Chapter 01: Anthropology of law as a science - prefatory materials

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Outlines, Issues, Suggestions

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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).
Mottos

“....anthropological approaches to the law are very likely to become the foundation of jurisprudence in the new century”


anthropology is “....the most scientific of the humanities, the most humanist of the sciences.....”


“A nation’s strength is in its culture”

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

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

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

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

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

Literature
There is a shortage of books on the relationship between law and anthropology. Leopold Pospíšil’s „Anthropology of Law“ (1971, several reprints) is rather a handbook that for the most part speaks to the initiated reader but not to the beginner. Pospíšil’s „Ethnology of Law“ (1978; 1985; now out of print) is a very readable introduction for all students, including the novice. His “Sociocultural Anthropology” (2004) pursues similar goals as I do here, in that the anthropology of law reaches into neighboring normative fields (political science, religion, economy). However, Pospíšil’s most recent book again addresses mainly the initiated reader. Laura Nader’s 1969 volume „Law in Culture and Society“ was reissued in 1997. Its contributions are valuable readings but its structure evidences a less than systematic approach. The same may be said of Sally Falk Moore’s “Law and Anthropology: A Reader” (2004). Norbert Rouland’s „Anthropologie juridique“ (1988, translated by Philippe G. Planel into English in 1994 with the title „Legal Anthropology“ (1994) is rich in detail and information, yet with its special interest in the relationship between state and law reveals its originally intended audience: the French student of legal anthropology. In 1992, Peter Sack and Jonathon

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

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

The present book grew over the years of offering classes and seminars on law and anthropology in Munich and Berkeley since 1986. These courses were held with the support of mimeographed readers. The readers in Berkeley, compiled in part with Robert D. Cooter and Jeremy Waldron, and consisting of one, two or three volumes depending on the scope of the class, were prepared for classes in 1991, 1992, 1994, 1995, 1997, 1998, 1999 and 2000. Beginning in 1997, I have been sole author. Over the years, the readers grew into the direction of a textbook. Finally, the reader of 2000 contained so many comments that I regarded it mature enough for becoming a book. I worked on the book between 2001 and 2008, parallel
to a limited amount of fieldwork among American Indian tribes and in Southern Africa, as well as my teaching load in Munich. It was clear from the beginning that the book was not to contain a full survey on law and anthropology as it is intended in class, but was to be designed only to bring the actual issues, themes, and my thoughts concerning them.

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

The distinction between a general part of legal anthropology (Chapters 1 through 7) and a special part (Chapters 8 through 13) is new and orients itself at the separation of general principles and specific areas of cultural anthropology. Part Two of the book presents the substantive branches of the anthropology of law: Family and kinship (Chapter 8), extra-family human order, especially organizations (Chapter 9), the anthropology of exchange, reciprocity, distribution, market and other economic topics (Chapter 10), the anthropology of possession, ownership and inheritance including cultural property (Chapter 11), the anthropology of wrongdoing, torts, crimes, and sanctions (Chapter 12), and the anthropology of legal
procedure including mediation, jurisdictional and conflict of laws issues (Chapter 13). With its subchapter on conflict of laws in culture anthropology, Chapter 13 enters a new field of study which, to my knowledge, has been covered in court decisions and a number of articles, but which still awaits systematic presentation. National and tribal conflict of laws is a subject matter that, if handled circumspectly, is able to generate and develop respect for national and tribal identity, because it may cause courts all over the world to study and apply the law of a nation or tribe when rules of conflict of laws point, by applicable nexuses, to the applicable substantive tribal customary or code law. If the preceding examination of jurisdiction had also pointed to a tribal court, this tribal court will decide under tribal law – its own or of another tribe, and may hereby confront foreign courts with the embarrassment of having to reject the recognition of a foreign decision for reasons of local public policy.

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

Part Three of the book is devoted mainly to diverse specific cultures. Chapter 14 deals with American Indian tribal law, customary and code, and Indian jurisdiction and conflict of laws. The reason for this preference, among many other possibilities, for American Indian legal anthropology is simple: It is the legal world that constitutes one of my „fields“, that is, the laws of predominantly Southwestern tribes, and in particular Pueblo laws. The legal situation of the tribes in my other field, the aborigines of Southern Taiwan, received their reservation status from the Japanese who in turn copied for these ancient peoples the US-American reservation system. Nobody can cover all the cultures of the world - about 10,000 in history and presence -. So every anthropologist has to limit her or his studies to one, two or – rarely - three fields . More is hardly feasible. Thus, what is being said in Chapter 14 has to be taken pars pro toto, and mutatis mutandis. Chapter 15 is to render a brief report on the role of indigenous peoples in the international world of today, most of all in the United Nations. Much cannot be said. The subject belongs to the law of nations, so that Chapter 15 is only meant to open a view through a window onto the many other cultures which might furnish as subjects to cross-cultural investigations. Chapter 16 closes the book with a few remarks on applied anthropology. Most international problems exist because they themselves are not properly set, most of all anthropologically: Kosovo, Iraq, Iran, Pakistan, Myanmar are examples. Familiarization with comparative culture may help to solve them.

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

The purpose of this book is not to broadly repeat what is known long since of classical cultural anthropology, whether concerning law, economics, politics, religion, or its other fields. Every chapter attempts to focus on topics that concern recent contemporary debates. Therefore, at the beginning of each chapter, these novelties – or at least some of them – are mentioned to stimulate the interest of the reader. To reiterate these novel issues here, in the preface, would surely overburden it. Reference should therefore be made to the opening paragraphs of each following chapter.
Some aspects newly introduced into cultural anthropology may be found in various places throughout the book, such as the phenomenon of “youth bulge”, or non-ethnic anthropology.

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

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

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

Facts and Values
The reader will notice a dilemma in which every speaking or writing cultural anthropologist finds oneself. His or her primordial task is to present the researched facts as complete and precise as possible. Then comes a point where the speaking or writing anthropologist may wish to develop a theory of the typification and categorization of the reported facts. This is the threshold from facts to evaluation. Here, the style may change from “ises” to “shoulds”. Often the “shoulds” dictate needs and ways to choose from the material. Immanuel Kant characterizes this distinction between these tasks as between pure and practical reason, Max Weber as between observing and understanding sociology, Clifford Geertz as between “thick description” and interpretation, the legal methodologists as between descriptive and prescriptive rationale of a decided case, and the cultural anthropologist between anthropological comparison and applied anthropology. In the following text, the step from
comparative survey observed facts to their critical evaluation will not be indicated. To meet eventual “pure” and “practical” demands, Chapter 1 II. 8. offers a theoretical treatment of the nature of anthropological concluding. Chapter 16 IV, V. on applied anthropology presents a summary of “prescriptive” thoughts.

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

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

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

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

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

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Wolfgang Fikentscher
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Table of abbreviations
A.D.     Anno Domini = C.E.)
A.H.     After Hegira (= 622 A.D.) (the Prophet Mohammed’s
         move from Mekka to Medina)
AJCL     American Journal of Comparative Law (Ann Arbor, MI)
AJIL     American Journal of International Law (Washington, D.C.)
ARSP     Archiv für Rechts- und Staatsphilosophie (law journal)
å.s.     Abbreviation for aleyhi’s-selam, arab.: Peace be with
         Him (to be added to the name of a messenger of God,
         esp. Mohammed, a.s.)
b.       born in the year….
B.C.     Before Christ (=Before Common Era)
B.C.E.   Before Common Era
Südd. Ztg.  Süddeutsche Zeitung, Munich (also SZ)
transl.  translated by
UCC  Uniform Commercial Code (USA)
Univ.  University
vol.  volume
WTO  World Trade Organization
ZBG  Zivilgesetzbuch = Swiss Civil Code
ZgS  Zeitschrift für die gesamte Staatswissenschaft
ZKM  Zeitschrift für Konfliktmanagement
Ztg.  Zeitung (daily)

Other abbreviations: See Table of Abbreviations in the Modern Language, Association of America International Bibliography
Part One: Anthropology of law in general

Chapter 1: Anthropology of law as a science

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

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

1. Anthropology, ethnography, and ethnology of law

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

Anthropology differs from sociology in mainly two respects: The anthropologist focuses on the human being in the singular (Greek: anthropos = man) and sees human agglomerations as being derived from the single person, whereas the sociologist starts from society which is one of those agglomerations. Anthropology is essentially interested in human culture and cultures (see Ch. 11 3 and Ch. 3), while sociology investigates human society in its various aspects (Stagl 1997), culture being one of them ("cultural sociology“, Kultursoziologie)- The term "social anthropology" has a limited technical meaning: it is the British style of anthropology between the “functionalism” of the 1920s and the “American-British Compromise” of 1945 ff. (see V. 1., 3., below). In a wider sense “social anthropology” can be used to characterize any society-related interest of cultural anthropology. As such, the term is imprecise.

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

Another example: The ethnographer describes the details of the extensive funeral rituals in a given African tribe. The ethnologist uses this material and discusses whether this type of funeral ritual conforms to a certain kind of ancestor worship as the prevalent tribal religion. The anthropologist may study liminality, i. e. the phenomenon that many cultures have age
classes, and that in the development of a person from child to senior these age classes are being passed in transitional steps usually accompanied by a liminal ritual (e.g. baptism, confirmation, marriage, the last rites). The anthropologist is interested whether these funeral rituals are proof of a habit of practiced liminality beyond physical death which would point to a belief in some kind of afterlife. Of course, there are no clearcut lines between the three scientific activities.

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

2. Issues

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

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

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

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

c. Next to these and other fundamental anthropological issues there are numerous minor problems to be solved, many of them in daily court practice. If in a family law case state law conflicts with local usages, often religious, what is to prevail? In a murder case, can the defendant successfully point to the duty of feudal revenge that obliged him to kill? Traditional

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1 From lat. limen (boundary). See Chapter 9 V., below
and religious ideals and attitudes often contradict the norms secular courts have to follow. Is there a way to solve this conflict of normative forums?

d. In a murder case, the defendant, a native of Sicily, makes the allegation that it was his duty to kill the victim. The duty rises from the fact, he claims, that a clan member of the victim had killed his brother. Therefore, under the traditional rules of feud that are being obeyed in his home region since centuries, the act of his killing should be regarded as justified. For, without his act of revenge, he would have lost his honor and respect among family and friends. Will the judge deem this defense valid? (For cases of this type see, e.g., Guido Calabresi, Ideals, Beliefs, Attitudes, and the Law (1987) Yale University Press: New Haven, CT; German version: Ideale, Überzeugungen, Einstellungen und ihr Verhältnis zum Recht, Foreword W. Fikentscher (1990), Duncker & Humboldt: Berlin).

