Chapter 17: Illustrations

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Law and Anthropology: Outlines, Issues, and Suggestions
Abbreviated Online Version, Updated (§ 52a UrhG – “Studienausgabe”)

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### Table: Religion in Ancient Greece

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### Notes:

- Whether monotheism can be categorized under religious types has not yet been solved.
- Monotheism is surely one of the principal forms of religious types, and this has as a result been a source of debate.
- Even monotheism has been dealt with in the book "Northen Religion and the Roman Empire," and this is why this book is the only book dealing with the subject.
- Monotheism, as defined by M. L. H. R. in the book "Northen Religion and the Roman Empire," is a form of religious belief in which one God is worshipped.
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### Basic Concepts

- **Monotheism**
  - Defined as a belief in one God.
  - Found in various cultures and religious traditions.

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### Notes

- The translation by Minna Lichtman in Barlow's "Philosophy of Religion" has not been solved.
- Even monotheism has been dealt with in the book "Northen Religion and the Roman Empire," and this is why this book is the only book dealing with the subject.
- Monotheism, as defined by M. L. H. R. in the book "Northen Religion and the Roman Empire," is a form of religious belief in which one God is worshipped.
"should", or a Paiwan aboriginal from Southern Taiwan that "it never occurs that the rule to respect one's neighbor's right in the fruits of a planted tree is not obeyed, you simply don't do this", or the ethnologists find that in many tribes it is "brave" to challenge the spirits' demands, there may be quite different kinds of norms and prescripts in use than "Westerners" are used to. Hence, the list of culturally distinguishable norms is open-ended. Other cultures may have other types of "ought". Here follows a Western inventory.

I. Norms of Law

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

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

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226 Unlike other social sciences, anthropology does not distinguish between customs, morals, and ethics, but uses these terms interchangeably. In the social sciences, there is no established terminology of these nonlegal and at the same time non-religious norms. In divinity, some writers identify ethics with prescriptive, postulatory normativity, and morals with a more descriptive attitude towards good behavior. In law, good mores serve as extra-legal standards of desired behavior whereas customs signify what is usual and generally accepted. Another distinction in law is custom as non-legal prescript to which law refers as valid standard of behavior (custom as fact referred to by law) and custom "raised" to valid law (= customary law). See Cooter and Frenkenscher (1998), at 329; Edward Coke established that reasonableness of a custom is a question of law, for the court, and not a question of fact, for a jury, Rowes v. Mason, 2 Brown 192, 123 E. R. at 892 (1611), a discussion by David L. Calles: Custom and Public Trust: Background Principles of State Property Law, 39 The Environmental Law Reporter 10003-10021, at 10009. But this does not imply that custom as such is of legal, and not of factual nature.

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

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

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

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

Malinowski held that customs usually are self-evident and therefore strictly followed by the people as a matter of course, but that law quite often is subjected to doubt and dispute, and therefore requires for a decision. Unlike law, custom for Malinowski means a psychological must, a ... social machinery of binding force” (p. 55). By contrast, law has to be ascertained.
The chief differences between cultural time concepts lie in the time-reflecting person’s aspective of perspective view on time. The dichotomy of aspective and perspective concepts of time is taken from comparative studies of space. In all pre-axial-age cultures, and some post-axial age ones, orientation in space is of an aspective nature (Emma Brunner-Traut, who wrote the seminal publications in this field). In aspective presentation, there is no outside vantage point, neither the “true” perspective that depicts objects in a logical-systematic ways (using a vanishing point and, in case of a sculpture, a center of gravity), nor the “parallel” perspective that permits pictorial story-telling (such as in Chinese and Japanese art). In aspective presentation, the important aspects of an object are depicted “disproportionately” large, the unimportant aspects are small. As in most early medieval altar canvasses, kings, princess, and sponsors are modeled tall, their wives somehow smaller, and the servants tiny. The psychologist William Hudson presented the following pictures of an elephant to Bantu people in his home land South Africa, and later to many other African ethnic groups:

gree, Noam Chomsky’s “universal grammar”. – In a conversation of 1999, I asked a Hopi law professor and friend, Patricia Sekaquaptewa, who is right, Sapir and Whorf, or Malotki. Here is the answer: The question, whether the Hopi language has a future tense and future things can thus be expressed or not, is wrong in itself. The Hopi language designates reality not as static data or givens, but describes everything as being in flux and development, in a continuum that moves on, sometimes faster, sometimes slower. This includes, of course, the consciousness of future, presence, and past. But these stages in time are not being addressed in separate grammatical forms.

264 Brunner-Traut 1990; f, Hallowell 1955: 184ff; 205ff; horse statues (Laibungstiere) from Assur show five legs instead of four because they could be viewed from the front and from the side, Barthel Hrouda 2003: 7, 27.
When the drawing on the right was shown (or another “perspectively correct” drawing showing the elephant from a side angle, or from the front) the Bantu observer could not decipher it. The other drawing on the left, however, was recognized as an elephant at once.265 Point-of-gravity centered sculptures are a discovery of the (acial-age) Greek polis culture. Similarly, Greek pottery since 500 B.C. begins to show “true” perspective. The point of gravity is the inner vanishing point. The concept of the polis as a political unit that is more than the sum of its parts (namely, its members) is accompanied in the fine arts by the use of the vanishing point and the point of gravity, and in the sciences by the use of the concept of system. It follows that aspective art is not limited to animism. It is a general feature of all pre-axial age and some post-axial age cultures.

Aspectivity refers a unilinear bipolar look of an observing person (= the one pole) upon an object (= the other pole) without comparative looks to the right or left or other directions. Thus, aspective is an alternative to perspective. Perspective means a plurilinear comparing look that places the regarded object in a critical context to its surroundings, and hereby makes the object meaningful. A second characteristic of aspective is its tendency, to give the depicted object meaning, to attribute to the object properties that are important to the observer. By contrast, perspective is a circumspect look of an observing person upon an object from a tripolar vantage point, relating the object to its environment and thereby describing the object’s characteristics and relationships in their importance to the environment. The observing person is the one point, the object the second, and at least one point related to the object the third point. In perspective, this third point may be the vanishing point at the horizon, or the point of gravity within a statue.

