Indians, see Alfonso Ortiz 1972,: 142f.; on problems Indians have with fences, Linderman: 17–21. I may also refer to the examples and the corresponding texts with references in Fikentscher 1977a: 64f., and idem 1995/2004, 254, showing a table in aspective, "true" perspective, and East Asian "parallel" perspective form. When German colonial officers before World War I tried to use Herero scouts in what is now Namibia, the scouts had difficulties "reading" a map of an area in which they were able to find their way comparably much better than the Germans. Correspondingly, sculptures in animist societies do not feature a point of gravity. On pre-axial-age spatial categories that pose problems similar to time categories, Bernhard Grossfeld & Hoeltzenbein, Poetic Legal Dreams, 55 AJCL 47–66 (2007).

fontes antiquarian, and ecclective-antiquarian cultures, there is hardly ever a concept of "time as a straight line", *i.e.,* a time concept that enables "correct" historical perspective and, e.g., a thoroughgoing counting of years.[266] To illustrate, the Bavarian farmer who invoking the "good old time" says: "We ought to do it exactly as our forefathers did", renders an *aspective* judgment: His historical sense is limited to himself and forefathers' time in in bipolar manner. The lawyer who says: "The German Civil Code of January 1, 1900, attempted to represent the Roman law as it had developed until December 31, 1899, but today German judges apply the Code as needed it in the 21st century and they will continue to develop it", thinks in terms of past, presence, and future, and hereby takes a *perspective* position outside of the flow of time.

Proceeding from left to right in the graph that shows the cultural understandings of time, above, the various time concepts can briefly and summarily be characterized as follows (as "middle types", omitting many details):

(1) "No-time cultures" probably do not exist, and "deficient understandings of time" involves an ethnocentric position that is no longer acceptable. However, there are occasional remarks about early cultures which allegedly lack any conception of time and history. Pirsig's remark about missing time in Hopi language have just been mentioned. TheAcheguachahi of Paraguay seem to have no future tense.[267] The Piraha of Brazil (south of Manaus) do not express the past tense.[268] Some tribes think the past to be safe ahead of mankind because it has already occurred, but the future to be non-existent because of its uncertainty, etc.[269]

(2) Another cultural concept of time is history understood as (the normative guideline of) presence. The past is being drawn into the presence to give guidance there. Helmut Brunner (1989) and Emma Brunner-Traut (1963; 1990) describe this history as still existing presence and as a key to deciphering Old-Egyptian world view. The past is still present, and it controls presence. In idealized reality, no past is believed to have existed. Therefore, whenever possible, the past is mummified. Helmut Brunner used the phrase: "The Ancient Egyptians stood with theit back towards the future". There was no flow of time, no acceptable development. The Bavarian farmer's "good old time" belongs here. Islam, to the degree that it denies the

266 Evans-Pritchard 1939; C. Geertz 1973b: 391 (Bali); Hallowell 1955: 216ff.; Dozier 1977 (Hopi) and, in dramaturgy, the Aristotelian-Shakespearean plot – here Tony Hillerman and Umberto Eco err). Alfonso Ortiz' remark (1972: 143) that the Pueblos are "ahistorical", and von Bothmer's observation in Nigeria that "time plays no role" (in W. Hillebrand: 143) should be read to this effect. Pueblo Indians have a *different* concept of time: "past as the better presence" combined with cyclicity (W. Fikentscher 1995/2004, ch. 6 V 1b; Kurath: 23, 49). Ancient Egypt's animistic-polytheistic culture developed time concepts that cannot be discussed here in detail (cf., Manfred Görg, Zeit als Geburt aus Chaos und Raum, in: Kurt Weis (ed.), Was ist Zeit? Vol. 2, Munich 1996: Faktum/TU Munich, 89–116; W. Fikentscher 1977a: 59, *id.* 1975a: 269, 276; id. 1995/2004 ch. 6 V 1; Jan Assmann 1975, and Assmann's other works listed, *e.g.,* in Assmann 1991, 115ff.). Starting from his studies on Old Egypt, Jan Assmann, Aleida Assmann, Tonio Hölscher, Wiehl, and others wrote a number of publications on culture and history (*e.g.,* J. Assmann, J. & T. Hölscher (eds.) 1988). These works, along with Jack Goody's studies on the influence of writing on culture, generalize the relations between culture, time, and literacy in a way that does not evenly distinguish between the various modes of thought. For example, the important role "creation stories" of animist tribes play for comparative study of cultures and time concepts should be given closer attention in this context. There is much ethnocentric (Western) understanding of the concept of time in these writings. – Biological investigations may have contributed to this. On brain aspects of time perception, e.g., Ernst Pöppel, Wie kam die Zeit ins Hirn? In: Kurt Weis (ed.), op. cit., Vol. 1 (1995), 127–152; Eva Ruhnau. What is Missing? – The Fundamental Role of Time in C. F. von Weizsäcker's Conception of Physics and Some Insights from Modern Neuroscience, in Lutz Castell & Otfried Ischebeck (eds.), Time Quantum, and Information, Berlin 2003: Springer, 203.

267 Communication Anne van Aaken (2006).

268 See note 276, above.

269 Katarina Kramer, Wo die Zeit vorne liegt, Geo Wissen No. 38 2005, 168f.

occurrence of important things since the Prophet Mohammed's, a.s., death and the completion of the sharia, is close to that "standing with the back towards future". The "door to knowing (ijtihad)" has been closed (since 220 A.H. = 850 B.C.E.). One consequence is the necessity of re-establishing the old order including strict sharia. Once this has been performed, the fulfilment and perfection of life is present again.

(3) A third, widespread attitude towards time is a belief in cyclicity. It holds that everything has always been there, and everything will return, cycle after cycle. The cycle of the year's seasons is a convincing model. The Nuer in southern Sudan use an ecological category of time that matches phases of rain and drought to corresponding stays in villages and camps.[270] The malleability of time, together with tribe-specific ethical standards of necessity creates a consciousness that involves the worshipping the presence of those who have lived and of those who will live under the same norms of belonging: "ancestor worship" is a reflection of tribal ethics influenced by reiterative time.

A cyclic understanding of time in rather pure form controls the Hindu belief. The steady return out of death into some form of life and from life to death is called *samsara,* in Western translation often rendered as the wandering of the soul *(Seelenwanderung).* Rebirth is certain, and according to one's meritorious or disgraceful life, rebirth will occur in a somewhat higher or lower status of the animal or human world *(karma).* In principle, there is no escape from this eternal wheel of life and death so that Hinduism defines itself as *sanatama dharma,* literally: the eternal religion. This all-embracingness of time and space enables hinduism to integrate pre-axial-age animist religious types such as ancestor worship and polydaimonism, as well as post-axial-age traits such as gnosticism. The Indian national flag with its colors yellow, white and green features, in its middle field, the wheel as the symbol of eternal repetition and redundancy. Only by forsaking attachment to the circle of life and death by personal restraint, indifference towards others (even family) and environment, and instead by concentration on one's own internal values (the teaching of the *Bhagavat-Gita*), the eternal wheel of rebirths can at an indefinite distance of time, be left behind and rest from repetition be gained (*mukti,* or *moksha*).[271]

(4) Buddhism shares with Hinduism the belief in cyclic time. However, the escape from cyclicity is obtainable by a world-denying way of life. A gnostic way to redemption by individual good works opens. The Buddha teaches the eightfold way – an ethical guideline – to let the believer know that overcoming the eternal wheel of rebirths can be performed for the one who gave up all forms of attachment to this world. Introductory presentations of Buddhism to Jews or Christians sometimes compare the relationship of Hinduism to Buddhism to that of Old Testament to New Testament. Buddhism is a post-axial-age total religion trying to explain all facets of life. Buddhism also starts from a cyclic understanding of time but includes an eschatology (a teaching of the last things) that puts an attainable end to eternal redundance. Hindu and Buddhist time concepts are both aspective, but the Buddhist development opens a window of perspectivity, if a negative one, in the shape of total dissolution of reality *(nirvana)* and hereby the end of the incessant causalities of reward and redress.

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270 E.E. Evans-Pritchard, The Nuer (1956), 197.

271 However, the personal *Karma* which is attached to the individual's eternal cycle of rebirth (*samsara*) cannot be removed by *Brahma,* the eternal supreme being. Here, Buddhist gnostic teaching offers a way out: apart from the halting of the wheel at an indefinite distance of time, as described above, the eightfold path to *nirwana* opens a cumbersome, but meritorious way out of the wheel's working, For more details see Michael v. Brück, Wo endet Zeit?, in: Kurt Weis (ed.), Was ist Zeit, vol. 1, 3rd ed. Munich 1995: Faktum/TU Munich, 207–262, at 220ff. (Hinduism), and 225ff. (Buddhism); W. Fikentscher (1975 a), 180–190 (Hinduism) and 190–206 (Buddhism), with some authorities. See also, e.g., Rodger Doyle, Measuring Modernity, Scientific American, December 2003, 22, for additional references.

Thus the Buddhist approach reflects a fourth attitude to time that may be called "gnostic-cyclic-eschatological": The basis is an indifferent time concept that does not know a flow from past to presence to future and is similar to cyclicity according to the Hindu and Buddhist concepts. But additionally, there is a final stage when all comes to a perpetual state of completion. In Buddhism, this is the dissolution and detachment of everything in nirwana. In Islam, by contrast, the final state of fulfilment of revelation has already arrived and become history. It has come with the Prophet Mohammed, a.s. His revelation of God's truth and will taught mankind everything it needs. Before Hegira (622 A.D.), there was time that developed in history. But now, after the Prophet's revelations to His followers, everything important to humans is known and openly accessible. This means an end to history as understood in the former sense. History stops. Nothing can further be developed, because nothing needs to be developed further. However, Islam knows an eschatology consisting of a Last Judgment over the deeds and misdeeds of all humans. The idea of a Last Judgment is foreign to Hinduism and Buddhism. The judgment is given by cyclicity under better or worse circumstances. Howeber, Buddism and Islam converge in the assumption of "a way out" of the endless cycles.

With regard to Islam, this comparison raises a question. Answering it invites to extend the comparison to modern totalitarian belief systems which also show gnostic and eschatological traits. In Islam, what happens to time and history between the Prophet's revelation, at the latest at time of His death (12 A.H. = 634 A. D) and the Last Judment. Mohammed, a.s., taught His followers that the period of time between revelation and Last Judgment is "dark", or "hidden". In the Koran, usually this time is called "the later", "the dark", "the secret", or "the concealed".[272] Throughout the time after the Prophet's death, the guiding line for ethical behavior has to be the revelation, including the sharia, and thus something obviously already passed but as the correct presence (see before). This implies that the Islamic concept of time is also aspective: At least after the Hegira, past, presence, and future do no longer exist (given that they existed before). After Hegira, historical studies, let alone critique, lack justification. This is the consequence of the fulfilment of time after revelation. Thus, Islam knows three concepts of time: the time before Mohammed, a.s., – aspective or perspective –, the aspective "hidden time" (or "no-time") between Mohammed's death and the Last Judgment, and the time thereafter (paradise or the fire of hell). Regarding time aspectivity, secular, as well as atheist, totalitarianism points to the same direction. Alluding to the beginning of Communist revolution, Karl Marx is said to have remarked: "There was history up to now. From now on, there is no history any more". When Joseph Stalin rejected Leo Trotzky's concept of a "Permanent Revolution", he could have referred to Marx. Similarly, Adolf Hitler thought that, German history had ended after his and his party's Access to Power in 1933 *(Machtergreifung).* For the Nazis, 1933 was the beginning of the "Empire of Thousand Years" *(Tausendjähriges Reich),* a period of time without perceivable end as a final solution to all issues, and a lasting achievement of happiness for all People's Comrades *(Volksgenossen).* A critical study of time and development from a point of view outside, that is, in a perspective way, was no longer possible. The reason has already been mentioned before: In contrast to pre-axial-age religious types (such as ancestor worship or animatism), post-axial-age total religions tend to be mutually exclusive as to their world-and-life-exlaining dogmatics which implies a

272 See the Koranic verses Henning 2.85 = Paret 2.86; Henning 3.178 = Paret 3.179; Henning 7.188 = Paret 7.187,188; Henning 19.62 = Paret 19.63 where Paret translates the "concealed" as paradise); Henning 19.81 = Paret 19.78; Henning 72.26 = Paret 72.26; more parallels relating to the Kranis concept of time Paret 6.50, 11.31, 53,35, 68.47, and 27.63.

certain intolerance which is unfavorable to critique and which in turn makes aspective time concepts preferable to perspective ones.

(5) A fifth model of time understandings is open to the difference between past and presence and often includes a sense for future, but this awareness is not driven to the point of a critical observation of passing time. In this model, it is accepted that by-gone events are (often revered) history, but what precisely in history followed what and why is of no peculiar interest. This model may be called "naïve-antiquarian". Declarations of "golden eras" and Aristoteles' handling of historical data are examples.

(6) A sixth attitude towards time is closely related: From a truly revered history, single events or traditions are singled out and set as models for nowadays' behavior, law, morals, or etiquette. Humanists developed a keen sense for history, praised historical standards, and studied antiquity. To explain modern developments, they resorted to history, and their battle call was *"ad fontes"* (to the sources). But what lay between their "sources" and their presence, was not what they were interested in. They jumped across history, often more than 1000 years. Old things of a certain preconceived periods of time became standard-setting. It was history what they looked at, but the look was punctual, perspective in terms distance of time but aspective in terms of development, and in this sense uncritical. The humanists laid open the need for occupation with history, but not for historical growth. A characterization would be "perspective antiquarianism". In law, perspective antiquarianism became fashionable in the German Historical School of Law *(Historische Rechtsschule)* at the turn of the 18th to the 19th century. Carl Friedrich von Savigny (1779–1861), his followers and many of their students extracted valid German law for use in their own time mainly from classical and post-classical Roman law, beginning in the period of the Roman Republic, the first century B.C.E., and ending with Justinians Corpus Juris, in the first half of the sixth century A.D. Later developments from this Roman law, for example in the times of the humanists and the great natural law teachers of the 17th and 18th centuries were of little interest to these legal "historians". This resembles the claim "ad fontes" of the humanists, but the interest remained limited to those "fontes" without paying attention to what happened to these sources later. Only one certain distant period of legal history was the envisaged guideline, not history of law in its development. This amounts to an "aspective use of historical data and developments for the explanation of the present". In essence, Savigny's "Historical School" was not historical.[273]

Perspective understanding of time has received, in time theory, the title "time as a straight line".[274] It is the concept of time which is being observed from a point of view outside of the flow of time, so that past, presence, and future can empirically be distinguished, and every moment on that "arrow of time" *(Zeitpfeil)* may be identified and discussed. In principle, all moments on that "time as a straight line" are of equal importance for the concept of time. Of course, the importance and meaning of these moments vary according to the weight given to each of them by the time researcher. It is this concept of time which is used by the student of history in order to discover causes, reasons, developments, changes, influences on, etc., within the time as it goes by. Among the pre-Socratic thinkers, Herodotus and Heraklitos

273 W. Fikentscher (Methoden) 1975a, 142, 413ff.; 1977a, 3–107; After having critically reviewed the Methods book, Hermann Klenner later published one of its results, that Savigny's historical thinking and the Historical School proceeded unhistorically in the above sense, as his own result, H. Klenner, Savigny's Research Program of the Historical School of Law and Its Intellectual Impact in the 19th Century Berlin, 37 AJCL 67–80 (1989), with a list of his earlier publications at 68, note 5.

274 J.T. Fraser, F.C. Haber & G.H. Müller, The Study of Time, 3 vols. Berlin, Heidelberg &New York 1972, 1975 & 1978: Springer. On the problem of the presence in the course of time, Eva Ruhnau, in: Kurt Weis (ed), see note 270 (vol. 2) above, 63–88.

may be quoted as protagonists of the course of time without beginning and end. In law, it was Rudolph von Ihering (1818–1892) who – in opposition to C.F.v. Savigny and the Historical School – proposed to distinguish between a historical view of legal development from an outside point of view in a perspective manner on the one hand, and the dogmatics of the valid and applicable law on the other. Accordingly, in 1857 Rudolph v. Ihering founded a legal journal under the title *Jahrbücher für die Dogmatik des römischen und deutschen Privatrecht,* explaining the distinction in the editorial and elsewhere.[275]

Once time is judged from a vantage point outside of time's flow, enabling the observer to distinguish and assess past, presence, and future and within those three categories every moment of time, modes of thought change, as a result, both generally, and of course in law, too. For the development of human self-understanding, and world-understanding, this judgment is of groundbreaking impact, because taking this outside position singles out the observer as an individual viewer of situations. The consequences are manifold:

Since every observer is able to give a different judgment, depending on the vantage point, the observing person takes on the role of an individual. His or her view, being a perspective one and thus open to comparison and critique, amounts to what Parmenides describes as a judgment, or (in Greek and modern logic) a proposition. On the basis of such a proposition, it is possible to say: "This is true" (or untrue), "this is good, just, and adequate" (or not), "this is beautiful" (or ugly). These are the three judgments a human can make (Plato, Parmenides Dialog). The possibility to render judgments (correct ones and incorrect ones) creates the Platonic concept of the idea which can be approached by a judgment, and the truth, morality, and beauty of which can be stated or doubted. The chance of approaching an idea by several observers creates dialog. The uncertainty about the degree of approximation to the idea and the ensuing dialog among the observing makers of judgments implies their equal rank. Thus, perspectivity of time implies democratic equality, *isegoria* (the right to speak up in political debate without respect to wealth, nobility, and societal standing), and equal participatory position in the Greek and Frankish sense of membership (originally, the Franks had no nobility).

This equality calls for a corresponding societal and legal order (see Chapter 9 below). In turn, the new legal order must build on superaddition *(Übersumme),* that is, the assumption that the whole can be more than the sum of the parts, and thus needs to have and employ organs. By the same token, the superadditive unit creates mutual executable rights and duties, including responsibilities and accountabilities, both among its members and between the members and the organs.

Historically, these are the Greek and Frankish answers to the axial age (see in detail Chapter 9). Of course, cultural concepts of time are closely related to many other traits and complexes of any culture. Some of them have been listed above. A given concept of time in the sense of the chart above works like a steering wheel for many aspects of a culture. In a cultural concept of time, attitudes and proprieties of a culture are reflected and concentrated like signals are in a parabolic mirror. For example, the orientation towards risk, together with corresponding ethical components, is a derivative of the concept of time of a given culture. Every culture, and every mode of thought behind a group of cultures, has its specific attitude towards risk. The spectrum ranges from extremely little risk-awareness, through various positions on risk-shifting or -bearing, to another extreme: no risk-shifting at all, as in strictly monotheistic Islam. Closely related are attitudes towards the morals concerning risk, such as animistic relational ethics, "Eastern" ethics of detachment, Tragic/Jewish/Christian "respon-

275 Ihering shared editorship first with Gerber, later also with Unger. Details: W. Fikentscher 1976, 134–137ff.

sibility ethics" *(Verantwortungsethik),* Islamic determinist "Insch-Allah" ("God willing") ethics, Marxist revolutionary and in case of failure self-indictment ethics, etc. In the law of contracts, contracting reflects cultural differences in risk -bearing and the weight of reciprocity.[276]

The obvious interrelation of time concept, individuality, Parmenideian judgment, Platonic dialog, belief in the objectivity of ideas, epistemological approach, equality of opinions, a new societal legal order and superadditive organization could have been hinged on a starting point other than time, for example on individuality, or societal organization, still the results would have the same as above. The axial age is a complex of interlinking culture changes. Time as the starting point for this interrelation is an especially effective tool of analysis because it is easy to identify. But time is only one trait of several that define the axial age.

History in the perspective sense proves to be particularly effective for explaining culture change. The issue of modernization is nothing but a debate on effects of the axial age and the interrelation of the traits mentioned above. Cultures that do not employ Western perspectivity of time, such as Buddhism or Islam, are tempted to adapt to perspectivity when it comes to "modern" life, and thus to consent to the concept of time as a straight line, while conserving their traditional patterns of concepts and inherited values. This leads to much debated modernization issues which cannot be discussed here.[277] In the case of Islam, a literal split into (at least) two factions can be observed: There is the Islam as described above that divides time in pre-revelation aspective or aspective time, the "concealed" and therefore aspective time between revelation and Last Judgment, and the time of eternal redemption or punishment. Since mankind lives, (etically said) "at present", in the "concealed" period, historical research in Islamic teachings is emically not feasible,[278] and the undistorted prophetic revelation, including classical sharia, is valid law and religion: there is no time that passes. On the other hand, there is the Islamis faction, that opens itself to the "Western", perspective, concept of time as a line that runs from past to presence to future, and politics call this faction as "moderate" or "non-extremist". For followers of the "moderate" faction, it is often a problem to be confronted, together with time as a straight line, with other facets of perspectivitiy such as Parmenideian judgment (in disrespect of strictly monotheistic "Insch-Allah"), Platonic dialog, empirical search for truth, morals, and esthetics, epistemological equality, and consequential tolerance. A somewhat deeper issue, touching upon religious dogma, is whether an at least partial acceptance of time as a straight line requires – under a monotheistic point of departure – a messiah as a messenger of God who Himself accepts the flow of time as His own gift to mankind, or – from a non-messianic point of view – a Tragic Mind (see below IV.5.). The Islamic God withdraws from time (precisely: what His believers sense as time passing by); the Prophetic-Jewish not[279] Moreover, whether and which post-axial-age traits are acceptible to Muslims depends on the outcome of the further development of Muslimic factionalism. To identify two factions, the terms "time-closed Islam" and "time-accessible Islam" may be used, considering that a moore or less strong sense of "time" (as well as a sense of history) is a trait of every cul-

276 Cf. Bierbrauer (2002); Wesche (2001), Nader & Grande, and Goodale.

277 See, e. g., W. Fikentscher (1995/2004), 294, 467, with parts of the literature.

278 W. Fikentscher, Deus otiosus – Deus activus: Religionsanthropologische Überlegungen zum Thema Gott und Zeit, in: Gruber, Hans-Günter und Benedikta Hintersberger, Das Wagnis der Freiheit: Theologische Ethik im interdisziplinären Gespräch, Festschrift Johannes Gründel zum 70. Geburtstag, Würzburg 1999: Echter, 69–87. See also note 163 above. For a general background: Bernard Lewis, Cultures in Conflict: Christians, Muslims and Jews in the Age of Discovery, Oxford 1994: Oxford University Press; idem, Der Atem Allahs: Die islamische Welt und der Westen – Kampf der Kulturen? Vienna & Munich 1994.

279 Not the orthodox and not the gnostic; cf., Alois Troller, Wolfgang Fikentschers eleutherische (prophetisch-jüdische, christliche) Rechtsmethode, 74 Schweizerische Juristen-Zeitung 53–55 (1978).

ture, and of course of every faction of Islam as well. The split between time-closed and time-accessible Islam divides many Islamic countries and groups in the Muslim diaspora. A few important cultural traits other than time are discussed below (See 6.).

IV. Person. Individuality. Identity. Culture personality. Vita research

1. Person

In anthropology, and thus in anthropology of law, a person is not the same as an individual. A person is any carrier of human characteristics, regardless of the degree of individualization or collectivization of the society to which that person belongs. Animals are not persons since they do not own human characteristics.[280] A person has one or more souls. Pre-axial-age cultures often assign to a person two souls, one concerning the physical existence (a "vegetative soul"), the other referring to the person's moral (a "normative soul").[281] The treatment of corpses depends on the culturally variable belief in souls.

An individual is a person to whom that culture to which that persons belongs attributes a particular role of being a familiy-, lineage-, and clan-independent decision-maker, having responsibilities as a single person, belong to a guilt culture (in contrast to a shame culture, see Chapter 11), and behave conforming to those independencies. That particular role makes the person a performer of an ascribed role, and instrumental to certain ends. In an in-depth analysis of a biography of a Cherokee Indian – R.H. –, Robert D. Cooter convincingly distinguishes personality and individuality in the following way: "The analysis … proceeds from the assumtion that self-conception unifies personality … Kinship involves some general prescriptions and a sensibility to particular persons. Within the kin group, relationships were personal; he ((R.H.)) enjoyed autonomy, and he was treated as an end. He had little experience with instrumental relations in which his worth was measured by his performance. The larger world was understood by extension of kin relations – nature as an older relative who is beloved but a bit spooky and the general society as a large system of kin relations in which there is distinction without rank … ((On the other hand)) Instrumental interactions teach children to take an objective attitude towards themselves and others, and to measure value by performance. Performance gets built into identity as the child prepares for the labor market. The end-product is a new kind of person, an individual whose identity depends substantially upon performance relative to internalized values. For this new person, the larger world of nature and society is understood … as … a hierarchy of interdependent roles … Does the contrast between relatives and individuals exemplify history? … A life among kin exhibits the core of our humanity in its original form, whereas a life of instrumental roles is an extension of humanity in a novel direction …"[282]

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280 Animals may in some respects act similar to persons, for example hunt, form groups, assist each other, etc., and some ethologists hold that animals may have culture (see Chapter 7).

281 W. Fikentscher, The Soul as Norm: Reflections on an Ojibway Burial Site, in: Werner Krawietz et al. (eds), Sprache, Symbole und Symbolverwendungen in Ethnologie, Kulturanthropologie und Recht, Festschrift für Rüdiger Schott, Berlin 1993: Duncker & Humblot, 457–466. Some cultures know three souls, for example. among some Inuit peoples, who besides vegetative and normative souls believe in the inheritable soul that causes the similarity of blood relatives in the vertical line.

282 Individuation of personhood has rarely been described in better words. Robert D. Cooter, Individuals and Relatives, in: S. Pavlik (ed.), A Good Cherokee, A Good Anthropologist: Papers in Honor of Robert K. Thomas, Los Angeles 1998: American Indian Studies Center, UCLA, 57–92 (the quotes above are on pp. 91 f.). Bohannan (1992), 296, applies "person" in a different sense, along with an almost reverse usage of what is said in the text above. In discussing what he calls the "emergent culture" of today, Bohannan starts from the

Thus the four main features: the person as a means to certain ends (for example to be a carrier of individual rights), instrumentality, subject-object dichotomy, and the the ascription of a role of individuality are what Robert D. Cooter calls the novel direction. It is the new societal legal order, mentioned above as a consequence of the (6th) perspective understanding of time. Another text which – rather bluntly – despribes individuation is Chapter 18 of the book of Ezechiel.[283] Here, around 610 B.C.E., the Jews disovered individuality and separated it from kin. The Greek *polis* discovered it, too, during about the same period: Thucididis in his *Historiae* "reports" Perikles' orations to his Athenian fellow citizens, where he openly rejects the influences of families and family metaphors (such as clans). Since then Judaism and, in its footsteps, Christianity are individualist religions, addressing the single believer. Originally, Islam appears to have addressed the individual[284] but later, as a religious system, opted for kin, kin metaphor (e.g., "brotherhood") and collectivity.[285]

2. Identity

Identity is a primordial subject of cultural anthropology and belongs to the most frequently researched topics of the field.[286] Identity research asks: "Who is somebody, in the first place", or "who is somebody anyhow", or "who belongs to that group", or "what defines this group as being different from another"?. Identity research forms part of the theory of culture and cultures because this theory is bound to ask: "Whose culture is it that we are talking about?"

Identity in cultural anthropology has two faces: A person can say: "I am a Pashtuni" when expressing that she or he derives descent from the Pashtuni nation in eastern Afghanistan. In this sense, identity marks the quality of a person.[287] A related, but different second meaning is assumed by using the term identity, when a group of persons wants to state that it forms a recognizable unit such as a clan, tribe, or nation. "We all are Coquille Indians and want to be a recognized tribe of the US again", is such a claim. In this sense, identity defines a part of mankind.[288] Of course, both meanings interconnect, since "belonging to depends on "be-

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concept of individualism as it is accepted in Western, e.g., in US culture. An expression of this individualism are *civil rights*. However, the development goes into the direction of a much broader concept, that of the "person" which is endowed with multi-valued personhood including *human rights*. Bohannan here follows Theodore Roszak, Person/Planet: The Creative Disintegration of Industrial Society, New York 1978: Anchor & Doubleday. The civilization-critical undertone of Roszak and Bohannan is not shared by Cooter's role theory.

283 See 1.c., before d., above.

284 Very clear: Surah 19.80 (Paret's numbering); in Henning's numbering it is 19.83.

285 Khaled Abou El El Fadl, Islam and the Challenge of Democracy, a Boston Review Book, ed. By Joshua Cohe & Deborah Chasman, Princeton & Oxford 2004: Princeton Univ. Press, 28f. (see also pp. 96. 113, 126f.), who sees the change from individuality to collectivity in Islam to have happened since the middle of the 19th century, without giving further reasons for this change other than assuming that the change was in the wake of French conquest of Egypt and similar events and was meant to express an anti-European attitude. Today, both time-closed and time-accessible Islam (El Fadl does not distinguish) collectivize the *ummah*, as is evident, for example, from the role revenge against fellow kin, nationals, same-racials, and religious believers plays in debates of Islamic terrorism.

286 See the material in note 153 above; also Kottak (2004) 85ff., 392f.; a survey on a number of recent identity research projects: Michael Craanen & Antje Gunsenheimer (eds.), Das ‚Fremde' und das ‚Eigene', Forschungsberichte (1992–2006), Bielefeld & Hannover 2006: transkript Verlag & VolkswagenStiftung.

287 In this sense identity is used in the following text at several spots: in the introduction to Part Two; with reference to nationals of countries in the course of joining the European Union whenever doubt arises whether such a national is "Pole" (Slowene, Chech, Slovak, Estonian, etc) or "European" or both.

288 In the sense of "clan", "tribal" or "national identity", identity is used., e.g., in Part Two, below, in Chapters 8 and 9, for example in connection with the theory of cooperative unit, as well as in Chapter 13 VI (conflict of laws). An allegedly extinct Massachusetts tribe, the Mashda, moved for recognition by the BIA. In court, the claim was rejected on the ground that the Mashda "have no culture". This was to some degree correct be-

longing together" and vice versa. The part of mankind may be a smaller or greater group. Collective societies are not used to express their identity in individualistic terms such as tribal heros or spirits. Instead, the collective identity is stated by relating it to other collective entities. A Prairee Indian saying goes: "You are known by the greatness of your enemies".

In the discussion of legal pluralism in Chapter 1, two meanings had to be distinguished: legal pluralism in the sense of conflict of laws (and the solutions offered by the legal doctrine of conflict of laws), and legal pluralism in the sense of the theory of sources of law. The latter meaning of legal pluralism is is one of the consequences of the anthropological identity issue. Without anthropological identification of human groups there would be no modes of thought, cultures, societies, nations, tribes, clans, lineages, families, or households. All human beings would form an undistinguishable melting pot, an amorphous mass of persons, and any comparison would be impossible. No cultural trait would be identifiable, and no cultural specificity protectable. There would be no homestead for anyone, no tradition or roots, nor linguistic idiom or characteristic language. Empirical observation, however, teaches that humans exist in categories. Here the three main problems concerning anthropological identity start. (1) How should categorizations of parts of humanity be made (by language, history, skin color, geography, a common law, purpose, etc.; (2) how can discriminations be avoided, and what amounts to a distinction that discriminates instead of offering "useful" differentiations; (3) what to do with the obviously countless overlaps, mixes, "double memberships" and "criss-crossing" (L. Nader) of the various categories? Asking these questions is to concenrate on the fundamental issue of cultural anthropology: identity.

In the present context, a single premise needs to be given: The outcome, "the product", of any anthropological identity categorization, is never pure, but always shaded, twisted, and mixed. There is no "blond-blue-eyed Aryan", no "true Han Chinese", no "typical Bavarian", and no car driver who exclusively uses the gas stations along Highway 66. Reality works with overlaps, imprecisions, interfaces, and exceptions. Therefore, in anthropology, Max Weber's (gnostic) concept of "ideal type" is useless. But this does not mean that cultural categorizations are useless. Even "airport society", "suburbia" and "workforce" are anthropological categories. Instead of the ideal type, a concept of a "central type" is recommendable (for more details see W. Fikentscher 1995/2004, 15f.).

3. Culture personality

Cultural anthropology is divided into five fields, archeological, sociocultural, linguistic, modes of thought, and applied anthropology. Sociocultural anthroplogy can be subdivided into three subfields, the anthropological theory of culture, a presentation of the several cultures, and culture personality.[289] Some writers rank culture personality even on the next higher level, along with archeological, sociocultural, linguistic, modes of thought, and applied anthropology (e.g., L. Pospíšil 2004, 32f.). Culture personality as a subfield or field of anthropology is interested in significant proprieties of participants of a given culture. Pejoratively, culture personality could also be dubbed the social science of alleged cultural stereotypes.

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cause for about three decades the tribe had been dissolved by law so that little more than archeological sites and traditional stories of the Mashda had survived. Of course, this was also a consequence of the status of termination, so that the reasoning became circular. In effect, under US administrative practice, such lapse of time thus may lead to ending an identity. The US Oil Pollution Act (33 US C) knows the term "damage to culture".

289 See Chapter 1 B. II above (in the system of empirical anthropology). See also W. Fikentscher (1995/2004), 110–114 and the examples there.

Culture personality is replete with *"terrible simplifications":* "All Cretans lie". Or: "Heaven is when all the mechanics are German, all the chefs French, all the police British, all the lovers Italian, and the whole is organized by the Swiss; hell is when police are German, the chefs British, the mechanics French, the lovers Swiss, and the whole is organized by the Italians". Or: "Germans are always noisy, Dutch are noisy when abroad, French are noisy when Communist and abroad, and the English get noisy when drunk. The people that most complain about suffering from noise are the Germans, the Dutch never suffer nor complain, the French suffer and complain when not Communist, and the English suffer taciturn and get drunk until they no longer hear any noise whether their own or the others'. Therefore, our hotels invest a lot in P.A. animation and advertize mostly in Great Britain" (communication of a Mallorquin tourist expert; P.A. = public address = outdoor loudspeakers).

In many countries, certain parts or groups of inhabitants fall victim to stereotype teasing, such as the people from Berne in Switzerland for their alleged slowness, or the East Frisians in Germany for their "obvious" denseness. In this context it is noteworthy that in many nations there is a north-south tension between "arrogant" northerners and "dull" southerners. But culture personality can be serious science. Notorious Japanese interest for gardening with plants, stones and gravel, Spanish proverbial pride, German inclination for as-uniform-as-possible systems of law and order, French love for elegant language, Kurdish insistence on honor – all these characteristics represent traditions that count, for example in the frame work of "ordre public" and public policy in private international law and for the recognition of foreign judgments. Justice Oliver W. Holmes, Jr., once remarked that in a country such as Bavaria, where people begin a revolution because of a beer price hike, the price of beer is a human right.

Of course, there are always exceptions to the rule and the stereotype. But an anthropologist often wants to explain certain behavior and look for certain standards. To this end, culture personality, applied with due caution and reserve, may be a useful tool.[290] Some cultures of renown have typical attitudes towards all other cultures. The Han Chinese are said to regard their home country, China, as the "land of the middle". According to this view, China is the central place of humankind, and all non-Chinese peoples a kind of prevented Chinese. Trade agreements with China incorporate in the first line tributes brought by others to China. To those who bring such contributions to the center, Chinese leaders may grant counter-gifts. Such traditional attitudes stick to cultures in a covert manner, and modern international rationale is hardly fit to change them. Similarly, "America first" is a wide-spread feeling in the US, born maybe from pioneers' pride, two victorious world wars, and economic prosperity. After decades of refusals of US governments to cooperate in an international antitrust law agreement, a German-Japanese semi-private initiative decided to move on without the US.[291] Within a year, the US took the initiative for the establishment of the International Competition Network (ICN) and declared to want to be the "leader" in the field. Russia's Christian-Orthodox principle of verticality in the orderings under church and state sees Moscow in the Byzantine tradition of theocracy. When asked in 1992 whether the Breshnjew doctrine, according to which Russia has the right to one-sidedly politically or militarily intervene in other countries whenever this might work in favor of Russian interests, was discarded together with the end of the Soviet-led "Socialist Camp", or whether this Russian principle of international

290 See, e.g., the study by Erhard Blankenburg, Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany, 46 AJCL 1–42 (1998); and the books by E. T. Hall.

291 Japanisch-Deutsches Zentrum Berlin – JDBZ – (ed.), Symposium Neue Weltwirtschaftsrechtsordnung, Veröffentlichungen, vol 34, Berlin 1997.

relations was still in force, a Russian expert of international law and diplomat answered that the Breshnew doctrine is still valid.[292] The Chinese, US-American, and Russian attitudes can be called "unilateralisms". Such *unilateralisms* place the own political culture on top of the relations to other cultures. They can also, as culture personalities, be found in smaller nations such as Serbia which struggles to establish contacts with other nations.

There are other "lateralisms". A widely used pattern is *bilateralism:* International relations are regarded in a bilateral framework solely between two partners. Japan tends to see international relations bilateral. Joining ASEAN would mean to give up bilateralism in favor of multilateralism, but this seems to be hard on Japanese self-esteem, in spite of all advantages ASEAN would offer. Poland acceeded to the EU but never really felt as a member of the club. The seemingly incessant Polish veto discussions and other disputes are always being carried on between Poland and the EU, bilaterally, not between Poland as a member and other EU members.

The general Western Continental approach to international matters is the one of *multilateralism* along with the covertly accepted wisdom that the whole is more than the some of the parts.[293]

There are also more or less pure *"non-lateralisms".* Ancient Egypt could not imagine that there were other viable nations. The realization that the Hethites were somebody who could not be conquered but had to be dealt with an agreement as outsiders of equal standing led to a severe psychological crisis of the Pharaonic empire from which it never really recovered. A religiously founded non-lateralism can be found in most members of the Arabe League. Its proverbial inefficiency is rooted in the absence of the Grotianic *fides,* caused by strict monotheism: the only lateralism – *sit venia verbo* – of a Muslim is the one to God. Thus, what here is called the "lateralisms" are a fascinating up-to-date area of culture personality. At the bottom lies much of what has been discussed in connection with the identity concept.[294] Needless to say that culture personality statements about lateralism are just as "superficial" as all others and can only represent mainstream observations. There will be many Han who do not share the "country of the center" conviction, and many Serbs with multilateral international ambitions.

In anthropology, many authors have worked on culture personality. It is said that Leslie Alvin White's (1900–1975) studies started the field of culture personality. Other writers in the field are Ruth Benedict, Margaret Mead, Julian H. Steward, A. I Hallowell, Ralph Linton, John Honigman, G. Bateson, A. F. C. Wallace, Clyde Kluckhohn, Edward T. Hall, Mildred R. Hall, L. Pospíšil, and Karl Rohe.[295]

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292 Gennady M. Danilenko, personal communication to the author; more details at note 800, below. With reference to the continued validity of the Breshnew doctrine, an Americam diplomat said in 2006: "In international politics, Russia does not help solving the problem, it is part of the problem".

293 The basis is the fides-concept of Hugo Grotius, see historic details in W. Fikentscher, De fide et perfidia: Der Treuegedanke in den "Staatsparallelen" des Hugo Grotius aus heutiger Sicht, Sitzungsberichte der Bayerischen Akademie der Wissenschaften, Phil.-Hist. Klasse, Heft 1, München 1978: (Kommission C. H. Beck).

294 See above 2.

295 Leslie A. White, Personality and Culture, 39 The Open Court 145–149 (1925); R. Benedict (1943); Margaret Mead, Growing Up in New Guinea; New York 1930: Blue Ribbon Books; Ralph Linton, The Cultzral Background of Personality, New York & London 1945: Appleton-Century; Edward T. Hall & Mildred R. Hall, Understanding Cultural Differences, Yarmouth, ME 1989: Intercultural Press; Julian H. Steward (et al.), The People of Purto Rico, Urbana 1956: Univ. of Illinois Press; Margaret Mead & G. Bateson, Balinese Character, New York 1942: II Special Publications of the Be York Academy of Sciences; A. F. C. Wallace, Culture and Personality, New York 1970: Random House; Clyde Kluckhohn, Culture and Behavior (ed. By Richard Kluckhohn), New York 1962: Free Press: Karl Rohe, Zur Typologie politischer Kulturen in westli-

4. Vita research

Anthropological vita research is a relatively new area of study. Here a historic person is placed at the center of an anthropological study, and the biographic presentation of her or his life is used to introduce the reader to the societal surroundings and cultural conditions of that time and land. The interest in the life and fate of the protagonist is combined with historic and societal information, in order to report on an certain culture at a given period and a given place.[296]

V. Circles of cultures, based on the "two revolutions" (neolithic, urban) and on the modes of thought (pre-axial age incl. Ancient Egyptian; Southeast Asian; Western; Islamic; secular-totalitarian)

To understand the plurality of cultures as they present themselves today to the researcher of cultures, realizing the impact of the axial age is indispensible. In turn, to understand the axial age, it is convenient to apply V. Gordon Childe's two "revolutions" and draw the conclusions from the second, the "urban revolution", for the "axial age".[297]

1. The "two revolutions"

Childe's "two revolutions" and their relationship to the axial age may be summarily described as follows:[298]

a. Before the *neolithic revolution,* all humans live as foragers. Hunters, gatherers, and fishers (= foragers) collect what nature produces. Therefore, foragers do not cultivate. While the North Siberians learned to herd the reindeer, the Eskimo never tried to reproduce the caribou. Surviving by hunting requires living in small groups (with a number of persons usually not more than fifty, often less). When a group becomes too numerous so that hunting, gathering and fishing turn unproductive, the group splits. The split is often along the line of relative concepts of "modern" versus "traditional". Since the reasons for the split grow over time, the critical point is reached when the modernists begin to outnumber the traditionalists. When tensions grow unbearable, in the majority of cases the traditionalists leave, and religious reasons will be quoted for the move. It is more plausible that the world has been settled by traditionalists, than by adventurers (although adventurers may have caused splits, too). Besides, adventurers pushed on without splits. The speed by which mankind expanded has been estimated at five to ten miles per generation on an average (probably the generations were shorter than today). Society is guided by consensus and big man leadership. Consensus is necessary to carry on daily decision-making. Specialists for tracking, kindling fire, making and

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chen Demokratien: Überlegungen am Beispiel Großbritanniens und Deutschlands, in: Festschrift für Heinz Gollwitzer, Münster 1982: Aschendorff, 581–596; L. Pospíšil 2004, 32f.;. further materials in W. Fikentscher (1995/2004), 110ff.

296 Examples: James L. Peacock & A. Thomas Kirsch, The Human Direction: An Evolutionary Approach to Social and Cultural Anthropology, Appleton 1970; Appleton-Century-Crofts; Elisabeth F. Colson, Autobiographies of Three Pomo Women, Berkeley 1974: Archeological Research Facility, Univ. of Berkeley; Ruth Underhill, Papago Woman, Prospect Heights, Ill 1979: Wavelength (on Maria Chona); Robert D. Cooter, see note 288 above (on Robert K. Thomas).

297 Axial age in the sense explained before, see I. 3. and II. 3., above; and Chapter 3 III.; the following text under 1. is an abbreviated adaptation from W. Fikentscher (1995/2004 – in the 2nd ed. – Pref. Note, part V).

298 On Childe, see the introductory remarks in Chapter 3 III, above. On the meaning of axial age and materials, see, as an introduction in this Chapter, the remarks in II 3 above. As announced, here, both ideas – Childe's revolutions and the axial age – will be combined.

using tools and weaponry, forecasting the weather, healing, divining and other spiritual services generate leadership in their various proficiencies, and in addition there is frequently an all-round personality as the "big man" in charge. The position big man, if existent, is not inheritable and usually not otherwise transferable. The big man is appointed and dismissed by consent. He is a leader, but not more than the *primus inter pares* within a "close-knit" consensus society. Most big man societies are patrilineal. In matrilineal societies, are there "big women"?

The pattern of the foraging society changes during the neolithic revolution (about 12000 to 10000 year ago). People begin to cultivate and thus engage in reproduction for consume, both of plants and animals. Herders, horticulturalists, and farmers reproduce and thus are able to save and store. The ability to reproduce and thus be more independent from hunger is called the *neolithic revolution*.[299] Usable land and access to it by trails become assets. With more durable property, there is wealth (and poverty) and influence (and lack of it). Wealth can be accumulated by processes within the family such as storing, marriage and inheritance.[300] Lineage heads become leaders, and when lineages expand, artificial lineages, called clans (often encompassing several lineages), gain importance, and with them clan leaders.[301] Since wealth may last beyond a single generation, wealthy families arise, and with them aristocracy – matri-, patri-, ambi-, or bi-lineal. Thus, cultivating societies can generally be characterized by lineage or clan leadership. Leadership may still be vested in big men, especially in early horticulturalist societies (e.g., Kapauku). But for demographic and territorial reasons, lineage and clan leadership will for the most part grow into chieftaincy and inheritable kingdoms.

b. The next "revolution" in V.G. Childe's sense, the *urban revolution,* is characterized by a beginning of division of labor: Not everyone does everything anymore for her or his life support. There are now blacksmiths, tanners, potters, and traders. This enables and induces a separation of cities from the surrounding country side. Such centers develop into marketplaces which require a market police. The military, and its financing by taxes, add more power to the leading clan or clans. City kings and territorial kingships become possible. But separation of labor causes specialization and divergent individual and groups interests. Separated labor and abilities tend to reflect thenselves in a form of societal leadership that builds upon cooperation. All are needed, and thus all should contribute. The urban revolution calls for a unit to which many should offer their views. Here is where the axial age poses problems: Some post-axial-age cultures tackle the unit-problem, others not.

c. The *axial age* is not an "revolution" of this kind, but a just as important step in cultural evolution. It is distinguished from the two revolutions by its independence from time. But what is presisely is the "axial age"?[302] *Axial age* means that spirits and gods become confronted with (and possibly get subjected to) a "new" worldwide good-bad ethics. This implies that "axial age" means two different phenomena: a certain period in world history, and a time-independent culture change of any animistic society. Historians roughly fix "the" axial age to the period between 650 and 400 B.C.E. It was the time of many religious founders and foundations: Zoroaster (about 630–560 B.C.E.), the Upanishads, Lao-tse, Confucius, Buddha, the synagogue during the Jewish exile, the Greek polis, etc. From this it follows that the modes of thought that are to be found in this world and explain and categorize the cultures have, next

299 See Ch. 3 III, above.
300 See Ch. 3 V, above.
301 ibid.
302 See the discussion with S.N. Eisenstadt EWE 1/2006, 3–16 and 31–34; and, as mentioned, in Chapter 3 III. and Chapter 5 I. 3 above.

through the "two revolutions", strongly been shaped by the axial age in the historical sense. It is self-evident that the axial age by its essence (a non-tribal, trans-national and in this sense *secular* good-bad ethics) influences human society and its ideas of leadership. The axial age as described by philosophers and historians concerns the then known world, from Gibraltar to Japan. However, it is possible that another culture, outside of this "old world," experiences its own axial age *any time* in history or presence. This is meant by "independence from time".

The influence of the axial age on the societal patterns just described is of special interest here. What do *post-axial age societies,* their leadership, production and distribution, settlement and other complexes typically look like? In the first edition of W. Fikentscher (1995/2004, 170ff.) the axial age was introduced in connection with the elements of the modes of thought, whereas V. G. Childe's two "revolutions" are reported (and utilized for structuring the modes of thought) on p. 238ff. in the context of hunters' and gatherers' societies. This sequence is not convincing. Childe's two revolutions should be mentioned first. The axial age should follow since it is particularly important for today's modes of thought. There may even be talk of three consecutive "revolutions", the neolithic, the urban, and the axial age. Suggestions were made to add to V. G. Childe's neolithic and urban revolutions one, two, or three more revolutions, such as rationalism in the 16th century, the industrial age of the late 18th and early 19th century, or the informational revolution during the second half of the 20th century. These suggestions will not be taken up here because their respective reach is significantly more limited that that of the neolithic, the urban, and the axial age ethical revolutions. Indeed, it is the combination of V. Gordon's two revolutions with Jaspers' observation of the axial age which is of utmost explanatory force for growth and existence of historical and present-day cultures and thus for a good deal of human history and development. The anthropological consequences for the world in which we live are easy to see: Europe's "special way", colonization and decolonization, imperialism, uni-, bi- and multilateralism, the theory of sovereignty in the law of nations, the self-understanding of Han China as land at the center of the world, Africa's plight, Islam's disunity – all these shaping factors of the world as we presently find it have been caused by what Childe and Jaspers describe as the hubs of human development, if one combines them.

If there is any development, comparable in its impact on human society to the revolutions Childe has identified, it may veery well be globalization, because through its all-pervading turn from knowing an "outside" to the realization that there is only an "inside" left, globalization affects all aspects of human life. In a way, the historical axial age was a similar globalization, and a contemporaneous culture change towards "new ethics" contributes to modern globalization because, as mentioned, the core of the axial age cultural revolution is the replacement of behavioral guidance by spirits and gods through a worldwide abstract ethical standard of good and bad.

We now know that this gives the axial age the meaning that humans begin to mentally reflect and doubt guiding rules for their behavior independently from the supranatural, so that pre-axial age "religious types" are defining the belief systems of single tribes or nations, while post-axial age "total religions" address the globe. Therefore, the plurality of cultures as it exists today may be seen as a consequence of the axial age. Pre-axial-age cultures encompass foragers, reproductionists, and those post-urban-revolution cultures that escape or avoid the changes called for by the entry in the axial age: The tasks posed by the axial age as described in 1. c. above (recognition of a world-wide good-bad ethics, individuation of the person as told in Ezechiel 18, solving the issue of the cooperation of the contributors of separated labor, etc.) are either not recognized, or seen but not taken up, or seen and taken up but suppressed by traditional leadership. The urban revolution does not necessarily lead to entry in the axial

age, and hence, there are post-urban-revolution pre-axial-age cultures. For societies, the dependency of leadership on belief systems is of considerable impact. Here also lie the reasons lie for the differences of religions, and for the different societal, economic, and leadership models (Bernard Lewis' and Samuel Huntington's "clashes") in the present world. The axial age the cr total (= world and life explaining) religions and the typical behavioral patterns of their followers. This makes possible to draft a concatenated list of human societies and their appropriate forms of law and economy, societal leadership and power control, taking modes of thought into consideration as they have been shaped by the axial age. But from now on, since post-urban-revolution cultures can be pre- or post-axial-age ones, the distinction between pre- and post-axial-age cultures is more important.[303]

d. The preceding paragrapphs tried to combine Childe's "revoluitions" and Jaspers' axial age. The result was the statement that the culture-shaping modes of thought which we find in our present world derive from that combination. This gives rise to the question which modes of thought are presently existing. An overview of the existing modes of thought, and how additional modes of thought can be artificially be composed from their elements ("culture chemistry") is provided in the book "Modes of Thought".[304] In anthropology, modes of thought shape cultures and "bundle" them to groups of cultures. Condensed versions of these groups follow here:

2. Pre-axial-age cultures. Societal inertia

Pre-axial age societies, composed of either foragers or reproductionists, are characterized by tribal structures and tribal ethics. Tribes are a type of societal entities. The entities may be smaller than a tribe, such as lineages, or clans, phratries, or moeities.[305] Or they may be larger, such as nations or federations. But the typical standard for good and bad is what is good and bad as seen from the tribal vantage point. In Hopi, indecent and unseemly behavior is called "ka-hopi". If the own tribal standard is the decisive criterion for good and bad, outsiders are not "real people". Therefore, tribal people frequently call themselves simply: "people" or "men"(Navajo: dinee = people; Germanic: dietz, deutsch, dutch = people, etc.; Ainu, people on Hokkaido, the northern most of the four great Japanese islands = men, humans; Anywa, a

303 On the "clashes of civilizations" Bernard Lewis, Die Welt der Ungläubigen. Frankfurt/Main 1984: Propyläen; Samuel P. Huntington, The Clash of Civilizations and the Remaking of World Order. New York 1996: Simon & Schuster; Jörg Calliess (ed.), Der Konflikt der Kulturen und der Friede in der Welt, oder: Wie können wir in eine pluralistischen Welt zusammenleben?, Loccumer Protokolle 65/94, Rehberg-Loccum 1995: Evangeische Akademie Loccum. – On the relationship between Childe' concepts and the modes of thought: In the first edition of the "Modes of Thought" (1995), the axial age was introduced in connection with the elements of the modes of thought on p. 170ff., while V. G. Childe's two "revolutions" were reported and used there for structuring the modes of thought on p. 238ff., in the context of hunters' and gatherers' modes of thought. This sequence seems to me no longer convincing. Childe's two revolutions should be mentioned first. The axial age should follow those "revolutions" since it is of particular importantance for the modes of thought. Ar any rate, the combination of Childe's two revolutions with Jaspers "discovery" of the axial age is a key to understanding history's and today's wealth of cultures, including religions.

304 W. Fikentscher (1995/2004), XVII–XXX 1, and 157–188; similarly, however laying the accent on the dissection of cultures: Nathan Glazer, Zur Entflechtung von Kultur, In: Samuel P. Huntington & Lawrence E. Harrison (eds)., Streit um Werte: Wie Kulturen den Fortschritt pflegen. Hamburg & Vienna 2002: Europa-Verlag, 293–310, at 298f. (engl. Orig: Culture Matters, 2000; transl. Holger Fliessbach); see also David A. Noebel, The Battle for Truth, Eugene OR 2001: Harvest House Publishers (German ed.: Kampf um Wahrheit: Die bedeutendsten Weltanschauungen im Vergleich, Gräfelfing 2007: Resch), who offers a new subject-oriented approach to the modes of thought (chapters on theology, philosophy, ethics, biology, psychology, etc).

305 See Chapter 3 IV 2.

tribe neighboring the Nuer, = men, see Schlee, in Report of the Max-Planck Institute for Social Anthropology 2002/2003, 53 ff.). Thus, whether outsiders are people of the same sort and quality as the inside group is a problem (Bandelier 1890, 1971).

Pre-axial-age cultures have often been called primitive (Lévy-Bruhl, Murdock, Epstein, etc.). This epithet may be justified with regard to technical tools compared with modern high-tech instruments. It is certainly not justified with respect to mentality and thinking abilities. Practically all field researchers receive, from their contacts with foraging peoples, nomads, horticulturalists and early farmers, cogent impressions of ingenuity and refinement whenever interpersonal relations, expertise in material culture, and survival techniques are concerned. Attempts at analyzing the "primitive mind" have been given up.[306] Some anthropologists assert that the so-called "primitive mind" in reality often is overcomplicated and extremely demanding on the persons involved. When Robert K. Thomas, a Cherokee, married into a Pasqua Yaqui family, it was not easy for him to understand the hints that were necessary to understand the working of a Pasqua Yaqui family (communication Robert D. Cooter, R. K. Thomas' friend). Compared with the mental life in "close-knit societies", Western habits often seem easy to follow.

Consensus is necessary to carry on daily decision-making, but finding that consensus is often a matter of high-grade diplomacy. In difficult situations, specialists may become leaders in their various proficiencies. In addition, in foraging and some reproductionist societies, there may be a "big man" as leading figure. Big men are no chiefs. The big man is appointed and dismissed by tribal consent in recognition of his personality and abilities within his "close-knit" consensus society. *Herders, horticulturalists, and farmers* reproduce and thus are able to save and to store harvested goods (provided they are storable). The importance of property increases considerably. The cultural step of being able to reproduce and thus be more independent from hunger is called, as has been mentioned before, the neolithic revolution. The role of the chief grows from the greater demands on internal peace-keeping. More details of the types of leadership in pre-axial-age societies will be discussed in Chapter 9 in the context of maintainance of societal order.

Pre-axial age societies rely on two elements for the identification of recommendable behavior: on consensus, and on big man or chieftain leadership. Foraging societies prefer big men, for the reasaons just mentioned. That big men may also be found in reproducing societies, is due to an effect of (what may be called) *societal inertia:* The appropriate type of leadership for a reproducing, preurban society would be the chief, for the reasons just mentioned. But tradition may leave the institution of the big men unchanged. However, as far as reproducing societies possess storable property, there may be present – in the absence of a chief – extreme egoism and fragmented protection of property. This is an explanation for the "Kapauku capitalism" that has intrigued many economic anthropologists since its description by Pospíšil (1963). The "urban revolution" with its division of labor between professions would call for a type of leadership that profits from the "oversum principle" that the whole is more than the sum of the parts; because ideally the professions have to cooperate. In mathematics, the oversum principle is called super-additivity or superaddition. But not all urban

306 Mary Douglas (1940). "Bell Curve" research has not changed this. Richard J. Herrnstein & Charles Murray, The Bell Curve: Intelligence and Class Structure in American Life, New York 1994: Free Press, found that intelligence is a better predictor of many life-forming factors including financial income, job performance, unwed pregnancy and crime than parents' socioeconomic level or education level (an almost banal statement). The authors state no position on a context between IQ and genetics (Introduction to Chapter 13). On the controversy about the book Russel Jacobi & Naomi Glauberman (eds.), The Bell Curve Debate: History, Documents, Opinions, New York 1995: Random House.

societies decide to make use of superadditive efficiency. Urban societies frequently stay chiefdoms or kingdoms. Their citizens rather remain loyal to their chiefs and kings. Again, there is this "overhang effect" due to societal inertia. Comparable to the continuation of the big-men system in reproducing societies, societal inertia prevails, if not simple fear of power. The architecture of society and its leadership of the former type of the society overhangs into the later type: the big man into reproducing societies, and the chief into the urban societies.[307]

Here, at the transition of pre-axial-age tribalism to post-axial-age good-and-bad ethics, the differences between the thought-modal outcomes of the axial age become of decisive importance: There are two fundamentally opposite solutions which the axial age presented to mankind.

One is the recommendation to get detached from this (ugly) world. The other exhorts mankind to stay attached to this world (however ugly it may be). For axial-age world-views which propagate *detachment from the world,* a new interpretation of human society and its respective types of leadership is essentially a non-issue: The world is already doomed and has to be overcome. Therefore, post-axial age modes of thought recommending world denial *will be reluctant to replace* pre-axial age societal patterns by new models and ideals. For axial-age world-views that idealize detachment from the world, a new interpretation of human society becomes possible. The world has to be overcome anyway. It is therefore to be expected that post-axial age modes of thought which recommend world denial *do not replace* pre-axial age societal and leadership patterns, but carry them on as part of the burden to be dropped, understandably playing down their human importance. Hinduism and Buddhism in most of their variants give examples for this attitude: Their thinking about society and leadership does not produce new models, but retain pre-axial-age models combined with disinterested or distanced interpretation. Hinduism pronounces the eternal repetition of forms of life, symbolized by the wheel *(samsara).* Confucianism, a basically sceptical look at human society and leadership as inevitable burdens, adds wise and practical advice how to deal with them. Confucianism is "semi-detached", but tendencies of a modern tragic mind to fill the gap between semi-detachment and worldly realism has been noted (W. Fikentscher 1995/2004, 160, 307ff.). As societal corollary, after the axial age, predominantly world-denying or world-sceptical modes of thought retain chieftaincy, royal or imperial leadership, or one-party top cadres (more details in Chapter 9).

By contrast, the basic attitude towards world and life in it is different for *world-attached* axial-age solutions: The consensus tradition is being confronted with a principled doubt whether the result of consensus is good or bad under an ethical standard that no longer flows from clan, tribal or national expediency, but from comparable world-wide standards. Leadership by a big man, chieftain, or king finds itself exposed to critque.[308]

3. (Post-axial age) East and South Asian cultures

To summarily characterize the genesis and essence of East and South Asian cultures seems to be an overambitious task. It may have been Adolf Bastian who first said that anthropological purposes East and South Asian societies may be grouped together as a significant conglomerate of similar and comparable cultures for. Others followed, some concentrating on one or more

307 On the importance of these leadership issues for human societal order see Chapter 9, below.

308 In the Modes of Thought (1995/2004), this is the point where the description of the post-axial-age *modes of thought* begins (295ff.). In the present book, the expressions of the modes of thought, cultures, are being focussed. Again, the characterizations will be brief. Many traits can simply be seen by analogy.

single cultures with only cautious glances at East and South Asia as a whole, while others attempted to draw a larger picture and attempting at elaborating on points of comparison.[309] Among the latter, Joseph Needham found stability in Chinese and neighboring societies a reason for their relatively high and parallel developent, whereas Max Weber saw "worldly ascetism" as a source for culturally related achievements in East and South Asia, most of all in its societies and economies[310] In the "Modes of Thought" (1995/2004, at 295 ff.) the typical attitude of East and South Asian cultures is being ascribed to "detachment", to intended separation from this – in principle – evil world.

Joseph Needham wrote in the fifties and sixties of the 20th century, Max Weber forty years before him. Neither Needham nor Weber could have foreseen the imposition of Marxism on China, Mongolia, Laos, North Korea, Vietnam, and the rapid economic developments in Japan, South Korea, Republic of China on Taiwan, Chinese People's Republic, India, Malaysia, Singapore, just to name the most salient. Weber, whose one focus was economy might have seen himself in need of re-examining the older theories. These occurances make it difficult to formulate general statements. The old questions of common characteristics and points of cultural comparison today are amended by at least one more: Do economic developments influence the mental structure of people?

Is economic activity or incipient prosperity being reflected – in Needham's opinion – in greater stability, or – in Max Weber's coordinates – in wordly ascetism, or – my own derivation – in lesser detachment resp. increasing attachment to this world? Karl Marx would say: Of course, the economy shapes the mind of people. Charles de Gaulle would disagree and repeat his post-World-War-II statement (with a look at post-war occupied Germany) that the characters and mind-sets of a people never alter, in spite of all historical, economical, political, or military changes. In my earlier book (1995/2004), I defended the position that the modes of thought which are behind the cultures and shape them, are rather fixed mental constructs, but that modes of thought can change and thus cultures, too. For example, the axial age was defined as a period in the mental development of mankind that brought about many changes. Therefore, it was then held probable that philosophical theories and lofty moralities, such as that of the Bhagavat-Gita, or a feeling of attachment to or detachment from this world shape the consciousness of whole populations (loc. cit at 325).

This was stated despite Pospíšil's warnings (1971: 19): "Preoccupied with the notion that actual behaviour of people is controlled and guided by the various leading philosophies of the nations, Northrop implicitly equated Ehrlich's living law with these philosophies.[311] He concluded that to understand, for example, the Chinese living law, one would have to study Confucian philosophy, while to understand modern Russian living law one must turn to Marx-Leninism … Besides the fact that an overwhelming majority of the Chinese were … ignorant of the official Confucian philosophy, nothing can be farther from Ehrlich's living law than principles of well-formulated scholarly philosophies which usually are the property of very few in a given society; "living law" derives from the actual behavior of people, not from officially recognized theories posited in scholarly treaties."

Against Pospíšil one can argue that it may not be learned books and "official philosophies" which shape the mind-set of a culture. Of course, it would be ridiculous to contend that *every*

309 A survey on both kinds of literature in W. Fikentscher (1995/2004), 299 ff.

310 See the discussions of both opinions loc. cit. 313 ff.

311 Pospíšil alludes to Northrop 1946 and 1949; see also the similar statement about the necessary distinction between culture on the one hand and the "nationalist world" on the other by Christopher M. Hann, Creeds, Cultures and the 'Witchery of Music", 9/2 J. of the Royal Anthropological Institute 223–239 (2003) at 234 f.

Hindu, Buddhist, Taoist and Confucianist thinks in terms of detachment from this world and of self-centeredness according to the Bhagavat-Gita morality. But there may be a general trend within a specific culture, an underlying generally accepted attitude towards the approach to ontological and epistemological data, an opinion that finds my support because the power and persistence of philophically founded cultural attitudes are observable, if covert, data. Thus, economic change and beginning prosperity are – as such – no reasons to assume a culture change or change of a culture-shaping mode of thought. This is generally true, and it is true for East and South Asia. Thus, detachment must be searched in older and more modern developments there, and the question is whether the recent developments were strong enough to cause culture change. But both Hinduism and even more Buddhism view world and life in it with a critical, resigned attitude, still today. *Samsara* and the Eightfold Path to possibly and slowly escape it are not joyous, this-worldly, and not even combattive approaches to the meaning of human life. A hidden causality and a hard-to-obtain wordly-ascetic betterment are the strands of fate. Modernity is accepted, to be sure, and energetic activities unfold along with modernity. Still, the Bhagavad-Gita remains the ultimate ethical point of orientation, and it places care for one's own and the world's betterment in general terms over serving thy neighbor, here and now, and getting organized for it.

Is it therefore legitimate, in view of the general attitude of *detachment* which can be discerned in East and South Asian cultures, to speak of just one East and South Asian mode of thought? Just because there are a great number of cultures in this geographic area there must not be equally as many cultural modes of thought. It cannot be denied that all these cultures – with the partial exception of Confucianism – share the themes of detachment from the world and self-centeredness, both in a non-individualistic sense. According to the theory of cultural plurality, the possibility of *one* mode of thought common to these disparate cultures may be tenable.

But – to use two extremes – modern Japanese Zen-Buddhism is far less "awe-inspired" (and "-inspiring") than for example the elaborate services and modes of worship of Taoism, Tantrism and Vajrayna (the "diamond-vehicle"), so that the existence of cultural plurality per se ought to be accepted as decisive. Therefore, several East and South Asian *modes* of thought and a substantial number of cultures sustained by these modes of thought may be combined to form the geographic cultural "province" (Adolf Bastian) of East and South Asia. At the same time, the empirical observation is still valid that they are all alike in one point of central impact: a detached view on world and life.

While in Hinduism an escape from eternal reiteration seems almost impossible, Buddhism teaches such escape under the conditions of the Eightfold Path. In this respect, the two branches of Buddhism are of importance. Hinayana Buddhism (the smaller vehicle, practiced in Thailand, Myanmar, Sri Lanka, and parts of Laos, Vietnam, and Korea) maintains the purer and stricter dogma, Mahayana Buddhism (the larger vehicle, practiced in the other Buddhist regions, including Japan, China, and Indonesia) is the more lenient version, including the belief in spirits and in Bodisattvas, persons who completed the Eightfold Path to the point of near-fulfilment, and then decided to help others to move ahead on the Path to reach the *Nirvana* together with them as well. Especially by the introduction of the Bodisattvas, an element of mercy, caring, and compassion – and thus elements of attachment – enters Buddhist conviction.[312]

312 In Japanese, Bodisattvas are called Bosatsu (a combination of botei satsutaba). The term busutsu appears to have be fallen in disuse; cf. W. Fikentscher (1995/2005), 305, communication Eike Mai Rapsch. On other differences between Hianaynism and Mahayanism, see W. Fikentscher, loc. cit. 303 ff., idem, (1975 a), 303 ff.

With Confucianism, traits may be different, at least at first sight. Confucianism's attachment to the aim of making this world a decent and liveable place (see 2. above) should be taken into serious consideration, and separate answers should be given when thought-modal consequences are discussed. However, the gnostic approach to self-cultivation which is also inherent in Confucianism will lead to results similar to other East and South Asian modes of thought. Confucius' ethics teach an attachment to this world up to a certain, albeit distanced and practice-oriented, degree. There are five inter-human relations which have to be guarded: the relationships between father and son, husband and wife, emperor and subject, older brother and younger brother, (older) friend and (younger) friend. These are five basic vertical ties. However, this attachment does not lead far into this world because it is mainly – if not altogether – meant for the good days. Confucian rules teach how to make good days a reality. However, if events go wrong, the teachings of Confucius offer no dogmatic or ethical parachute. In comparison, even Protestant work ethics offer redemption. Thus, In Confucianism, attachment is partly withheld. It may be called a semi-attachment, or a semi-detachment.

The five Confucian virtues are:

Zhi ( ) = wisdom, knowledge
Xin ( ) = trustworthiness
Li ( ) = propriety, rites (there are 300 rules of rites, and 3000 of dignified manner)
Yi ( ) = righteousness, and
Ren ( ) = humanity, benevolence (including cultivating personality and observing good practice).[313]

For the bad days, Confucianism gives no instructions to its followers. A Chinese adage is" A person with a determined heart frightens problems away", so that a strong person should have no problems. When evil strikes, the Confucianist must look for another belief system – and many Confucianists do –: Marxism, Taoism, Hinayana-Buddhism, Western Judaic/Christian redemption from the Tragic Mind, animism, etc. Confucianism is not a belief system for the victimized and suffering, and while it is rather indifferent to the persecuted and less happy ones and to the days of bad fortune and despair, it is tinted with speculation in much the same manner as detached belief systems are. Moreover, Confucianism teaches gnostic ascetism and modesty in much the same way as Hinduism and Buddhism. Confucius said: "One who nourishes oneself with air shines like God and lives long".[314]

Did Marxism under Mao Tse Tung, or the present economic growth of the People' Republic of China, add new moments to that semi-detached culture? Mao Tse Tung is said to have once confessed to Henry Kissinger that only a few towns in the neighborhood of Beijing may truly have adopted a Communist life for a while, but that the rest of China never became Communist. The ongoing development of Chinese economic success and power has not yet touched the political command by the Party while essentially leaving Maoist structures of political leadership, as far as can be seen, intact.[315] Thus, the Confu-

313 From the five stones placed in front of the new Asia Building of the University of British Columbia, 2000 West Mall, Vancouver, Canada.

314 Universität für Musik und darstellende Kunst, Vienna (ed. & publisher), A Scene of Concise Restlessness, Vienna 2002, 49.

315 Ellen Hertz, The Trading Crowd: An Ethnography of the Shanghai Stock Market, Cambridge 198: Cambridge Univ. Press; X. Moa & T. Glass, Das neue Antimonopolgesetz der Volksrepublik China, GRURInt 2/2008, 105–121; W. Fikentscher, Die Rolle von Markt und Wettbewerb in der Sozialistischen Marktwirtschaft der Volksrepublik China: Kulturspezifisches Wirtschaftsrecht, GRUR Int. 1993, 901–909; Chinese translation (by Shao Jiandong): Jahrbuch des Deutsch-Chinesischen Instituts für Wirtschaftsrecht der Universitäten Nanjing und Göttingen 4 (1993) 17–37.

cian roots of Chinese ethics, including their desinterest for situations that go wrong, seem to stay stable. According to Karl Marx' understructure theory, freedom of economy should trigger freedom of government. Marx errs here, too. Whether major changes will affect China, for example a tendency to develop a Tragic Society of individuals according to the *polis* model, or a time-closed or time-open monotheism, or a modern – pretendedly secular – totalitarianism, etc., remains to be seen. Dealing with foreigners is one of the open Chinese issues.

There is, in Marxism, a blatant despise of the human being (wrong thinking, wrong consciousness, use value determination, alienation from created work under the "plan", deprivation of property, falsified information policy under the keyword of "prawda" = truth, lumpenproletariate, limitation of traveling, etc.). This may be caused by Marxism's ("historical-dialectic") determinism, or by the alleged necessity of class struggle, or by the emptiness of the use value concept. This inhuman despise is un-Chinese, and the cultural Un-Chineseness of Marxism will bring about China'a return into the world. Based on the persistence of cultural attitudes, as discussed above and reconfirmed by Mao Tse Tung's remark to Henry Kissinger, this is more than a speculation. However, the return will take a long-term strategy based on values, and short-term tactics based on interests.

Not Chinas and Japan alone, also India, South Korea and other East or South Asian nations show a remarkable speed in adapting to globalization and market economic mainstream. This adapation is stronger than in other parts of the world, for example African or Arab.

The explanation for this is to be sought in what has been said before (under 1.) about the concepts of time. For East and South Asian cultures, concepts of time and development over time are not of central importance but at least integrable into modes of thought based on the belief in the eternal repetition of things *(samsara)* and incessant causality. Thus, passing time is an acceptable concept. Not so in Islam. After the revelation by the Prophet Mohammed, a.s., there has been, in principle, no more ongoing time, and no development beyong the stages already achieved. Therefore, unavoidable submission to time, development, and modernization have led to a split of Islam, in time-closed and time-open Islam, with significant consequences for *jihad* and tolerance (see 5. below). This is the reason why today Asian achievements tend to pass by Islamic developments (or rather statics), much to the discontent of activity-oriented Muslims. Moreover, the multitude of animist time concepts are not available to Islam since animists are the most despicable targets of *jihad,* even more than Jews and Christians.[316] This means that Islam today runs the risk of falling behind the Bantu cultures between Sudan and Capetown and Daressalam and Dakar ("Ubuntu-Africa"), too. If an *ubuntu*-founded harmony for the cooperative, similar to the Greek-Frankish model, were drafted and implemented, Africa south of the Sahara with its African Philosophy background could jump to the forefront of "modernization" by-passing the Islamic world by lengths because concepts of time and system would be available.[317] A confirmation of the above statements is offered by the example of Indonesia: Of all Muslim nations, it is the most inclined to modernization, and while having maintained many animist cultural traits (called: *primal* in

316 Koran 2. 186ff.; 32.21f.; 33.60 f.; 34.32; 37,95; 65.8 (in Henning's edition).

317 Cf., W. Fikentscher, The Whole is More Than the Sum of the Parts, Therefore I have Individual Rights: African Philosophy and the Anthropology of Developing Economies and Laws, in: Manfred O. Hinz (Hrsg.) in collaboration with Helgard K. Patemann, The Shade of New Leaves: Governance in Traditional Authority, A Southern African Perspective, International Conference on Traditional Government and Customary Law, Windhoek, 26–29 July 2004, Münster 2006: LitVerlag, 295–328; idem, Geistiges Gemeineigentum – am Beispiel der Afrikanischen Philosophie, Festschrift Gerhard Schricker zum 70. Geburtstag, München 2005: C.H. Beck, 3–18.

Indonesia), it belongs to South East Asia. – These remarks will be developed further under 6. below where the discussion focuses on Islam.

4. Post-axial age Tragic cultures

The Tragic mode of thought is based on an active, intervening, attached attitude of the human being towards this world. It shares this attitude with Judaism, Christianity, and Islam. It is to be distinguished in this respect from East and South Asian modes of thought. Tragic cultures are the Ancient Greek, the Frankish (since the middle of the third century A.D.), and a few Northamerican native tribal conglomerates (Iroquois, Tewa, Otoe). Another name for the Ancient Greek Tragic culture is "the religion of the *polis*".[318] Whether with respect to their Ancient Greek, Frankish, or Native American origin, the Tragic cultures are "heathen", not Jewish, Christian, or Muslim. The Italian popes made ample use of the Frankish-Normannic system of fief (trust) which the Normans had borrowed from the Franks, and which was particularly useful for the Church because of its purely administrative, not family-bound nature. Still apparently, the heathen origin of Frankish enfeoffing was no hindrance.[319] Tragic societies are composed of people who honestly confess to each other and towards outsiders the failure of their own personal good efforts and the failure of their societies in spite of idealistic contributions and leadership. A good definition of the Tragic Mind is contained in the letter of Paulus of Tarsos directed to the community of Christians at Rome (in chapter 7 verse 15–23), obviously written with respect to the prevailing culture that surrounded that community in the capital of the Roman Empire. The Tragic Mind is predominantly law-related and law-conscious. The classical Greek tragicians offer impressive examples. Cultures differ widely in sensibility to suffering, and the Tragic Mind holds an especially sensible position. A high degree of sensibility for the difference between guilt and fate, between doing wrong and suffering evil, sharpens the mind for the justice of compensation.

In surveys on the "great religions", "world religions", "grand belief systems", "great philosophies, or "most important cultures" often two religions or belief systems are left out:: animism, and the Tragic Mind. This is so although by far the longest time (99,37%) of their four million years old history human beings were animists (and many still are) and although most modern societies of the "West", as well as Europe's way through history, and almost every detail of the globalized world are unthinkable without the Tragic Mind. Whenever a pope or another religious leader assembles representatives of the most important world religions, surely there will be no North American Indian, Bantu African philosopher, or Australian aboriginal "dreamer", and just as surely no expert of the Tragic Mind who could explain the Parmenideian judgment, the idea of dialog, of membership, or of Frankish-Normannic pledge-of-faith. A German adage goes: *Man sieht den Wald vor lauter Bäumen nicht* (one does not see the forest because of all its trees). Often things nearby simply are not seen. Yer, animism and the Tragic Mind are relevent factors for culture comparison because they belong

318 Werner Jaeger, Praise of the Law: The Origin of Legal Philosophy and the Greeks, in: Paul Sayre (ed.), Interpretations of Modern Legal Philosophies, Essays in Honor of Roscoe Pound, vol. I, New York 1947: Oxford Univ. Press, 352ff.; idem, Paideia: The Ideals of Greek Culture, 3 vol., New York 1939–1944: Oxford Univ. Press; W.G. Forrest, The Emergence of Greek Democracy: The Character of Greek Politics, 800–400 BC, London & New York 1966: MacGraw-Hill; Martin Persson Nilsson, Geschichte der griechischen Religion, 2 vol., 3nd ed., Munich 1967: C.H. Beck; Heinrich Weinstock, Die Tragödie des Humanismus: Wahrheit und Trug im abendländischen Menschenbild, Heidelberg 1953 (5th ed. Wiesbaden: Aula-Verlag); W. Fikentscher (1975 a), 235–286, with more literature; idem (1995/2004), 355–386.

319 On probable reasons for the oversight of animism and Tragic Mind in nowadays discussions of religion and belief systems, see W. Fikentscher (1995/2004), 356.

to the same category as East and South-Asian, Islamic, and secular-totalitarian modes of thought.

A central element of the Tragic Mind is superaddition *(Übersumme, oversum),* according to which the whole is more than the sum of the parts. This assumption involves the creation of a unit that has *members.* By definition, these members have rights and duties among themselves. The unit or entity – the product of superaddition – is headed by *organs* who in turn have rights and duties against the members (accountability being one of the latter). The concept of membership creates individuality (instead of collectivity), individuality creates individual responsibility which – in consequence of the axial-age dichotomy of good and bad as universal principles instead of "ka-Hopi offenses" – creates individual guilt, and events show that this guilt cannot be healed. Hence, there is doom in human action, though carried on with good or at least defendable intentions.[320] Still, withdrawel from this world is no way out of the problem. Historically, Western civil society grew out of the Tragic Mind.

To illustrate:[321] The Greek mind of the *polis* taught man to marvel, to wonder. This meant taking a "perspective" position outside: to compare and to think in terms of a system. Only the marvelling modes of thought are thus inclined to engage in what "the West" calls reasoned philosophy. To be sure, other post-axial age modes of thought would perhaps like to marvel, too, but in terms of the relevant belief system this is sometimes inadmissable (many a Muslim would perhaps like to know how to historically interprete the Koran; many a Marxist perhaps wanted to know the truth of a story reported in Prawda; Peter Abaelard (1079–1142), the scholastic Philosopher, once remarked:" My students do not want to be confronted with what I teach, they want to understand what I am teaching" – by the way a good example for the difference between aspective and perspective thinking). Belief systems tend to engage in solving the self-imposed task of selecting admissable behavior from the innumerable possibilities open to man as a cultural being. They serve this function by imposing prohibitions against doing this or that, *i.e.,* by taboos. Thus, of all religions and belief systems, that religion or belief system is *most* human which comes closest to re-establishing man's old cultural liberty of being curious. Not "back to nature", but "back to culture – properly defined" is the most human of all calls. Greek Tragic is one of those culture-centered belief systems.

The basic difference between pre-axial-age cultures and the cultures shaped by the Tragic Mind lies in the latter's breach from nature's and the gods' forces, based on a skeptical heroism. The Tragic Mind is different from Eastern detachment by its caring for the individual and a public made up of these individuals. The Tragic Mind knows a private and a public sphere. One of the most concise descriptions of the Tragic Mind is contained in three speeches by Pericles reported by Thucydides in his "Peloponesian War". Thucydides attributed to Pericles fictitious speeches which Pericles did not in fact pronounce. Through this – in modern terms – unscientific practice, Thucydides wanted to emphasize the contents of Pericles' ideas in their philosophical, historical, and political impact. The general line of argument in those speeches, in particular in the funeral oratory (2nd speech; book II 35–46), is devoted to the concept of responsibility of the individual for himself and, distinct from this, for the community; and to the necessity of facing the tragic fate destined for a mankind of individuals and communities of individuals.

Reading the texts of the Tragic Mind, one cannot but feel impressed by the human warmth with which these statements are made; by the refinement of thought handling, with

320 For examples in pre-Bhagavad-Gita, Greek, Germanic, and North American Indian ethics, see W. Fikentscher (1975a and 1995/2004), loc. cit.

321 examples are partly taken from W. Fikentscher (1995/2004), 358–363.

sovereignty, a holistic entity of ethics, honor, courage, freedom, state, wealth, time, fate, responsibility, eloquence, and intelligence; and by the forlornness of a moral reasoning entirely oriented to this real world. Pericles, through Thukydides, said, in a parenthesis, that for mankind there is no peace without the political liberty, and no political liberty without the courage to defend it. In saying this, he knew and made known to his fellow citizens that every human effort to follow this maxim might be in vain and that only the memory will survive of those who tried because there exists this law of growth and decay (3rd speech, book II 64).

The Tragic philosophy that lay at the bottom of the Greek city state can be compared with the Tragic Mind of other heroic societies and their institutions, for example the Germanic *genossenschaft*. Aiming for the decent and morally appropriate, but harvesting ill fate and disaster is the theme of the Song of the Nibelungen. An alliance of loyalty is felt to be only viable defense against evil fate. Still disaster cannot be prevented. Similar to Pericles' statement that grim fatality is fenced off best by the loyalty of the citizens among themselves and towards the city, Germanic sagas teach mutual loyalty as the virtue that is required in the face of hostile destiny. The Tragic Mind as the mode of thought of heroic societies is also at the bottom of the Beowulf saga. *Wyrd* is the fate that strikes everyone, the well and the ill-minded. In the second part of the saga, the noble, caring and altruistic hero Beowulf kills the dragon but is himself deadly wounded. After Beowulf had killed Grendel, the monster which had tyrannized Heorot, King Hrothgar's and the Danes' mead hall, Hrothgar praises the future (in the first part of the saga). But those who listened to the epic knew that Heorot would be destroyed and Hrothgar's lineage end. Throughout the Beowulf saga, loyalty is praised.

In the New World, the League of the Iroquois is the most prominent example for a heroic society that organizes itself. There is another parallel – with a distinct difference – in the Judaic Apocalyptic Mind that led, for example, to the mass suicide at Masada. The modern importance of the Tragic Mind seems to be increasing. Civil society grows from the Tragic Mind, not from Judaism, Christianity or other belief systems or cultures. Only the Frankish pledge-of-faith *(Treueid)* enables self-organization across time (more details in Chapter 9). The pledge-of-faith is the political form of Platonism in time as a straight line. The Franks, and Plato, preceded Christianity.

5. Post-axial age Judaism and Christianity

The thrust of the axial age must have reached Ancient Greece and the Mesopotamian Halfmoon about at the same time, between 650 and 550 B.C.E. One piece of evidence is the similarity of issues discussed in Deutero-Isaya (Isaya 40–55) and pre-Socratic texts (especially Parmenides), another Herodotus' culture-comparative observations, a third the rise of the Greek city-state. In Greek, the ethical good-bad dichotomy encountered a tentatively free self-determined people so that the notion of individual guilt and responsibility led to an egalitarian defense alliance that came to be known as *polis.* The late-animist polydaemonist set of spirits and gods, inherited from Homer, had to be ordered into a systematic heaven of polytheistic gods (Hesiod) because comparison is always a challenge to look for a system. For the Jews in Babylonian exile, the same ethical good-bad dichotomy happened to meet a foreign-determined people so that the notion of individual guilt and responsibility brought about an egalitarian community of believers and sinners confronted with monotheistic god The resulting community came to be known as synagogue. Parallel reading of Thucididis, Herodotus and what we have on Parmenides, and of Deutero-Isaya, demonstrates that these themes of the times were much the same, with the noticible difference that Greek polytheism combined with moral individualism fostered the Tragic Mind, whereas Jewish monotheism

and moral individualism fostered a belief in responsibility, atonement and salvation by returning to a home land under God's guidance.

The religious problems of the exiled Jews were indeed striking and for the exilants considerably more pressing than those of the Tragic Mind for the Greek citizens: Should the axial-age dichotomy of a world-wide good v. bad standard be accepted?[322] This was – not only politically – an option through the conquest of Babylon by the Persians and Meders, the obvious end of the suppressors' spirits and gods, and the expectation of a return by permission of Cyrus/Kores. But this would have meant giving up monotheism. To solve this issue, the exilants opted for monotheism. On the other hand, a monotheist god as author of good *and* bad (as portrayed in Isaya chapter 11[323]) was no longer tenable in view of the new ethics. But if God is *only* good (as portrayed in Isaya chapters 40ff. with eschatological-apocalyptic consequences in Isaya 55ff.), who then is responsible for the bad?[324] Individual guilt and responsibility had to be accepted along with the ethical enlightenment that replaced tribal and national morals with general morals (Ezechiel 18). But if guilt was personal – and God was not the author of the bad anymore – how can a person carry or make good for that guilt? Is a representative of that monotheistic god needed, a messenger, a "chief penitent" (comparable to a cacique of the Tewa speaking pueblo dwellers)? And how does this representaive/messenger/chief penitent relate to David, the King, whose reapparition was desired by the exiled people? Finally, what about the geographic and national reach of that monotheistic good god? He could no longer be a tribal or national one, since the good-bad dichotomy applied world-wide.

Isaya 40–55 (the "Deutero-Isaya" = second Isaya) and Ezechiel 18 tell of the issues, deliberations, twists of reasoning, and of the solutions of these problems:[325] The monotheistic god is retained, restated, and modernized in terms of the axial age. God is good. He reigns worldwide ("to the islands", "to the coastlands far away") which makes the Jews a nation among other nations of equal status, so that the (other) "nations" *(Fremdvölker)* become a problem (Exodus 22.20; Isaya 40.15; 42.4; 49.1; 51.5; 66.19; Jeremiah 31.10; 46–51; Psalms 72.10; 97.1). Man is member of a synagogue community. Yet man is an individual and as such carrier of individual guilt (Ezechiel 18). Gnostic efforts are in vain. God is gracious in forgiving individual guilt (Isaya 63.7–64.12), and he permits the community a return to Jerusalem.[326] The evil in the world is caused by man's guilt and taken away by god because there is

322 Zoroastriansm is one of the original forms of this dichotomy; for Zoroastrism see, e.g., Mary Boyce, Zoroastrians: Their Religious Beliefs and Practices, London 1979/1987: Routledge & Kegan Paul; Jeff Howell, Zoroastrianism and Christianity,; anonymous, Zoroastrianism: Its Antiquity and Constant Vigor: Emeritus Professor Mary Boyce, http://www.vohuman.org/Article/Zoroastrianism,%20lts%20Antiquity%20And%20Constant%20Vigor.htm.

323 And congruent to most pre-axial-age spirits, demons, and gods. To offer a relief from this double role of spirit beings of being the senders of good and bad, pre-axial-age people of many cultures used the figure of the trickster. Tricksters (such as Hiawatha, Coyote, Prometheus, and the Ratcatcher of Hamelen) mediate not only between Gods and mankind, but also between good and bad. Their stories float between good and bad. Therefore, there are no post-axial-age tricksters. For the pre-axial-age (= pre-exilic) Jews for whom God was the cause of good and evil, the maschiach seemed to have been a kind of trickster. See also note 527, below.

324 Cf., David Daube, Jehova the Good, 1/1 S'vara 17–23 (1990). Whether God is just (= good) and therefore cannot be the source of evil is defined as the question of theodicee.

325 Deuteroisaya's historical existence is a matter of debate: he could be identical with the "the" Isaya who wrote during the early sixth century B.C.E., or be one of his successors, or member and spokesman of a pious school during the exile). His writings should be seen in context with the socalled deuteronomic historical work: Joshua, Judges, Ruth, First and Second Samuel, First and Second Kings. See for certain details W. Fikentscher (1975a), 269–306; idem (1995/2004), 386–394; only the results can be repeated here.

326 It is believed that only a minority of the Jews opted to return to Jerusalem in 537 B.C.E. upon permission to do so by the victorious Cyrus. A substantial number of the Jews must have stayed on in Persia, forming part

a messenger, a representative of God who takes on the role of the mashiach (Messiah) – as *incarnation* instead of *inlibration* – in recollection of King David's role as atoner and carrier of hope for reapparition. The conception of a mashiach consists in the conviction that God becomes an active and constituting factor of the time that has been created by Him. It is not specified whether this mashiach is a group of people or an individual, but the mashiach is believed by exilic Jewry and Christianity to come.[327] The mashiach is the individually-responsible given answer to the problem of theodicee, a problem that has been posed – along with the individual responsibility itself – by the axial-age-defining good-bad generalization. Hence, having no mashiach, for example in Islam, means having no history, presence, and future, in the sense of a time that passes and is open to development. Also, monotheism, for example in Islam, and its concept of sovereignty then suffer. Having no past, presence, and future means absence of omnipotence. God becomes locked in His own creative draft.

The similarity between Tragic Mind and Judaism with regard to individualism, time-as-a-straight line, guilt concept, and rejection of gnostic efforts for betterment of world and individual becomes clear. The two differences consist in the replacement of a tragic fate afflicted by a justice-seeking *polis* by a monotheistic god, and in the exchange of that tragic doom by redemption.

Christianity emerges at exactly this point, so that, regarding dogmatics and ethics, not much needs to be said about it: Jesus of Nazareth declares himself to be the mashiach so that the Tragic Mind loses its tragic element (Paulus of Tarsos in the letter to the Romans, Chapter 7). Birth, death, and announced "coming again" of the messiah opens a stretch of time which conceptionally is not available to the Tragic Mind, Judaism, Islam and other monotheisms. The Christian conception of the messiah consists in the conviction that God becomes part and parcel of the time created for mankind by Himself, and that this has already occurred. Thus, Christianity can be defined as the establishment of a notion of time as a straight line within a monotheistically conceived world, the monotheistic god being *good,* so that his entry into his own time means redemption. The simple comparison of "God's Empire" with a farm in Mark 4. 26–29 involves such time as the main driving factor: The farmer scatters seed on the gound. Then he lets the corn grow, and "he does not know how" (scil. how the corn grows). It is the earth that "produces of itself". When the grain is ripe, harvest has come. That's all. For Judaism and Christianity time is what for Islam is *jihad* (strain, effort) because Islam has no time available (see above). For the relationship between Judaism and Christianity it follows that Christians should respect Jews who believe that the messiah will come (in whatever form), and Jews should repect Christians who believe that the messiah will come again.

The cultural impact of Christianity as a belief system is harder to portray. Taking contributions to novel achievements, development, cultural diversity, and closeness to human needs (to avoid the term humanity) as a standard of evaluation, positive and negative influences can

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of the already then strong Jewish diaspora. Since not all Jews followed the axial-age changes during the exile, and of those who followed them some hoped for the messiah as redeemer to come while others were impressed by Eastern and Hellenistic gnosticism, the Jewish religion after 537 B.C.E. began to point into in three theoretical directions: the orthodox, the prophetic, and the gnostic variant.

327 For reasons mentioned in the foregoing note, this imports that with regard to the mashiach the three main factions of today's Judaism grew: pre-axial-age orthodoxy (the messiah is reincarnated King David), post-axial-age prophecy (the messiah will come as God's son), and post-axial-age gnosticism (the messiah is the leading line of self-betterment and world-betterment) which later became the rabbinic mainstream. Since all three directions occur in the Zionist (centripetal) and diaspora (centrifugal) version, this results in six groups of sometimes highly divergent political goals as well as psychological characteristics.

be distinguished. On the positive side, the promotion of the steadiness of a government "from the bottom", through the acceptance of Athanasian Christianity by the allied Frankish tribes around 496 A.D. is a big step forward in the direction of appropriate leadership of urban society (in V.G. Childe's sense). For urban society this input of human values prevented the repetition of the death of the Ancient Greek *polis,* now of the Frankish cooperative. It opened new possibilities of cooperation, acknowledgments of inalienable moral and legal positions, establishment of trust inside human societies and to the outside among them, and a general sense of history and development. The fine arts, music, philosophy, and law flourished under Christian influence, accompanied by a steady circle of – partially overlapping – piously reformative and secularizing enlightenment periods.[328] A chief cultural impact of Christianity is its ability to get organized under the conditions of an ongoing dialog. The assurance of inviting the other to a Parmenideian-Platonic dialog, against the background of an active (un-Buddhist) attitude to life on either side of the dialog, is a Christian ideal.

On the negative side, Christianity has a historical record that includes recklessness, strife, and cruelty. Whether under the above mentioned standard of evaluation these negative effects follow from characteristics of Christianity as a religion or whether they are phenomena caused by abuses, misinterpretations, or misunderstandings of (otherwise positive) Christian teachings is a religious issue which cannot be decided in the present discussion of cultural relevance. Two kinds of sources for negative *cultural* effects, however, are apparent.

a. There are *impositions* of Christian dogmas and ethics onto other religions that may give rise to confusion and sectarian Christian behavior. For example, the belief in Christian saints may be imposed on reverence shown to pre-Christian animist heros or spirits of several religious types, and the result is confusion[329] Post-axial-age total religions which may mix with Christianity include gnostic tendencies, although St. John's gospel argues from the first to the last chapter against gnosticism. Yet, from Marcion over the monasteries of Constantine and post-Constantine periods, Byzantine state church hierarchy, the Kartharians, indulgencies, rosary piety, Judaic and Calvinist work ethics to Christian anthroposophy – gnostic activism answers to a widespread and lasting sense of reciprocity that heaven must be earned by holy deeds and good works.

b. However, the three most "un-Christian" *misunderstandings* are based upon flawed translations and unsatisfactory interpretations of the original Greek text of the gospels. A sufficiently developed epistemology has been missing. (1) Matthew 28.19 contains the so-called mission order. Usually this text is translated to the effect that all human individuals shall be taught and baptized. But the Greek text says "panta ta ethne" which means that peoples should be taught, not individuals. Singling out individuals from collective societies for the purposes of mission and telling those individuals of personal guilt, a program of missionaries which often has catastrophic results for family, lineage and clan structures of shame societies, is un-

328 W. Fikentscher, Die heutige Bedeutung des nichtsäkularen Ursprungs der Grundrechte, in: E.-W. Böckenförde & R. Spaemann (eds.), Menschenrechte und Menschenwürde, Historische Voraussetzungen – säkulare Gestalt – christliches Ver-ständnis, Wien 1987, 43–73 (revised version under the title: Zwei Wertebenen, nicht zwei Reiche: Gedanken zu einer christlich-säkularen Wertontologie, in: W. Fikentscher, St. Heitmann, J. Isensee, M. Kriele, N. Lobkowitz, A. Püttmann & R. Scholz (eds.), Wertewandel – Rechtswandel: Perspektiven auf die gefährdeten Voraussetzungen unserer Demokratie, Gräfelfing 1997: Dr. Resch, 121–166, see there note 4 on p. 164f.).

329 A Tewa Publo Indian to the author in 1992: "Catholic saints are similar to our spirits. Often they serve the same purposes. But it is not easy to combine them. For us, Catholic saints are too far away – may be in Italy –, and too abstract. They do not have colors, nor mountains". Similarly, in a conversation in 1988, a Hopi tribal member protested against the idea of mission ("recruiting") as such, see Ch. 10 II 4, below. This is not syncretism, it is – polite – reaction.

Christian. When missionaries address "heathens" and these heathens do not want to be missionized because they are not used to recruiting non-tribal members for their own religious type, for example ancestor worship, the Christian duty is to leave them alone and to go to another town (Matthew 10.14; Acts 13.51). (2) When St. Augustine was asked whether it is permitted to use force in promoting Christian mission, he gave a fateful answer in the affirmative. He was unaware of a wrong translation of the Greek original into Vulgata Latin.[330] The crusades, and the killing of reportedly 20 million Native Americans were only two of the consequences.[331] (3) A third misunderstanding of this kind, caused by flawed interpretation, refers to a main obstacle of modern eucumenism. On October 31, 1999, in Augsburg where Martin Luther had his disputations with the doctors Cajetanus and Eck, the Catholic and the Lutheran Churches agreed on a "Joint Declaration". In essence, the Joint Declaration confirmed the Lutheran stance of *"sola gratia":* the dogma that human justification and salvation occurs by God's grace alone, not aided by human judgment, cooperation, sacrifice, or indulgencies. One of the promoters on the Catholoc side of this Joint Declaration was Cardinal Josef Ratzinger, elected Pope Benedict XVI. The Joint Declaration of Oct. 31, 1999 raises the problem whether the dogma of St. Peter's Office as the foundation of papacy is also subject to *sola gratia,* or whether the calling of St. Peter to become "the rock" upon which the Christian Church is built is the installation of a chain of succession of carriers of the papal office. St. Peter says: "You are the Messiah, the son of the living God". Thereupon, the words of calling are these: "Blessed are you, Simon, son of Jonah. For flesh and blood has not revealed this to you, but my Father in heaven. But I also tell you *(kago de soi lego):* You are Peter, and on this rock I will build my church …" (Matthew 16.17, 18). The text seems indicate that the appointment is a follow-up to what Peter had said as divine inspiration, not based on Peter's human judgment. God's empire, including His church, is said to develop *sola gratia* independently of human input (Mark 4. 26–29). Both arguments speak in favor of a justification of St. Peter's Office by instantaneous divine calling, not by spiritual delegation or succession. Consequently, no chain of callings would be needed, so that. God could make popes "out of these stones" (cf., Matthew 3.9). Therefore, when the Catholic Church agreed to the Joint Declaration of 1999, it may have questioned its own theory of papacy: According to the Scriptures, St. Peter's Office is not bound to a genealogy, rather only to *sola gratia.* Then *Sola gratia* applies to Church, St. Peter's Office, and eucharist no less than to a human's

330 See note 218 above.

331 This means no siding here with the "leyendra negra", attributed to Las Casas and others. It is just a – historically confirmed – report on a warning of King Henry II of France in 1559, given to William of Orange, who seemed to have been deeply moved since at that time the Netherlanders counted less than 20 millions. The warning had far-reaching consequences: it led to the foundation of the Dutch Republic in 1572 (Den Briel, April 1st); the Dordrecht Assembly of he General States July 15 and, by using its theoretical principles, the democratic revolutions in England in 1689 and USA in 1787ff.; see for the details Achim R. Fochem, Introduction, in: W. Fikentscher & A.R. Fochem, Quellen zur Entstehung der Grundrechte in Deutschland, Stuttgart 2002: F. Steiner, 11–20, at 16f. The unwillingness of the Hapsburg rulers to protect the Dutch population against the religious persecution by the Spaniards forced the Netherlands to secess from the Empire. This was the main proposition in William the Silent's carefully formulated *Apologia* of 1581, directed to the Emperor. Politically, and from a humanist point of view, it was certainly a mistake not to protect the Dutch against the Spaniards, but for Hapsburg the meeting of religious duties counted higher than superadditive responsibilities flowing from the Empire's Frankish constitution. The Hapsburgs acted similarly to *Rotfront* for which everything "left" is preferable than democracy, because ideological fixation is deemed to prevail over superaddition. It seems farfetched, but it is not without truth that the sacrifice of 20 millions Native Americans through the initiative of William the Silent led to the development of modern democracy in a globalized world, and this historical conjecture is valid independently from the assumption of the leyendra negra as historically correct or false.

standing before her or hissn God. As regards negative cultural effects (according to the above standard of evaluation, see before a.), the built-up or maintenance of hierarchies as such is no serious point. Hierarchies may contribute to lack or distortion of legitimation, inhibition of control, and opportunity of abuse.

c. Three times in history, Christendom has missed the goal of a Christian order of life in this world, and all three times this occurred by lacunes in *Christian epistemology:* (1) Through the Constantinian gnostic-oriental theocracy and its ensuing hierarchic verticalism; (2) in spite of the Frankish "horizontal" attempts, through the zoroastric-manicheic-Augustinian-Lutheran juxtapositon of *civitas mundi* and *civitas Dei* whereby the standards by which *this world* could have been governed in a Christianity-conforming way were to be missed; and (3) through the Continental – (as opposed to Anglo-Normannic)-scholastic theory of papal hierarchy. Constantinism and Augustinian theology did not develop Christian epistemologies. When due to the rediscovery of the writing of antiquity an epistemology was at hand in scholastic times, it was subjected to Christianity as it was understood by scholasticism so that independent thinking was widely repressed (on exceptions and developments W. Fikentscher 1975a, 367–370). Martin Luther did not develop much of a Christian epistemology, or else he would have been urged to add political consequences to the *Freiheit eines Christenmenschen* (1520) something he could not conceive of without loosing the Elector of Saxony's support. A this-wordly governable Christian way of life began only after the Calvin-critics, the advisers of William the Silent, the irenists, the monarchomachs, and the summarizer Richard Hooker (1566–1600) formulated a usable Christian epistemology.[332] It is noteworthy that Christian epistemology builds on a theory of societal ordering. The starting point is the differentiation between (rejected) despotism (Luke 22. 25, 26) and (recommended) administration by elders or "city fathers" (archontes, Romans 13). From the latter only, superaddition, a theory of offices, pluralism of opinion, and a theory of incomplete judgment and critical dialog is derived (see Chapter 9 III. 7.).

6. Islam

"But now we are being confronted with the vehement return of Islam, with a movement which practically overnight appeared on the world stage" (René Girard).[333] There is no doubt that Islam both as a religion and as a mode of thought and as such homestead for many Islamic cultures belongs to the most discussed spiritual and political "movements", to use Girard's words, of our time. The following lines cannot do more than try to throw some light on the cultural effects of Islam from a general and observational anthropological point of view (I never engaged in fieldwork in Islamic countries or in the Muslimic diaspora). Islam as religion is not subject of this study, and the Islamic mode of law has been discussed elsewhere, albeit in "arm chair " mode.[334]

This subchapter is structured as follows: (a.) Some demography, geography, and history (including "pre-Islam") is mentioned at the outset. (b.) Cultural effects of Islam can most impressively be studied with reference to Islamic epistemology, which in turn opens up aspects of dogmatics and ethics, including time and risk awareness. (c.) A related look on secularity and prayer practice follows. (d.) From this, observations of individuality and collectivity, per-

332 See Fochem, cited in note 302 above; cf., W. Fikentscher (1995/2004), XVII, 397ff.; idem (1997), 180–184).

333 René Girard, in an interview with Thomas Assheuer, DIE ZEIT No. 13, of March 23, 2005, 49; cf., Wolfgang Palaver, René Girards mimetische Theorie, Münster 2004: LIT Verlag; H. Kremp, Nach dem Untergang der Sowjetunion ist die ‚orientalische Frage' wieder auf der Tagesordnung, Welt am Sonntag No. 21 of 5–24–92, 28.

334 W. Fikentscher (1975 a), 306–338; idem (1995/2004), 402–438, with authorities.

sonal or group responsibility, and superaddition can be derived. (e.) This leads to conclusions concerning Islamic notions of human suffering, God's omnipotence, theodicee, and trinity. The following paragraphs focus on further conclusions to be drawn: (f.) the kinds of Islam, (g.) comparison of Islamic with other cultures, (h.) relationship of Islamic cultures to other cultures including topics like jihad, tolerance, and terrorism, and (i.) a summary. Together, these issues cannot be dealt with here exhaustively. They may encompass some areas of ongoing debate.

a. In 2002, of the 6.2 billions of inhabitants of the world 1.23 billions, or 19.8% were *Muslims*. In 2007, the world population is estimated 6.5 billions, or 4% more than in 2002. The percentage of Muslims of the world population will rise to over one fifth.[335] Among all Muslims, Sunnites count about 83%, Shiites 16%, and other Muslim groups 1%, relations that seem not to have changed much since 1990.[336]

The present status of Islam in the world means that old-style "orientalism" and etic observation from European and American viewpoints are no longer sufficient or justified. [337] Islam has gained momentum in the traditional Muslimic countries, and has developed a "European Islam" in France, Germany, the Netherlands, and other Western countries. In Berlin 135000 to 140000 Turks live of which every fourth is a practicing Muslim.[338]

The Islamic *economic* world shows ambivalent aspects. In London, about 160 Islamic finance institutions do business. In 2001, their total assets amounted to some 100 billion US$. 80% of these institution take some legal form of a fund. They work with share holding or equity capital instead of interest.[339] The most used circumventions *(hijal)* of the Islamic prohibition of interest taking *(riba)* are the following: (1) sale and resale: the debtor of a loan sells the creditor an object which is to be resold at a higher price when the loan is mature; (2) share holding: the creditor holds a share in an undertaking of the debtor and directorship and profits and/or losses are divided *(musharakah),* a special form of *musharakah* being *mudarabah* where the creditor (e g., a bank) gives the debtor a loan for the latter's firm but refrains from active direction; (3) quasi-leasing: *ijara* is a form of financing where the creditor lends the debtor

335 Islam-related world-wide news in broadcast and TV tend to have higher percentage, in German stations in 2007 about 50% or more of all news. These issues mostly concern superaddition (in connection with attempted unit-forming) or (collectivity-defined) terror against outsiders (author's count).

336 See the statistics in W. Fikentscher (1995/2004), 169f.

337 This does not mean that the older etic assessments are useless. Many classic treatments of Islamic and Arabic "orient" will retain their scientificness and historical value. Critically, on orientalism as colonialism Edward Wadie Said, Orientalism, New York 1979: Vintage Books; idem, Beginnings: Intention and Method, New York 1985: Columbia Univ. Press; idem, Freud and the Non European, London & New York 2004: Verso; idem, Out of Place: A Memoir, New York 1999: Said (1935–2003), a Protestant raised in Muslim environment with a British first name and an US-American passport supported the idea of balanced give and take between Europe and Asia. He suffered from always being "out of place". More recent introductions: Rotraud Wielandt, Offenbarung und Geschichte im Denken moderner Muslime, Wiesbaden 1971: Harrassowitz Booksellers and Subsciption Agents; Hans Zehetmair (ed.), Der Islam: Im Spannungsfeld von Konflikt und Dialog, Wiesbaden 2005: VS Verlag; Hans-Jörg Albrecht et al. (eds.), Conflicts and Conflict Resolution in Middle Eastern Societies: Between Tradition and Modernity Berlin 2006: Duncker & Humblot; Jan Brugman, Het Raadsel van de Multicultuur, Amsterdam 1998: Meulenhoff; Brugman mentions as one of the few generalist authors of Islamic studies the critical tension between poetry and Muslimic tradition; see for this also Tahar Ben Jelloun, Die Araber in Frankfurt, DIE ZEIT No. 37 of 9–2-2004, 37; and the musical and literary works by Rabih Abou-Khalil; a handbook: A. Th. Khoury, L. Hagemann & P. Heine (eds.), Lexikon des Islam: Geschichte, Ideen, Gestalten, Freiburg 2006: Herder (orig. 2001).

338 Cf., Wilhelm Heitmeyer, Joachim Müller & Helmut Schröder (eds.), Verlockender Fundamentalismus: Türkische Jugendliche in Deutschland, 2nd ed. Frankfurt/M. 1997: Suhrkamp; Thorsten Anger, Islam in der Schule, Berlin 2003: Duncker & Humblot.

339 Bavarian Broadcast No. 5, of 9–22–01.

tangible capital similar to a leasing contract; (4) payment for additional activities: in *murabahah* contracts, the creditor (e.g., a bank) assumes the additional role of agent or broker and is paid for this activity; (5) two consecutive contracts of work for hire: in *istisna* financing agreements, the debtor concludes a (first) contract of a work for hire with a bank as creditor, then the bank concludes a (second) contract of work for hire with a builder, and after performance the bank pays the builder (which makes *istisna* a risky business for the bank), and the debtor pays the bank a higher price which contains the reward for the bank's credit to the debtor.[340] Interestingly, a Christian circumvention of the medieval prohibition of interest taking which was harsh and often ruinous for the debtor and now prohibited in § 1229 German Civil Code of 1900 (forfeiture of a collateral) does not seem to apply in modern *sharia* law. Condensed to a theory, the circumvention of the prohition of interest taking can assume four different forms: (1) payment for additional activities on the side of the creditor, such as consultation, agency, or leasing; (2) share holding and profit sharing (*partiaric* contracts in Roman law); (3) splitting contracts (e.g., *istisna;* sale and resale); (4) forfeitures.

However, despite these refined credit techniques in disregard of a basic prohibition and the ensuing credit mobility, business in Islamic countries is widely regarded unsatisfactory, in spite of billions of dollars earned from oil and natural gas. Experts rate Islamic countries among the poorer group of developing countries. The reasons for these discrepancies are seen in the unwillingness of Islam to accept non-Islamic principles of freedom of education, critical judgment, a genderbased inequality of human beings according to the *sharia,* business organization, and trust.[341]

Law and *religion* in Islam are not two different forums,[342] but essentially identical. Thus, there is no control of the law by religious standards. It is not wrong to say that Islam is law. This law consists – undisputed between all directions and schools of Islam – of the Koran and the *sunna,* the ideal and exemplary deeds and behavior of the Prophet, å.s. The word *sharia* is derived from the Verb shara'a which means to show and prescribe an obvious, even way to a water well (cf. Surah 45, 18). The use of the image of the "way" to something necessary (water) proves gnostic influence on the Koran, certainly traceable to pre-Islamic times. "Way" is an axial-age term for handling supranatural cultural issues (Buddhist "Eightfold Way", etc.).[343] The gnostic-

340 iwd, of 12–10–87; Florian Amereller, Hintergründe des "Islamic Banking", Berlin 1995: Duncker & Humblot; Clement M. Henry & Rodney Wilson, The Politics of Islamic Finance, Edinburgh 2004: Edinburgh Univ. Press; Volker Nienhaus, The Performance of Islamic Banks, in: Chibli Mallat (ed.), Islamic Law and Finance, London 1988: Routledge; Ulf R. Siebel (ed.), Projekte und Projektfinanzierung, in: Handbuch der Vertragsgestaltung und Risikoabsicherung, Munich 2001: C.H. Beck, 242–250, with materials. – The prohibition of taking interest from poor fellow citizens in Exodus 22. 25 is the original source of Koranic, Jewish and Christian prohibitions of interest taking. Whether Exodus 22.25 aims at interest as such, or just usury, or just credits to poor business partners is controversial. In the 4th century, the Christian church probited interest taking to church officials, and in 443, the Church expanded the prohibion to lay people. In the Koran, interest taking is prohibited in Surah 2.275, 278; 3. 130. In 1311, Church sanctions were introduced: exclusion from eucharist and from Christian funeral ceremony. Later, secular legislation followed, until interest taking became permitted again. Christian circumventions were purchase against annuities, and forfeiture of the pawn or object of mortgage.

341 Iwd No. 2 of 1–29–03:, 4f.; Arnold Hottinger, interview with Adelbert Reif, Universitas Orientierung in der Wissenschaft, No. 700, Stuttgart Oktober 2004: Hirzel, 1070–1076.

342 In the sense of Chapter 4, above. See also Michael Gilsenan, Recognizing Islam: Religion and Society in the Modern Middle East, London 1982: Croom Helm.

343 In this sense, as a term for belief system, religion, sect, etc., "way" is sometimes used in the Bible, too, cf. 1 Cor. 12, 31; Acts 14.14, 18.25, 24.14; asked which way he would recommend to find truth, Jesus, obviously with critical reference to the Eastern axial-age tradition, rejects the way metaphor and answers "*I am* the way, the truth, and the life …", John 1.6 (John is the most outspoken anti-gnostic gospel).

mystic version of Islam, Sufiism, likes to make use of the way metaphor: *tariqa* – the mystic way – leads to *haqiqa* (truth) and *ma'rifa* (epistemologically knowing the truth). A certain contradiction can be found in the fact that Eastern gnostic way conceptions contain the elements of search, possible error, repeated attempts, multiple versions, and hence at least a certain amount of free will. However, the Islamic way called *sharia* is a forcible instrument that does not tolerate doubt or deviations. In this strict and obligatory form *sharia* claims univeral validity for all humans. Non-muslims have to be subjected to it. The sharia is the foundation of all law in Islamic states (Kairo Declaration of Human Rights in Islam of 1990). In two states; Saudi-Arabia and Iran,[344] the *sharia* exclusively applies, and to its full extent; the same holds true for certain Muslimic parts of other states (Sudan and Nigeria). In other Islamic countries such as Afghanistan, Algeria, Yemen, Jordanis, and the Indonesian province of Atjeh, the sharia is in force in combination with with local customary law.[345] In Brunei, Egypt, other parts of Indonesia,[346] Irak, Kuwait, Lebanon,[347] Libya, Maledives, Malaysia, Mauretania, Oman, Pakistan, Qatar, Somalia, Syria, and Tunesia *sharia* is used side by side with Western style legislation.[348] Morocco has Islamic family law. The only state with predominantly Islamic culture in which the *sharia* does not apply is Turkey.[349] The current trend in the Islamic world goes to a broader application of *sharia* rules.[350]

b. Islamic international *politics* in relation to the non-Islamic parts of the world show very divers cultural patterns and can hardly be described in a few words. The scale goes from friendly and peaceful ties (Emirates, Oman, Kuwait) via professionally correct but sometimes strained diplomatic relations (Saudi-Arabia, Indonesia, Tunesia etc.) to unsatisfactory and even hostile confrontations (Iran does not even honor the 2500 year old customs and laws of protection of diplomatic personnel), Sudan, Libya, Syria, etc. The destruction of the World Trade Center on Sept. 11, 2001 by Muslims who do not act as soldiers of an enemy nation nor as criminals who can be attributed to a nation state, but solely as Muslims, has created a new quality of intercultural tension.[351] Since Osama Bin Laden and other Al Qaida-leaders have characterized Islam as the driving force behind the attack, one could have expected an Islamic attempt to come to terms with it. It cannot have gone unnoticed by other Islamic

344 Shala Haeri, The Law of Desire: Temporary Marriage in Shi'i Islam, Syracuse 1989: Syracuse Univ. Press.

345 An example: Anna Würth, Aš-Šari'a f B b al-Yaman: Recht, Richter und Rechtspraxis an der familienrechtlichen Kammer des Gerichts Süd-Sanaa (Repubbil Jemen) 1983–1995, Berlin 2000: Duncker & Humblot.

346 Clifford Geertz, The Religion of Java, New York 1960: Free Press of Glencoe, New York 1964: Collier-Macmillan.

347 Michael Gilsenan, Lords of the Lebanese Marches, London 1991: Tauris.

348 An example: Eslah H. Stark, Das Patent- und Mustergesetz der Vereinigten Arabischen Emirate, GRUR Int 2000, 111–121, 202–224, 143–150 (legislation).

349 Richard Tapper (ed.), Islam in Modern Turkey, London 1991: Tauris.

350 A small selection of books and articles, Tilman Nagel, Das islamische Recht, Westhofen 2001: WVA Verlag; Eduard Sachau, Das Recht der Scharia, new ed. Frankfurt/M. 2004; Peter Scholz, Scharia in Tradition und Moderne – Eine Einführung in das islamische Recht, JURA 8/2001, 525–534; Chibli Mallat, From Islamic to Middle Eastern Law: A Restatement of the Field, Part I, 51 AJCL 699–750 (2003); Part II loc. cit 209–286 (2004); Smail Balic, Ruf vom Minarett. Weltislam heute – Renaissance oder Rückfall, 3rd ed. Hamburg 1984: EB Verlag Rissen; Christian von Bar (ed.), Islamic Law and Its Reception by the Courts in the West, Cologne etc. 1999: Heymanns; Mathias Rohe, Der Islam – Alltagskonflikte und Lösungen, rechtliche Perspektiven, Freiburg i.B. et al. 2001: Herder; Birgit Krawietz, Hierarchie der Rechtsquellen im tradierten sunnitischen Islam, Berlin 2002: Duncker & Humblot; idem, Die Hurma, Berlin 1991: Duncker & Humblot; Jan Brugman, Het raadsel van de multicultuur, Essays over Islam en integratie, Amsterdam 1988: Meulenhoff.

351 Richard Rorty, Der unendliche Krieg, SZ No. 207 of Sept. 7 & 8, 2002, 11; Olivier Roy, The Failure of Political Islam, Boston 1994: Harvard Univ. Press; idem, Globalized Islam: The Search for a New Ummah, New York 2004: Columbia Univ. Press.

leaders that the world tries to make sense of what happened against the background of the Islamic doctrinal distinction of the inhabited world between *dar-al-Islam* (the realm of peace by submission under Allah's will) and *dar-al-harb* (the realm of chaos, conquest, and death of the non-believers). Apart from the "epistemologist" group of Iranian philosophers Muslims do not distinguish between the act of knowing and an object of knowing.[352] In other words, they know what the want to know and do not doubt the truth, justice, or beauty of the object. There are no Parmenideian judgments, no reasoned propositions within a dialog, and therefore no critique. This leads to a blockade of thinking about September 11, 2001, and thus to a certain burden on Islam's trustworthiness, regardless of what the result of such dialog might be. What is missing is the critical political judgment based on a critical philosophical judgment, shaped in a group of dialoging members. All that remains is Aristotle's *entlechia,* the drawing of a conclusion from pre-defined purposes, and hence from pre-bargained preferences. Perhaps a solution would lie in a separation of *jihad*- and non-*jihad* Islam, but the wisdom that *jihad* is Islam-inherent is undisputable and dialog-removed in the portrayed sense.[353] The Holy Koran suggests jihad in Surahs 2.191; 2.216; 4.89, 91; 5.35; 8.38; 9.5 and 9.16. Four out of these quotes require jihad against animists (that is, participants of pre-axial-age cultures): 2.191; 4.89 and 91; 5.35 and 9.5, admonishing to persecute and even kill them.

c. Can Islamic society be a *human-rights democracy?* Yes, but at the price of the Tragic Mind, or of the acceptance of inalienable values to be derived from Islam including the inalienable freedom to leave Islam. These alternatives would also require the acceptance of time-as-a-straight line at least to some extent. In this context, the theory of the "greater *jihad*" as developed by the Prophet Muhammad, å.s., on the occasion of the military and diplomatic conquest of Mekka in 630 C.E. as a virtue of *fighting against oneself,* and thus of self-restraint (Brugman 1998, 111) points the way to a reflective, discursive, and explicit thinking and thus to Islamic Cartesian doubt across time. Human rights and democracy in relation to Islamas such will be discussed below.

Here the Islam-political dilemma of the unit of dialog partners, of members, the confrontational issues in many parts of the Islamic world, and between the Islamic world and the outside world are based. The Palestine-Israel confrontation is hinged upon the superadditive issue of a constitution that assigns inalienable positions to its members, including Israeli and Arab enclaves.[354] A great deal of the difficulties between Israel and the Palestine Authority has its roots in this issues of superaddition and membership.: Religious politics of Israel were since its creation in 1948 based on keeping equal distance to both Islam and Christianity, i.e., in personal terms, essentially to Muslim and Christian Arabs. These politics overlook that Judaic and Christian traditions are definitely influenced by superadditive forms of public life, wheras the Muslim tradition does not know superaddition but *ummah* collectivity and leadership instead. In the present constitutional debates, for example in the 2007/8 Annapolis process, Christian Arab modes of thought could have been of considerable assistance to the Israelian stance with-

352 See note 30, above. The Closing of the Door of Knowing (ijtihad) has been internalized even where the dogma itself is no longer held in esteem.

353 Lawrence Rosen, Bargaining for Reality (1984). See also m., below, and Chapter 1 V (at the end), above. On Islam-inherent jihad: Rotraud Wielandt, Krieg um des Glauibens willen? Grundlagen und neuere Entwicklung der Anschauungen zum Dschihad im Islam, Zur Debatte 6/2001, 1–3. See also m.; below.

354 Cf., Joseph Weiler, Israel and the Creation of a Palestinian State: A European Perspective, London 1985: Croom Helm; even a few blocks within a city may form a cultural enclave with an own respected government, see for an example the Las Vegas Paiute (from my not yet edited fieldnotes). On Abdallah Frangi, whose ideas about Palestine's future are not far from Weiler's, see Nina Grunenberg, Radio Freies Palästine, DIE ZEIT No. 19 of May 2, 2002, 9.

out doing any harm to Jewish religion. The Israelian neglect of the organizational-anthropological point of departure of any settlement now shifts Christian Arab positions to the Muslim side, dismissing the Christian Arabs for apparent non-organizationability. The pacification of Iraq depends on the superadditive issue of a constitution that assigns safe positions, executable in a non-corrupt court system, to Iraqi citizens, denominations, and ethnic groups. The list of examples could be continued, but the central argument would be similar.

A rather recent area of research – triggered by the aforementioned general rise of interest in Islam – is the world to which the Prophet Mohammed, a.s., spoke, known as "pre-Islam" *(pré-Islam, Vorislam),* etc. Was it an animist or polytheist world of early Arabic tribes that had to be overcome? Did the Prophet want to proclaim an opinion to contemporary christologigal controversies? Was there a competition with Christian local communities or monasteries? Or with Jewish synagogue communities? Or with Neoplatonic philosophies? How strong was the influence of Eastern gnostic "ways" including ascetism at the time? Did the Prophet in His statement that Islam knows no "monkery" take sides in the controversy between world-denying oriental-Christian and world-attached Western Christian monasterianism (as introduced by Benedict of Nursia)? Was there a link with other axial-age innovations, older than Christianity? Were there any texts that influenced sections of the Koran? Can the world which the Prophet addressed through His revelations be at least in part reconstructed by the Christian gospels including the socalled apocryphic ones? Was the Prophet confronted with the Petrinic-Paulinic controversy, or with the Augustinic (and possible Zoroastric-Manicheic influenced) *civitas dei – civitas mundi* controversy? Given the far-reaching identity of the Islamic belief system and law, what was the law at the time and place of early Islam? These are some of the questions that have just begun to be asked in the context of "pre-Islam". The eight German Academies of Sciences, organized in the *Union der deutschen Akademien der Wissenschaften* (seated in Mainz) in 2007 announced a joint program under the title *"Corpus Coranicum"* on the historical and cultural background of Islam. The announcement shows a purely etic – and therefore probably partly questionable approach.[355]

d. *Islamic epistemology* does not seem to be an elaborate branch of Islamic philosophy.[356] The subject is intriguing. An obedient Muslim is able to answer the epistemological question: How do I know something?) in a straightforward manner: "All I need to know is what my God, Allah, told humankind through His messenger, the last Prophet, Mohammed, a.s., and this is laid down in the Koran, Sunna, and the other true sources of the Sharia; God's law is

355 David Burrell, Platonism in Islamic Philosophy, http://www.muslimphilosophy.com/ip/rep/H001.htm (Routledge 1998, visited May 2008; containing references and further reading e.g. on Al Farabi, Maimonides, etc); F. Rosenthal, On the Knowledge of Plkato's Philosophy in the Islamic World, 14 Islamic Culture 398–402 (1940); Alice Lanzke, Eine europäische Sicht auf den Koran, Union der deutschen Akademien der Wissenschaften (ed.), Das Alphabet der Menschheit beginnt mit A wie Akademien, Mainz 2007, 44f.; on Arabic and Palestinian environment: Klaus Berger, Worte christlicher Araber, Frankfurt/Main & Leipzig 2006: Insel; Marcus Simon, Den Philistern auf der Spur, Rektorat der LMU (ed.), Einsichten 2006, 83–86; on hellenist and gnostic environment: Elaine Pagels, Adam, Eve, and the Serpent, New York 1988: Random, and the other works on gnosticism cited in W. Fikentscher (1995/2004), 163–165; Christoph Markschies, Warum sich das Christentum in der Spätantike durchsetzte, 36 Zur Debatte No. 3/2006, 33–34; on Judaic influences: Mathias Morgenstern, Abraham, Ibrahim, FAZ No. 197 of August 24, 2006, 8; for this see also the Koranic commentaries; on apocryphic themes: Klaus Berger, op. cit.; Hans-Josef Klauck, Apokryphe Evangelien: Eine Einführung, Stuttgart 2002: Kath Bibelwerk; ders, Religion und Gesellschaft im frühen Christentum, Tübingen 2003: Mohr Siebeck; idem, Das Evangelium des Judas, 37 Zur Debatte No. 2/2007, 29–30.

356 See notes 30 and text near note 352 above; Herta Müller, Sarkuhi ist unschuldig, DIE ZEIT No. 32 of August 1, 1997, 37; Katajun Amirpur, Kritikern eins "in die Fresse schlagen", DIE ZEIT No. 51 of December 14, 2006, 61.

all I have to know, and I know it from these sources". The Koran as revelation of God's word by the Prophet gives the book the quality of being God (the so-called Muslimic "inlibration"). This type of epistemology does not leave room for doubt. Any error is a misjudgment and can therefore be omitted. If doubtless epistemologies are epistemologies, then Islam has one. If an epistemology has to include questions that can be answered one or the other way, Islam means knowing and not *wanting to know.*

When increased populations, traveling, trading, and contact around 600 B.C.E. triggered increased comparison and the quest for common ideas, early Greek philosophers – later called the "pre-Socratic" – asked whether among the tribes and nations there were shared concepts of the true, the good, and the beautiful. Parmenides with whom this kind of investigation is most often connected held that a human being has the option of asking the questions for the true, the good, and the beautiful, to think about them, and to reach a result. This he called a judgment, or a proposition, and he taught that every human being has the right and the power to make such judgments. He reduced the process of making a judgment to three elements: the judging human being, the object to be judged (whether it is true, good, and beautiful), and an epistemological tie between those two which he called "thinking". Parmenides lived in a polytheist world which permitted him to neglect the issue of whether a human being might be entitled to judge in the first place.[357]

A strict monotheistic belief system such as Islam is bound to reserve the right and the power to judge to the only God. Therefore, the Parmenideian judgment is not limitless available for Islam, but has to be placed under the proviso of "Insch-Allah" – God willing. A Muslim is therefore restricted to the immediate, doubt-free access to things in the manner of Aristotle's *entelechia,* the sense-finding out of the object itself, always on condition of God's approval. Whereas Parmenides' indirect student Socrates derives from the theory of judgment the conviction of existing ideas (e.g., *the* true, *the* good, *the* beautiful, in order to give the judgments objects to be judged), and Plato developed from the theories of judgment and of ideas the theory of dialog as an instrument of better approaching the ideas, Islam has no access to dialog, nor to the Plato-influenced Kantian teachings about judgments of truth ("pure reason"), morality ("practical reason"), nor esthetics *(Kritik der Urteilskraft).* This means that for understanding and re-enacting Islamic reasoning, Parmenides, Socrates, Plato, and Kant are irrelevant.[358]

This does not mean that Islam has no "reasoning". Islamic reasoning is akin to pre-axial-age thinking and Aristotelian concluding: the nature of things defines their meaning and purpose, which to know is open to all believers – God willing. This is not a worse, less efficient or less cogent way of concluding. It is different. For a culturally meaningful exchange of opinions with Islamic thinkers, forming meta-judgments is therefore necessary. Derivation

357 W. Fikentscher, Wissenschaft und Recht im Kulturvergleich, in: Chr. Engel & Wolfgang Schön, Das Proprium der Rechtswissenschaft, Tübingen 2007: Mohr Siebeck, 77–86.

358 Therefore, a question such as "what would Kant say about the war in Afghanistan" makes little sense, see Volker Gerhardt, Eine Frage an Kant: Der Afghanistan-Konflikt aus der Sicht der Kritischen Philosophie, Forschung und Lehre 12/2001, 639–641; Kant's answer could be: "Forget the pre-Socratics, Socrates, Plato and myself, study pre-axial-age reasoning, Aristotelian epistemology, its Islamic reception – then you will find an emic solution which you may metatheoretically compare to an etic one". See generally Felix Klein-Franke, Die klassische Antike in der Tradition des Islam, Darmstadt 1980: Wiss. Buchgesellschaft; on dialog, e.g., Hans Küng, Der Islam: Geschichte, Gegenwart, Zukunft, Munich & Zurich 2004: Piper; Institut für Auslandsbeziehungen (ed. & publ.), Der Westen und die islamische Welt, Stuttgart 2004; A. Bsteh SVD & Tahir Mahmood (eds.), Vienna International Christian-Islamic Round Table publ., 3 vol. Mödling 2003, 2004 & 2005: Religionstheologisches Instiitut St. Gabriel; on the three last publications see the review by Helmut Reifeld, Der Dialog mit dem Islam bleibt schwierig, KAS/Auslands-Informationen 3/2005, 131–148.

and legitimation of such meta-judgments could be based on reality and value estimations, or other pre-established criteria. It seems, as an ahistorical argument, that one of the most ardent opponents of Islam is Parmenides with his opinion that distanced, critical thinking stands between man and object. This perspective "thinking" as a third entity besides person and object looks like employing, for getting to know something, a competing god which from an Islamic point of view amounts to no less than apostasy.

In terms of time, Islamic-Aristotelian epistemology (see above b. first paragraph) is a matter of the here and now. It does not need time. Parmenideian-Platonic epistemology requires time, to consider the issue, exchange of opinions, debating doubts, etc. Dialog takes time, and chances are it makes you wiser. Allah's world stands complete, fixed, whereas the God of the Jews and of the Christians lets His world grow and develop (Mark 4. 26–29, comparing the world to a farm). Therefore Jews and Christians can pray to God *for* something, not just *to* God. The official prayers of Islam do not include to pray for something, they are incantations of God's greatness and mercy. Muslims give honor to Allah in almost every respect, except for time. As to time, a Muslim does not need to honor God because there is no time which God provides for human use over time. Islamic prayers are praise of Allah and as such self-confirmations of the belief in the only God. Islamic prayers do not serve to pray. Praying means to ask the addressee of the prayer to do or omit something. This would imply that Allah in His mercy when planning the world would have commited an error. Of course, to assume this would be sacrilegious. Therefore, Islamic prayers do not pray *in order to receive something* but pray *to someone,* to God. It is not prohibited to pray for health, for passing the exam, for not getting unemployed, for consolation, for a child's welfare, for the soul of a deceased in heaven, and so on. But these prayers, being permitted because of human feableness, are called "inofficial". The five official prayers of a day, including the important Friday prayer, are no instruments to change Allah's mind. For a Muslim, the world is made by God; for a Jew and a Christian, the world is in the making by God. Therefore, for a Muslim, the world is God's empire; Jews and Christians pray that the world will be God's empire.

Allah's monotheistic power over and care for the world is to be understood as a time-removed phenomenon while the growth and development of God's empire in Jewish-Christian understanding makes the prayer of an indivudual a building stone of such increase. Islamic monotheism ends where honoring God *across time* is at stake. Therefore Islam has its traditional difficulties with passing time, history, development, testing and test results, and time-related values.[359] Allah would never think of entering His own time, as the God of the Jews and Christians does in the shape of a "man's son", for love of His "children". But to negate the flow of time leads to an abridged monotheism. Thus, the religious program of a strict monotheism is exposed to certain difficulties: Time-bound, individually shaped ties to fellow human beings as well as to the environment are hardly to be stored in it. Only if the human being and every natural reference are radically dis-individualized, a strict monotheism can succeed.

In terms of culture, the religious program of Islam is rather unique because of lack of time-as-a-straight line it cannot integrate individually formed interhuman and environment-attached relations. A time-open monotheism needs a messiah, but a messiah in Islam is intolerable. Only if one detaches the individual and nature from time, strict monotheism may

359 In favor of opening Islam to time: Smail Balic, see note 350 above; Thomas L. Friedman, Breaking the Circle, NYT of Nov. 16, 2001, 16; Bassam Tibi, Das arabische Staatensystem, ein regionales Subsystem der Weltpolitik, Mannheim 1996: B.I. Taschenbuchverlag; contra: Mohamed Talbi, Interview in Jeune Afrique, l'intelligent, No. 2346 of Dec. 25, 2005.

convince. Islam needs no messiah because its validity is momentous, for every moment, not across a growing and developing time. Because it needs no messiah, it needs no Holy Spirit as messiah's memory and spiritual presence to the "Last Day". In this sense, Islam is truly monotheistic, not trinitarian, but at the price of timelessness (in the sense of time-as-a straight line until the "Last Day"). With regard to time, Islamic monotheism has no emic answer concerning its own dogma. Only etic answers from outside monotheism are possible. For Islamic culture, this living outside of time and without development is of course of great relevance and explains many traits. It explains, for example, the desire of many Muslims to get back to the time of Mohammed, a.s., and the first four *Kalifs,* the *Rashidun* (1–38 A.H. = 622–661 A.D.), the "Golden Period", when things seemed well-ordered and near to perfection (Abu Bakr 632–634, Umar Ibn al-Khatab – 644, Utman – 656, and Ali – 661). That so often values as they are represented by Koran and Sunna suffer from disrespect or just poor attention may have one of its reasons in the fact that they cannot be asserted by Parmenideian judgments and made subject to Platonic dialogs. It cannot be denied that of the 6.5 billion people who live on this world, the 1.3 billion Muslims are surrounded by roughly 4.5 billions whose mental coordinates are shaped by the cultural-philosophical development from Parmenides to Kant. Hence Islam needs to confront this fact, above all in the age of globalization.

For followers of Islam, the world stands as it does, and it stands well. That this-wordly futurelessness is Islam's fate. Not all that happens can be interpreted by reinterpretations (and certainly not by so-called *hijals* as more or less disrespected "tricks" of interpretation). It is difficult to deny the progress of time once the creation of time by God the Creator has been acknowledged. Humans who believe in a monotheistic God as creator of time should not try to take their God's time out of His hands and declare it moot. But this is what people do when they declare the revelation of God's wisdom and will to mankind to be the last act within that time. Islam's monotheism is a time-deprived one, and therefore not a really convincing one. In a truly monotheistic belief system, human propositions about time cannot be placed above God's propositions about time.

In Islamic view, the factor time is closely connected with the issue of sovereignty. Although there is after the end of the Ottoman Empire (1299–1922) presently in Islam no acting *Kalif,* the reign of the *sharia* would require a Kalif, appointed for life time, as the only Islamic worldly leader. His task would be to see to it that the *ummah,* the assembly of all Muslims, is only responsible to God as sovereign. Human sovereignty besides this this religious sovereignty is not existent. God's sovereignty is timeless. This makes it hard for a Muslim to accept other forms of sovereignty, such as the sovereignty of a state, a demographic government, or a human judgment rendered in personal responsibility. Islam is a world without Plato. Therefore, Islam is a world without Parmenides. Al-Farabi's (870/871–950/951 C.E.) neo-Platonism failed to influence his students.

e. Since the *period* during which things seemed well-ordered and near to perfection lie so far back in (what for non-Muslims is) history, it is not easy for Muslims to make correct decisions today. The Prophet's life serves as a model. Islam knows godly legal titles against humans to obey certain duties, and within this framework of godly legal titles also duties towards humans. Therefore besides these duries many issues of modern times may be left open simply because time has passed by and unforeseen situations have occured. Instructions on how to behave, for example under duress of migration, under a modern political regime, or in view of superadditive organizations which cannot be squared with the principles of the *ummah,* sometimes cannot be drawn from medieval examples. Love, trust, and reliance among human beings are societal flowers that have not been planted by the *sharia.* Given that reason is be-

stowed upon man, different opinions may be put forward and bargained about. Therefore, "bargaining for reality" is an appropriate replacement for missing this-worldly trust instructions.[360] Allah does not bind Himself to men, and therefore not the individuals of the people of His creation to one another except for said duties (Muhammad Shama, of Al-Ahzar University in Cairo, *"Ehrung des Menschen im Islam"* (Honoring Man in Islam) of May 22, 2007, Zur Debatte 7/2007, 19–21, at 20). Thus, there can be no rule of trust and reliance across time among human beings because Allah did not take the initiative to start time-related love and trust in humans, and consequently He did not, mirroring this love and trust, plant trust and reliance among human beings. Neither is there – in view of God's omnipotence – any reliance on life-shaping, risk-minimizing facts. God's omnipotence is stronger than any law of causality. Causality is not more than usage, and a miracle is nothing more than an exception to usage. There is no *propter hoc,* only a *post hoc,* Al-Ghazali (d. 1111) taught that a man does not die because he has been beheaded, but after he has been beheaded). The concept of time which underlies this "post hoc" irresolvably conflicts with the lack of time-as-a-straight line Obviously Al-Ghazali worked with a naïve time concept, since his basic idea that God creates the world anew in every moment would have permitted neither *propter hoc* nor *post hoc* (see for details W. Fikentscher 1995/2004, 412, 432). Therefore, facts are malleable and unsafe, and trust is a risk, so reality has to be bargained for, and rebargained, always considering the relevant prevailing circumstances.

