

# PHILOSOPHY OF LAW IN THE ARCTIC



**UArctic**

edited by Dawid Bunikowski

UArctic Arctic Law Thematic Network: The Sub-group of Philosophy of Law in the Arctic

# Philosophy of Law in the Arctic

edited by Dawid Bunikowski

The University of the Arctic

The Arctic Law Thematic Network

The Sub-group of Philosophy of Law in the Arctic

Rovaniemi 2016

*The term "Arctic" is not only ecological but also mythical. The term refers to the areas which were thought to be located under the constellation 'Ursa Major' (the Great Bear).*

J. Pentikäinen, *Shamanism and Culture*, Helsinki 2006, p.120.

*If we shadows have offended,  
Think but this, and all is mended,  
That you have but slumber'd here  
While these visions did appear.  
And this weak and idle theme,  
No more yielding but a dream,  
Gentles, do not reprehend:  
if you pardon, we will mend (...).*

William Shakespeare, *A Midsummer-Night's Dream*,  
*Epilogue*, Cambridge University Press 1924.

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## Introduction

This is rather the first book with a title "Philosophy of Law in the Arctic" in the literature. This philosophy of law is a very wide and cross-disciplinary area of research: between law, philosophy, anthropology, history, cultural ecology or environmental studies. I have no doubts that we have done such kind of philosophy in the academia so far, not using this term, but keeping up with the concept, the idea.

The book is a result of research conducted by many members of the Sub-group of Philosophy of Law in the Arctic (the University of the Arctic). This team seems a very interdisciplinary academic group. Our cooperation bears fruit.

The aim of the book is to define and systematise Arctic legal philosophy problems. In this book, there are five thematic parts. Each part consists of two-five short articles (we can call them also chapters or papers). These are the sixteen short articles all together. Each article consists of between six and fourteen pages. So going further, what we see in the book then is, in fact, a set of both theoretical and practical papers<sup>1</sup>. The topics of these papers (chapters) are different as the authors are different while representing a wide-ranging scope of academic disciplines or specialisations. Each paper is followed by a relevant bibliography, which might be helpful for other scholars interested in the field. The seventeen writers come from such countries as Finland (4), Norway (1), Canada (3), Poland (3), Japan (2), Austria (1), Ireland (1), and England (2). Some of them have Arctic indigenous roots (3). In the end of the book, there is a very original attachment - the map of Arctic Canada.

That said, the content is divided to the five parts, shortly speaking, on fundamental concepts of philosophy of law in the Arctic (part I), Arctic cosmologies, beliefs, art and shamanism (II), Arctic lands and waters and the environment (III), indigenous rights and customary law (IV), and topics for the future like teaching philosophy of law in the Arctic or global governance through intercultural justice (V).

What is the idea? My idea behind the project is that we should always consider two issues as important sides of the same coin: one is indigenous legal philosophies, and the second is Western legal theory on indigenous peoples, laws, and problems. I would say shortly: it is about how "they" (Arctic indigenous people) think of the world of own laws and

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<sup>1</sup> Since the authors represent different academic disciplines, then we unified the references as far as possible. However, sometimes some differences between our referencing styles and customs were accepted in the name of diversity of our team.

our Western concepts and how "we" (Western scholars) think of them and our justice concerning their rights.

Obviously, in this book, the notion of legal pluralism is an important (theoretical) concept on the spot (*vide*: Dobrzeniecki's paper)<sup>2</sup>. However, this mentioned idea of the two ways of thinking shows also the existence of distinct and sophisticated legal philosophies in the Arctic. Furthermore, as a reminder one can roar that indigenous narratives such as cosmologies or beliefs are so extremely indispensable - we must never skip them (see: Dillon's and Joy's chapters). Of course, although we focus on international law concerning indigenous peoples (see: Szpak's paper, and Heinämäki's and the Valkonens' paper), we are also to conduct research on more political-moral-philosophical problems concerning the justification of indigenous rights in traditionally occupied lands or waters (see: Usami's and Kuppe's papers). In this context, Canada's case and its challenges and practical problems regarding the First Nations are interesting (see: Hanrahan's two chapters). This is true that discourses on indigenous customary law are still coming (see: Svensson's paper). Comparatively speaking, (I)indigenous legal philosophy always is conceptually, essentially and "ideologically" so different from Western legal philosophy: it is more about harmony or the spiritual relationship to the past or the land (see: Tobin's or Johnson's papers, or again Heinämäki's and the Valkonens' paper). But philosophically speaking, the Arctic might be understood as a common good as well (see: Hasegawa's paper). The common good always is the most important aim of law. It matters.

Plurality matters. Diversity matters.

When we really understand how diverse in terms of laws a world is, not only the Arctic will be safer and happier, but also our earth will enjoy more peace and harmony, both of them we need so much now (*vide* also: Tobin's chapter again). This is true that globally speaking, positive law regimes must be accompanied by customary (or natural) law regimes much more deeply than it is happening nowadays.

By the way, some more general reflections must come in the place: when I arrived in Eastern Finland over three years ago, some thought came to me whether there would be possible to talk about e.g. Aristotle or Aquinas while in the Arctic. Maybe nay... However,

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<sup>2</sup> But maybe Hoekema's "interlegality" is even better: this concept means a kind of combination of both indigenous and Western laws. (That might be also seen like a mix in flux with the tragic history but a hopeful future.)

we can and should speak about other relevant issues concerning legal philosophy in the Arctic. Why? Because this kind of philosophy of law that *is* here, in the Arctic, seems so different and idiosyncratic (see: Husa's or Ginn's papers, or my chapter). Maybe this is the reason why, generally speaking, scholars cumbrously grapple with philosophy of law in the Arctic. Not only the climate and the history have had some obvious direct impact on the exceptionality and peculiarity of topics of this Arctic legal philosophy, but also some other ways of thinking, which we enjoy in the Arctic, are crucial in this phenomenon. Who has not ever been to Inari or Karasjok, Nuuk or Labrador, Siberia or somewhere there in the North does not feel what we felt while writing our pieces concerning chosen issues on legal philosophy in the Arctic. This was our academic duty and privilege to release these thoughts we put on the articles of the book.

I want to thank you all the Authors so much for our common work and your impressive enthusiasm and incredible will of cooperation. This, precisely speaking, e-book is given to your hands (or eyes), the fellow Reader. Open your mind widely: it's *the* legal philosophy in the Arctic, what is a very distinguished and *arduously* but fascinatingly sophisticated topic, as I have grasped. That is not *this weak and idle theme*, but *a dream* about recognised diversity and plurality of laws and cosmologies.

*Dawid Bunikowski, The Editor*  
*Joensuu, North Karelia, Finland*  
*February-June 2016*

## **Part I.**

# **Fundamental Concepts: Law, Tradition, Common Good, Legal Pluralism**

# 1.

## What Is Philosophy of Law in the Arctic?

*Dawid Bunikowski\**

### Abstract

The paper focuses on the essence of philosophy of law in the Arctic. It presents its different topics and ways of thinking. The author proposes a kind of systematisation of the concept.

### 1. Introduction

My aim is to answer the question what legal philosophy in the Arctic is. Old legal-philosophical questions always sound like these: What is a law? What is justice?

My first impression is that Western philosophers of law must rethink own concepts, theories, models, methodologies, and narratives while conducting research on the Arctic, Arctic law, customary law and indigenous law in the Arctic. They should pay more attention to the real economic, political, environmental, and cultural processes actually happening in this region as well as to indigenous perspectives, concepts, and meanings. I think we need scholars with different academic backgrounds, who are interested in the mentioned topic (i.e. not only lawyers, but also Arctic anthropologists of indigenous religions and communities, historians, cultural ecologists or just philosophers). Inter(trans)-multi-cross disciplinarity is the clue. Also indigenous scholars are necessary in this scholarship, because they enjoy a kind of internal perspective or perception of what a law is for indigenous peoples (IP).

### 2. Questions

In particular, I claim that while thinking of the essence of the philosophy of law in the Arctic, I should answer two questions (I start from the Western perspective as a Western scholar):

- 1) What is "Arctic indigenous peoples' law" from the point of view of Western philosophy of law?
- 2) What is "law" for indigenous peoples in the Arctic?

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**Question 1 (Q1)** concerns: concepts of law, justice, morality; sources of law and status of customary law in constitutional hierarchy of sources of law; relations between law and morality; jurisdiction and legal pluralism; the rule of law, nation state, sovereignty; rights, human rights; multiculturalism, political and cultural autonomy, self-government, self-determination; the role of international law in recognising indigenous customary law and legal pluralism in the Arctic; the role of international law in resolving conflicts between states while in the Arctic. Here are the problems of moral and philosophical justification of the (universal) right of indigenous peoples to their own law as well. All ideas of protection of "distinct culture"<sup>3</sup> come in this place, too.

These problems are quite new issues in the Western philosophy of law, which must finally redefine own paradigms and seriously take a look at some challenges, which have appeared in the Arctic recently (like climate change, indigenous rights movements).

Here we use Western terminology, models, and meanings to describe the phenomena.

In particular, contemporary legal philosophies (theories, jurisprudence) from the Arctic countries should be taken into consideration and studied (legal theories in United States, Canada, Finland, Greenland and Denmark, Iceland, Norway, Russia, and Sweden). However, it is justified to remember about legal-philosophical considerations in countries, which enjoy the status of observer states in the Arctic Council, too (i.e. France, Germany, The Netherlands, Poland, Spain, United Kingdom, People's Republic of China, Italian Republic, Japan, Republic of Korea, Republic of Singapore, Republic of India).

**Question 2 (Q2)** covers problems of relations of law and indigenous traditions, religions, cosmologies, mythologies or shamanism. The important relations are: the relation to land (like *sieidi*), ancestry, and the history/past (spiritual heritage) as well as the relation to people, Nature, the cosmos (cosmology). The other serious issues are: "sustainable development" (relation: man-society-Nature); unwritten law as customary laws in particular areas (like reindeer husbandry, natural resources management; fishing waters, hunting grounds, shamanism); organisation of villages or communities (like *siida*); indigenous redistribution of wealth; transmission of knowledge of *own* law; indigenous perception and value of law.

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<sup>3</sup> The phrase comes from *R v Sparrow*, [1990] 1 S.C.R. 1075. The case concerned aboriginal fishing rights. See also this summary: [http://casebrief.wikia.com/wiki/R\\_v\\_Sparrow](http://casebrief.wikia.com/wiki/R_v_Sparrow). Another leading case of the Supreme Court of Canada on aboriginal rights was *R v Van der Peet*, [1996] 2 S.C.R. 507, establishing the Distinctive Culture Test (the clue was that both the relationship of aboriginal peoples to the land and the distinctive cultures and societies of aboriginal peoples must be taken into consideration by courts).

Here we use indigenous terminologies, narratives, and meanings to describe the phenomena, following the anthropological theory by Juha Pentikäinen<sup>4</sup>.

Indigenous scholars, by the nature of the state of things, are first invited to work on Question 2, but Western scholars are not excluded if they follow Pentikäinen's advice that scholars should use indigenous meanings and terminologies<sup>5</sup>.

### 3. Perspectives and topics

To sum up this part of considerations, we have two perspectives in our research:

- 1) Western philosophy of law on indigenous law in the Arctic (Q1),
- 2) Arctic indigenous philosophy(ies) of law (Q2).

Therefore, although indigenous law seems highlighted in Question 1, not only indigenous peoples' law in the Arctic is the most important subject there, but also other philosophical-legal issues, which are very related to indigenous law and interests or just to the region called the Arctic<sup>6</sup>, are equally crucial. These are as follows:

- values of law (international, state, indigenous, customary etc.) in the Arctic: justice, diversity, peace, energy justice, the environment,
- transnational governance, indigenous governance beyond state borders, changing sovereignty, changes of the rule of law, political decisionism (Schmitt etc.), multiculturalism, justice and injustice in the Fourth World,
- Western legal theory about environmental law, the right to clean climate, and restorative justice,
- some classic topics in Western legal theory (like functions of law, sources of law) or legal anthropology (like interlegality<sup>7</sup>).

While Q1 says what we (West) say about them (IP, IP's law, rights, cultures, the Arctic) or how we want to use our theories (like legal pluralism) to describe their legal artefacts or just help them, Q2 says what they say about themselves (IP's law, culture) and us (Western theories, law, culture).

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<sup>4</sup> See how this idea was expressed in these essays: J. Pentikäinen, *Shamanism and Culture*, Helsinki 2006.

<sup>5</sup> *Ibidem*, p. 86.

<sup>6</sup> Also non-indigenous peoples live in the Arctic. The Arctic is administered rather by states and state governments than by indigenous peoples themselves still. So this non-indigenous perspective of law must be also taken into consideration in order to "catch" the true picture of imaginations of law in the Arctic.

<sup>7</sup> See more: A. Hoekema, *European Legal Encounters Between Minority and Majority Cultures: Cases of Interlegality*, "Journal of Legal Pluralism" 2005, vol. 5, pp.1-28. Hoekema prefers to speak about 'local law' than 'customary law'. He argues that it is well known that often, surely in present days, indigenous peoples pick part of the dominant law and mix this somehow with their own law. Hoekema calls it 'interlegality'. See also: T. G. Svensson, *Interlegality, a Process for Strengthening Indigenous Peoples' Autonomy: the Case of Sámi in Norway*, "Journal of Legal Pluralism" 2005, vol. 51, pp. 1-78.

#### 4. Clash of values

Western societies chose own way of building a nation state. They invented concepts like commonwealth, sovereignty, democracy, and the rule of law. They started to colonise the Arctic and the indigenous nations like the Inuit in Greenland, Canadian Indians, Sami in Scandinavia and northern Europe. This is not like that these indigenous societies and communities had not known their ways of something what we call democracy, law, and sovereignty. They knew them without us. They had the law and philosophy. Let us give two short examples of indigenous concepts. First, Rauna Kuokkanen shows e.g. the problem of the philosophy (logic) of the gift<sup>8</sup>. The philosophy of gift was the basis of indigenous peoples' relationships and communities and all the rules of social life as well as rituals and beliefs. Secondly, Mattias Åhrén describes the old Sami customary laws concerning natural resources management and their social, legal and political organisation. He uses terms such as *siida* or *norraz*, or *kärreg*<sup>9</sup>. Generally speaking, Western scholars as (even) internal outsiders or (rather) external outsiders know rather little about both. (There are some great exceptions).

Importantly, the West brought civilisation by violence. The West came with a sword and gun to make the Arctic Western. The West came with own meanings and in the name of own conceptions. Of many conceptions, nation state paradigm, progress, the Enlightenment were the most important. Nevertheless, this was against the traditional ways of life of the

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<sup>8</sup> R. Kuokkanen, *The Logic of the Gift: Reclaiming Indigenous Peoples' Philosophies*, [in:] T. Botz-Bornstein, J. Hengelbrock (eds.), *Re-Ethnicizing the Minds? Cultural Revival in Contemporary Thought*, Amsterdam-New York 2006, pp. 251-271.

<sup>9</sup> See: M. Åhrén, *Indigenous Peoples' Culture, Customs, and Traditions and Customary Law -- the Saami People's Perspective*, *Arizona Journal of International & Comparative Law* 2004, vol. 21(1), pp. 63-112.

See also more about Sami customary law in Western scholars' narratives: E. Niemi, *Sami History and the Frontier Myth: A Perspective on the Northern Sami Spatial and Rights History*, [in:] H. Gaski (ed.), *Sami Culture in a New Era. The Norwegian Sami Experience*, Davvi Girgi OS, Karasjok 1997, pp. 62-85; T. G. Svensson, *Indigenous Rights and Customary Law Discourse: Comparing the Nisga'a and the Sámi*, "Journal of Legal Pluralism and Unofficial Law" 2002, vol. 47, pp. 1-35; Ch. Allard, S. Funderud Skogvang (eds.), *Indigenous Rights in Scandinavia: Autonomous Sami Law*, Farnham: Ashgate Publishing 2015; D. Bunikowski, *Indigenous Peoples, Their Rights and Customary Laws in the North: the Case of the Sámi People in Scandinavia and Russia*, [in:] M. Lähteenmäki, A. Colpaert (eds.), *East Meets North - Crossing the Borders of the Arctic*, "Nordica Geographical Yearbook" 2014, vol. 43 (1), pp.75-85; D. Bunikowski, *Sámi Reindeer Husbandry as a Way of Life: On Culture, Philosophy, Cosmology, and Law*, [in:] T. Koivurova, W. Hasanat (eds.), *Current Developments in Arctic Law 2015*, vol. 3, University of the Arctic Thematic Network on Arctic Law, Rovaniemi 2015, pp. 3-6;

See also chosen Sami scholars' narratives on Sami laws and culture:

K. Näkkäläjärvi, *Reindeer Earmarks as a Sámi Cultural System*, [in:] J. Pennanen, K. Näkkäläjärvi (eds.), *Siidastallan. From Lapp Communities to Modern Sámi Life*, The Inari Sámi Museum, Inari 2003, pp. 140-147; K. Näkkäläjärvi, J. Pennanen, *The Assimilation of Sámi Reindeer-Herding Administration into the Finnish Government*, [in:] J. Pennanen, K. Näkkäläjärvi (eds.), *op. cit.*, pp. 66-67; K. Näkkäläjärvi, *J. Pennanen, Reindeer Herding and the Cycle of the Seasons*, [in:] J. Pennanen, K. Näkkäläjärvi (eds.), *op. cit.*, pp. 62-63; J. Pennanen, *Reindeer Herding - the Defining Cultural Element in the Circumpolar Region*, [in:] J. Pennanen, K. Näkkäläjärvi (eds.), *op. cit.*, pp. 60-61; J. Porsanger, *A Close Relationship to Nature - The Basis of Religion*, [in:] J. Pennanen, K. Näkkäläjärvi (eds.), *op. cit.*, pp. 151-155.

indigenous peoples in the Arctic. Who lost and who won in this battle is a rhetorical question. The West depreciated and almost destroyed the indigenous heritage of the Arctic. Now the indigenous rights movement is strong. It seems that there are some pangs of conscience on the Western side, too. The indigenous peoples' fate stirred up compassion around the world. *Historical Justice* requires more recognition of indigenous rights. Nowadays then Western philosophy, also legal philosophy, may help to resolve some problems we are still facing in our politics. As said Aristotle, there is no a happy society if only part of the society is happy. Aristotle himself says so: "One should call the city-state happy not by looking at a part of it but at all the citizens."<sup>10</sup>

## 5. Concluding remarks

To sum up, there are two ways in the philosophy of law in the Arctic. One, as we see, is *morally* stronger, and it is about indigenous legal philosophies (Q2). These legal philosophies are the indigenous legal philosophies, which are based on indigenous philosophies at all. Here we have e.g. the philosophy of gift, described by Rauna Kuokkanen, or the old Sami customary laws, described by Mattias Åhrén. Generally, indigenous scholars are able to present these philosophies better than Western scholars (even if the latter are not excluded).

And there is another way (Q1). This second way goes through Western legal theory (philosophy) and its considerations on justice, environmental issues, minority rights etc. In this Western philosophy of law we combine both legal philosophy and moral and social philosophies. What we can propose as an interesting stuff *for the Arctic*, borrowing from Aristotle, Cicero<sup>11</sup>, St. Thomas<sup>12</sup>, Justinian<sup>13</sup>, Immanuel Kant<sup>14</sup>, John Austin<sup>15</sup>, Herbert Hart<sup>16</sup>, Brian Tamanaha<sup>17</sup>, and Ronald Dworkin<sup>18</sup>, if any, is the question yet unanswered.

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<sup>10</sup> Aristotle, *Politics*, VII.9.1329a22–3, Translation: Barker, Ernest, revised by Richard Stalley, Oxford 1995.

<sup>11</sup> See: Cicero, *On the Laws (De Legibus)*, available at <http://www.nlnrac.org/classical/cicero/documents/delegibus> (04.02.2016). Cicero pointed out that all humans are naturally equal, instead of living in different cultures. They all enjoy one universal and common law based on reason and Nature: *Troubles, joys, desires, fears wander through the minds of all similarly. And if persons have different opinions, it does not follow that those who worship dog and cat as gods are not tormented by the same superstition as other races. Moreover, what nation does not cherish kindness, benevolence, or a soul that is grateful for and mindful of a benefit? What nation does not despise, does not hate the haughty, the nefarious, the cruel, the ungrateful? Since from these things it may be understood that the whole race of human beings has been united among themselves, the final result is that knowledge of living correctly makes persons better.* (Cicero, 31).

<sup>12</sup> See: St. Thomas Aquinas, *Summa Theologiae, Of the Essence of Law*, available at <http://www.newadvent.org/summa/2090.htm> (22.02.2016). He indicates the most important aim of law in this way: *Consequently, since the law is chiefly ordained to the common good, any other precept in regard to some*

These two ways, poetically speaking, should march together, like two sides of the same coin, like two birds in one pair, like two soldiers of the same battalion. Of course, the Arctic indigenous legal tradition is more spiritual, always related to Nature. Western legal philosophy is more "rational" and procedure-oriented nowadays. But not always it was like it is now. Western philosophical traditions are deeply spiritual also. For example, Nature was the most important criterion for the Greeks or Romans. Philosophy of Stoicism is one of the idiosyncratic signs of this attitude. However, these two ways of thinking are different like different are environments in which these ways of thinking and doing things have been adopted and developed for centuries. Probably, we enjoy also different imaginations of what a legal philosophy is. The aim is to make them both get together in the Arctic. The way is to traverse by progressing steadily and rhythmically in this new science and enkindle new notions.

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*individual work, must needs be devoid of the nature of a law, save in so far as it regards the common good. Therefore every law is ordained to the common good.*

<sup>13</sup> See: Justinian's Code (534), The Institutes of Justinian (Book I. Of Persons, I. Justice and Law), available at <http://classes.maxwell.syr.edu/His381/InstitutesofJustinian.htm> (03.02.2016), where it is stated: *Justice is the constant and perpetual wish to render every one his due (Justitia est constans et perpetua voluntas jus suum cuique tribuere).*

<sup>14</sup> See: I Kant, *Grounding for the Metaphysics of Morals: with On a Supposed Right to Lie because of Philanthropic Concerns*. Hackett 1993 (1785), trans. J. W. Ellington, where he asks for universal principles, which are absolute and unconditional, and where the categorical imperative is formulated (p. 30): *Act only according to that maxim whereby you can at the same time will that it should become a universal law without contradiction.*

<sup>15</sup> On what a law is (in terms of legal positivism and utilitarianism): J. Austin, *Lectures on Jurisprudence* (5th ed. 1885).

<sup>16</sup> On the essence of law in the Western world (and rather the Anglo-Saxon one): H.L.A. Hart, *The Concept of Law*, Oxford 1961.

<sup>17</sup> See especially his papers on legal pluralism: B. Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, "Sydney Law Review" 2008, vol. 30, pp. 375-411; B. Z. Tamanaha, *The Folly of the "Social Scientific" Concept of Legal Pluralism*, "Journal of Law and Society" 1993, vol. 20 (2), pp. 192-217.

<sup>18</sup> See especially his books on law and justice, and rights: R. Dworkin, *Law's Empire*, Cambridge, MA, Harvard 1986; idem, *Taking Rights Seriously*, Cambridge, MA, Harvard 1977.

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## 2.

### Arctic Legal Tradition?

*Jaakko Husa\**

#### Abstract

This short article does not deal with narrowly understood public international law related questions or legal-political disputes over the Arctic, instead, it asks if there is something we might label as an Arctic legal tradition.

#### 1. Introduction

The Arctic is an interesting and challenging area not only geographically and politically but also in a legal sense. To begin with, establishment of Western-style territorial sovereignty over the Arctic land area and its seabed is today highly attractive to many nations as a source of minerals or for military purposes. From a narrow legal point of view, international law questions concerning mostly territorial claims are at the centre of Arctic issues, like, for instance, contesting national claims of sovereignty over the Arctic area. This short article does not deal with narrowly understood public international law related questions or legal-political disputes over the Arctic, instead, it asks if there is something we might label as an Arctic legal tradition. In order to discuss the possibility of an Arctic legal tradition we need to first to look at how Arctic has been and how it can be conceptualised from the viewpoint of comparative law.

#### 2. Comparative Law and the Arctic

Clearly, Arctic contains many sorts of overlapping laws and normativities.<sup>19</sup> But essentially, Arctic is certainly not a monolith in any meaningful law related sense. So, what is

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<sup>19</sup> The concept of law is far less clear than we come to think of. In modern comparative research it is nowadays regarded as a subset of more general normativity. However, the Western notion is certainly not the only one. See S. P. Donlan and L. Heckendorn Urscheler, *Concepts of Law: An Introduction*, [in:] S.P. Donlan and L.

the place of the Arctic in comparative law? In the discipline of comparative law various large-scale entities have been dealt with by macro-comparison. In macro-comparison whole systems (as large-scale normative entities), legal cultures or traditions, which are more extensive than legal systems (in a narrow sense), are examined and discussed.<sup>20</sup> In the mainstream macro-conceptualisations of comparative law, different classifications of legal systems are presented as part(s?) of comparative law theory with the aim of mastering the plurality of the different legal systems in terms of knowledge. In other words, the motive is mainly epistemic in the sense of systematisation. This way, the aim has been to create a general, at least reasonably reliable, simplified panorama of the systems, which are pluralistic as to their contents. Notwithstanding, comparative research has usually concentrated on formal legal systems (i.e. systems of positive law), so it comes as no surprise to see that there is no Arctic legal family or Arctic legal culture in the same sense as comparative lawyers talk about common law, civil law or mixed-law as meaningful macro-constructs.

