

INDIGENOUS RIGHTS AND CUSTOMARY LAW DISCOURSE COMPARING THE NISGA´A AND THE SÁMI ¹

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Introduction

In Canada and Norway we are witnessing commensurable processes of social-structural change which to a large extent are directed towards improving, on a broad scale, the conditions for indigenous peoples within these nation states. Clarification of rights and the establishment of cultural and political autonomy, based on formal recognition, form the main content of such improvements. In Norway the Sámi have been subject to a comprehensive inquiry on rights carried out by the Sámi Rights Commission, appointed by the Norwegian government in 1980. This Commission, which at present is only half way through its task, an investigation of the northernmost part of Norway (Finnmark), has delivered five substantial reports (NOU 1984, 1993, 1994, 1997a, 1997b; these amount to 2,490 pages in all), including proposals for new legislation. The last published report appeared early in 1997, and deals with Sámi rights to land and water. A report connected to the Sámi Rights Process, but independent of the official Sámi Rights

¹ Fieldwork on which this paper is partially based (among the Nisga´a) was carried out in autumn 2000 financially supported by a Faculty Research Award (Canada) and the University of Oslo, for which I am most grateful. Archival research in Ottawa in 1999 and the generous assistance I received from DIAND should also be mentioned. To members of the Nisga´a Nation, and lawyers on different sides taking part in the negotiations, who all generously gave of their time, I extend my cordial thanks. Finally, I wish to recognize useful comments on an earlier version by Professor Julie Cruikshank, Dr Richard Daly and Dr Gro Ween. Responsibility for any conclusions drawn, however, is exclusively my own.

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Commission, was published more recently, adding 692 pages to the bulk of documents produced so far (NOU 2001).

In Canada the Royal Commission on Aboriginal Peoples had an inquiry on a similarly broad scale, concerning conditions related to First Nations. Its final reports, five volumes consisting of 4,000 pages, were completed in 1996 (RCAP 1996). Preceding this inquiry, a process referred to as Comprehensive Land Claims Negotiations has been going on since the 1970s. The Nisga´a case in northern British Columbia is one of the first cases.

Thus there are parallels in time, scope and objective which call for comparative analysis based on the perspective of anthropology.² To make such research feasible, however, it is necessary to focus on one particular issue, not to try to cover the entire processes. Aboriginal customary law, or customary rights, is a significant element both in legal and cultural terms when it comes to attaining and establishing legitimacy for stated claims. Such claims have to do with both legal rights, such as rights to land and water, and political rights, namely, rights to self-determination and self-rule. By focusing on customary law discourse, the duality between tradition and modernity, and how it is managed, may, moreover, be uncovered. This focus is required by the continual dialectic between tradition, a concept covering traditional knowledge and customs, and modern life conditions. It is not tradition *per se*, but carefully selected parts of tradition which are deemed appropriate to be employed in adapting to a modern way of life. These sections of tradition are constantly subject to revival and reinvention by indigenous people themselves. In this way they represent part of modernity, as they are new if viewed in the way in which they are used today. My intention is not to distinguish firmly between this pair of concepts, but I believe that to focus on indigenous customary law discourse may contribute to unfolding and explaining the dynamic force of customs and traditions.

² Information substantiating the argument derives partially from fieldwork carried out in Nass Valley, British Columbia, and in Finnmark, Norway; and in part from certain documentary sources relevant for the two specific cases analysed. Fieldwork consisted of extensive contacts and interviews with various actors, including both indigenous people and representatives of authorities of the dominant societies, conducted locally and in more central settings. In addition participant observation was conducted in diverse political and ceremonial fora. My role in the Sámi case was quite explicit in this respect as I was head of the steering committee of a particular research project focusing on Sámi customary law.

In relation to the Norwegian case a research project has recently been initiated dealing exclusively with the theme "Sámi customs/Sámi legal perceptions". This interdisciplinary project is closely attached to, although independent of, the ongoing work of the Sámi Rights Commission. It started in 1996 as a supplement to the Commission at the request of the Sámi Parliament and has so far covered the region of Finnmark. In May 2000 nine separate reports, in addition to a substantial introduction, were delivered. These reports have been published as a separate volume of the Sámi Rights Commission (NOU 2001: 34), the essence of the result of the research will, furthermore, be incorporated in the preparation of the Government Bill to be introduced to the Norwegian Parliament in 2002. (For further information see Svensson, 1999.)

In this paper I identify and uncover to what extent customs and legal perceptions among First Nations in Canada correspond, or contrast, to the findings we have obtained among the Sámi. In this way possible generalizations could be developed with a theoretical objective in mind in relation to indigenous, or Fourth World, peoples. Key terms in this research are custom, legitimacy and legal pluralism. It is not customary law as such we have in mind, but in particular those parts of customary law which refer to land, including the idea of land in material as well as spiritual terms. This is crucial as land is intimately connected to identity, defined by cultural criteria and collectively expressed

In addition to contemporary processes of change simultaneously occurring in the two nations states, it should be mentioned that there is a historical correspondence which coincides in time. The first recognitions by state authorities of aboriginal customs and rights were the Sámi Codicil (Lappecodicillen), 1751, referring to the Sámi in Scandinavia, and the Royal Proclamation, 1763, dealing with First Nations, or aboriginal peoples, in Canada. Comparison of the situations in Norway and Canada is thereby motivated both historically and by what is presently taking place.³

³ The Sámi Codicil is an addition to a frontier treaty between Denmark-Norway and Sweden in 1751. Based on customary rights and practices of land use since time immemorial this codicil confirms for the first time the existence and continuation of specific Sámi rights. For further information as to specific paragraphs regarding this document, see Svensson 1997: 208-11, Appendix.

In a similar way the Royal Proclamation of 1763 is the first official document issued by the dominant society, in this case Britain, recognizing fundamental rights of aboriginal peoples in Canada. However, the document asserts British jurisdiction and sovereignty, at the same time as it states protection of aboriginal territory as existing possessions. Despite their ambiguous workings, statements in

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The indigenous peoples under study are engaged in a process of transformation, the ultimate aim of which may be called nation-building. The term 'nation' refers to a distinct people, a collective defined and recognized as different based on ethnic criteria. In no way should 'nation' be confused with the term 'nation state', which is something totally different. In this process, however, self-government, or increased cultural-political autonomy, is a relevant component. The processes in both Canada and Norway aim at a reconciliation between the two parties involved, the nation state authorities on the one hand and the indigenous, or First Nations, peoples on the other.

There are no decisive differences between Canada and Norway in this respect. From my point of view it is the role that customs and peoples' own legal perceptions may play, and the extent to which these may be reactivated to cope with new challenges facing the future, which are open to systematic comparison. Both in Canada and Norway indigenous people also make frequent references to international law and its recent development, expressed in particular through ILO Convention 169 and the Draft Declaration of the UN Working Group on Aboriginal Peoples.

When studying customs to reveal what, more precisely, constitutes customary law, it is necessary to look at what role elders play as transmitters and keepers of valuable knowledge derived from tradition. Customs are the very foundation of law, and all peoples do have customs which to a larger or lesser degree regulate social life and practices. Eventually this set of customs evolves into customary law, or customary law rights (cf. Woodman 1999), which are culture-specific in nature. The specific content of a nation's, that is, a people's customary law reflects its cultural uniqueness, a culture difference which is retained as long as it conveys meaning. Customs as law generating, on the other hand, are characteristic phenomena of all cultures.

What is needed at present, therefore, is a more definitive recognition of diversity. If cultural diversity is acknowledged then legal diversity, or legal pluralism, ought to be recognized as well. My primary thesis for this inquiry is that customary law is part of culture, not just a matter of jurisprudence. The question remains, to what extent has customary law discourse been a topical feature in the continuous process regarding indigenous rights in both Canada and Norway.

principle are still valid. Consequently the two documents are frequently referred to in contemporary political and legal articulation. (For a recent consideration of the Royal Proclamation, see Asch 1997.)

In my view there is a clear connection between comprehensive indigenous rights, i.e. legal rights as well as political rights, and customs or traditional knowledge and practice. Reactivating customs and making them an ethnopolitical force, should not be conceived as cultural conservatism. The knowledge and practice of customs are indispensable for indigenous peoples in coping with new challenges to remain culturally distinct at the same time as gathering enough strength to carry on a successful life within the framework of the dominant society. This is part of the ultimate question of cultural survival. Furthermore, to be strong in one's traditions reflects power.

Given the situation introduced, what can anthropology contribute which is different to other relevant approaches? Without question customs are culturally defined features. They relate to (a) systems of ideas and traditional knowledge, and (b) practice, often socially exercised. Customs represent that part of culture which has a clear bearing on legal orders or regimes of proper conduct in society. Rules for resource utilization are also based on customs, a guideline for conduct people generally agree upon. This points to the law-generating aspect of customs.