The lack of time-as-a-straight line in Islam has, apart from epistemological consequences, ethical implications. If time does not pass, and the ideal state was the Hegira (= 622 A.D.) and the 39 years after that, future-directed activities are difficult to conceive. The destiny of the world has been pre-fixed by the world's ruler, God. Ethically, this could be understood as a basis for utmost inactivitiy. However, Islam is not world-detached like Buddhism, but a world- attached belief system. This means that the lack of time-as-a-straight line has to be replaced by a mandate to become active. In Islam, this mandate is known as *jihad*. (= effort, engagement, overcoming, fight). In short, it replaces time.[361] Since epistemology in the meaning of getting to know (and therefore dialog) are neither necessary nor possible, *jihad* represents effort without accompanying learning, rather an accomplishment of known things. *Jihad* is performed not in order to influence let alone gear historical developments but to pursue an eschatologigal final state is, a state the quality of which is fixed and which comes close to the "Golden Period" of Islam after Hegira.

f. Against the conceptual background of *jihad* it is possible to explain what in Islam is comparable to what in (most) other belief systems are values, or preferences. Values, or in more modern variation, preferences, are positions which may be pursued, to be aimed at, by persons who wish these positions to become reality. Efforts under *jihad* aim at making reality what has already been determined to be. Therefore, efforts of *jihad* are different from values in the sense of other belief systems. Islam as submission and and striving for values are mutually exclusive. Standing up for, or weighing, values, is un-Islamic. An "Islamic use value" does not exist. Rather, the values to be pursued are set by the Almighty God, and they become visible in the *ummah's* (= the collectivity of the believers) or the *ulema's* (= the experts') consent, practically in the results of the bargainings of the followers of Islam. This is one of

360 Lawrence Rosen, Bargaining for Reality, Princeton 1984: Princeton Univ. Press.

361 Comparable is the combination of strict-Calvinist determinism and this-wordly activism in Max Weber's understanding of the Protestant Ethics, and the Marxist exhortation to engage in revolt and class truggle because (!) historical and dialectic materialism makes world revolution a *sure thing to come;* see on the illogic of this combination of determinism and decisionism, W. Fikentscher (1976), 544–546 ("Stalin's Therefore").

the reasons for the extraordinary number of defendable positions,[362] all of them self-reflexive and autonomous rather than not value-oriented in the non-Islamic sense. To summarize: Islamic monotheism is time-(as-a-straight-line)less. Instead, Islam replaces the lack of passing time by *jihad*.

The following cultural aspects of Islam are additional consequences of what has been said under a. through f. above about human rights, epistemology, time, and ethics.

g. Additional suggestions may be given for the debate on whether Islam can, may or indeed must accept *democracy*. Among many writers, Khaled Abou El El Fadl and a group of experts have discussed this questions.[363] There are four theories:

(1) The first theory claims that Islam and its sources require democracy. Ya ar Nuri Öztürk holds that the Koran prescribes democracy, for example in surah 60.12 where even the Prophet Mohammed is told, by Allah, to obtain *bajat* from the leaders of the community, who speak for the whole community, including the women. Bajat means, according to Öztürk, an agreement to govern and to be governed, similar to the *contrat social*.[364]

(2) El Fadl himself belongs to the (most numerous) group of writers who think that Islam does not require, but permit democracy: Islam can accept democracy as far as "freedom, foregiveness and tolerance and the pursuit of overlapping consensual commitments are virtues that are important to a democracy but … not exclusively Western".[365] Khalid Abou El El Fadl's answer is a "yes, but", insisting on certain conditions.[366] He sees no sense in opposing views and voting on them, rather in freedom of expression, foregiveness, tolerance, and consensus.[367]

(3) A third group of authors denies that democracy can be combined with Islam. One of them is Jeremy Waldron who cannot find in Islam what he thinks is essential for democracy, namely, "a system of open decision making empowering and facilitating the confrontation between opposed ideas and interests in the context of representation, debate, and voting".[368]

(4) A fourth opinion may be added that starts from theory (3) but mentions certain conditions under which Islam could turn from a necessarily undemocratic belief system to a symbiosis of Islam and democracy. Bassam Tibi considers the jihadist threat of totalitarianism to be very serious but believes in the possibility of a cultural reform of Islam and democratiza-

362 For this see, e. g., Mathias Rohe, note 350 above. There are serious doubts whether under the rules of Islamic morality such completely time-deprived ethical quodlibet is really tenable.

363 Khaled Abu El El Fadl' discussion is contained in: Joshua Cohen & Deborah Chasman (eds.), Islam and the Challenge of Democracy, Princeton & Oxford 2004: Princeton Univ. Press; Boston Review Book. Christina Jones-Pauly & Neamat Nojumi, Balancing Relations Between Society and State: Legal Steps Toward National Reconciliation and Reconstruction of Afghanistan, 52 AJCL 825–858 (2004); The issue No. 12/2007 of KAS/AuslandsInformationen contains a series of articles on Islam and democracy. See Chapter 9, notes 234 ff. below, in the context of anthropological leadership models.

364 Y. N. Öztürk, Die Zeit nach den Propheten, DIE ZEIT No. 9 of February 20, 2003, 11; similarly, Leonard Binder, Islamic Liberalism: A Critique of Development, Chicago 1988: Univ. of Chicago Press.

365 El Fadl op. cit. 111 f.

366 El Fadl op. cit. 111, 128. Others in this group: Monika Jung-Mounib, Begründung der Demokratie aus dem Islam, NZZ No. 188 of August 14/15, 2004, 77, Mohssen Massarat, Preis der Freiheit, DIE ZEIT No. 14 of March 31, 2005, 27; Bernard Lewis, Noch heißt der Sieger Saddam Hussein, SZ No. 187 of August 14/15, 1991, 8; Michael Lüders, Ewige Herrscher, DIE ZEIT No. 31 of Juki 29, 1999, 8; Erdmute Heller & Hassouna Mosbahi, Islam, Demokratie, Moderne, Munich 1998: C. H. Beck; Gunter Schubert, Wie demokratiefähig ist der Islam?, KAS/Auslands-Informationen 2/2002, 4–20.

367 At 112.

368 For Waldron, see El Fadl, op. cit. at 55–58 (58). Similarly, Bassam Tibi, Demokratie ist Unglaube, FAZ No. 152 of Juli 3, 1996, 34; but see the following note.

tion.[369] He comes close to the point of view that follows from the above remarks: Islam can accept democracy if it opens itself to time-as-a-straight line. Otherwise the democratic progress from one legislative period to the next and, in connection herewith, a possible change from previous minority to majority, cannot be performed. A requirement closely connected with the acceptance of current time is an individuality of judgment, and a Parmenideian character of this judgment. Otherwise political opinions cannot be counted to become majority or minority opinion. A third requirement would be the introduction of superaddition, that is, the assumption that the voters are the members of a unit which by granting rights and duties to the members is more than the sum of the parts. Taken together, this would mean a far-reaching approach of the consensus society of the traditional *ummah* in the direction of the ancient Greek *polis,* whereby the ummah need not be abolished, but may be retained as the religious community of the Muslims.

h. Another question is whether a belief in passing time would require a belief in a messiah. This would indeed end Islam. However, such a consequence is not indispensible as the Greek *polis* and the non-Christian Frankish cooperative show. The introduction of time-as-a-straight line to Islam, not necessarily by conscious culture change but by mere political practice, without letting the monotheistic god send a messiah, would place Muslims in a mental state coming close to the followers of post-exilic apocalyptic Judaism. A monotheism without expectation for a God present *across time* would have some similarity with millenarism, and thus offer some stability. Clearly, the door to wisdom and knowing *(ijtihad)* could be reopened. This would faciltate democratic opinion-forming in the Parmenideian-Kantian manner, far away from any *hijal*. Islam would gain political ethics ready for use across time. Turning dispute-removed holdings into debatable values would strengthen Islam. And yet, there would be – as welcome control – recourse to revealed truths in the meaning of the proviso of Simmias.[370] The difference between the asking Plato – the West's leading epistemologist, who asks – and the knowing Aristotle – Islam's philosophical supporter, who knows – can be defined as follows: Plato's epistemology is based on Simmias' condition of doubt (defined as absence of revelation), Aristotle does not recognize this condition so that for him no revelation is of importance.

It should be noted that the discussion of Islam's compatibility with democracy is frequently brought under the headline of sovereignty or authority. It is said, for instance, that God's sovereignty has to be respected above all so that "people's sovereignty" as required for democracy is in conflict with Islam. Others use the term authority with similar arguments. However, sovereignty and authority should not be confused, and a clarification of both terms may solve the issue. Monotheism assigns sovereignty to God, but it does not, in and of itself, bar the creation or the use of authority. There are different kinds of monotheism: (1) Where monotheism holds that God made man a thinker who, for example, is able to render a Parmenideian judgment, God grants man the power to have authority as far as the judgment goes. By consequence, the same must hold true for a judgment that is the result of a Platonic dialog, and thus apt for a democratic decision. (2) Where monotheism identifies sovereignty and authority, God disables man to render udgments, to engage in a dialog, and to make democratic decisions. It seems that traditional Islam follows theory No. (2). But the position No. (1) is not un-

369 Bassam Tibi, Der neue Totalitarismus, Darmstadt 2004: Wiss. Buchgesellschaft.

370 "ἡ λόγου Θείου τινός," Plato, Werke in acht Bänden, ed. Gunther Eigler, vol. 5, bearbeitet von Dietrich Kurz, griechischer Text von Leon Robie, Auguste Diez, und Joseph Souilhé, deutsche Übersetzung von Friedrich Schleiermacher und Dietrich Kurz, Darmstadt 1990: Wissenschaftliche Buchgesellschaft (Sonderausgabe), Phaidon, 85 d, phrase 3; similarly in Symposion, Nestle op. 130, note 7; and Plato, Letters VII, 324 B – 326B, see Nestle p. XVII. The meaning is: "as long as we have no revelation".

Islamic. Position No. (2) is self-defeating by the assumption that man cannot decide about the true, the morally good, and the esthetically acceptable because of God's sovereignty. But a God who is afraid of human authority is not omnipotent. Rather, God's sovereignty is the ideal source of human authority to judge in the Parmenideian sense.

i. A subject closely related to Islam's compatibility with democracy is the question whether Islam knows a separation of private from public sphere. This separation presupposes the separation of individual and public. The creators of this distinction are the fathers of the Greek polis.[371] According to Khaled Abou El Fadl's convincing historical arguments, Islam rejected individualism at the latest in the middle of the 19th century, in order to have a practical dividing line against Judaism and Christianity.[372] From this it would follow that Islam has no or different concepts of private and public spheres. The gist of the issue is superaddition – again –: Only where the whole – the *polis* – is regarded to be more than the addition of its citizens (the citizens as *its members* with rights and duties among themselves and between themselves and the whole) there can be talk of a separation of of private and public spheres in the general sense.

j. Here, a word about risk and discouragement is in order. It has been said that it is impossible to deter a Muslim because he knows his fate in God's hand so that any calculation of whether an act is worthwile the sacrifice connected with it is futile. There is certainly some truth in this statement, and Western political, economic, and military planning will do good to reckon with low Islamic risk awareness. On the other hand, most "kismet"-stories and reports on Muslimic fatalism seem exaggerated. Muslims are highly sensible to discouragement. When something does not work out, a Muslim may think that Allah's will is not in favor of it. Thus, it might be better not to try. In this aspect, Islam is similar to Marxism. For Islam and Marxism, sensisibility to failure follows from the inadmissibility of the Parmenideian judgment. In Marxism, the Parmenideian judgment is possible, but pre-empted by the decisionism of the "top cadres in the metropolies". In Islam, the Parmenideian judgment is a sacrilege, because it may pre-empt Allah's will. Human goal-setting requires such a judgment, so that failure requires another such judgment. In Islam, this is difficult to perform, and in Marxism it is forbidden. The less risk-aware a mode of thought, the easier it is to discourage its carriers. Martin Luther's *pecca fortiter* is missing in both Islam and Marxism.

k. Theodicee, secularism, prayer practice, guilt and shame, and human rights are related subjects in Islam. Theodicee (from theos = God and just = dikaios) is the issue whether God is responsible for the misery of the world. The issue arises together with the decision, by the Jews in exile, that the answer to the challenge of a secular non-tribal and non-national world-wide good-bad ethics must be that God is good.[373] What, however, is Islam's position to theodicee?

Unlike animism (in the wide sense), Hinduism, Buddhism, Tragic Mind, Judaism, and Christianity, Islam does not start its position towards the evil in the world with concepts like misery, disease, suffering, and ill fate. Islam has little sense for tragedy. In accordance with the overwhelmingly legal understanding of the Islamic belief system, a wrong in Islam arises al-

371 W. Fikentscher, Oikos und Polis und die Moral der Bienen, eine Skizze zu Gemein- und Eigen nutz, Festschrift Arthur Kaufmann, Heidelberg 1993: C. F. Müller, 71–80.

372 See Khaled Abou El El Fadl, Islam and the Challenge of Democracy, a Boston Review Book, ed. By Joshua Cohe & Deborah Chasman, Princeton & Oxford 2004: Princeton Univ. Press, 28 f.

373 See text near note 323 above. The criticism of animism, which characterizes the axial age, unavoidably leads to the secular good-bad dichotomy. On theodicee as a common theme of the monoheistic religions: Navid Kermani, Der Schrecken Gottes: Attar, Hiob und die metaphysische Revolte, Munich 2005: C. H.-Beck, reviewed by Helmut Reifeld, KAS-Auslands-Informationen 6/2006, 129–143, 141 ff.

most exclusively through human unjust behavior. God is not the author of unjustice, but humans may be, Koran 3.182; 8.51; 22.10; 41.46; 50.29. Humans can behave unjustly against others and also against themselves, 2.231; 3.117; 12.79. Therefore, it is un-Islamic when a Muslim kills another Muslim (Brugman 109f.). When a suicide bomber kills Muslims, instead of non-believers – and in Pakistan and Afghanistan this is currently the rule rather than the exception – the suicide bombers are soon declared martyrs, in order to whitewash them from the sin of killing fellow Muslims. Therefore, Benazir Bhutto was herself declared a martyr within minutes after her death on December 27, 2007, in order to prevent the assasin from being entitled to martyrdom.

As an exception, the Koran lists some situations of human distress and suffering, speaking of God's mercy to the victims of such faultless misfortune. All these examples have been taken from the Bible, Old and New Testament (see the quotes in Koran 21, 74–90). The Koran even deems possible that God is the source of evil. This is similar to the situation before the axial age in the Babylonian exile (see Isaya chapter 11): In the same sense, Surah 33, 17 states that there is no protection whatsoever if God wants to hit humans with evil. But in the foreground of Koranic revelation are human offenses against humans as source of wrong. Consequently, Islam has no doctrine of original sin (the Christian term for faultless genetic misery in Exodus 20.5). As in Judaism and Christianity (Ezekiel 18; Matthew 8. 21, 22), there is a concept of individual guilt in Islam, and man comes into this world free of sin and responsible for her and his own behavior. Among the other main modes of thought in this world, Animism (in the wide sense), Hinduism, Buddhism, Greek Tragic Mind, Judaism, and Christianity, Islam is the only where leading a responsible, faultless, decent life is enough to be safe from being engaged in evil.[374] It is hard to find a Muslim who tells you that he or she has a bad conscience.[375] E.E. Evans-Pritchard wrote a famous chapter on wrong in certain animist societies, titled "Witchcraft Explains Unfortunate Events".[376] The belief in witches is – officially – un-Islamic Therefore, in official Islam the phrase would go: Human wrongdoing explains unfortunate events.[377] This negation of tragic evil is one of the strongest arguments in favor of Islamic mission, for example in the spread of Euro-Islam.

The general solution which Islam offers for such human wrongdoing is punishment (see the verses of the Koran quoted in the foregoing paragraph). But Allah may forgive human wrong because he is mercyful. The time for punishment and pardon is the Last Judgment (Surah 6, 25–32; and same verses as above). When it comes, divine pardon will be the preferred solution, punishment the less frequent, because heaven has eight doors, and hell seven. In Islam, there is no general authorization to Allahs servants, the Muslims, to share in the execution of punishment and pardon. But *jihad* is a Muslim duty, and punishing unbelievers is part of *jihad*. Time and patience play no role. Punishment may happen just as well today, at least when it is part and parcel of *jihad* as the effort to spread Islam or to fence off damage. Damage done to Islam includes discriminatory or socially disadvantageous treatment of Mus-

374 Confucianism is, in this respect, somehow similar to Islam: it works for normal behavior but has no answers if things go awry; see W. Fikentscher (1995/2004), 309. Islam has (biblical) answers if things go awry, but – apart from these references to Judaism and Christianity – it does not accept that things may end tragically (a conception that requires time).

375 See the Khidr legend, told by Ömer Özsoy in: Katholische Akademie in Bayern (ed.), Zur Debatte 6/2006, 18–20, at 19: seemingly wrong is Allah's blessing.

376 In: E.E. Evans-Pritchard, Witchcraft, Oracles, and Magic Among the Azande, Oxford 1937: Clarendon.

377 Tahsin Görgün, Mahmoud Hamdi Zakrouk, Fuad Kandil, Ömer Özsoy, and Abdullah Takim contributed to an erudite symposion about Islamic theodicee in Zur Debatte 6/2006, 10–26 (ed. Katholische Akademie in Bayern), all more or less to the above effect.

lims or Islamic institutions. Punishment is to be applied just as collectively as the damage is done, so that there are no innocent by-standers. In contrast, in Matthew 13. 25–30 the story is told when Jesus' followers offered to punish the unbelievers. Jesus again, as in Mark 4. 26–29, compared the kingdom of god to a farm, where good wheat and evil weeds should be permitted to grow together undisturbed till harvest, and only then will be severed. In short, Islam is Christianity minus time.

Islamic theodicee gives rise to a certain (bargain-subjected) shortlivedness of societal relations. In order to introduce longer and more regular periods for ordering society, Kemal Atatürk, the founder of modern Turkey after World War I, insisted on a separation of state and religion. This "secularism" in Islamic Turkey is not only to limit the influence of "fundamentalist religious rules" on society but also to guarantee a "form of life that opens access to science and intelligence".[378] While officially claiming to maintain and safeguard secularism as part of Turkish constitutional theory and practice, recent political developments seem to indicate a stronger influence of Islamic positions within the Turkish government and state. It remains to be seen whether this will lead to recurrent instabilities the founder of modern Turkey wanted to avoid. It should be noted, however, that Atatürk's Turkey did not understood secularism as religious tolerance in the meaning of Western open and civil society, and whether secularism one day will develop into tolerance remains to be seen.

Thus, carriers of the (secular and tolerant) civil society in the Western sense are individuals. They are members of a superadditive unit, for example a nation state, and should have individual rights against one another and against the unit.[379] If a individual commits a wrong, it is *guilty.* Western civil societies are "guilt societies". In a collective society, such as most pre-axial-age societies and also in Islamic society (see before, according to Khaled Abou El El Fadl since the middle of the 19th century) there can be no individual guilt. There is collective *shame.* Therefore, collective societies are called "shame cocieties" because the perpetrator's family, lineage, clan or tribe has to carry the shame connected with the deed.[380] In connection with Islamic ethics and theodicee this explains the essence of what in the Western media is called Islamist terrorism, and it also explains the use of weaponry and "human" or "living shields". Seen emically, the self-defined "attack" on Islam by discriminatory or socially disadvantageous treatment of a Muslim or an Islamic institutions is a collective act. This implies that any single person belonging to the likewise self-defined counter-group (family, lineage, clan, tribe, nation, denomination, skin color, gender, etc) is just as "guilty" of the "attack" as

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378 Words taken from a message of the former Turkish President of State Ahmet Necdet Sezer of February 5, 2001, on the day of the 64th anniversary of the introduction of obligatory laicism into the Constitution of the Republic of Turkey.

379 The weaker development of the latter in the Normannic type of the Frankish cooperative organization ("the lack of an Art. 19 (4) German Constitution") will be discussed in Chapter 9, text near notes 206ff.; see also the remark before 6., above.

380 See Chapter 11 below; in German in this context "shame" should not be translated by "Scham", but by "Schande": the criminal act brought *Schande* on the actor's collective. References include: Günter Bierbrauer, Toward an Understanding of Legal Culture: Variations in Individualism between Kurds, Lebanese, and Germans, 28 Law and Society Rev. 243–264 (1994); idem, Reactions to Violations of Normative Standards: Cross-Cultural Analysis of Shame and Guilt, International Journal of Psychology 1992, 27/2, 181–193; G. Bierbrauer, Heike Meyer & Uwe Wolfradt, Measurement of Normative and Evaluative Aspects in Individualistic and Collectivistic Orientations, in: U. Kim, H.C. Triandis, C. Kagitcibasi, S.C. Choi & G. Yoon (eds.), Individualism and Collectivism: Theory, Method, and Applications, Thousand Oaks, CA 1994: Sage, 189–199; Leon de Winter, Vor den Trümmern des großen Traums, Die Zeit No. 48 of Nov. 18, 2004, 17f.; Ralph Patai, The Arab Mind, New York 1973: Scribner; see, however, Frank Drieschner, Was predigt der Imam nebenan? DIE ZEIT 53/2004.

any other such participant. Therefore, it is – emically – permitted to kill, maim, kidnap, take hostage, or otherwise counter-damage her or him. As to weaponry, the same deliberations emically "justify" the use of explosives because explosives are able to hit what etically is a harmless by-stander, shopping house-wife, pedestrian, tourist, onlooker, etc. Again, the same philosophy emically permits the use of human or living shields. Who is to judge these collective assumpions? Intentionally hitting innocent people is not permitted under any civilized and international law. Interestingly, it is also prohibited under the *sharia: harbis* are non-Muslims at war with Muslims. The sharia prescribs to kill these *harbis,* but to spare women, children, and non-fighting men such as monks.[381] At least by way of *qijas* (analogy) this means that non-fighting persons may not be harmed. It also means that arming a province for war (e.g., turning Northern Lebanon into "Hisbollah-land" as a platform for missile warfare) includes the duty of the military to built air raid shelters for non-fighting civilians. Islamic collectivism is not as pure as Khaled Abou El Fadl writes. There seem to be some remnants of Islamic individualism, to say the least.

However, Islamic individualism runs into the problem of punishment without pardon Surah 3.182; 6.25 ff). This is understandable against the background of Islamic denial of faultless guilt: there must be a culprit. But as far as the Koran accepts Jewish-Christian biblical tragic (Surah 21. 74–90), where is the culprit? Here the meanings of time and the messiah as God within His own time make the Christian approach plain: Islam needs no messiah only when it understands itself as a collective religion without individually attributable guilt for world's misery. If Islam recognizes individual guilt, it has in order to remain consistent to deny theodicee and hereby the good God. Then, Islam's God is the god who brings the good and the bad. But this is not Allah as the Prophet, å.s., teaches Him. Islam would have to decide between culprit-seeking and an ill-willing God. Instead, the Christian holding is that the messiah suffered because God in His mercy did not want to leave humans as individuals alone to be the carriers to be punished of faulty and faultless guilt.

l. Does Islam have, require, or negate human rights?[382] Historically, human rights are executable rights of individuals against government, religious authority, and parlamentarian majority.[383] Islam is, according to Khaled Abou El Fadl (see above), at least in its mainstream since about 1850 A.D. a collectivist belief system. As a consequence, Islam cannot acknowl-

381 See Georg T. Kunta, Krieg und Kultur schließen sich aus, 24 Paneuropa 4/2001, 15–17, at 16.

382 The relevant literature is sizeable. A report doing justice to even the most important publications is not possible. See, for example, Selim Abou, Menschenrechte und Kulturen (Transl. A. Franke & G. Schmale) Bochum 1995: Verlag Dr. Winkler; Bernd M. Weischer, Islam heute: Entwicklung und Tendenzen, KAS-Auslands-Informtionen 10/1995, 41–57; Sami A. Aldeeb Abu-Salieh, Les mouvements islamistes et les droits de l`homme, Bochum 1998: Verlag Dr. Winkler; A. Peterson, Islamisches Menschenrechtverständnis unter Berücksichtigung der Vorbehalte muslimischer Staaten zu den UN-Menschenrechtsverträgen, Diss. Bonn 1999; Fathi Osman, Islam and Human Rights, in: Abdelwahab El-Affendi (ed.), Rethinking Islam and Modernity, Essays in Honor of Fathi OsmanLondon 2001: Markfield; Leïla Babès & Tareq Oubrou, Loi d'Allah, loi des hommes, Paris 2002: Albin Michel ; Nasra Hassan, Mit einem Knall ins Paradies … Versuch einer Kontaktaufnahme, SZ Magazin No. 4 of January 25, 202, 20–25; T. G. Schneiders & Lamya Kaddor (eds.), Muslime im Rechtsstaat. Münster 2005: LIT-Verlag; Syed Maududi, Human Rights in Islam, Mounmt Pleasant, SC 1998, 2005: Sabr Foundation: Mahhood A. Baderin, International Human Rights and Islamic Law, Oxford 2005: Oxford University Press; Jan Michiel Otto, Sharia en nationaal recht: Rechtssystemen in moslimlanden tussen traditie, politiek en rechtsstaat, Amsterdam 2006: Amsterdam Univ. Press; Abdulwahid van Bommel et al., Islam en de rechten van vrouwen, Amsterdam & Utrecht 2006: Forum.

383 According to Richard Hooker's system of 1592 which integrates the scattered juristic achievements of the Calvin-critics, the irenists, the Dutch revolution since 1572, the monarchomachs, and the interests of the British crown: W. Fikentscher (1977 a), 583 f.; Fikentscher & Fochem, note 331 above.

edge individual (such as human) rights.[384] Modern understanding of human rights derives from them a bundle of interhuman values which effect the relationships *between* humans (not just against government, religious authority, or parlamentarian majority), e.g., by granting torts claims based on such values, or injunctive relief. In Islam, these private law effects of human rights are just as excluded as any right against government and other public bodies. This follows from a human's standing in front of the radically monotheistic God: Professor Muhammad Shama of Al-Ahzar University, Cairo, in his already mentioned lecture *"Ehrung des Menschen im Islam"* (Honoring Man in Islam) of May 22, 2007, Zur Debatte 7/2007, 19–21, at 20) concludes: "Therefore, everything in the universe is at his service (scil.: the human being, personified in Adam), whereagainst God made man servant to absolutely nothing, but rather asked him to serve HIM in prayer". Islam does not know serving your neighbor, let alone giving the neighbor a right (and follows in this a consequential anti-animist – anti-lineage and anti-clan – line). This confirms El Fadl's position. It also coincides with strict monotheism that places human intentions under a "God-willing" (Insch-Allah) reservation. From "God willing" it follows that God's care for humans cannot be used as an unequivocal motivation for human care for other humans, because either that human is already cared for and does not need care, or God has not cared about that person and then human care would be opposed to God's will. "God-willing" is incongruent with the "glorious freedom of God's children" (Romans 8.21).

m. (1) Are there *different kinds of Islam?* Of many a mind-set or ideology it is said that it can be separated in so different kinds or branches that there can be no talk of a "real" one. Whether this true or not depends on whether this mind-set or ideology can be reduced to a single criterion which is common to all subspecies, so that upon this core criterion the various kinds can be based and distinguished from one another. For example, it is sometimes said of Marxism that there are so many kinds of Marxism that there is no "real" one. But all variations of Marxism, even pure "Marxist method" have in common the belief in the use value as a guiding standard. There is no Marxism that does not depend on the distinction between use and exchange values.

Islam is different: It has been shown above that a common criterion of Islam is its non-approachability via the Parmenideian judgment. But this is a negative criterion that opens so many possibilities that a concept of "the Islam" may appear a matter of doubt. A consequence of the wealth of possibilities is that in Islam kinds of kinds have to be distinguished. Here are some ways of outlining Islam:

(2) The schism between *Sunnites and Shiites* is widely known. It occurred only 27 years after the death of the Prophet Mohammed, a.s. (634) in 661 when Ali, cousin and son-in-law to Mohammed and pretender for the caliphate was murdered and Moawija acceeded to the leadership of Islam. Moawija founded the heritable caliphate of the Umayyads (- 749) and thus the Sunnite faction whereas the followers of Ali became the Shiites. The Shiites adopted elements of the Zoroastrian tradition, centered in Persia with extensions to Iraq, Syria, Lebanon, and India, of strictly observing the axial-age good-bad distinction. Today Shiite Islam is known for its principledness.[385]

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384 Therefore, the Cairo Declaration Declaration of Human Rights in Islam of August 5, 1990, adopted and issued at the Nineteenth Islamic Conference of Foreign Ministers, signed by 57 wholly or partly Islamic countries, is sytematically correct in generally placing the *sharia* above the Universal Declaration of Human Rights of the United Nations (1948). Whether this hierarchy in validity is correct on the merits is another question (see for a possible answer W. Fikentscher (1994), 255–307).

385 L. Nader (1965), W. Fikentscher (1995/2004), 409 with authorities.

(3) Ernest Gellner has made the point that almost all religions present themselves in two shapes: a popular version that addresses the commoner with more or less colorful rites, focussing on orthopractice instead of orthodoxy, belief in helpful spirits, and relatively simple dogmatics and ethics, and an intellectually "higher", stricter form for the more thoughtful members and followers that lacks pompous externalities and ritual.[386] Gellner finds high culture within Islam where it has become the pervasive culture of broad section of society and has taken on the function of what in other societies functions as nationalism. "Low" Islamic religious culture concentrating on orthopractice might then mean less nationalism.

It should be noted that Gellner does not identify high culture with Shiitism and low culture with Sunnitism. His dividing line runs through both traditional branches of Islam. While his general observation of *high v. low religious intellectualism* may be applicable to many religions, for Islam it seems doubtful. While strongly nationalist tendencies such as in Iran may to some degree conform with Zoroastric principledness, nationalist impressions received from modern Iran and other Muslim states do not necessarily underline intellectualist tendencies.

(4 a) Rather, another divide, related to Gellner's distinction but on a a different terrain, may be interpreted into modern Islam. It is the obvious contrast between a *peaceful,* reasoned, cooperative Islam, and violent, *aggressive* Islam which appears under different names: "jihadist", "terrorist", "islamist", "extremist", "excessive" "radical", "fundamentalist", "radicalized violent criminal", etc. Islam-immanent markers of distinction between the two are hardly available since the Holy Koran easily changes from the one to the other. Therefore, it is difficult to pinpoint the exact trait that defines the difference. An easier access seems to be from outside: Gellner would call the "higher", peace-seeking form religious culture, meaning the more intellectual, thoughtful, and reflexive variant. The aggressive side of Islam would be assigned by Gellner to the "lower" sphere. But this would not do justice to the lofty theories of self-defense which are being presented with considerable intellectual input. Nor may Bin Laden whose nick name is "the professor" be categoritzed as folkish. The relationship between peaceful and peace-making Islam on the one hand and jihadism on the other must be left unanswered. – The following divergent approaches can be observed in the Islamic diaspora:

(4 b) Are there *South-East-Asian Muslims* to be distinguished from traditional, *Arab* Muslims? For the peoples in East and South Asia, conceptions of time and development may not be of central importance, but they can be mentally integrated into the wheel of eternal existence (the Hindu *samsara*). However, in Islam, time and development, including modernization, are potentially disturbing sacrileges. Therefore, in East and South Asia a limited understanding of time and development has brought about a special kind of Islam which has been studied thoroughly been by anthropologists of the Leyden School, Clifford Geertz and his collaborators (including Lawrence Rosen), Franz and Keebet von Benda-Beckman, and many others. While generally insisting on the religious unity of Islam they point to the East and South Asian shades of Islam with their influences of animism (adat law), Hinduism (Bangla-Desh), or Buddhism (Java). This is also a reason why Asia generally moves ahead of Islam, as mentioned. Even the varieties of animistic time conceptions are inaccessible for obedient Muslims whose main enemies have to be the animists (see 2.191–193, 216; 8.38; 9. 5 – the "Sword-Surah" directed against the animists –; 9.16; 37, 93; 65.8–10; etc.).

(4 c) Are there – on the other, western side – *Euro-Muslims* as "organized Muslims" (my term)? There is talk of "Euro-Islam".[387] It is embodied in the groups of Europeans who con-

386 E. Gellner, Postmodernism, Reason and Religion, London 1992: Routledge.

387 Frank Drieschner, Islam, Im- und Export, DIE ZEIT No. Nov. 18, 2004, 48. On Reform-Islam more general: Katajun Amirpur & Ludwig Amman, Der Islam am Wendepunkt, Freiburg i. B. 2006: Herder; on the re-

verted to Islam (the number seems to be rising) and in the migrant groups from Islamic countries. Euro-Islam is to be found in multiple Islamic organizations. Austria and Belgium, both trying to give a legally recognized status to Muslims, have the longest experiences. Whether organized or not, Muslims living in European national societies live the same life as the ordinary citizens, being integrated legally, linguistically and socially to varying degrees into their host societies. They may participate in public life and not infrequently are members of local, intermediate, or higher parlaments.

(5) Are there *human-rights Muslims?* These are Muslims that accept human rights as valid norms within, side-by-side, or even superior to the sharia (cf., c., above). There are Muslims who share in discussions about democracy, human rights, rights of women, and the relationship between the sharia and the law of the host country. For them, the alleged primacy of the sharia (see above) is a matter of debate. The prevailing opinion among "human-rights Muslims" is that there are human rights and that they have to be interpreted in the light of Islamis teachings (the "side-by-side solution"). However, since human rights are individual rights (even when they protect an individual group such as minority against the majority) and Islamic teachings contain, at least at present, overwhelmingly collective truths, Islamic interpretation of human rights may be somehow misleading. Before entering into a discussion about the relationship between human rights and sharia, the role of the individual in Islam needs clarification. In this context, The Cairo Declaration on Human Rights in Islam (CDHRI) of August 5, 1990 mentions some individual rights, for example the right of free speech (Art. 22). Other human rights mentioned in the CDHRI are collective rights, such as the right to education (Art. 9) and the right of freedom from colonization (Art. 11/2). The CDHRI is valid only within the limits of the sharia (recital 7 of the preamble) and admit only the sgaria as guideline for interpretation (Art. 25). It does not grant the right of freedom to choose and change one's religion, but protects against enforced changes. The CDHRI has frequently been criticized because of its discriminations against non-Muslims and women (Rhona Smith 2003, 195).

(6 a) *Official v. unofficial* Islam, and – in a similar sense – *universal v. local* Islam, are other debated subcategories. Is there a distinction between official and unofficial Islam? Such a dichotomy could be derived from the differentiation of official and inofficial prayers (see d. above). Is there perhaps an official face of strict Islamic observation, alongside a more loosely styled practical Islam that includes syncretic mixes with European and US-American cultures and their individual-collective, private-public-spherical, grass-roots organizational daily things including the Jewish-Christian *prayer for* something? A small, electric-bulb-lit Christmas tree in the eveningly window of a Muslim family home in a German suburb and hidden crosses in Oriental rugs would be inconspicuous symbols. Empirical observations of this sort may be evidence that there is unofficial Islam.

(6 b) Pawel Jessa wrote on "Religious Renewal in Kazakhstan: Redefining 'Unofficial Islam'", in Chris Hann & the "Civil Religion" Group (169–190), and Manjy Stephan on

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ligious side of Islamic modernism: Rotraut Wielandt, Offenbarung und Geschichte im Denken moderner Muslime, Wiesbaden 2005: Harassowitz. Hallaq (1994, 1997, 2001) offers convincing examples of progress in Islamic law. Holger Scheel, Die Religionsfreiheit im Blickwinkel des Völkerrechts, des islamischen und ägyptischen rechts, Berlin 2007, points to a high grade of Islamisc manysidedness in international affairs. <also seew Mathias Rohe, Der Islam: Alltagskonflikte und Lösungen, Freiburg 2001: Herder, sees in Islam a high grade of dogmatic flexibility permitting Muslims to adapt to European cultures in many ways. He also points to the validity of the local laws of the countries where Muslims live which, according to the teachings of the sharia, have to be observed (interview in MDR of December 26, 2007, 17.05). This obedience owed to local law in combination with Islamic flexible dogma might help solve many issues of integration.

"'You Come to Us Like a Black Cloud': Universal versus Local Islam in Tajikistan" (ibid. 147–168). In Kazakhstan, similar to Western European and American Islam, there is both an official Islamic canon, while unofficial popular practices and rituals persist. Jessa mentions two variants of unofficial Islam: Sufi revitalization (showing gnostic inclinations), and regained traditions of often mere local importance (indicating older aninimist influence). The general picture which Jessa draws of Kazak Islam demonstrates promising tolerance and "civility". Stephan's report on Russian influence on Islam is less confident.

(7) *Time-open and time-removed* Islam is another possible categorization. Euro, human-rights conscious, and inofficial variations of Islam have no difficulties with passing time. Too strong is the influence of the other modes of thought pervading the host societies and their cultures. The radical, violent forms of *jihadist* Islam may suffer from not having enough time. Success must be here and now. Time-open Islam tends to focus on understanding the Prophet, a.s., and His teachings whereas time-removed Islam aims at imitating Him and His works.

(8) *Secular and obedient* Muslims: Muslims from Turkey (much less from other countries) often include not only obedient and confessing adherent of the Koran and *sharia,* but also nationals who follow Atatürk's separation of nationalist citizenship and religious partiality. In this aspect, they behave similar to citizens of Western states. Human-rights-consciousness and acceptance of "inofficial" behavior are not identical with secularism, but may be found more on the secular side of the specter than on the religious side. The difficulty of such Islamic secularism lies in the inconsistencies of time conceptions. It is not comfortable to politically live in perspective post-axial-age "Greek" by-passing time, and religiously under pre-Parmenideian aspective and "uncritical" non-history. This may explain the heat of the debate around recent Turkish attempts to combine secular state and Islamic concepts.

n. *Enculturations.* Because of its basic clarity and the straight-forwardness of the Prophet's teachings, Islam has always been susceptible to foreign cultural and thought-modal influences. Over centuries, this has led to many combinations of Islam with other cultural traditions. For example, Zoroastric influence contributed to Shiitism at a very early stage of Islam. Sikhism, founded by Nanak (1469–1538) is the product of a successful attempt to reconcile Hinduism and Islam under the principles of an aniconic (= picture-free) monotheism, its founder is Nanak (1469–1538). Eastern gnosis and its ascetic attributes shaped Sufism with its mystic and non-mystic branches, its dervishes, fraternal orders, and partly individualist philosophies.[388] Sikhism and Sufism are mixtures that cannot be called kinds of Islam, and syncretism is no fitting category either because of lacking volatility. They are culture changes, based on borrowing or partial assimilations. Less obvious are single borrowed traits that add facets to Islam which do not really grow from Islam but form its appearance, often more the outer than the inner. An example are animist relicts such as societal segmentation,[389] clan leadership, circumcision, or belief in evil spirits. The division of *dar-al-Islam* and *dar-al-harb* seems to be a borrowed trait from animist segmented societies whose principle is disunity towards the inside, but alliances towards the outside. As far as the concepts of *jihad* and of *dar-al-harb* are connected – one of the meanings of *jihad* is to conquer dar-al-harb – *jihad* is another aninimist, "heathen", trait and thus not genuinely Islamic. A shintoist (-animist) implant is the suicide ("kamikaze") mentality which may lie at the bottom of Muslimic terrorist suicide attacks or at least shows striking similarity, reinforced by the hope for immediate access to Paradise

388 See Annemarie Schimmel, e.g., Mystische Dimensionen des Islam: Die Geschichte des Sufismus, Köln 1985: idem, Islam: An Introction, Albany, NY 1992: State Univ. of New York Press.

389 For details of societal segmentation, see Chapter 9 IV.

according to Islamic teaching, and heavily aggravated by victimizing women, children, innocent non-fighting by-standers ("monks"). Suicide is just as anti-*sharia* as are these "collaterals". Thus, besides the shintoist-animist allusion, the suicide attacks by pious Muslims also show a gnostic input (*effort* to "enter paradise"). Suicide attacks can be defined as gnostic preemptions of human perfection and problemlessness in a shame society that ethnocentrically generalizes itself. Melancholic-*tragic impact* and thus a relationship to the Tragic Mind is witnessed by modern "time-open" Islamic writers.[390] Under the Tragic Mind, a problem is to be *solved*. As remarked before, for the mainstream Chinese mode of thought a person with a determined heart frightens problems *away*. In a nutshell, the diverging attitudes towards a problem define the differences between West and East.

Jihadism is envy for and replacement of time, individual judgment, dialog, and superadditive unity. Terrorism is envy's product. Often, the envy is being sublimated into a feeling of oppression,[391] and from there into a perceived need for (collectivized) revenge. A third important motivation for engaging in terrorist activities is, according to a study among British-born Muslims, the rejection of a double moral standard: "the West" with its big talk about democracy, freedom, and rule of law permits Guantanamo and Abu Ghraib. On the occasion of the sixth anniversary of the killings in the name of Islam of more than 2,700 innocent bystanders and tourists (the *sharia's* women, children, and non-fighting men such as monks) in New York's World Trade Center, Osama bin Laden gave a video interview on September 7, 2007, admonishing US-Americans to convert to Islam. A cultural anthropological answer to Osama Bin Laden would be that US-citizens are already Muslims and need no conversion, inasmuch as they are Christians or Jews: If Islam is Christianity or Judaism minus time, Christianity and Judaism are Islam plus time including its corollaries, to wit, a monotheistic God within His own time and not outside or above of it. A time-implemented Islam would mean God's empire growing instead of immovable, human individual judgment, dialog, tolerance, superadditive units, civil society, organized welfare, individual rights and duties instead of collective obedience, however coming at a price: mashiach.

o. Islam's *relationship to other cultures* or modes of thought has already partly been addressed in the foregoing paragraph on enculturations. Relations of equal rank exist, e.g., with the Russian Orthodox Church in order to oppose Catholicism in Russia.[392] Non-messiah time-openness in the sense decribed above calls for cultural configurations corresponding to the Tragic Mind and its futile feelings of personal guilt. Islamic mission opens many contacts to other cultures, not the least in Africa, mainly along Africa'a east coast from Egypt to South Africa, and there predominantly in the Sufi tradition (communications during fieldwork in Namibia) and along what used to be the "Silk Road".[393] Relations between Islam and Marxism are difficult because for Muslims Marxists are atheists. A thought-modal difference consists in a different treatment of the Parmenideian judgment. Marxism *uses* the Parmenideian judgment but operates with politically obligatory, fabricated truths and evaluations (*Pravda,*

390 Cf., Orhan Pamuk, Rot ist mein Name, 2002; idem, Schnee, Frankfurt/M. 2007: Fischer Taschenbuch (orig. 2005); see also Joachim Sartorius, Orhan Pamuk ist für uns ein Glücksfall, DIE ZEIT N.4 of October 27, 2005, 59. – The prizewinning movie "The Other Side" *(Die andere Seite)* of 2007 demonstrates that and how Islam, once it opens itself to individualism, personal feelings of guilt, and a Shakespearean plot across time, becomes influenced by the Tragic Mind. On religious motivations of suicid attackers Hans Maier, Religiöse Motive von Selbstmord-Attentätern in der Kritik, 38 Zur Debatte 2/2008, 16–19.

391 Jochen Bittner, Jung, rebellisch, explosiv, DIE ZEIT No. 30 of Juli 21, 2005, 8.

392 Gernot Facius, Der Kalte Krieg zwischen zwei Schwesterkirchen, Die Welt, of June 13, 2002, 6.

393 On the Silk Road, see, e.g., Thomas O. Höllmann, Die Seidenstrasse, 2nd ed. Munich 2007: C.H. Beck; idem, Das Seidenstraßenprojekt der UNO, UNESCO heute, 1/1993, 32–35.

De Waarheid, Die Wahrheit/Niedersächsiche Volksstimme, etc). Islam operates *without* Parmenideian judgments because of the "Insch-Allah" proviso. In Marxism, arbitrariness of judgments originates in the monopolized interpretation of the use value concept by the political *leaders,* the "cadres in the metropolises". In Islam, the arbitrariness of judgments originates in *anybody's* interpretation of God's will, without Islam-theoretical ethical control. True, there may exist rudimentary principles for the definition of "God's will" but not for application in everyday life in a manner comparable to Christianity with its principles of service, patience, and dialog.

Islamic ethics are too loosely structured (in other words: too much dependent on the *ulema's* – experts'- dominant opinion and therefore too wide-meshed) in order to furnish enough "leading values" in Karl Jaspers' sense). Of course, in terms of leadership, this may favor regional or local strongmen. It seems to be a characteristic of (post-axial-age) total religions that they cause dogmatics and ethics to enter into an especially close relationship. By contrast, (pre-axial-age) religious types coordinate their dogmatics and ethics much more loosely (therefore those strogmen are no big men). Still, the closeness of ethical rules to dogmatic assumptions varies among total religions. In Christianity, dogmatics and ethics are particularly close: repeatedly, Jesus of Nazareth demands behavior resembling his own behavior. In Islam, interhuman behavior is not strictly modelled after Islamic belief. Otherwise there would be a requirement of submission of all obedient humans to all other obedient humans which is hardly workable and certainly not the case in the relations between Muslim men and women.

Islam, Marxism, and Christianity are also comparable with regard to risk. Because of Allah's benevolent will and foresight, a Muslim is rather insensitive to risks (so that it is nearly impossible to deter a Muslim). Inversely, a Muslim is particularly sensitive in the handling of failure: If something goes wrong, Allah's will and foresight must be the cause, and therefore it should be given up. In this, Islam is similar to Marxism. For Islam and Marxism, this sensitivity to failure follows from the absence resp. inhibited Parmenideian-Platonic search for and judgment of truth. Human goal-setting requires judgment so that failure gives rise to revised and improved judgment. The less a mode of thought is risk-aware, the sooner its followers are to be discouraged.

The relationship between Islam the the concepts of value is worth a study in itself. It cannot be presented here even in abbreviated form. Because of the unconditional submission of humans to God, the Islamic meaning of "value" is different from the Western-Greek meaning. From a Western-Greek perspective, unconditional surrender and "value", confession of values, weighting of values, holding something valuable etc., are mutually exclusive, and the Western-Greek attitude towards values are acts of disbelief. Therefore, Islam does not know and would refuse the Marxist use value. Rather it is the God on High, Allah, who determines all value, and such a value is knowable, no matter of doubt, and able to be transformed into reality by those of the believers who are successful in having bargained for reality. It is one of the reasons for the astonishing multitude of defendable positions in Islam: unconditional submission turns into multifariousness, into *liberty from.* But the multiformity is not value-bound. Rather it is self-reflexive-autonomous. Predictions are not the task at hand. But the may be ventured under the heading of applied anthropology. This non- (or anti-)Parmenideian and non- (or anti-) Platonic lack of value-oriented judgment may one day lead to (and in some heads exists already as) concerted anti-Western efforts.: Both pravda and Insch-Allah prevent people from making self-responsible, value-bound decisions, necessary, e.g., for having a democracy. Anti-democrats are not picky in looking for arguments. An alliance of European and Russian Marxists with Muslimic parts of the world would mean a lot of trouble for freedom.

p. An Islamic relationship to other cultures of a special, alienated kind is *Islamic terrorism*.[394] It is a world-wide movement without specific geographic or ethnic base. In this, it resembles piracy. In classical law of nations, a pirate was regarded *hostis humanis generis,* an enemy of humankind (21 Ruling Case Law (R.C.L.) 419f.). The same can be said today of a terrorist, called so because of an indiscriminate selection of victims. The main reasons that may make him a terrorist are discussed under f. above: a feeling of oppression, a felt need of revenge as traditional part of a feud between collective groups, and a criticism of double morality. There may be additional motives: a sense of obligation to share in *jihad,* friendship and comradship with others, personal disappointments, insults by family members or assumed friends, the sense of being superfluous in a youth bulge context ("the older brother got the farm"), religious fervor (called "Holy War" in order to claim a position of defense), revolutionary idealism, living out brutality, etc.

Islamic terrorism should not be identified or mixed with other kinds of Islam, as they are listed above. It amounts to a special facet of Islam that, as pointed out earlier, Islamic dogma utilizes certain aspects that are not the most consistent ones, such as the partly animist, partly Islamic concept of *jihad,* the conceptional difficulties of Islam with time, or the Islamic reluctance of rendering self-responsible statements ("Parmenideian judgments"). The latter factor may also be responsible for the silence with which the vast majority of more than one billion of Muslims watch terrorism that is being committed in the name of jihad as an Islamic duty. This is no good omen for international respect of *sharia*.[395]

The main weapon of terrorism committed in the name of Islamic jihad is suicide bombing. Suicide attackers kill by far more Muslims than "infidels" although it is un-Islamic to kill fellow Muslims (Brugman 109f.). Thus, suicide attackers kill both Muslims and infidels in the name of Islam disregarding (the Western concept of) causality. Therefore it is difficult to criticize the *subjective* psychology of suicide attacks without getting into a conflict with basic principles of Islam. However, this difficulty can be overcome by assuming that the killers are abusing the name of Islam and thus in doing so separate their deeds and psychology from Muslim belief. More problematic is the separation of the *objective* context between suicide killing psychology and Islam. But it can be done. Islam knows no visible time and development between 632 A.H. and the Last Judgment. This period is, in the words of the Prophet, a.s., "dark". One way of saying this is that Islam offers no visible future. It does not have to because it is perfect. But humans need to imagine future. Thus they seek a future. But this future does not exist in this real world. It exists in the other-world. Islam envisages it as Paradise. Gnostics offer a future by jihad., effort, active input. Suicide killers seek their future in Paradise. For them, their bombings are a short-cut to future. Suicide killings are to replace future. This context may bring Islam itself under criticism when one criticizes the killings of Muslims by Muslim suicide candidates. It makes that criticism appear so difficult. It sounds like: Give Islam a future and these killings will stop. Jihad is being used to replace time, so

394 Only a few hints to literature can be given here: Mark A. Gabriel, Islam and Terrorism, Stuttgart 2002: Charisma House; Gilles Kepel, The War for Muslim Minds: Islam and the West, Cambridge, Mass. 2004: Harvard Univ. Press;Guido Steinberg, Der nahe und der ferne Feind: Netzwerke des islamistischen Terrors, Munich 2005: C.H. Beck (failure at home starts terror against suspected enemies far away). In order to distinguish mainstream Islam from terrorist Islam, for the latter often the term "islamistic" is used. An unwelcome side effect of this that in the public discussion often mainstream Muslims are addressed as "Islamists". For the presentation above, a differentiation of terms is not necessary. This does not mean that it is rejected.

395 There are few exceptions: the Topkapi Declaration (2006) of outstanding Islamic authorities, see Jörg Lau, Keine Gewalt, DIE ZEIT No. 28, of Juli 2, 2006, 38; and the open letter of October 12, 2006, written by 38 Islamic leaders and addressed to Pope Benedict XVI., see the in FAZ No. 247, of October 24, 2006, 6.

time may replace jihad. But introcing a future into Islam means introducing the element of time into Islamic religious dogma. This means accepting Allah as a monotheistic God who is active across time, and this reqires something of a messiah whether you like it or not, and irrespective of how one may call, imagine, circumscribe, and depict such a God across time, as "Son of Man" or otherwise. One way out of this dilemma is the assumption of utter determinism bordering at a *deus otiosus,* another to devise an Islam-specific concept of time that ethically works satisfactorily. Both propositions cannot be tackled here.

q. To sum up the cultural *impact of Islam on the world* in history and presence is not an easy task. Even more difficult are predictions for the future, for example, the Turkish plea to join the European Union.[396] And most difficult would be to try recommendations for such development. Again, predictions enter the field of applied anthropology, and they may so. In the light of the foregoing discussion, at least the following points may be raised as a summary of Islam's observable impact on world culture and as salient for Islam's prospective peaceful coexistence with other cultures.

(1) It would be a welcome step to re-individualize Islam (in Khaled Abou El El Fadl's sense but coutrary to his results). Collectivism should not stay the Islamic mainstream. A change would mean a return to guilt culture and a corresponding decrease of shame culture traits such as revenge and feud concepts as against "the West", "the Eastern capitalists" China, Japan, and India, or any emical "oppressor".

(2) Advisable is a positive attitude towards the Parmenideian judgment. This could be performed on the basis of the "greater jihad", recommended by the Prophet Mohammed, a.s., in 8 A.H. = 630 A.D. after the defeat of the Mekka clans: Self-restraint creates time for deliberation and peace-making. Another source for the Parmenideian judgment could be Abdelkarim Sorush' "epistemology".

(3) Even a bit of individualism and individual judgment would pave the way to the superadditive unit so that it would become thinkable that the whole is more than the sum of the parts, and units under private and public law become possible that have members and organs, tied among each other by individual rights (including human rights) and duties (including social duties). Corruption would be better controlable.

(4) That bit of individualism and individual (and thus self-responsible) proposition-making would introduce enough time, and dialog across time, to justify a theory of God-guided development. Most of all for modern Islamic ethics and law this would be useful and beneficial.

(5) After 1945, nobody oppresses Islam,. The feeling of being oppressed, claimed by the terrorists as a reason for their deeds, is a misnomer for subjectively felt backwardness in comparison with Western Judaic-Ancient-Greek-Christian, East and South Asian, and possibly soon also Bantu-African modernity. Once the foregoing points (1) through (4) are being tackled, the cultural impact of time-open Islam for the world would considerably rise.

7. Modern secular-totalitarian cultures

a. In the early twenties, Italian *fascism* grew from Marxist socialism by replacing the international with a nationalistic appeal. The empoverished, disappointed post-World-War-I generation in Italy rallied behind the charismatic leader ("Il Duce") Benito Mussolini (1883–1945) who in 1920 openly proclaimed to have no political project except to govern Italy in order to "save" the country. In 1921, the *Partita Nazionale Fascista* was formed under his leadership. In

396 Independent Commission on Turkey (ed.), Turkey in Europe: More Than a Promise?, New York 2004: Open Society Institute & Soros Foundations Network; J.M. Westerfield, Behind the Veil: An American Legal Perspective on the European Headscarf Debate, 54 AJCL 637–678 (2006).

the next year, Mussolini discarded his originally socialist, anti-monarchist, and anti-Catholic program in favor of a pure, voluntaristic, anti-parliamentarian, and dictatorial nationalism, with a special emphasis on the military and on labor relations. In 1943, the Italian fascistic regime was overthrown by troops of the Italian king under Marshall Badoglio, and in 1945 Mussolini was killed by Italian resistance fighters.

After 1922, the cultural importance of fascism developed into serving as a model for similar movements of analogous nationalist tendencies as societal form and mental attitude in many countries, the most prominent one German Nazism (for National Socialism, see b.). Among them, the "British Union of Fascists" (Mosley) is the only one which in its title expressly referred to fascism.[397]

b. By far the most deadly form of nationalist-fascism took on, in Germany, the form of National Socialism ("Nazism"). Joseph Goebbels, the later propaganda minister of the Nazi government, is said to have remarked in the late twenties of the 20th century that ideology and methods of Nationalsocialism and Marxism are about the same with the only major difference that Marxism is international, and Nationalsocialism national. There may be some truth in this statement, however, some differences should not be overlooked. Nazism had less theory. The Marxist idea of use value as the guiding societal value has at least some appeal of economic science and can be logically opposed to market (or exchange) value. The leading Nazi value of "blood and soil" (Alfred Rosenberg, *Der Mythos des 20. Jahrhunderts* (The Myth of the Twentieth Century), 1930, is a much less rational sounding counterpiece. Nazism was from its outset a militarist movement, led by World-War-I survivors who tried to glorify their war experiences. As in Italy, industry and business favored fascism/nationalsocialism over international Marxism and were content to see Marxism kept at bay an attitude which in turn was exploited by the "leaders" for their own purposes.

The historian Percy Ernst Schramm (Univ. of Göttingen) once said that National Socialism is the institution that gave the Prussian sword into the hands of Austrian tomfoolery. The result was crime of desastrous extent.[398] Under German National Socialism, fascist mentality became the basis for massive crime and genocide. In historical descriptions of the relatively short time in which Nazism was able to destroy large stretches of Europe and kill six million Jewish citizens of German and other nations it is sometimes said that Nazism of course had it criminal side but also here and there an acceptable point. Such pretendedly balancing statements suffer from a fundamental mistake that may be called anthropological: If a society is based on criminal principles, crime affects every societal trait. Nazism is a culture of lie and terror. The whole system is so much soaked with crime that every cultural trait suffers from the all-pervading poison of criminal intent and inhumanity. The "acceptable-points" rhetoric is flawed.

c. This may also be true for an observation, related to the handling of *property,* by Elena Bonner, on how Marxism and Nazism worked mind-damaging in different ways. In *one* respect, Mrs. Sacharow thought Marxist ideology to be more desastrous for the human personality than National Socialism: Marxism deprives the person of property so that there is no foothold anymore to stand on.[399] Marxism contributed to a modern secular-totalitarian world culture for more than seventy years. Marxist theory and methodology stipulates for every

397 H. van den Bergh, in: Winkler Prins, vol. 8, Fascisme, 487–491, at 490.

398 An anthropology of Nazism has not yet been written and cannot be written here. Earlier discussions on Nazi legal methods and on its general mentality and Post-World-War-I tendencies, also in comparison with Marxism, may be found in W. Fikentscher (1976), 313–331; idem (1995/2004), 439–466.

399 See the first para of Chapter 11, below.

thing a contrast between its value that can be negotiated (exchange value = market value) and its use value that can only be "scientifcally" ascertained. Under Marxist rule, people have to believe in the correctness of officially (= scientifically) prescribed use values. Use values must not be discussed, otherwise they are exchange values (and create surplus value which should be avoided). Use values are authoritatively determined not only for material things. Also mental objects are fixed, such as access to information, option for a certain understanding of time, mobility including travel destinations, sanity and insanity, and truth in general ("prawda"). Forcing people to believe in the correct determination, by "Party" and state, of such material and immaterial contents of consciousness characterizes Marxism as a species of theocracy. In a society where one is not permitted to ask for values but obliged to uncritically obey politically prescribed use values state authority cannot originate in the people. After its economic failure in 1989 (a society based on use values cannot survive because it has no control over the cost), Marxism in the early 21st century survives only in the People' Republic of China, North Vietnam, Cuba, some Western esoteric circles, and in the memories of leftist parties.[400]

To conclude, the application of the modes of thought to the anthropological study of a society and its own control of societal power produces certain rather robust results of categorization and predictable conduct in a number of cultures. Six shorter subchapters on culturally relevant phenomena follow below.

VI. Acculturation (an enlarged theory)

Acculturation is the field of cultural anthropological theory that deals with issues that arise when two or more cultures encounter each other. According to Richard Thurnwald (1932), acculturation is a "process of adaptation to new conditions of life", a definition that has found not many followers. Literally deriving from the Latin *ad culturam,* this definition relates persons to circumstances. Instead, the majority of opinions about acculturation relates cultures to cultures.[401] Following a suggestion of the American Anthropological Association (AAA), three renowned anthropologists of their time, Robert Redfield, Ralph Linton, and Melville J. Herskovits began, in the early thirties, drafting a theoretical survey of the anthropological term acculturation.[402] Their view, which for many is still the position to begin with, is the basis for the following, though with substantial modifications or additions. A general remark may be made first: All cultures are in flux. Relatively stable cultures such – allegedly – the

400 For details W. Fikentscher (1976), 497–636; idem (1995/2004) 439–466 (both with literature). On the direct dependence of the German student revolt ("the 68ers") during the period of 1964–1975 on Soviet-Russian and East German ideology, money, and political influence, see Hans-Joachim Noack, Rosen aus Ost-Berlin, Der Spiegel 11/2006, 46–49.

401 Some examples: E. Z. Vogt 1951; R. Linton 1940; E. Colson 1953; R. L. Beals 1953; W. W. Newcomb 1953; Kartomi 1981; John J. Bodine 1972; F. A. Marglin & St. A. Marglin 1990.

402 Robert Redfield, Ralph Linton & Melville J. Herskovits, Outline for the Study of Acculturation, 41 American Journal of Sociology 366–370 (1935) = Memorandum on the Study of Acculturation, 38 American Anthropologist 149–152 (1936). Their definition of acculturation was first given in 1930 by the Subcommittee on Acculturation (appointed by the Social Sciences Research Council), the members of which were the three researchers mentioned. It says that acculturation "comprehends those phenomena which result when groups of individuals having different cultures come into continuous first-hand contact, with subsequent changes in the original cultural patterns of either or both groups". For the following, see the more elaborate texts and the cited literature in W. Fikentscher (1995/2004) 476–482; idem, Migration, Akkulturation und Bikulturalität aus rechtsanthropologischer Sicht, in: R. Böttcher, G. Hueck, B. Jähnke u. a. (eds.), Festschrift Walter Odersky, Berlin/New York 1996: de Gruyter, 4 31. The above lines are a modernized version of the two older texts. The new version attempts including concepts such as "integration", "parallel society", "tourism", *"Leitkultur",* "multi-culti", etc.

Ancient Egyptian – are rare. This means that in most cases the following instances of biculturality, coexistence, and acculturation do not trigger the development of one or more cultures that was not there before. Rather, cultures move on, across time. When then biculturality, coexistence or acculturation enters the scene, things that are already in motion continue motion but may change direction. This is meant by the changes to be mentioned now.[403]

When two (or more) culturally autonomous ethnic groups come into contact, there are two possible outcomes: either there is a culture change[404] in one or the two (or more) cultures, or there is none. If there is *none,* the result is either *biculturality,* or it is *coexistence.*[405] In both non-change types, the encountering cultures are kept and maintained separately. However, biculturality and coexistence are two different forms of culture contact:

1. Biculturality

In the case of biculturality, cultural contact is internalized. One and the same person belongs to the two cultures that are present in its mind. The person internalizing two separate cultures can live at will in either culture, and decides for the moment in which it wants to be. However, the person keeps these cultures separate, again internally. A Hopi Indian is educated to be a Hopi at home, but behave and think like a "white" when going to Washington, D.C., for negotiations with the BIA, or entering into other contacts with other white persons.[406] If more than two cultures are being internalized, *multiculturality* would be the appropriate term. Multiculturality is to be distinguished from what below is characterized as "airport society": the temporary presence of many persons of different cultures in the same geographic area such as an airport or an international tourist area.

2. Coexistence

In the case of coexistence, the participants of the encountering cultures do not internalize the contact. Each person belongs to one culture only and does not leave it, but both (or more) cultures coexist while being kept and maintained separate externally. An example may be the city of Mostar, former Yugoslavia, where the famous arched bridge separates the Serbian and the Bosnian parts of the city: persons are either Serbs, or Bosniaks. A more recent synonymous term for coexistence is "parallel society" *(Parallelgesellschaft).* Some protagonists of integration (which as we will see is a form of assimilation) use the term "parallel society" with an undertone of criticism, to the effect that immigrants who insist on their way of life "parallel" to the mainstream or framing culture refuse to do their share to promote integration into the mainstream (framing) society. Turkish *Gastarbeiter* in Germany are sometimes exposed to such critical comments, as well as early German settlers have been in USA. If persons of more than two cultures enter into coexistence, one can speak of *multicultural coexistence.* The already mentioned "airport society" may hold multicultural coexistence. There are three special forms of (apparent) coexistence that will be discussed in the context of cultural neighborhoods (see XI. below): (1) the anthropology of minorities in situations of national borders,

403 My thanks go to Kai Fikentscher for this comment.

404 on culture change in particular, see VII below.

405 For biculturality, see W. Fikentscher (1995/2004), 476 ff.; for coexistence, see, for example, Kartomi: 237: "pluralistic coexistence"; cf. also L. Kuper and M.G. Smith; Vanderlinden 1971.

406 On psychological difficulties of such "switching" from one culture to another, sometimes within seconds, W. Fikentscher, Domestic Violence under Indian Pueblo Law, in M. Gruter und M. Rehbinder (eds.), Gewalt in der Kleingruppe und das Recht, Festschrift für Martin Usteri, Schriften zur Rechtspsychologie Bd. 3, Bern 1997: Stämpfli, 45–73.

(2) the anthropology of enclaves and ghettos, and (3) the anthropology of syncretism and "melting pots". These forms of coexistence pose their own problems.

3. Acculturation (classic terminology)

If there is at least one culture change as the result of the contact of two or more cultures, the meeting of the cultures is called *acculturation*. A dominant culturewill often claim that it implanted its cultural values in the less strong culture "enriching " it. Such strictly unilateral acculturations are largely theoretical. More often than not, the "inferior" culture will introduce at least some of its traits to the dominant one.

Acculturation can be subdivided. There are four different kinds of criteria, and all are used in acculturation theory. Their respective points of reference are: (a.) the cultural *source* of the culture change, changes, or exchanges; (b.) the *cause* through which acculturation takes place; (c.) the *personal involvement* of the participants in the change(s); and (d.) the *results* of acculturation. Those four different ways of distinction, however, may be combined with one another. As the literature often confuses some or all of these four criteria, the distinctions used by the writers on acculturation necessarily vary. M. Gordon (77), for example, uses acculturation and assimilation interchangeably, while Teske and Nelson make great efforts to distinguish them. But on the whole most authors are in agreement on the resulting kinds of acculturation.

a. If acculturation is seen from the point of view of the *cultural sources* from which culture change may flow, there is only one basic distinction: "The innovation can originate within the culture itself, and then we speak of either *invention* or *discovery,* or it may come from outside a culture, in which case we call it *borrowing* (or *diffusion*)" – both used in a broad sense – (Pospíšil 1986a, 50). The cases in which acculturation is achieved through invention or discovery within one's own culture are on the whole rare, but they occur when, for instance, a culture, having come into contact with another, develops a (mostly adaptive) change from its own source. When the Romans fought against Carthage during the First Punic War, there occured quite a bit of "acculturation" on both sides as to the style of warfare. One distinctive feature of acculturation on the Roman side was an invention of their own, breaking away from the habit of destroying a conquered city, killing the adult males, and enslaving the rest of the population. This inventive change brought Rome many friends in what is today southern Italy, thus giving a competitive advantage over Carthage. *Reaction* as a result of acculturation (see *infra*), is as a rule invented. Otherwise, acculturation means borrowing (in a wider sense).

b. The *cause* of acculturation can either be *free borrowing* (referring here not to the cultural source, but in a different, narrower and process-related sense), by *dominance,* by *migration (Zuwanderung), or by immigration (Einwanderung).*

(1) *Free borrowing* is also called *incorporation*. One example is the Navajo nation, which during the 17th century freely borrowed herding and trading from the Spaniards. Free borrowing may work one way (reception of Roman law in Germany in the 15th century; Chinese script in Japan), or both ways (frequent for fairy tales).

(2) If acculturation is achieved by *dominance,* one also speaks of *directed culture change* (Spicer 1940 (1967); 1943; 1973). It usually works only one way (examples are rare; the Norman conquest of England 1066 A.D. comes close). A special form of acculturation caused by dominance is missionizing by a politically, militarily, or economically superior total religion.[407]

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407 On the difference between religious types and total religions see Chapter 3 above. An example of mission with military support is the Spanish *entrada* in the New World, see Edward H. Spicer (1962) and Marc Simmons (1988). On the doubtful interpretation of the Christian mission order see text before note 334, above.

(3) Another cause of acculturation may be migration *(Zuwanderung)*. Migration can be on a commuter basis (for example for seasonal workers). It also may lead to a more stable relationship between the migrant and the host country. Migration is discussed below (IX.).

(4) Still another cause is immigration *(Einwanderung)*.[408] An immigrant will often adopt at least a few cultural traits of the destination country because it will be her or his new home.[409]

c. As to the *personal involvement* of the participants, acculturation occurs either through *internalization* (Pospíšil 1986: 60; 1982: 248ff.) or *imposition* of the other culture. An example of internalization areWest Germany's and European antitrust rules (Art. 85, 86 – now Art. 81 and 82 – EC Treaty). They reflect internalized US antitrust policy as it existed before 1982. An example of imposition is Kemal Atatürk's enactment of the Swiss Civil Code in Turkey in 1925. A species of acculturation that may be called *intentional non-involvement* or *guarded internalization* is represented by writers, mainly in the Chinese and Islamic worlds, who distinguish the essential traditional culture (to be retained) and the non-essential western achievements of modernization (to be superficially accepted and tolerated). In this way, "culture" and "civilization" may be be mixed in order to make a modern life in traditional surroundings possible. Wolfgang Bauer (1980, 38) quotes Chang Chih-tung (1837–1909) to this effect, and Wolffsohn (1992, 230), Diner (in Taubes 1987, at 246f.) and Sivan (1985) refer to similar statements by fundamentalist Islamic authors. However, Wolfgang Bauer *(loc. cit.)* appropriately calls this begging the question of how to square traditional culture and Western modernity. The idea is not far from the model of biculturality. Constitutionally secured biculturality may facilitate intentional non-involvement in Western "civilization" while availing oneself of its advantages.

d. Finally, the *results of the process* called acculturation may be set a focus. The bulk of anthropologicalthe literature concentrates on this aspect, with various accents on pace and process. Five kinds of results are to be mentioned:

(1) *Assimilation* is the most frequently quoted concept. Kartomi (at 233) calls it transculturation. Sometimes the term assimilation is used in a chiefly person-related sense, and transculturation in a culture-related sense. Assimilation is defined as the replacement of one culture with another (*e.g.,* Marxist culture replacing German culture in East Germany 1945–1990). Assimilation may be *full* so that nothing of the assimilated culture remains. When the USA and Australia in their own countries, and the Japanese in conquered Taiwan, tried to assimilate the Northamerican Indians, the Australian aborigiones, and the Taiwanese indigenous peoples respectively, the (in every case unsuccessful) intention was to perform a full assimilation. In the majority of cases, assimilation is only *partly.* The dominant culture succeeds in partly imposing its own traits and complexes on the receiving culture, but the latter retains more or less cultural property of its own.

Partial assimilation may also be called *adaptation* because one or both sides enter into a give and take. Thus, there are situations where two (or more cultures) *remain* and yet adapt to one

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408 I thank Ugur Kör for drawing my attention to a strict differentiation of *Zu-* and *Einwanderung*. A "commuting" migrant (a term used in the US Immigration and Nationality Act – INA –) may become an immigrant, but this will change her or his status, in anthropology and in law.

409 An example: Bärbel Wehr, Rechtsverständnis und Normakzeptanz in ethnopluralen Gesellschaften: Eine rechtsanthropologische Untersuchung über das Verhältnis Deutscher kurdischer Abstammung aus der Türkei in München zur deutschen Rechtsordnung, Munich 2000: C.H. Beck, who correctly distinguishes the acceptance of a legal system and the acceptance of how it is applied. Other examples are the "Molukkers" in the Netherlands, and Sudanese boys in Maine and Vermont, both ethnic groups transferred to a radically new environment.

another to some degree, by free borrowing or dominance. Unilaterial or multilateral adaptations can be distinguished. The US and European cultures are presently engaged in a course of mutual adaptation, with Americans borrowing some of the food customs *(muesli),* and Europeans some of the clothing habits *(blue jeans).* In a similar vein, Teske and Nelson (1974) point to the need for a concept implying *less than* (full) *assimilation.* They give the example of a research scholar living in a foreign country for a number of years who is not assimilated but "only acculturated" (Teske and Nelson apply a narrow concept of "acculturation" which they oppose to assimilation, in that the latter requires identification with the outgroup (the surrounding culture) and acceptance by this outgroup. Both elements are missing in "acculturation", they say. This narrow use of the term "acculturation" conflicts with the broad definitions of acculturation offered by Thurnwald, the mentioned Subcommittee, and the dominant opinion, which all are followed here. Therefore non-complete or partial assimilation or (uni-, bi- or multilateral) adaptation may be preferable terms).

A difficult concept is *integration.* It may be discussed in connection with partial assimilation = adaptation. As to sources (a., supra), integration is ambivalent and can lead to invention or borrowing. Borrowing is the rule. Regarding the causes (b., supra), dominance is more frequent than free borrowing, since the culture into which integration is to be performed is the prevailing one, and the culture to be integrated is the (in most cases weaker) "newcomer". Dominance will be stronger for immigrants because of their closer attachment to the host country, less dominant for non-commuting migrants, and least dominant for commuting migrants (see b. (3) and (4) above). Free borrowing is important for the integrative success. Personal involvement (c., supra) differs depending on the time that is granted for the process and on the reasons for the upcoming integration: the longer and the more stable the integration is envisaged, the more personal involvement is required. The true test for successful integration, however, is the result. Migration, on a commuter or on a more stable basis, asks for much less integration than immigration. It would not be justified to deny differences between these three cases of integration: *Zuwanderung* (seasonal or more durable) requires less integration than *Einwanderung* (see b. (3), (4) above). But in any case, integration involves partial assimilation = adaptation. Only the degree varies. And it would be wrong to require, on the side of the receiving culture (the culture to be integrated in) fusion (see (2) below), or participation in a "globalized" "airport society" (see (3) below), or blocking off retention of traditions, religion, folklore, etc. (see (4) below. Anyone of these non-adaptive policies would most certainly lead to reaction (see (5) below).

However it is the right and the duty of the prevailing or "dominant" culture (the culture to be integrated in = the "host" or "framing culture") to provide for law and order necessary both for the integration and for its own integrity. Otherwise the imported cultural traits and complexes of the migrants and immigrants would destabilize the system in which these persons are to be integrated. In Germany, this dominant or host culture was given the term *"Leitkultur"* (= leading culture). In public opinion, it remains a contested concept. The present study of integration as a subcategory of adaptation (= partial assimilation including a give and take on one or more sides) argues that there is justification for such a concept, although the choice of the word is unfortunate. "Leading" may evoke the connotation of leadership, although the host culture is not to function as a "cultural leader", but as an (existing) cultural mainstream.[410] Instead of "leading culture" *(Leitkultur),* a better term would be "frame culture" or "framing culture" *(Rahmenkultur)* because the host culture provides for the constitutional and societal

410 On this deliberation, the decision of the issues of "cultural defense" in a criminal court, and of the public policy reservation in private international law, will depend, see Chapter 11, below.

frame in which both the migrant and the immigrant may fit, along with all their cultural retentions.

A special case of *partial assimilation = adaption* is what is called *enculturation (or inculturation)*. The term is mostly used to describe a result of religious missionizing. Hence, enculturation is that partial adaptation that combines traditional cultural complexes and traits, e.g., of an African tribe, with religious holdings introduced by missionaries, e.g., Christian, or Muslim. Using this term, sometimes it is not clear what is being enculturated into what: the retained local traits into the otherwise successfully spread religion, or the missionized religion into the existing local culture? The answer depends on an evaluation. If the missionized religion remains only a varnish on the in essence stable local culture, the religion is enculturated. If the mission results in a pervading culture change with some remaining traditions such as fetishes and the belief in local mountain and well spirits, the former culture with its remaining traits is being enculturated.

(2) *Fusion* (also called blending, accommodation, or syncretism) is defined as the origination of *one* new culture (or cultural trait) out of more than one ("melting pot") so that the "melting-pot culture" replaces the cultures (or cultural traits) that contributed to it. To find examples for *whole* cultures is not easy. Hawaii culture appears to be a mix of indigenous, North American, and Japanese culture, and it is said that Argentina, seen at least from the outside, succeeded in forming a rather homogenuous culture from indigenous, Spanish, Italian, German, and other European elements. Idealistic programs (such as "green" party platforms, Emery Reves' "world citizenship" after 1945, or encompassing "world ethics") to move ahead to a global "multi-culti" uniformity are not convincing. Humans are all of equal value, but they are not equal. Since they all have their cultural homestead. These cultural homesteads deserve respect, diversity, and equal treatment. They do not deserve abolishment by blending. For *parts* of cultures, "cultural traits" chances for successful and innovative blending and syncretism are greater. Music is an example, medical practice another.

(3) When fusion does not lead to *one* combined culture but to a geographically defined agglomeration of *many* cultures present, often for a purpose that brings the many cultures together, an acculturation is created that has still no fixed name. *"Airport society"* may indicate the outcome. In terms of the triade biculturality – coexistence – acculturation, an "airport society" is a case of multicultural coexistence: The cultures and their carriers remain separate and little fusion takes place. The "airport" can also be a tourist area, a travel center, a cruise ship, a suburb, a conference hall, an international office place, or a university campus, etc. For such an agglomerations, German humor created the ironic term "multi-kulti". To some observers this may also create an object of criticism. Is the "airport society" very numerous, "global society" may be an appropriate term. But this could be mistaken for a synonym of the world population. "Globalized society" would avoid this, but the word is clumsy and may bring about an unwelcome connotation of political activities. In spite of all objections, "airport societies" exist, have identifiable characteristics, and follow significant rules. An experienced director of a Swiss organized vacation club once remarked that the easiest way to keep up law and order in such a globalized institution is to mix as many cultures as possible and let no single nation or group become too numerous. "Then the cultures control themselves. But if you have large shares of British, Dutch, French, or German customers, there will be trouble" (personal communication in 1975).

In the West Indies and Lousiana (USA), fusion (blending, accomodation, syncretism) has received the special name of *creolization*. Despite its derivation from an ethnic word, creolization is not used for Creole culture alone. In cultural anthropology, creolization means any coming together of diverse cultural traits or complexes, with the result of forming new traits

or complexes. An example is Cajun culture. Cajuns (orig. "Acadians") are French-Canadian exiles and their descendants in the state of Lousiana. Cajun music mixes black and white sounds. *Gumbo,* a Cajun food, is a creolization of French, African, and Native American ingredients.

In the culture of music, a fusion of different cultural traditions is called *bimusicality.* Examples are Cajun creolized music (see before), Zydeco (Alabama), Papua New Guinea blends of sacred melodies and rhythms with Western style pop music, *"Bayernpop"* (Bavarian style pop music that includes yodeling), and the mostly humerous pieces of a Navajo band that calls itself the "Chelley Valley Brothers". Bimusical products may also grow from leaving aside certain traits of a musical culture in order to adapt the culturally foreign music to listening customs at home. An example is Western sobstuff deprived of its bass lines in order to fit Chinese ears. Bimusicality should not be mistaken for biculturality (see above). Bimusicality is a fusion, biculturality is no fusion but "two alternative cultural souls in one mind". If more than two musical cultural traditions fuse, in ethnomusicology *multimusicality* or *musical syncretism* are the established terms (cf., Mantle Hood 1971; Kevin Miller 204; Maya Deren 1983).

(4) *Retention* is a form of acculturation that takes notice of traits and comlexes of the other culture(s) but results in reflecting about the qualities of one's own culture, by not always rejecting the other. Recalling these qualities, cultural groups, folklore associations, and traditional leaders favor retention of the traditional culture and rejection or only limited adaptation to foreign cultural input. This may refer to the retention of local costumes, traditional food, music or dances one is accostumed to and likes to practice, etc. In the course of *decolonization* after 1945, retention has played and still plays a prominent role. Also enclaves and border situations (see below) may give rise to retentive behavior

(5) Finally, *reaction* is to be defined as the conscious refusal of the cultural other. Compared to retention, reaction is the stronger form: retention plus rejection, if in a sublime, quasi-imitative form. Sometimes reaction may have self-destructive dimensions. In terms of sources of acculturation (see VI. a., above), reaction is invented.[411] Reaction requires single or serial events directed against a dominant culture. The Catholic Corpus-Christi procession in Protestant Donauwörth that started Germany's Thirty Years War 1618–1648 may be called a reaction, but the Counter-Reformation of the 16th and 17th centuries not. Other examples are cargo cults,[412] chiliastic movements, sometimes with suicidal effect,[413] the plausible and self-protective closing of a pueblo to outsiders during the entire year except for one day when a certain ceremony is held (*e.g.,* Santa Ana Pueblo),[414] the desparate cattle sacrifices of the Xhosa,[415] the Sioux Ghost Dance,[416] and events arising from *clashes* between a marginalized and a dominant culture.[417] A transient kind is "culture shock".[418] Enclaves (especially ghettos)

411 M. Hunter; E. Colson 1970, 1971, 1973 (see also note 423, below).

412 R. Linton 1943; W. W. Hill 1944; L. Spier 1927; J. Mooney 1896; Peter Worsley, The Trumpet Shall Sound: A Study of "Cargo" Cults in Melanesia. 2nd augmented ed. New York: Schocken; however, against what do cargo cults protest? Against the *non*-reappearance of WWII-US Air Force cargo on Pacific islands?

413 Kottak (1987) 272.

414 Cf., Joseph H. Suina, Pueblo Secrecy Result of Intrusions, New Mexico Magazine Quincerntennial Edition 1992, 60–63.

415 J. W. Raum, Der 'Prophet' Mlanjeni und der sogenannte "Kaffernkrieg" von 1850–1853, In: Münchner Beiträge zur Völkerkunde, vol. 1, Festschrift László Vajda, Munich 1988: Hirmer, 145–167, with references.

416 W. W. Hill 1944.

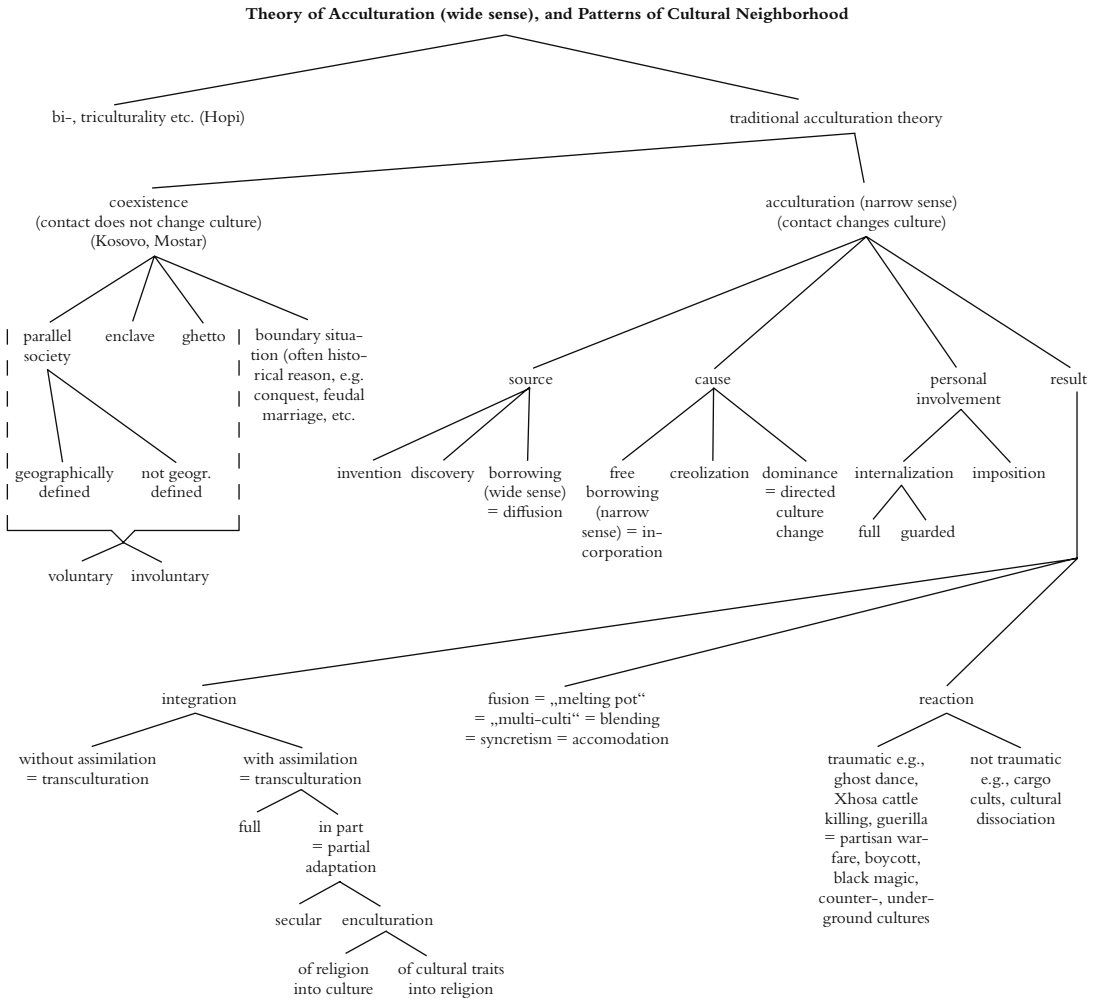
417 Cf., Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal, New York 1933: Ballantine; George Mc Kay, Senseless Acts of Beauty: Cultures of Resistance since the Sixtis, London 1996: Verso.

418 Philip Bock, Culture Shock, New York 1970: Devereux, IX.

and border situations, much less than cultural mixes (see below IX.), may generate reactive behavior.

h) Sources, causes, personal involvement, and result-orientation of the process of acculturation can be combined. A given source or cause does not necessarily lead to a corresponding result. However, *invention* and the *free borrowing process* are mutually exclusive because one cannot at the same time invent something and take it over from another.

A graph of acculturation in the broad sense, as well in the old narrow sense, including more recent developments, shows:



VII. Culture change

Up to this point in this chapter, culture and cultures were rather discussed as *static* entities even when seen as entities involved in a steady process of internal growth and development: definitions, categorizations, and dependencies from and connections with historical and thought-modal developments including time perceptions were the points of attention. The rest of this chapter (VII.–XII.) deals with culture and cultures in more or less *rapid motion,* often caused by external influences.

Culture change is the replacement of cultural themes through others.[419] The reasons may be manyfold: peaceful influences by neighboring cultures, conquest and imposition by a hostile nation, the spread of ideas with or without trading with other peoples, change by inventive minds, changes of the climate enforcing changes of agriculture and livelihood, demographic changes such as overpopulation, perhaps accompanied by a "youth bulge" phenomenon, or depopulation by famine, emigration, childlessness, or disease. An important issue has been raised by Thomas Glas. Fieldworking among the Finnish Sami ("Laplanders" – a pejorative term) he noticed that Samish culture had changed, during the last 150 years, so much that cultural continuation could not be upheld.[420] The Sami had adapted to the Finnish-Swedish life style and given up practically all known traits of Samish culture. However; their will to "survive" and continue to live *as Sami* was strong and lively. If this culture change, culture may not only be what somebody is, but also what somebody wants to be. The Sami, the Hopi, the Herero, the Bavarians, and many other cultural groups want to continue their cultural identity even if, from an objective point of view, culture change borders at culture replacement. The commitment to one's own culture may be stronger than many a moment of aculturation. The issue remains and it is of considerable political impact whether such continuation can still be recognized as culture change.

Similar situations arise when North- or Southamerican Indians claim to be survivors of a tribe believed to be extinct, and apply for acknowledgment as registered tribe. Can an evident gap in the historical development of a nation or tribe be "filled" or "bridged" by a reconstructed continuity? To accept continuation, and therefore culture change, evidence must be shown in more than one respect, but can be put together from various sources in various combinations, depending on the particular case: language, traditional stories, family recollections, cementaries, feelings of geographic belonging, historic documents, surviving crafts, proofs of forced migrations or other dispossessments, etc.[421]

When Martin Gusinde (1886–1969) of the ethnographically interested and active Mödling Monastery (near Vienna) that specialized in anthropologically educated Catholic missionary activities visited the Tierra del Fuego Indians between 1910 and 1920, he noticed a culture that soon would be extinct. He turned from mere missionizing to the observation of this process and devoted much of his work to scientifically immemorializing these Indians.[422] Elisabeth Colson (1917–2001) of Berkeley, CA, published seminal books and articles on culture change, for instance among the Plateau and the Gwembe Tonga which she kept revisiting between1946–1989.[423]

Although anthropologists should be aware of the changes in the cultures they study – notably in connection with the relatively new concept of "nation-building" –, not many have

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419 On cultural themes see Ch.3 I a. E., above. On culture (or cultural) change see Julian H. Steward, Theopry of Culture Change, Urbana 1955: Univ. of Illinois Press; Kottak 76; Bohannan 283 (breakdown of cultures); see also note 145 and Chapter 5 VI, above.

420 See note 240, above.

421 For standards for indigenous peoples in UN organizatiions, see Chapter 15, below.

422 Martin Gusinde, The Yamana: Life and Thoughts of the Water Nomads of Cape Horn, New Haven 1961; Human Relations Area Files (transl. from German by F. Schütze).

423 Elisabeth F. Colson, Tradition and Contract: The Problem of Order, Chicago 1974: Aldine Publ.; idem & Thayer Scudder, Secondary Education and the Formation of an Elite: The Impact of Education on Gwembe District, Zambia, New York 1980: Academic Press; see also E. F. Colson, The Makah: A Study of Assimilation, Ph. D. dissertation, Cambridge, Mass, 1945; idem, The Plateau Tonga of Northern Rhodesia: Social and Religious Studies, Manchester 1962: Manchester Univ. Press.

concentrated on such changes.[424] There is a temptation for the fieldworker to idealize the tribe, nation, or institution she or he is studying, and hereby historicize it. Often, the conversation partners of the fieldworker are elderly people because they have the time for lengthy talks, the patience necessary to have an exchange with the uneducated, curious intruder (while the middle generation has to go to work and may not trust the outsider), and the knowledge of things "as they used to be". But exactly these may be the stories from by-gone times. Valuable as these hourlong conversations with the respected tribal elders are, the fieldworker should always be mind full of the changes that may have occurred since an experienced consultant was an active member of that society.

A special kind of literature on culture change are the "revisiting" studies, also called "restudies". They are written by anthropologists who walk in the footprints of an earlier generation of anthropologists in order to doublecheck the results of their precursors and report on possible erroneous results and recent developments.[425]

VIII. Culture transfer, receptions, transplants, internalization. Legal families

1. Culture Transfer

Culture transfer is a term used mainly in acculturation theory.[426] On the other hand, culture transfer is also a form of culture change. When Namibia gave itself a constitutiomodeled under South African, Dutch, French, Swiss, and German influences, tribal life in the Namibian country side changed.[427] German re-unification in 1990 effectuated a wholesale transfer of West German legal, administrative, federal-constitutional and economic culture into East

424 However, see E. Colson, preceding note; Paul R. Brass, Caste, Faction, and Party in Indian Politics (vol. I), New Delhi 1985: Chanakya; idem, Ethnic Groups and the State, London 1985: Crooms Helm; F. Snyder, The Formation of Non-state Law: Some Influences of National Develoment Strategy on Rural Innovation ijn Senegal, In: G. Conac (ed.), Dynamiques et finalies des drots africains, Paris 1980: Economica; Joanna Pfaff-Czarnecke, Ritual, Distances, Territorial Divisions: Land Power and Identity in Central Nepal, in: Michael Saltman /ed.), Land and Territoriality, Oxford & New York 2002: Oxford Univ. Press, 113–133,; idem, Vestiges and Visions: Cultural Change in the Process of Nation-Building in Nepal, in: David N. Gellner, Joanna Pfaff-Czarnecka & John Whelpton, Nationalism and Ethnicity in a Hindu Kingdom, Amsterdam 1997: Haarwood Academic Publ., 419–470 (cf., three models of nation-building, at 422f.); Andres Heinemann, Der Übergang zur Marktwirtschafrt in der Mongolei: Wettbewerbspolitische Vorgaben und nationale Besonderheiten im Transformationsprozess, in: W. Fikentscher (ed.), Begegnung und Konflikt – eine kulturanthropologische Bestandsaufnahme, Munich 2001: Bayer. Akademie der Wissenschaften, C.H. Beck Kommission, 145–157.

425 Examples: Ekkehart Malotki, Hopi Time: A Linguist Analysis of the Temporal Concepts in in the Hopi Language, Berlin 1983: Mounton (on the Sapir-Whorff hypothesis that the Hopi language has no future tense and therefore is unable to express future things; see also note 248, above); Derek Freeman, Margaret Mead and Samoa: The Making and Unmaking of an Anthropological Myth, Cambridge, Mass. 1983: Harvard Univ. Press (a cfritique of Margaret Mead's bestseller "Coming of Age in Samoa"); Lowell Holmes, The Restudy of Manu'an Culture: A Problem in Methodology, Northwestern Univ. PhD. thesis 1957, Ann Arbor Microfilms No. 23,514; Jacques Lizot, Tales of the Yanomami: Life in the Venezolean Forest, Cambridge 1985: Cambridge Univ. Press (critical of Napoleon Chagnon's Yanomami studies); Armin Geertz, Prophets and Fools: The Rhetoric of Hopi Indian Eschatology, Native American Studies No. 33, Lewiston etc. 1987: Edwin Mellen (critical of stories told by informants).

426 See VIII., below.

427 M.O. Hinz & H.K. Patemann (eds.), The Shade of New Leaves. Governance in Traditional Authority: A Southern African Perspective, Münster & New Brunswick/London 2006: LIT Verlag & Transaction Publishers.

Germany, and it was not easy for East Germany to retain cultural identity in non-political contexts The subject is still vigorously debated.[428]

2. Reception

Another aspect of culture change (see VII., above) in law are the *"receptions"* of a whole legal system by another culture. A more recent term is *"transplant"*. There is not much literature on the theory of such "reception " or "transplant" processes.[429] Outside of law, for example in historical and political sciences, the expression *"transplant"* is preferred Here are some historical examples when and where receptions of law took place:

- the Code of Hammurabi in the Near East after its creation during the first half of the second millenium B.C.
- laws of Greek city states were taken over by other cities within the Greek *koiné* (commonwealth) so that there was what today would be called an ongoing practice of comparative law.
- the development of the *ius gentium by the praetor peregrinus* (the judge for foreign law cases) in Rome
- the spread of the Roman law throughout the Roman empire
- the spread of the Code of Manu in Asia
- the spread of Islamic law across Northern Africa and elsewhere
- mutual exchange and reception of medieval city laws (Lombardy, Hanse); Lübeck Law and Magdeburg Law were taken over by many cities in Eastern and Northern Europe (often recognizable by the term *Rathaus* (= House of the City Council = city hall, in various spellings).
- the reception of Roman Law (actually North Italian law as it was taught at Bologna, Florence etc.) throughout the "Holy Roman Empire of German Nation"(1495), with different development in Britain (pertaining to methods, not so much contents)
- the introduction of European laws into the colonies of the European nations.
- the spread of the British common law.
- the reception of the French Civil Code of 1804
- the introduction of federal Swiss civil law and Neuchatel cantonal civil procedural law in Turkey in 1925 by Ataturk
- the exchange of legal methods and conceptions after World War II between US, Japan, Germany and European Union, for example US antitrust law in Japan, Germany, and European Union; in Japan, there is talk of the two Westernizations of Japanese law, from 1868 through the Meiji Revolution (opening to the West), and after 1945 (defeat by the US).[430]
- the reception of Swedish marriage property law by Germany in 1957

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428 R. Pommerin, G.A. Ritter & A.J. Nicholls (eds), Culture in the Federal Republic of Germany (German Historical Perspectives, Oxford 1996: Berg Publ.

429 Michel Alliot, Über die Arten des "Rechtstransfers", in: W. Fikentscher, H. Franke & Oskar Köhler (eds.), Entstehung und Wandel rechtlicher Traditionen, Veröffentlichungen des Instituts für Historische Anthropologie vol. 2, Freiburg & Munich 1980: Alber, 161–231; Gunther Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies, 61 Modern Law Review 11–31 (1998) (critical of the term "transplant").

430 See, however the "otoshi dokoro" discussion, Ch. 6 IV. 2., below.

3. Internalization

Internalization my be understood as a person's or a group's acceptance of a norm as valid law. A political order may be binding, but not accepted by those who have to obey it. By internalization, a legal norm becomes a *legal* forum for that person or group. Before becoming such forum of *legal* quality, the norm may have had political, societal, or religious (etc.) character. Therefore, internationalization has been discussed in Chapter 4 above (II. at the end, near note 237), especially in the context of the different forums on which a person may be held to be responsible. In connection with criminal punishment or civil liability (see Chapter 12 IV., below), internalization has a similar meaning.

4. Legal families

In comparative law transfers and receptions (transplants) and similar phenomena as discussed above result what are called the "families" or "circles" of laws or of legal systems *(Rechtsfamilien, Rechtskreise).*[431] Many comparatists of law have outlined their own system:

René David numbers eight families of law: Roman-germanic, Common law, Socialist, Islamic, Hindu, Jewish, Canon law, and Far-eastern[432]

Konrad Zweigert distinguishes ten legal circles: Roman, Germanic, Nordic, Angloamerican, Socialist, Hindu, Islamic, Fareastern, and Hybrid (e.g., Philippine, Madagaskar, South Africa) – a category lacking in the 2nd edition[433]

Henry W. Ehrmann lists seven legal "families of law": Romano-germanic, Common law, socialist, Non-Western (incl. China, Islam, Hindu and traditional)[434]

Léon Constantinesco has developed an elaborate system of world views, legal circles, families and relationships of law, legal orders, and legal types. The most numerous class is that of legal orders to which Constantinesco counts about 150 national laws[435]

Barton, Gibbs, Li & Merryman list six legal cultures: Western; Eastern (China, Japan); religious (Hindu, Muslim, Jewish), traditional, Soviet, and "international legal culture"[436]

Elsewhere, I have discussed fourteen legal circles: tribal laws, Zoroastric, Vedic-Brahmanic-Hindu, Taoist, Confucian, Hinayana-Buddhist, Mahayana-Buddhist, (Ancient)
Greek-Roman, Judaic-Christian, Islamic, (modern) Romanic ("French"), Anglo-American, Scandivavian, and Middle-European.[437]

Obviously, authors use criteria derived from different levels of generalization and for different purposes. Partly, the criteria are extracted from historical data, from legal "styles" (Zweigert), from world views and modes of thought, or from geography. This makes them hardly comparable. For purposes of anthropology of law I note that the writers use divergent starting points for their categories of legal cultures. Depending on the literary goals of the relevant expert, all manners of distinction are permissible oncc that goal is clear.

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431 Literature on families of law and legal systems as such: P. Arminjon, B. Nolde & M. Wolff, Traité de droit comparé, Paris 1950ff.; Bernd Wieser, Vergleichendes Verfassungsrecht, Vienna 2005: Springer, 105–115.; Willibalt Posch, Einführung in die internationalen Dimensionen des Recht, http.//www-classic.uni-graz.at/brewww/Posch (a good survey).

432 René David (ed.), The Legal Systems of the World: Their Comparison nd Unification, Tübingen 1984: Mohr Siebeck.

433 K. Zweigert & H. Kötz, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts, 3rd ed. Tübingen 1996: Mohr Siebeck.

434 Henry W. Ehrmann, Comparative Legal Cultures, Englewood Cliffs 1976.

435 L.-J. Constantinesco, Einführung in die Rechtsvergleichung, 3 vol., Cologne 1971, 1972, 1983: Heymanns.

436 J.H. Barton, James L. Gibbs, Jr, V.H. Li & J.H. Merryman, Law in Radically Different Cultures, St. Paul, Minn. 1983: West.

437 W. Fikentscher (1995/2004), 189ff., in various contexts considered in connection with the modes thought.

IX. The anthropology of borders, corridors, trails, and trading routes

1. Anthropology of borders

The rule in the development of intercultural neighborhood is slow transition, sometimes by almost imperceptible degrees. Traveling north-south from Lower Bavaria through Upper Bavaria, Tyrolia, South Tyrolia (= Alto Adige) to Verona brings one from one dialect to the next – mostly of historical Bavarian origin – and even the linguistic border to Italy appears to be smooth due to local bilinguality. The traveler may be surprised to find same music, same jokes, similar dress, and yet she or he senses passing through a scenery of changing mentalities and local cultures. Borders do not only divide, they also connect and serve as interfaces of multicultural contact.[438] Moreover, they feed cultural imagination and memory. Still, there are borderlines that signify stark contrasts on both sides, and invite confrontation. There are only few anthropological studies on these and other borders that draw cultural (mostly economic) dividing lines between neighboring nations.[439] In some places, cultural splits along certain borders amount to human tragedies, for example:

The Rio Grande between Mexico and the US and the frontier between these two nations west of the Rio Grande through the Sonora desert. The State of California is reported to plan to reinforce the existing steel fence against illegal immigrants from Mexico. There are the western frontiers of Russia bordering to the member states of the EU.[440] What used to be the trouble zones, the borders between Poland and Chechia on the outside and Germany on the inside of the EU, has recently been changed into uniform EU territory since the access via Poland and Chechia to the EU has been moved to the eastern borders of these two states.[441] The Mediterranian Sea (Lampedusa, Ceuta) and the waters between Africa and the Spanish and Portuguese islands in the eastern Atlantic, the waters between Cuba and Florida, and the border between the Palestinian territories and Israel are further examples of tragic borders.

To create a term for these culturally incisive frontiers, and for lack of a better expression, they could be called "forbidding borders". Sometimes these forbidding borders may have their cause in economic differences on both sides of the line: there is enough to eat on the one side, and hunger on the other. In other cases, oppression on one side in contrast to the rule of law on the other makes the difference that causes thousands to illegally cross that border, even at risk of life and limb. My estimation is that more migrate for the rule of law than for fleeing poverty and hunger.

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438 Au example: the two terminals at Istanbul Airport; Robert R. Alvarez, The US-Mexican Border: The Making of an Anthropology of Borderlands, 24 Annual Review of Anthropology, 447–471 (1995); L. Pospisil, Obernberg: A Quantitative Analysis of a Tyrolean Peasant Economy, New Haven, CT 1995: HRAF Press; Michael Rösler & Tobias Wendl (eds.), Frontiers and Borderlands: Anthropological Perspectives, Frankfurt/M. & al. 1999: Peter Lang (case studies from Africa, Europe, North, Middle, and South America, and Asia, examined in the ethnic, economic, legal, cognitive, and linguistic arenas); Christian F. Feest, Die Grenze als Standort der Ethnologie, 122 Zeitschrift für Ethnologie, 121–131 (1997).

439 E. g., Faculty of Cultural Sciences, European University Viadrina Frankfurt (Oder)/Collegioum Polonicum, Slubice, Border Cultures, The Rhetorics and Politics of Drawing and Crossing Borders, http://viadrina.euv.frankfurt-o/-anthro/Summer06/webpagevus1.htm; Houston Institute for Culture, Special Feature, The Borderline/La linea frontera.http://www.houstonculture.org/borderhist.html; Axel Gayko, Investititons- und Standortpolitik der DDR an der Oder-Neisse-Grenze 1950–1970, Frankfurt/Main 2000: Peter Lang.

440 The University of Liverpool, Behind the Crystal Curtain – Russia's Western Border./The New East-west Border in Europe), The Economist (US), October 2003; Heinz Eggert, Grenzziehungen, http://chemnitz-report. Muellers-seiten.de.

441 Chr. Tenbrock, Verkehrte Angst, DIE ZEIT No. 35 of August 19, 2004, 19; see also note 421, above.

2. Anthropology of corridors

A corridor is a hallway of sortswhere people meet. Everyone in the building passes through a door to enter the hallway. The corridor becomes a meeting place, chattels and ideas are being exchanged, comparisons made, and friendships or antagonisms generated. History tells of cultural "corridors" and "hallways" where cultures met and entered in friendly or inimical exchange. The exchange triggered change and development. The Nile Valley, the Fertile Halfmoon between Asia and Europe, the Mediterranian Sea, the German Rhein-Main area, the Columbia River for Northwest Indians are only some examples of culture stimulating corridors. The effect is largely the opposite of culture-separating borders (1. above) even if nature often provides the basis for both.[442]

3. Anthropology of trails and trading routes

Trails for seasonal migrations – from winter country to summer country and back – are a common cultural complex in nomad societies and in half-nomadic tribes.[443]

Trading routes are historically important because along them, together with the merchandise, travel ideas, ideologies, and religions.[444] Cutting off traditional trading routes can lead to evolutions of considerable dimensions.[445] The "Silk Road" is still subject of trade, ideological and political interest. Connecting Turkey via the Caucasian countries of Georgia, Armenia, Chechnya, Azerbeijan, Dagistan and Ingushetia, and further though Iran, Turkmenistan, Uzbekistan, Kazakhstan, Kyrgistan with China, it is one of the oldest and and most important trade routes of the world.[446] Anthropological treatments of trails and trading routes are not frequent. Research shows that there is much touristic material on historic Highway 66, the "Mother Road" from Chicago to Los Angeles, but no anthropological literature of importance. On Indian trails, Linderman (1968) and Schoolcraft (1847) offer old stories.

X. Forms of cultural neighborhood (in situations of cultural boundaries, enclaves, ghettos, "melting pots").

1. An ongoing research project

The Bavarian Academy of Sciences in 2006 began a research project on forms of cultural neighborhood. Subject of the research project are the forms, raisons-d'être, and main characteristics of cultures getting in contact. Cultural encounters can be friendly, neutral, or inimical. There can also be talk of succeeding and failing cultural contacts. The conditions for each of the two possibilities are to be addressed. The project is scheduled to last until 2011.

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442 On such a "corridor theory" W. Fikentscher (1975 a), 159–162, on the anthropology of the Rio Grande as a cultural border between USA and Mexico, op. cit. 244 ff.

443 Traditional stories of the Paiute Indians report of regular moves of camp on oold trails, in the fall from the mountains to the prairee, in the spring from the prairee to the mountains (fieldnotes from Kaibab Paiutes reservation).

444 Islam on the Silk Road, hunters of the Hudson Bay Co., Pueblos on the northern Rio Grande, Sahara routes, Norman routes of trading warriors through Russia to the Black Sea. The axial age concept of good-bad dichotomy traveled east and west from India and Persia. Mahayana-Buddhist care for human neighborhood and guidance through Bodisattvas such as Amidhaba (Amida) and Kannon started after Nestorianic Christianity contacted the East.

445 When Islamis conquests impeded trading connection between the Mediterranian and the Indic worlds, Europeans opened a new trading route by sea and discovered America.

446 Thomas O. Höllmann, Die Seidenstraße, 2nd ed. Munich 2007: C.H. Beck; idem, Das Seidenstraßenprojekt der UNO, UNESCO heute, 1/1993, 32–35.

2. Three types of cultural neighborhood

There seem to be three main types of such encounters leading to neighborhoods in a cultural sense: (1) Encounters of cultures may have arisen from *borderline situations* (see also IX. 1. above). Often the reasons were the more or less haphazard result of warfare. Slavic tribes were subdued by German kings and dukes. Alsace-Lorraine changed from Germany to France and back five times. Ireland was conquered by the British. South Tyrolia was given Italy in 1919. Sometimes the reasons were political or administrative acts without consent of the people. In Africa after 1945, cultures remained neighbors because the colonial powers had divided the land by using a ruler, and the UN decolonization policy in and after 1945 did not want to get involved in ethnic referenda. (2) A second type of cultural neighborhood is represented by *enclaves* (or *ghettos,* a pejorative term used for enclaves with degrading policies exercised by the surrounding culture against inhabitants). Northamerican Indians, Australian aborigines, Taiwanese indigenous tribes and many other traditional nations and peoples have been forced to live on reservations which may be the prototype of an enclave. Some enclaves work well and give cultures enough space and enririnment to live their traditional life, others suffer from neglect and economic expropriation.[447] (3) The third main type of cultural encounter are those areas or agglomerations where the carriers of diverse cultures live together as a – in general – heterogeneous population. Today, and after a long and difficult development in state and society, African Americans live as US citizens. In Namibia, the indigenous tribes and nations, the British, the Germans, the Dutch, and some other groups form a society of equal respect and mutual exchange. In these cases of mixed cultures, many forms of biculturality, coexistence, or acculturation are possible. A form of cultural neighborhood does not preempt one of the three main categories of acculturation theory, although coeexistence may be a frequent solution. This means that the discussions under VI. and X. in this chapter can be combined.

What are the principes of such cultural encounters in each of the three mentioned situation? When does cooperation work, when not? These are questions under observation and investigation in said project (see 1., above).

XI. The anthropologies of minorities, and second and third state peoples

Minorities research raises related anthropological issues. As such, minority research rather belongs to sociology and sociography (esp. socialization theory), cultural studies, and administrative law. But anthropology may contribute work on cultural aspects.

Conceptionally, minorities are cultural units within or attached to a larger, dominant culture, with their own group or individual interests because of their different historical, linguistic, religious, economic, life style or otherwise distinct character in relation to that dominant culture. Often, more than one of these distinct characteristics apply. Members of minorities need not be lower in numbers than the dominant culture, subordination is the criterion, not so much demographics.[448]

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447 On boundary anthropology, Laura Nader (ed.), Naked Science: Anthropological Inquiry into Boundaries, Power and Knowledge, New York 1996: Routledge; F. Barth (ed,), Ethnic Groups and Boundaries: The Social Organization of Cultural Difference, London 1969: Allyn & Unwin. Generally, on the law of indigenous populations see Chapter 15 below.

448 Correctly Kottak, 88. Also Günter Bierbrauer & Edgar Klinger, Gerechtigkeit in ethnopluralen Gesellschaften: Die Grenzen der Solidarität gegenüber zugewanderten Minderheiten, In: R. Mokrosch & A. Regenbogen. (eds.), Was heißt Gerechtigkeit? Ethische Perspektiven zur Erziehung, Politik und Religion, Hamburg

Minorities are created in several typical ways. Reference may be made to subchapter X 1. and 2, where the reasons for cultural neighborhoods are discussed. Any one of these reasons may also work to produce minorities. In addition, migratory movements (see next subchapter XI.) often create minorities. A distinction should be made between minorities and second or third state peoples. State peoples are defined here as culturally sufficient homogeneous peoples who form such a large share of the population of a nation state that the description as "minority" does no justice to their obvious size. The Indians are a minority in the US, the Danes and the Sorbs are the two German minorities. However, in some instances, the "minorities" are so numerous and territorially large, that the term no longer fits. One fourth of the population in Turkey is Kurdish, and one third of the Turkish territory is where the Kurds live.[449] This is no "minority", but another state people. The reason is that the Kurds had no adequate representation at the negotiations that led to the Treaty of Lausanne of 1923 which constituted the Turkish territory in the shape that essentially exists today.[450] There was a somehow comparable situation concerning the Germans and the Slovaks in former Czechoslovakia after 1919.[451] Postcolonial Africa offers more examples. The legal issues created by such second or third state peoples are not easy to solve and depend on the willingness of the majority people(s) to live together with the smaller people(s) according to the Swiss and Belgian superadditive models.[452]

Minorities sometimes flock together in cities and towns where they may be held reponsible for in-town problems. Cultural Studies have contributed to this issue.[453]

Outside of anthropological discourse, minorities research has its own literature, authorized by experts who sometimes work in public administrations, consultative councils, NGO's, religious organizations, or similar institutions.[454]

XII. Migration

Similar to minorities research, migration is a field the point of gravity of which lies outside anthropological competence, but – next to the sciences of demography, politics, history, economy, cultural studies, and law (in particular immigration law) – has its anthropological impact.[455] Migration has many forms. They are decidedly shaped by reason that cause migra-

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1998: E. Franke, 41–44; Rodolfo Stavenhagen, Ethnic Conflicts and the Nation-State, New York 196: Macmillan. Within a minority, there may be a diversity of languages (e. g., the Muslimic hue in China).

449 Bärbel Wehr, note 409, supra.

450 Treaty of Lausanne of July 24, 1923; Kottak, 89.

451 Of the Czechoslovakian population (1972: 14,4 Mio), between 1919 and 1938 43% were Czech, 23% German, and 22% Slovak.

452 On superaddition, see Chapter 9.

453 E. g., Leo Lucassen, The Immigrant Threat: The Integration of Old and New Migrants in Western Europe since 1850, Urbana 2005: Univ. of Illinois Press; Cultural Studies research started from minority issues, see Chapter 1 III. 3. e., above.

454 From this literature: Bärbel Wehr; see note 409, above; Brigitte Kohnen, Akkulturation und Kognitive Kompetenz: Ein Beitrag zu einem grundlagentheoretischen Perspektivenwechsel in der sozialisationstheoretischen Migrationsforschung, Münster 1998: Waxmann (relies on evolutionary psychology and recommends activity for promoting the integration of the migrant itself); Michael Krugmann, Das Recht der Minderheiten, Berlin 2004: Duncker & Humblot.

455 Bauböck, Rainer (ed.), Migration and Citizenship: Legal Status, Rights, and Political Participation, IMISCOE Research, Amsterdam 2006: Amsterdam Univ. Press; idem et al. (eds.), Accqisition and Loss of Nationality, IMISCOE Research, Amsterdam 2006: Amsterdam Univ. Press; F. Heckmann, Hauptseminar Integration von Migranten und interethnische Beziehungen, http://web.uni-bamberg.de/~ba6ef3/pdf; The Centre for Migration Studies, New York (since 1964) issues Annual Reports (the 8th Report is of 2007); the Univer-

tion. The central question is: Was it a voluntary desire to move,[456] or was there force that expelled those who became the migrants.[457] Here are some anthropological issues of migration:

Not infrequently migration lays the foundation for the growth of *minorities* and their problems.[458] Migration is also related to the anthropology of *borders.*[459] There is an extensive literature on the relationship between migration and *identity* because the migrant enters a new environment with its demands upon understanding oneself and the new surrounding culture.[460] Migration has close connections to the themes of societal *marginality,* since migrants often form a lower or the lowest strata of the receiving society.[461]

A different aspect is the context of migration and diaspora. Migration may lead to diasporas in other countries, and history is rich with examples, not only concerning the Jewish nation but also others. Many diasporas were created by forcible expulsion, flight, persecution, or resettlement of peoples.[462] The anthropology of refugees and expellees deals with these diasporic situations. Slave trading began the black diaspora.[463] Anthropologically, calls for "repatriation" following forced migrations may be cases of what in acculturation theory has been identified as reactions.[464] Living in a diaspora quite often generates a feeling of "diaspora identity", event of "diaspora reaction".

XIII. Cultural justice and cultural rights. Intercultural justice. Tolerance and its paradox

From a legal perspective, the issue of whether there exists a justifiable distinct treatment of a given culture is what the preceding discussions are all about. Questions of this sort are: Does the proposed form of intended – or simply ongoing – assimilation deserve support or opposition? Should this culturally incisive "forbidding border" be torn down, or upheld and improved? Do a minority or second state people need protection, and if so, in what respect? Should a stream of migrants be channeled or inhibited, legalized or illegalized?

These are questions of law, and following the uncompromising anti-positivist line of argument throughout this entire book, necessarily questions of justice.

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sity of Nijmegen has a Centre for Migration Law; the University of Bonn runs a website Migration; the University of Stockholm has a Centre for Research in International Migration and Ethnic Relations; etc. There are about eight academic journals on migration, of them one on migration and law.

456 Examples: The Normans' conquest of parts of Europe in the ninth, tenth, and eleventh century; the settlements of Rastafaris in Ghana; Werner Zips (ed.), Rastafari – eine universelle Philosophie im 3. Jahrtausend, Wien 207: Pro-Media; Günter Bierbrauer & Paul Pedersen, Culture and Migration, In: G.R. Semin & K. Fiedler (eds.), Applied Social Psychology, London 1996: Sage, 399–422 (on motivation to migrate).

457 In and after World War II, more than 12 millions of people were migrants forced to leave.

458 Kottak, 92, 427f.

459 See IX. 1., above.

460 See Chapter 5 III, above.

461 Marginality is both a sociological and anthropological topi, depending on the role of marginal people in the greater society (example: Roma and Sinti in many European countries), or on the marginalized culture and its traits.(Australian aborigines and their "songlines", see Chapter 9 II. 1., note 59, below).

462 See, e.g., Michel Agier, On the Margins of the World: The Refugee Experience of Today, Malden, Mass. 2008: Blackwell.

463 Paul Gilroy, The Black Atlantic: Modernity and Double Consciousness, Austin, TX 1981; Cambridge, Mass. 1993: Harvard Univ. Press;Rosalind Shaw, Memories of the Slave Trade: Ritual and the Historical Imagination in Sierra Leone, Chicage 2002: Univ. of Chicago Press.

464 Marcus Garvey & Amy Jaccques Garvey, The Philosophy and Opinions of Marcus Garvey, Or, Africa for the Africans, Fitchburg, MA 1986: Majority Press; Centennial Edition. See notes 382–387, above.

A distinction can be made between two kinds of justice involved here: Whether cultures should be handled as mental homesteads of human existence is an issue that can be named "cultural justice". Here, the justice owed by the dominant culture to a subjugated culture is at stake. The point is that what is owed has to be a legal title. Does it give a valid legal title to promise "forty acres and a mule"? There is a temptation for the administration of the dominant culture in order to shake off the participants of a losing culture, to offer cultural reminiscences such as folklore evenings and costum dances. A religious leader of a community of the Atayal tribe on Taiwan, R. o. C. said: "They give us too much culture and to few rights. What we need is rights".[465] What this religious leader claims are cultural rights, and such cultural rights are convincing only when they are based upon cultural justice. A theory to solving the issue of cultural justice has been drafted elsewhere, and in modified and shortened form will be reprinted in Chapter 7 below as the closing section of Part One, and in the Postscript of the whole book.

A related, but slightly different question relates to the justice owed by one culture to another. This issue includes one of tolerance between the cultures, versus "clashes" between civilizations, and of inhibiting intolerant cultures which raise the claim to abolish the other. Here justice owed by one culture to another is the point. For the corresponding field of law; Rebecca Tsosie has proposed the term "intercultural justice".[466] Intercultural justice is a timely analogy to, and expansion of, the law of nations which should not restrict itself to nations but extend its pacificatory rules to regions, alliances, tribes, cultures and other carriers of legal title.[467] Rebecca Tsosie's introduction of the concept of intercultural justice opens a door between anthropology of law and other fields of investigation. Tolerance is a research item also in conflicts research and peace studies. These are domains of other social sciences, with extensions into anthropology.[468] Here, only a hint may be given to an interesting parallel: Freedom, uninhibited and therefore undefended, may lead to unfreedom, and this is called the freedom paradox. Tolerance, uninhibited and therefore undefended, easily leds to intolerance, and this is the tolerance paradox.[469]

The two kinds of justice belong together: Justice owed to a culture by recognizing it is an identity issue. Intercultural justice follows from it as a necessary consequence.

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465 Fieldnotes (unidentified Atayal tribal leader).

466 Rebecca Tsosie, Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights, 47 UCLA Law Review 1615–1672, a definition at 1658–1661 (2000). According to Tsosie, intercultural justice involves four components: combined inquiry and action, group harms or grievances, accepting responsibility, and making reparations. See also text bnear note 1024, below. Arelated concept is interracial justice, Erik K. Yamamoto, Interracial Justice: Conflict and Reconciliation in Post-Civil Rights, New York 1999: NYU Press.

467 On this, W. Fikentscher, Culture, Law and Economics (2004), 243–307,idem, in this book Chapter 15; Arthur Kaufmann, Das Prinzip Toleranz, Südd. Ztg. No. 214, of Sept. 15/16, 1984, 139.

468 Peace research on the basis of cultural anthropology is undertaken by a number of institutions, e. g., Zum Stand der Friedens- und Konfliktforschung, University of Augsburg, http://www.uni-protokolle.de/nach richten/id/86243; in this book, the subject is not dealt with, see however note 183, above, and materials and text there: Günther Schlee has worked on ethnological reasons for conflict, see bibliographie in Chapter 1 II.

469 On the freedom paradox, see Chapter 10, below, and materials cited there.

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Chapter 6: Analyses in cultural anthropology

Chapter 6, on anthropological analyses, starts with a criticism of ethnocentrism by using some contemporary examples, including the much debated "export of democracy", in connection with Immanuel Kant's theory of "eternal peace" through democracy. Chapter 6 also introduces the new idea of using synepeia analysis, as developed for the cultural anthropology of the modes of thoughts, as useful for other issues of cultural anthropology as well. This adds a new dimension to the much debated emic-etic discussion. It will be shown that a solution to this discussion might be the replacement of the traditional inside-outside approach by a consequential – "synepeical" – separation of epistemological levels and meta-levels: One wants to know something – then one discovers the other who also wants to know something about the same object – and then one has to proceed on one's way of thinking taking into consideration the other's way of thinking which can only be done by stipulating meta-facts and meta-values. That procedure amounts to a more satisfying re-orientation of the emic-etic issue.

What is the purpose of studying the analyses of objects to be observed in anthropology? Imagine to have applied for and received a grant to study the formation and eventual separation of marriage as practiced by a newly discovered tribe on a newly discovered island in the South Pacific. No outsider ever has set foot on that island. The language of the inhabitants is unknown. It is even unknown whether they have a language. Photographs taken from a helicopter of a nearby research ship indicate that they look like humans. It is not known of these islanders whether they have marriage at all, whether they live in families, whether they have law, etc.

How does one tackle such a research project? How can the behavior of these islanders be interpreted, their language be learned,[470] their way of describing themselves and their environment be studied, including their customs, laws and other valuations? Would it be correct to study the islanders' family law according to the categories of New York, New Jersey, Nebraska, French, Dutch, or Skandinavian law, depending on the nationality or education of the grantee? Certainly not. But by which other standards? Questions of this sort – here illustrated by a hypothetical scenery – are the task of cultural anthropological analysis.

Cultural anthropological analysis serves to learn the material and mental life of a cultural entity. Before going to Japan to do business there, or deciding in the UN Security Council on a peace keeping or restoring mission in Korea, Yugoslavia, Somalia or Afghanistan, or safeguarding elections by NATO troops in Kongo (Democratic Republic of Zaire), etc., it is necessary to research the local culture or cultures entering the unknown terrain. Otherwise failures may occur.

There are several kinds of cultural anthropological analysis. Here follows a survey and a discussion of the available possibilities, including an own proposal of how to approach such a task. With respect to the modes of thought which are to be presumed to be found "behind" the cultures, the own proposal has already been made elsewhere. It was given the name "synepeia analysis", from Greek *synepeia* = consequence, indicating that it is necessary to be consequential in rendering judgments on the specific-cultural or the meta-cultural level.[471]

Further research demonstrated that synepeia analysis also works beyond the limited issue of the modes of thought. It appears that it also applicable for every other culture-related investi-

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470 The linguistic side of the project is left aside here. The focus is on the material and immaterial environment, including law.

471 W. Fikentscher (1995/2004), Chapter 4.

gation.[472] Therefore, it will be repeated in the following text, adapted from the modes of thought (as a special kind of application) to the exigencies of general cultural anthropological analysis, needed here.

Because closest to a human's mind, starting point is ethnocentrism, the understandable, but anthropologically wrong attitude to judge foreign cultures by applying standards of one's own culture. Therefore, ethnocentrism will be discussed in the first subchapter below, although it is no genuine analysis of cultural anthropology at all. All analyses in cultural anthropology to be discussed in the following subchapters have in common gthat they are refutations of ethnology. An examples of the ethnocentric approach may illustrate this:

In 2006, a German journalist accredited in Washington, D. C. and specializing in Near East problems asked a US Government official who had been active in US foreign policy for some time to whom he could talk about political issues connected with Islam. The journalist received the answer that the US Constitution provides for the separation of government and church, and that therefore no expert on Islam would be available in the US Government to talk to.[473]

This leads to an even broader modern issue of ethnocentricity: Many international problems last longer than four years. Examples are German, Japanese and Italian militarism in the 1930ies and 1940ies, the build-up of a European union after 1945, Soviet expansionism between Yalta (1945) and Reikjavik (1985) including the Korea, Laos, Vietnam, Angola-Mozambique, and Falkland crises, foreign aid since the 1960ies, Israel-Palestine relations since 1948, terrorism since the Olympic Games of 1972, decade-long Iraq and Iran crises, etc. Problems of this sort outlast democratic administrations which (influenced by the rules of the Platonic dialog[474]) regularly change every four or five years and whose new governments cannot but aim at goals opposing the former governments' initiatives ("Get our boys

472 W. Fikentscher, Culture, Law and Economics: Three Berkeley Lectures, Berne & Durham, NC, 2004: Stämpfly & Carolina Academic Press, 89–93; idem, Intellectual Property and Competition – Human Economic Universals or Cultural Specificities?: A Farewell to Neoclassics, IIC 2007, 137–165, notes 32ff.

473 Wolfgang G. Schwanitz, Amerikas ungeschriebene Islampolitik, Teil 2, 22 KAS Auslandsinformationen 10/06, 89–116, at 106; the story reminds me of an own experience in 1966, also in Washington, D. C., where I had a lengthy discussion with a Pentagon official on cultural-psychological aspects of the Vietnam war (which at that time went favorably to the Southvietnam-US side). Our discussion included traits of Mahayana-Buddhism and activities of monks of Buddhist monasteries (who at that time started gruesome self-immolations at an almost daily pace, not in protest against the US-American presence, as the Western media misinterpreted, but in protest against un-Buddhist involvement on any side). Towards the end of our talk, with a view to the psychological side of US warfare in Vietman and its importance for US strategy and tactics, the Pentagon official insisted on a presentation of my points of view to a group of experts in the Pentagon. He said he wanted to bring together a group of experts and inform me of a suitable date for my presentation. After about five weeks, the Pentagon official called, offered an excuse about the delay, and said that to his surprise not a single person in the Pentagon knew anything about Buddhism nor was interested in knowing something about it. After this failure, he continued, he had contacted the State Department and had received the same reaction: no information, no interest. Finally, he said, he had addressed the White House, only to get the same answer: No expert, no interest. He closed by saying: "I am very sorry, but I am afraid that in whole political Washington there is nobody who is interested in the psychological and cultural side of the Vietman war". I thanked him for his efforts and repeated attempts and asked him whether he would permit me to make a prophecy. He agreed. I said. "You will loose the war". He, obviously with an undertone of anger, asked for reasons. I answered that if US politics do not understand the modes of thought present in a part of the world in which it is engaged, militarily or otherwise, no matter whether successful or not, the US are bound to loose because people out there do not recognize what is going on. The Pentagon official hung up. No contact was renewed.. In 1974, US withdrew from Saigon, and more than one national trauma took its course.

474 See Chapter 9, below.

home!"). This incongruency between long-term issues and short-term periods of government disfavors democracies in dealing with global problems. Non-democratic states (in which time concepts may, for "revolutionary" reasons, differ from the time-as-a-straight-line principle valid in democracies) often simply have to wait for a bit more than four or eight year get their will.[475] To find an answer to this ethnocentric miscue is not easy because it touches upon basic constitutional premises in the democracies. Immanuel Kant, in his book on "Eternal Peace", presented convincing reasons why democracies are not inclined to wage war so that a democratic world should be a peaceful world, but he overlooked the possibility that undemocratic governments may create reasons to wage war that last longer than the average democratic administration period.

To cope with these demands of empirical studies of cultures, anthropology has developed and used a number of types of analysis. Which analysis is preferable is still a matter of dispute. In the rest of this chapter, these analyses will be discussed with the inclusion of the ethnocentric approach to other cultures.[476]

I. Ethnocentric analysis. Ethnocentrism and exoticism

The aforementioned examples (newly discovered island, UN peacekeeping activities, US Near East policies, international reach of national law including national constitutions, Vietnam, etc.) show that calling the ethnocentric approach an "analysis" is too benevolent. Ethnocentrism means that the researcher uses his or her own categories, experiences, and even bias while problematizing, concluding, reasoning, or systematizing the study of another culture. Of course it is wrong to measure other people and their cultures with one's own cultural standards. But does this interdict cross-cultural contacts and comparisons? Ethnocentrism continues to be the most pervasive problem in anthropology.[477]

Most ethnocentrism occurs inadvertently. One example is the influence of English traditions of law and constitutional history upon the formation of basic concepts of descendence and lineage by some authors of the British "social anthropology".[478] Another example is the assumption that underlies the Cornell project on comparative law: that laws can be compared by identifying the problem to be solved and then comparing the solutions proposed by various national or local laws.[479] Such an approach is flawed because different legal systems may have quite different concepts of what constitutes a problem.[480] A third example are the Pueblos who divide peoples into those with a geographic center (themselves) and nomads who come and go, such as the Navajo, Apache, Ute, Spaniards, Mexicans, and Anglo-Americans.[481] Some

475 Laos, Northkorea, Northvietnam, Iraq, and Iran are examples.

476 It follows a revised and condensed version from W. Fikentscher (1995/2004), 117–149.

477 It has its counterpart in the historical sciences when a researcher uses his or her own conceptual framework for the interpretation of a former period which existed under a different conceptuality: for example, if a historian calls the rule of the Pharaons a "state", or Hannibal's army an "organization". Both anthropology and historical sciences are concerned with the comparison of culture. Therefore, the methodological problems of anthropology and the sciences of history must at least in part be identical. It could be demonstrated that the analyses discussed in this chapter – ethnocentrism; vision of the participants/folk-concepts/emic-etic/inside-outside; componential analysis; correlational analysis; and synepeical analysis – work just as well in the study of history. For a criticism of both ethnocentrism and cultural relativism, see Kottak 31.

478 Raum 1990, esp. at 118 on Radcliffe-Brown's characterization of Kariera hordes as "corporations".

479 Schlesinger 1970, foreword.

480 W. Fikentscher 1975a: 62. The same must be said about the attempt to start from "cases". What a "case" may be differs from culture to culture, W. Fikentscher 1975a: 56ff., 61, 154 note 16; see, however, A.L. Epstein 1967.

481 H.A. Tyler, at 3: "... Western man is a nomad ..."

analysts think that an ethnocentric approach to other cultures is the only one possible because nobody can get inside another's mind. For them, ethnocentrism becomes a legitimate mode of analysis.[482] The way Max Gluckman analyses Barotse jurisprudence, for example, in his discussion of reasonableness and uprightness (1955/1967/1972: 125), is indicative of his tendency of starting from English law concepts. However, he concedes that "… this complex process of social control can be understood only in an analysis of the social relationships which are controlled (1955; 1967; 1972: 25).[483]

A more refined ethnocentrism is the tendency in the United Nations Organization to pretend that there is just one mode of thinking in this world, one world culture, and one type of societal order: namely, that of its own organization, which is derived from the Frankish feudal pledge-of-faith system.[484] Alain Finkielkraut[485] convincingly juxtaposes the "respect" for cultural pluralism arising from Western emancipation, enlightenment, and tolerance with the defeat of emancipation, enlightenment, and tolerance that results from such "respect" in socialist and Third World countries. He ridicules UNESCO's careless ambivalence to both extremes which, of course, exclude each other. He describes what may be called the "paradox of tolerance" (a parallel issue to the paradox of liberty). One of the reasons for such "refined ethnocentrism is that Greek philosophy dominates Western thinking so much that philosophies of other cultures, or comparative philosophy, are hardly represented. This philosophical or mental ethnocentrism mostly goes unnoticed, so that ethnocentrism may become a ready-to-hand mode of analysis.[486]

Europe's special way in history since the 16th century is an undeniable and much debated fact. Chapter 5 raised some of the involved issues when Western culture had to be compared with non-European cultures. A corollary of Europe's special way in world history is Western ethnocentrism. It purports that European culture is the "normal" one and the model for others. Christian mission and imperialist colonization are examples. This European self-esteem has two sides. On the one hand, it gives rise to the anthropologically unfounded assumption that other cultures are willing to accept this European "model" and in this manner contributes to the ethnocentrism which has been criticized above. On the other hand, besides looking down on other cultures, there may be for educated Europeans a good deal of interest and curiosity to learn and sense these other cultures. The "savages" and "barbarians" in distant countries became an interesting object of getting to know and to study ("the noble savage"). Amazement and idealization were added to disrespect and despite, so that an antagonistic atti-

482 J.N. Shklar (1986); very skeptical also Fabian (1983), criticizing the temporal distancing of other cultures, *e.g.,* at 151, and pleading for "coevalness", e.g., at 154; coevalness already exists whenever scholars engage in what may be called "native anthropology", e.g. Alfonso Ortiz (1969), Chie Nakane (1970/74); cf. also, in a more general context, Nelson Goodman, Of Mind and Other Matters, Cambridge & London 1984: Harvard Univ. Press; Jerome Bruner, Actual Minds and Possible Worlds, Cambridge, Mass. 1986: Harvard Univ. Press; Franz & Keebet von Benda-Beckmann (2007), 192, whose criticism of W. Fikentscher's (1980) "evolutionary" categorizations at 199 misses the point because the criticized text does not speak of societies, cultures or evolutions, but of the modes of thought. An introduction to the problem: W. Schmied-Kowarzik 1981 (in Wolfdietrich Schmied-Kowarzik & Justin Stagl, Grundfragen der Ethnologie, Berlin: Reimer 1981, (2. Aufl. 1993).

483 Rouland (1988), 132 discusses Gluckman's dilemma.

484 See Ch. 9 III 1a, *infra*.

485 In: Die Niederlage des Denkens, Reinbek 1989 (franz. Orig.: La défaite de la pensée, 1987).

486 On a general scale, "post-modernist" minimalism tends to deny legitimacy to comparisons of one's own thinking with that of another, and consequently presses for "doing justice" to the insular, independent unit in language and law, see Derrida 1983; De Man 1986; Hempfer 1992; Odo Marquard (with regard to hermeneutics); see also Ch. 11, *infra*.

tude developed spanning looking down on underhumans and looking up to the unspoiled, aboriginal, simple, pious, strong and healthy "wilds".

In a word, the other cultures got exotic: Spanish scholasticists praised the morals of the indigenes of the New World, Mozart composed "alla turca", In his "Western-Eastern Divan", Goethe delved into Asian wisdom. For Claude Débussy listening to Javanese Gamelan music became a revelation that shaped – through his subsequent compositions – much of post-classical music. Even Hans Küng's "world ethics" and similar attempts are not free from the admiration of exotic otherness. Nietzsche philosophized about Zarathustra, Richard Strauss made the music to Nietzsche's philosophy, and Stanley Kubrick used Richard Strauss' music for his "2001: A Space Odyssee" movie that heightened science fiction (Mark Prendergast 2001). Ethnocentricity and exoticism are two sides of one coin, both taken from the cultural identity treasure chest. However, as we will see, a modern conception of cultural anthropology denies any merit to ethnocentrism, and to exoticism correspondingly. To the exoticists, MacClancy's collection "Exotic No More" (2002) may be an eye-opener. Other cultures are, for anyone, not only for Westerners, different from the own, neither better nor less valuable, unfit for idealizations as well as for contempt, rather necessary objects of study, deserving respect and tolerance also when criticized as inconsequential, to the degree they are, towards other cultures, respectful and tolerant themselves. The less way is given to ethnocentrist and exoticist inclinations, the better cross-cultural understanding works, and the less xenophobia is imminent.

II. "Vision of the Participants", Folkways, and Emic-Etic Analysis (Leyden School of Anthropology)

One of the first criticisms of ethnocentrism was introduced by Cornelius van Vollenhoven (1874–1933) (Het adatrecht vau Nederlandsch-Indie 1918/1933) and other writers collectively known as the Leyden School of Anthropology[487], which advocated that the *visie der participanten* (the vision of the participants) should control the approach (P. E. de Josselin de Jong 1956). The slogan goes: *"het oosterse oosters te zien"* (the Eastern must be looked at the Eastern way). However, a detailed theory on how this vision of the participants can be squared with the observer's own view still seems to be lacking.

