Chapter 11: Possession, ownership, probate; market and non-market economies; antitrust; cultural property and heritage of mankind (the anthropology of distributive justice)

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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).
Chapter 11: Possession, ownership, probate; market and non-market economies; antitrust; cultural property and heritage of mankind (the anthropology of distributive justice)

Chapter 11 on ownership discusses, next to a brief introduction to the essentials of the field, aspects of anthropological respect for the environment and of other collective goods as well as the anthropology behind the protection of traditional knowledge and cultural heritage. These rather recent additions to traditional anthropological discourse are examined, using the relationship between preservation of nature and preservation of culture as general frame.

In an interesting comparison Elena Bonner, the spouse of Andrej Sacharow, remarked that Marxism had a stronger desorienting and mind-destroying force than National Socialism. As brutal, extortionate, and deadly as the latter was, it leaves the institution of property untouched. Marxism, however, deprives people of property as an institutional backing, thus changing personalities into different beings and producing a type of humans devoid of identity, rights, and dignity, respect for others, respect for oneself, and the ability to act.

Similarly, Dan Diner observed that in the Osman Empire generals, ministers, and other high nobles and dignitaries, while holding considerable power, never owned sizeable fortunes of their own, for example agricultural estates. They thus never filled the position of a feudal lord of the European Frankish pledge-of-faith system under the king. Diner concludes that, in the Osman Empire, there was no governmental intermediary class able to, on the one hand, become a political threat to the Sultan, and on the other, serve as a stabilizing factor of existing rights and duties in times of unrest and instability.¹

I. Nature and nurture of property

As much as animals express the possession of territories for nourishment and reproduction,² humans, too, are in need of protected goods in all economic funds, including, at the most rudimentary level, the subsistence fund.³ To be entitled to have something, including the necessary protection of this ownership, belongs to the essentials of human existence, biologically and culturally, and therefore as a matter of justice.⁴ For instance, the right to property plays an eminent role in the historical rise of fundamental rights.⁵ Having property translates into freedom to act – the mutual reference of possessing and acting, of having a free port to start sailing from, appears to be a human must.⁶ A few anthropologically relevant aspects of property are mentioned below: distinction

¹ Dan Diner, in a lecture before the Siemens-Stiftung Munich, March 2006.
² Chapter 7, text near note 556.
³ See Chapter 10 II. 1., above.
⁴ a good example for W. Durham’s co-evolution, see note 529, above.
⁶ The discrediting of having something as opposed to being human, propagated by some Marxist writers starts from the unproven supposition that every ownership, compared to being, is necessarily an abuse. Of course, property can be abused. Abuse control of property is another matter of the anthropology
between ownership and possession, property rights, chattels an land, property in body parts, property after death, environment and collective goods, intellectual property.

Distributive justice attributes to everyone what she or he deserves, resp. owes to others. Everybody should get what is due to her or him: suum cuique. The attributions may differ in size and value. Depending on the merits of the case also results are different. It has been pointed out that only in balancing distributive and commutative justice (and in consideration of other kinds of justice) „true justice“ can be approached (see Chapter 9 I. 3., above). Distributive justice considerations are (or rather should be) behind what is owed by and to the individuals and groups

It is an open question whether distributive justice can be traced back to a general biological principle in a parallel way as commutative justice can be to the principle of reciprocity. Such a principle is at least less evident in the case of distributive justice. Biology speak of the niche phenomenon: plants and animals try to make their living in a niche that suits their needs. Nature assigns niches to its creatures. Every being attempts to find a place or a territory „of its own“. Maybe this indicates a parallel from biology. Another parallel could be dominance. Niche theory and dominance behavior are related: The dominance of some leaves only niches for others, and Darwin would say that thus the world is organized in an efficient way. A third approach may point to parasites: Parasites force plants and animals to adopt to constraining conditions (see Chapter 7 II. 2. f., above). Niche theory and parasitism seem related in „assigning“ plants and animals ways of existence that are beneficial to them, but these are speculations. (for further discussion see Murray Gell-Mann, The Quark and the Jaguar, 1994, and John O. Holland, Hidden Order, 1995.

II. Some issues

There are many definitions of property, and the different functions of property have been widely discussed. From an anthropological perspective, the following six issues have been selected:

1. From possession to property?

Legal theorists differ on how property came into existence. To some say, possession was the rudimentary form of all property, and only later possession dissociated in two forms, less protected possession, and stronger protected property (Carol Rose). This theory is supported by historical findings of intermediate forms between possession and property. Other legal thinkers point to the fact that possession and property are antagonistic concepts and therefore hardly developed from one another. Once contracts such as lending, leasing, renting etc. come into use, property and possession become indeed opposites. Therefore, the question can only be decided against the background of a certain developent in the law of contracts (see Chapter 10, above). One of the aspects involved is the conceptional distinction between possession and property, and the ensuing question whether there are intermediary forms or not. One views holds that

referring to market and antitrust.

possession is the older, more elementary form of exclusive holdership, growing slowly into safer protected forms of property along with changing economic needs. This argues in favor of intermediate forms, including Gewere, a type of legal exclusivity in Germanic law. The opposing view points to the obvious fundamental distinction between property and possession which may be lent or leased to a contractually entitled holder, for example a tenant. This distinction does not permit gradual degrees. Historically the former applies, systematically the latter.