Customary law, then, is the original and most distinctive set of rules and is, consequently, one of the most effective ethnic markers in cross-cultural legal contexts. This is an undeniable fact in anthropology, but since in the main customary law is orally sustained and transmitted it has experienced severe difficulty in gaining acceptance in legal contests in court, where the state law and normal legal procedure of the majority society prevail.

One should remember, however, that customary law is a legal concept, and as such it is part of state law and readily recognized when it comes from the majority population. The problem arises when indigenous people advancing their basic claims, especially to land rights, title to land, rights to self-determination, and other firm cultural rights, frequently point to their customary rights, which have never been extinguished. The power of evidence of such customary rights is not infrequently denied by the courts for the mere reason that they are not written. Oral history has little value as legal proof, even if it can be shown to be significant in maintaining cultural distinctiveness and in making a nation, regardless of how small in number, quite viable culturally speaking.

Customary rights discourse, therefore, achieves two ends. First, it offers legitimate strength in the attempt to establish a state of legal pluralism, where state law and indigenous customary law can both play a role in reaching court decisions, as a new acknowledged practice. Second, it maintains and develops a significant body of knowledge.

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In recent years studies focusing on indigenous rights issues have shown a noticeable increase among legal anthropologists. In-depth analysis, critically scrutinizing court procedures as well as court decisions, represents one field of inquiry (e.g. Culhane 1998; Asch 1997; Cassidy 1992; Svensson 1997, merely to mention some of the most topical ones) another equally important field focuses on processes of negotiations and parliamentary inquiries. In terms of theory-building this branch of anthropology and the development it has recently undergone represent a new phase in the progress of legal anthropology. A study emphasizing customary law discourse addresses itself primarily to this sub-disciplinary orientation.

In the following I will give ethnographic accounts of customary law discourse derived from two different kinds of processes, although each is equally important for the indigenous peoples concerned. The first case discusses a process of change in relation to a Parliamentary Inquiry (the Sámi), whereas the second case uses Land Claims Negotiations as the point of departure (the Nisga´a). Differences and possible similarities as to form and content of the customary rights discourse will be elucidated.

Among the many aboriginal peoples who are particularly active ethno-politically, it is appropriate to consider the Nisga´a and the Sámi as being very much in the frontline; their achievements up till now are quite remarkable. Their untiring activity for decades, gradually acquiring certain gains which have strengthened their position, gives sufficient motivation for choosing them as my cases in point. In my view the two cases, having continued for such long periods of time, have enough informative power to substantiate empirically the general occurrence of customary law discourse.

The Sámi Case

The Sámi case can be described as a three-step process: phase I being a stage of confrontation, phase II involving with a parliamentary inquiry, and phase III concentrating on research. All phases shed light on the themes of customary law discourse.

For years the Sámi in Norway have been involved in a political process of change, the ultimate aim of which has to do with the explicit clarification of Sámi power in terms of legal rights as well as political rights. Since 1980 we can observe a process towards consolidation and acknowledgement of non-state normative orders referring to land rights. Customary rights are about to be recognized. At least we

can observe an openness on the part of the dominant society to considering Sámi customs and legal perceptions as relevant factors in defining Sámi rights.

Phase I. Confrontation

The initiation of a customary rights discourse among the Sámi goes back to the period 1979-80. At that time a hydro-power development, the Alta case, generated a number of reactions among the Sámi. The Sámi decided immediately and rather spontaneously that the limit had been reached to encroachments on their land which they could tolerate. Consequently they objected firmly to any kind of proposed development in the Alta River. To make their voices heard they used various types of demonstrations. 'Chain gangs' tried to stop road constructions in the area for development. They staged hunger strikes in Oslo, the capital of Norway. They also went to court to have their rights, based on the specific confrontation, tested.

The legal case ended in the Norwegian Supreme Court with the conclusion that the Sámi were unable to prevent construction of the dam. On the other hand, on a matter of principle, the court made a firm statement recognizing that preconditions of international law could be relevant, and could even overrule state law, if a case of exploitation were huge enough to threaten interests vital to the local Sámi culture (HR 1982). This legal breakthrough was considered a half-way victory for the Sámi.

The protest actions in sum eventually led to negotiations with the state authorities. The Norwegian government met representatives of the two leading Sámi organizations at the time, the Norwegian Sámi Association (NSR), and the Norwegian Reindeer Pastoralist Association (NRL). The negotiations resulted in a Sámi Rights Commission appointed by the government's Ministry of Justice, which was to investigate in depth all relevant aspects of the predominant issue of Sámi rights. (NOU 1984: 18) The terms of reference pointed to such pertinent questions as: what historical rights could the Sámi as people refer to? to what degree would Sámi customary rights play a role in defining present Sámi rights? and what relevance did international law have? Agreeing to the Sámi demands concerning the mandate for this comprehensive inquiry, the government sought to compensate for the grievances the Sámi felt from suffering a defeat in the concrete Alta case.

Never before had Sámi customs and their own legal perceptions been articulated so explicitly. It was possible to record them in diverse informal manifestations as

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well as in court and formal negotiations. Obviously, knowledge and insight about Sámi customs, and knowledge of the extent to which they regulated the conditions of everyday life had always been there. It was the growing awareness that this body of knowledge, anchored in traditions, could be used strategically in cases of confrontations which was rather new. This actualisation of the customary rights discourse facilitates mobilization for a cause and emphasizes legitimate strength.

We can conclude phase I, then, by asserting that the Sámi lost an interethnic confrontation dealing with a case of industrial development. Their innovative and combined strategy of action, however, led to a political gain. For the first time they reached a stage of negotiation; their pressure brought about a Sámi rights inquiry with a scope much broader than ever before and with a mandate very much in accordance with the Sámi political program adopted earlier at the XIth Nordic Sámi Conference, Tromsø June 16-19, 1980 (reprinted Ruong 1982: 262-266). The first stage of implementing such a program had now been realized.

Phase II. Parliamentary inquiry

The Sámi Rights Commission began its investigation in 1980, and to date it has produced five substantial reports, presenting proposals for crucial changes to be enacted through legislation. The first report was delivered in 1984. It dealt with a reorganization of the political structure of the Sámi, including a clarification of their legal status. This restructuring of the general legal foundation of the Sámi consisted of (1) a Sámi Act, (2) a Constitutional Amendment, and (3) a nationwide assembly of Sámi, an elected representative body named the Sámi Parliament, *Sámi Dikki* (NOU 1984: 18). A Sámi Language Act was later in 1990 added to this structural transformation. By this Sámi is acknowledged to be an official language, equal to Norwegian, to be used in all circles of life in core areas of Sámi habitation. The statement of intent and purpose of the Sámi Act concludes: "It is the duty of Norway as a state to facilitate and see to it that the Sámi as a people will be able to secure and develop their own culture". This statement in principle was added to the Norwegian Constitution as § 110a, which means that the rights in question are constitutionally protected. As far as Sámi politics is concerned this, no doubt, represents a decisive landmark.

As a political body the Sámi Parliament is restricted to advisory functions unless a clearly defined power base is attached to it. The very core of such a power base relates to law, since Sámi rights must be identified, recognized and eventually codified as an undeniable legal fact. The continuation of the Sámi Rights Commission focuses especially on this issue, primarily related to conditions in Finnmark County in northernmost Norway and, secondarily, to the rest of Sápmi

south of Finnmark. Early in 1997 the Finnmark part was completed with two reports, one dealing with the material basis for the maintenance of the Sámi culture in Finnmark, namely, Sámi rights to land and water (NOU 1997a), and one based on recent developments in international law, emphasizing its significance for and relevance to the land rights issue (NOU 1997b). Prior to the completion of the first stage of this extensive process of change two other reports were prepared by specially assigned experts, representing the academic disciplines of law and history (NOU 1993: 34, 1994: 21). They provided the necessary groundwork and background material for the Commission's own argumentation and proposals (NOU 1997a.).

The legal aspect of change constitutes the most important part of the work of the Sámi Rights Commission. All ethnopolitical articulation and actions in modern time point to the question of rights. The strategy is legal as to form and content, but its goal is primarily political. It comes as no surprise, then, that the greatest expectations of the Sámi relate to the part of the inquiry focusing on rights. The extensive report of 650 pages (NOU 1997a) examines, in great detail various modes of production considered to be Sámi, and what system of rights, consonant with international law covenants as well as rights related to Sámi history, is required to secure an adequate and equitable management regime for environmental resources in the entire Finnmark County.

