



Indigenous Inuit Law, “Western” Law and Northern Issues

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Abstract: The magnitude of rapid changes occurring in the Arctic have generated a further inquiry on the role of law and existing legal systems in meeting the many challenges that Northerners, Arctic indigenous peoples and their communities are facing today. On the one hand, we deal with the pluralism of legal orders across the Circumpolar Region which can be valuable to finding innovative solutions for existing issues, and it can be of learning significance to different Arctic jurisdictions. On the other hand, the dominating influence of national legal systems and legal procedures on the regulation of internal and local affairs of the Arctic sub-national entities and their communities raises the question of the role of indigenous legal traditions and practices in various Northern issues and developments. By looking mainly at the example of the Inuit of Canada’s Eastern and Central Arctic (Nunavut), to understand the Inuit law-ways, at the outset, this essay examines some general features of the traditional Inuit legal order. Further, by exploring some principles and aspects that define linkages and interactions between indigenous legal practices and “Western” law in the Arctic, it raises questions that are essential to our better understanding of the value of indigenous law in contemporary issues and developments in the North.

Keywords: Indigenous law, Inuit law, legal pluralism, the Arctic





1. Introduction

Over the years many prominent representatives of the indigenous and academic community, anthropologists, sociologists, ethnographers and jurists have looked at the core differences and similarities that define the essence of indigenous law and "Western"¹ law in various geographic settings and periods of time. Their findings have led to different conclusions and further development and evolution of several disciplines in the social sciences. Thus, the foundations of legal ethnography, legal ethnology, and legal anthropology gradually formed the basis of the sociology of law/law and society studies; criminology/alternative dispute resolution or informal justice studies; legal pluralism and comparative legal systems' studies;² and indigenous law as such, with a broad system of approaches to its interpretation and understanding by various authorities.³ The development of indigenous law in the Arctic has in many ways been similar to and followed what has been established in other geographic areas but, at the same time, it has its unique features and innovations. By looking mainly at the example of the Inuit

1. By "Western" law I mean Euro-centric or State law; basically it is the dominant/national legal system of the country in question. Views and suggestions expressed in this paper are based on author's own perceptions and analysis as an outsider and do not necessarily reflect the positions of any particular government or indigenous group.
2. There is extensive literature on this subject. For the most recent review see: Jonnette Watson Hamilton and Nigel Bankes, "Living together on the land: A review of the literature on the property relations of settler and indigenous societies," 2012, sections on transitional justice and legal pluralism. On legal pluralism across borders see: Peer Zumbansen, "Transnational Legal Pluralism," *Transnational Legal Theory*, Vol. 1(2), 2010:141–189.
3. See, for example, John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, Toronto: University of Toronto Press, 2002; John Borrows, *Canada's Indigenous Constitution*, University of Toronto Press, 2010; Mattias Åhrén, "Indigenous Peoples' Culture, Customs and Traditions and Customary Law – The Saami People's Perspective," *Arizona Journal of International and Comparative Law*, Vol. 21(1) 2004: 63–112; Elina Helander, "The Nature of Saami Customary Law," in Timo Koivurova, Tanja Joona and Reija Shnorro. (eds.), *Arctic Governance*, Rovaniemi: Juridica Lapponica 29, 2004: 88–96; John Bennett and Susan Rowley (eds.), *Uqaluraiit: An Oral History of Nunavut*, Montreal-Kingston: McGill-Queen's University Press, 2004; Mattias Åhrén, "The Saami Convention," point 4.2.4 "Further on the right to self-determination; particularly on the Saami people's customary legal thinking and norms," in *GÁLDU ČÁLA – Journal of Indigenous Peoples*, Vol. 3, 2007: 8–39, at 18–19; James Anaya, "Indigenous Law and Its Contribution to Global Pluralism," *Indigenous Law Journal*, Vol. 6 (1), 2007: 3–12; Øyvind Ravna, "Sami Legal Culture – and its Place in Norwegian Law," in Jørn Øyrehaugen Sunde and Knut Einar Skodvin (eds.), *Rendezvous of European Legal Cultures*, Bergen: Fagbokforlaget, 2010: 149–165. On customary law in general see, for example, Jeremy Webber, "The Grammar of Customary Law," *McGill Law Journal*, Vol. 54, 2009:579–626; Jens Dahl & Geneviève Rose (eds.), *Development and Customary Law*, Indigenous Affairs, Vols.1–2, 2010.





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of Canada's Eastern and Central Arctic (the territory of Nunavut since 1999), at the outset, this essay examines some general features of the traditional Inuit legal order. Further, by exploring some principles and aspects that determine linkages and interactions between indigenous legal ways and "Western" law in the Arctic, it raises questions that are important to our better understanding of the role and value of indigenous law in contemporary Northern issues and developments. It argues that law in general, and indigenous law in particular, have a valuable role to play in addressing the many challenges in the North, but they are not a panacea, as those issues can be tackled in cooperation and coordination with other areas that concern Northerners, their livelihoods, environmental and economic matters, well-being, social order and relations.

2. Some Features of Traditional Inuit Legal Order

To understand the role of indigenous law and its interaction with the dominant/national legal systems today, it is essential to identify the main features of traditional indigenous beliefs. There is a great deal of "Euro-centric" Euro-American anthropological and legal pluralistic literature which deals with questions of existence, formation, explanations, and transferability of various indigenous cultures and indigenous legal beliefs. There are also studies that have been done by indigenous peoples explaining the essence of their own legal structures, order and values. Analysis of this literature on the Inuit of Canada's Central Eastern Arctic shows that there is a clash in "Western" and indigenous perceptions of law;⁴ it also shows that it is quite difficult to evaluate the legal nature of traditional Inuit society from the point of view of "Western" values and legal order.