The fact that Arctic has been missed by comparative law is, however, not a genuine surprise. All States have legal systems, as do many units that are smaller than States, such as cantons and different autonomous territories. But Arctic is different in many senses and not only geographically. For instance, indigenous peoples have their own legal traditions, which are not technically similar or as comprehensive as the legal systems of States that colonized them, or other modern communities that correspond to the State (e.g. the European Union). Moreover, indigenous traditions do not coincide with State borders, which is illustrated by the Sámi law.<sup>21</sup> The Sámi law consists not only of the national norms of the Finnish, Swedish, Norwegian and Russian States and the relevant international norms concerning the Sámi people, but also – and more crucially – of the traditional norms that are followed (internally) in Sámi communities because these rules are felt as binding.

In principle, Arctic indigenous laws should not pose a problem for macro-comparative law; other non-Western normative entities based on, say, customary law have been seen to have formed entities that are sensible from the point of view of comparative law as objects of legal knowledge. In spite of this general recognition, macro-comparative law has for a long time concentrated on the so-called legal families (common law, civil law, mixed law) that are based on the State-centric classification of formal legal systems that originate from the

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Heckendorn Urscheler (eds.), *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives*, Farnham 2014, pp. 1-17.

<sup>20</sup> See J. Husa, *A New Introduction to Comparative Law*, Oxford 2015, p. 100-104.

<sup>21</sup> See C. Allard and S. Funderud Skogvang, *Indigenous Rights in Scandinavia*, Farnham 2015.

Western law. As a result, the very idea of an Arctic legal culture has been left virtually unnoticed. The reason for this is not hard to grasp. From the view point of modern Western comparative lawyer, the laws and normativities of the Arctic peoples are scattered under various separate indigenous laws, as for instance, Sámi law or Inuit law. In this way, the grip of State-oriented thinking has been but overwhelming i.e. State-oriented thinking, by comparatists, has resulted in an Arctic legal tradition not being considered.

The fact that the Arctic has been left out is surprising because there are many such features that justify talking about an Arctic legal tradition. Obviously, the somewhat outdated concept of legal family does not seem to work with the Arctic, but the idea of an Arctic legal tradition might be worthwhile looking into.<sup>22</sup> In effect, if we abandon the epistemic framework of Western comparative law and take into account the views of archaeologists and anthropologists the macro-comparative picture may look different. There are clear reasons to change the classical views and understandings which cannot be discussed here.<sup>23</sup> The basic situation in the Arctic is simple if we leave out the troubles with Western oriented public international law and assume a broader, culturally sensitive point of view on law. Simply put, today we know that people have lived in the Arctic for as long as twenty thousand years. Such peoples as the Inuit in Canada and Greenland, or the Yu'pik, Iñupiat, and Athabascan in Alaska, are examples of traditional ethnic groups that are native to the Arctic. Also the Sámi in Nordic countries and Russia belong to this group.<sup>24</sup> All of these groups have certain anthropological, historical, and mental similarities because traditionally, Arctic native peoples have lived primarily from hunting, fishing, herding, and gathering wild plants for food. And even while much of their traditional worlds that once were are gone today, there are still much Arctic indigenous languages and customs very much alive. But, can we argue that there is an Arctic legal tradition? First we need to define what it is that we mean by the notion of legal tradition.

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<sup>22</sup> The notion of legal family does not fit here not so much because it is outdated but rather because 'legal family' is based on kinship. This means that family members ought to have historical connections and, clearly, this is missing in the case of Arctic law. On a similar note, see also J. Husa, *A New Introduction*, p. 228-229, discussing the Nordic legal family.

<sup>23</sup> See for more detailed discussion J. Husa, *The Future of Legal Families*, [in:] Oxford Handbooks Online.

<sup>24</sup> See G. Fondahl, V. Filippova, and L Mack, *Indigenous Peoples in the New Arctic*, [in:] B. Evengård, J. Nymand Larsen, Ø. Paasche, *The New Arctic*, Berlin 2015, p. 7-22.

### 3. Legal Tradition?

In comparative law discussions, the concept of a legal tradition has been used in different contexts for a long time, but from the beginning of the twenty-first century the notion has been specifically connected with a particular comparatist. *Legal Traditions of the World*, by late H. Patrick Glenn, was first published in 2000 and its fifth edition saw daylight in 2014.<sup>25</sup> Glenn underlined the interaction between different traditions, while simultaneously efficiently silencing the attraction of relativism, which aims at emphasising the distinctiveness of different traditions and their incapability of becoming involved in a genuine dialogue. The main comparative law message is directed to the preservation of a polyphonic legal culture(s) on the globe. Glenn's argument is a powerful point for diversity and cultural pluralism while simultaneously avoiding naïveté or patronage towards non-Western traditions.<sup>26</sup>

By tradition, Glenn refers to the part of the past that is still present at this time and has a chance of being transmitted even further. His notion of a legal tradition emphasises long continuity as a significant part of tradition itself. It is a question of the impact of the past and of how the past stays alive and reaches the present; *pastness* is conveyed in the information contained in the tradition. To state the obvious, there are crucial differences between classical comparative law approaches and the legal traditions approach.<sup>27</sup> The older comparative law classifications of legal families and the different groupings of legal cultures do not contain the dynamic interaction between the macro-constructs that Glenn's basic idea relies on a continuous fashion. That the different legal traditions are in interaction with each other, means that information (concepts, institutions, solution models, principles etc.) is on the move between them.<sup>28</sup> Now, much of Glenn's contribution is particularly useful when we discuss the possibility of a specific Arctic legal tradition.

Glenn distinguished several legal traditions, none of which seems specifically fit to describe the legal tradition of indigenous peoples' Arctic law. In the terminology used by Glenn, this is *chthonic law*, which is defined as a system of law centred on the sacred

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<sup>25</sup> H. Patrick Glenn, *Legal Traditions of the World – Sustainable Diversity of Law*, Oxford, 2014.

<sup>26</sup> See also J. Husa, *A New Introduction*, p. 233-236.

<sup>27</sup> It is not argued here that Glenn's approach would be without flaws. For a critique, see *A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn's Legal Traditions of the World, 2nd Edition*, "Journal of Comparative Law" 2006, vol. 1, no. 1.

<sup>28</sup> See H. Patrick Glenn, *Legal Traditions*, ch. 1.

character of the cosmos.<sup>29</sup> In other words, it is built upon a certain kind of an idea of nature and man. In Glenn's analysis the chthonic legal tradition emerged through experience, orality and memory. He regarded this legal tradition as the oldest of all legal traditions. Glenn specifically describes the chthonic legal tradition as a way to live in close harmony with earth. However, chthonic law is not an exclusive notion because in a broad sense it can be used to describe any legal culture which is a part of the longstanding custom of the people and in this sense also distinguishable from the Western oriented definition of law. In essence, however, Glenn's view relies on a specific legal theoretical thinking according to which there is no distinct line between legal and non-legal forms of normativity. If this standpoint is accepted, then, much of Glenn's arguments should make perfectly sense. And, of course, in the case of the Arctic legal tradition this is imperative because if we do not accept the lack of a distinct line between different forms of normativity, we cannot really speak of the Arctic legal tradition; without this broad theoretical framework we would be left with just the narrow Western notions of law and legality. And, it goes without saying that if we accept only Western law as law having truly normative power, then, indigenous Arctic traditions are not "legal". But this is clearly way too narrow of a standpoint to be upheld in modern comparative legal research!

#### **4. Chthonic Arctic Legal Tradition. Conclusions**

Now, if we follow Glenn's line of argumentation and expand it a bit we may tentatively claim that there indeed is an Arctic legal tradition. Undoubtedly, it has some distinguishable features. First, as to its nature, it is not Western positive (State) law, as it has emerged through long experience, orality and memory of indigenous group. Second, an Arctic legal tradition covers the indigenous peoples of the geographical Arctic, who have inhabited this area for thousands of years. In other words, it is not the laws or legal systems of Western colonizers, nor is it the laws or customs of non-Arctic indigenous peoples.<sup>30</sup> Third, an Arctic

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<sup>29</sup> See H. Patrick Glenn, *Legal Traditions*, ch. 3. Originally the word chthonic refers to earth and has its roots in Greek mythology. According to this mythology, there were deities or gods which were related to the subterranean underworld i.e. a world where the souls of the dead go. Accordingly, the notion of chthonic comes from the Greek χθόνιος (*khthónios*) which means "of the earth, in the earth". The basic root of chthonic comes from the word χθών (*khión*) which means "earth" or "ground". In short, this notion refers to a certain kind of relationship between man and earth.

<sup>30</sup> Of course, other indigenous peoples may be part of the larger chthonic legal tradition but they lack the "Northness" which is distinctive for the Arctic indigenous groups. In other words, the Arctic groups' relation to nature is labelled by the Northern conditions (e.g. animals, ice, snow etc.).

legal tradition builds especially on the specific connection to the land (earth) that the indigenous peoples have inhabited for very long periods of time. Fourth, a chthonic Arctic legal tradition is intimately connected to indigenous languages and traditional livelihoods such as reindeer herding, fishing and hunting. Fifth, a chthonic Arctic legal tradition is in danger because of industrialization, social change and environmental issues (e.g. climate change). The danger stems from the fact that indigenous normativities are typically born out of, and upheld together with the basic condition which is derived from the foundational relation between human being and their environment (earth), thus, these indigenous normativities are essentially chthonic as to their nature.

In a deeper legal cultural sense, a chthonic Arctic legal tradition is threatened by the tightening grip of Western State laws and their imperialistic embrace. Importantly, the growing recognition of indigenous rights and the renaissance of self-governing indigenous institutions are paving way to a legal recognition of the value and significance of an Arctic indigenous legal tradition. Yet, it is up to us, Western lawyers and legal scholars, to make sure that the chthonic Arctic legal voice will be heard and that it is not suffocated by the all-encompassing Western, State centred understanding of law.

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### 3.

## The Philosophy of Law in Canada's North

*Diana Ginn\**

### Abstract

The philosophy of law in Canada's North is best understood through the metaphor of a bridge, exemplified through the recognition of customary aboriginal law, the doctrine of aboriginal rights, and the devolution of jurisdiction to territorial governments, all of which reflect a pragmatic, contextual and pluralistic approach to law.

### 1. Introduction

Canada is a federal state, comprised of 10 provinces and three northern territories (Yukon, Northwest Territories and Nunavut). While some portion of each territory lies south of the Arctic Circle, politically, socially and colloquially, "the North" in Canada is seen as encompassing all of the three territories as well as northern Quebec and Labrador. The North plays a significant role in Canada's geographic reach and its identity: it encompasses more than 40 percent of our land mass and nearly 75 percent of our shoreline;<sup>31</sup> and in our national anthem, we sing of "*the true north strong and free*".<sup>32</sup> The population of Canada's North is small – less than 120,000 people, approximately half of whom are aboriginal (and this percentage rises to 80% above the Arctic Circle<sup>33</sup>).

The philosophy of law in Canada's North can best be understood through the metaphor of a bridge. This metaphor is explored here in three contexts: recognition of aboriginal customary law; resolution of land and self-governance claims through the doctrine of aboriginal rights; and devolution of jurisdiction to territorial governments. The pragmatic, contextual and pluralistic approach to law reflected in these three examples has facilitated the building of judicial, legislative and constitutional bridges between systems of law, between aboriginal occupancy and Crown sovereignty, and across a spectrum of governance models.

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<sup>31</sup> L. Neilson Bonikowsky, "The Arctic, country by country" in *Diplomat and International Canada* (October 4, 2012) available at <http://diplomatonline.com/mag/2012/10/the-arctic-country-by-country> (28.02.2016).

<sup>32</sup> "O Canada", Canada's National Anthem, *National Anthem Act* (R.S.C., 1985, c. N-2).

<sup>33</sup> L. Neilson Bonikowsky, *op cit*.

## 2. Recognition of aboriginal customary law

Britain's acquisition of North America was premised on the continued existence of aboriginal laws and governmental structures, except to the extent these were lawfully extinguished or were incompatible with Crown sovereignty and underlying Crown title.<sup>34</sup> This concept of continuity found expression in a number of cases upholding "custom" marriages and adoptions. The earliest known case occurred in 1854, where the court validated a marriage solemnized in accordance with aboriginal law.<sup>35</sup> Custom marriages have also been upheld more recently<sup>36</sup> as have custom adoptions,<sup>37</sup> including where the adopting parent was of European descent but had become part of the aboriginal community.<sup>38</sup> Custom adoptions now have statutory recognition in the Northwest Territories and Nunavut.<sup>39</sup> This legal pluralism operates as a bridge between two communities and two legal systems, offering a flexible and pragmatic recognition of existing familial relationships.

## 3. Aboriginal rights: land and self-governance claims

While aboriginal peoples in Canada's North had some early contact with traders, whalers, prospectors and missionaries, they remained largely undisturbed until the early 1970s. In 1968, oil and gas were discovered in Alaska, and by 1975, there were various proposals for pipelines running through the western Arctic. Although the pipelines were put on hold, it became evident that development planned for the North could threaten traditional lifestyles that had remained largely viable until then. One response to the prospect of increased development was the initiation of aboriginal land claims, including an attempt in 1973 to lodge a caveat against title to almost half of the Northwest Territories.<sup>40</sup> While the application was ultimately unsuccessful, that same year, the Supreme Court of Canada recognized the doctrine of aboriginal title, based on historic use and occupancy, and not dependent on any grant from or treaty with the Crown.<sup>41</sup>

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<sup>34</sup> B. Slattery, *The Hidden Constitution*, Am. J. Comp. Law 1984 vol. 32, p. 366.

<sup>35</sup> *Tranchemontaque v. Momtefeand et al*, referred to in B. Morse, *Native people and the Resolution of Family Matters* (LLM Thesis) York University 1981 at p. 45.

<sup>36</sup> *Re Noah Estate (1961)*, 32 D.L.R. (2d) 185.

<sup>37</sup> *Re Katie's Adoption Petition* (1961) 38 W.W.R. 100; *Re Beaulieu's Petition (1969)*, 3 D.L.R. (3d) 479; *Re Deborah E-789* [1972] 5 W.W.E. 203.

<sup>38</sup> *Re Washee* [1967] 57 D.L.R. (d) 743; *Re Tagornak Adoption Petition* (1984) 1 C.N.L.R. 185.

<sup>39</sup> *Aboriginal Custom Adoption Recognition Act*, SNWT (Nu) 1994, c 26.

<sup>40</sup> *History of the Dene Nation*, available at <http://www.denenation.ca/history> (28.02.2016).

<sup>41</sup> *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313.

The connection between aboriginal title to land and some form of jurisdiction over those lands soon became evident. Two early land claims settled in Canada's North - the James Bay and Northern Quebec Agreement (1975) and the Northeastern Quebec Agreement (1978) - recognized aboriginal control over land and resources, with the latter described as "the first Aboriginal self-government model in Canada".<sup>42</sup> Similarly, a 1984 agreement between the federal government and the Inuvialuit of the western Arctic contained self-governance elements as did four agreements signed in the Yukon in 1993, which recognized significant aboriginal control over internal administrative matters, and legislative authority over matters of a "local or private nature" within the area covered by the agreements.<sup>43</sup> Nunavut (formerly part of the Northwest Territories) was formed through the Nunavut Land Claims Agreement, signed in 1999, with self-government being exercised through a public government representing a majority Aboriginal and minority non-Aboriginal population.

While the resolution of land and self-governance claims has occurred primarily through negotiated settlements, the legal parameters of those negotiations are found in Supreme Court of Canada jurisprudence on aboriginal rights, particularly since 1982 when, as part of the patriation of the Canadian constitution, aboriginal rights were given constitutional protection.<sup>44</sup> The doctrine of aboriginal rights has been described by the Court as a "*bridging of aboriginal and non-aboriginal cultures*",<sup>45</sup> which is "*aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory*".<sup>46</sup> One Supreme Court justice ended his landmark description of aboriginal title with the words, "*Let us face it, we are all here to stay.*"<sup>47</sup>

#### **4. Devolution of jurisdiction to territorial governments**

The federal and provincial governments in Canada exercise inherent jurisdiction, enshrined in the constitution. While the territories do not enjoy constitutionally-protected jurisdiction, in all three there has been significant devolution of legislative and administrative

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<sup>42</sup> Y. D. Belanger, ed., *Aboriginal Self-Government in Canada: Current Trends & Issues*, 3d ed. (Saskatoon, Purich Publishing, Ltd.) 2008 at p. 11.

<sup>43</sup> M. Whittington, *Aboriginal Self-Government in Canada* in M. Whittington & G. Williams (eds.) *Canadian Politics in the 1990s*, 4th ed. (Toronto: Nelson) 1994 at p. 14.

<sup>44</sup> Section 35, *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>45</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 50, para 43.

<sup>46</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para 81.

<sup>47</sup> *Ibidem*, para 186.

authority from the federal government.<sup>48</sup> On a conventional account, this authority could be revoked simply by repealing the relevant federal legislation; however, some political scientists argue that unwritten constitutional conventions would prevent the federal government from dismantling or eviscerating territorial governments.<sup>49</sup> Thus, devolution too has acted as a bridge, allowing territorial governments to move along the continuum from purely subordinate entities exercising powers at the goodwill of the federal government, to entities that exercise authority and occupy a position far closer to that of provinces. Devolution has happened over several decades and at a different pace in each of the territories, thus allowing a contextualized response to the conditions and realities in each territory.

## 5. Conclusion

Using the metaphor of a bridge is not intended to portray an unrealistically rosy picture of the Canadian North: there is still a great deal of work to be done in building healthy communities, as is evident from high levels of illness, addictions, poverty and suicide, and in promoting sustainable economic development while respecting traditional ways of life. Recognition of customary aboriginal family, the settlement of land and self-governance claims, and the devolution of legislative and administrative authority to territorial governments are not panaceas; for instance, some would argue that the autonomy of aboriginal child welfare agencies is still limited or that the degree of aboriginal self-government recognized thus far is inadequate.<sup>50</sup> However, by providing a bridge between different legal systems, between aboriginal use and occupation of the lands and the assertion of Crown sovereignty, and between more and less autonomous models of government, each of these has played some role in offering pragmatic, contextual and pluralistic responses to the challenges and conundrums of the Canadian North.

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<sup>48</sup> *Yukon Devolution*, available at <https://www.aadnc-aandc.gc.ca/eng/1352470994098/1352471080537>; *Northwest Territories Devolution*, available at <https://www.aadnc-aandc.gc.ca/eng/1352398433161/1352400493640>; *Nunavut Devolution*, available at <https://www.aadnc-aandc.gc.ca/eng/1352471770723/1352471861365> (28.02.2106).

<sup>49</sup> See for example: K. Cameron & G. White, *Northern Governments in Transition: Political and Constitutional Development in the Yukon, Nunavut and the Western Northwest Territories* (Montreal: Institute for Research on Public Policy) 1995 at p. 118.

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## 4.

### The Arctic as Common Good

*Ko Hasegawa\**

#### **Abstract**

The paper is to sketch a problem framework for reflecting the moral nature of the Arctic as common good that would be significant for further practical considerations on various Arctic issues.

#### **1. Introduction**

As a fundamental problem of the philosophy of law in the Arctic, it is significant how we could grasp the moral nature of the Arctic. In particular, the idea of common good in the Arctic looks much relevant when we see many political, legal, or economic issues concerning the Arctic. In this brief exploration, I try to sketch a problem framework for reflecting the moral nature of the Arctic as common good that would be significant for further practical considerations on various Arctic issues.

#### **2. Introductory Remarks—The Significance of the Idea of Common Good for the Arctic**

Should the region of the Arctic be shared by all the relevant societies and peoples, or be appropriated severally by each of those societies and peoples? This is the fundamental issue for the preservation and utilization of various conditions and resources in the Arctic. If to be shared by all, there must be significant constraints to the utilization of the Arctic; if to be

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I am very grateful to the invitation of Dr. Dawid Bunikowski to the research group for the philosophy of law in the Arctic and to this e-book project. As what I discuss in this short essay concerns only the points for my further research on the Arctic as common good, I would not make detailed footnotes for possible references.

appropriated severally, there must be significant freedom in the preservation of the Arctic. The way of thinking in this regard is theoretically contrasting and practically conflicting, whether politically, economically, socially or morally. Which is better, or are there any other possibilities? And, how is the Arctic law to be related to those thinkings? ——These are the problems for philosophy of law in the Arctic.

To tackle with these problems, we need beware that there are two different basic problems which gets entangled with each other: conceptual and empirical problems. The former is the problem that concerns the conditions and features of relevant concepts such as common good or property in discussing about the Arctic issues; the latter is the problem that concerns the identification and instantiation of relevant facts to the concept in question such as the allocation of land or sea rights in discussing about those issues. And these problems get entangled in the sense that the conceptual conditions and features are prerequisites to the recognition of empirical matters, while the empirical identification and instantiation are the matters of conceptual application. We have to heed to this twofold problem situation, especially when we wish to focus on the idea of common good for the Arctic.

The idea of common good indicates, in my view, the holistic condition for all human beings in a society, as well as the idea of global common good for all the peoples on this globe. For example, it is evident that clean air is an invaluable life condition for all the people in a society, as well as for all the peoples on this globe<sup>51</sup>. This means not simply that clean air is non-exclusionarily sharable but rather that anyone in society cannot live well at all without that condition<sup>52</sup>. Even if clean air is given in some artificial way, the fundamentality of the condition is the same. Thus we may say that clean air is a (natural) common good. On the global level, we can also say that all the peoples on this globe must need this sort of common good in some universal way. Common good is the good that is invaluablely basic for any individuals, classes, groups, or communities of divergent people in society, without regard to their political, economic, or cultural variations.

Yet, what sort of particular good(s) should be regarded as invaluablely basic for the fundamental conditions of human life without which human beings cannot subsist and act well at all? The important question here is concerned not simply with the non-exclusionarily

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<sup>51</sup> Common good in a society can be a part of a global common good. One example is clean air mentioned in the text; the other may be climate condition in the sense that the climate change in a region might influence other changes in other regions on the globe.

<sup>52</sup> Although I am not a Thomist, I maintain that this invaluableness, and thus basicness, is the key to the genuine idea of common good for human beings.

sharable use but rather with the basicness of that good for the subsistence and activities for all the people(s) concerned. To understand this significance of common good, we need some theory of boundary conditions of it, namely conceptual conditions and features of common good, including some paradigmatic instances. Still, to add, while it could be easier to think about that possibility as for natural and economic good, it could be more difficult to think about commonality or universality as for cultural and societal good.

In this short essay, there are few rooms for more explications. However, needless to say, we have to distinguish the concepts of common good, collective goods, public goods and the like<sup>53</sup>. These various communal good(s) are the good(s) to be co-utilized by anyone in society in some practical way. Still, common good indicates the very necessity of communal hold for the intrinsic and essential basis of human lives.

### **3. Problems of the Arctic as Common Good**

Now, for the idea of the Arctic as common good, central problems are concerned with the conceptual one as I have distinguished above; which may include several sub-problems necessary to address. They are the problem of *circumstance*, the problem of *distribution*, and the problem of *participation*, as I call them, as well as the problem that is the common thread of them, namely the problem of *communality*.

The first problem is concerned with the possibility of the recognition of common good: how can some good or goods be grasped as invaluablely common? The second is concerned with the standards of distribution or redistribution of common good among the relevant peoples, organizations, or states around the Arctic: how can common good be shared equally among relevant societal units? The third is concerned with the conditions of human decision-making for the effective use of common good: how can the relevant units around the region in question decide the administrative issues on the common good in question in a fair way? And the fourth is concerned with the prerequisites of the three problems explicated so far: how the circumstance, distribution, and participation concerning common good can be relevantly common among the relevant units in the region in question? This last problem is ultimately important because the former three problems presuppose some positive answer to

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<sup>53</sup> The point that common good is invaluable for human life is the difference from collective goods and public goods. Collective goods such as oil are to be allocated in some practical way by individual rights. Public goods such as water supply are to be handled in some individualist way with sharedness and non-excludability. Still, this is an intuition that must be examined further.

this last problem: if those former problems be not given some positively communal characteristics, there would not arise those problems regarding common good.

In particular, the first and the last problem is the vital one for considering whether the Arctic, or some important aspect of the Arctic, can be a common good, and, if so, in what sense and for whom. For example, can the legal issues concerning the Arctic today, such as, naturally, the preservation of climate conditions, the acquisition and use of natural resources in the Arctic, the cooperative use of sky, sea and land for transportation, or socially, the rights of indigenous peoples in the Arctic with each other and against other people and organizations from different areas, the relationship between the necessity of economic development and the maintenance of traditional ways of life, and the communicative exchanges of divergent cultures in the region, be identified as that sort of common good? Here the problem is twofold: one is concerned with the possibility of the Arctic resources as common good for the peoples concerned, and the other is with the possibility of the concept of common good in the Arctic itself. And the direction of possible responses to the particular issues mentioned above is determined by the positive or negative answers to these problems. If we can think positively about these two problems, we will have a positive view for the Arctic as common good, and *vice versa*.

Also, for example, how to arrange the cooperative use of sky, sea and land for transportation among relevant societies and peoples is a distributive question concerning the privilege and burden for that common good. Is the privilege and burden of the Arctic sky, sea or land for transportation to be absolutely equalized among relevant societies and peoples, or to be distributed unevenly and proportionately? And it includes a participatory question concerning common good, in this context, how the scope and extent of those privileges and burdens should be decided, by democratic voting or under some deliberative procedure among relevant societies and peoples.