Ethnologically, three considerations may be raised: (1) Possession requires a factual dominionship by a person over the possessed matter. In most cultures this is delineated differently. Among Prairie Indians loosing your cowboy hat without immediately picking it up again means relinquishing your property, so that anyone may take it. Putting your pair of shoes in front of your hotel room door at night means getting a shoshine on the Continent, but giving up your property in USA, like hanging your laundry on a line in public spaces in some South European regions. – (2) The context of property and contract is culture-specific, too. Some cultures respect long-term leases, others not. – (3) When a culture has a traditionally strong feeling for the separation between a private and a public sphere, public property is respected; if not, public property is likely to be neglected.

2. Property rights?

The theory of property rights has its anthropological aspects. As a theory of biological, organizational, and economic impact, it has been discussed in Chapters 7 IV. i. F., 9 III 6, and 10 I. 1. Its main problem is that it derives from the concepts of perfect competition and market failure. Following this kind of reasoning, property inhibits competition because it is a market failure. Once it is realized that perfect competition is non-competition, because it avoids rivalry, property becomes a requirement for competition, namely, as the object of rivalry. Then, an issue can be solved which property rights theory cannot address: the question whether the freedom to compete is a property right. For property rights theorists, such a freedom is a property right, so that the freedom to compete is a market failure (which is economically undefendable). For the theorists of the individual – that is, rivalry-defined – market, the freedom to compete is not a property right, but the vehicle of the law to move property rights from one person to another. Thus, the freedom to act – a right in itself – is the counterpiece to property (and its protection by law) so that both have to be weighed against one another, for example in deciding the limits of a copyright, or of a patent, or on

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8 Carol Rose, Possession as the Origin of Property, 52 Univ. of Chicago Law Rev. 73 – 88 (1985).
9 Rudolf Huebner, A History of Germanic Privare Law, Boston 1918: Little, Brown (Transl. from German by Francis L. Philbrick), esp. on Eichhorn’s book on Gewere.
10 A scene in the movie “Dances with Wolves”, with and directed by Kevin Costner (1990)
12 See Chapter 10 I. 1., above.
13 See W. Fikentscher (2004), 37, 185.
14 Op cit. 27, 204 f.
the limits of the permissibility of licensing contracts.\textsuperscript{16}

The theory that freedom to compete and property constitute one another is no subject for a book on law and anthropology, but it ought to mentioned.\textsuperscript{17} \textit{Sedes materiae} is economic anthropology, as well as in a much broader sense macro- and microeconomics. In brief, the theory holds that competition requires mini-monopolies to begin with, and the pursuit for slightly larger mini-monopolies to make competition worthwhile.\textsuperscript{18}

The relationship between competition and property can be expressed by a curve that is so simple that it need not be drawn in a graph: The horizontal axis represents the influence (“mini-monopoly”) a market participant has on his market by virtue of holding property. The vertical axis represents the intensity of competition. The curve of optimal competition may be added as follows: Near the crossing point of the horizontal and the vertical axis, the curve starts right on the horizontal axis. This means that the market participant has no influence on the market whatsoever, in other words, he has no property. Competition is zero. To the right of this, when the market influence through property may still be very weak, the curve starts to rise, of course rather low, but on the upper (plus) side of the horizontal line. When the market influence becomes stronger and stronger, the curve turns up, indicating that competition becomes more and more intense and lively. Then comes an \textit{optimal point} where the property held by the market participant is so strong that an optimal intensity of competition is reached. When now the market influence grows even stronger beyond this point, the mini-monopoly develops into a restraint of competition, followed by substantial lessening of competition, and in the end followed by a real monopoly. The curve bends down, and when there is a complete monopoly, the curve touches the horizontal line again: Zero competition is left.\textsuperscript{19}

***The theory of property rights (Harold Demsetz, Toward a Theory of Property Rights, Proceedings of the American Economic Association, Spring 1967) is not interested in saying what is being assigned to a person as property, and why, and thus uninteresting for the lawyer. For example, in law using an indication of source (\textit{Herkunftsangabe, indication de source}) such as “Badonian Wine” is a passing off tort if the wine grew on different, less famous soil, so that the plaintiff has to offer proof for all the requirements of such a tort. But “Badonian Wine” is not protected property of Badonian wine growers so that the plaintiff would just have to show the act of selling and the defendant would be left with having to show her of his right to use the indication of source. Thus, wrong indications of source and appellations of origin (“Paris flaire”) are tortuous acts, not violations of intellectual property. For the lawyer, property means an assigment of a position of defense that forces the actor to show a right to act (such as acting in self defense). There is a difference between protecting something (a property right) and protecting against something (e.g., against unfair competition), and much depends on this, among other consequences the burden of


\textsuperscript{17} For the theory, based on the rivalry-defined individual market as opposed to perfect competition, see W. Fikentscher (2004), 119 – 178.


\textsuperscript{19} The theory of the little monopolies which are \textit{required}, not just accepted as trade-off, for competition has for the first time been published in Borchardt & Fikentscher (preceding note), Part One, II; on the history of this theory, W. Fikentscher (2002), 121 f., with note 201.

The subsections 3. Property in chattels and in land and 4. Property in body parts including genes containing the footnotes 20, 21, 22, 23 and 24 are not included in this abridged version because of their lesser importance.