Paul Bohannan developed the theory that the two views should be kept apart:[488] the view of the participants of the culture to be observed, which he called folk-terms, folk-concepts, folk-system; and the scientific view of the anthropologist.[489] To this method, Leopold Pospíšil remarked that there is a risk of ethnocentrism, in that the "scientific" view of the observer is nothing but the folk-way of the Western culture.[490] Accordingly, objective scientific standards which one culture could utilize for the study of another culture simply do not exist.[491]

Pospíšil's own position represents a pragmatic trial-and error approach:[492] neither is it correct to ethnocentrically analyze other cultures, nor is it completely impossible to understand *nothing* of another culture. A partial approach at least is possible, from both cultures' points of

487 A report: W. Fikentscher 1975 a, 98 ff., 326 ff.; see also G. C. J. J. van den Bergh 1986.

488 Obviously Bohannan had no knowledge of the Dutch concept of the vision of the participants.

489 Bohannan 1957: 4; id. 1969.

490 Pospíšil 1971: 15 ff.; 1978 c: 3 ff.; 1982: 38.

491 The further development of the Bohannan-Pospíšil debate is reported in Pospíšil 1978 c: 3 ff. It is still under way. The idea of an artifical scientific language for the comparison of the folk-ways was discussed, and dropped, Pospíšil 1978 c: 7. A recent statement in Bohannan and Glazer (1988), at xv.

492 Pospíšil 1971: 17 f.; 1982: 40.

view, and this approach must be effectuated by trying, modelling, and discarding concepts until they fit the needs of comparison and translation.[493]

The "missionary linguist"[494] Kenneth Pike coined these terms by analogy with the "emic" in "phonemic" and the "etic" in "phonetic".[495] Although Pike wanted to apply the emic-etic distinction in order to differentiate structural and nonstructural results of both verbal and non-verbal behavioral studies, the distinction was adopted to distinguish the inside (emic) and the outside (etic) views of a social science phenomenon, such as a culture. It soon was accepted that the outside (etic) view could also be "structured", if only a more general concept of "structure" than the one Pike had in mind was envisaged. The distinction stuck, probably even more effectively than Pike had ever anticipated. A recent account of the wide use of the emic-etic distinction for anthropological purposes was given in *Emics and Etics: The Insider/Outsider Debate,* edited by Thomas N. Headland, Kenneth Pike, and Marvin Harris.[496] M. Harris and E. A. Hoebel gave contours to the emic-etic differentiation.[497] Bohannan, on the other hand, tries to avoid the all-pervasive use of the emic-etic pair by distinguishing between his folk-terms and the emic-etic approach.[498] While the use and usefulness of the emic-etic distinction and of hermeneutics for general analytical purposes in the social sciences is still under debate,[499] another type of anthropological analysis, also inspired by the linguists' highly operationalized paradigmatic renderings of "cultural phenomena",[500] has been widely accepted: componential analysis.

III. Componential Analysis

Componential analysis is an analytic procedure first applied in anthropology by Ward Goodenough and Floyd Lounsbury (both 1956). Harris describes it "as an activity devoted to the formulation of the rules by which semantic domains are logico-empirically ordered".[501] Sturtevant (1964) calls it "The New Ethnography", others the "The Yale School of Ethnography". In order to understand the intentions of componential analysis, it is helpful to imagine the following hypothetical situation. A new island is discovered in the South Seas. An anthropologist arrives and sees living beings, similar to humans, communicating amongst themselves in what seems to be language, behaving in ways hitherto unknown, handling objects of unknown character and purpose, and living in an environment that at first sight contains plants and animals which no one has ever seen. The anthropologist has received a grant from a

493 Therefore Pospíšil's main work (new ed.1971, 1974, 1982, 1987) carries the subtitle: A Comparative Theory.
494 Marvin Harris (1968: 569).
495 Pike 1954: 8.
496 Headland et al. (1990).
497 Harris (1968/1987: 568ff.) Harris thinks that if it comes to ideas, the investigation is "emic" (1987: 568). For him ideas cannot be real. They have to be subjected to rational, "etic", study. But ideas can be actual, and often they are. Inside and outside cannot be made parallel to ideas and facts, nor to emic and etic. Hoebel (1972a: 542f.) also errs when he calls the emotional identification of his Zia friend with a plant (chamiso) "emic" and his own intellectual understanding of what the friend was saying "etic". Hoebel's point of view – while being "rational, scientific, mechanistic" – is just as "emic" as the emotions of his friend. The two examples demonstrate a deficiency of the emic-etic approach.
498 Bohannan and Glazer 1988 (Foreword).
499 For details of this debate, and the literature (Fabian, Kohl, Duerr, Blok, Heinrichs, Freilich, Hymes, Geertz, Masson, Stagl, Clifford, Marcus, and others), see W. Fikentscher (1995/2004), 120f.
500 Harris (1968: 568).
501 Harris (1968: 573). Some writers allege that componeutial analysis is less used today than 30 or 40 years ago (communication Sally E. Merry 2008). But to my knownledge nothing has been offered instead.

sponsoring organization to write a thesis on the law of inheritance among these islanders. How does he take up his work? It is clear what an ethnocentrist would do: try to learn the language, and then describe the laws according to his own system. However, being no ethnocentrist, our anthropologist knows that "etic" and "emic" make a difference. Now, componential analysis comes to his aid to find out the island's folk law of succession. Componential analysis claims to be able to do only this, but more it cannot do. In order to avoid confusion, etics, the outsider's view, and comparison, must be shelved for a while.

As has been pointed out (I., II., *supra*), a starting point of componential analysis is the differentiation between *ethnocentric concepts* and *folk concepts.* Componential analysis tries to solve the theoretical problem that there may be, at first sight, no way to meaningfully identify folk concepts as the subject of ethnographic investigation because the investigator may be blinded by his or her own ethnocentric biases. For example, an anthropologist from Yale does not know the many kinds of land which are important for the Kapauku, how many kinds of green are important for Amazona Indians, how many types of water are distinguished by the Dutch, how many scales are used in Indic music, etc.[502]

"Componential analysis" is a basically linguistic method separately adapted to ethnography by Floyd G. Lounsbury.[503] and Ward H. Goodenough.[504] Both their articles opened up a discussion in which J.-C. Gardin, S.M. Lamb, E.A. Hammel, R. Burling, A.K. Romney, Roy G. D'Andrade, L. Pospíšil, A.F.C. Wallace, H.C. Conklin, Ch.O. Frake, N. Bischof (1985: 54ff.), J.A. Bright, W. Bright, David M. Schneider, R.M. Keesing (1967), Geoghegan (1970) and others participated. Componential analysis proposes a five-step procedure which, condensed into a simplified pattern, may be formulated as follows, based on the writings of the above named authors:

(1) compilation of lexicographic raw data on particular objects *(denotata)* as found by the observer (= the semantic components of a matrix);
(2) assembling of the *denotata* of each single linguistic form as a semantic class of objects in the same manner that the participants establish these collections, still without systematic ordering (= named categories, redrafting folk classifications);
(3) discovery of the classificatory dimensions imposed upon the field by native linguistic usage, i.e., the "folk-generalization" if there are any (= evaluations leading to folk taxonomies);
(4) specification within the classifications under (3) of the distinctive features, defining each of the constituent semantic classes as a type in folk-terms, not in the observer's experience of particularization (= combination of contrastive components by distinctive features in folk terms); and
(5) ordering of the semantic units into the various hierarchical levels within the folk system, again leaving aside the observer's experience in distinguishing the various kinds of meaning

502 If a single item is to be researched, Pospíšil (1978c: 72ff.) thinks that Harold Conklin's (1962a, b) taxonomic approach (the "Linné-system" approach) is appropriate but that for a matrix, such as a kinship system, componential analysis is indispensable. If this method were correct, componential analysis would be preceded by taxonomic analysis in "single item" cases. However, it is doubtful whether "single item" situations are realistic. Rather, componential analysis must reveal whether something can be regarded as a single item.

503 In the article "A Semantic Analysis of the Pawnee Kinship Usage", (1956) Language vol. 32/I: 158–194; Lounsbury later preferred the term "rule analysis". The older term *componential analysis* will be used in the following text.

504 "Componential Analysis and the Study of Meaning" (1956) Language vol. 32/I: 195–210; also *id.,* 1970, 106–113; *id.,* Essays G.P. Murdock: 221–238, 222ff.; a critical view: *Dell H. Hymes* "Discussion of Burling's Paper [Cognition and Componential Analysis: God's Truth or Hocus – Pocus?]" 66/I American Anthropologist 116–119 (1964).

within the system (= statement of semantic relationships in the form of reasons given by the participants for the specifications under (4), again in folk terms: why and in which manner are the specifica distinguished by the participants?).

Upon closer observation, it appears that this five-step procedure can be separated into a linguistic phase 1. and 2. and a logical phase 3. to 5. Steps 1. and 2. can be solved by applying phonemic rules, 3.–5. reflect the logical ideas of genus proximus (3), differentia specifica (4), and giving reasons for this differentiation (5).

In the first step, it is interesting that the ethnographer must first register the sounds of the language he wants to understand. This is what is meant by the "compilation of the *denotata*".

The second step is to find out to which objects do the registered sounds apply, which results in an unordered quantity of named things. Then the three following steps remain, intended to find an inner order and arrangement for the named things. This amounts to a three-step concept discovery in folk terms that is accessible from the "outside" while discarding the linguistic "ballast".

Thus, the third step is the identification, in folk-terms, of a possible *genus proximus* (for the examples given above: land; color of environment; water; musical scale; another example would be "whether" as genus proximus for rain, sunshine, snow and hail, etc.). Without mentioning componential analysis, Barnett and Silverman (1979, at 7) offer a good example of its application: "If, for example, by asking questions about kinship we learn that in another culture much of what appears as kinship to us, has to do with the relations between people and land, kinship disappears as a relevant analytical category, and is replaced by 'the relations between people and land'."

In the fourth step comes the identification in the folk-terms of the *differentia specifica,* driven by the question: what are, in folk-terminology, the various objects within the genus proximus that make up the genus? In Barnett and Silverman's example, these *denoted* objects might be different forms of land tenure based upon kinship relations.

The fifth step concerns the discovery, in folk-terms, of why and how the subparts of the genus are distinguished from each other.

If in taking the third step no *genus proximus* (or no genus at all) can be detected, it is to be presumed that none exists. Thus, componential analysis of an English-speaking society would on step 1. register the emic sounds of "brother" and "sister", and on step 2. identify brother and sister as male and female descent in relation to someone born from the same parents. However, on the third step, the analyst would discover that no genus for brother and sister is available, since the word "sibling" also denotates other relatives (*cf.* Webster: siblings). Componential analysis of a German-speaking society would, by contrast, tell the researcher on step 1. that there are three "emic" sounds: "brother", "sister", and (in German) *"Geschwister";* and on step 2. that the sound "brother" fits the designatum "male descent in relation to someone born from the same parents", the sound "sister" means "female descent in relation to someone born from the same parents, and the sound *"Geschwister"* means brothers, sisters, or brother(s) and sister(s) born from the same parents. Next, on step 3. componential analysis would for a German-speaking society reveal that the designatum "*Geschwister*" is the *genus proximus* for the denotata "brother(s) and brother(s), sister(s) and sister(s), or brother(s) and sister(s)". Step 4. would involve the question of how the Germans (but not the English) understand the meaning of the words *brother* and *sister* as concepts *within* the term *"Geschwister",* and whether there are third or fourth *differentia specifica.* Step 5. would be devoted to the way Germans (not the English) distinguish the concepts of brother and sister (by gender), and arrange those concepts to form the next higher conceivable unit of *Geschwister.*

Step 3., 4. and 5. involve conceptual operations relative to and constitutive of each other, and could be listed, more aptly, as steps 3a, 3b, and 3c.

A critical assessment may raise a possible objection to componential analysis. Steps 3., 4., and 5. use logical concepts: genus proximus, differentia specifica, and reasons for their specificity. Is there a culturally universal logic fit for steps 3., 4. and 5.? These steps use Greek logic: specifically, the logic of conceptual hierarchies. Greek logic is rooted in one mode of thought, the Western (Ch. 9). Other modes of thought may generalize in different manners. Therefore, componential analysis is mode-of-thought dependent. The investigator must be a Westerner or a user of Western (Greek) logic. If a Pueblo or Yoruba sets out to describe a German, English, or Kapauku speaking society in his own mode of thought, he or she might not be able to use step 3. to 5. of componential analysis. In other words, componential analysis is in part formulated in terms of classical logic *(genus proximus, differentia specifica),* and thus has no meta-theoretical properties. The question remains whether it is permissible to research a non-Western culture using a Western (classical Greek) research method. Does what is said here also apply to a Hindu, Buddhist, or Muslim? This problem of general hermeneutics cannot be discussed without the theory of the modes of thought (the program is developed in Fikentscher 1978 b) and the definite answer to the problem lies in the "uneasy insight".[505] However, a pragmatic answer will be given soon (IV 2 *infra*).

IV. Correlational Analysis

1. General Description

Still, for anyone who accepts Greek logic, componential analysis is a useful tool for the analysis of factual matrices such as kinship systems, alliances, professions, trade systems, etc. However, when it comes to the setting of values through institutions as law, morals, belief systems, and economic or social policies, a new problem arises: whereas componential analysis enables the observer to study the cognitive framework of the society with which he is dealing regarding facts, it does not explain *normative* thinking in the *folk-way.* Pospíšil therefore went on to develop from componential analysis what he calls correlational analysis.[506] The main idea of Pospíšil's approach is that for *componential* analysis only *one* matrix is needed (see the five-step procedure above), but that for *normative* purposes "correlative" normative concepts are to be identified and separately regarded, so that three matrices must be used: the first for the *subject* to whom the right, the title to land, etc. is to be given; the second for the *object* to which the right, the title, etc. extends (for example, the piece of the hunted animal which is shared with an elderly member of the tribe; the object can also be a person): and the third for the identification of the legal relationship *between* subject and object. In this way, normative thinking in the study of culture can be evaluated for consistency within the demands of the *visie der participanten,* the use of folk-concepts (see II., above).

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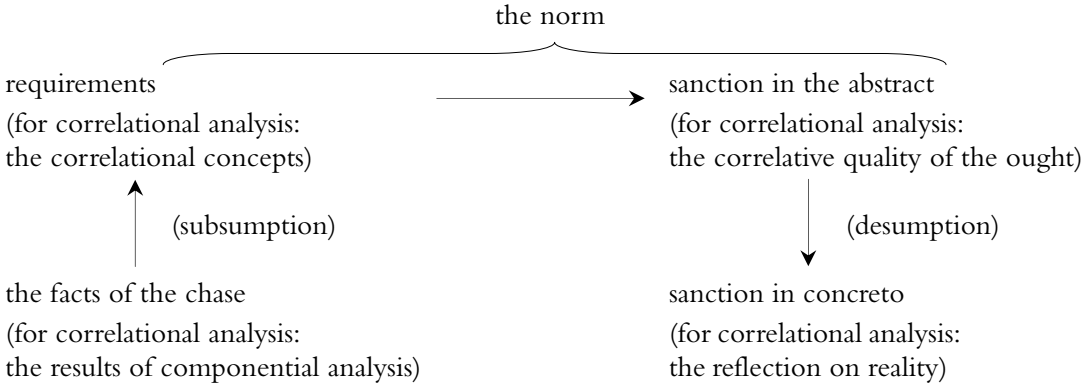
505 W. Fikentscher 1979a: 105f.; 1980b: 593; 1987b: 29f.; see also Ch. 1 V, end of first paragraph, above, and Ch. 6 IV. 3., below.

506 L. Pospíšil, A Formal Analysis of Substantive Law: Kapauku Papuan Laws of Land Tenure, in: E. A. Hammel (ed.), Formal Semantic Analysis (1965) American Anthropologist, vol. 67/5, part 2, 186–214; *id.,* A Formal Analysis of Substantive Law: Kapauku Laws of Inheritance, in: Laura Nader (ed.), The Ethnography of Law (1965) American Anthropologist, vol. 67/7, part 2, 166–185; last revision in: Pospíšil 1982a: 346–424. – A recent restatement of the fact-value contrast: Richard Miller 1987. A criticism of value-free, flat anthropology: Pirsig 1991: 58ff. (I owe the term "flat anthropology" in this context to David Alexander, Santa Fe).

Correlational analysis correctly assumes that normative applications of componential analysis require more than one "run" through the five-step process because normativity opposes the categories of "is" and "ought". Normativity works with rules (legal, moral, religious) that must be implemented by confronting them with sets of fact. Thus, the application of a rule to a set of facts, in every system of law (or morals or religion),[507] can be symbolized by the following graph:



norm and subsumption

2. Examples

The set of facts in a given culture can be analyzed by componential analysis: for example, let us examine a verbal ("handshake") agreement under the law of contracts of San Juan Pueblo, New Mexico. To analyze San Juan Pueblo contract law, componential analysis is not enough. In addition, one must ascertain the applicable norm. The norm says: verbal agreements are valid without consideration.[508] To express this in a reasoned way, the requirements of this norm (offer, acceptance, contents, no consideration) must be stated in terms of a second "run" through the componential analysis because the manner in which San Juan legal culture correlates facts and requirements may be different (and is indeed different) from Anglo-American norm implementation. The Paiwan, one of the ten surviving aborigial tribes on Taiwan (Republic of China), follow this rule of acquisition of crops: if a mango tree has been planted and taken care of by somebody the fruit that falls from the tree belongs to the owner of the tree even if it falls upon the neighbor's piece of land. If the tree was, however, a *nagiduzuvuagashju,* a wild growing tree, everyone may pick up the fallen mango fruits regardless where they fall. For the purpose of deciding this issue of crop acquisition, *nagiduzuvuagashju* is a correlative concept.

The mode in which a culture correlates requirements and sanction *in abstracto* may be culture-specific, too. Therefore, a third "run" of componential analysis, this time for the abstract sanctions, is necessary. In particular, the kind of "ought" may be culture-specific. Thus, in Chinese tradition, "must" and "should" are much closer related concepts than in Western usage (if not identical).

In Chinese, "must" *and* "ought" is *ingae*. Similarly, when a Paiwan finds a precious object in the open, such as a piece of slate, he or she may acquire property of it by putting a twig on

507 W. Fikentscher 1976: 774ff.
508 Cooter & Fikentscher (1998), 548.

the road that points to the object. It need not be taken home right away. I asked what would happen if somebody disregards this rule and takes the piece. The answer was that this would not happen "because it is a matter of trust". A breach of the law in this situation is simply not envisaged. These qualifications of the "ought" have to be taken into consideration in correlational analysis by the third "run" of componential analysis that connects the correlational concepts and the correlative quality of the ought.

There are cultural differences in the understanding of a legal "must". When pedestrians lights show red, a German would not cross the street even late at night when there is no traffic and nobody watches, because he is educated to the understand that the law that provides "don't cross at red" has been decided in a parliament or council which is part of the Frankish democracy: the political unit is made up of "us citizens", and the citizens have rights and duties among each other, as well as between them and the elected "king" (or organ) of the unit, so that the citizen stands in a recipocal relationship to the organ: "I owe you, and you owe me". In US, a no-parking sign does not necessarily represent a strict interdiction to park, but an admonition not to park here to avoid getting a ticket, because the Normannic version of Frankish democracy knows rights and duties among the citizens, but in the relationship between the citizens and the organ – in spite of existing duties of the citizens owed to the unit – in general no duties of the unit to the citizens: "the king can do no wrong".[509] Thus, there is no reciprocal feeling to be able to wrong the other side. This leads to a lesser strictness of obedience on the side of the unilaterally bound partner. Therefore, quite logically, in front of the United Nations Building in New York City, additional traffic signs say, next to the usual no-parking signs: "Don't even think about parking here".[510] Correlational analysis will mark a differentiation in the qualification of a "must".

An other example is recent Japanese adjudication. A general feeling in the theory and practice of Japanese law is that the two Westernizations of Japanese law (1868 ff. – Meiji Revolution, and 1945 ff. – US occupation) should no longer stand in the way of a search for a genuine Japanese mode of adjudication. A typical Japanese way of deciding a civil case is not to feel slavishly bound to what the parties claim and deny. The judge should be able to propose to the parties a decision that intends helping both sides to find a viable solution to what they want to have but cannot get. Therefore, this adjudicatory proposition can be situated outside of the parties' motions. In German law, in principle it would not be permissible to let the decision remain outside of the *Streitgegenstand,* or to go beyond the contested subject matter. This new or not so new Japanese method is called *otoshi dokoro.* In Japanese characters: (see next page). Its literal meaning is that the decision may be *dropped from above* to fall down on the case. In term of correlational analysis, *otoshi dokoro* is a culture-specific manner of connecting the requirements of a legal rule with the abstract sanction an outside-of-the-*Streitgegenstand* connection. This connection means that *otoshi dokoro* moves away from the Continental European and common law rule *ne eat iudex ultra petitum partium* (the judge shall not go beyond the claims and motions of the parties.[511]

The foregoing is nothing yet but a restatement of Pospíšil's reasoning of correlational analysis presented in slightly different words. The entitled *subject* makes up part of the requirements, and the *object* of the right adds the sanction to the requirements: the piece of meat "must" be shared with the elderly member; a Paiwan "must" obey the rules of property acquisition, etc.

509 More on kinds of democracy in Chapter 9.

510 I thank Kai Fikentscher for sharing these observations with me.

511 I wish to thank Kiminori Eguchi for drawing my attention to *otoshi dokoro* and writing it in Japanese letters:
落としどころ
On *otoshi dokoro* as an element of procedure see also Chapter 13 I. (near the end).

However, Pospíšil's third matrix, the legal relationship *between* the parties can be either the application of the requirements to the set of facts of the case in question or the transformation of the abstract sanction into concrete sanctions. Thus, Pospíšil's correlational analysis is one "run" short of what correlational analysis requires when it comes to applied norms, because the correlation of the norm and the reality consists of three phases: subsumption, inference of the sanction in abstracto, and concretization. All three underlie culture-specific thought. Therefore, for an application of San Juan contract law, *four* "runs" of componential analysis are necessary: for the facts of the case; for the San Juan verbal contract as part of San Juan's legal system; abstract sanction; and for the concrete sanction in the particular cases.

An example for the culture-specific nature of the sanction *in concreto,* that is, the application of a rule's sanction to the realities of life, is the following Rukai case (the Rukai are another tribe of Taiwanese aborigines): A drunken driver killed a person. Unlike under Western and most other laws which would hold the drunken driver liable in one way or the other, under Rukai law the family of the drunken driver offered an excuse and damages repaid to the victim's family. The victim's family accepted the excuse and did not pursue further compensation. Still, it was not the actor but his family which was sanctioned.

These examples show that correlational analysis consists of a quadruplication of componential analysis. With the help of correlational analysis, scientific anthropological statements can be made in normative contexts. Impressive as they appear, componential and correlational analysis have been criticized for their dependence upon linguistic methods in a general cultural context, because problems in conceptual understanding sometimes go beyond linguistic problems. The encoding of meaning may vary among people from different cultures.[512] Hopefully, this objection may at least be partially overcome by dividing the procedure into two first steps (1 and 2) of definitely linguistic character, and 3 more steps formulated with reference to language but also to concepts of traditional logic. The first two steps are of necessity merely linguistic because the observer who encounters an unknown society is confronted with the sounds of a language he does not yet understand. But the three subsequent steps involve understanding of the folk context of the words attached to the objects, which requires that logic serve the larger function of solving the semantic problem.

Correlational analysis shares with componential analysis the objection that steps 3. to 5. are taken from the inventory of Greek philosophy and its peculiar way of defining a phenomenon. This disadvantage must be taken into account, although in correlational analysis the problem quadruples in scope. It does not help to say that componential and correlational analysis are "analytical tools" as opposed to folk conceptualizations, because what we call analytical might be a Western folk conceptualization for the participant of another culture. However, a pragmatic, *thought-modal* approach promises a way to solve the dilemma:

3. "The uneasy insight" revisited

The methods of componential and correlational analysis are presented here as the currently most developed methods for conceptualizing and understanding a foreign culture. A caveat was made as to the use of "Greek" logic on steps 3. to 5. of componential and correlational analysis because it seems improper to categorize a foreign culture by logical means that have been exclusively produced by a single culture, in this case the Greek Tragic one. But all cultures do engage in producing some relations between their concepts; therefore it is possible, now that the modes of thought have been introduced, to adjust the componential and correlational analyses by adding the aspect of the modes of thought, resulting in what may be

512 Burling, in Tyler 1969, 419; see also the controversy between Goldberg 1966 and Pospíšil 1966.

called "the mode-of-thought adjusted componential analysis". The mode of thought of a given culture comes into play only in steps 3. to 5.: that is, when consistent relationships between concepts are to be identified. Thus, in addition to performing the five steps of componential analysis, it is neccessary to consider in a reductive manner whether and to what degree the participants of the culture under observation are able and willing, in view of their cultural traditions, to establish the logical relationship prescribed for performing of steps 3. to 5. Only when this is done, can any purely Greek-Western logical and systematical thinking be avoided in the application of componential or correlational analysis. This *thought-modal adjustment of the generalization process* within componential or correlational analysis may, for example, result in "illogical", loosely structured relations between the concepts to be ordered, so that a white horse is not a horse. It may on the other hand lead to much broader generalizations than would be permissible under the standards of Western logic when, for instance, under the influence of mystical conceptions of causality (e.g., bad government causes earthquakes) sweeping generalizations must be made in order to do justice to that particular culture. A classical example of such "illogical" over-generalizations is the Aristotelian concept of *quality,* which is unempirical in its broadness, and therefore "un-Greek". This puzzling discovery of the "un-Greek Aristotle", was the starting point for T.S. Kuhn's theory of paradigm changes in natural science (see Kuhn 1962; Pirsig 1991).

V. Synepeia analysis. The metatheory

A mode of thought may be an important concept for cultural anthropology, enabling the researcher to assess and explain how people think and behave, and why they do so differently in different cultures. Modes of thought research is certainly not a divinatory panacea in order to discover human mental data without any limitation or qualification. If this were the case, this kind of anthropological research could become a dangerous instrument in the hands of those whose inhuman ideologies call for brain-washing methods in order to produce a "correct consciousness" in their political "followers". A mode of thought is, first of all, a research object of cultural anthropology, and it should be regarded as an influential factor for sociocultural themes. It should be the respected property of its cultural participant to the same extent as other cultural properties. Intriguingly, modes of thought do lend themselves to comparison, and, by way of this comparison, to practical prospects for applied anthropology.

The theory of thought-modal analysis is called "synepeia analysis" or "synepeics".[513] Synepeia means consequence, and synepeics call for consequential reasoning in any given mode of thought. To illustrate, it is un-synepeical for a Marxist to claim human rights as rights directed against the state; for a rule-of-law democrat to call for an economy of use values, because they are exempt from dialogue; for a Muslim to get organized in the true (Greek) sense of organization as a system of reliance and responsibilities between the members of an assembly, and between the assembly and its appointed "organs", because the *ummah* is not structured; for a Buddhist to be socialist; for an American Indian child to play "show and tell", because showing off is bad manners; for a Guaraní child to play "musical chairs" because fellows should be offered seating facilities; etc. Since a comparison of cultures and their undelying modes of thought is possi-

513 This has been extensively discussed in earlier publications so that a summary, although enlarged here in one important aspect (strategy), may suffice (Fikentscher 1975a, 1977a, b; 1979a; 1979b; 1980a; 1983a: 102ff.; 124ff.). The word and its use were proposed in Fikentscher 1977b, 30–32; see also Fikentscher 1979b, 15 note 10. Philological tradition would require a consonant before – ics (*cf.,* esoterics, ethics, platonics, etc.). But modern neologistic usage permits to drop this postulate (*cf.* photovoltaics, pythagoreics, galileics, parmenideics, etc.). A similar approach to look for culture's consequences: Hofstede 1980.

ble through analysis, synepeia analysis leads to a meta-reasoning and provide for concepts on a meta-level (such as space, time, causality, risk, personhood, and human dignity).[514] As already indicated at the beginning of this chapter, synepeics require consequential thinking in three respects:

Somebody who renders a judgment (= makes a proposition in the sense of Ch. 3 I 3) should know in which mode of thought he does so. A participant of the Western culture with its Greek/Judaic/Christian roots who says: "I claim my human right" means something totally different from a Buddhist who speaks the same words, and both meanings differ from what a Marxist implies with these words. Thus, it is necessary to take into account the mode of thought used in making judgments. If a Native American says: "One has to account for pain and suffering", his meaning is the opposite from what an Anglo-American lawyer intends to say with the same words: Indian tort law leaves the damages for pain and suffering with the injured party, while Anglo-American tort law makes the injurer pay. The mode of thought about risk is different. One should heed thought-modal limits when saying something within a given mode of thought. Muslims who say: "Let's start an organization" overlook that getting organized – in the Greek sense of the word – is un-Islamic (communication Ayyub Axel Köhler 1994; the intricate topic of the use of non-Islamic organizational instruments by Muslims cannot be further discussed here; see Ch. 5 V. 6., above).

It will be shown that synepeics consist of at least three levels of thinking: the theoretical (as opposed to metatheoretical) level (I.), the level of dual perception where one "discovers the other" (II.), and the metatheoretical level of comparison with its metaconcepts (III.). Synepeics require the thinker to stay consequentially on a chosen level, and to be aware of the changing of levels if the latter is desired. When a Buddhist monk in a debate with Western friends says: "Hinayana Buddhism is the ideal environment for the development of human rights",[515] this can have two very different, even opposite, meanings. On the level of synepeics I where theoretical statements within a given mode of thought are made, it means: "Getting detached from other persons and things of this world, as recommended by the Buddha, creates a state of non-interference and non-caring that conforms with the true meaning of human rights as we Hinayana Buddhists see them." If said on the meta-level of comparison (synepeics III), it means: "If a foreigner comes to our country, he or she will be delighted to see how every possible interpretation of what 'human rights' can mean is acceptable for us, and our tolerance will provide for fruitful discussions." Spoken on levels I or III of synepeics, the same words imply either near-intolerance, or tolerance.

Following the explication of consequential thinking with regard to the modes of thought and their comparison, the three levels of synepeical analysis (I–III) as discussed below, and a fourth level – synepeics IV – will be added to cover the policy side of synepeia analysis.

1. Consequential thinking within a given culture ("Synepeics I")

It has been said that a mode of thought is defined as a predominantly covert, ideational mindset in cultural anthropology, having impact upon various cultural themes. Thus, there are different mental reactions to identical or similar perceived data in different cultures. This statement can be challenged as an impermissible segmentation of mankind into ways of thinking. However, permissibility is not the point here. It may very well be that there should be no

514 Cultural universals may serve as such metaconcepts and metavalues, W. Fikentscher, Intellectual Property and Competition – Human Economic Universals or Cultural Specificities? – A Farewell to Neoclassics, International Review of Industrial Property and Copyright (IIC) 2/2007, 137–165.

515 Some years ago I participated in a conference where this remark was made by a Hinayana-Buddhist religious leader.

different mental reactions to identical data input. Then, there would exist just one mode of thought as a universal. Maybe, children up to a certain age, 4 or 5 years old, live under a universal mode of thought. The fact is that, at least for persons over this age, there are different mental reactions. Eibl-Eibesfeldt's studies of childrens' behavior (1984a: 537ff.) are indicative of a universal childrens' mode of thought, at least in some essential behavioral aspects.

An example is the compensation of losses suffered by the *negotiorum gestor,* the volunteering helper. A makes a vacation trip and takes his dog along. The dog runs home and is fed by person B, the kind neighbor, until A returns (case No. 31). Under continental laws, the volunteer can claim restitution (*cf.,* §§ 681, 670 German Civil Code). The "Puritan" attitude of the common law, on the other hand, arises from the principle that helping your neighbor is a Christian duty. This does not entitle the helper to restitution when he or she, in fulfillment of his or her selfimposed duty, is struck by a calamity or otherwise incurs expenditures. It is a different mode of thought (concerning the partition of risks) which bars restitution for suffered losses in such cases; *Noble v. Williams,* 150 Ky. 439, 150 S.W. 107 (1912).

For the Kapauku, all that happens takes place because of the will of God. This means that man does not have free will (in the Western sense), and thus cannot sin (Pospíšil, 1986b, 23). Thus, there is no reward or judgment after death. Obviously, such a mode of thought must lead to attitudes different from those under a mode of thought which conceives of personal guilt, such as the Tragic Mind and the mainstream Judaic/Christian mode of thought. Therefore, synepeics start with the realization that propositions (Ch. 3 I) should be made and consequences be drawn from within a specific culture against the background of a specific mode of thought. This bottomline is named synepeics I. Synepeics I are concerned with the "folk-concepts". For an Arunta man it is consequential that after going through the witchcraft procedure of "bone-pointing", the magically attacked person dies. "Western minds" would deem this illogical. For a Marxist, it is correct reasoning within Marxism as a folk concept that a dissident is out of his mind and may be subjected to psychiatric treatment (Marxism defined on the basis of the use-value theory, W. Fikentscher 1976, 497ff.; and Ch. 11, *infra*). For a dialogue-oriented mode of thought (Tragic Mind; Judaic/Christian) the opposition of a dissident is part of everyday political life, and the Marxist treatment applied to him pseudo-psychiatric. John Rawls' theory of justice as fairness (1971) is applicable only to a Western (Greek/Judaic/Christian) mode of thought, and cannot adequately explain non-Western ideas of justice (W. Fikentscher 1977a, 643f.) Rawls does not see this problem. "Right" (or "fair") and "wrong" are therefore – at this first stage of synepeical reasoning – not absolute criteria, but propositions related to, and deriving their meaning from, a specific mode of thought. Evaluative thinking, positive and negative, is for the most part ideationally and covertly culture-related.

This culture-relatedness concerns even the three questions: (1) whether a specific mode of thought knows the concept of "consequence" at all, (2) what in a specific mode of thought is consequential, and (3) what must the premise be in relation to which a conclusion is consequential. All these questions of consequentiality are think-way-definite, or, in the terminology of this book, mode-of-thought defined. It follows that a mode of thought is therefore competent to define its own concepts of time, causality, risk, aleatoric elements, coincidence, accident, history, subject-object relationship, etc.

Thus one cannot criticize results of mode-of-thought defined reasoning as wrong or objectionable when the argument is drawn from another mode of thought. This would be not consequently "synepeical", and would amount to an offense against the rules of "synepeics I". So a Muslim, whose convictions are founded on a notion of a certain unity of religious and (derivate) political concepts, should not criticize the principle of separation of state and church, drawn from the dialogical nature of the mainstream Greek/Judaic/Christian belief in the sepa-

rability of *oikos* and *polis,* of *res privata* and *res publica,* and in having subjective private and public rights (W. Fikentscher 1993a). While the Muslim may of course take issue with that principle, he should realize that it cannot be duly criticized from the Muslim point of view because the Muslim and the Western modes of thought are in this regard different. However, the Muslim's criticism could be based upon a method which transcends specific modes of thought. This mode-of-thought transcending criticism, or cross-cultural comparison, follows other rules, which will be discussed later.

A problem, discussed elsewhere, which must be left aside here, is that of the "synepeical unit": A specific mode of thought is not composed of a "disjointed conglomeration of shreds and pieces" to use a phrase contained in an anthropological text (Pospíšil 1986a, 38); rather, it is a consistently structured whole, evidencing "synepeical consistency" (Fikentscher 1979, 21; 1980, 565; 1995/2004, 134f.). By implication a culture which does not know, for example, perspective in its works of art is not likely to use systematic reasoning in its scientific literature; this is becauce both art and science require a certain cognitive attitude, and the three-pointed structure of perspective art finds its parallel in the three-pointed structure of systematic reasoning (*cf.* W. Fikentscher 1977a, 65, 105f.). Or, a culture that does not know the dichotomy "black-white" will lack the dichotomy "good-bad". Pospíšil reports that the Kapauku say "a little more black", "a little more white", and that killing a man is good for his enemies and bad for his family (personal communication). Hence, a "synepeical unit" implies thought-modal consistency.

From an anthropological point of view, the concept of the *configuration* justifies such study, because modes of thought are part of a culture, and culture is not a mere conglomeration of shreds and pieces but tends to form configurational units. Any further explication of the concept of synepeical units cannot be included in this text due to the limits of space. A thorough study of integrative attempts throughout the history of anthropology would be indispensable for such an explanation, starting from the "psychic unit" theory, and not ending with the "configuration" concept (Ruth Benedict 1934).

Looking back at the debate between the ethnocentrists and those favoring the "vision of the participants" approach, the need to understand a mode of thought synepeically appears to be very similar to judging a culture "emically": from the inside. Both analytical approaches are indeed derived from the desire to do justice to the other's life and world. Thus synepeical analysis strongly suggests that the folk-way approach is correct. Moreover, for researching a factual matrix such as a kinship system or succession rules, the folk-concept ("emic") approach also seems adequate. But many features of different cultures are the same, or similar, because *behind* these cultures lies the same mode of thought (e.g. in South and East Asia, or with regard to Plains Indians, or Pueblos; see Chapter 3 I. 3., above)). Therefore, for researching cultural themes such as space and time perception, the ethics of risk handling, or the conceptuality of units and attributes, justice is done to a foreign culture whenever its modes of thought about these themes are correctly analyzed. One need not go into Kachin culture to understand the meaning of Hinayana Buddhist detachment. Many of the "more evaluative" cultural themes are accessible through the modes of thought and *their* analysis. This introduction of synepeical analysis of the modes of thought makes a major contribution to the vision of the participants/folk-ways/emic-etic/insider-outsider debate in that it defuses much of the heat of their debate. Synepeical analysis sharpens the focus of analysis by reaching out, whenever appropriate, beyond the cultures.

This is the second contribution of synepeical analysis to the folk-way dilemma. The first was the hint that the folk-way approach is basically correct. There will be a third contribution of synepeical analysis to "emic-etic" as an analytical tool to compare cultures: Synepeics III,

which links emic and etic in a more satisfactory way than trial-and-error. The way to synepeics III presupposes synepeics II: dual thinking. This is the point where componential and correlational analysis, both concerned with folk-ways only, are left behind, and comparison of cultures becomes possible. "Yale ethnography" is being extended.

2. "Discovering the Other" as the beginning of dual thinking ("Synepeics II")

Synepeics II consists of discovering the other. Consequential reasoning *within* a specific mode of thought has been called "synepeics I". But there is a point where one culture discovers another, when carriers of one mode of thought discover that there is more than one think-way. Thought-modal conclusions (synepeics I) do not preclude thought-modal transcending argumentation. This step is different, however, because the relation to this "other" is that of the linguistic dual: "You and I, but not we two." There is no plural yet, no group that could say "we". "We" is a later discovery. The dual relation is bi-, not multilateral. This next step will be called "synepeics II". Also within this step, consequential (in Greek: = synepeical) reasoning has to be used in order to stay consistent, notwithstanding all the scruples raised by the "uneasy in sight" discussed before.

It is not difficult to see that the discovery of an other moves the argumentation to a new level (Fikentscher 1983a, 104). It is not only useless but impermissible to treat the other, once discovered, as if it were oneself (and the same is valid for the other). The problem of neighborhood pops up, and with it problems of war and peace, and of relating in general. There is no thought of comparison yet, or of translating. Tribal members were shocked or suspicious when somebody came who could speak Keresan *and* Tewa (Bandelier 374; see also note 1089, below). The other is discovered long before the concept of another group is completely grasped and the other's values are ascertained. *Now* it becomes an issue that it is not advisable to butcher the holy cows of others (*cf.,* Fikentscher 1975a, 323 note 413), nor is it of any avail to punish others for not beatifying their cows. Synepeics II is no more than a cross-cultural or, more specifically, a cross-thought-modal discovery procedure. In this it is a naive approach, and, if charged with negative undertones, a naive protest and an unreflected rejection directed towards the value-system and way of reasoning of another mode-of-thought. Synepeics II demonstrate the need for metatheory to serve as the base for a metatheoretically reasoned comparison which is no longer naive. The second stage of synepeics has not yet reached the level of metatheory. A metatheory for comparison and criticism of the modes of thought requires an arsenal of common denominators (= synepeics III; see 3., *infra*).

In the philosophy of natural sciences, Thomas S. Kuhn (1922–1996) observed that "scientific revolutions", identifiable as such by the introduction of a new "paradigm", lead to distinguishable scientific modes of thought (he does not use this term; Kuhn 1962, 2000). Some literary reactions have focused upon Kuhn's seemingly utter relativism, which questioned the scientific and rational striving for truth by replacing that quest with interchangeable paradigms: Kuhn said that Ptolemaios is not *wrong* and Kepler *right,* but that both offered theories corresponding to the needs and mental abilities of their time. Later, Kuhn abjured such "relativism", however without giving up his basic tenet (2000). Kuhn's observation is correct: synepeical thinking is also applicable to natural sciences as a matter of course (*cf.,* Fikentscher 1977b, 29ff.). Kuhn (1952) describes nothing more than the confrontation of different modes of thought in natural science on the level of synepeics II. Kuhn's failure to search for common denominators ("synepeics III") results in the reprimand of relativism and irrationality. A conscious rejection of a common denominator is the Chinese philosophical adage: "a white horse is no horse". Here follows more illustrations of mode-of-thought related reasoning on the second level of "discovering the other".

(1) The first example is given by the development aid policy under the "New International Economic Order" program of the United Nations after 1974 that encouraged direct investments. It was a thought-modal mistake to assume that the rules of credit and loan applicable under "Western", in particular U.S.-American, concepts of trust and reliance should also apply to the (much more short-termed) *bona-fides* relations in many developing countries. Too little attention was paid to thought-modal factors of other cultures in the handing out of loans. This does not imply that no credits should have been given. Quite on the contrary, they should have been given, maybe even more generously, but with regard to the conditions of the modes of thought prevalent in the recipient countries: for instance, on a short-term and a "trickle-down"-ensuring basis. The present debt crisis is to a large extent a result of the neglect of differences in modes of thought. Such neglect may have practical results and can be expensive (*cf.,* the warnings in Fikentscher *et al.* 1980c: 29ff.).

(2) Governments inventing the truths according to which they want their citizen to live are inclined to distort or cover up news on disasters (some examples in Fikentscher 1979c, 110ff.). But as soon as the nuclear fallout of the Chernobyl disaster reached Western states with their dialogue-oriented information systems, the Soviet information policy underwent a change, interestingly enough not only with regard to the outside, but also from within the socialist camp. This is an example for what happens to mode-of-thought-defined values when confronted with value systems of other modes of thought.

(3) A third example of synepeics II is (in-)tolerance. Arthur Kaufmann writes (1984 b): "There is a powerful institution which confesses, up to this day, in sympathetic sincerety that it is not tolerant: The Catholic Church … This standpoint is consequential if one believes to possess the one and undivided truth which to teach mankind one feels to be called." Kaufmann quotes Max Pribilla, S.J.: "Never the Catholic church will consent to assigning equal weight to truth and error or leave undecided the question of Lessing's Nathan the Wise which of the rings is the genuine one; this is the standpoint of dogmatic intolerance which has so often been reproached to the Catholic Church; but only the expression sounds hard … in reality it just brings to light what is self-evident for every church that takes itself seriously …; therefore it is a fact to which one has to agree that every church has to be dogmatically intolerant" (case No. 39). Arthur Kaufmann disagrees. In the language of this book, Pribilla argues on the level of synepeics I, Kaufmann on that of synepeics II. This means that, when speaking of modes of thought or religions, intolerance presupposes that one has made up his mind to confine oneself to synepeics I. Many followers of religions do this.

(4) A fourth example is "explaining". What does it mean to "explain something"? Explanations are on the whole a way of thought-modally confined reasoning. Modes of thought vary as to their categories. Categories cannot be explained; they can be only pointed out (Stephen C. Pepper 1942: 237). Starting from categorial premises, explanations are possible. Cultures and their underlying modes of thought therefore differ in their relative distribution of categorial and explainable concepts. What may be explainable in one culture may not be explainable in another. Thomas S. Kuhn (1962/81) describes how, as a student of physics, he was utterly dissatisfied with Aristotle's "unscientific" explanations of mechanical movement, of the empty space etc., until he discovered that Aristotle did not start from pure mechanical movement but from a concept of change of quality of which movement is only one aspect, and that "being situated" is another quality which excludes the idea of an empty space. So Kuhn found "that the mistake was mine and not Aristotle's" (1962, at 10). Associative, speculative, topical, mystical and other ways of explaining something compete with Western rationale, and nobody can claim that his way of explanation is "correct" or "best".

(5) Synepeics II does not structure cultures or their underlying modes of thought; they just list both of them. Synepeics II also does not require that one mode of thought should respect the other. To a Muslim, synepeics II teach that beyond *dar'al Islam,* the pacified area of Islam, there is a *dar'al harb,* an unpacified area of chaos outside. To Hugo Grotius, synepeics II teach that outside the rule of Christianity as the true religion there is only a "terra missionaris" (Fikentscher 1979a: 77ff.). But synepeics II teach neither to the Muslim nor to Hugo Grotius that Islam should leave the *dar'al harb,* or Christianity the "terra missisonaris", untouched and existing in their own rights. Tolerance, respect, renunciation of world revolution, etc., do not follow from synepeics II. They are postulates added to synepeics II. Why? Article I of the UN Pact on Civil and Political Rights, and Article I of the UN Pact on Economic, Cultural, and Social Rights, both of Dec. 19th, 1966, supply a formal, legalistic, but nevertheless valid answer: every "people" has a right to adopt, retain, and change it own modes of thought (for details and literature see W. Fikentscher 1983a: 100–132). A less formal answer that at the same time justifies the underlying philosophy of the mentioned pacts is the assumption that an existing or developing mode of thought, as background of one or more existing cultures, should be respected by the participants of other cultures.

Although synepeics II do not organize or structure cultures or modes of thought, they invite comparison. This calls for comparative tools (= Synepeics III), and also raises the question whether it makes sense at all to compare. It should be noted that the "vision of the participants", Paul Bohannan's "folkways", and most emic-etic-analyses terminate analytical investigation after synepeics I and II.

The epistemological level of synepeics II is burdened with the problems of xenophobia, discrimination, and racism. Discovering the other can provoke such "trap" reactions (Bohannan). A cultural warning is in order. In the present context, only references to these related topics can be given.

3. Common denominators on a meta-level: comparing modes of thought ("Synepeics III")

A systematic treatment of the similarities and dissimilarities of the modes of thought requires common denominators for comparison, otherwise the view of the other remains dualistic and *naive* (synepeics II). One may venture the proposition that, under an evolutionist-linguistic approach, the cognitive step from the early dual ("there is a pair of …") to the numeric entity *two* ("There could be more of them, but there are only two of this sort") rather precisely describes the transition from synepeics II to synepeics III. This is the step when a common ground of attributes is conceived in order to bring the entities to be compared into some order (not necessarily, but possibly, into a system).[516] Synepeics III thus is a reduction of cultural

516 W. Fikentscher 1983a, 104 as to the principle, and as to the problem of cultural plurality; *id.,* 1979a: 73ff. as to the problem of inter-cultural value-acceptance (*cf.,* also Albach 1980; Mössner 1979); *id.,* 1983a: 130 as to a cross-cultural economic theory; *id.,* 1979b: 109; and 1980 as to the concept of law; *id.,* 1979b: 169 as to the concept of justice; see Clyde Kluckhohn's (1953: 509) call for "a better working-out of the universal categories of culture"; also J.W.M. Whiting 1954 ("cross-cultural method") and Lawrence M. Friedman 1990. W. Bremer's criticism of metatheory relates to social sciences in general, a different problem. – Alternative Dispute Resolution (ADR) may develop into bridging cross-cultural and cross-thought-modal difficulties of communication, Laura Nader and Elisabetta Grande, Current Illusions and Delusions About Conflict Management – In Africa and Elsewhere, 27 Law and Social Inquiry 573–594 (2002); Mark Goodale, The Globalization of Sympathetic Law and Its Consequences, 27 Law and Social Inquiry 595–608 (2002); also Bierbrauer, and Wesche, see Ch. 6 V 2b, infra. The problem with ADR is always the non-represented third party, and thus the possible antitrust offense, broadly speaking: the uncontrolability of "self-made law."

complexity (Fikentscher 1992 a). First, some examples will follow (a); next, the source and terminology of the metaconcepts, of both facts and values (b); then, their two kinds (c); and finally, two general remarks (d).

a. The problem of the *common denominators,* or common contents, of different modes of thought can be illustrated by the recognition of human or basic rights. In 1985, a Brazilian trade union leader was reported to claim the right to form a union and to strike not only for his (moderate-left) union but also, in a way which was said by an unnamed Brazilian broadcast commentator to be revolutionary for Brazil, for the right-wing Catholic and the left-wing Communist unions. The trade union leader gave the following reasons for his demand: there was, in his opinion, a difference between the right of a union obtained by bargaining a contract with an employer and the basic right to be a union and to act as such. He did see a problem in the proposition that one must grant the right to have rights against others who think and act differently because otherwise the right to have rights will be granted to nobody. For Brazil, this appeared to be a novel idea; in other words, for Brazilian unions synepeics III did not yet work in 1985. The example relates to facts.

As to *values,* the meta-level is even harder to define. The right to ask for and to discuss values must be included in synepeics III (W. Fikentscher 1977b, 1979 a). The duty to listen and to be tolerant of the values of a participant of another mode of thought is the corollary to the right to explore values. The ability to be someone who is asks about values, and who would like to discuss their evaluation, is another requirement for the meta-level. This ability may be called *Wertfähigkeit der Person* (a person's ability to be a carrier or owner of values). The right to be left alone in one's own value assessment without preventing others from exercising their rights to be left alone in their evaluations is also indispensible to comparing modes of thought by using common denominators. It is evident that Synepeics III ask for more protection of basic rights that some of the modes of thought having or claiming political influence in today's world are ready to grant. These basic rights imply not only the rights of single participants, but ask for the protection of peoples' and ethnic groups's rights as well. Every mode of thought is entitled to be accepted as long as it accepts others.

Regarding *conceptual unit-building,* on the meta-level one has to be careful to avoid concepts of ordering which do not fit culture. In fact, as soon as the metaconcept of ordering disregards the structural corroboration habits (Stephen C. Pepper, 1942) of a single mode of thought – as phenomena to be considered and compiled –, it is of no use as a common denominator. Hence, the wide-spread and uncontroled utilization of terms like *structure* (Lévi-Strauss; see the critique in W. Fikentscher 1975a, 134ff.), *system* (*e.g.,* "système juridique" for tribal laws), *team, organization,* etc. must be rejected for thought-modal comparative purposes. Some modes of thought do not know teams: a road through Kapauku land could not be built by teams of local workers because the Kapaukus refused working in a team. Even when the Kapaukus were forced to do so by the police of the Dutch colonial government at gun-point, they risked being shot rather than join the teams formed by the Dutch. The Dutch police were helpless. Then, on the advice of Leopold Pospíšil to the headman, the road in the Kamu-Valley *was* effectively built by the individual Kapauku horticulturalists who owned the lots over which the road was to lead, segment by segment, lot by lot, owner by owner. And as every Kapauku owner of his individual stretch of road jealously maintained his segment in good order and critized his lot neighbar for not keeping his stretch of the road in shape, this road outlasted by many years other government-built roads in the New Guinea lowlands which soon were reclaimed by the jungle.

Similarly, to apply the term "organization" to the Majlis (the Iranian "parliament") does injustice to fundamentalist Shiite Islam, which rejects the idea of an assembly having the right

by majority vote to elect organs to be entrusted with responsible leadership, and to hold such organs accountable for their decisions. The wisdom of an Ayatollah need not be accountable. The term "organization" is thus as inapplicable to the Majlis as it is, for different reasons, to the Kapauku road owners. For purpose of Synepeics III, therefore, the formal term "ordering" will be used when the topics of "working together" or "unit-building" or team organization are to be discussed. As long as a language spoken in one mode of thought is translatable into a language used in another mode of thought, there must be definable common denominators (insufficient as any translation may be).

However, more is needed to be a common denominator on the level of Synepeics III than the ability of being free to ask and to evaluate; otherwise the argument could be made that some people should be slaves, or treated like chattels, or do not have a right to live. Hence, on the level of Synepeics III it is necessary to set some absolutes that safeguard the human condition. A test for what should be included in these absolutes would be to imagine the aspect of the human condition being challenged or disregarded. If somebody is being deprived of his or her chances of engaging in the sharing of the values common to the modes of thought on the level of Synepeics III, such as life, liberty, personhood, and human dignity, there should be absolute and undebatable protection of such attributes of the *conditio humana.* These rights exist on level III, due to the generalization by comparison of rights existing on levels I and II.

b. On the level of Synepeics III it remains to be explained what, after all, the common denominators are supposed to be. Synepeics III and its common denominators, the metaconcepts, go beyond componential and correlational analyses behind. These two analyses are confined to folk-concepts, to a specific culture. Synepeics III makes it feasible to step beyond a specific culture, for both facts and evaluations. Comparison becomes possible. *Concepts common* to all modes of thought must necessarily be of higher formal quality. Concepts like causality (J. H. Steward 1949), time, suffering (P. Gilbert 1989), risk, cooperation, and participation (in a culture) vary from one mode of thought to another. But, taking causality as an example, for the purpose of comparison there must be a common (meta)concept that links together historic events. The link may be Euclidean-empirical (traditional "Western"), quantum-mechanical, magical, Karma-cyclic, or of some other quality. There must also be a common (meta)concept of time in order to study whether and how a specific mode of thought handles time (as-a-straight-line, cyclical, reiterative, future-less, eschatological, etc.). There must be common (meta)concepts of suffering and risk in order to evaluate whether and how suffering, anticipated suffering, and risk are handled with in a given mode of thought. The same applies to the question of whether common concepts are conceived at all and if so, how they are formed. For example, the formation of common concepts requires the concept of the plural, a plural that leaves the dual behind.[517]

This raises the question of how the metaconcepts are produced. All other anthropological analyses are at a disadvantage in that their "analytical" tools cannot be convincingly inferred from the folk-concepts. Synepeics III looks for what is common in at least some modes of

517 For clarity's sake, it would be better to talk of meta-causality, meta-time, meta-risk (including the theodicy issue), and meta-cooperation to discuss these problems on the level of synepeics III. This terminology is not used here, however. And although it would be permissible to call the metaconcepts "analytical concepts", this would disregard the fact that the analysis starts on the level of synepeics I with its "folk-concepts". Componential and correlational analysis, two *analyses,* are concerned with *folk*-conceptualities. Hence, to call the metaconcepts, which are used for comparison, "analytical" is confusing. Thus, "meta-" is preferable. Unusual combinations such as meta-risk, meta-level etc. will appear hyphenated, *termini technici* such as metatheory, metaconcept etc. not.

thought: for example, – culturally different – causality concepts, but at any rate a middle-type concept of causality. Moreover, Synepeics III evaluates whether this common concept should be accepted and used for meta-purposes. Thus an *evaluated commonality* of folk-concepts fills the ranks of the meta-level. The evaluative element is of special importance whenever the folk-concepts are value concepts themselves. One might object that the notion of a "meta"-concept (-value; -time; etc.) is too lofty or too removed from the folk-concept (value; time); or that a tendency inherent in any "meta"-concept guiding the concept in the direction of a certain content reduces the "meta"-concepts to usual concepts of some postulative character. But again, both objections do not do justice to the variety of modes of thought found in this world, and this study is intended to include *all* modes of thought, including the most dogmatic and intolerant ones, within a *conceptual* framework which makes comparison possible (evaluation is a different matter, see c) and 4, *infra*).

c. This leads to an important distinction between the common denominators on level III: empirical analysis includes factual concepts and value concepts of all existing and conceivable modes of thought, including the dogmatist, tyrannical, exclusionary, and totalitarian. However, synepeical analysis would come to a sudden end if those intolerant modes of thought were permitted to join in the setting of common values, because they would not tolerate evaluations other than their own, and thus would end the analysis. Therefore, empirical investigation and compilation must be followed by an evaluative selection. Participation in this second process on the level of Synepeics III can only be permitted to those modes of thought which are mutually tolerant and "willing to learn". Hence, on the level of Synepeics III there are *is*-(meta)*concepts,* and *ought*-(meta-)*concepts.* This dichotomical nature of the meta-concepts raises many issues, not all of which can be tackled and solved in this book. The most salient ones are discussed, however incompletely, in connection with the examples under (a). It is by virtue of these *ought*-concepts that Synepeics III is able to develop models for cross-cultural coexistence and cooperation.

d. The generalization taking place on the level of Synepeics III so as to arrive at metaconcepts comes at a price. A *system* or *order* is won, but duality in the sense of Synepeics II is lost. Likewise, the openness for topical, serial and intuitive thinking decreases. A system, built on a hypothesis and therefore by definition *open* (in contrast to the closedness of cybernetic circles) is still always a prison. Its walls are defined by the scope of the hypothesis which is drawn from the inferences from empirical data. Dual, topical, serial, intuitive and possibly more kinds of cognition are of even wider scope, but not usable for metaconcepts. This limitation of comparative thinking should clearly be seen.

4. Synepeical strategies ("Synepeics IV")

The preceding sections were an exposition of a modern concept of *modes of thought* going beyond the dichotomical model of "primitive" vs. "modern" mind thus far used in anthropology. It attempts to show the existing and conceivable variety of the modes of thought, their comparability, and their core of common denominators. It follows from the foregoing that ethnocentric thinking is not the proper approach to that variety. It also follows that thought-modal intolerance occurs whenever Synepeics I is isolated and cut off from Synepeics II and III. Once synepeics II and III are included in the cross-cultural comparison, a specific (and possibly intolerant) mode of thought is reduced to its proper dimension as merely one of many. To examine the intolerant modes of thought within the formats of synepeics I, II and III exposes the irrelevance of their participation in, and their exclusion from contribution to, the common core of denominators which underlies the conceptuality of synepeics III.

This reduction also touches upon issues of policy. Utilizing the mitigating effect of cross-cultural comparison in the field of cultures and their undelying modes of thought means doing something with them. This "doing something" may be called "Synepeics IV": it is a strategy using steps I, II and III of Synepeics. Moving to Synepeics IV means leaving behind anthropological analyses and creating different responsibilities since practical politics, including legal, economical, social, and "high" politics, are all involved. Synepeics IV is, in the modes of thought, what in general anthropological terms is called "applied anthropology". Three "applications" of Synepeics IV will briefly be discussed: (a) legalistic proposals for a "better world order", (b) modes of thought and Third World development and conservation, and (c) Western v. Eastern tolerance.

The approach to cross-cultural tolerance competes with other, more formal and legalistic approaches, which exist in great numbers and variance. Some of such approaches advocate plans to reorganize the United Nations Organization, or to create or remodel other international bodies. Using synepeia analysis for political ends (in the widest sense) opens up two different, even opposing, lines of strategy. One line may be called the "development line", which focuses on possible modification and change of modes of thought in political, economic, legal, and other regards.

Another line of strategy is probably more important: it concerns the opposites of development and conservation. It has already been noted that synepeics call for inalienable rights or protected legal positions for individuals, ethnic groups, peoples, cultures and also for "participants" in modes of thought. With regard to the modes of thought, these rights aim at the conservation of thought-modal plurality and complexity. Shielding the small and "unimportant" one from being "modernized" and "developed" is an issue of Synepeics III which seems to keep her or him in a state of "poverty" and "backwardness" but grants him the benefits of his traditions and accustomed life. Societal antitrust, developmental antitrust (Fikentscher 1984a, b), and decentralization (in the undistorted, non-Marxist sense) are some key words for this indispensable conservationist elements of "development aid" that has to be weighed against "modernization".

Every mode of thought has its specific problems and deficiencies which cannot easily be cured by borrowing elements from other modes of thought, just as the "world hypotheses", described by Stephen C. Pepper, all have their cognitive shortcomings and yet exclude each other to such a degree that they cannot properly be combined. The same way that for the early Christian scholastics the Greek-Roman *rational mind* was a stumbling block (which Christianity never overcame), Eastern tolerance is an obstacle for modern Christianity. Should Christianity try to integrate Eastern tolerance (which has its roots in the very un-Christian mode of thought of detachment)? Or should Christianity try to overcome Eastern tolerance, which it can do convincingly only in a tolerant manner? But how to overcome tolerance by tolerance? In theory, *i.e.,* on the level of synepeics I, this makes no sense at all. After comparing Eastern and (alleged or intended) Christian tolerance (Synepeics II), more "sense" can be found on the level of Synepeics III: Christianity may exhort *its* followers to obey the commands of Christian tolerance, and at the same time to be of service to people believing in other tolerant modes of thought. This then is tolerance in terms of a common denominator (Synepeics III). It may considerably change at least Christian attitudes towards Easterners (Synepeics IV).

Often the distressing result of Synepeics I is that the situation appears seemingly hopeless, that the culture under consideration is simply unable to produce the result which from an economic, political, humanitarian or other point of view appears mandatory. But it would not correspond with the spirit of synepeics to end by saying that a certain culture, or a certain hu-

man being, is a hopeless case. There is hope in Synepeics III that the problem can be elevated to a metaconceptual treatment, and if this can be done there is always hope for a strategy in terms of the modes of thought; *i. e.,* for a solution within the framework of Synepeics IV. Culture change *may* have a curing effect, and synepeia analysis may open the door to a discussion about the curing or detrimental elements of culture change.

VI. Synepeia analysis compared with other analyses, and a summary

The synepeical method is able to assign to folk-analysis its appropriate place, and to go beyond it in order to compare cultures. In doing so, synepeics avoid the need to call western science the only "analytical" one. For synepeics, western thinking remains "emic". Thus, synepeics avoid the identification of "Western" = etic = analytical. Instead of distinguishing between emic and etic, synepeics call for consequential thinking in all "emic" situations including the western way of reasoning. Instead of opposing "etic" to "emic", synepeics call for a comparative treatment of "emics" to be built upon metaconcepts and metathinking. For synepeics, it is not consequential to oppose "emic" and "etic" because both belong to different levels of reasoning, theory and metatheory, and because it is incorrect to measure theory by metatheoretical standards. "Meta-", instead of "western" (concealed as "etic"), this is all the difference. Of necessity, there is little ethnocentricity in metatheory, because of its source in the comparison of more than one entity. By contrast, "etic" means "analytic" in a western-ethnocentric sense.

Still, "emic – etic" has become a shorthand expression among ethnologists and anthropologists in order to distinguish the inside from the outside view. Synepeics teach that the outside view requires a meta-conceptuality and a meta-reasoning. If anyone is convinced, with Bohannan, Pospíšil, and the present writer that "etic" as it is used today is in reality "western" and therefore just another "emic", and that comparison implies a metatheory, one could still use the term "etic": for the work that is done on the level of synepeics III. This redefinition of "etic" – as a shorthand term – as being identical with synepeics III could save the term and give it a totally new meaning. A complete anthropological analysis should proceed from componential to correlational and from there to synepeical analysis in order to obtain comparative results. When we investigated the common law of Native American tribes, we tried to follow this path (Cooter and Fikentscher 1998a, b; a similar study on Native American code law appears in 2008). For teaching the anthropology of law, the three analyses – applied in the above order – offer invaluable support. Ethnocentricm is given no chance any more to be taken seriously, and still comparative work is possible. A sketch of method in componential, correlational, and synepeia analysis shows:

Ethnocentrism claims that other cultures can only be regarded by using one's own categories and ways of understanding. This need not be the result of one's own sense of superiority. It can also be the result of a sense of frustration, of the apparent difficulty of entering the mind of a participant of another culture. Max Gluckman traced the common law concept of *"reasonable man"* in Barotse legal culture, and in Somalia the UN peace keeping force (vainly) tried to bring the clans to a round table of discussion.

Less confident ethnocentrists do not even try to understand a foreign culture by making the point that every attempt at comparison conflicts with the impossibilty of one culture understanding the other. The Dutch School of Leyden anthropologists is quoted to this effect (C. van Vollenhoven: het oosterse oosters te zien). Melville Herskovits and Jerome Bruner have expressed similar doubts.

This position generates a restriction of anthropological study in general, that is, to a serious obstacle to learning what Paul Bohannan has called the "folk-ways" in "folk terms". It leads in final consequence to cultural relativism (Melville Herskovits). To overcome mere ethnocentrism and cultural relativism, the linguist Kenneth Pike taught that any culture can be viewed from inside – the "emic" way – and with the tools of scientific analysis from the outside – in the "etic" manner. A lively inside – outside debate ensued (see the summary by Headland et al.) until Leopold Pospíšil convincingly remarked in 1978 that the "etic" analysis does not describe an objective, quasi world-wide scientific approach to any culture from the outside, but indicates a Western approach of dichotomizing and systematizing: Etic is just another emic, namely the western way of forming concepts and reasoning with them.

Thus, the debate was thrown back to Herskovits' "utter relativism" (Stephen C. Pepper). Pospíšil himself proposed a pragmatic, comparative trial and error step-by-step method. In an earlier book "Modes of Thought" (1995/2004)) I tried to develop a more satisfying method of cross-cultural understanding. This method is called synepeia analysis, derived from Greek "synepeia" = consequence. The gist of sysnepeia analysis is: *Stay in the mode of thought* which you happen to have chosen; *do not mix up the modes* of thought which underlie the cultures; but try to *define metatheoretical concepts and value judgments,* and again with consequence *stay on that metalevel* of reasoning. This enables you to analyze modes of thought, and cultures. Synepeia analysis when applied to a chosen mode of thought is able to explain another culture and compare it to other cultures. For example, if one is to examine any cross-cultural issue, such as xenophobia, or tourism, or ebonics, three steps of reasoning are required, and a fourth step may be added if desirable:

Synepeics I: It deals with a specific culture in terms of Kenneth Pike's "emics", or Bohannan's "folk-ways", and thus attempts to understand that culture, or any of its traits, from within, according to its own terms. Here the classical "Yale Ethnography" of the Sixties (Ward Goodenough, Floyd Lounsbury, Harold Conklin and others) is still the best method. It is called componential analysis, and essentially consists in itself of five propositions:

(1) Ascertaining the denotata, that is, learning how a plant, a disease, a member of the family is called in a given cultural setting,
(2) Collecting these denotata through simple compilation,
(3) Classifying these compilations in folk terms,
(4) Specifying the denotata within their folk classes, and
(5) looking for the reasons, again in folk terms, for such specifications.

The componential analysis works for cultural traits that are of descriptive nature. It does not work for evaluations (Pospíšil), as in the case of a legal conclusion.

In order to make componential analysis applicable to normative thinking, too, one needs to remember that normative thinking relies on rules. A rule consists of a set of requirements, and a sanction in abstracto. The requirements are being applied to the bits and pieces of real life, if met, the sanction in abstracto follows, and from it the enforceable change in the real world is to be derived. All four constituent parts of rule application – *the facts, the requirements, and the sanctions in abstracto and in concreto,* need be subjected to componential analysis because they may be culture-specific. This sometimes cumbersome procedure is called correlational analysis because its main factor are the legal correlates of the facts of the case.

Componential and correlational analyses of the themes of another culture exclusively concern that other culture. This means, every proposition is being made in folks terms, in the emic view of a single, specific culture. Any conclusion to be drawn so far has to stay, in a consequential manner, within that folkway (for example, don't count on damages for pain

and suffering in a Native American tribal court; or: don't expect interest-taking in Islam, etc.). The same applies to any other culture.

However, comparison of cultures – a prerequisite to any form of their cooperation, or getting along with one another – has to look at more than one culture. Therefore, it is correct to say that the study of one culture with the aid of componential and correlational analysis constitute the first step of such comparison – or Synepeics I.

The next step – Snepeics II – consists of discovering the other. For every primal society it must have been a shock, or a wondrous and menacing discovery, that there are others who speak differently. Bandelier has described this for the Keresan Pueblo. Discovery of another causes dualist thinking. "Me and the Other" is the dualist formula, not yet the plural "We all". Historical linguistics teach us that that the dual is the older form of designating "more than one", than the plural.

Thirdly, once the plural is discovered, the multitude of different cultures, every such culture finds itself confronted with an important decision: leave it at dualist bilateralism, or start comparison – Synepeics III. Not every primal culture engages in comparison, and some who know what comparing means, place it under a taboo, such as most Pueblos. If comparison is accepted, metaconcepts such as time, space, pain and suffering, risk and risk management, color, weather, and family and leadership become conceivable and have to be created.

If used, such metaconcepts again may only be used consequentially for meta-reasoning. If one were to mix up folkway and meta-reasoning, costly cultural blunders occur. To illustrate, for Mostar, and probably also Sarajewo, a city government cannot be based on the concept of organization – it cannot be organized – because it is un-Islamic to have an organization (Ayyub Axel Köhler). A metaconcept of ordered society is needed that pays due respect to the horizontality of the Muslimic *ummah,* to Orthodox verticalism, and Roman-Catholic blend of conciliarism and hierarchy. Humanitarian relief to Somalia requires to stay outside of the segmented society (Evans-Pritchard) of partly primal, partly Muslimic clans.

The examples lead us into synepeics IV, which is the applied anthropology of synepeical analysis. On the search for cross-cultural cooperation, synepeia analysis is a rather skeptical method which, with considerable certainty, teaches what from a point of consequent thinking surely *cannot* be achieved. On the positive side, it calls for consequential reasoning in folk- and comparative terms respectively. It clearly distinguishes between concluding 1) within a specific culture, and 2) on a metalevel. On both levels, it distinguishes between description and strategy.

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

Systematically, anthropology can be divided in cultural and biologocal (= physical, physiological) anthropology. Historically, in all stages of its development, anthropology has its period-specific relationship between its cultural and biological side.[518] 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 *systematialc* behavioral implications of culture call for a chapter on biological anthropology in a book on a field of cultural anthropology, law.[519] 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 commiting 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 fivefold: archeological, socio-cultural, linguistic, physical (= physiological = biological), and applied anthropology.[520] For reasons explained above, instead of this pentalogy this book prefers to present culture and biology as the *two sides of anthropology* equally relevant to all its sections. The resultis a system of anthropology as a social science that is discussed in Chapter 1.[521] Ob-

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518 On the relationship between system and history in ethnology, Justin Stagl, Zur Entwicklung der Ethnologie, in: Hans Fischer & Bettina Beer (eds.), Ethnologie, Einführung und Überblick, 5th ed. Berlin 2003, 33–52; and Chapter 1 II, and on the stages of development of anthropological thought, see Chapter 2, above.

519 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.

520 See Chapter 1 II. And V., above.

521 See graph on system of anthropology, p. 51, 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. 7f.

viously, 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 procedure is most comprehensive and adequate enough to answer the anthropological questions.[522] 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?[523] 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 "etically" be correct. But emically it may be very doubtful. Asking the question 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 *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" *(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 6 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

522 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 bioanthropological research of the unchangeable "natural" human basic outfit on the other (my translation).

523 See Chapter 12 I, below.

departments.[524] After a long and careful study of the historical[525] and contemporaneous situation in Germany and abroad the Max-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 to Leipzig, that both are served by one airport. Cooperation exists.

II. Themes

Once the themes of *biological* anthropology are listed alongside the themes of *cultural* anthropology, as indicated on p. 51 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 developüment of mankind.[526] 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.

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524 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.

525 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 (Max-Planck-Gesellschaft, München, ed.), Berichte und Mitteilungen 4/1982, 39–50.

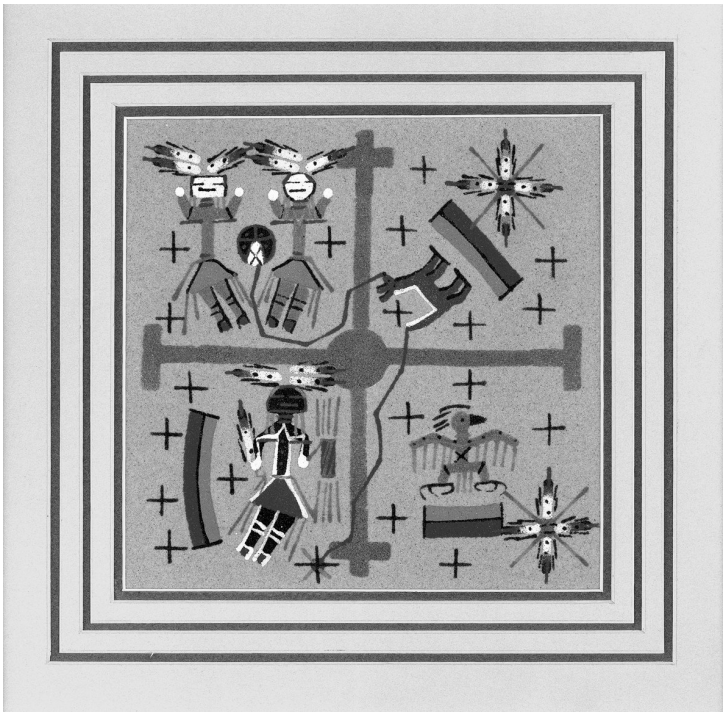
526 Recent and much debated and very readable publications from the last years include Richard Leakey, The Origin of Humankind, New York 1994: Basic Books; Jared Diamond, The Third Chimpanzee: The Evolution and the Future of the Human Animal, New York 1993: Harper; Ursula Goodenough, The Sacred Depth of Mnatute, New York & Oxford 1998: Oxford Univ. Press; Spencer Wells, The Journey of Man: A Genetic Odyssee, Princeton 2002: Princeton Univ. Press; Walter Bodmer & Robin McKie, The Book of Man: The Human Genome Project and the Quest to Discover Our Genetic Heritage, Oxford 1997: Oxford Univ. Press; William H. Durham, Genes, Culture, and Human Diversity, Stanford 1991: Stanford Univ. Press; and others. A watershed mark was the book by Luigi Luca Cavalli-Sforza and Mark W. Feldmann, (1981): Cultural Transmission and Evolution: A Quantitative Approach, Princeton 1981: Princeton Univ. Press. Here the use of DNA analyses was proven as a means to study human descent, migration, and language ability.

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 – from a bright, golden and peaceful time to the modern world of iron, blood, and tears.[527] 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 chaptrers of the first book of the Bible. It also has phases, seven days, and it links monotheism and theodicee, decides in favor of the good God and provides an explanation where the evil of the world comes from. These moral teachings are post-axial age and

527 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:



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 have 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.

told to a worldwide audience as part of a total religion, but there is enough animistic tradition connected with it 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 glorioles.[528] 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 threshhold 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 growing 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 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.[529] However, it has its dilemmas.[530] One of them is that that mutations occur

528 1st Thessalonians 5. 21 (1st. half): "... but test everything ..." (respect of conflicting opinions), and 5.11 (encouraging dispute); a discussion at W. Fikentscher (1975 a), 286–306, esp. at 297; idem, Die Freiheit und ihr Paradox, Gräfelfing 1997: Resch, last chapter; idem (2007), 137–165, at 143.

529 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.

530 E.g., Marc W. Kirschner & John C. Gerhart, The Plausibility of Life: Resolving Darwin's Dilemma, New Haven 2005: Yale Univ. Press; Frans de Waal, Hippie oder Killeraffe?, DER SPIEGEL Nr. 34/2996, 138–141; in a similar vein: George C. Williams, Adaptation and Natural Selection: A Critique of Some Current Evolutionary Thought, Pronceton 1966: Princeton Univ. Press; idem (ed.), Group Selection, Chicago 1071: Aldine/Atherton; idem, Sex and Evolution, Princeton 1975: Princeton Univ. Press: idem, Natural Selection: Domains, Levels and Challenges, New York 1992: Oxford Univ. Press; Randolph M. Nesse and G.C. Williams, Why We Get Sick: The New Science of Darwinian Medicine, New York 1994: Times Book; Christian Vogel, Anthropologische Spuren: Zur Natur des Menschen, Stuttgart 2000: Hirzel.

too seldom and the periods of reproduction last too long in order to explain the obvious and observable speed of evolution.[531] 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.

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 group and sacrificing themelves in the defense of kin.[532]

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.[533] However, group selection theory suffered a hard blow when Jane Goodall observed deadly warfare between hords of chimpanzees.[534] 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.

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531 Phillip E. Johnson, Darwin on Trial, 2nd ed. Westmont, IL 1993: Intervarsity Press; more materials at http://ourworld.comouserve.com/homepages/rossuk/Johnson.htm; John H. Holland, Hidden Order: How Adaptation Builds Complexity, Reading Mass. 1995: Addison-Wesley Publ. Co., Helix Books, 1 ff. (crossing-over in Holland's sense may mean that nature is its own breeder). A modern defense of Darwin: Volker Sommer, Von Menschen und anderen Tieren: Essays zur Evolutionsbiologie, Stuttgart 1999: Hirzel.

532 W.D. Hamilton, Altruism and Related Phenomena, mainly in the Social Insects, 3 Annu. Rev. Ecol. Syst.193–232 (1972); idem, The Genetical Evolution of Social Behavior, I-II, 7 Journal of Theoretical Biology, 1–52 (1964); D.C. Queller & J.E. Strassmann, Models of Cooperation, 19 European Society for Evolutionary Biology, Journal Compilation, 1410–1412 (2006); Peter Hammerstein (ed.), Genetic and Cultural Evolution of Cooperation, London & Cambridge, Mass. 2003: MIT Press.

533 Konrad Lorenz, Die Rückseite des Spiegels, 4th ed. Munich 1983: Piper; idem, Das sogenannte Böse,2nd 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 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.

534 Jane Goodall (video) http://ocw.mit.edu/NR/rdonlyres/Brain & Cognitive …; idem, My Life with the Chimpanzees, New York 1988 (1996): Simon and Schuster.

e. What became known as *genetic revolution* again revolutionized the issue of the origin of the species and their behavior.[535] Kin is not what evolution has in mind, nor the individual animal, but the single "selfish" gene.[536] Evolution became a "gene-centered principle". Wolfgang Wickler and Uta Seibt called this the *"Prinzip Eigennutz"* (principle of egoism).[537] 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".[538] Other studied help as provided between animals of different species.[539] Another outcrop of this interest in what may be called "animal individualism" are Jane Goodall's studies on animal characters.[540]

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 expanded it to a general human ethology, defined by Eibl-Eibesfeldt as the "biology of human behavior".[541] Hereby, a door to intensive investigations of "innate" universals as opposed to "learned" cultural specificities was opened.[542]

f. In the 1990ies, a new theory drew attention to the special role in human develoment 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

535 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).

536 Richard Dawkins, The Selfish Gene, Oxford 1976: Oxford Univ. Press.

537 Wolfgang Wickler & Uta Seibt, Das Prinzip Eigennutz: Zur Evolution sozialen Verhaltens, Hamburg 1977: Hoffmann & Campe (Neuausgabe Munich 1981: dtv; E. Voland Grundriß der Soziobiologie, Stuttgart & Jena (G. Fischer) 1993; idem (Hrsg.), Evolution und Anpassung – Warum die Vergangenheit die Gegenwart erklärt. Christian Vogel zum 60. Geburtstag, Stuttgart 1993: Hirzel; idem, Egoistische Gene?, Zur Debatte (Munich), Juli/August 1997, 3.

538 Robert Trivers, The Evolution of Reciprocal Altruism, 46 Quarterly Review of Biology 35–57 (1971), idem, Natural Selection and Social Theory, Oxford 2002: Oxford Uniuv. 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.

539 Volker Sommer (note 531, above); Report of Natural Symbiosis Research Center, Science Links Japan, http://sciencelinks.jp/j-east/article/200 506/000020050605A0 151 836.php; on reciprocity among humans see Raimund Jacob & W. Fikentscher (eds.), Korruption, Reziprozität und Recht, Berne 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.

540 Goodall; Jane Goodall; Order Without Law, or The Law of the Jungle, Bornemouth 1983: TOP COPY (an expanded version of the paper published in M. Gruter and P. Bohannan (eds.), Law, Biology and Culture: Proceedings of the First Monterey Dunes Conference, 5 Journal of Social and Biological Structures No. 4, 353–360 (1982); Japanese studies.

541 Irenäus Eibl-Eibesfeldt, Ethology, Biology of Behavior, 2nd ed. New York 1975: Holt, Rinehart and Winston; idem, Die Biologie des menschlichen Verhaltens. Grundriß der Humanethologie, 4th ed. Munich 1997: Piper.

542 W. Fikentscher (2007).

enough sufficiently "thinned out" to reach a stable relationship defined by an equilibrium between being aided and being killed by parasites.[543]

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.[544] They claim that genes are indispensible 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).[545] 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 *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.[546] (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.[547] 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.[548] Richard Alexander stressed the role of (generalized) re-

543 E. g., Paul W. Ewald, Evolution of Infectious Disease, Oxford & New York 1994: Oxford Univ. Press.

544 W. Fikentscher & W. Wickler, Genes, Epigenes, Culture, Gruter Institute for Law and Behavioral Research, Newsletter, vol. XII, Spring 1999, No. 1, 3; idem (F. & W.), System und Außenanbindung epigenetischer Verhaltenssteuerung, 30 Rechtstheorie 69–77 (1999); W. Fikentscher, Rechtsethologische Bedeutung neuerer Ergebnisse der Epigenetik, in: Martin Usteri, Wolfgang Fikentscher & Wolfgang Wickler (eds.), Gene, Kultur und Recht, Schriften zur Rechtspsychologie, vol. 5, Berne 2000: Stämpfli, 23–38; W. Fikentscher & Sebastian Kuck, Normative Verhaltensforschung: Ethologische Grundlagen der Rechtsverhaltensforschung – Epigenetics and the Law, Texte zur Vorbereitung der Konferenz des Gruter Institute for Law and Behavioral Research i. V. m. dem Max-Planck-Institut für Verhaltensphysiologie, Seewiesen Post Starnberg, vom 17. bis 20 Sept. 1998 in Tauberbischofsheim, München 1998 (Skriptum).

545 See Usteri et al., preceeding note. Cultural influences may shape human brains epigenetically. Humans activate their brains in culturally different ways, and thas the concept of knowledge varies from one cultural mode of thought to the other, see Ch. 1 III. 5., above.

546 E. g., Paul H. Rubin, Group Selection and the Limits to Altruism, 2 Journal of Bioeconomics, 9–23 (2004).

547 Frans B. M. de Waal, Good Natured: The Origins of Right and Wrong in Humans and Other Animals Cambridge, Mass. 1996: Harvard Univ Press; see the discussion in Leonard D. Katz (ed.), Evolutionary Origins of Morality, 7 Journal of Consciousness Studies No. 1–2, January-February 2000; also Raymond R. Coletta, Biotechnology and the Creation of Ethics, 32 McGeorge Law Review, University of the Pacific 89–110 (2000).

548 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

ciprocity.[549] Murray Gell-Man spoke of the explosive force of cultural possibilities that shapes natural development.[550]

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 literatuire.[551] The proposision to building a transdisciplinary bridge to "evolutionary" ethology has become a reality.[552]

Human Development, Festschrift Daniel G. Freedman, Foreword I. Eibl-Eibesfeldt, Washington, D.C. 1997: American Psychological Association; 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, 964f. 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.

549 Richard Alexander, The Biology of Moral Systems, 206/2 Journal of Theoretical Biology, 169–179 (1987).

550 Murray Gell-Man, The Quark and the Jaguar, London 1994: Abacus, 70f.

551 Niko Tinbergen, On Aims and Methods in Ethology, 20 *Zeitschrift für Tierpsychologie*, 410–433 (1963); M. Gruter, Where Law and Biology Meet (Part I), 9 Gruter Institute for Law and Behavioral Research News Letter No. 1 Spring 1006, 2–3; Frank, Robert H., Microeconomics and Behavior. New York 2003:, McGraw-Hill; Randolph M. Nesse & G.C. Williams, see note 513, above; Oliver Goodenough & Semir Zeki, Law and the Brain, Oxford 2006: Oxford Univ. Press; Hans-Peter Schwintowski, Brain Moral Judgement: Auf dem Weg zu einer Neurobiologie des Rechts, in: Wolfgang Klein (ed.), Sprache des Rechts II. Themenheft der 'Zeitschrift für Literaturwissenschaft und Linguistik', Jahrgang 32, Heft 128, 114–127 (2002). Progress has been made by functional Magnetic Resonance Tomography (fMRT) and Positron Emissions Tomography (PET), two procedures that help identify brain areas involved in specific activities of the brain. However, critics point to three gaps in the present state of the art: Knowing *where* something happens in the brain does not say clearly enough *what* is happening there (lack of knowing contents), "activating" brain ares does not define what the triggered activity holds (lack of knowing enough about brain "activity"), and the cooperation by other parts of the brain with the activated part cannot yet be shown (lack of knowing contexts); see Ludger Tebartz van Elst & D. Ebert. Bildgebende Befunde bei affektiven Störungen, In: Henrik Walter & Manfred Spitzer: Funktionelle Bildgebung in Psychiatrie und Psychotherapie, Stuttgart 2004: Schattauer; see also L. Tebartz van Elst, BioLogik. Leben, Denken, Wirklichkeit. Eine Genealogie der Logik. NoRa-Verlag. Berlin (2003); idem, Alles so schön bunt hier: Gehirn-Scans sagen viel weniger aus als in sie hineininterpretiert wird, DIE ZEIT No. 34 of August 18, 2007, 30.

552 See already Stephen Jay Gould, Evolution: The Pleasures of Pluralism, The New York Review, June 26, 1977, 47–52; Robert Wright, The Moral Animal: Evolutionary Psychology and Everyday Life, New York 1944: Vintage. Reinhold Zippelius, Rechtsphilosophie, 2nd ed., Munich 1989, pp. 53–65; Since 1980, ethology of law has been the main projects of attention of the Gruter Institute for Law and Behavioral Research which is responsible for a series of pertinent writing and research, for example: M. Gruter, Die Bedeutung der Verhaltensforschung für die Rechtswissenschaft, Berlin 1976; id., Law in Sociobiological Perspective, in: 5 Florida State University Law Review 2 (1977); M. Gruter/P. Bohannan (eds.), Law, Biology and Culture: The Evolution of Law, Santa Barbara, CA, 1983; 2nd ed. New York et a! 1993; M. Gruter & Roger Masters (eds.), Ostracism: A Social and Biological Phenomen, New York 1986; M. Gruter & Manfred Rehbinder (eds.), Ablehnung – Meidung -Ausschuß, Berlin 1986; *William Rodgers,* Bringing People Back: Toward a Comprehensive Theory of Taking in Natural Resources Law, in: 10 Ecology L.Q. 205 (1982); R. Masters &

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.[553] Others followed.[554] 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.[555] The *sociobiology debate* deserves a closer look. In 1971, Robert Trivers published that seminal article on reciprocal altruism.[556] The article triggered two scientific developents 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 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.[557] The book caused a lively discussion and a deepened interest in alleged biological building blocks of human moral and legal behavior.[558] 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

M. Gruter (eds.), The Sense of Justice, Newbury Park et al. 1992; R. Masters & Michael T. McGuire (eds.), The Neurotransmitter Revolution: Serotonin, Social Behavior, and the Law, Carbonale (in press); Michael T. McGuire (ed.), Human Nature and the New Europe, Boulder, CO, 1993; Margaret Gruter, Ethology and Environmental Law, in: M. T. McGuire & M. Rehbinder (eds.), Biology, Culture and Environmental Law, Berlin 1993, pp. 27–42.

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

554 E. g., Margaret Gruter, Law in Sociobiological Perspective, 5/2 Florida State University Law Review, 181–218 (1977); idem, Soziobiologische Grundlagen der Effektivität ds Rechts, 11/1 Rechtstheorie, 96–109 (1980).

555 Philip Kitcher, Vaulting Ambition: Sociobiology and the Quest for Human Nature, Cambridge, Mass. 1985: MIT Press.

556 See note 509 above.

557 E. O. Wilson, Sociobiology: The New Synthesis, Cambridge, Mass.: Harvard Univ. Press, reprinted 1976; 25tzh anniversary edition 2000 by Belknap Press, Harvard Univ.

558 Some non-exhaustive examples: Richard D. Alexander, Biology and Law, 7 (3/4) Ethology and Sociobiology, 329–337 (1986); idem, The Biology of Moral Systems, Chicago 1987: Aldine; G. W. Barlow & J. Silverberg (eds.), Sociobiology: Beyond Nature/Nurture? Boulder, CO, 1980: Westview; K. B. MacDonald (ed.), Sociobiological Perspectives on Human Development, Heidelg & New York 1988: Springer; J. P. Rushton, R. J. H. Russel, & P. A Wells, Genetic Similarity Theory: An Extension to Sociobiology, 14 Behavior Genetics 179–193 (1984); J. R. Udry, Biosocial Models of Adolescent Problem Behaviors, 37 Social Biology 1–10 (1990): Linda Mealey, The Socioobiology of Sociopatzhy: An Integrated Evolutionary Model, http://www.bbsonline.org/Preprints/Old Archive/bbs.mealey.html (with extensive bibliography); C. George Boeree, Sociobiology, http://webspace.ship.edu/cgboer/sociobiology.html (with definition of relevant concepts).

mentally ill and epileptics are notorious examples.[559] An early warning about the misuses of biology was issued by the anthropologist Franz Boas.[560] More recently, Richard Lewontine, Philip Kitcher and Daniel Kevles[561] 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 (scil: Margaret Gruter and Paul Bohannan (eds.), Law, Biology, and Culture 1983: Ross Erickson, Inc.) would be reeeived – 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".[562]

Still, the natural sciences, the social sciences, and the humanities are moving towards one another both in their interests and methodologically.[563] Ours is a time in which legal scholarship cannot 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 "preprepared" to bond, to learn a language, to respond with anger if willfully hurt by others, and to make decisions on the basis of experience.

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559 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 Sociobiology, 80 American Anthropologist 5–20 (1978): "There is more to my life, if not yours, thank you, than maximizing inclusive fit-ness" (at 15). A historical account: Eckart Henning & Marion Kasemi, Kaiser-Wilhelm-Institut für Anthropologie, menschliche Erblehre und Eugenik, in: Max-Planck-Gesellschaft (ed.), Berichte und Mitteilungen 3/93, Dahlem-Domäne der Wissenschaft, Munich 1993, 36–42; see also note 194, above. However, see Roger Masters, Beyond Relativism: Science and Human Values, 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."

560 Franz Boas, The History of the American Race, 1911, in: *id.,* Race, Language, and Culture, New York 1948, pp. 324–330.

561 R. Lewontine see note 542, above; Philip Kitcher, Vaulting Ambition: Sociobiology and the Quest for Human Nature, Cambridge, Mass. 1985; e.g., at p. 6: "... denigrating of particular racial and social groups ..."; Daniel Kevles, 65 Southern California Law Review, 255 (1991).

562 Paul Bohannan, Preface to the Second Edition, in: M. Gruter & P. Bohannan (eds.), Law, Biology and Culture, 2nd, New York etc. 1993.

563 R. Masters, The Nature of Politics, New Haven & London 1989; *id.,* Beyond Relativism, Hanover 1993: Univ. Press of New England; Jan van Dorsten, The Radical Arts, First Decade of an Elizabethan Renaissance, Leyden/London 1970; *id.,* Alternatieven, in: Holland, Regional-Historisch Tijdschrift 4 (1972), p. 143; see also the remarks in W. Fikentscher, Methoden des Rechts, vol. 1(1975a), 676.

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 neds 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 non-gene-based biology, besides a gene-based one.

As we will see under III., both biologies have informing functions for law, and there are four of them. Two of the biologigal 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.[564] 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 ten-dency 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

564 Ralph Linton, The Cultural Background of Personality, New York 1945; Richard Potz, Editorial, in: 1 Law and Anthropology 7–22 (1986).

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.[565] 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.

III. A four-function theory of biology for law[566]

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.[567] 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 behavioräl 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.[568]

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.

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565 Cf., Wolfgang Stegmüller, Hauptströmungen der Gegenwartsphilosophie, vol. 2, 7th ed. Stuttgart 1986, pp. 741 *R. M. Hare,* The Language of Morals, Oxford 1952; R. Masters, Beyond Relativism (see note 546), 117–134.

566 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).

567 This latter issue is discussed, e. g., by Richard D. Alexander, Biology and the Moral Paradoxes, in: M. Gruter & P. Bohannan (eds.), Law, Biology and Culture, 2nd ed. New York etc. 1993: 109–118; *Christopher Boehm,* The Evolutionary Development of Morality as an Effect of Dominance Behavior and Conflict Interference, in: M. Gruter/Bohannan, op. cit, pp. 141–153; *Paul D. MacLean,* A Triangulär Brief on the Evolution Brain and Law, in: M. Gruter/Bohannan, op. cit., pp. 83–97; two critical voices: *Hubert Markl,* Constraints on Human Behavior and the Biological Nature of Man, in: M. Gruter/Bohannan, op. cit., pp. 98–108; *Richard D. Schwartz,* On'the Prospects of Using Sociobiology in Shaping the Law: A Cautionary Note, in: M. Gruter/Bohannan, op. cit., pp. 26–37.

568 On this, see notes 552 through 559, above.

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 exces-sively strict legal prescripts. Examples include:

a. *Kin-related conflict,* such as parent-offspring conflict, offspring-off-spring conflict, and preferential Investment of time and resources in kin (relative to nonkin). For this category, actors are genetically related, in most instances kxiown to each other, and the majority of conflicts center around behaviors that disrupt interpersonal relationships, constrain individual expression (e.g., values, behavioral styles), or which are asso-ciated 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).[569] The law often acknowledges the biological basis of such behaviors by granting milder or otherwise specially regulated punishments.[570]

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 develop-ment of alternative strategies for kin investment, such as using inter-mediate 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 exceedmgly difficult to constrain legally.[571]

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569 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' Oedipos.

570 Legal history shows that intra-family killing often was punished with special severity.

571 The legal problems of these intricate situations are sometimes summed up under the category of "domestic violence," three examples: H. Homer Clare, 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 oecurs 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; Charlottesville, 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 ineidence 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.,

c. *Preventing assembly.* Humans are strongly predisposed to associate with one another, and they do so for both self-interested and social rea-sons. 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 asso-ciations. The law failed largely because it disregarded human predispositions to associate.[572] Similar examples can be found in the failed 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 gangs.

d. *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.[573] 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).

e. *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 onlyoccur 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.[574] 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).

f. *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 terri-

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1992, Revision by Sheryl Gross-Glaser: "One might expect that women seeking legal advice because they were being beaten by their husbands would teil their lawyers about the vio lence. Abused women, however, generally do not discuss violence in their homes unless they are asked" (§ 6.01).

572 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 rejeet 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 eise had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. We have not yet reached the stage where the selectiön of a trader's customers is made for him by the govern ment", 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.

573 Reinhold Zippelius, Geschichte der Staatsideen, 10th ed. Munich 2003: C.H. Beck; idem, Allgemeine Staatslehre: Politikwissenschaft, ein Studienbuch, 15th ed. Munich 2007: C.H. Beck.

574 Legal Standards of interethnic and multicultural tolerance are discussed by Guido Calabresi, Ideals, Beliefs, Attitudes, and the Law, New Haven CT 1987 (German edition: Ideale, Überzeugungen und Einstellungen und ihr Verhältnis zum Recht, übers. P. Martin, preface W. Fikentscher, Berlin 1990).

tory; hamadryas baboon males are possessive of their females; and so forth.[575] Possession requires a surrounding environment out of which the things to be possessed can be singled out. On this point, possession and environment are mutally constitutive.[576] 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.[577] 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 tradi-tional tort law protection as well as marketability.[578] "Auctioning-off the environment" 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 sharea 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-foolowing 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

575 M. Gruter, Law and the Mind, Biological Origins of Human Behavior, New-bury Park/London/New Delhi 1991, pp. 41 ff. (German edition: Rechtsverhalten, Biologische Grundlagen mit Beispielen aus dem Familien- und Umweltrecht, übers. Elmar R. Gruber, prefaces W. Fikenscher and E. Donald Elliott, Köln 1993).

576 Cf., M. Gruter, op. cit., pp. 122 ff.

577 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 Programm, in: 6 Yale K. Reg. 109 (1989).

578 Michael Lehmann, Umwelthaftungsrecht: Ein Beitrag zur Internalisierung von negativen externen Effekten, in: Lorenz Schulz (ed.), Ökologie und Recht, Köln etc.: Heymanns, 81–89, 85.

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 interprete 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.[579] Although an earlier leading case had suggested 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.[580]

d. *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.[581] Constraining Function II teaches the legislator and administrator to be particularly careful and inventive to cope with "natures' temptations".

e. *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 un-

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579 BGHSt 24, 54 = WuW/E BGH 1147, 1153 – Teerfarben –.

580 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.

581 Paul Bohannan, Preliminary Notes on Ethnocentrism and Xenophobia, in: Michael T. McGuire, Human Nature and the New Europe, Boulder etc. 1993, pp. 75–82, calls xenophobia a cultural universal that in large-scale societies may become a serious social trap. See the debate between Irenäus Eibl-Eibesfeldt, Chancen einer multitethnischen Gesellschaft aus der Sicht eines Ethnologen, in: Welt am Sonntag No. 50 of Dec. 10, 1989; id., Der Brand in unserem Haus, in: SZ am Wochenende No. 105 of May 8/9, 1993, Feuilleton-Beilage, p. I, and Heiner Geissler, Wenn die Fahne fliegt, ist der Verstand in der Trompete, in: SZ am Wochenende No. 156 of Juli 10/11,1993, Feuilleton-Beilage.

aware 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 implica-tions of force. However, the fact that shows of force are often required sug-gests 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.[582] 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 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 environ-

582 On this partial congruity of biology and morals – and its problems – Wolfgang Wickler, Die Biologie der Zehn Gebote, München 1971, 6th ed. 1985; R. D. Alexander, The Biology of Moral Systems, New York 1987.

mental 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 multi-religious 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 cul-ture, 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.[583] But taboos have another side, namely they are contrary to concepts of freedom and behavior variability.[584] 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.

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583 Norbert Bischof, Das Rätsel Ödipus: Die biologischen Wurzeln des Urkonflikts von Intimität und Autonomie, München 1985, at p. 442: "kulturübergreifendes Universalphänomen" mit vermutbarem "vorkulturellen Kristallisationskern" (trans- cultural universal phenomenon with presumable pre-cultural focus of crystallization). Bischof uses G.P. Murdock's "gradients" at p. 41 and p. 577; see Georg Peter Murdock, Our Primitive Contemporaries, New York 1934.

584 A collection is presented by Wesel 124: Eskimo; Wesel quotes D. Jenness, The Life of the Copper Eskimos, New York 1970 (original 1922).

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, sociology, anthropology, and etholgy 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 societally 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 reeiprocity, such as reducing the complexities of contract law; and facilitating indirect reciprocity, such as recycling through developing social norms in preference to or in conjunetion 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 infrastrueture 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 produetion, and drug peddling to children and adolescents. Given that this behavior oecurs 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 ränge 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 täke-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 preceeding 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.[585] 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 anthroplogy 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,[586] 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.

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.[587] 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 *historie.*[588] In Germany, the term *nativism* was first used in a controversy among psy-

585 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.

586 W. Fikentscher, The Sense of Justice and the Concept of Cultural Justice: Legal Anthropology, in: Roger D. Masters und Margaret Gruter (eds.), The Sense of Justice, Biological Foundations of Law, Newbury Park/London/New Delhi 1992, 106–127.

587 See Chapter 10 I.

588 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*

chologists about whether the categories of pereeption 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.

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; 1884/1965 a). 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 tue law has generated the sense of justice," added von Ihering in one of his posthumous publications (von Ihering, 1965 b). 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).[589] For sociological reasons, Rehbinder (1989) is one of the most recent voices

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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).

589 It is this "intellectual value feeling" that caused Bihler to contradict Riezler, and it seems that Bihler has modern psychology on his side (Bihler 22 f.).

that favors the historic approach to the sense of justice instead of a speculative play with metaphysical concepts.[590] 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. 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.[591]

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, *Rechtsgeflihl* 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 argu-ments. 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 proce-

590 M. Rehbinder (1989, pp. 167ff., especially p. 169). Rehbinder gave credit to Geiger, *Vorstudien zu einer Soziologie des Rechts,* 4th ed., by M. Rehbinder, 1987, especially at 340. Geiger prefers the expression *Rechtsbewußtsein* (consciousness of the law) to *Rechtsgefühl* (feeling for the law).

591 See 15., below.

dure 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.[592] 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.

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 periodof 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 (Pospíšil, 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" (Pospíšil, 1978, p. 9). If there are any sanctions sustained by a this-worldly authority, one has to acknowl-edge 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*

592 M. Rehbinder (1989, 167ff.) points to die desolate state of the discussion of the *"Rechtsgeflühl"* 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."

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,* Pospíšil (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 Pospíšil, 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 deiinition 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 rea-

sons 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.

Pospíšil (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 psycho-logical deduction that leads to such a result. With this self-constraint, Pospíšil's dichotomy is the most convincing Statement of the reason why people follow the law. Pospíšil held that it does not matter whether imposed law is applied by brüte compulsion or by a more refined inducement, such as fear of monetary sanctions. Neither does it count whether the volun-tary and therefore internalized obedience to the law is cognitively (by *Rechtsbewußtsein*) or emotionally (by *Rechtsethos*) based. Pospíšil's bi-polarity model has the additional advantage of explaining the various devel-opments from imposition to internalization and the reverse, and of illustrating the imperceptible degrees and shades by which these developments occur.[593] For that reason the model offered by Pospíšil 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 Pospíšil 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 ofthose 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.

593 in (1982), 248 ff.

8. More examples for the sense of justice

The preceding remarks on the sense of justice are supposed to point out what may be called the methodology of law. It is time to add some examples concerning the substance and the practical contents of the sense of justice. The examples are taken from (a) the debate about the equality of treatment versus the adequateness of treatment (*Gleichgerechtigkeit* versus *Sachgerechtigkeit,* for details, see Fikentscher, 1975–1977, Vol. 4), (b) the issue of timely justice, (c) the alleged dichotomy between justice of the decision and justice of the law, and (d) the discussion about static and dynamic justice. Space and time do not permit more than some brief and sketchy observations.

9. Aristotelian principles

Since Aristotle and the scholastic philosophy, two principles of justice have commonly been distinguished: *equal* (including commutative and compensatory) justice under law tending to give everyone the same *(idem cuique),* and *distributive* justice aiming to give everyone an adequate share *(suum cuique);* see W. Fikentscher (1977 a) 185–194 and Chapter 35; M. Rehbinder, 1989, 173 f).

Being "treated alike" is a claim raised by the child who wants to have its mother's love and attention in exactly the same manner that is extended to its brothers and sisters. Children often insist on a meticulous equality that is not always understood by grown-ups who, in turn, tend to have developed an understanding for distributive, adequate justice. The art of the judge is to find the golden mean between necessary equality and necessary adequate-ness in the circumstances of a particular case. *Stare decisis* – treating cases alike – is a principle opposed to distinguishing one case from another as having essentially dissimilar facts. Thus the sense of justice of a child, of a professional expert, or of a judge is guided more strongly either by the equality or the adequateness principle. Therefore, it may be said that the sense of justice is person-specific, age-specific, profession-specific, and so on.

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.[594] Instead, and for the same purpose, the Spanish Constitution provides a *defendor del pueblo,* which is an Institution modeled after that of the Scandinavian ombudsman. The defendor 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.[595] To this end, the defendor 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

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

595 There is no appeal from the decisions of the defendor del pueblo. The number of complaints to to gt the defendor 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 defendor del pueblo that is threatening its efficiency; see Mallorca Magazin, 1989, 15, 9–15 and 28, where the statistics are reported.

Citizens are increasingly reluctant to use this legal Institution to get relief; as a result, the defendor del pueblo, a democratic institution set up with good intentions, threatens to fall into disuse.[596] 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, Pospíšil (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, 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.

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 ofthe 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.[597] 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 unwilltng 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

596 loc. cit.

597 This corresponds to Pospíši'l observations of Kapauku trials.

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 accessi-ble 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 everyfhing 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" epistemo-logical accessibility, or to "dynamic" ("procedural") search and debate according to one's personal religious or cultural convictions.

13. The sense of justice of persons within the legal bureaucracy

It would be worthwhile to study the sense of justice among persons whom Max Weber referred to as the legal staff: lawyers, attorneys, barristers, solicitors, judges, justices, State officials, administrative personnel, parlia-ments, members of parliament, and so on. Under this aspect, the sense of justice gains most of its practical importance. Of course, a study of each type of the legal staff and its engagement in, its rejection of, or its indifference to the sense of justice would amount to a monograph in its own right.

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, itis, 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 ofthe 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 streng sense of justice: It is the querulist, the person "abnormally given to suspicion and accusation" *(Webster).* M. Rehbinder (1989) notes that in cases of an insane exaggeration *(krankhafte Übersteigerung)* 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 *(Rechtsstaatlichtkeit;* 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 renowed literary example in German poetry.[598]

15. Cultural Justice

To conclude, there is a universal sense for justice tat 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.

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598 On conflicting forums in general, see Chapter 4, above, and Heeschen (1989, 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 *ofmutu yangana,* "the sensible man," and the other is that *oimutu 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, 244; 1982, 312) discussed Gluckman's observation and confirmed them with respect to his 6wn 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 llif distinctign between the objective legal wrong and the subjective culpability (intent or negligence). See the discussion of 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 Pospíšil (1971, 195; 1982, 249). Internalized law has, of course, a better chance to be morally accepted. The relations of laws to morals and the subsequent distinctions ofmoral, amoral, and immoral law, as well as the possibility of morals beyond the law, pose a set of different issues. Pospíšil (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 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.

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PART TWO: THE SUBDISCIPLINES OF ANTHROPOLOGY OF LAW

The following discussions of the subdisciplines of legal anthropology begins with brief remarks on the outline and the largely ethnological meaning of these subdisciplines.

The discussion of anthropology of law in Part One covered anthropology of law in its general anthropological aspects. It focused on law-related outlines, themes and thoughts, such as terminology, the theory of fora, anthropological analyses, the theory of culture, and biological topics. In this discussion anthropology is understood as a social science: An anthropology of law therefore simply follows general anthropological concepts such as identity, culture, modes of thought, analyses, migration, acculturation, etc. Therefore, Part One is an introduction to anthropology with issues, materials and ideas taken from legal science, but not ordered according to the fields of law.

Part Two raises issues that more closely belong to law. Here, not the science of anthropology in general, but the science of law provides the structure of presentation. Therefore, the outline of Part Two corresponds to an introduction into law. Of course, introductions to law present of the several fields of the law in various orders. This is so within one and the same legal system, and even more so when the laws of different legal systems are introduced. The following outline of presenting the chapters of Part Two is especially designed for anthropological purposes, and will probably not be found in an introduction to any legal system. But a reader initiated in studying legal materials will have no difficulties finding a familiar and suitable way through the subdisciplines of the law.

Chapter 8 will discusses kinship patterns, and other anthropological aspects of family and gender law. Though one of the most intricate areas of ethnology, aspects of family and kin form a basis for many other anthropological contexts, such as societal ordering, possession, and dispute settlement. Thus, Chapter 8 is about what in the civil law system is called "family law". Chapter 9 deals with social and societal ordering and presents the anthropology of constitutional justice.[599] In terms of private law, Chapter 9 covers the legal anthropology of associations and organizations. Chapter 10 deals with the law of contracts. The "contractual" issues to be discussed include reciprocity, exchange, gifts, forms of contracting, and trust. In term of legal philosophy, Chapter 10 examines the anthropology of commutative justice. Chapter 11 discusses possession, ownership, cultural property protection, inheritance – in essence the "law of property", and in terms of legal philosophy the anthropology of distributive justice. Chapter 12 contains ethnological findings and theories of wrongful acts and omissions, torts, crimes, and sanctions – in short the anthropology of compensatory justice. Finally, Chapter 13 deals with issues of dispute settlement and other procedural, including jurisdictional, issues, that is, an anthropology of procedural justice. Chapter 13 also presents an introduction to conflict of laws from a legal anthropological point of view, due the close connection of collision issues to jurisdictional ones.

The study of legal issues of ethnology shares the general development of the subdisciplines of anthropology (see Chapter 1 II. 3.). Accordingly, in Germany, investigations in strict legal

599 On the branches of justice, see W. Fikentscher (1977 a), 656 f., with literature; idem Schadensersatz aus rechtswidrigem Streik unter besonderer Berücksichtigung des politischen Streiks, Diss. Jur. Munich 1952 (mimeogr.), 46 ff., 55 ff.

ethnology are relatively rare,[600] compared to broader anthropological designs, and to ethnological traditions outside of Germany.[601] A hallmark in legal ethnology proper is Llewellyn's and Hoebel's book on the Cheyenne Indians,[602] paving the way for future studies in the ethnology of law. The work of Karl N. Llewellyn, a lawyer, is a good example for the input of ethnological work in law for both legal theory in general[603] and codificatory work in particular.[604] Llewellyn and Hoebel distinguish between ordinary "law stuff" to be dealt with in daily practice, and "trouble cases" for the treatment of which a "grand style" of decision making is necessary. The distinction seems to be valid for law in general. Yet, to the legal ethnologist even the daily "law stuff" is as interesting as are trouble cases because each kind of cases or legal issues reveals something specific for the culture of a legal system.

The subdisciplines of the anthropology of law, such as family systems, leadershjp patterns and types of legal procedures, are closely related to the legal subdiscipline of comparative law. Comparative law is the legal science of the study an knowledge of foreign laws, such as the various national bodies of civil, criminal, and public law, and their comparison as to substance and methods. Comparative law is usually taught along with international private law and other collision laws. As a rule, teaching comparative law limits itself to the great legal systems, such as the group of common law countries, European continental legal systems such as Italian and Swiss law, and the circle of French-influenced laws (see Chapter 5 VII. 4., above). When comparative efforts are being extended to the study of religious laws such as Buddhist, Hindu, Islamic, Marxist-Confucianlaw, or to pre-axial-age ("animist") laws such as tribal laws, comparative law and ethnology of law tread the same turf. The comparatist will stress identity and comparability of what she or he finds, the ethnologist will concentrate on the links between the legal and the non-legal traits of the group or nation under consideration. The main distinction between the endeavors of the comparatist and the ethnologist are the cultural-anthropological background of the ethnologist (as discussed in Part One above), enabling the ethnologist to make generalized statements of cultural importance, if she or he wants to do so. To the comparatist, these general cultural categorizations might not be relevant or recognizable.

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600 See, however, E.J. Lampe, Rechtsanthropologie, Berlin 1970: Duncker & Humblot; U. Wesel, Frühformen des Rechts in vorstaatlichen Gesellschaften, Frankfurt/M. 1985: Suhrkamp; Rüdiger Schott, Justice versus the Law: Traditional and Modern Jurisdiction Among the Bulsa of Northern Ghana, 21 Law and State: A Biannual Collection of Recent German Contributions to These Fields, Tübingen 1980: Mohr Siebeck, 121–133.

601 Examples: Pospíšil, Leopold, Kapauku Papuans and Their Law, Yale University Publications in Anthropology, no. 54, New Haven, CT., 1958; idem, Anthropology of Law, New York 1971 (Neudrucke 1974, 1987 HRAF New Haven, Conn.), dt.: Anthropologie des Rechts, München 1982; idem, Ethnology of Law, 2. Aufl. Menlo Park 1985; idem, Sociocultural Anthropology, Boston 2004: Pearson Custom Publ.; Rouland, Norbert, Anthropologie juridique, Paris 1984; engl. Stanford U. Press; 1992; Moore, Sally F. (ed.), Law and Anthropology; A Reader, Malden, Oxford & Carlton 2005.

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603 American and Scandinavian legal realism, see, e.g., W. Fikentscher (1975b) 273–326, with authorities.

604 The Uniform Commercial Code – UCC –.

Chapter 8: Kinship patterns, and other anthropological aspects of family and gender Law

In kinship anthropology, up-to-date economic and demographic reasons for the existing six kin terminology systems are given, and implemented by new insights in cross cousin marriage and fear of incest. The rest of the Chaper is devoted to polygamy and gender issues.

I. Shorthand Kin Identification

As a rule, the identification of a kin relationship, starts from an *ego,* i.e., from a person whose view on others furnishes the relevant perspective. This characterizes kin relationships as basically social, not societal (see Chapter 3 II.). On the other hand, kin groups may and often will be societal components of a society, but then *ego* plays no role.

The shorthand symbols of social kin relationship are (cf. Pospisil 2004, 255f.):

Fa = father, Mo = mother, Br = brother, Si = sister, So = son, and Da = daughter.

The prefixed genitive is used to identify a relationship: Fa Br is father's brother, the paternal uncle. Mo Br is mother's brother, the maternal uncle. Mo Si So is ego's cousin, Si So is ego's nephew, and Mo Br So So is ego's cousin once removed; etc.

But who is ego's father in this shorthand system? In some kinship systems the biological father is not counted as family. It seems to be a generally accepted ethnocentrism that in what is called here the shorthand system Fa = father *is* the biological father. Thus, emic understandings of family relationships do not seem to affect the shorthand expressions listed above. The matter has not yet been clarified.

II. Concepts of Kinship

The following sketch tries to define the most frequently used concepts of kinship. This is necessary because there is no generally accepted terminology of kinship relationships in anthropology. However, disputes about terminology are avoided. Often, they are only boring. To a large extent, the terminology used here follows widespread practice. Exceptions and meaningful issues are marked when necessary.

1. Genealogical Table and Pedigree

A table that shows the descendents of a person, the person usually placed on top, is called a genealogical table – the top is narrow, the bottom broad (*Stammbaum,* family tree). A table starting from ego at the bottom and telling the persons from whom ego descends is a pedigree – the bottom narrow, the top broad *(Ahnentafel).* The English usage is flexible.

2. Two Assistance communities: Orientation and procreation. Nuclear and extended family. Kindred[605]

Every person belongs to two assistance communities (Norbert Bischof: *Beistandsgemeinschaften*), one descendency community and one procreation community. The descendency communities are also called tradition or orientation community. Typically, both communities (descendency and procreation) are nuclear families, and the assistance given is direct and immediate in order to meet daily needs, so that is has not to be expressly claimed:

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605 For the following, see Norbert Bischof, Das Rätsel Ödipus; Die biologischen Wurzeln des Urkonflikts von Intimität und Autonomie, Munich 1985: Piper. I am grateful for Norbert Bischof's permission to use his graphs for this Chapter.

Together, several descendency and procreation families form the extended family or kindred, die *Verwandtschaft,* the *mishpoke*.

3. Procreation community

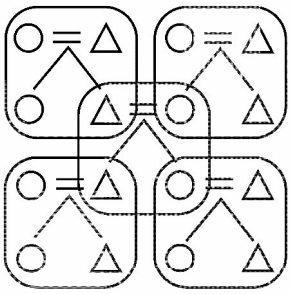
Typically, a person begins to exist by procreation through mother and father. The parents will give her child immediate assistance to enter life, by feeding, clothing, sheltering, etc. A nuclear procreation unit can be seen in the following Graph.

Procreation generates a very strong force of belonging and care. This can be demonstrated by legal rules governing the establishment of an artificial nuclear family: In most legal systems, modern adoption laws, inside and outside of "patch-work families", involve an elaborate procedure including visits, reports, and well-reasoned decisions by public counsellors, psychologists, legal advocates and judges. Even after a lengthy and careful screening process, it is not sure whether an adoption will be granted. Compared with cumbersome and double-checked adoption, the recognition of a child as legal descendent of a natural mother or father – leading to the same legal status as adoption – almost goes as a matter of course. Procreation establishes a factual presumption of good parenthood. The difference from adoption is striking.

4. Descendency (or: tradition, or orientation) communities

The counterpiece to a procreation community is a descendency (or tradition, or orientation) community. In the first line, their purpose is not to give a person immediate help such as food or rearing. Rather, descendency communities explain who descends from whom and what follows from such tracing one's ancestry. One of the consequences of descendency may also be the granting of personal or economic assistance ("nepotism"), but assistance will often have to be claimed. Descendency communities can always point to a common tradition. Therefore, they are also called tradition communities (Norbert Bischof: *Traditionsgemeinschaften*).

A picture in which procreation and descendency community may be illustrated in the following graph. Combined they show a kindred:



Kindred

When the lines of descendency run vertically, indicating who descends from whom, one can speak of a "linear" descendency group. Linear descendencies ("lineages", also called "sibs") are, in anthropology, either "agnatic" (= "patrilineal") or "uterine" (= "matrilineal"). Agnatic (or patrilineal) descendency exists between a father and his children, grandchildren, etc. Uterine (or matrilineal) descendency links a mother and her children, grandchildren, etc. (Bohannan 1992, 94f.)

The anthropological use of the terms "agnate" or "agnatic" should not be confused with the agnate form of relationship in Roman law where these terms originate. In Roman law, agnation means to belong to that group of persons which is under the patria potestas of its

holder, the male family head. These are indeed the persons connected to him by the patrilineage. In Roman law, the opposite concept is cognation, whereby a cognate relationship refers to a vertical or horizontal blood relationship, e. g., between father and his children or between brothers, sisters, or brothers and sisters. Therefore, all agnates are cognates, but not all cognates are agnates. In anthropology, cognation may be used for "blood related kin", but the term is of no great importance.

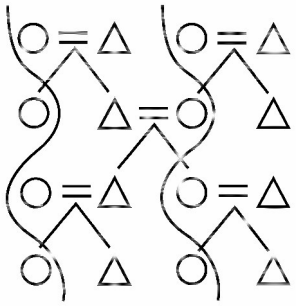
The agnatic relationship in anthropology, that is, the patrilineage, is a core concept in the identification of a lineage (see illustration below). In legal history, the patrilineage is important for succession of offices and inheritance. In Old German law, the agnates form the *"feste Sippe"* (steadfast sib). For anthropological usage, matrilineages are an alternative to patrilineages. A Roman law term is missing. Therefore, the term "uterine" has come into use for the identification of a matrilineage. In this book, patrilineage and matrilineage will be used more often than "agnatic" and "uterine" relationship. Both lineages are of central importance for the anthropological understanding of kinship, and for many other anthropological findings and teachings.

When kinship terminology includes statements of descendency that include a connection by marriage, "kin" or "kindred" may be used, implying that blood relationship and marrige ties may be fused. In German legal history, there is talk of *"wechselnde Sippe"* (changing sib), in contrast to *feste Sippe* (= steadfast sib). Modern terminology speaks of "marriage-related kin" *(Schwägerschaft)*.

Because of their all-pervading importance for anthropology, two kinds of descendency (or tradition) communities merit closer attention: lineages (5.) and clans (6.). Clan can best be understood by first defining lineage.

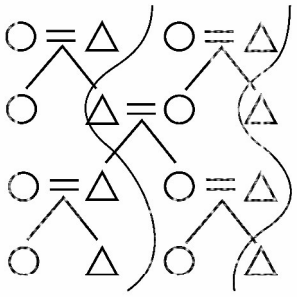
5. Lineage

A lineage (German: *Linie,* often also *lineage* with English pronunciation, sometimes *linage* with French pronunciation; French spelling however: *lignage*) is a relationship based on descendency that in the minds of the members of that lineage is traceable to an *identifiable human* progenitor or progenitrix, for example a greatgreatgrandmother. This is called "demonstrated descent", and the progenitor or the progenitrix are "demonstrated apical ancestors" (apex = Latin for top). When visiting a tribe and starting a conversation with a tribal member, frequently she or he says: "We are matrilineal, you should know", or: "We are patrilineal and have been since time immemorial". Everyone in the tribe, literate or illiterate, knows the tribe's linearity type. Making it explicit is part of introducing oneself because family relationships make persons identifiable. In many tribes it is good custom to talk a while about relatives before the older conversation partner turns to the intended subject matter of the exchange. A branched-off lineage is sometimes called a *ramage.*
A lineage may be sketched as follows:



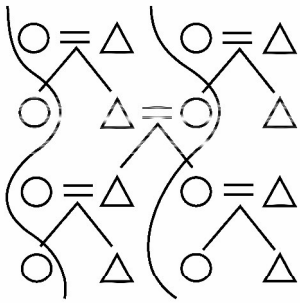
Lineage

A matrilineage may look like:



Matrilineage

And a patrilineage appears below:



Patrilineage

Hunters, gatherers and fishers are predominantly patrilineal (because the main foodstock is contributed by the hunting men), horticulturalists and early farmers tend to be matrilineal (because the soil, "mother earth", is often deemed to be female, and earth and fertility spirits, demons, gods, saints are mostly female). After the urban revolution,[606] many matrilineal societies turned to patrilinarity. Today matrilineal cultures form a minority, albeit sizeable, among all existing cultures. Examples are the Navajo nation in New Mexico and Arizona (about 240000 members), several Pueblo Nations in New Mexico, e.g. Taos Pueblo, Zuni Pueblo, the Hopi Nation in Arizona (>10000 members), and many nations north of Angola along the West African Atlantic coast.

Patri- or matrilinarity is the decisive factor for many family matters. The most important are tribal membership and its corollaries such as leasing rights for housing and agriculture, the right to be initiated to tribal ceremonies (and other attributes of tribal standing), personal and familiy names, the right to claim divorce or separation, custody for children, marital property, and inheritage. When a man from matrilineal Taos Pueblo marries a girl from patrilineal Santa Clara Pueblo and lives with her in Santa Clara, some fifty miles away, "he is in bad shape" because in neither place he is of influential status (fieldnote, communication by tribal member) Paul Bohannan (1992, 86–100) provides a rather complete picture of kinship terms and their practical meaning for behavior and activities (loc. cit. 90f.). "Kinship terms are language tags for referring to and addressing kinfolk. Each tag lumps some kinfolk together and sepa-

606 For V. Gordon Childe's two revolutions, and their use in this book, see Chapter 5 II. 2. above.

rates them from all others" (loc. cit 88). Bohannan also stresses the fact that the patterns emerging from different modes of reckoning kinship terms are often linked with religious, economic or other schemata. For avoiding grave ethnographic errors these different cultural meanings of kinship designations should always be kept in mind when studying and comparing groups.

Sometimes a tribal nation has both types of linearity. Some bands are patrilineal, some matrilineal. These nations are called ambilineal. An example are the Apache in the US-American Southwest. Originally, the Apache were no homogenous tribe or nation but a loose conglomerate of independent bands, some patri-, some matrilineal. When forced by the US government to form "a tribe" the family traditions subsided. This is of legal importance: When an Apache family judge has to provide for custody of minors (orphans, children of divorced parents, etc.) she or he will assign custody to relatives of the patriline when the child comes from a patrilineal familiy, but to a relative of the matriline when the child comes from a matrilineal family, and follow state law analogy when the family "lives modern". In all situations, however, according to Apache law, the welfare of the child will prevail over tests of linearity or state law analogy.[607]

Ambilinearity is to be disdiguished from bilinearity. Bilineal relations are descendencies when the person derives its descent from both sides, mother and father. Industrial states such as Sweden, Spain and Germany are bilineal, and the laws of familiy names express this in various ways.

6. Clans

As stated, the "demonstrated apical ancestor" of the lineage holds the highest position in the descendency group called a lineage. When this highest position is attributed to a non-human or mythical entitity such as an animal (bear, raven, eagle, butterfly, wolf, etc.) or by the sun, the sun forhead, the moon, a star, a cloud, a tree, a mountain, a river, a well, a plant such as chamiso or corn, etc. one speaks of a clan. Clan members derive their status from a "stipulated apical ancestor". A clan is therefore, etically speaking, no descendency group. Emically, however, the clan members believe in their common ancestor as their progenitor, be it a bear, a cloud, or the sun. By this in fact enlarged citerion of belonging, the clan is comparable to a large artificial family, it is a family metaphor. Therefore, usually clans count more members than lineages, and often several lineages form one clan.

Often what in popular usage is called a "clan" in reality is a lineage. Most Scottish clans claim to be lineages, not clans. Also, clans are not infrequently mistaken for what in reality is a kindred, just a big, branched out, family.

In German, there is no generally accepted translation of the word clan. Some translators use *Sippe*. But *Sippe* may also mean kindred or extended family. *Sippenhaft* is collective guilt as opposed to individual guilt. *Sippe* could also lead to mistaking clans for a kind of sib, a term from which the English terms sibling (= sister or brother) or siblings *(Geschwister)* are derived. Therefore, in the following text, clan is both a German and an English word.

Clans are, like lineages, important structural elements in the build-up of a tribe or tradition-conscious nation. Often, clans are the carriers and agents of the ongoing events, and the points of reference of tribal life. Clan members assist each other while non-clan members may be excluded from help. The Middle German Broadcasting Company (MDR) reported on July 8, 2007 (at 1.30 h) about heavy flood in the Brahmaputra delta in Bangladesh, and that help to flood victims depended on clan membership: When an island sinks, the inhabi-

607 Cf., Cooter & Fikentscher (1998) 544 f.

tants move to clan members who live on safer ground, which again may be an island. People living on the river banks are helpless because they have moved there from other places and may have no clan members in the neighborhood. In New Mexico, citizens of many Pueblos (other than Tewa speaking) almost invariably belong to clans. If a Pueblo clan member belongs, for example, to the Squash clan of his own town and, while traveling, comes to another Pueblo and needs help there, the clan member may ask for assistance from the members of the Squash clan in that foreign Pueblo if there is such a clan. From this custom, some Pueblo elders have concluded that the clans are older than the Pueblo towns. However, this seems to be misunderstanding, based on a misjudgment of what clans anthropologically are. The reason for the hospitality is not the older age of the clans compared to the age of the towns and a later diffusion, but the stipulated nature of the apical ancestor: There is only one mythical squash plant, or chamiso bush, or bear, or sun forehead, etc., and of course that mythical being exists independently from geographical locations. Thus, the artificial "family" relationship extends to other Pueblos provided there happens to be a like-named clan.

In some tribes, there are subclans. They are comparable to the ramages as branched-off lineages. Clusters of clans are possible but have no general ethnological designation. When in a tribe or nation clans cluster together to form two half tribes (in order to approach a tribal structure similar to moieties), the clusters are called phratries (for example: Santa Ana Pueblo in New Mexico), as already mentioned.[608] In theory, three or four clan clusters may compose a tribe, and one could speak of three or four phratries. I could not find examples of this type.

The working and importance of clans in everyday life is brilliantly depicted by Bohannan (1992), with examples from Navajo society (246–248) and Hopi society (155–157). A caveat may be added: According to the criteria discussed above, many "clans" in Africa an Asia are rather lineages, and many subclans ramages.

7. Patterns of Residence

If the wife moves to the husband's place, the ethnological term is virilocality (*vir* = Latin for man). The opposite is uxorilocality (uxor = wife). If the young couple moves to live in the husband's or wife's father's place, it is called patrilocality. The opposite, moving to the husband's or wife's mother's place, is matrilocality. Moving to an uncle's place is covered under avunculocality.

Patrilinearity does not necessarily imply patrilocality, nor matrilinearity matrilocality. Rules of linearity and rules of residence may criss-cross.

8. Patriarchy and matriarchy. Motherright

Since J.J. Bachofen's pathbreaking book *"Mutterrecht"* (motherright, 1861), one of the founding books of cultural anthropology, ethnological study has distinguished patriarchy and matriarchy. The distinction is to indicate whether males or females play the socially dominant roles in a society. Today, this terminology has been almost totally discarded because too many qualifications would have to be made in attempting to assign a given culture to the one or the other side. Whenever used, it should only be done so in an non-technical sense. Under 6. above it is said that matrilineal does not mean matrilocal, for example. This was one of the reasons for giving up the dichotomy.[609] Following Bachofen's terminology, Bronislaw Malinowski in "Crime and Custom" (1926) speaks of "fatherright", written in one word.

608 See Chapter 3 VI, above.

609 Malinowski confronts motherright and father's love in a special sense to explain leadership rules in Trobriand society, B. Malinowski, Crime and Custom in Savage Society, New York 1926, Hartcourt & Brace.

9. Incest

An ethnological theme in the present context is incest. Culturally, incest is closely connected with the concepts of nuclear family, extended family, lineage, and clan. So far as one can see, every culture has rules concerning incest because norms concerning incest, leadership, and contact supranatural forces exist in every culture. Other cultural norms will be added, of course, making cultures many-faceted and flexible. The contents of these norms vary widely.

Also the concept of incest varies. It may mean the fact of sexual intercourse, or socially or legally formalized conditions for it such as engagement or marriage. The warning against, or the prohition of, incest may refer to persons of the same nuclear or extended family, of the same lineage, the same clan, or the same moiety (or phratrie).[610] Even if a clan comprises thousands of people, when tribal custom or law disapprove of clan incest there may be sanctions against the parents and ridicule against the child. "Talking clans" in Navajo may indicate her or his interest in getting to know the other a bit better. So when "talking clans" continues, the flirt may turn serious.

There are several etic theories on why there is a universal tendency towards incest avoidance. The four prominent theories are the following:

(1) A *medical* theory is based on observations from medical history that since immemoriable time mankind believed that incest may lead to bodily or mentally impaired offspring. This belief is sometimes expressed in stories and ceremonies of indigenous peoples. For example, many pueblo nations in New Mexico, Arizona, and the state of Mexico have sodalities, in English called clown societies. On feast days, certain members of clown societies, dressed in black-and-white striped costumes perform their antics to onlooking tribal members and, whenever admitted, guests. If a clown climbs down a ladder head down and feet up, it is to demonstrate what may happen to a person born from clan incest.[611] There is evidence that human inbreeding is perceived to cause corporeal defects. Six fingers on one hand is a phenomenon found among the Amish, a religious group that disfavors marriages with non-Amish. On the other hand, marriages between siblings among Ancient Egyptian royalty were common, again for reasons of purity, in this case the purity of the royal bloodline.[612]

a. (2) Another theory argues psychologically, basing its argument on what is called "instinctive horror". Children – including non-siblings – who know each other from playground or come of age together in daily contact tend to show little sexual interest in each other. They know the friend too well to be interested in her or him as marriage or sex partner.[613]

b. (3) The *disruption* theory, a third proposal to explain incest avoidance, points to the undeniable importance of the family, nuclear and extended, and reliance on kin relationship for early societies. Incestuous relations within that family or kin may have disruptive effect because normal family or kin ties collide with ties that are typical of sexual partners.[614]

(4) A psychoanalytic theory, called *Oedipal* theory, has been brought forward by Sigmund Freud:[615] In the early days of mnkind, the father, a strongman, had a harem. One day, his sons kill him and inherit his wives. In order to avoid the same fate as the father, the sons agree not to commit incest.

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610 See Chapter 3 VI. 4.

611 On clown societies, see Bandelier 1890, 1971; Tony Hillerman, Sacred Clowns, New York 1993: Harper-Collins.

612 W. Scheidel, Brother-sister Marriage in Roman Egypt, 29:33 Journal of Biosocial Science 361–371 (1997).

613 Francis Galton, Studies in Eugenics, 11/1 American Journal of Sociology 11–25 (1905).

614 E.g., Gerhard Kubik, Zur ontogenetischen Basis der Inzestscheu, Berlin 2003: Reimer (incest taboo as society-political strategy).

615 Cf., Bruce Bower, Oedipus Wrecked: Freud's Theory of Frustrated Incest goes on the Defensive, Science News of Oct. 19, 1991.

To decide which of the theories holds more scientific water, deeper investigations are needed than are possible in the present context. The medical theory has the merits of being able to point to medical facts. The instinctive horror theory sounds plausible for many imaginable situations, but could also be turned around: Kids growing up together may like each other for marriage. The disruption theory has one important advantage: it explains why incest between the generations is felt as much repulsive as between siblings. Freud's Oedipal theory stands against results coming from biological anthropology against it: harem holding mammals (such sea elephants and lions) show much greater dimorphism (= bodily differences between the sexes in size and appearance) than early man so that monogamy with marginal exceptions is the most probable form of partnership among the ancestors of humankind.[616]

III. The Six Terminological Forms of Family Relationship: Eskimo, Sudanese, Hawaiian, Iroquois, Crow, and Omaha

One of the unsolved issues of the foregoing considerations of kin concepts is the question whether the starting point for any classification of kin relationship is the etic point of view of the outside observer or the emic ascription of relationship in the minds of the participants. In order to make generalized statements of kin relationships at all, above we chose the etic stance. Now we have to leave the etic view aside and change to emic conceptions of who belongs to whom:[617] When an Inuit, a Hawaiian, an Iroquois and a Navajo says "this is my father", the statement may have very different meanings. Using such emic perspectives, we can count no more than six types of family designations in the world.

This is a surprise in more than one respect. Why do ten thousand cultures[618] use only six types of kinship terminology, why not more, and why not less? In defining the six types we will see, at least in part, that circumstances of life style, economic considerations, and generalized cultural feelings of belonging may be responsible for the number of six. At least several of the six family types are deducible from one another. Ethnological literature on these deductions is scarce, and the views proposed below may be criticized as being rather speculative. At the very least, they illustrate the six types and explain their existence and form.

The names for these six types of family systems are more or less haphazardly chosen. Usually the ethnographic discovery of a system as being practiced by a certain tribe or nation led to the name.

1. The Eskimo System

The Inuit do not like to be called Eskimo. The latter word means "raw meat eater" and is given as a nick name at best, by Indian tribes settling farther south where there is more fire wood to roast meat on. For Inuit people, wood is a precious item, and drift wood is distinguished from other wood. Inuit simply means "man", "human being". But the word "Eskimo" remains, without any pejorative connotation, as part of a designation of a certain type of family system, the "Eskimo system", and an ethnological family definition.

In the Eskimo system, the family is determined by a father, a mother, and their children. It is the small, nuclear, family which is used not only in Inuit society but also in most Western industrialized societies, and which by the participants of these societies is often regarded as

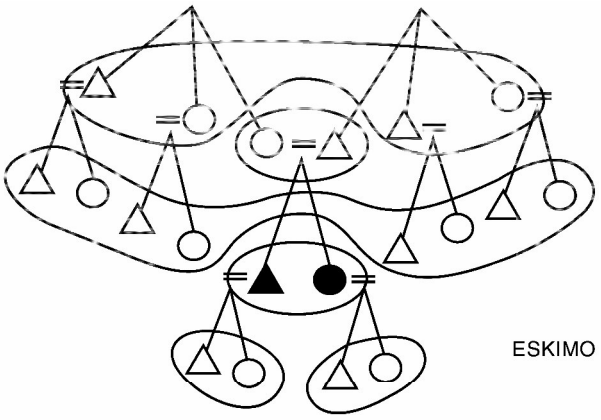
616 Volker Sommer & Paul L. Vasey, Homosexual Behavior in Animals: An Evolutionary Perspectice, Cambridge 2006: Cambridge Univ. Press.

617 On etic and emic see above Chapter 2 I, and text near note 477.

618 Estimates are that in history and presence about ten thousand cultures existed and exist.

the only one existing. But statistically, in relation to the number of cultures in history and presence, the Eskimo type of family is an exception.