What has been said so far points to the Sámi struggle toward empowerment, or the process of acquiring more influence in and control over their own affairs. The question of rights is crucial and must be both clarified and specified. Any devolution of power to the advantage of the Sámi, between the Norwegian dominant society and the Sámi minority depends on an increased precision regarding relevant legal properties, thereby eliminating existing ambiguities. Rights to the material basis for maintaining Sámi culture, that is, firm rights to land and water, have long been the ultimate issue, not only in legal terms but also and mainly politically. Without such a legal foundation political actions lack enough strength and are most often reduced to empty phraseology.

In the hearing process regarding the last report (NOU 1997a), the Sámi Parliament made special reference to the inquiry on international law (NOU 1997b) and the research project on Sámi customary law (to be discussed later on), both of which add extra legitimacy and weight to its hearing statement. In this way the Parliament points to the necessity of a holistic perspective, in contrast to an excessive particularism when Sámi matters are to be resolved, so that their aboriginal rights based on culture difference are specified. In their statement the Sámi stress that their property rights, as well as rights of use, have existed since

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time immemorial and continue to do so irrespective of recognition from formal Norwegian sources of law.

Thus for example Sámi reindeer pasture rights are part of Sámi customary rights. Consequently they are inextinguishable. The issue of land management in Sámi core areas of habitation must be viewed as a connection between customary rights and land rights. The Sámi made their point very clear: rights built on Sámi custom must not be neglected or reduced by means of administrative procedure (Sámi Parliament 1999, in reference to NOU 1997a). Custom and use are considered key concepts in the ongoing struggle toward the establishment of Sámi customary rights as a legitimate factor, an undeniable legal fact which makes it possible for the Sámi to compete with other interested parties with relative equity.

In the customary law discourse the Sámi frequently refer to the Sámi Codicil of 1751 (*Lappe kodicillen*) as the first example of formal recognition and codification of Sámi rights based explicitly on ancient custom. The need to return to this document and reactualize it is underscored by the fact that the rights stated in 1751 are still not acknowledged or affirmed in precise terms in state law or legal practice. Sámi historical rights, customs, legal perceptions, and system of rights have not played any decisive role in the state's exercise of power in the enactment of legislation particularly designed for the Sámi. In the opinion of the Sámi Parliament this negligence can also be considered a violation of human rights principles. The Hearing Statement ends by laying further emphasis on the aspect of customary rights: "The Sámi Parliament will focus especially on Sámi customs and legal perceptions in its further work concerning Sámi rights" (Sámi Parliament 1999). Apparently the issue of customary rights has been defined by the Sámi as highly significant and placed on their agenda for years to come. It is, moreover, believed that only by thorough research to elucidate Sámi customary law will Sámi rights in general be substantiated in an appropriate manner. This leads us to phase III of the Sámi case, the research project focusing on Sámi customary law.

Phase III. Research on Sámi customary law

In its terms of reference the Sámi Rights Commission was to investigate Sámi customs and Sámi legal perceptions to find out to what extent these might have an impact on the process of creating new legislation in relation to Sámi rights in general (NOU 1984: 18). The Sámi Rights Commission failed to comply with the mandate on this crucial point. The issue was regarded as too complicated, as it announced in 1993 (NOU 1993: 34). As a result the Sámi Parliament demanded that a new research project, focusing exclusively on Sámi customs and Sámi legal

perceptions, should be carried out independently of the commission.⁴ The difference between Norwegian state law and Sámi customary law, a distinction considered significant in strengthening Sámi cultural uniqueness, should thereby be established. The appointment of the steering committee for this research with strong Sámi representation, three members each being appointed by the Sámi Parliament and the Ministry of Justice, was another achievement which moved a frontier concerning Sámi influence both symbolically and in real terms. Some years after the appointment in 1996, this composition has become a feature frequently referred to in Sámi political articulations as a unique, but most commendable, example of Sámi equivalency.

Before research could begin it was necessary for the steering committee to prepare a specific research program to be approved by the two authorities, the Ministry of Justice and the Sámi Parliament. Already at this stage a customary rights discourse received emphasis in various Sámi political arenas and had, as well, a noticeable impact on Sámi media.

A characteristic of the research program has been the equal emphasis laid on legal studies and socio-cultural studies. Such an interdisciplinary approach was considered necessary in order to attain a fairly complete body of knowledge related to the topic in question. There was full agreement both in the steering committee and in the Sámi Parliament that beyond any doubt the perspective of culture should have weight equal to that of law.

In the mandate for the project there was a focus on rights related to modes of production, and the means of livelihood, based on customs. An objective of the research was to expose the existence of custom perceived as established practice and, moreover, to investigate how such custom varied in the region under study. For this reason intensive studies of local custom, based on a limited number of cases showing sufficient diversity in terms of ecological adaptation and specific life styles were advocated. Through this research we can already state on the basis of empirical documentation there exists a vast amount of private practice and customary law in the Sámi areas. Internal regulation of reindeer pastoralism based on custom has also been recorded. For example, the right to herd reindeer is an inherent right, *hevdvunnen rett*, based on rights of immemorial prescription,

⁴ Correspondence between the Ministry of Justice and the Sámi Parliament (1995) in response to Sámi demands concerning the failure of the Sámi Rights Commission to follow its mandate from 1980 in all parts, including that on customary rights. The mandate in its entirety is reproduced in the Commission's first report (NOU 1984: 42-45).

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alders tids bruk, a right anchored in customary law. Affirmation of this legal condition serves as evidence of living traditional knowledge among the Sámi. Its legal implication is that there is an unequivocal distinction between rights emanating from Norwegian legislation (the Reindeer Herding Law [*Lov om reindrif*] 1978) and rights based on ancient custom, i.e. a constituent part of Sámi indigenous rights (NOU 2001).

In the findings we can also point to court records from the 1600s and 1700s which show that it was quite common for state law to take Sámi customary law into consideration in the rulings of the district courts (NOU 2001). It is further confirmed equally strong rights based on custom could be proved to exist in many areas for coastal Sámi regarding fishing, and inland Sámi regarding reindeer herding. How conditions changed to the worse is also reflected in the historical research which has been conducted. In the later half of the 19th century Sámi customary law was gradually undermined by various measures initiated by Norwegian state authorities. This decline in the attention paid to Sámi customary rights and their recognition by state authorities is partly a result of the growing nation-building process in Norway during the same period. The historical research represents an important contribution, uncovering how Sámi customary law, and the respect and acknowledgement it formerly enjoyed, was reduced to little more than a legal curiosity in state law decision making. The legal history of Sámi reindeer pastoralism 1852-1960, a period when reindeer pastoralism was gradually deprived of its autonomy, is another most significant outcome of the research.

Sámi terminology on normative orders of conduct and rights of use, and regimes of commonage codifying customary use are other findings which this research has brought forth. Traditional knowledge is far richer and more manifold than expected, and its codification corrects a commonly held misconception that the Sámi have lost much of their traditions through their adaptation to modernity. Respect for and knowledge of each others' fishing grounds, hunting areas, trapping lines, reindeer pasture, and gathering places are all based on custom, and it is this system of customary rights which defines a specific land area and indicates to whom it belongs. The need for definite boundaries recorded on paper in official documents and fencing around each piece of land used, which are standard legal orders of the dominant society, stand in blurring contrast to land demarcations based solely on traditional knowledge and custom, which are still a common conception asserted by the Sámi.⁵

⁵ The project consisted of the following case studies, contained in NOU (2001): Kristensen, 'Sámi customary law and legal perceptions as shown in court records from Finnmark 1620-1779'; I. Nicholaisen, 'Sámi customs and legal perceptions.

In conclusion, for the first time a research project has generated new insight and systematized that which was already known into a new body of legal knowledge primarily based on custom. The implications of this are unforeseeable. Through a customary rights discourse the Sámi have decided that knowledge of their customs and traditions is politically crucial. This knowledge once regained through the process described must be retained and has to be continually practised. The question is how? This case illustrates a process of reactivating, from diverse sources, customary legal perceptions which are Sámi-specific. The importance of their own customary legal perceptions is fully understood by the Sámi. On the other hand, sufficient knowledge and active practice of the same customary legal perceptions are not present. The Sámi have recognized the need for increased insight into their customary law, and its power of legitimacy has been acknowledged; consequently, research focusing on this theme is essential from both a political and a cultural point of view. And this research will continue to nourish and encourage a continuing customary law discourse among the Sámi. The power of evidence of Sámi customary law, for example in courts, is still questioned. Consequently such discourse has evolved into a virtual political and cultural necessity (NOU 2001; also New Year speech on TV by Sven Roar Nystø, President of the Sámi Parliament, January 1, 2002).