III. Inheritance (probate) law.

Were there is property law, there must be inheritance law because people die. Lenin’s attempt to do away with inheritance, as a consequence of classless and therefore property-less society soon ended with a re-introduction of the right to inherit what the Russian Revolution of 1917 had left of private property to the Russians (Russian Civil Code of Oct. 17, 1921). In all known legal systems of the world today, property - material (chattels and land) and immaterial - can be inherited. The law of inheritance, or as it is often called: probate law, bridges family law (see Chapter 8, supra) and property law. Therefore, it is highly culture-specific. For example, it differs widely from puey to puey in New Mexico and Arizona (see Cooter & Fikentscher). Central issues which all inheritance laws have to deal with are the following: (1) Is there only intestate inheritance, or are wills permitted? (2) If there is testate inheritance, do people have to observe a form, or is an „oral will“ enough? (3) If an oral will is permitted by law, how can the intentions of the testator be proved („probated“)? (4) Is the form, wherever required, constitutive, or is it just a matter of proof? (5) If a will is possible, where are the limits of decency and good conduct? How can close family be protected against the free will of the testator? Who decides? (6) If the deceased dies intestate, or a will is invalid, who are the heirs? Various systems are possible: Marital partner


23 “How can the sky be bought or sold, and how the warmth of the earth? This perception is foreign to us. When we do not possess the freshness of the air and the glittering of the water – how can you buy them from us? Every part of this land is holy for my people, every glittering needle of the den, every sandy beach, every fog in the dark woods, every clearing. Every humming insect is holy in the thoughts and experiences of my people. The sap that rises in the trees carries the memories of the red man. The whites forget their land of birth when they leave to walk under the stars. Our dead never forget this wonderful earth because she is the ed man’s mother. We are part of the land, and the land is part of us…………”; from an oratory of Chief Seattle of the Duwamish tribe, cf., Paul Burke, First People, http://www.firstpeople.us/FP-Html-WisdomChiefSeattle-HASmith.html. The text, tradited in several versions, might never have been spoken in this form. Some sources allege that it was composed from memory for a TV program in 1971.

24 See Cooter, at 760, 792-293; another important article is by Robert C. Ellicksen, Property in Land, 102 Yale Law Journal 1315 - 1400 (1993), at 1399 f.. Both Cooter and Ellickson warn against compelling a close-knit group to change its land institutions.
alone, children alone, or do both share somehow? One child alone (primogeniture, ultimogeniture such as in Acoma Pueblo and in the province of Khazi, India) or shares for the children? Equal or unequal shares? (7) If the deceased dies intestate, and has no family, who is the „heir”? These are just some basic questions. What an ethnographer can find beyond them is illustrated by Pospíšil’s inheritance system of the Kapauku in Papua New Guinea.

Not surprisingly, inheritance law follows both the underlying property system and at the same time local family law. Pospíšil presents a perfect study of Kapauku inheritance law. A much more modest attempt of sketching the probate law of some Indian tribes may be found in Cooter and Fikentscher.

IV. Environmental law and anthropology. Are animists true guardians? Human stewardship.

If homo sapiens can be dated back 4,000,000 years, and if the axial age flourished around 500 A.D., it follows that humans were not animists for just a 1/1,600th of their existence. This explains the strong influence of animism in all post-axial-age modes of thought (and their religions). It also says a lot about human connection to nature both as nourishing and threatening environment. Environment as such is an animistic notion. If the environment is to be protected, do animist conceptions play a role? Are today’s animists the ideal guardians of nature from whom followers of other modes of thought can and should learn? Is animism a good modern means of protection of the environment? Does the destruction of the environment start with the statistical decline of animism? Should the preservation of nature be based on the preservation of (animist) culture? Is there an equilibrium of nature and culture that exists in animism and should be reconstructed again?

Young Hopi (in Arizona) are educated to collect feathers and consacrate them to the spirit of the well to keep the well clean and plentiful. In the dry country of the Northamerican Southwest, an Indian will ask the bush to forgive the deed of cutting it to make a fire. Before and after a bear hunt, Navajo make a “medicine”, a purification ritual. Should a bear “go wild” and it is not the season to kill bears, Navajo will call a white hunter to do the job (“killing by proxy”). Santa Clara Pueblo takes care of Puye ruins and the surrounding park. But there were also complaints that the Navajo nation did not employ the necessary care to Canyon de Chelley, an nature reserve placed under Navajo administration for guided tours and care of the vegetation.

On balance, nations of animist traditions may be expected to be good stewards of the environment. But education, laws, money, and appropriate supervision are needed to make environmental guardianship a success.

V. An anthropology of collective goods. Property in market and non-market economies.

Within exchange value economies, two main kinds of allocation have to be distinguished: (a) allocation by competition (or, if necessary, corrections of competition), and (b) allocation causing


26 Cooter & Fikentscher (1998), 530 - 535; from an comparative law point of view, an interesting facet is San Felipe Pueblo “civil death”, loc cit. note 53.