This leads back to the dichotomy between aspective and perspective orientation in time. In animist, Old Egypt, cyclical (Hindu, Buddhist), gnostic-eschatological, naïve-antiquarian, ad-

265 Delggen 1978: 31, quoting New Scientist, 1972; on the boundaries and direction awareness of the Pueblo Indian, see Alfonso Ortiz 1972: 142f.; on problems Indians have with fences, Linderman: 17–21. I may also refer to the examples and the corresponding texts with references in Fikentscher 1977a: 64f., and idem 1995/2004, 254, showing a table in aspective, “true” perspective, and East Asian “parallel” perspective form. When German colonial officers before World War I tried to use Herero scouts in what is now Namibia, the scouts had difficulties “reading” a map of an area in which they were able to find their way comparably much better than the Germans. Correspondingly, sculptures in animist societies do not feature a point of gravity. On pre-axial-age spatial categories that pose problems similar to time categories, Bernhard Grossfeld & Hoeltzebein, Poetic Legal Dreams, 55 AJCL 47–66 (2007).
fontes antiquarian, and eclectic-antiquarian cultures, there is hardly ever a concept of "time as a straight line", *i.e.*, a time concept that enables "correct" historical perspective and, *e.g.*, a thoroughgoing counting of years. To illustrate, the Bavarian farmer who invoking the "good old time" says: "We ought to do it exactly as our forefathers did", renders an aspective judgment: His historical sense is limited to himself and forefathers' time in in bipolar manner. The lawyer who says: "The German Civil Code of January 1, 1900, attempted to represent the Roman law as it had developed until December 31, 1899, but today German judges apply the Code as needed it in the 21st century and they will continue to develop it", thinks in terms of past, presence, and future, and hereby takes a perspective position outside of the flow of time.

Proceeding from left to right in the graph that shows the cultural understandings of time, above, the various time concepts can briefly and summarily be characterized as follows (as "middle types", omitting many details):

(1) "No-time cultures" probably do not exist, and "deficient understandings of time" involves an ethnocratic position that is no longer acceptable. However, there are occasional remarks about early cultures which allegedly lack any conception of time and history. Pirsis' remark about missing time in Hopi language have just been mentioned. The Acheguachahi of Paraguay seem to have no future tense. The Pirahã of Brazil (south of Manaus) do not express the past tense. Some tribes think the past to be safe ahead of mankind because it has already occurred, but the future to be non-existent because of its uncertainty, etc.

(2) Another cultural concept of time is history understood as (the normative guideline of) presence. The past is being drawn into the presence to give guidance there. Helmut Brunner (1989) and Emma Brunner-Traut (1963; 1990) describe this history as still existing presence and as a key to deciphering Old-Egyptian world view. The past is still present, and it controls presence. In idealized reality, no past is believed to have existed. Therefore, whenever possible, the past is nummified. Helmut Brunner used the phrase: "The Ancient Egyptians stood with their back towards the future". There was no flow of time, no acceptable development. The Bavarian farmer's "good old time" belongs here. Islam, to the degree that it denies the

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266 Evans-Pritchard 1939; C. Geertz 1975b: 391 (Bali); Hallowell 1955: 216 ff.; Dosier 1977 (Hopil) and, in dramaturgy, the Aristotelian-Shakespearean plot – here Tony Hillerman and Umberto Eco etc). Alfonso Ortiz' remark (1972: 143) that the Pueblos are "historical", and von Bothmer's observation in Nigeria that "time plays no role" (in W. Hillebrandt: 143) should be read to this effect. Pueblo Indians have a different concept of time: "past as the better presence" combined with cyclicity (W. Fikentscher 1995/2004, ch. 6 V 1 b; Kurath: 23, 49). Ancient Egypt's animistic-polytheistic culture developed time concepts that cannot be discussed here in detail (cf., Manfred Görg, Zeit als Geburt aus Chaos und Raum, in: Kurt Weis (ed.), Was ist Zeit? Vol. 2, Munich 1966: Fakturn/TU Munich, 89–116; W. Fikentscher 1977a: 59, id. 1973a: 269, 276; id. 1995/2004 ch. 6 V 1; Jan Assmann 1975, and Assmann's other works listed, *e.g.*, in Assmann 1991, 115 ff). Starting from his studies on Old Egypt, Jan Assmann, Aleida Assmann, Tonio Hölscher, Wiehl, and others wrote a number of publications on culture and history (*e.g.*, J. Assmann, J. & T. Hölscher (eds.) 1988). These works, along with Jack Goody's studies on the influence of writing on culture, generalize the relations between culture, time, and literacy in a way that does not even distingish between the various modes of thought. For example, the important role of "creation stories" of animist tribes play for comparative study of cultures and time concepts should be given closer attention in this context. There is much ethnocentric (Western) understanding of the concept of time in these writings. – Biological investigations may have contributed to this. On brain aspects of time perception, *e.g.*, Ernst Pöppel, Wie kam die Zeit ins Hirn? In: Kurt Weis (ed.), op. cit., Vol. 1 (1995), 127–152; Eva Ruhnau, What is Missing? – The Fundamental Role of Time in C. F von Weizsäcker's Conception of Physics and Some Insights from Modern Neuroscience, in Lutz Castell & Otfrid Ichlebeck (eds.), Time Quantum, and Information, Berlin 2003: Springer, 203.

267 Communication Anne van Aaken (2006).

268 See note 276, above.

and border situations, much less than cultural mixes (see below IX.), may generate reactive behavior.

h) Sources, causes, personal involvement, and result-orientation of the process of acculturation can be combined. A given source or cause does not necessarily lead to a corresponding result. However, invention and the free borrowing process are mutually exclusive because one cannot at the same time invent something and take it over from another.

A graph of acculturation in the broad sense, as well in the old narrow sense, including more recent developments, shows:

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**VII. Culture change**

Up to this point in this chapter, culture and cultures were rather discussed as static entities even when seen as entities involved in a steady process of internal growth and development: definitions, categorizations, and dependencies from and connections with historical and thought-modal developments including time perceptions were the points of attention. The rest of this chapter (VII.-XII.) deals with culture and cultures in more or less rapid motion, often caused by external influences.
Correlational analysis correctly assumes that normative applications of componential analysis require more than one "run" through the five-step process because normativity opposes the categories of "is" and "ought". Normativity works with rules (legal, moral, religious) that must be implemented by confronting them with sets of facts. Thus, the application of a rule to a set of facts, in every system of law (or morals or religion),\(^{507}\) can be symbolized by the following graph:

\[ \text{the norm} \]

- **requirements**
  - (for correlational analysis: the correlational concepts)
  - (subsumption)

- **the facts of the case**
  - (for correlational analysis: the results of componential analysis)

- **sanction in the abstract**
  - (for correlational analysis: the correlative quality of the ought)
  - (desumption)

- **sanction in concreto**
  - (for correlational analysis: the reflection on reality)

2. Examples

The set of facts in a given culture can be analyzed by componential analysis: for example, let us examine a verbal ("handshake") agreement under the law of contracts of San Juan Pueblo, New Mexico. To analyze San Juan Pueblo contract law, componential analysis is not enough. In addition, one must ascertain the applicable norm. The norm says: verbal agreements are valid without consideration.\(^{508}\) To express this in a reasoned way, the requirements of this norm (offer, acceptance, contents, no consideration) must be stated in terms of a second "run" through the componential analysis because the manner in which San Juan legal culture correlates facts and requirements may be different (and is indeed different) from Anglo-American norm implementation. The Paiwan, one of the ten surviving aboriginal tribes on Taiwan (Republic of China), follow this rule of acquisition of crops: if a mango tree has been planted and taken care of by somebody the fruit that falls from the tree belongs to the owner of the tree even if it falls upon the neighbor's piece of land. If the tree was, however, a nagiduzunugashji, a wild growing tree, everyone may pick up the fallen mango fruits regardless where they fall. For the purpose of deciding this issue of crop acquisition, nagiduzunugashji is a correlative concept.

