

Comment on Fikentscher's Paper — Modes of Thought in Law and Justice — A Preliminary Report on a Study in Legal Anthropology*

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Communication between a German legal philosopher and an American one should not be difficult. Both cultures are "western," and the immigration of many German legal scholars has made German legal thought well known in the United States.¹ American jurisprudence is equally well known in Germany. However, in Professor Wolfgang Fikentscher's preliminary report on his forthcoming book, *Modes of Thought on Law and Justice*, references to Austin, Pound, Hart, and Fuller are conspicuously absent.² This is due to his concentration on legal anthropology. It may be that this writer's disagreement with certain parts of Professor Fikentscher's theory of law will diminish once the entire book becomes available.

In order to understand my reaction to Professor Fikentscher's theory of law, it is necessary to describe my background in jurisprudence and my own theory of law. Although Bentham's writings in analytical juris-

* This paper was presented at a meeting of the Center for Hermeneutical Studies, Berkeley, April 1987. Many stylistic changes have been made in this publication. The original paper will be published in the Center's Protocol of the 56th Colloquy. The Center has granted permission to publish this paper in the *U.C. Davis Law Review*.

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¹ Roscoe Pound wrote extensively about German legal philosophy, the *Modern* and the *20th Century Legal Philosophy* translations and the publications of Hans Kelsen's books into English have made German legal philosophies well known in the United States.

² He does refer to Holmes' non-normative definition of "law" which he apparently accepts as valid, and he translates Llewellyn's "law-way" as "mode of thought." W. Fikentscher, *Modes of Thought in Law and Justice — A Preliminary Report on a Study in Anthropology* 16 (1987) (available at University of California, Davis, Law Review).

prudence preceded Austin's, in English-speaking countries Austin is regarded as the primary figure in that type of analysis. Austin's definition of positive law originated in a sovereign's commands to his subjects, commands enforced by a sanction — a negative privation. Alternatively, the sovereign was not subject to anyone.³ Kelsen stated his concept of law in terms of a hypothetical judgment in which a set of circumstances culminating in a delict was joined to a physical sanction. "Validity" meant conformity to the procedure prescribed in a basic hypothetical norm. Later, H.L.A. Hart and others criticized both Austin's and Kelsen's concepts of law because these concepts focused on "command." Hart distinguished primary rules, such as criminal laws that are sanctioned commands, from secondary rules, which confer powers to make contracts, to marry, to make a will, and so on. He believed that law was a "union" of primary and secondary rules.

The distinction between powers and duties led to Hohfeld's scheme of four legal relations stated in terms of correlatives: right-duty, privilege-no right, power-liability, and disability-immunity. Later writers substituted "susceptibility" for "liability" and pointed out that two of these legal relations, privilege-no right and immunity-disability, were merely negatives of the other two. They concluded that from an analytical perspective only two jural relations exist, namely, right-duty and power-susceptibility.

My contribution to the debate is that law is a categorical judgment (the primary rules) to which a hypothetical judgment (secondary rules) is instrumental. In sum, the legal relation, right-duty, is essential. Power-susceptibility is also essential because it is the use of power that creates the right-duty relation. The use of power precedes the origin of the right-duty relation. Accordingly, in a dynamic theory of law, law can be both hypothetical and categorical.

In western jurisprudence, a perennial battle has raged between natural law advocates and legal positivists. The battle centers on the question of whether "law" should be applied only to morally valid statutes and decisions, or whether any command of a sovereign or any hypothetical judgment based on an assumed *Grundnorm* is "law."⁴

Both Plato and Aquinas wrote that statutes which oppose reason are not laws. They also wrote that there are good laws and bad laws. Su-

³ Sir Henry Maine criticized the generalized inclusion of the sovereign, stating that in his many years in India, no maharajah promulgated a command; Indian law was customary.

⁴ Professor Fikentscher ignores this issue in his definition of law, perhaps because most anthropologists ignore it.

perfidiously, this appears to be a contradiction. However, there is an explanation to support consistency: society and even practicing attorneys speak of some laws as good and other laws as bad. From this societal perspective, it is absurd to say that "law" is restricted to good laws. However, from a scientific or philosophical perspective it is necessary to proceed along lines that are significant in a science of law: "law" must be restricted to uniform data, for example, to good statutes and decisions.

Proceeding in this direction, and supplementing my earlier definition of the structure of law, I selected the following seven categories or criteria: (1) law is morally valid; (2) it serves sound goals; (3) it is supported by public attitudes; (4) regularity rather than "system;" (5) it protects public interests; (6) it is supreme — when challenged by other norms; and (7) it is inexorable since, unlike membership in a voluntary association, one cannot resign from the state when summoned to court — the law is inexorably imposed on everyone's will. Finally, my philosophy of law has been correctly described as sociological, nonscholastic natural law.