Incidentally, we should not forget all these points lead to another problem of the so-called common capital in society<sup>54</sup>. The problems mentioned so far include institutional aspects which concern the infra-structure of adequate human dealing of common good. For example, the problem of distribution includes the problem of the institutional framework for the realization and maintenance of distributive justice. Also, the problem of participation includes the problem of the institutional framework for participation such as the system of

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<sup>54</sup> Kohbun Uzawa, *Shakaiteki Kyotsu Shihon (Social Common Capital)* (Iwanami Shoten, 1998).

rights and voting. These frameworks are derivations from the idea of common good; in other words, those are socially common capital for the realization of common good, the constitutive one of which is law. We have to explore how this capital is to be shaped properly in the political, economic, or social determination of common good, and, especially for the philosophy of law in the Arctic, how the proper role is to be given to law in the settings in question.

Meanwhile, there are purely empirical problems as well. Assuming that the significance of the concept of common good is explicated in a proper way in responding to all those questions I have touched in this section, how to empirically identify and instantiate such common good is itself an significant problem<sup>55</sup>. Still, I will leave this problem to relevant empirical discussions.

#### **4. A Future Perspective for the Arctic as Common Good**

All the problems I have pointed out in this overview are philosophically deep and practically complex, which requires deep reflections. It is hasty for us to advocate some particular positions to those problems without such reflections. And this is why we need the exploration of the philosophy of law in the Arctic.

To note at this moment, the following issues may be important especially from the viewpoint of common good in the Arctic — whether and to what extent natural resources and conditions in the Arctic are to be preserved for the stable natural environment in the region and on this globe; whether and to what extent the important species should be protected and preserved for the maintenance of the bio-diversity in this region; whether and to what extent the Arctic is to be geographically arranged to share by the societies or peoples concerned and thereby important resources are to be explored for the common or universal interests of the peoples in this region or on this globe; whether and to what extent the interests of minority peoples in the Arctic, whose livings are endangered by capitalistic globalization and other private exploitations from the advanced parts of the world, should be respected in harmony with relevant global considerations<sup>56</sup>.

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<sup>55</sup> For example, to identify the importance of clean air as common good, we have to observe and grasp the invaluable characteristics of clean air for the life of human beings.

<sup>56</sup> Cf. Leif Christian Jensen & Geir Hoenneland, eds., *Handbook of the Politics of the Arctic*, Edward Elger Publication, 2015

Not only whether one should answer to these issues affirmatively or negatively but also how one could answer to these issues properly are significant problems for the philosophy of law in the Arctic as common good. To answer these problems, we have to consider what elements we should appreciate as fundamentally common in accessing, utilizing, and preserving those various goods in the Arctic via a legal perspective on the Arctic as common good. And, we should note in the end, the exploration of the Arctic as common good is ultimately a cosmological problem on the very meaning of life for human beings in that vast region in determining the communality of the common good in question<sup>57</sup>.

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<sup>57</sup> To understand why we have to live under common good is to answer the meaning of life for human being, which, I believe, must face another problem about her communal nature. It might become the problem of the communality of communalities in the Arctic.

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## 5.

### Legal Pluralisms

*Karol Dobrzeniecki\**

#### Abstract

“Legal pluralism” may denote various things in very various contexts. Its popularity in contemporary socio-legal debate sometimes additionally impedes the accurate understanding.

#### 1. Introduction

An issue that requires careful consideration, always when writing about legal pluralism, is an adequate and conscious usage of the term<sup>58</sup>. “Legal pluralism” may denote various things in very various contexts. Its popularity in contemporary socio-legal debate sometimes additionally impedes the accurate understanding. Different meanings are confused by polysemy. In my opinion legal pluralism cannot be confined solely to – as a popular definition says - “the idea that in any one geographical space, there is more than one law or legal system”<sup>59</sup>. Each plane of legal research (linguistic or analytical, psychological, sociological and axiological) offers a different view on legal pluralism. Below I would like to sketch exemplary usages of the term.

#### 2. Exemplary usages of the term "legal pluralism"

Analytical approach concentrates on the logical structure of law, the meanings and uses of its concepts, and the formal terms and the modes of its operation. Legal pluralism, from this perspective, was described by Nick Barber. In his view, a single legal system can contain multiple rules of recognition<sup>60</sup> that leads to the system with unranked

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<sup>58</sup> N. W. Barber, *Legal Pluralism and the European Union*, “European Law Journal”, Vol. 12, No. 3, May 2006, p. 306–329.

<sup>59</sup> M. Davies, Legal Pluralism, in: *The Oxford Handbook of Empirical Legal Research*, P. Cane, H. M. Kritzer (ed.), <http://www.oxfordhandbooks.com/> [access: 22.03.2016].

<sup>60</sup> The rule of recognition points which rules belong to a given legal system. All the rules that could be identified through the application of the rule of recognition constituted a single legal system.

legal sources. This kind of inconsistency cannot be resolved within the legal system because of the lack of legal mechanisms which could be used for such purpose. In analytical approach to legal pluralism, it is assumed that there is no higher constitutional body that can resolve such kind of dispute through adjudication or legislation. “Consequently, pluralist legal systems contain a risk, which need not be realised, of constitutional crisis; of officials being compelled to choose between their loyalties to different public institutions.”<sup>61</sup> For Barber, pluralist model of a legal system requires both multiple sources of law, and, also, the possibility of inconsistency between legal rules<sup>62</sup>. Systems with inconsistent rules of recognition existed not only as theoretical constructs. Pluralist legal orders in this sense occurred e.g. during Rhodesian crisis of 1965. The concept might also be applied for explanation of the relations between European and domestic legal orders.

The founder and the most prominent representative of the legal psychologism was Leon Petrażycki (1867 – 1931). His concept consists in treating of all legal phenomena as a mere subclass of ethical ones<sup>63</sup>. The basis for the theory was a concept of emotion, especially ethical emotion regarded as an inward impediment to individual freedom. These psychological phenomena comprise both passive experiences (feelings) and a drive toward a certain action. According to Petrażycki, if a man is facing the possibility of committing an ethically wrong act, it will evoke in him repulsive emotions that reject such an act. Ethical appulsions, on the contrary, usually cause proper behaviour, like paying debts or helping the poors etc.<sup>64</sup> Experiencing ethical emotion is a condition for every ethical act. Such observation leads Petrażycki to conclusion that, in fact, all ethical and legal phenomena are purely and exclusively individual phenomena and the consent and approval on the part of others, if any, are irrelevant from the point of view of defining and studying their nature<sup>65</sup>. Ethical and moral phenomena differ in the aspect of reference to others. Obligations as to which nothing appertains are moral obligations. Ones which are felt as unfree with reference to others should be termed legal obligations<sup>66</sup>.

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<sup>61</sup> N. W. Barber, *op. cit.* p.306.

<sup>62</sup> *Ibidem*, p. 308.

<sup>63</sup> E. Fittipaldi, *Chapter 18 - Leon Petrażycki's Theory of Law*, in: *A Treatise of Legal Philosophy and General Jurisprudence, Volume 12 Legal Philosophy in the Twentieth Century: The Civil Law World, Tome 1: Language Areas, Tome 2: Main Orientations and Topics*, E. Pattaro, C. Roversi (eds.), Dordrecht 2016, p. 447.

<sup>64</sup> L. Petrażycki, *Law and Morality*, Cambridge, MA 1955, p. 30.

<sup>65</sup> L. Petrażycki, *Law...*, p. 75.

<sup>66</sup> *Ibidem*, p. 46.

Important for the discussed issue of legal pluralism is Petrażycki's distinction between official and unofficial law. Official imperative-attributive phenomena are made up by what state officials actually experience in their capacity of public-legal authorities<sup>67</sup>. Unofficial law (e.g. system of norms governing the life of any family) does not possess this significance in the state<sup>68</sup>. From the theoretical point of view there are no essential differences between them. Positive law are rules referring to any kind of normative fact, which could be official (as statutes, administrative decisions), as well as unofficial (command of a leader) or may have only psychic nature. It refers to anything that is referred to by an agent as the source of the norm<sup>69</sup>. Petrażycki's definition of law covers each imperative-attributive phenomenon anywhere and anytime<sup>70</sup>. Capacity to experience such kind of feelings is not limited to humans, but covers also other kind of beings, even animals and plants.

Legal pluralism moved to centre stage in socio-legal studies in the late 1980s. Many anthropologists and sociologists adopted the concept of law set forth by John Griffiths, in the article "What is Legal Pluralism?" from 1986. He distinguished a nonuniformity of law (when more than one role is applicable to the same situation) from legal pluralism. The latter must be not normative but empirical, being an attribute of a social field, not of a legal system. Legal pluralism is a concomitant of social pluralism. "It is when in a social field more than one source of 'law', more than one 'legal order', is observable, that the social order of that field can be said to exhibit legal pluralism."<sup>71</sup> Griffiths applies Sally Falk Moore's concept of the 'semi-autonomous social field'. He argues that law is present in every such field, and "since every society contains many such fields, legal pluralism is a universal feature of social organization."<sup>72</sup> He argues that there are many rule-generating fields in society, hence there are many legal orders in society, including the family, corporations, factories, sports leagues, and indeed just about any social area with social regulation

Similar phenomena are taking place at the supranational level. As another sociologist, Günther Teubner noticed: wherever autonomous social sectors develop, at the same time autonomous law is produced, in relative distance from politics. World society is coming about not under the leadership of international politics, nor can it be equated with

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<sup>67</sup> E. Fittipaldi, *op. cit.*, p. 499.

<sup>68</sup> L. Petrażycki, *Law...*, p. 139.

<sup>69</sup> K. Motyka, *Leon Petrażycki challenge to legal orthodoxy*, Lublin 2007, p. 39.

<sup>70</sup> *Ibidem*, p. 35.

<sup>71</sup> J. Griffiths, *What is Legal Pluralism?*, "Journal of Legal Pluralism and Unofficial Law" no. 24, 1986, p. 38.

<sup>72</sup> *Ibidem*.

economic globalisation. “Instead, globalisation is a polycentric process in which simultaneously differing areas of life break through their regional bounds and each constitutes autonomous global sectors for themselves.”<sup>73</sup> Law-making takes place outside the classical sources of international law, e.g. in agreements between global players, in private market regulation by multinational concerns, internal regulations of international organisations, interorganisational negotiating systems, world-wide standardisation processes, etc.<sup>74</sup>

### 3. Iusnaturalism

An example of a legal research on axiological plane is iusnaturalism. In this context legal pluralism might be understood as co-existence of different kinds of law, not in psychological or sociological but in metaphysical sense. Aquinas recognized four main kinds of law: the eternal, the natural, the human, and the divine. The eternal law is “the type of divine wisdom, as directing all actions and movements”. The natural law is eternal law as it applies to people; it is “promulgated by the very fact that God instilled it into men's minds so as to be known by them naturally”. The divine law is the revealed word of God. The human law is created by men and its aim (*telos*), according to Aquinas, is the common good. The human law is “an ordinance of reason for the common good, made by him who has care of the community.”<sup>75</sup> Aquinas’s definition of law requires that there should be an authority in political communities, translating certain principles of natural law into positive law and reinforcing these principles with legal sanctions. Justified authorities derive the positive law they make from the natural law or, equivalently, translate natural law principles of justice and political morality into the rules of positive law<sup>76</sup>.

Positive law may be derived from the natural law in two ways. First, as a conclusion from premises, secondly, by way of determination of certain generalities. Some things are therefore derived from the general principles of the natural law, by way of conclusions. For example, that “one must not kill” may be derived as a conclusion from the principle that “one should do harm to no man”. But some are derived there from by way of

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<sup>73</sup> G. Teubner, *Societal Constitutionalism: Alternatives to State-centered Constitutional Theory*, Storrs Lectures 2003/04 Yale Law School, p. 10.

<sup>74</sup> *Ibidem*, p. 13.

<sup>75</sup> St. Thomas Aquinas, *The Summa Theologica*, Benziger Bros. edition, 1947, Q. 90, art. 4.

<sup>76</sup> J. Finnis, *Aquinas : Moral, Political and Legal Theory*, Oxford 2008.

determination. For example, the law of nature has it that the evil-doer should be punished. But that he be punished in this or that way is a determination of the law of nature<sup>77</sup>. Those things, which are derived from the law of nature by way of particular determination, belong to the civil law, as each state decides on what is best for itself<sup>78</sup>. Accordingly, both modes of derivation are found in the human law. Those things, which are derived in the first way, are contained in human law not as emanating from that place exclusively, but have some force from the natural law also. Aquinas says that laws whose derivation from natural law is of this second type have their force 'from human law alone' (*ex sola lege humana vigorem habent*)<sup>79</sup>.

Iusnaturalism is considered as having double or triple character. Besides positive and natural laws, L. L. Vallauri distinguished also "free law"<sup>80</sup>. Because of this fact, iusnaturalism is often considered as "ontological pluralism of law"<sup>81</sup>.

#### **4. Conclusion**

Legal pluralists reject narrow-minded perspective of traditional, positivistic and state-centred legal theory. They look for a different paradigm, which would recognize the plurality of law. The attitude should be praised as long as the pluralistic approach is used consciously and precisely, in order to explain legal issues at this research plane in which legal discourse is conducted.

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<sup>77</sup> St. Thomas Aquinas, *op. cit.*, Q. 95, art. 2.

<sup>78</sup> *Ibidem*, Q. 95 art. 4.

<sup>79</sup> J. Finnis, *op. cit.*, p. 267.

<sup>80</sup> P. Ferreira de Cunha, *Rethinking natural law*, Heidelberg 2013, p. 9.

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## **Part II.**

### **Arctic Cosmologies, Beliefs, Art and Shamanism**

## Customary Laws and Nomadic Cosmologies of Art and the Environment

*Patrick Dillon\**

### Abstract

This paper offers a brief overview of some connections between art, environment and nomadic cosmologies, and relates these to matters concerned with customary laws. The connections are made in a cultural ecological framework which emphasises the transactional basis of how people engage with their environments. Whereas art has always been an integral part of nomadic cosmologies, it now has additional roles in recording customs and traditions and in political and ecological critique.

### 1. Introduction

In 1996, John D. Barrow, a professor of astronomy, wrote *The Artful Universe*, in which he made connections between human aesthetic appreciation and the basic nature of the cosmos. His thesis is that the adaptive behaviour of people in the environments they inhabit has, over many generations, laid foundations for sensitivities and subjective responses which, in turn, are manifest in their works of ornamentation and art.

Twenty years later, some of Barrow's ideas look a little reductionist, but new insights from across the disciplines have added weight to arguments about human aesthetics and environments. My own discipline is cultural ecology which is concerned with the flux of transactions that characterise how people interact with their environments. In this paper, I

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would like to sketch out some connections within a particular cultural ecological configuration, that of art, environment and nomadic cosmologies, and relate these to matters concerned with customary laws. Space permits only the briefest of outlines, a more detailed cultural ecological framing of customary laws can be found in Bunikowski & Dillon (2016) and of art and craft in Dillon (2016).

## **2. Cosmology, nomadism, and customary laws**

The general argument is that cosmology is a form of universal or divine law which becomes internalised as beliefs and values, and these, in turn, are expressed within a community as customary laws. Customary laws are primarily reflected in people's *behaviour* within an environment, but they can also be given form and meaning through *art*. Here I use the term 'art' broadly as the application of creative skill and imagination, typically in visual form, producing works that are appreciated for their beauty and, more importantly in the context of this paper, for their symbolic, emotional and spiritual significance. This definition encompasses the crafting and ornamentation of tools and artefacts that are an integral part of nomadic ways of living.

Nomadism refers to a lifestyle where people move from place to place, taking their possessions with them, and making a living from the resources of the environment immediately to hand. Few people now are wholly nomadic, so the term is taken to include pastoral groups who move periodically on hunting expeditions, to manage their livestock, or to exploit seasonal resources (Ingold, 2008). Nomadism, so defined, is an important component of the lifestyles of the indigenous peoples of the Arctic.

Cultural ecology does not romanticise nomadism, nor does it see it as representing something 'different' or 'other'. Rather it conceptualises nomadism as a lifestyle lying at one end of a continuum of possible engagements between people and their environments. The nomadic end of the continuum is characterised by transactions between people and the primary resources (landscapes, plants, animals) of the environments concerned, and the lifestyles and values associated with living off those resources. Urban living, with high energy demands, consumption of secondary (manufactured) goods and dependence on the provision of services, is at the other end of the continuum.

The customary laws of nomadic people have developed over centuries of adaptation through the people having to respond to the immediate opportunities and challenges of the environments through which they travel and in which they live. These laws are part of cosmologies: customary rules that come from traditions based on common, long-standing beliefs and understandings of the world and of the universe. They work on the principle of reciprocity: a constellation of mutual relationships, obligations and duties among people in a given community interlinked with 'being in' the social and ecological milieu. They recognise and acknowledge the bigger picture but at the same time seek an accommodation that reflects a temporally dependent dynamic between site, location, place and space. Mustonen and Lehtinen (2013) put it like this: "... an appreciation of the continuity of cultural routines that constitute the indigenous practices of ethical and spiritual co-being between humans and natural systems". Customary laws are the basis of social order and may or may not be consistent with state laws.

Customary laws are manifestations of cultural ecologies in the sense that the transactions are shaped by, and are expressions of, social norms, economic conditions, material resources, means of exchange, institutional structures, knowledge, skills, beliefs, values, attitudes, tastes, needs, wants, patterns of production and consumption and so on. This means that 'environment' is more than just physical surroundings and economic activities. It includes social relations and the collective capabilities of all the people who inhabit it. Artistic production is an important part of this mix.

### **3. Art and craft in the customary laws of nomadic people**

Whereas it is self-evident that art is an expression of behaviour, it follows from the arguments made above that, when viewed as cultural ecology, art cannot be understood as *separate* from the behaviour of the people who produce it, nor from the environmental context in which it is produced. All are intricately connected. Thus a 'songline' (Chatwin, 1987), meaning a track across the landscape, often with ancestral associations, that is established and maintained through stories, songs, dances and painting, is art in its most culturally integrated form. This is art that is both embodied and expressed, what Vuojala-Magga (2016), a Finnish anthropologist and reindeer herder who spends a large part of her life in wilderness, describes as sensory experience interacting with the affordances of the environment.

The closer one's lifestyle is to the environment, the more intimately is the art a part of it, and the more difficult it is for outsiders to understand the depth and nuances of its ecological, social and cultural meanings. Kivikäs (2005, 8) makes the point, when talking about the challenge of engaging with Finnish rock art:

“The paintings live in symbiosis with the surrounding environment and are continuously changing... works of rock art look different in different kinds of lighting and weather. Before they will ‘speak’ to you, however, you must have encountered them several times, have certain basic knowledge, and be prepared to approach them without preconceptions and learned ideas about figurative art. Once a painting site and the paintings themselves touch your soul, you will form a lifelong tie and friendship with rock paintings and the natural environment that surrounds them.”

So also with customary laws; one has to put aside preconceptions and acknowledge them for their intrinsic value, to trust that they have meanings and relevance for those whose lives they touch, and accept that such laws will not always align with the thinking of people who are outside them, and with the generalised, relational rules that govern the wider society.

These arguments recognise no hard distinction between art and craft, and between functionality and decoration. In Northern Europe, for example, everyday items made by Sámi people are typically small and unpretentious, made with great care and with very particular ornamentation (Linkola, 2002, 168). Visual symbols and imagery play an important role in Sámi communities. Imagery is, according to Lehtola (2004, 118,) a language of its own in which many meanings may be found, each of which may be followed as its own story. According to Phillips (2015), art in its most fundamental form comprises ornamentation of functional objects: “[the] syntactical elements (stripe, hatching, dot) that are all paraphrases of nature”, which once divorced from nature become abstractions. As Valkeapaa (cited in Franceschi et al., 2001, 61) observes: “... although the Sámi had no art as a distinct phenomenon, at the same time everything was art for the Sámi, and all Sámi were artists... it was part of life... and life was a special kind of perpetual art.”

All the while nomadic lifestyles persist, so too does ‘life as perpetual art’ where it has a role to play in customary laws. Here art and craft are deeply rooted in traditions, oral stories, collective memories and cosmologies. These frameworks for how to act and how to do things constitute unwritten codes of conduct passed on from generation by generation. Ways of living, customs, art, and laws are inseparable. The art is an integral part of lived

experience, celebrated through handicraft, performance and oral tradition; it does not sit comfortably with the consumer view of art as commodity which dominates industrialised societies. Art as a static presence on the wall of a gallery is a long way from life as perpetual art; they have very different cultural ecological contexts.

#### **4. Changing relationships between art and craft and customary laws**

However, as nomadism is increasingly compromised by the economic dominance of urban ways of living, its art can take on additional functions: the interrelated processes of recording tradition, renewing ancient stories, and political and ecological critique. As Lehtola (2004, 118) observes, its production is often triggered by a trauma that highlights conflict between a person's background and new influences, especially those that damage the environment or conflict with the nomadic way of life.

Consider the work of two Arctic artists who were born in the 1930s and have lived through a period of profound change. Ruth Annaqtuusi Tulurialik is from the small island in the Kazan River, 200 miles West of Hudson Bay. She says her coloured pencil drawings are like *Qikaaluktut* – the sounds of people passing by outside the *iglu*, heard but not seen. The drawings are there to talk to the viewer directly, to tell the story of Ruth's people, to acknowledge a way of life that is changing so fast because, as Ruth notes, "even my own children don't know how we lived when I was young." Thomas Frederiksen is from Igíniarfik, on the south western coast of Greenland. He says:

"Art was very much a part of daily life; the decoration of household articles and hunting equipment, the carving of sculptures, patterns in clothing and the decoration of the women's leatherwork all added pleasure to everyday living".

Thomas's art celebrates especially hunting and how it was governed by unwritten laws.

Andreas Alariesto (1900-1989) was an artist and storyteller from North Calotte. His genre paintings record historical and mythological elements of nomadism as a functional economic system. Hautala-Hirvioja (2009, 21) observes:

"Through his paintings, Alariesto recalled and recreated the past. Art, life and story are intertwined. The story, whether painted or told, is not significant only to the

author, but also for the whole community. Memories depicted in the paintings help people understand life and past conflicts. They analyze emotions by depicting and dealing with emotions and memories.”

## 5. Conclusions

Art continues to have an important role in the cosmologies of nomadic people in the Arctic, but its interrelationships with other elements of their cultural ecologies is constantly changing and adapting. ‘Life as perpetual art’ is now complemented by art as recording tradition and art as political and ecological critique. Contemporary artists have brought in new images based on humour and irony, and new ways of working with colour and composition (Lehtola, 2004, 121). Others have introduced new materials or transferred ideas between different media. But the connectedness of people and nature is ever present, positioning art as a powerful advocate for the environment and for sustainable living. This is artistic practice adapting within the cultural ecology. It is a means by which people can engage in decisions about how their traditions are represented, and how the resources and affordances of the environment might be engaged with so that they serve the common good locally. It bridges between the oral and enacted modes of customary laws and the written statutes of state laws.

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## **Sámi Shamanism Past and Present and the Desecration of the Sacred in Finland**

*Francis Joy\**

### **Abstract**

The aim of the paper is to outline a number of prospective legal issues in relation to Sámi shamanism and culture within a discussion about Sámi cultural heritage.

### **1. Introduction**

The purpose of this paper is to outline a number of prospective legal issues in relation to Sámi shamanism and culture within a discussion about Sámi cultural heritage. In order to facilitate such a task, it is essential to understand the nature of the background issues which contribute to this debate. These are presented to you below.

Since the melting of the ice caps at the end of the last Ice Age across Fennoscandia 10,000 years ago and the formulation and migration of human populations within these vast areas, today in the north, we encounter through the study of prehistory, traces of the legacies they have left behind. The search for human settlement areas across the landscapes has revealed how both groups and individual artists and story-tellers have emerged from what developed into ancient hunting, fishing and trapping civilizations. These persons, one could say on reflection, and who shared a polytheistic worldview of life, which was animated, have been tradition bearers and cultural custodians who have carried the responsibility, customs, and identities of their societies forward into modern times.

For example, throughout the Nordic countries and also the Kola Peninsula in Russia where the indigenous Sámi people live, and who are the descendants of early civilizations. These peoples share a unique feature in the ways their cyclical cosmos and worldview, social life, customs, religious practices and relationship with nature and the animal kingdom has been portrayed through art. Such activities are predominantly characterised within hunting, trapping, fishing and reindeer herding narratives.

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Although we have no evidence of who the actual persons were that created the prehistoric landscape art; namely rock carvings and paintings, the content of their work shows overwhelmingly how they have been ritual specialists and people with extraordinary skills and abilities and who made contact with unseen worlds and the spirits who dwell there.

Today, we find many aspects of such practices which have largely continued until the 17<sup>th</sup> and 18<sup>th</sup> centuries portrayed on 71 Sámi shaman drums which were collected by priests and missionary workers whose campaign began sometime during the 13<sup>th</sup> century in the Nordic countries, to convert the Sámi populations from their pre-Christian religion to Christianity<sup>82</sup>.

The Sámi shaman drum can be described as an oval shaped instrument which was a representation of between 2-5 layers of the cosmos depicting the human, spirit and animal powers that dwelled in the different dimensions within such landscapes. As a magical instrument, the painted drum has also been decorated with solar and lunar symbols as well as spirits representing the different elements within the natural world, thus paying reverence to them and their divine nature. A receptacle as such, could be compared to a sacred vessel into which powerful ancestral spirits and the spirits of nature took up residence and were subsequently called upon by the shaman when he needed assistance in matters pertaining to healing, divination and fortune-telling, for example. In this sense the shaman acted as an intermediary between the people and spirits.