The mode in which a culture correlates requirements and sanction in *abstracto* may be culture-specific, too. Therefore, a third "run" of componential analysis, this time for the abstract sanctions, is necessary. In particular, the kind of "ought" may be culture-specific. Thus, in Chinese tradition, "must" and "should" are much closer related concepts than in Western usage (if not identical).

In Chinese, "must" and "ought" is *ingae*. Similarly, when a Paiwan finds a precious object in the open, such as a piece of slate, he or she may acquire property of it by putting a twig on

\(^{507}\) W. Fikentscher 1976: 774 ff.
\(^{508}\) Cooter & Fikentscher (1998), 548.
the road that points to the object. It need not be taken home right away. I asked what would happen if somebody disregards this rule and takes the piece. The answer was that this would not happen "because it is a matter of trust". A breach of the law in this situation is simply not envisaged. These qualifications of the "ought" have to be taken into consideration in correlational analysis by the third "run" of componential analysis that connects the correlational concepts and the correlative quality of the ought.

There are cultural differences in the understanding of a legal "must". When pedestrians lights show red, a German would not cross the street even late at night when there is no traffic and nobody watches, because he is educated to the understand that the law that provides "don't cross at red" has been decided in a parliament or council which is part of the Frankish democracy: the political unit is made up of "us citizens", and the citizens have rights and duties among each other, as well as between them and the elected "king" (or organ) of the unit, so that the citizen stands in a reciprocal relationship to the organ: "I owe you, and you owe me". In US, a no-parking sign does not necessarily represent a strict interdiction to park, but an admonition not to park here to avoid getting a ticket, because the Normannic version of Frankish democracy knows rights and duties among the citizens, but in the relationship between the citizens and the organ—in spite of existing duties of the citizens owed to the unit—in general no duties of the unit to the citizens: "the king can do no wrong". Thus, there is no reciprocal feeling to be able to wrong the other side. This leads to a lesser strictness of obedience on the side of the unilaterally bound partner. Therefore, quite logically, in front of the United Nations Building in New York City, additional traffic signs say, next to the usual no-parking signs: "Don't even think about parking here". Correlational analysis will mark a differentiation in the qualification of a "must".

An other example is recent Japanese adjudication. A general feeling in the theory and practice of Japanese law is that the two Westernizations of Japanese law (1868ff. - Meiji Revolution, and 1945ff. - US occupation) should no longer stand in the way of a search for a genuine Japanese mode of adjudication. A typical Japanese way of deciding a civil case is not to feel slavishly bound to what the parties claim and deny. The judge should be able to propose to the parties a decision that intends helping both sides to find a viable solution to what they want to have but cannot get. Therefore, this adjudicatory proposition can be situated outside of the parties' motions. In German law, in principle it would not be permissible to let the decision remain outside of the Streitgegenstand, or to go beyond the contested subject matter. This new or not so new Japanese method is called otoshi dokoro. In Japanese characters: (see next page). Its literal meaning is that the decision may be dropped from above to fall down on the case. In term of correlational analysis, otoshi dokoro is a culture-specific manner of connecting the requirements of a legal rule with the abstract sanction an outside-of-the-Streitgegenstand connection. This connection means that otoshi dokoro moves away from the Continental European and common law rule ne eat index ultra petitum partium (the judge shall not go beyond the claims and motions of the parties).

The foregoing is nothing yet but a restatement of Pospíšil's reasoning of correlational analysis presented in slightly different words. The entitled subject makes up part of the requirements, and the object of the right adds the sanction to the requirements: the piece of meat "must" be shared with the elderly member; a Paiwan "must" obey the rules of property acquisition, etc.

509 More on kinds of democracy in Chapter 9.
510 I thank Kai Fikentscher for sharing these observations with me.
511 I wish to thank Kiminori Eguchi for drawing my attention to otoshi dokoro and writing it in Japanese letters: 落としどろ

On otoshi dokoro as an element of procedure see also Chapter 13 I. (near the end).
2. Theories of evolution and behavior

a. Almost all known cultures have creation stories such as Genesis 1 and 2. Illiterate cultures have elders, female and male seniors, who tell the younger generation how the world came into being, how light and darkness became separated, who first man and first woman were, and how plants and animals entered the world. Often the creation of the world went through stages, either on a path from dark, cold and evil periods gradually to the light and less evil world of today, or – in reverse – from a bright, golden and peaceful time to the modern world of iron, blood, and tears. Animism, addressed to tribes and nations, enlivens these stories and lets sun and moon speak, and animals be punished for their misbehavior.

The creation story Westerners grow up with comes from a literate culture and it is found in the first two chapters of the first book of the Bible. It also has phases, seven days, and it links monotheism and theodicee, decides in favor of the good God and provides an explanation where the evil of the world comes from. These moral teachings are post-axial age and

527 See, e.g., Mircea Eliade, Images and Symbols: Studies in Religious Symbols, Princeton 1951: Princeton Univ. Press (orig. Paris 1931); many Southwestern tribes of Northamerican Indians divide bygone times into four sections, or “worlds”, usually in the sense that things get better or at least more understandable in the next world. See the Navajo sandpainting “Creation Story” by Foster ©, about 1990:

On a summer evening on the White Mountain Apache Reservation our host suggested that “let’s have some story telling tonight” Quietly preparing for the event, I was trying to think of stories of interest for our Apache friends and recalled a Mallorquin fairy-tale I happened to like and – knowing that the Apache value the flute and their magic enticement – the German story of the Pied Piper of Hamelin, the trickster who ends up stealing the town’s children. To my disappointment, my memorizing was of no avail since the stories to be told turned out to be Apache creation stories only. Stories of Apache creation must have been all known to the listeners. The have been told since time immemorial. Obviously, re-telling these creation stories again and again (as if they were new) was an act of self-reassurance and identity-confirmation. I kept silent, pretending to know no creation story, assuming that the story of Adam and Eve was familiar to all present, from the Lutheran mission nearby, and that the gist of this story would earn me a humorous smile but make no deep impression otherwise.
Together, several descendancy and procreation families form the extended family or kindred, die *Verwandtschaft*, the *mishpake*.

3. Procreation community

Typically, a person begins to exist by procreation through mother and father. The parents will give her child immediate assistance to enter life, by feeding, clothing, sheltering, etc. A nuclear procreation unit can be seen in the following Graph.

Procreation generates a very strong force of belonging and care. This can be demonstrated by legal rules governing the establishment of an artificial nuclear family: In most legal systems, modern adoption laws, inside and outside of “patch-work families”, involve an elaborate procedure including visits, reports, and well-reasoned decisions by public counsellors, psychologists, legal advocates and judges. Even after a lengthy and careful screening process, it is not sure whether an adoption will be granted. Compared with cumbersome and double-checked adoption, the recognition of a child as legal descendent of a natural mother or father – leading to the same legal status as adoption – almost goes as a matter of course. Procreation establishes a factual presumption of good parenthood. The difference from adoption is striking.