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

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

g. In the work place, conflicts between employees from different cultures are frequent. The EU established a project „Quak“. The project is administered by the Institute for Fair Conflict Management and Mediation, Cologne/Germany. A training as intercultural „conflict pilot“ including subsequent coaching was offered for DEM 350 (Phone 0221-4305910) (Die Zeit No. 46 of Nov. 9, 2000). Generally, what has become known by “intercultural communication” has received attention in the media.

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

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

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

k. The issues of anthropology thus far mentioned imply what is called cultural anthropology. But also physical anthropology comes into the range of objects to be studied. Research at the Psychiatric Department of the University Hospital Eppendorf (UKE) at Hamburg/Germany has shown that there is a significant correlation between migration and schizophrenia. Immigrants treated in that department suffer from schizophrenia in 42% of all cases whereas the percentage of patients settled in Germany is 27% (Süddeutsche Zeitung No. 112 of May 15/16, 1996, Umwelt..., p. IV). Migration is a field of study of cultural anthropology. In this case, its link to physical anthropology is obvious (for more examples see Ch. 7)

3. **Theory, research, and applied anthropology**

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

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

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

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

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

In order to make available this anthropological input to up-to-date legal, economical, political, diplomatic, or foreign aid work, etc., a certain number of academic anthropologists (a critical mass) is necessary. Therefore, colleges and universities provide for curricula in anthropology and hire specialists to teach them. Since anthropology is a social science based on empirical observation - field work - academic teaching of anthropology is always combined with a good deal of practical research. Arm-chair anthropology is always admissible but not the rule. Thus there is increasing demand for full time teaching and research personnel in anthropology in all its fields and geographic areas. These specialists can be asked for advice whenever political, economical, legal, foreign aid or United Nations activities are being planned and more than one culture will be concerned. Some of the large organizations doing business in the international arena such as governments and international organizations should hire their own full-time anthropologists. The same applies to Non-Governmental Organizations (NGOs) active in foreign cultures.

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

4. Two approaches to the anthropology of law

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

Sociology of law is an established subject area of sociology with a long literary tradition. Following older authorities, for example Max Weber, Theodor Geiger, Julius Stone and Niklas Luhmann, Manfred Rehbinder places sociology of law as a „dash-science“ in the middle between social sciences of law and sociology. Following H.U. Kantorowicz, Rehbinder assigns to law three objects of study, the value-oriented search of legal philosophy for justice, the ought-directed normativity of legal dogmatics, and fact-centered study of „the life of the law“ in legal sociology whose task is to study „the context of law and society.“
The aim of sociology to deal with “the context of law and society” can be paralleled to the anthropological study of the context of law and culture. However, since anthropology is also concerned with human universals, there is anthropology independent from a certain culture. We will see that cultural anthropology may deal with institutions and contexts such as gas stations, hospitals, soccer fan clubs, stock exchange, or political strategies. A positive parallel to sociology exists with respect to the dichotomy of genetical and operational approach: Both sociology and anthropology assume that society resp. culture contribute to the creation of the law, and that law operates to shape society resp. culture.

Starting from sociology as the science of human life in society (in Max Weber’s and Niklas Luhmann’s tradition), Manfred Rehbinder distinguishes two tendencies: a trend of sociology to build a theory of social action of the individual, and another trend to build a theory of social systems. Anthropology refrains from building general theories of human actions. It rather describes what humans do in their respective cultural environment, and if there should be value judgments, they refer to the consequences of such behavior which can be productive or counterproductive with regard to the cultural standards chosen in the first place. Anthropology never builds theories of social systems, for the simple reason that many cultures do not use the concept of system. Systems are mental tools of “Western” thinking. Anthropologists try avoid ethnocentric thinking, including Western.

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

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

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

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

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

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

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

6. Types of cases

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

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

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and report what they see.\(^5\)

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

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

II. Literature

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

1. Introductory works.

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


Bohannan, Paul (1992). We, the Alien: An Introduction to Cultural Anthropology. Prospect Heights: Waveland


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

\(^6\) Hirschman (1967).

\(^7\) See Chapter 16 III, below.


Fischer, Hans, Ethnologie, see Beer & Fischer


Wesel, Uwe (1979). Frühformen des Rechts in vorstaatlichen Gesellschaften. Frankfurt/M. Suhrkamp

2. In-depth-study literature

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


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


Canaris, see Larenz


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

*Doss, Erika Lee (1999). Elvis Culture. Kansas City: University of Kansas Press*


Fikentscher, Wolfgang (1975 - 1977). Methoden des Rechts in vergleichender Darstellung. Tübingen: Mohr Siebeck. The five volumes are indicated as follows: vol.1 (1975a); vol. 2 (1975b); vol. 3 (1976); vol. 4 (1977a); vol. 5 (1977b). Vol. 1 contains anthropology and Roman legal systems; vol. 2 the Angloamerican legal system; vol 3 Continental legal systems and Marxism; vol. 4 my own theory of legal method, and a draft for a European legal method (“Fallnorm”); vol. 5 postscript, registers, and bibliography


Fikentscher, Wolfgang (1997), Die Freiheit und ihr Paradox, Gräfe & Stift: FAZ & Resch


*Rosen, Lawrence (1989). The Anthropology of Justice: Law as Culture in Islamic Society. Cambridge: Cambridge Univ. Press; see also the Princeton Univ. version of 2006*


Waal, Frans de, see De Waal


3. Chapter bibliographies

Each Chapter (and sometimes a subchapter) ends with a section called “bibliography”. These bibliographies contain literature specific to the issues discussed in the chapter. Therefore, the
books and articles mentioned in these special bibliographies are not necessarily quoted in the text, and if, not only by name, year, and pages, but in full quote. The meaning of the bibliographies is to open the view for additional interesting publications the contents of which cannot at all or only briefly be included in the text. As a matter of course, these *bibliographies* are be incomplete.

4. **Footnotes**

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

5. **General bibliographies**


Mealey, Linda (see Chapter 7 Bibliography, and look in Mealey for the references)

6. **Periodicals**

*Anthropos. Official Journal of Anthropos-Institut, St. Augustin/Germany (“Anthropos School”)*

*Dialectical Anthropology* (founded in 1975 by Stanley Diamond)

*European Journal of Anthropology* (ed. by A. Gevers & H. Tak, Middelburg/Netherlands), Cambridge, UK

*Journal of Legal Anthropology* (Narmala Halstead, ed.), publ. by Carribbean Law Online and the Anthropologies-in-Translation Group

*Journal of Legal Pluralism and Unofficial Law* (Gordon R. Woodman, ed. in chief), Münster i.W./Germany

*Law and Anthropology. International Yearbook for Legal Anthropology, Vienna University*

*PoLAR: Political and Legal Anthropology Review. Association of Political and Legal Anthropology, a Division of the American Anthropological Association*

*Zeitschrift für Ethnologie, Berlin: Reimer*

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**III. Anthropology of law as a social science**

Eric Wolf is said to have once remarked that „the whole field is coming apart.“

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

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

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

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

Kant’s „trick“ was the synthetical a priori in the application of practical judgment (see below 2.). This approach opened the road to scientific evaluations for moral ends. But while Kant’s critical philosophy was in part substantively influential in Anglo-American philosophy, it did not change anymore its general concept of science. To this day, the term „science“ remains reserved to empirical thinking, and thus speculative philosophy, in the Anglo-American world, is not called scientific, evaluations remaining „guesswork“. By contrast, Continental philosophy regards evaluations scientifically accessible.

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

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

2. History and system. Diachronic vs. synchronic (de Saussure)

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

A particularly interesting contribution comes from Guido Adler (1855 - 1941), the Austrian musicologist, in his article “Umfang, Methode und Ziel der Musikwissenschaft”, Vierteljahresschrift für Musikwissenschaft I, 1885, 5 ff. In musical science, he distinguishes the systematic (systematic musicology) and the comparative approach to an issue, and within the comparative approach he again distinguishes comparison over time (historical musicology) and comparison in space (ethnomusicology). He does not give a particular

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

3. **Anthropology and related fields**

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

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

b. Interestingly, comparative sociology is almost non-existent since Max Weber’s death (1920), perhaps because the main interest of modern sociology is the study of what is assumed to be universals of human societies, such as „civilization“ or - even more abstract - „structure“ or „system“ (Talcott Parsons, Niklas Luhmann). Deducing from general concepts such as „civilization“, „structure“ or „systems, modern sociology starts from a rather ethnocentric, namely, Western position and is thus not equipped, and often not utilized, to engage in the study of non-Western cultures which often lack civilizational, structural, or systematic properties (see Ch. 3). Therefore, anthropological work after Max Weber often includes sociological issues, such as political or other societal forms of human ordering. Recently, some sociologists have felt this cross-cultural deficit on the sociological agenda and have tried to resume sociological work where Max Weber’s culture-comparative studies ended. But as sociology and anthropology have since then developed very different methodologies, and anthropological discoveries, methods and results after 1920 often have gone unnoticed by sociologists, misunderstandings occur. *Inversely, sociology has developed branches that do not have yet a counterpart in anthropology. For instance, there is a sociology of knowledge (Wissenssoziologie), but no anthropology of knowledge or of knowing. Here opens a new discipline: an anthropology of knowledge or of knowing. It relates to sociology of knowledge by taking its start from human cultural diversity instead of inherent structures of (Western) society (Durkheim).* It is timely to convene anthropologists and culture-comparing sociologists to study each other’s methods and combine their efforts. This is all the more urgent since anthropologists have branched out from classical ethnic studies to include institutional and other non-ethnic „life world“ issues as objects of study.

c. Until progress has been made in promoting this inter-science contact, the following characteristics distinguish sociology and anthropology: (1) Sociology starts from human aggregations - societies -, anthropology from the single human being (anthropos = man,

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8 e.g., Paul Masson-Oursel., Comparative Philosophy, London 1926: Routledge & Kegan Paul. Treatments of comparative philosophy are rare.
including male and female). (2) Sociology is traditionally an ethnocentric social science and uses concepts developed from Western society, whereas anthropology tries to avoid ethnocentric reasoning. (3) Sociology is principally not interested in cultures other than Western, while anthropology’s focus are the many-faceted cultures of this world. (4) Methodologically, sociology does not distinguish the emic (outside) - etic (inside) view on the phenomena to be studied, for anthropology this distinction and its problems are central. On the differentiation of anthropology, ethnology, and ethnography, see subchapter V in this Ch. 1.