28 W. Fikentscher (2004), 186 ff. ***A chart from there: ***
social cost by involvement of collective goods.\textsuperscript{271}

1. Collective goods defined

When, instead of the market idea, the problem of allocation is solved with the use of collective goods, the resultant economic behavior that typically causes social cost. In an exchange on a market (in the individual sense), the parties capture all the benefits and bear all the cost. If third parties enjoy a benefit from the exchange, such as the customers of one party from its profitable deal, it is an external benefit. If third parties suffer from that deal because it was unprofitable, it is an external cost. If the external cost hit not just single persons but a large group of citizens who form what may be called a social unit (e.g., the farmers participating in an irrigation system, the external cost is a social cost. Cost is a deduction, a minus, from some entity of value. Thus, social cost must be a deduction of a social entity of value. If this entity of value is used to meet a demand, by allocating that entity of value, whole or in parts, to the participants of a social unit, that entity of value is called a collective good. It is an allocation different from an allocation that is performed through working or corrected competition. Any such non-competitive allocation causes social cost. Therefore, competitive economy should be distinguished from social cost economy (= collective goods economy).

In a section entitled “What can be privately owned?”, Cooter & Ulen (4\textsuperscript{th} ed. 2003) cite the reasons why sometimes allocation by the property & individual market system, and under different circumstances by a system of public goods, is preferable (Cooter & Ulen call “public goods” what here are called “collective goods” in order to include privately owned but collectively used goods such as sports fields and lighthouses; some authors use both terms interchangeably). Cooter & Ulen give two reasons: (1) a good is “public” when its use is non-rivalrous (hiking in a national park, enjoying the scenery), and (2) in contrast to private property (which can easily be fenced in) the cost of keeping others from using the good would be very high or virtually impossible (non-excludability of citizens from protection by the fire brigade, or of ships taking advantage of a lighthouse, for example). A third and “positive” requirement should be added. It points to the central problem of a collective goods economy, the distribution of benefits and cost, and at the same time draws an illustrative line between property & (individual) market economies on the one hand and collective goods economies on the other: whereas in property & (individual) market economies the allocation of the goods is managed by the economic automatism of the “invisible hand” of the market, in collective goods economies distributive justice calls for the visible hand of the law to fairly distribute benefits, and often of the cost, too. In slightly other words: Whereas the central issue of the market system consists in keeping competition free and fair by defending it against the freedom paradox, the central issue of a collective goods economy is (non-)discrimination. Thus, there is antitrust in both sectors.\textsuperscript{274}

The free competitive market of properties of any kind (Marktwirtschaft) as the presently most common general rule of economy, based on the “invisible hand”, including its legal protection against the freedom paradox by antitrust and unfair competition law, (allgemeines Wirtschaftsrecht) is sided by regulated forms (“visible hand”) of the economy (besonderes Wirtschaftsrecht). These regulations include

\textsuperscript{2} W. Fikentscher, Wirtschaftsrecht (Economic law ), vol. 1 (1983), 44; idem (2004), 190 – 200. A third kind of lesser importance in Western economic systems, but e.g. not in Taiwan, R.o.C., concerns public auditing, surveillance (in German: Wirtschaftsaufsicht); this third kind is not discussed here

- goods which are owned, but should not be fully used by the owner because otherwise the market would deliver socially unwanted results so that a distribution by regulation has to intervene (apartment space in a bombed-out or artillery-shelled city, gasoline during an oil crisis, food stamps in times of hunger) - a strategy that is called coupon system (= Bewirtschaftung), economically being the “distribution of want.”

- property rights and liberty rights to be granted to individuals to overcome the coupon system, a strategy called development aid (Entwicklungswirtschaft), economically aimed at “overcoming the want”.

- goods economically or naturally unfit for the assignment of property to private owners (the regulation of social cost = social cost economy = collective goods economy), 275 and

- a surveillance system to enable the government to decide whether the free market system or one or more of the aforementioned kinds of regulations have to be politically initiated. 276

2. Kinds of collective goods

For the following discussion, only the third category - the collective goods (or social cost) economy - is of interest. 277 Goods which are for reasons of economy (non-rivalry, non-excludability, lack of invisible-hand allocation of the goods to those who value them most) unfit to be owned and therefore unfit to be competed for encompass the following kinds. Collective goods may be subdivided in two groups: they are either cost-qualified, or cost-free. This means that some collective goods cause financial burdens upon those who want to enjoy them, such as a highway, a public swimming pool, an irrigation system, or the police force of a city. It has to be decided who shall bear these cost and how. This is a matter of distributive justice as is the size of the share every participant may enjoy. Since there is no market, market prices are no immediate help. However, comparisons to similar economic situations and markets analogies are permitted and often helpful. 278 Other collective goods do not cause cost for those who want to use them, such as a communal forest where the villagers may graze their small cattle and harvest timber, or the public domain in copyright law (Beethoven’s works are free so that every telephone company may offer the melody “Für Elise” to all customers who do not care to answer the phone right away). 279 The main issues of cost-free collective goods are over-grazing (“the tragedy of the commons”) and ruinous use, such as pollution of water or air.

1. Cost-qualified collective goods are properly called public goods and can further be categorized:

2 275 Social cost will be of special interest in this context. It has to be further subdivided below (under 5).


2 278 cf., Cooter & Ulen (2000), op. cit. 40 f.

2 279 copyright fair use is another example.
(1) There are so-called “club” public goods (congested highways, city parks, swimming pools, sports fields and other not privately owned goods where an individual’s benefits depend on the amount of personal consumption and the number of people with whom the facility is shared); contrary to what has been said above, congestion may cause some rivalry so that use must be regulated, for example by an entrance fee or other limitations of access.