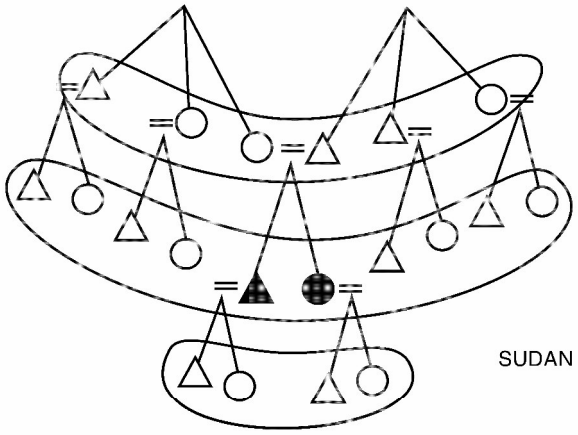
Why do hunters, gatherers, and early fishing societies and modern industrialized societies use the small, nuclear family as their standard? Firstly, the hunting of individual prey, gathering and fishing can be achieved by a small group such as the nuclear family, and the modern industrialized society also gets along best through these small units because of a high degree of division of labor. Secondly, there is no need for large collective efforts such as slash-and-burn farming, irrigation, net-hunting, or nomadism. Thirdly, there is an almost even mortality rate of men and women, so that no significant inequilibrium of males and females necessitates forms of collectivity, nor exists significant warfare to enslave needed males of females. Fourthly, there is no preference of certain categories of marriage partners such as, in other family systems, between cross-cousins. These four reasons explain why the Eskimo system is the best-fitting form of family for both northern foragers and modern industrialized societies. A sketch of the Eskimo system looks as follows. (The circles are the females, the triangles the males; the black symbols designate the "ego(s)"):



2. The Sudanese System

The Sudan system is not dissimilar to an Eskimo system. However, it avoids mergers, prefers bifurcations, and its family type may numerically include more people than a nuclear Eskimo type family. The Sudanese system is found in Near East and Northern Africa. Books on legal anthropology often do not mention the Sudanese System, only the other five systems. Norbert Rouland (1992, at 193) indicates that because of its high degree of bifurcations the Sudanese system has different designations for cross- and parallel cousins, and in addition distinguishes between matrilateral cross-cousins (Mo Br Da/So) and patrilateral cross-cousins (Fa Si Da/So). Thus it is understandable that Rouland's order of presentation is Eskimo, Hawaii, Iroqois, Crow, Omaha, and Sudanese, because at first sight the Sudanese system looks like a Crow or Omaha system further developed. However, when the Sudanese system distinguishes between cross- and parallel cousins it does not so for reasons of overcoming incest avoidance by peace-seeking (see below VI.). This may indirectly be concluded from the Old Testament that does not refer to a conflict between peace-seeking and incest avoidance in the early Near Eastern societies it mentions, and is indiscriminately (mildly) opposed to incest (cf. Genesis 28.6–9: Esau marries Malahath, his parallel cousin; Genesis 38: Judah and Tamar; Leviticus 18. 6–18; 20. 11; Deuteronomy 23. 1; 2 Samuel 13: Amnon and Tamar). More sources still have to be studied Therefore as of now, in the Sudanese system the reason for cross- and parallel cousin distinction is not pacification but fragmented designation through far-going

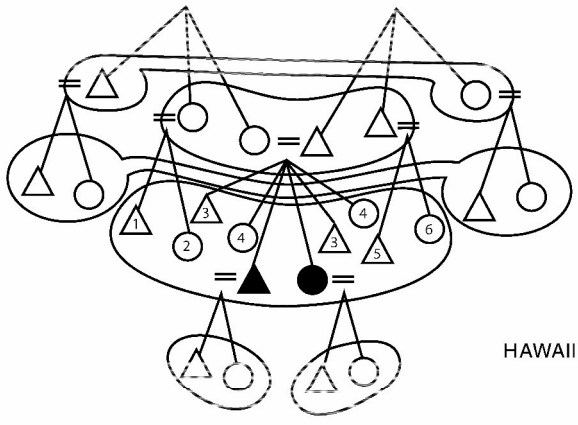
bifurcation. As a result, one may assume that the Sudanese system is closer to the Eskimo system than to a system of the Hawaii-, Iroquois, Crow-, and Omaha group. A sketch of the Sudanese system follows:



3. The Hawaiian System

The Hawaii system can be found in societies that practice slash-and-burn, among horticulturalists, early farmers, and in other societies that require collective efforts such as irrigation or cattle herding for their livelihood. Large families are needed to produce the daily supply. The Hawaii system is also a solution to the need for a child of having several fathers and mothers because warfare or diseases take a high toll among the parent generation. In Hawaii type society, children of several mothers grow up together.

The Hawaii system is called generational because it neatly separates the generations, of the grandparents, the parents, and the children. Each ego child says "mother" to all the females within the next higher generation, and "brother" and "sister" to each child within its own generation. In the highest "cloud", all females are called "grandmother", and all males "grandfather".



4. The Iroquois System

The following remarks are to prepare the understanding of the third type of family, the Iroquois system. It is, as are the remaining family patterns (the Crow, Omaha, and Sudan, discussed below), a "Hawaii plus" system. Something is added to the Hawaii system, and this

"something" leads to a new identification. This means that there are really only two radically different family types: Eskimo – the small family –, and Hawaii – the large generational family. Iroqois, Crow, Omaha, and Sudan can be developed from Hawaii by adding certain elements.

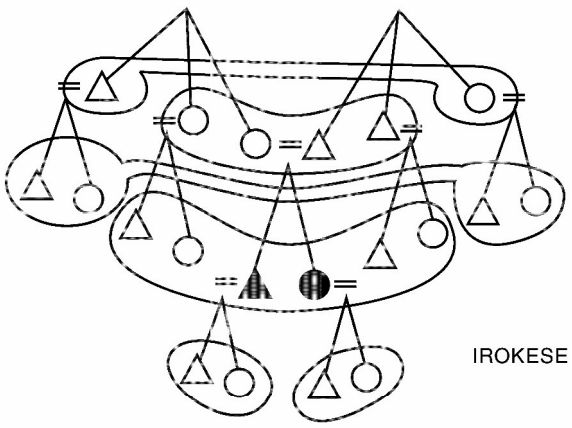
Also, the following remarks are to introduce two opposite concepts of family designations that are in use to identify characteristics of family systems as well as other ethnographic findings. The opposite concepts are "bifurcation" and "merger". They could be discussed in an abstract introduction to basic ethnological conceptuality. But it is easier for introductory understanding to put them in place in the derivation of the Iroquois system from the Hawaii system:

Arbitrarily, and as a theory, somebody could take the Hawaii system and, instead of calling both grandfathers equally "grandfather", and both grandmothers equally "grandmother", give the grandparents on mother's side, and the grandparents on father's side, different names. Or, somebody would prefer, independently from any system, the idea of calling father's brothers with names different from mother's brothers, instead of calling them all "uncles". The Swiss, for example, do this for aunts: Father's sister is *Tante,* mother's sister is *Muhme.* Or any cousins may be distinguished in a similar manner: cousins born from same-sex siblings, of father or mother, are called "parallel cousins", whereas cousins born from different-sex siblings, of father or mother, are dubbed "cross cousins".

Such differentiations, as described in the preceding lines, are called *bifurcations* (furca = Latin for fork). The opposite concept is *merger.* To distinguish parallel and cross cousins means to apply a bifurcation. In modern Western society, father's *and* mother's brothers are called uncle, thus, here, uncle is a merged term. Bifurcation and merger can be combined to *bifurcate merging: All* cousins born from *all* sisters of a father, and *all* cousins born from *all* brothers of a mother, are called cross cousins. *All* cousins born from *all* sisters of a mother, and *all* cousins born from *all* brothers of a father, are called parallel cousins. In this example, the word *all* indicates the mergers, and the distinction of cross and parallel cousins indicates the bifurcation.

In contrast to the ethnographically rather minor distinctions on grandparents' and parents' levels (such as distinguishing *Tante* and *Muhme*), the distinction between parallel und cross cousins are anthropologically very important. Much of family and incest law, and the family systems under discussion below, depend on this differentiation.

For example, let us take the Hawaiian system and add to it the distinction of parallel and cross cousins. Such a "Hawaiian" system qualified by the distinction between cross and parallel cousins is no longer a Hawaiian system, it is called the *Iroquois system*. The drawing of the Iroquois system looks as follows (The third cloud from the top contains the cross cousins. The fourth cloud from the top contains the egos and the parallel cousins):



Thus, the Iroquois system is the Hawaii system plus the distinction between cross and parallel cousins. What is the practical purpose of this combination? It is striking that in many societies cross cousins are preferred marriage partners while a marriage with a parallel cousin is considered incestuous. There is a reason for these seemingly contradictory rules:

Let us assume a village of hunters and slash-and-burn horticulturalists. At a certain distance there is another similar village. Other villages are farther away. There may be conflicts, maybe wars, between the villages for deer or usuable soil. A good basis for avoiding such conflicts is to get marriage partners (as many as possible women or as many as possible men, depending on patrilinearity of matrilinearity of the villagers) from the other village. These marriage partners will oppose waging war against the neighboring village. For a patrilinear village A this means that its young men will marry girls from the neighboring village B, and the young men of village B will marry girls from village A. Village A "marries out" its girls to B, and vice versa. Then, in the next generation, the boys from village A again will try to get girls from village B. These girls often may be those boys' cross cousins because the girls' mothers are the sisters of the boys' fathers. For the boys from village B the situation is reverse. Their female cross cousins from village A are, for pacificatory aims, preferred marriage partners.

In matrilinear societies, village A will "marry out" its boys to village B, and in the next generation for the girls of village B the ideal marriage partners will be their male cross cousins in village A.

In reality, cross cousin marriage is frequently practiced not only between two villages, but between three, four, five or more villages. Ethnographers report of veritable circles of villages that practice cross cousin marriage in a kind of round-about. But the principle remains: Cross cousin marriage is common because it promotes peace.

On the other hand, parallel cousins are cousins from one's own village because they are defined by the same sex of the relevant parents. In village A, two brothers or two sisters may be married to other partners and have children, that is, boys and girls who grow up together. According to the incest theory of *instinctive horror* (see II. 8. (2) above), adolescents who know each other from playground do not show much interest in one another for marriage. *Disruption* of family or close kin ties (II. 8. (3) above) may be feared so that negative medical experiences (II. 8. (1) above) will be remembered. No possible pacificatory effects are in sight, rather the opposite may occur for family or kin relationships within the village. The societal consequence of this is that these parallel cousins should not marry. Again, the Iroquois system can be defined as a Hawaii system which is supplemented by the distinction between cross and parallel cousins.

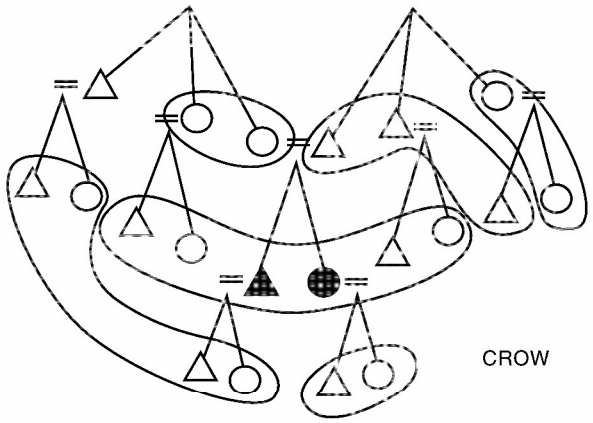
5. The Crow System

The Hawaii system can be expanded by adding even more factors to the Iroquois qualification of distinguishing between cross and parallel cousins. Let us assume, the society in question is characterized by three circumstances: (1) Cross cousins and parallel cousins are distinguished, and cross cousins are preferred marriage partners, as under the Iroquois system; (2) in addition, marriage partners are preferably chosen from one and the same other family, lineage, or clan; (3) furthermore, for economic, health, political (e. g., warfare) or other reasons, there is a significant want of males, females, or children because of a high mortality rate. Two family systems answer to these needs, the Crow and the Omaha system, with the distinction that one society is matrilineal (Crow), the other patrilineal (Omaha).

The Crow system is based on *matrilinearity.* Women are in positions of authority. Theirs is the family tradition, the family property (parental custody of the children, house, trailer, bank

account, horse, car, etc.). A high mortality rate among the male population (warfare, hunting, etc.) leads to the probability that the widow will marry again. The new husband will enter the matrilineal family, lineage, clan, etc. The children of the wife's first husband need protection against the weight of their mother's family. A representative is needed and to be taken from the deceased father's side to offer that protection. For this, the number of fathers is being expanded to replace the deceased father. More "fathers" are needed, for example in a sequence of seniority. They are taken from the deceased mother's sisters' sons. If there are no such sons, but sons of the sons (= grandsons), the oldest grandson on mother's side becomes the replaced "father". He may even be younger than the children which are to be protected against the pressure from mother's family, lineage, or clan. Still, he is the father of these children. In this way, a high male mortality rate is being counteracted by replaced fathers *in disregard of the generation barrier.*

There is a second disregard of the generation barrier in the Crow system: The mortality rate of children may be exceedingly high. Ego may have lost her or his children. But also children can be "replaced". They can be taken from mother's side, to wit, from the children of mother's brother. Thus, mother's brother's children are being counted as ego's children. The Crow system can be sketched as follows:



Often, the Crow system is found not in the pure form described above, but subject to variations. One of the many variations is "little father" in Navajo. The Navajo are a matrilineal society. "Little father" is the oldest maternal uncle. Traditionally, he has to take care of his sister's children in case of need.

6. The Omaha System

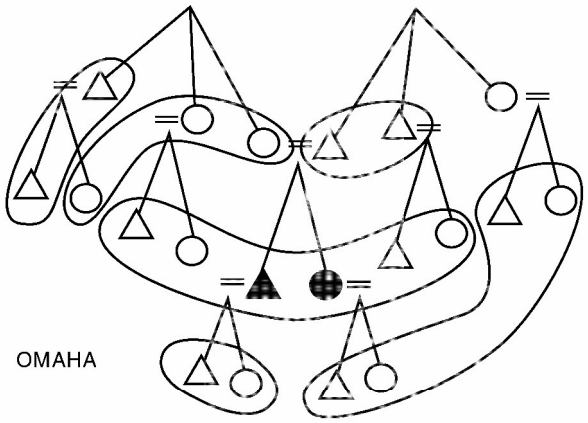
Turn the Crow around to become a patrilinear family formation, and you have the Omaha system: (1) Cross cousins and parallel cousins are distinguished, and cross cousins are preferred marriage partners, as under the Iroquois system.

(2) In addition, marriage partners are preferably chosen from one and the same other family, lineage, or clan, or village.

(3) Now the want has to be imagined on the other side, on the side of the *mothers.* The Omaha system is based on *patrilinearity.* This means, the men are in positions of authority. Theirs is the family tradition, the family property (parental custody of the children, house, trailer, bank account, horse, car, etc.). A high mortality rate among the female population (childbed fever, malnutrition, etc.) may lead to the probability that the widower will marry

again. The new wife will enter the patrilineal family, lineage, clan, etc. The children of the widower's first wife need protection against the weight of their father's family. A representative is needed and to be taken from the deceased mother's side to offer that protection. For this, the number of mothers is being expanded to replace the deceased mother. More "mothers" are needed, for example in a sequence of seniority. They are taken from the deceased mother's sisters' daughters. If there are no such daughters, but daughters of the daughters (= granddaughters), the oldest granddaughter on mother's side is the replaced "mother". She may even be younger than the children which are to be protected against the pressure from father's family, lineage, or clan, but still is the mother of these children. In this way, a high female mortality rate is being counteracted by replaced mothers again *in disregard of the generation barrier.*

The second disregard of the generation barrier applies as it does in the Crow system: The mortality rate of children may be exceedingly high. Ego may have lost her or his children. But also children may be "replaced". They can be taken from father's side, to wit, from the children of father's brother. Thus, father's brother's children are being counted as ego's children. The Omaha system can be sketched as follows:



A basic and universal human sense for balance and reciprocity can be found in many family relationships, and especially visibly in Crow and Omaha: In Crow, the weight of matrilinearity is balanced by quasi-fathers, in Omaha the pressure of patrilinearity is tentatively neutralized by quasi-mothers. Again, there are both pure and modified forms of the Omaha system. Statistically, the Omaha systen seems to be less common than the Crow system; the latter is particularly frequent in the Northamerican Southwest.

7. An ethnographic test

Let's make a test: When you visit a people or tribe, can you simply ask your hosts under which family system they live? When Shiow-ming Wu and I visited the Paiwan, an indigenous tribe in the southern mountains of Taiwan, we were invited to watch, in our hosts' house, a hand-made movie of a recent wedding in the family. This was a good occasion to ask: "How do you call the sister of your mother?" The lady to whom I had directed my question hesitated a bit, and then said with a smile: "Also mother". "And when you marry, is there a certain preference for cousins within the family as marriage candidates?" "No", was the somewhat surprised answer. Which family system must be assumed for the Paiwan? (Except, for example, in Professor Bischof's book "Das Rätsel Ödipus", the stories about the

family systems in anthropology in the books to learn from are hard to read and even harder to understand. Some writers simply give up when it comes to Omaha or Sudan, refering the reader to her or his own imagination The foreoing is an attempt to give a possible – both ideational and material – explanation for what looks so complicated and still can be made quite understandable).

IV. A Comparative Summary

In principle, there are two main types of family systems, Eskimo and Hawaii. Sudan is a variation of Eskimo, characterized by an extreme degree of bifurcation. The Hawaii system is a basically generational model fit for larger groups that may be needed for collective forms of agriculture such as slash-and-burn horticulture. It occurs in pure form and in three main subtypes: In its pure form it is called the "Hawaii system"; it is not characterized by cross-cousin preference. However, peace-keeping and -seeking interests may cause cross-cousin preference, typically between two or more ("ring-wise" ordered) villages. As long as the generational barrier is maintained, this is the Iroquois system But in addition to cross-cousin and parallel-cousin distinction, serious constraints of health and life expectancy may lead to a disregard of the generational barrier, and depending on matri- or patrilinearity either the Crow system or the Omaha system is the consequence, When several tribes unite to form a federation that is composed of both Crow and Omaha types, Crow and Omaha peculiarities may after a while fall in oblivion so that cross-cousin preference alone in a basically Hawaiian system – now called Iroquois –, survives; thus, it may be assumed that, according to oral tradition, under Deganawida and Hiawatha the five tribes, being partly Crow and partly Omaha, united in the 14th century to form the League of Iroquois. If this assumption is correct, the Iroquois system is a derivative of two derivatives of the Hawaii system.

V. The Impact of polygamy on the family systems. Sororate and levirate

Polygamy is a difference in number of males and females in a procreation family (see above II 2). For the orientation family, anthropologically polygamy is of no essential relevance (although it may of course influence the psychology of child rearing)

There are three main types of polygamic procreation families are: One man with more than one wife is called polygyny. One wife with more than one man defines polyandry. More than one man with more than one wife is consequentially called polygynyandry. All forms occur.

In the Eskimo system, polygamy affects the number of the marriage partners depending on the number of additional men or women. Under the Sharia, a Muslim is permitted up to four wives provided he is able to give each of them a separate and sufficiently equipped household.

In Hawaii and its subsystems, Crow, Omaha, Iroquois, and Sudan – with their "collective" father- and motherhoods –, polygamy does in principle not increase the number of family members. In practice, polygamy is often restricted to the wealthier or societally more influential members of the tribe, be it patri- or matrilineal.

"Consecutive polygamy" is a designation for the custom that a widow marries a relatively young man, who after her death marries a relatively young girl, and so on. In this way, a shipping business or another craft may stay "in one hand" which makes consecutive polygamy a precursor to the company.

When a widower marries his deceased wife's sister, this is called *sororate,* when a widow marries her deceased husband's brother *levirate.* Instead of sister or brother, another member of the deceased person's kin may step in. The effect is similar to consecutive polygamy, no bridewealth will be returned, the dowry may be rededicated (cf., Chapter 10 II. 6. e., below).

VI. The conflict between peace-seeking and incest avoidance

In this chapter, under III. 3., in connection with the Iroquois system, the reasons for a preference of cross-cousin marriage is explained. The reason is peace-seeking with one or more neighboring villages. However, genetically, cross-cousin marriages are as incestous as are parallel-cousin marriages. The medical risks are the same and they be observed by the villagers who participate in the exchanges of marriage partners, becoming more visible the longer the exchanges last. Thus, there is a conflict between peace-seeking and incest avoidance, growing over time. One day, the negative reaction to incest will get stronger than the positive desire for peace, and the village alliance will break up. This may have been the tragic fate of many early society, and the often so inexplicable disappearances of early civilizations may have one of their reasons here, e.g., Chaco and San Lazaro in New Mexico, Son Fornes near Montuiri on Mallorca.[619] Norbert Bischof compares the phenomenon of the increasing incest menace to the Tower of Pisa: it still stands, but one day it will fall. More research may produce a better understanding of rise and fall of pre-urban- and pre-axial-age-revolutions societies.

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619 For the following, see Norbert Bischof op. cit. 67–78. See also D. Eyde & P. Postal, Avuncolocality and Incest: The Development of Unilateral Cross-Cousin Marriage and Crow-Omaha Kinship Systems, 63 American Anthropologist 747–771 (1961); W.J. Schull & J.V. Neel, The Effects of Inbreeding in Japanese Children, New York 1965: Harper & Row; quantitative material cannot be given here; besides the issue of peace-seeking vs. incest taboo avoidance, more factors must be taken into account, such as degree of isolation, conquest by outsiders, climate changes, number of participating villages and persons, etc. It seems noteworthy that both the Chaco and the Son Fornes culture with their comparable kiva structures "flourished" about 300 years.

Chapter 9: Societal order, personhood, and human rights (the anthropology of constitutional justice)

Next to family and kinship, society is the closest framework and mark of orientation to a "higher mammal" such as the human being (cf. Chapter 7; and I., below). Chapter 9 deals with societal and social ordering of human life and thus represents the "public side" of personhood. This gives rise to a simultaneous discussion of the concept of personhood in anthropology. Johann Wolfgang Goethe once remarked in his drama "Dr. Faustus": "It's in their gods that humans paint themselves" *(In seinen Göttern malt sich der Mensch).* Similarly, Goethe could have said: "In his companionships man paints himself". Also he could have said: "It is in terms of family relationships that a person assumes the qualities and roles of its personhood". Family, society and supranaturality define what a person is: because the three cultural tasks with which a human being is confronted is incest regulation, regulation of societal power, and regulation of human relationships with supranatural phenomena (see Preface, the last two paragraphs).

In detail, Chapter 9 on human organizations contains a redesigned explanation of the segmented society (encompassing big man societies and chieftaincies), its history since Durkheim, its restatement by Evans-Pritchard, and its relation to other fragmented societies including Islamic societies. The focus on superaddition as gist of any organization (that deserves its Greek name) owes much to the Thai studies of the sociologist of law Ludwig Hamburger.[620] Also, Chapter 9 attempts a correlation of cultural and economic development with systems of government and religion. This leads to an explanation of existing forms of government by what is called here the phenomenon of societal inertia. Again, the axial age will serve as a background.

The picture of any society also reflects how the persons who make up that society see themselves as a group. A dialectical relationship exists between the understanding of oneself and of one's society. It would mean putting the cart before the horse to start from a preconceived idea of a person (for example the individual which is typical for a western style society), and then try to study what kind of society is being formed by that kind of person (note that many anthropologists, political science experts, and sociologists, let alone psychologists, take this approach). Likewise, it would be wrong to simply postulate a society that works under certain observable, describable and seemingly inherent rules, and then derive in a monocausal manner from that type of society and those rules a fitting idea of personhood (Emile Durkheim's and his followers' approach).[621]

Rather, societies constitute cultural qualities of their members, and persons define their societies contingent upon the way they define themselves as persons. In anthropology, in conformity to available and accepted generalizations, concepts of person and society may best be developed together (a principle that could be called personhood-society interdependence).

This is not a gnostic statement on subject-object identification, but a consequence of what society and persons *are* as mutually reflective ideas: A Muslim is part of a Muslim type of society, the citizen of an ancient Greek city state is citizen in the sense of the *polis,* a Hinayana Buddhist monk is a member of his Wat (monastery) society, the President of Afghanistan is

620 Tributes to him are contained in W. Fikentscher (1977b, 20–27), and idem, Festschrift Andreas Heldrich (2005, 1119–1143).

621 On Durkheim: Jerry Moore (2004) 46–58; also see 177 for the ongoing importance of the conflict between given "materialist" societal structures and personal "idealist" flexible input.

defined by his and his government's understanding of what Afghanistan is today, an Amerindian is what his tribe or nation has educated and expects him to be. These and other examples are used in the following text.[622]

Chapter 9 could be entitled "anthropology of organization" if the word organization would be used in a wide sense as human societal order in general. However, we will see that not every societal order is an organization in the strict sense of the term. Therefore, the word organization is not contained in the headline of Chapter 9, but the expression societal order instead. Keeping in mind this terminological remark it may be said: In spite of many known details and well researched materials, in theoretical respect ethnography, ethnology, and cultural anthropology of organization *(Organisationsanthropologie)* are noticeably underresearched. The Max-Planck- Institute for Multireligious and Multiethnic Societies, established in Göttingen (2008), under its director Steven Vertovec, may help fill this lacune.

I. A System of Groupings in Behavioral Science

Humans may belong to different groupings of humankind. Groupings of humankind are special kinds of groupings of all living beings. Below is a survey of groupings of living beings.[623] Whether human beings join one or more of these groupings depends on human nature and usage. To some, they belong always, to others only rarely or never. The interesting point is that by *nature* humans are biologically able to belong to almost any grouping of living beings, but that *culture* may exclude them from this or that biologically possible grouping. The issue is of considerable relevance for forms and requirements of human cooperation, for example, in the contexts of foreign aid, or federal organization.

Robert M. Axelrod provides a foundation for understanding the principles of human cooperation.[624] His models are derived fromWestern society, more precisely, from the post-axial time Greek-Judaeo-Christian mode of thought.[625] For pre-axial time and non Greek-Judaeo-Christian post-axial time modes of thought, Axelrod's conclusions are less than convincing.[626] Moreover, Axelrod did not check his conclusions against the wealth of grouping possibilities as they are discussed in behavioral science.

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622 For the idea of personhood-society interdependence see also Bandelier (1890/1971); Robert C. Cooter & Robert K. Thomas, The Meaning of Change in an Indian Village, In: Robert D. Cooter & W. Fikentscher, Introduction to the Anthropology of Law, Reader Fall Term 1991, 2 vol. Readings No. 10, University of California at Berkeley;. W. Fikentscher, The Whole is More Than the Sum of the Parts, Therefore I have Individual Rights: African Philosophy and the Anthropology of Developing Economies and Laws, in: Manfred O. Hinz (Hrsg.) in collaboration with Helgard K. Patemann, The Shade of New Leaves: Governance in Traditional Authority, A Southern African Perspective, International Conference on Traditional Government and Customary Law, Windhoek, 26–29 July 2004, Münster 2006: LitVerlag, 295–328.

623 Zoology knows many systems of this kind, e. g., H. Kummer, Primate Societies: Group Techniques of Ecological Adaptations, Chicago 1974: Aldine/Atherton; Hubert Markl, Die Evolution des Soziallebens der Tiere, In: Grzimeks Tierleben, Enzykloplädie des Tierreiches, Ergänzungsband Verhaltensforschung, Zürich 1974: Kindler, 461–487, with a list of other topical works on p. 644. The text above uses a simplified combined version of types found in zoologic literature, and also orients itself at the elaborate system used in the Encyclopedia Britannica. On reasons why humans form groups and why they leave them, for example by a split", see note 697, below.

624 Robert M. Axelrod, The Evolution of Cooperation, New York 1984: Basic Books.

625 S. N. Eisenstadt "Culture and Power – A Comparative Civilizational Analysis", Erwägen Wissen Ethik (EWE, previously EuS)/Deliberation Knowledge Ethics 17/1 2006, 3–16: the "European Complex".

626 Cf. Axelrod himself: The Convergence and Stability of Cultures: Local Convergence and Global Polarization, Santa Fe Institute Working Paper 95–03–28, = Institute of Public Policy Studies, Discussion Paper No. 375, Michigan Ann Arbor, MI 48109.

This text concerns the large but limited number of forms of cooperations of living beings and their importance for humans, a number of forms that goes beyond Axelrod's approach and, in addition, is shaped by cultural specificities. There are six main groupings of living beings, and several subgroups:

(1) Populations
(2) Parent-offspring agglomerates
(3) Sexual bonds
(4) Interspecific associations
    a. symbioses
    b. reciprocally altruistic groups
    c. "mixed unilateral" groups
    d. parasites
(5) non-familiar space-based groups
(6) societal groups
    a. swarms
    b. flock formations
    c. herds (= packs, troops)
    d. hunting packs (and their subdivisions)

1. Populations

Populations are accidental agglomerates of living beings without bonds, such as by descent, sex, interspecific advantages, space, or societal bonding. An island, created by submarine volcanic activity, is uninhabitated at first. Successively, insects, birds, amphibia, and rats from ships of by-passing discoverers may agglomerate. Together, they form a population, not more. Tourists on a resort beach, pedestrians in a mall, and cinema audiences are examples of populations.

2. Parent-offspring agglomerates

The parent-offspring relationship defines the grouping as long as parents (mothers, fathers, or boith) and their offspring stay together. Ducks, bears, lions, and whales are examples.

3. Sexual bonds

In a similar way, sexual relationship may be the defining factor. Many animals show sexual bonding for the mating period. Thereafter, sex-defined grouping is dissolved.

4. Interspecies associations

Interspecific associations may arise from advantages on either side. They have been intensely studied by ethologists as a particularly interesting form of grouping. Four kinds can be distinguished:

a. Symbioses

A symbiosis consists of two or more differently specialized species of animals which, in the course of evolution for adaptive reasons, have found together and support each other in a one-way or (typically) two-way exchange.[627] Even within a cell, symbiosis is frequent (endo-symbiosis).[628] The hermit crab and the sea anemone form a mutually supportive group of

627 Wolfgang Wickler & Uta seibst, Männlich-Weiblich: Ein Naturgesetz und seine Folgen, 4th ed. Heidelberg & Berlin 2004: Spektrum (1st – 3rd ed. 1983, 1984, 1990: Piper), 243.

628 Wickler & Seibt, op cit. 62.

two.[629] There are complex groupings among beetles and ants.[630] They are non-social in the sense of sociability (see 6., b elow). Also, the living together of the two sexes may be called symbiotic.[631]

b. Reciprocally altruistic grouping

Robert Trivers has defined reciprocal altruism, and his discovery appears to amend Darwinist advantage-seeking for ends of adaptation: there are animals that instead of hunting each other help out one another.[632] The small cleaner fish enters the mouth of the big fish in order to feed on impurities found between the big fish's teeth. During the cleaning period, the big fish does not close its mouth to bite and swallow the little one.[633] The cleaning behavior is useful for both sides, thus "altruistic", and adaptive in the Darwinian sense.

c. "Mixed unilateral" groups

A similar phenomenon of *unilaterally* useful grouping behavior may be called "mixed unilateral" groups. Herds of elephants are accompanied by flocks of birds which feed from the pachyderms' skin. Starlings often stay with cow herds because of the presence of flies.

d. Parasites

The long and fascinating biological story of parasites cannot be retold here.[634] Although thriving on and thus in principle being detrimental to their hosts, parasites are an essential factor of many natural, partly adaptive, developments of species, including their hosts.[635]

5. Non-familiar space-based social bonds

The preceding examples of groupings lack the specific element of sociability. They are not characterized by social bonds. Either a haphazard agglomerateion by "natural events" like being washed ashore, or some bond defined by a natural link, generates the group. This is different in groups that agglomerate because of knowing one another. A bridge between "just natural" bonded groups and "truly social" bonded groups are non-familiar space-based bonded colonies. In particular, the sometimes very large and numerous colonies of penguins and of seagulls are examples for this bridge. The guano rocks off Chile give witness to the sometimes centuries old colonies of seabirds. It cannot be expected that the birds which belong to these socially-bonded groups neither based on family ties nor on mere sexuality know each other as individuals. Still, they feel to "belong" to that group. However, this feeling of belonging is only based on a spatial element, such as an island, or a slab of ice.

6. Social groupings

Sociability is characterized by a feeling of belonging that is more than merely nature-given (1.–4.) nor merely based on space (5.). This negative definition may be the most precise, although it is, as all merely negative definitions, unsatisfactory. The positive trait of a group that

629 Dieter Matthes, Nahrung und außerartliche Beziehungen, In: Grzimeks Tierleben (as in note 623, above), 81–99, at 91.

630 See preceding note, at 93 f.

631 Wickler & Seibt, 276.

632 R. Trivers, see note 538, above.

633 Both big and little fish observe this mutually profitable cleaning behavior even if raised out of sight other fish. On both sides, the cleaning behavior is not learned, but genetic, including the "altruism".

634 Wickler & Seibt, op. cit., 59, 65, 159; Matthes (note 629, above), 97 f.

635 Wickler & Seibt, op. cit., 26 ff.

may be called "social", or better: "societal" (see Chapter 3 II, above), is an innate consciousness of belonging to an entity of animals of the same sort. There are four separable subgroups which in certain subgroups in turn can be subdivided:

a. Swarms

A swarm of fish, mosquitos, flies, locusts etc. is characterized by a lack of hierarchy or leadership although the swarm is locally more closely contained than colony and population. The swarm is a means of defense. As long as a swarm of fish sticks together, a shark will not attack them by swimming into the swarm. As long as the pidgeons fly "in formation", a falcon will not attack them. Only after a raptor succeeds in singling out an individual prey, it may very well be caught.[636]

There may be a leader of the swarm, not in the sense that the "leader" commands the direction in which to go, but in the sense that one of the more respected animals indicates which course to take so that the rest will immediately follow. There seems to be an intricate mechanism of stimulus and response that together determines the direction for a swarm to go. If *any* fish (not only one of the respected animals) of a swarm is deprived of its sense of orientation by an experimenter's brain surgery on that fish, this mutilated animal does not know where to go, but the whole warm will still follow.[637] The brainless "leader" proves that in a swarm there is no "leader".

b. Flock formations

This is different in flock formations of which migratory birds are a well known example. The issue of true leadership in many cases is solved by a strong, experienced bird which sets itself at the head of the formation. A hierarchy is created. Comparable are ant hills, termites' nests, social spiders, etc.[638] A flock formation is a swarm within an inherent structure. There is separation of labor. However, there remains a relatively large number of animals within the flock. Flock partipants are not brought into an individualized order. Rather, instead of an in individualized order there is a class structure, consisting perhap of a queen, female "working" bees, and male "drones". This structure is typical for bees, ants, and termites. A "brainless leader", for example a queen that has been subjected to surgery, would not "lead" the flock formation or its movement.[639]

c. Herds (= packs, troops)

In English, "herd" and "pack" applies to ordinary mammals. "A "troop" is used for primates. In German, cows and sheep form a *Herde,* chickens a "court" or "yard" *(Hühnnerhof),* apes and monkeys a *Schar,* or *Horde.* The middle type is an extended family which need not be internally related by descent. The animals know each other and establish, sometimes in tournaments, a hierarchical, societal order. The proverbial "peck order" was discovered in a chicken yard: Chicken may only peck kernels etc in a fixed order, that extends from the lead animal down to the lowest rank. Every farmer knows his "lead cow" who holds its position in the stable and on the pasture. A newly bought cow may need weeks to find its place in the hierarchy beneath that lead cow and will fall back in its milk production during that period.

636 Cf., H. Klingel, Gruppenbildung bei Huftieren, Grzimeks Tierleben, Enzyklopädie des Tierreichs, Ergänzungsband Verhaltensforchung, Zürich 1974: Kindler, 506–528, at 522.

637 Communication Wolfgang Wickler (1992).

638 K. Schmidt-König, Vogelzug und Vogelorientierung, In: Grzimek (note 636 above, Ergänzungsband Verhaltensforschung, 182–188.

639 Cf., R. Sossinka, Hormone und Verhalten, in Grzimek, op. cit. (preceeding note), 293 f.

Ethology distinguishes the alpha, beta, gamma etc. animal down to the least important piece of the herd, the omega animal. This inner hierarchy is typical for the herd's sociability. Still, a herd (pack, troop) lacks the element which is so important for the next type of social grouping, the *joint effort* (as can be found in a hunting pack of wolves). When a herd of cows shares in grazing on a meadow, every cow grazes for itself. The grazing is no joint effort. The alpha cow does not tell the others who are lower in rank: "O. K, now let's graze on that piece of land and finish off the gras." The alpha animal need not besingle. It has been reported that wolves – they hunt in joint efforts – know not only alpha-males but also alpha-couples, a male and a female.

d. Hunting pack

An even narrower societal grouping is achieved when the group joins efforts, that is, forms what in German is called an *Arbeitsgemeinschaft* (team, working group, joint venture). Now the group aims at a common goal, often the kill of huntable prey. The group achieves more, a plus, than the addition of the single separate efforts such as cows grazing on a pasture, and often it is only this addition that makes the pursuit of the common goal possible. The hunting pack of wolves or some other canines is the prime example. However – and this may add new aspects to what can be found in ethological literature – there are significant distinctions within what is called "a hunting pack":[640]

aa. Hunting packs without separation of labor and without inhibition of hunting impulse

In this most simple form, a hunting pack approaches the prey from various sides, each hunter running on his own, each hunter essentially doing the same, in the absense of a strategy that would involve the inhibition of the hunting drive to ensure the success of the hunt. Examples are hyenas, Scandinavian foxes in summer time, jakals, coyotes, and similar canines, however not African wild dogs *(lycaon pictus),* Indic red dogs, Scandinavian foxes in winter time, wolves and dogs. Characteristical for this "everyone-on-his-own hunt" of hunting packs without separation of labor and without inhibition of hunting impulse is the collectivity of the effort, the absence of labor specialization, and the absence if drive-inhibiting strategies. In terms of "cooperation", this behavior could be called "parallel cooperation".

bb. Hunting packs with separation of labor, but without inhibition of hunting impulse

The effort is performed jointly, as above. However, there is a specializatiom among the hunters. Not everyone does the same thing. Still, there is no strategy which requires a temporary suppression of the innate hunting drive. The African wild dog, the Indic red dog and Scandinavian foxes in winter time hunt in this manner.[641] The prey of the African wild dog, for example, are animals which are much stronger than a single wild dog. African wild dogs are relatively small canines who specialize in hunting comparatively large animals such as gnus, zebras, wildebeest, hartebeest and the like. Zimen thinks that small prey such as rats, mice, moles, squirrels etc. are inaccessible for wilddogs because here other raptors such as fox and

640 Cf., Hubert Markl (note 623, above), at 481.

641 Communication Adriaan Kortlandt (1971); Erik Zimen, Der Wolf: Mythos und Verhalten, Frankfurt/Main 1980: Fischer; Eckhard Fuhr, Von Wölfen und Frauen: Ein Besuch bei dem Verhaltensforscher Erik Zimen, FAZ Nr. 302, vom 30. 12. 1997, p. 7. According to Zimen, of the about 40 kinds of canines, only the wolf, the African wild dog, and the Indic red dog hunt in groups. Kortlandt adds Scandinavian foxes in winter time.

larger cats monopolize this ressource. Large animals such as zebra or hartebeest can only be brought down by the small dogs if they attack from all sides, one biting in the nose, others in the legs, again others in the belly, and so on. Each dog goes for a different part of the victim's body, representing separation of labor. But the manner of attack is simple, like above: the hunters come from all directions. In terms of "cooperation", this kind of behavior could be called "concurring cooperation".

cc. Hunting packs with separation of labor and with inhibition of hunting impulse

When wolves and dogs, bred by humans from wolves, go in a hunt an additional attribute can be noticed:[642] They hunt not only under the principle of separated labor, but also a strategy that requires a temporary suppression of the hunting drive. Wolves encircle their prey, for example a herd of reindeer. The wolf pack divides itself into three subgroups. Groups A and B prepare an ambush on both sides of the herd, in an angle of 90° to the orientation of the main group. Both groups lie down, making as little noise as possible, and hide. Then the main force, Group C, attacks, noisily storming against the herd from the third side. When the reindeer try to flee, Groups A and B join the attack from their respective sides (the battle plan resembles the one by Hannibal at Cannae). For the reindeer, only the fourth side seems to remain open for flight. But Groups A and B try to cut off the reindeers' retreat. Not every reindeer will succeed in finding the "escape door". Wolves seem to have mastered the inhibition of the hunting "instinct" which is indispensible for this hide-and-hunt strategy.

Whether the strategy is "in the genes" or learned from experienced members of the pack, must be left open here. When a modern herder sends his two dogs to assemble a flock of sheep, on the herder's whistle the dogs will separate and *encircle* the flock in order to contain it and then guide it to the place the herder is indicating after the encirclement. Thus, the strategy of encirclement is innate. Throwing some dirt, with a little shovel fixed to a long stick, into the desired direction is the traditional way to indicate to the dogs the direction of the upcoming move. Obeying the order is learned. In terms of cooperation research and game theory, this kind of cooperation could be called "strategic – or strategically planned – cooperation".

dd. Separation of labor with fixed or changing roles

Hunting groups falling under bb. and cc. can further be subdivided by yet another aspect applicable to both categories. Separation of labor may be introduced in such a way that the actors always do the same kind of the labor. In old Dutch reports from colonial "India" (today Indonesia) it is often told that Malay personnel of Netherlands land owners observed a separation of labor strictly confined to the original job conferred upon them. The *babu* (nurse, *Amme*) would take care of the children, but never share in house cleaning, or cooking. The gardener would refuse any orther work than gardening, the chauffeur other work than driving the car, etc. This is a system of separated labor with firmly *fixed roles.* Charley Chaplin describes in his movie "Modern Times" the fate of the assembly line worker who forever has to turn one and the same screw. The opposite is separation of labor with *changing roles.* Charles Heston in the title role in the movie "Ben Hur" demands and is granted the privilege of being used as a galley slave on both sides of the galley, taking turns, in order not to have his body crippled by one-sided rowing, the common fate of galley slaves. Before automation, at the assembly line shop stewards pressed employers for plans for changing positions of the employees. Doing different work for others can be a political goal of authoritarian socialism:

642 Kortlandt (see preceeding note).

During the cultural revolution in Maoist China, academic doctors had to serve as "barefoot doctors" in the country side.

Whether hunting African wild dogs not only do separated labor but also change their roles when attacking the prey, is not yet known. They probably work with changing roles and not "specialize" on the nose, belly, etc. Likewise, it would be interesting to know whether hunting wolves have their fixed places in the two ambushing groups resp. in the attack group, or whether they are able to take different roles in different groups.

In terms of "cooperation" in game theory, in addition to (1) "parallel cooperation" defined above under d. aa., four more kinds of cooperation now become apparent: (2) concurring cooperation without changing roles, (3) concurring cooperation with changing roles, (4) strategic cooperation without changing roles, and (5) strategic cooperation with changing roles. Game theory could distinguish these five kinds of cooperation since they deliver different results, as it is shown by the examples above. Particularly the degrees of efficiency are significally different.

7. Application to human groups

All groupings discussed so farmay occur in humans. However, choice and frequency of any of these groupings as applied to humans, differ widely due to cultural specificities. Ludwig Hamburger based his theory of the fragmented society on observations in Thailand in 1952. "Cooperation" in the Thailand at that time essentially meant the grouping which has been described above as "hunting group without separation of labor and without inhibition of hunting impulse" (6. d. aa). Work was done by parallel efforts without strategic serial planning.[643] Thus, he did not observe "real" cooperation. Hamburger found "operation", but the "co" missing. Whether these observations were correct at that time must be left open. A comparison to China may indicate that there were changes since then With regard to China, Lin Yutang criticised a lack of cooperative spirit in the 30^{ies} and 40^{ies} of the last century.[644] My personal observations in Nanjing 1992 document a high degree of voluntary and improvised cooperation inside and outside of family ties. But recent reports (2008) speak of a Chinese "elbow society" characterized by a lack of voluntary cooperation.

A hypothesis may be that cultures have different ideas of cooperativeness and togetherness.[645] Axelrod himself has doubts whether his "evolution of cooperation" works in non-European cultures.[646] Axelrod's differentiating line of argument will be followed in the rest of Chapter 9. The relationship of evolutionary building blocks for human behavior to cross-cultural reality is governed by the four-function theory of biological anthropology for societal order. Details of this theory are discussed above.[647]

To sum up: The survey of extant groupings in the animal world, in particular the variations of societal hunting pack behavior, demonstrates what is possible also among humans. This demonstration is like a lecture about the building blocks out of which human societal behavior are made. On top of them, cultural specificities may further unfold human possibilities. Inversely, cultural specificities may limit the possibilities offered by the wealth of societal

643 Ludwig Hamburger's observations; see W. Fikentscher (1977 b), 20–24.

644 Lin Yutang, My Country and My People, Taipei 1975: Mei Ya Publ.; also 3rd ed. New York 1975: John Day; 1st ed. 1939.

645 W. Fikentscher, Zur Anthropologie der Körperschaft – Polis, Genossenschaft, Tewa-Pueblo – (ein Feldforschungsbericht), Bayerische Akademie der Wissenschaften, Phil.-Hist. Klasse, Sitzungsberichte Heft 2/1995, Munich 1995 (Komm. C.H. Beck).

646 See notes 624, 626, above.

647 See Ch. 7 IV, above, with references.

forms to human behavior. Culture not only gives rise to human variability of behavior, culture sometimes limits what is open to adaptive and successful human behavior. For example, whenever certain modes of thought warn their followers against cooperation, family attachment, mutual reliance, and trust across time, for whatever reasons such as self-improvement or overcoming human suffering, culture has a restrictive or limiting influence on forms of human cooperation and government.[648] Whenever religious or political commands prescribe consensus for at least a large part of the population, restricts diversity of opinions and corresponding separation of labor in that part of society.[649]

II. Segmentation

1. The concept of segmentation, societal inertia, and superaddition

Evan E. Evans-Pritchard (1902–1973) called the Nuer, a Nilotic tribe, a segmented society. Since then, segmentation has become a form of societal order often associated with traditional people, which use to be called segmented societies. However, the precise meaning of segmentation is not clear as the term has undergone successive stages of understanding. The theory and history of the concept of segmentation are summarily sketched below. [650]

The first author in the social sciences who used segmentation as a general expression for the description of early societies is, as far as can be seen, Emile Durkheim (1858–1917). In his early major work "De la division de travail social" (1893), Durkheim wanted to show how humankind developed from the collective consciousness of primitive societies ("mechanical solidarity") to the freely willing individuals that form modern societies ("organic solidarity") by way of steadily increasing division of labor (which in turn grew out of demographic factors). In order to distinguish the "primitive societies" in contrast from modern ones, he called the former "segmented" and the latter "state organized". Later in life, Durkheim concentrated on the social facts ("faits sociaux") underlying *all* societies, causing them to appear in collective representations ("représentations collective") that make up social life. With this theory, Durkheim became the founder of the school of thought that recognizes supra-individual rules inherent to society as such.[651] Here is not the place to discuss the question up to what degree the earlier concepts of segmented collectivism found their way into Durkheim's later ideas of society-inherent rules and laws. This ought to be assumed to some extent.

Among the Nuer, Evans-Pritchard observed a societal feeling of not belonging to a greater unit, such as a state, or a region, but to horizontally ordered family and kin clusters of varying sizes, typified by brotherhood. While not necessarily intent on drafting a system of these clusters, he called the Nuer entities which he observed (households, nuclear families, extended families, lineages, clans, and tribes) "segments", and saw the brelation between brothers as their prime model.

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648 Cf., W. Fikentscher (1975 a) 182–188.

649 Cf., W. Fikentscher (1995/2004) 408–438.

650 E. E. Evans-Pritchard, The Nuer: A Desciption of the Modes of Livelihood and Political Institutins of a Nilotic. People, Oxford 1940. On segmentation, esp. in Durkheim's sense, see W. Richard Scott, Organizational Structure, 1 Annual Review of Sociology 1–20 (1975).

651 See Jerry D. Moore (2004), at 58, 368; Roy Rappaport, Humanity's Evolution and Anthropology's Future, In. R. Borofsky (ed.), Assessing Cultural Anthropology, New York 1994: McGraw-Hill, 153–166; Justin Stagl, Die Morphologie segmentärer Gesellschaften, Meisenheim am Glan 1974: Anton Hain; Christian Sigrist, Regulierte Anarchie: Untersuchungen zum Fehlen und zur Entstehung politischer Herrschaft in segmentären Gesellschaften, Hamburg 1994: Europäische Verlagsanstalt (based on Sigrist's dissertation, Freiburg i. B. 1967); Gero Erdmann, Vorkoloniale politische Organisationsformen in Afrika, Informationen zur politischen Bildung, No. 264, Afrika I, Bonn 1999: Bundeszentrale für politische Bildung.

The difference between Durkheim's and Evans-Pritchard's understanding of segmentation is this: For Durkheim, a segmented society *lacks* the organized coherence of a modern state. For Evans-Pritchard, segmentation *obtains* a positive meaning inasmuch as politically independent groups of equal standing communicate with each other, friendly or belligerently, being essentially sovereign units, instead of being subjected to a vertical centralized organization. Furthermore – as a consequence of this communication between these entities on principally equal terms – Evans-Pritchard observes that each entity and its participants consider an entity "out there", on the other side, as an undivided unit.

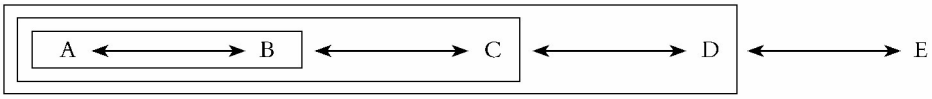
Elsewhere, I have used segmentation neither as a general term for non-state societies (as Durkheim did), nor merely as same-level agglomerations of households, nuclear families, lineages, clans, or tribes (as Evans-Pritchard did for the Nuer). Rather, segmentation was used to designate a principle of ordering societies that is defined by the absence of corporate organization and – positively – by the interpretation of human togetherness as brotherhoods or family-metaphors comparable to brotherhoods. In this sense, segmentation becomes a principle able to explain all non-Western social and societal life.[652] My use of the term segmentation takes from Durkheim the general character as a non-western society-explaining principle, and from Evans-Pritchard the brotherhood-like horizontality of independent societal clusters whose inside structures are of no interest to the outsider. In this book I use segmentation in the same meaning as in (1995/2004) and (2004)..

The advantage of this understanding of "segmentation" over Durkheim's use is that lineages, clans, etc. can now be described as segmented (or not), whereas for Durkheim all lineages, clans, etc. are segmented. The advantage over Evans-Pritchard's use of the term is that there can be talk of a type or principle of human sociability that contrasts to human *organizations* in a true sense of this word, whereas for Evans-Pritchard segmentation is a matter applying to the Nuer mainly.

Thus, segmentation may be understood as the principle of human sociability that is defined by the absence of a corporate order of society and the presence of a family or family-metaphoric – essentially horizontal – order of equal components. The absence of the corporate order places the components on one and the same "horizontal" level so that the components, viewed from the outside, appear as undivided units of "others". Visualized, a segmented society does not look like a map on which parts and subparts are shown as from above ("bird's eye" view), but like a chain of pearls, lined up on a string, whereby every pearl feels related only to the neighboring pearls and is not concerned with the entire necklace.

Graphically, this may be represented as follows:

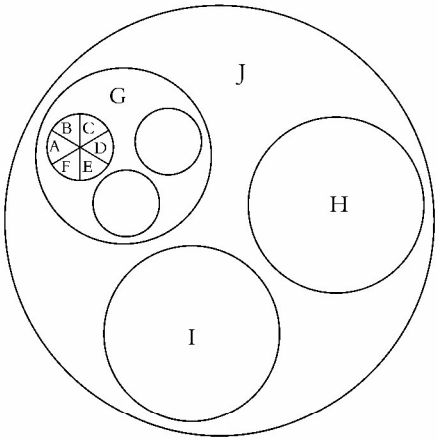
Segmented Society
(„the whole is not more than the sum of the parts")



For example:
A, B = nuclear families
C = person, nuclear family, extended family, lineage
D = lineage, clan
E = lineage, tribe

652 W. Fikentscher (1995/2004), 216–219, 430; idem (2004), 77, 221: on the relationship between segmented society and anarchy idem, Anarchie und Rechtswandel, Festschrift Murad Ferid, Munich 1978, 463–480.

Superadditive Society
(„the whole is more than the sum of the parts")



For example

A, B, C, D, E, F = nuclear families
G, H, I = towns
J = county
etc.: state, federation, United Nations

Segmentation is not the same as fragmentation.[653] All segmented societies are fragmented, but not all fragmented societies are segmented. Segmentation as a principle of human sociability is a special form of fragmentation, a special type of fragmented societal order.[654] Principally, segmentation is limited to pre-axial age societies.[655] Fragmented societies can be found in pre-axial age societies as well in post-axial age societies including Hinayana-Buddhist (also called: "loosely structured"[656]), Arab,[657] and Modern-Totalitarian.[658]

Although segmentation is the typical form of pre-axial age societies, segmentation may often last into post-axial age environments. This is a phenomenon that may be called societal inertia: People sometimes tend to maintain traditional societal patterns of leadership such as bigmanship, chieftaincy, kingship, or empire. Thus, for reasons of societal inertia,[659] post-axial age societies may operate with pre-axial age cultural traits, so that segmentation is not foreign, for example, to leadership patterns such as kingships without or by "God's grace", or may be practiced in modern Islam, Eastern Europe, and Asia.[660]

The dividing line between a segmented society and its opposite, a cooperative society, is the principle of the "oversum" or superaddition. It means that – quite generally – the whole is seen as something different and in a normative importance more than the sum of the parts. Segmented societies are not superadditive, whereas cooperatives are. Big man societies and chieftaincies are segmented societies. Nay-voters and abstainers are not bound by a decision

653 W. Fikentscher (1975 a), 104–120; idem (1995/2004), 214–219; the opposite of fragmented is defragmented by mutual trust, the opposite of segmented is, in Durkheim (1964), centralized by state government; in Evans-Pritchard (1940) living in a coherently structured society, and in this book (as well as in earlier publications of this author): cooperatively organized in the true sense of Greek *polis* antiquity or other corporate forms.

654 On fragmentation and loosely structured society Ludwig Hamburger (1965 and 1967), see note 140, above; John F. Embree, Thailand: A Loosely Structured Social System, 52 American Anthropologist 181 (1950).

655 W. Fikentscher (1995/2004), 214ff.

656 See Embree (note 654, above).

657 W. Fikentscher (1995/2004) 430; Bruce Chatwin, The Songlines, German translation by Anna Kamp: Traumpfade, Munich & Vienna 1990, 253.

658 W. Fikentscher (1995/2004), 460ff.

659 On the phenomenon of societal inertia see IV. below. Societal inertia may be classified as an issue of acculturation across time (communication Irmgard Fikentscher 2006).

660 For Islam, see VII. (below); for Eastern Europe, VI. 2., (below).

of the others, the yea-voters. By contrast, in the cooperative system, the element of superaddition binds the nay-voters to obey the majority decision., because the whole is more than the sum of the parts. One consequence of superaddition is that majorities and minorities (and thus majority rule) become conceivable in the first place. Another consequence is an understanding of time-as-a-strsight line because majorities may become minorities and vice versa.

2. Big man societies

Big man societies are one type of the segmented societies. The second may be called family and family-like ("family-metaphoric") societies (chiefs, kings, queens, etc.). Neither big man societies nor family-metaphoric societies vote with results of majorities and minorities. The difference between bigmanship and family-metaphoric societies consists in the lack of importance of family and family-like ties and hierarchies in big man societies. Big men are a type of societal leadership frequent in foragers' or *Wildbeuter* (hunters', gatherers' and fishers') societies. Thus, in the evolution of human society, big man societies may mark the earliest step.

Contemporary big man societies are the San in Namibia and Botswana,[661] the Inuit,[662] Melanesian peoples such as the Kapauku and Eipo,[663] Philippine aborigines,[664] Australian aborigines,[665] and "pygmies" from the African rain forest.[666] Colonization, television, political pressures, and increasing identity awareness have of course changed the situations that existed before these societies had contact with the "West". Sometimes one need not go far to experience life under big man societal conditions. Sitting at a beer table of an inn in a Bavarian country side village and listening to what the most well to do farmer has to tell the others what to fight for next week in county parliament, and from other farmers who react to his proposals, is witnessing contemporary big man society.

Demographically, groups led by big men may be small and "close-knit", but relying on mere numbers may be misleading. The Kapauku, described by Pospíšil,[667] and the San, described by Schebesta and others,[668] are numerous nations (with many big men).[669]

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661 John Perrott, Bush for the Bushmen, Greenville, POA 1992: Beaver Pond Publ.

662 Knud Rasmussen, Eskimo Folk-Tales, transl. and ed. by W. Worster, London 1921: Gyldendal.

663 On the Kapauku, see Leopold Pospíšil's books and articles, on the Eipo see I. Eibl-Eibesfeldt and W. Schiefenhoevel. Among the Eipo of New Guinea, the *babyal* is the big man in general, and the *mal deyenang* the leader in warfare. Thus, specialists as big men as specialists for certain tasks are not infrequent so that several big men may exist at the same time and place (communication Schiefenhövel 2006).

664 E. g., J. D. Early & T. N. Headland, Population Dynamics of a Philippine Rain Forest People: The San Ildefonso Agta, Gainesville, FL 1998: Univ. Press of Florida. Philippine aborigines are also known as Negritos, or Aeta, see Schebesta, note 646, beloiw.

665 For an introduction, Chatwin, note 656, above. The anthropology of Australian aborigines is voluminous. A first overwiew: Sarina Singh, Aboriginal Australia and the Torres Strait Islands: Guide to Indigenous Australia, London 2001: Lonely Planet. Two examples: The Piranas (= Pitjantjara, Pitjendadjara, Pintubi), an Australian inland tribe living in the neighborhood of the Uluru (= Ayer's Rock), know the *Kandachi (= Kandadji, Kadaitja, Kurdaitcha, Katatschi)* man. He is the executor of legal sanctions, including death sentences. In order not to leave recognizable footprints and hereby remain anonymous, the Kandachi man wraps his feet in feathered sandals; A. P. Elkin, The Australian Aborigines, Sydney & London 1938, reprint 1966: Angus & Robertson, 313–315; A. & K. Lommel, Die Kunst des alten Australiens, Munich 1989: Prestel; Bruno Scrobogna, Die Pintubi, Berlin & Frankfurt/M. 1980: Ullstein, 109–121; see also in Chapter 13. I thank Uta Seibt for drawing my attention to the Kandachi man and for procuring materials. On the (limited) legal protection of aboriginal works of art in Australian courts, see Thomas Ramsauer, note 938, below.

666 Kevin Duffy, Pygmies of the Rain Forest, San Francisco, CA 1975: Pyramid.

667 L. Pospíšil (1971, 1985, 2004).

668 Paul Schebesta, Anthropology of the Central African Pygmies in the Belgian Congo, Prague 1933: Czech Academy of Sciences and Arts; idem, Die Bambuti-Pygmäen von Ituri, Brussels 1938: Académie Royal de

Big men can be specialized, and then their leadership may be limited to that special ability. There may be an outstanding tracker – he becomes the big man for the hunting expedition. There may be an elderly tribal leader knowledgeable enough to cure diseases, handle supernatural issues and apply the traditional legal rules and customs – he will be the big man for healing corporeal and deciding upon social mishaps. There may be a young warrior who at the same time has distant family in neighboring villages – he will be the big man in warfare and peacemaking.[670] It is an honor and a burden to be a big man.

Big men are not elected, nor appointed. There is an understanding in the tribe that X should be big man. The position of the big man is not inheritable. If he gets old and unwise, there will grow an understanding, also in the big man himself, that some other outstanding figure should take over.

The big man has no staff (although he may have helpers).[671] He listens to others, but there is no council of elders. Big man societies are usually what may be called consensus societies, in the sense that decisions to be taken for the continuation of societal life require the consent of all participating members (adult males in Kapauku).[672] In other words, every participant has the right of vetoing the decision, but the vetoer does not have the legal possibility to prevent those who voted positively from acting under the decision.[673] Saying "nay" means to exclude oneself from having to obey the decision. In a consensus society, people do not cooperate in the precise meaning of the word, because every participant consents on her or his own. Cooperation requires to cooperate *towards something,* and this something is more, and different, from the entirety of the participants.

In this sense – consensus is necessary, if all should be bound – big man societies are "collective". There are no precise concepts of "individuality" or "collectivity".[674] In addition, even if precise concepts could "etically" be determined, their concrete cultural application may mean different things in different cultures, because every culture seems to possess a special "mix" of individual and collective traits. As test whether a society is individualistic the standard should be that individualism is present when a person takes on a role in a unit that is conceived as more than the sum of its parts. The opposite, collectivism, has to be assumed when this is not the case, so when a person feels to be participant in a family, lineage, clan, or tribe without being assigned a distinct role in relation to other participants of this group.

To illustrate, the issue may be raised whether the Kapauku are "individualistic" or a "collective" of tribesmen and tribeswomen. In economic respect, Kapauku are described, by L. Pospíšil as "individualists" because of their keen sense for property and market (see soon,

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Science et Lettres; idem, Die Negrito Asiens, Vienna 1957: Mödling: Wesel (1985), on Mbuti; on the San (bushmen), see note 638, above.

669 See the authors in notes 665–666. Max Weber's studies on charisma as a form of leadership should also be mentioned.

670 Pospíšil's texts (2004), 442–448, on necessity and essentials of leadership in close-knit societies are worth reading.

671 See Eibl, Schiefenhövel, Pospíšil in the preceeding notes.

672 Pospíšil, Perrott, Schebesta. Heidi Berger-Bartlett, Besuch im Langhaus, DIE ZEIT No. 17 of April 19, 1997, 76f., reports on a visit in a longhouse community in Sarawak Province, Borneo: "Talks and contacts are in highly valued in this living community which is based on egalitarian principles … (scil.: our hosts) introduce us to the chief of the longhouse. The chief is the head of every village community, a man who is held in great esteem and who makes all important decisions for the village community", at 76. Does the author note the contradiction? Remarks such as this are typical for the exotic romanticism critized throughout this book.

673 Pospíšil, Kapauku Papuan Political Structure, in: Verne F. Ray (ed.), Systems of Political Control and Bureaucracy in Human Societies, Seattle 1958: American Ethnological Society, 9–22.

674 Cf., Günter Bierbrauer's two articles of 1994, cited in note 362, above.

below). However, they do not seem to assign to each other membership roles, comparable to the citizens of the Ancient Greek polis, or the farmers of a Frankish cooperative. A (cooperative) team for building a village road could not be formed. In this respect they form a "collective" society. Likewise, their law knows collective liability of a family or a clan for the deeds of a single person. From the reported cultural traits it may be inferred, that Kapauku society has individualistic and collectivist elements, the latter being preponderant. In a similar manner, the two sides could be examined for every big man society. On the whole, with respect to existence and weight of collective civil and criminal responsibility, big man societies may be characterized as collectice societies, and thus societies of blame (*Schamgesellschaften*), not of (personal) guilt *(Schuldgesellschaften)*.

Aesthetically, fine arts of big man societies are aspective, not perspective,[675] their music seems to be melodic-vocal, not tonal-instrumental.[676]

Economically, big man societies belong to the subsistence fund societies and typically use hunting, gathering or fishing as means of subsistence.[677] Social and ceremonial funds are thinkable and have been observed.[678] Replacement funds exist at Kapauku who store harvest and animals (pigs). In addition to their hunting and gathering activities, Kapauku are horticulturalists and as such know the property of storable goods. According to the theory on cultural correlates as developed below (see IV.), Kapauku society as an increasingly reproducing society should have changed from big man type of societal leadership to chieftain type of society because stored property invites envy and, as a rule, the defense against possible theft and robbery asks for a police under an institutionalized command. In Kapauku society, trust relations seem to exist but are short-range.[679]

However, Kapauku society, in contrast to a theoretically to be expected change from bigmanship to chieftaincy, as so many other societies develops a reluctance to change from one type of leadership to another. This has been called societal inertia (see above, more under IV., below). Thus, Kapauku society has to combine loosely structured swarm- or herdlike grouping under semi-authoritative big man leadership providing property protection.[680] Of necessity, the result is a jealous "individualism" that is to guard one's own, resulting in so-called Kapauku capitalism.[681] While Harris calls Kapauku capitalism an erratic exception hard to explain,[682] for this phenomenon societal inertia is a rather plausible explanation. Households, villages, sub-

675 For Australian rock paintings, see A. & K. Lommel, note 642, above; for literature on aspectivity vs. perspectivity see. Emma Brunner-Traut, Die Aspective. Nachwort zu Heinrich Schäfer, Von ägyptischer Kunst, 4th ed. (by Emma Brunner-Traut), Wiesbaden 1963: Harassowitz; a discussion: W. Fikentscher (1995/2004), 253–256.

676 Cf., Rudolf v. Ficker, Primäre Klangformen, Jahrbuch Peters 1929, 21–34; idem, Die Grundlagen der abendländischen Mehrstimmigkeit. Ein wiederaufgefundenes Teilmanuskript aus dem Nachlaß Rudolf von Fickers (1886–1954), ed. Christian Thomas Leitmeir, Gesellschaft für Bayerische Musikgeschichte, Veröffentlichungen, Heft 68 (2004).

677 Kottak (2002), 249.

678 See Kottak's (2002) remarks on social activities of big men, referring to Pospíšil's reports.

679 Leopold Pospíšil, Kapauku Papuan Economy. New Haven 1963: Yale University Publications in Anthropology No. 67.

680 For common purposes such as slash and burn, or a pig feast, the societal structure may change into one of the hunting pack types, see I. 6. d., supra.

681 See Pospíšil's famous road building story, Fikentscher, MoT (1995/2004), 142; and Ch. 6 V. 3. a., above.

682 Marvin Harris, Cultural Anthropology, 4th ed. New York 1995: Harper & Row; see the discussion in W. Fikentscher (1995/2004), XLIII; idem (2004), 25–27; for Africa, e.g., Maitseo Bolaane, The Impact of Game Reservation Policy on the River BaSarwa/Bushmen of Botswana, 38/4 Social Policy & Administration, 399–417 (2004), at 403 f.: "We didn't call him *Kgosi* (chief), like you people do …"); Bolaane quotes Richard Lee, Colonialism, Apartheid and Liberation: A Namibian Example, Oxford & New York 1979: Berghahn (1979), consenting.

lineages, lineages, subclans, clans, and tribes (= "federations" of clans) are the entities ascribed by Pospíšil to Kapauku society. Thus, it cannot be said that a big man society lacks structure or inner order.[683]

Religious types found in big man societies include totemism, dreaming, cult of the dead, ancestor worship, idolatry, animism in the narrow sense and possibly magic.[684]

Big man society is, as such and as distinct from chiefstaincy, not well researched. Its precise description is all the more difficult as older or less informed ethnographic texts, such as colonial officials's reports, media news, and foreign aid materials, often do not distinguish between big men and chiefs and often simply call big men "chiefs" or "village heads". This can lead to misunderstandings and ethnic disruptions.[685]

When modern humans migrated from Africa to Australia and Melanesia around 60000 years ago,[686] their leaders were big men (not chiefs). The second great migration, 20000 years later, again from Africa, but this time along a more northernly route, to many areas including Polynesia, was led by chiefs, not by big men. As pointed out it is important to distinguish big man society and chiefstaincy as ideal types. Both kinds of societal order not only characterize different phases of migration of *homo sapiens* from Africa since about 60000 years, both also respond to different building blocks of the mental program of humans, and both continue to influence human societal behavior and ordering: Bigmanship is the historically older general form of leadership, observable in Melanesia and remote areas of Africa. Chiefship is younger, and can be oberved for example in Polynesia (see Bohannan 1992, 161 ff.). It became much more influential through its further historical development to kingships, queenships, empire, dukedom, down to modern forms of dictatorship (on the transient relationship between chiefdoms and state see Kottak 2004, 258 ff.; Bohannan (1992) 161–167); and II. 2. (at the end), above.

Because of its foundation in the group and its relatively weak position of the big man, bigmanship appeals to the sense for human equality. Chiefship resembles the verticality of mammalian societal structure, from the alpha-animal down to the lowest ranking members of the hord. Whenever societal egalitarianism and claims of leadership collide, both building blocks of innate and universal human behavior become visible: egalitarian alliances, and leadership. This directly leads to the study of chieftaincy.[687]

3. Chieftaincies (chiefdoms), kingdoms, and queenships

As societal structures, chieftaincies among humans are as little "purely natural" as are bigmanships. Instead, they are cultural constructs, based on natural building blocks. Anthropologically, there are no significant differences between chiefdom and kingdom. Chiefdoms are the

683 See, e. g., Pospíšil (2004), 149 f. Whether big man societies know sodalities could not be certified.

684 W. Fikentscher (1995/2004) 195. In the Old Testament, the book "Judges" describes the pre-Davidian Israelites' leading men, in Hebrew called *shōfet,* usually translated as "judges". They were selected for a certain period when the people felt a need for having leadership, for example when war was threatening. When the danger had passed, the. *shōfet* returned to private life, and there was no transfer of leadership to another institution. Since in history these "judges" preceded kingdom, it is probable that they were rather big men than chiefs. See for details Rémy Brague, The Law of God: The Philosophical History of an Idea, Chicago & London 2007: University of Chicago Press (transl. Lydia G. Cochrane), 31. Brague calls the *shōfet* chiefs. But any transfer of office, inheritance, staff, and hierarchy seem lacking.

685 For the Namibia San, see examples in Bolaane, note 682, above.

686 Spencer Wells, The Journey of Man: A Genetic Odysse, Princeton 2002: Princeton Univ. Press.

687 The texts follows Bohannan (1992), Kottak (2002)., Meyer Fortes & Evans-Pritchard (see d., below), Middleton & Tait (see d., below), and my own observations in three different areas: Pueblo nations of New Mexico and Arizona (USA), and surrounding tribes; Taiwanese indigenous peoples (Paiwan, Rukai, Atayal); and Namibian tribal organization.

second model of segmentary society, historically often – but not always – following bigmanship. The Old Testament tells a story of such a succession in the books Joshua, Judges, 1st and 2nd Samuel, and 1st and 2nd Kings. The non-segmentary, cooperative form of human societal order will be discussed later. Only the cooperative form uses the idea of super-addition, the *Übersumme,* which can be expressed by saying that the whole is more than the sum of the parts. The three models, bigmanship, chiefship, and cooperative, are the three types that have been culturally invented by humankind to guide and govern its societies. All three are rooted in two innate human building blocks, egality and leadership. The third one, the cooperative, combines the two natural possibilities in a peculiar human way, superaddition (see III., below).

The following lines discuss common cultural traits of chiefdoms/kingdoms. The traits listed under a. to f. concern (a.) property implications, (b). kinds of chiefdoms, (c.) the family metaphoric background, (d.) and (e.) examples from Africa, and (f.) a reconsideration of the "succession" theorem. Similarly to the presentaion of bigmanship, traits g. to k. treat /g.) economic factors, (h.) collectivity and shame vs. guilt culture, (i.) types of socialization in chiefdoms, (j.) aspectivity vs. perspectivity, and (k.) religious types. In preparation of the following subchapter on cooperative and superaddition, the traits l. through n. deal with (l.) a correlation of civilizational stages, axial age, and leadership, (m.) the ensuing change from elders to organs, and (n.) a specialty: the "harvesting nations".

a. Reproduction, property, leadership, splits, diseases, witchcraft

In many cultures cultivate creation stories and related myths are set in a time when people began to grow crops (such as corn, rice, beans, etc.) and breed animals. Hiawatha, the hero of the Iroquois, is said to have taught the people to plant corn.[688] Countless other half-gods and wise men with similar merits exist. Myths serve as education under conditions of illiteracy. Basically, it is of no great difference whether plants are reproduced in horticulturalist societies, or animals in nomadic or sedentary early farming societies: the idea to reproduce nature is the same. Humans enter into a give-and-take relationship with nature, instead of merely taking (by hunting, gathering, or fishing). The time of this monumental change of livelihood and corresponding psychology can roughly be estimated at about 8000 years ago.[689] In the aftermath, many life-influencing factors were affected: Among them are the following:

– Reproduction means storage. In times of need, cattle or livestock can be slaughtered and eaten, and supplies used. Hunger becomes much less of a threat. Populations increase. Storage means possession, and possession invites theft, and with itthe necessity of a defense against it. The defense can be handled by the single herder or farmer, or by a police force overseen by a leader, or leaders: the chief(s). A more centralized leadership arises from these exigencies. Storability of produce even influences the form such government takes: The better storable a crop, such as corn or rice, the more centralized a government may be installed. Conversely as in the case of a more perishable crop such as pine apple, the more powerful the clans would remain, resulting in a less centralized form of government.[690]
– Reproduction makes for a new relationship to land, because both forms of cattle herding – nomadic or sedentary – require an area, and planting requires a garden or field which in turn may ask for slash-and-burn or clearances Again, this land's defense – single or collective – as well as policing and taxing become issues.

688 Henry Rowe Schoolcraft, The Hiawatha Legends. Reprint of idem, The Myth of Hiawatha … Philadelphia & London 1856: Lippincort & Trubner.

689 See Childe 1925, 1942, 1950.

690 The observation is Marvin Harris' who remarks that Hawaii never got "real kings", comparable to Egypt's pharaos, because pineapple cannot be stored.

– Planning alters the human mind's attitude towards the environment. A hunt and a fishing expedition ask for "one-shot" plannings; even if seasonally occasioned. But reproduction requires "multi-shot" planning on a regular basis across time to address future needs.[691]
– Intensive contact to an area or a homestead strengthens the role of women in the family. The fertility of soil and motherhood become comparable. A reverence for women as the heads of societal groups is acccompanied by collateral sacrality. Hunter and gatherer societies are often patrilineal, whereas reproductionists' societies tend to be matrilineal, with all the direct consequences for family, real estate, inheritance law and economy, as well as the indirect ones for a strengthened family, lineage, and clan structure. In many sedentary Germanic tribes, the *kuni* (a term used for both lineage and clan) was influential, and from there the a new type of leader, the chief, called *kuning* (king, *König, koning*) emerged with significantly more power that a big man.
– It seems that the precise differentiation of lineage and clan becomes an issue as reproduction increases: As lineages grow, alliances for work or defense that are larger than lineages may become necessary. Blood-related descent is no longer enough to form effective groups. Quasi-relationships are constructed and to justify these a the descent "from the sun", "from the eagle" or other stipulated apical ancestors replaces the descent from a demonstrated apical lineage ancestor.[692] Artificial relationship by clan descent, phratry, moiety or even tribe becomes of interest.[693] This explains why in hunters' and gatherers' societies lineages as undistinguished from clans (= "kunis") are known, but clans proper are rare. In reproductionist societies, by contrast, the distinction between lineages and clans is common and wise-spread.

Thus, the size of human societal groups is the result of a plus-minus calculation: the more danger from outside and the more demographic pressure from inside, the larger a group may be. Less danger from outside and less demographic pressure from inside mean smaller groups. The phenomenon of the "split" is related to this calculation. For not yet fully understood reasons, groups of early humanity tended to split up, and there are indications that often the faction of the "traditionalists" took the initiative to quit.[694] "Splits" are related to risk. The unit of a group of humans makes risk more manageable politically. This is a generative factor of forming units, a cause of uniting. On the other hand, if staying together is deemed to be riskier than splitting by a majority, a split occurs.

In animist societies, many of the risks bear a character which etically could called religious. A place which has become religiously unclean, will be abandoned.[695] Unclean in this context means too risk-laden. In early times, the Japanese imperial court used to move after every death of an emperor. Very grave uncleanliness may lead to a multiple split: People simply flee into many directions. San Lazaro (near Santa Fe, NM) seems to have been left by what may be called a double split: both sides left.[696] Uniting and splitting may have played an important role in the rise and fall of early civilizations.

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691 The issue of planning is discussed, in the form of a story, in Genesis (1st book of Mose) Chapter 41.

692 See Chapter 3 V.

693 This is not pseudosocialization; pseudosocialisation may occur in the absence of actual communication and allow for "membership" of an imagined community. Fictitious relationships require communication.

694 An example for the rule is the "Oraibi split" in Hopi in 1908, see text near note 1030, below; an example for the exception: is the "Duncan split" of the Tsimshian Indians (a Northwest Coast tribe) in Metlakatla, the Anglican converts left to avoid contact with the traditionals. "Risk and split" is an understoodied research subject.

695 The early Japanese imperial court moved after each death of an emperor.

696 I thank Dr. John Ware, Santa Fe, for a discussion of this case; see also Douglas Preston, Cannibals of the Canyon, The New Yorker, of November 30, 1998, 76–89.

– These differentiations within reproducing cultures brings about a multifaceted life of societal groupings and thus ask for speakers and representaives of those groups. The several specialized big men, or the one big man surrounded by similarly informal (and like the big man himself never heritable) helpers are replaced by the chief (or king) and those speakers. Often, the chief's position is inheritable or tied to a certain lineage or clan, and the speakers for the sub-units are tied to their respective lineage or clan, or are relatives of the chief. High-sea-going boats need a crew, and the boss of the crew holds the position of a chief, not of a big man. Polynesians are known as great sailors, Melanesians are not.[697]
– A phenomenon observable in bigmanship cultures and in chiefdoms as well (but less frequent in cooperatively organized cultures because of their greater inner flexibility) is the "youth bulge". In bigmanship cultures, regular food is too scarce to permit a sharp increase of the population. Reproductionist societies may very well show a population growth affecting a group consisting of second, third, fourth, fifth sons.[698] In a patrilineal culture, the first son typically inherits the farm etc., the later born sons have to find their own way. Under matrilinearity, a daughter will inherit the farm and marry one of the boys, and all the other young men may belong to that "bulge" group. Some authorities attribute the tendency of such additional male popuation to engage, under the leadership of youthful "war chiefs", in sudden raids, daring sea voyages, extended expeditions or warfare to the lack of opportunities to make an acceptable living at home. This is also a facet of chieftaincy society.[699] Examples are the attacks by Vikings, Normans, Apache, Comanche, crusaders, and many other similar aggressive undertakings.[700] Some think that the early conquests of Islamic warriors were due to youth bulge as well.[701]
– While a hunter and a fisherman as a rule makes the kill at a distance and touches the prey only to carry it home and distribute its parts, the herder and the early farmer lives together with the animals, often under one roof. This has drastic effects on human hygiene compared to the forager's life-style. Many diseases strike humans through contact with cattle (tuberculosis), chicken (bird flue), or sheep, goats, and cattle (all smallpox), or with wild animals attracted by the domesticated ones or by stored crops (mice, rats, fleas).[702] For the forager, the typical critical handicaps are hunger and injury, for the reproductionist, disease and contagion.[703] The causal link between domestication and illness is not always apparent

697 Cf. Spencer Wells, The Journey of Man, New York 1992: Random, 147.

698 Gary Fuller, The Demographic Backdrop to Ethnic Conflict: A Geographic Overview, in: Central Intelligence Agency, ed., The Challenge of Ethnic Conflict to National and International Order in the 1990's, Washington: CIA (RTT 95–10039, Oktober), 151–154; Gunnar Heinsohn, Söhne und Weltmacht: Terror im Aufstieg und Fall der Nationen, Zürich 2003: Orell Füssli.

699 See also Gunnar Heinsohn, Machen junge Männer Krieg?, DIE ZEIT, No. 10 of Febr. 26, 2004, 49.

700 Litigation before US courts between Native Americans and descendents of pioneers about land, involving for instance so-called "clouded titles" dating back to homesteading and settlement times, often concerns "peace treaties" between a tribe and an US-American agency in which the tribal representative ceded Indian land to the whites. These tribal "representatives" may have been self appointed "war chiefs" who led a group of young warriors hunting and raiding, then were defeated and asked to sign the "treaty", but had no mandate to turn over tribal land to the victors. Upon return, these war chiefs used to get in trouble with the tribal council.

701 Cf., Fred McGraw Donner, The Early Islamic Conquest, Princeton 1098: Princeton Univ. Press.

702 Reference must be made to the specialized literature of medical history.

703 Frank Linderman, Montana Adventure: The Recollections of Frank B. Linderman (H. G. Merriam, ed.), Lincoln & London 1968: Univ. of Nebraska Press, reports that during his time as assayer for mining companies in the Northwest Territory that an Indian once asked him: "Tell us, what does it mean to be ill? We know that one may starve from hunger, or is killed by a bear, but what is illness?" Linderman let the Indian look through a microscope and showed him some bacteria, answering that this "dirt" is illness.

to the affected people. This may explain a much expanded belief in witchcraft among reproductionists, compared to foragers. While a hunter or a fisherman may be known for superstition, foragers generally do not believe in witchcraft. Among horticulturalists and farmers, witchcraft is common and inevitable part of daily life.[704]

b. Chiefs, kings, queens

The salient feature of chiefship is hierarchical power *as such,* a power that is no longer tied to certain tasks, qualities, and abilities as in the context of bigmanships. In chiefdoms, there is a frame for governmental power that gives rise to a presumption of jurisdiction. This presumption can be refuted (except in a tyranny),[705] but the burden of proof is on the challenger. To indicate this concentration of power, Bohannan speaks of a "role" the chief assumes. Again, this idea of a leading role is indicative of a certain framework of power. Often, chiefship is inherited. The Polynesian chief is protected by *mana,* a spiritual power that works against commoners who come too close to the chief and thus violate a *tabu* (taboo) zone (Bohannan 1992, 161). In chiefdoms, social inequality is the rule.[706]

Because of their basic lack of horizontal legitimation, chiefhoods tend to have a spillover effect: the chief – perhaps self-appointed – wants to govern additional subjects. Particularly in connection with the phenomenon of a youth bulge as a surplus of young men (often the second, third, and fourth sons who did not inherit father's farm, shop or position. chiefhoods may take on a aggressive character. The interior verticality then turns into an exterior one.[707]

Instead of specialized leadership in different contexts which is common in big man societies, chiefs are in command of a staff to take care of different tasks. For the basic structure of a chiefship it makes no difference, in principle, whether the chief is more or less powerful, more or less elevated from the people, more or less assisted or controlled by a council of elders as the horizontal element of human society.[708] It does not matter very much whether his title is chief, paramount chief, king, emperor, or pharao, or whether the chief's position can be held by a female, a queen or empress. Among the elders, the consensus principle is followed. The parallel opinions have to be bargained; a common will is absent.[709] Colonial powers often did not distinguish between the big man as *primus inter pares* (the first among the equal) and the chief as holder of an office which is equipped with a framed authority, even if they intended to change the structure of leadership of the subjugated nation as little as possi-

704 More on witchcraft in Chapter 12 VI.; see also Adolphe F. Bandelier, The Delight Makers. San Diego, New York, London: Harcourt Brace Jovanovich Publ. (1971; orig. 1890); E. E. Evans-Pritchard; Witchcraft, Oracles, and Magic Among the Azande, Oxford 1937: Clarendon; W. Fikentscher (1995/2004), 227, 230, 279 with a calculation of witchcraft trials in Pueblos. This reseach demonstrates that moiety systems may reduce witchcraft accusations because of their neutralizing and pacifying effect; Ch. 3 VI 2; above.

705 Bohannan (1992), 160f.

706 Bohannan (1992) 159; Kottak (2004) 242.

707 An often overlooked factor in peace studies; a century-old but still modern example is what has now come to be called "Breshnjew Doctrine", the demand for intervention.

708 See 3., before a., above; for example: hierarchy and conciliarism (the power of the bishops to meet and decide in council) are the two elements of leadership within the Roman Catholic Church. Christian Orthodox churches even more stress hierarchy which was a factor in the East-West split (Schism) of Christianity that separated the Orthodox and Latin Church in 1054 A.D.; from modern times, see, e.g., Rudolf Schunck, Profil einer hierchischen Rechtsfigur in der Kirche: Aspekte der Personalpräfektur Opus Dei, A. Egler & W. Rees (eds.), Festschrift Georg May, Berlin 2006: Duncker & Humblot, 597–610.

709 See note 767, below.

ble. Generally, big men were regarded and treated as chiefs.[710] Sometimes the colonial power went farther and instructed these "chiefs" to act as its politically authorized agents.[711]

c. Families, lineages, clans, tribes. Family metaphors

Demographic pressures, including the need for more numerous defense troops, lead to alliances of lineages, and to artificial family structures such as clans (see Ch. 3, and the remarks under a.). Clans unite to tribes. Chiefs as speakers of these units play a role in forging these advanced alliances. In this phase of the formation of human associations the next higher unit was conceptualized by using a family metaphor: the chief, especially a paramount chief, receives the title of a "father". For many Native Americans, especially Plains Indians, the US president was the "Great White Father". A queen is sometimes called the "mother" of the "motherland". Members of alliances in warfare become "brothers" who might drink to"brotherhood", nuns become "sisters". A king might address his subjects as "my children". The Orthodox church officials received the title of "pope", the head of the Roman Catholic Church that of "papa" or "Holy Father". Monks address each other as brethren or brothers, and Islam has its *Muslim Brotherhood*. In German, the *Vaterland* (fatherland) has its *Landeskinder* (land's children). The examples are numerous.

Family metaphores are used to legitimize alliances that otherwise may be difficult to rationalize. Precisely at this point, superaddition as a reason for forming an alliance may become an issue (see III. below). To oppose both families and family metaphors and their political impact, superadditive alliances may be conceptualized. Historical examples include the ancient Greek *polis* (the city state, around 550 B.C.), the Frankish cooperative (around 250 A.D., the League of Iroquois (allegedly around 1350 A.D.). and the Tewa moiety system (which may be 1000 years old or more).[712]

d. African studies by Fortes & Evans-Pritchard and Middleton & Tait. Polynesian studies. Other chiefdom structures

In 1940, Meyer Fortes and E.E. Evans-Pritcard edited a book on "African Political Systems".[713] The book was followed by a similar volume, titled "Tribes Without Rulers: Studies in African Segmentary Systems", edited by John Middleton and David Tait.[714] The reports cover the period 1920 to 1953. More recent comprehensive and comparative studies do not seem to be avalilable. Decolonization, political independence of African states, and UN membership changed the picture. Thus, despite of their lack of modernity, these reports contain valuable material on traditions that may be of interest today, especially when new African constitutions refer to traditional rules.

The authors divide the African political systems which they studied into three main groups: the Bushmen or lineage systems as the oldest traditional forms (Amba = Bwamba), the segmented tribes Tiv, Bantu-Tavirondo, Tallensi, Konkomba, Lugbara, Nuer, Western

710 In 2004, as reported above in notes 682 and 685, it appeared that in Namibia the same mistake is still being made.

711 On the negative effects of the British rule that gave such political power to the chiefs of the Tiv (Nigeria), see Bohannan (1992) 159.

712 W. Fikentscher, Zur Anthropologie der Körperschaft – Polis, Genossenschaft, Tewa-Pueblo – (ein Feldforschungsbericht) (On the anthropology of the corporation – polis, cooperative, Tewa-Pueblo –: A field report), Bayerische Akademie der Wissenschaften, Phil.-Hist. Klasse, Sitzungsberichte Heft 2/1995 (Munich: VerlagBayerische Akademie der Wissenschaften, in Kommission bei C.H. Beck, 1995).

713 London, New York & Toronto 1940: Oxford University Press, here used in its 10th reprint of 1966.

714 London 1958: Routledge & Kegan Paul, here used in its 3rd reprint.

Dinka, and Mandari), and what the editors call the "centralized tribes" (Ngwato, Banyankole, Kede, and Zulu). The Bushmen or lineage systems correspond to big man societies. The San of contemporary Namibia and Botswana and rainforest "pygmees" could have been added. Their main groups are lineages, and there are no chiefs. In the segmented tribes, the lineages become combined to ever growing entities, such as clans, tribes, and people or nation. A segment is variable in composition and is always defined in relation to who is the actual or possible enemy (A.-W. Asserate).[715] These segments have leaders who may be called chief. Hostilities between lineages, clans, and tribes require mediators, such as the "leopard skin chief" of the Nuer (who is not a chief but a go-between and intermediary). The centralized political systems are characterized, according to the four editors, as having a power center and often a territory. If there is one person who holds central power, a male person is the paramount chief or king, a female person the queen. In the centralized systems, hostilities between the lineages, clans or tribes will be policed, rather than mediated.

Of course, there are transitional forms of political systems, not so much between bigmanships and chiefships, but between what the four editors call segmented and centralized chiefships. Also in the centralized national or tribal political forms, there is this feeling, expressed by Asserate, that "the other" is the enemy who defines the size and composisition of the group to which somebody belongs. The only difference is that in the less combined forms hostilities are mediated, and in the more combined forms settled by the kings's or queen's police or army because there is a centralized power. Here, by generalizing the absence of hierarchized units, the term segmentation is used to refer to both bigmanship and chiefdoms.

The original meaning of segmentation in Durkheim is "non-state", and in Evans-Pritchard "non-hierarchy of units of belonging". This permits to group together what the four editors call "segmented" and "centralized" "political systems" to a wider concept of segmentgation (also with a view to the many forms of transition). This facilitates to separate from one another on the one hand the wider concept of *segmentation* – to be found as big man societies or as (more loosely or more centralized) chiefdoms –, and on the other hand the *corporate* forms of political structure, typified by *polis* and cooperative *(Genossenschaft),* in short, by what is called the "state". To some degree, this harks b ack to Durkheims distinction between the state and segmentation. But going beyond Durkheim, big man societies and chiefdoms are separated and distinguished, and the essence of " the state", the idea of the cooperate entity of members, is stressed. The great difference between segmentation and corporation consists in the corporation's special combination of horizontal and vertical elements which provide for superaddition, membership, member's roles as individuals, and rights and duties both between the members and the members and (consequently accountable) authorities. The gist of the corporate entity, that the whole is more than the sum of the parts, because horizontal and vertical elements combine to form a unit separate from the sum of the (horizontal) parts, is not to be found in segmented societies.

To complete the sketch of chieftaincy, it would be necessary to compare with the African systems of political order other chiefdom systems such as the Polynesian. This cannot be done here in detail. Suffice is to say that Polynesians highly developed various forms of chiefdoms, including the one of the Hawaiian kings, and that Polynesian chiefships are clearly different from Melanesian bigmanships.[716] Native American chieftaincies would have to be discussed

715 See the discussion of segmentation II. 1., above; there is only a word for enemy in the 2000 African languages, and no word for opponent, Prince Asfa-Wossen Asserate of Ethiopia, cited in Chapter 10 I. 4 (at the end), below.

716 See, e. g., Bohannan 15 f.

and compared with chiefdoms in other parts of the world, such as those of the Slavic and Germanic tribes, described by Tacitus and others. Reference must be made to the authorities of these subjects of study.[717]

e. The village head

In reports from Bantu Africa,[718] the "village head" or "village leader" *(Dorfältester)* plays a central role. He is responsible for keeping up decency, and law and order, in the village, mediates and sometimes decides family issues, and is the instanceto be addressed for ruling many other things. Now, after having discussed a number of typical societal administrative forms, the position of the village head can – as middle types – be determined:[719]

(1) In bigmanships, in most cases the village head is identical with the big man. He will be taklen from an influential lineage and thus may – in derivation from the demonstrated apical ancestor as the head of the lineage – be named a demonstrated actual leader.

In chiefdoms, there is to be made a distinction: (2) In the more loosely structured chiefships, the village head will be a clan leader, or head of a subclan, having essentially the same functions as a lineage head, but involving more households, maybe based on some lineages, and the stipulated nature of the apical ancestor of the clan will attribute to the chief a somewhat higher, spiritually authorized status. (3) In the more centralized chiefships up the veritable kingdoms, the village leader traces his competence and jurisdiction to the central chief, or king, or to one of his relatives or officials, so that there is a noticeable human line of authorization down from the power center of the tribe.[720]

(4) During the postcolonial period, under Western influence, maybe transmitted by the United Nations, there may be village heads who are appointed, or elected with governmental consent, by the modern government. The corporate structure of the cooperative based on superaddition will become visible, foreign to the traditional tribal form of government, but acceptable by virtue of "modernity". Conflicts with traditional patterns including village heads of the types (1) through (3) are frequent, detrimental, and often inevitable.[721] Africa-grown superaddition has not yet been discovered.[722]

(5) and (6) There are two more types of village heads in regions where Muslim mission is successful, like down the coast of the Indic Ocean from Erythrea to Mosambique. Muslim mission in Africa is alsmost always of Sufi type, which is closer to Bantu conceptions of harmony than the more strict or radical versions of Sunnitism and Shiitism. Acceptance of

717 E. g., Kottak (2004) 242–269 (general); Bohannan 161–163 (Polynesia); H. M. Fried, The Notion of Tribe, Menlo Park 1975: Cummings; Susan C. Humphreys, Anthropology and the Greeks, London 1978: Routledge & Kegan Paul; Adam Kuper, The Invention of Primitive Society: Transformations of an Illusion, London 1988: Routledge; R. Wenskus, Stammesbildung und Verfassung. Das Werden der frühmittelalterlichen gentes, Cologne & Graz 1961: Böhlau.

718 Roughly the geographic area between the South of Sudan to Cape Town in North-South direction, and between Sansibar and Dakar in East-West direction, spiritually the area of discussion and research of "African Philosophy", see W. Fikentscher, The Whole is More Than the Sum of the Parts, Therefore I have Individual Rights: African Philosophyand the Anthropology of Developing Economies and Laws, in: Manfred O. Hinz (Hrsg.) in collaboration with Helgard K. Patemann, The Shade of New Leaves: Governance in Traditional Authority, A Southern African Perspective, International Conference on Traditional Government and Customary Law, Windhoek, 26–29 July 2004, Münster 2006: LitVerlag, 295–328.

719 On the concept of central type – in contrast to Max Weber's ideal type –, see W. Fikentscher (1995/2004) 15 f.

720 See, however the warnings against centralization in Bohannan, 161 ff.

721 W. Fikentscher, The Whole is more…, see note 718, above.

722 Models from Native Americans (Iroquois, Tewa Pueblos) would be available, but since they are "heathen", Christian and Muslim missionary efforts are in the way.

Islam usually lets familiy structures such as the lineage or clan system break up (as does Christian mission), which in turn generates a call for leadership thus opens a gate to more centralization. Therefore, village heads in those areas become conceivedly Islam-appointed one way or the other, from benign local imams up to religiously supported warlords.

Thus, there are six rather different types of village heads. For foreign aid actions as well as for UN peace keeping and similar interventions, the knowledge of the local (regional) type of village head(s) is indispensable for success, but practically never investigated.

Leadership issues in other chiefdoms (Polynesia, Amerindians, Near East, Slavic and Germanic tribes, etc.) seem to be similar. The modern ones among them are not as well researched as African chiefdoms, although there is a wealth of ethnographic material. Time ands space do not permit to go into details. Most of what has been said about Africa will analogously apply.

f. Elman R. Service' and Kottak's idea of chieftainship as transition from tribe to state

Following a proposal by Elman R. Service,[723] Carl Philipp Kottak divides early human social organizatiuon in bands, tribes, chiefdoms, and states.[724] The definition of big man corresonds to the one used in this book.[725] For Kottak, a tribe is characterized by horticultural or pastoralism and a lack of socio-economic stratification, central rule, and no enforcement of political decisions, a chiefdom by a kin-based social-political organization with a permanent political structure in which the participants are stratified by having different access to available resources. Chiefdoms are, in this perspective, a transitional phenomenon between tribe and state.

However, some Native American tribes have strong socio-economic stratifications,[726] many tribes have a centralized rule,[727] and tribes enforce political decisions.[728] On the other hand, chiefdoms are not always kin-based,[729] often engage in horticulture or pastoralism or both, and they are no organizations in the original meaning of the word since they do not know membership or accountable organs.[730] Moreover, tribe is an assembly of people, and chiefdom is a form of societal order. Both are concepts on different levels. Therefore, the assumption fails, too, that chiefdom is a transition from tribe (a group of people) to state (another form of societal order).

Thus, the division in segmented societies (bigman societies and chieftaincies), and cooperative societies defined by superaddition, both under the impact of frequent societal inertia, seems to be the better solution. Against Service and Kottak, chieftaincy is seen as an important, independent, and non-transitionary form of socieral ordeer, which appears in many more or less loosely structured or centralized shapes. The chiefs are the chiefs of tribes.

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723 Elman R. Service, Primitive Social Organization: An Evolutionary Perrspective, New York 1962: McGraw-Hill.

724 Kottak (2004), 249ff., 269; see also Bohannan (1992) 161ff.

725 II. 2., above.

726 Alfonso Ortiz, The Tewa World: Space, Time, Being and Becoming in a Pueblo Society, Chicago 1969: Chicago Univ. Press.

727 See the four editors in d., above.

728 Cooter & Fikentscher 2008.

729 In general, pueblos are either moiety- or clan-based (both do not mean kin). See for details, R. Fox, F. Eggan; L. White, Ortiz (1969), Fikentscher (2004) 276–285.

730 On sharing and sharing habits see, for example, Frans de Waal. Good Natured: The Origins of Right and Wrong in Humans and Other Animals. Cambridge, MA 1996: Harvard University Press, 136f. (etiquette), 142 (joint hunting), 143 (status enhancing), 160 (revenge), see III, below.

g. Barter. Short-range trust

The economic forms of chiefdom are richer than those of bigmanship. Reproduction of domesticated animals and of garden or field crops creates property in need of protection. From such property follows lending, credit, additional economic stratification, but not necessarily the introduction money. Barter remains the main type of exchange (see Chapter 10, below).

The policing of property protection, effectuated by the tribal chief, initiates trust. The combination of barter and such trust results in what may be called short-range trust. Long-range trust, over distances of space and time, is facilitated in cooperative societies (see III. below).

The phenomenon of societal inertia can also be observed in chiefdoms. In big man societies, the phenomenon has been described above and used to explain Kapauku capitalism: Although it would have been more appropriate to pass to chiefdom because of storability of property, the Kapauku stayed with their their traditional bis man system and developed a high degree of property awareness instead. In a formerly chief/king/emperor system such as China, societal inertia can also be found on the side of the governed: Although kingdom and empire should have generated a more or les strictly vertical "tributory mode of production (TMP)", the Han Chinese stayed for more than thousand years – in juxtaposition to TMP – with their "petty capitalism mode of production (PCMP)" (Hill Gates 1996), with consequences for today's apparent inability of Chinese Communist Party and state to successfully interfere with the "trading crowd" of the Shanghai stock market (Ellen Hertz 1998). After the urban revolution, the appropriate governmental form would have been the *polis,* and for the governed the individual longe-range trust market. But societal inertia worked on both sides. The effect is an expansion of the tripartite

h. Collectivity. Shame

This is an especially sensitive issue in moodern cultural anthropology. An often made distinction holds that there are individualist and collectivist societies. Broadly speaking, Western society is regarded as individualist, non-Western societies are bconsidered to be collectivist.[731] Brought under these wide and imprecise categories, chiefdom societies would have to be dubbed collectivist, along with bigmanships.

Historically and systematicalls, an important text on the contrast between collectivitiy and individualism is Chapter 18, in the book ascribed to the prophet Ezekiel, from the Torah, die Old Testament. This text, dating back to about 610 B.C., contemplates whether it is correct to punish children for the misdeeds of their fathers, and fathers for the misdeeds of their offspring, or whether it is more just to punish a human being, ans nobody else, for its own misdeeds. The issue is personal guilt versus *Sippenhaft,* a word for which there is no literal English translation.[732] The result of Ezekiel 18 is, that in contrast to earlier Jewish law, the future rule should be individual responsibility, and collective liability, *Sippenhaft,* and thus feud, rejected.

About 130 years later, around 480 B.C., Thukydides, in his *Historiae,* makes Pericles talk about individuality in the classic Athenian culture of the polis. Thukydides' text reads in-

731 G. Bierbrauer, Heike Meyer & Uwe Wolfradt, Measurement of Normative and Evaluative Aspects in Individualistic and Collectivistic Orientations, in: U. Kim, H.C. Triandis, C. Kagitcibasi, S.C. Choi & G. Yoon (eds.), Individualism and Collectivism: Theory, Method, and Applications, Thousand Oaks, CA 1994: Sage, 189–199.

732 My dictionary circumscribes *Sippenhaft:* " Liability of a family for the crimes or actions of one of its members." This is too narrow because feud can hit victims outside of victim's family, such as members of the same religion city, caste, skin color, tribe, or nation.

triguingly because the concept of the individual was was not yet born in his language. Yet, what individuality and person al responsibility mean in the eyes of the author, is clearly presented in so many words.

Khaled Abou El Fadl, Professor of Islamic Theology at UCLA, and one of the competent speakers of and for Islam as a religion, discusses the issue under the Muslim belief system.[733] El Fadl says that originally Islam, since the teaching of the Prophet, a.s., adhered to the principle of individual guilt, but that in the course of the 19th century Islam turned to collectivity and the assumption of collective guilt, including feud and revenge against the opponent's family, friends, co-believers, and people. El Fadl muses why this turn occurred and offers several reasons. The most convincing to him is an at that time rising desire of the Muslims to be different from Jews and Christians.

One of the most striking texts on Muslim collectivity is Malcolm X's report of his *hadj*.[734] Malcolm X convincingly describes the overwhelming feeling of being taken up in the multitude of pilgrims and carried away, without a feeling of individuality, in the great mass of *hadj* participants.

In moral science, and in criminal law, the difference between personal guilt and collective responsibility is of remarkable impact. Not only that feud and revenge against members of the actor's family, friends, religious co-believers, and co-patriots is forbidden, guilt is what is reproached against the perpetrator. In collective systems of morals and law, no accusation of guilt is raised against the wrongdoer, but he is put to shame. He will be criticized by the villagers, or cursed by the offended parties, and subjected to others forms of shaming and public reprimand.[735] Synonymously, along with individualist and collectivist societies, there is often talk of guilt societies and shame societies.[736]

However, it should be noted that individuality and collectivity are no rubber stamps that can be pressed upon any culture in the same manner. Probably, every culture has its own shade of individuality and type of collectivity which both should be studied before making sweeping judgments.[737]

Moreover, much depends on precise examination of what is meant in the particular case. For example, in Christian religion, the order to missionize (Matthew 28, 19) is usually quoted to the effect that all humans should be taught the Christian belief, made disciples, and be baptaized. A frequently heard complaint by animist believers, especially cultural revivalists, against Christian and Muslim missionaries is that, by missionizing single persons, the tradi-

733 Kaled Abou El El Fadl, Islam and the Challenge of Democracy, Princeton 2004: Princeton Univ. Press, 28f., 96, 113, 126f. See also Ch. 5 V. 6., 6th paragraph, for the cultural context.

734 the pilgrimage to Mekka which a pious Muslim should perform at least once in his life time.

735 Pospisil (2004), 514f.

736 As member of a collective and shame society (since the middle of the 19th century), a Muslim may be tempted to take revenge against Western society as well as other societies in the world and all their members because victory, good life and success, promised by the Prophet, a.s., to his followers already during their life time, have in the Muslim's judgment not occurred and are likely to even get more and more distant. Not only Western, but also East and South Asian, animist African, South American and Pacific modes of thought today prove, politically and economically, to be more successful than Islam. Some Muslim might think that this is a wrong done to the righteous believers, the Muslims, by all the other inhabitants of the world, that this wrong has Islam put to shame, and ought to be revenged. This theory has been established for the Islam-Western relationship by Ralph Patai: R. Patai, The Arab Mind, New York 1973: Scribner. Given the apparent successes of Chinese, Japanese, Russian and – at least in philosophiocal respect – even African peoples, Patai's theory could be extended to modes of thought other than Western. However, against Patai, this collective feud theory should not be applied to all Muslims. There are inner-Muslim changes in direction back to individuality, for example in Morocco under King Muhammad VI.

737 The issue cannot be pursued here further.

tional structures of family, lineage, clan, moiety, and tribe are declared to be "heathen" and consequently ruined so that stable life and reliable societal patterns come to an end. For many peoples, this indeed meant loss of familial and societal ties. However, in the Greek and Latin text of Matthew 28, 19 (if the verse is authentic, which is debated) is does not say that individuals should be taught, baptized, and made disciples. The text clearly speaks of nations (ethne) alone, not of nations *and* individuals. This is different in the Zwinglian translation and translations following it, where the object of mission is duplicated by saying that the way should be taken to *peoples* in order to teach and baptize *individuals.* Obviously, these translators cannot conceive of a collectivity to be taught and baptized and therefore split the object. However, following the originals texts, missionizing single human beings is neither warranted nor mandated by the Bible, much less doing this by force.[738] Rather, according to the text, the addressees of mission should be nations, or other similar collective entities at best. Of course, this does not impede the practice to address single persons: Mission *may be* individual. In Islam, mission means adding participants to the *ummah* (the assembly of believers) which, according to El Fadl, as mentioned before,[739] consists of a collectivity, not of individuals. This does not prevent Muslim mission of individuals. But the result, if positive, can only be strengthening a collective.

i. Pseudosocialization: Sodalities. Secret and non-Secret "Societies". Criss-crossing. Harmony – inside, outside

Chiefdoms are known for having cross-culturally typefied internal structures that go beyond mere family, lineage, clan, tribal, or national ties. The designations vary, and the activities of these non-familial societal groups as well. A systematic cultural-anthropological overview seems to be lacking.[740] Only some keywords may be listed here:[741]

Sodalities are are unions of likeminded persons within a tribe for many thinkable purposes, such as fishing sodalities, traders' associations, chanting and drumming teams, sports clubs, newly-weds, from outside accepted members and their descent, etc.[742] Liminality may give rise to such uniting.[743] Moieties are no sodalities. They belong to the theory and practice of tribal structure as such.[744]

Non-secret societies are frequent in Native American tribes, such as warriors, hunting, medicine, clown, scalp (often female), musical (female flute players), etc. societies.[745] They serve the need to have feelings of belonging.[746]

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738 See note 218, above.

739 See note 733, above.

740 E. g., Thomas O. Höllmann, Poro und Sande: Geheimgesellschaften im westlichen Afrika, 1 Münchner Beiträge zur Völkerkunde 115–130 (1988); Conrad Phillip Kottak, Windows on Humanity, New York 2007: McGraw-Hill; Adolphe F. Bandelier (1890).

741 On the spot research is not easy because membership and habits are often secret, and the anthropologist soon becomes an intruder. Indian tribes in the Southwest often have *kivas* or similar assembly rooms that are not open to outsiders.

742 The clown societies are a well known example; see Bandelier (1890); Tony Hillerman, Sacred Clowns, New York 1993: HarperCollins.

743 See Chapter 9 V., below.

744 W. Fikentscher (1995/2004), 272 ff.

745 Michael W. Hughey & Arthur J. Vidich, The New American Pluralism: Racial and Ethnic Sodalities and Their Sociological Implications, 6/2 International Journal of Politics, Culture and Society 159–180 (1992).

746 Among Native Americans, sodalities are often called societies. "Sodality" may have a religious tint since Catholic lay groups often use the term sodality.

Secret societies may practice witchcraft, vehmgericht, kangaroo court and other more or less sinister activities.[747]

Laura Nader mentions an important consequence of the belonging of the same persons to more than one of these groups: There results a "criss-crossing" of memberships which strengthens the inner ties of (let us say) a tribe because one person may be member of sodalities and societies A, B, C, and D, another in B, D, and E, and so on.[748] For life in societal harmony within the tribe, and using pretended harmony as a means of cultural defense towards the outside, this criss-crossing is of considerable assistance.[749]

Anthropological and sociological science has given these non-familial unions the technical name of "pseudosocialization".[750] Clubs, political parties, factions, etc. are also counted under this concept. However, the concept of pseudosocialization is somehow biased and will not be used in this book. It places too much weight on family ties as purportedly most important and "true" foundation of societal structure, disregarding the societally helpful contributions of non-familial memberships.

j. Aspective presentation. Music

Chiefdoms and kingdoms (queenships) are to be found in human societies which frequently have an advanced artistic feeling and count artists among their members.[751] The way of presentation, in figurative art, is aspective, not perspective.[752] Music is either melodic-vocal,[753] or soundic-instrumental.[754] Thus, music lacks bass-line and counterpoint.[755] Dances show the *Reigen* pattern (powwow), not the counter-dance or sqare-dance structure.[756]

k. Religious types[757]

Chiefdoms essentially show the same religious types as bigmanships.[758] This is another argument for grouping bigmanship and chiefship together as segmentation (in a wider sense than the one used by the "four editors").[759] It would amount to an interesting anthropological study to investigate differences. As to possible differen ces, it might be expected that religious types which require no "discovery of the other"[760] such as ancestor worship and idolatry without magic are more characteristic for bigmanship, and that religious types that built upon

747 Franz Boas, The Social Organization and the Secret Societies of the Kwakiutl Indians, Reort of the U.S. National Museum for 1895 (1897) 311–738 (1st ed. New York 1970: Stechert); E.E. Evans-Pritchard, Witchcraft, Oracles, and Magic Among the Azande, Oxford 1937: Clarendon.; Höllmann, note 740, above.

748 This is not just a matter of "being social" but also of protection, W. Fikentscher (1995/2004), 277f.

749 L. Nader, Harmony Ideology (1990).

750 On pseudosocialization see note 693, above.

751 This is a gradual contrast to big man societies.

752 See the remarks on Emma Brunner-Traut, note 675, above; Ludwig Hamburger, Fragmented Society: The Structure of Thai Music, Sociologus 1967, 54–71.

753 See the remarks on Rudolf v. Ficker, note 675 above.

754 E.g., Tilman Seebass, Change in Balinese Musical Life: Kebiar in the 1920 and 1930s, in: Adrian Vickers (ed.), Being Modern in Bali: Image and Change, New Haven 1996: Yale Southeast Asia Studies, 71–91.

755 R. v. Ficker, note 775, above.

756 Gertrude Kurath, with the aid of Antonio Garcia, Music and Dance of the Tewa Pueblos, Santa Fe 1970: Museum of New Mexico Press. A comparative anthropology of dance has – to my knowledge – not yet been written.

757 On the concept and its history (a manuscript of L. Pospíšil of 1986) W. Fikentscher (1995/2004), 193, 305.

758 See II. 2., above.

759 See d., above.

760 See Chapter 6, above.

culture comparison, such as intertribal witchcraft, polydaimonism, and polytheism are rather to be found in chiefdoms.

l. A correlation of civilizational stages, axial age, and types of leadership

For this reason, one finds chiefs on all evolutionary levels of human society, among foragers, reproductionists, and urban citizens. However, and for the same reason, on the three levels of human development, foraging, reproduction, and urban division of labor, leaders assume different roles and have different competitors. (1) Among foragers, one of the important tasks of a leader is to mediate consensus and decide when consensus is too inefficient; hence, the big man is the appropriate type of leader. (2) Among reproductionists, chiefs carry a responsibility for protecting property, their own, their followers', and the whole nation's. Being responsible for, and therefore responsive to, the customary law regulating the adequate distribution of property and land use rights, the chiefs share the dignity of the land, and are thus entitled to corresponding respect, often including music and dance. Among pastoralists and farmers, magic is considerably more practiced than in society of hunters and gatheres. This increase of magic may help to replace the big man by a chief as type of leader, since a chief enjoys richer prestige. The chief's competitor may be an usurper who challanges the chief's qualities as a leader. He could be also an appointed or elected lord in the sense of the Franko-Normannic cooperative of vassals (the Franks had no nobility) who is representing another type of leadership. (3) In urban societies, everything even more depends on the outcome of the axial age: Outside of superadditive units, the chief's or king's task is to run a full-fledged government. His main challenger may again be an usurper. Inside superadditive units, there is more stability: Chiefs and kings are replaced by appointed or elected lords who derive their power from the trust and allegiance of the members. In turn, the lords feel responsible for their follower's welfare and protection. Urban division of labor develops into a superadditive entity.

m. A consequence: From elders to organs

Besides big men, and chiefs respectively kings, groups of elders exist, assisting and sometimes controlling the big men, chiefs, and kings. However, one does not find elders of this quality in those farming and urban societies that opted for axial-age secularity *and* world-attachment, such as the ancient Greek, the Germanic Franks, the Tewa-speaking Pueblos of Northern New Mexico, and the League of Iroquois. Both Greek city state culture and Frankish farmer's culture were cooperative, egalitarian, and lacking nobility; the Tewa-speaking Pueblos possess at least egalitarian moieties (half-tribes), the half-tribes representing the Winter (foraging) people and the summer (farming) people; and the Iroquois understand their leaders as accountable functionaries of the League in which only the Mohawk have a veto against majority decisions. In cooperative, that is, superadditively thinking societies, as a matter of logic elders become organs, city fathers, responsible *archontes* in the meaning of Paul's letter top the Romans, Chapter 13, and accountable tribal office holders. Historically, the cooperative structure tried to free an organized society from the influence of strong lineages, clans, phratries and other forms of sub-tribes, priesthoods, sodalities, unaccountable nobility, and tyrants, and to strengthen egalitarian peace and economy by trust and credit between the members of an entity.

n. A Transition: Harvesting peoples *(Erntevölker)?*

As mentioned before, the theory of *Erntevölker* (literal translation: harvesting peoples) posits that there is a transient stage in between bigmanships with their typical economic form of foraging (hunting, gathering, fishing), and chiefdoms with their typical economic form of

reproduction of animals (herding, nomadic life), or crop (slash-and-burn, horticulture, sedentary early farming).[761]

The North Amnerican nation of the Chippewa (= Ojibways) consists of many bands. Some of the bands use wild rice for their livelihood. Traditionally, harvesting of the wild rice is done not only by reaping the bundles of wild rice from shallow water and putting them in the canoe, but also by occasional but regular beating some bundles of rice over the railing of the canoe. Hereby, rice kernels fall lout of the bundles, sink to the bottom of the water and will contribute to the harvest of next year. Australian aborigines are said to care for certain fruit trees by cutting their fruit in way destined to make the tree carry the same amount of fruit or more during the next harvesting period.[762]

These practices are no "real reproduction" as it is practiced when herds are held to produce offspring, or seed is sown or planted.[763] Instead, re-growth is fostered. not more. The harvesting peoples theory, interesting as it looks, has not been accepted by dominant opinion as foundation for a full-fledged type of economy besides foraging and reproduction. The majority of the authorities seem to hold that these and other next-harvest-fostering practices may be regarded not more than a negligeable dead-end road in the gradual development of human economy.[764]

III. Superaddition

As we have seen under II 2. above, at the end of the description of bigmanship and the opening of the discussion of chiefdoms as the two types of segmentation in Evans-Pritchard's sense, the exact opposite of segmented society is cooperative society, exemplified by the agricultural, defensive, dike building, mining, manufacturers', "Kings Peace" *(Landfrieden)* or other citizens' cooperatives *(Genossenschaften)*.[765] They could also be named "associations", but this term is

761 See the works of Julius Lips, z. B. Rolf Herzog, in: Neue Deutsche Biographie, vol. 14, Berlin 1985: Drucker & Humblot, 672 ff. on "harvesting peoples" as possible civilizational stage see Chapter 3 III (end), above.

762 Julian Cribb, Yvonne Latham, & Maarten Ryder, Desert Delicious, 16 Terrain. org, A Journal of the Built and Natural Environment, Spring/Summer 2005.

763 Desert dry farming by the Hopi is performed by digging and placing the seed of corn in a peculiar way and more than one foot deep into the soil in order to use the ground water found there from experience. This is why the lowering of the ground water level by the coal producing plants in the neighborhood of the Hopi reservation for winning ground water in order to pump a mix of coal and water to centralized mines via pipelines is of devastating effect to the traditional livelihoods of the Hopi tribe, a livelihood for which corn is central.

764 Cf., L. Pützstück, Symphonie in Moll: Julius Lips und die Kölner Völkerkunde, Pfaffenweiler 1995: Centaurus; Matthias Krings, Julius E. Lips, in: Feest & Kohl, Hauptwerke der Ethnologie, Stuttgart 2001: Kröner, 263–268 (no mention of the harvesting peoples theory).

765 Defined by superaddition, that is, by the understanding among the participants that the whole is more than the sum of the parts. Discussions in Southern Africa, Taiwan, US, and Eastern Europe about these types of human governance produced two typical misunderstandings: (1) For many participants in these discussion the notion that the whole could be more than the sum of the parts was simply illogical and inconceivable; usually, these participants were educated in a mode of thought that strived for "consent", "unity", or "harmony". (2) In places where before 1990 communism was of political influence, mentioning the "cooperative" as a model for superaddition raised suspicion. Discussion partners surmised that I was surreptitiously propagating communism, because the only association to the term "cooperative" they could think of was a kholkhoz or sowchoz system of forced collectivity. When they realized that a cooperative *(Genossenschaft, polis)* is the tool to individualize a person by making it a member of a contractual unit with interior rights and duties and responsible agents conceived as, and called, *organs* of a body of self-government, they could not believe that such a "mix" of communism and capitalism might exist. In such discussions, I therefore dropped the expression "cooperative" and replaced it by "corporation", and was suspected to be a "capitalist". The best way to avoid these misunderstandings, I found, is to study the constitutions of historical *polis* and Frankish cooperative. –

imprecise since it covers non-superadditive units as well. Farmers who "associate" may do this for variuos reasons, arrange marriages, meet in the beer hall, or drive together to the weekly market. What is meant here is the association for the pursuit of a common goal, such as building a dike, city hall, or church, or joint purchases, or joint sales of their products, or forming a defense unit, or using the same machinery, mountain road or bull, etc. Therefore, "coopereative" as a term for such joint agricultural undertakings is preferable. The difference between the segmented and the superadditive society can be sketched as follows:

1. Importance for trust, coherence, and egalitarianism. Lingua franca

The axial age has direct impact on the concepts of individuality, social contract and government contract, majority rule, and economic organization. Social contract, government contract, and majority rule are possible (not necessary) consequences of the axial age secularization (whereby counting of the votes, as in Athens, is only one way of determining a majority; Tacitus describes some Germanic peoples as "weighing" votes – according to the noise they are able to produce by knocking their swords against their shield). Outvoting a minority *without breaking up the social entity* amounts to a *social contract* – the *pactum generale* (or *sociale*) both of the Greek city state (the Athens model) and of the Frankish feudal pledge-of-faith system. Trust and superaddition are mutually constitutive, *Treue und Übersumme bedingen einander.*

Accordingly, the big men who try to reach consensus among those who see themselves exposed to the forces of spirited nature turn into a city government of *archontes* or into a *lord* who is *mandated* by a second contract, the *pactum regium,* or *government contract,* that is built upon the *pactum sociale.* The meaning of the second contract is to authorize a leader *(lord)* or leaders *(archontes)* to head a group, to let them levy services and contributions, and in turn give account to the members of the group, the citizens *(vassals, polites)* after a predetermined period of time. In the Germanic tradition, a *vassal,* obligated and entitled in relation to all other *vassals and* to the *lord* within the described system, was called a *Franke,* a free, able, and active man. Franks were to defined not so much as a tribe by descent than as an entity, the membership of which was obtained by accession. If not born from a *Franke,* it was possible to "join the club" by taking an oath to be willing to become a *vassal* in relation to a *lord*. Of necessity, the *vassals* as obligated and entitled individuals, had legally equal rank. Their society became a society of equal *Franks.* As everyone – as far as political action is concerned – was a secularized individual and thus entitled to his or her own personal conviction, the principle of "one man one vote" and therefore majority rule are logical consequences. Taken together, social contract and government contract, make up the classical Greek city state (about 550–330 B.C.E.) and the Frankish Feudalism, which in its Normannic derivation is called "pledge-of-faith system" (third century A. D – today's modern state).[766]

The following lines are a combined and revised version of W. Fikentscher (2004), 65 ff. and idem (2006), The Whole is more …; in (2004).

766 Frederic William Maitland & Francis Charles Montague, Sketch of English Legal History, ed. by J.F. Colby, New York 1915; also Reinhard Wenskus, Stammesbildung und Verfassung: Das Werden der frühmittelalterlichen gentes, 2nd ed. Vienna: Böhlau. Frankish Feudalism lasted, in its historical form, from 258 C.E., when the Franks were first mentioned, for fifteen and a half centuries, till 1806 C.E. (in Germany, see below under 8.), with modernized versions wherever the democratic form of government became in use. For detailed historical argument see Edward Gibbon, The History of the Decline and Fall of the Roman Empire: A New Edition to Which is Added a Complete Index OF THE Whole Work, I–VI, New York 1845 ff.: John W. Lovell Publ., article Franks (I 299): creation of a new confederacy around 240 A.D. comprising Chauci, Sicambri, Attuarii, Bructeri, Chamavii, Cathi (= Tacitus' Gambini) on Lower Rhine, Weser and in Westphalia: "Tacit consent, and mutual advantage, dictated the first laws of the union (at I 300, III 222 – fidelity to Roman government –, III 543 – Christianity –, III 568 – Chlovis –, III 590 – Salic law composed in the be-

Since the leader was assumed to have a mandate and was held accountable, for some time the Franks had no nobility comparable to the chieftaincy system (which was characterized by dukes, *Herzöge*): the *wergeld* (compensation for manslaughter) was the same for every Frank, rich or poor, whether or not he came from a known family. Consequently, there was no Frankish nobility which could be employed for structuring and administering the Frankish empire. Royal officials had to be selected to do the job. Since they were expected to be able to write selected, these officials were called *Grafen, comptes,* or *counts* (from Greek: graphein = to write; and Latin: computare = to count, to add up).

The Frankish tongue (the Italian-Provençal jargon used in the ports of the Eastern Mediterranean) became a trade language and received the name *lingua franca* (comparable to Suaheli, Papiamento, Pasamalais, Pidgin English, Chinook Jargon, Tlingit, Ancient Greek and modern English).

2. Role of time

Time is an important factor of the pledge-of-faith system because of the stipulation to hold the lord accountable periodically (hence the woed "diet", meaning a gathering on a certain day). For this political purpose, time by logical necessity becomes "time as a straight line". Time-related contract (between contractual *partners* entitled to *rights*) and time-related corporation (composed of voice-and-exit entitled *members*) become conceivable. Both grow from the same contractual thinking across time as a straight line. The Frankish-Normannic pledge-of-faith system, composed of both egalitarian and authority-providing elements, with its time-as-a-straight-line related subjective rights and duties between the members of the group, and between the members on the one hand and the periodically accountable leader(s) on the other, becomes the central organizational pattern of the "West" and the foundation for "Europe's special way" (S.N. Eisenstadt: the "European complex"), in politics as well in economics. Note that the words politics, economics, and organization are Greek.

3. Heathen, not Christian. A history of superaddition

It is noteworthy, and of considerable tactical advantage in contemporary discussions with Asian, African, and Islamic politicians, lawyers, and economists that both *polis* and the Frankish-Normannic pledge-of-faith are not secularized Christian achievements, but rather products of "heathen" thinking (albeit on the basis of Parmenideian judgments). More precisely, the concurrent crises of animism (in the narrow sense of "spirited nature") and its later forms of polydaimonism and polytheism marked the end of animism in the broad sense, introducing the axial age in both Ancient Greece and the Frankish-Normannic regions.

For the subject of this chapter, the anthropology of constitutional justice and the establishment of societal order in the widest possible sense between humans, obtains an influential tool by the Frankish-Normannic pledge-of-faith system. Social contract and government contract create an entity to which its participants belong. The Franks understood this entity as agricultural and political *Genossenschaft* (= cooperative). Through uniting for an entity, associated risk became more manageable, in weather, floods, politics, business, disputes, and defense. Today, the concept of membership appears so self-evident that Westerners do no longer think about its sources – the Greek polis and the Frankish cooperative – and its cultural specificity. But the ability to think in terms of membership is in no way natural. Being a

ginning of the fifth century before 421 A.D. –, III 594 – federal structure –); Heineccius, De lege Salica, III Sylloge III 247–267, on public vote in successive assemblies), a discussion and more authorities in W. Fikentscher (1977 a), 478–607, esp. footnotes 198 ff.

member of something requires the assumed existence of that very "something", an entity that is not identical to the sum of its members, the compilatory association. In other words, Greek *polis* and Frankish cooperative created a new identity, the identity of a unit which exists in addition to the participants. When hundred *polites* as citizens of a Greek city state form a *polis,* or when hundred Franks form a Frankish cooperative, there are hundred and one individual entities in each cae. The hundred and first entity is a corporation, a *personne morale,* a *juristische Person,* composed of hundred members. The Greek city states (the *poleis*) had membership lists. Although the Franks were illiterate, they became members by taking an oral oath. By that oath, they received a new *legal* status, namely, to be a Frank (hence their name which does not designate a tribe such as the Goths, Burgundians, Teutons, or Alemans, etc., but a legal quality: being a member. Thus, *poleis* and Frankish cooperatives were wholes that differ from, or are "more" than, the sum of the parts, a phenomenon that may be called the *oversum principle* (as a translation from German: *Übersumme*; an English term seems to exist only in mathematics: superaddition). Why the principle of superaddition took hold of the minds of people at different times in certain parts of the world and in others not, remains an open question.

The increase of trade after the invention of the wheel and the construction of seegoing vessels must have promoted the interchange not only of merchandise but also of animist, polydaimonist and polytheist belief systems that included tribal or national good-bad evaluation scales. Comparison led to an abstract good-bad dichotomy of a more secular nature (compared to tribal and national moral standards). This in turn fostered a thinking in comparative terms and over-arching concepts which related to reality like a superadditive unit to its local implementations. The assumption of superadditive units then gave rise to the independence of thinking, thinking seen as a nexus between subject and object (Parmenides) and to the approachability of abstract ideas through dialog (Socrates/Plato). Thus, (Greek) polis and (Frankish) cooperative have their roots in generalizations of good and evil without an inclination of recurrence to tribal/national morals, but linked to sceptical attachment to this world. Hence the majority vote, and the ("horizontal") trusting of one another.

The adage that the whole is more than the sum of its parts has been attributed to Aristotle. An extensive literary search did not produce a conclusive confirmation. However, Aristotle as the great collector of the philosophies of his time may have made this statement, but probably as the rendering of another's opinion rather than as his own. His general "entelechial" conviction (that things have their reasons of being and meaning in themselves – a basically animistic attitude) is essentially anti-reductionist and opposed to doubt, and thus foreign to the idea of superaddition. The reductionist concept of superaddition is pre-Socratic, Parmenideian and ontologically idealist, and Aristoteles' was rather critical of his teacher Plato's "realistic idealism": *Amicus Plato, sed magis amica veritas* (Plato may be a friend, but I prefer Truth above Plato), is one of Aristotle's confirmed sayings. Where Plato asked for truth, Aristotle claimed he knew it, an attitude towards philosophical inquiry which Plato found pert, even checky (see the ironic remarks in Plato's dialog Parmenides, 137b, c).

4. Philosophical (ontological and epistemological) and political meanings of superaddition. A definition

In philosophical terms, entities such as the Greek city state and the Frankish cooperative follow the principle of superaddition: The whole is – *ontologically* – more than the sum of the parts. The parts are individualized "members". In this sense only superadditive units have genuine membership, that is, an individuality separable from the individuality of the whole.

In other words, members take the quality of a role, of a task to be performed, within the entity. There is the entity outside of the sum of the members, and this entity can be empowered by a will. Once there is a distinction between "all the members" and the entity to which they belong, from the point of view of comparative culture decision-making by vote becomes conceivable, and consensus is unnecessary to form the will of a group. Under the consensus rule which is typical for pre-axial age cultures, and frequent in post-axial cultures outside of the "West",[767] all concerned have to agree in order to be bound. There is no indidual role of a person (as member, as obligated participant) within the group, apart from being that person. In the case of consensus, all opinions are laid on the table, so to speak, one next to the other. On this virtual table, these different opinions remain to lie, that is, to exist, in all their diversity. No common will is formed, no shared will guides the group's behavior. There is no hierachization of several divers opinion under a common will. An opinion brought forward most convincingly, or by the most respected person, will be followed. Since consensus requires a cumbersome process or cannot be achieved, dictatorship may replace the consensus will of all. The Islamic *ummah*, the community of the believers, follows the consensus principle so that a like-minded undertaking, for example *djihad,* requires at least a substantial number of Muslims.[768]

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767 When in November 1989 the Berlin Wall fell and the Soviet Empire began to crumble, for several months East Germany, officially still the GDR, was without effective leadership ("Modrow period"). The Four-plus-two treaty, restoring German unity, was in preparation. The general crisis in Germany, however, was severe and asked for decisive steps to be taken, for example to keep up law and order in the streets and at the workplace, keep the education system running, the economy intact, etc., not to speak of having forums for the hectic political debates about the end of socialism that were going on. The political instrument chosen, by civil self-help, for doing all these jobs was the *Runder Tisch,* the round table. It worked under the consensus principle on the initiative of one or more respected citizens, "big-men" so to speak, and thus did not apply democratic decision making by the "majority-beats-minority-for-a-limited-time rule". The pacifying effectiveness of these *ad-hoc* round tables in business and administration was remarkable. Anthropologically speaking, during those months, there was no superadditive Germany. Local government by consensus was therefore logical. – A counter example: On a field trip in March 1994, Hsiao-lo Wu, Shiow-ming Wu and I studied the legal and economic situation of two aboriginal tribes in Southern Taiwan, the Paiwan and the Rukai; see W. Fikentscher, Vom Recht der Paiwan und Rukai: Ein Forschungsbericht über die Altvölker Taiwans (Of the law of the Paiwan and Rukai: A research report on the aboriginal people of Taiwan), Jahrbuch der Gesellschaft von Freunden und Förderers der Universität München 1994, 18–20. – Again, my thanks go to the two Wu's who shared the field trip. – Traditionally, the Paiwan practice an animist-polydaimonist belief system. Earlier researchers also categorize them as polytheist. It appeared that the Paiwan have been largely missionized by Christian denominations, mainly Presbyterian, and that they see little difficulty in combining their traditional and Christian religious patterns (a case of enculturation). After their Sunday church services, the community members habitually stay on, remaining seated on the church benches, and discuss town problems, the minister often acting as facilitator. We were invited to attend the meeting. After a lengthy discussion about a planned demonstration, it was decided not to demonstrate, but no formal vote was taken. We were told that, as a recent development and new usage, such secular meetings were added to church service. Regular town meetings take place on weekdays outside the church, the mayor acting as moderator. There also, issues of general interest are being discussed and decided upon. We learned, for example, that decisions were made outlawing Karaoke events in the town (because of the noise), and prohibiting the possession of dogs except for professional breeding (for reasons of cleanliness). At the town meetings, decisions are made by majority vote. However, neither the polydaimonist background, nor the surrounding dominant Han-Chinese culture provides for voting under the majority rule, both lacking the concept of superadditive units. Obviously, the idea that the town is more than the sum of its citizens, who can therefore proceed by majority voting, is a secular form of the Christian church community practice. From its beginning in the first century C.E. (cf., Acts 1. 12–26; 6. 1–7; 1 Thessalonians 5. 21) Christians used the synagogue and the polis as organizational models of superaddition, membership, voting, and time-as-a-straight-line.

768 Peter Scholz, Scharia in Tradition und Moderne, Eine Einführung in das islamische Recht (Sharia in tradition and modernity: an introduction to Islamic law), JURA 2001, 525–534, at 529. See also note 299, infra.

The idea that the whole is more than the addition of the parts does away with the need of consensus (and its subterfuges) because the members – being bound by their pledge of faith to serve – serve the entity by contributing their individualized will. The validity of the decision of the majority is based on the original pledges of faith. The minority has to follow the will of the majority for the same reason: the original pledge of faith. Since the entity exists across time, majorities and minorities may change, but these changes do no affect the existence and efficiency of the entity. The roles of the members remain the same, regardless of the momentary situation of majority and minority. The introduction of the factor time into the forming of the joint will makes this possible.

Superadditive units such as the Greek city states and the Frankish cooperatives are politically anti-family and anti-clan creations.[769] The history of the *polis* is the best known proof, that of the Tewa-Pueblos in New Mexico another.[770] Superadditive units tends to avoid family metaphors, such as "father", "mother"," brotherhood", etc.[771] The consequence is that a superadditive unit may be confronted with the objection that "there is no family tradition", or "any spiritual legitimation is lacking". Indeed, the polis is a product of the secular Tragic Mind of Ancient Greece as an instrument to control influential families (in serious cases by ostracism). As noted above, the Franks needed counts *(Grafen)* for want of noble families.

The word membership may be taken literally. The idea is that the participating persons play a role for running the entity, the whole, based on the pledge of faith to play this role as long as one wants to be a member. Thus, the whole, the corporation, the cooperative, the moral person, is seen as a *body,* of which the participants are its *members.* The Greek *polis* followed this metaphor. In his Historiae, Thucidides (about 460 – after 400 B.C.E.), has Pericles explain to his Athenian co-citizens the city of Athens as a body of common ownership *(ta koiná),* to be seen separate from the individual citizens who enjoy and support the city. The service for the city makes them into organs that belong to this body. The word "organization" describes this entity-membership relationship with the aid of the organ metaphor. Therefore, in culture comparison, strictly speaking the term organization can only be applied to cultures that recognize the principle of superaddition – historically the Greek and Frankish cultures –. These cultures are known as "Western". Outside the West, there are many forms of human ordering, but no organizations *stricto sensu,* and if we find there institutions called organizations, they may have been accepted by way of borrowing from another culture. Sometimes they may be simple misnomers.

In addition to granting membership entitlements, another major advantage of the pledge-of-faith system and its underlying principle of superaddition over the consensus principle is *efficiency.* The Franks were surrounded by animist tribes using the consensus principle. Among them were the more numerous Celts who – if we may believe Caesar – had a cultural development regarding arts and crafts. But cultural standards do not necessarily mean higher efficiency in warfare. At that time, warring was considered a necessity of life, comparable to the Indians in the Americas. Let us take a numerical hypothtical example: Hundred Franks debate whether they should go on the warpath. Fifty one are in favor of, forty nine against the raid. Under the principle of superaddition, the fifty one outvote the forty nine, and the *"Gang"* (the Germanic word for the warpath) would be waged, with one hundred warriors partici-

769 W. Fikentscher, Zur Anthropologie der Körperschaft – Polis, Genossenschaft, Tewa-Pueblo – (ein Feldforschungsbericht), see note 712, above, with a discussion of the opposite view that the corporation has developed from family, lineage, clan, Roman gens, etc. Also metaphors such as "brotherhood" and "motherland" do not fit.

770 See the Tewa-Pueblo study, preceding footnote.

771 The Muslim community is called *"ummah". Um* stands for "mother".

pating. In a consensus society, the vote fifty one against forty nine will enlist fifty one warriors. Forty nine would stay home. Who wins the encounter? With their efficiency derived from superaddition, the Franks became the most powerful and influential Germanic tribe after the demise of the Roman Empire for about the next one thousand years (258 C.E., the year of the first mention of the Franks (who in 496 C.E. accepted Athanasian Christianity), to 1273, the election of Rudolf von Habsburg as German king. "Franconia" *(Frankischer Kreis),* the political unit which, within the Frankish constitution of the Empire, represented the many times renewed "King's peace", survived as a legal institution until 1806 C.E.). The German term for "King's peace" is *Landfrieden* (land's peace). Many small, and even before the Frankish king Charlemagne was installed three larger German tribes, the Alemans, the Thuringians, and the Bavarians, and as the only Slavic tribe the Slovenes, joined the Franks by pledge-of-faith). For religious reasons, the German king broke his own land's peace when after 1566 C.E. the Hapsburgs refused to help the Netherlanders against Spanish intended genocide (see note 302, above and accompanying text). William of Orange's "Defensio" gave this reason for ending Dutch membership of the Empire. Hugo Grotius established a new trust-based system of sovereign nations in its place (W. Fikentscher 1979 a). Consequently, having lost its value-based superadditive structure, Germany disintegrated. Neither the Peace of Westphalia, nor the Vienna Congress, Bismarck's European five-power equilibrium, or Hitler's reckless militarism succeded in putting a superadditive unit together again. It took the defeat in 1945. to go the "long way to the West" (H.A. Winkler 2002) that in a sense is a return, of course not to the empire, but to "Franconia".

Giving way to the organizationally superior Franks, the Celts withdrew to Brittany, Wales, Ireland, Spanish Galicia, and other European outskirts. Frankish law became the backbone of Europe's constitutions, and via the Norman who – in anthropological language – borrowed from the Franks after the conquest of Northern France, also for Britain and the US (see 7., below) German kings from other tribes (such as the Saxons or Suebians – the latter called *Staufer* –) upon election by the Electors had to submit expressly to the Frankish constitutional pledge-of-faith.[772] The Frankish cooperative became the basis for the Western systems of government.

