Law and Anthropology

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2. Auflage 2016. Buch. Rund 600 S. In Leinen
ISBN 978 3 406 65907 2

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Second Edition
2016

C. H. BECK · Hart · Nomos

Published by
Verlag C. H. Beck oHG, Wilhelmstraße 9, 80801 München, Germany,
eMail: bestellung@beck.de

Co-published by
Hart Publishing, 16C Worcester Place, Oxford, OXI 2JW, United Kingdom,
online at: www.hartpub.co.uk

and

Nomos Verlagsgesellschaft mbH & Co. KG Waldseestraße 3–5, 76530 Baden-Baden,
Germany, eMail: nomos@nomos.de

Published in North America (US and Canada) by Hart Publishing,
c/o International Specialized Book Services, 930 NE 58th Avenue, Suite 300,
Portland, OR 97213-3786, USA, eMail: orders@isbs.com

ISBN 978-3-406-65907-2 (BECK)
ISBN 978-1-84946-789-6 (Hart Publishing)
ISBN 978-3-8487-1319-6 (Nomos)

Printed in Germany by
Beltz Bad Langensalza GmbH
Neustädter Straße 1–4, 99947 Bad Langensalza

Typeset by
Reemers Publishing Services GmbH, Krefeld
Einbandgestaltung: Druckerei C.H. Beck Nördlingen

Preface to the second edition

The first edition of this treatise, which appeared in 2009, found friendly reception with anthropologists and legal theorists. Since 2009, in many parts of the world developments of anthropological relevance have occured place that invite a new edition. The slow but steady growth of a political Europe and regional alliances in other parts of the world, voluntary or forced migratory movements with or without acculturative contact (cf. Fikentscher, Pflug & Schwermer 2012), culturally deep-rooted upheavals such as the "Arab Spring" and the overall effects of globalization in many fields of life, all these evolutions reach down to the basics of human culture. Meanwhile, in some sectors the use of the word anthropology has become commonplace. It is not easy for the social sciences to catch up at this pace. On the other hand, anthropological criteria and working methods might contribute to solving the pressing issues of global culture change.

The second edition omits the book's subtitle "Outlines, Issues, Suggestions". Outlines in this sense meant to refer to surveys, systems, dichotomies, tables, charts, checklists and the like. "Issues" and "suggestions" were to relate to debated themes of legal anthropology. The second edition aims at broader topics, integrating these and other into cultural anthropology as such, while retaining a special focus on law but also having in mind links to economics, religion and political science. Cross-disciplinary issues of this kind may be found throughout the text, such as the legitimization of political leadership, foreign aid, the phenomenon of "youth bulge", make-believe worlds paralleling belief systems, non-ethnic anthropology such as "Elvis culture", and jurisdictional conflict of laws aspects. As regards economics, anthropological approaches will be discussed from both the behavioral-psychological side (Chapter 7) and from a cultural point of view (Chapter 10). The series of economic crises throughout the years 2004 to 2013 continued to raise anthropological problems (Fikentscher, Hacker & Podszun 2013). They touch upon anthropological epistemology and may prove important for understanding the scientific and researching working of the human mind in general and in cultural contexts in particular.

Having grown from yearly class readers, occasional monographs, articles and lectures, the first edition separately assembled introductory and in-depth literary works (in Chapter 1). Intending a more treatise-like shape, the second edition presents a general bibliography at the end of the volume to which all chapters refer. Most chapters end with a section on references that have been cited in that chapter by name and year. The footnotes tend to confine themselves to side aspects.

