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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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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 (|980 – 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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[146] 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 (22.04.2016).]