4. Descendancy (or: tradition, or orientation) communities

The counter-piece to a procreation community is a descendancy (or tradition, or orientation) community. In the first line, their purpose is not to give a person immediate help such as food or rearing. Rather, descendancy communities explain who descends from whom and what follows from such tracing one’s ancestry. One of the consequences of descendancy may also be the granting of personal or economic assistance (“nepotism”), but assistance will often have to be claimed. Descendancy communities can always point to a common tradition. Therefore, they are also called tradition communities (Norbert Bischof: *Traditionsgemeinschaften*).

A picture in which procreation and descendancy community may be illustrated in the following graph. Combined they show a kindred:

![Kindred Diagram](image)

When the lines of descendancy run vertically, indicating who descends from whom, one can speak of a “linear” descendancy group. Linear descendancies (“lineages”, also called “sibs”) are, in anthropology, either “agnatic” (= “patrilineal”) or “uternine” (= “matrilineal”). Agnatic (or patrilineal) descendancy exists between a father and his children, grandchildren, etc. Uterine (or matrilineal) descendancy links a mother and her children, grandchildren, etc. (Bohanan 1992, 94f.)

The anthropological use of the terms “agnate” or “agnatic” should not be confused with the agnate form of relationship in Roman law where these terms originate. In Roman law, agnation means to belong to that group of persons which is under the patria potestas of its
Kinship patterns, and other anthropological aspects of family and gender Law

holder, the male family head. These are indeed the persons connected to him by the patrilineage. In Roman law, the opposite concept is cognation, whereby a cognate relationship refers to a vertical or horizontal blood relationship, e.g., between father and his children or between brothers, sisters, or brothers and sisters. Therefore, all agnates are cognates, but not all cognates are agnates. In anthropology, cognation may be used for “blood related kin”, but the term is of no great importance.

The agnatic relationship in anthropology, that is, the patrilineage, is a core concept in the identification of a lineage (see illustration below). In legal history, the patrilineage is important for succession of offices and inheritance. In Old German law, the agnates form the “feste Sippe” (steadfast sib). For anthropological usage, matrilineages are an alternative to patrilineages. A Roman law term is missing. Therefore, the term “uterine” has come into use for the identification of a matrilineage. In this book, patrilineage and matrilineage will be used more often than “agnatic” and “uterine” relationship. Both lineages are of central importance for the anthropological understanding of kinship, and for many other anthropological findings and teachings.

When kinship terminology includes statements of descendancy that include a connection by marriage, “kin” or “kindred” may be used, implying that blood relationship and marriage ties may be fused. In German legal history, there is talk of “wechselnde Sippe” (changing sib), in contrast to feste Sippe (= steadfast sib). Modern terminology speaks of “marriage-related kin,” (Schwägerschaft).

Because of their all-pervading importance for anthropology, two kinds of descendancy (or tradition) communities merit closer attention: lineages (5.) and clans (6.). Clan can best be understood by first defining lineage.

5. Lineage

A lineage (German: Linie, often also lineage with English pronunciation, sometimes liniage with French pronunciation; French spelling however: lignage) is a relationship based on descendancy that in the minds of the members of that lineage is traceable to an identifiable human progenitor or progenitrix, for example a greatgreatgrandmother. This is called “demonstrated descent”, and the progenitor or the progenitrix are “demonstrated apical ancestors” (apex = Latin for top). When visiting a tribe and starting a conversation with a tribal member, frequently she or he says: “We are matrilineal, you should know”, or: “We are patrilineal and have been since time immemorial”. Everyone in the tribe, literate or illiterate, knows the tribe’s linearity type. Making it explicit is part of introducing oneself because family relationships make persons identifiable. In many tribes it is good custom to talk a while about relatives before the older conversation partner turns to the intended subject matter of the exchange. A branched-off lineage is sometimes called a ramage.

A lineage may be sketched as follows:

```
  O  O
/  /  /
O  O  O
  O  O
      
Lineage
```
A matrilineage may look like:

\[
\begin{array}{c}
\bigcirc = \triangle \\
\bigcirc = \triangle \\
\bigcirc = \bigcirc \\
\bigcirc = \bigcirc \\
\bigcirc = \bigcirc \\
\bigcirc = \bigcirc \\
\end{array}
\]

And a patrilineage appears below:

\[
\begin{array}{c}
\bigcirc = \triangle \\
\bigcirc = \triangle \\
\bigcirc = \bigcirc \\
\bigcirc = \bigcirc \\
\bigcirc = \bigcirc \\
\bigcirc = \bigcirc \\
\end{array}
\]

Hunters, gatherers and fishers are predominantly patrilineal (because the main foodstock is contributed by the hunting men), horticulturalists and early farmers tend to be matrilineal (because the soil, "mother earth", is often deemed to be female, and earth and fertility spirits, demons, gods, saints are mostly female). After the urban revolution, many matrilineal societies turned to patrilinearity. Today matrilineal cultures form a minority, albeit sizeable, among all existing cultures. Examples are the Navajo nation in New Mexico and Arizona (about 240,000 members), several Pueblo Nations in New Mexico, e.g. Taos Pueblo, Zuni Pueblo, the Hopi Nation in Arizona (>100,000 members), and many nations north of Angola along the West African Atlantic coast.

Patri- or matrilinearity is the decisive factor for many family matters. The most important are tribal membership and its corollaries such as leasing rights for housing and agriculture, the right to be initiated to tribal ceremonies (and other attributes of tribal standing), personal and family names, the right to claim divorce or separation, custody for children, marital property, and inheritance. When a man from matrilineal Taos Pueblo marries a girl from patrilineal Santa Clara Pueblo and lives with her in Santa Clara, some fifty miles away, "he is in bad shape" because in neither place he is of influential status (fieldnote, communication by tribal member) Paul Bohannan (1952, 86–100) provides a rather complete picture of kinship terms and their practical meaning for behavior and activities (loc. cit. 90f.). "Kinship terms are language tags for referring to and addressing kinfolk. Each tag lumps some kinfolk together and sepa-

\[606\] For V. Gordon Childe's two revolutions, and their use in this book, see Chapter 5 II. 2. above.
the only one existing. But statistically, in relation to the number of cultures in history and presence, the Eskimo type of family is an exception.

