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and related issues (the anthropology of
compensatory or retributive justice)

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Chapter 12 of:

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Outlines, Issues, Suggestions

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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 legal 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 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.¹ The distinction is a by-product of the more profound difference between the private and the public sphere,² 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,³ a tribe,⁴ or a nation.⁵ 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 not exclude private revenge (feuds) or private seeking of indemnification.⁶

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

¹ On the obvious success of state-anchored persecution see Jerome H. Skolnick, Making Sense of the Crime Decline, *Newsday, Currents & Books*, Sunday Feb. 2, 1997.

² 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.

³ See the example of the kandachi man, note 642, above.

⁴ 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.

⁵ For the concepts, see Chapter 9, above.

⁶ See Malinowski 60ff. He distinguishes party-interest from no-third-party-interest (*yakala*) procedures of the Trobrianders.

cases. A catchword is “civilizing wrongdoing”, or “civilizing torts”.⁷

I. Sanctions

Sanctions may be non-physical or physical. They may take place in the natural world, or may be of supra-natural character.

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.⁸ Pueblo courts may require the defendant to offer apologies, in public or toward the victim.⁹ Canadian Indians use a “circle meeting” of elders with the juvenile offender for similar effects.

Physical sanctions include killing,¹⁰ mutilating, ostracism,¹¹ 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

⁷ See Cooter & Fikentscher (2008), I. E. 7.

⁸ 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.

⁹ 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 apologies 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.

¹⁰ 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. Siefert & H. Breuninger (eds.), *Kulturen der Gewalt: Ritualisierung und Symbolisierung 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 literary 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 Academic; M. Harris, *Cannibals and Kings: the Origin of Cultures*, New York 177; Th. O. Höllmann, *À la mode des cannibales Anmerkungen zur Anthropophagie im westlichen Afrika (16. – 18. Jahrhundert)* 4 *Münchener 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 Aggression and Cultural Form*, New York 1974: Harper & Row; Ewald Volhard, *Kannibalismus*, Stuttgart 1939: Strecker & Schröder.

¹¹ 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.

retribution in form of givings 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”,¹² 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 rules and modern legislation.¹³ 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.¹⁴

II. Internalization (text with footnotes¹⁵, ¹⁶, and¹⁷ here not included; it mainly contains references to other texts)

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”,¹⁸ 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.¹⁹ 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

¹² for the Kandachi man , see notes 642 and 944, above.

¹³ 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).

¹⁴ 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.

¹⁵

¹⁶

¹⁷

¹⁸ See on bigmanship and chieftaincy, Chapter 9 II.

¹⁹ This indicates Trobriand society as a pre-axial age.

wrong may mean (Little Wolf's story).²⁰

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 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)²¹ 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.²² Guilt cultures are characterized by individuality, shame cultures by collectivity, because for shame an outside crowd is needed, whereas one can feel guilty alone. Khaled Abou el El Fadl calls Islam a society equipped with a collective conception of responsibility.²³ 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.²⁴

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

²⁰ 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); Bohannon, 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 produced

²¹ See text near notes 287 ff., above.

²² 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 Phenomenology*, 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.

²³ 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.

²⁴ See the remark on Malcolm X, text near note 711, above.

practically all other cultures, Western, East Asian, Hindu, maybe African. Since somebody must be blamed for this incongruity between promised welfare and actual delay, revenge has to be taken against the West. This 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 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.²⁵

(2) Another opinion about collectivity and individuality is held by Robert D. Cooter.²⁶ 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 collar 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.²⁷ Rather it presupposes that every cultural mode of thought has its own ideas of

²⁵ See Chapter 9 III 3., and texts near note 301, 780, and 787, above.

²⁶ 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.

²⁷ See Chapter 5 V. 5., above.

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.²⁸ It is again different in what Thucydides paints as Athenian individualism of the polis.²⁹ Thus, El Fadl's observation of Islam's turn from individualism needs 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 individualism 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 Christianity. 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.³⁰ Judaism, Greek Tragic Mind, and Christian answers to both generated the guilt culture which today is called "Western".

