

LIFE IN REINDEER RHYTHMS: CUSTOMARY AND STATE REGULATION

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Why do they pass laws? Of the many reasons one is definitely to defend the human right to distinctiveness. In the diverse modern context this is as important as any of the human rights which are defended in all civilized societies. Without the realization of the right of a person to be culturally distinct, the right to life of those following the reindeer is hardly to be recognized. And this is the lifestyle pursued by over ten of the peoples of the Russian Federation (RF). Reindeer herding is in fact the only possibility for them and their traditions to survive. For the majority of indigenous small-numbered peoples of the North of Russia, the issues related to the rights and possibilities of continuing reindeer herding have recently played a pivotal role. Reindeer herding that provides for the material basis of their lives – for transport, food, clothing and shelter. The reindeer is the main symbol of aboriginal culture in the world outlook of Northern peoples, their folklore, their rites and celebrations, their ways of teaching their young. The reindeer is their main sacrificial animal. Aboriginals constantly underscore the inseparable link between people and reindeers. They foresee their existence as distinct peoples only through the preservation and development of reindeer herding as a way of life. They cannot imagine their future without reindeer, which constitute the basis of their well-being and ensure their survival. The reindeer itself chooses the way it will go, and feeds itself while traveling long distances, and the Northern people follow it.

The possibilities of reindeer herding are constantly diminishing as a result of the alienation of pastures to industrial exploration in the northern region. Moreover, many young people when they come home from boarding schools no longer have a clear idea of the nomadic life, and do not associate themselves with it. However,

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some changes have been taking place recently, and private family reindeer herding is becoming popular in some regions of the North. How may we help those who want to preserve, and in some regions, to revitalize this ancient, but still modern, if not eternal activity of people living in the North? One way today is to ensure their legal rights in the context of the current Russian legal system where the role of customary norms regulating the status of these peoples is significant in national legislation.

In practice there remains much to be done in this sphere. The newly adopted laws “considering customs and traditions of indigenous peoples” are in limbo. In order to make customs an effective legal remedy, collaboration between aboriginals themselves, anthropologists and legal experts is required.

Recognition of Indigenous Peoples’ Laws by State Law

In 1993 the status of indigenous peoples of the North was constitutionally regulated. The state guaranteed their rights according to the acknowledged principles and norms of international law and the international treaties of the Russian Federation (article 69 of the *Constitution*). “The protection of the original environment and traditional way of life of small-numbered ethnic entities” were recognized as within the state authorities’ special competence (article 72).

In defining the legal status of indigenous small-numbered peoples, an important role is played by articles of the constitution which state that the land and other natural resources are used and protected by the Russian Federation as the basis of the life and activities of peoples inhabiting a certain area (article 9), which declare the status of autonomous districts as subjects of the Russian Federation (article 65), and which provide that local government is exercised with consideration of historical and other local traditions (article 131).

Certain legal provisions connected with the status of indigenous peoples are contained in the Land Code, the Water Code, and some federal laws. New opportunities for the defense of indigenous rights are provided in special federal laws concerning the legal regulation of different aspects of the life of these peoples. These include the law *On Guarantees of the Rights of Indigenous Small-Numbered Peoples of the Russian Federation, RF, 1999*; the law *On General Principles of the Organization of Obschinas of Indigenous Small-Numbered Peoples of the North, Siberia and the Far East, RF, 2000*; and the law *On*

Territories of Traditional Land Use of Indigenous Small-Numbered Peoples of the North, Siberia and the Far East, RF, 2001. In this legislation the rights of indigenous peoples and the powers of authorities are defined in the spheres of the organization of their life and activities, nature management, and protection of languages and cultures. One particular feature of the new legislation is the integration of customs and traditions of these peoples into the state legal system. Moreover, it should be noted that it allows for the taking into consideration of customs and traditions of indigenous nature management, in the determination by *obshchinas*¹ of issues regarding internal development, and in their legal defense.