One of the main ways communication was established by the shaman was through sacrificial activities, synchronized rhythmic drumming activities and singing-joiking. Many of these activities were focused upon fertility rituals and seasonal cycles and shifts in relation to hunting and reindeer herding

Today, the remaining 71 drums can be found in museum collections throughout Europe, the majority (37) being in the archives of the Nordiska Museet in Stockholm, Sweden.

Ever since the campaign through colonialism by the Swedish state, the Sámi shaman drum has been recognized by the Sámi as both as a symbol of resistance but also and more

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<sup>82</sup> See the works of Ernst Manker 1938 & 1950. His works contain photographs of all the surviving drums and their content and interpretations.

importantly, one of fundamental representations of culture and self-identification of the Sámi as an indigenous peoples.

Throughout the Nordic countries within the last several decades, in-depth historical research investigating the correlations linking symbols, figures, designs and patterns between prehistoric rock carvings, paintings and Sámi shaman drum motifs has determined how there are remarkable parallels and thereby, links between such documented art forms. As a result, much ambiguity has arisen in relation to the cultural context and ethnicity of the prehistoric art.

It is at this point the focus of this paper turns towards two distinctive features in relation to the practice of Sámi shamanism both past and present with regard to cultural heritage, cultural property and protection.

## **2. Prehistoric rock art in Finland and Sámi cultural heritage**

Currently, there are documented “[...] between 118 and 143” (Luukkonen 1994-2016) rock paintings in Finland. An abundance of scholarly sources have been written on this topic since the majority of the paintings have been discovered within the past 40 years (for example, see: Lahelma 2005, 2008 and 2008a; Nunez 1994 and 1995; Siikala 1981 and Kare 2000). The majority of the paintings are located in the Saimaa and Päijänne Lake regions located in the south east of the country close to water. At many of these sites Sámi place-names can be found in addition to figures and symbolism which parallels those painted on Sámi shaman drums from Norway, Sweden and Finland from the 17<sup>th</sup> and 18<sup>th</sup> centuries, thus demonstrating how there have been Sámi settlements in these areas previously. Despite the age of the paintings, the sites are predominantly used as tourist attractions to the extent a dozen sites have suffered vandalism and damage.

One further point as has been stated by Lahelma (2008) is how many of the scenes in the rock paintings concerning human and animal interactions are remarkably similar to those on the noaidi drums, and yet the paintings are in their present cultural context, referred to as ‘Finnish’. In addition, one of the main problems in rock art research in relation to the cultural context, ethnicity and dating of the art is their location below the Arctic Circle, in present day Finland. So, there is great scope for argument regarding the cultural context of the paintings

which has not yet been discussed in terms of cultural heritage and legal matters relating to Sámi history and pre-Christian religion.

The content of the rock paintings do in a similar fashion to the drum symbolism portray a type of Cognitive Map representing the grammar of the mind or mindscapes, as well as the body, which are intimately linked to activities related to maintaining Cosmic Order between the different levels of the universe. The location chosen to paint the rocks may also have represented a type of cosmic pillar or world tree. All of these features bear the hallmark of the work of the shaman and in fact it has been the shaman's out-of-body journeys to other realms of existence which have not only helped to create mythical stories but re-enact older ones as a way of maintaining the culture.

In my earlier research, I have noticed that rock paintings in Finland are listed a part of Finnish cultural heritage and not Sámi. Therefore, a problem exists concerning Sámi shamanism and the forwarding and protection of traditional knowledge so that it may be preserved for future generations. Within the study of the content of prehistoric rock art it is critical one understands the differences in viewpoints in relation to worldviews between western and indigenous peoples and their cultures. In indigenous societies, sacred places are not offered as tourist attractions, instead, and as Grimm (1998: 2-3) has stated:

“Indigenous lifeways as ways of knowing the world are both descriptive of enduring modes of sustainable livelihood, and prescriptive of ecological imaginaries, or deep communal, psychic attractors between place and people that activate sustaining relationships with the community of life. It is this close relationship and conceptual reflection found in mythic stories and ritual symbolism systems that we can call a “religious ecology”.

Needless to say, the fact that nearly all the drums collected during the 17<sup>th</sup> and 18<sup>th</sup> centuries from Lapland and how the rock paintings sites are in terms of what I will refer to as ‘established views’, the cultural property of persons outside of Sámi culture shows there are many legal issues which exist in relation to Sámi ways of life, their cultural history and dilution of their pre-Christian religion.

### **3. The use of Sámi drums symbolism within the tourist industry in Finland**

Another dimension in research which is currently being investigated by the author is the reproduction of new types of shaman drums, predominantly in Finland, by Finnish businesses and also tourism enterprises and individual artists which are marketed chiefly within the tourist industry. The new models are reminiscent of the oval shapes of older drums but the symbols and figures are almost identical copies. These can be found in tourist and souvenir shops throughout Finnish Lapland.

It is the reproduction and re-use of the symbolism from the old drums which is the cause of ambiguity in terms of legal issues and the Sámi's rights to protect and preserve their culture. For example, in her scholarly works titled: *Duodji – Sami Handicrafts – who owns the knowledge and the works?* Gunvor Guttorm (2007: 84-85) has made a specific point of stating how in Lapland “on the Finnish side, the Samis have often regretted that Finns have incorporated Sami symbols in their own culture and commercialism”. One could interpret these actions as an extension of the colonialism practices and mentality of assimilation of the Sámi and their culture into that of the Finnish Nation State.

The use of drums which contain symbols and figures copied from the original Sámi ones seems most prevalent within Lapland safari excursions, for example, under the northern lights during winter months and as well as the midnight sun in the summer. The end product is commercial exploitation of Sámi cultural heritage and history.

One theory concerning further observation of this phenomenon in Lapland and which appears to be a significant contribution underlying exploitation is the idea that Sámi shamanism and religion does not exist anymore in Lapland, therefore, it is officially dead. Moreover, the traditions and old ways are finished and gone.

In interviews carried out with Sámi shamans in Finland, the mentality surrounding the destruction of shamanism has been expressed in terms of a constant struggle to keep what is left alive with regard to the fragments of history. Fortunately, the Sámi shamans have the skill at adapting to change for example, where old meets new and the combination of these two help to strengthen the existing fragments, despite the persecutions still going on within both the Lutheran Church as well as contemporary society. One of the visible manifestations of Sámi spiritual culture is seen in the re-enactment of myths and stories within Sámi theatre,

films, poems and book. The shamans who are also artists, play a key role within each of these fields; some even working within the tourist industry and modern working sectors.

To elaborate on the loss of culture in relation to rock paintings and the Finnish state and also the possession of drums which belong to the shamans in Sámi society we may arrive at the following conclusions.

It could be argued as to how, and in particular Sámi children's education in Finland is deficient of these two aspects of their spiritual culture. The reason being is that the 60% of Sámi persons and their families who live outside of the Sámi homelands within Arctic Circle, in towns and cities, receive mainstream Christian Finnish education in schools as part of the National Curriculum to which Sámi history does not exist.

However, in Lapland throughout the Sámi areas, stories and myths are included in schools and education for Sámi children.

By contrast, in Norway for example, and since Sámi shamanism was made an official religion in 2012 and as I have witnessed during fieldwork, Sámi shamans who are artists and integrated educators, also teach about their culture and history at Sámi schools in the municipalities in northern Norway. This also includes drum making and visits to prehistoric rock art sites, such as the one at Alta Fjord, Finnmark. These activities do not exist in Sámi children's education in Finland.

The Sámi shamans in Finland, for the most remain invisible and work in secret, which is part of the traditional ways and customs and also as a way to help protect what is left of the culture and religion. The situation in Sweden and Norway is very different. However, there are also similar situations that exist in all Sámi societies in relation to secrecy because the older generations have been taught to deny their ethnic religion and believe it is evil, especially the use of the drum. At the same time, some Churches in southern Norway use drums as a part of the religious service.

#### **4. Concluding remarks**

It seems that in both cases regarding the plight of rock paintings in Finland in relation to cultural heritage of the Sámi and the Sámi shaman drums in museums throughout Europe,

as cultural property of the Sámi, nothing looks set to change concerning the restoration of knowledge.

It is my opinion that these issues provide much scope for future legal work for scholars both inside and out of Sámi society and thereby, could support further opportunities for cooperation between cultures.

The Sámi shaman and Sámi shamanism play a fundamental role in terms of the preservation of identity and culture across Fennoscandia, and the transmission of traditional ecological knowledge. The shaman's knowledge, wisdom and related spiritual practices and preservations of traditions and intimate relationships with the landscapes seem now at this time more important than ever.

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## **Part III.**

### **Arctic Lands and Waters and the Environment**

## 8.

### **The Agricultural Argument and Sami Reindeer Breeding Rights: Reflections on Legal Philosophy in the Arctic**

*René Kuppe\**

#### **Abstract.**

The paper is to shed the light on the agricultural agreement in the light of Sami reindeer breeding rights. These are reflections on legal philosophy in the Arctic.

#### **1. Introduction**

The expansion of settler states over the lands and territories of indigenous peoples is a world-wide phenomenon (see, e.g. Green & Dickason, 1993; Keale, 2003). The legitimacy of this expansion was based on the idea that indigenous peoples lacked a political or “civil” society of their own. Therefore, the political system of the intrusive colonizing society was imposed on the lands and over the way of life of the “Native” inhabitants. Even if the colonizers were aware that these lands were not physically uninhabited, they were somehow perceived as being “legally uninhabited”<sup>83</sup>. But this process of large-scale transmission of “civilized” law into “primitive” lands does not mean that the Native inhabitants were defined as living outside of any kind of legal rule. Beginning with the conquest of indigenous lands in the 16<sup>th</sup> century by the Spaniards, European philosophers had begun to develop ideas of a natural legal order, protecting and binding even those humans who were living outside of the reigns of civil society and Christian statehood. On the following pages, I will discuss how the debates on indigenous peoples living in a “state of nature” also influence the way how the rights of the Sami peoples of Northern Europe have been designed and limited. The consequences of political theories about indigenous people, living in a so-called state of nature, can be detected not only in overseas territories discovered in remote parts of the world, but also in Nordic indigenous territories conquered by settlers from neighbouring civilized nations. Only recently the law of the Nordic states has begun to overcome the unjust discrimination that was the outcome of the “state of nature”-doctrine.

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<sup>83</sup> Discussing in detail the „legally uninhabited“-rule: Secher, 2007.

## 2. Sámi territorial rights in Sweden

As Christina Allard states in her comparative study on Sámi territorial rights in the Nordic countries, during most of the 1900s, these countries “assumed that the Sámi semi-nomadic and wide ranging use of lands did not qualify for establishing rights to land and resources” (Allard, 2001, 7).

In 1886, Sweden enacted for the first time a legal framework for reindeer grazing of the Swedish Sami people. In a very ground-breaking publication, Eivind Torp (Torp, 2013) discusses the relevance of the legislative history of this 19<sup>th</sup> century statute for a critical understanding of Sami land and land use rights. The members of the Swedish Parliament shared a general understanding that the planned legal regulation did not have the purpose of *establishing* the rights of the reindeer Sami, but a new law rather should define the limits between their rights and the rights of Swedish peasants, whose ancestors had colonised large parts of Northern Sweden since the 16<sup>th</sup> century, arriving from the South and from the shores of the Gulf of Bothnia in the East. Since its origin approximately 1000 years ago, semi-nomadic reindeer herding in Scandinavia is based on a complex, geographically wide-ranging land use pattern, and involves the use of different pasture areas, especially in summer and in winter time. In summer, intense herding took place in the mountainous areas in the West, near to the (modern) border with Norway, while in winter the herders came down to the lower forest region near the sea, to what they considered as their winter pastures since centuries. However, most of these winter pasture lands have been colonized and settled by Swedish people, who had been pulled into these Northern regions through tax exemptions and other privileges issued by the Swedish Crown.

Allard states in her doctoral thesis: “The idea of colonising the north was coupled with the so called parallel-theory, a belief that the agricultural purposes for colonising those areas were so different from the uses that the reindeer herding Saami were making of the land, that the Saami and the non-Saami could coexist without difficulty.” (Allard, 2007, 34).

Although actually there had developed a certain pragmatic coexistence between (nomadic) Sami and sedentary Swedish settlers, “in the late 1800s, antagonisms between the two livelihoods had become an increasingly tangible problem” (Torp, 2013, 47). This situation, as it is explained briefly, is the background of the legislative debates taking place in Sweden in 1886.

An interesting consideration on the reindeer breeding rights of the Sami as indigenous rights in the modern sense of the word are expressed by the parliamentary committee, in the following words:

“It was the Lapp who first claimed the northern reaches of our country. Before the first settler felled the first tree in the forests of Norrland, the Lapp was already there. Over the centuries, he has without objection used the land from the mountain ridges of the Scandians to the Gulf of Bothnia as pastureland for his reindeer. And the right of the first claimant to the land must be considered stronger than that of he who [...] later arrived.” (Appendix to the Parliamentary Record for 1886, cited by Torp, 2013, 48).

So, the committee members recognised, and seemed to have had no serious doubts, about the “stronger” historical rights of the reindeer breeders, valid in the North of Sweden. But did these rights of the Sami, as “first claimants”, come close to the attributes of ownership rights, in the sense of Swedish official law?

It is worth the effort to reproduce the words, also cited by Torp from the parliamentary record of 1886, because of their unusual clarity:

“But the Lapp’s claim was, by nature, not such that it encompassed all the powers that belong to the concept of ownership. It did not extend beyond that required by the limited needs of the nomadic life. It referred only to, first, the use of the land as pasture for the reindeer, in the mountain regions during the summer and in the forests in the winter, and, second, to the fulfilment of the needs that were a prerequisite for or a consequence of the use of the reindeer pasture. For this reason, the nature of the Lapp’s right to the land was from the beginning such that it did not prevent the parallel rise, so to speak, of ownership in the sense understood by civilized society” (Appendix to Parliamentary record, cited by Torp, 2013, 49).

So, the historical right of the Sami breeders over their grazing lands were not only distinct from the comprehensive attributes of “full” ownership rights of civilized society, because they were limited to guarantee the exercise of reindeer breeding; they also did not stand in the way of “real” ownership rights over land, introduced by Swedish peasant settlers into ancient Sami territory.

The Parliamentary Committee also expressed its view about the legitimacy of introducing private settler ownership into this territory:

“And such ownership emerged and spread with cultivation, and finally included the areas as yet unclaimed by cultivation, because about 300 years ago in our country, the fundamental principle began to be expressed and applied that ‘such lands that lay unbuilt belong to God, the King and the Swedish Crown.’” (Appendix to the Parliamentary Record for 1886, cited by Torp, 2013, 49).

So, even if the emerging ownership of land cultivating settlers did not extinguish as such the rights of Sami reindeer herders, the Swedish crown – in other words, the state power

that had not been established and created by the Sami themselves – could extend legal claims over areas “unclaimed by cultivation”. The claims of the Swedish state, of “the King and the Crown” over territories used by the Sami nomads had been established against their will and laid the foundation stone for the speedy privatization of lands into the hands of the Swedish land cultivating settlers.

The basic idea expressed by the Record was that private property over lands was related to cultivation of the soil. In view of this, the rights of the Sami were limited to fulfil the needs required by reindeer breeding (and possibly by other traditional subsistence activities). Only a sedentary way of life of agriculturalists – associated with a “civilized society” – was supposed to give rise to “full” ownership rights. This idea sounds familiar to anybody aware of the history of western legal philosophical thinking about the origins of state, law, and legal institutions.

### **3. John Locke's justification of limited ownership of the Native Americans**

One of the most important and best known contributions to a theory about the relationship between nature and ownership was developed by John Locke (1632-1704). This influential thinker of the English Enlightenment, sometimes called the “Father of Liberalism”, developed a theory how individual ownership of goods and property can be justified. “According to Locke, God created the world and gave it to men in common to use for their sustenance in the state of nature” (Flanagan, 1989, 592). During this early era, according to Locke, men lived in a *pre-political condition*. But even if the world was owned in common, each man had private ownership of his own person. As expressed in Locke’s own words: “The labour of his body, and the work of his own hands, we may say, are properly his” (Locke, orig. 1689, para. 27).

The starting point for Locke to justify individual ownership over things and goods was labour. According to the views of Locke, when a person exerts labour upon a natural object, that labour enters into the object. Thus, the object becomes the property of that person. Or, in the words of Locke: “He by his labour does, as it were, inclose it from the common.” (Locke, orig. 1689, para. 32). So, original appropriation is justified by mixing individual labour with the resources of Nature (Flanagan, 1989, 592). “[L]abour, in the beginning, gave a right of property” (Locke, orig. 1689, para. 45). Such a claim of property does not need, to be legitimate, the consent of others, as it is directly authorized by the law of nature.

In other words, the origin of private property did not require human conventions – and no civil society – but was based directly on nature. According to the law of nature, Locke however adds additional condition that this “original appropriation” by labour as legitimate:

First, appropriation must be based on the application of one’s own labour – a limitation inherent in man’s equal natural liberty;

And, secondly, appropriation based on natural law, should leave enough in common for others, and should not extend to more than could be used without spoilage – conditions that are based on the idea that even the acquisition of unowned Commons, according to natural law, is legitimate only if it does not worsen the position of others.

For Locke, labour, in the form of agricultural cultivation, is the key to justify the appropriation of land. As secretary to both the Council of Trade and Plantations, and the Lord Proprietors of Carolina, he was especially interested in questions related to the creation of ownership in the American colonies. On the one hand, his considerations based on natural law did not exclude the American Indians from the benefits of ownership: “Thus this law of reason makes the deer that Indian’s who hath killed it; it is allowed to be his goods, who hath bestowed his labour upon it, though before it was the common right of every one (Locke, orig. 1689, para. 30).

Therefore, American Indians were the owners of the animals they had taken from nature; the same principles which regulate private appropriation of products of nature also apply to the soil. But the only natural justification for the ownership of the soil was agrarian use or, in Locke’s view, agrarian appropriation. The Native Indian had his right over his fruit or game, but this did not interfere with the claim of the Englishman, who was coming from the Old World into America: Locke compares the idleness of “several Nations of the Americans” with the industriousness of the English, or civil men (Arneil, 1996, 62).

Locke writes: “God gave the world to men in common; but since he gave it them for their benefit, and the greatest conveniencies of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated” (Locke, orig. 1689, para. 34). Nature and soil, in their original state, have very little value for human beings. Is it human labour, the input of human industry, that are creating the value of natural resources; even the original inhabitants of non-tilled soils, like the American Indians, will profit from the appropriation and the economic improvements of their former common lands.

According to the ideas of European enlightenment thinkers, the Indians of the New World, as nations living in a State of Nature, were entitled to what the Law of Nature gave to them – because these natural entitlements are not based on human convention: They were

using the land, by taking fruits from it. But using the land was not the same like cultivating the land. Why should the natives be the owners of a land that was still unsubdued, unimproved, uncultivated and unfenced?

The rights of the Indians were limited to what they could claim by natural law (Banner, 2005, 33). Only those nations who had reached the level of civil government developed human legal institutions that allowed the ownership over uncultivated lands. This is the reason why, according to European thinkers, cultivation was not a prerequisite to for ownership over land in Europe. “Anybody knew that [in Europe] land could be owned even it was not being farmed, and indeed even if it was not being used or occupied at all”<sup>84</sup>. As the European colonizers also introduced the legal systems of their country of origin this facilitated the extension of ownership claims over lands that even had not been cultivated by European settlers.

But what is the specific attribute that makes the distinction between the latter and the former?

Of course, according to Locke, the English settler cultivates the lands<sup>85</sup>. Agricultural labour is the special foundation of the appropriation of land in North America. But, according to Locke, the cultivation of the land also goes hand in hand with the enclosure of the land. Enclosure, or “fencing” is seen as an essential aspect to mark out the boundaries of cultivated lands, and underlines the allotted parcels of settlers, taken out of the common goods of all. So, it was completely legitimate for civilized European people, to establish themselves in a country whose inhabitants had not established positive legal institutions, and who were taking fruits from the land, but had shown no will to establish private property.

Locke was not the only influential thinker of European state philosophy, justifying the taking of lands of “uncivilized” peoples: As Ulla Secher explains:

“Gradually [...] the doctrine of *terra nullius* was extended to justify acquisition of inhabited territories by occupation if the land was uncultivated or its indigenous inhabitants were not ‘civilised’ or not organised in a society that was united permanently for political action.” (Secher, 2007).

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<sup>84</sup> Id.

<sup>85</sup> It is a striking aspect of Locke’s theories on the legitimacy of the establishment of ownership, relating to the Native American Indians tribes of Eastern North America, that most of these peoples practiced a slash-and-burn type of native agriculture, based on the combination of corn, beans and squash. It is an open question if Locke, familiar with a very different agrarian system in England, misunderstood this flexible form of native American Agriculture and classified it as “nomadism”, or if he simply misinformed his readers about the cultural attributes of native Americans of his time. It is a fact that in his famous treaties, Locke treated American Indians *as if* they were only wandering nomadic tribes.

#### **4. "Uncivilized nations" and property in the theory of international law**

The famous Swiss 18<sup>th</sup> century philosopher Emer de Vattel, also considered as one of the founding fathers of modern international law, states: "All mankind have an equal right to things that have not yet fallen into the possession of any one; and those things belong to the person who first takes possession of them. When, therefore, a nation finds a country uninhabited, and without an owner, it may lawfully take possession of it: and, after it has sufficiently made known its will in this respect, it cannot be deprived of it by another nation." (Vattel, cited after Keale, 2003, 101).

It was an expanded notion of a terra nullius theory, based not only on the idea of the positive effects of an expansion of "Western" civilization, but also grounded in the view that the non-tilled lands otherwise would remain uncultivated (Patapan, 2000, 114).

It seems that one of these natural law thinkers explicitly neglected the possibility that people living in the state of nature could be the holders of private property as such. But property should be established by the criteria of Western civilization, especially by using the land and cultivating it. The flexible and sometimes communitarian way by which indigenous people, especially nomadic and seminomadic societies, were using the land, could not fit into this schedule of property, especially as they were not fencing their land. Especially the ideas of Locke were based on a Western concept of individual freedom, industrious work and property. Therefore, the native could be the legitimate owner of the deer he has killed, but not the owner of the land on which he was just wandering around.

#### **5. The philosophy of Swedish Reindeer Grazing Law**

This philosophical view is the underlying intellectual background of the opinions expressed by the members of the parliamentary committee, debating the Swedish Reindeer Grazing Law in 1886. The Sami nomads had the right to pursue reindeer herding, but this did not mean that they had the same powers as owners of the land (see Torp, 2012, 48/49). At the same time, the land of the Sami had been considered as "open" for the settlement by civilized farmers, and for the Swedish state to introduce civil legal institutions, protecting individual appropriation and land ownership.

Like in other settler states, traditional indigenous land use was not seen as sufficient qualification to establish "real" ownership over lands and resources. As mentioned above, this situation has not changed until recently.

Still in the famous Taxed Mountains case<sup>86</sup>, a land mark case decided by the Swedish Supreme Court in 1981, the Court ruled that the Sami land use was not sufficiently intense or exclusive in character to establish ownership (see summary in Allard, 2011).

## **6. Conclusions**

Only very recently things seem to change. The Swedish Nordmaling case<sup>87</sup>, decided by the Supreme Court in 2011, has attracted attention because Sami claimants succeeded and their reindeer herding rights were upheld. But a most significant aspect of the case is the foundation of this verdict:

The rights over the winter pasture lands are founded on Sami customary law. It is an open question if the term customary law, as it was used by the Supreme Court, will be sufficiently adjusted to Sami tradition and to conceptions about land use. In that case, Swedish law would possibly leave behind its unique and exclusive liberal philosophical foundation of rights over land, based on the ideas of agrarian cultivation and privatization of the commons.

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<sup>86</sup> A very comprehensive analysis of the case and an English translation of the text can be found in: Jahrskog, ed., 1982, see summary also in Allard, 2011.

<sup>87</sup> Case No. T 4028-07, decided on April 27, 2011.

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## Sámi Relationship with the Land: What Does the Law Fail to Recognize?

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### Abstract

The purpose of this article is to make an overview on how UN Human Rights Committee (HRC), a monitoring body of CCPR, articulates and protects Sámi culture and its values. The further aim of this writing is to discuss Sámi people's relationship with the Land, its ontological basis and the failure of Finnish legislation to recognize crucial aspects of this relationship and inherently connected worldview.

### 1. Introduction

An integral part of Indigenous people's culture and worldview is their special relationship to the land and the closely connected traditional knowledge and practices. The relationship to the land is a fundamental question of existence for Indigenous peoples, as cultures grow from the land and in places. The relationship to the land bears on the place where an indigenous people dwells and is, where its members practice their traditional way of life, and what the people's broader cultural conception is of itself, its identity and its past.<sup>88</sup>

Although international law, significantly stronger than the Finnish national legislation, succeeds to recognize some key features of Sámi and other indigenous peoples' unique relationship with the Land, it necessarily fails to embrace and thus protect its totality, while resting on profoundly different premises than an indigenous worldview. In other words, the

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<sup>88</sup> See T. Ingold, *The Perception of the Environment. Essays on Livelihood, Dwelling and Skill*, Routledge 2000, pp. 148-150.

reality of indigenous peoples, as widely experienced and expressed, is based on a different ontology than that underlying the Western way of seeing the world.<sup>89</sup>

One of the main international human rights instruments, ratified by the most states of the global community, including Finland, which has an established practice related to indigenous peoples, is International Covenant on Civil and Political Rights (CCPR).<sup>90</sup> The aim of this article is to have an overview on how UN Human Rights Committee (HRC)<sup>91</sup>, a monitoring body of CCPR, articulates and protects Sámi culture and its values. The further aim of this writing is to discuss Sámi people's relationship with the Land, its ontological basis and the failure of Finnish legislation to recognize crucial aspects of this relationship and inherently connected worldview.