Why do hunters, gatherers, and early fishing societies and modern industrialized societies use the small, nuclear family as their standard? Firstly, the hunting of individual prey, gathering and fishing can be achieved by a small group such as the nuclear family, and the modern industrialized society also gets along best through these small units because of a high degree of division of labor. Secondly, there is no need for large collective efforts such as slash-and-burn farming, irrigation, net-hunting, or nomadism. Thirdly, there is an almost even mortality rate of men and women, so that no significant inequilibrium of males and females necessitates forms of collectivity, nor exists significant warfare to enslave needed males of females. Fourthly, there is no preference of certain categories of marriage partners such as, in other family systems, between cross-cousins. These four reasons explain why the Eskimo system is the best-fitting form of family for both northern foragers and modern industrialized societies. A sketch of the Eskimo system looks as follows. (The circles are the females, the triangles the males; the black symbols designate the "ego(s)"):

2. The Sudanese System

The Sudan system is not dissimilar to an Eskimo system. However, it avoids mergers, prefers bifurcations, and its family type may numerically include more people than a nuclear Eskimo type family. The Sudanese system is found in Near East and Northern Africa. Books on legal anthropology often do not mention the Sudanese System, only the other five systems. Norbert Roulard (1992, at 193) indicates that because of its high degree of bifurcations the Sudanese system has different designations for cross- and parallel cousins, and in addition distinguishes between matrilateral cross-cousins (Mo Br Da/So) and patrilateral cross-cousins (Fa Si Da/So). Thus it is understandable that Roulard’s order of presentation is Eskimo, Hawaii, Iroquois, Crow, Omaha, and Sudanese, because at first sight the Sudanese system looks like a Crow or Omaha system further developed. However, when the Sudanese system distinguishes between cross- and parallel cousins it does not so for reasons of overcoming incest avoidance by peace-seeking (see below VI.). This may indirectly be concluded from the Old Testament that does not refer to a conflict between peace-seeking and incest avoidance in the early Near Eastern societies it mentions, and is indiscriminately (mildly) opposed to incest (cf. Genesis 28.6–9: Esau marries Malahath, his parallel cousin; Genesis 38: Judah and Tamar; Leviticus 18. 6–18; 20. 11; Deuteronomy 23. 1; 2 Samuel 13: Amnon and Tamar). More sources still have to be studied Therefore as of now, in the Sudanese system the reason for cross- and parallel cousin distinction is not pacification but fragmented designation through far-going
bifurcation. As a result, one may assume that the Sudanese system is closer to the Eskimo system than to a system of the Hawaii-, Iroquois, Crow-, and Omaha group. A sketch of the Sudanese system follows:

3. The Hawaiian System

The Hawaiian system can be found in societies that practice slash-and-burn, among horticulturalists, early farmers, and in other societies that require collective efforts such as irrigation or cattle herding for their livelihood. Large families are needed to produce the daily supply. The Hawaiian system is also a solution to the need for a child of having several fathers and mothers because warfare or diseases take a high toll among the parent generation. In Hawaiian type society, children of several mothers grow up together.

The Hawaiian system is called generational because it neatly separates the generations, of the grandparents, the parents, and the children. Each ego child says "mother" to all the females within the next higher generation, and "brother" and "sister" to each child within its own generation. In the highest "cloud", all females are called "grandmother", and all males "grandfather".

4. The Iroquois System

The following remarks are to prepare the understanding of the third type of family, the Iroquois system. It is, as are the remaining family patterns (the Crow, Omaha, and Sudan, discussed below), a "Hawaii plus" system. Something is added to the Hawaii system, and this
"something" leads to a new identification. This means that there are really only two radically different family types: Eskimo – the small family –, and Hawaii – the large generational family. Iroquois, Crow, Omaha, and Sudan can be developed from Hawaii by adding certain elements.

Also, the following remarks are to introduce two opposite concepts of family designations that are in use to identify characteristics of family systems as well as other ethnographic findings. The opposite concepts are "bifurcation" and "merger". They could be discussed in an abstract introduction to basic ethnological conceptuality. But it is easier for introductory understanding to put them in place in the derivation of the Iroquois system from the Hawaii system:

Arbitrarily, and as a theory, somebody could take the Hawaii system and, instead of calling both grandfathers equally "grandfather", and both grandmothers equally "grandmother", give the grandparents on mother's side, and the grandparents on father's side, different names. Or, somebody would prefer, independently from any system, the idea of calling father's brothers with names different from mother's brothers, instead of calling them all "uncles". The Swiss, for example, do this for aunts: Father's sister is Tante, mother's sister is Muhme. Or any cousins may be distinguished in a similar manner: cousins born from same-sex siblings, of father or mother, are called "parallel cousins", whereas cousins born from different-sex siblings, of father or mother, are dubbed "cross cousins".

Such differentiations, as described in the preceding lines, are called bifurcations (furca = Latin for fork). The opposite concept is merger. To distinguish parallel and cross cousins means to apply a bifurcation. In modern Western society, father's and mother's brothers are called uncle, thus, here, uncle is a merged term. Bifurcation and merger can be combined to bifurcate merging: All cousins born from all sisters of a father, and all cousins born from all brothers of a mother, are called cross cousins. All cousins born from all sisters of a mother, and all cousins born from all brothers of a father, are called parallel cousins. In this example, the word all indicates the mergers, and the distinction of cross and parallel cousins indicates the bifurcation.

In contrast to the ethnographically rather minor distinctions on grandparents' and parents' levels (such as distinguishing Tante and Muhme), the distinction between parallel and cross cousins are anthropologically very important. Much of family and incest law, and the family systems under discussion below, depend on this differentiation.

For example, let us take the Hawaiian system and add to it the distinction of parallel and cross cousins. Such a "Hawaiian" system qualified by the distinction between cross and parallel cousins is no longer a Hawaiian system, it is called the Iroquois system. The drawing of the Iroquois system looks as follows (The third cloud from the top contains the cross cousins. The fourth cloud from the top contains the egos and the parallel cousins):
account, horse, car, etc.). A high mortality rate among the male population (warfare, hunting, etc.) leads to the probability that the widow will marry again. The new husband will enter the matrilineal family, lineage, clan, etc. The children of the wife’s first husband need protection against the weight of their mother’s family. A representative is needed and to be taken from the deceased father’s side to offer that protection. For this, the number of fathers is being expanded to replace the deceased father. More “fathers” are needed, for example in a sequence of seniority. They are taken from the deceased mother’s sisters’ sons. If there are no such sons, but sons of the sons (= grandsons), the oldest grandson on mother’s side becomes the replaced “father”. He may even be younger than the children which are to be protected against the pressure from mother’s family, lineage, or clan. Still, he is the father of these children. In this way, a high male mortality rate is being counteracted by replaced fathers in disregard of the generation barrier.

There is a second disregard of the generation barrier in the Crow system: The mortality rate of children may be exceedingly high. Ego may have lost her or his children. But also children can be “replaced”. They can be taken from mother’s side, to wit, from the children of mother’s brother. Thus, mother’s brother’s children are being counted as ego’s children. The Crow system can be sketched as follows:

Often, the Crow system is found not in the pure form described above, but subject to variations. One of the many variations is “little father” in Navajo. The Navajo are a matrilineal society. “Little father” is the oldest maternal uncle. Traditionally, he has to take care of his sister’s children in case of need.

