



**From the SelectedWorks of Wolfgang
Fikentscher**

January 2008

Chapter 14: Native American law

Contact
Author

Start Your Own
SelectedWorks

Notify Me
of New Work

Available at: http://works.bepress.com/wolfgang_fikentscher/14

Chapter 14 of:

Law and Anthropology
Outlines, Issues, Suggestions

Wolfgang Fikentscher

Bayerische Akademie der Wissenschaften

- Abhandlungen -

München 2008

Verlag C.H. Beck in Kommission

Texts between asterisk (***) are updates, Apr09 – Jan10.

The hardcover version of this book is available from Bayerische Akademie der Wissenschaften, Alfons-Goppel-Str. 11, 80539 Munich, Germany (phone: 49-89-23031-1138), in cooperation with Verlag C.H. Beck, Wilhelmstr. 9, 80801 Munich, Germany (phone: 49-89-38189-0). In conformity with § 52a German copyright law (concerning public access to teaching and research), digital versions of individual abridged chapters may be read and/or downloaded at http://works.bepress.com/wolfgang_fikentscher. A download may only be used for personal study or research and may not be distributed in any form.

The present part of “Law and Anthropology: Outlines, Issues, Suggestions” is an abridged version of the text of the hardcover edition, shortened by certain subchapters or other sections. The text and the footnotes left out are indicated by the words: *not included*. The reader who wants to see these omitted parts is referred to the hardcover version (see preceding paragraph).

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. ethnographically work in Native American tribes will be given (Chapter 14). Chapter 14 concerns ethnographic work with Native American tribes. 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, cited 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, this is the place where the specific cultures can 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 10,000, nobody can study 10,000 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.¹

Thus there is still much anthropology left to do. Starting from ethnographic (or comparable “institutional” fact finding) 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 ability of the major languages in which cultural anthropology is published is another indispensable 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 ethnologist may 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

¹ See Chapter 1 II 3.b. and 4, Chapter 3 I. 3, above, note 1123 below.

neighboring tribes could justify such an undertaking.² 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 1986, I focused on the law *of* the Indians (tribal law), not on the one *for* the Indians (“Indian Law”). When I started my research, 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.³ 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 place 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 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.⁴ Animism (in the narrow sense)⁵ is the belief in the animatedness of things. Certain things live. Words are part of this inherent soul.⁶ This one has to keep in mind in conversations with Indians.

² 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 Sub-Sahara governmental structures. A Baltic cruise in 2006 added insights in the history of Varangian migration and Hansa city government.

³ 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 Usteri/Schriften 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.

⁴ Cooter & Fikentscher (1998), 547.

⁵ W. Fikentscher (1995/2004), 240 – 285.

⁶ Words and soul, animism and its ways of expression, seems not yet sufficiently studied...

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.⁷

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 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 boundaries, within which their authority is exclusive.” So the tribes are “nations”. 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.²⁹ 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

⁷ 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, University of Texas Press) 1983; William C. Canby, *American Indian Law in a Nutshell*. 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.

its powers over the tribes to the states.⁸ 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 („horizontally”) 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 986, above, ***and Sandra D. O’Connor, Lessons from the Third Sovereign: Indian Tribal Courts, 33 Tulsa L.J. 1 - 6 (1997)***).

A graph can demonstrate this relationship in the following way:

Follows graph “Indian Law in a broader (“loose”) sens

⁸ Chief Justice Marshall, in *Johnson v. McIntosh*, 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 government 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 Indian Tribe*, 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.⁹ Nies' own estimation for North America is 18 million. Either way, it was not a "virgin continent".¹⁰

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.¹¹ 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.¹² In international law of war and peace, the two different kinds of victories are

⁹ Judith Nies, *Native American History*, New York 1996: Ballantine, 4.

¹⁰ "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 equitable negotiation. They saw Indians as savages, as a people without culture.....", at 73.

¹¹ See note 999, above

¹² For Germany after 1945, it was disputed whether *debellatio* or *occupatio 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 Treaty*); 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*

called “*occupatio bellica*” and “*debellatio*”. *Occupatio bellica* imposes characteristic 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 a right holder anymore. Today, *debellatio* in most cases conflicts with the prohibition of genocide.¹³

In 1823, 1831 and 1832, Justice John Marshall defined the legal status of Native Americans. In *Johnson v. McIntosh*, *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.¹⁴ Marshall derived both theories from the stock of European and Anglo-American 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).¹⁵ 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 “dependent 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).¹⁶

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 of 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

¹³ 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.

¹⁴ Cf., note 1126, above.

¹⁵ 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 (1977a), 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.

¹⁶ 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 preceding 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 combination 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

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.¹⁷

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....."¹⁸ As yet, however, no court has found a constitutionally protectible interest in tribal sovereignty itself, and numerous examples exist of federal statutes limiting it.¹⁹ 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.²⁰

In 1848, in the Treaty of Guadalupe Hidalgo 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 (historically 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 theoretically Justice 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 hand and the tribes on the other.