The Nisga´a Case

We are not opposed to the coming of the white people into our territory, provided this be carried out justly and in accordance with the British principles embodied in the Royal Proclamation. (1913 Petition, reproduced in Nisga´a Nation 1999)

a review of the 1987-1997 archives of the Legal Aid Agency of Inner Finnmark' K. Strøm Bull, 'The legal history of reindeer herding in Finnmark county'; N. Oskal and M.N. Sara, 'Customs and legal perceptions regarding land of the reindeer herding Sámi'; S. Pedersen, 'From use of natural resources based on Sámi customs to prohibition of purchase of land for non-Norwegian speaking people'; E. Helander, 'Sámi rights and legal perceptions in Tana, Deanodat'; B. Berg, 'Sámi customs and legal perceptions in Gearretnjarga'; S.G. Hagen, 'Pasturing in state-owned land in Finnmark'; P.T. Ørebech, 'The Sámi customary rights of fishing, the coastal Sámi in Finnmark'. (Short conference version: Svensson, ed., 1999.)

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When the Nisga´a Final Agreement was completed in 1998, the untiring struggle towards that end was summed up in the telling phrase: "Our canoe has landed" (Chief Jo Gosnell). The Nisga´a have always been a people living close to water, on the northern coast of British Columbia (BC) and along the Nass River. The characteristic dugout canoe has for ages been the basic means of transportation. In this phrase the Nisga´a imply that they have completed their longest voyage ever, that is, the political struggle for recognition of their aboriginal title and of their right to self-determination, an endeavour that began as early as 1887. For convenience this can readily be divided into three separate but related phases, phase I having to do with confrontation in terms of litigation, phase II taking the issue a bit further in an extensive process of negotiation, primarily focusing on land claims, and finally phase III dealing with the Treaty emanating from the negotiations and its implementation.

Phase I. Confrontation

The Nisga´a, although small in number (about 6,000), have very long been in the front line of political activity, aiming at clearly defined goals. Authorities in Victoria, Ottawa and London have all experienced demands repeatedly advanced by Nisga´a representatives. Therefore, it came as no surprise that the Nisga´a quite early decided to use the white man´s court system to have their legal status generally clarified and affirmed. The Nisga´a Tribal Council, founded in 1955, decided on this strategy and prepared for a law suit which was filed in 1967. In reactivating the land claims issue in modern times the Nisga´a under the leadership of Chief Frank Calder decided to unite forces. Thereby the four clans - wolf, raven, eagle, and killerwhale - as well as the four local communities in Nass Valley, where they traditionally reside, formed one ethníe.⁶

The Nisga´a Tribal Council was in part an innovative organization, but it was also a continuation of the former land committee dating from 1890. Its main objective was to work towards resolving the Nisga´a land claim (Tennant 1990), a major step in Nisga´a political development. In other words, the position based on custom and tradition was assumed by the Nisga´a more than one hundred years ago, that "the Nisga´a Nation has tribal ownership over the entire watershed of the Nass/Lisims" (Nisga´a Nation 1999: 51-70).

⁶ Among the Nisga´a each clan is divided into houses, *wilps*, which hold rights to songs, dances, names and territories, all deriving from and regulated by *Ayuukhl Nisga´a*, their customary law (Duff 1997).

Between 1969 and 1973 the *Calder* case, named after Frank Calder, was tried in the two courts of first instance and appeal in BC and finally heard in the Canadian Supreme Court. The Supreme Court verdict in 1973 was in many ways a landmark decision; it is, furthermore, considered to be a moral victory, mainly for the Nisga´a but also for First Nations in Canada at large.

The issue to be tested was Nisga´a aboriginal title and the claim that it had never been lawfully extinguished. The contest concentrated on the question of land rights, and the legal argumentation dealt very much with the concept of ownership. In other words, aboriginal title could only be recognized and confirmed if the Nisga´a were able to demonstrate ownership according to common law property rights. That which emerged from the trial was a marked differentiation between Canadian common law and its view on private property and the Nisga´a law regarding property, including land, to be held commonly by a tribe or clan.

Customary use of environmental resources, in addition to ideas and knowledge of land ownership and territorial rights based on custom, were clearly spelled out in court. The manner in which land and water were collectively owned and respected among clans and different *wilps* (houses) within each clan also appeared as an indication of Nisga´a traditional legal perceptions regarding land ownership.

By going to court on such matters of principle, the Nisga´a had entered on a process of transformation in which a customary law discourse emerged as a vital and most appropriate element. Another consequence of the legal action was that it reinforced unity among the Nisga´a, initiated by the Nisga´a Tribal Council. The unity of the four clans became even more effective as a result of this confrontation. For the first time the Nisga´a acted as one nation.

In addition to their reference to oral traditions and customs, the Nisga´a produced historical evidence deemed acceptable to a common law court. Noteworthy are the extensive references made to the Royal Proclamation of 1763 in support of the Nisga´a cause. For example it was stated that "the Nisga´a can claim right to possess, use, and occupy their tribal territory by virtue of the Royal Proclamation".

Their development of an argument heavily built on custom engendered a Supreme Court conclusion which certainly was a novelty at the time; "Nisga´a had concepts of ownership indigenous to their culture and capable of articulation under the common law" (*Calder*). This is nothing less than an acknowledgement of Nisga´a cultural distinctiveness and of the legal strength in modern terms of their

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customary law. The gain from the trial can, moreover, be specified as an acceptance by the Supreme Court that the Nisga´a had always used and occupied the territory they claimed to be theirs. It is interesting to note that anthropological evidence apparently played a role in terms of substantiating legal arguments used to convince the court, in addition to oral evidence presented by several Nisga´a. Based on his extensive research in the region, the expert witness, Professor Wilson Duff, made a remarkable contribution by confirming that the Nisga´a had their own legal conceptions related to tribal ownership to land and water. He also stated that territorial boundaries between tribes within the Nisga´a nation were well defined and recognized by the people themselves. The use of knowledgeable anthropologists in support of legal argumentation developed as a new strategy among indigenous people in the 1970s, when it became common to turn to the courts of the majority society. It was mainly the attempt to emphasize the cultural aspect of law, thereby adding a new and highly relevant dimension to legal decision making, which called for this mobilization of special non-legal expertise. Beside the Nisga´a case, attention can be drawn to the use of such expertise by the James Bay Cree in Quebec and the Sámi in Sweden, all having significant verdicts emerging in 1973, and also the Alta Case in Norway 1982. (HR 1982; for further discussion see Svensson 1997)

The outcome of the *Calder* case broke new ground and showed unexpected strength. It placed the issue of aboriginal rights on the political agenda as never before. A dramatic change in federal policy vis-à-vis indigenous people could also be noticed. Soon after the Nisga´a case it was decided that native land claims negotiations were to occur throughout Canada with the verdict in *Calder* as a basis. This leads us to phase II of the Nisga´a account.

Phase II. Land claims negotiations

The impact of the Supreme Court Decision in *Calder* in 1973 was considerable, for it triggered a change in federal policy vis-à-vis aboriginal people in Canada. Prime Minister Pierre Trudeau abandoned the assimilationist policy which had been earlier endorsed and, influenced by the Nisga´a verdict, initiated a new policy emphasizing land claims settlement regarding all non-treaty Indians. The Nisga´a were one of the first nations to enter negotiation in 1976 (Tennant 1990: 172). One year previously in 1975 the Nisga´a had produced the Nisga´a Declaration, advocating extra rights because of their ancestry, a program connected to the idea of 'citizens plus', a term originally introduced by Hawthorn (1967; see also: Raunet 1996; and Cairns, 2000, exploring the concept in great depth). Hardly could the Nisga´a imagine at that time that the process they were to take part in would be so slow and complicated. It took 22 years to reach a

conclusion - first an Agreement in Principle (1996), then a Final Agreement (1998) - by the three parties involved: the Nisga'a, on the one hand, and the Provincial and Federal Governments on the other. In the following we look more closely at the way in which Nisga'a customary law was part of the process.

As the name indicates the focus was placed on land rights. Based on the Nisga'a aboriginal title, partly confirmed in court as a legal principle, a land claims settlement should be seen as a specification of the substance of the title based on custom. For the Nisga'a it was apparent from the very beginning that land rights and customary law were inseparable, as was Nisga'a identity in relation to Nisga'a land. In the customary law discourse, the Nisga'a referred to their special Nisga'a law, *Ayuukhl Nisga'a*, with its explanatory power. This refers to the ancient code of laws and customs still very much kept alive among the Nisga'a. For customary rights to land and resources are clearly defined through *Ayuukhl*, from one *wilp* to the next. Rights to use and rights of collective ownership are clearly stipulated in this significant body of knowledge, orally sustained and transmitted over time.