Traditionally, the Inuit have developed a sophisticated and holistic system of legal mechanisms that performed the same function as law in "Western" cultures. According to Susan Inuaraq, they had their own legal system as most societies and "[...] a very unique system of justice."⁵ Although because of various impediments (e.g. differences among the Inuit groups; a nomadic way of life and the lack of state-like legal structures/authority, striking divergences between the Inuit and "Western" legal beliefs, etc.) it is challenging to conceptualize traditional Inuit law-ways from the Euro-American perception of law, I have tried to identify in

4. For a detailed analysis of this literature see: Ch. 4 in Natalia Loukacheva, *The Arctic Promise: Legal and Political Autonomy of Greenland and Nunavut*, Toronto-Buffalo-London: University of Toronto Press, 2007.
5. Susan Inuaraq, "Traditional Justice among the Inuit," in Anne-Victoire Charrin, Jean-Michel Lacroix, and Michèle Therrien (eds.), *Peuples des Grands Nords Traditions et Transitions*, Paris: Sorbonne Press, 1995: 255–261 at 261.





the following paragraphs some aspects of the Inuit traditional justice and legal concepts by looking at sources on Inuit social order.

Inuit legal culture did not exist in written form. According to an Inuit authority Robert Petersen, relationships were regulated by unwritten rules and demand for self-control;⁶ "laws" were mainly elaborated by oral traditions (i.e., legends, myths, stories) planted and transferred in people's minds by shamans, elders and leaders and transmitted from one generation to another; the Inuit also knew how to act on what is "right" or "wrong" from what their parents told them.⁷ As the elder Mariano Aupilaarjuk states, "The *maligait* [laws] of the Inuit are not on paper. They are inside people's head and will not disappear or to be torn to pieces [...] It is part of a person. It is what makes a person strong."⁸

Inuit laws were not codified.⁹

Inuit spiritual rituals and religious beliefs composed the foundation of their societal moral code. One such belief is animism and it underlines the Inuit legal thinking. Accordingly, the natural world is sacred; the Inuit "view people and animals as equal creatures and ascribe human characteristics to animals. They believe that both humans and animals have a soul (*inua*), character, and the capacity to think (*isuma*). Consequently, 'every object, every rock, every animal indeed even conceptions such as sleep and food are living'."¹⁰

The paucity of legal regulations in the traditional society of the Inuit was compensated for and partially caused by religious norms that directed and controlled socio-economic life of the Inuit. Importantly, taboos played the function of regulatory mechanisms and confronted daily life of the Inuit, but legal action was rare

6. Robert Petersen, "Administration of Justice in the Traditional Greenlandic Community," in Gudmundur Alfredsson and Peter Macalister-Smith (eds.), *The Living Law of Nations: Essays on Refugees, Minorities, Indigenous Peoples and the Human Rights of Other Vulnerable Groups in Memory of Alte Grahl-Madsen*, Strasbourg and Arlington, VA: N.P. Engel, 1996: 279–286 at 279.
7. 1987 fieldnotes, Allan L. Patenaude. *Whose Law? Whose Justice? Two Conflicting Systems of Law and Justice in Canada's Northwest Territories*. BA(Honours) essay. Vancouver, B.C.: Simon Fraser University, 1989: 29. See also: Neil Christopher, Noel McDermott and Louise Flaherty (eds.), *Nikkaaquuat: An Introduction to Inuit Myths and Legends*, Toronto: Inhabit Media Inc., 2011.
8. Cited in Jarich Oosten, Frédéric Laugrand and Wim Rasing (eds.), *Interviewing Inuit Elders: Perspectives on Traditional Law*, Vol.2. Iqaluit: Nunavut Arctic College, 1999: 14.
9. See: Kaj Birket-Smith, *The Caribou Eskimos: Material and Social Life and Their Cultural Position*. Report of the Fifth Thule Expedition 1921–24, Vol.5. Copenhagen: Nordisk Forlag, 1929: 260–261.
10. Quoted from Loukacheva *supra* note 4, at 81.





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although “the consequences of sinful behaviour may be believed to result in famine and starvation for the entire community.”¹¹

In the traditional Inuit society the rights and duties that appeared had a collective- communal rather than an individualistic nature. Thus, public-communal opinion had important value in enforcing law-ways and no one was permitted to break the law without colliding with public opinion.¹²

Custom served as a source of law; it arose from the repetition of precedents and the “opinion communis.” Customary rule protected the person from the aggressive forces of the environment against the entire group. According to Norbert Rouland, custom was not a “biological” or instinctive behaviour “but was a result of empirical thinking initiated by the fear of anything the individual considered beyond him.”¹³

The definition of right and wrong was based on traditional codes of behavior – certain rules on subsistence, hunting practices and social conduct; certain actions that are socially not approved in the “Western” legal culture, were considered as legally acceptable in the traditional Inuit society and were not deemed as criminal actions (e.g., perceptions of suicide, senilicide, invalidicide and infanticide).¹⁴

Inuit law-ways were oriented towards the restoration of peace and communal reconciliation rather than the exercise of justice through punishment. Thus, traditional Inuit sanctions sought to aid the offender instead of imposing a punishment; the determination of guilt and sentence were measured on the grounds of the offender’s situation and not on the basis of the offence itself; the system of social control and customs was marked by flexibility in its reaction to conflict.