(2) The use of pure public goods is strictly non-rivalrous and non-excludable and therefore meets all requirements of cost-qualified collective goods. Examples are the police, the military, public irrigation systems, public health services and other public services to an indiscriminate number of people defined by certain legal requirements. No limits by congestion upon an individual’s benefits exist, but there is a cost factor. The police, the public health service, the irrigation system need budgets. These budgets have to be collected either from the tax payer, or from those who benefit from the pure public good, for example the members of the mandatory health care system, or the farmers who benefit from the irrigation system. In the latter case, it is necessary to establish an organization of the beneficiaries. Membership in a public healthcare plan may be required, or in an irrigation cooperative. A subspecies of this kind of pure public goods are so-called “meritorious goods” such as mandatory vaccination, required first aid schooling, obligatory health checks, etc.; meritorious goods are prescribed for the user, without or against his or her will, by a well-meaning authority which provides for the cost.

A problem for all cost-qualified “public” goods, “club” and “pure”, is free-riding. There is a temptation to enjoy the collective good without paying a fair share of the cost. Therefore, the administration of public goods requires a control mechanism.\textsuperscript{280}

b. Cost-free collective goods can also be further subdivided. Their common features are no-cost participation, non-rivalry, non-excludability, and the need to be protected from overly use. Subcategories are the goods of the commons, and what may be designated as “free goods”.

(3) Goods belonging to the (cost-free) commons are exposed to the tragedy of the commons.\textsuperscript{281} Since all users have free access to the common village fish pond, one day it may be over-fished or empty. Similar “tragedies” are currently happening to high sea fishing (whales, tuna), not to speak of collateral killing of other species (dolphins along with tuna). Other examples are the gathering of flowers, berries, or mushrooms; the grazing lands of an Indian reservation, the cutting of the rain forest and other “timber harvesting”, hunting endangered species, etc. The goods of the commons are self-sustaining as long as there is no over-exploitation leading to any “tragedy”. But it takes regulated distribution to obtain sustainability.

(4) Finally, there are free goods which can be used free of cost. They are tragedy-, but externalities-exposed. The goods of the commons are subject to direct exploitation (hunting, fishing, gathering).

\textsuperscript{2} Cooter & Ulen (2003), at 101 ff. The German metaphor Trittbrettfahrer is taken from the streetcar: running board rider, freeloader.

Free goods may suffer not so much from direct utilization, but from indirect burdens such as pollution or other abuse. Examples are the outer space which may be polluted by missile trash, the high seas which are polluted by cleaning tanks or by refuse thrown overboard, and the air which produces acid rain from industrial smoke. More examples are beach combing, scenery, views, “borrowed landscape” (a Japanese expression for the view from a house over land which belongs to another), pristine landscape or seascape, the bottom of the sea, the look on sacred mountains (Hopis, Navajo), ground water, the traditional ensemble of a village or suburb, environmental characteristics, wetlands, freedom from jet skis, historical attachment, “roots”, recreational areas and sites, freshness and cleanness of air (e.g. in a mountain spa), climate, calm, material expressions of religious convictions, the internet, “fair use” and the “public domain” in intellectual property law (= gemeinfreie Güter), etc. Access to these free goods is open to everyone at no cost. Even intensive use does not lead to a “tragedy of the commons”, but pollution or other abuse may lead to externalization of cost that should be borne by the polluter, so that general deterioration can be expected from such abuses.

Thus, the term collective goods comprises club public goods, pure public goods, commons goods, and free goods. Joint ownership is not be included in the category of collective goods since it is a form of private property. Collective goods have in common that as a rule their use does not impede the use by others. There is no zero-sum game as is the case on an individual market by virtue of the rivalry among its participants. Production and distribution under competitive conditions are not worthwhile because mini-monopolies are technically not possible or culturally not acceptable. This applies to all kinds of collective goods. But their cost structure (always involving social cost = cost devoted to society = externalities) is different from category to category.

Speaking of cost, at closer sight and following from the above, there are two kinds of collective goods. There is one kind, comprising “club” and “pure” public goods, where the issues are (1) to provide them, (2) to make them accessible to the public in a non-discriminatory way, and (3) to make the users pay in a practical and fair way (taxes, contributions, entrance fees, etc). The other kind of collective goods is offered for free (the goods of the commons, and the free goods such as the public domain in copyright law). In a way, here the issues are reversed. The problem is not to make them available, but to protect them because they are available. The goods of the commons are to be protected against the “tragedy” of excessive and ultimately destructive use, and the free goods need protection against being overburdened with “externalities.”

Concerning public goods which often require very high investments and thus give rise to high fix cost, the marginal benefit for their producer can be so low that the incentive of the invisible hand

