Reconciling divergent normative orders
The struggle for recognition regarding Customary Law among indigenous peoples[1]

Tom G. Svensson
(University of Oslo, Norway)

Abstract

The contemporary processes of nation-building among a great number of indigenous peoples presume recognition of diversity, reconciliation and codification of special rights. In my view, customary law is a workable starting point in connecting society and law focusing on indigeneity, thereby shedding light on the complexity of divergent legal arrangements, or legal pluralism. Following Clifford Geertz (1983) law-generating customs represent the cultural foundation of law, which should be perceived as a necessary prerequisite in attaining special rights, even culture-political autonomy. This form of indigenous nationhood does not counteract nation-state sovereignty, on the other hand, it may be viewed as a condition of anomie *vis-a-vis* the nation-state pointing to the dynamic creation of new social orders presumed in meeting new demands initiated by indigenous peoples. The argument to follow will be built on three case

[1] Fieldwork on which the following chapter partially is based was carried out among the Nisga´a in the autumn 2000 financially supported by a Faculty Research Award (Canada) and the University of Oslo. Fieldwork among the Ainu was done during the first half of 1994, preceded by a short survey in 1990, supported by the Institute for comparative culture research and the Nansen foundation, but also Scandinavia-Japan Sasakawa foundation (1990). I hereby acknowledge with gratitude financial support offered. Besides continuous research on the Sámi since the 1960´s, my role in the Sámi case was quite explicit as head of the steering committee of the research project focusing on Sámi customary law 1996 - 2000 (Svensson, ed., 1999 and NOU 2001:34).

studies: the Sámi in Norway, the Nisga´a in BC, Canada, and the Ainu in Japan.

Key words: Customary Law, Indigenous peoples, Nationhood, Anomie, Sámi, Nisga'a, Ainu

---

When government asks us to surrender our title and agree to its extinguishment, they ask us to do away with our most basic sense of ourselves, and our relationship to the Creator, our territory and the other peoples of the worlds. We could no longer do that without agreeing that we no longer wish to exist as a distinct people. That is completely at odds with our intentions in negotiating treaties (Chief Edward John, First Nations Summit of BC, quoted in McKee, 2000).

Introduction

In recent years there has been a noticeable increase in studies focusing on indigenous rights issues among legal anthropologists. In-depth analysis, critically scrutinizing court procedures as well as court decisions, represents one field of inquiry (see e.g. Culhane, 1998; Asch, 1997; Cassidy, 1992; and Svensson, 1997, just to mention some of the most topical ones); another equally important area 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 recognition of divergent normative orders and how they may be accomodated addresses itself primarily to this sub-disciplinary orientation (Svensson, 2002).

Indigenous people have their own legal perceptions which frequently are contrasted with the legal system of the dominant nation-state. Such difference in terms of law has a value in itself; it reconfirms cultural uniqueness and autonomy. Normative orders to which indigenous people adhere are founded on custom,

regulating social relations and traditional resource use. Customary law is the legal property reflecting such indispensable regulating, or ordered form of behavior.

The question of *difference* is a predominant feature in the attempt at explaining the close interrelationship between society and law, and here a stage of anomie may play an explanatory role.

A positive aspect of anomie points to boundlessness, i.e. the quality of breaking formally established borders, not least important in reference to the legal system of society (Herbert, 1991:69). In a structural sense anomie connects to autonomy, i.e. cultural and political self-determination. When it comes to law, in concrete terms this has to do with finding legal solutions outside official state law orders. This does not mean replacing one normative order with a new and entirely different one; the attempt at penetrating the set legal boundary should rather be viewed as a supplementary addition to the existing, but somewhat inappropriate, legal system. Thereby an alternative normative order may be created, accentuating empowerment and appropriation, i.e. relative autonomy for the group of people in question. Since my major concern is to discuss the situation of indigenous peoples, the point should be made that I deal exclusively with collective rights, not individual rights.

What has been said so far brings us back to difference, and how decisive that perspective is for cultural survival among various indigenous peoples. To be meaningful difference, whether political, cultural or legal, requires *recognition* from an external party. Such recognition is presently a major objective for very many indigenous people globally. To acquire recognition is a strategic action, a process adequately referred to as the politics of recognition (Taylor, 1992).