Traditional Inuit society lacked forensic or law-enforcement institutions (e.g., penitentiary, police or courts); generally until the first part of the last century the “administration” of justice was performed by shamen with a quasi-legal power, headmen and community.¹⁵ Interestingly, however, according to several au-

11. E. Adamson, Hoebel, “Law-ways of the Primitive Eskimos,” *Journal of the American Institute of Criminal Law and Criminology*, Vol. 31, 1940–41: 663–883 at 669.

12. See Birket-Smith, *supra* note 9 at 261.

13. Norbert Rouland, “Legal Sanctions among Some Inuit Populations: Theoretical Problems and Ways of Intervening for the Community in the Process of Settling Disputes,” (1976) reprint in *Études/Inuit/Studies*, Vol. 3, 1979 at 14.

14. The Inuit interpretation of murder was also different. See R. Jane’s murder case in Pond Inlet (1920) in John Stephen Matthiasson, “Eskimo Legal Acculturation: The Adjustment of Baffin Island Eskimos to Canadian Law,” Ph.D. dissertation, Ithaca, NY: Cornell University, 1967 at 50–51. For rules on marital relations see: Rolf Kjellström, *Eskimo Marriage: An Account of traditional Eskimo Courtship and Marriage*, transl. by Donald Burton Lund: Berlingska Boktryckeriet, 1973.

15. About the role of shamanism historically, its continuity and Elders’ views on it today see, for example, Jarich Oosten, Frédéric Laugrand, Cornelius Remie, “Perceptions of Decline: Inuit Shamanism in the Canadian Arctic,” *Ethnohistory* Vol. 53(3), summer 2006: 445–477.





thorities, the formal Inuit justice structure in the form of a council that met and exercised justice did exist; thus the last traditional Inuit trial took place on the Southwest Baffin Island in Canada in 1924.¹⁶

The Inuit exercise of norms of social control and beliefs fluctuated according to the situation; they had pre-determined different reactions at different times to the same infraction and represented situational pluralism; legal actions could also differ depending on the season of the year.¹⁷ The Inuit application of legal ways was defined by particularities of Arctic conditions (e.g., coldness) and this implied a special spiritual connection with the land and wildlife.

There was a differentiation of Inuit norms of social control in accordance with the nature of wrong-doing and individuals involved. Thus, for each social level there existed a corresponding legal system.

Furthermore, normative visual culture has developed in the traditional Inuit society; consequently, emotionality and musical/visual views of conflicts and norms of morality underpinned the traditional Inuit legal system; thus, postulates with juridical functions were entrenched in song-duels, dancing, music and mythological narratives.

The Inuit forms and methods of conflict resolution were rooted in their own values and understanding of right and wrong-doing; accordingly, these norms are not always considered as punishable under "Western" law and vice-versa.

The system of the Inuit responses to conflicts in the traditional society substantially differed from what is known in "Western" law. For example, Patenaude has described informal methods of dispute resolution such as: mockery, gossip, ignoring, derision and threat of magical retribution in some cases (i.e., poor or lazy hunting or failing to share food); formal methods as: drum/song duels, banishment, physical contests, or execution that were applied in some cases (i.e., witchcraft or insanity); and an individual duty – an action that is required in line with a custom – e.g., in cases of senilicide or assisting suicide, etc.¹⁸ Furthermore, traditional conflict management was strongly based on personal restraint and internal controls, psychotherapeutic and cathartic value of song-duels with an audience acting like a judge, emotional relief and spiritual beliefs and rituals.¹⁹

16. Norman Hallendy, with Osuitok Ipeelee, Annie Manning, Pauta Saila, and Pitaloosie Saila, "The Last Known Traditional Inuit Trial on Southwest Baffin Island in the Canadian Arctic," August 1991. Background Paper No.2 for Places of Power and Objects of Veneration in the Canadian Arctic. Paper presented at the World Archaeological Congress III, Ottawa, 1994 at 2.

17. Nelson H. Graburn, "Eskimo Law in Light of Self- and Group Interest," *Law and Society Review*, Vol. 4(1), 1969: 45–60 at 58.

18. See table: Typology of Inuit Conflicts: Situations and Resolutions, Patenaude *supra* note 7 at 41.

19. For examples see: Loukacheva *supra* note 4 at 84–85.





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The above-mentioned features of traditional Inuit legal order are not exhaustive. They point to striking differences with contemporary “Western” legal systems and practices. How then do these two different legal cultures co-exist and interact today? To understand some of those interactions, I further look at contemporary aspects of indigenous law in Canada’s Eastern and Central Arctic (the area that since 1999 has become the territory of Nunavut) and “Western” law.

3. Indigenous Inuit Law and “Western” Law

Starting with colonization, an alien legal culture and social structures were imposed on the Inuit. The way “Western” Canadian legal order was introduced to the Inuit was not always attractive, as there have been instances of a clear clash of two cultures and the ignorance of the Inuit ways of social control by the state that had dramatic consequences for the Inuit. On the one hand, some of the traditional Inuit ways of dispute resolution gradually eroded or almost ceased to exist. On the other hand, the imposition of the national legal system on the Inuit often took place without much consideration of their cultural environment. For example, this is evident from the first murder trials of the Inuit under Canadian law where the Inuit were “taught” the “white-man’s justice.”²⁰

In the meantime, some aspects of traditional Inuit legal order exist to date and they have formed the basis of what is known as indigenous law; which sometimes is also referred to as: customary law, folk law, traditional law, autogenous law of indigenous peoples, aboriginal/native or chthonic (people of the land) law, unofficial law, people’s law, natural law, informal law, living law or *lex loci*.