At the same time it should be mentioned that in reality opportunities for the development of indigenous cultures are often limited because of intensive industrial exploration, intrusion into their habitation environment, and the lack of legal mechanisms for the implementation of laws. This particularly concerns the status of territories with traditional nature management (land use). Since issues of land use have not been adequately regulated through legal mechanisms, there is in practice a continuing curtailment of lands available for traditional nature management through their alienation for industrial enterprises. At present the life subsistence activities of these people often depend on the level of socio-economic development and the work of local authorities in the regions inhabited by them, as well as on the level of organization and activities of indigenous public organizations and their legal consciousness.

Indigenous peoples have asserted their rights at every level of public authorities, their social status has improved, and their major problems relating to self-government and co-management of natural resources and the status of traditional nature management territories have been defined. Many acute problems have been reflected in the legislation. However, this has been only the first step on the way to really independent development of these peoples and non-discrimination of citizens whose lifestyle distinguishes them from the dominant population.

¹ The term *obshchina* (community) of indigenous small-numbered peoples of the North is used in this article to refer to the form of their social organization. In accordance with the law of 2000, these communities are formed in the regions of the North in order to protect the traditional environment, and to preserve and maintain the traditional way of life, economy, crafts, and culture. At present, most of these communities are engaged primarily in economic activities.

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An effective approach to the socio-economic and cultural problems of these peoples is a policy of legal pluralism, in this case considered as an interrelation between public and customary law.

The experience of legal anthropology contains numerous examples of customs being taken into consideration by the legal systems of nation states. In respect to indigenous peoples, customs have also been integrated into international law. In spite of the considerable experience of different countries in this sphere, an exemplary universal scheme of coexistence and cooperation between public and customary legal systems has never been worked out.

I would like to suggest one of solutions of this problem using the case of the implementation of a project entitled "Principles of Customary Law of Indigenous Small-Numbered Peoples of the North, RF". This project is aimed at a search for a possible adequate solution of this problem, and provides for the formulation of the principles of legal consciousness of indigenous peoples of the North through the study and interpretation of their existing customs in the sphere of nature management, self-organization and self-government, family and clan relations, and other spheres of legal regulation. Court appears to be the best place for the working out of a model of an interaction and co-existence of state and customary legal normative systems.

Customary law principles formulation is aimed at the search for this problem's solution and is connected with the formulation of the main principles of indigenous peoples' world view through the study and interpretation of their existing customs of land use, self-organization and self-government, family and matrimonial, and other spheres of legal regulation. Both customary law principles and legal principles are juridical generalized rules regulating human behavior in a certain sphere of legal relationships (Gavrilenko V.G. and Yadevich N.I., 1999: 383-384; Anon 2000: 500-501). Indigenous peoples' customs and traditions as regulators of legal relationships have not been properly studied; this work is still to be carried out.

A separate part of the research may be devoted to the *justiciability* of those indigenous customs which we see as legal. Scientific literature contains general approaches to the latter issue, though they are to be considered and developed in the Russian context (Carbonnier 1986; Kryazhkov 1999: 21-22; Kovler 2003: 36-37, etc.).

Theoretically, general legal principles developed in Mohammedan law in the 10th to the 16th centuries are of interest. They are considered as original guidelines of any legal treatment.

They cannot be directly applied in court but used for an exact verdict based on a variety of opportunities the doctrine provides...Their status is vividly expressed in inclusion of 99 such principles in the norms of the Sheriat code concerning civil and judiciary law and called 'Madjallat Al-Akham Al-Adliya' ('The Code of Legal Norms') adopted in the Ottoman Empire in 1869-1876. (Comments of L.R. Syukiyaynen who translated from Arabian and published in Russian some articles from this code containing the principles mentioned above, Syukiyaynen L.R. 1999: 683-688.)

Original initiatives on integration of customary principles into the state legal system are proposed in some northern countries. In Norway which ratified ILO Convention 169 some work on "integration of state law and Sámi customary law and legal concepts in some vital issues" has already been done. T. Svensson provides an opinion of K. Smith, the former chairman of the Committee on Sámi rights, and the present chief justice of the Supreme Court of Norway, who speaks of "a Nordic legal doctrine the aim of which is to synthesize principles of minority rights with those of indigenous peoples' rights, thereby contributing to the development of international aboriginal law" (Svensson 1999: 105-6, referring to Smith 1996). The author also points out that the essence of the customary legal model requires re-confirmation of its indisputable historical recognition at present since respect to customary law is not given in itself. To do this, indigenous peoples should set up their claims properly (Svensson 1999).