Professor Fikentscher's thesis is that "the anthropological concept of 'modes of thought' properly redefined is able to explain cross-cultural differences in legal thinking."⁵ "Modes of thought" include "animism, Hinduism, Islam, Greek Tragic, Calvinist belief in predestination, [and] Marxism."⁶ He states that such ideas can be used in a "synepeical" way, which means "consequential reasoning."⁷ He also defines synepeics as a "thought-modal comparison" which may be analyzed in four stages or levels.⁸

He begins with examples of cultural misunderstandings, based presumably on different "modes of thought." It is noteworthy that none of these examples deals with basic values, such as those implied in common-law felonies. It is also significant that Professor Fikentscher's paper and lengthy bibliography omit any reference to Redfield, Kluckhohn, or even Boas, who wrote about common values shared by advanced and primitive peoples regarding indiscriminate homicide, theft, incest, and other major crimes. Instead, Professor Fikentscher follows the path of anthropologists who, in an attempt to avoid bias and ethnocentric intolerance, rely on "relativism" which espouses the

⁵ W. Fikentscher, *supra* note 2, at i.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 13.

unique values of each tribe or society, denying validity to any possible universal valuation.

Professor Fikentscher seems to be ambivalent on the issue of basic values. He concludes that “‘right’ and ‘wrong’ are . . . no[t] absolute criteria, but propositions related to, and receiving their meaning from, a specific mode of thought.”⁹ For example, he states that a Muslim should not criticize the principle of separation of church and state from a Muslim point of view, but rather that a Muslim’s criticism should be based on “a method which surpasses specific modes of thought.”¹⁰ This raises interesting questions regarding the criticism of Nazi and Communist ideologies from a western democratic perspective. He concludes that “an existing mode of thought, as part of an existing culture, should be respected by the participants of other cultures.”¹¹ Would this “respect” by other cultures include the English termination of the forced suicide of Indian widows, and the retention of other colonial laws after the independence of the colonies? Alternatively, he uses the nuclear Chernobyl disaster which led to changes in Soviet information policy as an example of the changes that are possible when a mode of thought is “confronted . . . by mere fact.”¹²

It is obvious that different cultures think in different ways.¹³ In some respects, Professor Fikentscher’s thesis resembles Savigny’s historical jurisprudence in positing a unique *Volksgeist* which implies that criticism and comparison are not relevant. However, German laws and theories have been adopted in many other countries.

Professor Fikentscher’s approach utilizes four types or stages of *synepeics*. The first stage seems to be simply recognition of specific modes of thought. The second, which discusses aspects of comparison thinking, is limited to the rejection of criticism of one mode of thought by reliance on another mode of thought.¹⁴ The third concerns common denominators of comparison,¹⁵ and the fourth is “applied anthropology” — policy questions based on the third stage.¹⁶

The common denominators “consist of rather formal ideas.”¹⁷ Concepts like causality, time, and risk “vary from one mode of thought to

⁹ *Id.* at 17.

¹⁰ *Id.* at 19.

¹¹ *Id.* at 27.

¹² *Id.* at 23-24.

¹³ Cultural differences are the subject of many books; among the best is Ruth Benedict’s, *The Chrysanthemum and the Sword*, about Japanese culture.

¹⁴ W. Fikentscher, *supra* note 2, at 19-28.

¹⁵ *Id.* at 29-39.

¹⁶ *Id.* at 39-44.

¹⁷ *Id.* at 33.

another.”¹⁸ In order to “link” the various modes of thought to historic events, a “meta-concept” is required.¹⁹ Meta-concepts include “meta-causality, meta-time, meta-risk,” and so on.²⁰ Professor Fikentscher’s logic may be excellent but in the absence of specific examples it is not persuasive. It is not merely that as every generalization rises in abstraction it loses the distinctive meanings of what it subsumes, but also that in some situations no meaningful meta-concept is conceivable. For example, if dissidents are considered psychotic in a Communist mode of thought but are regarded as quite normal in the American mode of thought, what meta-concept other than a vacuous generalization is conceivable? What meta-concept would adequately include both an ultimate impersonal god and the very personal one of the Abrahamic religions?

Professor Fikentscher concedes that “[a]s to values, the meta-level is even harder to . . . define[.]”²¹ He says that “[e]very mode of thought . . . [is] [en]title[d] to be respected as long as it respects . . . others.”²² This hypothetical condition ignores serious differences in valuation. Apparently he believes that “[t]he right to ask for and to discuss values”²³ adequately subsumes obvious differences in valuation. Synepeics stage four includes an appeal for “cross-cultural tolerance.”²⁴

My analysis may be the result of Professor Fikentscher’s concentration on cultural differences. Professor Fikentscher neglects the sharing of major values, that is, those values necessary for survival, values raised by common problems and a common human nature. The emphasis on differences and the appeal for toleration represent a questionable relativism. In addition, Professor Fikentscher uses conflicting and amorphous terms. For example, although “consequential thinking” suggests utilitarianism or pragmatism to an American, Professor Fikentscher has another meaning in mind. Other unexplained terms, for example, “authorization,” take us to the second half of his paper which is intended to demonstrate the value of synepeics for the definition of law.

In reading this section one must remember Professor Fikentscher’s thesis: that “modes of thought” of various tribes, peoples, and societies

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 34.

²² *Id.* at 35.

²³ *Id.* at 34.

