

A framework for location-sensitive governance as a contribution to developing inclusivity and sustainable lifestyles with particular reference to the Arctic

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The paper outlines a provisional framework for location-sensitive governance to promote inclusive decision making and sustainable lifestyles. Generalized sensitivities to location in places people live and work are modelled as cultural ecologies to reveal how localized adaptations and customary ways of doing things can be reconciled with national and transnational legislative and organizational structures. Good practices in integrating 'custom' and 'statute' has been developed in nomadic communities in the Arctic and general principles from these communities have been incorporated into the framework.

The cross-disciplinary approaches to research and the methods used in applying the framework to practical situations are explained.

A framework for cultural ecology is a work in progress and its central tenets have been developed in earlier papers, e.g. Dillon (2015, 2017), Dillon and Kokko (2017). A provisional alignment of cultural ecology with customary law as a basis for legal pluralism is given in Bunikowski and Dillon (2017). We have drawn on all of these publications in presenting our case for location-sensitive governance in the current paper. The paper reflects the understanding we have developed through cross-disciplinary cooperation. Our intention is to outline the research and bring it to the attention of the wider academic audience of Arctic lawyers and social scientists. In this sense, the paper plays an informative role to cordially encourage scholars mostly, but not only, from the Nordic countries to contribute ideas and help extend and refine this new field of research. We have found that combining perspectives from different backgrounds and disciplines has enabled us to take an original, and we hope significant, look at the relationship between customary law and legal pluralism in the Arctic, and to

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frame it through cultural ecology as a radically different way of approaching inclusivity and sustainable lifestyles.

In recent decades, industrialized nations have seen unprecedented economic and social mobility. The old links between labor and the land have largely been severed. Families tend not to stay long enough in one place for intergenerational traditions to develop as once they did around special places and practices. Places that were once 'special' no longer have discernible continuity from generation to generation. These trends have prompted a movement known loosely as 'localization', which in turn is closely allied to the growing interest in 'sustainability', both of which are concerned with re-connecting people with the particularities of the places in which they live. Together, localization and sustainability have a focus on optimizing the fit between the lifestyles of people in a given environment and the sustainable utilization of resources in that environment. They are also a step towards location-sensitive governance, of how democratic processes might be meaningfully devolved so that people have a stake in the policies and laws which govern their lives.

'Location-sensitive governance' is the key idea in this paper. It is important because: (i) it promotes more inclusivity in the democratic process, enabling

people to have a 'voice' in decisions about what happens in their locality; and (ii) it enables sensitized application of policy to local matters, enabling a more nuanced response to, for example, the challenges of responding to changes in the environment resulting from the changing climate, or of accommodating immigrants into a society and helping them integrate. Location-sensitive governance recognizes that people engage with their surroundings both 'formally', within local, national and transnational legislative and organizational structures, and 'informally' through their day-to-day activities. The theoretical underpinning of location-sensitive governance comes from an integration of cultural ecology with customary law.

Cultural ecology is closely allied to anthropology and sociology but differs subtly from them in having a focus on the transactions between people and the material, social and psychological resources of the environments they inhabit. Every human situation is a cultural ecology: social groups, communities, institutional structures, land-use systems, are all cultural ecologies. Cultural ecologies can be modelled at scales ranging from the very local to the global. At the level of the individual, cultural ecology can be thought of in terms of ways of 'being in the world', the interplay between how people experience the world and how

they come to understand it. Collectively, cultural ecology takes in not just ways in which people engage with their physical surroundings through economic activities, it includes social relations and the collective capabilities of all the people who inhabit it, their lifestyles, beliefs, ideas and aspirations. Generalized cultural ecological relationships are based on fundamental ideas in phenomenology (Lloyd, 2004), broadly confirmed by research in neuroscience (Eagleman and Downar, 2016). They can be shown through a series of diagrams.

The general relationship is represented in figure 1. The three intersecting lines forming a star shape in the right-hand side of the diagram represent formal transactions between people and their environments. Enclosing the star within a circle signifies that the transactions take place within a given 'context'. Behaving within a context is a 'relational'¹ process, i.e. it is informed by previous experiences and accumulated knowledge. Relationally driven behavior enables distinctions to be made between one situation and another.