To date, in most Arctic states, we deal with the multiplicity of legal orders and systems. For example, it is recognized in Canada that aboriginal law and indigenous legal customs and values form an area of law in the Canadian legal system and jurisprudence, but there are different approaches to the understanding of the definition of “aboriginal law.” This definition can include various indigenous legal traditions and systems only; present the bulk of Canadian jurisprudence (cases) and international Human Rights law jurisprudential practice and theory on aboriginal issues; or show the mix/combination of all these components. There is no one rigid definition of “aboriginal law.” There is an ongoing challenge of cross-culturally acceptable definition and I believe that it is best that indigenous peoples themselves determine what their system of legal values, beliefs and practices is.

20. For details see Loukacheva *supra* note 4 at 88; and Shelagh D. Grant, *Arctic Justice: On Trial for Murder, Pond Inlet, 1923*, Montreal and Kingston: McGill-Queen’s University Press, 2002.





INDIGENOUS INUIT LAW, "WESTERN" LAW AND NORTHERN ISSUES

In today's reality, we deal with the complex relationship between the existing/developing legal institutions of indigenous peoples and the dominant/national legal structures. Patterns of such developments vary from one Arctic area with indigenous populations to another. In this author's opinion those patterns are pre-conditioned by:

- the history and impact of colonial relationships between aboriginal groups in question and their colonizers, patterns of subjugation, etc.;
- the size of aboriginal collectivities – e.g., geographic areas where indigenous peoples form a majority of the population, present a minority of residents, or we deal with urban aboriginals;
- the level of continuity, variety of beliefs, and preservation of aboriginal legal values, ceremonies, traditions, language and other socio-cultural factors that impact the vitality of indigenous beliefs and legal systems;
- the homogeneity of indigenous communities or their mix with and dwelling with the various outsiders, other settlers or other indigenous groups, etc.;
- historic patterns of nomadic way of life with mainly hunting-gathering occupation versus more settled or mixed patterns;
- historic mode of social organization – (e.g., extended family structures);
- historic form of political organization – (e.g., small-scale stateless society with special role of a leader – the best hunter, or an Elder, etc.);
- the role of Elders and others in the education of young people, keeping and transformation of indigenous knowledge and values, etc.

Factors that define the preservation and maintenance of indigenous legal cultures and values depend a lot on each particular case study in question. The above-mentioned analysis of some traditional Inuit law-ways and forms of conflict resolution indicates that Euro-American legal culture is not universal. There was another image of law and legal tradition with a highly developed system of social control and dispute resolution based on a communal model and lacking abstract legal entities. This image is still existent to some degree. The principal differences between indigenous legal traditional/indigenous law and the "Western" legal tradition/"Western"/State/National/Statutory law are many and they pre-determine the nature of contemporary interaction of these divergent legal cultures.

Thus, despite some modifications, historically, indigenous law is *lex non scripta* – oral; it derives from customs and traditional beliefs and rituals; it is flexible and not fixed; in most cases it is not official law; rules are rooted in the natural environment (close connection with the land, nature and wildlife – e.g., Inuit community rules on whale hunting or game sharing) and traditional religions that form the base for certain codes of behavior; communal rights and duties prevail over indi-





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vidual rights and property; the exercise of justice and legal practices are oriented on reconciliation, the restoration of peace and harmony, the avoidance of tensions that may threat communal life; law is often considered as the guarantor of order and security and not with considerations about what is just or true, consensus-decision making and community/group involvement are essential in conflict resolution; there are different approaches to punishment, sanctions (that are mainly socio-psychological), compliance and law enforcement mechanisms, etc.

In comparison, State law / “Western” law – is *lex scripta*, official, fixed, it has authors/legislators and established law enforcement agencies and institutions; historically, it is centered on individual rights and protection of private property, etc. Canadian common law system which is dominant in Canada’s Eastern and Central Arctic is adversarial in nature with judges assessing the evidence; in some other Arctic areas it is based on civil law and is rather inquisitorial, or mixed, etc.

All these differences prove that, in general, indigenous law and legal thinking are not more or less advanced than “Western” ones; they are just different and are based on different principles and visions.²¹ The systems of indigenous legal beliefs and values in the Arctic are quite sophisticated but have different degrees of influence on those who exercise them. Patterns vary. Arguably, in some Arctic areas, they exist regardless of the dominance of national legal systems; co-exist together; can mix with State law and in some cases have vanished as a result of State law absorption. Indigenous legal beliefs cannot be studied through the prism of legal centralism where State agencies are dominant; they are rooted in indigenous traditions but are also mixed with other things/practices – e.g., how to behave with Elders, or how to catch game, a sanction with the healing procedure, etc.

Furthermore, according to some indigenous views that may not be shared by all representatives of the many indigenous groups across the North and globally, ideally, the natural world is divine and sacred, thus, one cannot damage the land, animals and other resources – indigenous law is conservationist – environmentally friendly. You respect nature as much you respect yourself, natural environment should be preserved – this also intersects with an idea of inter-generational equity.²²

Historically, in the Arctic, nomadic patterns of life pre-determined the development of legal practices within certain areas of legal regulation. For example, disputes over personal property or land did not often arise as generally there was no attachment to particular tracts of land, personal belongings were few and no

21. It can be argued, however, that indigenous legal culture is much more holistic and sophisticated compared to that to the Western legal culture, when it comes to the conservation and usage of resources from the land and sea, etc.