Moreover, difference calls for continuous management (Geertz, 1983:216), i.e. the manner in which people make use of it as an asset. In terms of legal arrangements, difference provides necessary legitimacy connected to stated claims. In other words, it

is a point in itself to emphasize difference in cultural terms, in most instances based on aboriginality; it is only thereby that an indigenous people will have a voice which calls for special treatment, in the end special rights. However, without recognition from the mainstream, dominant society, difference in this respect is bound to lose its meaning, possibly leading to a negative effect.

The aspect of recognition in connection to difference needs to be qualified further. Parick Macklem (2001) has discussed this problem, as it is related to the Canadian situation, at great length. According to Macklem, indigenous divergence should not be reduced to cultural difference in the more narrow sense of the word (op.cit: 75). In order to gain actual political influence for any First Nations people, difference is far more comprehensive and includes the questions of territory and unique relationship to land, sovereignty and the treaty process. Constitutional protection of difference on that level is what is at stake, not merely that of cultural difference per se. And, constitutionally, protection ideally follows upon formal state recognition, or in Macklem´s phrasing: "Constitutional recognition of indigenous difference promotes a just distribution of constitutional power" (op.cit: 287).

To adequately apprehend what is to be recognized and protected by means of efficient legal instruments, where no doubt constitutional protection certainly appears as the superordinate agent, a holistic perspective is warranted. As a starting point, such a holistic view goes far beyond that of narrow jurisprudence, it encompasses features of culture, politics, ecology, system of beliefs and social structure; in the words of Clifford Geertz (1983: 175) it constitutes the cultural *foundation of law*, part of which relates to custom and customary law, the central legal perspective to be treated in this chapter. Built on customary practice and traditional knowledge, customary law is the legal constituent to which is attached the most apparent cultural dimension; this, notwithstanding, it constitutes part of law and legal perceptions sustained over time.

Referring to indigenous rights viewed holistically, in addition to customary rights we can discern certain key terms; these can be, for example, land rights, rights to self-government, inherent rights, treaty rights, and aboriginal title, which show how complex the legal component indigenous rights really is. Common for all these conceptions are that they refer to communities, not to individuals. In the same way, customary law gains its meaning as a group-defined right, as it is founded on the principle of shared customs, some of which are law-generating.

The concepts of *treaty* and *title* are less general than the rest and call for a clarification as they connect specifically to the situation in Canada. *Aboriginal treaties* are binding legal agreements/contracts resulting from the process of negotiation between the larger society on the one hand and an aboriginal nation, properly acknowledged, on the other. The case of the Nisga´a in BC to be discussed further on elucidates plainly contemporary treaty-making processes. *Aboriginal title* refers to the right to occupy, use and enjoy their land and resources (Cf. McKee, 2000). And aboriginal title, whether it is to be extinguished or perpetuated, frequently forms part of the issues being negotiated, eventually leading to a treaty. To most indigenous peoples their title has a real as well as a symbolic value, something which must not voluntarily be given up, whereas to the state authorities the explicit policy aims at the extinguishment of the title. Aboriginal title is, by the majority state, often conceived as an obstacle to various kinds of development, which ought not to be impeded.

The process towards nation-building stands out as a superior aim for most indigenous people, a goal-orientation which assumes the clarification and establishment of a legal base as identified above. The conception "nation" should in no way be confused with that of "nation-state", which would imply complete separation as an ultimate goal. Nation represents a people, defined according to cultural criteria, to which is added the prerequisite

aboriginality. If these requirements are not met it is difficult to talk conceptionally about the statement"people equals nation".

In order to obtain this kind of nationhood, in contrast to statehood, recognition of distinctiveness in all its stages must be attained by the people in question. This has both a real and symbolic value as it gives the impression of empowerment as well as equity. The ultimate goal is to acquire firm self-rule and authority without abandoning being part of a nation-state, a stage of "domestic dependent nationhood" going back to Chief Justice Marshall´s illustrous phrase regarding tribal sovereignty in the US (quoted in Russell, 2000: 67). Dan Russell has also introduced some general tenets specifying further this type of "nationhood"; the two most basic and relevant for our purpose are: a) inherent right to self-government, and b) inherent jurisdiction over both criminal and civil law matters.

Nationhood in this respect means a large degree of autonomy without undermining state sovereignty. Here we are referring to a relational condition founded on mutual respect and comprehension, which is distinguished by moving frontiers, or disregarding formally established obstacles concerning rights and authority, at the same time as boundaries between an indigenous people and the outside world out of necessity may be sharpened and made more explicit. In other words, indigenous nationhood may be perceived as a condition of anomie vis-a-vis the nation-state, but it does not lead to what is called anomic disorder. On the contrary, as will be shown by the empirical accounts, it has to do with dynamic creation/recreation of new social orders, or arrangements, to meet current justified demands initiated by indigenous peoples.