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

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

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

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

The liberating functions turn the thrust around: Biology does not inhibit cultural possibilities, rather biology invites to use cultural possibilities not yet culturally envisaged. Liberating function No.I points to cultural opportunities hitherto hidden behind neglect or even outlawed as „holy cows“ that should not be molested. A Polynesian king’s son drowned during a

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11 That the holy cows of India may be protected for sound economic reasons - a claim raised by anthropologists, see Ch. 10 - is a different question. „Holy cow“, in a disparaging sense,
fishing expedition. The king prohibited future boat building. His subjects almost starved since on that island fishing was the main food source. The human brain is neurologically equipped for critical thinking about the true, the good, and the esthetically pleasing (see 4. b., below).. Political systems that dictate the non-use of critical thinking are biologically wrong. In utilizing biological opportunities, liberating function No.II suggests to avail oneself of substantive alternatives offered by nature. African wilddogs hunt large prey by dividing tasks among themselves for they are bound to cooperate. Wolves hunt not only under such a principle of division of labor, but even assumes changing roles within this division: some hide, some attack, and the roles may change during the next hunt (communication A. Kortlandt 1971). Human cultures that do not apply the principle of division of labor, or that apply it but only with roles fixed on specialists, perform less effective than wilddogs and wolves. Of course, nature need not be imitated, and for cultural reasons often should not be so. But nature may serve as model and ought from time to time be culturally reassessed.

e.In the 1960ies, Stuart Hall (b. 1932), a Jamaica born British sociologist, started research in a a field he called Cultural Studies”. He was appointed director of the Centre for Contemporary Cultural Studies at the University of Birmingham. Focus of his work was the culture of migrants, working class people, and underprivileged citizens, and the “hybridization” their individual culture underwent. From there, Cultural Studies spread to the US where the new field absorbed academic interest in gender, race, diversity and non-discrimination and related media research, and to France where, in the 1980ies and 1990ies post-modernist deconstructionism and post-Marxism were en vogue. In Germany, Cultural Studies met with unsatisfied interest in comparative culture, which since 1920 (Max Weber’s death) was underresearched in sociology as well as since 1933 in sociocultural anthropology. Called in German (too broadly) Kulturwissenschaft (in the singular, to distinguish it from the broad term Kulturwissenschaften as headtitle for culture-oriented humanities) Cultural Studies took up the British, US, and French impulses and reflected them against the background of the ongoing German discussion of the meaning of Geisteswissenschaften (humanités, humanities). The difference between Cultural Studies and cultural anthropology lies in the latter’s empirical methodology (emic-etic, evolutionism, diffusionism, multiplicity, functionalism, componential analysis, modes of thought, etc.) in the comparison of cultures. 12

4. Anthropological epistemology

As a social science, anthropology uses certain ways of concluding. This subsection reflects on anthropological reasoning. It is useful to start with a general remark on reasoning as such. It owns its essence to the Parmenidean-Platonic-Kantian epistemology. 13 Evolutionary and became a designation for unnecessary, obsolete regulation.


cultural origins of heuristics that influence law-making mirror evolutionary and cultural origins of non-heuristically made law. This research leads to the origins of thinking and judging, and thus to Pre-Socratic and Platonic teachings.

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

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

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

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16 Ezechiel Ch. 18; Isaya Ch. 41.4. 6. 23; 43.1; 61.1 2; 63. 7 ff. (individual judgments, responsibilities, and questioning for reality); for the Christian reception, see W. Fikentscher
Islam are not other religions, but Parmenides and Platon.\textsuperscript{17}

b. \textit{Kant’s Theory of Judgment}. This theory of judgment as the gist of Western thinking was refined by Immanuel Kant. The main advantage of Kant’s theory of judgment is its openness for logical judgments of evaluation. In other words, after Kant evaluations are not excluded from the logic of judgment. The often heard statement: Law cannot be a matter of logic because law involves evaluation, is wrong in view of the Kantian theory of logical judgment. In order to include evaluations in the theory of logical judgment, Kant distinguishes analytical and synthetic judgments. Analytical judgments are deductive and do not produce new insights (“It’s raining, you will get wet’). Synthetic judgments open new insights (“this lecture is boring, it makes me sleepy”). Then, Kant squares the distinction between analytical and synthetic judgment with the distinction between a priori and a posteriori judgments. This leads to four possibilities: analytical apriori, analytical aposteriori, synthetical apriori, and synthetical aposteriori judgments. Next, all four possibilities can be applied to the three Parmenidean judgments about the true, good, and the esthetically pleasing. Out of the number of these possible judgments (in theory: twelve), one is called, by Wolfgang Stegmüller, the fateful question of all philosophy: The (individual) synthetical judgment a priori about good and bad. For the following, we will concentrate on this judgment and neglect the eleven others.

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

Psychologically, the more profound Kant’s theory of judgment is internalized, the less is there a need for “holding” values to be heeded without convincing reasoning. To the extent that Kant’s access to scientific handling of values is not accepted, an epistemological lacuna concerning evaluations opens up. This lacuna can be addressed in two alternative ways: either by mere guessing including the use of heuristic associations and hunches; or by a reliance on extra-legal value data in some natural-law manner. These natural-law references can be made to history, sociology, psychology, politics (“overcoming law”), economy (“economic analysis of law”), biology (socio-biology), or any other “realities.” Thus, also in the Anglo-American common law system, the methodological mainstream, represented, e.g., by Benjamin N. Cardozo’s “Nature of the Judicial Process”, which was in

\textsuperscript{17} W. Fikentscher (2004a), 411 ff., 417, 464: “Rome is afraid of Athens……”; by introducing concepts of time and cooperative organization into Sharia, Islam – instead of forcefully establishing paradise - approaches the epistemology of the Greek Tragic Mind.
turn influenced by Friedrich Karl von Savigny and Francois Gény, is in agreement with the
Continental method of subsumption and thus treats law as a matter of logical conclusion. 18

However, the scientific treatment of evaluation remains an open problem in Anglo-American
law. Because of an only partial reception of Kant’s theory of judgment, legal evaluation, that
is, judgments about just or unjust, escape scientific treatment within the law and must rely on
an incessant series of “realisms” that serve as value suppliers: Justice Holmes’ historical and
sovereign-power-oriented realism was followed by sociological realism (Roscoe Pound),
psychological realism (Jerome Frank, Oliphant, Rodell, Petrazycki, Jerome Frank, Albert
Ehrenzweig and Harold D. Lasswell), the great realist movement of the late 20s throughout
the 30s (Karl N. Llewellyn, Alf Ross and others), a Catholic natural law realism (Francis
Lucey, S. J.), political realism (Critical Legal Studies), economic realism (economic analysis
of law by Richard Posner and others), biological realism (socio-biology in the last quarter of
the 20th century, neuroscience at the beginning of the 21st and behavioral realism in the
employment discrimination discussion), etc.. Anglo-American law runs the risks attached to
the gathering of values from fields outside the law seen as needed to decide legal cases. But
this is borrowed science, not heuristics. 19 Unlike the realist movements in the USA, a legal
science about just and unjust is possible against the background of the Kantian theory of
judgments, and this has been the mainstream in Continental legal history since Kant.

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

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

19 Fikentscher, W., Ein juristisches Jahrhundert, 19 Rechtshistorisches Journal (2000), 560-567;
idem, The Evolutionary and Cultural Origins of Heuristics That Influence Lawmaking,
Background Paper No. 6, 94th Dahlem Workshop on Heuristics and the Law 2004, Christoph
Press, 207 – 237; idem, Juristische Heuristik?, Festschrift Claus-Wilhelm Canaris, vol. 2, Munich

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

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

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

c. Specifically, for anthropological reasoning, consequences are:

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

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

(3) As to contents, humans can only make three kinds of judgments: of truth, of good (=adequate, fitting, just, fair, appropriate), and of beauty. These three possible judgments can also be called the truth-related, the moral (or justice-related), and the esthetic judgment.
(4) About these three contents-related judgments, two questions can be asked: The ontological questions asks whether the true, the good, and the beautiful exists (or has existed). The epistemological questions asks, how the true, the good, or the esthetically pleasing can be experienced and learned.

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

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

There are analytical judgments a posteriori, but they do seem to be very important. They amount to simple „therefore-conclusions”: „It’s raining, therefore we are getting wet”, „this shape is a circle, therefore it is round“.

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

- In his third Critique, the critique of judgment, Kant points to the close relationship of the moral and the esthetic judgment, however without postulating esthetic categorical imperatives.

Finally, there are synthetic judgments a posteriori, and they are the best known ones. About truth, they conclude in the usual manner that characterize the natural sciences: From experience we know that a mix of hydrogen and oxygen may explode and form water. In the social sciences, these judgments pragmatically conclude that experience may lead to morally acceptable or unacceptable results. In esthetics, empiry may induce and explain copying, or rejection of esthetic models.

5. Ontology and epistemology

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

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26 Geertz (1973).