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2 On the role of climate see Robert D. Cooter, “Mongolia: Avoiding Tragedy in the World’s Largest Commons,” FS Margaret Gruter, Portola Valley, 1999: Gruter Institute for Law and Behavioral Research, 87 - 109; on this article of Cooter, see also Introduction, supra, note 19. A corroborating observation is the following: In many forests which could be economically used there is hidden a collective good: the climate. It is, as Cooter would say, part of the commons, or as I would say, a free good. When a lumber company buys a forest, such as the Northern Californian redwood stands, the argument for being permitted to clear cut the stand usually goes that not being permitted to do so would unjustifiably hurt the investors who financed the company. However, the investors did not invest in the change of climate and its consequences of soil deterioration connected with the “harvesting” of the lumber. Both the probable change of the climate and the soil deterioration are acquired by the investors inseparably along with the purchase of the trees. But these inseparably attached free goods have not been paid for, and since they are free goods, not assignable to private ownership, they cannot be bought. Nobody can buy climate. As long as the inseparability lasts, and to the extent of impaired climate and soil, the marketing of the lumber would mean that somebody sells things of which he is not the owner Nemo plus iuris transferre potest quam ipse habet. Again, this is antitrust through culture and economics. To let economic power pervade all corners of the world would mean the demise or decline of many environments. – The examples show that in the field of collective goods biological explanations are necessary and work particularly well.
evaporates. Technical possibilities and cultural traditions may play important roles, so that, e.g., miscalculated privatizations may lead to substantial losses. Providing a TV cable net, a railway or a national nature park may not be justified in view of the profit to be expected from viewers’ contributions, ticket sales and park entrance fees. Rivalry is not worthwhile. This is the point where market and non-market economy part. If the good is in demand, such as an effective police force, or a public park, the state has to provide it. Free riders must be discouraged. Graph 5 illustrates the cost structure of public goods.

Regarding the goods of the commons and free goods, the users do not pay, and this prevents incentives to produce or to distribute them. However, they are available anyway. Here, the state must prevent excessive use and deny property assignment to private ownership. There are no freeriders, because all can and may “ride.” No user has to carry a cost burden, as far as the taking from the pools of common and free goods is concerned. (of course, a computer is needed to make use of the internet, but using the internet is free). Being from somewhere is no cost factor. Living in a climate - maybe a harsh climate - does not amount to cost. Having roots, having religious feelings, enjoying fresh air, a calm environment or a “borrowed landscape”, considering oneself historically attached to a town - all this is no cost. To belong to an ethnic group and feeling at home in its culture does not amount to cost. Speaking one’s own language, or dialect, is no cost to be carried by the speaker. Still, these not-for-property-assigned values, all collective goods, demand respect. The model for these cost-insensitive collective goods looks different.

3. Market failures?

It follows that the goods of the commons and free goods are not market failures. Economically, they belong to non-markets. In this sense, one may speak of commons and free goods non-markets. Still, it is economy, economy at exchange values, non-planned economy, and no dirigisme. The contrast exists between individual markets and commons or free goods non-markets. The test for belonging to the non-markets is the absence of competitive rivalry. Thus, the concept of the subjective market helps to draw the line between market and non-market economies. Objective markets cannot draw the line because they are non-rival. Furthermore, this distinction is, as we have seen, culture-specific. This is because what should be assigned to private ownership varies from culture to culture.

In sum, the assignment of goods to markets or to collectivity is based on culture. For an economy that thinks in terms of subjective markets, culture does what in neoclassic economy is achieved by the Pareto optimum. One of the reasons for this is that cost and risk are culture-specific notions. Whether the same also applies to the other categories of regulated economy “against the market” cannot be discussed here. If one still prefers the term “market failures”, the result is that market failures depend on cultural specificities.

In the present context, the economics of social cost cannot be dealt with in more detail.283 Only their contribution to culture and economics matter here. The protection of free competition by antitrust rules, their interface with non-post-axial-age-subjective-market economic activities, and the law for

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the protection against unfair trade practices all concern market economies. However, as has been shown, not all economic activities unfold on markets. There are substantial non-market economies.

Some were mentioned in Part One in connection with the description of economic types and certain total economies (such as Marxist and post-Marxist economies) under the category of economic anthropology. Non-market economics are discussed in modern Western economics. The terminology varies. In 2003, a recently established research institution of the Max-Planck Society, the Arbeitsgruppe für Gemeinschaftsgüter (working group for the collective goods), became a Max-Planck Institute for Collective Goods. Other investigations in many countries are going on. The economics of collective goods seem to be adequately researched. It is to be hoped that one day there will be a generally accepted terminology and a matrix of generally accepted legal rules for their establishment and distribution.

Non-markets economics in the sector of collective goods follow rules different from those for markets in the individual sense. Objective markets and their rules, however, may be assumed also for collective goods. To call these aggregate of goods a "market" in the objective sense of the word means to give some statistical data, for example about the number of the fish, the tons of spoiled ground water or of the sales in the music business concerning music which is “free” under the copyright concepts of fair use and public domain. Hereby, nothing is said about strategic behavior in those "markets", strategy being the test for a market in the individual sense. For the economist and the lawyer, state and business behavior on regulated markets pose a number of delicate problems. Again, more than a general reference to pertinent literature cannot be made here.

4. Collective goods antitrust?

There is the need for an antitrust and fair distribution law in the realm of collective goods, too. It cannot be very different from antitrust and unfair competition law in the area of private property and individual market. Certain analogies may be drawn. This is all the more probable since collective goods economies follow the exchange value principle just as property & individual market economies, and cannot be denounced as planned economy of Marxist-socialist brand, as we have seen. Moreover, there are many areas – e.g. traffic institutions such as public toll roads, recreational institutions, health plan systems, etc. – where combinations of collective goods and market economies are more efficient than one-sided solutions. For example, most medicare systems contain collective-goods distributive as well as market elements, in order to accumulate the benefits of non-discriminatory access for paying members and the cost-minimizing outcome of competitive production and distribution of pharmaceuticals.