22. For the Inuit views on these see, for example, Elders’ perceptions, *supra* note 8 Interviewing Inuit Elders and *supra* note 3 *Uqalurait: An Oral History of Nunavut*.





surpluses of food were kept, so there was not much need for property rules. For instance, disputes over and rules dealing with inter-personal violence, the sharing of food resources, mating – sexual access and marital relations, procedures followed in hunting, access to places for hunting, reciprocity obligation mechanism,²³ etc., formed the crux of rules in the traditional Inuit society.

Since land was the main object of law, spiritual connection to it and living on the land with the preservation of its harmony were crucial, such as the special relationship with the wildlife and rules on its usage/sharing; there was no right of alienation; there was no incentive to accumulate movable or personal property or development of a law of successions. Property law dealt with the transfer of possession to maintain the cohesion of the group/community to facilitate its survival. Communal wealth and stability were at the heart of such protection. Rights to land were recognized only in connection with land use and they were applicable as long as this continued. Even to-day, despite the growing need for the economic benefits that might flow from land and resource use, the non-commercial character of land rights and spiritual value of the land is still very important to the Inuit.²⁴

In family law matters, presently, many traditional Inuit society practices are non-existent, but the custom of the Inuit adoption is legally recognized by the settler state – e.g., in Canada which is well reflected in legislation, case law and other sources.²⁵ Accordingly, “[...] the institutionalization of custom adoption in Nunavut is unique in Canada [...] It is also unique in family law processes within

23. About game rights and hunting procedures among the Inuit see: Peter Kulchyski & Frank James Tester, *Kiumajut (Talking Back) Game Management and Inuit Rights, 1900–70*, Vancouver: University of British Columbia Press, 2007.
24. This is obvious from interviews with the Inuit and documentation of their life in a series of documentary films on Nunavut. A National Film of Canada (NFBC): *In Celebration of Nunavut: Life on the Land*, Vols. 4–7, 1999; see also: Martin Kreelak and Ole Gjerstad directors. *Journey to Nunavut: The Kreelak Story*, Ottawa: NFBC, 1999.
25. See: Aboriginal Custom Adoption Recognition Act (Nu), S.N.W.T. 1994, c.26 as amended. For a survey of literature on this topic and cases for Canada’s Eastern Arctic (Nunavut), see, for example, Kelly Gallagher-Mackay, *Report on Family Law Research in Nunavut*, Ottawa: Department of Justice, Canada, 2003-FCY-3E, especially section 3.2. “Customary Adoption,” at 29–32. As she writes, “There is significant case law recognizing Aboriginal custom adoption in the Northwest Territories.” Judge Sissons, in *Re: Katie Adoption Petition*(1961) 38 W.W.R. 100 (N.W.T.T.C.) was the first to recognize that custom adoption was part of the law of the NWT. The NWT Court of Appeal reached the same conclusion in *Re: Wah-Shee*(1975), 57 D.L.R. (3d) 743. Two later decisions of the NWT Supreme Court clarified that the court’s role in custom adoptions was “merely declaratory”: *Re: Tagornak Adoption Petition*, [1984] 1C.N.L.R. 185; *C.(A.) v. G.(V.)*[1992] N.W.T.R. 236,” at 30.





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Nunavut. Custom adoption appears to be a well-understood legal institution that is accessible and commonly used across the territory.”²⁶

One could also look at the law of obligations and contracts, some practices of which were highly developed (e.g., contracts related to production – exchange, social contracts – rituals, religious contracts – the usage of sorcerers-witches, etc.).

Compared to the “Western” legal system which generally distinguishes between civil, administrative, contractual and penal/criminal responsibility but also captures elements of social injury to the group (e.g., criminal offence), as has been mentioned above, in the indigenous law responsibilities were mainly divided according to the communal character of the society. Thus, within this system, the interest of the group usually prevailed and social injury to the group required legal sanctions.

Importantly, indigenous law, as “Western” law, has undergone tremendous transformation and evolution. Custom is not static and despite its strong value in the tradition, indigenous law had to change to respond to modern challenges and complexities of life. That is why in contemporary times, gradually, the role of Elders and special traditional knowledge (TK) or traditional ecological knowledge (TEK) councils have become so increasingly important in the generation of this knowledge, its interpretation and preservation.²⁷

Over time, the State law took charge over areas that were not previously regulated (e.g., new types of crime), or codification of some unwritten legal practices, etc. However, generalizations are not plausible as each Arctic state or case study in question will indicate some variations or modifications;²⁸ there will be substantial divergences when one looks at forms of reconciliation, recognition and vitality of indigenous and non-indigenous legal cultures in the Arctic but there is no question that we deal with various legal traditions that are absorbed differently within each specific cultural setting.

There are also substantial variations with respect to conceptualization, acculturation, incorporation and cross-cultural transferability of indigenous law and customs to the national legal systems and relationships/interactions between

26. *Ibid.*, Gallagher-Mackay at 32.

27. This topic is not a focus of this paper; there is extensive literature on TK and TEK. For contemporary discussion on some of these issues see: Malgosia Fitzmaurice, “The Dilemma of Traditional Knowledge: Indigenous Property Rights and Indigenous Knowledge,” *International Community Law Review* 10 2008: 255–278; Terry Fenge and Bernard W. Funston, “Arctic Governance: Traditional Knowledge of Arctic Indigenous Peoples from an International Policy Perspective”, Background paper, December 2009, at www.arcticgovernance.org, accessed March 10, 2012.