Summing up at this stage, nation-building presumes: *recognition* of diversity, *reconciliation* and eventually *codification*. And in my view, customary law among indigenous people is a workable starting point for trying to elucidate and explain the connection between society and law in reference to nation-building processes.

The argument to follow will be built on three case studies: the Sámi in Norway, the Nisga´a in BC, Canada, and the Ainu in Japan. In order to substantiate some general points, these cases show enough differentiation but also a certain similarity as to fundamental nation-state frameworks to justify an attempt at comparative analysis.

Empirical cases

a) The Sámi

Since 1980 we can observe in Norway a process towards consolidation and acknowledgement of non-state normative orders referring in particular to the question of land rights. In this process, customary rights has been introduced as a legitimate factor recognized by the state authorities. Prior to the appointment of the Sámi Rights Commission (1980), demanded by the Sámi in a time of most severe conflict, its terms of reference were negotiated between the Norwegian Government and leading Sámi organizations. This kind of negotiation was formerly unheard of and represented a certain recognition. Created to meet claims explicitly stated by the Sámi, the Sámi Rights Commission was primarily to investigate in depth all relevant aspects concerning Sámi rights. At this stage the Sámi were able to exert some influence in pointing to certain pertinent issues to be inquired, such as 1) to what *historical rights* could the Sámi people refer? 2) to what degree would Sámi *customary rights* play a role in defining present Sámi rights? and 3) what relevance did *international law* have?

In 1984 the first report was presented, giving suggestions for a few general transformations focusing on structural and legal preconditions (NOU 1984: 18). These proposals were formally adopted by legislative procedure and resulted in: a) the establishment of an elected representative assembly named *Sámi*

Parliament; b) the institution of a *Sámi Act*, formulating in more precise terms than ever before the status of the Sámi as aboriginal people; and c) as a consequence of the Sámi Act, a *Constitutional Amendment*, § 110a, meaning that the main objectives in terms of general Sámi rights stated in the Act are constitutionally protected and guaranteed. No doubt, at this stage the Sámi rights process had shown great progress, which was reinforced even further by the *Sámi Language Act* 1990. The latter Act recognized Sámi as an official language, equal to Norwegian, to be used in all circles of life in core areas of Sámi habitations, if so desired. The intent and purpose of the Sámi Act concludes with the following phrase: "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".

As a political body the Sámi Parliament is restricted to advisory functions unless a clearly defined power base is attached to it. Such a power base relates very much to law; i.e. Sámi rights must be both *identified, recognized* and eventually *codified* to make the Sámi Parliament operative.

In 1997 the Sámi Rights Commission delivered its report dealing with the material basis for the maintenance of the Sámi culture in Finnmark, i.e. Sámi rights to land and water (NOU 1997: 4). A special report on international law in connection with indigenous peoples´ land rigthts was presented as a supplement (NOU 1997: 5). As it turned out, the Sámi Rights Commission failed to comply with the mandate on the crucial question of customary rights; the issue was considered far too complicated, and for this reason it would require new basic research. After several years of inquiry this omission was first announced in 1993 by the group of legal experts formed to provide required groundwork material on which the commission´s own argumentation and proposals were to be based (NOU 1993: 34). To the newly instituted Sámi Parliament this neglect of an important issue was unacceptable; consequently it requested that a

new research project, focusing exclusively on Sámi customs and Sámi legal perceptions, as stated in the original mandate, should be carried out independently of the Sámi Rights Commission.

The research brought new insight and knowledge concerning local custom and how it influenced landuse patterns related to diverse Sámi specific means of livelihood. After less than three years this interdisciplinary research was completed in 2000, and it was published as a separate report connected to the Sámi Rights Commission by the end of 2001 (NOU 2001: 34).

Following upon a far-reaching hearing process, finalized in 1999, and the completion of the research project on Sámi customary law in 2000, the Ministry of Justice could at last, after lengthy preparations, introduce a proposition for legislation, mainly based on NOU 1997: 4, to the Norwegian Parliament, "Stortinget", in April 2003 (Ot.prp.nr 53).