However, something else is happening as individuals interact with their environment. In addition to the relational context, unique, personal contexts are simultaneously created. These additional contexts are a property of the uniqueness of individual moments; they are literally constructed out of the ways in which individuals engage with the affordances of their environment as they exist at that time: the individual, the environment and the context all co-construct each other. This is called a 'co-constitutional'² process to distinguish it from the relational process. The three lines forming a triangle in the left-hand side of the symbol represent the co-constitutional process: individual, environment and context co-constructing each other. As soon as co-constitutional interactions occur they immediately interact with relational constructs, in other words people rationalize and conceptualize what they are doing. By definition, the co-constitutional exists only 'in the moment'; it is fleeting, but its influence can be profound. Creativity, improvisation, ingenuity, insight, etc. typically occur 'in the moment' or in the

¹ Relational, derived from: (i) 'relation' meaning belonging to or characterised by; and (ii) 'relative' meaning compared to.

² Co-constitutional, derived from 'constitute' meaning the whole made from its contributing parts where all of the parts are actively involved in the process. In its cultural ecological use, the word works well enough in English, but in some languages, it has no equivalent meaning. Care must be taken not to confuse the cultural ecological use of [co-]constitutional with the word 'constitutional' as it is commonly used in law, i.e. as a decree, ordinance, or regulation usually emanating from a higher authority. In cultural ecological terms, a regulation emanating from a higher authority would be 'relational'; a co-constitutional regulation would be one originating from the people as a whole.

‘flow’. The interrelationships between relational and co-constitutional contexts are shown by enclosing the symbols for each process in circles and then overlapping the circles. But the relationship is more than one of overlap. The relational and co-constitutional are continually re-structuring each other in ways that are themselves relational and co-constitutional. This reciprocal relationship between spontaneity and rationality is represented by two mutually referring arrows placed in the intersection of the two circles.

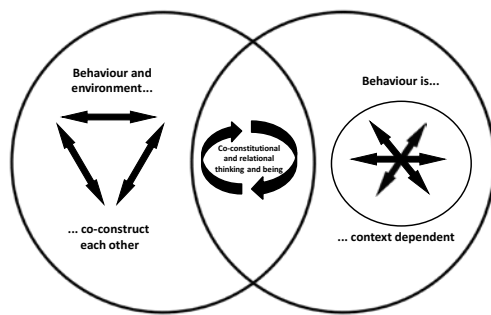


Figure 1. The cultural ecological dynamic

A key element in this framework is the differential interplay between the co-constitutional and relational ways of being in the world. This differential is particularly evident in the ways in which nomadic peoples engage with their environment, the decisions they have to make as they negotiate sometimes hostile environments and derive a living from them. Our contention is that through a better understanding of this ‘nomadic interplay’ we can develop

practical recommendations for location-sensitive governance.

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. As a way of life, it is continuously compromised by the economic dominance of settled lifestyles. Few people now are wholly nomadic, so the term is taken to include groups who move periodically on hunting expeditions, to manage their livestock (i.e. pastoralism, Ingold, 2008), or to exploit a seasonal resource. Despite its rapid decline globally, nomadism offers an important perspective on problems associated with human impact on the environment. However, most of this interest centers on the apparent benign relationships between nomadic people and the environments they inhabit. Cultural ecology does not romanticize nomadism, nor does it see it as representing something ‘different’ or ‘other’. Rather it conceptualizes 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 characterized by transactions between people and the primary resources (landscapes, plants, animals) of the environments concerned and the lifestyles and value systems associated with living off those resources. Urban

lifestyles with high energy demands, consumption of secondary (manufactured) resources and dependence on the provision of services, are at the other end of the continuum.

As a nomadic group travels through a landscape, some of the collective and cumulative decisions its members make as they go about their daily activities become strongly associated with certain places. Over time these places may accrue some collective significance or special meaning. Through such processes, everyday activities interweave with accumulated knowledge, stories are told, traditions develop. The stories and traditions are more than just narratives and routine practices; they embody collective understandings of place and create social cohesion (Ingold, 2000; Pentikäinen, 2006).

The customary ways of being in the world developed by nomadic peoples are the result of localized adaptations over many generations through a continuous interplay between in the moment behaviors and established ways of doing things. Although they are the basis of social order, they may or may not be consistent with statutory laws. Customary ways of being in the world are typically oral, spoken, and unwritten. They are part of cosmologies based on long-standing beliefs and understandings held by nomadic

peoples about their place in the world. Like the cultural ecological relations outlined earlier, they are based on the principle of reciprocity: a constellation of mutual relationships, obligations and duties among people in a given community (Mustonen and Syrjämäki, 2013).