Norwegian court practice provides an example demonstrating relationships of state law and Sámi customary law in the case of *Black Forest* tried in the Supreme Court of Norway in 2001 and described by T. Thuen. The land claim appeared in one of the coastal settlements in northern Norway where local inhabitants (mostly Sámi) have for a long time used the land for different economic practices. The state set up its claims for this territory and the court took its part. The community appealed to the Supreme Court which ordered that:

In practice the state was deprived of a proprietary right since it had not insisted on cessation of these practices. What is

interesting for us [writes Thuen] is that according to the court's opinion local inhabitants behaved as if they were owners in spite of the fact that they did not have an idea of property in its juridical sense (Thuen 2003: 120).

In this case customary law was defined by the court rather as a totality of different practices than a special model or specialized form – a prevalent land use tradition – and, thus, became an important source of law in Norwegian jurisprudence.

In the modern context this approach to customary law would seem preferable to that of codification.

The Supreme Court of Canada has determined that the general test for proving these rights must show that the claimed right is based on a practice, custom or tradition that was integral to the distinctive culture of the specific aboriginal group prior to European contact (*R. v. Vanderpeet* [1996] 2 S.C.R. 507) (*Krehbiel R.*, 2002: 143).

Problems in State Recognition of Indigenous Law

One of the most topical questions around the world is what the customary law of indigenous peoples today is all about – archaisation, 'cultural renaissance' or an important legal remedy? How is customary law influenced by its acceptance by the state legal system? Analyzing different states' policies in respect to customary law G. Woodman notes that there is a possibility of a policy of integration aimed at making customary law or its fragments part of the state law.

It is this policy which is more commonly referred to as recognition by state law of a body of customary law. The eventual goal may be to strengthen the customary law. But it can equally be to control, amend or even gradually to destroy it by subtly discouraging its observance. Incorporation may be considered in two sub-types. Normative incorporation occurs when state law recognises some of the norms of a customary law and requires its own institutions to apply them. This occurs, for example, in the instance, common in colonial territories, where the state courts are required to apply the norms of a customary law. This process entails a tendency to make changes to the customary law, even if the underlying policy is broadly of

support for its continuance. Invariably part of the customary law is approved and incorporated; part is disapproved and not incorporated, and this part is probably contradicted. Moreover, application by state institutions tends to change the operation of the norms. (Woodman 1999a: 36; also K. von Benda-Beckmann 1999: 11)

There are two types of recognition of customary law according to G. Woodman – normative and institutional. The first type of recognition characterized many countries of Africa and South Eastern Asia. In this case state institutions, namely state courts, are required to apply norms of the customary law, in which process there may be selectivity (Woodman 1999b: 115). This approach is followed in the Russian federal law *On Guarantees of the Rights of Indigenous Small-Numbered Peoples of the RF*, article 14, which provides for the taking into account of customs and traditions only if they do not contradict federal laws and the laws of the states of the RF.

The second type of recognition of customary law means that the state recognizes institutions of aboriginal law, such as those concerned with land use, or with the decision-making processes of enforcement of aboriginal legal norms. To avoid duplication of functions and competition the state authorizes these institutions to act. This recognition allows for a greater or lesser degree of self-government. This institutional recognition laid the foundation for the recommendations prepared by the Australian Law Reform Commission in its Report on the Recognition of Aboriginal Customary Law (Woodman 1999b: 116). This approach is demonstrated in the Russian federal law *On the General Principles of Organization of Obschinas of Indigenous Small-Numbered Peoples of the North, Siberia and the Far East, RF*, article 4, which contains the following provision:

Decisions on issues of internal organization of *obschinas* of small-numbered peoples and interrelations between their members may be made on the basis of small-numbered peoples' traditions and customs if they do not contradict the federal legislation and the legislation of RF subjects and the interests of other ethnic groups and citizens.