It would be wrong to think that it is acceptable for the whole world. The Frankish cooperative is culturally specific. The forming of stable governments and economies in many African societies, in Afghanistan, in Iraq, and in many other places is so difficult because democracy, historically grown from the Frankish cooperative, is culturally speaking alien to these places. This does not mean that other cultures are unable to understand democracy. The understanding of the principle of superaddition (that the whole is more than the sum of the parts) is open to borrowing by any other culture. But unless it is borrowed, democracy can hardly be fully implemented.

The Greek city state did not exist long, and estimates vary according to the selected. In essence, the *polis* died because it did not grant human, inalienable, rights. Thus, the minority could not be legally protected to become majority. Majority rule is an unstable order, if not

772 Regardless from which tribe he was taken, the (German) king always lived according to Frankish constitutional law which distinguished between the king's private property and the commonwealth, Karl Ploetz, Auszug aus der Geschichte, 27th ed. Würzburg: A.G. Ploetz Verlag 1968, 538; Brockhaus Enzyklopädie, 17th ed., Wiesbaden: F.A. Brockhaus 1968, article "Franken, Landschaft". Also the popes, by another step of borrowing, used to hand out feudal rights according to the Frankish – certainly not Christian, but heathen – pledge-of-faith system. When in 1157 A.D. Pope Hadrian IV. offered the Empire to Emperar Frederick I., the elected German King, as a feudal "beneficium" – as such a heathen procedure – Frederick I. (Barbarossa) angrily rejected.

protected by inalienable rights of individuals and the minority as such. But some of the Greek ideals survived, mediated and modified through the Roman Empire. The Roman Empire was in a sense a super-polis of the then known world, thriving on the Greek *polis*' spiritual force. Rom added to Greek egality and superaddition a strong element of trust, *fides.* But both Athens and Rome, lacking politically and legally recognized inalienable human qualities, suffered Socrates' death at the hand of sophists, their value arbitrariness leading to bargained realities.

For a while (258–496 C.E.) the Franks had similar problems. The protection of minorities (in every sense: as minority as such, or a regional subunit, or the smallest minority conceivable, an individual) remained an issue. The Frankish king Chlovis († 511 C.E.) sensed the instability of the Frankish cooperative style of government with its lack of inalienable rights and, in 496 C.E., decided to accept Christianity as a stabilizing factor for his animist tribe and himself. This made the Franks acceptable to the Gallic nobility and the Romanic population in what is today France. Christianity introduced welcome value standards into the simple rule of following the majority's will. In this form – majority rule, but with respect for the other side across time –, the Vikings (Normans) adopted the Frankish pledge-of-faith system in what is today Northern France, taking it to England in 1066 A.D. from where it spread to the United States, other countries, and international organizations. This sketch does not do justice to a historical subject covering 2500 years. In the present context, the study of societal orders in anthropological perspective, it may however suffice.

Nor is this the place to speculate on why superaddition could develop in ancient Greece considerably more than two thousand years ago and, a bit later- possibly transmitted by the original state philosophy at the bottom of the Roman Republic – among the animist Franks in the Middle European countryside. By focusing on establishing a union beyond its participants (now to be called members), this principle essentially rejects illegitimate and uncontrolled leadership and, anthropologically speaking, chieftaincy and absolute kingly rule. It rather tends to be egalitarian and bottom-up-oriented. However, the road back to tribal consensus society – older than chieftaincy – was barred by axial age good-bad ethics and corresponding epistemological doubt. Maybe, in short, the principle of superaddition may very well be the result of a combination of pre-axial age consensus memories and axial-age epistemological moral doubt.

Is the family a superaddition *(eine Übersumme)?* The family looks so close and elementary to the person that one may be tempted to say yes. But the answer must be no. Anthropologically, the family serves two purposes, orientation and procreation (Chapter 8 I.). Among birds, mammals, and humans, neither purpose becomes the basis for societal stratified ordering, such as peck order, alpha-to-omega stratification, sodalities (in Indian country: "societies"), moieties, etc.) and often these societal stratifying orderings are not only exoneratively parallel but also critical and even hostile to family and family metaphor. Superaddititon is one societal stratifying ordering among many. Therefore it is not family-born.

Superaddition can be defined as a societal stratifying ordering that stipulates an entity composed of members having basically equal rights and duties among themselves, and between them and the entity, the entity being represented by organs.

Also the *epistemological side* of the principle of superaddition is of anthropological importance. Cultural superaddition follows from the epistemological distance between person and object, introduced to ancient Greek philosophy by Parmenides (540–470 B.C.E.). In the present context, the distanced objects are those of good and bad, right and wrong, and there has be the general intention to understand this world as a place for engagement and action (unlike Buddhism). In Greek worldview, the decider and actor will probably fail (the Greek

Tragic Mind[773]). Still; the decider and actor is called to be – sceptically – aware of the objects outsice. The Greek *koiné* is a corporation of good-bad sceptics. By superaddition, those skeptics become *members* of a unit which is more than the sum of the parts. The citizens' register of the Greek city states makes this membership *visible.* On the superadditive unit depend the regional and personal extent of agreed ethics, law, trust and reliance, as well as the concept of membership. On the concept of membership depend the pledge of faith, a feeling of belonging, and protection by the law. The member of the unit takes on the role of an individual as against the commonwealth. This in turn creates the distinction between the private sphere (Greek: *oíkos*) and public sphere (Greek: *tà koiná*), enculturated by the Romans as *res privata* and *res publica* (republic). For pre-axial age, that is, most traditional, societies, it follows a falling-in-one of private and public sphere in the form of closely-knit family, lineage, or clan. In non-superadditive post-axial cultures a certain neglect of the public space in comparison to a highly refined private space (Islam) may be observed.

Cultural superaddition also implies a specific frame for interhuman exchange and discourse. It enables the exchange of opinions between two conversation partners with result orientation. In a superadditive society, discourse takes on goal orientation, and thus dialog in the true sense of the word: emerges. It follows an exchange between two or more individuals *about something,* and comparison receives a *tertium comparationis.* Systems can be built. Cooperation does no longer mean meeting half-way, but reinforced working for an end. Therefore, superaddition, dialog, cooperation, trust and credit, the corporation as a moral person, as well as public and private wealth are closely interlinked, and to be distinguished from pre-axial age and non-superadditive post-axial age modes of thought that lack these attributes.

Superaddition – the discovery of the "oversum" – should not be regarded as a "fulgurization", to use Konrad Lorenz' expression for an inexplicable memetic break or jump in the epistemological development of human thought. The assumption of a superadditive unit becomes at least plausible, if not a necessity, if two things are combined: (1) the critical epistemological distance between the person and the axial-age conception of a secular, general, worldwide good-bad distinction (born, as we have seen, from increasing cultural contact); and (2) the will to act (unlike the Buddhist reaction to that distinction). Rather, the assumption of cultural superaddition is the calculated result of a deliberation: that acting in front of a general and not tribe- or clan-related standard of good and bad leads to guilt in any case, regardless of the actor's good will, and thus to individual tragic, since against this general standard collective assumptions of guilt become untenable. The Judaic discussion of the issue in Ezekiel, Chapter 18) has already been referred to. The context of superaddition and personal guilt raises the issues of individuality and personal risk-bearing.

5. Superaddition and individuality. Risk

Once individual guilt is conceivable, it becomes obvious that dealing with that guilt addresses like-minded guilt-conscious individuals hedging different conceptions of guilt: Clan shame and clan responsibility develop into individual guilt. Thus, to weather the tragic situation, a unit beyond the guilt-laden individuals becomes imaginable, even desirable, a unit that is able to justify the individuals' actions while simultaneously bearing the agreed general ethical standard. A person assuming the role of membership within that unit becomes hereby an individual, and a voter under the rule of majority. Again simultaneously, an element presses itself like a wedge into the relationship between the individual and the object of that ethical

773 For details, see Wolfgang Fikentscher, Methoden des Rechts, vol. I (1975), 235–268; idem, Modes of Thought (1995), 355–401.

standard, opening the gap and filling it in one move: thinking. In this way, Parmenides places individual thinking between the individual and the observed object, and Plato/Socrates adds that an appropriate manner to represent that thinking is dialog.[774] In sum, cultural superaddition follows from the epistemological distance to the ethics of the axial age (Parmenides and Plato/Socrates) plus the will to act in this world; in contrast, non-superadditive institutions, e.g., pre-axial age and post-axial age non-superadditive associations, work "at arm's length".

If we follow the Platonic-Parmenideian theory of thinking as a connection – including distance as well as goal-orientation – between the self and the object as prerequisite for a truth-related, moral/legal, or esthetic propositions, and if we further accept the insight that this object *may* have "superadditive" quality, for example a city or a man-ofr-war, one is ready to do the third step. It consists in acknowledging that, in this kind of thinking, grasping the superadditive object, requires the Parmenideian distance between self and object. Only when this distance between self and object is maintained, conceiving of the superadditive object is possible, and a judgment about the object (i.e., whether it is true, or just, or pleasing) may be rendered. The object *may* be an encompassing idea, such as a value to be approached by critical thinking by oneself (Parmenides), or by *thoughtful* dialog (Plato/Socrates). That object may be personal or public property, and critical dialog (in the Platonic sense) about that property may amount to the setting of an economic value. Facing the object "out there", that is, in the Parmenideian distance by thinking about, it makes the critical observer a person, *an individual,* and facing this object in a dialog creates a public sphere. For example, in economics it follows that the distinction between internalities and externalities does not work in a society which has difficulties in conceiving a mutually related constitution of a private and a public sphere, such as Islam and many other non-Western societies. To the extent this functional distinction between internalities and externalities forms the basis of game and decision theory or institutional economics, these theories do not easily apply to non-Western societies. Moreover, in the public sphere the *right* to freely and fairly compete is constantly to be weighed against institutions and owning property,[775] so that there is little help to be gained from those theories for said reasons.

Thinking about superadditive objects requires making dependent the realization of superaddition, and: with it systematic thinking in generalizations and specializations, on a culturally very specific kind of thinking, namely, the Parmenideian distance-keeping between the individual observer and the judgment to be made. It submits the practical working with superadditive objects, for example the establishment of a fail-safe economy in de Soto's sense,[776] a government for Iraq; Afghanistan, or Kosovo; or a Palestinian state, *to the willingness to engage in a Platonic dialog.* This sounds far-fetched, even shocking, because it makes dependent certain political solutions on certain philosophies. But it is a consequence of culture comparison, of the

774 Cf. Tad Beckman, Plato, Notes, http://www4.hmc.edu:8001/humanities/beckman/PhilNotes/plato.htm; Christian Meier, The Political Art of Greek Tragedy, Cambridge & Baltimore 1993: Polity Press & Johns Hopkins Univ. Press.

775 Wolfgang Fikentscher, Wettbewerb und gewerblicher Rechtsschutz, Berlin & Munich 1958: C.H. Beck.

776 See Chapter 1 subsection 2, supra. Hernando de Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else, New York 2000 (Basic Books); other readings on the epistemological side of superaddition: Ludwig Hamburger, Fragmented Society: The Structure of Thai Music, Sociologus 1967, 54–71 (on fragmented societies); Karl Jaspers, Die Achsenzeit (the axial age), in: Ernst Schulin (ed.). Universalgeschichte (universal history), Cologne 1974, 96–106 (orig.: 1949); Wolfgang Fikentscher, Wettbewerb und gewerblicher Rechtsschutz, note 775, above; idem (1975) chapters 1 and 2; (1977 a), chapters 30–32; idem (1995/2004), chapters 6–11 (see sub-chapters on organization).

comparative study of cultural modes of thinking. The said interdependence is not a "clash of civilizations" (Samuel Huntington), but rather a restriction of civilizational thought-patterns for certain ends. In a pluralist world, such interdependences are of course hard to sell. Parmenides' and Plato's idealism considers ideas to be real, accessible, possibly superadditive, and subject to at least preliminary judgments of truth, good, and beauty. This Parmenideian and Platonic idealism is a cultural specificity of "the West". There are other modes of thought. The most important are Islam, Hinduism, Buddhism, Marxist-Confucianism, and traditional pre-axial-age modes of thought. These modes are different. Their thinking is not Greek. For instance, Buddhism rejects approachability of this-worldly operationable values, and Islam as a world without Parmenides and Plato (see Ch. 5 V. 6. d., above) regards non-submissive, independent human judgment an agnostic sacrilege.

6. Examples

To illustrate the above, some consequences of superaddition, randomly chosen, may be useful:

(a) Organization is a superadditive concept. A body which exists as an entity at the same time consists of parts, members, organs that, taken together, do more than amount to the whole. The whole is more than the sum of its parts. The state is an example, as is the corporation. Both organizations are derived from the Frankish cooperative and the Greek polis. Implications are the ideas of membership, trust, individual rights, human rights, and the distinction of the private and the public sphere. In contrast, the *shari'a* does not know the concept of the corporation, nor of the state. It is not anorganization. An Islamic saying goes: It is un-Islamic to get organized. The *umma* has no members, an Islamic government has no citizens comparable to the Greek polites, the Roman civis, and the Frankish "franks", and the Norman "knights and citizens". Pre-Islamic segmented society (E. E. Evans-Pritchard) prevails. The use of (Western) organizational forms in modern Islamic society occurs by certain suppositions, called by some *hijals.* Whether and how into Islam a mutually constitutive relationship between private and public spheres can be introduced ("borrowed") remains an open issue (for practical proposals see Rohe 2001).

(b) What in Western society is called dialog, in Islamic settings may take the form of "bargaining for reality", the title of a book by Lawrence Rosen (1984). Bargaining for realities gives freedom rights and property rights a certain degree of volatility. Rights as such become a function of (mostly short-term) stipulations. This "bargaining" ends with at least one winner and one looser. The prospective winner resembles what, in discourse theory, Jürgen Habermaswould call the competent one. Reality-creating bargain and truth-creating discourse are both attempts to bring about values through processes. The bargain is, as is force-free discourse, open-ended, until a substantive result is reached. However, processing value from procedure is subject to a debate that focuses on the admissibilty of forsaking (Parmenideian) judgment and (Platonic) doubt.

(c) Every human being is a person belonging to a nuclear and an extended family, frequently also to a lineage and a clan. Higher conglomerations of persons consequently are formed by family metaphors, such as brotherhoods, sororities, fatherlands, motherlands, popes, emperors with a father's role, big brothers, etc. Becoming an individualized member of an organization is not a derivative, but the opposite to families and family-like structures (contra: Max Weber in his study on the Roman *gens*). Both the Greek polis and the Frankish cooperative developed in opposition to nobility.

(d) There is a problem dealing with the identification of segmented societies (Southern Sudan, Somalia, Arabs, Kurds, etc.). Once the tribe is left or for some reason no longer avail-

able as the place to go to, people must retain their identities while living face to face to, or even among, strangers. People outside no longer live through relationships. They do not solve this problem by individuating as members of an oversum. The solution may be the "discovery of the other", in anthropological synepeia analysis on level II, and in linguistics the dual, the precursor of the plural ("you and me" is not yet "we").

(e) The de Soto issue is "why capitalism triumphs in the West and fails everywhere else". Its solution may have something to do with the Parmedeian distance: Only the "idealist-critical brain" can conceive of a superadditive object. Property and credit worthiness are culture-specific, as is getting organized, engaging in a dialog, being clan-and-tribe independent, and thinking in plural and pluralist terms. It is true that a credit economy depends on visible and secured property. But property is not worth more than its contents which in turn is defined by the rules of property exchange, that is, a specific form of the market. De Soto's visible and secured property depends on the long-range credit and trust market form. This form of the market only exists at the "price" of superaddition. Therefore, property remains invisible and unsecured in all modes of thought which do not think in terms of superaddition, such as religion-based clan hierarchies, Hinduism, Buddhism, Islam, and Marxist-Confucianism (all these are de Soto's fieldwork areas).[777]

(f) My concern is not to show, how on the basis of Parmenideian-Platonic thinking superadditive structures such as democracy, or a free and fair property and market system, may be established in Islamic, or Buddhist, environments. An intended acculturation would require much more detailed research. In Islam, the theory of the "greater djihad" as developed by the Prophet Muhammad, a.s., as a principle of self-restraint, may point the road to reflective, discursive, explicit, declaratory thinking and thus to Cartesian doubt, Parmenideian judgment, and Platonic dialog. In Buddhism, the seventh and the eighth step of the "right path" to salvation concern "right thinking" and "right reflection". Perhaps this can be interpreted in the Parmenidean sense of getting a distance to what a person is thinking about. Modes of thought are not "ideal types" (Max Weber), but middle types of human thinking. They are open to modifications. Not infrequently, such modifications are the reason for culture change. The issue whether such interpretaions are permitted illustrates a closeness to superaddition in neighboring modes of thought.

(g) In part, the acceptance of a superadditive reality of ideas, and their this-wordly detectable guidance for human behavior, iseems to be a matter of degree. There are statistics and other research on the degree of trust between cultures, telling us that in Lutheran countries the extent to which people trust and rely on each other is the highest worldwide (Zak & Knack 2001). In Lutheran teaching, human failure is not predetermined (as in Islam and Calvinism), not to be blamed on earlier failure (as in Hinduism), not to be overcome by walking a "right way" (as in Buddhism and other gnostic belief systems) or orthodox prescript (as in Christian and other orthodoxy). In Lutheran teaching, human failure is no deviation of the party-line defined *li = good mores* (Marxist Confucianism), and it is no offense against tribal law. Instead, other-wordly grace is promised, quite independently from "good works" (classic Catholicism) and other efforts to "do the right thing". Exactly that high degree of trust and reliance is mirrored in a this-worldly context and explains high levels of inter-human trust.

(h) For a society, the absence or presence of superaddition is of decisive importance. Among other factors, the efficiency of superadditive units is considerably higher than that of consensus units (see Frankish history, above). Also, the possession of rights largely depends on

777 See Chapter 1, section 2, supra.

superaddition. This can be illustrated by a juxtaposition of cooperative and segmented units in modern Africa:[778]

It is a truism that there are various forms of human cooperation. One is the cooperative, also called corporation, corporate unit, juristic or moral person, Ancient Greek city-state – depending upon historic or contemporaneous factual conditions. Here, it is called by its most general name, cooperative. Examples from modern times are agricultural, arts and crafts, and industrial cooperatives. Cooperatives are entities which legally exist independently from their members.

(i) An example of the essence of superaddition is the parable of the "Good Samaritan" in the New Testament (Luke 10. 25–37). This parable is usually told as a model of being kind to others, loving your neighbor, watching out for people in trouble, being generous, etc. However, seen with an eye on comparative culture, there may be a second morale of the story:

In the narrative, the helper is a Samaritan. At the time, the province of Samaria was hellenized, which means, it had become godless, or at least god-critical, under the influence of Ancient Greek city culture. Because of the Greek influence, Samaria was despised by the pious Jews, and when Jews traveled through Samaria, they did it as fast as they could and avoided contact with the non-believing and therefore "inferior" Samaritans. In this historical context, the parable of the Good Samaritan assumes a specific meaning, in addition to the ethical teaching traditionally expressed by it. By identifying the helper as Samaritan, Jesus of Nazareth says, that if these Samaritans learn from their parents and in school to assist one another as members of their communities and thus for political reasons, it shouldn't be too difficult for Jews to assist one another in times of need, to show interest in your neighbor's fate, and do good to others. It is the political anthropology of the cooperative, of the *polis,* which makes the parable additionally noteworthy. The cooperative culture of Hellenism gives the story a superadditive political emphasis that goes beyond its love-your-neighbor morale.[779]

(j) The spirit of the *polis* survived to this day, whereas the ancient *polis* died, after 250 years of existence, around 400 B.C.E., from the liberal paradox that says: If you're free to vote for absolutely everything, you are able to vote for a dictatorial regime, and in case of doubt, the winner takes all. There is no limit to liberty that may guard liberty so that liberty may become sustainable. If you as member of a city state are able to regulate everything by majority vote, this very vote may end the membership of others, or other members' life. Socrates received the death penalty because he had made use of the liberty to think, and to have his own opinion. The *polis* died because it did not provide enough inalienable rights in order to serve and maintain Socrates' liberty to think. 800 years later, he super-polis of antiquity, the Roman empire, died for the similar reasons.

(k) Apparently, there is no other way to create individual rights ("A B"), outside of the superadditive principle of the cooperative. A modern dictator may on a whim create, even prescribe, the existence and use of individual rights, but it will be a borrowing from the theory of the cooperative. And it wiouldcertainly not be in his interest. In the 18th century, Frederick the Great of Prussia did not like the answer of the owner of the Sanssouci Mill. The miller was addressed in person by the King who claimed that the mill, adjacent to the King's

778 The following text is in part an abbreviated and revised version of W. Fikentscher, The Whole is More Than the Sum of the Parts, Therefore I have Individual Rights: African Philosophy and the Anthropology of Developing Economies and Laws (2004), see note 161, above.

779 It may be this additional undertone of a comparison critical of Jŭdaism but favorable to Hellenism which is responsible for the otherwise astonishing fact that this "great parable" is to be found in one gospel, Luke's, alone. Luke's text was intended, by the Apostrle Paul, as written source for Christianity in the hellenized world. For Matthew, Mark, and John and their – different – Jewish audiences, the parable could have been too offensive.

palace, made too much noise and would therefore soon be closed by royal order. Confronted with the imminent taking, the miller answered, right into the King's face: "Alright, Majesty, but for a decision of the Chamber Court." The king – realizing that the king was *under* the law of the state as an entity comprising king and subjects, and not *above* the law, gave in, and the mill survived.

(l) During the 2008 primaries, accoeding to press reports, a US diplomat warned the Europeans: regardless of the outcome of any primary, US foreign policy was going to remain the same for decades to come, striving for two goals at a time, an idealist and a materialist one, namely to disseminate democracy around the world, and to be strong enough militarily to enable the US to have its way even if all others, foes, neutrals, and friends, would not agree. Anthropologically, it is remarkable that both counts are flawed by one and the same circumstance: the disregard of unqualified Frankish superaddition. US democracy follows the Normannic type, lacking a leadership's constitutional duty to answer; by the same token, this hinders internalization of the sense of being a member of the club (of Free Nations).

7. Additional historical and comparative dimensions

In a comparative survey of cultures, the cooperative system as a cradle for individual rights and duties can be observed in some cultures:

- The Ancient Greek city statewas established in order to overcome tyranny and the influence of powerful clans. It introduced the idea of equality of the citizens, membership rights and duties such as majority vote, one man one vote *("isegoria"),* legal control, and ostracism against potential tyrants. The *polis* mentality also created a feeling of belonging to an encompassing unit, and hereby a sense of trust and reliance among members. The reach of this trust and sense of reliance extended throughout the community of the Greek city states, the Commonwealth. Within the *koiné,* traders were willing to give one another credit, for example. The Olympic Games were a symbol of the *koiné.*
- Early and incomplete attempts, without lasting consequences, at superadditive units are reported from China 200 years B.C. E (Coulborn, 1956). The topic "China's organizational history and presence" is a clearly underresearched anthropological field. The older descriptions, maybe stereotypes, of Confucian verticality and non-sociality (Lin Yutang, Max Weber) do not seem to fit anymore. Ellen Hertz wrote a study on the role of the Han-Chinese "crowd" which may be a new element for a comparative study of governmental powers in Eastern – traditionally "collective" and non-superadditive – cultures, where Montesquieu's separation of political functions apparently does not work or is regarded insufficient.[780] Respect for a will or a (more or less sub-conscious) sentiment of the "crowd" may work as a fourth power next to parliament, government, and judiciary.
- Rudimentary cooperative systems within three North American Indian tribal groups: Iroquois, Otoe, and Tewa-speaking Pueblos can still today be found. These examples are little known.[781] So are the alleged Chinese examples.

780 From the "older" literature: Joseph Needham, Science and Civilization in China, Cambridge 1954: Cambridge Univ. Press; Lin Yutang, My Country and My People, 3nd printing, Taipei & New York & Mei Ya Publ., Inc & John Day (orig. 1939); Wolfgang Bauer (ed.), China und die fremden, Munich 1980: C.H. Beck; idem, China und die Hoffnung auf Glück: Paradiese, Utopien, Idealvorstellungen in der Geistesgeschichte Chinas, 2nd ed. Munich: dtv; Reinhard May, Verständigung und Argumentation, ARSP Beiheft No. 9, Wiesbaden 1977: W. Fikentscher (1975 a), 206–213; idem (1995/2004), 313–333. On the role of the "crowd" for contemporary Chinese society Ellen Hertz, The Trading Crowd: An Ethnography of the Shanghai Stock Market, Cambridge 1998: Cambridge Univ. Press.

781 W. Fikentscher (1995/2004), Chapter 7.

– The accepted history of theology holds that during the Babylonian exil the Jews "invented "the synagogue because the Temple was lost. The synagogue community was understood as a superadditive unit, the Christian church following suit. In a parallel conception, the relationship between the Jews and their God may be seen as founded on a superadditive entity. This entity was called testament, treaty. This treaty effectuated time-as-a-straight line and in turn God's participation in that (human time) in the form of a messiah. A comparison to Islam shows the logic of this context: Islam lacks superadditive conception, and thus has neither time-as-a-straight line nor a messiah. As indicated in Chapter 5 V. 5. c. (and in W. Fikentscher 1997, 178ff., 181–183), Christian concepts of societal ordering are connected with Christian epistemology. From rejection of despotism (Luke 22. 25,26) and acceptance of authority of elders and city fathers (archontes, Romans 13) follows a theory of superadditive organization (1st Corinthians 12.12–30) and within it of plurality of societal tasks, contributions, and judgments in meeting these demands (1st Corinthians 12.4ff; Colossians 4.17). In turn, from these positions follow the human ability to form self-responsible judgments (Matthew 16.3, example refers to causality), the necessitiy of difference of opinion (1st Corinthians 11.19, factions), the plurality of opinions including the encouragement to form self-responsible judgments (1st Thessalonians 5.11), the admonishment to respect even unexpected opinions and to test them (1st Thessalonians 5.19–21 first part), and all this because of the human inability to see things clear enough to fully know reality (1st Corinthians 13.12, with the metaphor of the dim copper mirror, reminiscent of Parmenides' teachings of human judging and of Plato's cave). Again, a comparison to Islam shows the logic of the context: Because of the "God-willing" proviso, Islam lacks Parmenideian judgment and Plato's "dim mirror" (so that no dialog about truth, moral good, and esthetic quality is epistemologically required). According to Lawrence Rosen (1984), bargaining for reality takes their place.
– As said above, the historically most lasting impact occurred with the establishment of superadditive political units among some Germanic tribes inhabiting the area of the lower Rhine that today encompasses to the southern Netherlands, northern Belgium, and the German state of North-Rhine Westfalia. These tribes joined to form a cooperative entity. The new unit had a general assembly of the vassals and elected leaders, the lords. The kings did not rule as an absolute monarchs, rather they were mandated to lead in peace and war, keep up law and order and the trading routes safe, tax the members with contributions to achieve these tasks (mostly in kind such as services in war, transportation, road building and policing, and participation in common affairs) and to give account at the next meeting of the assembly of the vassals of how the contributions were spent ("budget day", *Haushaltsdebatte*). The vassals, at least in earlier times, cherished political equality even in view of inequality of wealth and family influence. (The present practice to use budget day for criticizing the majority in parliament, is a misunderstanding. Budgetdlay is not an event to repeat arguments between majority and minority, but to give the whole parliament the opportunity to ask the government what it did with the old and what it wants to do with the new budget).

As already discussed, the Franks were mentioned for the first time in 258 C.E. Around 150 years later, at the end of the fourth century, the Franks had extended their territory up the Rhine and Main rivers in what is today western and southern Germany, and into what is today southern Belgium and northern France. They expanded not only by belligerent conquest of territories not yet covered by *Landfrieden,* but, as it seems, mainly by accession of other tribes. These latter joined the cooperative system of the Franks by taking an oath of loyalty, promising to follow the Frankish rule of becoming vassals to a lord and thus share in the cooperative system. In turn, the lord assigned a territory to the new members. This organiza-

tion is called the Frankish pledge-of-faith system, or Frankish feudalism. In Germany, it lasted until 1806 C.E., the year in which Napoleon defeated the German Empire, and thus brought to an end what was called Franconia *(Fränkischer Kreis),* as part of the Imperial Constitution. Later, it was reestablished in different forms and under different names, working to this very day. This is a long history for a political idea. The reason for this longevity is the following:

Again as already discussed, in 496 C.E., the Franks decided to become Christians, in order to stabilize the constitutional system, by grounding it on generally accepted values. This prevented the Frankish rule from falling victim to the liberal paradox that had ended Athens and Rome. In the eight and ninth century, the Franks ruled an empire from Denmark to Sicily, and from Brittany to Croatia, almost the entire Europe. In the ninth and tenth century, the Vikings, or Normans, coming from Denmark and Norway, conquered northern France. Thereafter, the Normans replaced their traditional chieftaincy by the Frankish pledge-of-faith system, and in 1066, under William the Conqueror, took it to England (Kerber 1997, at 21 f.). From there the Frankish-Normannic constitutional rule spread to all parts of the British Empire, including the US, and from there to international organizations such as the United Nations. Whoever thinks of the Charter of the United Nations, and of most of the constitutions on this planet, as superadditive pledge-of-faith rules of a pre-Christian Frankish cooperative of farmers?

– The entities mentioned above are in theory corporations with a Frankish constitution, equiped with a parliament, with organs – authorized and held accountable –, and with a legal system built upon individual rights between the members, as well as between the members and the political entity. According to the Frankish model, these rights include membership rights that prevent the majority from abusing the system. The most important of these rights today are called human rights. Human rights mark the difference to the Greek model of the *polis,* as an additional factor that stabilizes the entity across time because minorities may become majorities. But like the *polis* and the Roman Republic, the Frankish cooperative is more than the sum of the parts. It is a superadditive unit and as such across time.
– Interestingly, there is no country in world history that went through Frankish feudalism and later became Communist (communication Ludwig Hamburger). In Germany, there is a cultural divide running from Northwest to Southeast. It is the divide between the Frankish and the Saxon cultures. The Saxons, a strong tribe in Germany's North at the time of the early Frankish kings, never submitted to Frankish rule for good. They rejected the idea of the pledge-of-faith system, employing and continuing chieftaincy instead. The German kings were elected organs of a superadditive unit, the German Empire according to the Frankish constitution. Compared with other European rulers, kings or dukes, of Slavic, Normannic, Romanic, or Nordic provenance, German kings were rarely assassinated (see Peter Landau on Philipp of Suebia, forthcoming). It makes little sense to kill an organ. The person can be removed from office and replaced by an other carrier of that role. It follows that no provision of criminal law protected the life of a German king as a Frankish-constitutional organ By contrast, dukes as nobles of chieftain character needed such criminal law protection (for instance the Duke of Bavaria in the Philipp story, *lege Bavarica*). Superaddition makes all the difference.
– A superaddition-related difference is still observable today in local German newspapers, or German small talk. In the formerly Frankish areas to the West and the South, people might say: "There is a problem. Let's sit together and discuss it. Then, tomorrow, we'll decide what to do." There may be an exchange of opinions in the local newspapers. Assuming that

the decision the people wanted to come up with ends with a vote 51:49. On the day after the vote hundred people will support the resolution.

In the formerly Saxon areas to the German North and the East, one might hear people say or read in the local paper: "There is a problem. Somebody must come up with a solution. There *has* to be a regulation that takes care of that." Maybe, there will be a vote to establish a basis for that regulation, and the vote is 51:49. How many will support the resolution after it has been voted upon? 51. And all hundred participants will wait for the next directive from Brussels or Berlin.

What is more efficient, superadditive membership of individuals, or the collectivity of single deciders under the exhortation to find consensus? Which system is time-bound, and which is not? Polis (or *Genossenschaft*), individuality, and time-as-a-straight line are three aspects of one and the same phenomenon.

Why is there this difference, along a cultural divide between Franks and Saxons running through Germany? The answer is: In the Frankish tradition, a majority vote binds *all* members – for the time being, and until minority becomes the majority –. The Saxonian tradition does not know or rejects the cooperative, the oversum, or superaddition. Hence, the call of the people for guidance by a chief. Put bluntly, Franks think bottom-up, Saxons top-down.

– It follows from the main requirement of the cooperative, superaddition, that it is possible to draft a federalist, horizontally and vertically structured, multi-member system: A the bottom, members (formerly vassals) elect and control the organ (the former lord). This is a partly horizontal and partly vertical structure: the ties between the members, plus the ties between the members and their government. It is what is called the cooperative unit. One can image more than one cooperative unit, may be five, or ten, and let *them* be the members of a second cooperative unit, situated one level higher, with an organ of its own. This is the basic idea of federalism. One could continue and establish a third layer. Frankish feudalism made frequent use of this plurality of levels utilizing the pledge-of-faith system (= *Lehenswesen*). Today, corporations – which are superadditive economic units – use the possibility of multi-layer structures in every holding or similar business combination. The European Union is a mul-level superadditive structure.

However, parliamentarianism (grown from the vassal-lord-pledge-of-faith system) combined with federalism grown from building levels of corporate units on top of one another as sketched above raises an issue: Are the members of the lower cooperatives only members of these original cooperatives, or do they become – through federalization – members of the higher cooperatives, or do they become members of both the lower level and the higher level cooperatives? This issue every federation has to solve. For example, the citizens of the USA are citizens of both their home state *and* of the US as a federation. Consequently, they pay income tax to both, following a rather cumbersome procedure. The European Union was conceived as a federation (for limited purposes) of member states, not of their citizens, who were and still are citizens of their countries. Nobody in Europe seems to want an additional income tax system imposed by the EU. When the Constitution of the EU was drafted (since 2000) and accepted (October 2004), obviously nobody expressly addresses the issue. The text of the EU Constitution leaves the question unanswered: In elections of representatives to a body called European Parliament the direct vote of the citizens of the EU member states seems to indicate that there is direct citizenship, additional to the national memberships, but the lack of a European nationality as well as the absence of, and opposition to, a constitutional EU tax jurisdiction speak against it. In principle, the combination of parliamentarism and federalism is possible and in conformity with the idea of the cooperative (having conse-

quences for taxation and other membership duties and rights), but there should be lawyers and politicians who see and address the problem.[782]

8. Recent applications of superaddition, and instances where it is lacking

On May 1, 2004, five Slavic nations joined the EU: Poland, Latvia, Lithuania, the Czech Republic, and Slovakia. Historically, only one Slavic nation introduced the Frankish pledge-of-faith system and thus superaddition: Slovenia, in the 8th century. All five acceding members went through long periods of their history with a social order regulated by chiefs and kings, similar to the German tribe of the Saxons. The other Slavic nations with what anthropologists call a chieftain tradition are Russia, Belorus, Ukraine, Poland, Latvia, Lithuania, Serbia, Croatia, Czechia, Slovakia, and Bulgaria.

On May I, 2004, to celebrate the new membership of Slovakia in the EU, the Slovakian Prime Minister Mikulas Dzurinda gave a speech that – according to press reports on May 2 – contained the following statement: "We are now EU members. But it may never occur that Europe stands above us, or against us." Dzurinda continued by giving a reason why in the future Europe should never stand above Slovakia: "Because now we are Europeans." The speech indicates a neglect of superaddition. Of course, there are inherent conflicts of interest between Europe as a whole and Slovakia as its member state. Out of necessity, Europe must stand "above" Slovakia as one of its members among 27 members. Having never known or internalized the concepts of the cooperative, the Prime Minister could not think in terms of membership and its duties and rights. And his remark "Because now we are Europeans" sounded as if he were prepared to give up his Slovakian citizenship.

The Slovakian story is strikingly reminiscent of President Karsai's response, about one year before the Slovakian example, when he was asked by a journalist who then reported the interview how he could ever manage to solve the contradiction that on the one hand he has been appointed President of Afghanistan, while on the other he belongs to the tribe of the Pashtuni (the most numerous Afghan tribe). Mr. Karsai answered: "There is no problem: I am *not* a Pashtuni. I am an Afghan". Mr. Karsai did not say: "I am *both* Pashtuni and Afghan". Neither Slovakia nor Afghanistan ever joined the Frankish association of tribes, the superaddition, in which the whole is more than the sum of parts.

On May 19, 2004, in recognition of the access of the new members to the European Union on May, 1, 2004, in this case of Poland, the renowned Polish sociologist and philosopher Piotr Sztompka, in his Ortelius Lecture before the Netherlands Institute for Advanced Study on May 19, 2004, made an interesting personal remark about his feelings being now a Pole and at the same time a European.[783] Sztompka said that these multiple identities give him the feeling of personal richness and a more complete sense of self-realisation. "Unity and distinction may be two sides of the same human fate, its perennial and irrevocable duality".[784] However, from an anthropological point of view the assumption of a dual identity – if at all possible, see President Karsai's mutually exclusive either-or-statement – misses the point. Even for leading Polish thinkers it must be hard to conceptualize a political entity that is more than the sum of its parts, in other words, comprising membership, membership rights and membership duties. The stubborn insistence of Polish leaders on a Polish *liberum veto* against EU decisions,

782 See the remarks by W. Fikentscher, Harmonizing National and Federal European Private Laws, and a Plea for a Conflicts-of-law Approach, in: Mario Bussani and Ugo Mattei (eds.), The Common Core of European Private Law: Essays on the Project, Private Law in European Context Series, The Hague etc. 2002: Kluwer Law International, 43–48, 43 f.

783 Sztompka (2004).

784 Sztompka, op. cit., at 17.

most recently in the Lisbon Treaty which in essence is a European constitution, are proof of this difficulty to see oneself as "member of the – superadditive – club". When one follows the reports on the EU – Turkish access negotiations, it seems that the Turkish side is never pleading as a prospetive *member* of the EU, but merely as *Brussels'* negotiation partner. Will the Frankish structure of the EU be strong enough to integrate all the "Saxons"?

The first West German chancellor (prime minister) after World War II was Konrad Adenauer, a Rhinelander (from the western most part of Germany) who made no secret of his strongly francophile political conviction. After he was elected chancellor, a journalist asked him: "Dr. Adenauer, how can you conceive yourself of being the German chancellor – you as a Rhinelander of whom some people say that he likes France more than Germany?" This was the "Karsai question". Adenauer answered: "I think I am a good Rhinelander who loves his home country. *Therefore* I am a good German, and because I am a good German, I am a good European." This *therefore* – Adenauer's emphasis – explains superaddition, that is, the feeling of being a member of a greater unit that serves a legal, moral, and economic framework and an entity of itself. When I told this story in Namibia, a conversation partner said. *"Therefore? No Ovambo would say that!"* In superadditive conception, there is no duality and neither a new nor a double identity.

Some years ago, in a small West German small town, two brothers died, one briefly after the other. The two had owned a glass manufacturing business *(Glashütte Süssmut)*. There was no will and no known descendent. All employees, about 25, met in the local inn and, after a debate, decided by majority vote to continue their work in the factory. If any problem would arise, they would handle it in the manner of running the local soccer team. They then elected a chairman, a vice chairman, and a treasurer, because the local soccer association had such officials. With this simple organizational model they kept the business running successfully for years. The soccer team model worked, and the "company" earned enough to support 25 families. One day, probably in connection with a credit which was applied for with a local bank, it became apparent that the enterprise did not exist at all, legally speaking. But someone found a way to bring the situation into a fitting legal frame. This happened in a formerly Frankish area (Hesse). It could hardly have happened east of Berlin. The glass manufacture case is an example of "economic democracy", of the working of superaddition in the economy and labor world, and a piece of the rule of law in a small German town.

9. Majority rule and human rights

Lacking superaddition, a movie audience or the tourists in a hotel or on the beach are not organizations. From the idea of an organization two results can be derived: majority vote and – under the additional assumption of inalienable positions which are protected *against* a majority vote – human rights. Thus both one-man-one-vote *and* human rights are derivatives of the cooperative system: In history, what came first? In other words: What is older, democracy, or *Rechtsstaat* (= the "rule-of-law state")? The answer is: Human rights came first. In 1572 the incipient Dutch republic granted inalienable, majority-proof rights, such as free exercise of religion and other opinions, and freedom of assembly, to the citizens of the Netherlands. Other nations, such as France, Great Britain, or U.S., took it from the Dutch. But at that time, during the second half of the 16th century, single citizens did not possess individual rights to vote. Often the lords, the *staten* (Netherlands), *Stände* (German), *les états* (French) were entitled to form the common will of a political entity. However, they did this *both* for themselves and their families, *and* as *trustees* of the citizens for them; because as in Ancient Greece, trust was possible within a superadditive unit. In this manner, often based on a model

of presbyterianism, representative democracy arose, mainly during the 18th century, after the idea of human rights had taken foothold. In the 19th century, in many countries, a written constitution became to be the legal vehicle

In time, a complete legal system for the protection of the rights of the citizens against the corporate unit was established. The British *habeas corpus* legislation of 1679 marks a beginning, followed by the *Bill of Rights* in 1689. In 1810, the U.S. Justice John Marshall introduced the judicial review of the rule-setting activities of the cooperative entity, but only with regard to rules that cover a generality of situations. On the other hand, the introduction of a legal protection of the single citizen against every administrative action, that is, in particular cases, took longer, and is at present only introduced in a limited number of countries. Germany introduced judicial review of administrative acts – after a long period of precursers, experimentation and lawlessness under Hitler's regime – only in 1949, in Article 19 (4) of its constitution. The present situation – not the development – in France is similar. Great Britain and US still grant legal protection against singular administrative acts only if a specific statute provides for this, such as in Internal Revenue Service or Food and Drug Agency statutes in the USA.

10. Learnability of superaddition?

Can superaddition be learned? How would one teach it? The polytheistic Athenians around or soon after 600 B. C, the animist Franks around 250 A.D., and the animist Tewa Pueblos and Iroquois invented it in pre-Columbian time, all independently from each other. Most of the West European peoples and the Slovenes learnt it. What for those nations was possible centuries ago should also be manageable today for Turks, Chinese, and Ovambos. Turkey, China, Sri Lanka, Afghanistan, Poland and many other countries suffer from not being able to imagine superaddition: that the club has members with individual rights and duties and an accountable leadership. Turkey does not desintegrate when Catholics have a permanent permission to hold religious services at Tarsos, Poland does not need a second identity to belong to the EU, and China would profit from trust relationships between Han provinces and autonomous regions.

IV. Correlates

One of the hardest issues of contemporary cultural anthropology concerns the question whether and to which degree societal leadership, politics, economy, religion, mental activities and other cultural attributes can be correlated. S.N. Eisenstadt, Katherine Newman, H. de Soto, S.P. Huntington, Edward Said, V.S. Naipaul and many others tried comparisons of cultural traits (see background books listed in Chapter 1). So far such anthropological correlates have met with insurmountable difficulties. Moreover, the question as such has not been posed in a clear and direct manner. Is it possible to say: "Give me the economic situation of a society, and I will tell you its governmental form and its family system"? Or: "Tell me the government system of a society, and I will tell you from this not only its economy but also its manners of expressing objects in language and the fine arts"? Or: "Let me know the dominant religion observed in a given country or nation, especially its components of total religions or religious types, and I can predict its governmental structure, some principles of law, and the degree of trust elements as parts of the economy"? An attempt may be ventured from the vantage point of the modes of thought. Hence, the question posed and probed here is: Is it possible to deductively correlate modes of thought to the three following complexes: So-

cietal ordering, economy, and belief system? In the following text, such correlates are proposed, For them, S. N. Eisenstadt has introduced the expression "concatenated list" of cultural traits.[785] Such a list can indeed be drafted, by passing in review, at the price of repetition, the results from the earlier discussion of events of the development of cultures in human society, so that correlates may be indicated.

The theoretical framework of this issue is cultural determinism, that is, the question of concluding from one cultural trait or complex the truth or untruth of another. The authorities are divided both as to the possibilities and degrees of such deterministic conlusions as well as to the permissibility of the question in the first place.[786] In a discussion with S. N. Eisenstadt, the following sketch of correlates of cultural attributes has been developed elsewhere: Eisenstadt refers to two opposite theories on the relationship of culture and power: For Max Weber, *regulatory codes* for the exercise of power *arise* from the nature of man and human interaction, carrying a direct implication for the order of society. Michel Foucault assumes that culture interweaves with power and thus power establishes *the* determining factor for all arenas of social life. Eisenstadt views the Weberian approach more fruitful for a comparative analysis of social dynamics. He builds on it his own "comparative civilizational analysis" of the relation of culture and power. A normative judgment on human power behavior offers more criteria for evaluating and comparing cultures than a conflation of fact and norm. Eisenstadt also tests his overall theory in the cultures of Islam, Hinduism, and the Greek/Judaic/Christian/tribal-Germanic "European Complex".

If one accepts a distinction between culture and nature (along with Weber and Eisenstadt), one of the primordial tasks of culture is the control of natural power Empirically, there seems to exist no culture in history or presence that does not provide for rules concerning societal power, incest, and contact with the supernatural. One of the most contested issues of cultural anthropology concerns the question whether certain types of societal groupings, such as chieftaincies, are assignable to certain groups of cultures, such as animist cultures. Depending on the inclination of the anthropological writer, these attempts at categorization are designed either in an evolutionary dimension (diachronic), or proceed comparatively without relation to time (synchronic). None of these outlines has gained such reputation as to become prevailing opinion. Treatises and college text books refrain from offering more than a rough sketch that includes broad concepts such as bands, tribes, chiefdoms, kingdoms, and modern states (Kottak 2004, Ch. 9; Bohannan 1992; Wesel 1979). There seems to be no convincing genealogy or a concatenated list of observed possibilities of forms of societal control brought into context with societies, religion, economics, and law. Kottak is correct in pointing out that

785 Shmuel Noah Eisenstadt, Culture and Power – A Comparative Civilizational Analysis, 17/1 Erwägen Wissen Ethik (EWE) / Deliberation Knowledge Ethics 3–16 (2006); W. Fikentscher, Power Controlling Societal Order, Economy, Religion, and the Modes of Thought: Kritik/Critique to Shmuel Noah Eisenstadt "Culture and Power – A Comparative Civilizational Analysis", 17/1 Erwägen Wissen Ethik (EWE)/Deliberation Knowledge Ethics, 31–34 (2006); idem, Axial Age: Terminology and Impact, Erwägen Wissen Ethik (EWE)/Deliberation Knowledge Ethics 17/3, Appendix, 427–429 (2006), with an answer by S. N. Eisenstadt, The Basic Characteristic of Axial Civilizations, aaO 429–432). – For the summarized presentation in this book my two texts of critique were combined, revised and amended.

786 Boas, in Foreword to Ruth Benedict (1934), Katherine S. Newman, Law and Economic Organization: A Comparative Study of Preindustrial Societies, Cambridge & New York 1983: Cambridge Univ. Press; Benjamin Whorf, Language and Logic. New York 1941: Wiley; Eisenstadt, see next note; in earlier publications, I took the position of a modified cultural determinism that finds its roots and at the same time is limited by empiry-sustained cultural comparison on a pluralist basis: W. Fikentscher (1977 b), 30, 32; idem (1995/2004), XXIV, 184–186; idem (2004), 90ff., 303. Cultural correlations involving economics raise additional issues which are discussed in Chapter 10 II. 7., below.

there are "many correlations between economy and social and political organization". But more indications, other than general remarks of this kind, are hard to find. Also Eisenstadt, while offering a general theory and some examples, is reluctant to point to regularities, correlates and what he calls "concatened lists".

To determine, for example, which type of power control is used in a given culture, modes of thought are helpful. The starting point is, as so often, the axial age (see Chapter 5 II. 3, and V.). To repeat its essence: It is the time when belief systems that relate human beings in a tribe- or nation-specific manner to nature ("animism in a wide sense") become suspect. Axial age means that spirits and gods become confronted with (and possibly get subjected to) a worldwide good-bad ethics (and its societal and legal consequences, among others, for the conception of leadership in control of power, its economic system, its basic religious conceptions, etc.).

In *pre-axial-age societies,* as we have seen, the typical standard for good and bad is what is viewed to be good and bad from the tribal vantage point. To recall what has been said earlier: *Foragers* (hunters, gatherers, fishers; Richard Thurnwald: *Wildbeuter*)) collect from nature, and, typically, they do not reproduce. For 99,5% of their history, human beings lived in this state. When a group becomes too numerous so that hunting, gathering and fishing became unproductive, the group is ripe for a split. *Herders, horticulturalists, and farmers* reproduce and thus are able to save and to store storable produce. In herder, horticulturalist, and early farmers' settings, the importance of property increases considerably. The cultural step of being able to reproduce and thus be more independent of hunger is called the Neolithic revolution (Childe 1925, 1942, 1950, 1975) Usable land and access to it by trails become assets. With more durable property, there is wealth (and poverty) and influence (and lack of it). Wealth can be accumulated in family lineage, or clan by saving, storing, marriage, or inheritance. For demographic and territorial reasons, especially lineage and clan leadership may develop into chieftaincy and inheritable kingdom. The next "revolution" in V.G. Childe's sense, the "urban", is characterized by separation of labor: Not everyone does everything anymore for her or his life support. There are now farmers, blacksmiths, tanners, potters, traders, etc. This induces separation of cities from the surrounding country side. Such centers develop into marketplaces which require a market police. The military, and its finance by taxes, add more power to the leading clan or clans, and their leaders may be called paramount chiefs or kings.

All these changes in livelihood and lifestyle must leave their imprint upon government, economy, family systems, and religious attitudes. *Pre-axial age societies* rely on two tests for the identification of recommendable behavior: on consensus, and on big man or chieftain leadership. Foraging societies prefer big men over chieftains, for reasons just mentioned. Inversely, big men are to be found in reproducing societies, due to an effect of *societal inertia*. The "urban revolution" with its incipient separation of labor logically calls for a type of leadership that profits from the "superaddition principle". It implies that the whole is more than the sum of the parts; because ideally now the professions have to cooperate. In *post-axial-age societies,* the culture of power and of its control is even more diversified. Childe's two revolutions point the way of interpretation: There are even three consecutive "revolutions", the neolithic, the urban, and the axial age. As remarked, the core of the axial age cultural revolution is the replacement of behavioral guidance by spirits and gods through an ethical standard of good and bad. Humans begin to mentally reflect and doubt guiding rules for their behavior independently from the supranatural. Pre-axial age "religious types" are defining the belief systems of single tribes or nations. Post-axial age "total religions" address the whole known world.

This poses two questions to human understanding of societal control of power: How does the disrespect of spirits and deities, the loss of animist awe, influence that understanding and promote it to a new quality? What are the building blocks, if any, of pre-axial age society and leadership that may be retained, by that societal inertia, in a new more secular kind of understanding society and leadership although the axial age has brought about basic changes? The answers to these two questions ought to furnish reasons for the characteristic traits of post-axial age societies, their leadership and power control issues as well as their economic and personal traits of living. For axial-age world-views which propagate *detachment from the world,* a new interpretation of human society is essentially a non-issue: The world is doomed and has to be overcome. Therefore post-axial age modes of thought recommending world denial *will be reluctant to replace* pre-axial age societal and leadership patterns by new models and ideals. They will regard leadership as part of the burden to be dropped anyway, and downülay its human importance. Classical Hinduism and Buddhism in many of their directions and factions give examples for this attitude: Their thinking about society and leadership does not tend to produce new guidelines, but due to societal inertia rather retains the pre-axial-age models, and maybe add to them a disinterested interpretation. Eisenstadt's description of Indian (Hindu) civilization demonstrates this fragmented control of power by a diffuse culture. It should be added that this culture contains elements of pre-axial-age polytheism and post-axial-age world denial. Confucianism, a basically sceptical view of human society and leadership as inevitable burdens, adds wise, practical, and mildly distanced advice how to abstinently deal with power. Thus, even after the axial age, predominantly world-denying or world-sceptical modes of thought often retain chieftain, king, or one-"party" leadership. Examples are China, India, Myan Mar, Thailand, and to some extent Japan, whereas Nepal is about to drop traditional monarchy.

In confirmation of the theory of correlates, this is different for *world-attached axial-age world views.* Here the consensus tradition is being confronted with a principled doubt whether the result of consensus is good or bad under an ethical standard that no longer flows from tribal, or national, expediency. Leadership by a big man, chieftain, or king finds itself exposed to the same critique. But what is the "concatenated" standard to be? The obvious bridge from axial-age ethics to decision-making is voting: Generally convincing tribal and national backing is no longer available. Instead, true and false, good and bad, right and wrong, become standards of general, comparable meaning. Different people may have different opinions about these judgments. A logical way to – world-attached – decision-making is majority rule. This was the rule in Greek city states, in some organs of the Roman Republic, and is reported by Tacitus (animist) Germanic tribes. In ancient Greece, voting was introduced under the influence of the egalitarian philosophy of the Tragic Mind. As for leading families, lineages and clans, a radical axial-age solution would have been to deprive them of power. Leaders were held accountable by members of the city state. The Greek *polis* made frequent use of this device to keep actual and possible tyrants at bay. In this manner, older forms of societal ordering were sometimes respected, but at any rate fundamentally remodelled under the impact of secular axial age ethics. Wherever the axial-age revolution took place without the introduction of a value-founded pledge-of-faith system, totalitarian leadership patterns were installed based on "correct consciousness".

The Franks, Middle European egalitarian farming and river-trading people, were used to voting, and sworn together by a pledge-of-faith system among the vassals and between non-noble lords and vassals. A direct borrowing from Ancient Greece seems unlikely. This is why Eisenstadt is basically right in characterizing the "European Complex" by its decentralized but effective control of political power. Outside of this region, in the Near East, Africa, and

South Asia, Christian mission did not change much of pre-axial-age leadership and power control, and their essentials – described above – still prevail today. Apparently to be this-worldly effective, Christian mission cannot jump the Tragic Mind or a comparable organizational structure equipped with superaddition. This is logical because of the central role of the synagogue for the establishment of the Christian community. The Apostle Paul apparently calculated very well when he depicted, in his letter to the Romans, Christianity as an antithesis to, or derivative of, the Tragic Mind (as a belief system that accepts failure regardless of best intentions, letter to the Romans Ch. 7).

The remaining part of the question how government, economy, and belief system may be correlated refers to the areas of the world, where the axial-age revolution took place, but a value-based pledge-of-faith system was not introduced. This is the combination of axial-age revolution plus absence of *polis,* republic, or *Genossenschaft*. It is not difficult to give a theoretical answer (and again empiry confirms theory): The relevant post-axial-age belief system has to furnish a "religious" solution, because there is no secular one in the offer. The ideas of society and leadership have to be derived from the belief system itself. In short, religion serves as a guide to leadership. Theocracy – a combination of monotheism and human dictatorship – is one radical model of this sort. Christian orthodoxy is able to give more examples. Secular totalitarianisms such as Marxism derive their societal and cultural control models from their underlying value system: the Marxian use value cannot be discussed, and thus only be high-handedly ("scientifically") filled with contents. This requires an anti-pluralist society led by political dictatorship. The same holds true for nationalist, racist ("blood and soil"), iustum pretium, God-willing-conditioned, radical-Calvinist-predestination fixed, orthodox, discursive-competence-defined, "rational" and other debate-removed or interpretation-monopolized value systems. The practical performance of dictatorship orients itself at a *timeless* determinism that "victory is ours", "God with us" and "world revolution is certain to come," illogically but psychologically fused with exhortations to act (Stalin's "therefore").

The result is that – while cultures are manifold and pluralist – correlates exist and "concatenations" can be posited. Their main causal factors are Childe's "revolutions", the axial age, societal inertia, and the principle of superaddition. Only when these (or other, equivalent) factors are ignored or denied, can any form of cultural determinism be discarded. There is consequence in culture, *synepeia* (Chapter 6).

V. Liminality. Rites de passages. Sodalities. Stratification

Limen means border, separation. Liminality is the phenomenon of having interior groupings or categorizations within a society defined by certain stages, age periods, or events. Liminal stages in Western life are, e. g, baptism, confirmation, bar-mizwa, wedding, retirement, Last Rites *(Krankensegnung)*.

Numerous cultures may have more and stricter defined liminal groups. The Andamans are said to have: twentythree liminal stages.[787] Within each liminal category, special rules, permissive or certain obligatory behavior are usually attributed. In Hopi culture, for example, up to the age of 35, a male member of the tribe may be permitted to lead a flexible, not so steady

787 Alfred R. Radcliffe-Brown, The Andaman Islanders, Glencoe, Ill. 1948: Free Press (1st ed. 1922); for the following: Arnold van Gennep, Les rites de passages, Paris 1909: E. Noury (London 1969: Routledge & Kegan Paul); Victor Turner, The Ritual Process, Ithaka 1977: Cornell Univ. Press; Jean Cazeneuve, Les rites et la condition humaine, Paris 1958: Presses universitaires de France.

life. But after 35, a male person is expected to behave in a settled, reliable manner, speak clearly and reasonably, and be a useful member of the tribe. In Suebia, a southwestern part of Germany, a proverb says that a Suebian gets wise at 40 (and not before).

Stepping from one liminal stage into the next is often accompanied by rites of passage *(rites de passage)*. Initiation rites are a frequent type of liminal occurrences. In some cultures, rites of passage continue after death, for example, when funerals are divided into several stages. Among the Ojibway, a deceased person is assumed to stay around for four days to regulate things that remained undone when still alive, such as an apology. The still soul of the deceased lives in a little wooden hut and receives food and drink from those left behind for four days.[788] In parts of Germany, after a peron's death, a three-days period is observed during which the deceased is believed to be "still there". Also, the southern German custom of *Aussegnung* (Last Blessing for a deceased person), often celebrated in a last-blessing hall on the cemetery and to be done while the corpse is "still warm") indicates the belief in a *post-mortem* liminal stage.

Rites grant power to those who are licensed to perform them, and who how to perform them. A shaman is respected because he is a master of rites to be performed. The power of the Egyptian and Brahman priests rests in their esoteric knowledge. In Europe, for the Christian churches it is of essential importance to retain possession of rites connected with liminal stages: Baptism after birth, confirmation around puperty, wedding celebration, Last Rites or corresponding ritual. Often these rites are the only stable connection between the church and their members.[789]

Liminal events and rites of passage are often celebrated collectively, for instance all members of an age group. The young warriors of a tribe may be collectively initiated, and later remember their entering into the *sodality* of defenders of their tribe with pride. At this point, liminality meets sodality.[790] Students recall their commencement day. In many countries, navy officers observe a special respect for and feeling of belonging to the "crew of the year".[791] Thus, liminality may create sodalities, also called "societies", such as the clown societies in the Pueblos of the Northamerican Southwest. Fraternities and sororities have their rites of initiation, and advancements (*Fuchs, Bursch,* etc.).

Liminal stages need not, but may generate higher and lower classes within the population: The initiated ones have more duties and, by fulfilling them, more rights than average tribal members, guests or outsiders living in the tribe. In a Bavarian countryside inn, choice of seats is always free but you better do not sit down at the regular's table ("Stammtisch"), lest the innkeeper ask you to take your seat "over there". The regular's table is for the voluntary fire squad, the pharmacist, the rifle association members, or the local priest.

Another link of liminality is to *stratification*. In sociology and anthropology, stratification has often been treated as a uniform societal quality of a group of people. Put simply, stratification means that there are rich people and poor people, leading circles and commoners, etc. However, depending on the neolithic and the urban revolution, there are different kinds of societal stratification:

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788 W. Fikentscher, The Soul as Norm: Reflections on an Ojibway Burial Site, in: Krawietz, Werner (ed.), Sprache, Symbol und Symbolverwendungen in Ethnologie, Kulturanthropologie, Religion und Recht, Festschrift Rüdiger Schott, Berlin 1993, 457–465; reprint in: Roger D. Masters (ed.), The Ethology of Law, Festschrift in Honor of Margaret Gruter, (New York, et al. 1994) 108–116; idem (2004 a), 64f.

789 I thank Hans Borchardt for a thoughtful exchange on this issue.

790 See notes 720ff., above.

791 More examples, e.g., in Kottak 307ff. ; Jean Cazeneuve, Les rites et la condition humaine, Paris 1958: Presses universitaires de France.

As a consequence of reproduction there is possession and property, and hence the differentiation of rich and poor families, reinforced by hereditary succession. These families will be the ones who claim chiefship. The keyword for this could be *wealth stratification*.[792]

Separation of work goes hand in hand with an increas of functions within a society. This induces *functional stratification*. Both kinds of stratification may mutually reinforce each other, and castes may result. To equalize wealth stratification, the remedy is redistribution; to equalize stratification of functions, the remedy is open access to offices and a reexamination of functions.

VI. Anthropological lessons for Europe

1. A cooperative called Europe

In 1952, the European Community of Coal and Steel was founded for six European care states: France, Germany, Italy, Belgium, Nethgerlands, and Luxemburg ("Montan-Union"). It was followed in 1958 by the European Economic Community and the European Atomic Community. Together, these treaties have been called "Rome Treaties". The organizational structure of these three unions of joint political and economic purposes provided for each a parliament, consisting of six nation states as members (called Council of Ministers because it was the meeting place of the six nations' governments), a Commission as administration, and a Court. Montesquieu's pattern of separate powers was observed …

The later development of these three communities into a European Union (EU) caused imbalances for this incipiently satisfactory organizational system. The Ministerial Council in daily practice composed of government employees acted more like a second governmental administration next to and in competition with the Commission, so that its parliamentary function was no longer well understood, in public and by the Members themselves. Instead, in a centrifugal manner, the Ministerial Council became more and more the arena for airing the diverse national interests of the 27 members (in 2006). The original Treaties of Rome had provided for a weak "European Parliament" as a body of consultation. The loss of the original function of the Ministerial Council as parliament caused the European Parlament to ask for more power (which it got), in order to better promote the European cause in a centripetal way. Moreover, the loss of political weight of the Ministerial Council made necessary another Council, the European Council, composed of the heads of state of the EU members, taking turns on a six-months basis as political leadership of the EU members.[793]

This changed situation led both to the call for a European constitution as well as to the rejection of its draft by two founding members, France and the Netherlands who had held natiional referendums on the draft (in 2005).

Because of its roots in the Frankish cooperative system, the EU and all of its members are democracies. This holds true even for those areas of Europa where Frankish feudalism and its pledge-of-faith system of horizontal and vertical rights and duties (as mentioned earlier). have never been the law of the land, such as in all Slavic nations (with the exceptions of Slovenia

792 Among the White Mountain Apache in Arizona, the number of sundances (initiation rites for girls becoming young women) is increasing steadily. Instead of being forgotten, the liminal event contributes to cultural revival. This is a sign for the increase of wealthy families, both in number, and prosperity (communication Ben Chavis 1992).

793 Media keep confounding the Ministerial Council, the European Council, and the Council of Europe (in Strasburg), a treaty organization of about 50 European states for special, mainly legal, purposes, such as human rights protection; the Council of Europe has also a court.

and the Hanse cities) and in the area of the former Saxon tribe which under its dukes never accepted the cooperative model. The way in which the Saxon and Slavic chieftaincy traditions will adapt to the Frankish cooperative model of mutual assistance among the EU Members, accountable organs, and superaddivity (in a tripolar fashion, see 3., below) will be interesting to observe. The result could be a failure because of the sheer size of non-Frankish background. The accession of the non-Frankish nations to the EU has its historical parallel in Chief (or "Duke") Rollo's talking the feudal oath in 911 A. D. (see below). But Rollo did not represent more than a couple of thousand Danish and Norwegian successfully raiding Vikings. At this point, parallelism ends.

Since the EU itself is beyond any doubt envisaged as a continental democracy, the task of making a European constitution[794] consists in forming one cooperative from several cooperatives. This is what cultural anthropology asks from European constitution-makers today. Logic compels to go either one of the following two roads. Applied anthropology permits speculation because any application requires planning:

(1) Either the citizens of all of the member states become citizens of the EU as the cooperative "on upper level" as well. Then every ciitizen receives two annual income tax returns per year, one from the home state, the other from Brussels, and every citizen pays taxes twice. This is the consequence of the duty to cooperate in the Frankish model. Then also a European constitution will have to undergo a referendum in all member states, and the majority of all Europeans will have to vote with yes. A model is the USA.

(2) Or the nationals of all member states remain their respective citizens only. Every European pays income tax only once to his home state. The member states finance the "upper" cooperative, called EU. No referendum is needed, nor in conformity with superadditive membership. The accession to the EU is voted upon in the national parliaments. A model is the existing EU since the "Rome Treaties" were signed in 1958.

The commission which prepared the European draft constitution since 2002, headed by Mr. Giscard d'Etaing, was not aware of the above choiceand its logic of applied anthropology, nor were the French and Dutch governments when they submitted the draft to referendums. Yet, a decision between the two possibilities should have been made before attempting a EU constitution because the organizational structure of the EU depends on that decision:

In case of *double citizenship* – option 1 – direct elections to a European parliament are needed. Its task would be – in contrast to the present parliament's policy – to safeguard the interests of the national Member States and their citizen, thus engaging in the centrifugal task. Since 258 A.D.[795] and times, the budget of the Frankish cooperative – the contributions of free farmers – is decided upon by the members. The same parliament appoints the government as the centripetal force and executor of the budget, and holds the government accountable. For the European citizen, European politics would be something foreign from his home state, almost politics from another star. A tradition such as the one attached to the US model is not available.

In case of single citizenship – option 2 – the carriers of the EU are its member states, not their citizens. The European Parliament, in conformity with the current state of affairs, is be composed by members of the national parlaments. These parlmentarians would have to travel between the seat of their national parliaments and the European Parliament in Strassburg, to

794 Or according to the Dutch prime minister Mr. Balkenende's proposal a constitution-replacing treaty among the participating nations with self-executing rights and duties of all European nationals.

795 See III. and text following note 781, above. For centuries, Franks was a synonym for middle-Europeans, and the *lingua franca* was the language of common usage.

and fro, theoretically every day when either one of the two convenes. As the times of the Frankish assembly, the *"thing",* are over, when there was a meeting once a year or several times per year, the European parlamentarian's workload would be close to unbearable. It would be more sensible to elect a pair of two parlamentarians of each party in every voting district, one for the national capital, one for Europe. This enables national politics along with European politics, adjustable, debatable, and accessible because close to the citizens home. The task of the European Parliament is centrufugal controi of the European Government that is composed of delegates from the national governments, whose task in turn is centripetal promotion of European goals. The European Government replaces the Ministerial Council, the Commission and the European Council. It is accountable to the European Parliament.

The European Court of Justice may institutionally remain as is. However, it has to become a fair arbiter between centrifugal and centripetal interests, instead of deciding unilaterally – as it does now – "when in doubt, in favor of Europe". This is a cultural anthropological lesson for present-day Europe and its greatest need: a constitution and a readjustment of the centrifugality and centripetality of its organs.

2. Slavic chiefdom and the Breshnew doctrine

As mentioned above, historically no Slavic tribe except the Slovenes ever accepted the Frankish pledge-of-faith principle of cooperate organization.[796] Most Slavic tribes seem to have preferred chiefship, both in ecclesiastical and in secular contexts. Feudal horizontality as well as vertical vassality as expressions of mutual relationship of service and protection between lord and vassal with corresponding rights and duties, and the concept of a cooperative entity as superadditive organization with consequential accountability of the lord were either unknown or intentionally suppressed (as in Nowgorod and Pskow by Czar Ivan Grosny).[797]

In ethnocentric manner, leadership by a chief was turned to the outside of the country to subjugate peoples and to claim the right of peaceful or warlike intervention in other countries whenever this seemed favorable to Russia or the Russian chief, the Czar. This is the foundation of Russian foreign policy at least since Peter the Great. Bismarck, Prussian ambassador to Russia, critized this intervention-oriented foreign policy (*"Ich habe dem Eisbären in die Augen geschaut"* (I looked into the icebear's eyes). Bismatrck's European peace policy (Re-Insurance Treaty, *Rückversicherungsvertrag*) may have been drafted under the influence of his observation as ambassador. Lenin used the traditional concept of Russia's right of intervention in foreign countries for his addition of "imperialism theory" to Marxism: class struggle does not only take place with historical necessity between dominant and expropriated classes, but also between the rich imperial European powers and poor countries in other regions of the world. Lenin claimed the right to intervene in such poor countries in order to fight, in support of local insurgents, against Western colonialism. The competence to define the kind of socialism the insurgents are to fight for rests with the leaders of Russian socialism. Stalin

796 Bogo Grafenauer, Ustoličevanje koroških vojvodin država karantanskih slovencev, Die Kärntner Herzogeinsetzung und der Staat der Karantanerslawen, Laibach 1952; W. Fikentscher (1975 a) 94, 128, 392; (1977 a) 489.

797 E. g., Hans-Joachim Torke, Einführung in die Geschichte Russlands, Munich 1997: C.H. Beck, 37, 39, 47. 249 f., 252 f.; repeatedly, Torke stresses that Russian governments never acknowledged mutual trust relationships between the lords and the vassals. "Vassaldom as it existed in the Western European feudal system was unknown", at 37, 47. On Russian policies of expansion see, e. g., Juri Semjonow, Die Eroberung Sibiriens, Berlin 1937: Deutscher Verlag.

incorporated this theory of the right of intervention in other countries for self-defined purposes in Art. 28 to 31 of the "Stalin Constitution" of 1936.[798] After Stalin's death, the doctrine received the name "Breshnjew Doctrine" because Leonid Breshnjew repeatedly validated it as base of the foreign policy of the "Socialist Camp" under Soviet Russian chiefship.[799]

In 1992, on a study tour to Moscow arranged by the Gruter Institute for Law and Behavioral Research to empirically observe the legal and economic changes after the dissolution of the Soviet empire,[800] I asked the Russian professor of international law and diplomacy, Gennady M. Danilenko: "What happened to the Breshnjew doctrine after 1990?" In addition to his professorship, G.M. Danilenko served country as a diplomat. His answer was: "Of course, the Breshnjew doctrine is still in force. Russia assumes the right to intervene in foreign countries whenever this is in Russia's interest". I expressed my shock, sensing that he did not understand why I was shocked.

3. Bipolar and Tripolar Democracy

a. Bipolar democracy is characterized by a lack of separation of government and state, tripolar democracy is defined by their separation. The distinction goes back to the cultural borrowing of superaddition from the Franks by the Normans. The distinction is still of practical importance. In brief, history went like this:

b. It was mentioned that Scandinavian peoples, called Normans (northmen), or Vikings (villagers), mostly Danes, accompanied by Norwegians, attacked Frankish territories beginning in 834 A.D. sailing upstream on Frankish rivers (Rhine, Maas, Seine). The Normans had chiefs (dukes). A horizontal-vertical governmental system such as the land's peace and pledge-of-faith system was foreign to them. In this, they might be compared to Northamerican Indian tribes and the Bedouin tribes of Prophet Mohammed's time, a.s. The Norman thrust was such that large parts of Frankish land soon fell into Normans' hands. In church, the Lord's Prayer was amended during that time by the words: *et delibera nos de furore Normannorum* (and save us from the Normans' furor).

The Normans were obviously impressed by the efficiency of the superadditive unit that permitted horizontal peaceful cooperation and held leaders vertically accountable. In 911 A.D., the (militarily superior) Norman Duke Rollo swore the *Frankish* oath of pledge-of-faith to the King of the Franks Charles the Numskull, apparently in order to constitutionally integrate the Normans into the Frankish governmental system. Hereby a chieftain became an accountable organ, and the chieftain's followers turned members. Equipped with the Frankish pledge-of faith system, the Norman William the Conquerer crossed the Channel in 1066 A.D., introducing the Franks' way of having a constitution in England. The Battle of Hastings proved the superiority of the Frankish cooperative over Anglian chieftaincy.[801]

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798 Details in W. Fikentscher (1976), 578.

799 Discussion in W. Fikentscher, Blöcke und Monopole in der Weltpolitik, Die Herausforderung der Freien Nationen, München 1979: Olzog Verlag; Chinese translation by Yeong-chin Su, Taipei 1985; idem, Terrorism, Marxism, and the Soviet Constitution, in: Benjamin Netanyahu (ed.), Terrorism, How the West Can Win, New York 1986, 52–55. See also note 277 above.

800 My contribution: From a Centrally Planned Government System to a Rule-of-Law Democracy: Legal, Economic, and Anthropological Considerations, in: Bruce Smith & G.M. Danilenko (eds.), The Rule of Law, Human Nature, and the New Russia, Gruter Institute for Law and Behavioral Research und Brookings Institution, Washington D.C., 1994, 24–42. Cf., note 292, above.

801 On borrowing as a form of culture contact, see Chapter 5 VI. 3. a., above.

However, the borrowing was not complete.[802] True, the cooperative system as brought from France to England, and later from there to the US and other parts of the world, starts from the superadditive manner of having a unit which is more than the combination of social contract and contract of government. But superaddition can be understood in two different ways: (1) either as a unit that is in essence separated from societal forces forming, in modern terminology, a moral person, also called corporation, equipped with organs who feel that they are responsible to that corporation; (2) or as a unit that is represented by the respective majority of its constituting parts (the members), although conceptionally distinct from those parts.

c. The first – tripolar – idea of superaddition took shape as the concept for the modern state in the European Continental sense. It commands a "raison d'état". It can pose tasks that outlast periods of administration. Its organs will not be changed when majorities within the will-forming process of the corporation change. If after an election the opposition takes over, public employees remain in the positions they have been appointed to up to and including the rank of *Ministerialdirektor,* that is, one rank below the vice secretary of a ministry.[803] Although these officials know that after the election the political goals will change, they serve these goals because they feel loyal to the entity, not to a party line. The government itself, the cabinet, is not a commission of the Party in power, but an organ of the state as an abstract unit. There are human rights and claims (in the Hohfeldian sense) that are to be directed directly against the corporation, that superadditive entity, so-called "subjective public rights". Defendant of these rights and claims is the entity called "state", not as in the British system one of its officials or functionaries. Everyone who comes in contact with this "state" such as a Chinese passenger arriving from Hongkong or JFK, or a stateless combattant, or a Guantanamo inmate, has rights and claims against this entity "state". There is no need for a special legal provision enabling such a plaintiff to sue that "state", because the "King – the state through its organs – can do wrong".[804] And if there is a "public wrong" *(Amtshaftung),* "the state" will compensate the injured plaintiff (§ 839 Civil Code, Art. 34 Constitution), and have recourse against the public employee only in grave cases, so that the public employee may feel free to take action in the

802 A more elaborate treatment of this subject in W. Fikentscher, Staat vs. Government – eine Beobachtung zum Thema Kulturpersönlichkeit (state v. government: an observation in culture personality), Burkhardt Ziemske et al. (eds., Staatsphilosophie und Rechtspolitik, Festschrift für Martin Kriele zum 65. Geburtstag Munich 1997: C.H. Beck, 1407–1416 (at 1411–1415). On the lack of raison d`état in the US, W. Fikentscher, review of Delman-Marty, Mireille, Raisonner la raison d'état, vers une Europe des droits de l'homme, Travaux du séminaire "Politique criminelle et droits de l'homme", Presse Universitaires de France, Paris 1989, 39 American Journal of Comparative Law 625–626 (1991). For Delman-Marty, the result of her research for Britain in "inconclusive"; the USA are excluded from her comparison.

803 Contra: Horst Ehmke, Wirtschaft und Verfassung. Die Verfassungsrechtsprechung des Supreme Court zur Wirtschaftsregulierung. Karlsruhe 1961: C.F. Müller; Ehmke's proposals were not successful. Ju 2008, President Elect Barack Obama made known, that – as a rule – all personnel of the US administration from the four most upper ranks (incl. the Secretarys) down would be replaced by new office holders.

804 Cf., Art. 19 (4) of the German constitution. The lack of a provision like Art. 19 (4) German Constitution (everyone – also a foreign national – may claim her or his rights against public authorities including the right to sue) in theUK and USA is due to the difference between the Frankish and the Norman cooperative. The Norman type of democracy gives no inherent rights to the commoner against the lord (because "the King can do no wrong"). From constitutional history it follows, e.g., that US authorities may bar non-US citizens from entering the US, confront them with the choice between being detained or sent home on the next plane, without revealing reasons, accepting an appeal, or granting a right to call the traveller's next consular office, Nina Bernstein, … Scholar Barred From U.S., but No One Will Tell Her Why, NYT of 9/17/2007, 17, involving the case of a British professor teaching at a California college, whose visa was revoked because of administrative discretion, no explanation given.

interest of the concerned person (for example in cases of discretion). "Civil courage" (in Bismarck's sense), responsibly exercised, of public employees is favored.

d. The second – bipolar – idea of superaddition developed in the Normanic-Angloamerican sphere. There is no particular "raison d` état". The goals set for the superadditive entity loose their obligatory character together with the next election. Its organs change with majorities. The government is a committee of the party in power, and the loyalty of the organs is owed to that party. Subjective public rights, if recognized at all, are to be directed against organs, not against the entity, in the British system one of its officials or functionaries. There is no third partner to be identified as "state". There are the people and their government, in a bipolar relation. Somebody who comes in contact with the government or one of its organs has no rights or claims unless legal provisions grant them, because in principle and absent appropriate legislation, the "King can do no wrong" Since there is no public liability as a general principle, an Angloamerican public employee (especially in the US) – absent an abstract "state" as a third partner and protector as liability cover – will be afraid of violating the limits of democratic authorization and rather deny the concerned person's request (especially in cases of discretion). This makes – in particular US – administration often so cumbersome and running dry.

A linguistic implication of the difference between the (bilateral) government- and the (trilateral) state-oriented democracy is the lacking translatability of the German word *verwalten*. In the Frankish tradition, the state *regiert* and the government *verwaltet*. In the Normannic tradition, the verb for both activities is the same: administer. In the US, there is talk of the "Bush adminiatration" and of the INS or IRS "administration". In Germany, Frau Merkel as the head of *government regiert,* but nobody would speak of *Einwanderungs-* or *Steuerregierung.* The activities concerning immigration and taxes belong to the *Verwaltung* of the *state.* Behind the difference in expression, there is a noticeable difference in feeling responsible: an administrator is politically bound, a *Verwalter* is politically free. The Frankish system takes the separation of powers more seriously.

e. Both options are variations of superaddition. Superaddition is the common denominator. But the differences between the options need be seen (f. and g.). By the principle of superaddition over-arching units become conceivable. Toward the inside of the superadditive unit this means cooperative organization in the true sense: the whole is more than the sum of the parts, and the parts acquire membership role as in an assembly. Instead of seeking consensus, the members vote. There is a majority and one or several minorities. Next time, the minority may take over the lead by winning more votes and become the majority. The concept of time as a straight line is essential. Leaders become organs of that unit, to be held accountable by the governed ones, or by their superiors who again are organs (Romans 13, 1: archontes, literally: city fathers; instead of Luke 22. 25, 26: exousia = overlords, warlords). The symbol is, as has been noted above, budget day. Membership creates subjective rights, that is, rights between the individuals, and between the individuals and the unit represented by the organs. Superaddition creates a law made up of those subjective rights. This implies tolerance of different opinions, a basis to rely on, and long-range trust between the individual members under that law. The state becomes such an entity, and this entity is more than mere government. In a democracy, if the representatives come from the different parts of the country in order to represent the latterand not more, you have a government, but not a state in the tradition of the Frankish cooperative. If these representatives try to represent the whole as being more than the sum of the parts, there emerges a superadditive strate, a state in the true sense of its meaning. This implies not only judicial review of norms promulgated by that state, a consequence Chief Justice John Marshall has drawn in Marbury v. Madison, 5 U.S. 137, 180

(1803), but also judicial review of all state activities related to law including administrative acts *(Verwaltungsakte),* a consequence the German constitution of 1949 reflects in its Art. 19 (4), thus rejecting the enumeration principle based on the rules of "the king can do no wrong", act of state and sovereign immunity. There is a slight difference between rule of law and *Rechtsstaat*.

f. In a *Rechtsstaat* the protection of minority positions is more important than listening to the majority.[805] Sovereign immunity, state action, and act of state doctrine as legal means of immunizing government against private or public claims are not in use or limited to international ublic law.[806] Being at war with another state means warfare of one state against the other, and for their citizens a *res inter alienos gesta*. The war does not take place between the peoples of the states involved. In war, the peoples of the warring states suffer, indiscriminately.[807] Private property of citizens of warfaring states is left untouched and never confiscated. Foreign languages to be taught at school will continue to be taught because a language has nothing to do with states engaged in a war. Collateral damages ought to be compensated.

g. In peace and war, this (c.–f.), is the Frankish model of state and democracy. It can also be named the Continental model.[808] Another expression could be "state principle". The state principle works tripolar: The people elect a government, and the government is in charge of the state.

Things are different when the superadditive entity belongs, so to speak, to the temporary possessions of the majority of the parts of which the entity is composed. This is the Normannic, or Angloamerican, model of state and democracy. It could be called the "governmental principle". It works bipolar: The people elect a government, and here the number of engaged entities stops. The Normannic derivation from the Frankish cooperative system says "e pluribus unum". Franks would have said: "e pluribus magis quam unum quod est fides mutua". In the Normannic tradion, "the state" is not a third entity in addition to members and organs. Rather, the word "state" means a concrete something, for example the state of Ohio, or Michigan. Now the winner takes all because there is no "raison d'état",[809] but a public policy pursued by the party in charge. It goes without saying that loyalty is owed to "the country" or "the Crown", or "England" (Lord Nelson: "England expects everyone to do his duty"), and these and similar concepts represent the superadditive unit. But an element of Norman chieftaincy remains in this form of superaddition. Public officials and employees serve the governing party, not the state as an entity by itself. Therefore, in principle and largely in fact too, all offi-

805 W. Fikentscher, Demokratie – eine Einführung, Munich 1993: Piper; english version "Democracy: A Primer", 49/50 Law and State, A Biennual Collection of Recent German Contributions to these Fields, Tübingen 1994, 125–146, and 51 Law and State (as before) 1995, 115–116 (with Alice Broichmann); idem, Die Demokratie und die kulturellen Denkarten, in: Heidi Bohnet-von der Thüsen (ed.), Denkanstösse '96: Ein Lesebuch aus Philosophie, Natur- und Geisteswissenschaften, Munich & Zurich 1995: Piper, 143–150.

806 On "state action" see, e.g., Parker v. Brown, 317 U.S. 341 (1943); Southern Motor v. U.S., 105 S. Ct. 1721 (1985); cf., W. Fikentscher Wirtschaftsrecht, vol. 1, Munich 1983: C.H. Beck, 75, 199f., 265. Sovereign immunity in international public law (= law of nations) is a contested concept.

807 Johann Jacob Christoph von Grimmelshausen, Simplicius Simplicissimus, 1668.

808 Of course, sad exceptions occurred and occur. Hitler wanted to teach that the whole nation is at war with another. Nazi propaganda pushed the idea of *Volkskrieg* (people's war). The Nazis did not completely succeed. Private property, including real estate and intellectual property rights, of nationals of enemy nations as a rule was left untouched. Education in English and French took place as usual, also during World War II 1939–1945, SS officers married Russian girls in pompous Russian weddings, and German GI's cheered when they were announced to be sent to the Western front: they saw a chance to get "to the Californian hospitals" *(Auf in die kalifornischen Lazarette!)* (personal experiences resp. communications 1944/5).

809 See note 802, above.

cials change with the governments. Listening to the majority is more important than protecting the minorities against the majority. It is harder to put into effect programs that outlast the election period, to the dismay of attachés and foreign experts who may look into a different face and talk a different idiom when discussing an international issue from last year's agenda. The government itself is a kind of commissionor body of the successful party or parties. The peculiarities of the British parliamentary system including the exchange of the prime minister when he or she looses support in the own party follow from this "Normannic" tradition. Remedies for "public wrong" have to be enumerated by statute. In the same manner in which a citizen is responsible for the own government in peace time, she or he is held responsible for that entity called "government" in its inrernational relations including warfare against other governments.[810] The march from Atlanta to the coast at the end of the Civil War 1862–65 was warfare against the population. An Angloamerican traditional principle is to expropriate "enemy property".[811]

h. The principle of "separation of state and church" takes different forms when a state is recognized next to the government, or not: The less "state" besides "government", the stricter the separation of state and church has to be, because an instance of law and certainty begins to disappear that can act in a neutral manner in view of political positions of the government. The more there is of a "state" next to a "government", the easier border-crossing compromises are possible. The strict separation of state and church in USA is a consequence of the "government principle" in which the government ("the king") has a stronger, less accountable position. It is perhaps indicative that in the Frankish tradition one of the underlying ideas of forming a superadditive entity, the duty to keep peace among the members, is called "the land's peace", whereas in the Normannic tradition it is called "the King's peace", a term referring rather to the lord than to the community of the vassals.

This can be expanded to an even broader statement: The more "state" there is besides "government", in other words. the stronger a tripolarity works against a bipolarity, the more there is *"Rechtsstaat"* and the less a governmental fiat. The distinction between a tripolar Continental democracy and bipolar Angloamerican democracy is of immediate influence on the role of the *"Rechtsstaat"*. Usually, *Rechtsstaat* is translated by "rule of law". But rule of law does not require a *Rechtsstaat* because it requires no *Staat,* no state (in the Continental sense). Rule of law means only that the government is bound by law. It does not purport that besides a government there is a third entity, the state, monitoring whether or not the government abides with the law. The tripolar system, that in which the people elects a government to run the state as a superadditive entity, is able to grant much more protection against fiat and arbitrary action by that government to that people.

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810 In 1944, having been drafted as a flak-helper at the age of 15, I was treated in a military hospital against several health defects. In the area, a British bomber had been shot down. An injured crew member was carried to the same hospital and taken care of. He got a room for himself (which was exceptional, we all lay in eight to ten bed rooms). The Briton, a young fellow, steadfastly refused to talk to anyone, and to cooperate in the healing process. The hospital doctors who were military officers of some rank, asked me to cheer him up with my highschool English. I attempted repeatedly, mentioning his family, his home town, the Bavarian countryside, food and drink, the weather – all in vain. All friendly advances were refused. He regarded me as a non-person. Finally, I gave up, at that time not understanding what was going on. Had somebody told him to keep silent when talking to Germans? Did he suspect that I was a spy trying to interrogate him? Was I an enemy for him, or he for me, or were we both each others' enemy? I hope he got home safely.

811 For wartime consent decrees (often involving intellectual property rights) based on that principle, see S. Chesterfield Oppenheim, Federal Anti-Trust Laws: Trade Regulation, St. Paul, Miinn. 1948: West Publ., 988–1012.

i. These days, in political debate whether democracy can, or should, be "exported", i.e., made accessible to nations that venture to try self-government instead of dictatorship, the distinction between Continental (originally Frankish) and Angloamerican (originally Normannic) democracy is of great importance. What these nations, aspiring to democracy, need is *Rechtsstaat,* not "mere" rule of law (as well-intended as the latter may be), because having rights and claims against any public action is the essence of trust and reliance. The opposite position (the "mere" – rule of law says "the King is under the law, but he can do no wrong". For democracy-aspiring countries, this is difficult to understand. The principle that a modern government is liable to carry public responsibility, even hidden in heterogeneous statutes, is weakend if the legislator introduces the Angloamerican consequences of "state action", "act of state", "sovereign immunity," and broadly interpreted "political question", too. The gist of Frankish-Continental democracy is the opposite: general, not selective, accountability of government/state/sovereign/crown. It is the export of the state-conscious, government-accountable Continental democracy, not of the government-dependent Angloamerican variety that would help the recipients better. The desire of the US-Americans to democratize other nations, for example in the Near East or in South America, confounds the two concepts of democracy. Moreover, it confounds democracy and *Rechtsstaat*. Needed is a *Rechtsstaat* (and not just the rule of law), meaning legally accountable, court-subjected government absent, on the basis of a general constitutionally secured principle, instead of statutory enumeration, and free from hierarchy-focused exceptions. Once *Rechtsstaat* is safely secured and internalized, the democracy-aspiring countries need democracy of the Frankish – tripolar – type.

j. The outside effects of *polis/Genossenschaft* as a superadditive means of structuring society are underresearched. Outside effects of superaddition include issues such as representation vis-vis third partners, treaty power, piercing the corporate veil, and financing structure *(Finanzausgleich)*[812] The inside – horizontally pledging to keep peace and vertically to hold leaders responsible – is so interesting that authorities are kept busy studying it.[813] But *Genossenschaften* must have important outside effects, too. Most of all, outside nations are interested in the King's Peace pledge inside. This invites outsiders to join by taking the oath (Chief Rollo's example; see above). Exactly this is the reason why the Franks between 500 and 800 A.D. succeeded in uniting Europe from the British Channel to Croatia ("Franka Gora" – the Frankish forest – near Zagreb) and from Denmark to Sicily. As remarked above, the Franks did not "conquer" this huge area alone. The others came to join. This required an active foreign policy. At this point, the distinction between the original Frankish *Genossenschaft* and its Normannic derivative that shaped Britain and USA is gaining weight.[814] The Normannic version is more centralist and leadership-shaped, perhaps because of societal inertia. Some consequences of this have been discussed before.[815] Here is another difference: Angloamerican democracy is less outside policy oriented. In his book "On War", the Prussian general and philosopher Carl von Clausewitz (1780–1834) taught that war has always to be accompanied by negotiations between the parties because war is only a function of politics. This excludes a warfare for unconditional

812 G.L. Cawkwell, The Foundation of the Second Athenian Confederacy, 23 *Classical Quarterly* 47–60 (1973); Russell Meiggs, The Athenian Empire, Oxford 1972: Clarendon Press.

813 Harry Westermann, Rechtsprobleme der Genossenschaften, Karlsruhe 1969 C.F. Müller; Otto von Gierke, Recht der Genossenschaften, 4 vol. Berlin 1868–1913: Weidmannsche Buchhandlung; (Frankfurt am Main, Vico-Verlag 2006).

814 See e. through g., above.

815 Many differences have their reasons in the contrast between bipolarism of people and government (Normannic-Angloamerican version) and tripolarism of people, government, and state (Frankish-European Continental version).

surrender as asked from the opponent. Normannic/Angloamerican warfare has followed the principle of asking for unconditional surrender and almost never engages in negotatiations parallel to belligerent actions.[816]

For instance, negotiating with the Taliban while fighting them seems inconceivable to Angloamericans. Cultural anthropology would deem this refusal to be ethnocentric, and instead call for a comparative study of the relationship between war and bargaining in the various modes of thought. When in 2007 Germany was asked to contribute Tornado reconnaissance planes to an anti-Taliban campaign in Afghanistan it would have been the opportunity of the German government to reciprocate the demand by insisting on an examination of chances for bargaining talks with the Taliban parallel to the ongoing warfare, talks that had indeed been offered from the Taliban side through mediators in Kabul. Such reciprocation would have made it more difficult for terrorists to abuse the Tornado mission as a pretext for anti-German attacks. If peace keeping and peace restoring activities are planned by international treaty organizations it is, because of the internationality of the effort, important not to follow the culturally specific war theories of only one or two of the treaty members.

VII. Anthropological Lessons for Islam

"Export of democracy" is a subject bordering on Near Eastern and other global issues, notably connected with Islam. How do leadership issues of Islam fit into anthropological concepts of bigmanship, chiefship, and cooperative?

Islam, a post-axial-age mode of thought and a religion at the same time, does not focus on developing society and leadership models but rather restricts itself to timeless dogmatic tenets. It assigns to the *ummah* (the Islamic congregation) the pre-axial age consensus model, identifying the *ummah's* opinion as infallible instruction: Hereby, the (axial-age-related epistemological) difficulties of the consensus principle (Surah 3.106, 3.110 in M. Henning's transl. 1960 = 3.110, 3.114 in R. Paret's transl., 5th ed. Stuttgart 1989) are not reflected. Rather, the pre-axial-age chieftain principle essentially remains untouched so that, unlike the axial-age changes brought about by *polis* and *Genossenschaft,* a value-related accountability of political leaders *as organs* cannot be assumed. In concordance with Islam's egalitarianism, leaders are addressed as ordinary believers and participants of the *ummah*. S.N. Eisenstadt's description of Islamic essential non-control of societal power – outside of *ummah* status – comes to a correct judgment.[817] The outcome is an ethically largely open (Rohe 2001), timeless (in the sense of time as a straight line) society, obligated to engage in activity *(jihad),* under *ummah*-qualified "big man", "chieftain", "king" or comparable leadership.

Concernung Muslim leadership and political power conceptions Islam as a religion does not contain prescripts for good political behavior or government of men over men.[818] All that Islam expects from a good political leader is to grant the Muslim believers enough opportu-

816 Unconditional surrender of Germany was stipulated in 1943 by Roosevelt and Churchil in Casablanca, George Szekeres, Das Recht der Militärregierung, Erlanger Vorlesungshefte, Erlangen 1948: Dipax-Verlag, 32.

817 See note 254, above.

818 Charles F. Gallagher, Islam, in: D.L. Sills (ed.), International Encyclopaedia of the Social Sciences, vol. 8, London 1968, Macmillan & Free Press, 202–216; Johannes Hendrik Kramers, La sociologie de l'Islam, 2 Analecta Orientalia: Posthumous Writings and Selected Minor Works, Leiden 1956: E.J. Brill, 184–193; Rotraut Wieland, Menschenwürde und Freiheit in der Reflexion zeitgenössischer muslimischer Denker, In: J. Schwartländer (ed.), Freiheit der Religion: Christentum und Islam unter dem Anspruch der Menschenrechte, Mainz 1991: Mathias Grünewald Verlag, 179–209: idem, Der Islam, Zur Debatte Nov./Dec. 1990, 9ff.

nity and freedom to follow their religious calling in dogmatic and ethical respects.[819] Martin Luther wrote an important book on the "Freedom of a Christian Human" (in 1521 A, D.), but stopped short of telling how Christian liberty means in political respect. Instead, Luther relied on the existing system of local magnates, particularly the Electors of the Empire, to open for Christian believers to open the political space needed for the exercise of Christian liberty.[820] Similarly, Mohammed, a.s., did not provide, as part of his revelation, a political recipe or structure but relied on the religious reliability of existing tribal or governmental leadership.[821] This was not due to his disinterest in political affairs, but his belief in the all-encompassing authority of monotheism.[822]

From a Western "orientalist"[823] point of view, Muslim governmental practice appears ethnocentric because it uses the concept of *political* leadership. But *polis* is a concept specific to the Tragic-Western philosophical tradition and cannot be used to interprete other thought-modal leadership structures. *Polis* is the cooperative of the city, as much as cooperative is the *polis* of the countryside. Both concepts imply a structure, as described above in this chapter, of a horizontal layer of pledges-of-faith between members of a superadditive unit combined with a vertical delegation of organs held responsible and accountable. Most of all, polis and cooperative require the concept of time-as-a-straight line, that is, passing time, historical awareness and evolution from the past into the future. This is not Christian. It is heathen, Greek, and Frankish. Christianity lateradded inanlienable values, sometimes even rights, to the Frankish cooperative, but not to the Greek polis that ended about 300 B.C.[824] Only in a wider sense can one speak of *polis*-related subjects in Islam. But this is confusing, and it is not easy to find a word that does justice to both Islam and public leadership. The term "organization" is just as unsuitable because it is also Greek and implies a political whole which is more than the sum of its parts, such as an association of citizens, a city state, or the classic Greek *koiné* (commonwealth of Greek city states) that has organs like a human body does. The use of words such as polity, politics, organ or organism for non-Greek-Judaic-Christian assemblies is misleading because they assume an inner structure and an outside-identity which both do not exist. Therefore, in the present discussion, the designations of such assemblies and their leadership will be "group" and "leadership".

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819 See Khaled Abou El Fadl, Islam and the Challenge of Democracy, a Boston Review Book, ed. by Joshua Cohen & Deborah Chasman, Princeton & Oxford 2004: Princeton Univ. Press, 28 f.

820 On the long path from "Freedom of a Christian Human" via Calvinism, Swiss, Dutch, and German critique of Calvinism, irenism, monarchomachism and Dutch constitutionalism to what may be called a "politically required Christian government", see W. Fikentscher (1977 a), 478–638; idem (1997), 178–197.

821 See note 796 and material cited there.

822 Still, the Islam world is in need of a book on the "Freedom of a Muslim Human", but fitting ot the 21st century and in contrast to Martin Luther with a final chapter on the political consequences of that freedom. This final chapter ought not just cover the issue of an Islamic *democracy,* it also would have to draw conclusions from Muslim strict monotheism for any kind of legitimate leadership in Muslim society. As mentioned, the Koran does not seem to contain sufficient binding conclusions.

823 See, e.g., the criticism of "Orientalism" by Edward W. Said, Orientalism, Berne 1979: B&T Vintage; and Bernard Lewis, Cultures in Conflict: Christians, Muslims and Jews in the Age of Discovery, Oxford 1994: Oxford University Press; idem, Der Atem Allahs: Die islamische Welt und der Westen – Kampf der Kulturen? Vienna & Munich 1994.

824 For a detailed discussion, see W. Fikentscher, Die heutige Bedeutung des nichtsäkularen Ursprungs der Grundrechte, in: E.-W. Böckenförde u. R. Spaemann (Hrsg.), Menschenrechte und Menschenwürde, Historische Voraussetzungen – säkulare Gestalt – christliches Verständnis, Wien 1987, 43–73 (extended and revised version in: W. Fikentscher, St. Heitmann, J. Isensee, M. Kriele, N. Lobkowitz, A. Püttmann & R. Scholz, Wertewandel – Rechtswandel: Perspektiven auf die gefährdeten Voraussetzungen unserer Demokratie, Gräfelfing 1997: Resch, 121–166.

A modern version of the question for the appropriate form of Muslim leadership is whether Islam can or should accept democracy, and how democracy could work in an Islamic country. Khaled Abou El Fadl and others have discussed.[825] El Fadl himself does not think that Islam requires democracy, but that Islam can accept democracy as far as "freedom, foregiveness and tolerance and the pursuit of overlaspping consensual commitments are virtues that are important to a democracy but … not exclusively Western".[826] Thus, El Fadl's answer is a "yes, but", and placed under certain "conditions".[827] He holds a middle position between Muslim defenders of and opponents to democracy.[828]

One of the most impressive critical voices in El Fadl's book is Jeremy Waldron's: Waldron misses in Islam what he thinks is essential for democracy: "a system of open decision making empowering and facilitating the confrontation between opposed ideas and interests in the context of representation, debate, and voting".[829] El Fadl disagrees with Waldron. He sees no sense in opposing views and voting on them, but favors freedom of expression, foregiveness, tolerance, and consensus.[830]

Anthropologically – to limit the issue to these two views *pars pro toto* –, the contradiction between El Fadl and Waldron as to the leadership of human groups can be defined in the following manner: The views disagree about the coming into being of an opinion. El Fadl's interpretation of Islam has an opinion grow from conciliatory contributions such as freedom of speech, tolerance, foregiving erroneous opinions, and in the search for consensus. An opinion becomes a sound basis for acting when these factors combine. Opinions emptying into this combination are wrong in that they differ by content from the final product.

Here follows an important point: Once the final outcome is reached, the wrong opinions that contributed to the outcome, are still there – though being wrong. Thus, there is still a multiplicity of contradicting opinions. The diverse opinions remain "on the table". No common will on a level higher than the opinions is formed. There is no procedural technique to eliminate the wrong opinions, at least for a while, because in Islam (and some other belief system who may be similar in this respect) there is no "while", no ongoing time. Consensus does not work to create an overriding entity because the consenting opinions remain in existence, parallel to each other, in an aspective, not perspective serial order. Consensus is a result laid open on a wide horzontal plain. In order to overcome the flaws of consensus of which volatility is the biggest it is necessary to combine horizontal and vertical elements of will forming. One has to think in terms of a triangle, not in those of a line between two points on a plain. Dialog is such a triangle. To get to it, one has to care for a system of opinions in the first place, not just for a series of opinions. This is the wisdom of Pre-socratic reductionism. But early Islam adopted Aristotle's entelechia, the doctrine of the inherent goal and meaning, and not Parmenides' doctrine of human judgment and Plato's realism of partly knowable ideas.

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825 The literature is vast and cannot be reported here. For a recent discussion, see: Khaled Abu El Fadl with Jeremy Waldron, John L. Esposito, Noah Feldman, and others (edited by Joshua Cohen and Deborah Chasman), Islam and the Challenge of Democracy, Princeton & Oxford 2004: Princeton Univ. Press, a Boston Review Book. Also: Christina Jones-Pauly & Neamat Nojumi, Balancing Relations Between Society and State: Legal Steps Toward National Reconciliation and Reconstruction of Afghanistan, 52 AJCL 825–858 (2004) and Chapter 5, text near note 366.

826 El Fadl op. cit. 111 f.

827 Op. cit, p. 111, 128.

828 See the eleven contributors to the El Fadl volume, note 825, above.

829 El Fadl, at 55–58 (58).

830 Op. cit., at 112. Eli Amir (2005), 405, denies for Arabs the ability to compromise. Justead, they are able to "bargain" and to find "interim solutions". Apparently, a compromise requires superaddition because it has to fit in a preconceived unit. The same holds true for reciprocation.

For the aspective mind this triangle is inconceivable, The unit is always missed. In international law between Arab nations, "regional solutions" are hardly conceivable. "Road maps" are possible because they only indicate a malleable direction and only as long as the "road" permits timelessly repeatable changes of the momentuous forces involved.

Consensus is the least useful means to reach a result, strange as it sounds, because the other opinions – all "wrong" except one – still exist in opposition of the outcome. This is the reason for proverbial Arab disunity, of short-livedness of consensus results, and of frequent renegotiation of commercial transactions. It is also the reason for what Lawrence Rosen calls "bargaining for reality" as the main epistemological tool for establishing opinions among Muslims. If an imaginary moderator were participating in the consensus-finding process, he could say: "OK, you are right, and you are right, and you are right. But we must come to a result *today* and this can only be one opinion. Let's have a vote, and then we have a temporary solution, until next *time,* when we come together again and have another discussion, and another vote, and then another temporary solution.

However, there is no Muslim moderator of this kind, because in Islam there is no such time, time-as-a-straight line, ongoing time. Why not? Because ongoing time binds time together to an entity, so that there is a unit that can embrace all opinions brought forward, without tolerance, foregiveness and searching for consensus. No voting is possible. With voting there is a majority and one or more minorities. The majority is "right" *for a while,* and the minorities "wrong" *for a while,* until the next vote. The majority opinion is a relative truth, a relative reality, until a "better insight" wins (which need not be better), when one of the minorities becomes a majority. But this thinking in ongoing time and contributions by majority and minorities requires that there are entities that are more than the sum of their parts. It requires the convictions of classic Greek city dwellers, or of Frankish farmers, who at that early time in history had never heard of Judaism or Christianity. Superaddition stabilizes opinion making, while avoiding disunity between the contributors of different opinions.

Islam must have serious difficulties with this, because such a procedure goes beyond the consensus of the *ummah,* re-opens the door of epistemology, establishes opinion-forming units within the *ummah* and thus some form of a federal structure, and entrusts the single Muslim with rendering judgments devoid of the caveat of *Insch-Allah* (God willing). This looks like denying Islam the ability to introduce democracy into the Sharia, or any other form of government using representation, debate, and voting (to use Waldron' words).

It has been said before in the context of the anthropology of leadership that secular totalitarianisms such as Marxism derive their society and cultural control models from their underlying value system:[831] the Marxian use value cannot be discussed, and thus only high-handedly ("scientifically") be filled with contents. This requires an anti-pluralist society led by political dictatorship. The same holds true for nationalist, racist ("blood and soil"), iustum pretium, discursive-competence-defined, "rational" and other debate-removed values. Also Islam, though not a secular mode of thought is exposed to political dictatorship for lack of available, doubt-subjected, debatable and dialog-result-accessible values. Islam, of course, is rich in what is to be called values. But Islamic values are hard to transfer into reality because they cannot be made subject to a Parmenideian judgment or to a Platonic dialog. In Marxism, there is a (Parmenideian) judgment that "use values" *(Gebrauchswerte) a*re just values. This is so because of the concept-immanent inoperationability of use values This inoperationability forces the strongest of the strongmen (the big man within "the top cadres of the metropo-

831 See notes 661 f., above.

lises")[832] to define the contents of the use values.[833] Hence, there is no Marxism without dictatorship.

By contrast, in Islam, there is for reasons of a strictly defined (i.e. non-messiah-qualified and thus not inter-humanly effective) monotheism *no* Parmenideian judgment. There are only competing allegations of truth, good and bad, and esthetics. These allegations have to be weighed against each other and in case of non-agreement bargained about. The strong speäkers have to decide among themselves whose allegation is to be followed. The one with the most bargaining power will win the contest of competing allegations.[834] As long as his bargaining power will not change, he is the leader. Criticism is anti-Muslim. What for Marxism is the emptiness of the use value that asks for a definition monopoly of the top cadres (and their top politicians) in the metropoles, for Islam is the pre-Parmenideian inconclusiveness of opinion forming that asks for political activism. Both is mode-of-thought-inherent and "system-immanent". The main difference between Marxism and Islam is that Marxism operates with fabricated truths using Parmenideian judgments, and Islam with successfully bargained truths outside of, and not pretending to use, the Parmenideian judgments. However, there is always at hand what the anthropologist calls culture change.[835] It occurs steadily, across time. So which characteristics of Islam *would have to undergo culture change* in order to make Islamic democracy a reality? There are at least four points:

(1) Linear *time* with a human awareness of history, present and future, seems to be indispensable. Instead of letting time begin with Mohammed, a.s., and end with the closing of the epistemological "gate" around 300 A.H. or 950 A.D. Islamic time ought to be accessible for perspective observation and historical categorization.[836] Otherwise parliaments in Islamic countries that meet and work on a timely regular basis it cannot be explained. Since these parliaments exist, they are evidence of culture change taking place. Time may be understood

832 Rudi Dutschke, Liberalisierung oder Demokratisierung, Interview with the journal Konkret No. 5, May 1968, 19ff., reprint under the new title "Von der Liberalisierung zur Demokratisierung", In: Klokocka (ed.) Demokratischer Sozialismus, Konkret Extra No. 1 Hamburg 1968, 7ff, idem, Die Widersprüche des Spätkalpitaöismus, die antiautoritären Studenten und ihr Verhältnis zur Dritten Welt, In Bergmann, Dutschke, Lefèvre & Rabehl, Rebellion der Studenten oder Die neue Opposition, Hamburg 1968, 3, 45, 47, 56, 84.

833 See W. Fikentscher,. Zur politischen Kritik an Marxismus und Neomarxismus als ideologischen Grundlagen der Studentenunruhen 1965/69, Recht und Staat Heft 392/393, Tübingen 1971: Mohr Siebeck (with materials); further (non-romantic) literature on the German version of the student revolt of 1968: idem, Rechtswissenschaft und Demokratie bei Justice Oliver Wendel Holmes, Jr., eine rechtsvergleichende Kritik der politischen Jurisprudenz, Juristische Studiengesellschaft Karlsruhe Heft 96, Heidelberg 1970: C.F. Müller; idem (1975 b) 151–222, and (1976) 497–636; Harald Gerfin & Rudolf Hickel (eds.), Karl Marx, Das Kapital, 3 vol –, Frankfurt/Main 1971, Introduction; Klaus Hornung, Protestbewegung und Hochschulreform, 10 Der Staat 357 (1971); Ernest Mandel, Der Spätkapitalismus, Frankfurt/Main 1972; Ernst Theoror Mohl (ed.), Folgen einer Theorie, Essays über "Das Kapital" von Karl Marx, Beiträge von Ernst Theodor Mohl, Werner Hofmann, Joan Robinson, Ernest Mandel, Karel Kosík, Alfred Schmidt, Henri Lefèbvre, Rodolfo Banfi, and Mihailo Markovic, Frankfurt/Main 1967: Suhrkamp; Heinz Schimmelbusch, Kritik an Commutopia, Tübingen 1971: Mohr Siebeck; Kurt Sontheimer, 68er: Eine skeptische Bilanz, in: Die politische Meinung No. 292, March 1994, 64–66; Rudolf Wiethölter, Recht, Funkkolleg zum Verständnis der modernen Gesellschaft, Frankfurt/Main/Hamburg 1967 (four lectures), revised version published under the title Rechtswissenschaft, Funk-Kolleg vol. 4, Frankfurt/Main 1968; 2nd ed. 1971; Zoller (ed.), Aktiver Streik, Dokumentation zu einem Jahr Hochschulpolitik am Beispiel der Universität Frankfurt/Main, Frankfurt/Main n.d. (about 1970): Joseph Melzer Verlag.

834 Lawrence Rosen, Bargaining for Reality: The Construction of Social Relations in a Muslim Community, Chicago & London 1983: Chicago Univ. Press.

835 See Chapter 5 VI, above. The above is a castle-in-the-sky discourse, but at the same time a "negative" checking of statements made before.

836 For details and a discussion, W. Fikentscher (1995/2004), 419–431.

as depending upon the time-creating and time-pervading God, and such time creates trust, and from such trust follows the lack of necessity to bargain truth, morals, and esthetics.

(2) Judaic monotheism, historically the model for Islam, grew to an undisputed religious dogma during the time of the Babylonian exile (597–538 B.C.). The axial-age dichotomy of good and bad on a transnational, comparative scale (replacing the old tribe- and nation-oriented ethical standards)[837] made inevitable a monotheistic God who represents the side of the good. This in turn immediately raised the question of the xource of evil in this world (the question of theodicee). Once the good God was identified as an individual, the question arose whether a human being is an *individual* as opposed to participant of a collective. This search for human individuality is a subject discussed in more than one culture. In the Jewish exile, the synagogue was founded as a membership organization of individuals, replacing the Temple lost in Jerusalem. The issue of theodicee in combination with God's assumed individuality created the image of the suffering Servant of God. Thucydides developed the theory of the *polites* as the individual members of the Greek city state,[838] in Ezechiel 18 individual guilt is treated as the appropriate way to punish humans, the Greek tragicians dwelled on the subject *in extenso,* and Deutero-Isaiah or (if he existed) Trito-Isayah confronts the Jewish nation with the individual believer (Isaiah 63.7–64 12).

In sum, one of the most exciting facets and maybe the very essence of the axial time is this: The increased contact between cultures leads to a comparison of the ethics commanded by national spirits, polydaimonisms and polyhteisms. The end result is a worldwide standard of good and bad. In the world of spirits and gods, the same comparison leads to monotheism. Then, the monotheistic god is identified with the good, and this is the end of the pre-axial-time gods who are both good and evil. Moreover, the good God, because of his ethical quality, besides his other qualities, takes the features of an individual. This individualistic monotheistic god is necessarily reflected by human individualism, and this is the end of a merely collective responsibility and culpability. For human individualism, Ezechiel 18, Thucydides' oracles ascribed to Pericles, and the Greek tragedies are relevant texts. The individualization ofguilt and responsibility has a double effect: It exonerates the tribe, clan, town (Slavic: *mir*), lineage, and family. But it places culpability on that ("newly invented") individual. This creates the issue of theodicee of the good God: Who is causing wordly evil? This calls for an individualized good God who takes care of the evil. While the non-monotheistic Greek leave it at the Tragic fate of humankind, monotheistic Jews believe in the suffering Servant, identical with God and of human nature at the same time: He is the messiah. Whether this Servant-messiah is a part of the Jewish exilant population or a single person can be left open. Thus, Deutero-Isaiah's repeated announcement of a personalized Servant of God related to himself. Five centuries later, Jesus of Nazareth resumed this relatedness. Therefore, this Jesus must be seen in the context of the search for individuality, by mirroring the individual monotheistic God in the human sphere.[839] The Servant of God is part of the finding of individual-

837 See Chapter 11 IV., below.

838 W. Fikentscher (1995/2004), 184, 358, 371; and in this book Chapter 5 III 3, and 7 (a).

839 Individualization is no less involved if, as some authorities think, the Servant of God is a circumscription of a group of the exiled Jews who hoped for a return to Jerusalem and were willing to suffer disadvantages for this from Babylonian and Jewish camps. It is not unusual that the image humans make of their god or gods is reflected in a prototype of a human being. This prototype serves as a kind of mediator or messenger of god or gods to humans. Prometheus, Herakles, Hiawatha, coyote, Big Brother and other "tricksters" seem to be a necessary part of the inventory of human need for supranaturality. The messiah may be the intermediary in a monotheistic religion, as the halfgods of Greek and Roman polytheism came to be intermediaries of their time. Mohammed, å.s., wanted to be seen as a mere human, not as a son of God. But popular belief raised

ity under the aspect of monotheism, comparable to Thucydides' search for Athenian individuality in a non-monotheistic, polytheistic environment.

Islam shares strict monotheism with Judaism. It cannot escape the reason why a monotheism of the good God was necessary for a Zoroastrian good-bad dichotomical world in which animism ("the Gods of Babylon") had become doubtful. In contrast to Jesus, Mohammed, a.s., never wanted to be identified as "God's son" and at the same time as a "Son of Man". Rather, he insisted to be no more than a human prophet – the last in a series of God-sent prophets. The reverence shown to the Prophet proves that the acceptance of an individualistic monotheistic God induces believers to look for such an outstanding messenger, and – more important:- to look for human individuality.[840] Thus, the denial of a messiah in Islam has logical consequences: the denial of personal culpability and the collectivity of guilt and responsibilities. Allah's infinite almightiness prevents individual humans to act in direction of self-set – albeit doubtful – goals: hence the difficulties of cooperation and cooperation-directed dialog, leaving a felt certain lack of opportunities for cooperation and communication. But *jihad* fills the place.

In his book on the possibilities of an Islamic democracy, mentioned before, Khaled Abou El Fadl deplores that Islam, as El Fadl thinks in the middle of the 19th century, "turned" from an individualist to a collectivist religion.[841] It will be remembered that El Fadl declares that in the middle of the 19th century there was no explicit reason for Islam to become a collectivist religion, and that he assumes that the change from individualism to collectivism in Islam had something to do with France' victory over Egypt and a general feeling of being in need of a differentiation from the West (something which could be called an intended religious dimorphism). The derivation of the belief in a messiah from axial-age demands – as posited in Deutero-Isaiah (Isaiah 40–55) – demonstrates, that Islamic collectivism is basically rooted in the Prophet's, a.s., denial of a messiah, rather than in an anti-Western caprice of the 19th century. El Fadl overlooks that the concept of the messiah is not an offense against monotheism, but a consequence of the axial-age reduction of animism and polytheism to monotheism and a corollary individualized understanding of god-human relationship.

To this one could add a point of simple psychology: it may be a relief for anyone not to be identifiable by individuality.[842] However, who would not want to eat the cake and have it, too: collective, not individual, culpability, but monotheistic grace? Seen against the historical background of the axial age, this calculation cannot go but wrong, because apart from the fact that the participant of a shame culture is hardly able to render a Parmenideian judgment – one does not have to stand for something –, nobody can bea participant of a shame culture and be responsible to a monotheistic God at the same time.

The culture change toward collectivism, as assumed by El Fadl, would of course have to be made undone if Islamic democracy is to be accepted, because – as Thucydides brillantly ex-

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him to an elevated position. The Servant of God in Deutero-Isaiah may have both attributes: the position of the intermediary, and that of the active but suffering individual in front of a monotheistic God that is good. See also Chapter 5 note 326 above.

840 Goethe: in his gods depicts man himself *(In seinen Göttern malt sich der Mensch);* cf. the opening lines of the present chapter.

841 At 28f., 126f.

842 Cf., Bierbrauer's result gained from converts to Islam, see note 362, above. See also the report on his *hadj* (pilgrimage) to Mekka in Malcolm X's autobiography, Malcolm X & Alex Haley, The Autobiography of Malcolm X, New York 1965, re-issue 1993: Bantam Doubleday, where Malcolm X describes the relief that flows from a feeling of being carried along by a indefinite number of pilgrims, and just be a grain in a huge pious crowd. This has nothing to do with irresponsibility, it is a form of being open to God.

plicates – democrats are *individuals* and members equiped with rights and duties who are tied together by a pledge-of-faith in the *polis* (or Frankish) style to form superadditive units. Within those units, members put forward and defend their judgments (see below 5.). Also, members have a right to quit ("exit") the superadditive unit.

Islamic collectivism means a turn against Judaic (Ezechiel, Chapter 18) and, following Judaism, Christian conviction of individual culpability. Lacking *individual* culpability before God and fellow humans, personal responsibility for one's own behavior and acts is different. This makes it difficult to hold Muslims personally responsible, for example in British courts dealing with Islamic youth gangs,[843]or Spanish courts dealing with Islamic terrorists.[844] Islamic suicide bombings have their philosophical roots here: the actor cannot be held accountable.

Shame cultures are difficult to deal with by guilt cultures for two reasons which reinforce each other in their force: Individuals cannot be held responsible, and the groups of persons which *can* be blamed are the carriers of feud and will seek revenge from an opposing group – yet to be defined ethnocentrically. This is the explanation for Islamic fundamentalist terrorism. God's chosen people to whom all the glory of the world is promised, the Muslims, suffer and culturally seem to lag behind the other modes of thought. Revenge must be taken against those others.

A (re-)turn to Muslim individual responsibility and culpability – from shame culture to guilt culture – would make a huge difference. Besides getting in line with other individualist and personal culpability-positing modes of thought, a recognition of individuality and of individual judgment would open, as a corollary, the distinction of private and public sphere (Thucydides: *oikos* and *polis*),[845] the possession of inalienable rights, and a path to fight corruption.

(3) This implies another culture change to be performed, the one from tolerance of the contents of different opinions (in the consensus seeking assembly) to tolerance and respect of the frame and the procedure within that frame for "representation, debate, and voting" (in Waldron's terms). "Keep thinking the way you think, but respect that you have been outvoted, for the time being, until next time when we might need your point of view. What needs respect, in the long run, is not our or your opinions opposing each other, but the framework, the entity, that enables us to govern ourselves" (loc. cit., note 339, above).

(4) It was remarked before that Muslim philosophers, in Islam's forming years, did not have much chance to read Pre-socratic or Platonic writings since they were largely not yet rediscovered.[846] Only Plato's dialogs on the Laws, the Sophists, Timaeus, and Republic, and some Neoplatonic texts are said to have been available. "Plato seems to have been more an icon and an inspiration than an authentic source for Islamic philophers".[847] The discovery of the individual and its judgments is a Pre-socratic achievement, but it can also be found in Deutero-Isaiah. A good Muslim will not render a Parmenideian judgment on "this is true", or "good", or esthetically acceptable". The *"Insch-Allah"* is in between. Nor does a good Muslim know the meaning of a Platonic dialog in which A and B participate to learn more about C, because a Platonic dialog consists of Parmenideian judgments (see Chapter 1 II. 4a., above). Culture

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843 Newspaper reports on March 19, 2007.

844 following the terrorist attacks on Madrid suburb trains of 2006.

845 W. Fikentscher, Oikos und Polis und die Moral der Bienen, eine Skizze zu Gemein- und Eigennutz, Festschrift Arthur Kaufmann, Heidelberg 1993: C.F. Müller, 71–80.

846 see, e.g., Tad Beckman, Plato, Notes, http://www4.hmc.edu:8001/humanities/beckman/PhilNotes/plato.htm.(visited March 2008).

847 David Burrell, Platonism in Islamic Philosophy, http://www.muslimphilosophy.com/ip/rep/H001.htm (visited May 16, 2008), with references.

change may mend this, once historical research is reopened. It should be no sacrilege against God's supreme power, sovereignty, and compassion to make propositions. A proposition made with the intent to subjugate all other propositions may be a sacrilege, but not making them and subjecting them to a vote for given period of time. Cartesian doubt is a gift, not a curse. The theory of the "greater *jihad*" as developed by the Prophet Mohammed, a.s., on the occasion of the military and diplomatic conquest of Mekka in 630 C.E. as a virtue of fighting against oneself and thus of self-restraint, may point the way to reflective, discursive, and explicit thinking and thus to an Islamic kind of Cartesian doubt.[848] Perhaps this can also be interpreted in the Parmenideian sense of developing a self-critical distance to what a person thinks, comparable to the aforementioned interpretation of Islamic "greater jihad".

(5) After all, can Islamic society be human-rights democratic (a question Eisenstadt does not expressly ask but may imply[849])? The answer may be yes, at the price of some culture change in the direction of the Greek Tragic Mind, or of the acceptance of inalienable values to be derived from Islam including the inalienable freedom to leave Islam. Both alternatives would also require the acceptance of time as a straight line with its religious and behavioral implications.

As to *foreign relations* of and to Muslim countries, the aforementioned anthropological suggestions for Islam apply respectively. The radical division of the world in *dar-al-Islam* (world area of submission) and *dar-al-harb* (world area of chaos, turmoil) does not admit a basic relation of trust *(fides)* between the sovereign nations of the world, whether organized in form of the UNO, or not.[850] Parallelely, a friction exists between ongoing time conceptions in most non-Muslim countries and non-ongoing time conceptions in Islamic-countries. Consequently, from the Muslim point of view, ethnocentrically, no propositions in the Parmenideian sense can be extended to other nations, and time frames such as deadlines are meaningless. Therefore, from the non-Muslim point of view, again ethnocentrically, irritations may result whenever statements prove to be "unreliable" and time tables or deadlines are not observed. These irritations can be avoided after an advance clearance of the mode of thought in which contacts between dar-al-Islam and dar-al-harb countries are to be carried out. Absent such advance clearances, culture change seems to be the only way.[851]

VIII. An anthropological lesson for the introduction of democracy to a formerly undemocratic country

On a global scale, the present time shows a number of attempts to introduce democracy in countries that for diverse reasons (history, tradition, colonization, conquest, etc.) formerly were not democratically governed. Whether this is possible can be predicted: Democratization is possible only in countries in which a sufficient number of people accept the principle

848 Correspondingly, in Buddhism, the seventh and the eighth step of the "right path" to salvation concern "right thinking" and "right reflection" may open this way to legitimate doubt.

849 See Chapter 5 IV. 5., above.

850 For the *fides*-conception underlying the conception of international law since Hugo Grotius, see W. Fikentscher, De fide et perfidia, Der Treuegedanke in den "Staatsparallelen" des Hugo Grotius aus heutiger Sicht, Sitzungsberichte der Bayerischen Akademie der Wissenschaften, Phil.-Hist. Klasse, Heft 1, München 1978: Commission C.H. Beck.

851 A sub-issue of this is the different attitude toward reciprocity in Muslim and non-Muslim countries. Factors of reciprocity, such as mutual deterrence, *do ut des,* or tit-for-tat, often do not work in contacts to Muslim countries because of their leaders' sometime extreme reliance on monotheistic destination. This adds to the described volatility in foreign relations to Muslim countries. The issue of reciprocity may serve as a starting point for the next chapter.

of superaddition. Without being able to perceive that the politicical whole of the country is normatively more than the sum of its parts – the citizens –, winning a majotity makes no democratic sense because it leaves the minority and its supporters out of sight as members of the whole. Consequences of such an oversight are protests of outvoted citizens, riots, suppression by members of the "majority", boycotts by those who are being declared the minority without being a minority because the whole is missing, and other disturbances. Recounts cannot help much either. First, the entity must be defined, and this cannot be done without substantial internalization of that entity. Contemporary examples are Iraq, Afghanistan, Pakistan, Kenia, and Zimbabwe. The establishment of *rechtsstaatliche* conditions might be an interim help (the rule of law in the Euro-Continental, not in the Angloamerican sense, and this means including general accountability of government as a constitutional principle). Living under a common constitutional law may prepare the internalization of a superadditive unit. For this, democratic elections are not necessary. In such a situation it is better not to start with an election, but with law.

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Chapter 10: Reciprocity, exchange, gifts, contracting, trust (the anthropology of commutative justice)

The anthropology of law borders at the anthropologies of religion, politics, and economics.[852] Interdisciplinary work in these three fields is essential. In the anthropology of economics, this raises the issue whether to approach the overlapping areas from the economic or the anthropological side. This chapter argues in favor of the latter, reporting on (I.) an overview of the mainstream theories and ensuing remarks and, (II.) because of their special importance for modern political tasks, the anthropology of the market and of competition, including the anthropologies of giving thanks and corruption. As in all chapters, a bibliography closes the chapter (III.).

I. Formalism or Substantivism? Two Determinisms, the Role of Empiricism, and a Farewell to Neoclassics

The approach to economic anthropology chosen here is neither psychological, nor sociological, nor sociopolitical. It uses of the tools of micro-economical and (to a lesser degree) legal empirical anthropology. Empirical anthropology (in contrasted to philosophical anthropology) is a social science divided into cultural and biological anthropology (see Chapter 1). Both these branches research and define the conditions of the human being in a comparative way, and in their mutual interdependence.[853] For example, regarding intellectual property and competition, the biological branch researches possible innate predispositions, and the cultural branch the various cultural shapes which intellectual property and competition may take in legal-economical reality. Underlying the economic issues of anthropology are two general human themes: the liberty to decide what to do with one's life (= the *freedom to;* for instance, but not only, in the economic sphere), and – when this liberty has produced retainable results – the liberty to own (= the *freedom from* interferences).[854] If these two themes build on innate human universals, in order not to be counterproductive law has to meet certain biological functions.[855]

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852 Chapter 10 on legal aspects of tribal and modern anthropological economy will address, among other topics, results from a recent monographic study in economic anthropology, and from two related articles. The monograph is W. Fikentscher, "Culture, Law and Economics: Three Berkeley Lectures", Berne & Durham, NC, Stämpfli & Carolina Academic Press (2004). The first related article is "Markt oder Wettbewerb oder beides", GRUR Int 9/2005 (FSR. Krasser), 722–731. The second article is "Intellectual Property and Competition – Human Economic Universals or Cultural Specificities?: A Farewell to Neoclassics, 38 IIC 137–165 (2007) which was a lecture at the Conference "Intellectual Property and Behavioral Science", co-sponsored by Gruter Institute for Law and Behavioral Research, Portola Valley, California/USA, and Max-Planck Institute for Intellectual Property, Competition, and Tax Law, Munich, August 28/29, 2006, abbr. version in http://www.bepress.com/giwp/default/vol4/iss1/art1; the lecture was also presented, with shifting focuses, at Arbeitsgemeinschaft Humanethologie, Max-Planck-Institut für Verhaltensphysiologie (i. L.) und Max-Planck-Institut für Ornithologie, Andechs, 17.–18. 6. 2006 ("Eigentum und Wettbewerb: Ethnologische Universalien oder kulturelle Besonderheiten?"); Ramapo College of New Jersey, Mahwah, New Jersey/USA, School of Contemporary Arts, November 28, 2006 ("Intellectual Property and Competition: Indigenous Law Between Universal Norms and Cultural Relativism" – a special thanks goes to Mark Howenstein and his students –); Visions for Applied Knowledge, Andechs Conference of the Center for Human Sciences (HWZ), University of Munich, 5. 12. 2006 ("Empiricism and Models"). The following lines are a condensed and revised version of this article.

853 W. Fikentscher, Law and Anthropology, Reader Law 265.7 & LS 190, University of Calfornia School of Law at Berkeley, Spring 2000, 2; cf., idem, Modes of Thought.(1995/2004), 77, 91.

854 On the tensional relationship of these two basic economic interests W. Fikentscher, Wettbewerb und gewerblicher Rechtsschutz, Berlin 1958: C. H. Beck.

855 See Chapter 7 IV ; Léopold Pospisil, Le droit comme concept opérationnel fondé empiriquement, 13 Droit et cultures, Revue semestrielle d'anthropologie et d'histoire 5–23 (1987) at 17.

The micro-economical and legal approach raises a preceding issue: (1) are there economic laws and other generalities that apply to all cultures, and therefore may claim to be observed in the first line, such as the laws of supply and demand, limited resources, unlimited needs, rational decision, utility maximizing, marginal utility, cost, perfect competition and market, property rights, and acting under risk and uncertainty, before there can be a cultural specification; or, (2) do we better start ascertaining the cultural variations of doing business (including the handling of material and intellectual property and of competition) before one can arrive at economic and legal generalities? The issue is the main methodological topic in economic anthropology.[856] In this debate, the former position, moving from transcultural economic generalities (such as the doctrine of marginal utility) to cultural variations later, received the name "formalism".[857] The latter position, starting from the wealth of cultural variations and empirically looking for common points of view and points of contact for comparisons, is called "substantivism".[858] Both are discussed below.

1. The formalist argument

The strength of the formalist argument rests upon the success of *neo*classic economic theory in the second half of the 19th century. Neoclassics were preceded by classical economics (Adam Smith (1776), David Ricardo (1817), Th. R. Malthus, N. W. Senior, J. Mill, J. St. Mill, J. B. Say, etc.), a theory that explains *observed* economic behavior by researchable rules of general application. After 1870, the writings of Gossen (1854), W. S. Jevons, L. Walras, C. Menger, A. Marshall, F. Y. Edgeworth, J. B. Clark, V. Pareto) and others turned economics into a science that *postulated* economic behavior under certain fixed theoretical requirements.[859] Such requirements are marginal utility, rational choice, perfect competition, perfect market, property rights, and other "generalities".[860] The formalist camp finds the neoclassic economic concepts and laws to be so strong and convincing that they it applies them to preindustrial societies as well.

2. The substantivist answer

The substantivists refer to the many forms of economic behavior which, in terms of Western economic science, can only be labeled ineffective and irrational, such as potlatching or circular gift-giving in the Kula style.[861] To quote one voice: "Western economists assume that

856 Martin Rössler (1995, 2005); Jochen Schumann (1992); cf., Harold K. Schneider (1974); Hertz (1998), 21 f. The issue is not confined to economics. Since Durkheim, the alternative between model-examination and cultural empiricism conformity pervades all social sciences and humanities; cf. Jerry D. Moore (2004).

857 Chief protagonists: Raymond Firth (1952; 1967); Melville Herskovits (1952); Harold K. Schneider (1974); the leading German economic ethnologist Martin Rössler shares the formalist view because "economy follows always and everywhere certain inherent patterns of regularity". However, Rössler also stresses the frequent shortcomings of neoclassic economic theory to do justice to the economic specificities of many preindustrial ethnic groups. Nonetheless, Rössler holds the basic ideas and laws of neoclassicism in principle applicable to all economies in the world.

858 Chief protagonists: Bronislaw Malinowski (1920; 1922); Karl Polanyi (1957); George Dalton (1961; 1965); Marshall Sahlins (1969; 1974). Why the opposing doctrines received these labels cannot be discussed here, see, e. g., Rössler (2005), 33 ff. Raymond Firth and Melville Herskovits took the lead of the formalist group. Rössler does not discuss this issue in terms of universals v. specificities. But asked whether these "inherent patterns" of regulaties amount to universals, Rössler's answer would probably be yes.

859 Rössler (2005), 34 ff.; Gregory (1982; 1997); Appadurai 1986; H. K. Schneider (1974).

860 This change of paradigms is also called the "marginalistic revolution", for details see, e. g., Blaug 1985, Boland 1985, Rössler (2005), 35–45, 128–131.

861 B. Malinowski, Kula: The Circulating Exchange of Valuables in the Archipelagoes of Eastern New Guinea, 20 Man 97–105 (1920); Rolf Ziegler, The Kula Ring of Bronislaw Malinowski: A Simulation Model of the

scarcety is universal, which it isn't, and that in making choices, individuals try to maximize personal profit. However, in non-industrial societies … people maximize values other than individual profit. Furthermore, people often lack free choice in allocating their resources".[862]

The other neoclassic tenets show significant flaws when applied to the wealth of economic realities, even beyond Rössler's doubts: The laws of supply and demand do not work in moneyless societies. As Kottak remarks, resources are often unlimited. Needs, always unlimited in neoclassics, are often limited. Rational decisions are lacking in ceremonial exchanges. In turn, utility maximizing and the concept of marginal utility often yield to what appears as irrationality. Cost calculation is missing whenever ideologies prevail. Perfect competition and perfect market exclude rivalry and are therefore opposites of competition and market.[863] Property rights may take very different shapes and lack a coherent theory of cost and participation.[864] Acting under risk and uncertainty is just as culture-specific as are societal structures.[865]

Regarding the interface of economics and anthropology, the alternative between the formalist and the substantivist position does not only affect a basic approach to economic anthropology. This alternative touches upon a general societal and science-theoretical attitude towards the social science of economics as such. As explained in more detail elsewhere (W. Fikentscher 2004, XV–XVIII), contemporary public interest in economics is mainly directed at neoclassic model thinking, and not at empirical, including cultural, observation and evaluation. This is reflected by the policy of selecting the Nobel laureates in economics during the last decades. Representatives of neoclassic model-theoretic deductionism prevailed in receiving Nobel prizes. The policy supported the catchword of "Chicago School", a version of A. v. Hayekian paradox-free unfettered "discovery liberalism", in contrast to the Franz-Böhmian freedom-paradox-avoiding "sustainable liberalism". When this Nobel prize policy reached its limits, it turned to game theoretical achievements – again model-oriented. Then, side fields of economics were acknowledged (history, psychology) but even here rewarding original deductive *model* thinking dominated. A "substantivist" researcher whose "lab" is real economic life, empirically observed and inductively generalized, can be found among the laureates nor – as far as can be seen – among those who consult United Nations and other pertinent organizations. It is the return to classic economic empiricism which is overdue. It is time to return to economic realities, empirically to be researched, including cultural-economic realities. Instead of fittingness of models, appropriateness for humans is the core issue of today's economic science (W. Fikentscher 2007, 144–149).

3. Two determinisms in conflict

The main incongruency between economic neoclassics (formalism) and economic ethnology (substantivism) lies in the clash of two determinisms: Neoclassic economy does not aim at explaining observations of economic occurrences, but at establishing a *model* for a given eco-

Co. Evolution of an Economic and Ceremonial Exchange System, Bavarian Academy of Sciences, Philos.-Historical Class, Proceedings *(Berichte)* Fasc. 1/2007, Munich 2007: Verlag der Bayerischen Akadamie der Wissenschaften, Commission C. H. Beck. See also note 292, below.

862 C. Ph. Kottak, 4th ed. 1987, 144 (not contained in later editions). For other substantivists, see note 861, above. My own position in Culture, Law and Economics, Berne & Durham 2004, is substantivist, without giving detailed reasons. For literary attempts – none of them having been convincing – at bridging the opposing views, see, e. g., Rössler (2005), 128–131.

863 W. Fikentscher, Culture, Law and Economics (2004), 119–178, with references.

864 See, e. g., Rössler (2005), 97 f. on the one hand, and W. Fikentscher, Culture, Law and Econimics (2004), 37, 185, on the other.

865 W. Fikentscher, Modes of Thought (2004), 183, and at the different modes of thought.

nomic behavior, namely, rational, utility maximizing, cost conscious, etc.[866] Thus, neoclassics deductively and normatively postulate and study model-conformity of actions of an ideal type of economic agent, called *homo oeconomicus,* in accordance with economic general rules. Neoclassics are not relevant for reality, and defy empiricism.[867] Economic ethnology, on the other hand, is determined culturally by observable economic behavioral specificities, and has no *raison d'être* but empiricism. These two determinisms oppose one another, and meeting halfway miss each other. This may be a reason why conciliatory theories are so difficult to find.