From the preface to the first edition

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

What the book is about

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

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

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

Literature

There is a shortage of books on the relationship between law and anthropology. Leopold Pospíšil's "Anthropology of Law" (1971, several reprints) is rather a handbook that for the most part speaks to the initiated reader but not to the beginner. Pospíšil 's "Ethnology of Law" (1978; 1985; now out of print) is a very readable introduction for all students, including the novice. The same author's "Sociocultural Anthropology" (2004) pursues similar goals as the present book by having the anthropology of law reach into neighboring normative fields in particular political science, religion, and economy; however, Pospíšil's most recent book again mainly addresses the initiated reader. Laura Nader's 1969 volume "Law in Culture and Society" was reissued in 1997. Its contributions are valuable readings but its structure evidences a less than systematic approach. The same may be said of Sally Falk Moore's "Law and Anthropology: A Reader" (2005). Norbert Rouland's "Anthropologie juridique" (1988, translated by Philippe G. Planel into English in 1994 with the title "Legal Anthropology" (1994) is rich in detail and information, yet with its special interest in the relationship between state and law reveals its originally intended audience: the French student of legal anthropology. In 1992, Peter Sack and Jonathan Aleck edited a collection of articles

on "Law and Anthropology". Martha Mundy's edition "Law and Anthropology" (2002) contains a collection of chapters and articles on various topics. "Exotic No More: Anthropology on the Front Lines" by Jeremy MacClancy is a welcome reflection on anthropology's general modernity, for law and beyond. Christopher C. Fennell and Lee Anne Fennell published "Sources on anthropology and law" in 2003. In their book "Anthropology and Law" (2003), James M. Donovan and H. E. Anderson III call for more attention to the field and identify a number of pending issues. Donovan's "Legal Anthropology: An Introduction" (2008) offers an initial overview of the debates surrounding cross-cultural analysis of systems of law. My own book "Modes of Thought: A Study in the Anthropology of Law and Religion" (1995, 2nd revised ed. 2004) concentrates on modes of thought as a basic topic of anthropological culture comparison, but it does not include other subjects of the anthropology of law. In its attempt to focus on recent issues of outlining, substantiating and critically assessing the anthropology of law, the present book may serve as an introduction to the current state of a somehow broader field.

Overview of the contents. Earlier versions

Said for short, this book bases cultural – including legal – anthropology on V. Gordon Childe's two "revolutions" (the neolithic and the urban) combined with Karl Jaspers' axial age. From this combination follows, directly or indirectly, the presentation of all further propositions: superaddition, economic universals, family structures, human rights, rule of law (*Rechtsstaat*), conflict of laws and legal pluralism, societal ordering, etc. Regarding four normative fields of sociocultural anthropology, that combination facilitates, a.o.: (1) in law, a science of values granting individual rights of having and obtaining; (2) in political science, individual and collective human rights; (3) in religion, individualism; and (4) in economy, the individual – because superadditive – market with its invisible hand as a solution to the private-public-interest issue and therefore as a power control.

A textbook on the anthropology of law would in principle have to confine itself to the discussion of legal issues of anthropology. After more than twenty years of teaching on graduate and college levels I have learned that students and researchers of anthropology of law are not satisfied with the mere presentation of legal issues, because questions of general anthropology cannot be left aside when legal anthropology is to be discussed meaningfully. This holds true with respect to the emic-etic distinction (Chapter 1), law as a set of social norms (Chapter 4), the attributes of culture in a wider context (Chapter 5), the anthropological methods of analysis (Chapter 6), issues of wrong and compensation (Chapter 11), and procedure and remedies (Chapter 13), to name just a few examples. Often, the anthropologically interested lawyer must be an anthropologist first before turning to legal questions. Therefore, I decided not to write a book on the anthropology *of* law (= legal anthropology), but on law *and* anthropology. This is why the reader will find introductions to some fields or subfields of general anthropology, and also, in the relevant context, the application of anthropological generalities to law. A certain disadvantage of some of the legal anthropological works quoted above is an overly fixation on *legal anthropology*. A focus on anthropology *and* law seems to me a more efficient approach.