28. For analysis of legal systems in the Arctic see: Nigel Bankes (lead author), “Legal Systems,” Ch.6, Arctic Human Development Report, Akureyri: Stefansson Arctic Institute, 2004: 101–118.





indigenous law and State or statutory law.²⁹ A question can be raised about the restoration of indigenous laws and their preservation in the written form versus oral tradition, which can be interpreted as another form of legal acculturation or assimilation with the mainstream legal system. There are substantial challenges in making the contemporary "justice" system in the North adequate to the indigenous legal tradition.³⁰ There are two parallel legal cultures that co-exist. The ongoing challenges are how to let them co-exist in the most balanced and harmonious way; and how to preserve indigenous legal practices in light of prevailing dominance of national legal systems and legal procedures in all Arctic areas? What is the role of indigenous law/customary law in various Northern issues? What is its contribution to regulating social relations, social order and other developments?

Within the scope of this paper it is not possible to outline the broad scope of issues in the North where customary law may be relevant. Thus, the next section looks only at some examples.

4. Indigenous Law and Arctic Realities

There is no doubt that indigenous law, traditions and customs are of essential value to those who practice and employ them in the daily life; they are the source of empowerment of indigenous peoples and are of the core importance for their cultural identity.³¹ As, for example, Saami authority Mattias Åhrén notes, "All cultures, large and small, have legal regimes based on custom. Indigenous peoples are no exception in this regard. Customary law distinguishes itself from statutory law merely by being more intrinsically attached to a people's culture than statutory

29. On this account see, for example, Bradford W. Morse, "Indigenous Law and State Legal Systems: Conflict and Compatibility," in Bradford W. Morse and Gordon R. Woodman (eds.), *Indigenous Law and the State*, Dordrecht, the Netherlands and Providence, RI: Foris Publications, 1988: 100; Jacob T. Levy, "Three Modes of Incorporating Indigenous Law," in Will Kumlicka and Wayne Norman (eds.), *Citizenship in Diverse Societies*, Oxford: Oxford University Press, 2000: 297–325; Jonnette Watson Hamilton and Nigel Bankes, *supra* note 2, 2012.
30. This question has been studied by many commissions and scholars: for experiences from Greenland and Nunavut see, for example, ch. 4 in Loukacheva, *supra* note 4; Travis Anderson and Mary Stratton, "The Civil Justice and the Public: Justice for Nunavummiut: Partnerships for solutions," Edmonton: Canadian Forum on Civil Justice-June 2008, Final Report.
31. See *supra* note 24. The preservation of those values is also linked to maintenance of the language. In Nunavut, substantial efforts have been made to ensure the vitality of the Inuit language and its dialects. See: "NTI, Our Primary Concern: Inuit Language in Nunavut", Iqaluit: NTI, 2009/10 Annual Report – The State of Inuit Culture and Society, 2011.





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law. Unlike statutory law, customary law does not gain its authority from formal acts such as a vote by an assembly. Rather, it derives its existence and content from social acceptance.”³²

At the same time, these customs can be of great learning significance to the outsiders and legislators/reformers of contemporary national legal systems.³³

Although there may be no consensus among Arctic indigenous peoples and others on how comprehensive, legitimate and powerful remaining customs are in the regulation of contemporary life in the North, traditions and customary practices have been adapting to the changing realities and environment. This raises a question whether indigenous law as such or some of customary law practices meet needs of those who exercise them today? If State/national legal systems and statutory laws were imposed on indigenous groups and often are not adequately reflective of indigenous legal values and beliefs, then can law in general, but indigenous law in particular, assist Arctic indigenous communities in adapting to changes in their livelihoods and environment?

There is no unanimous view on these questions among the Inuit authorities who have indicated that some practices have been more successful (e.g., Pangniqtuuq community whaling hunting custom; or Elders and Youth counselling / summer land camps in dealing with minor offences) than others; all respondents emphasized that not many customary practices have been used today as they would have wished to and much more could be done to revive the value of indigenous law and bring some of the Inuit customs back into life.³⁴

Can indigenous legal practices and knowledge help to improve living conditions and livelihoods of Arctic indigenous peoples, their well-being and health;

32. *Supra* note 3 (2007), at 18.

33. One notable example is the Draft Nordic Saami Convention which refers mainly to Saami of Norway, Finland and Sweden as it is hoped that Saami of Russia may join convention one day in the future. It indicates that the states are eager to give special credence to Saami customary law. Thus, Article 9 “Saami legal customs” reads: “The states shall show due respect for the Saami people’s conceptions of law, legal traditions and customs. Pursuant to the provisions in the first paragraph, the states shall, when elaborating legislation in areas where there might exist relevant Saami legal customs, particularly investigate whether such customs exist and, if so, consider whether these customs should be afforded protection or in other manners be reflected in the national legislation. Due consideration shall also be paid to Saami legal customs in the application of law.” Nordic Saami Convention – draft (unofficial translation in English), Annex in *GÁLDU ČÁLA – Journal of Indigenous Peoples*, 2007 (No 3).

34. Bridges to Nunavut: Reconciling Legal Systems Conference, University of Ottawa, October 1, 2011; conversations of the author with Inuit authorities.





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to increase safety and improve subsistence practices at land, sea and in the air; help in dealing with natural disaster and climatic changes; to increase sustainable development and protection of environment, to ensure precautionary approach to exploration of natural and living resources on Arctic lands, and tackle other calling matters of modern challenges and Northern realities, etc.? There could be a long list of areas where one could explore the role of indigenous law and customs³⁵ but there would be no unanimous answer to all those questions. In light of present uncertainties and ongoing great transformation in the Arctic at several levels, the role of law as such in dealing with Arctic challenges, and indigenous law in particular in addressing some of them, require further evaluation.