6. The Omaha System

Turn the Crow around to become a patrilineal family formation, and you have the Omaha system: (1) Cross cousins and parallel cousins are distinguished, and cross cousins are preferred marriage partners, as under the Iroquois system. (2) In addition, marriage partners are preferably chosen from one and the same other family, lineage, or clan, or village. (3) Now the want has to be imagined on the other side, on the side of the mothers. The Omaha system is based on patrilinearity. This means, the men are in positions of authority. Theirs is the family tradition, the family property (parental custody of the children, house, trailer, bank account, horse, car, etc.). A high mortality rate among the female population (childbed fever, malnutrition, etc.) may lead to the probability that the widower will marry.
again. The new wife will enter the patrilineal family, lineage, clan, etc. The children of the widower's first wife need protection against the weight of their father's family. A representative is needed and to be taken from the deceased mother's side to offer that protection. For this, the number of mothers is being expanded to replace the deceased mother. More "mothers" are needed, for example in a sequence of seniority. They are taken from the deceased mother's sisters' daughters. If there are no such daughters, but daughters of the daughters (= granddaughters), the oldest granddaughter on mother's side is the replaced "mother". She may even be younger than the children which are to be protected against the pressure from father's family, lineage, or clan, but still is the mother of these children. In this way, a high female mortality rate is being counteracted by replaced mothers again in disregard of the generation barrier.

The second disregard of the generation barrier applies as it does in the Crow system: The mortality rate of children may be exceedingly high. Ego may have lost her or his children. But also children may be "replaced". They can be taken from father's side, to wit, from the children of father's brother. Thus, father's brother's children are being counted as ego's children. The Omaha system can be sketched as follows:

A basic and universal human sense for balance and reciprocity can be found in many family relationships, and especially visibly in Crow and Omaha: In Crow, the weight of patrilinearity is balanced by quasi-fathers, in Omaha the pressure of patrilinearity is tentatively neutralized by quasi-mothers. Again, there are both pure and modified forms of the Omaha system. Statistically, the Omaha system seems to be less common than the Crow system; the latter is particularly frequent in the North American Southwest.

7. An ethnographic test

Let’s make a test: When you visit a people or tribe, can you simply ask your hosts under which family system they live? When Shiow-ming Wu and I visited the Paiwan, an indigenous tribe in the southern mountains of Taiwan, we were invited to watch, in our hosts’ house, a hand-made movie of a recent wedding in the family. This was a good occasion to ask: "How do you call the sister of your mother?" The lady to whom I had directed my question hesitated a bit, and then said with a smile: "Also mother". "And when you marry, is there a certain preference for cousins within the family as marriage candidates?" "No", was the somewhat surprised answer. Which family system must be assumed for the Paiwan? (Except, for example, in Professor Bischof’s book “Das Rätsel Ödipus”, the stories about the
The difference between Durkheim’s and Evans-Pritchard’s understanding of segmentation is this: For Durkheim, a segmented society lacks the organized coherence of a modern state. For Evans-Pritchard, segmentation obtains a positive meaning inasmuch as politically independent groups of equal standing communicate with each other, friendly or belligerently, being essentially sovereign units, instead of being subjected to a vertical centralized organization. Furthermore — as a consequence of this communication between these entities on principally equal terms — Evans-Pritchard observes that each entity and its participants consider an entity “out there”, on the other side, as an undivided unit.

Elsewhere, I have used segmentation neither as a general term for non-state societies (as Durkheim did), nor merely as same-level agglomerations of households, nuclear families, lineages, clans, or tribes (as Evans-Pritchard did for the Nuer). Rather, segmentation was used to designate a principle of ordering societies that is defined by the absence of corporate organization and — positively — by the interpretation of human togetherness as brotherhoods or family-metaphors comparable to brotherhoods. In this sense, segmentation becomes a principle able to explain all non-Western social and societal life. My use of the term segmentation takes from Durkheim the general character as a non-Western society-explaining principle, and from Evans-Pritchard the brotherhood-like horizontality of independent societal clusters whose inside structures are of no interest to the outsider. In this book I use segmentation in the same meaning as in (1995/2004) and (2004).

The advantage of this understanding of “segmentation” over Durkheim’s use is that lineages, clans, etc. can now be described as segmented (or not), whereas for Durkheim all lineages, clans, etc. are segmented. The advantage over Evans-Pritchard’s use of the term is that there can be talk of a type or principle of human sociability that contrasts to human organizations in a true sense of this word, whereas for Evans-Pritchard segmentation is a matter applying to the Nuer mainly.

Thus, segmentation may be understood as the principle of human sociability that is defined by the absence of a corporate order of society and the presence of a family or family-metaphoric — essentially horizontal — order of equal components. The absence of the corporate order places the components on one and the same “horizontal” level so that the components, viewed from the outside, appear as undivided units of “others”. Visualized, a segmented society does not look like a map on which parts and subparts are shown as from above (“bird’s eye” view), but like a chain of pearls, lined up on a string, whereby every pearl feels related only to the neighboring pearls and is not concerned with the entire necklace.

Graphically, this may be represented as follows:

**Segmented Society**

(„the whole is not more than the sum of the parts“)

![Diagram](image)

**For example:**
- A, B = nuclear families
- C = person, nuclear family, extended family, lineage
- D = lineage, clan
- E = lineage, tribe

---

Superadditive Society

(\(\text{the whole is more than the sum of the parts}\))

For example

\[
\begin{align*}
A, B, C, D, E, F & = \text{nuclear families} \\
G, H, I & = \text{towns} \\
J & = \text{county} \\
\text{etc.: state, federation, United Nations}
\end{align*}
\]

Segmentation is not the same as fragmentation.\(^{653}\) All segmented societies are fragmented, but not all fragmented societies are segmented. Segmentation as a principle of human sociability is a special form of fragmentation, a special type of fragmented societal order.\(^{654}\) Principally, segmentation is limited to pre-axial age societies.\(^{655}\) Fragmented societies can be found in pre-axial age societies as well as post-axial age societies including Hinyana-Buddhist (also called: "loosely structured")\(^{656}\), Arab,\(^{657}\) and Modern-Totalitarian.\(^{658}\)

Although segmentation is the typical form of pre-axial age societies, segmentation often last into post-axial age environments. This is a phenomenon that may be called societal inertia: People sometimes tend to maintain traditional societal patterns of leadership such as bignmanship, chieftaincy, kingship, or empire. Thus, for reasons of societal inertia,\(^{659}\) post-axial age societies may operate with pre-axial age cultural traits, so that segmentation is not foreign, for example, to leadership patterns such as kingships without or by "God's grace", or may be practiced in modern Islam, Eastern Europe, and Asia.\(^{660}\)

The dividing line between a segmented society and its opposite, a cooperative society, is the principle of the "oversum" or superaddition. It means that – quite generally – the whole is seen as something different and in a normative importance more than the sum of the parts. Segmented societies are not superadditive, whereas cooperatives are. Big man societies and chieftaincies are segmented societies. Nay-voters and abstainers are not bound by a decision

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653 W. Fikentscher (1975), 104–120; idem (1993/2004), 214–219; the opposite of fragmented is defragmented by mutual trust, the opposite of segmented is, in Durkheim (1964), centralized by state government; in Evans-Pritchard (1940) living in a coherently structured society, and in this book (as well as in earlier publications of this author): cooperatively organized in the true sense of Greek polex antiquity or other corporate forms.