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

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

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

6. The role of writing

The philosophical attitude behind this critique of the activities of writers and interpreters of text may be the gnostic conviction of the relatedness of thinker and subject matter of his/her

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


31 Seventh letter, 341 c.

32 Seventh letter, 341 d.

33 Seventh letter, 341 c, d.

34 Seventh letter, 344 c; Phaidros, 275b, 276a, 277 d and e, 278 c.
thinking, a living kindred that cannot be fixed in letters. It is interesting in this context that Native American nations that refuse to put down their law in writing are therefore in good philosophical company. They also could quote in their favor the German jurist Friedrich Carl von Savigny (1779-1861). He not only opposed the creation of a German Civil Code that then was proposed to codify and simplify the Roman judge-made law (“usus modernus”) of his time as premature and necessarily unscientific, he also influenced German law-making to this day by proposing the whole of the law as a composite of regulation of legal relations (Rechtsverhältnisse), thus reducing every legislation to exactly this: indicating the pertinent legal relation and stipulating its requirement and sanction. Therefore, German statutes never have an introductory chapter of “definitions”. In Savigny’s thinking, definition only tends to confuse what the regulation of a legal relationship is about: the contents of a legal concept is a function of the legal relation, nothing more, so that it depends on the regulation of the legal relation and has to be interpreted in only this context. When, after 1945, the US and British occupation powers promulgated occupation law to be applied by German judges, the latter were at a loss what to do with the definatorial introductory chapters. For example, the Western Allies antitrust statutes prohibited cartels and defined the “cartel” in an introductory definition as an agreement in restraint of trade. What exactly does the law say, asked the German judges: the prohibition of an agreement in restraint of trade, or a cartel as a concept that might require more than that? The parties’ counsels litigated partly under the provision, partly under the definition. Most judges simply disregarded the definitions – following the Savigny tradition. Native American tribal codes, where they exist, sometimes begin with definatorial chapters, sometimes not. This is one of the examples where Indian law does not necessarily follow the Anglo-American tradition, but its own. Plato and Savigny, of course, do not count among its authorities.

7. Judgments (= propositions) in anthropology

Anthropology as a social science makes use of several kinds of judgment. (a) It (rarely) uses analytical judgments a priori (logical deductions without an expansion of knowledge), for example when it is said that Indians are Native Americans, so that since Navajo are Indians, they are Native Americans (syllogism modus barbara). (b) Analytical judgments a posteriori (therefore-judgments without expansion of knowledge) are more common. They are of the kind: Navajo courts follow the rule of lex fori so that they apply Navajo law. Also, system-building in anthropology cannot proceed without analytical judgments a posteriori since these systems are built from empirical observation. (c) Synthetical judgments a priori are, as we

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

36 F. C. von Savigny, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, Heidelberg 1814; English translation:

37 Other examples: free proof, no consideration but mere agreement, specific performance. More on Native American law, esp. code law, in Chapter 14, below.
have seen, Kant’s solution to the opposition of Leibniz’ conceptual dogmatism and Hume’s empiricism, and are used - in the Kantian tradition - whenever judgments of truth (“the Anazasi settlements dissolved in the 14th century”), justice (“genocide is a crime”), or beauty (“Mimbres pottery shows the most refined designs in Northamerican Southwest archeology”) are made. (d) The bulk of anthropological judgments belongs to the synthetical a posteriori category: “Observation demonstrates that moieties may have endogamous, exogamous, or agamous meaning, that is, where they exist people have to marry outside their moiety, inside their moiety, or the moieties have nothing to do with marriage” (judgment of truth); “the treatment of this minority is unjust” (moral judgment); “fine art should not try to represent objects in motion, or otherwise the human brain will react disprovingly” (esthetic judgment).³⁸

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

8. The nature of anthropological reasoning

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

Platonic and Kantian thinking patterns are culture-specific (Western, „Tragic-Judaic-Christian Mind“). Anthropologically, it is not admissible to transplant these patterns into other modes of thought such as Hindu, Islamic, or Buddhist. Other modes of thought than Western have developed their own theories of judgment, sometimes, as mentioned before, non-epistemological, dialogless, replacing attributes such as true, just, and beautiful through descriptions of activities,³⁹ or in other ways. A consequence of the theory of the modes of thought is that in order to discover the ways other cultures think means to disregard Plato and Kant. The confrontation of orthodox clergy and epistemologists in today’s Iran, mentioned above, is proof of this need to „deconstruct“ Western thinking, including Greek logic, to pre-Platonic and pre-Kantian building blocks. This cannot be done here, however.⁴⁰ It must suffice here to identify the issue and to watch for culture-specific pitfalls when talking of human thinking. The anthropology presented in this book is thus Western post-Kantian.

In British and US-American intellectual cultures, as mentioned, the „categorical imperative“ as a consequence of Kant’s bridging of the gap between Leibniz and Hume (in other words, the synthetic apriori), has never been fully accepted. Hume’s dictum that empirically observable repetitions of acting properly do not establish a norm that one should act well is

³⁸ See note 32, supra.
still widely en vogue, with the consequence that valuations are unscientific guesswork. As indicated before, this is why in these cultures „science“ is limited to natural science,\textsuperscript{41} and why social sciences are said to step beyond science once they engage in values. The Continental-European freedom of working with values as a scientific engagement is lacking. As pointed out, the consequence of this is the succession of positivisms in US legal and related „sciences“, and since working with legal values is unscientific results drawn from non-legal empirical sciences are said to shape the law: Oliver W. Holmes‘ law made from history, experience, and sovereign power; Roscoe Pound’s law made from sociology; Jerome Frank’s and others‘ law made from psychology; Karl N. Llewellyn’s and others‘ law made from behavior; the Scandinavian legal realists’ law made from fact (“Law as Fact“); the Critical Legal Studies Movement’s law made from politics; the economic positivism postulated by economic analysis of law and „law and economics“; the sociobiologists and legal behaviorists law made from biology, etc.\textsuperscript{42} Consequently, legal doctrinal developments such as the ones listed here lack the combined judgments in the sense described before (8.) here claimed for anthropology.

In anthropology itself, the US-American reluctance of dealing with synthetic a prioris in Kant’s sense (in other words: with scientific evaluation) has led Clifford Geertz to add to mere empirical ethnography and anthropological observation an evaluative effort he calls „interpretation“.\textsuperscript{43} Geertz found that compiling facts cannot meet the full purpose of anthropology. His proposal to „interprete“ data has ist pros and cons. It replaces to some degree the Continental-European synthetic a priori of practical reasoning in that it opens the road to scientific evaluation, however without being able to draw the indispensible clear line between data and evaluation,\textsuperscript{44} and at the cost of overexpanding the meaning of the linguistic category of interpretation, resp. its metaphorical use. An interpretation of cultures has both less scope and less precision than an evaluation of cultures.

9. Results of Chapter 1 II

To sum up:

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

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

c. Anthropology is no field of philosophy. But it may be operated upon with philosophical methods. Among them is the ontology-epistemology distinction and the theory of judgments. Often, anthropology works with combined judgments (for instance, in legal anthropology). Here lie its main difficulties, but also its charm. This is also the reason why anthropology so often appears to furnish „click- experiences“ (\textit{Aha-Erlebnisse}).

\textsuperscript{41} see above II 1.

\textsuperscript{42} See note 24, above.

\textsuperscript{43} Geertz’ interpretationism (1973).

\textsuperscript{44} There is the danger that empiricism is conturelessly swallowed by „interpretation“.
IV Anthropological meaning of law

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

1. The issues

As a minimum, there are three issues that ought to be addressed in connection with the anthropological meaning of law, the practical importance of defining law for anthropological and legal reasons (2.), a workable definition of law for the purposes of anthropology (3.), and the theory of legal pluralism.45

2. Legal and other social norms

When a case impinges upon more than one legal system, such as a cross-border marriage, the adoption of a Nigerian child by an Ohio couple, or a US-Moroccan joint venture, the rules of a subfield of the legal science, called „conflicts-of-law“, helps to identify the applicable national law. This may lead to the situation where a court one another country has to apply the law of another country. Usually, the parties’ attorneys will be interested and helpful in finding out the proper law and its substance. Also, some legal systems expressly obligate their courts to look for the applicable law. For example, sec. 293 of the German Code of Civil Procedure provides for that foreign laws need to be proved only if they are not known by the court, and that the court in finding out such laws is not limited to what the parties bring as the allegedly applicable rules.46

In such a case, the validity of a marriage, an adoption, a contract, etc., may depend on the performance of a ritual. To the Western party that ritual may look religious. Does a provision of the kind of sec. 293 of the German Code of Civil Procedure refer to foreign religions? Or to foreign laws only? The latter is the general opinion. But what is law in such a case, and therefore relevant for the decision of the case, and what irrelevant religion? Only legal anthropology can give good reasons to decide these issues.

The examples show that besides law there exist other social norms, which may be of religious, moral, habitual, of etiquette, political etc. nature. This gives rise to a theory of the forums, or social norms.47

3. Towards an anthropological definition of law 50

45 See 4., and IV. infra.

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

47 See the discussion in Chapter 4 below

50 The original source for the following text are the pages 16 - 26 of a monograph: W.
One of the first issues in legal anthropology is the question: What is law? Law is thought justice, not necessarily spoken justice. What follows is an attempt to define law for the aims of legal anthropology. Earlier opinions and theories will be reported and discussed. Defining law for anthropological purposes leads to the concept of legal pluralism (see IV. below).

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

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

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

(3). A third legal theory is what may be called the “folk-system theory” which stresses the point that law can only be comprehended through the frame of thought of the people whose legal structure is being studied. This folk-system theory, or synonymously, the participants

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


53 Pospíšil, Ethnology, 8

54 The most important representative of this “folk-system theory” is Paul J. Bohannan, e.g., in: Justice and Judgement among the Tiv (London, 1957), 4. Bohannan created the term “folk-system.” See also S. J. L. Zake, Approaches to the Study of Legal Systems in Non-literate Societies, Ph. D., Dissertation, Northwestern University, 1962, quoted from Pospíšil , op. cit., 9. The theory is older: It dates back to the Dutch anthropologist C. van Vollenhoven, and has become the guideline of much of Dutch anthropologists’ and ethnologist’s work (Leyden school), more recently by P. E. de Josselin de Jong, de Jongmans, P. C. W. Goedkind, J. F. Holleman, and others; for quotations see Fikentscher (1975a), 61; (1977a), 87; P. E. de Josselin de Jong speaks of the “participants’ view of their culture” (Dutch: “de visie der participanten”); see, esp., P. E. de Josselin de Jong, De visie der participanten op hun cultuur, Bijdragen Taal-, Land-en Volkenkunde, 112: 2 (1956), 149.
view of their culture, does not, if applied strictly, permit comparison.\textsuperscript{55}

(4). The next group Pospíšil calls “legal pessimists”: its proponents claim that law cannot be defined at all.\textsuperscript{58}

(5). He then quotes those writers who try to define law as a concept by a \textit{single} criterion.\textsuperscript{57}

b. He himself thinks that the concept of law in legal theory and likewise in legal anthropology is defined by five criteria, one “formal”: the abstract rule; and four “inherent”: authority, \textit{obligatio}, intent to generalize, and sanction.\textsuperscript{58}

c. Based on these types, and others given in general jurisprudence, it is not difficult to go beyond Pospíšil’s topical list and to systematize definitions of law in the following way:

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

As mentioned earlier, Paul Bohannan believes that it is not possible to define law, its content and its structure from outside. That “participants’ view of their culture” is also the approach of many Dutch anthropologists and those following them. Since C. van Vollenhoven demanded, “het oostersche oostersch te zien” (to look on the Eastern things the Eastern way), this group of anthropologists thinks it necessary to view a legal order only from the inside, to measure it with the yardsticks of its own concepts, to apply a conceptuality from within, and to use the system, the division and ordering of the law to be studied for studying exactly that law.