Currently, we are facing a problem of information-knowledge uncertainties that complicate policy-making decisions and regulatory/legislative formulation for environmental and political stewardship, and socio-economic development in the Arctic. One such area of information-knowledge uncertainties deals with unpredictable consequences, challenges and possible opportunities as a result of global warming and climatic changes, which often threaten the management of Arctic ecosystems, lead to irreversible changes in food chain, wildlife, biodiversity, traditional diets and health of indigenous peoples, their livelihoods and subsistence.³⁶ There are indications that indigenous knowledge of seasonal variations of weather patterns, animal behaviour and climate change becomes less reliable and there is a challenge of adaptation to the new realities.³⁷

There is also an ongoing discourse on the clash between scientific and traditional indigenous knowledge dichotomy which impacts legislative practices (e.g.,

35. For one study of the role of customary law in sustainable development of resources including some examples from the Arctic, see: Peter Ørebech et al eds., *The Role of Customary Law in Sustainable Development*, Cambridge: Cambridge University Press, 2005; see also Dahl and Rose eds. 2010, *supra* note 3.
36. See, for example, Inuit Circumpolar Conference (ICC) Petition to the Inter American Commission on Human Rights seeking relief from violations resulting from global warming caused by acts and omissions of the United States, submitted December 7, 2005.
37. See, for example, Inuit Qaujimagatuqangit of climate change in Nunavut. A sample of Inuit experiences or recent climate and environmental changes in Pangnirtung and Iqaluit, Nunavut. Iqaluit: Government of Nunavut: Department of Environment, Environmental Protection Division, November, 2005; for possible solutions see recommendations in: S. Nickels et al., *Unikkaaqatigiit-Putting the Human Face on Climate Change: Perspectives from Inuit in Canada*, Ottawa: ITK, Nasivvik Centre for Inuit Health and Changing Environments and the Ajunnginiq Centre at the National Aboriginal Health Organization, 2006.





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quotas for polar bear hunting, or the seal ban, etc.).³⁸ This presents a challenge to the usage of indigenous customary legal practices that in some cases are based on this TEK knowledge, indigenous knowledge (IK) and in case of the Inuit of Canada's Eastern and Central Arctic – Inuit Qaujimagatuqangit (IQ).³⁹ Presently, TEK and IQ are incorporated into decision-making in Nunavut. It is reflected in the work of the Government of the territory and Institutions of Public Government (IPGs), created under the Nunavut Land Claims Agreement (NLCA) of 1993. There is a practice of decision-making by IPGs, i.e., the Nunavut Wildlife Management Board (NWMB), in relation to polar bear and narwhal harvesting which reflects on the value of TEK and IQ in modern realities and associated challenges.⁴⁰

Furthermore, the general trend of economic globalization and the need of economic development in the Arctic,⁴¹ and legal unification of some rules (e.g., trade), also put an impact on some indigenous law practices and traditional values. For example, the pressure of advanced industrial-economic development on indigenous

38. For some discourse on these matters see: Natalia Loukacheva, "Climate Change Policy in the Arctic: the Cases of Greenland and Nunavut," in Timo Koivurova, E. Carina Keskitalo and Nigel Bankes (eds.), *Climate Governance in the Arctic*, USA: Springer, 2009: 327–350; Nigel Bankes and David S. Lee, "The Legal Framework for the Conservation Hunting of Polar Bears in Nunavut," in Milton M.R. Freeman and Lee Foote (eds.), *Inuit, Polar Bears, and Sustainable Use: Local, National and International Perspectives*, Edmonton: Canadian Circumpolar Institute Press, University of Alberta, 2009: 199–213; on the EU seal ban and actions of the ITK (the national Inuit organization of Canada) see: *Inuit Tapiriit Kanatami and Others v. Parliament and Council*, Case T-18/10 R; OJC 100 of 17.04. 2010 and orders of the EC of Justice of 25.10. 2010 and of 18.12.2010 www.eur-lex.europa.eu accessed October 10, 2011.

39. There is extensive literature on the definition, understanding and implementation of IQ into Nunavut's policies and legislation. For some explanations on the definition, see, for example: IQ – Guiding Principles, GN: Department of Executive and Intergovernmental Affairs, Iqaluit, 2010, www.gov.nu.ca, accessed October 18, 2011; Frank James Tester and Peter Irniq, "Inuit Qaujimagatuqangit: Social History, Politics and the Practice of Resistance," *Arctic* Vol. 61 (1) 2008: 48–61; Some notable examples of introduction of IQ in Nunavut's legislation: are Wildlife Act, S Nu 2003, C26 and Inuit Language Protection Act, S Nu2008, C 12.

40. These issues are well examined by scholarship, see, for example: Nigel Bankes, "Exploring the roles of law and hierarchy in ideas of resilience: regulating resources harvesting in Nunavut," in Firket Berkes et al (eds.), *Breaking Ice: Renewable Resource and Ocean Management in the Canadian North*, Calgary: University of Calgary Press, 2005: 291–315, at 301–306; about NWBM, polar bears and narwhal management see: Alan Diduck et al., "Unpacking social-ecologic systems: case studies of polar bear and narwhal management in Northern Canada," in Firket Berkes et al (eds.), *Ibid.* 2005: 269–290, at 272–277; Firket Berkes et al., "Cross-scale institutions and building resilience in the Canadian North," *Ibid.* 225–247, at 231–234.