***Islamic individuality - God-related, not directly humanity-related, as shown before – of course implies a limitation of the Parmenideian judgment of the morally good and adequate: There is only one responsibility to God and His will, or what on the bases of the sharia is to be assumed to be God's will. This reduces the catalogue of moral wrongs to wrongs in relation to God and widens the scope of guiltless behavior towards humans. Therefore, in Islam a good deal of human suffering is to be categorized a "kismet", a "God willing", a guiltless mishap, instead of a tragedy arising from conflicting interhuman duties (see Ch. 4 above). In Islam, there is no tragedy, just guilt - in God's judgment. Buddhism (and Buddhism-influenced Hinduism) draw from human suffering the consequence of no-acting and even of no-self, Christianity the consequence of acting under the promise of redemption from interhuman guilt (cf. Paulus of Tarsos Letter to the Roman Ch. 7, and Martin Luther's "pecca fortiter"), and Islam the consequence of acting under the promise of being released from ungodly behavior. A Buddhist is called to refrain from worldly ties, a Christian to minimize suffering of fellow-humans, a Muslim to avoid missing God's obvious and knowable intentions. Animism does not know individual guilt at all, as does modern totalitarianism, the former for lack of a Parmenideian judgment, the latter for correct consciousness as prescribed judgment.

Guilt*** includes a time factor. Some years ago, Libya's President of State, M. Gaddhafi, gave a reception for members of Amnest International.³¹ The representatives 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. Colonel 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 on-

²⁸ See Ch. 9. III. 5.–7.

²⁹ 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.

³⁰ W. Fikentscher (1975 a) 235–268; idem (1995/2004) 355–393.

³¹ One of the members is a personal friend of mine who told me the anecdote.

going 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 required, because shaming takes place *now*. Shame cultures do not apply time-as-a-straight line.³²

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

³² 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 responsibility 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.globalsecurity.org/military/library/report/1990/GJ.htm>, with further readings.

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.³³ 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 considered 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, 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

E.E. Evans-Pritchard, *Witchcraft, Oracles, and Magic Among the Azande* Oxford 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, *Poru und Sande: Geheimgesellschaften im westlichen Afrika*, 1 *Münchner Beiträge zur Völkerkunde* 115 - 130 (1988).

communicating with spirits, deceased persons, or other (mostly) invisible carriers of natural forces. For communication 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 animist cultures, knowledge is considered a doubtful treasure, causing potential liability 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.³⁴ 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 possibly be a witch.³⁵ Copying pottery or other designs 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?");

³⁴ Bandelier, Adolf F. 1971. *The Delight Makers*. San Diego, New York, London: Harcourt Brace Jovanovich Publ. (orig. 1890); Alonzo 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

³⁵ Frank H. Cushing, *My Adventures in Zuni, Palmer Lake, CO 1962: Filter Press* (orig. 1882); Ruth Benedict (1934).

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.³⁶ 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 moieties 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 medicinal 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 that were unknown to the hunters and gatherers to the farmer households. This led to a belief in witchcraft, and mistrust 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.³⁷ 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..

³⁶ 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), see note 681, above. 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.

³⁷ See note 975, above.

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 other field to substantive criminal law applicable by national or international courts to crimes of cross-border importance (“criminal law of nations”). International criminal law is a section of law in development. With reference to literature on criminal law and the law of nations a few remarks on the relationship between international criminal law and the anthropology of law may suffice:

1. To international conflicts 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.³⁸ 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.³⁹ 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.⁴⁰ 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.⁴¹ More international tribunals on genocide cases followed later (Ruanda, former Yugoslavia).⁴² In 1948, the genocide convention of the UN was passed.⁴³ In 1996, a Draft Code on Crimes Against

³⁸ PCIJ, Danzig Railway Officials Case, PCIJ Ser. B, No. 15 (1928), 17 f.

³⁹ 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. Kettmann, *Investment Protection Law and the Privatization of International Law*, Thesenpapier, http://intl.wu.wu.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).

⁴⁰ International Law Commission, UN General Assembly Resolution 177(II), Principles of the Nuremberg Tribunal, 1950, No. 82; <http://deoxy.org/wc/wc-nurem.htm>.

⁴¹ 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.

⁴² International Criminal Tribunal for Rwanda, <http://69.94.11.53/main.htm>; International Criminal Tribunal for the Former Yugoslavia, <http://www.un.org/icty/>.

⁴³ 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

Peace and Security was introduced and, in 1998, led to the establishment of an International Criminal Court.⁴⁴ 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 Prosecutor for the International 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 War II, the relation is 1 : 9. This rise speaks against wars and similar conflict settlements on the basis of shame culture collectivity, and against what has been called above Normannic warfare as well.⁴⁵ 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.⁴⁶

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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⁴⁴ The American Society of International Law (ed.), *International Criminal Court, Bibliographies*, http://www.asil.org/resources/bio_icc_1998-1999.html.

⁴⁵ See note 966, above.

⁴⁶ See Chapter 6 I., above.

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