As we may see, this also contains qualifications on the general enforcement of this law, although the issue of selectivity in recognition goes far beyond this framework. In practice the path of development of an *obschina* from its

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establishment to the point at which it becomes an organ of self-government is too long and is not legislatively supported. Therefore, at present these norms have only a prospective application.

Recognition of the complexity of the interaction between customary law and official state law should not result in giving up the attempt to solve this problem. Legal pluralism is seen as the situation, according to J. Griffiths, where peoples' behavior corresponds to a multiple legal order (cited in Kovler, 2003: 28) and suggests both co-existence of and interference between the systems. To provide conditions for their dialogue we should try to define the peculiarities of legal awareness and consciousness, of those images and figures of law that guide people in 'multilegal space'.

In Russia the state seeks to solve the problem of when and how to take into account in the legal system peoples' customs and traditions by the change in their constitutional status provided in the current Constitution and recent federal laws, some articles of which are specially devoted to these peoples' customs. But how should a modern judge with a standard education conduct a case if the federal law *On Guarantees of the Rights of Indigenous Small-Numbered Peoples of the RF*, article 14, states that

in cases in which persons representing small-numbered peoples figure as claimants, defendants, victims or accused, these peoples' traditions and customs not contradicting federal laws and laws of the subjects of the RF may be taken into account.?

Which customs and traditions should be taken into account?

Customs are mentioned in other federal laws as well, but neither scientists nor aboriginals themselves have speculated on how those laws containing provisions on peoples' customs and traditions should be applied. All of these issues affect the real life of indigenous peoples of the North, and especially that of reindeer herders, whose nomadic and semi-nomadic life style has its own foundations and depends directly on the capacity and conditions of natural resources. This explains why it is traditional land use which is underscored in the present legislation as a characteristic determining their special legal status.

What spheres of indigenous peoples' life can be regulated by customs? Traditional land use seems to be the top-priority sphere for customary regulation. Self-

government of indigenous peoples, founded on their own legal concepts concerning management of resources, the appointment of leaders, and the preservation of the natural and cultural heritage, present the second sphere of regulation. Legal customs can also regulate some issues of family law and inheritance. The list might be continued subject to the consideration that the realization of aboriginal customs should not lead to discrimination over human rights and other rights of the population.

The development of customary law principles inevitably leads to the issue of how to identify which customs, with which characteristics, may be applied in a given situation. To answer this question, ethnographic data collected during observations over a long term (perhaps over the past hundred years) among peoples of the North should be referred to, and the most typical, significant rules of behavior perceived as historically settled should be selected. A custom is obligatory if by breaking it “a person risks incurring the anger of supernatural and mighty powers, and also the anger of living people” (Rouland 1999: 59). The aim is not the codification of certain norms, which would hardly be reasonable and possible today due to the diversity of local variants and the rapid transformation of the norms caused by their necessary adaptation to changing life conditions.

Researchers repeatedly noted that aboriginals do not explain their customs and, to ground their observance of them, refer to the fact that their ancestors followed them (Rouland 1999: 59; Thuen 2003: 108). Legal customs are perceived as the rules that have already proved their effectiveness and obligatoriness. This fact is interpreted as indicating a lack of law in traditional society. However, it should be noted that by no means all societies, including the contemporary one, can serve as interpreters of the law. In a traditional society, or in one that we call *traditional*, there are people who can explain why a certain custom appeared or who at least can interpret its meaning. The researcher’s goal is to interpret a norm in the context of interrelations within the society, thus revealing its legal essence.

In the present day context of the Russian North where conflict of interests in the land use sphere is aggravating and opportunities for traditional land use as well as for industrial exploitation of renewable biological resources are getting rare, a new approach to indigenous peoples’ legal knowledge is required. However, the outcomes of legal policy can be more satisfactory if “it is planned through a conscious decision making” (Woodman 1999a: 13).