\textsuperscript{55} This is also the criticism by Pospíšil, op. cit., 9.

\textsuperscript{48} For example, Max Radin, “A Restatement of Hohfeld,” Harvard Law Review 51 (1938) 1141, 1145. Pospíšil thinks that the mistake of the “legal pessimists” consists in viewing law as a phenomenon. This not being the case, but seeing in law a (nominalist) concept rather than a phenomenon, Pospíšil holds that a conceptualization of law should be possible; a discussion: W. Fikentscher (1975a), 95f.

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

\textsuperscript{58} For details, see below b); among the group of other writers who think that multiple criteria define law, Pospíšil names Llewellyn and Hoebel, Pospíšil, Ethnology of Law, 12.
including its own concept. Any kind of “ethnocentrism” is rejected. Carried to an extreme point this theory bars any kind of comparison between laws and legal orders. P. E. de Josselin de Jong, therefore, makes the workable proposal never to neglect the participants view even where the transposition of foreign concepts and tools of investigation are necessary to reach results that make sense. It will be seen that the folk-system theories conform to step One of the synepeia analysis as developed in Chapter 6 below.

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

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

It is obvious that the idea of law to which the transposer is clinging, and which is carried into the foreign context, will differ according to the general possibilities of understanding law. Thus, three main ways of transposing a concept of law are available: It may be a natural law ideal, i.e. some definition of law as a “phenomenon,” capable of shaping reality according to legal guidelines; it may be some social data theory in law attributing to law the mere function of the word, a concept in the well known nominalist manner; and there may be the third approach for which Rudolf Stammler may be quoted, trying to define law as a controlling instrument of reality, and following a middle way between reality-shaping natural law and law-shaping reality.

The transposing theories violate the principles of step One of the


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

62 See, e.g., Glanville, L. Williams, preceding note, and the summary in German of his article, loc. cit.
synepeia analysis (see Chapter 4 below) that every mode of thought should stick to its own premises and consequences; on the other hand, they do not enter synepeia analysis Step Two.

d. Comparative theories acknowledge a plurality of definitions of law in different cultures. All **comparative theories** attempting at defining law must cope with the problems of defining comparison.\(^6\) A comparison is the statement that at least two different items have common features and, to the extent of this commonness are subject to a generalization (the so-called **tertium comparationis**). At the same time, comparison is bound to state the non-common features of the compared items, and thus of a particularization.\(^6\) As mentioned, Pospišil distinguishes, among the comparative theories, single-criterion theories and multiple-criteria theories. That a comparative approach in defining law is unlikely to end up with a single criterion can be easily understood. So the multiple criteria theories attract our sympathy.

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

In the opening chapter of his book Ethnology of Law, Pospišil explains his own “folk-system.” “Through trial and error the concepts are changed and become adjusted to the necessities of cross-cultural inquiry.”\(^6\) In refuting Bonannan’s claim for a reduction to non-comparable “folk-systems,” Pospišil argues that it is possible to start, e.g., with the English language (or with any other language) and to enlarge its concepts by trial and error to fit for comparative purposes.\(^6\) Accordingly, then, folk-legal concepts would be the meanings the natives give to categories that they may or may not provide with a term. Anthropologists study these concepts as given facts. On the other hand, analytical concepts are constructs of the ethnologists (or any other scientists), designed for analytical and comparative purposes, whose justification lies not in their phenomenal existence in the outer world (in ethnographic data, for example) but in their heuristic value of achieving results with ethnologist’s tools. For purposes of easy communication they must be provided with appropriate terms. Since they are only convenient labels for concepts, they need not belong to a newly devised language. The

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\(^6\) Pospišil, Ethnology 5 (see note 51, above).

\(^6\) Cf., for this linguistic aspect of the comparison, Ernst W. Müller, “Problematik des Gebrauchs juristischer Kategorien bei der Aufnahme und bei der Kodifizierung von Eingeborenen,” in Hans Dooele (ed.) Deutsche Landesreferate zum IV. Internationalen Kongress fuer Rechtsvergleichung in Hamburg 1962 (Berlin-Tuebingen, 1962), 55; for the linguistic-logical aspect, see, for example, Pospišil, Anthropology of Law: A Comparative Theory (New Haven, 1971; several reprints), 275 f.; also Chapter 4, infra.
reader of this book will not be forced to master a new medium of communication”.  

4. Pospišil’s definition of law

a. After extensive research in numerous (60) legal systems, Pospišil arrives at four substantive elements (indicated above under a.) which, to his mind, define “law”:

(1) Law is manifested in a decision made by a legal authority;
(2) law contains a definition of the relation between the two parties to the dispute (obligatio);
(3) law has an intended regularity of application;
(4) law is provided with sanctions.

b. A review of these four points shows that two of them may be questioned. A criticism of the four criteria ought to include the following aspects: The first element prerequisite to law, according to Pospišil, is (existing) authority. There is so much persuasive force in the examples of early and religious law systems, given by Pospišil, that law seems to be, in fact, hardly conceivable without a deciding and, if necessary, executing authority. But some doubts still remain. Does the requirement of authority (according to Pospišil vested in “leadership”) not put too much weight on just natural data, in place of cultural (and therefore human) consideration and evaluation? And what about the law of nations? The law of nations, international public law (Völkerrecht), is somehow similar to ethnological situations described by Evans-Pritchard, Sigrist, and others, as being – on a higher level – “leaderless.” The consequences are, according to these writers, “acephalous” societies and nations lacking a law of nations. Yet, there is law governing them.

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

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7 Pospišil, Ethnology, 7
8 Pospišil, Anthropology of Law, a Comparative Theory (New Haven, 1971), 44 f.; for a more detailed discussion of Pospišil’s theory see Fikentscher 1975 a: 100; 1977 a: 90 f.
9 Cf., Pospišil, The Ethnology of Law, 30 f.; idem, Anthropology of Law, 44. See, for the following, Fikentscher (1979 a) “De fide et perfidia”; idem, Blöcke and Monopole in der Weltpolitik, Munich 1979: Olzog, 14 f.; and Chapter 9, below.
the group, the society, or a similar generality governed itself. The point is rather that there must be a "division of labor" between those who apply the law and those who obey it. This division of labor calls, in general, for specialized persons, but it is not certain how big this circle of persons can be. It may include, as has already been remarked, in marginal cases the whole group. But the division of labor remains.

Authority in this sense means the formation and implementation of law – based upon the concept of validity (Geltung) – by a separation of law-executing power from "man as such". This guarantees the heteronomity which is necessary to make law an external binding force. In other words, it is not so much authority which is a constituent of law. The crucial element is that law by virtue of its validity is authorizing someone. On closer inspection, it is therefore the authorizing character or activity, the "authorizingness" – sit venia verbo -, not the authority itself, which is an essential constituent of law. This holds true for law in every thinkway, or mode of thought. Yet, nothing has been said so far about quality, origin, legitimation etc. of that authority. The element of "authorizingness" distinguishes law, by the same token, from moral norms, i.e. norms which, without being law, prescribe a certain behavior, but which cannot be applied with authority. Nonetheless, moral norms are norms, they can be sanctioned, but they lack the element of "authorizingness". To illustrate, if someone does not behave himself as he should, according to social norms, he will most probably be "cut off" or in extreme cases, boycotted. This shows that moral norms possibly have sanctions. But there is no authority behind the "cutting off," behind a possible boycott, which, as the bearer of a task, can be considered to be separated from the society. The division of labor is missing. There are distinctions from other social norms ("forums"). As we will see when we will discuss "obligatio" and "sanction", the "authority" which is being "authorized" must not be supranatural (such as a deity). It must be this-wordly. Otherwise, law cannot be distinguished from religious norms.

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

If obligatio means establishing a given relation between the parties to a dispute, it would not fit for example in Hinayana-Buddhist and Confucian law where, in principle, no legal relations exist between the disputing persons. In classical Chinese court procedure both "parties" face the judge only and not each other. They are no parties to the dispute, they do not even talk to each other; law is applied “vertically”, as Chie Nakane would say about Japanese legal culture. In Tibetan legal procedure, the judge even receives the parties at different times for their depositions (communication Rebecca French). There is therefore, no obligatio between those who in this way have to obey the law. According to Pospišil, one might say that there is however obligatio between the Chinese judge on the one hand and the defendant on the other. But then, one cannot explain why the judge in many cases reacts to the

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

plaintiff’s claim. A second *obligatio* between plaintiff (or accuser) and judge becomes necessary. The judicial decision is however not binding to the plaintiff. He only gives rise, in some cases, to a trial. Therefore, *obligatio* can only be used for the relation between judge and defendant. But then it is lacking in the legal relation which should be attached by way of *obligatio* between two persons, the parties to the dispute.