656 See Embree (note 654, above).


659 On the phenomenon of societal inertia see IV. below. Societal inertia may be classified as an issue of accul-turation across time (communication Irmgard Fikentscher 2006).

660 For Islam, see VII. (below); for Eastern Europe, VI. 2., (below).
Reciprocity, exchange, gifts, contracting, trust (the anthropology of commutative justice) 391

they behave as “quantity adapters.” Notwithstanding linguistic difficulties, perfect competition defines the absence of competition, and complete competition defines a very weak form of competition in certain atypical situations. The “real” competitive market is “individual” or “subjective” in the sense that it involves rivalry and the ability to engage in strategies. Thus, the “real” competitive market requires the knowledge who might be, or potentially become, a competitor. In this sense, the modern market of an individual market participant is always personal. In the individual (= subjective) market, rivalry exists, as shown in the following graph (“the invisible hand made visible”):

This is corroborated by the theory of the modern efficient market as a superadditively coherent entity of common laws, morals, and trust, as developed in Chapters 1 and 5 (subsection 10), supra. In order to know who is, or potentially may become, my competitor, one has to “know” him, if not by name, then by identifiable competitive trade relation. In this sense, all modern individual, and thus competitive, markets are personal. Impersonal markets are objective markets, defined by good, place, time, and possible absence of competition. This is illustrated below:

Recent warnings that shopping on the Internet can be abused by identity manipulations confirm the – preliminary – result. The warnings were issued by consumer organizations stating that “you should always know whom you are dealing.” There is hardly a more convincing proof that the individual (that is: rivalry-defined) market is not anonymous. It is interesting that internet trading (e.g., “e-bay”), develops its own sanctions based on personal contact and reliance. E-bay transaction partners may rank each other’s reliability by applying a one to five star scale, and this ranking is visible for every internet user. Unreliable partners receive what is called a “negative feedback”. This may be so business-damaging that every effort will be made to indemnify the injured side. What is be more personal within what you would think to be one of the most impersonal forums of trading?

Granting an advantage" means, in this context, that the giver transfers upon the other something that belongs to the giver’s sphere: property, time, effort, attention, thoughts, care, etc. In a culture that does not assign these goods to a person’s sphere in form of an extended concept of ownership, these goods are free and therefore not fit to be thanked for. Every culture assigns to its participants something to be owned, but the dividing line between ownables and free items varies greatly. A “thank you” is only due for granted ownables. All that lies beyond the limits of culturally approved possessions is unfit for saying “thank you”. Here the reason may be found behind the attitude found in some developing countries, and among affirmative action recipients, for not showing much gratitude, including the insistence on common heritage of mankind, and equality of opportunities.

A special kind of giving thanks, often in advance, is bribery. Corruption represents a negative side of reciprocity, and its anthropology is worthy of study. To judge the legality, or impropriety, of corruption, each specific cultural situation has to be evaluated.918