Research into Customary Law in Furtherance of State Recognition

The study of customary law principles may be complicated due to the interdisciplinary nature of this work. The frameworks of a legal anthropology seminar and Commission on customary law and legal pluralism activities illustrate problems of interaction between social anthropology and jurisprudence. In traditional law of indigenous peoples of the North some principles considered by lawyers as habitual may take unexpected forms. I would like to provide one example. According to the liberal juridical concept (notion) of law proposed by V.S. Nertsisyants, “law [is] a relationship of equality, freedom, and justice ruled by the principle of formal equality of this relationship’s participants. Wherever the principle of formal equality (and its concrete norms) operates, there is law and a legal relationship” (Nertsesyants 1998: 5). In the economic routines of Northern peoples the sphere of legal regulations includes the relationship of a human with a human as well as that of a human with nature. According to one norm, a fox which runs into a settlement cannot be killed. Indigenous peoples of the North have a rule of hunting on a competition basis: a human should defeat an animal while on equal terms with it. Thus he can chase it, but an animal has a chance to run away and save its life. A hunter should only kill an animal in the forest, on the hunter’s and the animal’s common territory, entering into competition with it. The relationship between a human and an animal in this case is based on the principle of equality.

As researchers have repeatedly pointed out, in order to provide arguments aboriginals don’t explain their customs, referring instead to their ancestors who have long been doing the same (Rouland 1999: 59; Thuen 2003: 108). Legal customs are interpreted as rules with proven effectiveness and obligation. This fact is explained as a lack of law in traditional society. It should be considered, however, that any society including a modern one has a limited number of legal commentators. In a traditional society or that perceived by us as ‘traditional’, there are people who can explain the origin of this or that custom, as well as the interpretation of its application. Researchers’ tasks include an attempt to interpret this norm in the context of relationships existing in a given society, and to reveal its legal nature.

Formulation and fixation of legal principles rather than norms is appropriate in this situation. During the project’s implementation it is the rules of indigenous peoples within what they conceive to be law which count.

However, one point here is that legal customary norms, legal customs of indigenous peoples of the North are oral; and their codification can distort their meaning. And the principles will present ‘a written code of rules’. They will in a sense bridge the gap between officially acknowledged law and customary law.

From Recognition of Indigenous Law to Self-Government by Indigenous Communities

The major objectives in the development of legal customs are represented by self-government and the establishment of self-governing territories. A rich experience in this sphere has been gained in Canada, as well as in many other countries where territories of this type are regulated by ‘laws’ worked out collaboratively by elders and lawyers.

These objectives also characterize the Russian legislation, namely, the Constitution, according to which local government “provides independent decision making by the population on issues at the local level, in the sphere of ownership, use and management of municipal property” (article 130) and should exercise its powers “taking into account historical and other local traditions” (article 131).

In a special federal law local government is defined as “recognized and guaranteed by the Constitution of the Russian Federation as an independent population’s activity focused on local issues which can be settled immediately or through the local authorities with the regard to the population’s interests, and its historic and other traditions” (federal law *On the General Principles of the Organization of the Local Government in the Russian Federation*, article 2).

The legislation on local government is only partially applicable to aboriginal issues for it concerns the entire population inhabiting a certain area. If local government of indigenous peoples is to be considered as a form, even a specific one, of local government, its significance will also be revealed in the ways in which aboriginals can solve the development problems of the area and to what degree they can effect development. Aboriginal self-government can refer exclusively to local groups representing the population. In the legislation on federal subjects and in aboriginal life, be it in Russia or in other countries, self-government is often connected with *obschinas*’ activity. The preamble of the federal law *On the General Principles of Organization of Obschinas of Indigenous Small-Numbered Peoples of the North, Siberia and the Far East*, RF, 2002, defines the general principles of the

organization and activities of *obschinas*. It states that they are “established to protect the original habitation area, traditional life style, rights and legal interests of the aforementioned indigenous small-numbered peoples”, and it defines the legal basis of the *obschina*'s (communal) form of self-government and state guarantees of its implementation. Although this law as a whole is fairly criticized, we will underscore article 4 which states that “decisions on the issues of internal organization of small-numbered peoples' *obschinas* and relations between their members can be made on the basis of small-numbered peoples' traditions and customs, if the latter do not contradict federal legislation and the legislation of federal subjects and beneficial interests of other ethnic groups and citizens”. It is in the framework of self-government that many urgent issues connected with the distinct life style of indigenous peoples can be settled. *Obschinas*' experience can serve as a starting point for work on the establishment of customary law principles.