In the following I will point out the main points of the law; as a comment I will, moreover, discuss its eventual connection to the Sámi rights process preceeding the Bill for legislation; finally, it is necessary to inform about the Sámi internal, as well as cross-cultural, debate the proposition has caused[2]. The law is called "Finnmarksloven", the law regarding Finnmark (the northernmost county in Norway). The submitted law consists of four chapters divided into thirty-one §§. As a preamble the government asserts that the proposed law is a direct follow up of NOU 1997: 4, from the Sámi Rights Commission, dealing exclusively with questions related to the natural/material foundations of the Sámi culture. In the main, the law has to do with clarification of the legal situation and administration of land and natural resources. As can be seen, already the naming of the law departs markedly from the original intent and purpose of the Sámi Rights Commission. After more

[2] Media attention this proposition drew was primarily related to the region. And the Sámi newspaper *Ságat* has been a most valuable source in its continuous and very detailed recordings of various aspects of the debate.

than twenty-two years of preparation for a clarification and explicit definition of Sámi rights, not even the name *Sámi* is retained in the proposed law. Instead, the Sámi as an indigenous people with an undeniable historical right to vast territories in the county of Finnmark are reduced to one of several kinds of people regionally attached to Finnmark.

Chapter I specifies some general provisions. § 1 sets the tone by offering the Sámi no exclusive rights but placing them on equal level with other regional inhabitants and the public in general. Hereby, Sámi empowerment in vital areas of Sámi cultural sustenance is impaired, which is in noticeable contrast to what had been expected after all these years from the Sámi rights process. § 3 makes a common statement that this law is in accordance with stipulations of international law. This is far from convincing, since the law firmly contradicts international law in so many areas; consequently this paragraph is void of meaning.

In addition Chapter I contains instructions for the administration of the commonage and the fact that the law will not violate, or interfere with, already existing rights, private or collective, based on *inheritance*, or *immemorial prescription*. It also indicates basic presumptions in terms of regulating and managing rights to resource use; the remaining part of the law has to do with specifications as to territorial management. As we see, then, the government has chosen to give more emphasis to the question of management than to the one concerning rights; it bears an unmistakable characteristic of bureaucracy rather than that of law. This is dubious and highly unexpected in view of the fact that the proposed law is supposed to be the end result of a lengthy Sámi rights process.

The law speaks about Finnmark property, "Finnmarkseiendomen", which is supposed to be defined as its own legal subject, administered by a Board consisting of 3 members appointed by the Sámi Parliament, 3 by the Finnmark County with a chair person alternating annually. The original

proposal of an additional member representing the Norwegian Government, but without voting power, was removed after Sámi pressure. The authority and tasks of this Board point to limited Sámi influence, also in Sámi relevant affairs. The Board will, furthermore, be subject to a Controlling Committee consisting of 3 members, one of which appointed by the Sámi Parliament.

In questions referring to national parks and expropriation generally, as well as rights to hunting, trapping and fishing, Sámi influence and controlling ability are curtailed. This means that established rights based on practice over time, by anyone irrespective of ethnic origin - a sort of open-ended rights - will by this law acquire codification, or at least affirmation. If so, the question remains: did we really need such a comprehensive, very time-consuming and costly, Sámi rights process, to have it confirmed once and for all that the Sámi do not have any specific rights founded on ethnicity and aboriginality with the exception of rights to reindeer pasture and related rights. This is thought-provoking considering that Norway is a state which, for several years, has placed itself in the front line when it comes to the development of international law concerning both human rights and aboriginal rights.

As demonstrated, the law offers no *clarification* of Sámi specific rights; as a consequence, with few exceptions, there is no *recognition* of Sámi specific rights. Considering the objective of the entire Sámi rights proces, this is highly problematic. The law put forward does not open for any substantial change; therefore, *reconciliation* between different legal perceptions, normative orders, is still far from realization. As a result of this flagrant redundancy by the state authorities, showing great disregard for the Sámi as people and the Sámi Rights Commission and its profound and detailed work, the issue of *codification* is readily put aside, since there are no Sámi aboriginal rights to be codified at this stage. Exclusive rights to herd reindeer and rights to pasture, recognized as a traditional

Sámi means of production, are already codified by a special Reindeer Pastoralist Act (1978).

As it appears, the law is a compromise more than anything else. Key factors are balance, equality and regional economic development. It is a *property rights law*, "tingrettslig lov", and with that position the government has chosen to lay stress upon management procedures rather than on rights and the legal aspect generally: an apparent divergence from the primary mandate of the Sámi Rights Commission.