## **2. Sámi and other Indigenous Peoples' Relationship with the Land in Covenant on Civil and Political Rights**

Article 27 of the CCPR may be regarded as a basic norm in protecting the right of indigenous peoples to their cultural integrity. HRC recognizes that indigenous peoples' subsistence and other traditional economic and social activities are an integral part of their culture. Interference with such activities may be detrimental to their cultural integrity and survival.<sup>92</sup> HRC has acknowledged that, in the context of indigenous peoples, the right to culture under Article 27 may apply to a *way of life* that is closely connected to a territory and the use of its resources. Furthermore, it has stated that the enjoyment of such rights may require positive protective legal measures and methods for ensuring the effective participation of minority communities' members in decisions that affect them.<sup>93</sup> The

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<sup>89</sup> See M. Blaser, *Ontology and Indigeneity: On the Political Ontology of Heterogeneous Assemblages*, "Cultural Geographies" 2012, pp. 1-10; T. Ingold, *The Perception of the Environment. Essays on Livelihood, Dwelling and Skill*, Routledge 2000, pp. 132–152; see also S. Valkonen, J. Valkonen and V.-P. Lehtola, *An Ontological politics of and for the Sami cultural heritage – Reflections on Belonging to Sámi Community and Land*, In A. Xanthaki, S. Valkonen, L. Heinämäki and P. Nuorgam (eds.), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*. Brill. Forthcoming 2016.

<sup>90</sup> International Covenant on Civil and Political Rights (CCPR), G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 52, UN Doc. A/6316 (1966), adopted 16 December 1966, entered into force 23 March 1976, 999 *United Nations Treaty Series* 171. Status of ratification: 161 (6 May 2008); Optional Protocol to the CCPR, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 59, UN Doc. A/6316 (1966), adopted 16 December 1966, entered into force 23 March 1976, 999 *United Nations Treaty Series* 302. There are 111 parties to the Optional Protocol (6 May 2008).

<sup>91</sup> The UN Human Rights Committee was established under Article 28 of the CCPR, see CCPR, Arts 28-34.

<sup>92</sup> See *Kitokv. Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988),

<http://www1.umn.edu/humanrts/undocs/197-1985.html> ( 21 January 21, 2007).

<sup>93</sup> *Ibid.*, at 7.

Committee has also stated that the protection of the above mentioned right is directed at ensuring the survival and continued development of the cultural, religious, and social identity of the minorities concerned, which also enriches the fabric of society as a whole.<sup>94</sup>

When studying HRC's general comments as well as case studies, it becomes evident that more than emphasising indigenous peoples' worldviews or values, HRC tends to protect the economic sustainability of their nature-based livelihoods. The Committee has stated that Article 27 requires states to utilize the necessary steps in protecting indigenous peoples' titles and interests in their traditional lands and to secure the continuation and sustainability of indigenous minorities' traditional economies.<sup>95</sup> There are, however, some instances where indigenous worldview is touched upon, particularly related to indigenous peoples' places of worship (sacred natural sites). In its Concluding Observations on Australia (2000), HRC expressed "its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, which must be protected under article 27, are not always a major factor in determining land use."<sup>96</sup> HRC further stated that the Australian law reform related to the Aboriginal and Torres Strait Islander Heritage Protection Act (1984), which recognizes also sacred sites culturally and traditionally significant for Australian Aboriginals, should give sufficient weight to the *values* important to indigenous peoples.<sup>97</sup>

It seems that HRC, in principle, is willing to recognize aspects of indigenous peoples' worldview, including spiritual, social and environmental values. It could be argued that if indigenous authors that bring claims to the HRC would strongly argue the need to protect their values and not solely a livelihood in an economically sustainable sense, there might be readiness in the Committee to expand the protection towards value-based rather than economic-based ground. For instance, in one Sámi case, *Länsman et al v. Finland*,<sup>98</sup> HRC did acknowledge that the mountain Riutusvaara continues to have a spiritual significance relevant to the culture of the Sámi community.<sup>99</sup> However, despite that in this complaint the Sámi authors observed that the site of this mount where the quarrying of stone took place is a

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<sup>94</sup> *Ibid.*

<sup>95</sup> Concluding Observations of the Human Rights Committee: Australia, UN Doc. CCPR/CO/69/AUS (2000), paras 10-11.

<sup>96</sup> Para 510.

<sup>97</sup> Para 511, *Aboriginal Land Rights (Northern Territory) Act 1976, Part VII, s.69.*

<sup>98</sup> *Länsman et al v. Finland*, Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 (1994).

<sup>99</sup> Para 9.3.

sacred area of the old Sámi religion, where in old times reindeer were slaughtered,<sup>100</sup> the basis of the claim was not the value of the sacred area as such to Sámi people. Instead, the authors affirmed that the quarrying of stone on the flank of the Riutusvaara mountain and its transportation through their reindeer herding territory would violate their rights under article 27 of the Covenant, in particular their right to enjoy their own culture, which has traditionally been and remains essentially based on reindeer husbandry.<sup>101</sup> Perhaps because the authors did not actually reason the sacredness of the mountain area as a basis of the actual claim, also the Committee did not take a clear standpoint in this particular matter.<sup>102</sup> Since the Committee clearly recognizes spiritual values as a part of the cultural integrity of indigenous peoples, this argumentation could have brought an extra weight to this particular case that was lost by the Sámi authors, while HRC did not find a significant harm being done to the reindeer husbandry.

One limit to fully recognize collective elements of indigenous peoples' cultures and related worldview is that cases brought to HRC cannot invoke the violation of article 1 of CCPR, a people's right to self-determination, because the right of self-determination is a right of a collective (a people), and HRC deals with individual claims.<sup>103</sup> This may limit HRC from putting a collective rather than particular individuals at the center, thus failing to get a comprehensive picture of and place focus on the collective values in a wholesome way. The right of self-determination is, however, endorsed by HRC in State reporting system.<sup>104</sup> In 2013, HRC, in its Concluding Observations on Finland's country-report, expressed its concern that the Sámi people lack participation and decision-making powers over matters of fundamental importance to their culture and way of life, including rights to land and resources.<sup>105</sup> The Committee also noted that there might be insufficient understanding or accommodation of the Sámi lifestyle by public authorities and that there is a lack of legal clarity on the use of land in areas traditionally inhabited by the Sámi people. HRC also stated

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<sup>100</sup> Para 2.6.

<sup>101</sup> Para 3.1.

<sup>102</sup> For an analysis, see, L. Heinämäki and T. Herrmann, *The Recognition of Sacred Natural Sites of Arctic Indigenous Peoples as Part of their Cultural Integrity*, "Arctic Review on Law and Politics", vol. 4, 2/2013, pp. 206-231.

<sup>103</sup> See, *Lubicon Lake Band v. Canada*, Communication No. 167/1984, CCPR/C/38/D167/1984.

<sup>104</sup> See Concluding Observations of the Human Rights Committee on Canada UN Doc. CCPR/C/79/Add.105 (1999). Explicit references to either Article 1 or to the notion of self-determination have also been made in the Committee's Concluding Observations on Mexico, UN Doc. CCPR/C/79/Add.109 (1999); Norway, UN Doc. CCPR/C/79/Add.112 (1999); Australia, UN Doc. CCPR/CO/69/Aus (2000); Denmark, UN Doc. CCPR/CO/70/DNK (2000); Sweden, UN Doc. CCPR/CO/74/SWE (2002); Finland, UN Doc. CCPR/CO/82/FIN (2004); Canada, UN Doc. CCPR/C/CAN/CO/5 (2005); and the United States, UN Doc. CCPR/C/USA/CO/3 (2006); Sweden, UN Doc. CCPR/C/SWE/CO/6 (2009); Finland, UN Doc. CCPR/C/FIN/CO/6 (2013).

<sup>105</sup> UN Human Rights Committee, Concluding Observations on Finland, CCPR/C/FIN/CO/6 (22 August 2013), para 16.

that decision-making powers of Sámi representative institutions, such as the Sámi parliament should be strengthened. Finland was asked to increase its efforts to revise its legislation to fully guarantee the rights of the Sámi people in their traditional land, ensuring respect for the right of Sámi communities to engage in free, prior and informed participation in policy and development process that affect them.<sup>106</sup>

This Concluding Observation makes several important statements. First of all, HRC expresses its concern that public authorities may have insufficient understanding about “Sámi lifestyle”. Although not directly speaking about the necessity to understand Sámi worldview, HRC is in the right track by viewing that the seed of the problem might be the lack of understanding Sámi lifestyle – thus their way of life. Second important comment of HRC is the requirement of strengthening the Sámi institutions such as Sámi Parliament. This Concluding Observation is based on article 1 (people’s right to self-determination), article 26 (equality before law) and article 27 (right of minorities to their culture) of CCPR. HRC, referring to the right to self-determination, emphasizes the need to empower Sámi Parliament and declares strong participatory rights.

This Concluding Observation points towards Sámi people’s right to free, prior and informed consent in decisions that are crucial to them. Although using a milder formulation of “participation”, it should be mentioned that after the international adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007), HRC, in a case against Peru, has explicitly acknowledged indigenous peoples’ right to free, prior and informed consent.<sup>107</sup>

As it can be seen, HRC makes strong statements in relation to State Parties to CCPR. A general problem, in Finland and elsewhere, is the lack of national implementation in a satisfactory manner. Recently, there has been several attempts in Finland to follow HRC’s recommendations, such as ratification of ILO Convention No. 169, changes in legislation related to Sámi Parliament (stronger decision-making powers, Sámi definition etc), and Metsähallitus (Forest Park Service managing the state-owned lands), which all have failed in

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<sup>106</sup> Ibid. The Committee was referring to Articles 1, 26 and 27.

<sup>107</sup> Human Rights Committee, Communication No. 1457/2006, Doc. CCPR/C/95/D/1457/2006 of 27 March 2009. On the legal developments of free, prior and informed consent see T. Ward, *The Right to Free, Prior and Informed Consent: Indigenous Peoples’ Participation Rights within International Law*, “Northwestern Journal of International Human Rights”, vol. 10(2), p. 54; L. Heinämäki, *The Rapidly Evolving International Status of Indigenous Peoples: The Example of the Sami People in Finland*, in C. Allard and S. Funderud Skogvang, *Indigenous Rights in Scandinavia, Autonomous Sami Law*, Ashgate 2015, pp. 189-204; L. Heinämäki, *Global Context – Arctic Importance: Free, Prior and Informed Consent, a New Paradigm in International Law Related to Indigenous Peoples*, in T. Herrmann and T. Martin (eds.), *Indigenous Peoples’ Governance and Protected Territories in the Arctic*, Springer 2016, pp. 209-240.

the last minute. In the case of reforming Metsähallitus Act, however, no final decisions have been made regarding Sámi people's rights. Importantly, UN Special Rapporteur on the Rights of Indigenous Peoples, has recently reproached Finland for its failure to recognize Sámi people's rights and full participation in the present draft of the Metsähallitus Act.<sup>108</sup> In the earlier draft, prepared years in consultation with the Sámi Parliament and Skolt Sámi village association, Sámi people were guaranteed rather strong rights of participation in all activities that might affect their nature-based way of life.

### **3. Ontological Basis of the Sámi Belongingness to the Land and Lack of Legal Recognition**

The connection to the land in Sámi culture is an ethnic underpinning of all Sámi groups and the foundation from which Sámi culture dwells. According to anthropologist J. Pennanen, underpinning the Sámi feeling of ethnic identity is the conception that they belong to the same language family and share a nature-bound cultural background comprising the hunting, fishing and gathering livelihoods and reindeer herding.<sup>109</sup> Sámi culture has a connection to a historical place defined through their life practices, to the ethnic ties and social relations which prevail in that place, to memories and to biographical experiences of place. The connection to the land produces and sustains Sáminess and through the connection a Sámi today can experience an affinity with Sámi who lived millennia ago.<sup>110</sup>

Any examination of the Sámi connection to the land must take into consideration that the connection involves both the intangible and material cultural components. The Sámi worldview makes no distinction between nature and culture, nor are the two mutually exclusive. Accordingly, the connection to the land is seen as including not only a material bond but also elements of the intangible cultural heritage, such as place names and the oral tradition. In the Sámi worldview, the human being is not an agent who manipulates or exploits nature; rather, the relation entails a deeper awareness of, belonging to and obligation

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<sup>108</sup> 17 December 2015,

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16897&LangID=E>

<sup>109</sup> J. Pennanen, *Ihmisen ja luonnon vuorovaikutus saamelaiskulttuurin lähtökohtana* [Human-Nature Interaction as a Basis of Sámi Culture], in: J. Pennanen & K. Näkkäläjärvi (eds.), *Siidastallan. Siidoista kyliin. Perinteinen luontosidonnainen saamelaiskulttuuri ja sen muuttuminen*, Inarin saamelaismuseon julkaisuja 2000, pp. 13–18.

<sup>110</sup> See J. Valkonen & S. Valkonen, *Contesting the Nature Relations of Sámi Culture*, "Acta Borealia" vol. 31(1) 2014, pp. 25 – 40.

towards a place.<sup>111</sup> The Sámi connection can be aptly described as "ecological connectivity", a term coined by D. Rose. It indicates a "mode of existence", in which the land is not only a place or object but also a subject (or "agent") in its own right.<sup>112</sup> According to Rose, for indigenous peoples, the land is "nourishing terrain... a living entity with a yesterday, today and tomorrow, with a consciousness, and a will toward life. Because of this richness, country is home and peace; nourishment for body, mind, and spirit; heart's ease".<sup>113</sup>

In R. Harrison's view, the ontological basis of Indigenous peoples' connection to the land hampers efforts to safeguard their intangible cultural heritage. He asserts that the protection of indigenous cultural heritage is based on a Western, anthropocentric mentality that emphasizes a distinction difference between culture and nature and a pre-eminence of human beings over nature. In indigenous ontologies, by contrast, there is no boundary between nature and culture; rather they emphasize that the two are intertwined and that culture is everywhere. Indigenous peoples' connection to the land and notions of protecting their culture proceed from a wholly different ontological basis, making protection of cultural heritage challenging.<sup>114</sup>

It is difficult or even impossible to fit the Sámi conceptions on their environment into public categories used in defining, protecting and managing cultural environments since to Sámi, natural landscape is also cultural regardless of whether it bears traces of human activity.<sup>115</sup> E. Helander-Renvall writes how the Sámi language does not even have the word 'culture', and the word for 'nature' relates rather to inner aspects of nature (such as the non-human mind) than to the natural environment or landscape. Nature can also be transformed into culture through different activities, such as handicraft, fishing and healing, and culture

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<sup>111</sup> E. Helander-Renvall, *Saamelainen tapaoikeus* [The Sámi Customary Law], in P. Magga & E. Ojanlatva (eds.) *Ealli Biras. Saamelainen kulttuuriympäristöohjelma*, Sámi Museum – Saamelaismuseosäätiö 2013, pp. 132 – 134.

<sup>112</sup> D. Rose, *Sharing Kinship with Nature: How Reconciliation is Transforming the NSW National Parks and Wildlife Service*, NSW National Parks and Wildlife Service 2003; D. Rose, D. James, and C. Watson, *Indigenous Kinship with the Natural World*, NSW National Parks and Wildlife Service 2003.

<sup>113</sup> D. Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness*, Australian Heritage Commission 1996.

<sup>114</sup> R. Harrison, *Beyond "Natural" and "Cultural" Heritage: Toward an Ontological Politics of Heritage in the Age of Anthropocene*, "Heritage & Society", Vol. 8, No. 1, May, 2015, pp. 24–42.

<sup>115</sup> E. Helander, *Sámi Subsistence Activities – spatial aspects and structuration*, "Acta Borealia" 2, 1999, pp. 7-25; P. Magga, T. Elo, *Johdanto* [Introduction] [2007], in T. Elo and P. Magga (eds), *Eletty, koettu maisema: näkökulmia saamelaiseen kulttuurimaisemaan*, Lapin ympäristökeskus 2007; E. Helander-Renvall, *On customary law among the Saami people*, in N. Bankes and T. Koivurova (eds.), *The proposed Nordic Saami Convention: national and international dimensions of indigenous property rights*, Hart 2013, pp. 281-291; P. Magga, *Mikä tekee kulttuuriympäristöstä saamelaisen?* [What makes an Environment Sámi], in P. Magga & E. Ojanlatva (eds.), *Ealli Biras. Saamelainen kulttuuriympäristöohjelma*, Sámi Museum – Saamelaismuseosäätiö 2013, pp. 10 – 13.

may be transformed into nature.<sup>116</sup> “All places and lands have their special character.”<sup>117</sup> According to Helander-Renvall, the places where the Sámi live are connected to “activities, experiences, stories, songs, ceremonies, mythic relationships, social interactions, and memories”.<sup>118</sup>

Management of the environment in the Sámi homeland of Finland is governed for the most part by the Wilderness Act and the Conservation Act, which are an essential element of the Finnish system. In contrast, sites in the Sámi cultural environment, in particular cultural usufruct areas, have not been given any particular consideration. Yet, given that Sámi usufruct of the landscape and environment differs from the Finnish, it easily remains invisible. It lives in the cultural knowledge of small communities and, inasmuch as it has not been articulated and asserted verbally, it is ignored in decision making.

According to E. Helander-Renvall, the Sámi connection to the land is based on customary rights that are integrated in the form of an oral tradition into the daily practices of the local community”.<sup>119</sup> The members of the Sámi community do not even conceive of these as rules; the practices are renegotiated if someone for one reason or another departs from the land-use practices established by custom. Helander-Renvall takes the view that the use and applicability of traditional legal notions is further eroded by the fact that there is a constant collision between them and national legislation and orders issued by government authorities. Moreover, the non-Sámi population in the Sámi region does not necessarily adhere to or even know the Sámi’s traditional norms when it comes to use of the land, a situation which might even prompt some members of the Sámi community to depart from the norms.<sup>120</sup> What is more, as T. Kurttila and T. Ingold have shown, the Sámi’s traditional system of knowledge underlying their use of the land is very difficult, if not impossible, to express in concrete terms, for it is far too dynamic and practically oriented and adapts too readily to the situation at hand.<sup>121</sup>

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<sup>116</sup> E. Helander-Renvall, *Animism, personhood and the nature of reality: Sami perspectives*, 46 “Polar Record” 236, 2010, pp. 44–56.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> E. Helander-Renvall, *Saamelaisten perinnetieto, tapoikeudet ja biologinen monimuotoisuus* [The Sámi Traditional Knowledge, Customary Law and Biodiversity]. 2011, 3, available at <http://www.ymparisto.fi/download.asp?contentid=127691&lan=fi> (24.11. 2015).

<sup>120</sup> E. Helander-Renvall 2013, pp. 133–134

<sup>121</sup> T. Ingold and T. Kurttila, *Perceiving the environment in Finnish Lapland*, “Body and Society”, 6, 2001, pp. 183–196.

The nature of indigenous peoples' connection of the land, including the underpinnings of that connection in customary law, has led to its not necessarily being accepted – or accepted at all – as equal to what is set out in the written legislation of the state. Yet, this does not mean that, for example, rules deriving from customary law cannot be taken as the basis for legislation or as part of it. There are many examples internationally of how customary law has been taken into account in legal proceedings and negotiations dealing with indigenous peoples' land rights.<sup>122</sup> According to Helander-Renvall, acknowledging the customary rights indicating the connection of an indigenous people in a state's land-use policies requires active elaboration of the connection to the land through different practices and discourses so that the rights will be recognized more broadly and become part of society's commitments.<sup>123</sup>

The right to cultural autonomy for the Sámi, as an indigenous people, is recognized by the Article 17 (3) of the Finnish Constitution. In accordance with this, several domestic legislations are in place in order to concretize this right. Sámi traditional livelihoods, namely reindeer herding, fishing and hunting, are recognized as a part of their culture.<sup>124</sup> General failure of the articulation in Finnish legal instruments is that it talks about livelihood, which emphasizes an economical aspect, thus failing to embrace the culture as a wholesome way of life that includes certain values and worldview. Although the Sámi Parliament is functioning with the task to “look after the Sámi language and culture, as well as to take care of matters relating to their status as an indigenous people”<sup>125</sup>, in real, their decision-making powers are rather limited. Authorities are obliged to negotiate with the Sámi Parliament in “all far-reaching and important measures which may directly and in a specific way affect the status of the Sámi as an indigenous people and which concern matters in the Sámi homeland.”<sup>126</sup> In reality, however, this means “an opportunity to be heard and discuss on matters”. Failure to use this opportunity, however, in no way prevents the authority from proceeding.<sup>127</sup>

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<sup>122</sup> See E. Helander-Renvall 2013, p. 132; See also M. de la Cadena, *Indigenous Cosmopolitics in the Andes: Conceptual Reflections beyond Politics*, “Cultural Anthropology”, vol. 25 (2), pp. 334–70; M. Blaser, *Ontology and Indigeneity: on the Political Ontology of Heterogeneous Assemblages*, “Cultural Geographies” 2012, pp. 1-10.

<sup>123</sup> Helander-Renvall 2014, p. 132.

<sup>124</sup> PeVL 38/2004 vp.

<sup>125</sup> Sámi Parliament act, 974/1995 (amendments up to 1026/2003 included), Section 9.

<sup>126</sup> *Ibid.*, art. 9.

<sup>127</sup> Sámi Parliament act, 974/1995 (amendments up to 1026/2003 included), Section 9.

#### 4. Concluding Remarks

We argue that if there is a true will to protect the rights and cultures of Indigenous peoples in a way that future generations can engage with it and feel a connection to previous generations, it must be understood and taken seriously that indigeneity refers to a different way of conceiving of reality and the world. In other words, the reality of an indigenous people is based on a different ontology than that underlying the Western way of seeing the world.<sup>128</sup> This being the case, efforts to safeguard the culture and the very existence of Sámi as an indigenous people should be predicated expressly on the people's own ontologies and respect for those ontologies.

At least a partial legal solution in Finland would be the finalizing and accepting the Draft Nordic Sámi Convention.<sup>129</sup> Similarly to the UNDRIP, the Convention endorses Sámi people's right to self-determination and free, prior and informed consent in crucial issues such as matters related to the use and management of natural resources. The Draft Convention is not explicitly inasmuch as the UNDRIP based on indigenous worldview, but does succeed to recognize Sámi belongingness to the Land in the form of traditional knowledge, customs and customary laws, and places the intimate and inherent nature-culture relationship at the centre. The Draft Convention creates a space, where states, when (and only when) willing, together with respected Sámi Parliaments (that are given a strong role and decision-making power to actualize Sámi self-determination) could reach out to protect Sámi people's rights, dwelling rather from their own ontologies than solely on Western legal framework.

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<sup>128</sup> See M. Blaser, *Ontology and Indigeneity: On the Political Ontology of Heterogeneous Assemblages*, "Cultural Geographies" 2012, pp. 1-10; T. Ingold, *The Perception of the Environment. Essays on Livelihood, Dwelling and Skill*, Routledge 2000, pp. 132-152.

<sup>129</sup> Negotiations are still ongoing. See, generally T. Koivurova, *The Draft Nordic Saami Convention: Nations Working Together*, 10 "International Community Law Review" 2008, 279; L. Heinämäki, *The Nordic Saami Convention: The Right of a People to Control Issues of Importance to Them*, in N. Bankes and T. Koivurova (eds.), *The Proposed Nordic Saami Convention, National and International Dimensions of Indigenous Property Rights*, Hart Publishing 2013, pp. 125-147; K. Hossain, *Human Rights approach to the Protection of Traditional Knowledge: An Appraisal of Draft Nordic Saami Convention*, "Yearbook of Polar Law", vol. 4, 2012, pp. 313-340.

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**Dismantling the Dismantling of Federal Protection for Arctic Waterways: Revisiting  
Canada's New *Navigation Protection Act***

***Maura Hanrahan\****

**Abstract**

This article calls for legislation with the necessary flexible mechanisms to protect the changing Arctic environment. Drastic changes in the Arctic are caused by from climate change,<sup>130</sup> with adverse effects on Arctic waterways.<sup>131</sup> Yet in 2012 Canada's Conservative federal government passed legislation that removed the bulk of Canadian, including Arctic, waterways from federal protection. This article critiques the new legislation and suggests ways through which the Canadian federal government might revise it and develop related legislation that would enhance, rather than diminish, protection for the Arctic.