¹⁷ Jerry Gardner, Overview of Federal Indian Law and Policy, http://www.epa.gov/indian/chapter_2.htm, 2.

¹⁸ *Babbitt v. Youpee*, 117 S. Ct. 727 (1997, a case relating to Indian property interests).

¹⁹ Canby, 85.

²⁰ Canby 69 ff.

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 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 called 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 citizenship 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 prohibited. 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 transferred 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 Washington). 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 determination and 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 revenue 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.²¹

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, adjudicatory 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 defendant 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 rights connected hereto²²

²¹ See, for the Native American Graves Protection and Repatriation Act, e.g., Echo-Hawk (1986); Harding (1997); Roberts (1997); Ochoa & Newman (1997).

²² *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)..

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,²³ later may be as an adjudicatory principle. Here follows a keyword list of such “overturning” decisions, according to the present state of case law:

(1) Major Crimes Act of 1885: There is no jurisdiction over major crimes even when committed 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 United 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 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).²⁴

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. 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 turned, 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 adjudicatory 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 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

²³ see Canby, 72ff.

²⁴ for example in *Dakota v. Bourland*, 113 S.Ct. 2309 (1993); *Nevada v. Hicks*, 121 S.Ct. 2304 (2001); *Strate 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.

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,²⁵ there is no established way of presenting it yet. Cooter and I decided to distinguish tribal common law and tribal code law.²⁶ Within each, the substantive fields of the law can 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 legal 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.²⁷ 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 considered enough 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:²⁸

Graph: Indian social norms, see next page

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, these are the rules that govern our behavior in law; or whether it is rated as a product of a legal process, as

²⁵ See the few older articles in Cooter & Fikentscher (1998), at 291, note 8 – 10

²⁶ (1998) and (2008).

²⁷ On the theory of the forums (or fora), see Chapter 4, above.

²⁸ Cf. Cooter & Fikentscher (1998), 329. Above, the graph is presented in an improved version.

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.²⁹ 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.³⁰ Here the issue was the use or abuse of private corporation law for tribal administrative purposes.³¹

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.

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:³²

FOLLOWS GRAPH INDIAN COUNTRY.

VI. Dispute settlement institutions

²⁹ Cf., Cooter & Fikentscher (1998), 529.

³⁰ Communication Don Costello, J..CEDCO stands for Coquille Economic Development Corporation.

³¹ Cf., Otto Gassner, *Der freihändige Grunderwerb der öffentlichen Hand*, Munuich 1983: CH. Beck, for the same issue under German law.

³² For most of this area of substantive law, reference can be made to earlier publications by Cooter and myself (1998 and 2008 511 - 528); see also Canby, 343 ff; Gardner, see note 1135, above.

1. American Judicial System and Indian law

The following graph is taken from Deloria & Lytle, *American Indians, American Justice*. Austin, TX, 1983, p. 112. Graph (b) = Figure 19 indicates sources and production of norms in detail. The next graph demonstrates the possibilities of dispute settlement in Indian law. and is taken from Cooter & Fikentscher (1998).

FOLLOWS GRAPH

2. Dispute settlements institutions in Indian country

This is a survey on dispute settlements institutions in India country: FOLLOWS GRAPH

VII. Indian conflict of laws

Conflict of laws and its importance for the anthropology 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. ***Eventual material on Indian conflict of laws may be found in Symeon C. Symeonides' yearly surveys on "Choice of Law in American Courts" in the law journal AJCL (usually spring or summer edition)***.

VIII. An Indian law checklist (a sort of summary, not included in this abridged study version)

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.

Richland, Justin B. & Sarah Deer (2004). *Introduction to Tribal Legal Studies*. Lanham NY, Toronto, Oxford: Altamira Press, a Division of Roman & Littlefield Publ. (a useful primer for tribal students and practitioners, with test questions).

Spittler (1980) *Streitregelung im Schatten des Leviathan: Eine Darstellung und Kritik rechtsethnologischer Untersuchungen*, 1 ZfRSoz 4 ff. (1980).

Tiller, Veronica & E. Velarde (1996). *American Indian Reservations and Trust Areas*, Washington, D.C.: U.S. Department of Commerce, Economic Development Administration, Tiller Research Inc.

Vogt, Evon Zartman (1951). *Navaho Veterans: A Study of Changing Values*, Cambridge, Mass.: The Museum ***(a study of culture change).***

Wilkinson, Charles F. (1988). *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*, New Haven & London: Yale Univ. Press ***(a seminal study).***

Wilkinson, Charles F. (2004). *Fire on the Plateau : Conflict and Endurance in the American Southwest*, Washington D.C.: Island Press & Shearwater Books.

Wilkinson, Charles F. (2005). *Blood Struggle : The Rise of Modern Indian Nations*, New York & London: W.W. Norton