As I perceive it, *Ayuukhl Nisga'a*, as a living tradition, offered evidential strength to the Nisga'a cause in two respects: (1) it proved that the Nisga'a represented a culturally viable nation, where cultural difference made sense, and (2) its clear regulation of land use patterns and control undoubtedly made the Nisga'a entitled to certain rights. They were a people who long before contact with the white man had arranged their life based on a set of rules contained in *Ayuukhl*.

In no way was this customary law an item for negotiation. It was made clear from the start that *Ayuukhl Nisga'a* should be kept and remain what it has always been, the proper law of the Nisga'a. In addition it should serve as a guideline for younger generations of Nisga'a. During negotiations it was irrelevant as an issue: "Our traditions were not up for negotiation, but it gave us strength always to have our *Ayuukhl* in mind" (Edmond Wright, Nisga'a Lisims Government).

To make the complicated body of traditional knowledge comprehensible for the other negotiation parties, as it played a part in substantiating land claims, the Nisga'a conducted a Land Use and Occupancy Study, which was about law and the distribution of land based on custom, that is, the ancient history of the Nisga'a, in eight volumes. This study proved how the Nisga'a had used their land and how they had followed their law. In addition to an extensive descriptive text, it ended with a map defining in great detail what were considered Nisga'a lands.

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The map itself, named *Nisga´a Land and Nass Wildlife Area* (Ayuukhl Nisga´a Study 1995), was nothing new but has always been stored in the heads of chiefs and elders. Now it was produced to make claims understandable to non-Nisga´a. Hereby we notice how customary law discourse can have an effect on political processes, as a functional strategy dealing with nation-state authorities.

As the negotiations progressed the Nisga´a also appointed a special *Ayuukhl Nisga´a* Committee, consisting of a group of elders who functioned as an advisory body for the Nisga´a negotiation team during negotiations. In this way a constant flow of traditional knowledge was assured, in the main emanating from *Ayuukhl Nisga´a*. A dominant feature of the *Ayuukhl* is the 'Common Bowl Philosophy', an expressive metaphor for the ideal of sharing. This fundamental conception was presented to the outside world as early as 1890 by the Nisga´a Land Committee, and has recurred in Nisga´a political articulation ever since. It was frequently referred to in the *Calder* case, and was part of the ideology underlying basic claims during the negotiations. For instance, in 1989 the Annual Convention of Nisga´a Tribal Council adopted as a guiding principle in the continuing negotiations the ancient 'Common Bowl Philosophy'. The reason was to emphasize the collective nature of the Nisga´a Land Question together with the ideal of sharing. The metaphor illustrates the notion that the entire Nass Valley should be viewed as a common bowl, the environmental resources within which are to be shared by everyone, *sayuk´ihl wo´osihl Nisga´a*. In underscoring the fundamental values of sharing and coexistence, the Nisga´a argue for continuing equal rights to Nass River resources and the determination of how they should be used, or "sharing our land with Canada" (Chief Jo Gosnell personal communication). In defining Nisga´a land rights this idea, anchored in custom, should be taken into account. Or, as it has been expressed:

Our law tells us what and how much we can harvest. Harvesting agreements in the future will to a large extent be based on our *Ayuukhl*. You should only take from the land what you need, i.e. there is a law of limited harvesting (Rod Robinson, Nisga´a elder).

It has also been pointed out that *Ayuukhl Nisga´a* has always been built on the idea of sustainability. For this reason it is correct to assert that law was never a foreign conception to the Nisga´a. Nisga´a life was always based on and regulated by custom and tradition. And the predominant source for this is the *Ayuukhl*, reactivated in new contexts vital for cultural survival such as legal confrontation and land claims negotiations.

Reference to *Ayuukhl Nisga´a* does not imply an interest in conserving the past. The ultimate aim of the negotiation looked to the future, i.e. to preparedness for an adaptation to modernity without an abandonment of their cultural uniqueness as a people. The advice of the elders was clear on this point: the objective was to develop and survive culturally on Nisga´a premises, which meant being able to cope with the duality of tradition and modernity. This duality is characteristic of the negotiation process and among the Nisga´a very much managed by a customary law discourse.

As was indicated by this lengthy process, Nisga´a cultural viability is founded on (1) recognition of land rights and rights to self-government, and (2) reactivation of crucial cultural elements, values and practices, all reflected in a customary law discourse. What the Nisga´a tried to secure from the negotiation process were the rights to survive as a people and a culture; consequently the question of power was superordinate, because it was only by means of a sufficient power base that the Nisga´a could maintain their title to land; in other words, power and land rights go hand in hand. And cultural survival is completely dependent on to this interdependency. The ongoing negotiations were, moreover, mirrored by this ideological position. Chief James Gosnell, one of the leading negotiators for many years, summed it up in the following manner:

Without the title there can be no negotiation. Without negotiation there cannot be a just settlement of the land question; without a just settlement the Nisga´a people will have absolutely no economic base upon which to survive. (Gosnell and Robinson n.d.)

With these words Gosnell summarized a necessary strategy for action aiming at the future. And, as has been said before, the Nisga´a were very much ahead of their time in their growing awareness of the need for Nisga´a empowerment, i.e. increased political and cultural autonomy. The above expression is congruent with a programmatic statement on aboriginal rights by the Nisga´a Tribal Council in 1982, which specified in clear terms the meaning of aboriginal title (Raunet 1996: 221-222).

It can also be added that the dynamics of the negotiation process were shaped by Nisga´a customs. The negotiation team, for example, was made up of people with hereditary positions following closely the traditional order of rank. The Annual Conventions of the Nisga´a, as well as the Nisga´a Tribal Council and the aforementioned *Ayuukhl Nisga´a* Committee continued to feed the negotiation team with strategic insight and relevant proposals to be taken up in the actual

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negotiations. The constant flow of knowledge back and forth thus gave strength and legitimacy to the negotiation team and the Nisga´a claims which they put forth. The role of the legal councillors was in this respect to translate Nisga´a cultural knowledge and practice, mainly referring to their own laws, *Ayuukhl*, into a legal language intelligible to the parties on the other side of the negotiation table.

Finally, attention should be drawn to the aspect of education. In their explicit strategy to pursue land claims the Nisga´a Tribal Council decided to gain control of Nisga´a education, first on the levels of primary and secondary schools and second on a post-secondary, academic training program. Their own college, *Wilp Wilxo´oskwhl Nisga´a* (WWN, Nisga´a House of Wisdom), in which Nisga´a studies were placed at the centre, was established. Since 1994 WWN has collaborated with the University of Northern BC in Prince George. And the process of building adequate cultural competence is on its way. For instance, by the year 2000 no fewer than 10 degrees in Nisga´a studies have been completed. In this program Nisga´a language and knowledge about Nisga´a oral history and their system of law, *Ayuukhl*, are the most important building blocks. Not infrequently ordinary academic training is combined with a focused Nisga´a studies program, whereby young Nisga´a can acquire enough qualification to meet the demands of complex modern life. In this educational process the capacity of elders is well taken care of; their unique knowledge is indispensable for this program to succeed.

In this process the concept of ownership rights has been crucial. Only by means of collective ownership of their land can the Nisga´a feel that they are secured a sufficient land base on which their future can be built. For long it has been the principal issue to be resolved. At an early stage of the negotiations a Nisga´a Ownership Statement was issued with the explicit claim, "we are the true owners of the land, lock, stock and barrel, and that is what it means". (Chief James Gosnell quoted in Raunet, 1996, referring to Nisga´a Tribal Council n.d.)

Phase III. The Treaty and its implementation

The Royal Proclamation 1763 recognized clearly the rights of First Nations and that treaties should be negotiated. As in so many other instances, Nisga´a territories were taken without negotiating a treaty, which when subsequently negotiated was to confirm continued Nisga´a rights. This, more than anything else, is the background for the current negotiation process. It is a question of recapturing a historic right firmly founded on ancient custom and practice. Resulting from the negotiation discussed we can discern three interconnected

component parts: the Agreement, the Treaty, and the Constitution. We will look at each of these elements, especially in relation to Nisga'a customary law, *Ayuukhl*, and Nisga'a practice of their traditions in the form of feasts and ceremonial life, *Ayuuk*.⁷

Final Agreement

The Nisga'a Final Agreement is the specific product emanating from the negotiation process. Through ratification by the three parties involved, the Nisga'a Nation, Canada and British Columbia, it is formalized into a Treaty. The Preamble is not part of the actual Agreement, but the Nisga'a insisted that it should be included in the document because of its significant linkage to Nisga'a traditions. In this brief statement cultural distinctiveness is most evidently articulated.