Without further explanations/discussion, the Ministry of Justice commits several important omissions. First of all, the suggested law does not in any satisfatory, or convincing, way follow the intentions in relation to recent developments of international law. To be close to the workable legal instruments embedded in the body of international law, a specification of Sámi indigenous rights, as well as Sámi empowerment, are minimum requirements. By defining away the ultimate question of Sámi entitlement to a set of special rights according to international legal standards, to which Norway officially agrees, the Norwegian Government places itself drastically on the side line. Moreover, the rights of the Coastal and Fiordal Sámi in addition to the East Sámi, issues scrutinized in great detail by the Sámi Rights Commission following its terms of reference, are equally neglected. In a similar way the aspect of *customary law* is completely invisible in the law. The total disregard for the latter subject is similarly astonishing considering that the government, after Sámi pressure, agreed to include the issue of customary law in the mandate. Furthermore the government accepted the demand by the Sámi Parliament to carry out and financially support the research project when that was needed, due to failure of the Sámi Rights Commission.

This substantial research report (652 pp.) is only referred in brief (2 p.) in the introductory text as background discussion to the proposed law. The same is valid for practically all abundant material/analysis emerging from the inquiry. (Besides the law itself,

7 pp., the proposition consists of a grounding text of 107 pp., in part summing up the contents of the various reports brought forth in the process, in part discussing the choice of delimitation made of the complex subject matter. See Ot.prp.nr 53, 2003.)

As to the research report focusing on Sámi customs/Sámi legal perceptions, the account in summary form of each study shows a correct understanding of the essence in terms of knowledge generated. The value of the research is summed up as follows: "The project has documented that in large parts of Finnmark there existed formerly specific Sámi customs. These customs were perceived as collective rights and up till the 1850´s these customs were by and large respected by the Norwegian authorities. The research also shows that at present particular Sámi customs and legal perceptions do exist. These customs are kept alive in local communities and are still experienced as law-generating" (Ot.prp.nr 53:Ch. 3, p 5). The question still remains, why is not anything of this knowledge-generating contribution reflected in the law? And how is it possible to deny the Sámi any special rights based on aboriginality if their customary rights are still very much retained as normative orders locally? Local variations, Sámi cultural diversity, are, and have always been, a factor to consider, an obvious circumstance to follow up by the Sámi Rights Commission. It must, moreover, be underscored that if equity regarding the Sámi is advocated, special rights allocated to the Sámi are a prerequisite. Then, one must conclude that most of the components of this law seem to be built on erroneous premises. For example, empowerment of the Sámi Parliament, a specification expected ever since 1989 when this assembly was instituted, is now constrained merely to the right to appoint members to the Board and the Controlling Committee. This comes close to a status quo solution.

The proposal for such an encompassing and new law concerning the Sámi, awaited with great expectations among the Sámi for over twenty years, is highly questionable and has caused

an extensive and heated debate still going on. The Sámi Parliament immediately initiated a process aiming at a common, firm reaction to the proposal. Information meetings were arranged in all significant, relevant local areas, where local Sámi Associations/Sámi political parties could express their opinion. The Parliamentary Council, "Sametingsrådet", then prepared a comprehensive statement to be presented for open debate during the plenary meeting of the Sámi Parliament some six weeks after the Bill was introduced on April 4, 2003. The main point the Sámi Parliament wants to get across is that the Bill, as it stands, should not be passed by the Norwegian Parliament but sent back to the Ministry of Justice for further preparations. In spite of more than six years of basic preparation and deliberation, the end product is condemned as a hasty piece of work. The question of legitimacy is also raised. And in this respect the National Parliament must act with responsibility and caution, because, considering the objections expressed by the Sámi Parliament, there is no doubt that the legality of the law will be questioned if it is passed. Attention is also called to the ideological issue of *reconciliation* with earlier injustices the Sámi have suffered, in terms of an active assimilation/Norwegianization policy, which is not at all met by this law. On the contrary, the law serves more as a confirmation of the same negative policy.

Let me end this part of the argument by summing up the main points emanating from the statement recently adopted after lengthy debates by the general assembly of the Sámi Parliament. The statement is almost unanimous with the vote of 34 out of 37 in favor.