41. About some aspects of globalization in the Arctic see, for example, Lassi Heininen and Chris Southcott (eds.), *Globalization and the Circumpolar North*, Fairbanks: University of Alaska Press, 2010.





lands and territories, and attraction of external investors and multi-corporations with the ultimate objective of achieving self-sufficient and financially independent governance, often clash with the need to preserve traditional livelihoods (traditional/customary ways of dealing with the land and wildlife), subsistence economies and sustainable development.⁴² How should indigenous law react to filling in gaps of knowledge and reflect on changing situations? Could indigenous law have a greater say or impact when it comes to the regulation of benefits of access to Arctic resources and their monitoring, or climate change and energy issues? What can it do in the main areas of Arctic developments? These are questions that can be best elaborated by the representatives of indigenous communities.

Currently, legal developments in the North are linked to the economics, societal, human, and cultural systems and natural changes. It is for indigenous peoples to reinforce the role of their legal practices and making them a more adequate tool in dealing with the unprecedented transformation in the North. Quite often indigenous communities are struggling with gaining their knowledge back and protecting it (e.g., the area of intellectual property rights and ownership); at the same time we witness in the Circumpolar North and elsewhere the trend of a greater importance of indigenous knowledge and customary practices in dealing with the many issues. One notable example is the Draft Nordic Saami Convention which, as has been noted above, gives special credence to Saami legal traditions, customs and conceptions of law (Art.9).

There is a new generation of indigenous leaders, scholars, politicians and jurists who are able to bring this knowledge, interpret it with respect to cultural distinctions and *de facto* practice indigenous legal practices. Indeed, it is first and foremost for those leaders and practitioners to serve as a voice of their communities and making further changes in how modern administration of justice, legal education and practice of law are exercised with the consideration of indigenous law-ways, knowledge and culture. Despite indigenous influence, justice system may be the same (reflective of the dominant legal culture) but innovations come when its administration is exercised outside the courtroom.⁴³

42. This specifically can be observed in the discourse on oil and gas exploration on the traditional indigenous lands.

43. For example, several authorities on Justice and Inuit legal traditions have emphasized the need of being creative in dealing with the administration of justice outside the courtroom in Nunavut. Bridges to Nunavut conference, 2011, *supra* note 34.





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5. Conclusion

Law in general and indigenous law in particular have a niche and significant role to play when it comes to various issues and developments in the Arctic, but without real advocates and competent bearers of this knowledge, first of all among indigenous peoples themselves, it is challenging for a dominant national legal culture to become more flexible and inclusive of indigenous law. Important questions in the many years ahead would be: how law (both indigenous and State) and legal systems could assist in dealing with current and emergent challenges and opportunities in the North? How these legal systems and customary/indigenous law practices are efficient and legitimate in the eyes of Northerners (both indigenous and other residents)? How existing pluralism and co-existence of indigenous and non-indigenous law practices can contribute to the resolution of issues of common concern in the Arctic? In other words, more legal cooperation and understanding of indigenous law and its workability with national legal systems is required to fill in knowledge gaps and find plausible solutions to the many issues and challenges of Arctic developments.

Canadian experience of the Inuit of Eastern and Central Arctic shows that the national legal system can learn a lot from indigenous forms of dispute resolution and a more inquisitorial manner of dealing with the judicial process; it can also show more flexibility in ensuring the harmonious co-existence of both “Western” and indigenous legal traditions. Both national and indigenous legal systems could further learn from each other, so as further actions may be required to ensure the continuity, rejuvenation and revitalization of indigenous law in the existing legal thinking and practicing.⁴⁴

Law in general, and indigenous law in particular, has an important role to play in various Northern issues but they cannot be seen as panacea for resolution of all Arctic problems, developments and contemporary realities in the North. There are well-known challenges connected, for example, with non-implementation of existing national/regional regulations and making them more amenable to the Northern realities. At the same time, legal practices present only one window of opportunity in dealing with the many issues in the North. In dealing with those issues, in addition to the role of customary law practices in regulating some matters (e.g., contribution of indigenous law to the healing procedures and dealing with

44. There are several ways of doing it: for example, opening educational law programs which deal with indigenous law. The second Akitsiraq law initiative in Nunavut (expected to come into existence in 2012–2013) which aims to educate Inuit lawyers in line with their cultural values is a promising initiative. The first round of this program led to the graduation of 11 Inuit lawyers in 2005.





offenders, substance abuse, and violence, etc. bringing social stability), a lot shall depend on actions and will/leadership of actors in charge and many other factors that form the crux of changes and current trends in the Arctic that take place at different levels of social order, economic, environmental and political realities.

Обычное право коренного народа инуитов, "западное" право и вопросы Севера

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Широкий спектр изменений, происходящих сегодня в Арктике, ставит вопрос о роли права и существующих правовых систем в разрешении проблем коренных народов и других жителей Севера. С одной стороны, правовой плюрализм в Циркумполярном регионе способствует нахождению инновационных подходов и представляет интерес для различных Арктических юрисдикций. С другой стороны, доминирующее влияние национальных правовых систем и процедур о регулировании деятельности региональных субъектов и общин ставит под вопрос роль правовых традиций и традиционной практики коренных народов в развитии Севера. На примере инуитов, проживающих в Нунавуте (Канада), в статье исследуются некоторые общие черты традиционного правового порядка народов Севера. Далее анализируются принципы определяющие взаимосвязь между правовыми обычаями коренного народа и доминирующей национальной правовой системой. В заключение формулируются вопросы, существенные для лучшего понимания ценности обычного права и традиционных знаний коренных народов в разрешении современных проблем развития Севера.