The western, industrialized notion of the nation state emphasizes relational thinking and relational ways of being and thus privileges systematically defined organizational and legal structures that determine how we engage with our surroundings (see e.g. Ch3. in Humphrey and Sneath, 1999). These structures attempt to reduce uncertainty and 'fix' the cultural ecological dynamic in favor of the relational in the name of stability. Regulatory structures are developed externally to the cultural ecological system to which they will be applied. Legislative practices and laws are specified and take precedence over the co-constitutional day-to-day concerns of the people (which have reduced status in the overall framework, signified by the reduced size of the co-constitutional symbol in the left-hand circle in figure 2).

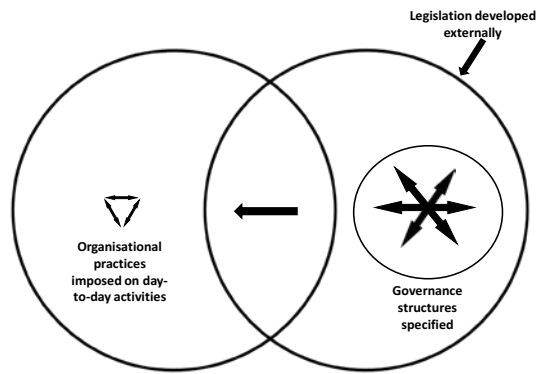


Figure 2. A cultural ecology dominated by relational forms of legislation, governance and law

This centralized, relational control dilutes the imperative of addressing the particularities of locality, of the ‘in the moment’ experiences of individuals. In some environments adaptability, dealing with situations as they arise, is as important as stability. For example, Dillon et al. (2012) have shown how local knowledge is important in developing resilience to the flooding which now occurs in the UK as a result of extreme weather. Individuals and groups, no matter how defined, represent different configurations of the relational and the co-constitutional, different configurations between people and the resources of their environment. There is a constantly adapting dynamic between co-constitutional and relational ways of being. To be truly adaptive, and by definition democratic, the cultural ecology needs to reflect a functional balance between the interests of the state, represented through statutory law and regulatory mechanisms, and the

localized necessities of people, represented through customary ways of being in the world (figure 3).

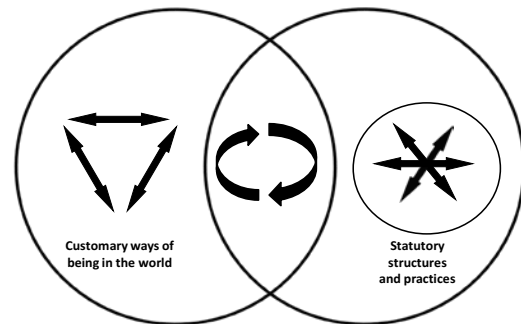


Figure 3. A localized cultural ecology

Here a localized cultural ecology is seen as the co-existence of statutory, legal (i.e. ‘relational’) contexts derived from the application of externally derived legislation, representing the ‘objective’ will of the people in the nation state, alongside the localized contexts generated through the co-constitutional processes of people living and working within the particularities of their environment. The dynamic between the two contexts is complex: day-to-day activities that give rise to practices that are functionally adaptive eventually become ‘established’, i.e. they become ‘customary’ ways of doing things and thus take on some ‘relational’ qualities, i.e. ‘we do it this way rather than that way’. And if state law is to ‘work’ it has to be applied in ways that are sensitive to local conditions, i.e. it has to be co-constituted with local beliefs and

practices. Such a configuration recognizes and acknowledges the bigger picture but at the same time seeks an accommodation that reflects a temporally dependent dynamic between site, location, place and space. This is adaptive rather than categorized culture ecology.

‘All law begins with custom. Anthropologists know this’, says Bederman (2010, 3). Bederman distinguishes ‘binding customs’ from ‘mere habits of a group, or subgroup, in a particular society’. The recognition of such ‘customary’ laws is a crucial element that stands against legal positivism. Indigenous people living in the northern part of the Americas, in Latin America and in the European North have developed their own systems of laws, rules, customs, traditions and beliefs over a period of centuries. Their laws cannot be separated from their religions, cosmologies etc. A customary rule comes from a tradition based on common longstanding beliefs and understanding of the world and of the universe. Llewellyn (1940, 1400) ³ recognized that the Cheyenne nation had developed a well-organized legal system in their community crucial to their survival. The system expressed

their beliefs and experience (their common sense) or traditional knowledge. Experience teaches that customary laws are inseparable from indigenous peoples, there is something intrinsic that produces such a law. Law always implies both respect for the matter in question and the possibility of enforcement or exclusion if it is not upheld. Unwritten legal rules are as legitimate as written ones. This is the basis of legal pluralism.