**1. Introduction: Climate Change in the Arctic**

Climate change in the Arctic is occurring at an alarming rate, creating an unstable and unpredictable geophysical environment; this includes Arctic waterways.<sup>132</sup> Inuit in Labrador and Nunavik (Northern Quebec) report rising temperatures, stronger tides, earlier springs, and changes in animals, including sickness in caribou and the arrival of new species such as moose.<sup>133</sup> Thus, these and related factors affect Inuit food security and other aspects of

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<sup>130</sup> E. Post, Eric, Mads C. Forchhammer, M. Sydonia Bret-Harte, T. V. Callaghan, T.R. Christensen, B. Elberling, A.D. Fox et al, "Ecological dynamics across the Arctic associated with recent climate change," *Science* 325, no. 5946 (2009): 1355-1358.; L.D. Hinzman, N.D. Bettez, W.R. Bolton, F.S. Chapin, M.B. Dyurgerov, C.L. Fastie, B. Griffith et al, "Evidence and implications of recent climate change in northern Alaska and other arctic regions," *Climatic Change* 72, no. 3 (2005): 251-298.

<sup>131</sup> O.M. Johannessen, E.V. Shalina and M.W. Miles, "Satellite Evidence for an Arctic Sea Ice Cover in Transformation," *Science* 286 (1999), 1937-39; D.A. Rothrock, Y. Yu, and G.A. Maykut, "Thinning of the Arctic Sea-Ice Cover," *Geophysical Research Letters* 26/23 (December 1999), 3469-3472.

<sup>132</sup> E. Post et al, *op. cit.*; L.D. Hinzman et al, *op. cit.*; O.M. Johannessen et al, *op. cit.*; D.A. Rothrock et al, *op. cit.*

<sup>133</sup> C.M. Furgal, D. Martin and P. Gosselin, "Climate Change and Health in Nunavik and Labrador: Lessons from Inuit Knowledge," In *The Earth is Faster Now: Indigenous Observations of Arctic Environmental Change*, I. Krupnik and D. Jolly, eds., Arctic Research Consortium of the United States in cooperation with the Arctic Studies Center, Smithsonian Institution, 2002, 267-300.

health.<sup>134</sup> The mental health of Circumpolar people is affected directly by climate change and/or indirectly through stressors like media reports or government policy<sup>135</sup>; the extreme changes to Canada's Navigable Waters Act is one instance of this.

## **2. Federal environmental protection in Canada**

In Canada, Arctic and other waterways had been protected under the Navigable Waters Protection Act, passed in 1985. Because of this act, in order for a project to proceed, its proponents had to submit their plans to a federal review process which used hearings and studies to carry out cost-benefit analysis and impact assessment, which were publicly reported on. Potential projects from several industries and sectors, such as construction, oil and gas, transportation, and telecommunication, all underwent this imperfect but useful process.

## **3. Dismantling federal protection**

During a decade in power, the Conservative Government, led by Prime Minister Stephen Harper, formerly an economist and right-wing lobbyist, demonstrated a singular disregard for environmental protection. The 2010 federal speech from the throne portended widespread environmental deregulation and showed that Ottawa would ignore its duty to consult and accommodate Indigenous people regarding anything that might affect treaty or Aboriginal rights.<sup>136</sup> In 2011, the Harper government withdrew Canada's support for the 1997 Kyoto Protocol.<sup>137</sup>

An omnibus bill of 450 pages and deceptively named the Jobs and Growth Act introduced changes to the Navigable Waters Protection Act so substantial they amounted to a complete overhaul of waterways protection legislation. The renamed Navigation Protection Act (R.S.C., 1985, c. N-22) removed no less than 98% of Canadian waterways from federal protection. The list of newly exempt waterways included, for instance, six rivers in the

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<sup>134</sup> *Ibidem*.

<sup>135</sup> A.C. Willox, E. Stephenson, J. Allen, F. Bourque, A. Drossos, S. Elgarøy, M. J. Kral et al., "Examining relationships between climate change and mental health in the Circumpolar North." *Regional Environmental Change* 15, no. 1 (2015): 169-182.

<sup>136</sup> The duty is affirmed in Section Thirty-five of the Constitution Act, 1982 and in various Treaties between the (British) Crown in right of Canada and First Nations and Inuit peoples.

<sup>137</sup> Canada and Kyoto: A history of the country's involvement and its greenhouse gas emissions, Canadian Broadcasting Corporation, <http://www.cbc.ca/news2/interactives/canada-kyoto/> Accessed Feb. 19, 2016.

Arctic's Queen Maud Gulf in Nunavut, Canada's largest jurisdiction in terms of land mass and the home of most Canadian Inuit. The Queen Maud Gulf hosts a large migratory bird sanctuary that extends from Ellice River in the west to Kaleet River in the east. This area has been the longtime territory of the Ahiakmiut or Kogmiut or the Perry River people,<sup>138</sup> whose lives are inextricably bound to the local river systems.<sup>139</sup> Hundreds of thousands of waterfowl breed in this area, including tundra swans, eider ducks, Ross's geese, and many other bird species.<sup>140</sup>

The omnibus bill was one of the triggers for Idle No More (INM), a social movement committed to peaceful protest and grounded in Indigenous activism. Its vision was (and is) *to honour Indigenous sovereignty, and to protect the land and water*.<sup>141</sup> INM was active in the Arctic with activities such as a flash mob at Iqaluit Airport and an outdoor rally in the town.<sup>142</sup> Many Arctic people were deeply concerned about the federal government's plans to dismantle environmental legislation.

#### **4. Dismantling the dismantling. Conclusions**

Inuit, Dene and others live with the often pernicious impacts of climate change in the Arctic. They know that the waterways that surround them are particularly vulnerable to adverse effects yet most of these waterways are now unprotected by Canada's federal government. In the face of climate change, these waterways need more protection, not less. Reversals to the new bill may occur with the 2015 election of a majority Liberal government but there are no solid indications of how or even if this will happen.

The original 1985 legislation should be strengthened, not weakened. As part of this process, legislators should recognize that the Arctic is an at-risk ecosystem that is changing rapidly; thus, its protection should be a priority. The original law assumed a stable ecosystem, characterized by predictability; this meant the emphasis was on preservation. But climate change research has proven that the Arctic ecosystem is far from stable. New legislation must reflect this. Legislative goals need to go beyond preservation to include flexible mechanisms

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<sup>138</sup> Nunavut Tunngavik, NTI IIBA for Conservation Areas: Cultural Heritage and Interpretative Materials Study: Phase I: Cultural Heritage Resources Report and Inventory and Appendices, Iqaluit, NU, May 2011.

<sup>139</sup> *Ibidem*, p. 13.

<sup>140</sup> Parks Canada, Canada's National Marine Conservation Areas System Plan: Queen Maud Gulf, [http://www.pc.gc.ca/progs/amnc-nmca/systemplan/itm1-/arc5\\_E.asp](http://www.pc.gc.ca/progs/amnc-nmca/systemplan/itm1-/arc5_E.asp), Accessed Feb. 19, 2016.

<sup>141</sup> Idle No More, "Vision," <http://www.idlenomore.ca/vision>, Accessed Feb. 17, 2016.

<sup>142</sup> W. Bernauer, Idle No More Comes to Nunavut, The Media Co-op, January 26, 2013, <http://www.mediacoop.ca/fr/story/idle-no-more-comes-nunavut/15924>, Accessed Feb. 15, 2016.

to respond to change that is sometimes fast and possibly devastating. The precautionary principle, which has guided activists and legislators for many years, is now insufficient as we seek to protect the geophysical environments on which we depend. Thus, preservation of certain ecosystems or elements of ecosystems may not be possible yet preservation has to be utilized as a first step, always keeping in mind its inadequacy as a response to our current circumstances.

Rather than ignore fragile environments, such as the Queen Maud Gulf, we should adopt a vigilant approach that would have us *monitor and study (these environments) all the time*.<sup>143</sup> Craig recommends that climate change be incorporated into all levels of planning, from the development of legislation onwards.<sup>144</sup> In the case of Nunavut, Canada's newest jurisdiction,<sup>145</sup> higher levels of scientific and financial resources are required.

Equally important is the recognition of the cultural and emotional significance of the Arctic ecosystem. When this ecosystem is threatened or altered, the mental health of the people for whom it is home are negatively impacted. Accordingly, the mental health impacts of climate change and a changing geophysical environment should motivate legislators. Following this, governments should include in legislation measures to promote the mental health of Arctic people as they cope with the burdens of an unpredictable ecosystem that is increasingly shaped by climate change.

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<sup>143</sup> R.K. Craig, "Stationary is Dead": Long Live Transformation: Give Principles for Climate Change Adaptation Law, *Harvard Environmental Law Review*, March, 2010, p. 6.

<sup>144</sup> *Ibidem*, p. 8.

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## **Part IV.**

# **Indigenous Rights and Customary Law**

## 11.

### On Customary Law. A Cultural Dimension of Ethnopolitical Strategy

*Tom G. Svensson\**

#### **Abstract**

The paper is to shed light on the most cultural perspective concerning aboriginal rights, i.e. *customary law*. The case of the Sámi people's legal perceptions is analysed in context of legal struggle regarding recognition of their customary law in the courts in Sweden and Norway.

#### **1. Introduction**

The intention of this short comment connected to 'Philosophy of Law in the Arctic' is to shed light on the most cultural perspective concerning aboriginal rights, i.e. *customary law*. Being a legal anthropologist, the notion of legal pluralism and what progress indigenous people in the North, especially the Sámi, so far have attained, motivate such approach.

#### **2. Customary law**

Referring to an indigenous rights discourse, customary law emerges as a central concept. All cultures fall back on a legal regime founded on custom, or tradition. According to a leading scholar in the field of legal anthropology, *Sally Falk Moore*, there are three meanings connected to customary law; tradition, practice, and legitimization (Moore 1978). Understood in this way, customary law is part of culture, it is a legal concept indicating cultural diversity as well as legal diversity, the latter aiming at a legal pluralistic arrangement. In cross-cultural legal contests it serves as an effective ethnic marker, and often appears as a necessary requirement when it comes to pursue claims concerning indigenous rights, emphasizing cultural uniqueness, the politics of difference.

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That which is problematic for indigenous people, whose aim is to make progress in their struggle towards improved rights, is the question of recognition. In the courts of most majority societies customary law is acknowledged as a legal concept, and as such part of state law. However, in the case of indigenous people, their customs and legal perceptions are as a rule unwritten. According to the legal establishment this means that such a customary law has less evidential power, or value. In making advance concerning their effort to attain comprehensive indigenous rights, recognition of customs, legal perceptions is a key factor. Specifically perceived such comprehensive rights contain political, legal, and cultural rights. If a people's customary law is not practiced, comprehensive rights are unlikely to be achieved. In other words, culture-specific customary law, or legal regime based on norms generated by customs, serves as a political asset for indigenous people in their mobilization for claims as well as in their use of political rhetoric.

To be culture-specific and different in comparison with official state law, does not mean that customary law is static and unchangeable. As Moore (Opus.cit.) has stated, customary law should be considered as process merging tradition with modernity, thereby perceiving customary law as a vital cultural element.

All cultures have customs, which influence behaviour and how communities, large or small, are structured. Some of these customs are law generating, creating set of norms and rules of conduct. For indigenous minorities it is essential to build bridges between law and culture in order to strengthen their position as a distinct people, and here recognition by an outside party, i.e. the larger society, is crucial. If such recognition is not obtained, it will be extremely difficult, for example for the Sámi to refer to customs, their own legal perceptions as a source of law.

There is no immediate need to have such customary rights codified, but to be recognized as a source of law, though mostly unwritten, which should be taken into account in legal contests, is decisive.

To recognize a people's customs, customary law, moreover, affirms a recognition of culture difference. It is a matter of placing an inter-cultural legal dispute in an appropriate cultural context, and adds a dimension to narrow jurisprudence. And it is the party representing the interests of indigenous people who is responsible for such an additional definition of the situation.

Without a cultural repertoire in which customs and legal perceptions have a central role in being continually practiced and valued, stated claims by indigenous people, in whatever forum in the majority society, are bound to lack sufficient legitimacy. Many recent court cases, as well as Parliamentary Inquiries leading to legislation, actualizing indigenous rights, underscore the substantial strength of customary law.

### **3. Empirical cases**

To have additional significance this general discussion should be grounded on some empirical case material. Historically speaking the “Lappecodicillen” from 1751 is rather unique in this sense. This appendage to the Treaty between Denmark/Norway and Sweden appears as a most significant document. For the first time Sámi land-use rights based on customary use were acknowledged irrespective of nation-state borders. This Codicil serves as evidence referring to Sámi historical rights, and, moreover, provides symbolic power in current Sámi political actions and rhetoric. And it is important to notice that the Codicil did not create new rights, but for the first time in history it officially recognized and confirmed existing rights, in particular applicable for traditional natural resource development.

The Codicil is frequently referred to in contemporary court cases, not the least due to its historical force. As a legal historical fact its intended content and spirit cannot be denied, and, furthermore, it was never extinguished. In that sense this document is unique and serves as an asset developing political and legal arguments endorsing the Sámi position as a people.

The *Alta* case in Norway and the *Taxed Mountains* case in Sweden, both ending with Supreme Court Decisions of principle value (1981 and 1982), are confirmations of legal nature between the Sámi and the majority society, and which both actualized the implications in principle of the Lappecodicillen and of custom, customary land-use. To have an unequivocal meaning supporting claims the legal conception, immemorial prescription (“urminnes hävd” eller “alders tids bruk”) presupposes a convincing association with the Codicil as well as with customs.

In Norway three fairly recent cases can be pointed to, all concluded in the Supreme Court, and therefore of great principle value as part of a process creating new law. All cases mentioned allude to decisions in favour of fundamental Sámi interests.

The *Seibu* case 2000 represents a new legal practice as it recognized the allocation of land based on *sii'da* traditions/customs. In this way a new practice enters the legal arena where Sámi customs are formally approved.

In the *Svartskog* case 2001 customary use rights to forestry and pasture, which for long had been exercised by a number of sedentary Sámi, turned out momentous against state ownership rights.

Thirdly, the *Selbu* case 2001 in the southern part of Sápmi affirmed immemorial prescription to a great extent founded on custom and customary rights to reindeer pasture.

These three cases confirm that Sámi custom as a prevalent practice represents an important principle having an effect on court decisions, when it comes to protect vital Sámi interests. The cases, and not the least their conclusions, point to a new legal pluralistic order, in particular when it comes to building a bridge between common state law perception and special conditions concerning reindeer pastoralism and its viability (Svensson 2003).

The *Nordmaling* case in Sweden 2007 is another example affirming the importance of Sámi customs. In this case Sámi customary land-use pattern of winter pasturing was acknowledged as sufficient evidence regarding testimony of Sámi rights against a group of land-owning, non-Sámi opponents, who had contested this pasturing practice. This decision constitutes a decisive breakthrough for the Sámi in Sweden recognising rights based on custom. This case of litigation, 1998 – 2007, concerns three local communities, “samebyar” in Västerbotten, and final decision was issued by the Court of Appeal in 2007 (Samefolket 2007).

In a recent case, February 3, 2016, the Sámi community *Girjas* in Swedish Lapland was by the District Court in Gällivare ascribed firm rights to hunting and fishing. This verdict confirms Sámi exclusive rights to manage the allocation of hunting and fishing rights based on immemorial prescription (*alders tids bruk*), a right formerly administered by the Swedish state. This verdict is hold to be a noticeable breakthrough and may appear as a first step towards ownership rights (Ságat 2016 Nr 29).

The politicization of the notion of customary law was, furthermore, emphasized by the Sámi Parliament in Norway as a critical follow up of the Sámi Rights Commission and its work on land-use rights (NOU 1997:4). The issue of customs/Sámi legal perceptions, clearly stated in the Commission's mandate, was not dealt with, consequently, in the view of the

Sámi, resulting in an incomplete report. According to the Commission this special question was considered to be too complicated, demanding new basic research, an undertaking the Commission was unable to seriously deal with. Being faced with such a response the Sámi Parliament decided to require that such research should be carried out before final legislation, a demand favourably met by the Ministry of Justice. In 2001 a new comprehensive report by an independent interdisciplinary research group was delivered (NOU 2001:34). In this manner the Sámi managed to convert the perspective of traditional knowledge and customary rights to an ethnopolitical asset. (See also Proceedings from a conference 1999 Svensson, ed.)

As a supplementary result of the Sámi Rights Process in Norway (1980 – 2005) leading to legislation, the Finnmark Act 2005, two principal new institutions emerged, first the District Court of Inner Finnmark, and second the Commission on Land Resolutions in Finnmark. By the District Court, assumed to possess clear competence in Sámi language and culture, the Sámi have reached an institution for legal conflict resolutions, which comes close to the idea real equality before the law. Its predecessor is the Office of Legal Aid of Inner Finnmark from 1987, which has been instrumental when it comes to incorporate an understanding of Sámi customary law into Norwegian state law (Johnsen 1997), a development of a new legal arrangement, and which can be perceived as interlegality (Hoekema 2006). This institute had no decision-making authority, though, and was constrained to prepare cases considering culture difference for an ordinary court. No doubt, the District Court represents an appreciable headway, in which Sámi customs, legal perceptions are expected to play a natural role. Obviously, such customs appears as a relevant factor in the work of the Finnmark Commission with the objective of solving the issue of land rights allocation for the entire county of Finnmark.

#### **4. Summing up**

As demonstrated *customary law* is part of comprehensive indigenous rights, the other central parts being land rights, rights to self-determination, and human rights. Customary law relates to four major perspectives having an effect on a people's daily life concerns; i.e. ecology, politics, legal actions, and culture.

To have any weight in political terms, once regained and strengthened, e.g. through research, to be included as part of the Sámi political agenda customary rights and custom

must be retained and continually exercised. Its value as evidence in inter-ethnic legal confrontations depends on the dynamic, innovative force of customary law, which means accepting its oral, unwritten form.

It must be established that rights based on custom represents an active cultural element, not simply an expression of static tradition. Because it is only in this way that Sámi customary law can be ascertained as a source of law. The court cases referred to in this brief note illustrate what can be called an example of development law, which gradually verifies custom, customary law as sufficient proof providing legitimacy to Sámi claims.

Following the argument presented, a sort of commentary, a people's customary law is part of an ethnopolitical strategy, not the least due to its close connection to culture, in the extreme conceived as being engaged in a struggle for cultural survival.

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<sup>146</sup> Editorial note (D.B.): The Supreme Court's decision was made in the Nordmaling case in 2011. The appeal court's decision in the same case was made in 2007. See also chapter 8 of this book, *in fine*. [My editorial thanks come to Professor Christina Allard for the explanation of the history of this case and sending her article: *The Nordic countries' law on Sámi territorial rights*, "Arctic Review on Law and Politics", vol. 3, 2/2011, p. 159–183, available at [http://site.uit.no/arcticreview/files/2012/11/AR2011-2\\_Allard.pdf](http://site.uit.no/arcticreview/files/2012/11/AR2011-2_Allard.pdf) (22.04.2016).]

## Moral Grounds for Indigenous Hunting Rights

*Makoto Usami\**

### Abstract

If indigenous people are to have the legal right to hunt a particular species that other citizens are denied, then it presents a significant challenge to philosophers to explore the moral grounds that justify the special right, especially in respect to the issues of normative weight and fairness. This exploration is the subject of the current paper.

### 1. Introduction

It is crucial for indigenous people living in the Arctic to harvest animals by hunting in a traditional manner, as is the case with such peoples in other parts of the world. The fundamental significance of hunting for native people can be illustrated by the case of the anti-sealing campaigns that environmental and animal rights activists conducted in the 1980s and 1990s. Their harsh condemnation, along with a decline in the market price of sealskin caused by the increased regard for animal welfare in Western societies, had serious adverse impacts on some Inuit populations in Canada. These impacts included malnutrition, poverty, reluctant relocation, and the collapse of long-standing culture. Given the nutritional, economic, and cultural importance of hunting for aboriginal people, it seems reasonable to say that they have the moral right to hunt animals in a sustainable way. Indeed, this right was established in a declaration made by a transnational Inuit organization<sup>147</sup>.

On the other hand, non-aboriginal people are occasionally prohibited from hunting a particular species of animal in many societies. The rationale for such prohibitions includes

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<sup>147</sup> The Inuit Circumpolar Conference calls on “national, provincial, and state governments to recognize the interent [sic] rights of Inuit with respect to sustainable hunting, co-management, and other subsistence activities.” The Kuuujuaq Declaration, 2002, available at <http://www.inuit.org/index.php?id=169> (accessed February 2, 2016).

the preservation of endangered species, restrictions on human intervention in ecosystem, and the protection of animal welfare. The question then arises: why do aboriginal people, unlike other citizens, have special hunting rights? There are two issues here. The first concerns normative weight: whatever argument justifies restrictions on hunting activities of non-indigenous citizens, the same argument, at least as a *prima facie* reason, should also apply to indigenous people in order to maintain consistency in moral reasoning. If special native hunting rights are ultimately justified, what is a reason against constraints on indigenous people's hunting, which can override that reason for the constraints? The second issue is that of fairness: how can it be fair to exempt only aboriginal people from legal constraints on hunting activities, which their fellow citizens must obey?

In the last decades, a growing number of legal, moral, and political philosophers have examined the moral foundations of various legal rights and rules governing citizens at large. The legal institutions they have studied include property rights, contractual duties, freedom of speech, and criminal punishment. If indigenous people are to have the legal right to hunt a particular species that other citizens are denied, then it presents a significant challenge to philosophers to explore the moral grounds that justify the special right, especially in respect to the issues of normative weight and fairness. This exploration is the subject of the current paper.

## **2. Cultural Plurality**

Since native peoples have unique cultures, the idea of cultural plurality seems to be a useful point of departure in inquiring into moral justifications for their special hunting rights. The position I term the plurality view maintains that a group of people should be provided the legal right to sustain their cultural practices, even when other groups are banned from doing similar practices, if the right is reasonably expected to enhance the multiplicity and variety of subcultures in a society. To acquire this special legal right, the argument goes, the group must satisfy two conditions. First, the size of their population is a considerably small part of the whole population of the country in which they live. Let us call this the population condition. Second, their cultural practices, which are supposed to be distinct from those of any other groups, have been passed down over hundreds of years. Call this the duration condition. These conditions are met in the case of indigenous peoples' hunting: they constitute a small portion of the entire population, and they have engaged in hunting in a long inherited manner.

The pluralist therefore claims, for example, that Inuit tribes in Canada should be legally allowed to hunt seals even if other citizens are banned from doing so, because this allowance admittedly helps to make Canadian society more multicultural.

The plurality view appears cogent in justifying special aboriginal hunting rights. But this appearance is mistaken. To illustrate how the view can lead to implausible results, consider the case of foxhunting in Britain. British foxhunting dates back to the 16th century in the modern form in which red foxes are tracked, chased, and killed by trained foxhounds and a group of unarmed followers led by the master of the foxhounds on horseback. Having been practiced until quite recently, the sport was closely associated with the social class structure and constituted an important part of rural culture. In recent years, foxhunting was increasingly criticized by the animal welfare activists who objected to the cruelty of dogs chasing and killing foxes. Hunting animals with dogs was eventually banned by law in Scotland in 2002 and in England and Wales in 2004.

Those who practiced foxhunting until the legal prohibition satisfied the population conditions the number of fox hunters was considerably small in the whole population. They also met the duration condition: the sport had been enjoyed for several hundred years. Therefore, the plurality view implies that the fox hunters were morally entitled to play their sport and that recent statutes banning it violated their entitlement. It is noteworthy that the issue here is not whether a blanket legal prohibition of hunting animals with dogs is morally well-founded. The question is: did fox hunters hold the exclusive moral right to hunt foxes with dogs, even if the rest of the population had no right to hunt animals including foxes in such a manner? The positive answer to this question, which the plurality view gives, will strike many people as implausible. This counterintuitive result indicates that the pluralist fails to explain why British fox hunters had no moral privilege of their traditional form of hunting, while Canadian Inuit—and aboriginal peoples in other parts of the world as well—do have such privileges.

### **3. Disadvantages and Needs**

There are several notable differences between British fox hunters and Canadian Inuit seal hunters, among which the following two are particularly relevant for the purpose of my discussion. First, the former group have enjoyed wealth, political influence, and fame in their

local communities and the society more broadly, whereas the latter have long suffered from poverty, political neglect, and stigma. Second, foxhunting was practiced as a luxury sport, while seal hunting is conducted as a way to obtain necessities of life. These differences between fox hunters and seal hunters suggest the idea that the right of aboriginal hunting is grounded in basic human needs, not cultural plurality.

The provision view, as I call it, develops the idea mentioned above by arguing that the disadvantaged should be vouchsafed the special legal right to sustain their social practices if these practices are necessary and effective in fulfilling their basic needs, such as staple foods and daily clothes. This view demands that a group of people fulfill two requirements to gain the right. One is the disadvantage condition, which denotes that the group is relatively disadvantaged in socioeconomic conditions. The other requirement is the needs condition, which means that the group's social practices constitute a way of meeting its basic needs. British fox hunters do not fit the disadvantage condition or the needs condition, whereas Canadian Inuit seal hunters satisfy both. By setting forth the two prerequisites, the provision view appears to supply solid grounds for the privilege of indigenous subsistence hunting, while rejecting that of luxury sport hunting.

Despite its apparent force, it is difficult for the provision view to pertinently draw boundaries of allowable hunting. Consider the case of whaling in Japan. Taiji, a small coastal town isolated by mountains on Honshu Island, has a long history of whaling. Since the early 17th century at the latest, the local people have hunted and eaten whales. A historical background of their traditional whaling is that they had suffered from meager rice crops for hundreds of years. The current inhabitants, who are ethnically not aboriginal but Japanese, are largely disadvantaged in economic conditions, as are many others who live in coastal areas distant from large cities. In 1982, the International Whaling Commission adopted a commercial whaling moratorium, which stipulated that the catch limit of whales for commercial purposes would be zero from the 1985/1986 season onward. In 1988, Japan abandoned commercial whaling practices in accordance with the moratorium. Today some whale hunters in Taiji hunt smaller cetaceans in a traditional manner, and others travel out of the town to work in the projects of scientific whaling that are authorized by the government with special permits.