First of all, the Sámi Parliament cannot accept the law and demands appreciable alterations. To improve the proposed law the Sámi Parliament asks for extensive consultations, an opportunity so far misssing. What the Sámi Parliament needs is decisive influence in regard to encroachments in and changed utilization of what the Sámi conceive as their land areas. Such influence

allocated to the Sámi is mandatory if the protective aspect of the law is ever to be increased. The Sámi Parliament, furthermore, demands that the law more clearly must be anchored in the Sámi Rights Commission and its thorough investigations. In the same way Sámi legal claims must be built on *custom, immemorial prescription, usage* and *aboriginal rights*, key conceptions not sufficiently reflected in the law. Important points totally missing are also referred to, such as those of a holistic identification of Sámi areas, rights to fishing and, finally, the situation of the special group of East Sámi. The latter group must be given special assurance for the continuation of their culture and community life. Lastly the statement calls for respect for the acknowledged fact that Norway is founded on the principle of two peoples, nations if you wish, Norwegians and Sámi, as constituting the state.

Thinking of the immediate future concerning Sámi rights the Sámi Parliament calls for *negotiations*, both to reformulate a law text which is more in tune with interna-tional law and contemporary Sámi reality and to establish an administrative regime for land management, i.e. a social contract between equal parties, the Sámi Parliament can accept.

The proposal discussed is, as expected, of great international interest and has activated engagement and endorsement for the Sámi cause both by the cross-national Sámi Council, represented by members of the Sámi political assemblies in the four nation-states having Sámi populations, and the UN-Forum for Indigenous Peoples.

As a most timely event, the UN-Forum held its annual large-scale conference just a few weeks after the Finnmark law was presented. And a major point on the agenda was a recurring and expressly stated critique of Norway for missing the opportunity to take the lead in the improvement and clarification of aboriginal rights to land and water, the material foundation for cultural survival, which to very many indigenous peoples remains the number one issue. In particular delegates from developing

countries reacted with discouragement and great worry. Strong sentiments expressed a consensual feeling at the conference: Norway, believed to be a leading country and example for the rest of the world in pointing to indigenous rights issues and their gradual improvements, is now about to betray its former ideal, thereby surrendering its front line position. As it was phrased, by such a law Norway not only deceives the Sámi but also indigenous people all over the world. The anticipated law could have served as an example for others to refer to and follow. Now with a legal framework for action which implies no change to speak of, the process towards progress in the continual struggle seems to have come to a stop, at least for an unforseeable period of time. This in itself is an issue which is bound to be brought up in the approaching debate in the Norwegian Parliament, where Norway´s international reputation may be questioned by effective lobbying on behalf of Sámi interests. In other words, what the UN conference brought up could very well work to the advantage of the Sámi; an additional means to inhibit legislation at this stage can hereby be discerned. Obviously the Norwegian Parliament will lend a sensitive ear to such negative criticism.

Before closing this section, two other modes of reaction against the proposed law are worth noting. First, as the Finnmark law to such great extent is in opposition to recent verdicts in the Supreme Court, most favorable to the Sámi as they have broken new legal grounds, the Selbu case (2001) and the Svartskog case (2001), an appeal for confrontation in court has been suggested, assuming the law is passed by the Norwegian Parliament in its original form (Åhrén, 2003: 86). According to Mattias Åhrén, a young Sámi trained in law and specializing in indigenous rights, the progress made in court should serve as an effective means to influence the further process towards final legislation. Second, the issue is considered so serious that traditional ritual thoughts and practice have been actualized. Sámi shamanistic power has been mobilized as a clear voice against the Finnmark law - a *mantra*. This

"strength of thought for Sámi rights", as it is called, should be repeated by as many as possible once a week at the same day and hour, explicitly urging the government to present a far better proposal for legislation concerning Sámi rights.

The original intention of the Norwegian Government was to have the introduced law passed by the Norwegian Parliament in June 2003, before closing for summer vacation. However, due to the ongoing public debate and the extremely critical reaction to it by the Sámi Parliament, such a time table proved unrealistic.

As an end product the proposal is full of palpable shortcomings and remains, to a great extent, an unfinished piece of work. It should be noted that in 1995 the former Prime Minister, Gro Harlem Brundtland, gave a speech to the Sámi Parliament in full assembly, in which she made it clear that the outcome of the projected research on Sámi customs/legal perceptions, concurrently with the investigations by the Sámi Rights Commission, were to form the basis for further political dealing with proposals for new legislation, in particular focusing on land management in Finnmark. Here we observe an authorized promise from the very highest political level. The previous discussion shows without doubt that the Finnmark law, as it now appears, has broken most promises and obligations formerly stated. Therefore, we can conclude that without *specification* and *recognition* of special Sámi rights, there can be no *codification*, which means legal ambiguity will remain as it has been; at the same time the Sámi Parliament will continue to lack a sufficient power base.