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

Pospíšil uses *obligatio* also to separate law from the impact of religious norms that, if applied, do not evoke a real change in the observable world. There are social norms that threaten an impious person with hell, cause somebody to be cursed, or announce another supranatural sanction which will punish an evildoer, such as: If you break this taboo you will become deaf. According to Pospíšil, this taboo is – in case its breach does not trigger the predicted effect – a religious norm, not a legal rule, because there is no *obligatio* as iuris vinculum between two persons. Again, it is just as clear to say that in case nothing happens, there is no sanction and therefore no law. If for some supranatural reason the taboo-breaking were really to result in deafness, a legal norm has, by way of sanction, validly been applied to the offender; and if the taboo and its (effective) sanction were, explicitly or by mere influence on the public conscience, applied by an authorized person or a group of persons, like priests, we are, as Pospíšil rightly states, in the field of church law or religious law.

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

Regarding the third element proposed by Pospíšil, the intent of general application, the intent to *generalize*, it does not fit any legal order or legal theory that applies law case by case in a non-generalizing way. Harun el Raschid und King Solomon administered law in single cases. Every case was a law unto itself. The same was the philosophy of Justice Oliver Wendell Holmes, Jr.: there are no rules applicable to a plurality of cases. The same holds true for the “phénomène Magnaud”, and for the legal philosophies of Georg Cohn and Fritjof Haft. And in Hubert Rodingen’s “near-range” world, there would be no intent to generalize at all, and there should not be.73 One cannot say that all these applications and theories of law “are no law.”. Of course, Holmes must be regarded as a man of law even if one does not share his legal theory (see a discussion in W. Fikentscher (1975 b), 151–222). Under the terms of a stepy-by-

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

73 Rodingen, Pragmatik der juristischen Argumentation (Freiburg/Muenchen, 1977), 157; as to the other examples (Kadi-justice, Holmes, phenomenè Magnaud, C. Cohn, F. Haft) see the materials in Fikentscher, (1975 a:), 464; (1975 b:), 38 f.; 151 et seq.; (1976:), 304, 380, 444, 755; (1977 a:), 200.
step comparison, by which according to Pospišil and many others, Western concepts are extended to non-Western with the help of “quotation marks” or by “Begriffshypothesen” (Martin Kriele), the intent to generalize seems to be a convincing element of law. However, under a comparative approach, metatheoretically taking into consideration attitudes towards law in possibly all civilizations and thinkways, the element of the intent to generalize is untenable.

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

Lastly, the fourth element, sanctions, is necessary for every kind of law. Sanctions must be accepted as necessary constituents of a comparative definition of law. That – this-worldly and other-worldly – sanctions may also be applied in the moral sphere, no matter how it might be defined (with or without including norms derived from behavior, etiquette or custom), is no argument against it. The example of being ostracized by the social community which can lead to a total seclusion, a heavy moral sanction, may be quoted again. Morals lack the authority which is behind the law. The moral forum and the legal forum are not the same.

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

Between the theory of mononorms and the theory of fora the following distinction is to be noted: The theory of mononorms states that the earliest human societies lived without law and authorities, but equal under norms which at the same time served the moral and the legal functions. The ideological background of the theory of mononorms, a theory propagated in the first line by Marxist authors like Pershits, is the ideal of a stateless and lawless society (Friedrich Engels). The theory of fora does not aim at an idealized society but thinks possible the existence of very early societies which lived under moral-societal norms only, but did not yet know specifically legal norms because the claim of authorizingness, necessary for law in the sense just described, had not yet been raised. The theory of fora consequently deems possible, in very early societies, political authorities not
Sanctions distinguish law (and moral/customary norms) from religion. Religion may make use of authority or of authorities, which is often the case. But it lacks, as such, sanctions. Where, however, religious sanctions are imposed – as when, e.g., the breaking of a taboo is punished with death – there is, as Pospíšil states, “religious law”, “church law”, and therefore law. The foregoing discussion of the four elements, or criteria, of law, as proposed by Pospíšil, is intended to show the fallibility of a trial-and-error method which builds comparison on looking around, and enlarges one’s own concepts to meet, if the data material is sufficient, heuristic needs. The pitfall consists in explaining the data or measuring them with the yardstick of one’s own “reality”, often neglecting them as the example of the single-case justice shows.

5. A new definition

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

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

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

Thus, if law is an evaluation of reality in the direction of justice, applied methodically in system and time, and if fragmented societies have a relatively fragile relationship to system and time, law is still “thought justice”, i.e. an evaluation (of an ethological decision) methodically applied (even to a single case without the intention of universal application). This is possible, because value and time need not coincide, – a value is a value, even if it does not last for a long while but merely is expressed in a single ethological decision. Fragmented think-ways work with less interest in system and less sense of time, but they also know law as an evaluation with the aim of changing reality based on the fixing of values and being the result of possibly conflicting values. The setting of a value with the aim of changing reality always requires a medium outside of the value itself, a “medium of communication”, for example, language, gestures, or, as in an example of Pospíšil, the sharpening of an arrow to indicate to the onlooking public that a legal decision has been made (Pospíšil, Ethnology, 29). Also a word by Harun al Raschid or by a Tibetan judge to one “party” (who need not be a “real” party because it does not form the part of a court audience) and the mediation between fighting Nuer by the leopard chief described by Evans-Pritchard are communicative media. There is always enough method to communicate the value.

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

d. Law is meant to change reality. When law is only to describe reality, we do not need it. In other words, law is an ought. So far, law, for legal anthropology, can be defined as a set of authorizing sanctions, being the result of values methodically applied in order to change reality in system and time, with varying weight on these four factors according to the given legal culture, being, to be sure, always an authorizing sanctioned evaluation. The prescriptive nature of law should be given closer consideration than anthropological literature has done up to now. It is related to the problem of custom as regular behavior versus custom as a norm. This distinction has direct impact on an anthropological definition of law. P. E. de Josselin de Jong illustrates that if one understands custom as regular behavior, and binding norms as law, there is no place for something in between, like “customary law,” Gewohnheitsrecht. This is quite convincing, if “custom” is given only the task of describing “regular behavior.” But

49 P. E. de Josselin de Jong, “Recht, Gewohnheit, Gewohnheitsrecht” in Fikentscher-Franke-Kochler, Entstehung und Wandel rechtlicher Traditionen (Freiburg i. B., forthcoming); in the book Contact der continenten (Leiden, 1972), 51, the author himself distinguishes “to conform to the ideal norms” of a group, and norms meaning “social control.” They are not the same. The former is, in the terms of German law, “Verkehrssitte,” the latter “gute Sitte.” Pospíšil implicitly mentions the problem in his criticism of the “non-law-theories.” See also Fikentscher 1975 a: 98, n. 118, and the examples from Native American law in Cooter and Fikentscher (1998a, b), 326–
“custom” can also mean a moral or legal norm. Then there is “something in between.” In the same context it should be remembered that law can be understood as “is” or “ought,” as “Sein” or “Sollen,” as fact or norm. But if this is so why cannot custom also be understood either as “is” or “ought”? Of course, it can. What should also be kept in mind when speaking of law is that law is not merely behavior derived from “conforming to ideals of a given group,” but that law means social control in a normative sense, aiming at the realization of justice as value. Law implies an “ought,” not only in contrast to the desireable or to the non-binding, but in contrast to descriptive regular behavior. If Pospíšil wished to fit this element into his “obligatio” one should accept it: Law is an ought.50

6. Definition of law, summarized

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

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

Yet, because of the evaluation of consequential thinking it would be wrong to ban the idea of justice from the synepeical definition of law altogether because if this were done, synepeia analysis could not serve its task as a critical tool (as the third step of the analysis). Thus, for example, criminal gangs can exercise social control over their members by their leaders. Hence, there is “authority” and “leadership” in gangs, and certainly “sanctions”. Values (if negative ones) are also realized, methodologically in system and time. Yet, what a gang sets up to maintain inner discipline is far from being law:51 Justice is lacking, because the discipline is to serve unjustified goals (so that the gang leaders’ belief in their activities as “just” would be no defense).

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

b. In summary, law is, anthropologically, an (1) authorizing (2) sanctioned (3) ought based on the result of (4) values (5) methodically applied in (6) system and (7) time, with the weight of the four latter factors changing according to the given legal culture. The requirement of “authorizingness,” “sanction” and “ought” define what law is. Justice, implied in the ought,

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

defines the purpose that law is meant to serve. And the four requirements, values, method, system and time, explain from what elements law comes into being.

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

c. Then, what is justice? Justice gives law its direction. (1) In the debate about global human rights, the distinction between culture-dependent and mode-of-thought dependent human rights will play a role (see Chapters 7 V, and 15 VI.). There are culture-dependent human rights, such as the US-constitutional right to jury. More encompassing are modes-of-thought dependent human rights, such as the right to property. On a third, highest level, there is the human right to freely ask for, submit to questioning, and discuss, values, a right that includes the freedom to change one’s religion. The admissibility of open critique plays an important role. The issue of world-wide standards of justice is being debated in two contexts: (1) Whether there are universal human rights; and (2) whether there are building blocks to be gained from a biological research of the sense of justice in the human brain. What here has been said in terms of human rights, can just as well said in terms of justice. Thus, there is culture-dependent justice (and a “sense” for it), secondly a modes-of-thought dependent justice (and a “sense” for it), and on the global level justice related to that right to tolerantly engage in the pursuit of values.

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

d. A different issue is internalization of justice. In anthropology, the degree to which just law is internalized draws the borderline between authority-derived and custom-derived law. If law has been decided upon in public assembly, or by acceptance among the patricians, or comparable representative bodies – a procedure frequent in axial-age world-attached Tragic

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54 Cf., Lawrence Rosen 1984.
and similar modes of thought – the issue of internalization is moot, because elf-decree law need not be internalized. For the anthropology of societal links and for issues of leadership in society this is of importance.

V. Legal Pluralism

1. Issues

In the foregoing subsection it said that according to many theorists law requires authority or rather an „authorization“. This raises the issue of the involved authority-granting, or authorizing, partner. Is it the state? Many peoples whose law is being studied by anthropologists are not organized in what may be called a state even though the term is used in a wide sense. Tribesmen who govern themselves by consensus do not live in any kind of state. Or are the people themselves the authorizing body? This would exclude dictatorships from having law since their mark is that the people do not participate in the making of the law by a dictator. Maybe they live under a traditional, customary law, and now the dictator superimposes that customary law by dictates of his own. It is probable that the people will try to make a practical mix of the inherited rules and the new dictates, and thus be under more than one law. If there are religious prescripts of legal nature, there may be three bodies or layers of - possibly conflicting - laws. There may also be an overlap of time periods of validity of those customary, politically prescribed, and religious laws so that at least some members of that society or group live under four or five legal orders; etc. These situations have received the characterization of „legal pluralism“ or „multiplicity of legal systems“ (there are more terminological proposals).