Suppose that the inhabitants of Taiji, including whale hunters, passed the referendum that all whale meat should be traded and consumed within the town. Do the whale hunters

then have the moral claim to resume the hunting of large whales to meet the dietary need of the local people?<sup>148</sup> The provision view supports rather than rejects their hypothetical claim to restore whaling because they satisfy both the disadvantage and needs conditions<sup>149</sup>. Many people will think, as I do, that this claim is unfounded even though all hunted meat is locally consumed. The ill-founded result implied by the provision view indicates that the view cannot grasp an important difference between Inuit whaling and Taiji whaling. We need to identify the difference in order to offer a robust moral argument for native hunting rights<sup>150</sup>.

#### 4. Respect for Indigenous Life

I have tried to show that neither the plurality view nor the provision view successfully distinguishes between native hunting and some forms of non-native hunting in the perspective of moral legitimacy. In other words, these views fail to identify the moral values that pertain to the legal right of aboriginal hunting. If I have been correct in assessing the two arguments as untenable, this right requires a third one.

In developing an alternative argument for native hunting entitlements, it is helpful to see how its two rivals suffer from difficulties. What both the plurality view and the provision view miss seems to be the autonomous character of indigenous life. Aboriginal people are not merely *patients* who are isolated and left behind by the majority of the population in each society. They are also *agents* who endeavour to inherit the cultural legacies of their ancestors, to sustain and develop them, and to bequeath them to their descendants, as they are proud of their lineage and language. It is true that they are struggling for survival under severe natural conditions, but they are also striving for dignity against the majority's indifference, prejudice, and discrimination. The plurality view pays attention to neither of these two aspects of

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<sup>148</sup> It is worth noting here that indigenous people are authorized by the IWC to conduct whaling. The so-called aboriginal subsistence whaling is not subject to the commercial moratorium that the commission issued.

<sup>149</sup> Some proponents of the provision view might attempt to differentiate between Inuit whaling and Taiji whaling by referring to the degree of need for hunted animals. The former group of people crucially relies on whale meat for nutrition, while the latter has many other foods than whale meat to eat. Given this difference between the two groups, the proponents could decline the hypothetical right of Taiji whalers if they made the needs condition more stringent by saying that the group's social practices constitute an indispensable way of meeting their nutritional need. The stricter version of the needs condition, however, would deny special hunting rights to some native peoples who have been under the influence of the majority's food culture. Another problem with this version is that it would fail to appreciate the non-nutritional elements of aboriginal life, including clothes, dwellings, and religious ceremonies.

<sup>150</sup> The plurality view encounters the same difficulty as the provision view does. Since whale hunters in Taiji meet both the population condition and the duration condition, it does not reject their hypothetical claim to resume whaling.

aboriginal people; it looks at only their formal characteristics, such as population size and cultural duration. The provision view highlights the patient aspect, while neglecting the agent one. In so doing, it fails to explain a moral value involved in special hunting rights as distinguished from other legal measures intended to protect the interests of native people. For instance, this view will consider granting the Inuit whaling rights as morally equivalent to giving them food stamps for whale meat because these policies equally satisfy their nutritional requirements. The difference that this view finds between the two is economic: the government can save the cost of full-fledged whaling carried out with advanced technology if it allows Inuit tribes to hunt whales by themselves. However, there is indeed a huge moral difference between the two mechanisms, which has to do with the agent aspect of native people. Special hunting rights indicate the public recognition of and respect for the mode of life that they have shaped over many centuries; in contrast, whale meat stamps are simply a tool of food supply to the needy.

Recognizing and respecting aboriginal patterns of life seem to be the key to the question of moral foundations of special hunting rights. To develop this basic idea, I propose the respect view, according to which a group of people should be accorded the legal right to sustain their social practices if the right is reasonably read to convey the society's official recognition of and respect for the group's autonomous way of life on the one hand, and to assist them in satisfying their basic needs by themselves on the other hand<sup>151</sup>. There are two prerequisites for this right. First, the autonomy condition states that the group's social practices compose a significant part of the life mode that they have sustained independently from other groups in the society for a long period of time. Second, the needs condition, which is shared with the provision view, says that the group's practices constitute a way of supplying their basic needs. In virtue of the autonomy condition, the respect view excludes the hypothetical Taiji whaling claim from the realm of protected hunting. This is because the local people have the contemporary Japanese way of life that has been considerably influenced by American culture for several decades, just as those living in other regions do, except for their custom of eating whale meat. The respect view also appreciates the moral value of whaling rights granted to the Inuit as opposed to whale meat stamps given to them.

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<sup>151</sup> The basic argument underlying the respect view is that human life consists of two distinct but interrelated aspects: voluntariness and vulnerability. Legal institutions are required to show respect for citizens' voluntariness and to provide rescue to particularly vulnerable groups. I elsewhere present this argument at some length. E.g., M. Usami, "Justice after catastrophe: Responsibility and security," *Ritsumeikan Studies in Language and Culture*, vol. 26, no. 4, 2015, pp. 222-223.

Only the former policy makes it possible for indigenous people to meet their dietary need by themselves.

## **5. Conclusion**

In previous sections, I explored moral grounds for exclusive legal hunting rights of indigenous peoples. To begin with, I examined the plurality view, which advances these rights by invoking the idea of multiple and various subcultures in a society. As I showed, this view fails to grasp the realities of aboriginal life because of its formalist approach, which utilizes the group's population size and cultural duration as prerequisites for the special rights. Its failure is exemplified by the fact that it does not differentiate foxhunting played as a sport by the wealthy British from seal hunting carried out for the daily necessity by Inuit populations.

The next target of my investigation was the provision view, which finds *raison d'être* of special hunting rights in meeting basic needs of the rights-holder group. This view correctly distinguishes between British foxhunting and Inuit sealing by taking a substantive approach that focuses on the socioeconomic (dis)advantages and material needs of a group in question. By centering its attention on human vulnerability and necessity, however, this view misses the agency aspect of native people. Its oversight is evident when it makes no distinction between the case of Taiji people's hypothetical claim of restored whaling and that of Inuit tribe's demand of traditional whaling, in both of which the disadvantaged have hunted and eaten the same species of animal to make their livelihood.

Based on my negative assessment of the plurality view and the provision view, I offered the respect view, which bases hunting rights of aboriginal peoples both on the recognition of and respect for their autonomously shaped mode of life and on the satisfaction of their basic needs. This view denies the supposed foxhunting right by taking the group's needs into account; it also declines the hypothetical claim of Taiji whaling by demanding autonomy of the group. Moreover, it draws a clear line of demarcation between granting native people whaling rights and giving them stamps for whale meat.

I have discussed the exclusive legal right to hunt a particular species that indigenous people have. But the basic line of my argument can be applied to the right to fish and the right to gather plants, if its details are appropriately changed. More generally, I hope that the

point of my discussion has relevance to other adopted or proposed legal rights and rules relating to aboriginal people in various societies, ranging from native language education to parliamentary seat quotas. Special rights granted to indigenous people are worthwhile only when they express the society's recognition of and respect for the mode of life that they have autonomously shaped and sustained on one hand, and empower them to tackle challenges in their realities on the other.

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## 13.

### Status of Indigenous Peoples in International Law

*Agnieszka Szpak\**

#### Abstract

The article briefly examines the most relevant representative factors of the status of indigenous peoples in light of international law with special references to the Sami rights.

#### 1. Introduction

For many years indigenous peoples, their needs, rights, culture and identity have been neglected and destroyed. These bitter remarks also refer to the Sami in the Arctic. This situation is slowly changing in practice while on paper in the international instruments both of 'hard law' and 'soft law' one may find provisions ensuring respect for the rights of indigenous people such as *inter alia* right to self-determination, to respect for their traditions and customs, cultures and languages, to participate in decision-making on matters that would affect their rights, land rights, to the improvement of their social and economic position or to maintain and develop their traditional knowledge. Many of those rights are guaranteed in the non-binding UN Declaration on the Rights of Indigenous Peoples<sup>152</sup> (hereinafter: UN Declaration) adopted in 2007 and legally binding ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries<sup>153</sup>. Below a few remarks will be devoted to the UN Declaration. With reference to the ILO Convention it should just be added that it aims to protect the rights of indigenous peoples, their way of life and their culture. Its adoption was at that time (in 1989) an improvement compared to the previous Convention 107 of 1957 on the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries<sup>154</sup> which aimed at assimilation of indigenous peoples. One may

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<sup>152</sup> *UN Declaration on the Rights of Indigenous Peoples* (UN GA res. 61/295) is available at <http://research.un.org/en/docs/ga/quick/regular/61> (29.01.2016).

<sup>153</sup> *The ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries* is available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169) (29.01.2016).

<sup>154</sup> *The ILO Convention 107 on the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* is available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312252](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312252) (29.01.2016).

conclude that there are legal provisions protecting the indigenous peoples, but unfortunately law in books does not always transform into law in action.

## **2. Indigenous Peoples and the right to self-determination**

In 1994 the UN General Assembly declared years 1995-2004 the International Decade of the World's Indigenous Peoples<sup>155</sup>. The second decade (2005-2015) was the continuation of the first one<sup>156</sup>. The first decade was supposed to be crowned by the issuance of the UN declaration on indigenous peoples but this happened in the middle of the second decade when in 2007 the UN Declaration on the Rights of Indigenous Peoples was adopted.

UN Declaration is the most important, however non-binding, instrument on the rights of indigenous peoples. It affirms that indigenous peoples *contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind*<sup>157</sup>. According to the Declaration, indigenous peoples have a collection of rights: individual ones that persons have as members of the group and collective ones that inhere in the group as a whole (such as land rights) (Art. 1 of the UN Declaration). Art. 3 refers to the right of self-determination of indigenous peoples which means the ability to *freely determine their political status and freely pursue their economic, social and cultural development*. Self-determination is connected to the right to autonomy or self-governance in matters relating to internal and local affairs of indigenous peoples (Art. 4 of the UN Declaration). This formula indicates that self-determination should be exercised first of all in the form of autonomy. To make things even clearer the UN Declaration contains a clause stating that *Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States* (Art. 46). Many States fear that according to the indigenous peoples, the right to self-determination may lead to secession. Those fears are however unjustified as indigenous peoples do not want to create a separate State but be able to make free and independent

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<sup>155</sup> UN GA res. 48/163 of 21 December 1993 is available at <http://research.un.org/en/docs/ga/quick/regular/48> (29.01.2016).

<sup>156</sup> UN GA res. 59/174 of 20 December 2004 is available at <http://research.un.org/en/docs/ga/quick/regular/59> (29.01.2016).

<sup>157</sup> *UN Declaration on the Rights of Indigenous Peoples*, preamble.

decisions in their own matters<sup>158</sup>. Consequently, indigenous peoples have the right to *maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State* (Art. 5 of the UN Declaration). But as Erica-Irene Daes, the former Chairperson of the UN Working Group on Indigenous Populations stated, *there is no distinction between indigenous and other peoples, save the indigenous people have not been able to exercise the right to self-determination*<sup>159</sup>.

### 3. Indigenous Peoples and the land rights

The UN Declaration takes into account the special relationship of indigenous peoples to their lands. It should be recalled that when the incomers arrived indigenous lands were regarded *terra nullius*. This doctrine has been rightly rejected by the International Court of Justice in the Western Sahara case of 1975<sup>160</sup>. Those lands were obviously not *terra nullius* and as N. Oskal rightly claims, *Saami customary rights to the usage of land and water, like any other usage right, are established and based on age-old use, and do not rest on the law alone*<sup>161</sup>. In accordance with Art. 25, *Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard*. The relationship between

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<sup>158</sup> L.-A. Baer, *The Rights of Indigenous Peoples – A Brief Introduction in the Context of the Sámi*, „International Journal on Minority and Group Rights” 2005, no. 12, p. 257; O. Ch. Okafor, *Entitlement, Process, and Legitimacy in the Emergent International Law of Secession*, „International Journal on Minority and Group Rights” 2002, no. 9, p. 41-70.

<sup>159</sup> L.-A. Baer, *op.cit.*, p. 255.

<sup>160</sup> The ICJ stated that at the time of colonization by Spain Western Sahara was not *terra nullius* (para. 75). In para. 80 of the advisory opinion the ICJ stated: *Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as terra nullius. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of terra nullius by original title but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an "occupation" of a "terra nullius" in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of terra nullius*. The Western Sahara advisory opinion is available at

<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=69&case=61&code=sa&p3=4> (29.01.2016).

<sup>161</sup> N. Oskal, *Political Inclusion of the Saami as Indigenous People in Norway*, „International Journal on Minority and Group Rights” 2001, no. 8, p. 261. See also: A. Eide, *Legal and Normative Bases for Saami Claims to Land in the Nordic*, „International Journal on Minority and Group Rights” 2001, no. 8, p. 137. On the social structure of the Sami see: M. Ahrén, *Indigenous Peoples' Culture, Customs, And Traditions And Customary Law-The Saami People's Perspective*, „Arizona Journal of International & Comparative Law” 2004, vol. 21, no. 1, p. 65-73.

the Sami and nature is regarded in a holistic and integrated way. Lands are important as the Sami have used them with their forests and lakes for hunting, reindeer husbandry, fishing and extracting raw materials<sup>162</sup>. Art. 27 of the International Covenant on Civil and Political Rights (1966), which is a binding international treaty, states that *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language*<sup>163</sup>. Human Rights Committee has pointed out that the right to culture from Art. 27 includes a right to traditional lands and territories<sup>164</sup>. In its General comment no. 23 the Committee stated that *With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law*<sup>165</sup>.

Many times the UN Declaration emphasises the necessity of free, prior and informed consent of the indigenous peoples for actions or enterprises that might affect their rights (Arts. 10, 11 (2), 19, 26 (2), 28 (1), 29 (2), 32 (2)). For the Sami, who live in four different States (Sweden, Norway, Finland and Russia<sup>166</sup>), it is important to be able to maintain and develop relations and cooperation in spiritual, political, cultural, social and economic spheres with other Sami and other peoples across borders. Such a right is granted in Art. 36 of the UN Declaration.

#### 4. Conclusions

For many years indigenous peoples have been marginalized in national and international politics. Since about 1980, however, international community became interested in indigenous peoples and started to recognize their rights and needs and regulate their status

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<sup>162</sup> L.-A. Baer, *op.cit.*, p. 248.

<sup>163</sup> International Covenant on Civil and Political Rights is available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (29.01.2016).

<sup>164</sup> See: *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (1984) available at <http://www1.umn.edu/humanrts/undocs/session45/167-1984.htm>, *Kitok v. Sweden* (1985) available at <http://www1.umn.edu/humanrts/undocs/197-1985.html>, *Länsman et al v. Finland* (2001) available at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (29.01.2016).

<sup>165</sup> General comment 23, para. 7, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11) (29.01.2016). See also: H. P. Graver, G. Ulfstein, *The Sami People's Right to Land in Norway*, „International Journal on Minority and Group Rights”, 2004, no. 11, p. 343.

<sup>166</sup> For more details see: L.-A. Baer, *op.cit.*, p. 247.

in international law. Despite all the efforts and international instruments that were adopted, the legal, social, economic and cultural situation of indigenous peoples, the Sami including, is far from perfect. Their special needs such as specific and almost sacred relationship with their lands and their right to maintain and develop their culture, customs, language and education must be respected. International community should appreciate and respect traditional knowledge and customs of indigenous peoples as the latter definitely is a part of the cultural heritage of mankind. Indigenous people should be recognized as subject of international law with rights to self-determination, self-governance and self-identification<sup>167</sup>.

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<sup>167</sup> R. L. Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, „Harvard Human Rights journal” 1994, vol. 7, p. 57.

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## Arctic Frost? Understanding Inuit Ambiguity towards Idle No More

*Maura Hanrahan\**

### Abstract

This chapter explores apparent Inuit ambiguity towards Idle No More. The Indigenous movement was founded in Canada in 2010 to protest the Conservative government's attempts to erode Indigenous sovereignty and reduce federal environmental protection, including in the Arctic, through omnibus legislation. Inuit perspectives on the movement are complex and reflect Inuit culture, priorities, and pressing realities.

### 1. Introduction to Idle No More

Idle No More is a global social movement founded in Canada in 2010, committed to peaceful protest grounded in Indigenous activism. Its vision is to *honour Indigenous sovereignty, and to protect the land and water*.<sup>168</sup> The Jobs and Growth Act, an omnibus bill introduced by Canada's former Conservative federal government, triggered an escalation of Idle No More activities in 2012. The Act dismantled much of Canada's environmental protection legislation, including in the Inuit Arctic, and increased Ottawa's ongoing attacks on Indigenous autonomy and sovereignty.

### 2. Inuit Ambiguity toward Idle No More

Despite the new legislation's potential adverse effects on the Arctic, Inuit demonstrated an apparent reluctance to engage fully with Idle No More. Some Inuit, however, supported the movement. For instance, on December 21, 2012 an Idle No More flash mob at Iqaluit Airport, Nunavut drew twenty-five people who drummed and sang.<sup>169</sup>

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<sup>168</sup> Idle No More, "Vision," <http://www.idlenomore.ca/vision>.

<sup>169</sup> W. Bernauer, "Idle No More Comes to Nunavut," The Media Co-op, January 26, 2013, <http://www.mediacoop.ca/fr/story/idle-no-more-comes-nunavut/15924>, Accessed Feb. 15, 2016.

Almost a month later, an outdoor rally of forty people took place in Iqaluit and an Inuit public interest group called Makita announced its solidarity with Idle No More.<sup>170</sup> Further, representatives from Nunavut Tunngavik Incorporated (NTI), the entity that manages the Inuit land-claim agreement in Nunavut, met with the hunger-striking chief of Attawapiskat First Nation, Theresa Spence, who was linked to Idle No More. NTI also issued a media release that criticized Ottawa for failing to live up to its obligations to Indigenous people, including environmental monitoring in the Arctic.<sup>171</sup> In 2006 NTI had sued the Crown on the same basis; NTI won the case along with almost \$15 million in damages.<sup>172</sup> NTI president Cathie Towtongie said, *In Nunavut, the government of Canada has failed to implement our modern day agreements in many respects.*<sup>173</sup>

Yet there was considerable evidence of Inuit ambiguity toward Idle No More. NTI's public statement in support of Idle No More masked its support for legislative changes made by the Conservative government. NTI stood with Ottawa as it amended the Nunavut land-claim agreement in 2008, effectively removing the territory from the Canadian Environmental Assessment Act. NTI also supported a further streamlining of the environmental review process in the Arctic through the Nunavut Planning and Project Assessment Act, an omnibus bill known and marketed as the Northern Jobs and Growth Act.

Pointing out that Inuit are not First Nations,<sup>174</sup> Terry Audla, president of the national Inuit organization, Inuit Tapiriit Kanatami (ITK), expressed his reluctance about Idle No More in a commentary in the National Post, a right-leaning southern Canadian newspaper with wide distribution. He wrote *As with our modern Inuit land-claim agreements, we believe that the Crown should better honour the historic numbered treaties signed with First Nations.* . . . Then he added: *As the national Inuit leader, I could be in permanent outrage mode with the Crown. But instead of casting the relationship between the Canadian government and its indigenous peoples in black-and-white terms, I would prefer to commend Environment Canada officials, and our Canadian ambassadors abroad. They are helping battle Goliath, both in our attempt to challenge a European Union seal ban in EU courts, and to counter*

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<sup>170</sup> *Ibidem.*

<sup>171</sup> *Ibidem.*

<sup>172</sup> Author unknown, Inuit side with Idle No More, say movement an opportunity to honour land claims, Metro Ottawa, January 10, 2013, Accessed <http://www.metronews.ca/news/ottawa/2013/01/10/inuit-side-with-idle-no-more-say-movement-an-opportunity-to-honour-land-claims.html>.

<sup>173</sup> *Ibidem.*

<sup>174</sup> First Nations are formerly known as Indians and are not related in terms of culture or descent to Inuit, the Indigenous people of the Circumpolar region.

efforts to list polar bears as endangered. . . For Inuit, that means putting food on the table. . . Inuit support the movement but we're a pragmatic people.<sup>175</sup> Some of Audla's sentiments were shared by the editors of the Nunavut newspaper Nunatsiaq Online who opined: *Idle No More's unifying principle is the idea that aboriginal people are sovereign nations who have yet to surrender their sovereignty to Canada. . . But no officially recognized Inuit organization within Canada asserts such an ideology. . . That's no commonality. It's a stark, irreconcilable difference.*<sup>176</sup> Nunatsiaq Online went further, labelling Idle No More *incoherent and chaotic* and calling Chief Spence's hunger strike *a bizarre sideshow*.<sup>177</sup>

### **3. Legislation and Protest: Understanding Inuit Dilemmas in the Canadian Context**

It is unreasonable to expect Inuit to speak with one voice. At first glance, it seems that many grassroots Inuit, especially those who live in southern Canadian cities, saw Idle No More as a good opportunity. Leaders like Terry Audla seemed to have a more negative view of the movement and NTI gave out mixed messages. The conflicting messages from Inuit organizations and groups about Idle No More were striking, especially as compared to the near consensus among First Nations organizations and groups.

How do we understand apparent Inuit ambiguity to Idle No More? Clearly, Inuit quite rightly expect their land-claims agreements to be respected, which is a similar goal to that of most First Nations Idle No More supporters. The aspirations of both Inuit and First Nations are political in nature, reflecting a desire to return to some form of self-government, but there is a philosophical difference too large to ignore. For Inuit, autonomy can happen within Canada; for many First Nations, the aim is self-government *alongside* Canada with citizenship linked to, for instance, the Oneida, Mohawk or Cree nation.<sup>178</sup> In contrast, ITK's slogan is *Canadians First, First Canadians* and Inuit from the Canadian Arctic and sub-Arctic see themselves as "Canadian Inuit" when they meet with Inuit from elsewhere in the

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<sup>175</sup> T. Audla, "Terry Audla on Idle No More: The view from the (far, far) North," National Post, January 29, 2013, <http://news.nationalpost.com/full-comment/terry-audla-on-idle-no-more-the-view-from-the-far-far-north>, Accessed February 15, 2016.

<sup>176</sup> Editors, "Idle No More: not yet relevant to Nunavut," Nunatsiaq Online, [http://www.nunatsiaqonline.ca/stories/article/65674idle\\_no\\_more\\_not\\_yet\\_relevant\\_to\\_nunavut](http://www.nunatsiaqonline.ca/stories/article/65674idle_no_more_not_yet_relevant_to_nunavut), February 13, 2013, Accessed February 24, 2016.

<sup>177</sup> *Ibidem*.

<sup>178</sup> G. R. Alfred, *Peace, power, righteousness: An indigenous manifesto*. Oxford University Press, USA, 2009.

Circumpolar region.<sup>179</sup> With Idle No More making its opposition to the Canadian state abundantly clear, Inuit leaders had little choice but to critique the movement and refrain from wholeheartedly embracing it.

Another related reason for Inuit ambiguity lies in high-context Inuit culture, specifically methods of dealing with conflict. Inuit respond to conflict by privileging necessity and *actions determined by the demands of what we could call honour*.<sup>180</sup> Thus, Inuit deal with conflict by considering what can be done and what needs to be done and then *using ritual communication based upon feelings and aesthetics*. When conflict occurs, even if it is of criminal nature, an important goal is to *restore harmony and peace in the community*.<sup>181</sup> Reflecting these values, the government of Nunavut, while a public, rather than Inuit, government is a consensus government, which means that members are independent of political parties and the tone of debate in the House should be courteous. According to former member Hunter Tootoo,<sup>182</sup> *Although unanimous agreement is not required for decisions in the Legislative Assembly, unanimity is a desirable outcome*.<sup>183</sup> As Terry Audla said with reference to Idle No More, Inuit are pragmatic. Litigation sits uneasily with Inuit culture, as does protest. While this may look like simple conflict aversion to observers, it is more complicated than this.

As ITK leader Terry Audla said with reference to Idle No More, Inuit are pragmatic. One of the things that makes Inuit responses complex is the health status, in the broadest terms, of Inuit in Canada. Inuit health status, reflecting multiple multi-generational trauma caused by loss of land, loss of language, forced residential schooling, and myriad other assimilationist policies, is alarmingly low. Inuit have higher total cardiovascular mortality than Europeans and other North Americans.<sup>184</sup> Injuries, intentional and unintentional, are *an important cause of death*<sup>185</sup> and there is a *prevalent pattern* of adolescent suicide.<sup>186</sup> In

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<sup>179</sup> Inuit Tapiriit Kanatami, *First Canadians, Canadians First: National Strategy on Inuit Education*, 2011.

<sup>180</sup> K. Sevón, "Identifying the communication of the other: The example of communicating conflicts to Greenland," *International Journal for the Semiotics of Law* 6, no. 2 (1993): 147-162, p. 153.

<sup>181</sup> P. Rousseau, "First Nations and the Canadian Legal System: Conflict Management or Dispute Resolution?," *11-15 August 2004 The Arctic Institute of North America University of Calgary Calgary, Alberta, Canada* 11 (2004): 275-283, p. 282.

<sup>182</sup> Tootoo, an Inuk, is now the Minister of Fisheries, Oceans and the Canadian Coast Guard in Canada's new federal government.