4. The role of empiricism

The decision between these two determinisms depends on the role to be assigned to empiricism. There is a debate on generalities and specifities, dating back to medieval times, on *universalia*. At the timehe issue of this debate was whether universal concepts such as grace, sin, spirit, family, people, property, etc., contain a thing that in reality exists, or whether universal concepts represent only designations for summed up bits and pieces, specificities, without real life. The first position was called universalism, the second nominalism. Since the Church taught, concepts of universal nature, universalism was methodologically convenient for its work. Nominalism had the reputation of criticizing religion.[868]

Famous *universalists,* also called *realists* because of the assumtion of universals existing in reality, were William of Champeaux and Duns Scotus. Both insisted on a conception introduced to Christianity by St. Augustine that universals exist even before they become visible *(universale ante re)*. The empirical element of this line of thought consisted in the admonition to check and judge the truth of the existing ideas. The most renowned *nominalist* was William Ockham, a skeptic of *realiter* existing universals, and as such an empiricist *(universale post rem)*. Abélard and Thomas Aquinas developed a mediatory theory holding that universals exist but only to a degree determined by the investigator, and the act of identifying the contents of the concept *not to be detached* from the universal to be known *(universale in re)*. This third, mediatory, theory carries Aristotelian *entelechia,* inherent purposefulness, into the knowing of universals and is thus in conformity with other Thomist thinking. But it is not empirical.[869]

After pre-Socratic theory of judgment, Socratic belief in the existence of ideas, and Platonic dialog as a means of interpersonal probing ideas with the aim of assertion and acceptance, Aristotelian *entelechia* was an animistic atavism harking back to pre-axial-age belief in soul-and-meaning carrying things. It became of historical importance that both Islam and Thomism learned from Aristotle, not from Parmenides and Plato. Tad Beckman writes: "The later dialogues (scil.: of Plato) take up subjects of natural science. Ironically, since this was the side of Plato's writingthat most appeal to the Arab scholar(s)/scientists, this was the Plato that passed through centuries of Arab translation and commentary and, from there, into 13th century Europe along with Aristotle. It was not until the 16th century that Europeans uncovered the true diversity of Plato's thinking".[870]

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866 Rössler (2005), at 36f., 39, 71. Obviously, present-style globalization seems to support neoclassics, and vice versa.

867 Rössler (2005), 37f.

868 In recent times, the *universalia* debate has regained philosophical importance in connection with issues such as rationalism, skepticism, empiricism, and relativism, see W. Stegmüller, Glauben, Wissen und Erkennen: Das Universalienproblem einst und jetzt, 1965, 1974.

869 Cf., W. Fikentscher, Methoden des Rechts, I 365ff., 404ff.; II 413; III 8, 10, 331; IV 454, 485.

870 Tad Beckman, Plato, Notes, http://www4.hmc.edu:8001/humanities/beckman/PhilNotes/plato.htm. On superaddition, see III., *supra*.

Other cultures did not develop these ideas and practices. In such cultures we will find a reluctance to use doubt and dialog, a fact, that, e.g., in exchanges between Christians and Muslims should be considered. Since market is a dialog on values, and dialog requires its participants to engage in Parmenideian judgments about the object of the dialog in a superadditive manner, Islam uses a different concept of market than the West.[871]

The Islamic mode of thought shares this foreignness to Platonic dialog with other modes of thought. The German foreign minister (1961–1966) Gerhard Schröder was once asked by Russian Premier Minister Kosygin: "Can you tell me, what is the meaning of opposition?" Schröder answered: "The opposition is the government of tomorrow". This was no wise answer because Kosygin now had to fear opposition as a tool of counterrevolution and an obstacle to good government. What both politicians did not understand is that all government wants to govern "right", but that this "right" governing follows from dialog, not from a single opinion. From the incomplete insight into the truth of things it follows that one opinion alone almost certainly cannot be right. In many countries and their cultures – Italy, Spain, Iran, Argentina, Chile, Nicaragua, Venezuela, etc. – the only alternative is between Don Camillo and Peppone. The choice is between being tied to the apron strings of infallibly dictated religious values and of infallibly dictated kadre defined use values. Something like the alternative between being tied to totalitarianism on the one hand and human liberty to think and freely opt for values on the other has not reached public consciousness. Human minds are shaped for Platonic dialog, not for Aristotelianism, because the mammal brain is built for the evaluation of choices, not for the belief in the essence of things.

As already mentioned in brief, Prince Asfa-Wossen Asserate, grand nephew of the last Ethiopian Emperor Haile Selassi wrote in an article, entitled "I have a Dream", in ZEIT Magazin No. 40 of September 27, 2007:"I dream that we include the word "opponent" in our language. Because we do nor know this word in Amharic. I does not exist in anyone of the 2,000 African languages. We have only one word for "friend" and another for "enemy", in between there is nothing. Therefore, opposistion is synonymous with hostility". An absense of superaddition cannot characterized better.

Thus, the background to the three theories of the medieval *universalia* debate is the degree of permission to empirically check truth and veracity. The medieval philosophers, when dealing with the universalia problem, were looking out for freedom of judgment founded on empirical research. Therefore, a historical argument leads to the result that in view of the two conflicting determinisms empiricism, and thus the ethnological – cultural – determinism wins over the model-economical one. This facilitates answering the question of modern universals: The starting point is ethnological empiricism, hence human universals have to be gained by induction. They are not preconceived generalities. The issue whether property and competition are human universals or cultural specificities may best be tackled from the empirical ethnological side.

The next question is: How can human universals empirically be ascertained? And more precisely in the present context: Are tangible and intellectual property among these universals?

5. Where Neoclassic Economics Fail

The empirical approach to a decision between universals and specificities raises a serious conflict with neoclassic economics. It is not only empiricism as being the heritage of a medieval dispute about knowing things that invites us to follow the empirical path. The medieval con-

871 More in W. Fikentscher (2004), 212–225, with authorities.

troversies lie way behind now-a-days' issues of philosophy and the humanities. All the more, they are extraneous to modern theories of economics and hardly mentioned at all when there is talk of epistemological alternatives.

Yet, empiricism is a backbone of modern epistemlogy as much as it has been since the musings of pre-socratic philosophers. Parmenides' teachings point to what today is Western (Greek-Judaic-Christian) thinking: that here is a subject, out there an object, and that both are connected by a third, to be called thinking. To that subject is given the chance the option of a judgment based on reasoning: "this is true because …", "this should be so because …", or "this is beautiful because …" Truth-related, moral, and esthetic judgments are the three propositions a human being can render, and each of these three judgments requires critical (and thus time-related) observation. This three-step process subject – thinking – object implies an activity of checking and probing – always against a background of doubt. It is called empiricism. Empiricism is not just checking reality against a preconceived model. It is observation in preparation of generalities, and an indispensible corollary of science, including the science of economics.[872]

The opposite of empiricism is the deduction from preconceived models or ideal states. Two pairs of distinctions should not be confused: Firstly, there is universalism vs. nominalism, a distinction focusing on the belief or disbelief in the existence of general concepts. Secondly, there is the distinction between empiricism vs. deduction from models, focusing on whether judgments are made by inductive concluding from observations or deductive applications of models. Arguably, defensible are the following four positions: empirical nominalism, model nominalism, empirical universalism, and model universalism. The approach chosen in this book is empirical universalism, in the anthropology of economcs, and in general. This position conforms to "modern economy", but not to "neoclassic economy".

The early modern economists *were* empiricists in deed. Adam Smith, David Ricardo and the other theorists mentioned above observed economic facts and drew their conclusions from such observations. The marginalist revolution contributed to defining ideal economic states (perfect competition, perfect market, marginal utility, *homo oeconomicus,* utility maximizing, antitrust "more economic approach", applying statitistcs instead of the law, non-time-related efficiency, etc.) and compared economic reality with them. Utility marginalism became a center piece of neoclassic economics. Economics became a reality-removed, time-removed, postulative theoretical program. Empiricism did not disappear at all, but was downgraded to an instrument for proving that reality did not meet the predefined model standards.[873] However, this methodological syncretism mixes two incompatible standards: inductive conclusion based on empirical observation against deductive derivation from non-empirical prescript. From postulative behavioral programs one cannot gain an economic theory that describes reality.

This is not the place to repeat the long list of shortcomings of neoclassic economics: non-competitive concepts of market, submarkets, and of competition itself; assumptions of market anonymity, misjudgment of market shares and their proof; misguided theory of socalled market failures; mistaking potential competition and contestable markets; misjudgment of substitutability, of "adverse selection", and of appreciability of monopolies and less incisive re-

872 On a more modern, quite similar version of this three-step process, based on *sola gratia,* see René Descartes, Meditationes de prima philosophia, German transl., R. Descartes, Meditationen über die Grundlagen der Philosophie, neu herausgegeben v. Lüder Gäbe, durchgesehen v. H. G. Zekl, Hamburg 1960: Felix Meiner Verlag, e. g. in the summary on p. 29, lines 32–39.

873 To give only one example from recent times: Frank Trosky, Heterogene Erwartungen auf dem Geldmarkt, Berlin 2006: Duncker & Humblot.

straints of competition; disregard of the factor time; unclear role of property, of intellectual property protection, and of private claims in market law; general unusability for national and international antitrust (including world trade) evaluations and policies (such as the relationship between "competition" and "trade" in WTO and ICN), deregulation, consumer, small business, and unfair competition law policies); inability to explain the role of collective goods in a free economy; mistaking the protection of free and fair competition as "paradoxical" – the long list of shortcomings of neoclassic economics ends about here.[874]

Some points of minor importance could be added, but there is at least one more reason worth mentioning why neoclassic economics run aground when exposed to the demands of practice-oriented economic theory and policy. The difficulty follows from economic needs and practices in less favored nations such as developing countries and countries which border on economically strong neighbors. Examples are Nigeria's problems with big oil corporations, Indian reservations whose peoples' traditions and skills are exploited by outside businesses, Ukraine's dependence on Russian natural gas, and Canada's general economic dependence on the US.

The legal protection of economically weaker partners poses well-known issues. In the areas of intellectual property protection and unfair trade practices, it has been proposed, as a consequence of the theory of the individual market,[875] to let the plaintiffs of the weaker economies resort to their own local courts which, jurisdiction assumed, apply their own laws and legal principles and ideas, and let the plaintiffs, if successful, try to get titles of execution granted by the courts of the more powerful nations.[876] There is no reason why this local-court-and-local-law approach should not work in antitrust matters in the same manner.[877] Defendants in the economically stronger countries will ask their courts to block transborder rules of conflicts on transborder-recognition of judgments. However, in general, courts are reluctant to rely on the public policy (or *ordre public*) defense against transborder executions when concepts and values of law are involved that bspeak in favor of the plaintiff, such as property protection, free and fair competition, trust, reliance on a given promise, equal treatment under the law, non-discrimination, due process, etc. Reluctance gets even stiffer when these concepts and values have found recognition in international instruments such as the UN Charter, the Human Rights Declaration, WTO, or TRIPS.[878] Law's efficiency lies in its decentralization execution by invoking public policy (lack of mutuality will not work).

What makes transborder effects of local legal protection so convincing as a test is the general idea of law behind the claim in question. Reaping where one has not sewn, or abusing a

874 Details of that "list" and reasons are contained in W. Fikentscher, (2004), 134ff.; idem, Markt oder Wettbewerb oder beides?, GRUR International 2004/9 (Festschrift Rudolf Krasser), 727–731; idem (2007).

875 W. Fikentscher (2004), 119–178; idem, Mehrzielige Marktwirtschaft auf subjektiven Märkten: Wider das Europa- und das Weltmarktargument, in: Immenga, Ulrich u.a. (Hrsg.), Festschrift E.-J. Mestmäcker, Baden-Baden 1996: Nomos, 567–578.

876 W. Fikentscher, Geistiges Gemeineigentum – am Beispiel der Afrikanischen Philosophie, in: Ansgar Ohly *et al.* (eds.), Perspektiven des geistigen Eigentums und Wettbewerbsrechts, Festschrift Gerhard Schricker zum 70. Geburtstag, Munich 2005: C.H. Beck, 3–18. Examples used in this article are taken from African tribes, Australian aborigines, Zuni Pueblo, NM, and the Hopi Nation.

877 W. Fikentscher, Die Rolle des Marktes in der Wirtschaftsanthropologie: Marktorganisation und das globale Wirtschaftsrecht, in: Christoph Engel & Wernhard Möschel (Hrsg.), Recht und spontane Ordnung, Festschrift für Ernst-Joachim Mestmäcker zum 80. Geburtstag, Baden-Baden 2006: Nomos, 199–230.

878 A recent example of such reluctance: OLG Naumburg of Feb. 9, 2006, WuW 2006, 932–936, where service of a US American antitrust class action for treble damages was granted in Germany and the public policy defense raised against it by German defendants was dismissed although German law does neither know class actions in comparable cases, nor treble damages at all.

monopoly are practices that meets with disapproval in many jurisdictions, Nigeria, Zuni, Hopi, Ukraine, Canada included. Thus, the protection granted against such behavior is based on universals. These universals are ideas the existence of which is assumed, their assumption being based on empirical observation. The requirements of empirical universalism are met.

As already in the context of empiricism, the empirical approach to universals can be traced back in the history of philosophy Different approaches towards empirical and categorical concepts can be found all over Western history. Greek philosophers were among the first to stress the triade of the individual self, the object, and thinking relating the former to the latter. The importance of this subject-object-thinking triade for the anthropological theory of societal ordering was used in Chapter 9. The importance for the anthropological theory of human engagement in the economy is another application of Greek thinking to a contemporaneous issue. It will be remembered from the discussion in Chapter 9: Parmenides (appr. 540–470 B.C.), the pre-Socratic philosopher, describes in a poem that on his voyage to knowing *(episteme)* he is guided by Dike, the goddes of this-wordly (non-mystic) justice. Parmenides held that his thinking were between himself and the objects his of environment, and that in this way he was able to empirically judge these objects as true, good, or esthetically beautiful. Socrates, Parmenides' student, as interpreted by Socrates' student Plato, expanded this quest for critical judgment to dialog. Aristotle, Plato's student, by way of his *entelechia,* returned to quasi-animist dealing with inherent meaning and purposiveness of things. Islam and scholastic Christianity adopted Aristotle. Only later, Parmenides and Plato' later writings were discovered by the Humanists, too late to be adopted before closing of the door of knowing in Islam occured, but giving rise to Reformation and Enlightenment. Thus in the West, making use of time as a straight line, a tradition of "judgment theory" based on doubt and discussion was developed that today prevails in Western cultures, whereas Islam does not make use of the self-responsible Parmenideian judgment and, correspondingly, of time-as-a-straight line, or empiricism. What in the West is dialog, in Islam is discovering the other and bargaining with him for reality. Muslims do not speak *about* or *on* something, but *speak "it"*. Speaking about or on something would imply a critical, including self-critical, distance between the speaker and what is said. In strict monotheism, this is a sacrilege because it doubts the wisdom and power of God.[879] For judging economic data this difference in modes of thought is obvious and far-reaching.

The main reason is that Parmenides' judgments and Plato's dialogical investigations are epistemological methods to be used for what above has been called empirical universalism. No deductions from models occur. The empiricism of universalism forbids the neoclassic approach. This means that neoclassic concepts are apt to interprete ethnographic economics. Neoclassics are even in the way of interpreting them. It is enough that local courts decide according to local law and the other jurisdictions concerned do not resort to the public policy defense because the legal policies pursued are similar. This makes commons *(Allmenden)* protectible in legal systems which do not know commons. This makes the *droit moral* to tribal secrets protectible in legal systems that have neither tribes nor secrets nor *droit moral*. Thus, the individual market and one of its corollaries, the local-court theory, provide for protection against exploitation: Starting from empirical universals, reality-removed neoclassic models may be discarded, and the smaller unit may receive protection of property and economic freedom, including those concerning collective goods. Property and freedom are inherent, universal values and innate building blocks of human law. Law need nor borrow values, nei-

879 Cf., Lawrence Rosen (1984); Khaled Abou El El Fadl, Islam and the Challenge of Democracy, a Boston Review Book, ed. by Joshua Cohe & Deborah Chasman, Princeton & Oxford 2004: Princeton Univ. Press, 28 f.

ther universal nor culture-specific ones, from other social or natural sciences, something authors of "realisms" keep proposing.[880] To apply the local-courts approach, centralized law is just as dispensible as identical concepts of person, market.

Neoclassic economic theory can make some economic decisions more predictable, even calculable. But for modern, national and global, politico-economical statements across time, such as antitrust and unfair competition policies, discussions about economic justice, globalization issues, or foreign aid consulting, it is time to say a farewell to neoclassics. At least in these areas, economic theory can benefit from empiricism and comparative concept-forming and evaluations. An *Empirical Economic Theory* fits our time better. It is due to replace neoclassic model economics by a new conception, both more close to reality and to human beings, that works with individual markets, rivalry-oriented ("incomplete") competition (as "best"), empirical data including those from the various cultures, and inclusion of the economy into political responsibility. For ethnoeconomics, substantivism is a consequence.[881]

II. The present mainstream: markets, property, and competition. Anthropologies of giving thanks and of corruption

Rather complete presentations of economic anthropology can be found in the textbooks on cultural anthropology by Conrad Phillip Kottak and Marvin Harris. For the purposes of the following presentation, one can follow their descriptions and add from other sources (such as Karl Polanyi, George Dalton, Elman Service, Paul Bohannan, Marshall Sahlins, Katherine S. Newman, Anthony Leeds, Andrew Vayda, Michael Mühlich, Heinzpeter Znoj, Ekkehart Schlicht, and Martin Rössler).[882] To account for the present state of economic anthropology the choice of sources used here may seem arbitrary.[883]

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880 Critical assessments of legal realism (in the singular) in A. Sarat & J. Simon (eds.), Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism, Durham & London 2003: Duke Univ. Press. For a Kantian refutation of legal realisms (in the plural), see W. Fikentscher (2004 b), 14–18. A realism appearing on the horizon seems to be psychological realism, cf., O. Goodenough (2006).

881 One need not share radical tribal revivalism (e.g., Peters 2006; Lundberg 2006) to see that intertribal justice and intertribal trust may – be it in part – assume the role state sovereignty has played, since Hugo Grotius installed the sovereign nations, linked in trust *(fides)* to each other, in the place the Roman Empire held since Caesar's times, cf., W. Fikentscher, De fide et perfidia, Der Treuegedanke in den "Staatsparallelen" des Hugo Grotius aus heutiger Sicht, Sitzungsberichte d. Bayer. Akademie d. Wissenschaften, Phil.-Hist. Klasse, Heft 1, Munich 1978: (Comm. C.H. Beck), 56–64. In such a world, rules of conflict of laws and of public policy defense against recognition of judgments would play a prominent role: *fides* between the cultures instead of *fides* between the sovereign states. It would be an upheaval of the cultures against the unholy alliance of neoclassic economiucs and abused state sovereignty.

882 See also the footnotes below. Here is a non-complete list of authorities of economic anthropology: Harris, Cultural Anthropology, 98 ff.; Kottak, Cultural Anthropology, 182 ff.; Raymond Firth, Primitive Polynesian Economy, London 1939: Routledge and Kegan Paul; Karl Polanyi, The Great Transformation, Boston 1944: Beacon Press; Marvin Harris, Cows, Pigs, Wars, and Witches.: The Riddles of Culture, New York: Random House, 1974; Marcel Mauss, The Gift: Forms and Functions of Exchange in Archaic Societies, New York: Free Press, 1954; French orig. 1925; Melville J. Herskovits, Economic Anthropology: A Study in Comparative Economics, 2nd ed., New York: Knopf, 1940, 1952, title of 1st ed.: The Economic Life of Primitive People; M.J.H. distinguishes between simple (= personal, direct, and specific, p. 14) and complex economics; Paul Bohannan, Some Principles of Exchange and Investment Among the Tiv of Nigeria, American Anthropologist 57 (1955): 60–70; idem, Social Anthropology, New York: Holt, Rinehart & Winston, 1963; Karl Polanyj, "The Economy as an Instituted Process," in: Karl Polanyi, Conrad M. Arensburg & Harr W. Pearson (eds.), Trade and Market in the Early Empires, Glencoe, Ill.: The Free Press, 1957, 243–270, reprinted in: E.E. LeClair and H.K. Schneider (eds.), Economic Anthropology: Readings in Theory and Analysis, New York: Holt, Rinehart and Winston, 1968, orig. 1961: 122–143; Leopold J. Pospíšil, Kapauku Papuan Econ-

1. Fund theory and other fundamentals

Basic economic anthropology can be found in *Karl Polanyi, Conrad Phillip Kottak,* and *Marvin Harris.* Polanyi (1968) sees economy as a bundle of exchanges, and the three types of exchanges are: market, redistribution, and reciprocity. The essence of economy according to anthropologists Kottak and Harris consists in a series of attributes: For Kottak, economy is a population's production, distribution, and consumption of resources (p. 182). For Harris economy is a set of institutions that combine technology, labor, and natural resources to produce and distribute goods and services (p. 98). According to Kottak economy has several possible motivations, not

omy, New Haven, CT: Yale University Publications in Anthropology No. 67, 1963, reprinted by Human Relation Area Files (HRAF) Press (New Haven, CT, 1972); Anthony Leeds and Andrew Vayda (eds.), Man, Culture and Animals, Washington; D.C.: American Association for the Advancement of Science Publ. No. 78, 1965; E.R. Wolf, Peasants, Englewood Cliffs, NJ: Prentice-Hall, 1966); Elman Service, The Hunters, Englewood Cliffs, NJ,: Prentice-Hall, 1966; George Dalton (ed.), Tribal and Peasant Economies, Garden City, NJ: Natural History Press, 1967; idem, Primitive Money, in: idem (as before), 254–281; Marshall Sahlins, Production, Distribution and Power in a Primitive Society, in: A.F.C. Wallace (ed.), Men and Cultures: Selected Papers of the Fifth International Congress of Anthropological and Ethnological Sciences, Philadelphia, PA: University of Pennsylvania Press, 1960; idem, Poor Man, Rich Man, Big-Man, Chief: Political Types in Melanesia and Polynesia, Comparative Studies in Society and History 5 (1963): 285–303; idem, Tribesmen, Englewood Cliffs, NJ: Prentice-Hall, 1968; idem, Stone Age Economics, Chicago: Aldine, 1972; Paul Bohannan and Laura Bohannan, Tiv Economy, Evanston, Ill.: Northwestern University Press, 1968; Richard B. Lee, What Hunters do for a Living, Or: How to Make Out On Scarce Resources, in: Yehudi Cohen (ed.), Man in Adaptation: The Cultural Present, 2nd ed. Chicago: Aldine, 1974, 87–100; Richard B. Lee and I. DeVore (eds.), Kalahari Hunter-Gatherers: Studies of the Kung San and Their Neighbors (Cambridge, MA: Harvard University Press, 1977); Robert Dentan, The Semai: A Non-violent People of Malaya, New York: Holt, Rinehart and Winston, 1968; J. Clammer (ed.), The New Economic Anthropology. New York: St. Martin's Press, 1966; Elman R. Service, Origins of the State and Civilizations: The Process of Cultural Evolution, New York: Norton, 1975; Jack Goody, Production and Reproduction: A Comparative Study of the Domestic Domain (Cambridge, UK: Cambridge University Press, 1977); Katherine S. Newman, Law and Economic Organization: A Comparative Study of Preindustrial Societies, Cambridge, UK: Cambridge University Press, 1983; Philip D. Curtin, Cross-cultural Trade in World History, Cambridge etc. 1984: Cambridge University Press (main interest: trading with cultural enclaves); Norbert Rouland, Legal Anthropology, Stanford, CA: Stanford University Press, 1994 (French orig.: Anthropologie Juridique. Paris: Presses Universitaires de France, 1988), 126ff., 133ff.; Stuart Plattner (ed.), Economic Anthropology (Stanford, CA: Stanford University Press, 1989); T. Ingold, D. Riches and J. Woodburn, Hunters and Gatherers, Vol. 2, New York: Berg, St. Martin's, 1991; Leopold J. Pospíšil, Obernberg: A Quantitative Analysis of a Tirolean Peasant Village, New Haven, CT: Connecticut Academy of Sciences, 1995 (one of the rare quantitative studies in economic anthropology); Schlicht, On Custom in the Economy, supra note 23; Martin Rössler, Wirtschaftsethnologie, 2nd ed. Berlin 2005 (1st ed. 1999): Reimer (includes microeconomic and historical issues); *on behavior and economics:* Russell Korobkin, A Multi-Disciplinary Approach to Legal Scholarship: Economics, Behavioral Economics, and Evolutionary Psychology, 41 (2001) Jurimetrics: 319–336; *comparative remarks* in Fikentscher, Wirtschaftsrecht, Vol. 1, 102–105, 124–133; idem, Modes of Thought, 183ff., 256, 264ff., 337, 377, 423, 456 (e.g., on so-called competition-free cultures, at 263f.); see also idem, Competition, Culture, and Economic (De-)Regulation, in: Hanns Ullrich (ed.), Comparative Competition Law: Approaching an International System of Antitrust Law, Proceedings of the Workshop, Bruges, College d'Europe, July 3–5, 1997, organized in cooperation with Wolfgang Fikentscher and Ulrich Immenga, Baden-Baden 1998: Nomos, 77–91 (with a brief discussion of some of the above-mentioned authorities); idem, Market Anthropology and International Legal Order, in: Theodor Baums, Klaus J. Hopt & Norbert Horn (eds.), Corporations, Capital Markets, and Business in the Law, Liber Amicorum Richard M. Buxbaum, London etc. 2000: Kluwer Law International, 157–176; idem, Market Anthropology and Global Trade, in: Christopher Heath & Kung-Chung Liu, Legal Rules of Technology Transfer in Asia, The Hague etc. 2002, 255–264 = http://demo.bepress.com/cgi/preview/cgi?/article=1069&journal= bejebl.

883 A somewhat more systematic overview: Wolfgang Fikentscher, Law and Anthropology: Texts, Materials, Readings, Spring Term 2000, University of Berkeley School of Law, Berkeley, CA, Chapters 10 and 11 on contracts and property.

just maximization of profits (p. 182). Harris distinguishes what he calls economizing (in a wide sense) as an activity that varies between cultures as to its premises and consequences, from economizing (in a narrow sense) that is maximizing benefits while minimizing cost (p. 98).[884]

Fund theory and its implications, as developed by Kottak as one of the economic motivations represents a basic part of economic anthropology. Kottak divides the activity of economizing (in a wide sense) into five "funds" (five-fund theory): Economizing may contribute to (1) subsistence, (2) replacement, (3) a "social fund", (4) a "ceremonial fund", (5) or making rent, be it for a superior who collects taxes, or for private ends. Rent-seeking, according to Kottak, leads to unequal distribution of means of production (p. 186), thus to stratification of society, divided labor, urbanization, and finally to the forming of states (p. 182ff.). From rent-seeking also follows what in economic theory is called scarcity (p. 185). In a stable subsistence or replacement oriented society, whether or not enriched by a social or ceremonial fund, people may say: "We have all we need." In a society with divided labor, (that is, after what V. Gordon Childe called the urban revolution around 8000 B.C.E.[885]), scarcity becomes synonymous with a lack of resources in the rent fund.

Apparently only the rent fund, with its specific concept of scarcity in a society of divided labor, brings about economic alternatives and, hence, rivalry. This is important for the concept of the individual (or subjective) market, which should be distinguished from the objective market that may also be found in subsistence, replacement, social fund and ceremonial fund societies. It is this rivalry which is essential for having competition, defining the market in the individual, subjective sense. The (sometimes romantic) theories on "non-competitive societies" established to explain their economies and social structure by Cushing, Benedict, Kramer & Sigrist and others disregard this aspect of the fund theory.[886]

In the absence of rent-seeking, economizing promotes subsistence, replacement, social, or ceremonial goals, or several of these at once. Kottak adds another goal without giving it fund character: peace. To the tribes it was adaptive to specialize for exchange in trading with other villages for peace-making.[887] This kind of trade did not have in mind the exchange of goods and services for getting materials, or useful items, nor was urbanization intended. Instead, regional exchange networks for clay pots, hammock, or shells (as in Malinowki's description of the Kula trade of the Trobrianders)[888] served to make or keep peace. Specialization sometimes takes care of local identities as assets in this peace-seeking. One aim of this desired peace may be obtaining marriage partners from neighboring villages, a practice which may lead to veritable "rings" of exchange.[889] Thus, trade was done for peace, not to fight

884 See also Plattner (1989), cited in note 11, supra, at 13.

885 See below, section 3: V. Gordon Childe, The Dawn of European Civilisation, London: Kegan Paul, Trench & Trubner, 1925); idem, The Urban Revolution, Town Planning Review 21 (1950): 3–17. On Childe, see also notes 123 & 412, and text near note 145.

886 Frank H. Cushing, My Adventures in Zuni, Palmer Lake, Colorado 1967: Filter Press (orig. 1882); Ruth Benedict, Patterns of Culture, New York 1934: Mentor Book; Fritz Kramer & Christian Sigrist, Gesellschaften ohne Staat: Gleichheit und Gegenseitigkeit (Societies without State: Egality and Reciprocity), Frankfurt/Main 1978: Syndikat; for a critique of the theories of non-competitive societies, see Wolfgang Fikentscher, Modes of Thought (1995), 263.

887 Kottak 187, quoting Napoleon Chagnon, Yanomamo: The Fierce People. 4th ed.(New York: Harcourt Brace, 1992; 1st ed. 1983); and B. Malinowski, Argonauts of the Western Pacific: An Account of Native Enterprise and Adventure in the Archipelagoes of Melanesian New Guinea, London, 1922, reprinted New York 1961: Dutton. See also B. Malinowski, Kula: The Circulating Exchange of Valuables in the Archipelagoes of Eastern New Guinea, Man 20 (1920): 97–105; see also note 266, above.

888 See preceding note.

889 Norbert Bischof, Das Rätsel Ödipus (The riddle Oedipus), Munich 1985: Piper.

scarcity. Or, it was peace which was scarce. Kottaks calls this the embedding of the economy in society (p. 188).

2. A discussion

Economist Karl Polanyi's distinction of the three principles of exchange, the *market* principle, *redistribution,* and *reciprocity,* is to serve cross-cultural economic studies.[890] Several anthropologists, including Harris and Kottak, followed his lead. Polanyi's trichotomy may be the one most in use ofeconomic anthropology.[891]

According to this trichotomy, the market principle governs modern consumer markets; redistribution is the principle of collecting the production and redistributing it by chieftain, pharaoh, king, or emperor; and reciprocity is said to prevail in bands in tribes who hunt and gather and then engage in sharing and exchanging with neighboring tribes or clans.

In evolutionary terms, Polanyi steps backward from more modern types of exchange to those of chiefdoms and early states, and from there again backward to typical tribal forms of life. Speculative as it is, Polanyi's trichotomy appears persuasive to this day because it furnishes an easy categorization of various types of exchange in existence.

An easier understanding of these contexts may result when turning this sequence downside up, starting from hunting and gathering tribes, engaged in reciprocal exchange, and proceeding to chiefdoms and kingdoms with their possibly distributive economic policies, and again from there to proto-states and modern states and their markets. The authorities named above observe that in ethnographic history and comparison various economic types may overlap and partly coexist.

3. Early trade

If one applies the historical occurrence of the axial age to Kottak's five-fund theory, to Polanyi's three principles of exchange, and to Childe's two-revolutions and three-step evolution of humankind, the market principle, generated by the rent fund and the urban revolution is a

890 For Polanyi see note 860, above, and Karl Polanyi, Anthropology and Economic Theory, In: Morton H. Fried (ed.), Readings in Anthropology, 2 vol. New York 1959, 165: Crowell; – *Reciprocity* is a form of exchange, through which goods (including services) are traded between two parties with respect to each other's performance; detailed study shows that there are several kinds of this mutual relationship, E.R. Service, Primitive Social Organization: An Evolutionary-Perspective, New York 1962: McGraw-Hill; idem, The Hunters, Englewood Cliffs 1966: Prentice-Hall; M.D. Sahlins, Tribesmen, Englewood Cliffs, NJ 1968: Prentice-Hall; idem, Stone Age Economics, Chicago 1972: Aldine; cf., also, Raimund Jakob & Wolfgang Fikentscher (eds.), Korruption, Reziprozität und Recht (Corruption, Reciprocity, and Law), Berne 2000: Stämpfli; and Serge-Christophe Kolm, La bonne économie: la réciprocité générale (The Good Economy: General Reciprocity), Paris: Presses Universitaires de France, 1982; idem, Modern Theories of Justice, Cambridge, MA: MIT Press, 1996; idem, La philosophie de l'économie, Paris 1986: Seuil; Kolm's focus is on an economy that works "*don contre don*;" for the anthropological distinction between generalized, balanced, and negative reciprocity, see in particular the text in 6., below.; reciprocity is usually applied to economic forms of exchange; however it exists also in the context of honor and reputation: A Plains Indians' saying goes, "You are known by the greatness of your enemies;" – *Redistribution* is the distribution of goods, which have earlier been collected. – On *markets* see infra.

891 For Kottak, see note 862, above, 181 ff; for Harris, see note 882, above, 15 ff (concepts), 82 ff. (production), 105 ff. (reproduction), 122 ff. (economic organization), 140 ff.; the tribal capitalism of the Kapauku Papuans of New Guinea, as described by L. Pospíšil, Kapauku Papuan Economy, see note 882, above, marks an irregularity for Harris that does not fit into his system; for this, see Katherine S. Newman, see note 882, above, 171 ff.; and L. Pospíšil, Empiricism and the Marxist Theory of Law: A Dialectic Contradiction, in: Bernhard Grossfeld at el. (eds.), Festschrift Wolfgang Fikentscher, Tubingen 1996: Mohr Siebeck, 178–199, at 188–190.

product of the post-axial age. This is confirmed by what we know about early cities and their trade relations both with each other and with their cultural surroundings.[892]

Of course, there were markets in pre-axial age times. The Pueblos of Taos and Pecos (cities of farmers) traded with the Plains Indians (hunters and gatherers), Navajo, and Ute in a fashion that is quite similar to a modern market. The Plains Indians exchanged their produce, such as buffalo hides, for Pueblo crops and crafted utensils. However, the Plains Indians, Apache, Comanche, among others, were not permitted to enter the fortified Pueblos. They had to stay outside at a certain distance where they put up their tipis or wickiups, or just slept in the open. Trading was done on a field, as found to the east of Pecos Pueblo for example. This barter trade sometimes turned into hostilities. Pecos Pueblo was indeed raided so often by Comanche and other Plains Indians that the Pueblo – already weakened by diseases – was finally abandoned in 1849. Its survivors moved to the only other Towa-speaking Pueblo of Jemez.

Taos Pueblo traded in a similar way with Navajo, Ute, and other (at that time) semi-migrant tribes. Maybe a tribute to the trading partners Taos adopted the buffalo dance although there were no buffalos in the Taos area. Still, the danger of being attacked because trading turned into raiding was such that the Taos people tried to protect themselves, by way of an intertribal arrangement, by asking for the military aid of the Jicarilla Apache in case of emergency. Thus, the Jicarilla helped protect Taos for a long time in history. But – as I was told in Jicarilla Apache in 1996 – every time the Jicarilla had assisted the Taos citizens and went home again, "some Taos girls were missing" so that today some Jicarilla Apache trace their family histories in part back to Taos. This seems to have been the price for the military assistance and, as a last resort, a trade-off for Taos commerce with the plains tribes. On the Northwest American coast, the Chinook were famed traders, and farther north the Tlingit are known to have traded with landlocked Athabascan tribes.

These rather well-known cases are retold here to point out that pre-axial age cultures used commercial relations that may be called markets. Proto-states such as the Inca and Maya Empires knew market places. The urban revolution with its separation of the population into groups with different and specialized commercial economic activities – farmers in the open country and specialized craftsmen in the places of agglomeration (blacksmiths, tanners (= *gerbers*), potters, weavers, etc.) – called for geographic places of exchange protected from hostile interferences. This might have been the origin of the market concept.

An intermediate form between the do-it-all farmer and the urban specialist is the farmer who specializes in a certain farm-related activity and offers his qualified service to other farmers, by going from farm to farm, leaving his own farm for a while under the temporary care of his wife and servants. Here do-it-all farming and specialization are combined without the need of a city. One of these migrating specialists was the saddler who took care of making and repairing the leather utensils needed for farming.[893] But the services of part-time migratory farmer-specialists were an intermediate form of exchange. They eventually lost their importance to specialists, some of them having given up farming and permanently living in cities. This called for the establishment of "market days", or markets.

On the other hand, certain forms of markets such as long-distance trading combined with personal (subject-connected) credit relations, known – according to the Anonymous Jamblichi

892 See the literature in note 882, above, especially Harris, Kottak, Pospíšil' and Sahlins (ibid.). Newman (1983) is silent on markets.

893 Another specialist, at least in traditional Upper Frankonia (today Northern Bavaria), was the professional sheep shearer who seasonally went from farm to farm when the sheep had to be shorn. Since the sheep were called fekles, that is, little cattle (cf. Indo-European: fecus – feculus, pecus – peculus; hence pecuniary, Val Fex in the Grisons), that seasonal migratory sheep shearer was the *feklshearer,* or *feknsher,* or *fikentscher.*

– from the Ancient Greek community of city states clearly belong to post-axial age phenomena. Thus, "market" is not a sufficient description of the exchanges that are of interest here. There are very different types of markets and market economies.

It should be noted that long distances alone do not necessarily indicate post-axial age market relations. Malinowski's report of the Kula[894] and the description of the trade of the Caribou Eskimo by K. Birket-Smith[895] show that barter trade in pre-axial age manner was effectuated over rather long distances. The Caribou Eskimo traveled hundreds of miles to meeting places where they bartered jade, weapons, hides, and other produce from hunting activities. The difference to the Ancient Greek trade within the koiné consists in the long-distance trust and credit elements that lack in Eskimo culture but were present in Greece. Douglass C. North sees "the market" as an institution as an effect of early long-distance trade.[896] This derivation misses the decisive distinction between pre-axial-age barter markets (which may have involved long travel) and post-axial-age long-distance trust and credit markets such as the Greek koiné and the (Christianity-influenced) Roman Empire under Justinian's Corpus Juris law with its legalized long-term business relations.[897] The institutional theory (whether in its descriptive or prescriptive application) cannot explain this distinction; whereas the modes-of-thought approach can.

Harris's distinction between barter markets and price markets[898] which refers to the use of money, does not suffice to identify the essential types of markets because money could be used on short-range markets with "arm's-length" relationships, as well as for long-range credit markets. And both arm's-length and long-range credit markets can work without money. Coined money may certainly play a role for the definition of certain types of markets, but it need not. Thus, there are many more forms of markets to be distinguished. Therefore, another proposal has been made elsewhere to refine the market concept. Accordingly, at least the long-range trust-market principle is a creation of the axial age and earlier types of exchange: reciprocity, redistribution, and short-range barter markets, developed in the animistic world (= "animism in a wide sense," "primal cultures").[899]

4. Economic types and total economies

This leads to a distinction of *economic types and total economies,* to be discussed briefly because there is a striking parallel. The analogy concerns the anthropology of religion. Pre-axial age religions should not be categorized in the same manner as post-axial age religions. Animism in the broad sense – one of more possible names for pre-axial age belief systems – consists of what in religious anthropology is called "religious types."[900] Totemism, deus-otiosus beliefs,

894 See note 66, supra.

895 K. Birket-Smith, The Caribou Eskimo: Material and Social Life and Their Cultural Position. Report of the Fifth Thule Expedition 1921–1924, vol. 5, Copenhagen: Nordisk Vorlag, 1929.

896 Douglass C. North, Institutions, Institutional Change and Economic Performance, Cambridge 1990: Cambridge Univ. Press, 118 ff.; the same must be said to Kimbrough, Erik O., Vernon L. Smith, & Bart J. Wilson (2008). Building a Market: From Personal to Impersonal Exchange. In: Zak (2008), 280–299.

897 On time and belief system, Wolfgang Fikentscher, Methoden des Rechts (Methods of law), vol. I (1975), 283; idem, Modes of Thought (1995), 394 ff.; idem, see note 302.

898 Harris, Cultural Anthropology, see note 66, supra, at 98 f.

899 For details, see Wolfgang Fikentscher, Modes of Thought (1995), Chapter 6 and 7. Examples for short-range business, e. g., in Hugo Lanz, Die neubabylonischen harrânu-Geschäftsunternehmen, Berlin 1976: Schweitzer.

900 Wolfgang Fikentscher, Modes of Thought (1995/2004), 193, 305, following L. Pospíšil, Belief Systems, Religion, and Magic (manuscript), Yale 1986 (this part of the forthcoming book "Anthropology: The Science of Man", has not yet appeared). Animism in the broad or wider sense is synonymous with pre-axial age modes of thought. Animism in the narrow sense is both a religion and a mode of thought that holds natural objects

dreaming, cult of the dead, shamanism, ancestor worship, animatism, witchcraft, sorcery, idolatry, animism in the narrow sense of believing in soul-animated natural objects, fetishism, magic (belief in certain causalities), divination, polydaimonism, and polytheism are some of these *religious types.* Religious types can be combined and they often are. Usually there is a combination of more than one religious type when the belief system of an ethnic group (clan, band, tribe, nation) is analyzed. For example, in Hopu religion there is totemic, ancestor-revering, and magic animism (in the narrow sense.[901] Religious types do not promote missionary work. By contrast, post-axial age religions are (what Pospíšil calls) *total religions* that claim possession of the whole human personality by offering a complete interpretation of the world and its creational and ethical meaning (pre-axial-age religious types do not do this). From their followers, total religions demand an encompassing attachment. In principle, they cannot be combined. Total religions tend to be exclusionary. Judaism, Christianity, Islam, and Buddhism make it difficult for the believer to accept more than one belief. Total religions proselytize: they "recruit." In a conversation with me in 1988, a Hopi elder used this expression, pointing out that he would never think of "recruiting" anyone for the Hopi religion. Should attempts at fusing two or more total religions develop, a new total religion has to be created. An example is Sikhism, an offshoot of Hinduism that adopts Islamic egalitarianism (see Chapter 3 IX. 2.), another the "Prussion Union" of Calvinists and Lutherans.

Could it be that reciprocity and redistribution are pre-axial age economic types, maybe along with more, yet to be discovered or defined economic types, and apt to be combined with each other without contradictory conflict? On the other hand, could it be that the market economies – there are more than one, as we have seen – are post-axial age total economies, along with which there may be more and different total economies, each claiming to be the only or the prevailing one? Do these exclusionary total economies existing alongside market economies include the economy of Islam, the Chinese Socialist Market Economy, and the economies of modern secular totalitarian systems?

The parallel should not be overstated. Yet it is persuasive enough to devote the following text to economic types such as reciprocity and redistribution and at least one more – simple distribution –, and to the total economies to be distinguished from them. This facilitates the differentiation of markets:

The application of the axial-age phenomenon to distribution, reciprocity, and redistribution explains basic types of economy that may still be in use today clarifies their combined use, for example in a developing or threshold country. Kottak mentions a possible coexistence of "modes of exchange".[902] In addition, the application of the axial-age phenomenon on "the market" explains the appeal of the latter for a secular world that orients itself at ethical principles. It also demonstrates the essential hostility between market principles and competing total non-market economies, such as Marxism's redistributory system. Moreover, the lim-

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such as trees, clouds, mountains, wells, etc. to be animated by living souls. Many early cultures know animism in the narrow sense. One of the behavioral consequences of animism in the narrow sense is a high respect for certain natural phenomena, for example mountain spirits. In Goethe's Dr. Faustus the "Earth Spirit" plays a prominent role. He says to Dr. Faustus: "You are like the spirit which you can understand, but not like me" *(Du gleichst dem Geist, den du begreifst, nicht mir).* Animated beings mixed of human and animal components such as *werwolf* (= man wolf), sea maids, or centaurs are representations of animism in the world of sagas and fairytales, as are winged angels in several religions, and the *metamorphoseis* of Zeus and other gods who are able to change from human to faunal or floral appearances (see Ovidius, Lucius Apuleius, and their precursors).

901 See, for possibilities, Wolfgang Fikentscher, Modes of Thought (1995), 195; on Hopi religion ibid. 226, with references.

902 Kottak, see note 882, supra, at 182.

its of the availability of market principles, for example in environmental or otherwise "regulated" economics, can be shown. Maybe most important might be the relatively easy explanation of the "modernity" of the market economy compared with "older types" of economy such as distribition, reciprocity and redistribution. In all, the discovery of the variety of economic types and total economies in this world implies a lot for the practical work of the WTO and other agents in the global economy.

5. Personalized vs. impersonalized trade

The relationship between the *market concept and early economies* raises a number of issues. The apparent difference between the market economy and earlier "economic types" has brought about attempts at interpretation. A recent example is that of James Gordley in the *International Encyclopedia of Comparative Law.*[903] In a highly readable chapter on contract law in pre-commercial societies he evaluates the teachings of Melville Herskowitz, Marshall Sahlins, Max Gluckman, Paul Bohannan, Raymond Firth, Leopold Pospíšil, and others and develops his own doctrine of pre-commercial contract law. In this context, drawing a fundamental line between "personalized" and "non-personalized" contract law.", Gordley resumes a distinction made by Plattner, Granovetter, and Sahlins.[904] Personalized transactions, he points out, are common in pre-commercial societies in which the transaction is embedded in a network of social relations.[905] In personalized transactions, the obligations between parties go beyond those undertaken in any particular transaction (Gordley, at 3). Gordley says that there are four main problems of contract law in a personalized system: preventing substantive unfairness; dealing with the unexpected; determining when an agreement is binding; and remedying a breach.

According to Gordley, the main instrument of a fair exchange is reciprocity, either in its generalized form (kinship and friendship induced exchange without immediate or exact-value related return of benefits), or in its balanced form (need of timely and approximate reciprocation in cases of increased social distance). Gordley does not mention a third form of reciprocity, proposed by Elman Service and Marshall Sahlins: negative reciprocity (great social distance and most urgent need to reciprocate at equal value in order to prevent hostilities or disconnection of contact). Gordley, Kimbrough and all the others who believe that there is a development from personal to impersonal markets miss the distinction between individual and objective markets, in other words, between rivalry-defined and rivalry-free markets. Already Adam Smith knew that only rivalry-defined markets are markets fit for the working of the invisible hand, and that those markets all are personal (W. Fikentscher 2004, 107–178; idem 2007; see also below under 7.).

6. Kinds of reciprocity

Service and Sahlins were among the first who distinguished three subtypes of reciprocity: generalized or positive, balanced, and negative.[906] The distinction found wide acclaim. Service' and Sahlins' tripartite system is applied below as well.

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903 James Gordley, "Contract in Pre-Commercial Societies and in Western History," in: Arthur von Mehren (chief ed.). International Encyclopedia of Comparative Law. Vol. VII: Contracts (1997). Tübingen & Boston: Mohr Siebeck & M. Nijhoff. Chapter 2 Sec. 1–102, pp. 3–51. Similarly, Kimbrough et al, see note 862, above.

904 Plattner, see note 882, supra, 210; Granovetter, "Economic Action and Social Structure: The Problem of Embeddedness," Am. J. Sociol. 91 (1985): 481–510; M. Sahlins, Stone Age Economics, see note 882 supra, 185–187.

905 Plattner, 210.

906 Service 1966; Sahlins 1968, 1972. A view from modern contract law, accentuating the element of reciprocity: Ian R. Macneil, The New Social Contract: An Inquiry Into Modern Contractual Relations, New Haven,

a. *Generalized reciprocity* addresses the situation that advantages are mutually exchanged, one in view of the other (in Roman law: *do ut des, I give because you give*), between persons or groups of persons, spread over a longer distance of time, and without precise counting of the values of the exchanged goods (including services). A typical example is the tradition that the parents raise and feed the children, and later the children, having become of age, support and feed the elderly. This "generation treaty" *(Generationenvertrag)* is based on principles that apply in many cultures, and underlie modern social security systems. Another example is the practice among Northwestern coastal tribes to give a potlatch in good years, for one's own tribe and also for neighboring tribes, expecting that a neighboring tribe that fared well fishing will return the invitation in a bad year. Exchanges of this kind are not based on penny-pinching. They require good and peaceful relations between the exchange partners.

b. *Balanced reciprocity* exists in a relationship when both sides are ready to engage in an exchange over a shorter span of time and with a more precise counting of the values to be exchanged. Examples are everyday's sales and other contracts, whether cash or credit. Relations must not be peaceful over a longer period of time, as in the case of generalized reciprocity. But under conditions of imminent conflict, balanced reciprocity is improbable. Sacrifices to spirits and gods are also special forms of balanced reciprocity: humans transfer goods to the other-worldly sphere in expectation of other-worldly grace. [907]

c. The least peaceful exchanges of the shortest duration are based on *negative reciprocity.* Whether negative reciprocity fits the pattern of reciprocity and the category of the personalized contract at all is a matter of doubt. Negative reciprocity is characterized by minimal trust and maximum insistence on equal value of gift and countergift. Acccording to Uwe Wesel, negative reciprocity is "totally impersonal" *(völlig unpersönlich).*[908] It is practiced, for instance, in "silent trade": one side, e.g., hunters and gatherers, deposits meat, berries, and other collected natural produce in the absence of the offerees, at an agreed place, and later – in the absence of the offerors – the other side, for example horticulturalists, picks up what has been stored and replaces the goods taken with field crops and utensils. Meeting face to face is avoided because of the likelihood of fighting. Silent trade has been asserted for rain forest inhabitants in their trade with neighboring cultivating groups. If the offering side regards the counteroffer as insufficient, the counter-offer will be left in place. The other side is expected to add up to the counteroffer or risk the break-up of the exchange relation. The parties do not meet to avoid confrontations.

A similar setup is followed between the Las Vegas Paiute Tribe and the Las Vegas city police. For historical reasons, the Law Vegas Paiute live in a reservation settlement in the northern part of Las Vegas. Due to their strong tribal police force, the Paiute are able to effectively

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CT: Yale University Press, 1980. In ethnology, generalized reciprocity, typical for kinship and association, is called "symmetry-based reciprocity;" balanced reciprocity, typical for social contingency situations, is called "calculated reciprocity;" and negative reciprocity, typically accidental, sentiment-oriented, and close to mistrust, is called "attitudinal reciprocity," communication Frans de Waal, June 2000.

907 Geza Ròheim, Ethnology and Folk-Psychologie, 3 International J. of Psycho-Analysis, 189–192 (1922); Pamela J. Stewart & Andrew Strathern (eds.), Exchange and Sacrifice, Durham 2007: Carolina Academic Press; Pierre Bonte, Anne-Marie Brisebarre & Altan Gokalp (eds.), Sacrifice en Islam: Espace de temps d'un rituel, Paris 1999: CNRS Editions; on the context of sacrifice, value and freedom W. Fikentscher, Gedanken zu einer rechtsvergleichenden Methodenlehre, Festschrift Carl Heymanns Verlag, Cologne 1965, 141–158, at 57f.

908 Uwe Wesel, Frühformen des Rechts in vorstaatlichen Gesellschaften: Umrisse einer Fruhgeschichte des Rechts bei Sammlern und Jägern und akephalen Ackerbauern und Hirten (Early forms of law in pre-state societies: sketch of an early history of law among gatherers and hunters and acephalous cultivators and herders) Frankfurt/Main. 1985: Suhrkamp.

contribute to maintaining "law and order" in that at times unruly neighborhood. Criminals caught in the act are picked up by Paiute tribal police and delivered at a city police station. In turn, the city refrains from interfering with Paiute reservation life and grants the a wider range of self-government than may be customary for some reservations. Neither side aims for a formal agreement. The mutual understanding is no secret, but kept discrete. No use is made of "cross-deputization" (mutual assistance between tribal and state police) as would result from a formalized agreement, as in the case of Santa Clara Pueblo and the city of Espagnola, NM. The Las Vegas Paiute example is a case of successful silent trade in public services between representatives of two cultures.[909]

Another example of negative reciprocity in the form of silent trade is reported from upstate New York: Farmers offer fruit and vegetables on road side tables expecting that passers-by drop the money, indicated on a price list, into an open jar. The jar is nailed to the table. A colleague from Chicago commented that in Illinois such silent trade would mean that everything "would go": fruit, vegetables, jar, money, and table (personal communication, 1986).

An extreme case of negative reciprocity is mutual respect based on enmity of equal violence. African tribesmen may observe peaceful behavior towards each other if they belong to tribes that are sworn enemies and neither tribe has ever succeded in defeating the other. Has one of the tribes succumbed to the other, the tribesmen avoid meeting (Asserate 170ff.).

If "personalized" means meeting face to face, or knowing the identity of the other side, negative reciprocity is not a case of personalized exchange. Only if "personalized" can be understood as a bilateral relationship even with unknown partners, negative reciprocity would fit the system as developed by Gordley. But this expanded interpretation of "personalized" (including unknown partners) appears too imprecise to define personal relations. Therefore, negative reciprocity would have to be rejected as a case of contractual relationship in a pre-commercial culture. However, to the extent thatsilent trade and other phenomena of negative reciprocity exist (or have existed) as confirmed by my own observation in Las Vegas, Nevada, and the New York state example, the only possible conclusion is that the concept of contract in "pre-commercial" societies cannot be defined by personalized relations. The sociologist Hubert Rodingen developed a similar distinction of near range and far range social relationships.[910] Applied to law, near range amounts to a personalized contract system, far range to an impersonal (my interpretation of Rodingen's distinction). Rodingen does not discuss negative reciprocity. For him it would fall under far range. Thus, negative reciprocity raises some doubt on the "personalized contracting" and "near range" social relations. Thus, pre-commercial cultures know impersonal trade.

d. *Belated reciprocity* is a kind of reciprocity not yet mentioned in anthropological literature, at least not under that name. It is an invitation to or insistence on reciprocal exchange from the side of a person to whom a gift is given in violation of a culturally relevant law, custom, or etiquette. Examples are mentioned in Chapter 1 I. 2. f.: A tourist presents to a Han Chinese hiking boots. Both are preparing a mountain hike together. Donating boots may be interpreted as an indication to leave as soon as possible and is therefore an insult. To save the situa-

909 The role of the Law Vegas Paiutes as part of the police force as an example of silent trade in public services is taken from the author's unpublished field notes of 1998.

910 Hubert Rodingen, Pragmatik der juristischen Argumentation: Was Gesetze anrichten und was rechtens ist (Pragmatics of legal argumentation: What laws generate, and what justice means), Freiburg & München 1977: Alber.

tion, the receiver might offer a price or (even a minimal) couter-gift, and the donor is well advised to accept. Reciprocity, albeit belated, is a strong proof of just and fair behavior, so that it may serve as a pacifier if things go wrong. Admiring something may be interpreted, or misinterpreted, as claiming something. To fence off the real or presumed claim, the owner of the admired object may prefer to resort to belated reciprocity by granting the claimant a gift which can even be the admired object itself (my thanks goto my seminar students 2008/2009, among them Daniel Song).

e. Reciprocity can be used to facilitate or stabilize marriage. There are two types of reciprocal gifts, *bridewealth and dowry* (see, e.g., Kottak 225ff.; Bohannan 1992, 76f.). Bridewealth *(Brautpreis)* is paid in connection with a marriage by the groom or his family to the bride or her family in recognition of her rearing, loss of labor, and addition of her children (still to be born) to the groom's family, failing marriage may involve the obligation to return the bridewealth. Dowry *(Mitgift)* is paid in connection with a marriage by the bride's family to the groom or his family in recognition of the groom's taking care of the bride. Dowry may evidence a low social status of women and may assume abusive forms (officially it is prohibited in India); but dowry may also be a practical means to help the young couple start the new household. Typically, bridewealth and dowry occur in patrilineal societies. In matrilineal groups children belong to mother's family anyway and no "progeny price" need to be paid, and the young couple will often profit from uxorilocality (living with the wife's family). A rare custom in matrilineal societies is *groomwealth*.

f. The general human feeling that reciprocity is "setting things right" and therefore doing justice to all concerned (as illustrated under a. through d., above) applies to the other-world as well. This causes humans to offer sacrifices to gods or spirits of nature: Since something valuable is given to them, one may expect something in return, rain, fertility, health, peace. Extrapositing belief systems (W. Fikentscher 1975a, 235ff.) do not sacrifice. Some of them replace reciprocity by trust. Abraham's rejected offering (Genesis 22) forever breaks with reciprocity in Judaism, Christianity, and Islam, demonstrating *sola gratia,* and allowing self-responsible value judgments (W. Fikentscher 1965, 157 as to Judaism and Christianity; Islam limits the authorization that is contained in the removal of reciprocity by a "God-willing" proviso). In general, the relation between reciprocity and trust is reverse proportional.

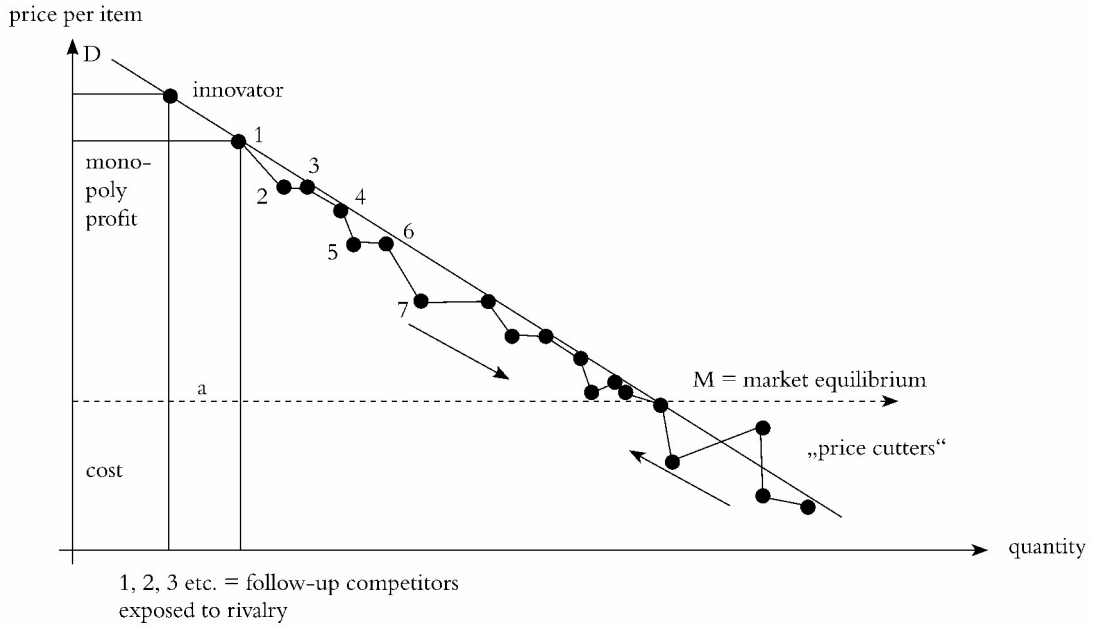
g. Alison Renteln sees reciprocity as an early source of what later became human rights (see notes 926 and 1192, below).

7. Kinds of competition

The distinction between personalized and impersonal contracting is also questionable seen from the opposite side, the side of the *market*. n principle, market economy is personal. Impersonal markets are the stock markets as well as situations that Walther Eucken described as markets without the intent of the market participants to engage in a strategy because they know that they are too unimportant for pursuing a strategy. Walther Eucken called this *vollständiger Wettbewerb* – complete competition (a confusing expression since absence of competitive strategies is hardly indicative of complete competition).[911] Complete competition in this sense needs to be distinguished from perfect competition. Under perfect competition, the market participants are indefinitely small and therefore cannot influence one another by any strategy. In complete competition, market participants are not indefinitely small, but definitely small and know that they cannot influence the market and behave correspondingly. Storage facilities permitting,

911 Walter Eucken, Grundlagen der Nationalökonomie (Foundations of National Economy), 6th ed. 1950, 95ff.; for a critique, Borchardt & Fikentscher (1957), 1ff.

they behave as "quantity adapters." Notwithstanding linguistic difficulties, perfect competition defines the *absence* of competition, and complete competition defines a *very weak* form of competition in certain atypical situations.[912] The "real" competiive market is "individual" or "subjective" in the sense that it involves rivalry and the ability to engage in strategies. Thus, the "real" competitive market requires the knowledge who might be, or potentially become, a competitor. In this sense, the modern market of an individual market participant is always personal. In the individual (= subjective) market, rivalry exists, as shown in the following graph ("the invisible hand made visible"):



This is corroborated by the theory of the modern efficient market as a superadditively coherent entity of common laws, morals, and trust, as developed in Chapters 1 and 5 (subsection 10), supra. In order to know who is, or potentially may become, my competitor, one has to "know" him, if not by name, then by identifiable competitive trade relation. In this sense, all modern individual, and thus competitive, markets are personal. Impersonal markets are objective markets, defined by good, place, time, and possible absence of competition. This is lllustrated below:

Recent warnings that shopping on the Internet can be abused by identity manipulations confirm the – preliminary – result. The warnings were issued by consumer organizations stating that "you should always know whom you are dealing." There is hardly a more convincing proof that the individual (that is: *rivalry-defined*) market is not anonymous. It is interesting that internet trading (e.g., "e-bay",) develops its own sanctions based on *personal* contact and reliance. E-bay transaction partners may rank each other's reliability by applying a one to five star scale, and this ranking is visible for every internet user. Unreliable partners receive what is called a "negative feedback". This may be so business-damaging that every effort will be made to indemnify the injured side. What is be more personal within what you would think to be one of the most impersonal forums of trading?

912 W. Fikentscher, Wirtschaftsrecht. Bd. 2: Deutsches Wirtschaftsrecht (Economic Law, vol. 2: German Economic Law), Munich 1983: C.H. Beck, 188f.

8. Superaddition as prerequisite for the working of the invisible hand

From the foregoing something follows which up to now has gone almost unnoticed when the working of the invisible hand was discussed and admired. Adam Smith was perfectly right when he stated that the baker who bakes bread for others who are hungry does this not for benevolence or because he is a charitable person, but in order to make a profit (and thus make his living). At first sight, to promote the common good by egoistically fostering one's own advantage appears paradoxical, and this seemingly counter-intuitive result made Adam Smith's "invisible hand" famous.

It should not be forgotten that Adam Smith was a professor of moral theory and his "Wealth of Nations" has also to be seen as part of his moral studies and writings. For the working of the invisible hand, Smith postulated three requirements: (1) there has to be a law binding and if necessary exposing both the baker and his customers to legal sanctions, (2) there has to be a common moral order for supplier and buyer to ensure truthworthy behavior on either side, and (3) monopolies (we would today say: restraints of competition) have to be absent. These three requirements for gaining altrustic effects from egoistic behavior, in turn, require something not thought of before: superaddition. The reasons are the following: The law and the moral order have to be valid for either side of any deal, and the market on which the deal is to take place, needs to be individual (= subjective). Without market rivalry, there would not be competition, and competition is necessary for the working of the invisible hand because any absence of competition is destructive for the invisible hand. Thus, only individual markets – defined by rivalry – enjoy the working of the invisible hand. Individual markets are superadditive entities – as the Anonymous Jamblichi remarked around 500 B.C. –, whereas objective markets are not. On objective markets – defined by not more than good, location, and time – the invisible hand cannot produce its salutary effects, it simply does not exist. Only in a superadditive system of mutual trust and reliance, selfishness works in the way Adam Smith empirically – and not deduced from modles – observed it. Outside of superadditive cultures, selfishness works against trade and commerce.

9. Economic correlates?

Are there identifiable correlations of economic types to forms of societal orders? In economic and legal anthropology, a much discussed topic is the possible relationships between economic types of living and forms of society. Theories of how to combine types of production, allocative results, and allocative modes such as reciprocity and redistribution, with societal forms such as bands, tribes, early states have already been reported.[913] Our discussion of these issues left us in doubt of any convincing parallelity. There were tribes that traded, such as the pre-entrada pueblos and the Viking merchant warriors on their way through what is now Russia to the Black Sea. On the other hand, there is evidence of early states with no developed credit market economy such as the Inka Empire and Old-Egypt. There seems to no easy way from making one's living to forming a government, in contrast to what Marx thought to be iron rule of historical materialism.

There have been attempts to correlate the three main cultural types (hunters-gatherers; reproducers – herders, horticulturalists, early farmers –; and city dwellers living under a regime of

913 See Katherine S. Newman's attempt (1983), and section 2, supra. Paul J. Zak (2008), 259–279, who investigated trust degrees in different countries believes that trust is a "deeply human" theme. This may be convincing but culture may take different attitudes towards trust and even warn against it. The question whether correlates between economy and societal organization exist is a subissue of the more general question of cultural determinism; see for this Chapter IV, above.

division of labor), with political organization, economic forms, and religions. As stated earlier (in Chapter 9 IV, near note 323), too many combinations can be verified to establish a convincing set of correlations. It seemed that the present stage of anthropological research does not permit conclusions of this sort: "they were hunters and gatherers, and therefore they were animists, and their political system was an egalitarian big-man society, and their economy rested on reciprocity": or: "they lived in cities, used division of labor so that not everyone did everything, and therefore they had a king, their economy was redistributive, and they were polydaimonists". Yet, some basic correlations between cultural traits and complexes were detected. Are there forms of economy that are "typical" for given cultures, at least in the manner of a "central type" (in contrast to a Weberian "ideal type")? If one applies synepeia analysis (see Chapter 6, above) to the correlation issue, a purely "etic" approach to addressing that question is avoided, and correlations between cultural type, social ordering, the role of consensus, economic forms, belief systems and philosophical systems, might result, at least in rough strokes. "Deterministic" prescrictions, albeit limited, seem possible: The economic side of this topic deserves some remarks here.

On the level of Synepeics I, the societal group usually calls itself "men" (Navajo: dinee; Old Germans: died, or deut; Hokkaido's Ainu: Ainu). Egality and egocentrism are strong (see Pospíšil on the Kapauku). Leadership is assigned to non-hereditary "big men". While a difference in wealth and influence may be visible, no formal societal strata exist. Communal decisions are made by consensus taking the form of time-consuming palaver with basically equal voice (no vote). Economically, allocation of scarce goods is provided for by acquisition (hunting, gathering, fishing), distribution (e.g., by the successful hunter to the village), and reciprocity, the two latter in a mutual relationship of balancing one another: Today, I was a good hunter and will share my prey with you, tomorrow you may reciprocate when you will have success. Trading (usually by barter) pacifies. Animism in the wide sense (= primal religions) is the typical belief system. Epistemologically, tribes and nations vary in their philosophy of knowing things, but usually develop knowledge from tribal traditional stories which may include sceptical ontologies (Navajo, Pueblos). The system is rather stable.

On the level of Synepeics II, the "discovery of the other" may come as a shock (Bandelier: The Delight Makers; the Hethites for Ancient Egypt). Moreover, the institution of the big man, as the authority for merely the in-group, is no longer sufficient. The group needs a chieftain, or king, not only as a leader but even more as a representative. The chief or king needs officials and police. Societal strata develop (Alfonso Ortiz for the Tewa Pueblos). Consensus takes the form of consulting the chief, with different or no voices according to strata. The system is less stable, both inside and outside: The strata fight for hierarchical order, and equality decreases. At the same time, the strata idea is bound to be exported, giving rise to fights for appropriate hierarchies on the "international" scene. There is no conceptuality of over-arching (superadditive) unit. *Economically,* the presence of a central power enables taxing and redistribution, and exchanges may be centralized in short-range markets (even if there may be long travels to the market places). Similar to distribution and reciprocity on the level of Synepeics I, redistribution and (short-range) market are somewhat balancing each other. Of course, acquisition, distribution, and reciprocity may exist along with redistribution and short-range markets, since there are fluid borderlines between the economic forms. But the stronger the power of the chief or king, the weaker distribution and reciprocity become. The "black market" emerges.: People try to circumvent redistribution by the accustomed system of reciprocity. Redistribution is stronger in economies with storable products such as corn (Ancient Egypt), and weaker in areas of non-storeable products (Hawaiian pineapple). Politi-

cal centralization leads to hierarchies in the world of spirits and demons. Polytheistic panthea develop from egalitarian spirits of nature (Hesiod). Politically successful nations integrate, but subjugate foreign gods to their own gods, which leads to even more hierarchical systems of gods, goddesses, and demi-gods (Greece, Rome). Failing "international" political leadership expresses itself in equally powered gods (Sumer). Epistemologically, the absence of superaddition prevents a critical distance between subject and object. Objects are not "thought-about". Parmenideic (or Platonic, i.e. dialog-related) ontology and epistemology are missing. Instead, reality has to be bargained for (Lawrence Rosen 1984). "Competence" prevails, causing instability, often short-term.

The thinking on the synepeical level III – the search for overarching concepts and evaluations, fit for comparison – opens up the possibility of a non-hierarchical international order based on *fides* (also in economics as trust and reliance) in the sense of Hugo Grotius (1603, 1625). *Dar-al-Islam* vs. *dar-al-harb* cannot be the last words. The greater *jihad* – self-restraint in view of a victory – may have an epistemological corollary. Then, in economics, greater *jihad* inaugurates the long-range trust and credit market. Trust may unfold its efficiency. The underlying belief system is a secularized version of Ancient Greek, Judaic, and Christian believes in equality, human dignity, and a mandate to be active. Epistemologically, democracy rests on Parmenides' trias of subject, object, and thinking: One is entitled to doubt and to critically think about something, casting one's opinion into judgments about the true, the morally good, and the esthetically agreeable. The subject-object relation is never direct and possession-acquiring, but reflected by thinking (with Plato in a dialogic shape). Distanced critical thinking is a requirement for the thinking in superadditive units. It consists in making dependent the cognisance of superadditive objects, in other words: systematic thinking in generalizations and specializations, on a culturally very specific kind of thinking, namely, the Parmenideian distance-keeping between the individual observer and the judgment to be made. It submits the practical working with superadditive objects, for example the establishment of a fail-safe capitalist economy in Hernando de Soto's sense, a government for Iraq or Afghanistan, or a Palestinian state, to the willingness to engage in a Platonic dialog. Especially Christianity accepted this Parmenideian sceptical – and time-related – world view in matters of alleged moral superiority and wisdom (Matthew 13.29, 30 – the parable of wheat and weed, which played a central role in 16th-century debates about tolerance –; 1. Thessal. 5, 21 – Christian epistemology in religious matters –). The disapproval of Judaism/Christianity and its secular product, the "Western" way of life, by Muslims, Buddhists, Hindus, Totalitarians and others finds its explanation, it seems, not so much in different contents of belief but in an education to be patient, to wait and doubt, to examine and reflect, to serve and to participate in dialog, and to build this distanced but attached targeting of objects on superadditive entities, as symbolized in institutions such as synagogue and church. There is of course Christian fundamentalism, too. But this is rather taken for granted by followers of competing belief systems.

The foregoing reduces societal structures to three "central type" models or cultural types: big men society, chieftaincy (*exousia,* as defined in *Luke 22.25, 26*), and cooperative (*archontes,* as defined in *Romans 13.*), which in turn are correlative to typical economic forms, belief systems, and ontology-epistemology philosophies. Consensus takes typical different forms and solves different tasks in all three models. That these generalizations – broad and imprecise as they may appear – become possible is probably due to the integration of the inside-outside distinction into cultural comparison, as a part of anthropological analysis, which is a method facilitating consideration of the cultural modes of thought, with a focus on economy. This was the point to be made here.

History demonstrates not only the way from (I) to (II) to (III). It may reverse this development and return to atavistic forms of correlated culture attributes. When in 1572 during the post-Jagiellonian constitutional deliberations the Polish nobility, the *shlachta,* insisted on consensus among the more than 500 noble families, this immobilized the Polish government, compared to the pre-democratic progress made in Western Europe by the irenists in Italy, Switzerland, France, the Netherlands, and England. In Western Europe, representative democracy began to develop from Presbyterian church law which used presbyters to represent the community for certain tasks. It is an atavism to assume that a political delegate is not bound by the interest of the *whole* but only by the interest of the *local* constituency she or he is coming from. A government that interferes with the business of another government in favor of a single firm ("Pfizer letters", Boeing dispute between US and EU, Monsanto) misses the superaddition of the state it represents to the outside, and takes a part for the whole. Modern international bilateralism and reciprocity misses the advantages and efficiencies of superaddition, that is, of enjoying the whole as being more than the sum of the parts. Bilateralism and reciprocalism deteriorate possible long-range trust relations to a serious of short-range and short-term exchanges.

The cultural types described above not only may sequentially move forth and back through history. They are also interrelated. In economy (as a part of culture), this means that there is a *law of the interdependence of economic forms* (for example in allocation): regular distribution reduces the need for reciprocity; less far-range means more reciprocity; less redistribution means more short-range markets (cf., the black-market phenomenon, or corruption); law-based and internalized long-range trust and credit markets reduce the risks associated with short-term dealings; etc.

10. Monetary types

The following sub-section on kinds of (a.) money and (b.) credit are not necessary for the progress of ideas. They are mentioned here for the purpose of at least partly completing the nutshell description of economic anthropology.

a. The different *kinds of money* are another main theme in economic anthropology, alongside the basic topics of what economy is about, and the theories on the kinds of exchanges. In the foregoing, economic types in pre-axial age cultures are investigated according to the categories of types of production, types of allocative results, and types of allocative modes such as distribution, reciprocity, redistribution, and market. In economic anthropology, there are exchanges with and without money. Speaking more broadly, involvement of money and credit directs the focus to the payment side of an economic exchange. Exchanges including money, as a counter concept to the types of exchanges discussed before, involve types of money, or monetary types. Looking at the opposite side of economic exchange, money, more allocative modes can be identified, as "money types."

Paul Bohannan distinguishes three types of money, according to the function it has.[914] (1) Money can work as a means of facilitating an exchange ("I pay you this amount in reciprocal exchange for your delivery"). (2) Instead, money may have the purpose of serving as the standard for value ("your cow is only … worth"). (3) Or, finally, money can serve as a means of payment without any reference to exchange or to value ("you have to pay income tax, war reparations," etc.). It seems that money may have further functions, for

914 Bohannan, Some Principles …, see note 882, supra; a critical view on the concept of debt in economic anthropology: Heinzpeter Znoj, Tausch und Geld in Zentralsumatra (Berlin: Reimer, 1995), see also Martin Roessler, Wirtschaftsethnologie note 856, above.

example the indication of wealth and power (round stones as "fa" money in Polynesia; copper among the Tlingit). It is a bit artificial to count these situations to the value standard category and to say that a person, a chief, a monastery, a sodality etc. is "worth" something within the meaning of the second of the before mentioned three types. Next, there are certainly types of money that can be divided numerically, such as the dollar, and those that cannot, such as pieces of jade in Inuit trade or dentalia shells in Chinook commerce (cases where the borderline to bartering becomes imperceptible). For the purposes of the following, we will restrict the discussion to the three generally acknowledged types in Bohannan's sense.

Money does not necessarily serve all (three or more) functions. If it does, it is called general purpose money, if not, special purpose money. Most anthropologists employ these distinctions. According to my research, Chinook dentalia, along the Northwest Coast of North America, served as general purpose money, however on short distances. By adding the distance over which money is used, an additional criterion of distinction could be introduced.

b. Similarly, *credit types* can be identified. They become of interest if credit is involved as types of allocative modes. This is not the place to go into details of pre-axial age or post-axial age non-Western credit types.[915] Such types depend on the prevalent allocative modes and the functions and purposes of money involved.

However, the story of the Anonymous Jamblichi is illuminating (W. Fikentscher 2004, 30ff.) because it demonstrates both the essence of credit, the meaning of the individual market in its long-distance version, and the importance of the axial age as such: Throughout history, philosophers of economy were fascinated by the phenomenon that general welfare develops from the egoism of merchants. Anonymous Jamblichi compared the general wealth of the Greek city states, the poleis, which did not possess much gold, with the widespread Persian poverty that existed despite the immeasurable gold treasure owned by the Persian Great King. Anonymous Jamblichi solved this paradox by stating that the Greek merchants' activity and spirit that apparentlyly caused Greek wealth. This activity in a certain spirit was caused, in turn, so Anonymous Jamblichi, by the manifold relations of trust and *credit* that existed, as an economic and legal framework, both within and between all city states of the Greek *koiné,* the Greek Community. A mental achievement, credit, in combination with a legal setting proved to be of greater weight and of higher value than gold. The Greek *koiné* was an individual (= subjective) market. Each Greek merchant trading in certain commodities, knew each other within the home city, and in other cities as well.

Distance trade was in use, but by crediting a merchant, something new entered the economic scene: the Greek Tragic Mind offered the possibility of becoming self-organized, similar to the Greek contingent at Marathon. The superaddition workes also with respect to a common market. There was competition within a club of members of that superadditive entity. Each member wanted to live under one law of liberty, equality, and economic fairness.

The Greek Tragic Mind is a turning point from pre- to post-axial age modes of thought (W. Fikentscher, 1995/2004, Chapter 9). At Anonymous Jamblichi's time (450 B.C. E), total economies with their objective and individual markets emerged, and credit relations upon the latter became practiced, as later increasingly throughout the Roman Empire. There was an economic unit which was more and different from the addition of bilateral economic relationships.

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915 An example: Michael Mühlich, Credit and Culture, Berlin: Reimer, 2000.

11. Economic spheres

The theory of the *economic spheres* represents a further important doctrine of economic. anthropology. Working among the Tiv of Nigeria, Paul and Laura Bohannan discovered what they called economic spheres.[916] Kottak, giving the credit to the Bohannans, calls these spheres "spheres of exchange in multicentric societies". The Tiv exchange food for small livestock or tools and vice versa, but they do not exchange these items of daily supply for items that belong to another economic sphere, such as cattle, large bolts of white cloth, metal bars and – formerly – slaves. Nor may, as a rule, these objects which indicate social standing be exchanged with objects from the economic sphere of daily supply. However, the items of the latter category can be traded among each other: cattle for metal bars, large bolts of white cloth for cattle and – formerly – slaves for either cattle, metal bars, or bolts of white cloth. The Tiv also exchange women, but only women for women, not women for tools, or women for cattle. An example for the economic sphere of women, the market for women, so to speak, is the Tiv wardship system, according to which a male member of the tribe is responsible for a number of women, his wards, for whom he may arrange marriages in exchange for wives for himself or for others, or wards for his "ward pool". Thus, Bohannan concludes that the Tiv have three distinct spheres of economy. On a more abstract level, the first sphere relates to subsistence, the second to prestige, and the third to marriage partners.

Economic spheres do exist not only among the Tiv. In Chinook trade, slaves formed a separate economic sphere. Classical Roman law excluded certain commodities from trade *(res extra commercium)*. Two-US-Dollar notes exist but can practically only been found in connection with horce-race bettings. In contemporaneous Germany, certain high-value bank notes are tradeable only among a closed number of traders and for limited purposes.

Exchanges *within* one sphere are called conveyances. If, in rare cases, exchanges are performed between spheres, for example – in times of want – metal bars for livestock, the exchange is called conversion. Conversions from the subsistence sphere to the prestige sphere will contribute to the honor of the recipient. Only a rich person can do this. Instead of giving savings to Savings and Loan Banks, not existing in Tivland when the Bohannans' research was done, surplus values were stored in the prestige sphere. A conversion from the prestige sphere to the subsistence sphere, for example sacrificing cattle for food and small livestock in order not to starve, entails shame. Emptying one's bank account in a money crunch, in our economy, is tantamount to a loss in social standing.

Potlatching among the Tlingit, Tsimshians, Haida, Kwakiutl, Salish, and other Northwestern North American tribes involves a conversion of food, clothing, and other items of everyday sustenance into "items" of the prestige sphere.[917] A population reduced by white man's diseases, fluctuating periods of abundance and shortage of salmon and herring, and other ill fate led to concentrating wealth from trading with the Europeans in the hand of a limited number of tribal members. In order to maintain an equilibrium between favored and disfavored villages without resorting to social stratification, potlatches are needed from time to time to convert abundance into prestige and to draw from this "account of prestige" in peri-

916 Laura Bohannan & Paul Bohannan, The Tiv of Central Nigeria. London 1953: International African Intitute; Paul Bohannan, Justice and Judgment Among the Tiv. London & Oxford 1989: Oxford Univ. Press (1st ed. 1957).

917 E. g., Stuart Piddocke, "The Potlatch System of the Southern Kwakiutl: A New Perspective," in: Andrew P. Vayda (ed.), Environment and Cultural Behavior (Garden City, NY: Natural History Press, 1969), 130–156; Andrew P. Vayda, "Economic Systems in Ecological Perspective: The Case of the Northwest Coast" in: Morton H. Fried (ed.) Readings in Anthropology, vol 2, 1961; reprinted New York: Crowell, 1968, 172–178; F. Boas, Kwakiutl Ethnography (H. Codere, ed.), Chicago 1966: Chicago Univ. Press (orig. 1897).

ods of need when other villages hold their potlatches. Potlatches, by means of conversions, serve to reduce the impact of altering periods of wealth and want, prevent undesired stratification, and generate an alliance of potlatching tribes. Thus, a potlatch may work both ways: it honors one side and shames the other. In addition to this inherent economic meaning (which seems to be declining in importance), potlatches have an identification effect: creation, migration, adventure, and family stories are told, statuses and alliances reconfirmed, and the coherence of the tribe is maintained.

To the Western reader of ethnological literature, potlatching may appear as a totally illogical, weird system of annihilating man-created or -owned values. Such cultural distancing overlooks that Western culture has developed similar, and judged by the intent pursued, almost identical means of value extermination: the property tax with its variations (*impuesto de patrimonio, Vermögenssteuer* – an old Socialist demand). Property taxes reduces man-created and -owned values without redistributing them to other members of society, as occurs by other taxes. Property taxes do not contain productive or reproductive elements. As in a potlatch, they merely reduce what certain people have, born from a feeling that "there is too much" and that this impedes life.

A modern and extreme form of conversion happened in post-war Germany. In the early 1950s, after the currency reform of 1948 and the beginning of the Germany economic recovery, tax revenues soared to an unprecedented level. The young Federal Republic of Germany became "too rich," similar to the Northwest Indian chiefs before the next potlatch. Instead of spending the unexpected revenue for political purposes Friedrich Schaeffer, then Minister of Finance in Chancellor Adenauer's first cabinet, let the incoming money simply disappear in a fictive account. That fictive tally, not to be accounted for in the budget, finally amounted to seven billion Deutschmarks. The disappeared money soon received the nickname *Julius Turm* (Julius' Tower) after a historical building of the Fortress Spandau near Berlin where in the eighteenth and nineteenth centuries the Prussian king had stored the state's gold reserves. Schaeffer may have been the only finance minister in world history who had too much money. He potlatched the excess revenues away, by converting them into international standing. Later, when Germany joined NATO, after a long national and international debate, part of the money was used to fund the new military.

12. An anthropology of giving thanks. Corruption

A comparative anthropology of giving thanks has yet to be written. In "Out of Africa" Isak Dinesen tells of a seemingly total absence of a feeling of gratitude from the side of Kikuyu tribal people whom she says she had "helped", for example in cases of illness. Frank Linderman (143 f.) reports the same of Northwestern Indians. In Taos, NM, I was told the story of a white American lady tourist who, impressed by a guided tour through Taos Pueblo, asked a native onlooker: "How do you say "thank you" in your language?". The addressed Taos citizen frowned and turned away silently. The tourist was taken aback.

Kottak suggests that in a hunters society it may be grossly impolite to say thank you to the successful hunter or fisherman who comes home and distributes the meat, or to the successful collector of berries or other food. His or her duty to distribute to the entitled receivers is self-evident, and expressing thanks might even include doubts in his or her hunting, fishing, or gathering expertise. Moreover, on another day another hunter, fisherman, or gatherer may be successful so that the duty to share easily changes from one food provider to the next. Saying thank you in this setting makes little sense.

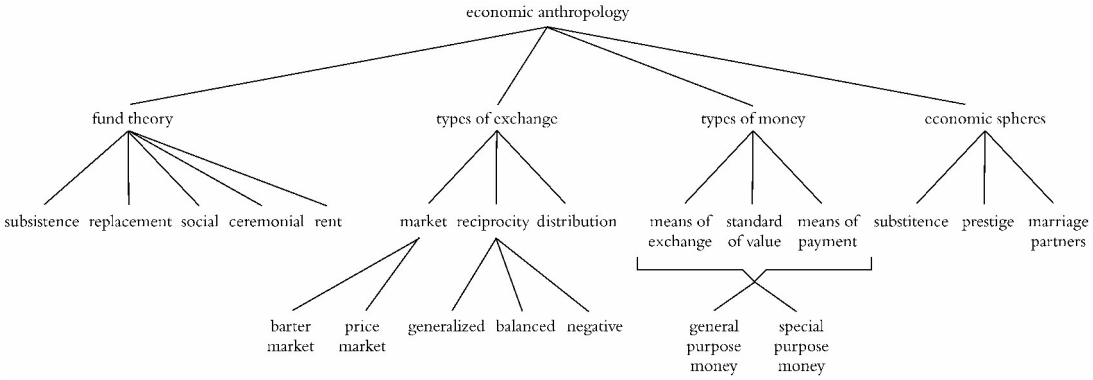
There may be another explanation: The feeling of gratitude means to be conscious of a necessitity, or etiquette, of reciprocally granting an advantage to somebody or something

(a human, an animal, a spirit, a god, blind fate, etc.) that has granted an advantage to oneself. "Granting an advantage" means, in this context, that the giver transfers upon the other something that belongs to the giver's sphere: property, time, effort, attention, thoughts, care, etc. In a culture that does not assign these goods to a person's sphere in form of an extended concept of ownership, these goods are for free and therefore not fit to be thanked for. Every culture assigns to its participants something to be owned, but the dividing line between ownables and free items varies greatly. A "thank you" is only due for granted ownables. All that lies beyond the limits of culturally approved possessions is unfit for saying "thank you". Here the reason may be found behind the attitude found in some developing countries, and among affirmative action recipients, for not showing much gratitude, including the insistence on common heritage of mankind, and equality of opportunities.

A special kind of giving thanks, often in advance, is bribery. Corruption represents a negative side of reciprocity, and its anthropology is worthy of study. To judge the legality, or impropriety, of corruption, each specific cultural situation has to be evaluated.[918]

13. Mainstream economic anthropology

The present state of the art in economic anthropology, described above, can be illustrated, in rough strokes, in the following graph:



The rather refined teachings and distinctions of economic anthropology can be used for practical work and the building of theories. However, five points of criticism may be raised, aiming to improve the present system of economic anthropology and thus to adapt it to even better use. Three points have already been addressed:

(1) There is a hitherto unexamined relationship between the theory of funds and the concept of market. Only in the context of the rent fund it is possible to generate what keeps a market running, that is, the alternatives between two or more competing offers or demand requests.

(2) The sequence: market - reciprocity - redistribution ought to be rearranged, corresonding to probable evolution, to reciprocity - redistribution - market.

(3) There are even more rudimentary forms of economic allocation than the traditional system of "exchanges" provides (1) acquisition by hunting, fishing or gathering, and (2) simple distribution (here called distributive sharing). Acquisition and distributive sharing are not

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918 See the contributions to Raimund Jacob & W. Fikentscher (eds.), Korruption, Reziprozität und Recht, Schriften zur Rechtspsychologie vol. 4, Bern 2000: Stämpfli; W. Fikentscher, Ersatz im Ausland bezahlter Bestechungsgelder, Besprechungsaufsatz zu BGH of May 8, 1985, IV a ZR 138/83, IPRax 2/87, 86 (with K. Waibl).

"exchanges".[919] Preempted taking, peace keeping, care for supporters, protracted infancy, balanced reciprocity (unlucky hunters) or general reciprocity (the elderly ones) may be the main reasons for distributive sharing. Equal treatment is anticipated reciprocity. Herein lies the truth of the Coase phenomenon: It is to be expected that people distribute reciprocally. But distribution comes first.[920] Thus, there are economic types which are not exchanges. Therefore, the word "exchange" used in the context of economic anthropology may be replaced by "allocative mode". It may be said that the four allocative modes are distributive sharing, reciprocity, redistribution, and "market."

(4) However, the main criticism above is directed against the indiscriminate use of the word "market". Even Marvin Harris's distinction between "barter" and "price" markets does not suffice to catch the wealth of empirically observable forms of what has been called "market." Thus, when one discusses the economic types and total economies in the anthropology of economics, what some call "market" in reality takes several forms. The forms of market are best derived from three pairs of distinction:

(a) First, there is the distinction between objective "anonymous" markets as statistical or political entities, defined by good, area, and time, but not by competitive rivalry, on the one side (e.g., "the world brick market"), and non-anonymous, competitive, and therefore "individual" ("subjective") markets on the other ("the Southern Bavarian/Eastern Suebian brick market"). An individual market is the aggregate of a market participant's perspectives of this participant's alternatives for supply or demand, and the rivals of this participant for such supply and demand.

(b) Second, there is a distinction between pre-axial age markets and post-axial age markets, both shaped by the pre- and post-axial age modes of thought, respectively.

(c) Third, there is a distinction between short-time and short-range markets, such as a bazaar, a barter market, the cheese market in Alkmaar/Netherlands, all markets where credit is not used, not asked for and not granted, on the one hand, and long-time and long-range markets involving trust, and credit, such as the trade by way of accreditment or in bills of exchange on the other. These long-time and long-range markets may aptly be called trust markets.

Since pre-axial age markets do not include long-range trust relations and since the three pairs of the possible combinations are mutually exclusive, there are six logical possibilities to construe a market. However, in practice, only four of them are economically important combinations: (1) pre-axial age subjective short-range markets (e.g., Pueblo barter trade), (2) pre-axial age subjective long-distance markets (e.g., Kula expeditions, Eskimo jade and utensils exchange meetings), (3) post-axial age objective markets ("Libya, the corn chamber of Ancient Rome" as discussed in history books), and (4) post-axial age individual (= subjective) trust markets (e.g., the Californian car insurance market). In particular, some but not all

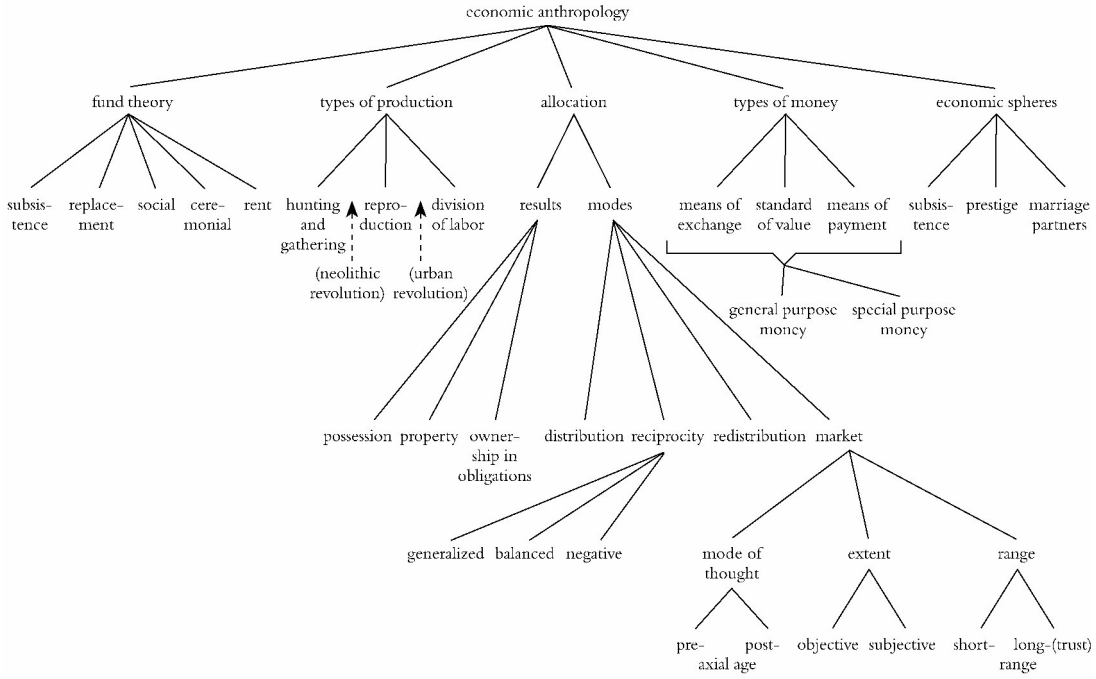
919 Jan Pettit, Utes: The Mountain People. Rev. ed. Introduction by Eddie Box (Boulder, CO: Johnson Books, 1990), 39: "When a group went out to hunt, the person who killed an animal was entitled to the skin, but the meat was divided equally among all the people. The kill would be brought into camp where the hunter would divide up the game by cutting portions from the animal and giving them to whomever came to get them". This is what here is called "simple distribution"; see also J. Woodburn, Sharing is not a Form of Exchange: An Analysis of Property Sharing in Immediate-Return Hunter-Gatherer Societies, in Chris M. Hann (ed.), Property Relations: Renewing the Anthropological Tradition, Cambridge 1998: Cambridge Univ. Press, 48–63; Uwe Wesel, (1979), who convincingly remarks that prey sharing is different in many tribes, but follows the same intention to protect the non-hunring part of the population.

920 On sharing habits among chimpanzees see, for example, Frans de Waal. Good Natured: The Origins of Right and Wrong in Humans and Other Animals. Cambridge, MA 1996: Harvard University Press, 136f. (etiquette), 142 (joint hunting), 143 (status enhancing), 160 (revenge).

post-axial age markets – according to the prevailing mode of thought – are characterized by far-range exchange relations that include credit and trust relations, as well as their participants' rights and duties.

14. An improved outline

Thus, in the following graph on economic anthropology, the lower left corner of the foregoing graph, containing the terms barter market and price market, are replaced by at least three positions: pre-axial age subjective short-range markets, post-axial age objective markets, and post-axial age subjective long-range trust and credit markets. Even more complete is the addition of the three distinctions so that combinations can be made. Here follows a graph which contains the proposed changes in economic anthropology:



The illustration demonstrates that "free economy" and "economic liberalism" as decribed, for example, by Adam Smith is a rather culture-specific mode of allocating scarce goods. It requires superaddition, rivalry, and long-range trust. Its problem lies in the conflict between the ethics of effort and the ethics of demand, and the resulting social injustice of unpaid effort. How to organize superadditive individual long-range trust markets that avoid social injustice (*soziale Marktwirtschaft* = constituted market economy) involves issues that cannot be discussed here (cf., W. Fikentscher 1983b, Ch. 2 IV; idem (1993), 905–907; idem, An Environment-conscious Constituted Market Economy, in: idem, Freiheit als Aufgabe, Tübingen 1997: Mohr Siebeck, 12–44; a report in: iwd No. 25 of June 19, 2008, 5, defines constituted market economy by four factors: freedom, social justice, subsidiarity, and legal protection of competition).

15. The role of antitrust for the rule of law and for economic development

For the German economic recovery after World War II, a law for the protection against abuses of economic power, first Allied (1947), then national (1958) and simultaneously European (1958), was of utmost importance to overcome point zero in 1945. The English tradition of

such a law, dating back to Edward Cook's initiative to have Parliament in 1624 promulgate a "Statute against Monopolies", speaks of antimonopoly law, the US tradition since 1891 of "antitrust law". The purpose of antimonopoly, or antitrust, law is to safeguard the government's prerogative to be responsible for the commonwealth's policy against attempts of twisting away this prerogative and shift it over to the powers of economy.

Thus, antitrust lawdoes not exist for consumer welfare or industry structures or non-transitory price hikes or substantiality of lessening competition or other niceties and technicalities of economic theory. Rather, antitrust is the economic side of the rule of law in its meaning as *Rechtsstaat*. This includes the consideration of anticompetitive effects of transborder financing, the "locust" problem (according to a remark in 2006 by former German Vice Chancellor Müntefering, "locusts" are holders of floating around "hot" money who are able to disturb national and regional competitive structures by cross-border channeling of large amounts of equity capital).

Historically, Continental European constitutions (democratic, bottom-up structured) consist of a pledge of faith of Frankish tradition that includes a horizontal tie of trust among the citizen members, and a vertical tie of trust between the citizens and a mandated and accountable government across time (on the Normannic variation of this structure characterized by reduced accountability of the lord, see Chapter 5 V. 4. and 9 III. 4., above). Human rights are part of this trilateral pledge. It also refutes a top-down political dictatorship, and asks for legal antitrust control of economic monopolies in a national and international framework.

Whoever understood the difference between the antitrust concept of the as-if-competition price and that of the Marxist use value, can say that she understood the main societal and economic problem of the world since 1848. This person, or nation, did not, as the Sowjet Bloc did, go bankrupt, but had and has a rather high measure of social and economic justice at her disposal. If she, moreover, includes in her judgment also cultural specificities, she will approach the economic and societal problems of developing countries, too.

What does all this mean to developing countries for overcoming *their* point zero? At least four consequences are to be mentioned: (1) antitrust in its usual form as control of hardcore cartels, and protection against abuse of *existing* economic power in horizontal and vertical respect; (2) regulation of public utilities on the basis of as-if-competition; (3) the protection against the *build-up* of abuse-directed economic power, for example in form of financial imposition; and (4) the jurisdiction of local courts and application of local law for effectuating these three goals, aided by recognition of such decisions in other jurisdictions under public policy standards.

In Russia, traditional chiefdom verticality seems still to prevails over cooperative membership. In 1989/90, the introduction to Russia of an unfettered Hayekian liberal market system ("self-healing market forces with competition as a discovery process") under the influence of neoclassic Chicago School professors of economy led to unequal distribution of wealth and insufficient control of political power. Professor Jeffrey Sachs was one of the US advisors who were not aware that freedom must not include the freedom to abolish freedom.[921] To teach the free market to Gorbachow and Jelzin without simultaneously teaching antitrust as the means to keep freedom sustainable and therefore free across time, was bound to cause havoc, economically, democratically, and internationally. In Russia, in 1989/1990, Adam Smith was

921 University of Michigan (Ann Arbor, MI) (ed.), Peace and Properity at Hand, Yet at Risk, report on the William W. Cook Lecture 1995 by Professor Jeffrey Sachs, 38 Law Quadrangle Notes, Spring 1995, 3–4; W. Fikentscher, Freiheit als Aufgabe, Freedom as a Task, Tübingen 1997: Mohr Siebeck, IV; idem (1995/2004), 206, 270.

taught halfway: his economics were taught but without their legal and moral requirements. But did "Chicago" ever think about morals? Overcoming law means overcoming morals. The advisers forgot the lesson of 1945: if you want to sell freedom you have to sell along an antitrust policy and antitrust law that are aware of the freedom paradox. Paradox-free market and competition are helpless against their opposites, monopoly and restraint of trade. There *is* now an "antitrust à la Russe" consisting in locking up oligarchs in Siberia, but this may not be a satisfactory solution.

Antitrust is a control of results of economy, and along with tax law the most important one. The main result of economy is property. The next chapter deals with the anthropology of property.

III. Bibliography

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Chapter 11: Possession, ownership, probate; market and non-market economies; antitrust; cultural property and heritage of mankind (the anthropogy of distributive justice)

Chapter 11 on ownership discusses, next to a brief introduction to the essentials of the field, aspects of anthropological respect for the environment and of other collective goods as well as the anthropology behind the protection of traditional knowledge and cultural heritage. These rather recent additions to traditional anthropological discourse are examined, using the relationship between preservation of nature and preservation of culture as general frame.

In an interesting comparison Elena Bonner, the spouse of Andrej Sacharow, remarked that Marxism had a stronger desorienting and mind-destroying force than National Socialism. As brutal, extortionate, and deadly as the latter was, it leaves the *institution* of property untouched. Marxism, however, deprives people of property as an institutional backing, thus changing personalities into different beings and producing a type of humans devoid of identity, rights, and dignity, respect for others, respect for oneself, and the ability to act.

Similarly, Dan Diner observed that in the Osman Empire generals, ministers, and other high nobles and dignitaries, while holding considerable power, never owned sizeable fortunes of their own, for example agricultural estates. They thus never filled the position of a feudal lord of the European Frankish pledge-of-faith system under the king. Diner concludes that, in the Osman Empire, there was no governmental intermediary class able to, on the one hand, become a political threat to the Sultan, and on the other, serve as a stabilizing factor of existing rights and duties in times of unrest and instability.[922]

I. Nature and nurture of property

As much as animals express the possession of territories for nourishment and reproduction,[923] humans, too, are in need of protected goods in all economic funds, including, at the most rudimentary level, the subsistence fund.[924] To be entitled to have something, including the necessary protection of this ownership, belongs to the essentials of human existence, biologically and culturally, and therefore as a matter of justice.[925] For instance, the right to property plays an eminent role in the historical rise of fundamental rights.[926] Having property translates into freedom to act. The mutual reference of possessing and acting, of having a free port to start sailing from, appears to be a human must.[927] A few anthropologically relevant aspects of property are mentioned below: distinction between ownership and possession, property

922 Dan Diner, in a lecture before the Siemens-Stiftung Munich, March 2006.

923 Chapter 7 II. 2. j (2).

924 See Chapter 10 II. 1., above.

925 A good example for W. Durham's co-evolution, see Ch. 7 II. 4. h., above.

926 Micheline Ishay, The History of Human Rights: From Ancient Times to the Globalization Era, Berkeley 2004: Univ. of California Press, 64 ff; W. Fikentscher, Die heutige Bedeutung des nichtsäkularen Ursprungs der Grundrechte, in: E.-W. Böckenförde u. R. Spaemann (Hrsg.), Menschenrechte und Menschenwürde, Historische Voraussetzungen – säkulare Gestalt – christliches Verständnis, Wien 1987, 43–73, substantially revised in: idem & St. Heitmann, J. Isensee, M. Kriele, N. Lobkowitz, A. Püttmann und R. Scholz, Wertewandel – Rechtswandel, Perspektiven auf die gefährdeten Voraussetzungen unserer Demokratie, Gräfelfing 1997: Verlag Dr. Resch, 121–166, with references. Since reciprocity often leads to ownership, this confirms reciprocity as source of fundamental rights (see Ch. 10 II. 6. g., above), and note 1192, below.

927 The discrediting of *having* something as opposed to *being* human, propagated by Marxist writers starts from the unproven supposistion that every ownership is necessarily an abuse. Of course, property can be abused. Abuse control of property is another matter of the anthropology referring to market and antitrust.

rights, chattels an land, property in body parts, property after death, environment and collective goods, intellectual property.

Distributive justice attributes to everyone what she or he deserves, resp. owes to others. Everybody should get what is due to her or him: *suum cuique.* The attributions may differ in size and value. Depending on the merits of the case also results are different. It has been pointed out that only in balancing distributive and commutative justice (and in consideration of other kinds of justice) "true justice" can be approached (see Chapter 9 I. 3., above). Distributive justice considerations are (or rather should be) behind what is owed by and to the individuals and groups.

It is an open question whether distributive justice can be traced back to a general biological principle in a parallel way as commutative justice can be to the principle of reciprocity. Such a principle is at least less evident in the case of distributive justice. Biology speak of the niche phenomenon: plants and animals try to make their living in a niche that suits their needs. Nature assigns niches to its creatures. Every being attempts to find a place or a territory "of its own". Maybe this indicates a parallel from biology. Another parallel could be dominance. Niche theory and dominance behavior are related: The dominance of some leaves only niches for others, and Darwin would say that thus the world is organized in an efficient way. A third approach may point to parasites: Parasites force plants and animals to adopt to constraining conditions (see Chapter 7 II. 2. f., above). Niche theory and parasitism seem related in "assigning" plants and animals ways of existence that are beneficial to them, but these are speculations. (for further discussion see Murray Gell-Mann, The Quark and the Jaguar, 1994, and John O. Holland, Hidden Order, 1995.

II. Some issues

There are many definitions of property, and the different functions of property have been widely discussed.[928] From an anthropological perspective, the following six issues have here been selected:

1. From possession to property?

Legal theorists differ on how property came into existence. Some say, possession was the rudimentary form of all property, and only later possession dissociated in two forms, less protected possession, and stronger protected property (Carol Rose 1985). This theory is supported by historical findings of intermediate forms between possession and property. Other legal thinkers point to the fact that possession and property are antagonistic concepts and therefore hardly developed from one another. Once contracts such as lending, leasing, renting etc. come into use, property and possession become indeed opposites.

928 Classic works: Vinding Kruse, Das Eigentumsrecht, 3 vol, 1931–1936 (transl. from Danish: Larsen); Oliver W. Holmes, Jr. The Common Law, Boston 1881: Little, Brown, 206–246 (here quoted from the 48th printing); Rudolf von Ihering, Zur Lehre von den Beschränkungen des Grundeigenthümers im Interesse der Nachbarn, 6 Iherings Jahrbücher 22 ff. (1862). On whether property is a pre-legal cultural universal or a culture-dependent and thus culture-specific guaranteed institution serving to grant persons the necessary material support is a matter of debate. Pro support: M. Wolff & L. Raiser, Sachenrecht, Ein Lehrbuch, 10th ed. Tübingen 1957: Mohr Siebeck; 1 ff.; L. Raiser, Das Eigentum als Menschenrecht, FS Fritz Baur, Tübingen 1981: Mohr Siebeck, 105, 117; pro universal: Harry Westermann, Sachenrecht, 5th ed. Karlsruhe 1966: C. F. Müller, 6 ff.; G. Dürig, Das Eigentum als Menschenrecht, 109 ZgS 326–350 (1953); Fritz Baur, see Rolf Stürner, Fritz Baur – Rechtswissenschaft zwischen Tradition, Dogmatik und Aufbruch –, St. Grundmann & K. Riesenhuber (eds.), Deutschsprachige Zivilrechtslehrer des 20. Jhrhunderts in Berichten ihrer Schüler, Berlin 2007: de Gruyter, 385–398, at 392, see also 160 f.

Therefore, the question can only be decided against the background of a certain development in the law of contracts (see Chapter 10, above). One of the aspects involved is the conceptional distinction between possession and property, and the ensuing question whether there are intermediary forms or not. One view holds that possession is the older, more elementary form of exclusive holdership, growing slowly into safer protected forms of property along with changing economic needs.[929] This argues in favor of intermediate forms, including *Gewere,* a type of legal exclusivity in Germanic law.[930] The opposing view points to the obvious fundamental distinction between property and possession which may be lent or leased to a contractually entitled holder, for example a tenant. This distinction does not permit gradual degrees. Historically the former applies, systematically the latter.

Ethnologically, three considerations may be raised: (1) Possession requires a factual dominionship by a person over the possessed matter. In most cultures this is delineated differently. Among Prairie Indians loosing your cowboy hat without immediately picking it up again means relinquishing your property, so that anyone may take it.[931] Putting your pair of shoes in front of your hotel room door at night means getting a shoshine on the Continent, but giving up your property in USA, like hanging your laundry on a line in public spaces in some South European regions. – (2) The context of property and contract is culture-specific, too. Some tribes respect long-term leases, others not. – (3) When a culture has a traditionally strong feeling for the separation between a private and a public sphere, public property is respected; if not, public property is likely to be neglected.[932]

2. Property rights?

The theory of property rights has its anthropological aspects. As a theory of biological, organizational, and economic impact, it has been discussed in Chapters 7 IV. i.F., 9 III 6, and 10 I. 1. Its main problem is that it derives from the concepts of perfect competition and market failure. Following this kind of reasoning, property inhibits competition because it is a market failure.[933] Once it is realized that perfect competition is non-competition, because it avoids rivalry,[934] property becomes a requirement for competition, namely, as the object of rivalry.[935] Then, an issue can be solved which property rights theory cannot address: the question whether the freedom to compete is a property right. For property rights theorists, such a freedom is a property right, so that the freedom to compete is a market failure (which is economically undefendable). For the theorists of the individual – that is, rivalry-defined – market, the freedom to compete is not a property right, but the vehicle of the law to move property rights from one person to another.[936] Thus, the freedom to act – a right in itself – is the counterpiece to property (and its protection by law) so that both have to be weighed against

929 Carol Rose, Possession as the Origin of Property, 52 Univ. of Chicago Law Rev. 73–88 (1985).

930 Rudolf Huebner, A History of Germanic Privare Law, Boston 1918: Little, Brown (Transl. from German byFrancis L. Philbrick), esp. on Eichhorn's book on *Gewere.*

931 A scene in the movie "Dances with Wolves", with and directed by Kevin Costner (1990).

932 An example is the story of the running water faucet in June Starr, Turkish Village Disputing Behavior, in: Laura Nader and Harry F. Todd (eds.), The Disputing-Process Law in Ten Societies, New York 1978: Columbia Univ. Press, 122–151.

933 See Chapter 10 I. 1., above.

934 See W. Fikentscher (2004), 37, 185.

935 Op cit. 27, 204 f.

936 W. Fikentscher, Wettbewerbs und gewerblicher Rechtsschutz, Munich & Berlin 1958: C.H. Beck, 204 ff.; idem (2004) 119 ff.

one another, for example in deciding the limits of a copyright, or of a patent, or on the limits of the permissibility of licensing contracts.[937]

The theory that freedom to compete and property constitute one another is no subject for a book on law and anthropology, but it ought to mentioned.[938] *Sedes materiae* is economic anthropology, as well as in a much broader sense macro- and microeconomics. In brief, the theory holds that competiton requires mini-monopolies to begin with, and the pursuit for Slightly larger mini-monopolies to make competition worthwile.[939]

The relationship between competition and property can be expressed by a curve that is so simple that it need not be drawn in a graph: The horizontal axis represents the influence ("mini-monopoly") a market participant has on his market by virtue of holding property. The vertical axis represents the intensity of competition. The curve of optimal competition may be added as follows: Near the crossing point of the horizontal and the verttical axis, the curve starts right on the horizontal axis. This means that the market participant has no influence on the market whatsoever, in other words, he has no property. Competition is zero. To the right of this, when the market influence through property may still be very weak, the curve starts to rise, of course rather low, but on the upper (plus) side of the horizontal line. When the market influence becomes stronger and stronger, the curve turns up, indicating that competition becomes more and more intense and lively. Then comes an *optimal point* where the property held by the market participant is so strong that an optimal intensity of competition is reached. When now the market influence grows even stronger beyond this point, the mini-monopoly develops into a restraint of competition, followed by substantial lessening of competition, and in the end followed by a real monopoly. The curve bends down, and when there is a complete monopoly, the curve touches the horizontal line again: Zero competition is left.[940]

3. Property in chattels and in land

Classical Roman law did in principle not distinguish between property in chattels and in land, and slaves were regarded chattels. Old German law did make the distinction, as does present-day common law, and it seems that most cultures treat movables and immovables differently. In hunter and gatherer societies, personal belongings such as garments, jewelry and sewing items of women, tools and weapons of men, were counted as part of the body. Their proprietary status followed the residence of the person and into the grave. The custom of burying personal belongings together with the deceased has made the study of these parts of the material cultures of former times possible.[941] Germanic laws provided for property of such

937 W. Fikentscher (see preceding note); idem, The Draft International Code of Conduct on the Transfer of Technology: A Study in Third World Development, Weinheim, Deerfield Beach, & Basel 1980: Verlag Chemie (with H. P. Kunz-Hallstein, Chr. Kleiner, F. Pentzlin & W. Straub); Andreas Heinemann, Immaterialgüterschutz in der Wettbewerbsordnung, Tübingen 2002: Mohr Siebeck.

938 For the theory, based on the rivalry-defined individual market as opposed to perfect competition, see W. Fikentscher (2004), 119–178.

939 Knut Borchardt & W. Fikentscher, Wettbewerb, Wettbewerbsbeschränkung, Marktbeherrschung, Stuttgart 1957: Enke; reprinted in W. Fikentscher, Recht und wirtschaftliche Freiheit, vol. I, Tübuingen 1992: Mohr Siebeck, 89–159.

940 The theory of the little monopolies which are *require,* not just accepted as trade-off, for competition has for the first time been published in Borchardt & Fikentscher (preceding note), Part One, II; on the history of this theory, W. Fikentscher (2002), 121 f., with note 201.

941 Nils Erland Herbert Nordenskiöld, Analyse ethno-geographique de la culture matérielle de deux tribus indiennes du Gran Chaco, Paris 1929 ; K.-H. Kohl, Die Macht der Dinge: Geschichte und Theorie sakraler Objekte, Munich 2003: C. H. Beck, 2003.

chattels is determined by the person's "bones", the principle being *mobilia inhaerent ossibus domini*.[942]

The distinct treatment of rights in land may have two reasons, (1) the feudal structure of public life that gave the vassal more responsibilities regarding land than in movables, and (2) an understanding of reciprocity, namely, that it is to the land, used agriculturally and for hunting to be able to survive. In contrast to a more technical and separation-of-labor-oriented approach to land in the Roman Empire, this narrower connection to arable land made real estate particularly precious and subject to protective laws. Both reasons may have had a common root. Movables were considered more volatile and a matter of less importance The contemporary "Roman" attitude of Northern European tax administrations of subjecting money capital and real estate to identical tax provisions is out of step with legal history.[943]

Another question is whether land should be divided at all into individually owned lots. Hunters and gatherers as well as nomadic herders have good reasons to oppose such individual ownership in land. The fence that cuts an Indian trail more often than not led to violent reactions (Frank Linderman). Northamerican Indians often refused to understand why land can should owned by humans. Chief Tecumseh's saying that land cannot be better divided than the running water, the air and the sky became famous.[944] In some countries of the developing world, individual ownership of land is being invented to become tradable in markets.[945]

4. Property in body parts. including genes

To what legal degree should property in and alienability of body parts, including genes, be permitted? For example, are body parts free to be sold or be willed? For these issues, some literature is listed at the end of the chapter.

III. Inheritance (probate) law

Were there is property law, there must be inheritance law because people die. Lenin's attempt to do away with inheritance, as a consequence of classless and therefore property-less society soon ended with a re-introduction of the right to inherit what the Russian Revolution of

942 James A. Ballantine, The College Law Dictionary, Rochester, NY 1931: The Lawyers' Co-operative Publ. Co, tranlates: Movables cling to the bones of their owner.

943 The issue cannot be discussed here; cf., BVerfGE 93, 121 of June 1996; Paul Kirchhof, Wege zu einem neuen Steuerrecht, Munich 2005: dtv., idem, Empfiehlt es sich, das Einkommensteuerrecht zur Beseitigung von Ungleichbehandlungen und zur Vereinfachung neu zu ordnen? Gutachten F für den 57. Deutschen Juristentag, 1988, at F 13; Dirk Krüger, Eberhard Kalbfleisch, & Stefan Köhler, Die Entscheidungen des Bundesverfassungsgerichts zu den Einheitswerten – Analyse und erste Beratungshinweise, DStR 1995, 1452 (1454); Karl-Georg Loritz, Verfassungsrechtlicher Rahmen für eine vernünftige Neubewertung des Grundbesitzes, DStR 1995, Beiheft zu Heft 8.

944 "How can the sky be bought or sold, and how the warmth of the earth? This perception is foreign to us. When we do not possess the freshness of the air and the glittering of the water – how can you buy them from us? Every part of this land is holy for my people, every glittering needle of the den, every sandy beach, every fog in the dark woods, every clearing. Every humming insect is holy in the thoughts and experiences of my people. The sap that rises in the trees carries the memories of the red man. The whites forget their land of birth when they leave to walk under the stars. Our dead never forget this wonderful earth because she is the ed man's mother. We are part of the land, and the land is part of us . . ."; from an oratory of Chief Seattle of the Duwamish tribe, cf., Paul Burke, First People, http://www.firstpeople.us/FP-Html-Wisdom/ChiefSeattle-HASmith.html. The text, tradited in several versions, might never have been spoken in this form. Some sources allege that is was composed from memory for a TV program in 1971.

945 See Cooter (1991), at 760, 792–793; another important article is by Robert C. Ellicksen, Property in Land, 102 Yale Law Journal 1315–1400 (1993), at 1399f. Both Cooter and Ellickson warn against compelling a close-knit group to change its land institutions.

1917 had left of private property to the Russians (Russian Civil Code of Oct. 17, 1921). In all known legal systems of the world today, property – material (chattels and land) and immaterial – can be inherited. The law of inheritance, or as it is often called: probate law, bridges family law (see Chapter 8, supra) and property law. Therefore, it is highly culture-specific. For example, it differs widely from pueblo to pueblo in New Mexico and Arizona (see Cooter & Fikentscher). Central issues which all inheritance laws have to deal with are the following: (1) Is there only intestate inheritance, or are wills permitted? (2) If there is testate inheritance, do people have to observe a form, or is an "oral will" enough?: (3) If an oral will is permitted by law, how can the intentions of the testator be proved ("probated")? (4) Is the form, wherever required, constitutive, or is it just a matter of proof? (5) If a will is possible, where are the limits of decency and good conduct? How can close family be protected against the free will of the testator? Who decides? (6) If the deceased dies intestate, or a will is invalid, who are the heirs? Various systems are possible: Marital partner alone, children alone, or do both share somehow? One child alone (primogeniture, ultimogeniture such as in Acoma Pueblo and in the provinece of Khazi, India) or shares for the children? Equal or unequal shares? (7) If the deceased dies intestate, and has no family, who is the "heir"? These are just some basic questions. What an ethnographer can find beyond them is illustrated by Pospíšil 's inheritance system of the Kapauku in Papua New Guinea.

Not surprisingly, inheritance law follows both the underlying property system and at the same time local family law. Pospíšil presents a perfect study of Kapauku inheritance law.[946] A much more modest attempt of sketching the probate law of some Indian tribes may be found in Cooter and Fikentscher.[947]

IV. Environmental law and anthropology. Are animists true guardians? Human stewardship.

If *homo sapiens* can be dated back 4000000 years, and if the axial age flourished around 500 A.D., it follows that humans were *not* animists for just a 1/1,600th of their existence.[948] This explains the strong influence of animism in all post-axial-age modes of thought (and their religions). It also says a lot about human connection to nature both as nourishing and threatening environment. Environment as such is an animistic notion. If the environment is to be protected, do animist conceptions play a role? Are today's animists the ideal guardians of nature from whom followers of other modes of thought can and should learn? Is animism a good modern means of protection of the environment? Does the destruction of the environment start with the statistical decline of animism? Should the preservation of nature be based on the preservation of (animist) culture? Is there an equilibrium of nature and culture that exists in animism and should be reconstructed again?

Young Hopi (in Arizona) are educated to collect feathers and consacrate them to the spirit of a well to keep the well clean and plentiful. In the dry country of the Northamerican Southwest, an Indian will ask the bush to forgive the deed of cutting it to make a fire. Before and after a bear hunt, Navajo make a "medicine", a purification ritual. Should a bear "go

946 Pospíšil (1982), 374.

947 Cooter & Fikentscher (1998), 530–535; from an comparative law point of view, an interesting facet is San Felipe Pueblo "civil death", loc cit. note 534.

948 Animism in the wider sense, W. Fikentscher (1995/2004), 185, 191. On environmental stewardship see, e.g., Symposium (participants: N. Bruce Duthu, Frank Pommersheim, Richard A. Monette, Dean B. Suagee, and Rebecca Tsosie): Stewards of the Land; Indian Tribes, The Environment, and the Law, 21 Vermont Law Review No. 1 (1996).

wild" and it is not the season to kill bears, Navajo will call a white hunter to do the job ("killing by proxy"). Santa Clara Pueblo takes care of Puye ruins and the surrounding park. But there were also complaints that the Navajo nation did not employ the necessary care to Canyon de Chelley, an nature reserve placed under Navajo administration for guided tours and care of the vegetation.

On balance, nations of animist traditions may be expected to be good stewards of the environment. But education, laws, money, and appropriate supervision are needed to make environmental guardianship a success.

V. An anthropology of collective goods. Property in market and non-market economies[949]

Within exchange value economies, two main kinds of allocation have to bedistinguished: (a) allocation by competition (or, if necessary, corrections of competition), and (b) allocation causing social cost by involvement of collective goods.[950]

1. Collective goods defined

When, instead of the market idea, the problem of allocation is solved with the use of *collective goods,* the resultan economic behavior that typically causes social cost. In an exchange on a market (in the individual sense), the parties capture all the benefits and bear all the cost. If third parties enjoy a benefit from the exchange, such as the customers of one party from its profitable deal, it is an external benefit. If third parties suffer from that deal because it was unprofitable, it is an external cost. If the external cost hit not just single persons but a large group of citizens who form what may be called a social unit (e.g., the farmers participating in an irrigation system, the external cost is a *social cost*. Cost is a deduction, a minus, from some entity of value. Thus, social cost must be a deduction of a social entity of value. If this entity of value is used to meet a demand, by allocating that entity of value, whole or in parts, to the participants of a social unit, that entity of value is called a collective good. It is an allocation different from an allocation that is performed through working or corrected competition. Any such non-competitive allocation causes social cost. Therefore, competitive economy should be distinguished from social cost economy (= collective goods economy).

In a section entitled "What can be privately owned?", Cooter & Ulen (4th ed. 2003) cite the reasons why sometimes allocation by the property & individual market system, and under different circumstances by a system of public goods, is preferable (Cooter & Ulen call "public goods" what here are called "collective goods" in order to include privately owned but collectively used goods such as sports fields and lighthouses; some authors use both terms interchangeably). Cooter & Ulen give two reasons: (1) a good is "public" when its use is *non*-rivalrous (hiking in a national park, enjoying the scenery), and (2) in contrast to private property (which can easily be fenced in) the cost of keeping others from using the good would be very high or virtually impossible (*non*-excludability of citizens from protection by the fire brigade, or of ships taking advantage of a lighthouse, for example). A third and "positive" requirement should be added. It points to the central problem of a collective goods economy, the distribution of benefits and cost, and at the same time draws an illustrative line between

949 W. Fikentscher (2004), 186ff.

950 W. Fikentscher, Wirtschaftsrecht (Economic law), vol. 1 (1983), 44; idem (2004), 190–200. A third kind of lesser importance in Western economic systems, but e.g. not in Taiwan, R.o.C., concerns public auditing, surveillance (in German: *Wirtschaftsaufsicht*); this third kind is not discused here.

property & (individual) market economies on the one hand and collective goods economies on the other: whereas in property & (individual) market economies the allocation of the goods is managed by the economic automatism of the "invisible hand" of the market, in collective goods economies distributive justice calls for the visible hand of the law to fairly distribute benefits, and often of the cost, too. In slightly other words: Whereas the central issue of the market system consists in keeping competition free and fair by defending it against the freedom paradox, the central issue of a collective goods economy is (non-)discrimination. Thus, there is antitrust in both sectors.[950a]

The free competitive market of properties of any kind *(Marktwirtschaft)* as the presently most common general rule of economy, based on the "invisible hand", including its legal protection against the freedom paradox by antitrust and unfair competition law, *(allgemeines Wirtschaftsrecht)* is sided by regulated forms ("visible hand") of the economy *(besonderes Wirtschaftsrecht)*. These regulations include

– goods which are owned, but should not be fully used by the owner because otherwisethe market would deliver socially unwanted results so that a distribution by regulation has to intervene (apartment space in a bombed-out or artillery-shelled city, gasoline during an oil crisis, food stamps in times of hunger) – a strategy that is called coupon system (= *Bewirtschaftung*), economically being the "distribution of want,"
– property rights and liberty rights to be granted to individuals to overcome the coupon system, a strategy called development aid *(Entwicklungswirtschaft),* economically aimed at "overcoming the want",
– goods economically or naturally unfit for the assignment of property to private owners (the regulation of social cost = *social cost economy* = *collective goods economy*),[951] and
– a *surveillance system* to enable the government to decide whether the free market system or one or more of the aforementioned kinds of regulations have to be politically initiated.[952]

2. Kinds of collective goods

For the following discussion, only the third category – the collective goods (or social cost) economy – is of interest.[953] Goods which are for reasons of economy (non-rivalry, non-excludability, lack of invisible-hand allocation of the goods to those who value them most) unfit to be owned and therefore unfit to be competed for encompass the following kinds. Collective goods may be subdivided in two groups: they are either cost-qualified, or cost-free. This means that some collective goods cause financial burdens upon those who want to enjoy them, such as a highway, a public swimming pool, an irrigation system, or the police force of a city. It has to be decided who shall bear these cost and how. This is a matter of distributive justice as is the size of the share every participant may enjoy. Since there is no market, market prices are no immediate help. However, comparisons to similar economic situa-

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950a Wolfgang Fikentscher, Free Trade and the Protection of the Environment as an Integrated Economic Value System: Outline of an Environment-conscious Social Market Economy – A Lawyer's View, The 1991 Cassel Lecture, Juridiska fakulteten I Stockholm, Skriftserien No. 34, Stockholm 1991: Juristförlaget. See also Chapter 11, note 1, supra.

951 Social cost will be of special interest in this context. It has to be further subdivided below (under 5).

952 See for details W. Fikentscher, Wirtschaftsrecht (Economic law), vol. 1 (1983), at 41, 168, 298, 696.

953 An earlier study makes the point that trading pollution rights cannot solve the issue of the deterioration tolerance of the environment: W. Fikentscher, Free Trade and Protection of the Environment as an Integrated Economic Value System: Outline of an Environment-Conscious Social Market Economy – A Lawyer's View. Cassel Lecture (Stockholm: Juristforlaget, 1991).

tions and markets analogies are permitted and often helpful.[954] Other collective goods do not cause cost for those who want to use them, such as a communal forest where the villagers may graze their small cattle and harvest timber, or the public domain in copyright law (Beethoven's works are free so that every telephone company may offer the melody "Für Elise" to all customers who do not care to answer the phone right away).[955] The main issues of cost-free collective goods are over-grazing ("the tragedy of the commons") and ruinous use, such as pollution of water or air.

a. Cost-qualified collective goods are properly called public goods and can further be categorized: (1) There are so-called *"club" public goods* (congested highways, city parks, swimming pools, sports fields and other not privately owned goods where an individual's benefits depend on the amount of personal consumption and the number of people with whom the facility is shared); contrary to what has been said above, congestion *may* cause some rivalry so that use must be regulated, for example by an entrance fee or other limitations of access.

(2) The use of *pure public goods* is strictly non-rivalrous and non-excludable and therefore meets all requirements of cost-qualified collective goods. Examples are the police, the military, public irrigation systems, public health services and other public services to an indiscriminate number of people defined by certain legal requirements. No limits by congestion upon an individual's benefits exist, but there is a cost factor. The police, the public health service, the irrigation system need budgets. These budgets have to be collected either from the tax payer, or from those who benefit from the pure public good, for example the members of the mandatory health care system, or the farmers who benefit from the irrigation system. In the latter case, it is necessary to establish an organization of the beneficiaries. Membership in a public healthcare plan may be required, or in an irrigation cooperative. A subspecies of this kind of pure public goods are so-called "meritorious goods" such as mandatory vaccination, required first aid schooling, obligatory health checks, etc.; *meritorious goods* are *prescribed* for the user, without or against his or her will, by a well-meaning authority which provides for the cost.

A problem for all cost-qualified "public" goods, "club" and "pure", is free-riding. There is a temptation to enjoy the collective good without paying a fair share of the cost. Therefore, the administration of public goods requires a control mechanism.[956]

b. *Cost-free collective goods* can also be further subdivided. Their common features are no-cost participation, non-rivalry, non-excludability, and the need to be protected from overly use. Subcategories are the goods of the commons, and what may be designated as "free goods".

(3) Goods belonging to the (cost-free) *commons* are exposed to the tragedy of the commons.[957] Since all users have free access to the common village fish pond, one day it may be over-fished or empty. Similar "tragedies" are currently happening to high sea fishing (whales,

954 Cf., Cooter & Ulen (2000), op. cit. 40f.

955 Copyright fair use is another example.

956 Cooter & Ulen (2003), at 101ff. The German metaphor *Trittbrettfahrer* is taken from the streetcar: running board rider, freeloader.

957 H. Scott Gordon, The Economic Theory of a Common Property Resource: The Fishery, 62 J. Pol Econ. 124 (1954); Garret Hardin, The Tragedy of the Commons, 162 Science 1243–1248 (1968); B. McCay & J. Acheson (eds.), The Question of the Commons: The Culture and Ecology of Communal Resources, Tucson 1987: Univ. of Arizona Press; Chris Hann, The Tragedy of the Privates? Post-socialist Property Relations in Anthropological Perspective, Halle/Saale 2000: Max-Planck Institute for Social Anthropology Working Papers Nr. 2 (with references).

tuna), not to speak of collateral killing of other species (dolphins along with tuna). Other examples are the gathering of flowers, berries, or mushrooms; the grazing lands of an Indian reservation, the cutting of the rain forest and other "timber harvesting", hunting endangered species, tapping scarce ground water etc. The goods of the commons are self-sustaining as long as there is no over-exploitation leading to any "tragedy". But it takes regulated distribution to obtain sustainability.

(4) Finally, there are *free goods* which can be used free of cost. They are tragedy-, but externalities-exposed. The goods of the commons are subject to direct exploitation (hunting, fishing, gathering). Free goods may suffer not so much fromdirect utilization, but from indirect burdens such as pollution or other abuse. Examples are the outer space which may be polluted by missile trash, the high seas which are polluted by cleaning tanks or by refuse thrown overboard, and the air which produces acid rain from industrial smoke. More examples are beach combing, scenery, views, "borrowed landscape" (a Japanese expression for the view from a house over land which belongs to another), pristine landscape or seascape, the bottom of the sea, the look on sacred mountains (Hopi, Navajo), ground water in a wet climate, the traditional ensemble of a village or suburb, environmental characteristics, wetlands, freedom from jet skis, historical attachment, "roots", recreational areas and sites, freshness and cleanness of air (e.g. in a mountain spa), climate,[958] calm, material expressions of religious convictions, the internet, "fair use" and the "public domain" in intellectual property law *(= gemeinfreie Gueter)*, etc. Access to these free goods is open to everyone at no cost. Even intensive use does not lead to a "tragedy of the commons", but pollution or other abuse may lead to externalization of cost that should be borne by the polluter, so that general deterioration can be expected from such abuses.

Thus, the term *collective goods* comprises club public goods, pure public goods, commons goods, and free goods. Joint ownership is not be included in the category of collective goods since it is a form of private property. Collective goods have in common that as a rule their use does not impede the use by others. There is no zero-sum game as is the case on an individual market by virtue of the rivalry among its participants. Production and distribution under competitive conditions are not worthwhile because mini-monopolies are technically not possible or culturally not acceptable. This applies to all kinds of collective goods. But their cost structure (always involving social cost = cost devolved to society = externalities) is different from category to category.

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958 On the role of climate see Robert D. Cooter, "Mongolia: Avoiding Tragedy in the World's Largest Commons," FS Margaret Gruter, Portola Valley, 1999: Gruter Institute for Law and Behavioral Research, 87–109; on this article of Cooter, see also Introduction, supra, note 19. A corroborating observation is the following: In many forests which could be economically used there is hidden a collective good: the climate. It is, as Cooter would say, part of the commons, or as I would say, a free good. When a lumber company buys a forest, such as the Northern Californian redwood stands, the argument for being permitted to clear cut the stand usually goes that not being permitted to do so would unjustifiably hurt the investors who financed the company. However, the investors did not invest in the change of climate and its consequences of soil deterioration connected with the "harvesting" of the lumber. Both the probable change of the climate and the soil deterioration are acquired by the investors inseparably along with the purchase of the trees. But these inseparably attached free goods have not been paid for, and since they are free goods, not assignable to private ownership, they cannot be bought. Nobody can buy climate. As long as the inseparability lasts, and to the extent of impaired climate and soil, the marketing of the lumber would mean that somebody sells things of which he is not the owner *Nemo plus iuris transferre potest quam ipse habet*. Again, this is antitrust through culture and economics. To let economic power pervade all corners of the world would mean the demise or decline of many environments. – The examples show that in the field of collective goods biological explanations are necessary and work particularly well.

Speaking of cost, at closer sight and following from the above, there are two kinds of collective goods. There is one kind, comprising "club" and "pure" *public* goods, where the issues are (1) to provide them, (2) to make them accessible to the public in a non-discriminatory way, and (3) to make the users pay in a practical and fair way (taxes, contributions, entrance fees, etc). The other kind of collective goods is offered for *free* (the goods of the *commons,* and the *free goods* such as the public domain in copyright law). In a way, here the issues are reversed. The problem is not to make them available, but to protect them because they are available. The goods of the commons are to be protected against the "tragedy" of excessive and ultimately destructive use, and the free goods need protection against being overburdened with "externalities."

Concerning *public* goods which often require very high investments and thus give rise to high fix cost, the marginal benefit for their producer can be so low that the incentive of the invisible hand evaporates. Technical possibilities and cultural traditions may play important roles, so that, e.g., miscalculated privatizations may lead to substantial losses. Providing a TV cable net, a railway or a national nature park may not be justified in view of the profit to be expected from viewers' contributions, ticket sales and park entrance fees. Rivalry is not worthwhile. This is the point where market and non-market economy part. If the good is in demand, such as an effective police force, or a public park, the state has to provide it. Free riders must be discouraged. Graph 5 illustrates the cost structure of *public* goods.

Regarding the *goods of the commons* and *free goods,* the users often do not pay, and this prevents incentives to produce or to distribute them. However, they are available anyway. Here, the state must prevent excessive use and deny property assignment to private ownership. There are no freeriders, because all can and may "ride." No user has to carry a cost burden, as far as the taking from the pools of common and free goods is concerned. (of course, a computer is needed to make use of the internet, but using the internet is free). Being from somewhere is no cost factor. Living in a climate – maybe a harsh climate – does not amount to cost. Having roots, having religious feelings, enjoying fresh air, a calm environment or a "borrowed landscape", considering oneself historically attached to a town – all this is no cost. To belong to an ethnic group and feeling at home in its culture does not amount to cost. Speaking one's own language, or dialect, is no cost to be carried by the speaker. Still, these not-for-property-assigned values, all collective goods, demand respect. The model for these cost-insensitive collective goods looks different.

3. Market failures?

It follows that the goods of the commons and free goods are not market failures. Economically, they belong to non-markets. In this sense, one may speak of commons and free goods non-markets. Still, it is economy, economy at exchange values, non-planned economy, and no *dirigisme.* The contrast exists between individual markets and commons or free goods non-markets. The test for belonging to the non-markets is the absence of competitive rivalry. Thus, the concept of the subjective market helps to draw the line between market and non-market economies. Objective markets cannot draw the line because they are non-rival. Furthermore, this distinction is, as we have seen, culture-specific. This is because what should be assigned to private ownership varies from culture to culture.

In sum, the assignment of goods to markets or to collectivity is based on culture. For an economy that thinks in terms of subjective markets, culture does what in neoclassic economy is achieved by the Pareto optimum. One of the reasons for this is that cost and risk are culture-specific notions. Whether the same also applies to the other categories of *regulated econ-*

omy "against the market" cannot be discussed here. If one still prefers the term "market failures", the result is that market failures depend on cultural specificities.

In the present context, the economics of social cost cannot be dealt with in more detail.[959] Only their contribution to culture and economics matter here. The protection of free competition by antitrust rules, their interface with non-post-axial-age-subjective-market economic activities, and the law for the protection against unfair trade practices all concern market economies. However, as has been shown, not all economic activities unfold on markets. There are substantial non-market economies. Some were mentioned in Part One in connection with the description of economic types and certain total economies (such as Marxist and post-Marxist economies) under the category of economic anthropology. Non-market economics are discussed in modern Western economics. The terminology varies. In 2003, a recently established research institution of the Max-Planck Societ, the *Arbeitsgruppe fur Gemeinschaftsgüter* (working group for the collective goods), became a Max-Planck Institute for Collective Goods. Other investigations in many countries are going on. The economics of collective goods seem to be adequately researched. It is to be hoped that one day there will be a generally accepted terminology and a matrix of generally accepted legal rules for their establishment and distribution.

Non-markets economics in the sector of collective goods follow rules different from those for markets in the individual sense. Objective markets and their rules, however, may be assumed also for collective goods. To call these aggregate of goods a "market" in the objective sense of the word means to give some statistical data, for example about the number of the fish, the tons of spoiled ground water or of the sales in the music business concerning music which is "free" under the copyright concepts of fair use and public domain. Hereby, nothing is said about strategic behavior in those "markets", strategy being the test for a market in the individual sense. For the economist and the lawyer, state and business behavior on regulated markets pose a number of delicate problems. Again, more than a general reference to pertinent literature cannot be made here.