5. Collective goods and allocation theory

An even more precise outline of a theory of a collective goods economic theory can be deduced from anthropological sources. In Chapter 10 it was said that besides an undifferentiated notion of “market”, there are three other types of allocation: distribution, reciprocity, and redistribution. From there, different types of the “market” were developed and the “individual market” given special attention. Since collective goods are not allocated on a market, the question arises of how they might be allocated. Offer and demand cannot provide for the liberal steering mechanism of the social-cost (collective-goods) economy. It is obvious that, in need of an interpretation of the appropriate functioning of collective-goods economies, one may turn to the other types of allocation known from anthropology. This leads to three guiding principles for the working of collective-goods economies:

(1) simple distribution requires distributive and participatory justice, more precisely: just rules for equal and unequal distribution based on evaluated participatory foundation;
(2) **reciprocity** requires non-discriminatory equal treatment and evaluation as equal; and

(3) **redistribution** requires justice in assigning disadvantages and advantages, the results based on appropriate evaluations often being unequal.

From principles such as these, pure or mixed, and from further refined sub-elements, a social-cost economy (an economy of collective goods) could be developed.284

VI. Protection of belonging to a place (landscapes and city scapes). Homesteading vs. urban sprawl. Hopi-Navajo dispute

Do we *own* our origins, our roots? Many refugees claim a right to their home place (*Recht auf Heimat*), or the right to return there. After World War II, displaced person (“DP”) was a legal title, granted by UNRRA, the United Nations Refugees and Repatriation Agency. Is diaspora ill fate, or a wrong (*Unglück oder Unrecht*)? International law tries to cope with the issues involved in the tragic fate of being expelled or exiled, being a refugee, or a person otherwise deprived of the place where one feels to belong.29

Moreover, is there a right to preserve the land as it is, and to restore the land to the former state? National and state parks and national monuments are attempts at preserving the land as it was, or to restore it to former appearance and structure. Similar arguments could be made for the look of a city, or town, or parts of them. Zoning regulations and laws limiting the number of permitted architectural styles may have this effect (*Ensembleschutz*).30

Should the land – a collective good – be protected from the city – another collective good - ? In USA, the issue got the name urban sprawl. In Continental Europe, the green open country between settlements forms part of Europe’s face. Europa was settled in the stone age when it was necessary to flock together in densely populated villages and towns. To fence off enemies and wild animals, a *town* was surrounded by a *Zaun* (the same word meaning fence). People lived in a fenced-in area. The outside was a different world and in a sense taboo. The resulting green zones between the towns still receive legal protection as *Außenbezirke*. Being subject to *extensive* agriculture, in order to keep the green zones intact they need subsidies, compared to the *intensively* used city zones. This is effectuated by agricultural subsidies which balance extensive and intensive use of the soil. These subsidies are contested in WTO negotiations and other contexts.31

The situation is reversed in the US. There, national subsidies are paid to settle the open space

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30 See, for example, Theiss Publisher (ed.), *Altstädte unter Denkmalschutz, 50 Jahre Ensembleschutz in Deutschland, Internationale Tagung Meersburg 28.– 30. Oktober 2004, 2007: Theiss*

between the towns as densely as possible because the country is so large that the use of the land would be inefficient. Native Americans with their traditional experience in the extensive use of the land have been expelled or killed. As a result, reducing agricultural subsidies for USA means widening the country at a price to be paid at the cost of desired efficiency. Reducing agricultural subsidies for Continental Europe means narrowing the country at a price to be paid at the cost of desired inefficiency. It follows that agricultural subsidies mean different things in USA and Europe, and reducing them must lead to contrarious results.\(^{32}\) In the USA, the anti-sprawl movement signals a – however contested – turn.\(^{33}\) The old tenet of the pioneers and homesteaders that building, farming or mining entitles a person to own land seems to be very much ingrained, to the detriment of the country.

In the Hopi and Navajo areas in Arizona the rigid attitude of the Washington; C.D., administration has lead to counterproductive results. According to what we know from archeology, about thirty clans of the Hopi nation originally settled and dry-farmed on the then more fertile plains which surrounds the Hopi mesas. For reasons of defense against non-Hopi tribes the clans retired to the three mesas and to Moencopi. A typical mountain top defense town is Walpi on First Mesa.

As a consequence, the plains surrounding the mesas were depopulated, but Hopi tradition remains to visit the old borderlines of the formerly settled area. About 1,600 A.D., the Navajo, an Atabascan nation from the North, started settling, dispersedly, on Hopi lands. Conflicts between Hopi and Navajo resulted. The Washington. D.C., administration tries to mediate between the two nations, and there has been court litigation. Unfamiliar with (or disregarding) the histories of the two nations, the federal government ethnocentrically tells the Hopi that theirs are the mountain tops but not the arid and unsettled plains because they do not “live” there. However, in view of history and climate, that tribe merits to own the land most that leaves it as unsettled as possible. It is possible to own the view over land as intangible property.\(^{34}\)

In reacting to the unsuitable building-farming-mining argument of the administration, in the 1960ies the Hopi started building structures here and there in the desert around the mesas, usually half-finished houses, uninhabitated or rarely used. It is the American way of settling, but it is homesteading by pretense. The Hopi do not want to live there, but they want to refute the argument of the empty land. While by this practice pristine desert land is destroyed, the Hopi rather ruin their country than loose it. As a recent consequence, the highway leading through the Hopi reservation, in terms of beauty of landscape one of the most precious highways in the world, is in danger to be lined by a row of houses, shops, malls, and half-finished structures along the way, as if it were a road between New Haven and Providence, or New York and Newark, areas where disorganized and unplanned settling is traditional. In turn, Hopi “fake-homesteading” may have an impact on Navajo. The Navajo often in vain try to raise sheep on barren desert land. Therefore they were instructed to reduce sheep raising by ten percent. To mediate the Hopi-Navajo conflict, court decisions have ordered Navajo living on Hopi territory to transfer some of their houses to the Hopi. But Hopi “fake-homesteading” induces these Navajo to disobey the court orders because settling the desert is going on anyway.\(^{35}\)


\(^{34}\) W. Fikentscher (2004), 193.