<sup>183</sup> H. Tootoo, "Nunavut: An Example of Consensus Government in the Canadian Arctic," *Canadian parliamentary review* 35, no. 4 (2012): 2-5, p. 3.

<sup>184</sup> P. Bjerregaard, T. K. Young, E. Dewailly, and S. O.E. Ebbesson, "Review Article: Indigenous health in the Arctic: an overview of the circumpolar Inuit population," *Scandinavian journal of public health* 32, no. 5 (2004): 390-395, p. 392.

<sup>185</sup> *Ibidem*.

addition, many Inuit are exposed to food and water contaminants, including lead and mercury,<sup>187</sup> and many experience chronic water insecurity<sup>188</sup> and, related to this, food insecurity.<sup>189</sup> Added to this is the mental health burden resulting from climate change.<sup>190</sup> These things interrupt the Inuit relationship with the land and sea, from which Inuit identity and health are derived. So, given the number and extent of these problems, at times Inuit are forced to resort to litigation, as NTI did in 2006. They take part in the adversarial British-Canadian justice system with the full knowledge that their preferences lie elsewhere; extrapolating from Terry Audla, we learn that Inuit eschew overt conflict and would rather concentrate on whatever needs to be done to put food on the table. In promising improved socio-economic conditions through industrial development with enabling legislation as a starting point, Canada's Conservative government forced NTI's hands more than once.

#### 4. Conclusion

The National Post and other right-leaning media outlets in Canada attempted to exploit alleged divisions between Indigenous people over Idle No More as a way of discrediting the movement. But they failed to understand the complexity of Inuit responses to the realities of life in the Arctic. In addition, given the Canadian tendency to conflate Inuit with First Nations, who are much more numerous and visible, Inuit have to assert themselves through emphasizing differences in culture, priorities, and goals. Thus Inuit ambiguity toward Idle No More can be explained not in terms of political agendas but in terms of cultural differences, preferred strategies and priorities, given the urgencies in the Arctic.

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<sup>186</sup> *Ibidem*, p. 393.

<sup>187</sup> *Ibidem*, p. 394.

<sup>188</sup> M. Hanrahan, A. Sarkar, and A. Hudson, "Exploring Water Insecurity in a Northern Indigenous Community in Canada: The "Never-Ending Job" of the Southern Inuit of Black Tickle, Labrador," *Arctic Anthropology* 51, no. 2 (2014): 9-22.

<sup>189</sup> A. Sarkar, M. Hanrahan, A. Hudson, "Water insecurity in Canadian Indigenous communities: some inconvenient truths," *Rural and remote health* 15, no. 3354 (2015); J. D. Ford, and L. Berrang-Ford, "Food security in Igloolik, Nunavut: an exploratory study," *Polar Record* 45, no. 03 (2009): 225-236.

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**Part V.**

**Topics for the Future: Teaching Philosophy of Law  
in the Arctic; Global Governance through  
Intercultural Justice**

## Notes on Using Film to Engage with Philosophy of Law in the Arctic

*Rebecca Johnson\**

### Abstract

In this note, I comment on my experience of using film as a tool for engaging with philosophy of law in the Arctic.

### 1. Introduction

For several years, I have been teaching a legal theory course called “Northern Jurisprudence: Inuit Law and Film”.<sup>191</sup> In this note, I comment on my experience of using film as a tool for engaging with philosophy of law in the Arctic. I begin with the impetus for the course, point to the theoretical structure that informs the course, and then detail the course content. Film is the primary text, but it is supplemented by traditional Inuit stories, Inuit art, case law, the words of Inuit elders, and writings by Inuit and Qallunaat academics and activists.

### 2. The Impetus and the Challenge

I teach at University of Victoria Faculty of Law, situated at the tip of Vancouver Island, at Canada’s most southern border. It is a place where significant legal and political energy has been invested in ongoing efforts to de-colonize Canadian structures of law. An oft-articulated observation in decolonization scholarship concerns the powerful role played by southern (and by this, I mean ‘Western’) concepts of law and philosophy in the work of Empire over the past several hundred years. It has been all too common for southern theorists

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<sup>191</sup> For an extended discussion of this course, see R. Johnson, "Reimagining 'The Truth North Strong and Free': Reflections on Going to the Movies with James Boyd White," [in] J. Etxabe and G. Watt (eds.), *Living in a Law Transformed: Encounters with the Works of James Boyd White*, Maize Books, 2014, at 173.

and politicians to read the northern ways of life against the background of southern presumptions about state-centred legality, hierarchy, civilization and progress. Here, one risks reading the north and its people as bereft of both philosophy and law.

This is, of course, a familiar refrain. One need always to be working reflexively on the limits of one's own philosophical imagination, particularly in the context of linguistic and cultural difference. But theorists from the south do face a particularly challenging horizon. How does one engage respectfully and deeply with the Arctic societies and peoples who have inhabited the land ('the people'), given the extreme difficulties posed by the very geography and physicality of the Arctic itself ('the land')? Attempts to move beyond one's own assumptions about philosophy of law in the Arctic are complicated given the difficulty and expense of visiting the far north, let alone managing to learn through immersion in the lifeways of Inuit/Arctic landscapes and communities.

### **3. Theoretical Structure Informing the Work**

It is for the above reasons that "story" offers such potential to philosophers. Indigenous theorists and cultural theorists have certainly emphasized the importance of stories as tools for thinking, as opportunities to inhabit other philosophies, as ways to imagine what it is to live in other worlds.<sup>192</sup> Stories can facilitate forms of engagement with both land and people, particularly when travel and face-to-face contact is not an easy possibility.

Stories offer a space of mediated experience. As Edward Saïd argues in *Culture and Imperialism*,<sup>193</sup> stories are powerful sites for critical analysis, for doing the work of making visible hidden structures of thought. He argues that it is in the world of fiction that we can access the 'structures of feeling' that most strongly hold a people to a set of deep philosophical commitments, even when one might say those commitments are, in fact, toxic.<sup>194</sup> Saïd focuses on the 19<sup>th</sup> century British novel, as a way of making visible the philosophies of empire that lay deep at the heart of many western societies. This theoretical approach informs the use of film in the Northern Jurisprudence course.

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<sup>192</sup> See V. Napoleon and H. Friedland. "An Inside Job: Engaging with Indigenous Legal Traditions through Stories," *McGill Law Journal* 2016, vol. 61, forthcoming.

<sup>193</sup> E.W. Saïd, *Culture and Imperialism*, Vintage Books, 1994.

<sup>194</sup> Saïd, *supra* p. 14.

#### 4. The Course

The course explores Inuit philosophy of law, including philosophies concerning relationships, land, animals, consumption and cosmology. I rely primarily on films made in the north, by northern directors. I draw on stories of the past and stories of the present, conscious of Saïd's argument that stories about the past are particular kinds of arguments about the present. We begin with Robert Flaherty's *Nanook of the North* to frame southern visions of the north. We then turn to the Igloolik Isuma trilogy (*Atanarjuat*, *The Journals of Knud Rasmussen* and *Before Tomorrow*), where each film can be understood as a present argument about the past. Those films can sit alongside documentaries situated expressly in the present, and dealing explicitly with law, and the impacts of colonization on Inuit communities (*Kikkik – E1-472*, *The Experimental Eskimo*, *Tunniit: Retracing the Lines of Inuit Tattoos*, *Martha of the North*, *Arctic Defenders*, and *Qallunaat!: Why White People Are Funny*). Case law and commentary is also drawn into the frame of reference.<sup>195</sup>

There is a rich contemporary literature on 'cinematic' elements in film (sound, sight, editing), and the ways that they can help one access the "structures of feeling" that are closely linked to the affective power of philosophies of law.<sup>196</sup> I do not argue that these techniques capture philosophical truths in any straightforward or unmediated way. Rather, the argument is that films are rich texts offering a helpfully complicated terrain for philosophical work; these texts enable a more robust simultaneous engagement with ways of knowing that are resident in narrative structures, audio tracks and visual fields.<sup>197</sup>

The goal has been less to identify what law or philosophy *is* in the North, than to find a scaffold to ask different questions about law and philosophy. The aim is to hold open a larger space of uncertainty, in order to loosen the power of un-interrogated southern presumptions about how notions of legality, cosmology and philosophy are woven together. All cultures have interpretive bounds: some interpretations, while creative, fall further from the centre. It is important to attend to a range of interpretations made by authoritative

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<sup>195</sup> See <https://rebeccaj63.wordpress.com/inuit-law-and-film/> for a copy of the syllabus and schedule of readings.

<sup>196</sup> For a concrete exploration of methodologies for theorists who want to work with film, see R. Johnson, "Television, Pleasure and the Empire of Force: Interrogating Law and Affect in *Deadwood*," [in] P. Robson and J. Silbey (eds.), *Law and Justice on the Small Screen*, Hart, 2012, at 33.

<sup>197</sup> For a concise exploration of three different approaches to law-and-film, an approach that is helpful in laying out different philosophical approaches, see Kamir, Orit. "Why "Law-and-Film" and What Does It Actually Mean?: A Perspective." *Continuum: Journal of Media and Cultural Studies* 19, no. 2 (2005): 255-78.

knowledge holders throughout a culture. In using film to do philosophy of law in the Arctic, it is thus important to triangulate, to use multiple sources.<sup>198</sup>

One important source is the voice of Inuit elders.<sup>199</sup> Elders provide important commentary on philosophies informing understandings of traditional law, child raising, health and cosmology. Often, philosophy is most visible when approaching it by indirection. In the interviews, one can feel the current of philosophical commitments in discussions about dogs, hunting, material culture, songs, games, family patterns, and naming. I note that many current debates about traditional knowledge involve attempts by elders to transmit important knowledge to youth.<sup>200</sup> These interviews make explicit a number of philosophical presumptions about the nature of knowledge and experience, amongst them, that there are important insights in Inuit ways of knowing and thinking, and that this knowledge can be learned. Significant acts of translation may be required for this learning to happen, but contemporary scholarship by southern and northern academics and activists helps to ground the acts of translation that are enabled by a story/film based approach to philosophy of law.<sup>201</sup>

Given the frequency with which elders teach using story, traditional Inuit stories are also incorporated into the course.<sup>202</sup> In some cases, the stories are drawn explicitly into particular films, and thus the stories require exploration on their own terms. In other contexts, being familiar with a richer bank of stories opens up new possibilities in the films.

I also turn to questions of art more generally. The world of art and image has always been a place that captures deep philosophical presumptions in a culture, and thus, it is helpful

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<sup>198</sup> For an example centring a legal case, and drawing in trial transcripts, popular writing, art, and film, see R. Johnson, "Justice and the Colonial Collision: Reflections on Stories of Intercultural Encounter in Law, Literature, Sculpture and Film." *No Foundations: An Interdisciplinary Journal of Law and Justice*, 2012, vol. 9 p. 68. <http://www.helsinki.fi/nofo/NoFo9JOHNSON.html>

<sup>199</sup> See, for example, the five volume series *Interviewing Inuit Elders*. We drew particularly from M. Aupilaarjuk, et al. *Interviewing Inuit Elders, Vol. 2: Perspectives on Traditional Law*, edited by J. Oosten et al, Nunavut Arctic College, 1999. See also J. Bennett and S. Rowley (eds.), *Uqalurait: An Oral History of Nunavut*, McGill-Queen's University Press, 2004.

<sup>200</sup> J. Oosten, and F.B. Laugrand, (eds.), *Surviving in Different Worlds: Transferring Inuit Traditions from Elders to Youth*, Nunavut Arctic College, 2012.

<sup>201</sup> I draw here on J.B. White, *Justice as Translation: An Essay in Cultural and Legal Criticism*, University of Chicago Press, 1990.

<sup>202</sup> See <http://www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/> for more information on the Indigenous Law Research Unit, and their methodologies for working with indigenous stories. See also H. Friedland and V. Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions," *Lakehead Law Journal*, 2015, vol. 1, at 16. For a working paper outlining the beginnings of such a project dealing with Western Inuit stories, see L. Groft and R. Johnson, "Journeying North: Reflections on Inuit Stories as Law." Commissioned by the Indigenous Bar Association - Accessing Justice and Reconciliation Project, University of Victoria - Indigenous Legal Research Unit, 2014. For more on this method, see also J. Borrows, *Drawing out Law: A Spirit's Guide*, University of Toronto Press, 2011.

to draw in work on Inuit sculpture and design principles. One can see the imprint of Inuit philosophy in the arts, be that print-making, sculpture, clothing, or singing. This is true of both the substance of the art works produced (the stories captured or invoked) and of the materials in which the art is rendered.<sup>203</sup>

## 5. Conclusion

In her MA thesis, Inuk scholar Jackie Price explores central intellectual and political philosophies, and arguments about the ways those philosophies link to contemporary adaptations.<sup>204</sup> As she notes, current adaptations, like past adaptations, are largely about ways of living well in the world. In making sense of current pressures, she looks to language, to film (using the *Nunavut: Our Land* video series), to reflections on conversations with parents about the past, and to kitchen table conversations. Drawing on all of these threads, she focuses on the challenges of ‘detangling’ Inuit and Western understandings of law, life, responsibility, connection, and more.

My argument lies in a similar track. Film can play a role in this detangling. It can enable one to experience a different feeling of time and space. It can enable a richer intercultural encounter,<sup>205</sup> helping viewers to make sense of relationships between people of the land and people with their own histories and pasts, their own cosmologies and philosophies of law. The film course operates through triangulation, using contemporary film making, case law, traditional stories, practices of art, interviews with elders, and work by Inuit and Qallunaat scholars as a way of enabling southern scholars to more respectfully and successfully be part of discussions about philosophy of law in the Arctic. This is of course only a beginning. Film cannot provide definitive answers to questions about philosophy of law in the Arctic. But it can provide a vehicle for imaginatively inhabiting stories in order to better understand the philosophies that inform those ways of living.

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<sup>203</sup> D. Eber, *Images of Justice: A Legal History of the Northwest Territories as Traced through the Yellowknife Courthouse Collection of Inuit Sculpture*, McGill-Queen's University Press, 1997.

<sup>204</sup> J. Price, "Tukisivallialiqtakka: The Things I Have Now Begun to Understand: Inuit Governance, Nunavut and the Kitchen Consultation Model." MA Thesis. University of Victoria, 2007. See particularly pp. 104ff.

<sup>205</sup> L. Marks, *The Skin of the Film: Intercultural Cinema, Embodiment and the Senses*, Duke University Press, 2000.

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## **Custom Rising: Indigenous Law and Legal Philosophy as Catalysts for Intercultural Justice and Good Global Governance**

*Brendan Tobin\**

### **Abstract**

After hundreds of years of marginalization Indigenous legal regimes are undergoing resurgence in many parts of the world. A growing recognition of Indigenous law as an important source of law and legal philosophy presents opportunities for Indigenous peoples to play a more proactive role in Arctic law making.

### **1. Introduction**

For almost two hundred years Indigenous peoples' legal regimes have been marginalized, distorted and displaced by positive (stipulated) law. The effect has been a 'massive juridicide' of legal practices and conceptions that do not fit within the modern positivist legal canon.<sup>206</sup> The dominance of positive law has undermined the traditional balance between what were traditionally seen as the three primary sources of law: natural law, customary law and positive law. The resultant lopsided global and national legal orders have proven incapable of preventing and have indeed exacerbated the extreme economic, environmental and social challenges, threatening the earth today.

According to the United Nations Permanent Forum on Indigenous Issues there are around 5,000 distinct Indigenous peoples in more than 70 countries each of which may have distinct legal regimes.<sup>207</sup> These thousands of customary legal regimes make up the vast majority of global juridiversity. This diversity may prove a vital resource in the search for inspiration in the development of legal measures to help rebuild the necessary links between humankind and the natural world upon which we depend. Similarly, the laws and legal philosophy of Indigenous peoples may help in recovering the sense of community and

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<sup>206</sup> de Sousa Santos, B. (2002). *Toward a New Legal Common Sense: Law Globalization and Emancipation*. 2nd edn., Butterworths, Lexis Nexis, London. 16.

<sup>207</sup> UNPFII (2007), E/C.19/2007/10, at 12.

responsibility necessary to secure regulation of the financial sector and prevent continuing destruction of the environment for personal and corporate gain. As with biological, cultural and linguistic diversity, the protection of global juridiversity seems crucial for our long-term well-being.

In the past thirty years or so advances in human rights, constitutional law and the advocacy by and on behalf of Indigenous peoples has led to a ‘resurgence’ of Indigenous law<sup>208</sup>, which is reshaping national and global legal orders. This is apparent in the increased recognition of Indigenous peoples’ legal regimes as a source of law and of their rights to regulate their internal affairs according to their own laws. It is also apparent in the growing influence of Indigenous law and legal philosophy on national law in particular constitutional law and its influence on judicial decision making. All of which is fuelling intercultural justice and equity.

## **2. Customary law, juridiversity and Indigenous legal philosophy**

Indigenous peoples’ legal regimes are rooted in relationships between people, community, land, resources, spirituality and culture. This notion of law as an integral part of the cultural and spiritual life and well being of the community is reflected in legal principles such as ‘reciprocity, duality and equilibrium’ found in Indigenous peoples legal regimes from Peru to China.<sup>209</sup> Amongst the most intriguing principles of Indigenous legal philosophy is the notion of law as harmony. Raymond Austin, a former justice on the Navajo Nation Supreme Court, describes the most important Navajo legal principle of *hozho* as

*a state (in the sense of condition) where everything, tangible and intangible, is in its proper place and functioning well with everything else, such that the condition produced can be described as peace, harmony and balance (for lack of better English terms).*<sup>210</sup>

Disharmony represents a divergence from the law and the role of law is to return the community to harmony. The importance of harmony between humankind and nature is an important feature of Sami and Inuit customary laws.<sup>211</sup> The notion of the law as a tool for

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<sup>208</sup> Borrows J. (2002). *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press).

<sup>209</sup> Swiderska K. (2006). *Banishing the biopirates: A New Approach to Protecting Traditional Knowledge*, IIED *Gatekeeper Series* 129, IIED, London.

<sup>210</sup> Tobin B. (2014). *Indigenous Peoples, Customary Law and Human Rights – Why Living Law Matters*, Routledge, Oxon, 160.

<sup>211</sup> Bunikowski D., Sami reindeer husbandry – legal-philosophical and cultural-anthropological dimensions (manuscript), 3; Loukacheva N. (2012). *Indigenous Inuit Law, “Western Law and Northern Issues*, *Arctic Review on Law and Politics*”, Vol. 3. 2/2012, 200-217, 209.

securing harmony rather than retribution stands in contrast to dominant legal regimes, giving greater primacy to collective rather than individualistic rights and a focus on restoration of community well-being.<sup>212</sup> This focus on restorative justice means Indigenous peoples and local communities' legal regimes tend to be structural and procedural, rather than substantive and rule-oriented, giving customary law a flexibility and dynamism which enables individual cases to be addressed on their merits.<sup>213</sup>

### **3. The growing stature of Indigenous law**

Indigenous peoples' rights to regulate their affairs in accordance with their own laws, customs and traditions, is grounded in common article 1 of the 1966 United Nations International Covenants on Civil and Political Rights and Economic Social and Cultural Rights, which recognizes the rights of all "peoples" to self-determination. The United Nations Declaration on the Rights of Indigenous Peoples adopted in 2007 recognises indigenous peoples as 'peoples' with rights of self-determination<sup>214</sup> entitled to autonomy over their internal affairs.<sup>215</sup> Although not legally binding, of itself, the Declaration is widely viewed as a true representation of the status Indigenous peoples' rights under international law, including unwritten customary international law. International Labour Organization, (ILO) Convention 169 on Indigenous and Tribal Peoples in Independent Countries, which has been ratified by 22 states including Norway,<sup>216</sup> is legally binding on those states. The Convention obliges states to secure Indigenous and Tribal peoples' participation in decision-making processes affecting them<sup>217</sup> and to give due regard to their customs or customary laws when applying national laws and regulations to them.<sup>218</sup> It specifically provides that Indigenous and Tribal peoples "shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights".<sup>219</sup>

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<sup>212</sup> Mayens cited in Reynolds, L. (2006). *Mayan Law Still Lacks Official Recognition*, Latin America Press, Lima.

<sup>213</sup> Zion J. W. (1988). 'Searching for Indian Common Law', in B.W. Morse and G. R. Woodman (eds.), *Indigenous Law and the State*. Foris Publications, Bilbao.

<sup>214</sup> UNDRIP, Article 3.

<sup>215</sup> UNDRIP, Article 4.

<sup>216</sup> Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain and Venezuela.

<sup>217</sup> ILO Convention 169, Article 6.

<sup>218</sup> ILO Convention 169, Article 8.1.

<sup>219</sup> ILO Convention 169, Article 8.2.

Customary law is directly or indirectly recognised in over 110 national constitutions,<sup>220</sup> primarily through the recognition of cultural rights. In Papua New Guinea, the Constitution of 1975 subordinates inherited British common law to customary law.<sup>221</sup> The Constitution of Botswana prohibits the legislature from proceeding on any Bill that would affect the organisation, powers or administration of customary law, customary courts or tribal organisation until it has been referred to the House of Chiefs<sup>222</sup>. In South Africa the constitutional court has held that Indigenous law must be seen as ‘an integral part of our law’ and as such ‘[i]ts validity must now be determined by reference not to common law, but to the Constitution.’<sup>223</sup> The same court has also embraced the traditional African legal concept of *ubuntu* (humanness) in many of its decisions. Both the Ecuadorian and Bolivian constitutions incorporate the indigenous Quechua legal concept of *sumac kawsay* (*buen vivir*) which embraces the broad notion of well-being and cohabitation with others and Nature. The Ecuadorian constitution gives specific recognition to the rights of *Pachamama* (Mother Earth), a concept enshrined in the Law of Mother Earth in Bolivia. This notion of rights of nature is also be found in the Whanganui River Settlement in New Zealand, which, at the behest of Māori, invests the river with legal identity.

The foregoing examples of innovative developments in law and jurisprudence serve as evidence of an emerging body of intercultural justice and equity. These examples of state law incorporating aspects of indigenous law are mirrored by Indigenous law making, which often looks to aspects of external law as the model for internal regulation. This blending process offers the possibility of drawing upon the best aspects of all legal regimes in order to develop the legal instruments and structures necessary for the challenges we now face. Where carefully constructed hybridized legal instruments may serve as functional interfaces between customary and positive law regimes. A growing example of such practices is the development by Indigenous peoples of a range of protocols to act as a guide to their rights and consent procedures.

#### **4. Biocultural Protocols**

Indigenous peoples already have their own internal protocols for dealing with management and use of their lands, resources and cultural heritage. While known to

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<sup>220</sup> Cuskelly K. (2012). *Customs and Constitutions: State recognition of customary law around the world* (Bangkok: IUCN), at 4.

<sup>221</sup> Constitution of Papua New Guinea, Sch. 2.2 (c).

<sup>222</sup> Constitution of Botswana 1966, Article 88 (2).

<sup>223</sup> *Alexkor & others v Richtersveld Community & others* [2003] 12 BCLR 1301 (CC) Para [51].

Indigenous peoples themselves these protocols are often invisible to outsiders. Over the past 10 -15 years Indigenous peoples, in many parts of the world, have begun to see biocultural protocols as a means to demarcate their land, resource and knowledge rights and as a means to provide would be users with guidance on seeking prior informed consent in accordance with customary law.<sup>224</sup>

The Nagoya Protocol calls upon states to support the development of community protocols.<sup>225</sup> At the international level support for such efforts could look beyond the purely local level to examine the potential of developing people wide, cross border, regional and even global protocols to act as interfaces between customary and positive law in the quest for securing Indigenous peoples' human rights. In this vein, the Inuit Circumpolar Conference (Canada office) has prepared a draft project proposal for the progressive development of an Inuit wide biocultural protocol.

An Inuit wide Protocol could help provide clear guidance to states and third parties of Inuit rights, interests and goals, with regards to the conservation and sustainable use of their lands, waters, biological and other resources and cultural heritage. Although not of itself immediately binding a Protocol of this nature may be seen as a soft law instrument based on Inuit law and legal philosophy. Similarly, a Sami wide Protocol could have a major influence on national and regional law making. Building on synergies in Sami and Inuit law and legal philosophy a process of collective Protocol building would serve as a means of self-empowerment of Arctic peoples.

By taking the initiative and defining the criteria for the recognition of their rights over their lands, traditional territories, biocultural resources and traditional knowledge, Indigenous peoples bring pressure on states to respect and recognise the role of customary law in securing their human rights. Exercise of their law making rights may also help to define the parameters of customary international law on the Arctic and Arctic peoples' rights, by forcing a reaction from states to their initiatives.<sup>226</sup>

## **5. Conclusion**

National and international recognition of customary law is on the rise, as is the incorporation of Indigenous legal principles in constitutional law. This is important for the

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<sup>224</sup> IIED, Natural Justice.

<sup>225</sup> Article 12.

<sup>226</sup> Tobin B. (2015). 'Traditional Knowledge Sovereignty: The fundamental role of customary law in protection of traditional knowledge', in M. Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Edward Elgar, Cheltenham. 591

emergence and enforcement of intercultural justice and equity. Indigenous peoples' legal regimes are a rich source of law and legal philosophy, and their protection is vital for maintenance of global juridiversity. Development of Arctic protocols by Inuit and Sami would amount to a clear exercise of their rights to self-determination over their lands, resources and cultural heritage.

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Figure 1: The Map of Arctic Canada (Myron King, Environmental Policy Institute, Memorial University of Newfoundland - Grenfell Campus)