4. Collective goods antitrust?

There is the need for an antitrust and fair distribution law in the realm of collective goods, too It cannot be very different from antitrust and unfair competition law in the area of private property and individual market. Certain analogies may be drawn. This is all the more probable since collective goods economies follow the exchange value principle just as property & individual market economies, and cannot be denounced as planned economy of Marxist-socialist brand, as we have seen. Moreover, there are many areas – e.g. traffic institutions such as public toll roads, recreational institutions, health plan systems, etc. – where combinations of collective goods and market economies are more efficient than one-sided solutions. For example, most medicare systems contain collective-goods distributive as well as market elements, in order to accumulate the benefits of non-discriminatory access for paying members and the cost-minimizing outcome of competitive production and distribution of pharmaceuticals.

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959 Reference should be made to microeconomics textbooks; and to three landmark articles: Ronald H. Coase, "The Problem of Social Cost," 3 Journal of Law and Economics 1 (1960); Guido Calabresi. "Some Thoughts on Risk Distribution and the Law of Torts," Yale Law Journal 70 (1961): 499; Knut Borchardt. "Volkswirtschaftliche Kostenrechnung und Eigentumsverteilung: Bemerkungen zum Problem der Sozialkosten" (Economic Cost Calculation and the Distribution of Property: Remarks on the Issue of Social Cost". Jahrbucher fur Nationalokonomie und Statistik 178 (1965): 70; another approach: W. Fikentscher, Free Trade and Protection …, (1991 Cassel Lecture).

5. Collective goods and allocation theory

An even more precise outline of a theory of a collective goods economic theory can be deduced from anthropological sources. In Chapter 10 it was said that besides an undifferentiated notion of "market", there are three other types of allocation: distribution, reciprocity, and redistribution. From there, different types of the "market" were developed and the "individual market" given special attention. Since collective goods are not allocated on a market, the question arises of how they might be allocated. Offer and demand cannot provide for the liberal steering mechanism of the social-cost (collective-goods) economy. It is obvious that, in need of an interpretation of the appropriate functioning of collective-goods economies, one may turn to the other types of allocation known from anthropology. This leads to three guiding principles for the working of collective-goods economies:

(1) *simple distribution* requires distributive and participatory justice, more precisely: just rules for equal and unequal distribution based on evaluated participatory foundation;
(2) *reciprocity* requires non-discriminatory equal treatment and evaluation as equal; and
(3) *redistribution* requires justice in assigning disadvantages and advantages, the results based on appropriate evaluations often being unequal.

From principles such as these, pure or mixed, and from further refined sub-elements, a social-cost economy (an economy of collective goods) could be developed.[960]

VI. Protection of belonging to a place (landscapes and city scapes). Homesteading vs. urban sprawl. Hopi-Navajo dispute

Do we *own* our origins, our roots? Many refugees claim a right to their home place *(Recht auf Heimat),* or the right to return there. After World War II, displaced person ("DP") was a legal title, granted by UNRRA, the United Nations Refugees and Repatriation Agency. Is diaspora ill fate, or a wrong *(Unglück oder Unrecht)?* International law tries to cope with the isues involved in the tragic fate of being expelled or exiled, being a refugee, or a person otherwise deprived of the place where one feels to belong.[961]

Moreover, is there a right to preserve the land as it is, and to restore the land to the former state? National and state parks and national monuments are attempts at preserving the land as it was, or to restore it to former appearance and structure. Similar arguments could be made for the look of a city, or town, or parts of them. Zoning regulations and laws limiting the number of permitted architectural styles may have this effect *(Ensembleschutz).*[962]

Should the land – a collective good – be protected from the city – another collective good –? In USA, the issue got the name urban sprawl. In Continental Europe, the green open country between settlements forms part of Europe's face. Europe was settled in the stone age when it was necessary to flock together in densely populated villages and towns. To fence off enemies and wild animals, a *town* was surrounded by a *Zaun* (the same word, now meaning fence). People lived in a fenced-in area. The outside was a different world and in a sense taboo. The

960 The guidelines for a functioning liberal collective-goods economy stated above are a refinement of the cruder rules proposed for the same purpose elsewhere: W. Fikentscher, Die umweltsoziale Marktwirtschaft – als Rechtsproblem –, Schriftenreihe der Studiengesellschaft Karlsruhe, Heft 197, Heidelberg 1991; idem, Free Trade and Protection of Environment as an Integrated Economic Value System: Outline of an Environment-conscious Social Market Economy: A Lawyer's View, Cassel Lecture 1991, Juristische Fakultät der Universität Stockholm, Stockholm 1992.

961 Cf., Alfred de Zayas, The Right to One's Homeland, 6/2 Criminal Law Forum 257–314 (1995).

962 See, for example, Theiss Publisher (ed.), Altstädte unter Denkmalschutz, 50 Jahre Ensembleschutz in Deutschland, Internationale Tagung Meersburg 28.– 30. Oktober 2004, 2007: Theiss.

resulting green zones between the towns still receive legal protection as *Außenbezirke.* Being subject to *extensive* agriculture, in order to keep the green zones intact they need subsidies, compared to the *intensively* used city zones. This is effectuated by agricultural subsidies which balance extensive and intensive use of the soil. These subsidies are contested in WTO negotiations and other contexts.[963]

The situation is reversed in the US. There, national subsidies are paid to settle the open space between the towns as densely as possible because the country is so large that the use of the land would be inefficient or less efficient than densely populated areas. Native Americans with their traditional experience in the extensive use of the land have been expelled or killed. As a result, reducing agricultural subsidies for USA means widening the country at a price to be paid at the cost of desired efficiency. Reducing agricultural subsidies for Continental Europe means narrowing the country at a price to be paid at the cost of desired inefficiency. It follows that agricultural subsidies mean different things in USA and Europe, and reducing them must lead to contrarious results.[964] In the USA, the anti-sprawl movement signals a – however contested – turn.[965] The old tenet of the pioneers and homesteadess that building, farming or mining entitles a person to own land seems to be very much ingrained, to the detriment of the country.

In the Hopi and Navajo areas in Arizona the rigid attitude of the Washington; C.D., administration has lead to counterproductive results. According to what we know from archeology, about thirty clans of the Hopi nation originally settled and dry-farmed on the then more fertile plains which surrounds the Hopi mesas. For reasons of defense against non-Hopi tribes the clans retired to the three mesas and to Moencopi. A typical mountain top defense town is Walpi on First Mesa.

As a consequence, the plains surrounding the mesas were depopulated, but Hopi tradition remains to visit the old borderlines of the formerly settled area. About 1,600 A.D., the Navajo, an Atabascan nation from the North, started settling, dispersedly, on Hopi lands. Conflicts between Hopi and Navajo resulted. The Washington. D.C., administration tries to mediate between the two nations, and there has been court litigation. Unfamiliar with (or disregarding) the histories of the two nations, the federal government ethnocentrically tells the Hopi that theirs are the mountain tops but not the arid and unsettled plains because they do not "live" there. However, in view of history and climate, that tribe merits to own the land most that leaves it as unsettled as possible. It is possible to own the view over land as intangible property.[966]

In reacting to the unsuitable building-farming-mining argument of the administration, in the 1960ies the Hopi started building structures here and there in the desert around the mesas, usually half-finished houses, uninhabitated or rarely used. It is the American way of settling, but it is homesteading by pretense. The Hopi do not want to live there, but they want to refute the argument of the empty land. While by this practice pristine desert land is destroyed, the Hopi rather ruin their country than loose it. As a recent consequence, the highway leading through the Hopi reservation, in terms of beauty of landscape one of the most precious highways in the world, is in danger to be lined by a row of houses, shops,

963 T. Josling & R. Steinberg, When the Peace Ends: The Vulnerability of EC and US Agricultural Subsidies to WTO Challenge, 6/2 J. of International Economic Law 369–417 (2003).

964 W. Fikentscher, Landschaft und Landwirtschaft, in: idem, Die Freiheit und ihr Paradox, Gräfelfing 1997: FAZ & Resch, 98–102.

965 Haya L. Nasser, Anti-sprawl Fervor Meets Backlash, http://www.usatoday.com/news/nation/2002-08-25-smat-growth_x.htm.

966 W. Fikentscher (2004), 193.

malls, and half-finished structures along the way, as if it were a road between New Haven and Providence, or New York and Newark, areas where disorganized and unplanned settling is traditional. In turn, Hopi "fake-homesteading" may have an impact on Navajo. The Navajo often in vain try to raise sheep on barren desert land. Therefore they were instructed to reduce sheep raising by ten percent. To mediate the Hopi-Navajo conflict, court decisions have ordered Navajo living on Hopi territory to transfer some of their houses to the Hopi. But Hopi "fake-homesteading" induces these Navajo to disobey the court orders because settling the desert is going on anyway.[967]

VII. Intellectual cultural heritage property, traditional knowledge

Modern law distinguishes material (or tangible) and immaterial (or intangible) property such as patents, copyrights, trademarks, artists' rights, design rights, topographies, etc. The protection of cultural property has become an important field of law, particularly since cultural property merchandizing became a flourishing business. The intricate subject cannot be covered here in more detail for lack of space (some details in Chapter 13 III.2; below, and in. W. Fikentscher & Th. Ramsauer, Traditionswissen – Tummelplatz immaterialgüterrechtlicher Prinzipien (2001).

A prominent case is the imitation of the Hopi snake dance by white esoterics, another the collection and marketing of tribal melodies and rhythms. The state symbol of New Mexico is a stylized sun design from Zia Pueblo. Should the State of New Mexico pay royalties to Zia Pueblo? To whom do tribal stories, patterns, dances, music, folklore belong? When arguing against royalties, is it enough to say that there are no individual authors? Where are the boundaries between protected cultural property and the "public domain"?

Property is a result of allocation. Allocation can result in tangible (chattels, land) or intangible property.[968] Intangible property is also called intellectual property. It encompasses the results of inventive or creative activity, trademarks, service marks and trade names, indications of sources and appellations of origin, know-how and other products of the human mind. To this end, the law has to single out the aforementioned products of the human mind from the bulk of intellectual products which are generally accessible for everyone, declare them worthy of protection and protect them by granting legally defined positions to persons (property rights). This can be performed by assigning individual rights to certain persons, or by recognizing claims of those persons against other persons under the law of unfair trade practices (so-called complementary protection by competition law). There is an elaborate system of national, regional (EU, Mercosur, etc.) and international (Paris Convention 1883, Berne Convention 1886, WTO/TRIPS 1994) regulations of this field of law.[969]

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967 Research done between 1986 and 2002; see W. Fikentscher (1995/2004), 199–206.

968 See graph in Chapter 10 II. 14.

969 The following text uses parts of two articles: W. Fikentscher & Thomas Ramsauer, Traditionswissen – Tummelplatz immaterialgüterrechtlicher Prinzipien, in: P. Ganea, C. Heath & G. Schricker (eds.), Urheberrecht: Gestern, Heute, Morgen, Festschrift Adolf Dietz, Munich 2001: C. H. Beck, 25–41; and W. Fikentscher, Geistiges Gemeineigentum – am Beispiel der Afrikanischen Philosophie, in: A. Ohly et. al. (eds.), Perspektiven des Geistigen Eigentums und Wettbewerbsrecht, Festschrift Gerhard Schricker, Munich 2005: C. H. Beck, 3–18; to the following text, see also S,. v,. Lewinski (ed.), Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore, The Hague 2003: Kluwer International; Th. Ramsauer, Geistiges Eigentum und kulturelle Identität, Munich 2005: C. H. Beck, and the bibliographies of these four publications.

Beginning with the New International Economic Order program of the United Nations of 1974ff., the system contained in these legal sources has come under critique from developing nations and tribes. Traditional stories, songs, music, rhythms, dances, pictures patterns etc. have been appropriated by commercial agents without permission and compensation. It appeared that for these products of the human mind additional protection was needed. From the many issues raised by this critique, the question *what* exactly has to be protected,[970] and *whose* interests have to be protected by legal claims (injunctice relief, damages, etc.) are only two. A large number of international, regional, national and private proposals habe been made, but effective protection could up to now has not yet been achieved.[971] The protection needed involves at least four kinds of claims: injunctive relief against intrusion into secret traditional knowledge; damages, license royalties, unjust enrichment and disgorgement of profits for illegal commercial use, general complementing proction against un fais competition, and "paid fair use" (= paying public domain, non-injunction torts, possible compulsory licensing)[972] Compensation for past exploitation may require international agreements, or may be a matter of national statutes of limitation *(Verjährung, Verwirkung)*.

Arguably, three ways of tackling these issues can be conceived: (1) expanding and adapting the existing system of national, regional and international legal protection, (2) creating a new intellectual property right sui generis covering traditional knowledge, and (3) a local-law-and-local-court approach leaving the initiative to the local plaintiffs under their law and court system, combined with the established international, regional and national law of recognition of foreign judgments. The latter approach has been introduced and argued elsewhere.[973]

For particularly valuable structures, views, natural treasures and cultural achievements, UNESCO has introduced a program of protection under administrative law, the program "Heritage of Mankind".[974]

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971 See the list of documents cited in Fikentscher & Ramsauer (preceeding note, at 41), and in Chapter 15, below.

972 For this, see Fikentscher & Ramsauer (note 969, above), at 37 note 22.

973 W. Fikentscher, in FS G. Schricker (note 969, above), and in FS Mestmäcker (1996), 576, see also in this book in Chapter 9 VI. 3. g. and in Chapter 13 VI. The local-law-and-local court approach has the advantage that established principles of conflicts of law can be used, and that this approach works also in the neighboring field of antitrust law.

974 UNESCO Heritage of Mankind, see http://whc.unesco/en/conventiontext/.; see also Chapter 15, below.

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Chapter 12: Torts, crimes, sanctions. Witchcraft and related issues (the anthropology of compensatory or retributive justice)

Chapter 12 on torts and other wrongdoings will treat, along with the traditionally well researched basic concepts of this field of legtal anthropology (to which only brief attention will be given) a recently again debated alleged contrast between shame and guilt societies, the phenomenon of knowledge as witchcraft, and a short report on the growth and institutionalization of international criminal law.

Early cultures do not distinguish between torts and crimes. They speak of wrongdoings. A designation of the person who commits the tort or crime, is a "perpetrator" who is the defendant in civil and criminal cases. In countries of Western culture, the distinction between (civil) torts and (public) criminal law is clear-cut, depending on the plaintiff: In torts cases, the plaintiff is a private person, notably the victim. In criminal law, the plaintiff is the state represented by the public prosecutor.[975] The distinction is a by-product of the more profound difference between the private and the public sphere,[976] and as such a corollary of the axial-age distinction between individualism and *polis (Genossenschaft)*.

In pre-axial-age societies such as animist bigmanships, chieftaincies and kingdoms, "public" persecution of wrongdoing is possible and indeed common: Persecutors act in the name of the group, be it a big man society,[977] a tribe,[978] or a nation.[979] These public executioners without a public sphere, as they may be characterized, are understood as acting *in lieu of* the victim, be they singles or a group of people. They are not organs of an entity such as a government of those singles or groups of people. Therefore, their activities are as a rule not the exercise of a power monopoly, and therefore do cannot exclude private revenge (feuds) or private seeking of indemnification.[980]

Consequently, in many non-Western cultures the field of law consists of executing sanctions against perpetrators. How close tort and criminal law are in tribal societies even today is exemplified by Native American code making. Much of criminal jurisdiction has been taken away from the tribes by the US federal government. However, civil – including torts – law is mostly tribal. In order to regain jurisdiction in criminal matters, tribes may be inclined to codify acts that may be regarded as torts law instead of criminal acts, for example in traffic cases. A catchword is "civilizing wrongdoing", or "civilizing torts".[981]

I. Sanctions

Sanctions may be non-physical or physical. They may take place in the natural world, or may be of supra-natural character.

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975 On the obviuos success of state-anchored persecution see Jerome H. Skolnick, Making Sense of the Crime Decline, Newsday, Currents & Books, Sunday Feb. 2, 1997.

976 On the history of this differentiation, W. Fikentscher, Oikos und Polis und die Moral der Bienen, eine Skizze zu Gemein- und Eigennutz, Festschrift Arthur Kaufmann, Munich 1993, 71–80.

977 See the example of the kandachi man, note 642, above.

978 In tribes, often it is not the chief as a person, but a sodality that assumes to be in charge of persecuting wrongdoings and executing sanctions, in Indian tribes for instance the war society. In some tribes, war societies or hunting societies work as tribal police.

979 For the concepts, see Chapter 9, above.

980 See Malinowski 60ff. He distinguishes party-interest from no-third-party-interest *(yakala)* procedures of the Trobrianders.

981 See Cooter & Fikentscher (2008), I.E. 7.

Non-physical sanctions include shaming, ridiculing, public or private, calling out the present and former misbehavior of the wrongdoer, hurling curses, or offensive speech in front of bystanders.[982] Pueblo courts may require the defendant to offer apologies, in public or toward the victim.[983] Canadian Indians use a "circle meeting" of elders with the juvenile offender for similar effects.

Physical sanctions include killing,[984] mutilating, ostracism,[985] banishment for a limited time or for life, compensation to victim (e.g. in the form of *Wergeld; Germanic: Wer = Latin: vir, man*), fines to the tribe, forfeiture of advantages, or a combination of those. Especially retribution in form of giving in kind, e.g. cattle, or money, need not represent the real or anestimated value of the damaged person or thing. Often the grieving family, lineage, or clan is at least in part satisfied by having the offender tacitly confess her or his wrong in the form of such delivery or payment.

Execution is sometimes handed to a strong man who has to kill the sentenced defendant. The kandachi man has already been mentioned (see notes 630 and 1105). Rasmussen reports a similar procedure from the Inuit. The defendant is killed from behind in order to take him by surprise. A law breaker often feels strong.

In cultures adhering to a belief in supranatural causation, such as "bone-pointing",[986] death by cursing, punishment by spitits of revenge, etc., both sentencing and execution may include such practices. South African police use such beliefs for putting into effect both traditional

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982 In Pospíšil's 131 Kapauku cases, these kinds of sanctions happened 24 times, L. Pospíšil, Kapauku Papuans and Their Law, New Haven 1958: Yale Univ. Publ. In Anthropology No. 54.

983 Cooter & Fikentscher (1998, 2008); an anthropology of apology has been developed by John Borneman, Public Apologies as Performative Redress, Johns Hopkins SAIS Review of International Affairs 25/2, 53–66 (2005), special issue "Pride and Guilt in International Relations"; idem, Can Public Apologies Contribute to Peace? An Argument for Retribution, 17/1 The Anthropology of East Europe Review: 7–20 (1999). Japanese juvenile "court" practice involves apalogies toward the victim on the basis of *amae*, an amicable behavior of affection by a psychologically schooled guide modeled after the (vertical) mother-child relationship.

984 In a few cultures, killing for eating the enemy or social foe has attracted curiosity. The issues of anthropophagy cannot be discussed here in greater detail. Some distinguish anthropophagy for nutritional and ritual reasons. Others categorize profane, court sentence related, magic, and ritual anthropophagy, Thomas O. Höllmann, Der pepökelte König oder Anthropophagie und Abschreckung, in: R.P. Sieferle & H. Breuninger (eds.), Kulturen der Gewalt: Ritualisierung und Symbolisieung der Gewalt in der Geschichte, Frankfurt/Main 1998: Campus, 108–122, at 108. Höllmann warns against hearsay information. He sees a propagandistic reason for many of the reports on anthropophagy: These reports may tend to keep out competitive contacts, terrorize subjected tribes, or support political advances. Sometimes they may simply intend to raise litrary curiosity. A side aspect are head hunting activities, for example reported from Taiwanese aboriginal tribes. The head is a part of the body evoking special attention for many reasons. Another aspect are healing beliefs which, however, may lead to reverse results as proven in the case of fore disease, see Chapter 1 V. 3., above. On cannibalism (a selection): W. Arens, The Man-Eating Myth: Anthropology and Anthropophagy, Oxford & New York 1979: Oxford Univ. Press; K.R. Chong, Cannibalism in China, Wakefield 1990: Longwood Academis; M. Harris, Cannibals and Kings: the Origin of Cultures, New York 177; Th.O. Höllmann, À la mode des cannibales Anmerkungen zur Aynthropophagie im westlichen Afrika (16.–18. Jahrhundert) 4 Münchner Beiträge zur Völkerkunde 9–20 (1994); idem, Von Kopfjägern und Menschenfressern: Reale und fiktive Elemente in der Darstellung Taiwans, in: D. Lombard & R. Ptak (eds.), Asia Maritima, Wiesbaden 1994: Harrassowitz 177–190; P. Reeves Sanday, Divine Hunger. Cannibalism as a Cultural System, Cambridge 1986: Cambridge Univ. Press; E. Sagan, Cannibalism: Human Agression and Cultural Form, New York 1974: Harper & Row; Ewald Volhard, Kannibalismus, Stuttgart 1939: Strecker & Schröder.

985 M. Gruter & Roger D. Masters, Ostracism: A Social and Biological Phenomenon, The Hague 1986: Elsevier; German edition: M. Gruter & M. Rehbinder, Ablehnung – Meidung – Ausschluß: Multidisziplinäre Untersuchungen über die Kehrseite der Vergemeinschaftung, Berlin 1986; Duncker & Humblot.

986 For the Kandachi man, see notes 642 and 944, above.

rules and modern legislation.[987] The inclusion of supranatural sanction in the concept of law does not impede accepting these sanctions as part of *law,* instead of *religion,* as long as in these cases the other requirement of law, authority, is restricted to be this-wordly.

Otherwise the delineation of law and religion as fora of human behavior becomes unprecise.[988]

II. Internalization

Whether punishment is accepted as just is a matter of internalization *(Rechtsakzeptanz).* The more law is derived from mere authority, the less it is internalized The more it is rooted in custom, the more is accepted as just (see Chapter 5 VII).[989] However, a differentiation has to be made: It is possible that the substantive law is accepted and internalized, but not the manner in which it is procedurally applied in practice (Chapter 13). In these situations, *Rechtsakzeptanz* and *Rechtsanwendungsakzeptanz* (acceptance of legal application) need to be distinguished.[990] The distinction is a corrollary of the multiplicity of cultures.[991]

III. Malinowski and Llewellyn & Hoebel

The anthropology of wrongdoing is fortunate to have two seminal books on the subject, and reading them is a must for a student of the field. One is B. Malinowski's "Crime and Custom" (1926). On pages 50–129, the Trobrianders' understandings of wrongdoing and redress is reported. Malinowski also discusses issues such as the position of the "headman",[992] the difference between softer civil and more severe criminal law, self-punishment, vendetta, incest, sorcery in the service of execution, a scandal making an act a crime and a ceremony undoing it, ostracism and exile, societal cohesion ("social fabric"), and the lack of a general good-bad dichotomy.[993] Moreover, breach of law and the restauration of order on the basis of customary law is discussed with impressive intensity.

The other notable book is by Karl N. Llewellyn & E. Adamson Hoebel on the "Cheyenne Way" representing the law as tribal leaders remember it from their youth and from tradition. The authors discuss the role and method of keeping up tribal law and order, and what doing wrong may mean (Little Wolf's story).[994]

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987 John Comaroff &Jean Comaroff, Policing Culture, Cultural Policing: Law and Social Order in Post-colonial South Africa, 29/3 Law and Social Inquiry 513–546 (2004).

988 See Chapter 1 III., above; Pospíšil comes to the same result by way of his concept *of obligatio* as requirement of the law, in L. Pospíšil (1982), 117.

989 See Pospíšil (1986, 60; 1982, 248ff, 249).

990 Barbara Wehr draws attention to this distinction, selecting the Kurdish minority in Germany as example., in her book Rechtsverständnis und Normakzeptanz in ethnopluralen Gesellschaften: Eine rechtsanthropologische Untersuchung über das Verhältnis Deutscher kurdischer Abstammung aus der Türkei in München zur deutschen Rechtsordnung, Munich 2000: C.H. Beck.

991 Pospíšil, op. cit. 137ff.

992 See on bigmanship and chieftaincy, Chapter 9 II.

993 This indicates Trobriand society as a pre-axial age.

994 Other books contain discussions of tribal torts and criminal law: Max H. Gluckman, Order and Rebellion in Tribal Africa, Collected Essays, London 1963: Routledge; idem, (1959), Custom and Conflict in Africa, Glencoe: Free Press (1959); Bohannan, Paul (1989). Justice and Judgment Among the Tiv. London & Oxford: Oxford Univ. Press (1st ed. 1957); L. Pospíšil (1958); Wesel, Uwe (1979). Frühformen des Rechts in vorstaatlichen Gesellschaften. Frankfurt/M. Suhrkamp. In view of the voluminous material collected it is surprising that a comparative study, a "general part", of tribal criminal law has not yet been procuced.

IV. Shame vs. guilt

A broad literature compares shame cultures to guilt cultures. It is generally accepted that for early cultures (to be more precise: for all pre-axial-age cultures) "wrong" means against the mores and the rules of the lineage, clan, tribe or nation to which somebody belongs. "Ka-Hopi" is an example. Misbehaving is is an offense against a group standard by a group member. Doing wrong means to misbehave as member of the group, so that the reproach to have misbehaved is directed not just against the actor alone but also against the actor's group. The single actor is not responsible for what he did, at least not toward the outside, the other groups. He is not guilty, but he *shares in the shame* that befell his group because of his deed.

A number of post-axial-age cultures (not all) take a different road, the road to *personal guilt*. Accordingly, misbehaving is an offense against a general world-wide standard of good and bad, and for this offense the single person, the offender, is responsible. The generality of the good-bad standard (which defines the axial age)[995] precludes the accountability of a special group such as clan, tribe, etc. To be more precise, there are three approaches to the shame versus guilt issue:

(1) The first theory distinguishes shame and guilt cultures.[996] Guilt cultures are characterized by individuality, shame cultures by collectivity, because for shame an outside crowd is needed, whereas one con feel guilty alone. Khaled Abou el El Fadl calls Islam a society equiped with a collective conception of responsibility.[997] Leon de Winter and Ralph Patai call Islam a shame, not guilt, society. Empirical studies by Bierbrauer show that Germans converting to Islam lose the sense of individual guilt. They feel relieved and sheltered by the *ummah,* the collectivity of the Muslim believers.[998]

De Winter and Patai trace the hostility of Islam to Western traditions back to pre-Islamic vendetta and feud concepts of the Bedouin society. Islam promises world supremacy and success to its believers. A comparison with non-Muslim societies shows to the Islamic believer that the Islamic mental and material state of affairs is currently lagging behind practically all other cultures, Western, East Asian, Hindu, maybeAfrican. Since somebody must blamed for this incongruency between promised welfare and actual delay, revenge has to be taken against the WestThis view, mainly Aitan's contribution, is not without flaws: As indicated, El Fadl reports that around the middle of the 19th Islam turned from a religion that focuses on individuals to a religion focusing on collectivity. El Fadl thinks that the reason for this change from individualism to collectivism in Islam occurred in opposition to the West in the aftermath of the French conquest of Egypt and other hostilities. This would turn causality upside down. El Fadl's opinion leaves unanswered why this rather late swing to collectivism was able

995 See text near notes 287ff., above.

996 Sigmund Freud, Civilization and Its Discontents, New York 1930: W.W. Norton (German orig. Das Unbehagen in der Kultur); Robert Metcalf, The Truth of Shame-Consciousness in Freud and Phenomonology, 31 J. of Phenomenological Psychology 1–18 (2000); Günter Bierbrauer (1994), note 380, above; idem, Normative Regulation durch Emotionen – Scham und Schuld im Kulturvergleich, in: W. Fikentscher (ed.), Begegnung und Konflikt – eine kulturanthropologische Bestandsaufnahme, Munich 2001: Bayer. Akademie der Wissenschaften, C.H. Beck Kommission, 49–62;Leon de Winter, Vor den Trümmern des großen Traums, Die Zeit No. 48 of Nov. 18, 2004, 17f.; Ralph Patai, The Arab Mind, New York 1973: Scribner.

997 Khaled Abou El Fadl, Islam and the Challenge of Democracy, a Boston Review Book, ed. By Joshua Cohe & Deborah Chasman, Princeton & Oxford 2004: Princeton Univ. Press, 28f. See also Eli Amis (2005), 379, 458, stating that Arab life revolves around honor and shame. Shame society and honor society may be used as synonyms.

998 See the remark on Malcolm X, text near note 711, above.

to raise old vendetta sentiments A second unanswered question is why Islam is not opposed to Buddhism, Confucianism and Hinduism with equal violence as to the West. And the third point of doubt is whether individualism and collectivism can really be confronted to one another the way Patai and de Winter think (see note 963, above, and under 3 below).

El Fadl convincingly explains that Islam today is a collectivist religion. Feeling relieved from personal guilt by the warmth and security of the *ummah* is an understandable and welcome attraction of Islam. Certain qualifications may be made, however. In his Guantanamo military trial, the confessed organizer of the attacks on the World Trade Center on Sept. 9, 2001, Khalid Sheik Mohammed, said that he was sorry that children had been killed in the attack, but that such losses of life were unavoidable in warfare. This demonstrates that the concept of collateral war damages, for example the killing of "innocent" by-standers, depends on relevant warfare theories which are culture-specific. For Khalid Sheik Mohammed's interpretation of Islamic collective warfare, the visitors and tourists on "nine-eleven" at the World Trade Center were enemies of Islam that may lawfully be killed as belligerent opponents, but children were not. Thus, the collectivity of the characterization of the opponent side in war includes visitors and tourists, but not children. Rather, children as owners of individuality, in the sense of Ezechiel Chapter 18, cannot be guilty. They are exempt from the collective identification of the opposing war party in Islam. El Fadl's Islamic collectivism theory goes too far at least in this respect. Sheik Mohammed's remark is evidence of a rudimentary consciousness of individuality in Islam. The issue of the treatment of collateral losses under individualist and collectivist modes of thought should not be confused with the issue of permissible or non-permissible killings of civilians for the promotion of war goals. Pertinent deliberations were made with regard to "strategic bombings" against civilians in World War II – There, a culturally determined difference between Frankish-Continental and Normannic-Angloamerican style of warfare has been observed.[999]

(2) Another opinion about collecivity and individuality is held by Robert D. Cooter.[1000] Encouraged by a psychological role theory, he says that Native Americans traditionally live as persons without individually ascribed societal roles. Their societal relations are in terms of family, friendship, closeness, and a feeling of belonging. Wrongdoing means to disturb these personal ties, this interpersonal harmony. To call this "shame" is arbitrary. Westerners assign roles to one another, roles as citizen, taxpayer, consumer, entrepreneur, blue coolar worker, head of household, teen mother, etc. Within this role thinking, wrongdoing means violating the relevant role. The result is guilt. Guilt is role deviance. Indians don't play roles.

(3) A third theory – my own – does not start from uniform concepts of collectivity and individuality.[1001] Rather it presupposes that every cultural mode of thought has its own ideas of personhood, right and wrong, the shaping of society, judging wrongdoing, risk, fate, and destiny. Marxist collectivity is different from Hindu collectivity, and Western individualism is different in Frankish and Normannic democracy.[1002] It is again different in what Thucydides paints as Athenian individualism of the polis.[1003] Thus, El Fadl's observation of Islam's turn

999 See Chapter 9 III 3., and texts near note 301, 780, and 787, above.

1000 Robert D. Cooter & Robert K. Thomas, The Meaning of Change in an Indian Village, in: W. Fikentscher, Law and Anthropology, Reader Law 265.7 & LS 190, University of California, Berkeley, School of Law, Spring 2000, 391–408.

1001 See Chapter 5 V. 5., above.

1002 See Ch. 9. III. 5.–7.

1003 See text following note 303, above, and W. Fikentscher, Oikos und Polis und die Moral der Bienen, eine Skizze zu Gemein- und Eigennutz, Festschrift Arthur Kaufmann, Munich 1993, 71–80.

from indivdualism needs seems to be in need of a not unimportant correction: It is true that according to El Fadl Muslims as participants of the *ummah* do not play the roles of individualists. For the individual Muslim as believer in Islam, its strict and unmediated monotheism ascribes him or her a distinct individuality before God. This is not Western individualism that regards humans as individuals both before God *and other humans.* Christians call them neighbors. But it is individualism, albeit an individualsim split in two, and claimed only for one – the heavenly – half.

True, with this individuality split in two halves, Islam moves away from Judaic/Greek/Christian individuality. A Judaic text from about 610 B.C., Ezechiel Chapter 18, develops Judaic individualism as against God and fellow humans that stayed valid in Christanity. The axial age in classic Greece, at about the same time as Ezechiel, or a bit later, created the concepts of individual guilt, the distinction between objective wrong and subjective reproachability, and hereby the idea of personal innocence and conscience, the difference between law and conscience as possibly conflicting human fora, and thus the Tragic Mind.[1004] Judaism, Greek Tragic Mind, and Christian answers to both generated the guilt culture which today is called "Western".

Guilty includes a time factor. Some years ago, Libya's President of State, M. Gaddhafi, gave a reception for members of Amnest International.[1005] The represenatives of A.I. complained that some prisoners were held in Libyan jails without trial for years, although they had obviously committed no crime since there was no law which they could have violated. Gaddhafi answered: "No problem, next week we'll have a law which makes illegal all what they did, so they are locked up alright. I'll tell the parliament". Guilt needs ongoing time. If in a guilt culture there is no law, one is innocent. Islam has no on-going time, thus, an ex-post-facto law as Gaddhafi was planning to suggest to his parliament cannot meet principled objection. From his point of view, Gaddhafi was right. For shaming, no law is reqired, because shaming takes place *now.* Shame cultures do not apply time-as-a-straight line.[1006]

1004 W. Fikentscher (1975 a) 235–268; idem (1995/2004) 355–393.

1005 One of the members is a personal friend of mine who told me the anecdote.

1006 The guilt-shame issue has consequences for warfare (attack and defense). A shame culture cannot blame individual opponents, but is able and even obliged to fight (if there is a reason to fight) against the group to whom the offender belongs. The group character of the opponent can be illustrated by practices of feud or vendetta: A kills B, B's brother C takes revenge against A or A's brother D, and so on. Family is opposed to family, lineage to lineage, clan to clan. According to the principle of segmentation, it is up to whoever takes the initiative to define the size of the opposing group, see text near note 787, above. This can be the opponent's family, clan, tribe, nation, descent, religion, life style, or skin color. Damaging the other side may include further "collateral damages", see the remarks on *Sippenhaft,* note 709, above. This is the reason for Muslims fighting against unrelated civilians, foreign nationals, assumed followers of another religion or other "innocent civilians", for example by suicide bombings or use of imprecise missiles or other weapons. Defense against such enlarged groups of "belligerents" under shame culture definition is difficult, especially for participants of guilt cultures. In a recent decision, Justice Barak of the Israel Supreme Court held permissible precision-aimed killings of organizers of such attacks against group-defined opponents. This is retribution in terms of the other side's mode of thought. It will certainly be understood by the followers of that other mode of thought (see however the criticism of violence against "neighbors and co-citizens" in the Tokapi Declaration" of July 2006, Jörg Lau, Keine Gewalt, Die Zeit Nr. 28 of July 6, 2006, 38). Still, doubts remain whether retribution according to in the relevant other mode of thought is objectionable. At any rate, applying a shame culture definition of group responsibilty to a shame culture, and thus a simple reciprocation, should be avoided. This is not the place to go deeper into the details of the international law of warfare relating to (what in WW II was called) partisans. See, e.g. Johnie Gombo, Understanding Guerilla Warfare, http://www.globalsecutity.org/military/library/report/1990/GJ.htm, with further readings.

V. Tort, contract, or property?

Max Gluckman discusses borderline issues of torts, contracts, and property law in Barotse jurisprudence (1965): "When a seller fraudulantly, or some times even innocently, delivers poor goods, it is held to be theft. For instance, if a hoe is purchased for money, and the hoe breaks because of a flaw which was not observable on the surface, the court may accuse the smith, denying his liability to replace the hoe, either of stealing the hoe or of stealing the money. That is, the court holds the injured party to be robbed equally of what he had given and of what he had received. If the court decides that the wrongdoer knew of the flaw, he pays double, as if for theft. The implication of the Barotse view is that in transactions fraud and even innocent mistake are not treated as a breach of agreement but as taking or spoiling a man's property. In Barotse, as in Roman law, barter and sale are considered as reciprocal conveyances of property: both parties have proprietary rights in both pieces of exchanged property, and the deliverer retains some rights, with corresponding obligations, after delivery" at 177).

This is not "primitive law". Ownership is the older, "natural", concept, and violation of ownership is what raises ownership into consciousness. Stolen or spoiled property makes the holder aware of a title. Therefore, historically contractual obligations develop from ownership. A famous example is Slade's Case (1602) 4 Co. Rep. 91b, 76 Eng. Rep 1074; Yelv 21, 80 Eng. Rep. 439, Moo K.B. 433, 29 Eng. Rep. 677. The details of this case are complicated, and the instances which finally decided between King's Bench and Exchequer Chamber, too. But the gist of the case was the introduction of a substantive law of obligations that existed independent from wronged ownership.

VI. Witchcraft

1. The professions

A witch can be male or female who owns supranatural or similar unusual capacities and draws her or his powers from a certain bodily attribute such as a "poisonous" gland in the own intestines of which she or he does not necessarily know. The attribute can be hereditary.[1007] Since witches are often regarded as evil-doers, their mention in the present context is warranted.

A witch *(Hexer, Hexe)* or witch doctor has to be distinguished from other more or less related forms of "specialists" such as:

A sorcerer *(Zauberer)* is similar to a witch because as a rule he is considred an evil person. In contrast to a witch, he has no corporeal anomaly.

A magician (*Magier,* also *Zauberer*) practices magic, with good or bad intentions (if the latter, one speaks of black magic). He belongs to the religious type of magic, and thus cannot be found in animist religions that do not practice magic (for example Navajo).

Medicine men and medicine women are professional healers. They may be members of the tribal medicine society. They use traditional medicine, modern medicine, magic or not,

1007 E.E. Evans-Pritchard, Witchcraft, Oracles, and Magic Among the AzandeOxford 1937: Clarendon (containing definitions that became accepted by the dominant opinion); other sources on witchcraft: V. Turner, The Ritual Process: Structure and Anti-Structure, Ithaca 1977; Cornell Univ. Press; Kornelius Hentschel, Magier und Muslime. Dämonenwelt und Geisteraustreibung im Islam. Jena & Weimer 1997: Diederichs; Emilie Savage-Smith (ed.), Magic and Divination in Early Islam (The Formation of the Classical Islamic World), London 2004: Ashgate; W.F. Ryan, The Bathhouse at Midnight: An Historical Survey of Magic and Divination in Russia, State College 1999: Pennsylvania State University Press; Margaret A. Murray, The Witch-Cult in Western Europe, Oxford 1921: Oxford University Press; D. Valiente, The Rebirth of Witchcraft, London 1989: Robert Hale; Thomas O. Höllmann, Poro und Sande: Geheimgesellschaften im westlichen Afrika, 1 Münchner Beiträge zur Völkerkunde 115–130 (1988).

and often have psychological training. Tribal members use their services, often to the benefit of children. When an Indian tribal member returns from a war, from oversea assignment, from a service as fire fighter in other states, or from a successful hunt, the medicine man may be asked to give mental guidance for reintegrating the soldier, fire fighter, hunter etc. into the tribal community, while the patient may undergo a sweat hut treatment. A more modern word for medicine man is local healer. When I asked, in Hopi and Apache, whether the healing and consulting services of the medicine persons were reimbursed by the public health system, the answer was in the affirmative as a matter of course.

A shaman is a medicine man or medicine woman, possessing the additional ability of communicating with spirits, deceased persons, or other (mostly) invisible carriers of natural forces. For communicationg the shaman may fall into states of trance that may be caused by health defects, intentional hyperventilation (strongly and persistently breathing), or other reasons.

Religious leaders and tribal leaders are persons who enjoy esteem as counselors, teachers, activists for tribal revival, conservers of tribal customs and laws, or simply as people of standing who can be asked for advice in difficult times, when families are in trouble, when juvenile delinquency becomes an issue, when outsiders' interests create unrest in the tribe, or when danger to the surrounding natural environment is imminent.

Singers are religious leaders in Navajo and some other tribes. They know how to perform rites, give spiritual guidance at various liminal occasions, recite the traditional "ways" (songs and dances), often after having received a thorough education. Sometimes the singer combines his "singing" performances with healing or consulting activities.

A diviner predicts the future. She or he has prophetic gifts, and may make use of magic devices or not.

Wherever the Christian missionaries have successfully abolished animism, a specific danger arises to tribal members. There is no longer an effective protection anymore against witchcraft, sorcery, and black magic. The negative influences can go underground and can no longer be fought with the aid of traditional positive countervailing powers. For most missionaries, this development seems to go unnoticed.

2. Knowledge as witchcraft

A noticeable difference between Western and animist cultures is the attitude toward knowledge. In Western culture, knowledge is seen as something to strive for, because knowledge is useful. In some ainimist cultures, knowledge is considered a doubtful treasure, causing potential liability and and hereby even a dangerous possession. For example, in the Pueblos of New Mexico and Arizona, "knowing something" is not meritorious. Rather it is an object of suspicion.[1008] Certainly it is an offense against a tribal member to say: "This is interesting, because in another Pueblo XYZ things are very similar (or quite different)". At least, it is in no good taste to report observations made in one Pueblo when in another Pueblo. In former times, knowing something meant to possible be a witch.[1009] Copying pottery or other designs

1008 Adolphe F. Bandelier, The Delight Makers. San Diego, New York, London (1971): Harcourt Brace Jovanovich Publ. (orig. 1890); Alsonso Ortiz, The Tewa World: Space, Time, Being and Becoming in a Pueblo Society, Chicago 1969: Chicago Univ. Press; in the Pueblos of New Mexico and Arizona, especially in the Rio Grande Pueblos, it is bad manners to inform a conversation partner that one knows already something about the subject of the exchange; for example, one should never say that one has observed similar or unsimilar things in a neighboring Pueblo. Knowing something is somehow distrustful and intrusive, and this has to be accepted as a covert cultural trait. In conversations there, I made many embarrassing mistakes of this sort.

1009 Frank H. Cushing, My Adventures in Zuni, Palmer Lake, CO 1962: Filter Press (orig. 1882); Ruth Benedict (1934).

from another Pueblo is permitted and may be regarded as a joke ("what will an archeologist say in hundred years from now when he finds an Acoma bowl with a Zia bird?"); but telling Acoma stories in Zia or vice versa would be shocking, to say the least. This is the exact opposite of the white man's legal culture: thoughts are free, but designs are protected.

The reasons for this difference are not easy to discover. Witchcraft reports from the time after the Spanish conquest ("entrada") in the 17th century reveal a noticeable difference of frequency of witchcraft trials between Pueblos where hunting and gathering still contributed to the Pueblo's economy, and Pueblos where reproductive agriculture was predominant.[1010] The deciding factor was whether a Pueblo had a distinct moiety tradition, separating winter and summer moieties. It may be assumed that a winter moiety represented (and still represents) the hunters' traditions, a summer moiety the farmers' life styles. Wherever moiety duality was strong and the winter moities active, witchcraft statistics were low. Less moiety activities and moiety consciousness meant less influence of the "winter people", resulting in more witchcraft trials.

A first explanation might be that: hunters and gatherers typically live in the open along with their wild animals of prey and collectible fruits. Horticulturalists and farmers have their domesticated animals and seeds at home. The latter setting relates to less information and knowledge about medicinical plants and herbs, roots, anatomy and livelihood of animals, etc. Therefore, the "old ones" and the "wood people" began to know more about these things than the – at that time – "modern" farmers. Knowledge became out of step.

Moreover, living together with cattle, large and small, introduced many new diseases diseases that were unknown to the hunters and gatherers to the farmer households. This led to a belief in witchcraft, and misrust of available knowledge.

There may be other reasons, too. Pueblo life distinguished between an upper and a lower class. The upper class was involved in exchanges with other Pueblos and with Plains Indians. Knowledge about these exchanges of knowledge and – possibly – merchandise meant power, and this power was not to be shared with lower class tribal members.

Finally, he who knows something, compares. He who compares, may criticize, for example the power and the influence of the rich families and nobles. This introduces unrest into the village, which should never occur. Internal peace always been placed above development and evolution, even at the price of less knowledge and expertise. Thus knowing something made a person a witch.[1011] The – necessary – belonging to a moiety meant some protection against witch indictments. Therefore, pueblos with an intact moiety system had – according to these early reports – significantly less witchcraft trials. But a price to be paid by the defendant of the witchcraft accusation for receiving the protection from the cacique as head of the moiety was to keep one's mouth shut.

VII. International criminal law

International criminal law is a subcategory of criminal law, dealing mainly with two fields of study: in cases of more than one applicable criminal law, for example cross-border crimes, one field refers to ascertaining the applicable law ("international conflicts of criminal law"), the

1010 W. Fikentscher, Zur Anthropologie der Körperschaft – Polis, Genossenschaft, Tewa-Pueblo – (ein Feldforschungsbericht), Bayerische Akademie der Wissenschaften, Phil.-Hist. Klasse, Sitzungsberichte Heft 2/1995, Munich 1995 (Komm. C.H. Beck); idem (1995/2004). Between hunting and gathering and reproducing crop and domesticated animals from soil there is the "neolithic revolution", see Chapter 5 V. 1., above. U. Wesel points to the fact that witchcraft belief is practically absent in foragers' societies, little known among pastoralists, but strong in farming societies, at 324.

1011 See note 1008, above.

other field to substantive criminal law applicable by national od international courts to crimes of cross-border importance ("criminal law of nations"). International criminal law is a section of law in developmnt. With reference to literature on criminal law and the law of nation a few remarks on the relationship between international criminal law and the anthropology of law may suffice:

1. To international conclicts of criminal law, national rules apply. Thus, there are as many sets of rules of international conflicts of law as there are national laws. A general tendency is to widen the applicability of a nation's set of conflict rules in order to be able to consider a wider set of cases that may have an impact inside the national territory or upon national citizens. But apart from such developments, this side of international criminal law stays within traditional limits.

2. More interesting because much more volatile is the development of the criminal law of nations during the last 80 years. In 1932, for the first time effects of the law of nations not only on sovereign nations but also upon their citizens have been contemplated in the Gdansk decision of the International Court of Justice in The Hague.[1012] In the 1940ies, Philip C. Jessup spoke of the need to "privatize" the law of nations in order to make it accessible to private persons, particularly for the protection of fundamental rights.[1013] The Nuremberg and Tokyo Trials of German and Japanese war criminals after World War II, were a big step forward on the road to render internationally recognized principles of law applicable to private persons.[1014] The four counts on which the defendants in these two sets of trials were indicted were crimes against peace, war crimes, crimes against humanity, and conspiracy.[1015] More international tribunals on genocide cases followed later (Ruanda, former Yugoslvia).[1016] In 1948, the genocide convention of the UN was passed.[1017] In 1996, a Draft Code on Crimes Against Peace and Security was introduced and, in 1998, led to the establishment of an Internatinal Criminal Court.[1018] The UN do not yet have an International Court of Justice, despite urgent calls for its creation. Among the reasons are the highly technicized manner of contemporary warfare, and "short-of-war" practices of settling conflicts applied by some countries. Judge Richard J. Goldstone, former Judge of the South Africa Constitutional Court and Prosecuter for the Internacional Criminal Tribunal for the former Yugoslavia, in a lecture to the university of Michigan Law School, Ann Arbor MI, in 2000, offered the following staggering statistics: Until World War II, the relationship of casualties among soldiers to killed civilians in a war was 8:1. During World War II, the relation was 1:1. Since World

1012 PCIJ, Danzig Railway Officials Case, PCIJ Ser. B, No. 15 (1928), 17f.

1013 Phillip C. Jessup, A Modern Law of Nations: An Introduction, New York 1948: Macmillan; Stefan A. Riesenfeld, International Law, Reader Fall 1995 & 1996, © 2007 Hastings College of the Law; Filartiga v. Pena, 630 F2d 876 (2d Cir. 1980); Matthias C. Kettemann, Investment Protection Law and the Privatization of International Law, Thesenpapier, http://intlaw,univie.ac.at/fileadmin/user_upload/int_b ... (with useful references); Bruno Simma & Andreas Paulus, The Responsibility of Individuals for Human Rights Abuses in International Armed Conflicts: A Positivist View, 93 AJIL 302–316 (1999).

1014 International Law Commission, UN General Assembly Resolution 177(II), Principles of the Nuremberg Tribunal, 1950, No. 82; http://deoxy.org/wc/wc-nurem.htm.

1015 Oberlandesgericht Nürnberg (Higher Superior Court of Nuremberg), International Military Tribunal, The Nuremberg War-Crimes Trial (1945/46), http://www4.justiz.bayern.de/olgn/imt/imte_inh.htm.

1016 International Criminal Tribunal for Rwanda, http://69.94. 11. 53/main.htm; International Criminal Tribunal for the Former Yugoslavia, http://www.un.org/icty/.

1017 Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948. www.preventgenocide.org/law/convention/text.htm.

1018 The American Society of International Law (ed.), International Crimal Court, Bibliographies, http://www.asil.org/resources/bio_icc_1998-1999.html.

War II, the relation is 1:9. This rise speaks against wars and similar conflict settlings on the basis of shame (or honor) culture collectivity, and against what has been called above Normannic warfare as well.[1019] For both, the collaterals are unbearable. For other kinds of warfare, for example according to the Frankish model, no room is left either, under the Kantian limitation of sovereignty by democracy.[1020]

The four main issues of international criminal law are: (1) Is there an "international culture of crime" that may call for a substantive international criminal law? Today, this question cannot yet be answered with a clear yes. However, there exist already the national cultures of understanding what a crime is, based on the anthropological modes of thought, and these national cultures are developing a common understanding of certain serious crimes in two directions: There are transnational absolute values that may serve as foundation of an incipient, if limited, substantive world criminal law. (2) Jurisdiction and conflict rules in cases of cross-border crimes need further development. (3) The third issue is: Internationally conceived, what is legitimate defense by force? (3) Fourthly, there is the idea of "like-minded nations" which may be able to promote in at least a number of nations a concept of regional international criminal law

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1019 See Ch. 9 V. 3. g., above.

1020 See Chapter 6 I., above.

Chapter 13: Jurisdiction. Procedure and dispute settlement. Conflicts of law (the anthropology of jurisdictional justice, of procedural justice, and of conflicts justice)

As mentioned in the foreword, Chapter 13, in addition to presenting general aspects of procedure, deals with the legal anthropology of conflict of laws as a novelty that will be discussed at greater detail using Native American material for sake of illustration. Comments concerning, heuristic law finding, culture-specific maxims of legal procedure, and the context of material, substantive procedural, and jurisdictional law, are also included.

I. Introductory remarks

Justice often cannot and should not be rendered at once. Quick justice may be injustice. Lynching is a matter for the mob, not for the court. When dictators resort to speedy trials because they are often not interested in ustice. For example, to oppress opposition, Hitler used so-called *Schnellgerichte (quick courts)*.

1. Justice and time. Heuristics

The reason why justice takes time lies in the difficulty to ascertain what the just solution to a given case should be. Following Malinowski customs are usually are self-evident and therefore followed by a people as a matter of course, whereas law quite often is subjected to doubt and dispute, and therefore asks for a decision.[1021] Unlike law, custom, to Malinowski, is a psychological must. a "social machinery of binding force" (p. 5). Law, however, has to be ascertained. It takes time to reflect on the case and the consequences of the decision, time to let the plaintiff prepare his or her case, time to give notice to the defendant, time to hear the parties making their case, time to examine the witnesses, to weigh the evidence, to prepare, pronounce and give reasons for the decision, and last but not least to grant appeal for review.

On the other hand, justice should not be delayed beyond a reasonable span of time: *Protracta iustitia, negata iustitia*. Justice needs to be "prompt" to make it comprehensible to the parties and the public. Justice done too late is no justice at all. Thus, there must be an appropriate time frame for justice. This appropriateness is expressed as procedural justice.

There are people who think they have a hunch for the law so that they know the just solution without much ado.[1022] The history of legal science shows repeated attempts at reducing "complicated" legal deliberation and conclusion to the sudden brainwave that churns out the result of an intricate case on the spot. The most recent attempt is a book by Christoph Engel and Gerd Gigerenzer on "Heuristics and the Law".[1023]

1021 Hence the importance of legal effects research *(Rechtswirkungsforschung),* e. g., R. Gmür, Rechtswirkungsdenken in der Privatrechtsgeschichte, Bern 1981. Fank K. von Bena-Bekmann (2007).

1022 The term hunch in law is attributed to J. C. Hutcheson, The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions, 14 Cornell Law Rev. 274 (1929).

1023 Christoph Engel and Gerd Gigerenzer (eds.), Heuristics and the Law, 94th Dahlem Workshop on Heuristics and the Law 2004, Berlin & Cambridge, Mass. 2006: Freie Universität & MIT Press. A description of the earlier attempts such as Phénomène Magnaud, Freirechtsschule, Scandinavian "law as fact", some American legal realist notions, is contained in W. Fikentscher, The Evolutionary and Cultural Origins of Heuristics That Influence Lawmaking, Background Paper No. 6, in: Engel & Gigerenzer (as above), at 207–237, at 220–224, with references, the idea of momently heuristic law finding is refuted there, too. See also idem, Juristische Heuristik?, in FS Canaris, Munich 2007, 1091–1106.

Next to history, comparative law can contribute to this issue. Of Harun-al-Rashid, the Great Caliphe, many stories are told of how he decided difficult cases having seen the proverbial flash in the pan. Max Weber believed this lack of general rules and the ensuing piece-by-piece subsumption of facts under these rules to be the general style of Sharia proceedings and coined the derogatory term of "Khadi justice".[1024] Biographers of Justice Oliver Wendell Holmes, Jr., report that after the Chief Justice had assigned a case to Holmes to draft a decision for the panel, Holmes became nervous and fidgety for quite a while until he had in his mind "hit" the decision which he was now convinced to be the right one. Only then he calmed down and wrote down the draft decision for his colleagues. Holmes' conviction was that principles and rules do not decide cases, but history, experience, and political power expressed, for example, by sovereignty.[1025]

These "heuristic" methods of "hitting" the right solution to a case never took hold in most legal systems of the world. They stayed proposals connected with the names of single judges and certain "schools". That law consists of principles and rules to be applied to a case is by far the dominant opinion everywhere. In 1954, Leopold Pospíšil asked the Kapauku (New Guinea highlands) who had watched a proceeding going on before big man and village, whether they found the judgment just, and if not, why. Three reasons for holding a judgment to be unjust were given: (1) the big man had applied the wrong rule to the case; (2) the big man had applied the correct rule to the case, but in a wrong manner, for example by not being imparial, or not listening close enough to the witnesses; (3) the rule was correctly chosen, and also correctly applied, but the rule seemed no longer to be just, and should therefore be dropped or changed. The answers reveal a lot: The Kapauku distinguish norm and fact, and understand the subsumption of the facts under principles and rules (norms).[1026] They also understand the difference between material and procedural law.[1027] And they conceive of a distinction between law and justice.[1028]

Different from economics, philosophy, sociology and all other social sciences, law needs to come up, at the end of the day, with a decision that changes the lives of the parties and possibly of many more persons. This decision has to be linked to facts of life. To whom shall the chance be given to bring the facts that will underlie the decision, to the judge(s), to the parties, to both, or to third persons? This problem is solved in very many different ways in the hundreds of legal systems all over the world. The principles of procedural justice depend on these possibilities.[1029]

2. Maxims

All principles of procedural justice are culture-specific. Among the culture-specific principles of procedural justice are two that are of special interest here: (1) *iura novit curia* (the parties do not have tell the law to the court),[1030] and (2) *ne eat iudex ultra petitum partium* (the judge should not go beyond the claims of the parties). Here are four examples: European Continental law applies both maxims: a plaintiff who forgets tort and only mentions

1024 With this, Weber did no justice to Muslim courts, cf., W. Fikentscher (1995/2004), 425.

1025 W. Fikentscher (1975 b), 161–222, e.g., at 181, 194, with references.

1026 See Chapter 6 V., above, W. Fikentscher (1977 a), 183–209.

1027 See notes 1101 f., above, and accompanying text.

1028 See Chapter 1 III, at the end.

1029 For a summary of principles of civil procedure see, e.g., Friedrich Lent & Otmar Jauernig, Zivilprozessrecht, 28 ed. Munich 2003, Chapter 2.

1030 Sometimes also dressed into the words: *da mihi factum, dabo tibi ius* = (the judge says:) you give me the facts, I'll give you the law, so you don't have to tell me the law.

contract can rely on the judge's experience also to examine tort; but the judge will never decide on a point outside of the case *(Streitgegenstand).* In the USA, a judge will leave it to the plaintiff whether he/she wants to sue under contract or tort or both; the responsibility of the attorney is much higher; and the judge is limited by the pleas of the parties. In Islamic law, as well as in Japanese law, the judge applies the full extent of the law and the parties do not have to ask him to look for all possible foundations of the claims and defenses; the judge is free to make a decision that may surprise the parties because it regulates something the parties have not thought of. In Japan, this maxim is called *otoshi-dokoro* (to let the decision drop from above on a spot which may lie outside of the original case *(Streitgegenstand).* Traditional Pueblo courts may apply none of the two maxims: neither are they bound to check the whole body of the law before they decide, nor do they feel limited by the parties' claims.[1031]

These are the combinations of only two culture-specific procedural maxims. There are additional maxims (such as *audiatur et altera pars,* the work of the French *juge d'instruction,* the prohibition of *ex-post-facto* laws, etc.), and many more combinations. The student of the cultural anthropology of legal procedure has to be aware of this, in order to respect the diverse traditions and needs. It is impossible to discuss all variations here. Research in comparative legal procedure is rich and has to be consulted in the given situation (see bibliography, below).

3. Kinds of collisions between legal systems

Conflict of laws is best understood as part of a broader field of law which may be called "collisions of law". Note that there do not have to be real *collisions* between legal systems. It is enough that there is a *doubt* as to which of several systems of law should apply whenever a case points to more than one. So a more precise expression would be "possible collisions". There are five possible collisions of this sort: (1) Collisions as to "rank", or "pre-emption"; (2) Collisions as to time ("intertemporal law"); (3) interreligious law; (4) interpersonal law; and (5), the field of interest here: interterritorial conflict of laws. No complete overview of this field of law can be given here. The focus is on interterritorial conflict of laws involving tribal law. From there, more general conclusions for settling normative collisions in legal anthropology may be drawn: the tribe serves as *pars pro toto.*

To (1): By virtue of "rank", or "pre-emption": federal statutory law that contradicts federal constitutional law can be nullified.[1032] Also, federal law ranks higher than state law in cases that concern a federal question or involves diversity of citizenship.[1033] EC law, as far as it goes, renders the law of the member-states of the European Union inapplicable.[1034] Art. 31 of the German Constitution of 1949 "breaks" state law, as the term goes. Especially in a federally organized country, this collision of rank is usually solved by constitutional provisions. Tribal

1031 The reason is the close-knit society of a pueblo: people know each other; Joe Sando (communication in 1996); for the similar Japanese *otoshi dokoro* principle, see Ch. 6. IV. 2., above. *Otoshi dokoro* implies that the decision of a judge is *not* bound to the frame which is demarcated by the parties so that *ne eat judex ultra petity partium* does not apply.

1032 In US law, the higher rank of the constitution in relation to federal statutory law follows from the US Supreme Court's power to strike down Congressional laws that are contrary to the federal constitution, Marbury v. Madison, of February 24, 1803, 5 U.S. 137; 1 Cranch 137; 2 L. Ed 60 (Marshall, Ch. J). The basis is U.S. Constitution, arts. I, III.

1033 The higher rank of federal law in relation to state law in diversity cases is regulated in 28 U.S.C. § 1332. On the higher rank of federal law in cases of federal question, see 28 U.S.C. § 1331 or 1343, or 27 Ruling Case Law 76. See also Canby (2004), 216–222.

1034 Albert Bleckmann, Europarecht, 6th ed. Cologne etc. 1997 ; Heymanns, § 1 V.

law within the US is, generally, not on a lower rank than federal or state law.[1035] Ranking issues between federal and state law on the one hand and tribal law on the other are usually set aside by the law of jurisdictions.[1036] There are some marginal ranking issues also in regard of tribal law that are discussed under III (3) and (4), *supra*.

To (2): *Intertemporal* law is frequent, and has a place, as a rule, at the end of an enactment. This law determines what happens to the legal situation as it existed until now (for example by granting "grandfather clauses"), the exact time when the new law will enter into force, and which cases belong to the old and which to the new regime.[1037] If the legislator overlooks this issue, the courts have a hard time assigning the cases to the old or the new law. The constitutional prohibition of an *ex-post-facto* law contains an important principle of intertemporal law that in turn forms an essential part of a rule-of-law democracy.[1038]

Sometimes, intertemporal law has to be read into substantive law provisions. An example is 9 Navajo Nation Code, § 212 where the property regime of a married couple, for which Navajo law applies, automatically changes to Navajo law when the couples moves to live on Navajo territory. Navajo marital property consists of four categories: Her and his separate property, communal property, and customary Navajo marital property of the wife.[1039]

To (3): *Interreligious* law solves possible collisions between different religious laws, as far as these laws go. For a valid marriage, some religious laws require the same religion for both husband and wife. A marriage between an Israeli and a Christian wife has to be performed in Cyprus.[1040] For countries that follow the Islamic *sharia,* similar rules are in force.[1041] Erroneously, the Restatement (Second) assigned as late as 1971 the law of Native American tribes *in toto* to the category of religious law, and therefore does not discuss conflict of laws in Indian country.[1042] Very probably, there is religious law in Indian country, but the bulk of Indian private, remaining criminal, and public law is of course secular[1043] and therefore accessible for secular conflict rules. I do not discuss here Indian interreligious law which exists as far as Indian religious law extends.

To (4): "interpersonal law" has a long history and is probably the oldest of all collision laws. In the Frankish Empire (ca. 500 to 950 A.D.) many nations lived together. The Frankish rule was: *Quislibet vivit sua lege* (everybody lives under his or her tribal or similar law): the

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1035 That state law ranks lower than federal law is one of the reasons why the "three sovereignties theory" does not work; however, see Judith Resnick, Dependent Sovereigns: Indian Tribes, States, and Federal Courts, 56 Univ. of Chicago Law Rev. 672 (1989); Sandra O'Connor, Lessons from the Third Sovereign, 33 Tulsa Law Journal 1 (1997); idem, Lessons from the Third Sovereign: Indian Tribal Courts, 9/1 Tribal Court Record 12–14 (1996); Gloria Valencia-Weber & Christine P. Zuni, Domestic Violence and Tribal Protection of Indigenous Women in the United States, St. John's Law Review (1995):91, also in: Joe Carillo (ed.), Readings in American Indian Law: Recalling the Rhythm of Survival (1998). This theory integrates the tribes into the federal system of the US, however, the constitutional case law of the US Supreme Court, in accordance with the treaty power under art. II, sec. 2, cl. 2 of the US Constitution, does not regard the tribes as constituent parts of the US federal system ; to this effect R.D. Cooter & W. Fikentscher (1998), at 295, note 27. See also Ch. 14 II. 2., below.

1036 See, e.g., Canby (2004), 195 ff., 214 ff., 224 ff.

1037 Transitional provisions (German: *Übergangsbestimmungen*).

1038 *Grundrechtsdemokratie.* See Gerald Stourzh, Wege zur Grundrechtsdemokratie, Wien & Cologne 1989: Böhlau, at XII, note 2.

1039 Grazing rights willed by the husband's father to the husband belong to the widow. See Commentary to 9 NNC § 212.

1040 This information is from 1964. The law may have changed since.

1041 This may require the conversion of the non-Mulim partner to Islam.

1042 Restatement Second, vol. I, Chapter 1, Introduction, § 2, Comment c.

1043 Cooter & Fikentscher (1998), 299 ff.

Franks under Frankish law, the Burgundians under Burgundian law, the Saxons – as far as Frankish permission went – under their law, the Langobards under Langobardian law, the Italians under modernized Roman law, the Gallic peoples under Gallic law, the Church under traditional Roman law, etc. This kind of legal pluralism[1044] is still important for some developed, developing and transient nations today.[1045] Interpersonal law could also be called the collision law built on tribal descent. It is interesting to note that the Franks treated the Christian Church and its personnel as a tribe. Modern interpersonal law exists, e.g., in form of so-called long-arm jurisdiction, which is in use, e.g., for serving purposes.

To (5): What is of interest to the present discussion is the law of conflict of laws of territorial states and state-like geographic areas. The First Restatement of the Law of Conflict of Laws[1046] starts from the premise that every state has its own law of conflict of laws. The Restatement of the Law, Second, Conflicts of Law 2nd, vol. I and II,[1047] states that "the world is composed of territorial states having separate and different systems of law".[1048] Thus, the prevalent rule in the modern world relies on territorial areas and their sovereignty systems, not on religions, nor on tribal descent.

This is reason enough to speak of conflict of laws in Indian country. "Choice of law" would be an expression equivalent to "conflict of laws".[1049] However, there are choice-of-law rules without a choice, as we have seen.[1050] Therefore, the expression "conflict of laws" is preferable.[1051]

4. The structure of Chapter 13

Because of the multitude of topics addressed in this Chapter, some words on its structure are in order. The first seven chapters of this book discuss general issues of law and anthropology, such as social norms as – possibly conflicting – forums, attributes of the several cultures, and the analyses of foreign cultures. The discussion of the material contents of legal ethnology began with Chapter 8. A judge who is confronted with a case that involves legal-anthropological issues will begin to study here. The material contents of legal ethnology covers five fields (discussed in Chapters 8 through 12): family, personhood and constituted societal and social order, contracts, property, torts and crimes, and procedure. These five main areas together form what may be called the *material law* (discussed anthropologically and ethnologically in this book). However, material law does not enter reality by itself, but rather most often by *procedure,* because courts are needed to try to transpose material law into real life. These courts, personified by their judges, will ask themselves whether they should take up the case in the first place, in other words whether they have *jurisdiction*. After a tourist is mugged, she may go to the local court at the place where the attack took place, and might hear the local judge tell her: Go home to your country and try your luck there. Thus, jurisdiction is the point where a judge begins legal thinking. Then follows the procedure which

1044 See Chaper 1 IV., above.

1045 E.g., Israel, South Africa, Navajo, especially in family and probate legal matters.

1046 American Law Institute, Washington D.C., 1934: American Law Institute Publ.

1047 American Law Institute, Washington D.C., St. Paul, MN, 1971: Am.L. Inst. Publ.

1048 Vol. I 1, Chapter 1, Introduction, § 1.

1049 The Restatement Second, in spite of its title, prefers to speak of choice of law.

1050 E.g., in property, inheritance, and tax law.

1051 The Restatement Second uses the following outline: "Conflict of laws" comprises three subfields: (1) judicial jurisdiction and competence; (2) foreign judgements, and (3) choice of law. We accept the distinction between judicial jurisdiction and choice of law which we call, for reasons just mentioned, conflict of laws. Foreign judgments are a matter of procedural conflict of laws, along with other matters, see below IV C; Restatement Second, vol. I 1, Chapter 1, Introduction § 2.

should be followed to solve the case, and only then the material law which decides the case enters.

There is no world law. Thus, in terms of geography, on all three levels just mentioned the laws will be different (and often they are): There are differing material laws, differing procedural laws, and differing rules of jurisdiction. In a transborder case, usually the material laws, the procedural laws, and the laws governing jurisdiction, as to contents, conflict. Therefore, every legal system (US, California, Rhode Island, Navajo, Picuris Pueblo, Germany, France, Kyrgistan, etc.) has legal rules to decide these conflicts. These fields of law – existing in every legal system – are called "conflict of laws". Hence, in a transborder case there there are jurisdictional conflict of laws, procedural conflict of laws, and material conflict of laws. This results, in a transborder case, in six steps that have to be taken to decide it: considering (1) conflict of jurisdiction, (2) correct application of the rules of jurisdiction, (3) conflict of procedure, (4) due decision in favor of a certain procedural system, (5) conflict of materials laws, and (6) application of the pertinent material law to the case at hand. To repeat: this six-step process is the line of thought the judge has to perform in a transborder case. In legal anthropology, a transborder case is present whenever the facts of the case affect more than one culture.

For the last issue no. (6), reference is to be made to Chapters 8 through 12 of this book. Chapters 8 through 12 above deal only with material law (6). This means that the issues (1) through (5) have to be dealt with in this Chapter 13. From this follows the structure of Chapter 13: (II) Conflict of jurisdictions; (III) appropriate jurisdiction; (IV) conflict of procedural laws; (V) laws of procedure; (VI) conflict of (material) laws. To illustrate, the cases will be mainly taken from Native American tribal ("Indian") law, as studied by Robert D. Cooter and myself.

5. Aspects of justice

This is no jugglery with concepts of law. The title of this Chapter aims to indicate, that this involves serious issues of justice, there are serious issues of justice starting with the justice when accepting a case that is troublesome enough for the parties to care for a legal decision. A judge may not say that the case is to be dismissed because it would be too much work to decide it. To decide on the appropriate jurisdiction is a matter of justice, an aspect that may be called jurisdictional conflicts justice. Moreover, the rules of the chosen jurisdiction should be justly applied because there is an inherent jurisdictional justice. Next there is a justice issue determining the appropriate procedural system and thus a procedural conflicts justice. Of course, the procedure as such should correspond to the requirements of substantive procedural justice which, for instance, is denied when witnesses are not heard whose statements are relevant for the case. Picking the wrong material law may cause grave injustice, for example, when a divorce case from a matrilineal tribe is decided in a state court used to apply patrilineal state divorce law. Following Gerhard Kegel, this kind of justice may be called (material) conflicts justice, or collision justice. Finally, deciding a case even under the correctly applicable law can end with an unjust decision.

To conclude: When a case is a cross-border case, for instance transnational, or affecting the law of more than one state, or affecting both tribal and state or federal law, the rules of conflict of laws have to be examined and applied. There are conflict rules for jurisdiction, for substantive procedural law, and for the material law that is to decide the case under the law of a certain nation, tribe, regional entity such as the European Union, the law of nations, religious law, etc. To every jurisdictional, procedural, and material law belongs a set of rules of conflict of laws. Thus, all three sets of rules of conflict of laws are national, tribal, or regional:

There is no "world law" or "universal law", neither on jurisdiction, nor on procedure, nor as to the material law, nor of conflicts rules for either one of those three. International jurisdiction follows the conflicts rules that determine the applicable material law. Procedure almost *always* follows the *lex forias,* the procedural law of the forum, that is, of the court of jurisdiction, so that a federal court will, for its procedure, apply the federal rules of civil or criminal procedure. A New Mexico court will apply the procedural rules of the State of New Mexico, and a tribal court the court rules of that tribe. As to what material law will decide the case (Arizona or Swiss or Paraguayan law), is determined by the substantive conflict of laws rules, for example the conflicts rule of the State of South Dakota that for a deceased Dakota the funeral rites of his tribe apply.[1052]

II. Conflict of jurisdictions

Distinctions not easily understood by non-lawyers are to be made between jurisdiction, substantive procedural law, and the material law which decides the case. As discussed, all three concepts underly the dichotomy of having to solve the conflicts issue first, and then the substantive issue. This leads to the six-step process already mentioned The first question a judge asks himself before accepting a case for decision is whether there is *jurisdiction*. "Why exactly does the plaintiff, and why does the defendant answering the plaintiff, exactly come to me?" says the judge. Thus, the issue of jurisdiction answers the question why the case lawfully should go before the court to which it is addressed.[1053] It would be unjustified if a Belgian court would assume jurisdiction in an Australian adoption case the facts of which have no relation to Belgium. Doctrine would speak of *forum non conveniens,* of unfitting jurisdiction (see below).

Thus, the theories and the jurisprudence of jurisdoction are not negligible. They are important indeed because without them one of the pillars of a rule of law state would be damaged: the rule that everyone has a constitutional right to her or his appropriate judge. It is a part of this constitutional right to the appropriate judge that this judge does not content herself or himself to merely look at the lex fori, but meets the duty, herewith included, to look out for the appropriate material law (see VI. 8., below).

III. Appropriate jurisdiction

Jurisdiction can have, as indicated above, many different meanings. In Indian country, jurisdiction is to be understood as the authority of a government to govern.[1054] In Indian country adjudication, similar to US federal and state law, a practice has developed according to which three elements must be met in order to give a court judicial jurisdiction:[1055] Under US substantive jurisdiction law, juridiction has to be subdivided into three categories, personal, subject matter, and territorial. There seems to be no fixed, prescribed order by which the three requirements are to be examined. The "the three pillars of jurisdiction" in Indian court practice are:

1052 Mexican v. Circle Bear, 370 N.W. 2d 737 (1985).

1053 Justice Felix Frankfurter once said that there are at least fourteen different meanings of the term jurisdiction. What follows in the tex, is a condensed description of the meaning and working of jurisdiction in comparative legal perspective for the purpose of an anthropological presentation. All legal doctrinal niceties are left aside.

1054 American Indian Law Center, Inc., Handbook State-Tribal Relations, Albuquerque, 1984ff (loose-leaf): Indian Law Ceter, 15.

1055 Id 15f. See also Kirke Kickingbird, Alexander Tallchief Skibine & Lynn Kickingbird: Indian Jurisdiction, Washington, D.C., 1983: Institute for the Development of Indian Law.

1. Person

Personal tribal jurisdiction requires a personal relationship to a tribe to be determined, such as membership, domicile, residence, abode, or presence in passing. Federal and tribal law work together to define a person in the sense of this requirement. Personal jurisdiction implies that the judge has the legally prescribed relationship to the parties, plaintiff and defendant. A federal judge who is asked to decide a custody dispute between a Navajo husband and wife would say that there is no personal jurisdiction, and a Sandia Pueblo tribal judge asked to sit in a federal tariff case would say the same.

2. Subject matter

Again, federal and tribal law together help defining whether a subject matter belongs to a certain tribal jurisdiction. Here, a negative approach ("minus method") is often helpful. Tribal jurisdiction does *not* cover the crimes of the Major Crimes Act. Neither does it apply to admiralty in case of a landlocked tribe, nor to immigration to the US.

Tribal jurisdiction has been cut down by Congress and case law. For example, in the Crazy Horse Malt Liquor Case, Hornell Brewing Co. v. Seth Big Crow Judge Stanley E. Whiting of the Rosebud Reservation tribal court ruled that the Crazy Horse family has a "*post mortem* right of publicity" in the name of Crazy Horse, even though Crazy Horse (Indian name: Tasunke Witko, d. 1877) did not commercialize his name during his lifetime. This led to an apology to tribal members by several brewery companies in 2001. After an eight year legal battle, the Stroh Brewing Company, owner of G. Heileman Brewing Company, one of the original defendants, settled with the Estate of Crazy Horse and the Rosebud SiouxTribe. The settlement agreement provided for a public apology and acknowledgment of the Estate's right to protect the name of Crazy Horse, and for delivery of culturally appropriate damages in form of seven race horses and thirty-two Pendleton blankets, braids of tobacco, and sweet grass, in compensation for the insult, and the defamation to the spirit of Crazy Horse. However, the Estate's claim that the tribe has jurisdiction for injunctive and declaratory relief under tribal law was rejected in Hornell Brewing Co. v. Rosebud Sioux Trial Court of Nov. 17, 1998, 133 F. 3 d 1087 (CCA 8th, Judge Lay writing for the court; no dissents) on the ground that under Montana v. United States, 450 U.S. 544; 101 S. Ct. 1245; 67 L. Ed. 2 d 493 (1981) the Estate lacks subject matter jurisdiction for "claims against the non-Indian breweries". The U.S. Supreme Court in Montana had decided that a tribe has no subject matter jurisdiction over on-reservation hunting and fishing activities of non-Indians on on-reservation fee-lands owned by non Indians, unless there are consensual relationships with the tribe or its members, or the activities amount to a conduct threatening the political integrity, economic security, health or welfare of the tribe. The Federal Court of Appeals held that the breweries' use of the name and memory of an Indian chief for the manufacturing of malt liquor was such an activity of non-Indians, with neither exception applying. Since the liquor was not sold on the reservation, no health risk existed.

Hornell overexpands Montana in several respects: The CCA decision leaves open which claim it addresses: a claim under the federal Arts and Crafts Act in eventual combination with the tort of breach of statutory duty, a right of publicity claim, an intellectual property claim, or a right of privacy claim. Rather, the decision uses subject matter jurisdiction, like a fence around the reservation against all kinds of claims, thus contributing to a containment policy contemporarily rising in strength (see text near note 1142, below). However, it is doubtful whether jurisdiction can be used this way. Jurisdiction is a set of requirements for the validity of a distinct claim. Also, Montana discusses administrative law, while Hornell concerns a civil

matter. Regarding the merits of (any such possible) claim it is furtermore questionable whether it is good constitutional law that an Indian tribe and its members are barred from defending themselves against commercial torts committed by outsiders through curtailing tribal jurisdiction. To refer the tribe and its members to federal or state courts (as Hornell does) is no convincing remedy since these outside courts may speak for a business-minded culture to which the tribe may not belong. Finally, Montana applies to fee-land and tortfeasors on this land. Both circumstances lack in Hornell, not to speak of the difference between hunting/fishing and abusing a deceased person's name and memory. Hunting and fishing on a limited territory is different from abusing a deceased chief's name and memory nation- or worldwide, and the Rosebud reservation is no fee land but tribal land. Thus, distinguishing from Montana would have been closer than *stare decisis.*

3. Territory

Tribal jurisdiction ends, as a general rule, at the border of the reservation. Off-reservation events or things cannot be tried in courts. However, it is enough that the effects of an act, which may have been performed outside, take place inside. Territorial jurisdiction means the competence of a court to decide within its correct precinct, so that an Alaska court will not hear an Oregon divorce case, for example.

IV. Conflict of procedural laws

A conflict between several procedural laws that offer themselves for consideration usually is promptly to be decided under the internationally accepted rule that a judge may apply the procedural rules applicable to his or her court *(lex fori).* Conflicts doctrine says that in substantive regard procedural law follows the law of the place of the court. In special transborder cases, this does not prevent the judge to make rare concessions to foreign rules of procedure when the application of *lex fori* alone would lead to unacceptable results (for example in cases involving a statute of limitation).

V. Substantive laws of procedure

Thus, once jurisdiction is established, the case is tried according to the *lex fori* rules of civil, adminitrative, or criminal procedure. These are the substantive procedural rules. They govern, for instance, how documents are served, hearings are conducted, witnesses are sworn in, appeals are made, etc.

VI. Conflict of (material) laws.
A critique of lex fori in substantive conflict of laws rules cases

Alongside jurisdiction and substantive procedural law, there is a third category of legal norms – the most important ones for the outcome of a cross-border case: the substantive rules of conflict of laws, for example the conflict-of-laws rule that assigns a contract case to the intent of the parties instead of to the language in which the contract is made. A conflict-of-laws rule attaches a cross-border case to a certain legal system for decision.

On the one hand, there is *material* law, that is, national, tribal, denominational, etc., law telling about the material contents of law (a promise must be kept, a thief goes to jail, etc.). On the other hand, there is a body of a less conspicuous number of rules that tells about the

conditions under which the principles and rules of the material law ought to be applied whenever one national, tribal, denominational, etc., law collides with another. If a Frenchman is married to an Italian woman, and their three children live in Norway, California, and on the Blackfoot Reservation, and the Italian mother dies leaving real estate in Austria and in the Netherlands, the French widower and the children will want to know whether the probate rules of France, Italy, Norway, California, the Blackfoot Nation, Austria or the Netherlands' apply, and should more than one of the laws apply which one prevails.

Legal rules and principles that govern these isues called collision laws, and the most important field of these collision-solving norms is called "conflict-of-laws", or, taking a part for the whole: "international private law" (there is also international criminal law, international tax law, etc.), or: "choice of law" (but in many areas of conflicts-of-laws there is no choice, only binding law). "Conflict-of-laws" is less conspicuous than "substantive law" because many cases develop with one and the same legal system, stay there and no collision with another legal system takes place. But growing exchange and developing trade have led to an increase of the number of collision cases. Thus, the question whether tribal law includes conflict-of-laws rules is not academic.

Every material law has its little sister, a set of conflicts rules. Even the solution of a seemingly merely "national" case, such as buying a softdrink in a restaurant, or a "lemon" from a used car dealer around the corner, has an invisible short chapter to be placed before the decider gets into conditions, warranties, small print, etc.: This sales case has to be decided under Michigan (Ohio, Hawaii, Jicarilla Apache, etc.) law.

Only after such an attachment has taken place, the material law which decides the case can be looked up and applied, for example the law of contracts, the law of torts, administrative law, or constitutional law (see Chapters 8 through 12, above).

1. General considerations of reasons for conflict-of-laws rules, especially in Indian country

A local court sometimes needs to apply foreign law to resolve a dispute. Tribal codes increase the possibility that a non-Indian court may apply tribal law to resolve a dispute. This enhances the identity of the tribe whose law is applied. Triggered by an ongoing globalization of life, cross-border-cases currently considerably increase in number, worldwide and in Indian country. For example, if a French couple who live in Berlin dispute over a divorce, the Berlin court will apply French law to decide the dispute. Similarly, if two Navajos who are married and live in Berlin owning a rug shop seek a division of their marital property from a Berlin court, the court has to consult Navajo marriage property law to resolve the case, which makes more sense than applying German marital property law to a Navajo marriage, or sending the couple home onto the reservation. To do so in Berlin, the parties have to argue Navajo law before the Berlin judge, which is difficult unless they can refer to Navajo law in a way that is accessible and comprehensible for the judge. A Pima Maricopa couple living and working in Paris wants a divorce there. Is it just to submit them to French divorce law? Or should the French judge send them home to Sacaton, AZ? "Conflicts justice" requires the French judge to investigate Pima Maricopa divorce law and apply it to the parties as (materially) just as possible. A Hausa mother from Nigeria living in Heidelberg asserting the validity of a Hausa child adoption and will entrust the decision to a German judge who may be required to study Hausa adoption law.

When two Navajo, as plaintiff and defendant, are involved in a car accident that occurred on the Hopi reservation, which law applies: Navajo or Hopi? When a member of the Jicarilla Apache tribe buys a car in Santa Fe, NM, and refuses to pay the installments claiming that the

car does not properly work, and the dealer sues the Apache for the remaining balance of the price, or for repossession of the car, should the dealer do this in a New Mexico court, or in Jicarilla Apache? And in either legal system, which substantive law applies, New Mexican or Jicarilla Apache? In such a case can, or should, the New Mexico court apply Jicarilla Apache sales law, or the Jicarilla Apache court New Mexican law, or each court its own law? May one, or all, courts involved deny to decide and refer the case to the other? When a Lakota tribal leader dies in a South Dakota hospital located outside the reservation, can his relatives claim the body for having an appropriate tribal ceremony inside the reservation land? In this case, is the claim that has to be examined by the court a claim under Lakota law, or does South Dakota state law apply? And which court should apply what law? Can either court involved refer the case to the other jurisdiction?

a. If Americans followed the European example, state and federal courts in America would in such cases apply tribal law to decide the cases. Similarly, tribal courts would sometimes decide cases by applying the law of another tribe, state, or the federal government. Unfortunately, the tribes and the state and federal courts have done little to develop the doctrine of conflicts of law as applied to tribal law. The application of foreign law by a court implicates national identity. In our example, a court in Berlin that applies Navajo law to decide a divorce case recognizes the power of the Navajo Nation to make law. Conversely, a court's unwillingness to apply foreign law withholds recognition of the power of the foreign nation to make law. Thus the development of the doctrine of conflict of laws contributes to the strengthening of national identity and mutual respect.

(1) Besides raising an identity issue, conflict-of-laws rules imply an issue of justice. "Collision justice" is the general term, applied to cross-border cases "conflict justice" is the more specialized expression. Both types of justice are different from the justice the parties appeal to when the applicable law is to be applied to their case. "Conflict justice" deals with the question whether it is just to refer to a certain legal system for deciding a case. It does not deal with the question whether the application of a rule taken from a given legal system to a particular case is just. To illustrate: If a car has been sold by an Albuquerque car dealer to a Navajo on the Navajo reservation, and the car is repossessed from Navajo territory because the Navajo asserting that the car didn't work properly allegedly did not pay the installments, what corresponds to "conflicts justice" more: the – easily accessible – sales laws of New Mexico, or the – less-known – sales law of the Navajo nation? This justice issue has to be decided, and the decision should hopefully be the same whether a New Mexico state court or a Navajo court decides the case according to New Mexico or Navajo conflicts law respectively. Identifying a culture, and hereby a law, calls for rules that decide such conflicts-of-law or choice-of-law. These rules exist, because every identifiable law must have them in order to declare when it wants to be applied, and when not. In Indian cases, two types of conflict-of-law rules are discernable: (1) conflicts between the laws of more than one tribe; (2) and conflicts between the law of a tribe and federal, state, international (e.g., UN) law or the law of a country other than US.

(2) The resort to conflict-of-law rules prevents what in crossborder cases is one of the most unsatisfactory solutions: that a court indiscriminately applies its own law (the *lex fori,* the law of the court). Conflicts rules recognize the truth that "conflict justice" often requires the application of a foreign law instead of the *lex fori* (a discussion in 8., below)

For a court to be able to apply a foreign law, the latter must be known. Legal systems differ in how to inform courts of foreign laws. Some oblige the judges to assemble the necessary information, others treat foreign laws as facts that have to alleged and proven by whosoever wants to have them applied. Both methods imply that an identifiable foreign law exists. Hav-

ing a law means having a culture. Therefore, rules of conflict-of-law are an infallible test for the acceptance of an identifiable foreign culture. Reversely, accepting a foreign culture, conflicts justice reqires – in appropriate cases – to apply foreign law.

(3) Crossborder cases may bring about the application of a foreign law in a country whose courts, or other (e.g. administrative) agencies, are bound by conflicts rules to do so, or prefer without being bound to, applying the foreign rules. This is not an inroad to the sovereignty of the country whose courts apply the foreign law, because declaring a foreign law applicable is nothing but the exercise of *one's own* sovereignty. The same holds true for legal sanctions. It is within country B's sovereignty to refer to the law of country A. It is also within B's sovereignty to hold applicable the law of country A and A's eventual legal sanctions to be executed, or otherwise followed, in the country B. The application in B of the sanctions under A's law can be handled in either two ways: (1) giving executable effect to the foreign sanction, a method called "full faith and credit" to be given to the foreign sovereignty's legal order, or (2) choosing the weaker form, called "comity" (Latin *comitas,* comradeship), when A may reject the idea of granting full faith and credit to B's decision, but grant that B's sanctions become respected in A. Both ways exist for reasons of good international, federal, or state-tribal cooperation.

(4) There is, of course, the often raised objection that it is too cumbersome to work with that many laws. A lay person may be confused by realizing that all nation states of the world, about 200, have different laws (also called, in this context, legal systems), and that each law has its set of norms of conflict-of-laws implemented by procedural rules both in general and concerning full faith and credit, and comity, in particular, and all this preceded by choices of jurisdiction. Why not one world law, might this person ask? Confusion may increase further once it is realized that many of these 200 nation states are homes of a plurality of legal systems (see Chapter 1 IV.). The plurality may exist vertically (constitution, regional, state, sub-state units) or horizontally as in a federation. Moreover all these sub-national legal systems own their respective body of conflicts rules. Thus, the US have more than 50 different laws. English, Scottish, and Northern Irish laws are different. Spain possesses her "foral laws". Germany knew "interzonal law" from 1945–1990. Canada and Australia have provincial laws.

(5) In some tribes, Indian Code law itself may concern conflict-of-laws in Indian country (such as in White Mountain Apache, and in Navajo). Relevant code provisions are not frequent, and material discussing them is even more scarce. Still, conflict-of-laws in Indian country exist and is an important field of tribal law. It deals with the situations in which the case under consideration reaches into more than one jurisdiction, and therefore into more than one substantive tribal law. Another name for conflict-of-laws in Indian country is cross-border tribal law.

(6) Theory and practice of conflict-of-laws ought to be placed into the wider setting of possibilities to avoid collisions with competing systems of law when a case reaches into more material laws than one. It is not a conflict-of-law case whenever one law for want of an applicable rule within its own system borrows legal rules from another or several other systems of law. This may be the case when one tribal law lacks applicable law on the issue at hand and the judge looks around to find a fitting rule in other systems of law, for example state, or federal, or tribal.

(7) A general division of collision cases can be made by distinguishing pre- and post-decree tools of bringing the case under another jurisdiction and/or material system of law. Sometimes a judge sees her or his own jurisdiction and/or material law unfit for the decision of the case. Instead of taking on the case and searching a fitting foreign material law, a judge may refer the case to another jurisdiction for *forum non conveniens,* or by rule of comity (especially

"judicial comity"). This occurs *before* the decree is envisaged. If however the judge takes on the case and is incontent with the application of own law for reasons of conflicts justice, the rules of conflict-of-laws are the appropriate remedy.

The judge is then *referred* to another legal system. Hereby, a distinction will have to made: If that *reference* is meant to *include* the conflict-of-law rules of that other legal system, these-rules may refer the judge back to the own system, or to a third system. Then the issue must be decided when and where these references should be stopped. About this "breaking off" of the reference, pertinent conflicts law may be available. However, if the judge is merely referred to another *material* law, this law decides the case and no further references, back, or to a third legal system, take place.

Post-decree collisions occur when at least in one jurisdiction a court decision has been produced, and the questions arises whether this decision unfolds effects in one or more other jurisdictions, and which these effects are. Full faith and credit is one means of avoiding conflict, comity another. Asymmetric solutions will have to be paid attention to. Another instrument of recognizing decisions from other jurisdictions is the acceptance of concurring jurisdiction. However, concurring jurisdiction may lead to different kinds of result:

(8) Concurring jurisdiction may mean that decisions from more than one jurisdiction concerning one and the same case coexist and support one another. Concurring jurisdiction can also lead to decisions from more than one jurisdiction concerning one and the same case contradicting each another in their outcomes. Then, for example, a marriage valid in one legal system, and at the same time made invalid or divorced in another; a child may be marital in one tribe and born out-of-wedlock in another; or a corporation may exist in one country and can do its business there, but not in another for want of being legally existent. For the parties and third persons involved, such as creditors or debtors, these "limping" legal relations may be quite troublesome.

(9) One purpose of conflict-of-law rules is to avoid them. In this sense the following remarks should be seen with regard to a comparison between pre- and post-decree instruments of avoiding or straightening out collisions of laws. Conflict-of-laws in Indian country is not safe from these collisions.

b. *Conflict of Laws in Indian Country and tribal or national identity* are closely connected (for identity see Chapter 3 I. 4., above). Most of what is called "law" in this world is attached to nation states and comparable sovereign units.[1056] If a group of humans have a law, they are somebody. If not, few people will recognize them as an entity, politically, culturally, as having rights. Having no law often means having no rights. Legal practice teaches that the first question in solving a case is whether the case has to be viewed under British, Spanish, Brazilian, German, Dutch, EU, federal US, Ohio, Hawaii, Navajo, Mohawk, etc., law. Law attached to non-states and comparable sovereign units exists, but it is not as common as national laws: United Nations law, international public law, canon law or law of any denomination, gypsy law,[1057] etc. It follows that speaking of law usually requires a qualification: *British* law, *EU* law, *Navajo* law, *gypsy* law, etc. Each law of this kind consists of numerous binding social norms, called rules, each rule being composed of a set of requirements (if …, and if …) and a sanction (…, then …). The rules can often be grouped together to principles.[1058] Together these

1056 Sovereignty in this sense is the power to make binding, social norms for a number of people. Their binding nature is derived from an authority (which distinguishes law from morals).

1057 Walter Otto Weyrauch, Romanya: An Introduction to Gypsy Law, 45 AJCL 225–235 (1997); idem, Romani Legal Traditions and Culture, Berkeley 2001: Univ. of California Press; W. O. Weyrauch, & Maureen Anne Bell, Autonomous Lawmaking: The Case of Gypsies, 103 Yale Law Journal 323–399.(1993).

1058 Benjamin Cardozo, The Nature of Judicial Process, New Haven 1921: Yale Univ. Press.

rules and principles make up what is called the substantive law of a nation, tribe, denomination, etc.

It is evident, that conflict-of-laws is *no international law (nor a part of it),* but *national* law or part of any other of the many legal systems. The term "international private law" for the non-substantive-law part of a legal system is misleading. Not the law is international, the cases are. Conflict-of-laws is just as national law as is material law. By consequence, conflicts-of-law norms of one legal system may be different from those of another, and indeed, they often are. Navajo conflict-of-laws rules differ from New Mexican and from Arizona conflict rules. There have been many attempts to make conflict rules more uniform because differing conflict rules lead to contradicting applications of rules of material law, and this again to disparate, non-uniform decisions. New Mexico follows the 1st Restatement of the Law, which grew from European tradition, whereas Arizona follows the 2nd Restatement, the modern US ("interest") tradition.[1059] In all, these attempts were far from successful.

c. There are consequences of the fact that every legal system of necessity contains *its own set of conflicts rules:* Although a truism, it had to be learned, as may be gathered from the anecdotal history of this book: When Robert D. Cooter and I decided, in 1988, to join previously individual efforts in the anthropology of law in order to study and to make available interior laws of North American Indian nations, this is what we had in mind, and we still hold to it: Like single persons, certain groups of persons may exist as identifiable units. A cinema audience, and a bus load of people are examples of such groups, but they are not identifiable as units. Nations, tribes, peoples, clans and certain other groups are identifiable units. Social scientists list various conditions that have to be met before a group of persons can be named a nation, tribe, clan, such as a common name (which may be different whether given from outside – Navajo – or from inside – Dinee), a common history, a language or dialect, or common beliefs. These and other requirements are debated. One unquestionable requirement for holding a group of people to be a nation, tribe, clan, lineage, etc., an identifiable unit is a common law. Whenever you may call a legal system "your own", you are an entity that may have duties and rights.

From our studies in certain localities (Cooter: Papua New Guinea, Warm Springs, Tohono O'odham; Fikentscher: Ojibway bands, San Juan Pueblo, Thailand, South Korea, Japan), we knew that law is an important factor for a group's self-identification. But knowledge of the laws of North American Indian nations appeared to be very limited, and access difficult. Of course, there was "Indian Law". But soon it appeared that this is federal or state law for Indians, not interior tribal law of Indians. Lawyers to whom we talked often had this reaction: Indians? Do they have law at all? Sure, they have primitive religions and their way of doing things. But law? Never heard of it. We have brought law to them. It's called Indian Law. You have to look there. The attitude behind this and similar statements was not confirmed by our observations after we made it our business, since 1988 to visit Native American tribal courts and ask.[1060]

d. While it is true that every legal system, in history and presence, of necessity owns its conflicts-of-laws rules and principles, and if it is further correct that a legal system is an essential part of a nation's, tribe's, or other group's identity as a unit, the inclusion of a conflicts-of-laws regime is part of this identification. In other words: Since you have, as part of your law, rules and principles of conflicts-of-laws, you *are* somebody. Being able to handle multi-jurisdictional cases, as to the applicable law and its procedural side: jurisdiction, you are a re-

1059 Communications by New Mexico and Arizona lawyers 1996–2000.

1060 Our first publications surveyed the unwritten legal customs of 37 nations, mainly in the North American southwest. In 2000, we turned to Indian tribal code law, see Cooter & Fikentscher (1998; 2008).

spected member of the community of law-possessing nations, etc. Professor Christine Zuni Cruz, of the University of New Mexico Law School, former Judge in Taos and now Appellate Judge in Isleta Pueblo, once remarked that tribal law, as the interior law of the tribe, has a life of its own and is invisible to outside courts and the legal science. This may beone of the reasons why Indian nations and tribes including the Pueblos are less respected than they could be, especially in view of their often highly developed legal culture and their economic importance, not to speak of what may be called the rule of respect for other cultures[1061] and the rules of intercultural justice.[1062] It is necessary, but not enough to say that Indian tribes have their own laws (customary or codified). One should point as well to the fact that every substantive law is accompanied (and, logically, made applicable) by a sub-system of conflicts rule. This calls for a treatment of Indian tribal conflicts-of-laws rules and principles, in connection with what is to be said in this Chapter about procedure and applicable law.[1063]

2. Importance of conflict-of-laws rules

The realization that the Indian nations own – without exception – collision laws, in the form of conflict-of-laws rules and principles, has two important effects:

a. The first is the application of the laws of other legal systems by tribal courts

Every tribal court must be willing, and equipped, to apply another (tribal, state, federal, or foreign) law whenever the principles or rules of the own conflicts-of-laws regime, for decision of a pending case, point to the applicability of that other law.[1064] This may be difficult, cumbersome, and unusual for a tribal judge (to learn a foreign law, experts need to be heard, etc). There are other situations in which a tribal court may be called to apply outside law, and they will have to be distinguished from the conflict-of-laws instructions to apply outside law; see below. We are here concerned only with the legal duty to apply the appropriate law, as imposed by conflict-of-laws rules. It is possible that the conflict-of-law regime of a nation or a tribe limits itself to one single provision or custom law rule: the application of the *lex for.i*[1065] This means that the own legal system does not want to deal with any non-own law. Where the court is, the law valid at this place decides. The judge may say: I apply only our own law and nothing else – the rest of the legal world does not exist for me. This is possible, and *legal* under the rules of sovereignty, while quite often unjust to the parties. If it opposes the international and interlocal policy of uniformity of results – whenever possible, it is unusual and *illegitimate.* It runs against rules such as full faith and credit, and comity. A car repossession, for example illegal under Navajo law, should not be decided according to New Mexico, or Arizona, law, but according to Navajo law, not only by a Navajo court, but also when the case is pending before a New Mexican, or Arizona, court.[1066]

1061 W. Fikentscher (2004);on the issue of national, tribal etc. identity from a theoretical point of view, see Ch. 3 II.4., above.

1062 See Postscript, below.

1063 Our materials on conflicts-of-laws are mainly drawn from Navajo, White Mountain Apache, Pueblo, and Lakota sources, implemented by occasional references to other tribal laws, customary or codified.

1064 "That other law" may again include a conflicts-of-law regime, or the reference to "that other law" may point to its substantive law only. Whether the former or the latter applies depends on the interpretation of the conflicts provision of the former. This is the intricate field of *renvoi*: *Zurückverweisung* ("return reference" = sending the case back to the original legal system which may accept or not accept the return), and *Weiterverweisung* ("third-legal-system reference = sending the case to a third legal system which again may accept or not accept the third-legal-system reference).

1065 *Qui eligit iudicem eligit ius* (choice of judge means choice of law).

1066 Allen Jim v. CIT Financial Services Corp; 87 N.M. 362 (of April 2nd, 1975), for a discussion of the case see Cooter & Fikentscher (1998), FN 121.

b. The second consequence of conflict of laws in Indian country is the *application of tribal laws by courts of other legal systems.* This is the other effect of realizing and acknowledging the tribal conflict-of-law regimes on the other side of the fence: Since every legal system of the world has its own conflict-of-law regime, anyone of them may point to the applicability of another nation's or tribe's law. This philosophy implies to let any court in the world decide a tribal case under the law of that tribe, and to let either the court investigate that law (e. g. according to § 286 German Civil Code of Procedure or a comparable provision) or the plaintiff prove, and the defendant disprove, the applicable tribal law if necessary. The same philosophy lies at the bottom of Allen Jim v. CIT Financial Services Corp; 87 N.M. 362 (of April 2nd, 1975). In that case – already mentioned above – the Supreme Court of New Mexico instructed the District Court to find out whether Navajo or New Mexican sales law was applicable under the New Mexican conflicts-of-laws rules. At least in the European tradition, a French, Dutch, Italian, etc. court, would not hesitate to decide a case under Picuris Pueblo or Jicarilla Apache law, whenever the conflict-of-law provisions points to it. The US American legal tradition is no different, in theory and practice. Lacking, however, is the knowledge of the tribal laws in the US, including their conflict-of-laws regimes. The respect for Indian (and any) tribal law will grow when the acknowledgement of tribal conflict-of-laws principles and rules becomes commonplace. He who respects tribal laws will respect tribes.

3. Cultural justice, and intercultural justice

Cultural justice and *intercultural justice* are other aspects. It is of legal-philosophical nature and starts from the fact that every nation owns its substantive and collision law, "nation" standing for modern nation states, their supranational combinations such as the EU, as well as for traditionally ordered nations, tribes, peoples without states such as the Kurds, the Gypsies, and etically recognized religious denominations. Every one of these entities has its own culture.[1067] The desire of all people assembled in one of these entities to possess their own way of life that distinguishes them from other such entities deserves – if pursued in tolerance of the others – to be respected and protected. This includes the protection of their name, history, language, economy, law, and belief system, in short, their culture. The sense of justice, inherent in any kind of law,[1068] commands rendering justice to any culture. This justice *due* to any culture has been called "cultural justice".[1069] Cultural justice includes both respectful distancing from interferences into other tolerant cultures, but also criticism of and resistance against violent and intolerant cultures that try to disturb mutual respect.

This attribution of the sense of justice to taculture, for example a tribe, leads to another step of attribution of the sense of justice: If *every* nation or tribe may claim justice owed to itself, the network consisting of these duties, to treat cultural entities with their respective justice, may be called "intercultural justice".[1070] From the inherent ownership of nations, tribes, and comparable entities in a material law and its conflict-of-laws regime follow (1) the duty of the courts of a tribe to apply outside law whenever appropriate under the own conflicts rules, (2) the duty of all legal deciders in the world to apply the inside law of that tribe

1067 On the concept of culture see Chapter 5 I.

1068 There are some problems hidden here. One issue is whether the concept of law requires a direction towards the sense of justice or not. Contra, e. g. Pospíšil; pro: e. g. Fikentscher, cf., Chapter 1 IV. 6., text near note 51, above.

1069 W. Fikentscher, The Sense of Justice and the Concept of Cultural Justice: Views from Law and Anthropology, 34 American Behavioral Scientist 314–334 (1991).

1070 Rebecca Tsosie, Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights, 47 UCLA Law Rev. 1615 (2000). See note 437, above.

in any reverse situation, (3) the duty to provide cultural justice to any culture – both respectful and critical, and (4) the legal and moral rights and duties in conformity with the principle of *inter*cultural justice.

4. Conflict-of-law reference and gap-filling references

The recognition of tribal laws as laws fit for conflict-of-laws should not be mistaken for a reference from one law to another law. This is *gap-filling* by seeking guidance in norms of other tribal or non-tribal legal systems, not a conflicts issue. A conflict-of-law issue exists when the principles and rules of any conflict-of-laws regime prescribe the application of a law other than the law of the decider; then, a Swedish court may have to apply Mescalero Apache law, and vice versa. However, this is not so in certain other situations where a court applies foreign law, and these situations have to be distinguished from conflict-of-laws. There are four "other situations" in this sense.

a. Express reference in one legal system to another legal system, or parts of it, as binding law within the first legal system, for example when a tribal constitution declares state law as one of its sources of law.

b. Without express reference, and as a softer instrument, compared to (1), the use of outside law "for guidance" because the own legal system is mute on and thus contains a gap which must be filled.

c. State law binding the tribe and thus binding the tribal court to apply it; and (4) federal law binding the tribe and thus binding the tribal court to apply it. For each of these four possibilities (see, for example, Section 8 of the New Mexico Gaming Compact with Native American tribes, new Mexico Statutes 11–13–1, however Pevar (1983) 99ff, 141ff.).

d. Federal acts and rules for policy reasons, e.g., in full and faith reciprocity
situations (see Laurence 1998, 28).

Therefore, it is not necessarily a matter of conflicts of law when a tribe accepts as its own law (1) references to outside law, (2) guidance by outside law, (3) state compact and other provisions on the generation of which the tribe had an influence, and (4) federal acts and rules for policy reasons. It should be noted that all four variations of outside law as inside law involve genuine interests of the receiving legal culture.

5. A historical sketch

In comparison, the European tradition is to be sketched in less than a nutshell: During the 17th and 18th century, the "statutists" developed the theory that the body of the law can be subdivided into "statutes" such as the property statute, the marriage statute, etc. These "statutes" were then assigned to the legal systems of the – at that time emerging – baroque "nation" states, the relevant link being a nexus such as domicile, situs, etc. For example, an Austrian couple's marriage statute was Austria because there is where they were domiciled at the time of the conclusion of the marriage, and their Bavarian real estate was governed by the Bavarian real estat statute because it lay in Bavaria.

The relative effective, but simplistic approach of the "statutists" was remodeled in a manner that still shapes today's Continental European law of conflicts-of-laws by *Carl Friedrich von Savigny* in the 8th volume of his Modern Roman Law treatise (1848). Savigny, a legal humanist and historian in search of a multilateral system of conflict-of-laws, favored the "seat (or place) of a legal relationship" as the guiding principle for choosing the appropriate applicable law; for torts the place of the wrong; for property, situs; for contracts, the will of the parties, etc. Joseph Story transplanted Savigny's approach to the US where it found acceptance in the First Restatement on Conflicts of Law (1934). Savigny's influence became weakened under the im-

pact of Brainerd Curries's ideas, particularly developed for use in US as a large economic and legal unit in the New World, and thus rather unilaterally than multilaterally oriented. Brainerd Currie favored a general interest approach and looked for "significant relationships" between the case at suit and the national laws involved. His theory found acclaim in the Restatement, Second, of 1971.[1071] Today, some states, such as New Mexico, still follow the First Restatement, others, such as Arizona, the Second. In Indian country, among tribal officials and law personnel the issues of history and theories of conflict-of-laws are little known.

For the relationship between the material law of conflict-of-laws and jurisdiction, the three approaches have significant consequences: (1) For the statutists, conflicts rules and jurisdiction are virtually disconnected: the state assigns the "statutes" to the fields of law on the one hand, and regulates jurisdiction on the other. (2) For Continental Europe, and Savigny's followers across the Channel and overseas, jurisdiction depends on the law applicable to the specific legal relationship: material conflict rule first, then the jurisdiction governing the assigned law. For a divorce, the Austrian couple (in the hypothetical above) has to go to an Austrian court, for their real estate in Bavaria to Germany. Jurisdiction becomes a function of the material conflict regulation. For Brainerd Currie and the Second Restatement, this narrow link is severed. The "significant relationship" of the interest approach will, as a rule, point to the material law of US (*lex fori*).[1072] Thus it makes sense, to examine jurisdiction first. This has become the US rule and explains, why in cross-border cases the interest in US jurisdiction prevails. Since *lex fori* – US law – is the rule, in cross-border cases in practice the search for appropriate jurisdiction is the focus, and the appropriate conflict-of-laws regime is often neglected. While this has become the legal way of life, generally and in Indian country, it is this what the law asks the non-Indian and Indian judges to do.

6. The present state. The limitations theory

In the US, including Indian Country, is therefore *conflict-of-laws examination superfluous?*

a. To answer this question, the difference between material, procedural, and jurisdictional laws should be accepted. Checking the three fields of civil procedure, conflict-of-laws, and Indian law, for the purpose of answering the question what role conflict-of-laws might play in Indian and tribal law adjudication, conclusive results are scarce. Writers of civil procedure and jurisdiction, and cases from these fields, show little interest in conflict-of-laws, or Indian or tribal law. The same may be said of the other side. Indian and tribal law have their established jurisdictional patterns, but these patterns are not linked to general jurisdictional theory. An integrating theory dealing with both sides appears to be lacking. Federal and state procedural laws differ in fact as to their approaches to jurisdiction, and Indian and tribal laws differ as well.[1073]

b. Native American and Indian Country jurisdictions may work as *"limitations"* to federal and state law. One may assume that there are at least three types of "checklists" for establishing jurisdictional requirements: one federal, one for each state, (with varying details), and one for tribal adjudication (also varying, possibly, from tribe to tribe). As far as I could ascertain, an attempt at comparative jurisdiction of this type has not yet been made.[1074] Because of the complexity of the "very significant limitations on the jurisdiction of the state courts, and even

1071 Restatement of the Law Second Conflict of Laws, vol. I and II, American Law Institute, Washington DC, St. Paul, Minn., 1971, West, vol. I., p. IX., at 145, 188. On Brainerd Currie's earlier and later position, see. e. g., Leflar § 89.

1072 See below under l., and VI. 1. d. (1), above.

1073 Canby (2004), 207ff.

1074 Most helpful was Canby (2004), Chapters VII and IX.

federal courts by reason of the United States Constitution, federal law and treaties relating to Native Americans and Indian Country", "this area has been largely ignored by conflict of laws scholars. Nevertheless it is of extreme and growing importance".[1075] The Restatement, Second, calls conflict of laws as such an "abstrusive (?), elusive subject".[1076] The problems multiply when one considers conflict of laws together with Indian and tribal laws.

The prevalent line of thought in US theory and case law is that there *is* federal and state law of jurisdiction in all their possible variety as more or less fixed complexes, and that carved out from *both,* there is Indian jurisdictional law, by virtue of federal constitutional legal *limitations,* set for the federation itself and for the states. This, for example, is the approach in one of the leading case and text books on conflict-of-laws, by Professors Eugene F. Scoles and Peter Hay. Accordingly, [t]he usually applicable state jurisdictional rules may be altered if American Indians are involved. Historically, Congress has implemented its powers and obligations by exempting Indians and tribal governments from the operation of state laws. Thus, as a general matter, state law is generally preempted in Indian country where federal and tribal laws govern. For example, state legislative jurisdiction does not extend to Indian country so that Indian tribes and individuals are not subject to state taxes, zoning requirements, property laws, and other regulatory laws … State judicial jurisdiction in Indian country is also limited …, and … restricted."[1077]

This "exemption", "preemption", or "restriction theory", as well as this "plus-minus approach" to the relation between federal and state jurisdiction on the one hand and tribal jurisdiction on the other seems to be the generally accepted point of view. Of course, it would be possible, and may be less ethnocentric, to place federal/state jurisdiction and tribal jurisdiction side by side and for both sides list their respective requirements. The "dependent sovereignty" of the tribes might point away from a "100% – minus" approach and towards a coeval positive approach. Tribes are not, and given their human and economic potential certainly no longer, the exemption from a rule of non-tribal society. Regardless of the approach, the question remains whether both jurisdictional issues and conflict of law rules have a place in tribal adjudication.

7. Legislative and judicial jurisdiction

Little needs to be said about the generally accepted distinction between *legislative and judicial jurisdiction.* The former applies to norm-making, the latter to the implementation of norms to particular cases, by the courts and other law-enforcing institutions. The concern here is only with judicial jurisdiction and its relationship to conflict of laws. Legislative jurisdiction can also lead to conflicts between legal systems. As a rule, these conflicts are solved according to the rules of "rank collision". A tribe that declares a certain behavior to be a crime fails to enact valid law when this crime has been preempted by the federal Major Crimes Act of 1885 in its up-to-date version.

8. A discussion of lex fori exclusivity

a. A basic question is whether a court, including a tribal court, should be permitted to apply the law of its own place exclusively. Technically, the question is whether the only law to be applied is the *lex fori,* the law of the place. When this question was raised in our conversations

1075 Eugene F. Scoles & Peter Hay, Conflict of Laws, 2nd ed., St. Paul, MN, 1992: West, 388. This justifies any attempt to bring some light into this area.

1076 Restatement of the Law Second Conflict of Laws, vol. I and II, American Law Institute, Washington DC, St. Paul, Minn., 1971, West, vol. I., p. IX.

1077 Scoles & Hay, op. cit., 390.

with judges of Native American courts, there was an immediate understanding of what the solution of this issue means to the practice of the court, both on the reservation, and in state court. Most of the judges in the Pueblos of New Mexico expressed their discontent with any pure *lex fori* approach, although the own local law would decide in most cases. However, the possibility of deciding, in one Pueblo, according to the laws of another Pueblo, seemed to these judges preferable if this would lead to better justice.

b. As mentioned before, Gerhard Kegel of the University of Cologne School of Law, coined the term "conflicts justice", implying that for a just-as-possible result of a legal case justice is to be sought not only on the merits of the case, but also concerning the most appropriate legal system that is used to decide it, providing for the rules that have to apply. Kegel's concept found entrance into authorities of conflict of laws in US.[1078] Even if the Pueblo judges to whom we talked had not studied these source of legal theory, their displeasure with a 100% *lex fori* rule was based on the same idea.

c. One argument in favor of a 100% *lex fori* application is simplicity: the court does not have to consider foreign principles and rules of law. Another argument is time. An expeditious handling of the case, usually desirable for at least one of the parties, and certainly desirable for an efficiently functioning court system, may suffer if the judges follow a collision rule that sends them to a foreign legal system, with different legal culture traits such as rules of precedent, of interpretation, or just day-to-day practice. It may be cumbersome to call witnesses, for instance elders, ask experts, or to do research in comparative law. These imagined burdens of a conflict of law regime argue against statutory or customary references to other legal systems and plead in favor of the court's "own local law".

In the doctrine of conflict of laws, including jurisdiction doctrine, this legal-political attitude is called "forum preference".[1079] Brainerd Currie's (1912–1965) ideas and those of his followers, focusing on governmental interest, interests of the parties, and national self-esteem, influenced US American attitudes to take a different direction.[1080] Lex fori, the courts "own law", became the rule, not just to make the judge's job easier, or for avoiding embarrassment,[1081] but as a principle. But the pendulum now seems to swing back. Scoles' and Hay's opinion that the application of the forum law should be "weighed",[1082] the general development towards a globalized world, in legal, economical, and other cultural respects, and last but not least an improved information technology concerning the access to foreign law, rather point to a "multilateral" approach that respects foreign legal systems as of comparable legal standing. Modern sovereignty concepts include the reference to foreign laws to be applied by the courts *at home* when this serves better justice *at home*. Thus, "forum preference" and "homeward trend" are principles much less favored today than ten or twenty years ago.

d. A rather convincing argument against a *lex fori* nexus that automatically parallels jurisdiction is based on the interpretational concept of *purpose.* Interpretation of a legal provision according to its legislative purpose is an accepted tool in all legal systems, at least since *Rudolph von Ihering*'. "Der Zweck im Recht", 1878. The English translation of the book,

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1078 Scoles & Hay, op. cit., 33.

1079 Robert A. Leflar, Luther L. McDougal III, & Robert L. Felix, American Conflicts of Law, 4th ed., Charlottesville, VA, 1986: Michie. The German term IS *"Heimwärtsstreben"* (homeward trend).

1080 Brainerd Currie, Selected Essays on the Conflict of Laws, 1963, Ehrenzweig, Conflict of Laws, 1962; Roger C. Cramton, David P. Currie, & Herma (?) Hill Kay, Conflict of Laws, Cases – Comments – Questions, 2nd ed., St Paul, MN, 1975: West, 1–8. Eugene F. Scoles & Russell J. Weintraub, Cases and Materials on Conflict of Laws, 2nd ed. St. Paul, MN, 1972: West 5–12, Scoles &% Hay, op. cit., 4–47.

1081 Scoles' & Hay's translation of the German word *"Verlegenheitsanwendung",* op. cit. 33.

1082 Scoles & Hay, op. cit., 30ff.

by I: Husik, has the title "Law as Means to an End".[1083] What is the purpose of rules of jurisdiction? To find out the appropriate judge, that is, the judge or the panel of judges most fitting to decide the case. What is the purpose of the principles and laws of conflict of law? To find out, among diverse legal systems that may claim to govern the case, the appropriate legal system, that is, the substantive law most fitting for the decision of the case at hand.[1084] Against the background of these obviously different purposes, it cannot be upheld that the proper judge will always apply the proper law. The search for the proper judge is to be distinguished from the search for the proper law. This distinction reflects the fact, discussed above, that every legal system has its own set of prescripts of conflict of laws, or choice of law. If choice of jurisdiction and choice of law were one and the same, there would be no difference between procedural and substantive law. Since nobody would deny this distinction, the one between jurisdiction and appropriate substantive law follows as a matter of course. Hence, jurisdiction does not preempt the collision between more than one legal systems.

e. In accordance with this conclusion is Rule 44.1 of the *White Mountain Apache Tribe* code "Constitution and Bylaws", Rules of Civil Procedure, of 1987, p. 91, on *conflict of laws:* "A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Rules of Evidence. The court's determination shall be treated as a ruling on a question of law." It follows that the WMAT courts, having assumed jurisdiction, are prepared to apply a foreign material law to decide the case. In terms of legal policy, the *result* of this investigation is both positive for the states and for the tribes: both have their conflict of law regime as parts of their law, and negative: jurisdiction does not preempt principles and rules of law that regulate conflict of laws. Or, as one tribal judge put it with whom Robert D. Cooeter and I discussed this issue: "Jurisdiction does not preempt or define conflicts, and proper judge and proper law are not the same".

9. Practical applications of conflict-of-laws rules in Indian country, and Canby's survey

It is not possible to report on all private laws of all North American Indian nations and tribes, let alone to keep such a report up-to-date. Too much is going on in the tribal laws in force on and off the reservations ("off", for example by virtue of "long-arm jurisdictional" devices such as for serving and Indian outside her or his reservation).[1085] Likewise, it is impossible to report on all conflict of laws principles and rules of all Indian tribes. Only selected examples can be given, to explain that and why tribal laws on conflicts of laws exist, conceptually independent from judicial jurisdiction, and how they work.

a. This is not the place to rehash the long story of jurisdiction in Indian country, divided by tribal courts, federal courts, and state courts. A historical background has been given in an earlier article,[1086] and in a reader.[1087] A number of excellent presentations may help orient the

1083 von Ihering, Rudolph (1877–1883). Der Zweck im Recht, 2 vol. Leipzig: Breitkopf & Härtel (English ed.: Law as a Means to an End [I. Husik, trans.], Boston: Boston Book Co., 1913).

1084 Some call it "the better law". On this and the problem of the "better law approach": to avoid impressionist nexuses, see Scoles & Hay, op. cit., 37, text near note 16.

1085 See Canby, op. cit., at 36f.; idem, Civil Jurisdiction over the Indian Reservation, 1973 Utah Law Rev. 206, 225–227, cited from Getches (2004), 592f.

1086 Cooter & Fikentscher (198).

1087 W. Fikentscher, Law and Anthropology, Law 265.7 & LS 190, University of California at Berkeley, School of Law, Spring 2000, at 381ff.

student of jurisdiction in Indian country.[1088] A condensed version, relying on the historical origins, has been prepared by one of the leaders in this intricate field, the Honorable William C. Canby, Circuit Judge on the US Court of Appeals, Ninth Circuit, and Professor at Arizona State University School of Law.[1089]

(1) Based on Canby's condensed "primer" (1993), the tribal courts have jurisdiction in *criminal* affairs only to a limited extent:

"Federal criminal jurisdiction. Some federal crimes, such as treason or theft from the mails, are applicable to everyone throughout the United States, in Indian country or out of it. These are not our concern here. Within the reservation, more specific federal jurisdiction covers:
Crimes by non-Indians against Indians, and crimes by Indians against non-Indians: Most of these crimes fall within the General Crimes Act, 18 U.S.C. § 1152, except for specified crimes by Indians that fall within the Major Crimes Act and happen to have been committed against non-Indian victims. When the General Crimes Act applies but there is no federal statute covering the crime, state law is adopted for the federal purpose under the Assimilative Crimes Act, 18 U.S.C. § 13.
Major Crimes by Indians. Included are such crimes as murder, kidnapping, and aggravated assaults. They are set forth in the Major Crimes Act, 18 U.S.C. § 1153.
Tribal criminal jurisdiction. Tribal criminal jurisdiction arises from the tribe's inherent sovereignty, and includes:
Crimes by Indians against Indians. For crimes covered by the federal Major Crimes Act, this jurisdiction is concurrent with federal jurisdiction. The tribes customarily leave prosecution of the most serious major crimes to the federal authorities.
Victimless crimes by Indians.
State criminal jurisdiction. In some states, a congressional statute known as Public Law 280 (18 U.S.C. § 1162 (criminal), 28 U.S.C. § 1360 (civil)) has led to an assumption of general criminal (or civil) jurisdiction by the states in Indian country. Arizona is not a Public Law 280 state, and that statute can be ignored. The state's jurisdiction arises from common law. Arizona exercises exclusive criminal jurisdiction on Indian reservations over:
Crimes by non-Indians against non-Indians.
Victimless crimes by non-Indians."[1090]

(2) *Civil* jurisdiction is broader, but less well-defined than criminal jurisdiction. The division of civil jurisdiction described hereapplies to subject matter (torts, transactions) located or occurring on the reservation. Long-arm jurisdiction, however, blurs the lines somewhat.

As to federal civil jurisdiction, the federal government has not carved out any special area of civil jurisdiction for itself in Indian country, as it did in criminal matters. Federal courts thus exercise their regular federal question and diversity jurisdiction. Whether a tribe has jurisdiction over a case may present a federal question, but the federal court will abstain and permit the tribal court to be the first to rule on the extent of its own jurisdiction. *National Farmers Union Inc. Cos. V. Crow Tribe* (471 U.S. 845 (1985)). Similarly, when a federal diversity case could also be brought in tribal court, the federal court will abstain and let the tribal court proceed first. *Iowa Mut. Ins. Co. v. LaPlante* (107 S. Ct. 971 (1987)).

Tribal civil jurisdiction. Tribal courts have unlimited civil jurisdiction over:

Suits against Indians, based on claims arising in Indian country, whether the plaintiff is a Indian or a non-Indian. See *Williams v. Lee* (358 U.S. 217 (1959)).

Suits against Indians domiciled or resident on the reservation, based on claims arising off-reservation, when the tribe chooses to exercise such jurisdiction.

1088 Canby (2004) idem, Pevar (1992); Getches, David H, Charles F. Wilkinson, & Robert A. Williams (2004). Cases and Materials on Federal Indian Law, 5th ed. St. Paul, MN: West; Clinton, Robert N. and Rebecca Tsosie, with the collaboration of Carole Goldberg (2004). American Indian Law: Native Nations and the Federal System. 4th ed. New York: Matthew Bender; Felix S. Cohen (the "2005 edition", see Chapter 1 I. 6. b., background books), and others.

1089 See preceding note.

1090 Canby, op. cit. (primer), 36, with the footnotes.

Suits by Indians against non-Indians for claims arising on the reservation, if the tribe chooses to exercise such jurisdiction. The propriety of such jurisdiction may present a federal question, but a federal court will abstain until the tribal court has ruled on the issue. *National Farmers Ins. Cos. V. Crow Tribe* (footnote: 471 U.S. 845 (1985)).

Child custody and adoption, not only for Indian children domiciled on the reservation, but also for those off-reservation. This jurisdiction is the subject of an unusual federal statute, the Indian Child Welfare Act of 1978 (footnote: 25 U.S.C. §§ 1901–1963). Under the Act, the tribe's off-reservation jurisdiction is shared with the states, but the state must transfer the case to the tribe upon petition of either parent, the child's Indian custodian, or the tribe, unless the state court finds good cause to keep the case or a parent objects to the transfer.

State civil jurisdiction. When claims arise off-reservation, states exercise their normal plenary jurisdiction, except for restraints imposed by the Indian Child Welfare Act. (See previous paragraph).

States exercise the following civil jurisdiction over claims arising in Indian country:

Suits by non-Indians against non-Indians.

Suits by non-Indians against non-Indians, if the Indian plaintiff chooses to bring the action in state court. Three affiliated Tribes of the Fort Berthold Reservation v. World Engineering, P.C. (467 U.S. 138, 148 (1984)). Notice that the reverse is not true, the state is precluded from jurisdiction when the Indian is a defendant. *Williams v. Lee* (358 U.S. 217 (1959))".[1091]

According to this survey, whenever there is tribal jurisdiction, does from this follow that the tribal court will always bring to bear *its own tribal law* upon the case before it?[1092] This is the question to be decided here. The answer to this question has an important implication for the whole area of conflict of laws in Indian country.

If tribal courts, by virtue of their judicial jurisdiction, apply their own local law always and as a matter of course, to all cases before them, it may be said that the *lex fori* principle of Indian tribal conflict of laws – which as such exists[1093] – is tribal Indian common law, valid not only for certain tribes but supposedly for all Indian tribes. *Lex fori* would then be a thorough-going legal-cultural principle of tribal law, similar to the principle of the free taking of evidence (including hearsay), or the principle of non-compensation of pain and suffering.[1094]

It would lead, with some evaluative inner logic of analogy, that neither state nor federal courts would in conflict ever apply any tribal law. Rather, federal and state courts would also apply the principle of the *lex fori,* unless instructed otherwise by federal law.[1095] The *lex fori* would be the generally accepted legal principle in Indian affairs.

The opposite is that tribal courts, by virtue of their judicial jurisdiction, apply the principles and rules of conflict of laws and disregard their own local law, applying instead another tribe's law, or state or federal law as a matter of conflict of laws. This application of foreign substantive law would not occur as a matter of reference to outside law, guidance by outside law, state compact and similar provisions, or of full faith and credit reciprocity and similar situations.[1096] But it would occur as a consequence of the fact that there is conflict of law in Indian country.

1091 Canby, op. cit. (primer), 36f, with footnotes.

1092 On *lex fori* (the Restatement, First and Second, uses as a translation from Latin "own local law"), see 8., above.

1093 This point is the goal of VI.

1094 Cooter & Fikentscher (1998), 552.

1095 General jurisdiction on Indian affairs in the US Constitution: Art. I, sec. 8, cl. 3; art. II sec. 2, cl. 2.

1096 See III, at the end, supra.

In turn, this would lead, with the same evaluative inner logic of analogy, to the result that states and federal courts do apply the principles and rules of conflict of laws not only in non-Indian legal affairs, but also in cases having reference to Indian country. States and federal courts would then apply, if the law of conflict of laws applies, tribal law.[1097] Therefore, much depends on the answer to the question whether jurisdiction in Indian law preempts conflict of laws, to the effect that Indian courts always follow the principle of *lex fori*.

10. Acoma v. Laguna, and Jim v. CIT

Robert D. Cooter and I found at least three cases in which foreign law was applied. In the first, the District Court of New Mexico applied Laguna Pueblo contract law.[1098] The judge held valid a loan contract between the Pueblos of Acoma and Laguna and ordered the Pueblo of Acoma to return a saint's canvas, holy to the Lagunans, that Acoma had borrowed from Laguna, and afterwards refused to give back. The case might also have been decided under Acoma contract law, but since the picture was borrowed by Acoma from Laguna, in all probability the loan was agreed upon where the canvas was, Laguna. In the venerable case, the New Mexico court did not delve into conflict of laws issues. It was sufficient that a valid loan contract existed. But this could only have been a contract under tribal law. New Mexican law was certainly not referred to in a loan of a holy canvas.

In another case, Allen Jim v. CIT Financial Services Corp. 87 N.M. 362 (of April 11, 1975), the Supreme Court of New Mexico remanded the matter to the District Court instructing it to find out whether a car sale was agreed upon under Navajo or New Mexican state law. If it was Navajo law – and the facts clearly pointed in this direction – the Supreme Court said it would be Navajo law which was to be applied by the New Mexican Courts. The case ended with an out-of-court settlement. From the Supreme Court's reasoning it follows that Navajo law would have to be examined and applied by a state court. Jim v. CIT is often quoted as a case of full faith and credit. But there was no decree yet. The suit was still in the pre-decree phase. Full faith and credit could have only played a role in a "prospective manner": If it was a Navajo sale, Navajo courts would have jurisdiction, and since decisions by Navajo courts enjoy full faith and credit in New Mexico, New Mexican courts would enforce Navajo decisions. This is the application of a foreign substantive law by way of *dictum,* combined with the declared expectation to respect the outcome of a foreign law during the pre-decision phase during the post-decree execution phase. It is only a small step from here to relying on Navajo law in the first place, that is, during the pre-decision phase. Thus, the idea that conflict of laws has a meaning for handling cases relating to Indian country, is not totally foreign to state case law.

The third case, *Lonewolf v. Lonewolf,* 99 N.M. 300, 657 P. 2d 627 (1982) is also based on *dictum* and shows other similarities to Jim v. CIT.

11. Navajo conflict-of-laws rules

Turning from tribal case law to tribal code law, the conflict-of-law provisions of the Navajo Nation Code (NNC) may be used as an example. They are proof of principled a reliance of a tribal law on a tribe-specific conflict of laws regime. Title 5 A Navajo Nation Code § 1–105

1097 Tribal law in this sense includes tribal conflict of laws *and* tribal substantive law. As a rule, the reference to another than one's own law by the law of conflict of laws implies *renvoi,* i.e., the applicability of the choice of law rules of another state, Restatement Second, vol. I 1, ch. 1, Introduction, § 8. *Renvoi* could only be avoided by tribe-state compacts, respecting tribal jurisdiction, not by mere federal law. Tribal sovereignty includes the tribal conflict-of-laws regime.

1098 Cf., Cooter & Fikentscher (1998), 558ff.; *Pueblo of Laguna v. Pueblo of Acoma,* 1 New Mexico Reports 220 (Jan. 1857, printed in 1911).

provides for that when a transaction bears a reasonable relation to the Navajo Nation and also to another state or nation, the parties may agree that either the law of the Navajo Nation or of such state or nation shall govern their rights and duties. This is a true "choice-of-law" rule, providing for an autonomy of the parties to agree on an applicable legal system. Failing such an agreement, the Navajo Nations Code applies to transactions bearing an appropriate relation to the Navajo Nation.[1099]

Under § 1–105 B. it is said that where one of the following provisions of this Code specifies the applicable law, that provision governs the cross-border case, and a contrary agreement is effective only to the extent permitted by the law (including the conflicts-of-law rules). As examples for such limitations on "party autonomy" regarding transactions in Navajo, § 1–105 B., second sentence, lists rights of creditors against sold goods (Section 2–402), and perfections provisions of the Article on Secured Transactions (Section 9–103). I would add to this at least one more example, the regulation of repossession in Title 7 § 107.[1100]

Title 5 A Navajo Nation Code, § 1–105, is part of the Navajo Uniform Commercial Code which adopts to a wide degree the model code of the UCC into Navajo tribal law, with some significant omissions, changes, and additions. In practice, the abbreviation for this code is NUCC. There is an important piece of tribal conflict of law legislation.[1101] The NUCC is not only a legislative reference to the UCC, a technique used by other tribes in order to integrate the UCC into their law.[1102] Rather, the re-worked text of the UCC is full and plain Navajo tribal *code law.*

5 A NUCC, § 1–105, would permit, for example, that three German jewelry traders, in an agreement to jointly establish an export-import agency for Navajo arts and crafts, would place this agreement, made in Düsseldorf/Germany, under Navajo law. Moreover, the agreement would not only refer to NUCC as the applicable governing the agreement, but also to other Navajo law, existing or to be developed by Navajo legislation or Navajo court precedents.[1103] The agreement would be judged in the light of special NUCC provisions of construction and interpretation.[1104]

1099 Note the distinction, made between *reasonable* and *appropriate* relation. The first circumscribes to applicability of Navajo conflict of laws rules for cross-border and other more-than-one legal systems situations; the second, indicating an stronger than only "reasonable" tie to Navajo law, works as a default rule *(ius dispositivum).*

1100 By the conflict of laws rules, 5 A NNC § 1–105 obviously thinks of nexuses obligatorily prescribed by Navajo conflict of law rules (here is no choice of laws in a field of law that is colloquially often called "choice of laws"). From this it seems to follow that the Navajo conflict of law regime acknowledges and accepts renvoi.

1101 However, § 1–110 limits the application of the NUCC to transactions worth more than $ 10000. Below this amount, Navajo customary law applies, Official Comment to § 1–110.

1102 Lummi are one of the "other tribes".

1103 5 A NUCC § 1–102 and Commentary:

"A. The Code shall be liberally construed and applied to promote its underlying purposes, and policies.

…

b. Underlying purposes and policies of the Code are:

1. To simplify, clarify and modernize the law governing commercial transactions;
2. To permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and
3. To make uniform the law of commercial transactions throughout the Navajo Nation.

C. The effect of provisions of this Code may be varied by agreement, except as otherwise provided in this code and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Code may not be disclaimed by agreement, but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

There is no denying that, relating to conflict-of-laws, Navajo law is well organized and a circumspect piece of tribal regulation. Not only the substantive law of contracts but also other areas of Navajo tribal law can be said to own their respective conflicts of law regime, even if this is not expressly dealt with in Navajo legislation. Navajo common law of conflict-of law applies.[1105] Furthermore, while the Navajo Nation undoubtedly possesses a conflict-of-laws

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D. The presence in certain provisions of this Code of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (C).

E. In this Code unless the context otherwise requires:

1. Words in the singular number include the plural, and in the plural include the singular; and
2. Words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender."

Official Comment:

"Commentary. 1. Subsections (A) and (B) are intended to make it clear that:

This Code is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Code to be developed by the courts in the light of unforeseen and new circumstances and practices. [Note this interesting statement about the relationship of code law and case law in Navajo – author's comment] However, the proper construction of the Code requires that its interpretation and application be limited to its reason.

The Code should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of its purpose and policy of the rule or principle in question, as well as of the Code as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.

2. Subsection (C) states affirmatively at the outset that freedom of contract is a principle of the Code: "the effect" of its provisions may be varied by "agreement". The meaning of the statute itself must be found in its text, including its definitions, and in appropriate extrinsic aids; it cannot be varied by agreement. But the Code seeks to avoid the type of interference with evolutionary growth found in *Manhattan Co. v. Morgan,* 242 N.Y. 38, 150 N.E. 594 (1926). Thus, private parties cannot make an instrument negotiable within the meaning of Article 3 except as provided in § 3–104; nor can they change the meaning of such terms as "bona fide purchaser", "holder in due course", or "due negotiation", as used in this code. But an agreement can change the legal consequences which would otherwise flow from the provisions of the Code. "Agreement" here includes the effect given to course of dealing, usage of trade and course of performance by §§ 1–201, 1–205, and 2–208; the effect of an agreement on the rights of third parties is left to specific provisions of this Code and to supplementary principles applicable under the next section. The rights of third parties under § 9–301 when a security interest is unperfected, for example, cannot be destroyed by a clause in the security agreement.

This principle of freedom of contract is subject to specific exceptions found elsewhere in the Code and to the general exception stated here. The specific exceptions vary in explicitness: the Statute of Frauds found in § 2–201, for example, does not explicitly include oral waiver of the requirement of a writing, but a fair reading denies enforcement to such as waiver as part of the "contract" made unenforceable; § 9–501 (C), on the other hand, is quite explicit. Under the exception for "the obligations of good faith, diligence, reasonableness and care prescribed by this Code", provisions of the code prescribing such obligations are not to be disclaimed. However, the section also recognizes the prevailing practice of having agreements set forth standards by which due diligence is measured and explicitly provides that, in the absence of a showing that the standards manifestly are unreasonable, the agreement controls. In this connection, § 1–205 incorporating into the agreement prior course of dealing and usage's of trade is of particular importance.

3. Subsection (D) is intended to make it clear that, as a matter of drafting, words such as "unless otherwise agreed" have been used to avoid controversy as to whether the subject matter of a particular Section does or does not fall within the exceptions to subsection (C), but absence of such words contains no negative implications since under subsection (C) the general and residual rule is that the effect of all provisions of the Code may be varied by agreement, subject to the prior comments."

1104 5 A NUCC, § 1–102, Commentary, Ist alinea, phrase 2; § 1–104; § 1–106; § 1–109 (captions are part of the code).

1105 On the history of the concept of tribal common law, see Cooter & Fikentscher (1998), 326ff.

regime, there is no reason why "other nations" and tribes, to which 5 A NCC, § 1–105A, points, should not have a conflict-of-law regime, applying to all areas of their respective tribal law. A law of conflict-of-laws cannot be attributed to one or several tribes and be denied to other tribes. If all tribes have their law, as can hardly be longer contested, they can only *all* have a law of conflict of law, or *none* of them has one. As the Navajo example shows – and there are more Indian nations who have enacted conflict-of-laws rules or adopted the UCC in one way or another including § 1–105 UCC – all tribes have a conflict-of-laws regime.