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

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

The following presentation of the issues of legal pluralism do not concern sociology or anthropology in general, only law (the third field quoted by Anne Griffiths) and anthropology of law. Furthermore, most arguments will drawn rather from legal practice than from legal theory. Few, if any, theorists of legal pluralism mention the practice under the legal rules known as „conflict-of-laws“. Conflict-of-laws, often synonymously called international (resp. interlocal, interzonal, etc.) private (resp. public or criminal) law (,,IPL“, German: „IPR“; French: „Droit international privé“; etc.) is a field of law encompassing rules that do not decide cases. Rather, the norms of conflict-of-laws decide which law applies to a case that


56 See the next section (V.), esp. under B. 2.
may be brought under more than one law (a Swiss-French married couple wants a divorce; a US-Japanese joint venture fails and must be dissolved; etc.). Every legal order has of necessity its own set of conflict rules, promulgated, customary, or judge-made because laws coexist in this world. Thus, conflict rules are national, not international (although the may be internationally uniformized or harmonized, but this does not change their national character). Once a conflict rule has prescribed the application of a legal order for solving a cross-border case, the substantive norms of that legal order will be used by the judge to decide the case. It is obvious that cases producing issues of legal pluralism need to be decided under conflict rules, and because of said necessity they always can be. It will be shown in Chapter 13 IV. how this works out in practice. A second question is whether legal pluralism points to another legal doctrine besides conflict-of-laws. It will be demonstrated that it does. The doctrine is called „sources of law“. Anne Griffiths’ remark points to this dual doctrinal importance when she says that legal pluralism has something to do, on the one hand, with „differing legal orders“, and with state-independent validity of law on the other. Conflicts-of-laws and sources of law are a lawyer’s main headings under which legal pluralism ought to be discussed. Both themes are not immediately interrelated to one another.  

2. An incomplete history of the discussion so far 

A full documentation of all the discourses on legal pluralism cannot be ventured here. A concise and therefore necessarily incomplete survey must suffice 57. It is said that the term

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

However, the phenomenon of an existing plurality of legal systems applicable to one and the same person or group of persons in one and the same case is much older than the terminology „legal pluralism“. One of the best presentations of the history of this phenomenon in contained in the fourth chapter of the book „Anthropology of Law“ by Leopold Pospíšil. Pospíšil starts from the overwhelming power of the Roman law tradition in Europe which led jurists and politicians to think in terms of the equation „one (politically defined) society - one law“. So strong was this tradition until the fifties of the twentieth century that sociologists and anthropologists tended to deny the existence of law where it could not be attached to a given politically defined society, even when the actual findings of those sociologists and anthropologists in observed reality spoke in favor of multiple legal systems within a society. These researchers and theorists concluded that there was either no law, or that there was law with as many exceptions as there were multiple legal systems minus one (the most eminent one). Pospíšil lists anthropologists who noticed multiple law but, according to him, failed to explain the underlying idea. He then discusses the works of the theorists who discovered, and elaborated on, the idea of the mutual independence of society and law. Building upon Llewellyn and Hoebel in their „Cheyenne Way“, but simplifying their terminology and turning from single or amassed cases to legal principles as substance of the law, Pospíšil sees as law the matter that forms the contents of the systems of authoritative social control of any human group. This implies a leadership of that group. Since a person usually belongs to several groups, she necessarily belongs to several legal orders, and since as a rule these groups are hierarchically ordered, the typical multiplicity of legal orders is

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58 N. Rouland, at 47.


60 also of 1971, the year of Gilissen’s article. In „Anthropology of Law“, Pospisil uses earlier fieldwork, published in 1958 - 1961, see references, infra.


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

63 Otto von Gierke (1868) in his theory of the cooperative (Genossenschaft); Eugen Ehrlich 1913 (living law as against promulgated law); Max Weber 1922 (society versus „socialization of law“); Llewellyn and Hoebel 1941 (with difficult terminology). Pospisil is not of this opinion so that for him multiplicity of culture also means multiplicity of societies; this is overlooked by John Griffiths (see note 96, at 15).
hierarchical and thus insofar deserves the name „legal level“. Thus, a person may at the same
time belong to the legal systems of her household, lineage, clan, moiety, nation, etc. These
legal levels may simultaneously coincide, complement each other, or be in conflict.  

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

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

Later authorities have contributed that any type of legal pluralism makes little sense since the
power attached to any legal system is too different in strength as to make plural legal systems
comparable; that the effective presence of state law as a social fact should not be overlooked
by the followers of legal pluralism in the strong sense; that the „two perspectives range
along a continuum“ and thus do not represent a strict dichotomy but rather contrast abstract
legal theory (weak) and ethnographic search for reality (strong legal pluralism); that in times
of globalization a disengagement of law and state along the lines of what is called here strong

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64 p. 146 ff. (in the German edition); see also Vorwort zur deutschen Ausgabe p. 15.
65 e.g., Anne Griffiths, Legal Pluralism, in: Reza Banakar and Max Travers, An Introduction to
66 John Griffiths, What is Legal Pluralism?, 24 Journal of Legal Pluralism and Unofficial Law
1 - 55 (1986).
67 J. F. Collier and J. Starr (eds.), History and Power in the Study of Law: New Directions in
68 G. Woodman, Ideological Combat and Social Observations: Recent Debate About Legal
69 Anne Griffiths, see note 65, supra, at 289.
legal pluralism cannot be denied;\(^{70}\) that state-independent creation of law may be rooted in corporate identity;\(^{71}\) that systems theory is able to redefine legal pluralism;\(^{72}\) that territory is not the only category providing for plurality, and law not the only category of what may be plural;\(^{73}\) that legal pluralism is of central importance for understanding the anthropology of law;\(^{74}\) etc.

In 1973, Sally Falk Moore introduced the term „semi-autonomous social field“ for describing the social unit in which there is self-generated and self-maintained law. This term has found wide acclaim.\(^{75}\) Without taking sides in the debate, Moore reconfirmed the position of legal pluralism in the strong sense. However, as will be seen (under 3.), „field“ is too narrow a


\(^{74}\) Norbert Rouland, op. cit. The so-called cultural defense, primarily in criminal law cases, is a less conspicuous but nevertheless highly important variation of legal pluralism. The number of cases is increasing in which the defendant alleges to belong to another culture in which the act for which he is indicted is legal, permitted, even required. Blood feud, vendetta, honor killings, rapes or mutilations (cf., Mukhta Mai 2006), extortions, non-treatment of wounds or diseases, etc. are said to be justified because this “is the law at home”: The defendant claims to confronted with two contradicting cultures. For these cases, and proposals to solve them, see Alison Dundes Renteln, The Cultural Defense, Oxford 2004: Oxford Univ. Press; idem, In Defense of Culture in the Courtroom, in: Rick Shweder, Martha Minow & Hazel Rose Markus (eds.), Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies, New York 2002: Russel Sage, 194 – 215; idem, The Use and Abuse of the Cultural Defense, 20(1) Canadian J. of Law and Society 47 – 67 (2005).

metaphor. It refers to territory, and thus does not cover multiplicity of laws in terms of belief systems, constitutional ranking, or time. Generally, from a lawyer’s point of view it may be said that „weak“ legal pluralism is debated when the approach to legal pluralism is made from international private law (broader: from collision law); the „strong“ sense is being addressed when, in Pospisil’s sense, legal pluralism (or multiplicity) is viewed as an issue of source of law. Moreover, being an issue of the theory of the sources of law, legal pluralism is connected with the definition of law itself.  

Legal pluralism appears to have a close connection to the anthropological definition of law as a product of authority and sanction, as „authorized sanction“. This close connection between legal pluralism and anthropological definition of law throws new light on legal pluralism itself. In short, legal pluralism touches upon two different areas of law, collision law, and the sources of law that help to define law. These two traditional areas of legal science have little in common.

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

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

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

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

Conflicts of law may also arise with reference to the rank of validity of a legal norm („collisions of rank“). In the old German Empire the general rule was: Professional laws (such as a guild’s statutes) overrule town laws, town laws supersede regional laws, and regional laws set aside the empire’s laws. Since 1871, the German rule has been the exact opposite: imperial law supersedes state law, and state law local law. Today, Art. 31 of the Constitution

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76 See note 56, supra.
lets federal law prevail over state law. Art. 31 thus is a conflicts-of-law rule concerning the rank of validity of a legal norm. The same holds true for Art. 249 EC-Treaty that provides for the general superiority of EC law in relation to the law of the member states.\textsuperscript{77} The nexus of such conflicts-of-laws rules concerning ranking may refer to concepts of federalism, size of territory, territorial subdivisions, personal attributes such as ethnic membership, qualification of norms as secular or religious, etc.

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

Not many lawyers are experts of conflict-of-laws, or collision law. As a result, there may be the impression that a certain situation is to be judged by a multiplicity of applicable laws. But this may rather be the result of inexperience or inactivity, than the occurrence of a legally unavoidable deadlock. Another apparently frequent reason for a seemingly inescapable multiplicity of applicable - and as the matter stands conflicting - laws is intentional disrespect of available conflicts rules. This disrespect may in turn be provoked by a sense of justice that deems the available conflicts rule as leading to unjust results by imposed „foreign” law. In sum, situations of legal pluralism in the conflicts-of-law sense often occur for lack of knowing - or the fact of disregarding - the competent conflicts rule. Thus, in the typical case of an African decolonized country, a case may at first glance fall under the scope of local secular, religious, and promulgated parliamentary law that has been decreed „European style” „colonialism-minded” in the capital far away. There may be also a constitutional or legal provision that in such cases the promulgated law will prevail. The parties and the local court know it all, but disregard the centralized law, both materially and conflicts-of-law-wise. Then the local court will have to decide between the local secular and the religious norm. If both parties belong to the same religion, it may sensibly resort to religious law. If there is a religious diversity, particularly between the parties themselves, a wise judge will resort to the secular provision and base his or her judgment on this.\textsuperscript{78}

4. \textbf{Legal pluralism as an issue of source and definition of law, and of cultural identity}

A different world opens when the discussion turns from the daily mundane perplexities of conflict-of-laws to the lofty heights of legal philosophy, by asking the questions how law comes into existence and what kind of norm law is. Legal pluralism asks these two questions. However, not the full breadth of legal philosophy need be taken into consideration. Again, more with practice in mind than theory, the starting point is the anthropological question: What is - for theoretical and applied anthropology - the \textit{law}? The answer given is: authorized

\textsuperscript{77} Subject to certain exceptions, especially in the civil rights sector.