Over the years, since 1986, the present book came about by offering classes and seminars on law and anthropology in Munich and Berkeley. These courses were held with the help of mimeographed readers. The readers in Berkeley, compiled in part with Robert D. Cooter and Jeremy Waldron, and consisting of one, two or three volumes depending on the scope of the class, were prepared for classes in 1991, 1992, 1994, 1995, 1997, 1998, 1999 and 2000. Beginning in 1997, I became sole author. Slowly but

inevitably, the readers gradually took on the shape of a textbook. In the end, the reader of 2000 contained so many comments that I regarded it mature enough to become a book. I worked on it between 2001 and 2008, parallel to a reduced amount of fieldwork among American Indian tribes and in Southern Africa, as well as my teaching load in Munich. It was clear from the beginning that the book was not to contain a full survey on law and anthropology as it is intended in class, but had to be designed to bring only the actual issues, themes, and my thoughts concerning them.

Similar to the course readers, but in no way identical, the book comes in three parts. **Part One** takes up subjects of law and anthropology in general. Chapter 1 assesses the systematic position law and anthropology hold in the framework of the social sciences. Chapter 2 reports historic developments of both law and anthropology, and of the schools of anthropology and their different views of the law. To the uninitiated reader, the first two chapters may not mean much since they demand some prior introduction into at least one social science. They also require some interest in the system and history of scientific investigation as such. These two chapters offer few practical examples. In class, some undergraduates do not like these assignments and often give up by dropping the course before the real matter begins. On the other hand, those who stay may be rewarded by some knowledge in the science of science and in its historical dimension. I have often wondered whether it might be advisable to move these – necessary – things to a later place in the course. But their introductory nature speaks against this. So all I can do is ask the reader for patience, or just to skip the two first chapters until interest has grown enough to return to these essentials. Chapter 3 attempts to unfold the conceptional world of anthropology as far as needed for law. The interested reader may be curious to to learn the language, the jargon, of the field. Chapter 4 discusses the theory of the forums, law being one of them, to be distinguished from the forums of the morals, of religion, of habits and etiquette, etc. Chapter 5 is devoted to various aspects of culture (in the singular) and cultures (in the plural). Culture still is the central concept of anthropology and its subcategories. This chapter is long and may present some difficulties, both for students, readers, and eventual teachers, as well as for this presentation in an issue-driven book. I have included some examples to help to understand the context. Chapter 6 treats the analyses, the methods, of anthropology with a special view of the forum of law and justice. Chapter 6 starts with a critique of ethnocentrism by the use of modern examples, including the much debated ones on the "export of democracy". My observation has been that students like this chapter. It deals with challenging, even mind-boggling, mental operations. They concern the pressing question of how to understand, as member of one culture, another culture. Often it is in this chapter on analyses that the student of the anthropology of law (or any value-centered ought-science) begins to become engaged in the subject. Chapter 7 is a survey of physical (or better: biological) anthropology and its importance for law. Biological anthropology may be a novel subject of study in a book on the anthropology of law. However, there is a link between cultural and biological anthropology that can be illustrated by a reference to law: It is a 4-function theory of biology for law. This theory could be expanded to other social norms. Later in the book I argue that this bridge between biological and cultural anthropology can be applied to certain forms of human organizations (esp. in Chapters 9 and 10). Therefore this chapter is also an introduction into the science of behavior, ethology.

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

From the preface to the first edition

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

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

Central concepts

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

From the preface to the first edition

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

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

Facts and Values

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

Fieldwork

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

From the preface to the first edition

Footnotes, no endnotes. Translations

Of endnotes it is said that they interrupt the reading flow least. But consulting them requires the use of three hands. Therefore, as indicated, this book has footnotes. Its precursors, the law and anthropology class readers, also used them. In a monograph, they serve different purposes. When a line of argument is presented, sidesteps into fields related to the discussion would distract the reader and weaken the point to be made. The sidesteps forming the argument were turned into footnotes. The foreword to the second edition, third paragraph, above, gives an account on the manner how literature, references and bibliograpies are handled in this book. – Unless otherwise indicated, all translations between English and German are mine.

Survey of Contents

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