The preamble sets the path for the Agreement. It consists of 11 'whereas' propositions. A few quotations may serve as illustration. It begins with two universal assertions:

WHEREAS the Nisga'a Nation has lived in the Nass Area since time immemorial;

WHEREAS the Nisga'a Nation is an aboriginal people of Canada.

Further down the text comes a third:

WHEREAS the Parties acknowledge the ongoing importance of the Nisga'a Nation of the *Simgigat* [chiefs] and *Sigidimhaanak* [matriarchs] continuing to tell their *Adaawak* [oral history] relating to their *Ango'oskw* [family hunting, fishing, and gathering territories] in accordance with the *Ayuuk* [Nisga'a traditional laws and practices] (Nisga'a 1998b: 1-2).

Other aspects of the Agreement itself relating to this theme have to do with Nisga'a language and culture, cultural artifacts and heritage, Nisga'a lands, the role of elders, healing, and, finally, post-secondary education, realised in WWN.

⁷ The term *Ayuuk* also refers to the animal crest and land traditionally attached to a clan, emblems of which are displayed on totem poles and house fronts.

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The role of elders was repeatedly emphasized throughout the different stages towards completion, of the Agreement in Principle (Nisga´a 1996), the Final Agreement (Nisga´a 1998b), and the Constitution (Nisga´a 1998c). Points which were considered non-negotiable were clearly defined and given status, namely, the *Ayuuk* as Nisga´a customary law and the elders who manage and convey the invaluable knowledge embedded in *Ayuukhl Nisga´a*.

Even if the Treaty and the *Ayuukhl* are separate entities in terms of shaping Nisga´a self-governance, there is a definitive connection between the two key factors. Based on Nisga´a history and *Ayuukhl Nisga´a*, not the least its Common Bowl Philosophy, Nisga´a territory entirely owned by the Nisga´a Nation is expressly defined in the Treaty. The Treaty, as it now appears, has resolved the outstanding question of land rights: Nisga´a aboriginal title is thereby affirmed. The Treaty also recognizes firm rights to self-government, which makes the Agreement unique. In terms of real political autonomy this Agreement is so far the strongest ever to be attained by any First Nations people in Canada, in particular because it includes a clause on self-government. In part this can be explained by Nisga´a perseverance in bringing the negotiations to a conclusion irrespective of time and effort. The support derived from the Nisga´a strong and vital tradition is probably another explanation. *Ayuukhl* with its Common Bowl Philosophy and its sense of peace making in contrast to unyielding confrontation, that is, 'the Eagle down justice', certainly reinforced and invigorated the Nisga´a negotiators. Due to its culturally defined power base, it is not incorrect to regard Nisga´a self-government as a third level of government within the Canadian political structure. In that capacity it relates directly to the Federal and Provincial governments, but differentiates itself from common municipal governments.

The Constitution of the Nisga´a Nation

In the future Nisga´a self-determination will be governed and influenced by their own Constitution. The wording of this document concerning self-governance is built on the Final Agreement, or what is now called the Treaty. It is interesting to note to how great an extent tradition is reflected in a political steering instrument, of which the primary purpose is to express in constitutional language accommodation for a smooth adaptation to modern life conditions. The opening Declaration, for example, is loaded with short, but pointed references to customs, symbolizing the link between tradition and modernity: "We commit ourselves to the values of our *Ayuuk* which have always sustained us and by which we govern ourselves, and we each acknowledge our accountability to those values, and to the Nisga´a Nation" (Nisga´a 1998c: 5). The role of elders is also underscored further on in this declaratory statement: "Nisga´a elders, *Simgigat* and

Sigidimhaanak' will continue to provide guidance and interpretation of the *Ayuuk* to Nisga'a government" (Nisga'a 1998c: 5).

The inclusion of custom is, moreover, pointed to in what is referred to as the Founding Provisions of the Nisga'a Constitution: "Nisga'a honour the traditions of our ancestors, the authority of our *Ayuuk*, and the wisdom of our elders", and "Nisga'a practice the principle of the common bowl". In diverse important issues it is clearly stated in the Constitution that *Wilp Si'ayuukhl Nisga'a* (Nisga'a legislative authority) should consult the Council of Elders and seek their advice. And law making ought to correspond to the spirit and meaning embedded in the *Ayuukhl*. Finally, the special oath of office endorses the weight laid on tradition, although there is a deep concern for modernity:

Will you be loyal to the Nisga'a Nation, uphold its values, and protect and obey its Constitution?

Will you seek the guidance of the elders, *Simgigat* and *Sigidimhaanak'* and respect their wisdom and interpretation of the *Ayuuk*? (Nisga'a 1998c: 6-8)

In other words, the Constitution follows up the intent and purpose clearly expressed in the Treaty connecting Nisga'a customs with modernity. Without a living tradition and an awareness of the importance of their own cultural values this would hardly have occurred. As a key document on which politics will be based in the future, it reflects both Nisga'a empowerment and identity. Let us now turn to the process of implementation of the culture-political position recently established within Canada. In doing this, I will concentrate on the perspectives of government, law and education, which all elucidate both some of the core features emerging from the negotiation and some of the dynamics in utilizing its outcome.

Implementation

Nisga'a self-government falls back on the following political structure. First, there is a central government, including a bureaucratic apparatus, the Nisga'a Lisims Government (NLG), which in a way replaces the former Nisga'a Tribal Council. Second, a Village Government exists in each of the four local communities. The third is a Council of Elders. The latter council will serve and maintain a guiding function vis-à-vis the two levels of Nisga'a government and act as the bridge linking modernity with tradition. This structure provides sufficient

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guarantee that Nisga´a policy making will conform to their customary law, and their managing and practising of traditional knowledge, *Ayuukhl*.

Preceding the first election to various political positions after the Treaty had been initialled, a political forum was held in each community. On this occasion most of the candidates running emphasized two indisputable principles, one related to Nisga´a traditions, the other to education. Values and beliefs, the ancestors as role models, and *wilp* responsibility were mentioned, for example in the comment "how crucial it is that we practice and incorporate our Nisga´a culture, values, traditions and beliefs in everything we do".

An election campaign to the Federal Government coincided closely with the Nisga´a election. A Nisga´a person was nominated for the New Democratic Party (NDP) in a political rally in the region, an event with very many specific Nisga´a ingredients spelled out: traditional dancing and music, the wearing of Nisga´a clothing, the manner of serving food, the use of a 'common bowl' to collect funds to support the campaign, and the drumming in of the main actors, in which the leader of the NDP and the nominee, Larry Gonu, the first Nisga´a trained in law and with a previous background in provincial politics, symbolically paddled a canoe while singing in a slowly moving procession. Even such an occasion, concerning a nomination for national elections, reflects the power and relevance of Nisga´a traditions, as well as indicating how the duality between tradition and modernity is handled in an appropriate fashion. In his short speech accepting the nomination Gonu referred to the spirit and unity the evening had shown. Reconciliation and bridge-building were also mentioned and towards the end he announced that, if elected, he intended to work for a new form of discourse, in which the new Nisga´a Treaty certainly will play a significant role.

It can also be mentioned that the local text TV was instrumental in communicating information related to the duality, tradition and modernity. The announcement of the NDP nomination rally is an example of that: "Potluck feast for Larry Gonu in Terrace 27 Oct. 2000. Food will be served in the traditional way as potlatch". This message was followed by an appeal to support the candidate. Terrace is the main community in the constituency and the rally took place in the Tsimshian Community Hall just outside Terrace.

In the implementation of the treaty we can observe a close connection between NLG and *Ayuukhl Nisga´a*, showing the impact of customary law discourse on various aspects of political development. The following examples may suffice. Based on a programme for land use planning, certain development projects have been initiated, such as logging, hunting and game management, and mushroom gathering. Specific *wilp* knowledge administered by hereditary chiefs and elders,

and which are founded in *Ayuuk*, will play a decisive role here. In addition, projects aiming at Nisga'a economic development will necessarily be guided by the Common Bowl Philosophy. In this way Nisga'a traditions are brought into planning measures. Among the Nisga'a it is unanimously believed that in the same way as *Ayuukhl* had an impact on the Nisga'a Constitution, it will have a continuing impact on Nisga'a land use planning. This linkage between tradition and modernity relates in particular to the NLG departments for fisheries and wildlife, and for land and resources.