²⁴ *Id.* at 40(a).

are decisive in defining "law." What is striking is the failure to distinguish between a scholar's concept of law and tribal or public opinion about law, and thus to ignore the basic issues that divide legal positivists' definitions of law from those of natural law advocates.

Finally, there is the striking absence of any reference to Hans Kelsen. Instead, Professor Fikentscher concentrates on the work of Leopold Pospisil, an anthropologist at Yale who studied law in Czechoslovakia. Had he chosen Hoebel, an anthropologist who is not a legal scholar, but who adopted Hohfeld's legal analysis, the outcome might have been very different.

I can understand and agree with Professor Fikentscher's rejection of Pospisil's "authority" as leadership. This is consistent with the criticism of "sovereign" by Anglo-American scholars. However, although I find authority in the acceptance of the categorical moral principles embodied in my concept of law, I am at a loss to understand Professor Fikentscher's position. He rejects leadership and states that authority "consists . . . in the acknowledgement of the necessity of reality-changing values."²⁵ However, in my view law is usually a conservative agency intended to preserve the status quo. He also states that "the crucial element is that law by virtue of its validity is authorizing someone"²⁶ but he does not define "validity," either as a logical or an ethical concept. It is, therefore, impossible to know what this statement asserts.

Professor Fikentscher also rejects Pospisil's second element, "obligatio," which means "a legal relation between certain persons,"²⁷ because it is of doubtful existence in fragmented societies and was non-existent in classical China and Japan. He concludes that "obligatio" is not a necessary element for the definition of law.²⁸ From the western jurisprudence perspective, this contention is invalid and hardly conceivable. There is disagreement regarding whether every duty has a correlative right, some holding that this is not true of criminal law. However, apart from that questionable exception, western jurisprudence scholars universally agree that a jural relation — one of Hohfeld's — must exist in law. But Professor Fikentscher states that "[i]n synepieics, . . . this transposing method applied to one's own concepts of right and wrong is rejected, and the right to measure 'eastern' understandings of law with the yardsticks of western 'reality' concepts is denied."²⁹ This raises ba-

²⁵ *Id.* at 135.

²⁶ *Id.* at 135-37.

²⁷ *Id.* at 137.

²⁸ *Id.* at 143.

²⁹ *Id.* at 145.

sic questions of ethics and smacks of a relativism. It also implies acceptance of the claim that western jurisprudence is a limited folk thought.

What, finally, is Professor Fikentscher's synepeical definition of law? His four-point criteria are "*values* and *method*, applied in a *system* and in the course of *time*."³⁰ His later statement is that "law, viewed synepeically, can be defined as a set of authorizing sanctions, being the result of *values methodically* applied in order to mould reality in *system* and *time*"³¹ In his summary, he states: "law is, synepeically, an (1) *authorizing* (2) *sanctioned* (3) *ought* based on the result of (4) *values* (5) *methodically* applied in (6) *system* and (7) *time*"³²

In view of his apparent relativism, it is permissible, indeed necessary, to ask how this definition distinguishes law from the rules of unions or, indeed, from the rules of criminal gangs. Moreover, is "system" included in this definition even though he suggests it does not fit fragmented societies?³³ Finally, it is unclear whether Professor Fikentscher ever used the diverse thought-ways emphasized in the first part of his paper. What we are given is a scholar's abstraction on a higher level of generality than those of traditional western jurisprudence.

Some anthropologists treat western jurisprudence as a folk-way that is simply imposed on eastern cultures. After Austin was appointed the first professor of jurisprudence in London, he went to Germany to study the German commentaries on Roman law and Roman concepts of law. Returning to England, Austin sought concepts common to advanced legal systems. Some of the basic concepts of western jurisprudence were expressed in Plato's dialogues. Therefore, the charge that western jurisprudence is biased, ethnic, and a folk-way is an implausible assertion. One need not go to eastern cultures or to pre-literate societies to find diverse conceptions of law. If one adds the different theories of anthropologists to the many different concepts and theories in the United States, the total number, as Professor Fikentscher says, is "legion." One can dismiss all of these theories as exercises in futility, or one can espouse and defend a philosophy of law in ways that others can test and evaluate. There is wide agreement on analytical jurisprudence; in any case, it is necessary to distinguish scholars' theories of law from public opinions.

Certain questions call for further discussion. The first area of query concerns ethical relativism. The second area concerns western jurispru-

³⁰ *Id.* at 155 (emphasis in original).

³¹ *Id.* at 161 (emphasis in original).

³² *Id.* at 167 (emphasis in original).

³³ *Id.* at 153.

dence: is it a folk-way that is biased and ethnic, or does it have objective validity? The third area of intrigue involves Bohannan's thesis that to understand a tribe or society one must understand that tribe's or society's concepts, not translate them in terms of our ways of thought. These areas raise questions regarding comparison,³⁴ *e.g.*, in contrast with Professor Fikentscher's reliance on meta-concepts. It is preferable, in the writer's view, to assimilate or distinguish foreign concepts from one's own concepts.

³⁴ I have discussed the logic and theory of comparison in my *COMPARATIVE LAW AND SOCIAL THEORY* 47-48, 97 (1963) and in *FOUNDATIONS OF JURISPRUDENCE* 135-37 (1973).