Another point in favor of tribal conflict of laws regimes can be made by a reference to legal-political criticism that has been levelled, with good reasons, against the present complicated system of federal, state, and tribal jurisdiction. The Honorable William C. Canby, Jr., describes the complexity of jurisdictional regulation of Indian affairs: "The above outline of jurisdiction, particularly in the civil area, is barebones; the practitioner will have to consult more detailed authority before proceeding. But the division of adjudicatory jurisdiction in Indian country does follow the path marked by our history. The tribes are self-governing; all-Indian cases presumptively go to the tribe. When no Indians (and thus no Indian interests) are involved in a crime or transaction, the states have jurisdiction. And when a crime between an Indian and non-Indian needs to be refereed, the federal government is the one to do it. Civil disputes between Indians and non-Indians are for the tribes, but the states share concurrent jurisdiction when a non-Indian is the defendant. It may be that few would design a system quite like this, but history has not left us with a clean slate".[1106]

Proposals could be made – and have been made – to obtain more clarity. Such a "clean-up" would differ in regards to jurisdiction on the one hand and conflict-of -aws on the other. Judicial jurisdictional simplification could be arranged by assigning broader jurisdictional fields to federal (or, to be delegated from the Federation: states) and to tribal jurisdictions, by reducing the number of exceptions, and – politically – by setting greater faith and trust in the legal abilities of tribes. Conflict of laws could be simplified – in theory – by reducing the number of states within the union, by making uniform or at least harmonizing the substantive laws as such, or by uniforming or at least harmonizing the conflict-of-laws regimes, both in the states and the tribes. Streamlining jurisdiction appears to be something very different from harmonizing law. Jurisdiction is not in need of harmonization, and conflict of law would gain nothing from broader fields of application. The differences between the remedies toward simplification, are so great that the distinctive functions of jurisdiction and conflict of laws can no longer be questioned. From the angle of legal-political improvement, jurisdiction cannot serve as the undisputable assignment of the applicable substantive law.

Finally, there is a constitutional argument in favor of tribal conflict of law regimes as independent from jurisdiction. Within the state's laws, largely based on common law, implemented by state legislation, conflict of laws is, as a rule, state common law. This part of state common law is, again as a rule, constitutionally not restricted or pre-empted by federal law. Thus, in principle, states enjoy the full range of their respective conflict of laws regime, unless restricted or pre-empted by federal law in certain fields. Under common law, this enables the states, and obliges their courts to make use of their legal conflict of laws regimes. Again, this does not stop at the threshold of a tribe's legal system. Instead, the states and their courts have rights and duties under common law, to apply their respective legal conflict-of -laws regime onto the tribes, as onto any other legal system. This is the essence of what *Jim v. CIT* is about.[1107]

1106 See note 1074, above.
1107 See VI 2. b., 10.

Inversely, while states may refer to tribal law and apply it in their own state courts, as illustrated by the above cases, by virtue of the sovereignty of each state of the federal system, the reverse is all the more admissible and necessary. Tribal courts may, and must under their law of conflict of laws,[1108] apply the law of the states, not as a matter of gap-filling, guidance, compact law, or binding federal law (about these possibilities see above), but as a consequence of *their tribe's* conflict of laws principles and rules. Federal law does not exclude states or tribes from conflict-of-laws rules, so the inherent power to have law – and hence conflict-of-law principles and rules – prevails.

12. Pre- vs. post-decree tools of resolving conflict of laws involving tribal law: the double meaning of comity

An important distinction between two kinds of conflict of laws principles and rules should be made (in partial conformity with the outline of the Restatement Second, as mentioned). Any reconciliation between possibly legal systems can address either one of two stages of any court proceeding: the pre-, and the post-decree stage. What is here called the "decree" is the judicial act by which the first part of a court-proceedings ends: a judgment, a decision, a court order, or any otherform of court decree. In the pre-decree stage of a court proceeding the claims and the defenses are brought forward, by the plaintiff and defendant, and evidence may be taken. Judge and jury examine the "merits" of the case and evaluate the claim. A German term for this period of the proceeding is *Erkenntnisverfahren* (knowing, or learning, procedure). This part of the procedure ends by any kind of decree (used in a wide sense of the word). It is followed by the execution (again, in the widest possible sense), because somehow the decree must be translated into observable reality.

Conflict of laws deliberations may affect the pre- or the post-decree stage, or both stages. As has been quoted from the Restatement Second, the Restatement distinguishes between "choice of law" (= the pre-decree stage) and "foreign judgment" (the post-decree stage, at least in one of several aspects). I will distinguish, under the encompassing concept of conflict-of-laws, the pre- (a.), from the post-decree (b.) phase.

a. *The Pre-decree period* concerns the time before a court decision is made. In Indian country, during this time span, there are four possible conflict of law.

(1) *between tribes:* when Laguna Pueblo tried to have the holy canvas returned from Acoma Pueblo, there was a choice between Laguna and Acoma contract law.[1109] As far as the text is recorded, the New Mexico District Court did not expressly say which of the two applied. In all likelihood, the court referred to Laguna law. The result under Acoma, or New Mexican, law would probably not have been different. Therefore, this a case with no real "conflict". However, if such a matter would be subjected to an appeal, it is always better to address the applied law precisely.

(2) *between tribe and state:* In *Jim v. CIT* the question arose whether New Mexican or Navajo sales law should govern the case. The Supreme Court of New Mexico remanded the case back to the District Court to determine this question.[1110]

(3) *between tribe and US:* In *Wilson Halwood, Jr., and Lorena Halwood v. Cowboy Auto Sales, Inc. and Bruce Williams,*[1111] the Court of Appeals of the State of New Mexico decided that punitive damages (arising out of an illegal repossession of a car sold and repossessed on Navajo

1108 That may or may not offer choices.

1109 See *Pueblo of Laguna v. Pueblo of Acoma,* see 10., above.

1110 *Allen Jim v. CIT Financial Services Corp;* 87 N.M. 362 (of April 2nd, 1975), see 10., above.

1111 124 N.M. 77, 946 P 2nd 1088 (1997).

territory) are a matter of private, not criminal, law, so that Navajo law of sales applies, not federal law. The wording of the decision is dressed in terms of judicial jurisdiction, as is the usual approach in tribal, state, and federal courts. But in substance it is a conflicts of law case where the applicable material law is at stake, not who might be the proper judge. Within the doctrine of conflict of laws, the issue of whether punitive damages for breach of contract are a private or criminal law sanction, is called a "characterization" issue.[1112] In *Cowboy,* punitive damages were qualified as private law.

(4) *between tribe and a foreign nation (outside of the US):* I was informed, by the Governor of a Pueblo, that a joint venture was being prepared between that Pueblo and an Arabian state, for the establishment of a factory that was to produce a merchandise of interest for both partners. Iproposed to have the question checked whether the joint venture was to be concluded under the law of the Arab nation, e.g., the *shari'a,* under the corporation law of the Pueblo, or that of the state surrounding the Pueblo (New Mexico).

On another occasion, I was asked by artists of Zuni Pueblo, N.M., what to do in the following case: An American citizen traveling in the Philippines asked villagers to rename their village to "Zuni". Then, he argued to the villagers, it would be possible to sell jewelry, made in that village, as "Made in Zuni". He would take care of bringing to Zuni/Philippines models of jewelry from Zuni/New Mexico and of marketing the imitations. The imitated jewelry would sell well because Zuni jewelry is world famous and the Pueblo's main source of income. The case involves issues of unfair trade practices, a field of the law of torts. In principle, under conflict of law rules, in the law of torts the applicable law is the law of the place of the wrongdoing (which poses further questions, e.g., as to the places of the *act* and of the *effects* of the wrong, and also of the law of international treatises covering these issues). A difficulty might arise with a view to the requirement of subject matter jurisdiction which, as discussed before in connection with the Crazy Horse litigation, has been curtailed by Congress and case law (see III. 2., above). But even if Montana would apply (which is unlikely because there is no fee-land involved), the exception of economic security and tribal welfare could be invoked. The Zuni artists were nor happy with my answer.

(5) Judicial comity is a means to solve a conflict issue during the pre-decree period. In all legal situations described above under a., a tribal, state, or federal court may have to apply the law of a certain other legal system. In the pre-decree stage of a court proceeding, this may cause problems because it is often not easy to determine what the foreign law exactly says. Of course, the parties may offer expert witnesses. Tribal law, especially when it does not exist in codified form but as tribal common law, is traditionally known best by tribal elders. Should the elders of a tribe be invited to appear in a court of another jurisdiction to testify? This is not only a matter of practicality, but also of respect, politeness, tact, and etiquette. This was the situation in *Mexican v. Circle Bear, 370 N. W 2d 737 (S.D. 1985).*[1113] In *Mexican,* a matter concerning the death of a Sioux medicine man, who was a tribal leader, the South Dakota District Court thought it more appropriate to let a Sioux tribal court decide the case. Members of the man's family and the tribe disagreed whether the deceased should be buried inside or outside the reservation. Both the tribal court and the South Dakota court entered in procedings. The Dakota court found tribal law to be applicable and for a while considered to hear tribal, but stepped back from deciding the case, and by way of "comity" declared that the tribal court should decide under tribal law, and the state court would accept the decision of the former, declaring itself as *forum non conveniens.* Henderson, J., in his concurrent opin-

1112 See, e.g., Scoles & Hay, op. cit., 51–67.
1113 *Mexican v. Circle Bear,* 370 N.W. 2d 737 (1985).

ion, called this reference by a state to tribal court and tribal law "judicial comity". The approach in *Mexican v. Circle Bear* applies the jurisdictional device of *forum non conveniens* to solve a conflicts issue in the pre-decree period, freeing a state court from the necessity to investigate and apply a foreign (tribal) law. In this way, pre-decree comity avoids contradicting decisions.

(6) An additional difficulty in resolving conflict of laws involving tribal law lies in the possiblity of the application of another law of conflict of laws. It has been shown that Navajo law accepts *renvoi,* that is, the application of principles and rules of conflict of laws of another legal system.[1114] This corresponds to the average international usage regarding *renvoi* (German law, as most others, distinguishes between two kinds of *renvoi*: *Zurückverweisung* ("return reference" = sending the case back to the original legal system which may accept or not accept the return), and *Weiterverweisung* (reference to a third legal system which again may accept or not accept the third-legal-system reference). To avoid *renvois* (they are always unpleasant for the court and one party involved), a uniform law of conflict of laws in Indian country – at least in this regard – would be helpful. A compact would do. Such a law, for example by way of compact, can provide for that *renvoi* is altogether excluded, or that the first *renvoi* may take place but then the addressed legal system must accept it and cannot engage in a further *renvoi*. Without such a law, *renvoi* and its dogmatic difficulties are almost unavoidable.

(7) Applying the substantive law of another legal system raises problems, too. When, after all, the way has been cleared to an applicable law that is not the court's "own local law", and the court assumes to have the necessary knowledge of that other law, some attention should be given, by the court and the parties before it, to the essentials of conflict of laws.[1115] In principle, there are two approaches: (1) the classical, more or less "mechanistic" approach, grown from Roman Law, *usus modernus,* and European and international experience, tying a cross-border case to a distinct legal system by way of a "statute" (e.g., the marital property statute, the contract statute, etc.) or a "nexus" such as situs, place of the wrong, nationality, domicile, will of the parties ("atonomy"), etc., which is the philosophy of the first Restatement; and (2) the "modern US approach" that asks for the "most significant relationship" of the case to one of several legal systems (Brainerd Currie, and his school, Armin Ehrenzweig and his followers, and the Restatement Second). Case law shows a slow rapprochement between the two approaches, also under the influence of European and international developments. As a rule of thumb it may be said, that a court does not err from the path of virtue when it applies the classical nexus method which ties a case to a legal system by manageable, investigable criteria in the light of the "most significant relationship", that is, controlled by practical, not mechanistic, deliberation. The Navajo conflict of laws system uses these tests, open to practice-related interpretation, by using the terms "reasonable relation" and "appropriate relation" in 5 A NNC § 1–105 A. Although these malleable tests are mentioned, in Navajo law, only in connection with the collision law of contracts, it is permitted to apply the same approach by way of analogy to other areas of Navajo conflict-of-law law rules. Other tribal law could follow this example.

(8) At this point a closer examination of actual conflict-of-laws issues in Indian country could be ventured. For our purposes, however, some examples of the use of non-mechanistic "nexuses", or "links" in Indian country conflict of laws will suffice. Some fields of tribal law will be mentioned, and it will be demonstrated how tribal law assigns ("links") the appropriate applicable law to the specific substantive field of law. Most examples are taken from Navajo law. It – and other examples of tribal collision law – serve as models for demon-

1114 See text near note 1028, above.

1115 See I. 3. at the end, above.

strating the issues of collision law in general, quite apart from tribal aspects (see the remarks in I. 4., above).

– *Personal Status Issues*
According to Navajo Nation Code 5, 1995 edition, title 17 § 1902, this is the law:

"A. The Courts of the Navajo Nation are vested with civil jurisdiction over all persons with respect to exclusion of non-members of the Navajo Nation from the Navajo Nation.
B. The Chief Justice of the Navajo Nation with the advice and consent of the Judiciary Committee, Navajo Nation Council, is empowered to adopt such rules as are deemed appropriate for exclusion proceedings".
This means that membership issues, but also domicile issues of non-members, fall under the scope of Navajo membership laws. The law of the public corporation (the Navajo Nation) governs issues of personal status.

– *Corporations*
"personal jurisdiction over foreign corporations, according to modern expansions of the "minimum contacts" due process standard. Ibid.

– *Movables = Chattels*
The applicable law for movables, at least in repossession cases, is determined by the land where the chattel is situated ("situs" of a thing). According to Navajo Nation Code (1995 edition), Title 7, § 607, personal property may not be taken from the territorial jurisdiction of the Navajo Nation (except in specially defined cases).
A. Written consent to remove the property from the territorial jurisdiction of the Navajo Nation shall be secured from the Navajo purchaser at the time the repossession is sought.
The written consent shall be retained by the creditor and exhibited to the Navajo Nation police officer or official upon proper demand.
B. Where the Navajo purchaser refuses to sign, there is only Navajo law.
Annotations: A Navajo court has subject matter jurisdiction over a wrongful repossession.
Thompson v. Wayne Lovelady's Frontier Ford, 1 Nav. R. 282, (Nav. Ct. App. 1978) …
The Court has jurisdiction over a non-Indian, non-resident business or individual which is alleged to have wrongfully repossessed … on Navajo land.[1116]

– *Land Law*
The Navajo Nation Code does not seem to contain conflict of laws rules for real estate. Internationally, the general rule is *situs:* land is legally governed by the law of the place. This seems so self evident that the NNC does not regulate it.

– *Torts*
In Navajo law, according to examples given in the code, torts are governed by the law of the place of the wrong. Neither membership, nor citizenship, nationality or domicile are of importance. Examples:
– driving under influence: T 14 § 707: "*any* person on Navajo territory"
– unattended vehicles, or causing damage by driving a car: T 14 § 220: "the driver of any vehicle …" (Title 14 is the Navajo National Motor Vehicle Code).

1116 See also *Wilson Halwood, Jr., and Lorena Halwood v. Cowboy Auto Sales, Inc. and Bruce William,* 124 N.M. 77, 946 P 2nd 1088 (1997), where the place of the vehicle determines the applicable law, not the law of the sale by which the car was bought.

Jurisdiction: § 100: The District Courts of the Navajo Nation shall have exclusive original jurisdiction over all civil traffic infractions under this title by any person eighteen (18) years of age or older; and over all criminal misdemeanor offenses under this title, committed within their respective jurisdictions by Indian persons eighteen (18) years of age or older.

– *Indian Gaming Compact between the State of New Mexico and tribes Native American tribes, New Mexico Statutes 11–13–1*
This compact contains law applicable both in the state and on the reservations. It obliges the tribes to accept liability for eventual accidents in the casinos, not to invoke sovereign immunity, and to arrange for the necessary insurances, Sec. 8, D. There is concurring jurisdiction of tribe and state, and as to material torts law concurring liability under tribal law and state law for accidents on tribal territory.

– *Cultural Resources*
An interesting provision in the Navajo Nation Cultural Resources Protection Act (19 NNC §§ 1001–1061) is that the nexus for claims arising from the Act is not *situs* as in property (movables and land) cases, but a special nexus of "cultural properties". Sec. 1011 A. defines "cultural properties" as buildings, districts, objects … which are significant in Navajo Nation history, architecture, archeology, engineering and (= or) culture. Sec. B. adds landsmarks of "significance to the entire Navajo Nation". From this it follows that the links between the facts and the applicable (Navajo) law need not be the geographic place where the object is found, but spiritual-cultural nexuses such as historical reports or sentiment of belonging. This provision is just as rare as it is useful, and should be recognized by conflict of laws doctrine in general, beyond Native American legal problems, for example for migration, cultural property, and repatriation issues.

– *Family Law, Marriage, Divorce, Child Custody*
Marriages are valid under Navajo law if they are valid by the laws of the place where they were contracted (NNC Title 9 § 1 A. A marriage performed in Navajo is valid if validly contracted under Navajo law (NNC Title 9 § 1 B.)

– *Marital rights in property*
Marital property rights are regulated in Title 9 § 212: They are controlled by the laws of the Navajo Nation when they are acquired after moving into Navajo Indian Country and when these rights in property are acquired in Navajo Indian Country.
For a divorce, the law of the place of the plaintiff's residence is to be applied, if this residence has been established at least 90 days before the claim is raised.

– *Child custody*
Under the Navajo Nation Children's Code, a "child" means "an enrolled member of the Navajo Nation or one who is eligible for enrollment with the Navajo Nation, or any other person who is subject to the jurisdiction of the Navajo Nation and is under the age of eighteen (18) years", Title 9 § 1002 F. A custody child must be a member, and a custodian must be appointed by a Navajo Family Court, Title 9 § 1002 L.

– *Inheritance*
Pursuant to Title 8 § 1 on Jurisdiction, the Family Court of the Navajo Nation has original jurisdiction over all cases involving the descent and distribution of deceased Indians' unrestricted property found within the territorial jurisdiction of the Court.
The examples show how rules of conflict of laws connect a material rule for resolving a legal case with a legal system by way of a link or "nexus".

b. The Post-Decree Period

Once a court has assumed jurisdiction and applied the appropriate procedural law, the conflicts regime and the material law fitting the case, it has *decided* the case. Now there is a decree which attempts to settle the dispute by some kind of order given to the parties. If such an order affects a legal system other than the one a court of which has issued it, the question is how to make effective the ordered sanction in that other legal system. Therefore, alongside rules of conflict of laws to be applied *before* such an order is issued, rules ar also needed for the time *after* the decree. There are several ways to regulate post-decree conflict of laws.

(1) Full Faith and Credit

Full Faith and Credit is found in the US Constitution, Art. V. § 1.[1117] Full faith and credit exists, on this constitutional basis, among the states, and by (disputed) interpretation, between states and Indian tribes. It requires, with few exceptions, that foreign judgments be enforced. Reference is to be made to the discussions of the full faith and credit clause that are numerous and not without open questions.[1118] Full faith and credit, if applied between states and tribes, put both on the same level of legal-judicial sophistication. It is a welcome instrument for avoiding duplicate court proceedings and inter-territorial mistrust and absence of uniformity of decided cases. It can be abused by burdening upon the side that recognizes the decree that has been made on the other side, the details of executing it.

(2) Again: Comity

The second approach to an avoidance of post-decree conflicts is *comity,* again (see a. 5. a. (5), above). Comity here refers to the time after a "foreign judgment" has been made. According to Robert Laurence: " Comity is a more flexible requirement than full faith and credit, in which the receiving court shows a generalized respect for the issuing regime, but it is not commanded to enforce the judgment".[1119] Four preconditions to enforcement of a foreign judgment under principles of comity are: (1) subject matter jurisdiction and personal jurisdiction over the defendant in the foreign court; (2) no fraud by plaintiff against foreign court; (3) fair foreign proceeding in the foreign court; and (4) a broad consistency between the foreign judgment and local policy at the place of the enforcing court, so that the conscience of the community in which the enforcement is sought is not shocked by the enforcement. Comity, taken from international law in Hugo de Groot's tradition, says that sovereign states should respect each other as *comites* (= friends, fellows). When applied to state-tribal legal collisions, comity changes from a loosely-handled instrument of international law to a stricter instrument of mutual assistance in legal conflict. This is why Judge Henderson in *Mexican* prefers speaking of *judicial* comity. Judicial comity, in Judge Henderson's sense, can be applied in the post-decree stage of any court proceeding.[1120] Then it works similar to full faith and credit, only more flexible.

1117 See 28 U.S.C. § 1738 (1938), Robert A. Leflar, et al., American Conflicts of Law, 4th ed. 1986, 215–249; for Indian law issues, see also Robert Laurence, The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith, Comity, and the Indian Civil Rights Act, 69 Oregon Law Rev. 59–688 (1990); idem, Full Faith and Credit in Tribal Courts: An Essay on Tribal Sovereignty, Cross-boundary Reciprocity and the Unlikely Case of *Eberhard v. Eberhard,* 28 N: M. Law Review 19–57 (1998).

1118 See, e.g., the survey by William D. Johnson, Honor and Respect: Recognition and enforcement of court judgments in Indian country, 9/1 Tribal Court Record 29–32 (1996); R. Laurence (1998).

1119 R. Laurence 1998, 20, with a quote from Hilton v. Guiot, 159 U.S. 113, 163–64 (1895).

1120 Mexican v. Circle Bear, 370 N.W. 2d 737 (1985), where Judge Henderson developed the concept of "judicial comity" in a concurring opinion, see text near note 1067.

At the pre-decree stage – as in the case of *Mexican v. Circle Bear* – comity refers to the material law needed to decide the case. Said simply: The court that feels farther away from the total appearance of the case refers it to a seemingly more appropriate legal system for decision, and therefore comity affects the material law to be applied. At the post-decree stage – this what Professor Laurence is discussing – comity refers to a jurisdictional element of execution. In the pre-decree period, a court says: the colleagues over there will decide alright, let's send them the case. In the post-decree period a court says: The colleagues over there have decided the case alright. Let's enforce their decision.

(3) Asymmetric solution

Ideally, full faith and credit is a symmetric solution to pre- and post-decree conflict of laws as it treats both sides alike. Either side can profit from the generosity of trust in the abilities of the other side. Post-decree comity may be asymmetric. The tribes may trust more in the results of state court procedings than the states do in those of tribal adjudication. Or, reversely, the states may be tempted to have tribes carry the burden of execution on tribal territory (for example, in repossession cases this is of importance) and may thus be inclined to treat tribal decisions with full faith and credit or at least with comity through their courts. Therefore, an asymmetric solution can result by which the states use the tribes as execution agents (the reverse case is also thinkable). On the other hand, the degree of "asymmetry" is often hard to determine. Also this tool does not rule out post-decree conflict of laws.[1121]

(4) Concurrent Jurisdiction and "Limping" Legal Relations

Other means of solving post-decree conflict do not seem to be available. Especially when there is concurrent jurisdiction, for example in gaming law cases,[1122] divergent outcomes of court proceedings are undesirable. Often the courts On the basis of concurrent jurisdiction the courts will often go to work with a view from the one to the other, and use full faith and credit, comity, or asymmetry, to reach compatible results. But if this is not the case, two jurisdictions, concurrent or not, may end up with contradicting results that can be described as "limping".[1123]

c. A Legal-Political Comparison of Pre- and Post-decree Procedural Tools

Such a comparison shows that pre-decree measures taken to avoid contradicting decisions are preferable. This means that the rules concerning conflict of laws in Indian country should be recognized, and not mistaken for, jurisdiction. Thgey could also prove useful for different legal systems (international, interregional, interlocal, interforal, interzonal, etc.) in the rest of the world.

13. Conclusion to conflict of laws

A culture is defined by several factors, among them law. As an indispensable corollary, every material law has a set of principles and rules of conflict of laws. North American Indian tribes have their own law, and their own conflict-of-laws regime. The fact that they are *dependently* sovereign, has no influence on the tribes' own material and collision law. Alongside an international law of conflict of laws, there are interlocal, interforal (Spain), interzonal (Germany 1945–1990) and intertribal laws of conflict of laws.

1121 See R. Laurence 1998, 20f.

1122 See, e.g., the New Mexico Gaming Compact with Native American tribes, new Mexico Statutes 11–13–1.

1123 Translation from German: *hinkend;* see VI. 1. a. (8), above. "Limping" legal relations are particularly cumbersome, for the immediate parties as well a for third persons, and administrations. Deplorably, they are not infrequent; there are limping marriages, divorces, adoptions, partnerships, even corporations, etc.

The law of conflict of laws responda to the question of the appropriate law to be applied to a case that has legally relevant factual connections to more than one legal system. In short: conflict of law is about finding the appropriately applicable law. Jurisdiction is about finding the appropriate judge to apply that law. The two are not congruent.

When a court decides to apply a law which is not his own, knowing that law requires expert witness expertise. Some tribes do not like to share information about their law, and how it is applied. They are not ashamed of having their own interior, local law, grown from tradition or modern needs, such as consumer protection. But their elders and representatives might tell you that for 400 years everything shared with outsiders has been turned against them, leading to loss of land and their way of life. Thus, information about tribal law may be difficult to come by. Therefore, when a tribe shares information about its own interior law, the court applying that law should be instructed accordingly. Whenever information about tribal law is hard to get, or inconclusive, a state or federal court should declare itself *forum non conveniens* and, in the pre-decree phase, send the case to the appropriate tribal court, to decide under an anticipated full faith and credit rule, or in the post-decree phase, accept the tribal decision under full faith and credit, or judicial comity.

Inversely, the tribal courts should decide under state or federal law when tribal conflict of law rules say so. This is not borrowed law or guidance, but a sanction of conflict of laws. Tribal identity has many constitutive aspects. Having your own law is also a part of tribal identity. So does having your own conflict of laws principles and rules. Respect given to both, from within and without, gives a tribe the standing it needs in a globalized world.

Tribal code law is a well established part of most tribal cultures. It thus contributes identity affirmation as much as customary law does. By contributing to tribal identity, code and customary law relate to other tribes, to the states, to the federation of US, and to international organizations. This may give rise to conflicts of laws in cases where more than one legal system calls for application.

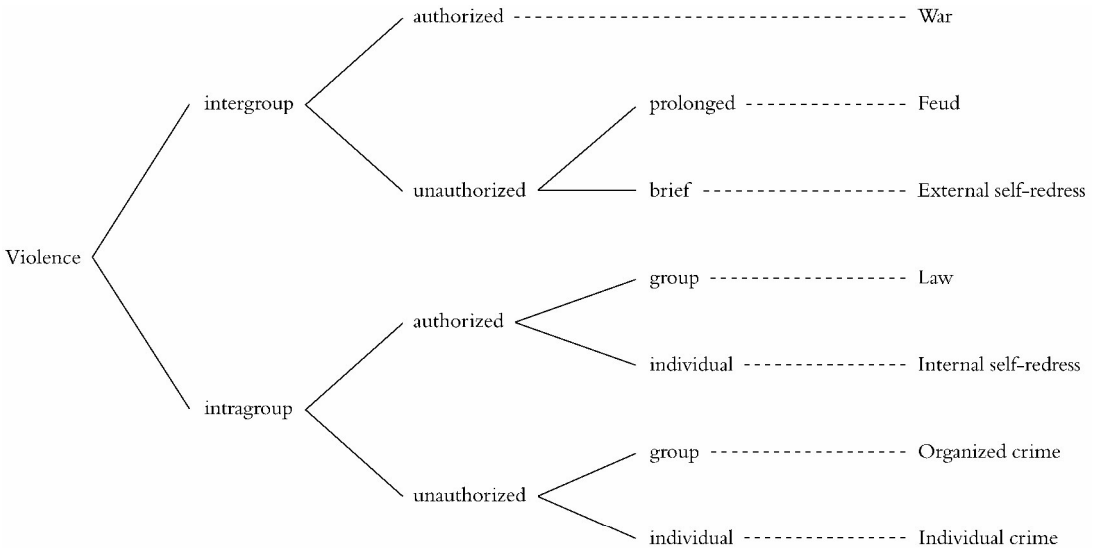
Underprivileged cultures struggle to survive, and they may do this by conceiving and maintaining their identity inversely, by calling other cultures "foreign". Law helps in this process. If a mechanic from Taos Pueblo in New Mexico can tell his employer in Espagnola, off the reservation: "I'm Taos, and Taos law requires us to observe the feast day, and that day they need me as police", the employer should not fire him for taking a day off. A person who has a law to live with is somebody. Law may not be all that a culture involves, even if used in the wide sense of "our way", as Indians are fond of saying. But law contributes to cultural identification, and thus to ownness, and foreignness. Stressing this point may be the second motive for learning the law of a lesser known nation.

A few more procedural issues of the anthropolgy of law should be briefly mentiones: the relationship of violence and and law, youth bulge, the theory that wants to nreduce law to process, general dispute management, and mediation.

VII. Force and law. Feud (Pospíšil's graph). The youth bulge phenomenon

Force can be lawful or illegal. The substance and process of law makes legitimate what otherwise might be brutal and senseless violence.[1124] According to Leopold Pospíšil lawful and illegal kinds of violence may be illustrated as follows:

1124 A broad spectrum of the anthropology of violence is describes in Jonathan Haas, The Anthropology of War, Cambridge 1990: Cambridge Univ. Press.



For Pospíšil, the four constituents of law, in anthropology, are authority, obligatio, the intent of general application, and sanction.[1125] In a detailed discussion in this book, the constituents have been reduced to two, authorizingness, and sanction.[1126] From the graph follows, that Pospíšil himself lets two constituents suffice: authority and sanction.

A disputed topic is feud (also called "blood feud", "vendetta"). Some claim that feud is an early form of law because it contains the element of reciprocal compensation. Pospíšil regards feud as an illegal exchange of force and thus not as early law.[1127] Wesel follows him.[1128] Spencer and Malinowski take the opposite position.[1129] If the latter group were right, reciprocity would be an element of law because feud would lie at law's beginning. But there is law without reciprocity, such as the forms of distributive justice. Of course, reciprocity is a frequent element of justice, but it is not all-pervading, which would have to be persumed if feud were a form of early law.

Other early forms of war and violence are youth bulge raiding, armed trading, and borderline fights.

In many societies, the second, third, fourth etc. sons start "hanging around", "doing no good", become lawless and, in early societies, begin raiding because the first son is to take father's position and there is little to do for the following brothers. This phenomenon, dubbed "youth bulge" is held responsible for much warfare, raiding, suburban violence, even student riots. Its leadership issue, among Indians sometimes personalized as "war chiefs", has been discussed.[1130] Youth bulge may have contributed to many conquests. Many a "clouded title" has its historic reasons in this practice.[1131] The raids of the Norman Vikings may have

1125 See Chapter 1 III., above.
1126 See Chapter 1 III. 5. and 6., above.
1127 L. Pospíšil (1978),14, 15; idem (2004), 493.
1128 Uwe Wesel, Frühformen des Rechts in vorstaatlichen Gesellschaften. Frankfurt/M. 1979. Suhrkamp.
1129 H.L. Spencer, Principles of Sociology, London 1876: Williams & Norgate, 161; B. Malinowski, An Anthropological Analysis of War, in: Leon Bramsin & George W. Goethals (eds.), War: Studies from Psychology, Sociology, anthropology, New York 1964: Basic Books, 245–268, at 261.
1130 See Ch. 9 II. 3. a., above.
1131 See note 699, above. Ch. 13 VII.

had one of their cultural roots here. Much of what has misleadingsly been written about Indian "braves" and "chiefs" may be better understood in the light of this irresponsible pasttime that mixed hunting and raiding.

"Armed trading", that is, engaging in commerce in full armour, is a practice reported from many parts of the world. The Normans traded though Northern Russia (where they were called Varangians, *Waräger*) all the way to the Black Sea.[1132] Similar stories are told of the Franks.[1133] In what is now the northwestern USA, the Chinook were armed traders along the Columbia River.[1134] In the Arabian desert, armed traders sought their way, being entitled to Bedouin hospitality of being permitted to stay for three nights without being harmed, and then having to leave because it was assumed that an enemy was following the trader at a three-days distance. The guest owed to his host not cause him trouble. The assumption was that if somebody is travelling, he is being hunted by somebody else. He who travels is wrong. In the Indoeuropean languages, *hospis* (Latin for guest) and *hostis* (Latin for enemy) are dissociations from the same stem *(chost, Gast, guest)* which indicates that originally the foreigner was that ambivalent being that could be both an enemy and a guest. "Discovering the other" was risky, potentially dangerous, and sometimes terrifying.[1135]

VIII. Law as (mere) process: A post-modern view

Some legal theorists reduce law to process.[1136] The underlying assumption is that there are no reliable legal values as such but that it is exclusively the development of law in its procedural nature which may lead to justifiable decisions. Legal skepticism is a valid basis for such an approach to law. The question is whether and the which degree skepticism as to workable legal values in law is altogether justified. In strict analysis this is an ideological, if not religious issue. It has scientifically be debated under these premises. The path followed in the present text is epistemologically critical because, otherwise, empirical anthropology – the starting point of this book – would not work. However, that path is not radically skeptical. It rather assumes that different aspects of justice, commutative, distributive, compensatiory, and of course procedural, too, need to be evaluated and brought into balance. With this presupposition, law is

1132 Karl Vollgraff, Erster Versuch einer wissenschaftlichen Begründung sowohl der allgemeinen Ethnologie durch die Anthropologie wie auch der Staats- und Rechtsphilsophie durch die Ethnologie oder Nationalität der Völker, Marburg 1855: Elwertsche Univ. Buchhandlung, vol. 1, 744; Hans-Joachim Torke, Einführung in die Geschichte Russlands, Munich 1997: C.H. Beck, 23, where Torke says that Waräger means "confederates". This is remarkable since Normans in general did not to participate in the Frankish pledge-of-fith system before they conquered Northern France. If "confederates" in this contect means having taken the Frankish oath of cooperative confederation, the Normans did take their version of the Frankish superadditive societal structure not only to England (1066), but also to Nowgorod and Pškow not much later.

1133 Anton Kirchner, Geschichte der Stadt Frankfurt am Main, Teil 1, Frankfurt/Main: Commission der Jägerischen und Eichenbergschen Bunchhandlungen, 5ff.

1134 Edward H. Thomas, Chinook: A History and Dictionary, Portland, OR 1970: Binfords & Mort.

1135 Bandelier (1890); Georg Elwert, Herausforderung durch das Fremde – Abgrenzung und Inkorporation in zwei westafrikanischen Gesellschaften unter wechselnden evolutiven Bedungungen, in W. Fikentscher (ed.), Begegnung und Konflikt – eine kulturanzhropologische Bestandsaufnahme, Munich 2001: Bayer. Akademie der Wissenschaftem, C.H. Beck Kommission, 132–144.

1136 Cf., Sally Falk Moore (ed.), Law as Process: An Anthropological Approach, London 1978: Routledge & Kegan Paul; Niklas Luhmann, Legitimation durch Verfahren, Neuwied 1969: Luchterhand; a discussion: R. Zippelius, Legitimation durch Verfahren? Festschrift Karl Larenz, Munich 1973, 205–304. The law as process theory is part of a broader philosophical tendency in the second half of the 20th century to proceduralize epistemology.

tied to process, but it is not mere process. There is a debate on law as mere process in legal philosophy.[1137]

IX. Dispute settlement, general and in Indian country. Mediation

Dispute settlement is an area of culturally highly diverse modes to bring a legal dispute to an at least preliminary end. In Chapter 14, dispute settlement among Native Americans is discussed in a short survey.

Ethnographic material on legal procedure is extensive.[1138] Trials are rather easily observed and discussed with native observers and by-standers. Here follow a few culturally specific examples:

- In the Nuer nation, a mediator walks back and forth between the homes of the parties trying to find an approproate compensation acceptable for both sides: the "leopard skin chief". He is not a chief, rather a parley go-between.[1139]
- A Kapauku big man is silently sharpening the point of an arrow to indicate his sentencing of the defendant as having to leave the community (which in practice means the death penalty).
- Among the Pirana of Central Australia, the kandachi man executes the defendant who has been sentenced to death by a secret "court" of elders.[1140]
- In a Papuan society, the parties argue, each side with the aid of a speaker. The village community is listening. Every time a good argument is made, the listeners show their consent with the point, and the party who made the successful point is permitted to ram a pole into the ground on its side. At the end of the day, the poles are counted, and the party with the greater number of poles wins the case.[1141]
- Malinowski, in "Crime and Custom" (1926), describes suicide as consequence of Trobriand court sentences

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1137 In defense of law as process: Jürgen Habermas: Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates, Frankfurt a. M. 1992; idem, Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft (Habil.), Neuwied 1962 (2nd ed. Frankfurt a. M. 1990); Theorie des kommunikativen Handelns (Bd. 1: Handlungsrationalität und gesellschaftliche Rationalisierung, Bd. 2: Zur Kritik der funktionalistischen Vernunft), Frankfurt a. M. 1981; idem, Drei normative Modelle der Demokratie: Zum Begriff deliberativer Demokratie. in: Herfried Münkler (Hrsg.): Die Chancen der Freiheit. Grundprobleme der Demokratie. München und Zürich 1992. S. 11–24., also in: Jürgen Habermas: Die Einbeziehung des Anderen. Frankfurt a. M. 1996, S. 277–292; for a refutation of Habermas' "process-only epistemology", see the legal philosopher Arthur Kaufmann, who does not deny the importance of discursive procedure to find truth, but holds that process alone cannot bring about substantive propositions because this would reduce ontology to a subcategory of epistemology (a Spinozist position that is generally recognized as a philosophical failure for not being able to produce substantive results). Habermas has to my knowledge never answered this critique: A. Kaufmann, Prozedurale Theorien der Gerechtigkeit, Sitzungsberichte der Bayerischen Ajademie der Wissenschaften, Phil-Hist. Klasse, Munich 1989: C. H. Beck (Commision); idem, Rechtsphilosophie in der Nach-Neuzeit, Heidelberg 1990: Decker & Müller. On Spinoza and his philosophical proceduralism W. Fikentscher (1977 a), 626 ff. ...

1138 Roberts (1981); Bohannan. Justice and Judgment Among the Tiv. London & Oxford 1989: Oxford Univ. Press (1st ed. 1957); Gluckman, Max, The Ideas in Barotse Jurisprudence. Manchester 1965: Manchester Univ. Press.

1139 Evans-Pritchard, Ewald Evan (1940). The Nuer: A Description of the Modes of Livelihood and Political Institutions of a Nilotic People. Oxford: Clarendon (reprints 1950, 1968).

1140 See note 665, above.

1141 Communication Leopold Pospíšil (1986).

– Inuit have been reported to "sing out" their case in a contest,. The "better" singer wins the dispute.[1142]
– The Germanic tribes "voted" by shouting and knocking their swords against the shields. The party making more noise wins.[1143]
– Often a council of elders is involved and asked for advice or judgment.[1144] Canada's "First Nations" (as the Canadian Indians call themselves) are said to practice "circle meetings" with juvenile perpetrators.
– In the Pueblos, sentencing was often done in the kivas. Cushing reports of the terror of the priesthoods ("of the bow").[1145] Still today, the hunters' or warriors' societies may do the police service at Pueblo ceremonies[1146]

An issue, a problem, a case is always a culture-specific concept. Therefore, comparative law cannot be outlined or structured by assembling and sorting issues.[1147] Lévy-Strauss reports how Bororo Indians from the South American rain forest try and decide their cases. The plaintiff and his side blame the defendant by not only telling what he "did" but also to which bad village, family or lineage he is coming. The defendant and his side not only deny the deed but also retort by telling negative stories of the plaintiffs village, family, or lineage. "Dirty laundry" is washed on both sides. The "case" *(Streitgegenstand)*[1148] possibly includes the history of two clans or villages. After the case is settled, all grudges between the two groups have been discussed and eliminated. The air between the groups is clean again.

The case is more serious when a split of opinions divides the entire village or tribe. In close-knit societies such basic differences in opinions are not frequent, but they occur so as to deserve further study. They are well remembered by the tribe and readily told to outsiders. They deserve future study. Examples may show the structure of such rifts: Modernists quarrel with traditionalists, such as in the Hopi village of Oraibi. In 1909, the traditionalists left and founded Bacavi ("Oraibi Split").[1149] Should the tribe establish a casino? Many a Pueblo remember bitter fights on this issue. In Zia, evangelical radicals ("the holy hollerers") seriously damaged the inner peace of the Pueblo for years, so that a law had to made and applied that provided for banishment.[1150] A today deserted Pueblo, San Lazaro (near Santa Fe) seemed to have been disrupted by what may be called a double split: both sides left a place that had become unbearably unclean.[1151] The Tasadai tribe on the Philippines are that part of a split tribe that rejected modernuty and wanted to live according to traditions. The

1142 Knud Rasmussen is said to be the first reporter of Inuit song contests; similar contests are mentioned in Hann & Group (2006) 138f, from Turkmenistan; in 2006, Irmgard and W. Fikentscher observed a sing-out at a show on the island of Saarema (Ösel), Estonia; the show represented a traditional island wedding and contained a half playful, half earnest song contest between friends and family of the bride who sang in her defense on the one hand, and the arriving groom and his friends on the other. The groom's party tried to outsing the defenders. Singing for settling a case does not seem to be unusual.

1143 Tacitus, Germania.

1144 Conversation with Judge Numkena in Pascua Yaqui (1992).

1145 See also Bandelier (1890).

1146 Fieldnotes 1992–1996.

1147 Contra: Rudolf B. Schlesinger, The Common Core of Legal Systems – An Emerging Subject of Comparative Study, in: K. Nadelmann & al. (eds.), XXth Century Comparative and Conflicts Law – Legal Essays in Honor of Hessel E. Yntema, Leyden 1961; A.W. Sijthoff, 65–79.

1148 Cf., Ch. 13 I. 2., above.

1149 See M. Titiev, Old Oraibi: A Study of the Hopi Indians of the Third Mesa, Cambridge, Mass. 1944: Harvard Univ. Press (repr. 1967). Cf. also K. N. Llewellyn's and E. A. Hoebel's distinction between "grand cases" and "law stuff", Part Two, before Ch. 8, above.

1150 Zia Custom Code of (about) 1945.

1151 Fieldnotes 1995.

rule seems to be that the modernists stay and the traditionalists leave (at the point when the modernists become the majority).[1152] Is this the way how human society "conquered" the world?[1153]

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1152 See Ch. 5 V. 1.a., above.

1153 Contra: Spencer Wells, The Journey of Man: A Genetic Odyssee, Princeton 2002: Princeton Univ. Press.

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PART THREE: THE LEGAL ANTHROPOLOGY OF ETHNIC GROUPS, AND APPLIED ANTHROPOLOGY OF LAW

After the general topics of legal anthropology (Part One) and its subdivisions (Part Two), Part Three contains a brief discussion of specific cultures, and a surrey on applied anthropology. Ethnographical work in Native American tribes will be given (Chapter 14). Chapter 15 does the same with respect to anthropological work with other ethnic groups on a more general and methodological level. Chapter 16 ends the book with some remarks on applied anthropology and its legal ramifications.

Chapter 14: Native American law

Chapter 14 is based on fieldwork among North American Pueblos and other Native American nations, the results of which have already been published elsewhere (Cooter & Fikentscher, cites in Chapter 1 I. 6. a., above). Therefore, Chapter 14 is short. It brings what has been included in the Readers of 1996 to 2000 (see the remarks in the Preface above), in an amended and revised form.

I. General remarks on the relation of Part Three to Parts One and Two

Part One of this book contains the general parts of law-related anthropology such as its history, its basic concepts, and analytic framework. These parts ought to be "drawn before the bracket". In Part Two, the substantive fields of legal anthropology are examined, such as the anthropology of family and kindred, of leadership and organization, of economics, of torts and crimes, etc. In the logic of an outline, Part Three is the place where on the basis of Parts One and Two the specific cultures may be discussed, such as the Trobrianders, the Nuer, and the Native Americans, the Inuit, and the Bavarians. While experts estimate the number of distinct cultures in history and present to be about 10000, nobody can study 10000 cultures. If it is true that today there is also non-ethnic anthropology, such as the anthropology of hospitals, of political apologies, of stock markets and of the poker game, this number is even higher.[1154]

Thus there is still much anthropology left to do. Starting from ethnographic (or comparable "institutional") fact finding may over ethnological evaluation to anthropological comparison – on all levels work is awaiting for researchers in the field, generalizers and comparatists. Fieldwork is and will be obligatory. Armchair anthropology is a stopgap. Knowing the language of the field, if only the *lingua franca* spoken there, is a must. And having at least reading abilitity of the major languages in which cultural anthropology is published is another indispensible requirement. It is permissible though to limit one's effort to engage in ethnography (for lawyers: the "living law") alone, or to ethnography and ethnology alone, and leave the generalities of comparison to others. This suggests teamwork.

Teamwork is recommendable, too, when cultural and biological anthropologists work together. A cultural anthropologist may engage in behavioral studies, and an ethologist may

1154 See Chapter 1 II 3. b. and 4, Chapter 3 I. 3, above, note 1123 below.

reversely dig into cultural anthropology. Taking up archeology, psychology, cognitive studies, or brain research, may soon become too ambitious for a cultural anthropologist. She or he might benefit by resorting to team research.

Experience shows that a cultural anthropologist should not dare go into too many ethnic fields. As a rule, one ethnic group or cultural institution or two are enough, unless the goal is broad institutional comparison. For this writer, the twenty Pueblo nations of New Mexico and Arizona are of course too much to study, but limiting the study to tribal law and court practices with a comparative view to neighboring tribes could justify such an undertaking.[1155] My attempt to include Taiwanese aborigines in the comparison proved to be overambitious. Only one aspect, the comparison of the reservation statuses, could be pursued. I agree with Laura Nader that "scratching the surface" is often the only thing that efficiently can be done in good conscience.

From the beginning, in 1980, I focused on the law *of* the Indians (tribal law), not on the one *for* the Indians ("Indian Law"). When I started my reseach, practically every US-American lawyer told me that Indians have no law, just customs, traditions, or religious habits. Since 1988, Robert D. Cooter, Berkeley, and I engaged in fieldwork together.[1156] Today, tribal law, besides "Indian law", is taught at most law schools. "Tribalism" is a pejorative term that we encountered but never paid attention to since the tribes seemed to us the carriers of the legal cultures in which we were interested

This may be the context to comment on the Indians' use of words. Legal proceedings require many words. Non-literary cultures – cultures that do not write and read – are in much greater need of words than literary. Therefore, Indians are much more "word-versed" (*wortläufiger*) and must have been so at the time when Christian missionaries came to missionize them. The missionaries may have had a feeling of being linguistically superior to the Indians. But the reverse is more probable. This may have been a reason why mission was not always successful; the words used – whether Latin, Spanish, English or German – did not convince. The Tohono O'odham (formerly: Papago) are said to use a special elevated speech

1155 These are the tribes which I had the honor of visiting to study their substantive law and their court systems: Several times (up to five times) I visited Ojibway bands, Tohono O'odham (San Xavier District), White Mountain Apache, Jicarilla Apache, Navajo, Hopi, Zuni, Laguna, Acoma, San Juan, San Ildefonso, Pojoaque, Tesuque, Cochiti. Only once I worked in Pascua Yaqui, Pima-Maricopa, Tohono O'odham main reservation, San Carlos Apache, Isleta, Santa Clara, Jemez, Santa Ana I and II, Taos, Zia, Picuris, the three Kaibab reservations, Nambe, Santo Domingo, San Felipe, Sandia, and Coquille. A search for the Ramapo tribe remained unsuccessful. Of Northwestern tribes I got only a glimpse: Tsimshian, Tlingit, Haida, and Makah. On Taiwan, I visited the Paiwan, Rukai, and Atayal. A lecture visit to Namibia in 2004 opened my eyes for African Philosophy and Subsahara governmental structures. A Baltic cruise in 2006 added insights in the history of Varangian migration and Hansa city government.

1156 For an anecdotal report, see Chapter 13 VI. 1. c., above. Our research is reported mainly in the following publications and papers: Cooter & Fikentscher (1998) and (2008); Robert D. Cooter, Inventing Market Property: The Land Courts of Papua New Guinea, 25 Law and Society Rev. 759–801 (1991); idem, & Robert K. Thomas, The Meaning of Change in an Indian Village, in: W. Fikentscher, Law and Anthropology, Law 265/& LS 190, University of California at Berkeley School of Law, Spring 2000 (a reader), 391–409; W. Fikentscher, Die Erforschung des lebenden Rechts in einer multikulturellen Gesellschaft: Karl N. Llewellyns Cheyenne- und Pueblo-Studien, in: U. Drobnig/M. Rehbinder (Hrsg.), Rechtsrealismus, multikulturelle Gesellschaft und Handelsrecht, Karl N. Llewellyn und seine Bedeutung heute, Berlin 1994: Duncker & Humblot, 45–70; idem, Domestic Violence under Indian Pueblo Law, in M. Gruter & M. Rehbinder (eds.), Gewalt in der Kleingruppe und das Recht, Festschrift für Martin UsteriSchriften zur Rechtspsychologie Bd. 3, Bern 1997: Stämpfli, 45–73; idem, Vom Recht der Paiwan und Rukai – Ein Forschungsbericht über die Altvölker Taiwans, Jahrbuch der Gesellschaft von Freunden und Förderern der Universität München, 1994, 18–20.

when somebody has to say something important, and they call it "throwing words". Words can mean a lot in Indian Country. Contracts need no writing, a promise is a promise.[1157] Animism (in the narrow sense)[1158] is the belief in the animatedness of things. Certain things live. Words are part of this inherent soul.[1159] This one has to keep in mind in conversations with Indians.

II. Federal and state Indian Law = "law for Indians"

The term "Indian law" is generally understood as the law which has been promulgated by Federal authorities (or delegated to states) essentially to regulate the contact with Native Americans and their life on reservations. It is therefore law for Indians, not law of Indians. "Indian law" in this sense is complicated and deserving of detailed study.[1160]

1. Nature of Indian law. History

From the legislative and other norm-establishing powers under the "law for Indians" it follows that much legal activity is left to the tribes. Generally speaking, the entirety of civil law, and criminal law for minor cases, belong to tribal sovereignty. Public (organizational) law is largely federal or – to a minor degree – state law, but some fields have been left to tribal jurisdiction (for details see the authorities listed above). Basically, Indian law is US federal constitutional and administrative law. It is law made by "whites" to govern Native Americans. Its history may be sketched as follows:

The Declaration of Independence began with the words, "We, the People". This phrase did not include most Indians living within the new nation's boundaries. They were members of sovereign nations that had been, or soon would be, conquered in war or otherwise forced to submit to the authority of the United States. The United States constitution acknowledges the distinct legal status of persisting Indian tribes. The commerce clause (Art. I, section 8, clause 3) provides that Congress shall have the power, not only to regulate commerce with foreign nations, and among the several states, but also with Indian tribes. Furthermore, Art. II, section 2, clause 2, empowered the President to make treaties, including treaties with Indian tribes, with the consent of the Senate. In 1871 Congress withdrew this power from the President. Only sovereign nations can make treaties, so this section of the Constitution implicitly acknowledges tribal sovereignty.

The relationship between federation, states, and tribes received a distinctly American interpretation along lines initially laid down by Chief Justice Marshall between 1823 and 1831 and expressed in the famous oxymoron, "domestic dependent nation." In *Worcester v. Georgia,* Justice Marshall pronounced that the tribes in Georgia are "distinct political communities, having territorial bound-aries, within which their authority is exclusive." So the tribes are "na-

1157 Cooter & Fikentscher (1998), 547; nor is a consideration required.

1158 W. Fikentscher (1995/2004), 240–285.

1159 Words and soul, animism and its ways of expression, seems not yet sufficiently studied …

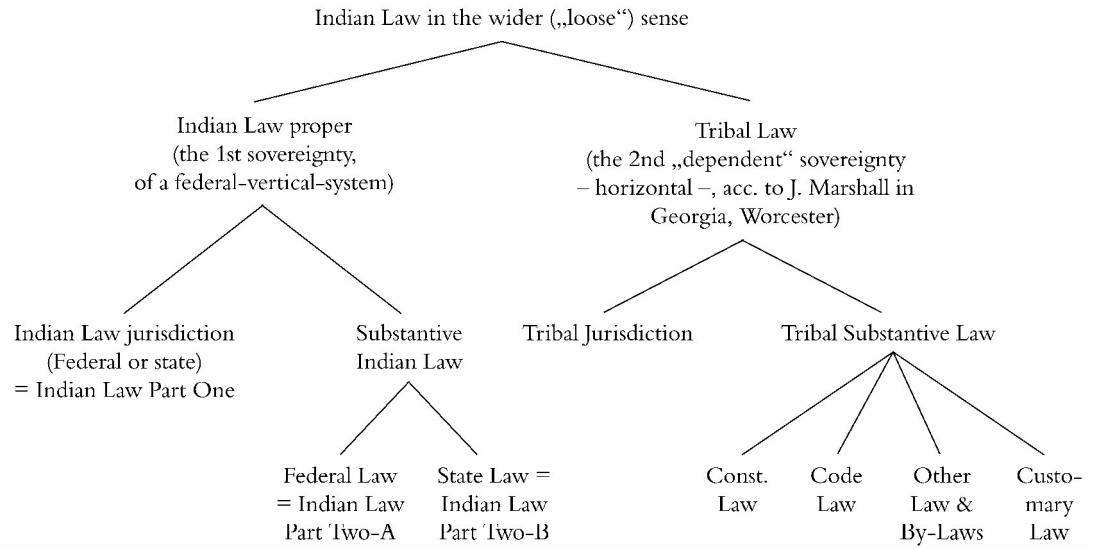
1160 Among the sources may be listed: Felix S. Cohen, Handbook of Federal Indian Law. (first edition: Washington, D.C. 1942: Government Printing Office), see now the "2005 edition", and details in Chapter I I. 6. b.; Vine Deloria, Jr. & Clifford M. Lytle, American Indians, American Justice. (Austin, TX, Universityof Texas Press) 1983; William C. Canby, American Indian Law in a Nutsheü. St. Paul, MN, 1981: West Publ. Co., 4th ed., 2nd ed. 2004; Stephen L. Pevar, The Rights of Indians and Tribes, Toronto 1983: Bantam (2nd edition 1992); Clinton, Robert N. and Rebecca Tsosie, with the collaboration of Carole Goldberg (2004). American Indian Law: Native Nations and the Federal System. 4th ed. New York: Matthew Bender; Getches, David H, Charles F. Wilkinson, & Robert A. Williams (2004). Cases and Materials on Federal Indian Law, 5th ed. St. Paul, MN: West.

tions". However, Marshall held that the exclusive authority of tribal nations is limited. The tribes retain "their original natural rights" in matters of local government, but the United States has exclusive power to deal with foreign states.[1161] So the tribes are therefore dependent in foreign affairs. Marshall's formula for allocating power survived in spite of persistent attempts by states to extend their jurisdiction over tribes. The formula solidified into the principle that states may legislate, adjudicate, or administer Indian affairs only to the extent that Congress empowers them to do so. Furthermore, Congress may not assign all of its powers over the tribes to the states.[1162] The result is that the tribes are "dependent sovereign nations".

2. The sovereignties

It follows from these landmark decisions that the tribes possess a "dependent sovereignty" which is not exactly of the same quality as the sovereignty of the United States. The sovereignty of the United States as a federation is divided between the Federation and the states. Hence, the sovereignties of the tribes (although "dependent" with respect to the trust relationship between Federation and tribes) and of the federal system of the United States are ("horizontaly") equivalent whereas the sovereignties of the Federation and of the states are ("vertically") structured as is the case in every federation. Thus, it is to be derived from those cases that there are only two sovereignties, not three (see, however note 1035, above).

A graph can demonstrate this relationship in the following way:



1161 Canby (2004), 70.

1162 Chief Justice Marshall, in Johnson v. Mclntosh, 21 U.S. (8 Wheat.) 543 (1823) on "discovery" giving title to discoverers; Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) on Cherokees having a "state"; Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 519 (1832) on tribes having no ability to deal with foreign powers but being "distinct, independent political communities, retaining their original natural rights" in matters of local govemment and enjoying the benefits of a trust relationship; see the discussion in Canby 14 ff., 66 ff. Later important US Supreme Court decisions: Menominee Tribe v. U.S., 391 U.S. 404 (1968); Antoine v. Washington, 420 U.S. 194 (1975). Oliphant v. Suquamish lndian Tnbe, 435 U.S. 191 (1978) U.S. v. Wheeler, 435 U.S. 313, 327 (1978); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149, 102 S. Ct. 834 (1982), dissent of Justice Stevens, joined by Chief Justice Burger and Justice Rehnquist, in S. Ct. at 918–920.

III. A survey of issues relating to the status of Indian tribes

European settling in the New World did not encounter an empty continent. Pre-Columbian North and South America is estimated to have been inhabited by 110 million natives, an estimation which Judith Nies deems rather high.[1163] Nies' own estimation for North America is 18 million. Either way, it was not a "virgin continent".[1164]

1. Foundations

The US Constitution of 1789 in Art. I sec. 8 clause 3, provides that Congress has the legislative power to regulate commerce among the states, and with the Indian tribes. It is noteworthy that Congress regulates commerce "with" the Indian tribes, an expression which places the federation on the same level with the tribes, whereas Congress regulates commerce "among" the states which expresses a momentum of verticality between the federation and the states. The verbal distinction between "with" and "among" is, if unconsciously, indicative of the sovereignties which are at stake. As mentioned, today there is a "three-sovereignties theory" which places federation, states, and tribes on one level.[1165] Constitutional law, according to verbal interpretation, provides otherwise, namely, a "two-sovereignties theory": There are tribes on the one hand, and on the other a federally, i.e. partially vertically structured combination of a superimposed federation and mediatized several states. The difference becomes clearly visible when the federation wants to delegate commercial regulation. It can do so to the states assigning parts of the commercial power to them and hereby distributing that power "among" them; but it cannot do so to the tribes "with" whom commerce is to be regulated.

Similarly, Art. II sec. 2, clause 2, assigns to Congress the treaty power with other nations and also. The latter power ("with the tribes") was withdrawn from Congress, in 1871 ("end of the treaty period"). Nevertheless, earlier treaties remain in force. The change of the Constitution limits the scope of the "with", but it does not replace the "with" by the "among"

The 16th, 17th and 18th centuries saw the defeat of most Indian tribes by the military forces of the "discoverers". In most cases the defeat of the tribes, such as Sioux, Navajo, Shoshone and also the Rio Grande Pueblos did not end the existence of these nations, like the defeat of the French and the Poles by Hitler's armies in 1939/1940, or of the Germans by the Allies, of the Japanese by the USA in 1945, and of the Palestinians by Israel in 1948, left France, Poland, Germany, Japan and the Palestinian state untouched as entities under the law of nations (disputed for Palestine). Some peoples became victims of annihilation, such as the Comanche, Mohicans, and Ramapo (Ramapough) Indians, comparable in world history to the ten northern tribes of Israel, the Eastern and Western Goths, and the Tasmanians. When Saddam Hussein of Iraq invaded Kuwait in 1990 he expressly claimed Kuwait's annihilation.[1166] In in-

1163 Judith Nies, Native American History, New York 1996: Ballantine, 4.

1164 "Far from settling a virgin continent, Europeans, from the very beginning, moved into pre-existing Indian villages and followed Indian trade routes into new territories using Indian guides. Without Indian villages, it's entirely possible there could have been no successful European settlements … What the natives did not realize until it was too late was that European Christianity made it impossible for the Europeans to view the Indians in a way that allowed a fair and equitabe negotiation. They saw Indians as savages, as a people without culture …", Nies, at 73.

1165 See note 1035; and II. 2., above.

1166 For Germany after 1945, it was disputed whether *debellatio* or *occupatin bellica* was to be applied: George Szekeres, Das Recht der Militärregierung, Erlanger Vorlesungshefte, Erlangen 1948: Dipax-Verlag, 18 ff., 28 ff., 37 *(debellatio);* F. T. Hollós, Zur Kontroverse über den gegenwärtigen Status Deutschlands, Erlangen 1948, 8 ff., 59 *(debellatio, but principles of occupatio bellica, independent from Sec. 3 of the Hague Land Warfare Trea-*

ternational law of war and peace, the two different kinds of victories are called "occupatio bellica" and "debellatio". Occupatio bellica imposes characteristical duties upon the victor (which are sometimes met, sometimes not, but nevertheless exist). Performed debellatio does not create obligations toward the defeated country because there is no longer aright holder anymore. Today, debellatio in most cases conflicts with the prohibition of genocide.[1167]

In 1823, 1831 and 1832, Justice John Marshall defined the legal status of Native Americans. In Johnson v. McIntoish, Cherokee Nation, and Worcester v. Georgia Marshall developed the theories of "dependent sovereignty" and "trust relationship" which until today govern the relationship between the US as a federal entity on the one hand and the tribes on the other.[1168] Marshall derived both theories from the stock of European and Angloamerican theories of law. This is, compared to the concept of trust, easier to understand in regard to the concept of sovereignty. Sovereignty is the basically independent exercise of the supreme power vested in a nation and its government whatever the form of relationship between nation and government may be (bigmanship, chiefdoms, kingdoms, superadditive units).[1169] Indian tribes have "inherent sovereignty" and the authorities flowing from it. However, this sovereignty is "dependent" on the sovereignty of the US. Such "no-full sovereignty" is conceivable, so that "dependant sovereignty" ably describes the interdependence of US federation and tribes. According to Justice Marshall, the tribes are subject to two limitations of the usual scope of national sovereignty: they are not permitted to alienate tribal land, and they are not able to entertain international relations to third sovereign countries. The idea of the "trust relationship" between the federation and the tribes was, in Marshall's intentions, to frame in law the duty of the federation to take care of the Indian nations and their affairs, most of all to keep Indian land from being freely sold on the marketplace. However, the concept of trust was not easy to apply to the US-Government-Native American situation since it is a cultural specialty of the Frankish-Normannic king's-peace and responsible government traditions, and as such foreign to Indian modes of thought (with the exception of the League of Iroquois, the Tewa speaking Pueblos, and a few other rudiments of superaddition).[1170]

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ty); F. A. Mann, Über Deutschlands heutigen Status, 1/1 Jahrb f. intern u, ausl. Recht (1948) = 2/9 Süddeutsche Juristenzeitung 478 (1947) (tendency toward *occupatio bellica*); H. Ruge, Reichs- und Zonengesetze I; II, Berlin 1947 (occupatio bellica); G. A. Zinn, Das staatsrechtliche Problem Deutschland, 2/1 Südd. Juristenzeitung 4 (1947) (occupatio bellica); cf., Hans Nawiasky, Ist Deutschland noch ein Staat?, Neue Zeitung vom 25. 4. 1948 (a survey). After 1948, majority opinion among non-German and German exerts opted for continuation of state identity of Germany and thus for occupatio bellica in spite of the obviously extended duration of this state off affairs. This comparative assessment permits to assume occupatio bellica in the cases of the surviving tribes, under customary law of nations or an analogy to it.

1167 See text near note 984, above. Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948.

1168 Cf., note 1162, above.

1169 The concept of national sovereignty became a necessity to explain the independence of several European nations and city states from the Roman and later Frankish-German Empire, such as Venice, Switzerland, France, England, and historically most important of all the Netherlands. On this development, focusing on the Dutch arguments in favor of independence from the Empire and on Jean Bodin's concept of sovereignty, W. Fikentscher (1977 a), Chapter 34; idem, De fide et perfidia, Der Treuegedanke in den "Staatsparallelen" des Hugo Grotius aus heutiger Sicht, Sitzungsberichte der Bayerischen Akademie der Wissenschaften, Phil.-Hist. Klasse, Heft 1, München 1978: (Kommission C. H. Beck); idem & A. Fochem, Quellen zur Entstehung der Grundrechte in Deutschland, Stuttgart 2002: Franz Steiner Verlag.

1170 See Chapter 5 V. 5., above. It is noteworthy that Justice Marshall's seemingly haphazard combination theory of sovereignty and trust precisely corresponds to the combination of sovereignty and *fides* (trust) in Hugo Grotius' writings (see preceeding note) on the law of nations. For Grotius, who is said to have been the "inventor" of the modern law of nations, the benefit of national sovereignty is only affordable if it is connected to international *fides*, a trust relationship between the sovereign nations: In Grotius' opinion, it is the combi-

Trust is, in Normannic-English law, a three-person relationship: The tribes are the trustors *(cestui que trust),* the US is the trustee, and the tribes (again) are the beneficiaries. Defining the trust responsibilities in detail is the task of Congress.[1171]

Justice Marshall's conceptualization of the relationship between the federal government and the tribes holds to this day. Congress has "plenary power" to regulate Indian affairs. "Plenary power, of course, is subject to constitutional restraint …[1172] As yet, however, no court has found a constitutionally protectible interest in tribal sovereignty itself, and numerous examples exist of federal statutes limiting it.[1173] However, one of the many consequences is the prerogative of Congressional plenary power works against the several states, to the effect that the tribes are, in principle, not subject to state governmental powers. The states have no authority over Indian affairs, tribal governments, or reservation lands, unless granted by Congress. What the states can do in law with the tribes who live surrounded by those states has to be delegated to the states by Congress. Thus, there is a presumption in favor of tribal sovereignty.[1174]

In 1848, in the Treaty of Guadalupe Hildalgo that ended the US-Mexican War, it was determined that in the territories ceded by Mexico to US the private property relations of formerly Mexican citizens would be left untouched. For the surviving Indian Pueblos (Taos, Picuris, San Juan, Santa Clara, Pojoaque, Nambe, San Ildefonso, Tesuque, Jemez, Zia, Cochiti, Santo Domingo, Santa Ana, San Felipe, Sandia, Isleta, Laguna, Acoma, Zuni and Hopi) this meant a confirmation of their private property (fee simple) of their reservations because the Spaniards (historicalls the precursors of the Mexicans) had given the Pueblos (whom they regarded as "republics") private property of their land. Today, this places the Pueblos in a better position vis-à-vis the federal government compared to the other recognized Indian tribes: they own their land so that theoreticcaly Justicer Marshall's trust relationship does not apply. However, the Pueblos accepted the trust relationship between themselves and the US. From this follow financial, tax, and other status-related advantages, rights and duties.

2. A brief timetable of events in "Indian law"

The following list cannot be more than a spotty summary of legislative events in the history of Indian law.

1789: Art. I sec. 8, clause 3 assigns to Congress the legislative power to regulate commerce among the states, and with the Indian tribes (note the indication of the two sovereignties through the use of the words "among" and "with").

Art. II sec. 2, clause 2 assigns to Congress the treaty power, also with Indian tribes. This power withdrawn from Congress (1871). Earlier treaties remain in force.

16th to 18th century: Defeat of most Indian tribes by the forces of the United States: however, in many cases, occupatio bellica, not debellatio (the tribes survived).

1823/1831/1832: In three leading cases – Johnson v. Macintosh, Cherokee Nation, and Worcester (see I "supra") – the theories of "dependent sovereignty" and "trust relationship" have been developed, theories that until today govern the relationship between the US as a federal state on the one band and the tribes on the other.

1849: Dealing with the tribes was transposed from the War Department to the Department of the Interior. The Bureau of Indian Affairs (BIA) is part of it. The logic of the constitutional provisions and of the three leading

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nation of national sovereignty *and* mutual trust between the sovereign nations that is to replace the medieval imperial unit, which after the Reformation had proved to be unreliable and unwilling to protect freedom of religion. Today, many a nation claims sovereignty but refuses to cooperate with others in trust. The principle of *dar-al-harb* is even expressly opposed to this.

1171 Jerry Gardner, Overview of Federal Indian Law and Policy, http://www.epa.gov/indian/chapter 2.htm, 2.

1172 *Babbitt v. Youpee,* 117 S. Ct. 727 (1997, a case relating to Indian property interests.

1173 Canby (2004), 85.

1174 Canby (2004), 69 ff.

cases (for both see above) would have called for a transfer of the handling of Indian issues not to the Department of the Interior but to the State Department because both legal sources placed the tribes in a quasi-international law position. But the tendency in those years went into the direction of assimilation of the Indians to the culture of the Whites and thus to "interiorizing" the tribes.

1883: In 1883, the Courts of Indian Offenses (usually calles CFR courts, Courts of Federal Regulation) installed.

1885: Major Crimes Act, 18 USCA § 1153 (1885), removes jurisdiction over major crimes from the tribes, even if actor and victim are members of the same tribe. Since then, only "petty criminality" has fallen under tribal jurisdiction. For the historical reasons which caused the Major Crimes Act to be enacted, see Deloria & Lytle (1983, p. 11).

1850–1934: During these years, an assimilation of the Indian population was politically attempted. Allotment was one of the means. The Dawes Act (official title: General Allotment Act) of 1887 provided for the allotment of lands to individual Indians on the reservations. Indian land shrank from 138 million acres to 40 millions acres of desert or semi-desert land (see, e.g., Gardner, note 1135, above).

1923: In World War I, Indians fought in the US armed forces. Therefore, it seemed appropriate to grant US citizenshiop to reservation Indians. This was performed by law and without individual options.

1928: The "Meriam Report" (official title: "The Problem of Indian Administration") was published. Government-sponsored and organized by the BIA, the report contained the results of a study, by Lewis Meriam, of 26 reservations. It revealed the weaknesses of the BIA administration and made a series of proposals including for better health care and education on the reservations. It marked a turning point in the formulation of government policy concerning Indians.

1934: The Indian Reorganization Act of 1934 (IRA) shifted administration of reservations to self-government of the tribes under democratic rules. Some tribes gave themselves constitutions under the IRA (e.g., Hopi, White Mountain Apache), others did not (e.g., Navajo, Cochiti).

1953–1968: This was a time of Congress policy of termination of tribes and assimilation to US American mainstream., relocation of Indian families from their reservations., and forceful taking away of children to send them to "English only" boarding schools where the use their native language was probited Attempts were made to dissolve tribes, resettle their members in cities, and to end the coherence of Indian extended families. Traumatic consequences resulted. The US determination policy resembled Australian policies directed against Aborigines ("stolen children").

1953: Political and legal departure from constitutional and US Supreme Court principles as established during the first half of the 19th century.: Public Law 280 transfered Indian affairs to the jurisdictions of "mandatory" (California, Nebraska, Minnesota, Oregon, Wisconsin and in 1958 Alaska) and "optional" states (Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah and Washingon). From its parliamentary promulgation on, the scope of Public Law 280 has remained disputed because of its hastily enactment. Later, several court decisions restricted the scope of Public Law 280.

The year 1968 marks a return to the policy of the Meriam Report of 1928 and the 1934 IRA policy of tribal self-government. The determinationand assimilation policies between 1953 and 1968 become reversed. Indian children were permitted again to attend schools on reservations. Also in 1968, the Indian Civil Rights Act (ICRA) introduced fundamental rights (but not all Amendments) into the law applicable on the reservations. One of the purposes of this law was to give tribal members protection against their own tribal governments.

1978: The Indian Children Welfare Act (ICWA) was passed. Its purpose is to give Indian children legal protection within their tribe and toward the outside.

1988 was the year of the National Indian Gaming Regulatory Act (NIGRA) which provided for casino regulations. Casino law became an important part of Indian law. Compacts between the states and the tribes on casino management became one tool of casino law out of many. In an increasing number of cases, professional casino management companies run the "gaming business" for the tribes on a license basis. Not all tribes decide in favor of having gaming halls. Most tribes think that gaming is "not the Indian way". Some tribes limit gaming to "one-arm-bandits" and reject table gaming. Observation shows that tribes living in the neighborhood of big cities fare well having casinos for the use by white business people, earn from the casinos and invest the revebue in police, schools, housing, hospitals and rehabilitation facilities, care for the elderly, and tourist activities (in more or less this order). On reservations situated in the country side, away from business centers, casinos often fail to be successful and may become a burden on the tribe. Across the board, tribes with successful casinos can afford experienced law firms. Their activities together with increased legal education of tribal members contribute to promoting the general standing of the tribes in both Indian and tribal law and economy. A tribal leader told me in 1999: "Formerly we fought against the Whites on the battlefield. Now we do it in court".

1990: The Native American Graves Protection and Repatriation Act (NAGPRA) regulates the access to and the protection of Native American graves and provides for the repatriation of human remains of Native Americans to their tribes for traditional ceremonial rites.[1175]

IV. Tribal sovereignty

Dependent sovereignty of the Indian tribes has become a difficult, hardly calculable legal concept. It follows from the foregoing that is always necessary to distinguish regulatory, adjucatory and administrative jurisdiction because their limits to be observed may vary from one another. The present state of tribal dependent sovereignty may be summarized as follows:

1. Three fields

a. Tribal sovereignty pertains to three main fields: Tribal membership, "petty crimes" if committed by Indians, and tribal civil matters. In theory, and based on the US Constitution as interpreted in the 19th century (see above), there is tribal dependant sovereignty as far as Congress does not limit it. As a consequence, there is a presumption in favor of tribal sovereignty. Following this line are two leading cases (see the discussion of jurisdiction in Chapter 13 VI., above): As to federal *civil* jurisdiction, federal law has not carved out any special area for itself in Indian country, as it has in criminal matters. Federal courts thus exercise their regular federal question and diversity jurisdiction. Whether a tribe has jurisdiction over a case may present a federal question, but the federal court abstains and permits the tribal court to be the first to rule on the extent of its own jurisdiction, National Farmers Union Inc. Cos. v. Crow Tribe (471 U.S. 845 (1985)). Also, when deciding whether a federal diversity case may also be brought in tribal court, the federal court will abstain and let the tribal court proceed first, Iowa Mut. Ins. Co. v. LaPlante (107 S. Ct. 971 (1987)).

b. Tribal jurisdiction over membership law is important. This jurisdiction enables the tribe to determine the conditions of becoming one of its members, with all the duties and righs connected hereto.[1176]

2. A presumption?

a. In recent case law, the presumption in favor of tribal sovereignty mentioned under a.), above, seems to have been overturned, first in selected instances,[1177] later may be as an adjudicatory principle. Here follows a keyword list of such "overturning" events and decisions, according to the present state of case law:

(1) Major Crimes Act of 1885: There is no jurisdiction over major crimes even when commited against members of the own tribe or non-member Indians;
(2) Oliphant v. Suquamish Indian Tribe, 98 S. Ct. 1079 (1978): Indian tribes have no inherent power to try and punish non-Indians who commit criminal acts on the reservation because of the "overriding sovereignty of the Unites States";.
(3) Montana v. US, 450 U.S. 544 (1981): There is no tribal jurisdiction in administrative law over fishing and hunting of non-Indians on "fee land" owned by non-Indians because tribes have no regulatory powers over non-Indians on such fee lands inside the reservation unless one of two exceptions apply: the non-Indians engage in a consensual relationship

1175 See, for the Native American Graves Protection and Repatriation Act, e.g., Echo-Hawk (1986); Harding (1997); Roberts (1997); Ochoa & Newman (1997).

1176 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S. Ct. 1670, 65 L. Ed. 2d 106 (1978); for details see Canby, 335 ff.; Cooter & Fikentscher (2008).

1177 See Canby (2004), 72 ff.

through commercial dealings, contracts, leases or other arrangements (so that lack of trust is being honored – an additional element of containment), or the non-Indian conduct "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe". These so-called Montana tests have been confirmed in several later decisions, e.g., in Hornell Brewing Co. v. Rosebud Sioux Trial Court of Nov. 17, 1998, 133 F. 3d 1087 (CCA 8th).[1178]

b. The legal policy pursued by the US Supreme Court in Oliphant and Montana appears to be turning around the presumption of tribal sovereignty by shifting the burden of proof that Congress did not limit it to the side of the tribes. Now, there seems to exist a presumption of existing Congressional limitation of tribal sovereignty with the burden of proof for the Indians that in "petty" criminal matters the Major Crimes Act does not apply, or that in civil matters the non-Indian part has submitted itself to consensual engagements with Indians, or has threatened or directly affected Indian tribal political integrity, economic security, or health and welfare. Indian jurisdiction going beyond these narrowly defined limits has obviously been curtailed by case law. Indians are now restricted to take care of certain parts of their tribal interests. It is questionable whether this turning around of the presumption of tribal sovereignty in the US Constitution and in partial reversal of Justice Marshall' s three leading cases conforms to constitutional requirements. In terms of procedural law, because of its complicated and elaborate contents, the mentioned shift of burden of proof seems hardly manageable. Moreover, both National Farmers and Iowa (see before) have not yet been expressly overruled. Politically, it is interesting to note that the obvious failure of repeated former assimilation policies have recently been deflected, in US Supreme Court and CCA courts decisions, into a containment and thus an anti-assimilation policy.

c. The recent tendency is well understood in the tribes and by their (often "white") lawyers. Their impression is that only the anti-assimilation part of the adjudicary policy is welcome (there is a well-known saying that the Indians are the sole minority in the US that is not interested in being treated alike, but rather in being treated differently). However, the containment part of that policy is met with mixed feelings. It favors the ultra-traditionalists in the tribes and disfavors the modern average Indian. It causes Indian culture and identity to go underground, and leads to fewer and less intensive contacts with the dominant culture. A noteworthy signal among others, sent by Indians in reaction to the containment policy, is the growing non-admittance of whites to Indian life, especially visits, tourist contacts, ceremonies and dances. The Indian reaction does not only apply to the about 350 admitted tribes in US, but also to the about 200 non-recognized tribes who therefore now increasingly prefer not being recognized. They rather work and cooperate in hiding.

V. Indian tribal law = "law of Indians"

1. Code and common law

Since the academic interest, and that of the bar, in tribal law is not much older than about ten years,[1179] there is no established way of presenting it yet. Cooter and I decided to distinguish tribal common law and tribal code law.[1180] Within each, the substantive fields of the law can

1178 For example in Dakota v. Bourland, 113 S. Ct. 2309 (1993); Nevada v. Hicks, 121 S. Ct. 2304 (2001); State v. A-1 Contractors, 117 S. Ct. 1404 (1997); and Boxx v. Long Warrior, 265 F.3d 771 (9th Circuit, 2001); Hornell Brewing Co. v. Rosebud Sioux Trial Court of Nov. 17, 1998, 133 F. 3d 1087 (CCA 8th), cf., the discussion of this case in Chapter 13 III. 2.

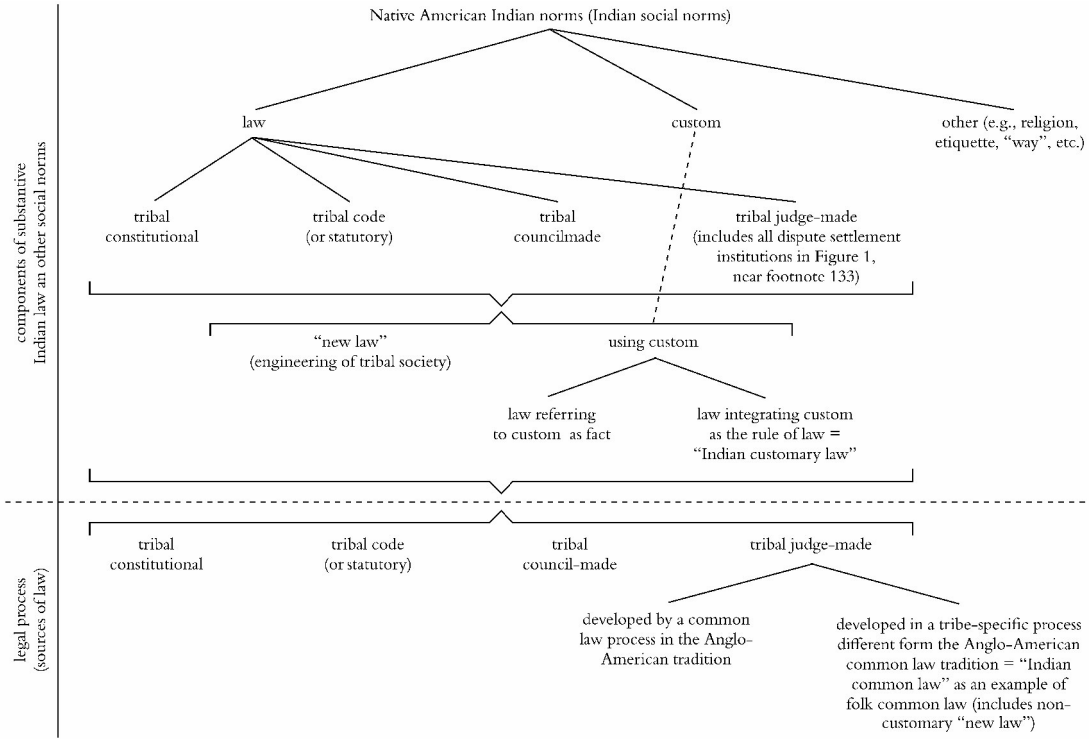
1179 See the few older articles in Cooter & Fikentscher (1998), at 291, note 8–10.

1180 (1998) and (2008).

be distinguished in the usual manner: membership, family, property incl. land, probate, contract, tort law, etc. Therefore, as to substantive Native American law, reference may be made to our collaborative articles (1998) and (2008), and the bibliographies following these articles. Besides Indian common law, Indian code law asks for a more detailed study. Indian codes are flourishing. According to Paul Tsosie, tribal judge in San Ildefonso Pueblo and Nambe Pueblo, discussing in any pueblo whether there *should* be a code contributes to the understanding of legal issues within a tribe (for instance, concerning domestic violence, or substance abuse). Such "prospective internalization" deserves attention. as a means of making lrgal issues known to the concerned public and hereby contributing to the success of the debated code or codes to come.

2. Indian social norms

To understand tribal law better, it has to be distinguished from other Indian tribal forums, especially custom, habits, etiquette, and religion.[1181] All of these forums posit norms to be followed by tribal members. They can be combined under the term "Indian social norms". Indians often combine them to the concept "way". When an Indian says "drugs are not our way", or "gambling (= gaming) is not our way", the speaker leaves open which kind of social norm (in etic terms) she or he is alluding to, because it is consideredenough to state that this kind of behavior is not tolerated or should not be permitted on tribal land. Indian social norms can be illustrated with the following graph:[1182]



The first line distinguishes law from other social norms. As regards law, it makes a difference whether it amounts to substantive, material law of which it can be said: This is our valid law,

1181 On the theory of the forums (or fora), see Chapter 4, above.

1182 Cf. Cooter & Fikentscher (1998), 329. Above, the graph is presented in an improved version.

these are the rules that govern our behavior in law; or whether it is rated as a product of a legal process, as something that flows from certain law-related sources, in particular courts, and is then applied to a case at hand.

The upper half shows Indian law from a purely substantive point of view. What the tribal constitution, the tribal codes, the tribal council and the institutions settling tribal disputes produce may be either new law, or law based on custom. Law using custom builds a bridge to another forum: custom, and makes law from custo, This can be done in either of two ways. A legal provision may say: To solve this kind of case, we will apply our customs. Then, custom remains a forum distinct from law, but is – as custom – referred to by law and thus integrated into the valid law. Or the custom is made a tribal rule of law, principally without a reference to that other forum, but simply giving existing custom a legal dress. Only this latter kind of legal norm is Indian "customary law". The former is a reference to another forum.

The lower half demonstrates tribal court practice. When the constitution, codes, and council-made law are silent, a tribal judge has notwithstanding to decide the case before her. She cannot say: I cannot find an applicable law, so I'll dismiss the claim. The judge is bound to find a rule that decides the case. She can do this in either two methods: Either she uses an established method of finding the appropriate principle or rule in a manner which is called, in the Angloamerican legal tradition, judge-made common law (in German: *Richterrecht,* in French: *droit judiciaire*); or she prepares the rule which decides the case in a tribe-specific process different from Angloamerican common law tradition and different from *Richterrecht, droit judiciaire,* etc., but in the Lakota, Menominee, Hopi, or San Ildefonso Pueblo, etc. "way". This common law, too, is tribe-specific common law. It may include new or customary Indian tribal law. With respect to "new" judge-made common law, tribal court practice creates a source of law different from the customary law as part of the tribe's existing substantive law (contained in the upper half of the graph).

An example of Jicarilla Apache common "new" law is the case law on consumer protection when an Indian buys higher-valued consumer durables such as a car, a laundry machine or a vacuum cleaner outside the reservation and does not pay the installment rates alleging that the merchandise does not function as it should.[1183] Another example of non-customary Indian common law is the legal treatment of resolutions of tribal economic corporations, such as CEDCO for a gaming facility, or for a woodmill. A Warm Springs judge introduced a judicial review of CEDCO resolutions in a common law development of tribal administrative law.[1184] Here the issue was the use or abuse of private corporation law for tribal administrative purposes.[1185]

From this it follows, that customary law and common law are concepts on different levels. Customary law is a part of substantive law, common law a method of producing law. Both concepts are frequently confused, by Indians and non-Indians alike.

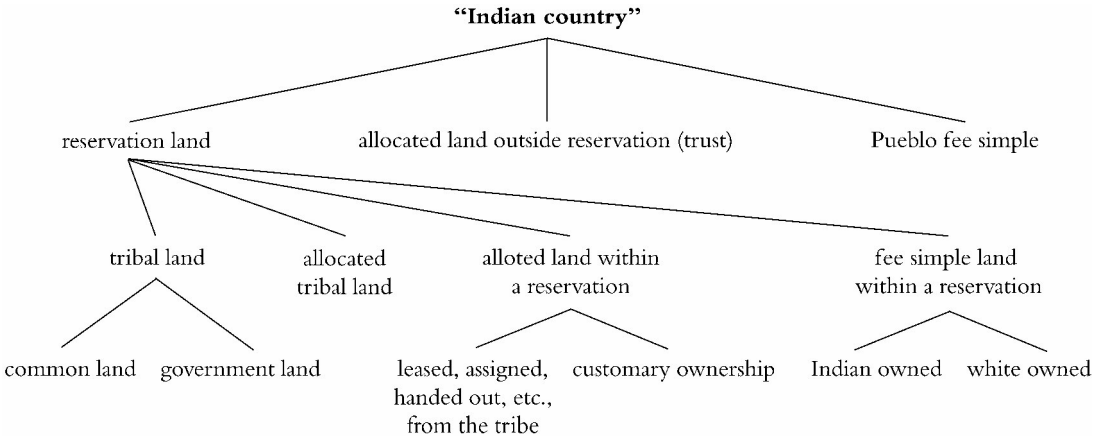
1183 Cf., Cooter & Fikentscher (1998), 529.

1184 Communication Don Costello, J. CEDCO stands for Coquille Economic Development Corporation.

1185 Cf., Otto Gassner, Der freihändige Grunderwerb der öffentlichen Hand, Munich 1983: C.H. Beck, for the same issue under German law.

3. Indian Country

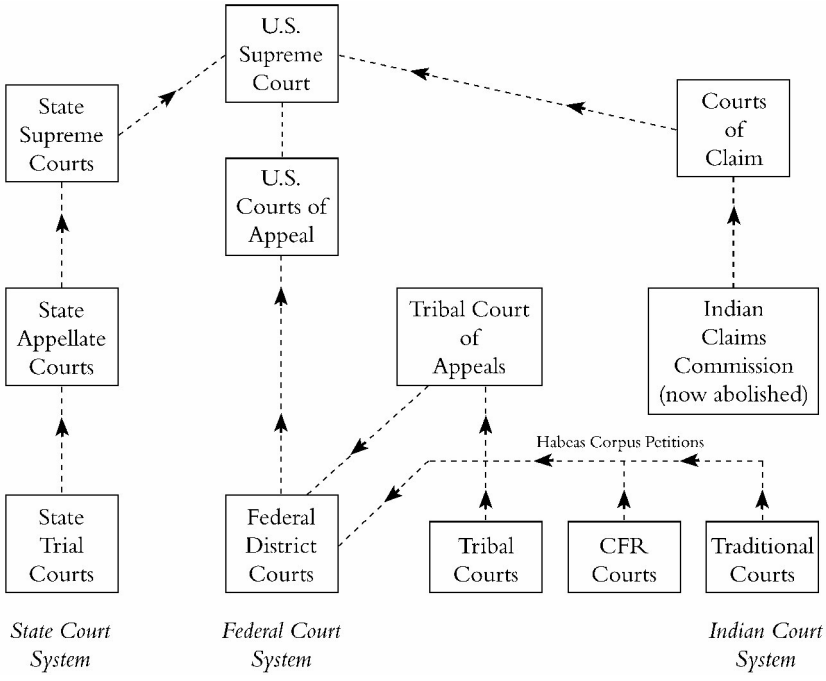
The following text is limited to some surveys and graphs. The complicated system of Indian land law is s a consequence of the equally complex history of the Northamerican Indians:[1186]



VI. Dispute settlement institutions

1. American judicial system and Indian law

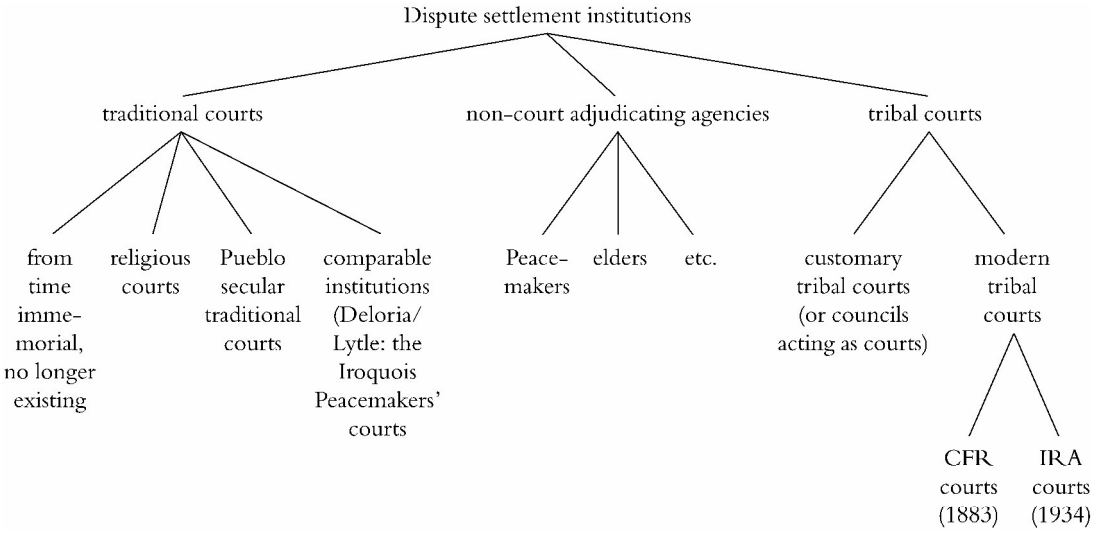
The following graph is taken from Deloria & Lytle, American Indians. American Justice. Austin. TX, 1983, p. 112. It indicates sources and production of cases in detail. The next graph demonstrates the possibilities of dispute settlement in Indian law. and is taken from Cooter & Fikentscher (1998).



1186 For most of this area of substantive law, reference can be made to earlier publications by Cooter and myself (1998) and (2008); see also Canby (2004), 343 ff; Gardner, see note 1171, above.

2. Dispute settlements institutions in Indian country

This is a survey on dispute settlements institutions in India country:



VII. Indian conflict of laws

Conflict of laws and its importance for the anthroplogy of law is discussed in Chapter 13 VI. The material there is taken from studies in Indian conflict of laws, mainly Navajo, White Mountain Apache, and Lummi law. What has been said above, therefore applies to this part of the law of a tribe. It will be remembered that conflict of laws is national, regional (EU), tribal, denominational, etc. law. Every "legal system", such as Kansas state law, Spanish foral law, Bavarian land law, Roma and Sinti "gypsy" law, has its own set of rules on conflict of laws. Conflict of laws is not a field of international law, rather it is national, subnational, regional, church law, tribal law, clan law, lineage law. Conflict of laws exists wherever law is and forms part of that law.

VIII. An Indian law checklist

The following checklist may be helpful when assessing the jurisdictions and the issues of conflict of law:

I. Is there jurisdiction? subject matter jurisdiction, personal, territorial jurisdiction, etc. (= "Indian Law" = law about Indians = "Indian Law Part One")
answer may lead to one, two or three procedures: Federal, state, or tribal. On this depends the applicable procedural law (federal, state, or tribal jurisdiction)

II. Once jurisdiction(s) is(are) determined, the next question for each jurisdiction is which substantive law applies under the rules of conflict of laws. This includes:
   1) Finding a point of reference ("connecting point", "nexus") such as choice of law (express or tacit?), place of the wrong, lex rei sitae ("situs"), residence, tribal membership, etc.
   2) From this follows the applicable substantive law. There are three possibilities:
      a) Federal law (= "Indian Law" = law about Indians = "Indian Law Part Two-A", or
      b) State law (= "Indian Law" = law about Indians = "Indian Law Part Two-B", or

c) Indian dormestic = internal = tribal law = law of Indians (the "2nd" sovereignty). Tribal law may consist in
   aa) Tribal constitutional law
   bb) Tribal code law
   cc) Other tribal laws and by-laws (e.g., concerning gaming)
   dd) Customary law

III. Normative requirements of the applicable substantive law (according to II.2))

IV. Results of the applicable substantive law (sanctions)

V. Concurrence of the procedures. Possibilities are:
   1) Exclusivity (e.g., felonies under Federal law, other proceedings to be discontinued), or
   2) Altemativity (e.g., state and pueblo divorce & separation proceedings), or
   3) Cumulation, with again two possibilities:
      a) true cumulation (e.g., state misdemeanor plus tribal banishment)
      b) correctible cumulation (e.g., federal or state attorney drops the case because the tribal Peacemaker's Court will settle it).

VI. If II.–V. do not apply, because conflict of laws rules cannot or should not apply since e.g. tribal law cannot be ascertained: full faith and credit? Comity? (see Chapter 15).

Indian law (Chapter 14) is only one example of a legal culture that may be studied, by using the generalities (in Part One) and the specificities (in Part Two) of legal antzhropology. Every legal culture might call for a different method to study it. Are there common rules that may facilitate the study of legal cultures? Chapter 15 gives a few tip-offs.

IX. Bibliography

On Native American law, see, as indicated, the references in Cooter & Fikentscher (1998) and (2008). Other sources include:

Coggins, George Cameron, Charles F. Wilkinson, John D. Leshi, & Robert L. Fishman (2007). Federal Public Land and Resources Law, 6th ed. Cambridge, Mass.: Foundation

Department of the Interior (1997). Bureau of Indian Affairs, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, Washington, D.C. 20240. 62 Federal Register No. 205 of Oct. 23, 1997, Notices, 55271 ff.

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Tiller, Veronica E. Velarde (1996). American Indian Reservations and Trust Areas, Washington, D.C.: U.S. Department of Commerce, Ecenomic Development Administration, Tiller Research Inc.

Vogt, Evon Zartman (1951). Navaho Veterans: A Study of Changing Values, Cambridge, Mass.: The Museum

Wilkinson, Charles F. (1988). American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy, New Haven & London: Yale Univ. Press

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Chapter 15: Other ethnic groups. The international law of indigenous peoples. Global human rights

"Native American" (Indian) law is the only law of one ethnic group considered at some detail in this book. Other tribes and nations cannot be dealt with here. A complete system of ethnologies would be desirable but nobody in the world can present in-depth studies of a larger number of ethnic groups. Chapter 15 offers suggestions on how to research other ethnic groups, with a summary on recent international law of indigenous peoples and a survey of the discussions concerning worldwide human rights.

I. The identification of an ethnic group

To some degree, the examination of Indian tribal law may serve as an example for the study of any other ethnic group, even if this one example is not more than the proverbial "scratching the surface".[1187] In both Part One the general concepts of cultural anthropology, and in Part Two the severals sectors of human livelihood as subdisciplines of cultural anthropology, the focus has been on method ratherv than inventory.

Attempts at categorizing cultures have been discussed above.[1188] My own is a categorization by mode of thought. This brings down the vast number of cultures to not much more than a dozen categories, albeit at the price of sometimes risky bird's eye strategies or questionable stereotypes. Of course, modes of thought have a somewhat different function in the structure of cultural anthropology than cultures: modes of thought stand "behind" the cultures.[1189] But the concept of modes of thought helps find central types of groups of cultures and thus facilitates comparison by careful generalization and specification.

The purpose of modes of thought is not to create a shoebox system with drawers into for better or worse, cultures can be lumped together. Rather the purpose is to indicate what is similar and what dissimilar, related and not related, relatively typical, atyical, or mixed.

The present context is not a pretext to delve into the theory of the modes of thought again. The focus is on the relationship of law and anthropology. The question then is, how other ethnic groups than Native American tribes, our main example, may be researched.

Often these groups form what is called "minorities". The term "minority" unfortunately carries the connotation of something of minor importance. This does injustice to many ethnic groups that try to defend their cultural identity. In many European countries, including the former Yugoslavia, and the former Soviet Union this issue is much debated. There is almost no country that is not confronted with ethnic groups demanding more respect. Often, information on these groups is scarce.

Minorities are only one aspect of one culture involved in problematic relations with another culture or several other cultures. The issue of unofficial law raises additional problems. Based on the theory of cultural multiplicity (see Chapter 1 V., above) there may be layers of law in every society where cultural encounters take place. Western systematizing would have difficulties in establishing categories of rules and exceptions. Moreover, this approach would rest upon Western ethnocentricity.

1187 See text following note 1155, above.
1188 See Chapter 5 I.
1189 W. Fikentscher (1995/2004), 19ff.

II. Human Relations Area Files (HRAF)

The Human Relations Area Files (HRAF) are a system of information for ethnologists and anthropologists. 300 cultures (now enlarged to almost 400 cultures) have been registered and checked for 700 cultural traits each, resulting in (more than) 210000 entries; see Ch. 5 II. 2., above.

Imagine to be called to study a distant culture, of which little is known, and contradictory what happens to be known. How to get prepared (apart from learning the language which is always a must when a foreign ethnic group shall be researched)? During World War II, the US Navy thought it advantageous to have as much information as possible on the peoples inhabiting the islands about to be conquered by General MacArtur's "island jumping". A card file was developed to identify these peoples. George Peter Murdock, professor of anthropology at Yale, heard of this file. After the war, he applied to the Navy to get access to it. He wanted to expand the file to a complete world-wide system that was able to give information on any culture whatsoever. After the Navy agreed, Murdock founded what became known as the Human Relations Area Files (HRAF), centered at Yale University, New Haven, CT.
Murdock included 700 cultures in the file, and defineded 300 cultural traits which were to characterize every culture. Originally, the HRAF were a card system. Later, the HRAF became a microfiche library. Today, entries are computerized and accessible under http://www.yale.edu/hraf/Collection.htm; see also http://www.library.uiuc.edu/edx/hraf.htm. The entries are of unequal length, quality and not always up-to-date. Some articles are excellent. The computerized system offers cross-references from one cultural trait to others. Overall, the HRAF are a welcome source of information to begin a study of a foreign culture, including its legal aspects.

III. Colonialism and decolonization

European imperialism used colonies for economic, military, and political reasons. Some nations such as Great Britain, the Netherlands, Belgium, France and Portugal were quite successful colonizers. Others, such as Spain, lost their colonial empire to growing pressure for independence from inside the colonies. Again others lost money by having colonies, such as Germany that entered the scene of "conquering" colonies rather late (after 1880). Germany lost her colonies after World War 1(1914–1918) which increased (not diminished) her budget. For Great Britain, France, Belgium, Italy, Spain, and the Netherlands who all lost their colonies after World War II, the time of colonization was also the time of ethnographic studies and early (and often path-breaking) anthropology.

In the United States of America, once a British colony, the idea of colonization was never popular. This led to the opposition of the American school of comparative cultures (Franz Boas) to the "functionalist" British school of social anthropology (see Chapter 2, supra).

Are Native American reservations US American colonies? To those who thinks so,[1190] the evidence includes the social and economic isolation into which people on the reservations are pressed and which indeed has some similarities with colonialist situations. In the US, the borders of reservations are open, and insiders and outsiders are able to move in and out. In Taiwan, this is not always and not everywhere the case. But even equipped with the liberty to freely move in and out, the inhabitants of a reservation may live in internalized isolation. Some tribal nations see advantages in this. In Zuni, in the local museum, I found a pamphlet

1190 Robert K. Thomas, Colonialism: Classic and Internal, 4/4 New University Thought, 37–44 (1967).

favorably stating to be in the possession of two sides of reservation life: being able to enjoy the spirit of modernity and at the same time being rooted in century-old tribal traditions with all their societal and personal richess, experience, and grace.

IV. The international public law of indigenous peoples. The non-governmental organizations (NGOs)

Indigenous peoples have limited representation within the United Nations Organization. The most recent success of indigenous peoples within the UN is the acceptance, by the General Assembly, of the United Nations Declaration on the Rights of Indigenous Peoples, on September 10, 2007 (distrib. September 12, 2007, UN General AssemblyA/61/I.67*). Art. 1 states that indigenous peoples, as collectives or as individuals, enjoy all human rights and fundamental freedoms as recognized in the Charter of the United Nations. Arts. 2 and 44 prohibit discriminations, and Art 3. provides for a right of self-determination which includes free pursuit of economic, social and cultural development. Art. 4 addresses "autonomy or self-government" in internal and local affairs. Art. 5 contains a right to maintain and strengthen distinct cultural institutions of indigenous peoples. The relationship between the indigenous group and "the State" is regulated in art. 5, 6, and 30. Forced assimilation, destruction of indigenous culture and forcible removal of children is probited, Art. 7 (2) and 8. Art. 9 protects the belonging to an indigenous "community or nation, and art 10 interdicts relocations without "free, prior, and informed consent". Land issues are regulated in arts. 26, 28, 29, 32 and elsewhere. All these protective provisions include minimum standards (art. 43). UN Declarations do not establish binding law. Arts. 12 (2), 22 (2), 36 (2) and, most of all, art. 38 oblige the UN member states to *transfer* the essential contents of the Declaration into state law. In this manner, and in other ways UN declarations unfold some practical efficiency as "soft law".[1191]

NGOs (Non-governmental Organizations) are recognized vehicles for the protection, among others, of endangered peoples and marginalized ethnic groups. The influence of NGO's is growing, and sometimes their cooperation in development projects or other projects affecting the life of indigenous peoples is welcome.

V. United Nations activities in the area of cultural anthropology

Arts. 11–16, 20, 21, 24, 25, 27, 29, 31, 34 of the UN Declaration on the Rights of Indigenous Peoples (see IV, before) grant various legal types of protection to the maintenance of the people's culture, such as medicine, spiritual leadership, and environment. The following is a list of UN and UN organizations documents on the protection of Traditional Knowledge ("TK") and related objects (as of August 21, 2007; I thank Josef Parzinger for assembling the list).

UN Resolution 59/174 – Second International Decade of the World's Indigenous People – December 2004 – http://daccessdds.un.org/doc/UNDOC/GEN/N04/486/70/PDF/N0448670.pdf?OpenElement

UN Resolution 60/142 – Programme of Action for the Second International Decade of the World's Indigenous People – December 2005 – http://daccessdds.un.org/doc/UNDOC/GEN/N04/486/70/PDF/N0448670.pdf?OpenElement

1191 On "soft law" efficiency, W. Fikentscher & W. Straub, Der RBP-Kodex der Vereinten Nationen: Weltkartellrichtlinien, Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil 1982, 637–646 und 727–739; also W. Fikentscher (1980). The tort of breach of statutory duty is one means to connect soft and hard law.

2. UNESCO

UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions – Paris, October 2005 – http://portal.unesco.org/culture/en/ev.php-URL_ID=33232&URL_DO=DO_TOPIC&URL_SECTION=201.html

UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage – Paris, October 2003 – http://unesdoc.unesco.org/images/0013/001325/132540e.pdf

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 http://portal.unesco.org/en/ev.php- URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html

UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Rome, June 1995 – http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm

3. ILO (International Labor Organization)

ILO The Indigenous and Tribal Peoples Convention, 1989 (No. 169) – http://www.ilo.org/ilolex/cgi-lex/conv.de.pl?C169

ILO The Convention on the Elimination of Worst Forms of Child Labour, 1999 (no. 182) – http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182

ILO The Indigenous and Tribal Peoples Convention, 1957 (No. 107) – http://www.ilo.org/ilolex/cgi-lex/convde.pl?C107

ILO Declaration on Fundamental Principles and Rights at Work (1998) – ttp://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT

ILO The Indigenous and Tribal Peoples Convention, 1989 (no. 169) – A Manual http://www.ilo.org/public/english/standards/norm/egalite/itpp/convention/manual.pdf

4. WIPO (World Intellectual Property Organization)

WIPO Report on Fact-Finding-Missions on Intellectual Property and Traditional Knowledge (1998–1999) – Title: Intellectual Property Needs and Expectations of Traditional Knowledge Holders – 68 pages – download: http://www.wipo.int/tk/en/tk/ffm/report/interim/index.html

WIPO International Committee on Intellectual Property and Genetic Resources, Traditional Knowledges and Folklore – 9th session, April 2006, Geneva – http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo grtkf_ic_9_4.pdf

WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledges and Folklore – 10th session, December 2006, Geneva – http://www.wipo.int/edocs/mdocs/tk/en/wipogrtkf_ic10/wipo_grtkf_ic_10_4.pdf

WIPO Revised Draft Provisions for the Protection of Traditional Knowledge – Policy Objectives and Core Principles –

Weitere Dokumente finden sich unter: http://www.wipo.int/tk/en/

5. UNCTAD (United Nations Conference on Trade and Development)

UNCTAD Report of the UNCTAD-Commonwealth Secretariat Workshop on Elements of National Sui Generis Systems for the Preservation, Proctection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework – Geneva 4–6 February 2004 – http://www.unctad.org/en/docs/ditcted200518_en.pdf

UNCTAD Protecting and Promoting Traditional Knowledge Systems, National Experiences and International Dimensions – eds.: Sophia Twarog and Promila Kapoor – 2004 – http://www.unctad.org/en/docs//ditcted10en.pdf

6. CDB (Convention on Biological Diversity)

CDB Convention on Biological Diversity Art. 8 (j) – http://www.cbd.int/traditional/default.shtml

7. UNDP (United Nations Development Program)

UNDP Model laws for the protection of biodiversity knowledge in developing countries – http://tcdc.undp.org/sie/experiences/vol4/Model%20laws.pdf

8. ECOSOC (Economic and Social Council of the United Nations Organization)

ECOSOC Protection of the heritage of indigenous people – decision 1995/297 – http://www.un.org/documents/ecosoc/dec/1995/edec1995-297.htm

ECOSOC Report of the Secretariat on Indigenous traditional Knowledge – 20th March 2007 – http://daccessds.un.org/doc/UNDOC/GEN/N07/277/15/PDF/N0727715.pdf?OpenElement

9. IFAD

Int. Fund for Agricultural Development http://www.ifad.org/media/events/2004/ip.htm

10. UNPFII

UN Permanent Forum on Indigenous Issues http://www.un.org/issues/m-indig.html

VI. The discussion of worldwide human rights

There is an extended debate on human rights in cultural anthropology. The discussion focuses on whether human rights are universal or dependent on cultures.[1192] This is not the place to share in the extended discussion of worldwide human rights, neither in its general scope, nor with respect to the role of human rights an cultural or biological anthropology. The rights of indigenous peoples are part of this discussion, and some literature on them is cited below.

One may doubt where in cultural anthropology the human rights issue is anchored: in connection with the cultural attributes of personhood and identity (Chapter 5 IV, in Part One, above), in the context of human orderings and individual rights following from being organized as members of a superadditive entity (Chapter 9, in Part Two), or as a corollary of rights, claims and procedure (Chapter 13, again in Part Two). Another approach to the anthropology of human rights concerns the issue of human universals vs. cultural specificities (Chapter 1. III. 3. d. and Chapter 10 I. 5.). Talking about the multitude of ethnia one cannot avoid mentioning the question whether there are global or culturally specific human rights. Despite its undisputable importance, so far the anthropology of human rights has not yet found a generally recognized place in anthropological research. Therefore it is mentioned here in Chapter 15, together with other aspects of a multi-ethnic research agenda. This cannot be more than a preliminary categorization.

My own ideas to this subject have been proposed elsewhere.[1193] Unable to repeat my reasoning here, the essence of these publications on international or global human rights is the

1192 Alison Dundes Renteln, International Human Rights, Newbury Park, CA 1990: Sage; idem, Relativism and the Search for Human Rights, 90 American Anthropologist 56–72 (1988); idem, Anthropology and Human Rights: A Selective Annotated Bibliography, 6 Human Rights Teaching Bulletin 74–144 (1987); idem, The Concept of Human Rights, 83 Anthropos 343–364 (1988); idem, "Human Rights Law" and "Indigenous and Folk Legal Systems", in: Herbert M. Kritzer (ed.), Legal Systems of the World: A Political, Social, and Cultural Encyclopedia, Santa Barbara, CA 2002: ABC-CLIO Publ.; Annelise Riles & Iris E. F. Jean-Klein, Introducing Discipline: Anthropology and Human Rights Administration, Cornell Legal Studies Research Paper No. 05–017, Fall 2005, http://ssm.com/abstract=775827; Samuel Martinez, Anthropology and Human Rights, 47 Anthropology News 28–28 (2006); Shannon Speed, At the Crossroads of Human Rights and Anthropology: Toward a Critically Engaged Activist Research, 108 American Anthropologist 66–76 (2006); Nico Horn & Anton Bösl (eds.), Human Rights and the Rule of Law in Namibia, Windhoek 2008: Macmillan Namibia (www.kas_13510-544–2-30.pdf).

1193 W. Fikentscher (1977 a), 400–625; idem, De fide et perfidia, Der Treuegedanke in den "Staatsparallelen" des Hugo Grotius aus heutiger Sicht, Sitzungsberichte der Bayerischen Akademie der Wissenschaften, Phil.-Hist. Klasse, Heft 1, München 1978: (Commission C. H. Beck); idem, 1995/2004, 50, 493–495; idem, Das Wechselspiel von Gewohnheitsrecht und Menschenrechten im Kulturvergleich, in: Heinrich Scholler (ed.), Gewohn-

following: Human rights serve as legal and political protections against governments of any sort, dictatorships, theocracies, aristocracies, enlightened absolute rulers, democracies, etc. Within a democracy, human rights serve as protection against government and parlamentarian majority.

There are three levels of human rights: Culture-specific human rights (such as the right to jury), mode-of-thought-specific human rights (such as the right of assembly or the *Recht auf Heimat* (right to one's homestead and identity), and thirdly, there is the global right to ask for values and freely speak and write in defense of what one considers to be valuable. This right to privately and publicly ask for values includes the right to free speech and the right for free exercise of religion. The right to freely ask for values cannot be abridged or waived, unless for a limited amount of time (such as under a strict monotheism that even prevents the Parmenideian judgment about values), but never forever. Thus, it is impermissible to prohibit the change of one's religion or worldview.

Alison Dundes Renteln (see note 1192) offers a more concrete and substantive argumentation in favor of global human rights. She refers to the anthropological principle of reciprocal exchange (see Chapter 10, above). This principle assigns to human beings a status of entitlement: Anyone who favors another may expect benefitting from reciprocity. If this is so, human rights can be developed from this universal principle. The Roman Law maxim of *do ut des,* Marcel Mauss' "Le dot", and Axelrod's tit-for-tat come to mind, and the question may very well be asked whether classic natural law is able to serve as basis of global human rights.

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Chapter 16: Applied anthropology of law

Chapter 16 focuses on applied anthropology and contains a renewed appeal, directed to the younger generation, to become engaged in culture-pertinent legal work. Currently much debated issues are ethnocentrism, modes of thought, identity, inalienable rights, problems related to the US, Europe, and Islam, as well as multicultural, ecumenical, foreign aid, and comparative issues.

Applied anthropology is the use of anthropology in a prescriptive sense. Anthropologists are sometimes asked to prepare economic or political steps to be taken by international organizations, national governments, non-governmental organizations (NGOs), foreign aid groups, military planners, environmental expert teams, trade unions, etc. More often, they are not asked. Foreign aid desasters and other international planning failures due to neglect of anthropological consultation are being reported elsewhere.

Some international organizations such the World Bank Group from time to time ask anthropologists for advice before loans are granted for certain development projects. This may effectuate the money lending, prevent environmental and personal damages, or stall the whole project. It is said that the United States government consulted anthropologists before embarking on the intervention of the United Nations in Somalia. The difficulty with such consultations rests in the fact that scientific insights are often controversial, and cannot replace political decision even if they are unanimous.

Questions relating to applied anthropology are, for example: Are there chances for applied anthropology in crisis-ridden parts of the world, such as Northern Caucasus, the Balkans, Africa, Indonesia, with the aim to contribute to solving crises? Can one define the issues of applied anthropology which are presently being raised by the intended expansion of the European Union?

Does the incipient work of the World Trade Organization, Geneva (successor to GATT) involve issues of applied legal or economic anthropology?

I. Concept

Applied anthropology is the transformation of anthropological findings into political decisions. All branches of politics may receive such anthropological input: Foreign and interior politics, economic, legal, religious, social, environmental, medical, etc., politics. The main working method of applied anthropology is consultation, because the decider(s) will in almost all cases lack an anthropological knowledge. In Carl Phillip Kottak's words: "Applied anthropology …refers to the application of anthropological data, perspectives, theory and methods to identify, assess and solve contemporary social problems".[1194]

Here are six main pitfalls for an anthropologist who is invited to counsel political decision makers, or who offers her or his consulting services without prior invitation:

– The anthropologist is misunderstood because she or he uses too much of professional jargon without explaining it, or does not realize that a term means different things in anthropological and political context. Not every political decider will know what a moiety is, a matrilineage, or a clan.
– The term "myth" will be understood by the consultee as something unreal and fairytale-like. For an anthropologist, myths are traditional knowledge of a society that does not write and read and thus has the same meaning "transmitted history" has in a literate society.

1194 In the 9th ed., at 17 f., see also 438 ff.

– The anthropologist gets too close to what the politically-minded listener intends to achieve. The anthropological advice should always be scientifically weighed and valued, asking for caution rather than for supporting the political goal. It is a different matter when an anthropologist becomes, for anthropological reasons, an advocate for a political goal her- or himself. Such advocatory activities, for example in favor of endangered peoples or animals, or against genital mutilation, infanticide, or senicide, are ethically permitted, but they should be clearly distinguished from the anthropological professional activity, and the advocating anthropologist should say that she or he intends on doing so.
– The anthropologist's advice may be wrong. For example, the US government asked anthropologists before the decision was taken to intervene in Somalia to prevent a human catastrophe by famine and get the fighting factions at a round table. The resistance by Muslim clan leaders and warlords was not foreseen. For years, the US government asked no more an anthropologist. The advice given had overlooked the segmented structure of the Somali clans.[1195]
– The anthropologist does not clearly realize that she or he is not the responsible decider. It makes a great difference to draw conclusions from scientific wisdom, or to have to decide and by deciding alter reality.
– The anthropologist may get in trouble because the decision to be taken is to be the result of the work of a team. There may be more consultants from other fields such as agriculture, economy, law, or politics. Seemingly, the various inputs have to weighed against one another. This is a particularly difficult situation because the anthropologist's arguments may be not some among many, but arising on a different level while influencing the other arguments, or some of them, on a higher or lower point on the decision tree. Then, the anthropologist' arguments cannot be compatibly weighed against the others. To get this to the attention of other experts may be a near-impossibility.
– This easily makes the anthropologist suspect to be obtrusive, even arrogant. There is that joke that describes the typical Navajo family: husband, wife, children, grandmother, uncle, aunt, and the anthropologist.

II. Ethical standards

Difficulties as these have led to ethical standards accepted by the professional organizations. For example, the American Anthropological Association (AAA) gave its members an ethical code in 1971, the present version of which is of 1997. It distinguishes three kinds of professional duties ofan anthropologist: duties to people and animals, duties to scholarship and science, and duties to the public.

Responsibility to those studied includes respect, avoiding harm or wrong, preservation of historical records, openness and honesty about the researcher's goals, and guarding the appropriate confidentiality. Responsibilty to scholarship includes sincerety as to reports on received information, non-fabrication of evidence, and preservation of fieldwork data for posteriority. Responsibility to the public includes consideration of the social, societal and political implications of work done in the field and its publication, and being candid about their qualifications and philosophical and political bias.[1196]

There are also responsibilities to the host government, also when the anthropologist's task is to concult that government and the advice is critical.[1197] A specifically difficult situation

1195 See Chapter 9 II, above.
1196 I would include religious and thought-modal holdings in the word "philosophical".
1197 Hamburger (1953).

arises when the anthropologist discovers cruel and inhuman treatment among the people she or he is studying. Is the anthropologist bound, by own *personal* ethical standards to intervene when confronted in the field with torture, infanticide, senicide, forced abortion, child labor, or inhuman punishment? Or is the anthropologist inhibited by *professional* ethical standards from any intervention into the law, customs or traditions of the people to be researched because no anthropologist in the exercise of this profession is entitled to introduce culture change? I do not know a single anthropologist who, caught in this dilemma of personal and professional ethics, has not followed his *personal* ethical standards, using if necessary polite subterfuges and one or the other ruse. However, such an anthropologist is risking membership in a professional association.[1198]

III. Failures

There is an extended literature on development failures due to the lack of anthropological interest (Albert O. Hirschman 1967; C. Ph. Kottak 1985; Michael M. Cernea 1985; Thomas Kelley 2008; W. Fikentscher 1980 and 1995/2004, etc). Development aid is indeed a field in which a lack of sensitivity for cultural conditions may produce the failure of the project, misappropriation of funds, and psychological and economic stress to the supposed beneficiaries.

In 1991, 37% of all development projects supported by the World Bank were failures. In 1981, the quota of failed projects amounted to 15%, in 1989 already at 30%. Most problems and insurmountable difficulties occurred in water projects and agriculture. In these two ares, 40% of all of the projects financed by the World Bank are rated as total failures. The World Bank had least success in Africa where the quota of failed projects ranges from 52 to 83%. Betterment of the situation is not to be expected (report by "mir" in Wirtschaftswoche No. 47 of November 13, 1992).

Michael M. Cernea, Conrad Kottak, Norman Uphoff (and others, in Cernea 1985) drew attention to what may be called development blunders caused by a lack of cultural awareness and by a neglect of culturally material conditions. Two of Kottak's – quantitatively researched – examples may be mentioned here again (Cernea 1985, 337, 340; see W. Fikentscher 1995/2004, 50, 493–495):

"Perhaps the most socioculturally naïve and incompatible of the twelve settlement schemes reviewed in this study was an irrigation project in Ethiopia that was eventually canceled and redesigned after land reform. The main fallacy was the attempt to convert nomadic Afar pastoralists into sedentary cultivators. Project designers totally ignored the traditional land rights of the Afar tribe and proposed using their territory for commercial farms and converting the Afar into small farmers. Noting that the conversion of illiterate, nomadic pastoralists into cash crop farmers is a long and difficult process, the project preparation team and the appraisal nevertheless proposed that holdings be mechanically prepared for cropping, as the trainee settlers were taught to sow, weed, irrigate, and harvest. Would an experienced and culturally sensitive agency be doing this teaching? Not at all: Settlement is … subject to other severe constraints, arising not only from the reluctance of Afar nomads to adopt a settled way of life, but also from AVA's [the implementation authority's] limited capacity to train them and provide supporting services.' As the audit points out, this project illustrates the past tendency to address technical and financial factors in design and evaluation while glossing over cultural variables."

The other failed project concerns "an African beef cattle project, because the local agency was oblivious to social realities and the Bank in the late 1960s and early 1970s paid limited

1198 On conflicting forums, see Chapter 4 V., above.

attention to customary rights and questions of land tenure, there was overconfidence in the (abstract) rule for formal law. The borrowing agency said that project area lands were government owned; perhaps in the sense that the government held modern legal title to some project lands. This was true. Also included in the project area, however, were village lands on which traditional grazing rights were in force, although not legally registered. When a few thousand local people, whose existence the appraisal mission had failed to notice, began to tear down fences, burn the Australian-style pasture, and rustle the Brahman cattle (as their ancestors had always done, living outside the national net of effective law and order), a government minister told the Bank he would ask the villagers to leave the project area. The local people, however, continued their guerrilla actions against the Australian-type ranches that had been established on their ancestral lands. The problems diminshed only after expatriate management was replaced with nationals, who used traditional pacts (blood brotherhood) between villages to end the rustling."

The most recent shocking report on development failures is Thomas Kelleys on harming Nigerian slaves by introducing Western property law.

IV. Theoretical areas

Theoretical areas where work ought to be done in modern cultural anthropology are no genuine fields of *applied* anthropology. Neverthless, some should be mentioned here:

- Unity of anthropology as a science, biological and cultural. Role of cognition, and of behavioral studies.
- Non-ethnic anthropology.
- The end of original cultures, culture change, role of television and tourism.[1199]
- Paradigm changes from materialist and "Marxist" anthropology to ideational themes such as modes of thought, religions, and ideologies.
- Anthropological evaluation of early travelers' and missionaries' reports.[1200]
- Comparison of contemporaneous anthropological research; formerly "objects" of anthropological studies today do "their own" anthropology: Hopi, Indic, Indonesian anthropology, etc.
- Plural and comparative epistemology is a worthwile field of theoretical anthropology, and contains a hot issue: the "uneasy insight" that cultural data may contradict epistemologies dealing with these data.
- Preparation of political forms of life for new or contested countries and territories such as Somalia, South Africa, Simbabwe, Namibia, parts of former Yugoslavia, parts of former USSR, etc.
- Cultural-anthropological expert counseling *("Politikberatung")* for political institutions and politicians, especially in legal, organizational, political, religious, and economic anthropology. Trust and superaddition are mutually constitutive.
- The relationship between anthropology and sociology has become a general social science topic. It is correct that one of the strenghts of anthropology lies in its being versed in ethnography and ethnographic methods. The analyses discussed above produce rather precise results.[1201] Sociology has its own methodology. Sociography is a field, for instance in the Netherlands, but not in Germany. Kottak thinks that anthropology's ethnography looks

1199 Jeremy MacClancy (ed.), Exotic No More: Anthropology on the Front Lines. Chicago 2002: Univ. of Chicago Press, also to non-ethnic anthropology.

1200 A beginning: Marschall, Wolfgang (ed.) (1990).

1201 Chapter 6.

more into the details of a specific situation than sociology (and political science) with its predominant method of survey research.[1202] Since the death of Max Weber (1920) comparative culture played no prominet role in sociology, and anthropology has since filled a gap left by modern sociology.[1203] Anthropology, sociology cultural studies, and "European ethnology" could move closer together and learn from each other's methodology. This would be particularly useful for the study of the following problem areas.

V. Problem areas

The following are some – randomly selected – problem areas of recent times for which applied cultural anthropology could probably contribute useful proposals:[1204]

1. Awareness of ethnocentrism

a. It is ethnocentric to assume that the rules and postulates of economics are the same all over the world, namely, determined by capitalism, competition, and markets. Having realized this, and rejecting the ethnocentrims, what can replace them, and under which circumstances? Are there parallels of ethnic and economic exploitation? Is there a "cultural antitrust"?[1205]

b. The loss of Laos and Vietnam, and the failures in Somalia, Iran, Iraq and Pakistan have posed serious problems for USA. All have been caused by Western ethnocentric misinterpretations of local conditions (including the respective modes of thought).

c. "Exporting democracy" is an idea embraced by many, but in its pursuit hampered by the ethnocentric generalization of the Normannic-Angloamerican type of democracy.

d. The consideration of, besides hundreds of religions, about a dozen modes of thought that help to identify potential steps in the international arena, is not an ethnocentric perspective. The study of the tribes, of animism in the wide and narrow sense, of the Greek Tragic Mind, is indipensible for understanding ongoing international and national developments.

e. Ethnocentrism, foreign aid, and environmental protection and their mutually triangular relevant conflicts are a field of eminent importantce.

f. Legal pluralism, inofficial law, and related conflicts of law remain inexhaustible areas of study.

g. Comparative trust (and financial credit) research has already become a popular field – in the wake of various national and international trust-related crises –, but more anthropological expertise could only help.

h. Comparative studies of time concepts are still in demand (although some work has been done),[1206] and often a clue to resolving cross-cultural issues.

i. identity, source of law, and the issue of generalization v. specification.

2. European issues

a. The relationship between citizens and their governments needs anthropological examination, especially in view of superaddition.

b. Part of the problem is how to make a cooperative out of several cooperatives: Does the EU have 490 million or 27 members, and do therefore the 490 million pay taxes to Brussels, or the 27? From this depends whether for joining the EU a national referendum is appropriate.

1202 Kottak, 32, 49–55.

1203 For details of this debate, see Chapter 1 II. 3. b., above.

1204 A proof for this plea in Exotic No More, see note 1199, above.

1205 W. Fikentscher, Wirtschaftliche Gerechtigkeit und kulturelle Gerechtigkeit, Heidelberg 1997: C. F. Müller.

1206 See the cites in note 271, above.

c. Another part of the problem is that the only Slavic tribe that acceded to the pledge-of-faith system are the Slovenes. Other Slavic tribes traditionally possess chieftaincy and consensus systems and therefore prefer determining their relationship to Europe bilaterally (Poland-Brussels, Prague-Brussels, Bratislava-Brussels, etc) instead of determining it as a membership along with other members. For this, societal inertia of leadership forms, particularly in the context of culture change, deserves to be studied.

d. Multicultural society, and – in broader formulation – forms of cultural neighborhood, need extensive study. This applies to Europe, but also to other parts of the world.

e. Comparative research is needed on the Frankish cooperative and the Franco-Normannic system of restricted responsibility of government with a view to the constitution of the EU.

f. The anthropology of borders within and towards the outside of Europe is a rich object of study.

g. The intended EU membership of Turkey has anthropological aspects, among them free choice of religion and bilateral vs. superadditive understanding of membership as such.

3. Development, human rights, democratization, and socialism issues

a. The difference between the Frankish and the Normannic type of democracy: accountability of elected leadership v. sovereign immunity (cf. art 19 (4) German constitution), act of state, state action, political question – this is a cluster of hot issues of the anthropology of organization. Whether democracy is exportable depends on convincing solutions.

b. A related issue of a. is the dependence of the rule-of-law concept on the chosen type.

c. For receptions of democracy in developing and threshold countries, which type fits anthropologically best?

d. and what depends on what: democracy on the rule-of-law, or the rule-of-law on democracy? Historical anthropology might help.

e. National, regional, thought-modal, or global human rights?

f. Accountability of administrative leadership under a "general claŭse" or an "enumeration principle" and judicial review – two sides of one coin?

g. Liberal-economical as-if-competition or Marxist use value (cf. Chapter 10 II. 15, above)? Understanding this choice – culture by culture – decides between freedom and tyranny.

h. For Africa, shall we agree with Bishop Desmond Tutu, the Nobel laureate, who on June 26, 2008 said, in a broadcast about President Mugabe's persecution of political opposition in Simbabwe, that (if Mugabe's claim should be *ubuntu*) "we should never take the word *ubuntu* in our mouth again"? But then, should *ubuntu* be replaced by superaddition, that is, by regarding the whole as being more than the sum of the parts?

4. Russian issues

a. What has been said under 2c. also applies to Russia. Traditional chieftaincy verticality prevails over membership. Societal inertia of leadership forms needs comparative research. If the Breshnjew Doctrine is still in force, what are the consequences?. The dismissal of Russia into an unfettered Hayekian liberal market system under the influence of neoclassic Chicago School and Harvard idealist professors in 1990 led to unequal distribution of wealth and calls for an antitrust law guarding the freedom paradox. "Antitrust à la Russe" by locking up oligarchs in Siberia may not be a promising solution in the long run.

b. Are exchange value, use value, form of government, and the end of the Socialist Camp contexted?

c. Who were the Varangians *(Waräger, Warjagi, Eidgenossen)?* To whom did they swear the oath, and what did the oath contain, e.g., assisting one another on armed trading expeditions, similar to those undertaken by the Franks, Chinnoks, and Rio Grande Puebloans? Did their oath derive from the Frankish pledge-of-faith tradition? How far south did the Varangian pledge-of-faith go? To the Kiever Rus? Why did the Varangian pledge-of-faith vanish in the East of Europe, but its (probable) source, the Frankish-Nornannic pledge-of-faith win in the West of Europe and become, anthropologically, the guideline for Western democracy, rule-of-law, and social and economic welfare, until today? Is this vanishing due to the influence of Christian-orthodox byzanthinism? Is the suppression of Varangian pledge-of-faith (logically including superaddition) by Ivan Grosny and Peter the Great reversible?

5. Islamic issues

a. Does the world need to learn that Islam does not tend to reciprocate?

b. Does the world need to learn that Muslims cannot be deterred (a. and b. underlie the strictly monotheistic God-willing caveat, strict monotheism defined as human sole individuality in front of God, not of men).

c. Is Islamic disunity inherent? Does it follow from the lack of superaddition which again is a consequence of strict monotheism?

d. Muslim shame (not guilt) culture needs further research. Is El Fadl historically right?

e. Islam, Parmenideian judgment, Platonic dialog, Islamic Neoplatonism, and "pre-Islam" need study.

6. Ecumenical issues

Interreligious and, for Christians, inter-church contacts deserve anthropological study. E.g., Russian chieftaincy traditions may be in the way to overcome the Great Schism.

b. Ecumene urgently needs anthropological study of animism and Greek Tragic Mind.

7. Tribal issues and issues of legal pluralism

a. In which direction should the doctrine of dependent sovereignty of US American Natives be further developed, and does this doctrine look promising for other situations of legal pluralism involving indigenous peoples?

b. Could this doctrine be simplified? Should it be?

c. In these situations of legal pluralism, are there inherent limitations to the "plenary power" of the governing institutions of the mainstream culture, such as Congress in the U.S. A?

d. What are the merits, or disadvantages, of the reservation system?

e. Do reservations need an economic basis?

f. Are there other ways as reservations to regulate cultural diversity, applicable – e.g. – to the Balkans (Bosnia, Kosovo, etc.)

g. Would personalized – instead of territorial – federalism be a solution? Are there historical examples of personalized federalism?

h. What are the forms and preconditions of peaceful cultural neighborhood?

8. United Nations issues

a. Minorities studies and policies profit from anthropological consultation, which may not infrequently show that the "minority" is in reality a second or third nation within a nation.

b. The same holds true for foreign aid and transfer of technology studies, as well as for

c. migration studies, which include the attitude of recipient countries: hostility v. integration policy,

d. environmental and endangered species studies, and

e. last but not least for endangered peoples studies. The tragedy of many an endangered nation, tribe, clan, or lineage calls for more awareness which can be promoted by better education in cultural anthropology. The Salish Indians once applied to the US government to be included in the national program for the protection of endangered species.

f. The anthropological UN issues all center around a single core question: what is cheaper and more feasible: aid granted *to others;* or expansion control *at home* plus socially and economically fair dealing enforcement (child labor, other ILO standards) plus transborder antitrust at home?[1207] With path should the UN follow?

VI. Bibliography

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1207 For a detailed discussion of this issue see W. Fikentscher, Entwicklungshilfe oder Expansionskontrolle? Rechtspolitische Überlegungen zu Antitrust und Technologietransfer, Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil 1983, 497–504 (Festschrift Eugen Ulmer zum 80. Geburtstag).

Postscript: The sense of justice resumed

Law implies a search for justice (see Chapter 11). Whether there is a sense of justice, innate or moulded by cultural education, is a matter of debate (Chapter 7 III). Considering the rights and duties of ethnic groups connects the anthropologist to the discussions of the sense of justice. The standard for such rights and duties is the cultural justice due to those groups, whether large or small. This includes a balancing of interests and evaluations attached to, and claimed by those groups as well as their neighbors'.

Chapter 7 III gave evidence that anthropological inquiry speaks in favor of a human sense of justice. The controversy of nativism versus historicism becomes pointless because every human being is gifted with a sense of justice, as the human being is equiped with law. The sense of justice comprising consciousness of justice *(Rechtsbewußtsein)* and the feeling of justice *(Rechtsgefühl)* is a "native" human universal. But as law grows and decays in history, and as law comprises justice, the sense of (any specific) justice is historical, too. When studying the implications of this universal, both the lawyer and the anthropologist will recognize "household items" of their daily work: legal obedience and acceptance of the law, the criteria of justice, timely justice, justice of the fact and law, justice and epistemology, bureaucracy, and criticism of the law.

One conclusion is that a sense of justice is a cultural trait. If the sense of justice is accepted as a human universal, it follows that a sense of justice is part of a human being's cultural identity. Thus it is a constitutive element of the culture to which the human being of a specific culture belongs. Although each individual has his or her sense of justice as a token of human culture in general, the whole of the individual senses are tinted and molded by the specific culture that surrounds the individual. For that reason, a sense of justice belongs to both culture and the cultures. As a consequence of culture per se, there is a sense of justice. The precise contures of the sense of justice are produced by the various cultures and are therefore specific for a culture, just as a certain law or legal system may be specific to a certain culture. The sense of justice may become a variable to be studied in the context of each of the many-faceted cultures. If cultures contain a trait that can be identified as an "average" or "predominant" sense of justice in that culture, the question arises as to whether a given culture may claim special attention and respect for its own specific comprehension and sense of justice.

Therefore, different laws may imply different senses of justice, and different cultures may have different laws and for that reason have different senses of justice. But is there a "chaos" of laws and legal understandings, and consequently a chaos of senses of justice? Synepeia analysis answers: Every "culture" is to some degree, and should be, consequential of what concems its dominant sense of justice, but on a metatheoretical level, common essentials of a sense of justice that is independent of culture can be established. This "metasense of justice" would serve as a common denominator for the identification and the comparison of the various senses of justice. In this way, the sense of justice becomes an instrument among many others for comparison of cultures. The fact that it can serve this purpose is just another proof that the sense of justice in a metameaning is a human universal. As a generalization of cultural traits on a metalevel for the purposes of comparison, the universal sense of justice is a *cultural* phenomenon, not a nativist one. As a cultural phenomenon it is universal and thus not historicist in a relativist or conventionalist sense. The "inside" of a culture is open to change and relativism, and yet there has to be an absolute frame in order to establish the "outside" preconditions of liberty and tolerance. The concern is the diversity of cultures and, in this context, their senses of justice, and their comparability on a metalevel.

The sense of justice, once metatheoretically established, leads to a concept of what may be called cultural justice. For the outlines, themes, and thoughts discussed in this book, this kind of justice, including the sense for it, may be called "cultural." If one accepts that various cultures have various senses of justice specific to each different culture (not as to the idea, which is undeniably universal, but as to their contents), there is a plurality of "justices" in this world. Hence, a culture is at the same time an entity of justice. This insight, in turn, raises the issue of whether a given cultural entity of justice demands respect in the intercultural arena as an entity in itself, and as being distinct from others. Here we find the the core problem of so-called minorities. It is the problem of the identity of an ethnic group, and its recognition and protection. From an anthropological treatment of the "sense of justice," it must therefore be concluded that there is something that may be called "cultural justice," that is, a justice owed to ethnic groups and other culturally relevant entities.

A global, mode-of-thought independent sense of justice is in this book identified as an element of the right to ask for and publicly defend values, a right to be protected by tolerance for the tolerant. Such a right belongs to the study of law and anthropology, yet it surpasses their scope. It is at the center of the human rights issue. Here, another field of study opens.

References

For literature, bibliographies, and references to this book, see Chapter 1 II., above.

INDEX OF SUBJECTS AND NAMES