The NLG also considers *Ayuukhl Nisga'a* to be crucial in contemporary politics. To maintain the function of the *Ayuukhl Nisga'a* Committee as a most significant advisory body during negotiations, NLG has established a new organ, the *Ayuukhl Nisga'a* Department, the main objective of which is to carry out basic research focusing on Nisga'a customs and traditional knowledge. Together with the Council of Elders this department will serve as a vital resource in shaping future Nisga'a politics, which will bear distinct Nisga'a characteristics. Without question, the role and capacity of elders will increase as compared to their status before the Treaty and during the preceding negotiations. Their function will be more formalized as certain tasks will be assigned to them. Thereby the connection between modern type politics and the function of elders will become more explicit. Political decisions made by NLG are reflected in Nisga'a culture and laws, as spelled out in *Ayuukhl*; the Council of Elders will be instrumental in harmonizing the Nisga'a Constitution with the *Ayuukhl Nisga'a*. A strong and unequivocally defined position of the Council of Elders is a prerequisite to making such duality between tradition and modernity operative. Obviously, a customary law discourse which has been active for years lies behind such clarification based on ethnic criteria.

According to the intentions enunciated in the Treaty, the Nisga'a are entitled to develop and establish their own Justice system, Nisga'a laws. And it is the NLG, through its legislature, *Wilp Si'ayuukhl Nisga'a*, which creates laws and eventually decides to establish a Nisga'a Court. Nisga'a laws and a Nisga'a court should not be confused with *Ayuukhl Nisga'a*. The latter is not to be challenged by innovative measures emanating from the Treaty. However, in serious cases of offences under Criminal Law the Nisga'a have to comply with the Canadian common law, as any other Canadian citizens; moreover, the Canadian Charter of Rights and Freedoms prevails.

Building on the newly acquired autonomy, however, the Nisga'a are able to give effect to their own justice to a fairly large extent whenever appropriate. For example, Nisga'a elders can be consulted when proper punishments are to be

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decided, making use of traditional methods for correcting those who have committed minor crimes or broken important Nisga´a norms. These methods are unique to the Nisga´a and appear as an alternative to imprisonment (Nisga´a 1998a). Nisga´a laws, thus instituted, are based on custom, which differentiates the Nisga´a Nation from the rest of Canada whenever appropriate. In a Nisga´a system of justice persuasion and shaming are more important than formal social control and punishment. Naturally, *Ayuukhl Nisga´a* will be an informative point of reference in this form of Nisga´a justice. On the other hand, a court of their own is not a requirement for the functioning of such a legal system. Establishing a Nisga´a court is more a question of autonomy than a confirmation in legal terms of traditions or customs. On the other hand, Nisga´a laws on which a Nisga´a Court will base its legal practice will not contradict, but rather correspond to, *Ayuukhl*, i.e. Nisga´a customary law perceptions. In this process the elders will play a decisive role in connecting contemporary justice to Nisga´a history, in this way making legal decisions culturally adequate without complete separation from the state law system.

In the Constitution two sets of principles serve as specification of what a Nisga´a justice system is about: principles of rights and of dispute resolution. These principles merge traditional laws of the Nisga´a Nation, founded in *Ayuukhl*, with a set of newly created laws in accordance with the Treaty, including the Constitution, referred to as Nisga´a laws. The key principle of rights is that resources and responsibilities are shared within the community according to a unique spirit, dignity and independence, as reflected in Nisga´a traditions - the 'Common Bowl Philosophy'. Dispute resolution processes are primarily founded on values expressed in *Ayuuk*, specified in the following conceptualization: unity of Nisga´a Nation, collective understanding of *Ayuuk*, healing and reconciliation, dignity and respect, restoring harmony. The main idea is not to punish but to make restitution, a traditional way of conflict resolution.

It was maintained by several informants that the characteristic Nisga´a philosophical approach to justice should be retained. Nisga´a culture is basically oral, and it is this which gives meaning to a philosophical approach.

To meet the new requirements a special programme for coordinating Nisga´a justice with *Ayuukhl Nisga´a* has been worked out under the auspices of NLG. This programme, called Community Based Justice, proposes a merger between Western Justice and Nisga´a Justice in a Community Justice Forum heavily influenced by *Ayuukhl*. For instance, there was no court of justice in the original Nisga´a society. Instead, the Nisga´a code of ethics was governed by rules of tabus which people were expected to follow. The Nisga´a way of life was affected by compassion and respect for the environment and the resources it could offer.

This is a circular way of thinking, in that it holds that you take and you give back, trying to restore a sort of equilibrium, a view not uncommon among aboriginal peoples. This is all summed up in the leading perception of ‘Common Bowl Philosophy’ underlying most Nisga’a justice (Nisga’a 1998b).

At this stage the creation of a Nisga’a Court in itself is not decisive; far more important is to institute a programme for community based justice and put it into operation. Such a programme will focus on restitution, which is a traditional manner in which forms of normative misconduct are handled. Restitution will emphasize mediation and *wilp* conferences. Nisga’a traditions and Nisga’a law will both be instrumental in this process, the aim of which is restorative justice. This form of justice stands for the maintenance and restoration of harmony and peace within the Nisga’a Nation, not for conflict solutions built simply on sentencing various offenders to jail.

In the implementation of the Treaty the connection between *Yuuhlawk’askw* Programme and *Ayuukhl* is a good illustration of a constant customary law discourse. Obviously, legal pluralistic thinking is attached to this; for example, the proposed Code of Ethics Agreement in the *Yuuhlawk’askw* Program of 2000 ends with an appeal for Western and Nisga’a systems of law to be equally respected. Finally, to have their own Justice system has political meaning for indigenous peoples; it gives back to the people their voices, and so power.

Education was the key factor which enabled the Nisga’a to move ahead politically. It was a question of competence building so as to be successful in the negotiations. Similarly, education is crucial for effective implementation of the Treaty which now lies ahead. Acquisition of control of the education system had the highest priority and was considered a human rights issue, especially in terms of building a future for the Nisga’a Nation, once a Treaty was completed. There are in particular two contexts for adequate learning which can be identified: feasts, i.e. the ceremonial practice of Nisga’a traditions, where customs are exercised and traditional justice affirmed; and WVN, the institution for formal training in diverse aspects of Nisga’a studies. Obviously, the *Ayuukhl Nisga’a* is central in both kinds of contexts, although it is taught in somewhat different forms.

It has been pointed out that the custom of feasting, such as taking part in ‘Settlement Feasts’ and ‘Stone Moving Feasts’, will be even more important after the Treaty than before, as it aids in sustaining Nisga’a cultural distinctiveness. Nisga’a feasts are the only means by which people can obtain traditional knowledge and develop competence in an appropriate manner, namely, through

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oral transmission. Feasts are the most important sources of learning of *Ayuukhl*, and people have a responsibility to attend these feasts to keep on learning their *Ayuukhl* and fundamental Nisga´a customs.

To follow the rules a ‘Stone Moving Feast’ (in commemoration of a dead person) will contain a set of predictable elements:

- seating of guests according to the rules
- support for the feast by the entire clan (e.g. Eagle)
- the kind of food and the way it is served
- the turning of the mourning into laughter and happiness by people appearing in funny, humorous masks
- the collection of money from Eagles present using the Common Bowl (a miniature canoe)
- display of gifts to all non-Eagles
- redistribution of money collected to all non-Eagles according to rank and age
- giving of names to persons to confirm their rank, and also adoption of persons into the Nisga´a Nation
- use of the Nisga´a language through story -telling
- the central use of objects manifesting tradition - the Common Bowl (canoe), a Copper Shield signifying the *wilp* hosting the feast, and the clan and *wilp* crest.

A feast like this with several hundred guests attending lasts between five and seven hours, and occurs several times in the feasting season, which is the autumn and winter period. From this summary it maybe seen how indispensable is the educational aspect of feasting to the Nisga´a.

In the customary law discourse among the Nisga´a different points of view can be discerned. The history of the Nisga´a Nation has always been oral, and to continue being real it has to remain primarily oral. Consequently, many Nisga´a do not want their stories to be written down, especially *Ayuukhl*, because if this is done they will no longer be the same for the Nisga´a; one important dimension will be lost. On the other hand, it is said that documentation is crucial, and in order to make this significant body of traditional knowledge comprehensible and accessible to both Nisga´a and non-Nisga´a some sort of codification is required. The resistance to having *Ayuukhl* codified is based on the possibility that it may be misinterpreted by outsiders who do not have the proper background, particularly in courts. The argument for such documentation, however, points to the risk of losing the knowledge if it is not recorded and preserved. The opinion has also been raised that even if it is written down it should not be published.

This knowledge is maintained through practice in the feasts, which has been found to be a most efficient channel for attaining cultural competence. For instance, stories which are told bring to life ideas and knowledge about land; in Nisga'a terms they are part of people's property rights. Each *wilp* has its own set of stories to be told at special events at certain feasts; thus these occasions represent the only opportunity in which essential knowledge about land and moral standards can be obtained.