Legal pluralism has a past history in northern Europe (Ahren, 2004, 76-80; see also Svensson, 2002, 6-13; Svensson, 2005, 52-56; Bunikowski and Dillon, 2017, 45-51; Bunikowski, 2014, 77-85). Ahren observes that the cultural hierarchy theories that were routinely implemented by the Nordic countries in the past compromised the traditional Sámi way of life and their customary laws, because the nation state had no room for non-Germanic oddities such as Sámi traditions, customs and laws (Ahren, 2004, 83-92). ⁴ The Hobbesian and Lockean understanding of sovereignty and a Lockean attitude towards Native Americans might have had some influence on ‘Fennoscandinavian politicians, legal scholars, or anthropologists’ (Ahren, 2004, 81-82).

³ He uses the concept of ‘general ruling on the community’.

⁴ There is an analysis of the implementation of such theories on cultural hierarchy in relation to legislation and to the practice of law from the beginning of the 19th century to the 20th century in Fennoscandia (or Fennoscandinavia).

By building on and integrating perspectives from cultural ecology and customary law, we make a revised and stronger case for legal pluralism as the basis for location-sensitive governance. Our specific concern is with the sparsely populated landscapes within the Arctic Circle. There are two reasons for this: (i) here the impacts of climatic and associated environmental changes on resources and lifestyles are profound, and (ii) there exists, in the way Sámi customary law interacts with statutory law, an established foundation on which to build new models of legal pluralism and location-sensitive governance. However, it should be emphasized that the potential application of our framework is not confined to the Arctic Circle and indigenous peoples; we anticipate that it will have utility in any situation where it is necessary to reconcile the lifestyles of people locally with the economic demands of the wider population.

The Sámi in Finland do not own their traditionally occupied and inhabited territories in terms of public law, the land does not belong to the Sámi as a nation. The Sámi enjoy cultural autonomy "to maintain and develop their own language and culture" (chapter 1, section 17 of Finland's Constitution of 1999), that in practice is limited to protection of linguistic rights at schools and in public administration (compare: chapter 11, section 121). The

Sámi do not manage fishing waters, hunting grounds, public forests, and reindeer pastures in their indigenous areas. In terms of developing our framework, we are interested in historical precedents and ongoing negotiations about land rights and sacred sites because out of these we will extract general principles. Nowadays, the problem is not only how to recognize Sámi customary laws concerning natural sacred sites but much more how to protect natural sacred sites understood as both spiritual and physical entities in terms of the state or official law.

In Canada's British Columbia, the Nisga'a, who are one of the First Nations, enjoy a democratic and accountable self-government (see: chapters 2, 3 and 11 of The Nisga'a Final Agreement). Their agreement with the Canadian government is one of the latest on self-government and land claims, which is why it is so advanced. Nisga'a have their own government, jurisdiction, constitution, laws, citizens, corporations, self-government in their villages, other authorities like police, and natural resources management (Bunikowski and Dillon, 2017, 52). Some examples from the Nisga'a Treaty: "Nisga'a citizens have the right to practice the Nisga'a culture and to use the Nisga'a language, in a manner consistent with this Agreement"; "the Nisga'a Nation owns Nisga'a Lands in fee simple, being the largest estate known in law. This estate

is not subject to any condition, proviso, restriction, exception, or reservation set out in the Land Act or any comparable limitation under any federal or provincial law. No estate or interest in Nisga'a Lands can be expropriated except as permitted by, and in accordance with, this Agreement"; "the Nisga'a Government will develop processes to manage heritage sites on Nisga'a Lands in order to preserve the heritage values associated with those sites from proposed land and resource activities that may affect those sites".

The Sámi and Nisga'a cases, outlined above, illustrate how the theory of cultural ecology (by Dillon) has been recently applied in considerations of "the right of indigenous peoples to their own law" (Bunikowski, 2017, 57-58). The argument from cultural ecology and, in particular, 'co-constitutional'/'relational' forms of meanings was used in "supporting the own law of indigenous peoples". In Bunikowski's words, "(...) customary laws are a good example of the *first way* of thinking or of rules, in other word rules that are compatible with adaptations to the environment, while all state rules and laws are always relational and thus imposed without any consideration of the processes of adaptation. The rules developed in the North in circumstances related to, for example, 'why is this a good place for summer grazing my herd', 'what traditions inform how people should

behave in this place', 'what are my responsibilities during the time I occupy this place', are good 'co-constitutional' exemplifications" (Bunikowski, 2017, 58).

