

# Philosophy of Law in the Arctic

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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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## 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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