The communication about land built into stories emphasizes the weight put on place names; thereby boundaries of each separate *ango'oskws*, i.e. *wilp*-based territory, are identified by a sort of collective memory based on oral tradition. Such traditional knowledge needs to be communicated, discussed and passed on, and this requires an ongoing discourse based on custom. Sharing, which frequently occurs on ceremonial occasions, is another customary value which is clearly expressed in *Ayuukhl*, and another idea which ought to be communicated orally.

This notwithstanding, in the view of most people *Ayuukhl* has to be written down; only in that way will the teaching of young people be facilitated and secured. Holding on to the ideal of communication as exclusively oral may result in the disappearance of important insights regarding cultural values and customs as elders pass away. The urgent need for preserving essential knowledge, the fundamental pillar on which Nisga'a identity rests, is hard felt. For this reason oral transmission will continue as an important cultural element reflecting Nisga'a life style; codification for the sake of convenience and practicality will not change that. The advantage to having *Ayuukhl* written down is twofold. First, it can be actively used by NLG whenever there is a need for it. Second, it can be a necessary source for learning made available at WWN. The Nisga'a House of Wisdom (WWN) is as important as the feasts in maintaining and teaching *Ayuukhl*. Oral conveyance of knowledge, through active participation by the elders as instructors, is here combined with learning from written documents based on recordings and transcriptions by knowledgeable elders. The impact of elders and Nisga'a participation in general at WWN is further reinforced by the facts that several instructors are elders, that elders also take part in the curriculum committee, and, finally, that programmes offered to a great extent are student generated (Deana Nyce personal communication). The course program presented currently is, as expected, a mixture of traditional knowledge, language and history, and Treaty-focused courses, even if different aspects of Nisga'a tradition are still emphasized. In this way, it is believed, the new challenge for the Nisga'a Nation derived from the Treaty can be met with full strength. The implementation

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of the Treaty is the core of that challenge. On the other hand, in order to understand the full implication of the Treaty many workshops will be required. These will encourage people at the grassroots level to take part. This educational process has just started.

The aims of the Nisga´a college, WWN, may be illustrated by a course which certainly tries to merge the objective of tradition with Treaty related insights in regard to Nisga´a politics. The course "Art and Material Culture" deals with feast law, *Ayuukhl*, and the issue of repatriation. Attention should also be drawn to a temporary exhibition which will inform visitors that the Treaty was not only about land, but had also to do with cultural heritage. Finally, in implementing the Treaty women will certainly play a role. Several women ran for different positions in the first election, of November 2000, confirming the traditionally strong positions of women in the Nisga´a Nation, expressed, for example, by matrilineal rules of succession and the role of matriarchs.

Conclusion

In their current rhetoric both the Nisga´a and the Sámi make frequent reference to documents of similar weight and age, representing the first formal recognition of indigenous customary rights. These are for the Nisga´a the Royal Proclamation, 1763, and for the Sámi the Sámi Codicil, 1751. As we have seen, for the Sámi this has meant actively emphasizing and proving the legitimacy of the call for empowerment based on custom and customary law, whereas for the Nisga´a it has been mainly a question of historical rights officially acknowledged, as customs and traditions generally speaking were not part of the negotiation process. Nevertheless, these two documents have recently been revived in an ethnopolitical strategy. They are undeniable facts expressing macropolitical points of view considered advantageous to relatively powerless aboriginal nations. The focus on custom makes these two historical documents particularly interesting for our purpose. The documents, moreover, meet the often stated request from the majority society for written evidence. Consequently, the indigenous people can persistently remind their counter-party of this irrefutable fact. As has been demonstrated, whenever land rights and rights to self-determination appear to be the main objective for political action, customs and customary law are the very foundation, and this factor neither party can disapprove.

Customary law points to the problem of oral history as legal and political evidence. Both for the Nisga´a and the Sámi ideas and knowledge about their customs and customary rights are in the main preserved as orally sustained

tradition. Such oral tradition is highly informative in giving substance to claims regarding land and power, because it offers, in an unsurpassable manner, cultural legitimacy to the claims in question. Therefore, one expects the evidential power of custom to be at the very core of resolutions in the legal as well as the political arena, in negotiations and also in parliamentary inquiries. Indeed, what else could aboriginal nations turn to if customs did not play that significant role? For this reason, I maintain, the customary law discourse presently occurring among indigenous peoples is an urgent theme for research.

The emphasis on education, very much formed and operated on their own premises, is another similarity between the two cases. In the respective institutions for higher learning, *Samisk Høgskole*, *Kautokeino*, and WVN, New Ayansh, the curriculum is shaped to build competence adequate for coping with the challenge attached to the duality between tradition and modernity, where customary law discourse is a relevant component.

Oral history contains a large body of knowledge. The Nisga'a are in a favourable situation in this respect compared to the Sámi. The latter are trying to rediscover their traditional knowledge based on custom, in particular through a research process. The Nisga'a, on the other hand, can reactivate and reinforce a knowledge more or less retained intact by means of practice, and incorporate the elders, as keepers of invaluable traditional knowledge, in the common work towards modernization. The Nisga'a can base their political actions on their *Ayuukhl*, which, for instance, explicitly states Nisga'a ownership of land. The Sámi do not have a similar body of knowledge concerning legal matters. Despite their differences, however, the ongoing customary law discourse is equally important. According to Julie Cruikshank, a leading anthropologist in this particular field of inquiry, "oral tradition/history in reference to land claims does three things: it expresses, confirms, and asserts ownership to land" (Cruikshank 1992). The *Ayuukhl Nisga'a* accords well with this claim: it conveys rules that governed and will continue to govern how land is allocated and used, reflecting a characteristic social organization. It points to and reaffirms cultural autonomy.

Both the Sámi and the Nisga'a have been, or are still involved in extremely long processes aiming at change. It took over 20 years for the Nisga'a to reach an agreement through negotiation; the Sámi rights process has taken about the same time for a resolution to be obtained based on a parliamentary inquiry, although half of the inquiry still remains to be done. As expected, from such lengthy processes a customary law discourse can be evolved and consistently reaffirmed as part of the cultural repertoire. This is useful for communicating cultural diversity

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whenever there is a need for it. Refining such discourse certainly demonstrates cultural viability, which has an impact on external as well as internal relations.

The Sámi maintain that only by means of codification of their customary rights can such traditional knowledge be instrumental in future legal and political conflicts. They have learned from experience that if the basic knowledge referring to culture specific normative orders and practice is transferred to a written source their power of proof will increase. The Nisga´a, on the other hand, are facing a dilemma concerning how much, if any, of their customary law, *Ayuukhl*, should be recorded. In any case they reject any proposal for codification in a Canadian sense. Diversity as to form and content of the respective customary law discourses may here be disclosed, although the discourse itself, focusing on the issue of land, is equally significant in the two cases.

To establish and acquire approval of their own justice system will be one aspect of the realization of increased autonomy for the Sámi and the Nisga´a alike. The Sámi are about to have a court set up in the core area of Sápmi which will handle cases in which the perception of specific Sámi customs is part of its role. This court will be a supplement to the common Norwegian courts; in no way will it be a complete substitute. According to the Treaty, the Nisga´a can authorize a court of their own. To create their own laws and thereby institute a justice system does not require a court as such, but the possibility is there if needed. Common to the two nations is customary law as a foundation on which such a justice system is built, and, moreover, the fact that the process towards managing self-justice reflects indigenous empowerment. These two cases show the urge for making legal resolutions affecting the Sámi or Nisga´a way of life culturally relevant: to "Nisga´anize" (Robinson 2000, personal communication), or, for that matter, to "Sáminize" conflict settlements. In this way the Sámi and the Nisga´a are attempting to adopt legally pluralistic orders, both in formal and informal terms. Only by this means, it is believed, will Sámi and Nisga´a legal rights be secured. Legal pluralism as a term is sufficiently loose to cover what is here described. It includes the possible combination of formal and informal elements in the execution of effective justice, not necessarily the existence of two legal systems which are equally formalistic structurally speaking. Only by means of such plurality can factors based on cultural peculiarity and peoples´ customs be regarded as satisfied in the extended legal arena.

In addition, the Nisga´a represent one Nation within one State, whereas the Sámi as a Nation relate to four different States. At the same time both nations are currently engaged in a process of nation-building, where rights to land and to self-rule are mandatory preconditions. Customary law discourse is only one of several elements contributing to this ultimate process of nation building.

Finally, the Nisga´a Treaty is the first agreement attained which clearly defines rights to environmental resources and rights to self-government, including its level of real power (Sanders 1999). It is still an open question what, more concretely, the Sámi rights process will bring about. A limited power base is attached to the Sámi Parliament, and its actual level of power depends to a great extent on the outcome of the legislation based on rights to land and water (NOU 1997a: 4). Regardless of the end result in the two cases, we can predict that the customary law discourse will continue as a dynamic cultural force.

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