Developing Advocacy for Indigenous Claims

The indigenous peoples of the North have gained rich experience in carrying on dialogue with the world in which they live. This experience includes interrelations with nature and in society, in the natural and the supernatural worlds. The rules of this behavior are taught in childhood, in the family, and are used further as a 'matrix' for their life. The interrelations traditionally established in the sphere of nature management by the indigenous peoples of the North are characterized by the notions of measure, prohibition and reciprocity. They underlie traditional nature management as a special kind of economic activity in the modern world, and they are promoted by aboriginals as remedies for a partnership with other people, nations and organizations.

This legal order is reflected in mythology, folklore and customary norms, as well as in self-identification in the modern context, as for instance in the case where in the course of 'experimental field research', games are played at seminars on legal education. However, this field should not be seen as a game, for only the conditions of cultural reproduction are artificial, while the essence of culture remains unchanged.

The arguments provided by aboriginals when protecting their rights in the games of *Lawsuit* and *Negotiations* seem interesting. Such games are conducted at legal education seminars for representatives of indigenous peoples. In these games

students use previously obtained legal knowledge to play, according to a preliminary plot, in various situations.

For instance, in the game *Lawsuit on Reversal of the Administration's Judgment on the Allotment of a Hunting Ground to a Commercial Enterprise* where a territory was claimed by a *rodovoe khozyaystvo* (patrimonial household) the 'claimants' and a specialist ethnographer provided the following arguments. First, they noted that their position was supported by article 49 of the federal law *On The Animal World*, which granted priority use of the animal world, meaning "providing privileges in the choice of hunting grounds..."

Moreover, their argumentation 'in court' was grounded on the norms of customary law which distinguished the management of nature from activities in commercial enterprises. The claimants in this case explained that if they were allotted this territory they would not inflict harm on nature for they observed a moderate measure in the use of natural resources. Their arguments were based on the following points:

- Their economy was complex in its essence, and the use of all animal and plant resources allowed for 'not taking too much from nature'.
- They used resources on an all-year basis.
- A semi-sedentary life style determined a highly extensive exploitation of territories and marine areas while diminishing the pressure on nature.
- There were traditional temporal restrictions on the use of certain resources, for instance, on fishing during the spawning period or fishing in some rivers, lakes, etc.

Certainly, it should be noted that such games reflect 'an ideal legal order'. In practice, both officially enforced laws and legal customs are often broken. Nevertheless, what is important is that students in their claims attempted to formulate general rules for keeping a traditional economy based on custom.

At one of the summer schools in legal anthropology a game *Negotiations between an Oil Company and the Obschina of Indigenous Small-Numbered Peoples of the North* was held. Negotiations are, indeed, one of the most important methods of preventing or settling conflicts. For aboriginals this form of relationship is more advantageous, since it takes less time than a court trial and is partly or completely free of charge. Psychologically, negotiations are also preferable because they correspond more closely to the traditions of the indigenous peoples of the North.

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The advantages of this method are that during the game the students live out a real situation under the supervision and with the help of instructors, and, then, having success in an experimental situation, will feel more confident in real life. In the game the students were to argue in support of the land claims of the *obschina*, referring both to legislation and to legal customs, and to demonstrate the meaning of 'obchina land' ('inhabited space') to them, the definition with corroboration of the legal status of sacral lands, and the definition of heirship in customary law.

Conclusion

A project drawing on 'the principles of customary law' should be based on the study, interpretation and formulation in legal terms of characteristics of aboriginal culture. Its implementation will be possible only through the collaborative efforts of scientists (anthropologists and legal scholars) and aboriginals themselves, and will take quite a lot of time. On the completion of its academic part it can be provided to legislative bodies. Although the work is responsible and complex, it should be an integral part of the enforcement of the legislation on 'customs and traditions' to overcome many serious obstacles. Success of the project will be dependant on and determined by not only the professionalism of its participants, but also the development of the legislation.

The formulation of the general principles of the customary law of indigenous peoples of the North can become part of new policy towards these peoples, when their special status will be declared as based on international, national and customary law. This will help them to strike the 'right' chord in their relations with the contemporary world surrounding them.

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