VII. Intellectual cultural heritage property, traditional knowledge

Modern law distinguishes material (or tangible) and immaterial (or intangible) property such as patents, copyrights, trademarks, artists' rights, design rights, topographies, etc. The protection of cultural property has become an important field of law, particularly since cultural property merchandizing became a flourishing business. The intricate subject cannot be covered here in more detail for lack of space (some details in Chapter 13 III.2; below, and in W. Fikentscher & Th. Ramsauer, Traditionswissen – Tummelplatz immaterialgüterrechtlicher Prinzipien (2001).

A prominent case is the imitation of the Hopi snake dance by white esoterics, another the collection and marketing of tribal melodies and rhythms. The state symbol of New Mexico is a stylized sun design from Zia Pueblo. Should the State of New Mexico pay royalties to Zia Pueblo? To whom do tribal stories, patterns, dances, music, folklore belong? When arguing against royalties, is it enough to say that there are no individual authors? Where are the boundaries between protected cultural property and the „public domain”?

Property is a result of allocation. Allocation can result in tangible (chattels, land) or intangible property. Intangible property is also called intellectual property. It encompasses the results of inventive or creative activity, trademarks, sercive marks and trade names, indications of sources and appellations of origin, know-how and other products of the human mind. To this end, the law has to single out the aforementioned products of the human mind from the bulk of intellectual products which are generally accessible for everyone, declare them worthy of protection and protect them by granting legally defined positions to persons (property rights). This can be performed by assigning individual rights to certain persons, or by recognizing claims of those persons against other persons under the law of unfair trade practices (so-called complementary protection by competition law). There is an elaborate system of national, regional (EU, Mercosur, etc.) and international (Paris Convention 1883, Berne Convention 1886, WTO/TRIPS 1994) regulations of this field of law.

Beginning with the New International Economic Order program of the United Nations of 1974ff., the system contained in these legal sources has come under critique from developing nations and tribes. Traditional stories, songs, music, rhythms, dances, pictures patterns etc. have been appropriated by commercial agents without permission and compensation. It appeared that for these products of the human mind additional protection was needed. From the many issues raised by this critique, the question what exactly has to be protected, and whose interests have to be protected by legal claims (injunctive relief, damages, etc.) are only two. A large number of international, regional, national and private proposals habe been made, but effective protection could up to now has not yet been achieved. The protection needed involves at least four kinds of claims: injunctive

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36 See graph in Chapter 10 II. 14.

38 For sake of convenience, the above text uses the term “traditional knowledge” as an object of protection, in a wide sense in order to include genetic resources and folklore. The terminology in this area is not yet settled.

39 See the list of documents cited in Fikentscher & Ramsauer (preceeding note, at 41), and in Chapter 15, below.
relief against intrusion into secret traditional knowledge; damages, license royalties, unjust enrichment and disgorgement of profits for illegal commercial use, general complementing protection against unfair competition, and “paid fair use” (= paying public domain, non-injunction torts, possible compulsory licensing). Compensation for past exploitation may require international agreements, or may be a matter of national statutes of limitation (Verjährung, Verwirkung).

Arguably, three ways of tackling these issues can be conceived: (1) expanding and adapting the existing system of national, regional and international legal protection, (2) creating a new intellectual property right sui generis covering traditional knowledge, and (3) a local-law-and-local-court approach leaving the initiative to the local plaintiffs under their law and court system, combined with the established international, regional and national law of recognition of foreign judgments. The latter approach has been introduced and argued elsewhere.

For particularly valuable structures, views, natural treasures and cultural achievements, UNESCO has introduced a program of protection under administrative law, the program “Heritage of Mankind.”

VIII. Bibliography


Comment, Tax Consequences of Transfers of Bodily Parts. 73 Columbia Law Review 842 (1973).


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40 For this, see Fikentscher & Ramsauer (note 923, above), at 37 note 22.

41 ***For the first approach see, e.g., most contributions to Lewinski, Silke von (ed.), Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore, 2nd ed., Boston etc 2008: Wolters Kluwer; for the second, e.g., Ramsauer (2005); for the third, W. Fikentscher, GRUR Int 2008, 626 – 628 (review of Lewinski), idem in*** FS G. Schricker (note 923, above), and in FS Mestmäcker (1996), 576, see also in this book text before note 858 and in Chapter 13 VI. The local-law-and-local-court approach has the advantage that established principles of conflicts of law can be used, and that this approach works also in the neighboring field of antitrust law.

42 UNESCO Heritage of Mankind, see http://whc.unesco/en/conventiontext/; see also Chapter 15, below.