13. Mainstream economic anthropology

The present state of the art in economic anthropology, described above, can be illustrated, in rough strokes, in the following graph:

```
<table>
<thead>
<tr>
<th>Economic Anthropology</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fund Theory</td>
</tr>
<tr>
<td>Types of Exchange</td>
</tr>
<tr>
<td>Types of Money</td>
</tr>
<tr>
<td>Economic Spheres</td>
</tr>
</tbody>
</table>

- Subsistence replacement
- Social ceremonial rent
- Market reciprocity/distribution
- Mean of exchange
- Mean of value payment
- Market running

- Market
- Generalized balanced negative
- General purpose money
- Special purpose money

(918) See the contributions to Raimund Jacob & W. Fikentscher (eds.), Korruption, Reziprozität und Recht, Schriften zur Rechtspychologie vol. 4, Bern 2000: Stämpfli; W. Fikentscher, Ersatz im Ausland bezahlter Be- stehungsgelder, Besprechungsaufsatz zu BGH of May 8, 1985, IV a ZR 138/83, IPRax 2/87, 86 (with) K. Waibl.)
post-axial age markets – according to the prevailing mode of thought – are characterized by far-range exchange relations that include credit and trust relations, as well as their participants’ rights and duties.

14. An improved outline
Thus, in the following graph on economic anthropology, the lower left corner of the foregoing graph, containing the terms barter market and price market, are replaced by at least three positions: pre-axial age subjective short-range markets, post-axial age objective markets, and post-axial age subjective long-range trust and credit markets. Even more complete is the addition of the three distinctions so that combinations can be made. Here follows a graph which contains the proposed changes in economic anthropology:

The illustration demonstrates that “free economy” and “economic liberalism” as described, for example, by Adam Smith is a rather culture-specific mode of allocating scarce goods. It requires superaddition, rivalry, and long-range trust. Its problem lies in the conflict between the ethics of effort and the ethics of demand, and the resulting social injustice of unpaid effort. How to organize superadditive individual long-range trust markets that avoid social injustice (sociale Marktwirtschaft = constituted market economy) involves issues that cannot be discussed here (cf., W. Fikentscher 1983b, Ch. 2 IV; idem (1993), 905–907; idem, An Environment-conscious Constituted Market Economy, in: idem, Freiheit als Aufgabe, Tübingen 1997: Mohr Siebeck, 12–44; a report in: iwd No. 25 of June 19, 2008, 5, defines constituted market economy by four factors: freedom, social justice, subsidiarity, and legal protection of competition).

15. The role of antitrust for the rule of law and for economic development
For the German economic recovery after World War II, a law for the protection against abuses of economic power, first Allied (1947), then national (1958) and simultaneously European (1958), was of utmost importance to overcome zero point in 1945. The English tradition of
For Pospíšil, the four constituents of law, in anthropology, are authority, obligatio, the intent of general application, and sanction. In a detailed discussion in this book, the constituents have been reduced to two, authorizingness, and sanction. From the graph follows, that Pospíšil himself lets two constituents suffice: authority and sanction.

A disputed topic is feud (also called "blood feud", "vendetta"). Some claim that feud is an early form of law because it contains the element of reciprocal compensation. Pospíšil regards feud as an illegal exchange of force and thus not as early law. Wesel follows him. Spencer and Malinowski take the opposite position. If the latter group were right, reciprocity would be an element of law because feud would lie at law’s beginning. But there is law without reciprocity, such as the forms of distributive justice. Of course, reciprocity is a frequent element of justice, but it is not all-pervading, which would have to be presumed if feud were a form of early law.

Other early forms of war and violence are youth bulge raiding, armed trading, and borderline fights.

In many societies, the second, third, fourth etc. sons start “hanging around”, “doing no good”, become lawless and, in early societies, begin raiding because the first son is to take father’s position and there is little to do for the following brothers. This phenomenon, dubbed “youth bulge” is held responsible for much warfare, raiding, suburban violence, even student riots. Its leadership issue, among Indians sometimes personalized as “war chief”, has been discussed. Youth bulge may have contributed to many conquests. Many a “clouded title” has its historic reasons in this practice. The raids of the Norman Vikings may have

1125 See Chapter 1 III., above.
1126 See Chapter 1 III. 5. and 6., above.
1130 See Ch. 9 II. 3. a., above.
1131 See note 659, above. Ch. 13 VII.
Native American law

2. The sovereignties

It follows from these landmark decisions that the tribes possess a "dependent sovereignty" which is not exactly of the same quality as the sovereignty of the United States. The sovereignty of the United States as a federation is divided between the Federation and the states. Hence, the sovereignties of the tribes (although "dependent" with respect to the trust relationship between Federation and tribes) and of the federal system of the United States are ("horizontally") equivalent whereas the sovereignties of the Federation and of the states are ("vertically") structured as is the case in every federation. Thus, it is to be derived from those cases that there are only two sovereignties, not three (see, however note 1035, above).

A graph can demonstrate this relationship in the following way:

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1161 Canby (2004), 70.
be distinguished in the usual manner: membership, family, property incl. land, probate, contract, tort law, etc. Therefore, as to substantive Native American law, reference may be made to our collaborative articles (1998) and (2008), and the bibliographies following these articles. Besides Indian common law, Indian code law asks for a more detailed study. Indian codes are flourishing. According to Paul Tsosie, tribal judge in San Ildefonso Pueblo and Nambe Pueblo, discussing in any pueblo whether there should be a code contributes to the understanding of legal issues within a tribe (for instance, concerning domestic violence, or substance abuse). Such "prospective internalization" deserves attention, as a means of making legal issues known to the concerned public and thereby contributing to the success of the debated code or codes to come.

2. Indian social norms

To understand tribal law better, it has to be distinguished from other Indian tribal forums, especially custom, habits, etiquette, and religion.1181 All of these forums posit norms to be followed by tribal members. They can be combined under the term "Indian social norms". Indians often combine them to the concept "way". When an Indian says "drugs are not our way", or "gambling (= gaming) is not our way", the speaker leaves open which kind of social norm (in etic terms) she or he is alluding to, because it is consideredenough to state that this kind of behavior is not tolerated or should not be permitted on tribal land. Indian social norms can be illustrated with the following graph.1182

The first line distinguishes law from other social norms. As regards law, it makes a difference whether it amounts to substantive, material law of which it can be said: This is our valid law,

1181 On the theory of the forums (or fora), see Chapter 4, above.

1182 Cf. Cooter & Fikentscher (1998), 329. Above, the graph is presented in an improved version.
3. Indian Country

The following text is limited to some surveys and graphs. The complicated system of Indian land law is a consequence of the equally complex history of the North American Indians.\textsuperscript{1186}

\begin{itemize}
  \item \textit{Indian country} \\
  \hspace{1cm} reservation land \\
  \hspace{1cm} allocated land outside reservation (trust) \\
  \hspace{1cm} Pueblo (free simple)
  \item tribal land \\
  \hspace{1cm} allocated tribal land \\
  \hspace{1cm} allotted land within a reservation \\
  \hspace{1cm} fee simple land within a reservation
  \item common land \\
  \hspace{1cm} leased, assigned, handed out, etc., from the tribe
  \item government land \\
  \hspace{1cm} customary ownership
  \item leased, assigned, handed out, etc., from the tribe
  \item leased, assigned, handed out, etc., from the tribe
  \item Indian owned
  \item white owned
\end{itemize}

VI. Dispute settlement institutions

1. American judicial system and Indian law

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

\begin{itemize}
  \item State Supreme Courts
  \item U.S. Supreme Court
  \item U.S. Courts of Appeal
  \item Indian Claims Commission (now abolished)
  \item State Appellate Courts
  \item State Trial Courts
  \item Federal District Courts
  \item Tribal Courts
  \item CFR Courts
  \item Traditional Courts
  \item Federal Court System
  \item Indian Court System
\end{itemize}

\textsuperscript{1186} For most of this area of substantive law, reference can be made to earlier publications by Cooter and myself (1998) and (2008); see also Canby (2004), 343 ff; Gardiner, see note 1171, above.
opology of law is discussed in Chapter 13 VI.
lian conflict of laws, mainly Navajo, White
en said above, therefore applies to this part of
conflict of laws is national, regional (EU),
tern", such as Kansas state law, Spanish foral
law, has its own set of rules on conflict of
ional law, rather it is national, subnational,
law. Conflict of laws exists wherever law is

assessing the jurisdictions and the issues of
ction, personal, territorial jurisdiction, etc.
ian Law Part One")
edures: Federal, state, or tribal. On this de-
state, or tribal jurisdiction
next question for each jurisdiction is which
lict of laws. This includes:
point", "nexus") such as choice of law (ex-
itiae ("situs"), residence, tribal membership,
e law. There are three possibilities:
Indians = “Indian Law Part Two-A”, or
Indians = “Indian Law Part Two-B”, or
2. Dispute settlements institutions in Indian country

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

**Dispute settlement institutions**

- traditional courts
  - religious courts
  - Pueblo secular traditional courts
- non-court adjudicating agencies
  - comparable institutions (Deloria/Lyde: the Iroquois Peacemakers' courts)
- tribal courts
  - customary tribal courts (or councils acting as courts)
  - modern tribal courts
    - CFR courts (1883)
    - IRA courts (1934)

**VII. Indian conflict of laws**

Conflict of laws and its importance for the anthropology of law is discussed in Chapter 13 VI. The material there is taken from studies in Indian conflict of laws, mainly Navajo, White Mountain Apache, and Lummi law. What has been said above, therefore applies to this part of the law of a tribe. It will be remembered that conflict of laws is national, regional (EU), tribal, denominational, etc. law. Every “legal system”, such as Kansas state law, Spanish foral law, Bavarian land law, Roma and Sinti “gypsy” law, has its own set of rules on conflict of laws. Conflict of laws is not a field of international law, rather it is national, subnational, regional, church law, tribal law, clan law, lineage law. Conflict of laws exists wherever law is and forms part of that law.

**VIII. An Indian law checklist**

The following checklist may be helpful when assessing the jurisdictions and the issues of conflict of law:

I. Is there jurisdiction? subject matter jurisdiction, personal, territorial jurisdiction, etc. (= “Indian Law” = law about Indians = “Indian Law Part One”)

answer may lead to one, two or three procedures: Federal, state, or tribal. On this depends the applicable procedural law (federal, state, or tribal jurisdiction)

II. Once jurisdiction(s) is(are) determined, the next question for each jurisdiction is which substantive law applies under the rules of conflict of laws. This includes:

1) Finding a point of reference (“connecting point”, “nexus”) such as choice of law (express or tacit?), place of the wrong, lex rei sitae (“situs”), residence, tribal membership, etc.

2) From this follows the applicable substantive law. There are three possibilities:

a) Federal law (= “Indian Law” = law about Indians = “Indian Law Part Two-A”, or

b) State law (= “Indian Law” = law about Indians = “Indian Law Part Two-B”, or