The distinction between 'co-constitutional' and 'relational' forms of meanings or modes of thinking in how people interact with their environments outlined earlier in this paper are highly relevant to reconciling customary and statutory laws in ways which have led to the Nisga'a Agreement. The co-constitutional mode results from highly localized adaptations, of interactions between specific behaviors and specific environmental conditions. It is the same with customary laws. The relational mode is about relations between behaviors and organizational structures. Organizational structures contain generalized rules that are external to the environments in which people are living; they have to work constructively with customary laws if location-sensitive governance is to be achieved. We are looking for new configurations of behavior and environment. The so called 'Fourth World' of the Arctic Circle is a circum-global, pan-Arctic region which includes the northern parts of some Nordic countries. Nordic countries have access to Fourth World ways of engaging with the environment which transcend notions of inter- and multiculturalism and the ideological tensions associated with them.' (Dillon

et al. 2013, 97). Both ways of thinking (categories, rules, and the worldviews) – the co-constitutional and the relational – are comprehensive and complementary. We need both in contemporary societies, but we must understand the differences between them and find frameworks for bringing them together. What follows, is an outline of a provisional research framework to address these matters.

Customary laws are ‘situated’ in the cultural ecology and thus situational analysis is the methodological framework typically used to investigate the significant people-environment transactions. Situational analysis covers the three fundamental elements of a ‘given situation’ proposed by Robson and McCartan (2015): (i) the important aspects of the situation to those involved; (ii) the meaning these aspects have for those involved, and (iii) the effects they have on those involved and on others. Situational analysis based on these elements identifies significant environmental (cultural, social, economic etc. as well as physical) characteristics and their relationships with the actors involved.

Situational analysis requires a mixed-method approach, recognizing on the one hand that people experience, understand and conceptualize the world around them in qualitatively different ways, and on the other hand there are bodies of collectively agreed,

disciplined, knowledge and organizational structures. In the first, the meaning arising from a situation is contingent on that situation (i.e. the two are co-constitutional) and it is thus essentially phenomenological. In the second, meaning arising from a situation may be related to disciplined knowledge and organizational structures through processes of literature review, documentary analysis, critical review and corroboration.

The cultural ecological approach seeks to avoid the dualities that frequently exist between these two representations of experience and knowledge. It does this by recognizing that enacted experience and disciplined knowledge are constantly reforming each other in ways which are themselves relational and co-constitutional. Scientific understanding of the world is derived through cumulative organization and rearrangement of experientially acquired understandings of the world (Marton, 1993). This is compatible with Husserl’s (1954) ‘phenomenological tradition’ and its more recent representations in, for example, the work of Varela, Thompson and Rosch (1991) and Thompson (2007) who argue that life and mind, experience and cognition, share a core set of formal, self-organizing properties.

Structures of experience and the enacting of customary laws may be

revealed through the application of participant ethnographic methods to investigating the ways in which individuals make meaning and construct knowledge, i.e. how they enact experience and how they conceptualize the world around them; how their tacit aspects of the world are systematized, made explicit. Ethnographic methods include narrative approaches (Gubrium and Holstein, 2008), biography (Goodson and Sikes, 2001) and empathy-based approaches (Eskola, 1998) where individuals express their understandings through stories and life histories. Also, how place-based traditions are developed and maintained, for example: the use of metaphor in the creation of meanings (Oberfalzerová, 2006); the physicality and sensitivity of engagement (Laplantine, 2015); periodicity and the role of seasonal rhythms (Groom, 2013).

National and transnational frameworks can be established through analysis of relevant statutory law and case law standards for the protection of cultural heritage and minority rights, nation state legal acts and statutory local laws like land-use planning acts and administrative decisions or policies as they are applied to specific communities, and experiences with legal standards, governmental policies and public participation in natural resources management from case studies of

jurisdictions, for example in Canada's British Columbia or Newfoundland.

Ethnographic investigations are mapped against the analysis of legal documentation to provide a basis for preparing strategies, pedagogies, processes and tools to support location-sensitive governance. These resources are generated out of the interaction between localized, lived experience and customary law, and the formal structures of disciplined knowledge and statutory law. The emphasis is on resources that afford localization and sustainable living. Here we are primarily concerned with relationships between local (co-constitutional) knowledge and ways of doing things, and the structures of (relational) statutory law and the behaviors implied in these structures (Aikenhead and Jegede, 1999). The strategies, pedagogies, processes and tools can be consolidated into practical guidelines for the application of location-sensitive governance, i.e. 'a legal-pluralistic model'.

The integration of cultural ecology with customary law is a new and bold attempt at a framework to facilitate a redistribution of responsibilities in decision making processes, giving a voice to local people without destabilizing democratically agreed governance structures.

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