\textsuperscript{78} Additional difficulties may arise by the possibilities of an appeal. See Laura Nader (1991)
sanctioned human behavior. The element of sanction is not difficult to define. However, what „authorizing“ means, is hard to determine. To illustrate: Five friends, stamp collectors, meet every Friday to swap stamps. Asked whether they have a chairman, they answer: „We all are „the chairman“, we have no binding rules, and we could change from Friday to another day of the week any time“. Among them, there may be sanctions, for example exclusion for cheating, but nobody authorizes anybody. Compare the stamp collectors to Knud Rasmussen’s reports from Inuit land. Five Inuit live with their families in a desolate polar area. One commits rape and openly threatens to go on, and as a seal hunter he violates accepted rules of good behavior. Four of them secretly agree to kill the perpetrator, and one of them assumes the role of the executer. He kills the wrongdoer in the manner customary in such a case: Shooting from behind, to take the victim by surprise. The five (!) Inuit had authorized themselves to have a rule, because the criminal knew what he was risking. The five Inuits are at the same time the law-subjected citizens, and the „chairmen“, that is, authority. The stamp collectors could agree on a by-law: Whoever fails to present at least ten stamps on Friday, should quit the club. If this should happen and the other four ask the rule breaker to leave, they apply their by-law, and it makes no difference whether all four demand this, or one of them as their „speaker“. In these examples, the Inuit have law. The stamp collectors own law only if they split themselves into each having two roles: law subjects and authority.

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

This explanation has much in common with the traditional theory of customary law. To become customary law, a rule has to be obeyed for a longer period of time (usus longaeus) and in addition it must be carried by the general belief that it should be the law (opinio necessitatis, opinio iuris). The general belief can also be expressed a “internalization” (see Chapter 5 VII., below, and Pospíšil (1986, 60; 1982, 248 ff.).The second requirement is what is meant here by authorization: to be held as the rule that of necessity is to govern a case. This

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79 See subchapter III, supra.

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

very requirement contributes to define what law is and at the same time establishes law in the 
(“strong”) sense of pluralism. The “general belief” or “internalization” delineates the group of 
believers and in this way the number of perinent legal subjects. To delineate in this sense 
means to give cultural identity to that group (see Chapter V III). The opinio necessitatis vel 
iuris, the internalization, and the confirmation of cultural identity coincide and are three 
aspects of the same phenomenon. Therefore, legal pluralism in that second meaning is a 
central topic of cultural anthropology.

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

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

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

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

1. A division for international usage

Anthropological libraries, journals, and some text books tend to use a five-fold subdivision: 
Archeological, sociocultural, linguistic, biological (or physical), and applied anthropology. 
For a general survey, this appears sufficient. The word combination „sociocultural“ in this 
context is to indicate the so-called „British-American compromise“ that was entered into after 
World War II when the British tradition of functional, so-called „social“, anthropology, with 
its slowly evaporating flavor of administering a colonial empire, and the US-American 
(„Boasian“) tradition of anti-colonial, comparative, „cultural“ anthropology began to merge for 
want of any meaningful future distinction.

2. The German tradition

Older German handbooks and surveys sometimes use the following divisions:
(1) Biological (= medicinical, physical) anthropology, subdivided in (a) heredity and genetics, 
(b) human physique, (c) evolution, and (d) races 
(2) philosophical anthropology (there is no generally recognized interior subdivision; the 
general subject is human self-understanding from different philosophical points of view) 
(3) pedagogical anthropology 
(4) psychological anthropology, and 
(5) theological anthropology (structured similarly to philosophical anthropology). 
With the exception of biological anthropology, the other branches traditionally do not insist on 
empiriy, but proceed in a manner that in a broad sense could also be called „philosophical“.
The disadvantages of non-empiricism in the metaphysical area (to use this old counter-concept to „physical“) was felt increasingly. Maybe in order to mend this defect, „historical anthropology“ branched off philosophical anthropology because the science of history cannot work but with empirically investigable data. In part, one might call this approach empiricism in historical disguise. Thus, pursuing „historically“ researched philosophical interpretations of human issues became an important field of anthropology in the German language. A survey is provided by Julika Funk, in her article on anthropology and historical social research (25 Historische Sozialforschung, No. 54 – 138 (2002).

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

3. A qualitative division for scientific purposes

a. anthropology A basic distinction is between the branches of non-empirical and empirical anthropology. Non-empirical anthropology covers the history of anthropology, philosophical anthropology, and interdisciplinary links of anthropology, for example to sociology, or political science. Empirical anthropology comprises cultural and biological (= physical) anthropology. Cultural anthropology comprises four fields (Kottak: subdisciplines): anthropological archeology, sociocultural anthropology („the British-American compromise“), linguistic anthropology, and culture personality; two important fields of biological anthropology among others are human ethnology, and cognitive anthropology. The broad field of sociocultural anthropology can be subdivided into the following sub-fields: (1) kinship, descent, alliances; (2) economic and ecological anthropology; (3) anthropology of law; (4) political anthropology and ideology research; (5) anthropology of religions and cults; (6) folklore; (7) anthropology of genders; (8) symbols and masks (note the link to linguistic anthropology); (9) modes of thought (note the link to cognitive anthropology); (10) methods of sociocultural anthropological research, including vitae research (= study of the life of individuals).

b. ethnology (Völkerkunde). Frequently, the question is asked how anthropology, ethnology, and ethnography relate. The ethnographer gathers the data of a tribe, people, nation, or cultural institution or field such as a suburb (e.g., favelas), hospitals, fans (see Erika Lee Doss’ “Elvis Culture” and L.A. Lewis’ “Adoring Audience”). The ethnologist focuses on a certain tribe, people, nation, of cultural institution; thus, she or he works with that culture, frequently in more than one aspect, for example in that tribe’s etc. law, economy, ceremonies, and traditional stories. It is expected of an ethnologist to become an expert on at least one, sometimes of more than one whole tribe, people, nation, or institution. The anthropologist uses the ethnographer’s and ethnologist's findings in order to compare them with the objective of stating human universals and specifics as subject matters. For this, she or he often does not have to pay attention to the plural cultural aspects of the whole tribes etc. to be compared (unlike the ethnologist). An anthropologist may write an article or a book on role of the maternal uncle in Southwestern Native American tribes, the concept and importance of gift-giving among Philippine tribes people, secret societies in West Africa, or economics of the commons among Mongolian herders. Thus, ethnographer and ethnologist concentrate their research interests on a given group or groups of people, whereas the anthropologist studies cultural or biological universal or specific traits (resp. other contents of culture).
Due to the influence of linguistics (Wilhelm von Humboldt, his work of the Kawi language), German Völkerkunde was for some time restricted to non-literate peoples. Literate peoples were a subject of linguistic studies. This contributed to the dearth of empirical interest in literate peoples, and the strength of philosophical anthropology and of folklore (see below). That restriction, however, diminished in the middle of the 20th century.82

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

c. Ethnography. It deals with the details of a cultural trait or complex and is aided by on-the-spot research (for examples interviews, or excavations). It is detail-oriented and leaes generalizations to ethnologists and anthropologists. As a method, ethnography has to be disinguished from survey research.83 Survey research works with samples, cohorts, exemplary results, average calculations, stochastic methods and other pars pro toto methods. It need not be less reliable, but it must work with estimations to a much higher degree than ethnography. In anthropology, survey research is infrequently applied, whereas ethnography is much preferred. Sociologists and political scientists have to work with broader generalizations and therefore prefer survey research.84 What has been said of ethnology applies to ethnography: The entire systematic outline developed under a. for anthropology can be used for ethnography. Thus, there is cultural and biological ethnography; archeological ethnography, sociocultural ethnography with all the sub-fields.85

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

In most countries, folklore (Volkskunde) is treated as a sub-field of sociocultural anthropology. However, in Europe it developed rather independently from anthropology and ethnology (Völkerkunde).86 Folklore is the study of cultural characteristics of one certain

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82 See, e.g., Wilhelm E. Mühlmann, Geschichte der Anthropologie, Frankfurt/M. 1968: Athenium; Marschall (1990); Kohl (2001); Feest & Kohl (2001); J. Funk, preceding note.
83 See, e.g., Kottak 32, 49 - 55.
84 See Chapter 16, below, on a desirable rapprochement of anthropology and sociology.
85 Laura Nader (2002).
people, such as traditional music, dialects, forms of settlement and agriculture, styles of houses, fairy tales, marriage customs, etc. Since some time, European folklorists began to compare peoples. Hereby, they move into the direction of general anthropological work so that today that independence is waning. Thus, also in Europe, folklore is gradually becoming a sub-field of anthropology. Much of this new comparative work today is called „European ethnology“.

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

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

4. Segments for teaching anthropology (curricular programs)

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

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

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


89 The problem for these writers is to bridge the gap between Max Weber’s death and the end of the 20th century.
c. Sociocultural anthropology: Introduction to cultural anthropology (u); field methods; history of ethnological theory; kinship, descent, alliances; anthropology of genders (u); anthropology of religions and cults; modes of thought; cultural ecology; musical ethnology and folklore; anthropology of law; political anthropology and ideologies; economic anthropology; linguistics and sociocultural anthropology.

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

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

5. The outline used in this book

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

Graph: Anthro-System, see next page

VII. Anthropological systems theory (this short text, including footnotes 90 and 91, is not included here, because for study purposes it is dispensible).