In the end the Sámi were able to exert enough pressure to have the legislation postponed, demanding consultations and further inquiries to central issues, especially related to international law. In this way they managed to have the final product for legislation to comply more closely with the initial intent and purpose. In the process towards improving the original proposal for a law (Ot.prp. 53, 2003) the Sámi demands were met a long way. The settlement, which to a certain degree shows willingness

to compromise, as the law must deal with issues concerning all original inhabitants of the county, not only the Sámi, nevertheless provides the Sámi with a legal framework for action, serving as an efficient instrument for protecting their aboriginal rights. Thereby the Sámi Parliament is assured a reasonable power base.

On Mai 24, 2005 the Finnmark Act was finally passed by the Norwegian Parliament by a great majority, in other words about two years later than first intended. Prior to enactment 4 substantial consultations were held between the Parliamentary Committee and the parties involved, i.e. the Sámi Parliament and the Finnmark County Administration. The Sámi proved very active in this process handing in no less than 7 so called working documents in preparing for the continual dialogue. In this fashion the Sámi influence is shown particularly in reference to the leading aspects of international law principles and Sámi customary law. At the same time, by means of such consultative process the Norwegian Parliament created a new model in preparing for legislation. In other words, it is no overstatement to regard the enactment of the Finnmark Act as unique in terms of the history of the Norwegian Parliament, and thanks to Sámi pressure a new era in policy-making vis-à-vis the Sámi has been established.

b) The Nisga´a

A court case, drawing great attention both nationally and internationally, preceded the treaty process regarding the Nisga´a Nation in BC, Canada. The case (Calder), named after Chief Frank Calder, who was the initiator in chosing the strategy of making use of the white man´s court system, ended with a Supreme Court verdict in 1973. In many ways this has been considered a landmark decision; it is, furthermore, viewed as 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 question of land rights was

in focus, in particular the Nisga´a perception concerning rights to land to be held commonly by a tribe or clan in contrast to Canadian common law and its view on private property rights.

The Nisga´a were still a non-treaty indigenous people; in furthering a Nisga´a political program, therefore, a test of their fundamental rights in the legal arena of the majority society was required. The ultimate aim of the action dealt with *clarification, confirmation* and *recognition* of specific Nisga´a rights, derived from their Aboriginal title. Even if it was a split decision, the conclusion of the Supreme Court was a significant novelty at the time; "Nisga´a had concepts of ownership indigenous to their culture and capable of articulation under the common law" (Calder 1973/SCR 373). Moreover, the court reasoned that the Nisga´a had Aboriginal title to their ancient lands in the Nass valley before British sovereignty was asserted (McKee, 2000: 26). In this way Nisga´a cultural distinctiveness and the legal strength of their customary law are acknowledged by the highest legal authority of the nation-state. In addition, the Supreme Court admitted that the Nisga´a had always used and occupied the territory they claim to be theirs. The outcome of the Calder case broke new grounds and showed unexpected strength. It placed the issue of aboriginal rights on the political agenda as never before.

Soon after Calder, the federal policy vis-a-vis indigenous people was transformed; for example, already in 1975 it was decided that native land claims negotiations were to occur throughout Canada, settling the land rights issue with most non-treaty indigenous peoples, and with the verdict in Calder as a basis. By this change of formal policy the Federal Government acknowledged certain key organizing principles, such as Aboriginal self-determination, treaty rights and self-government. Not unexpectedly, the Nisga´a appeared as one of the first aboriginal peoples to enter negotiations (1976), referring to the above mentioned principles as a point of departure. In other words, influenced by the Nisga´a trial on Aboriginal rights, the Federal

Government was prepared to adopt a new policy on *Aboriginal title*, a process focusing on treaty-making. In the following, an account of the Nisga´a treaty process will be offered, as well as the implementation of the Final Agreement reached between the parties involved, i.e.the Nisga´a on the one hand, and BC and Canada (the Provincial and Federal Governments) on the other.

The negotiation process turned out to be most complicated and lasted for twenty-two years before a conclusion was reached - first an Agreement in Principle (1996), later on a Final Agreement (1998), eventually referred to as the Nisga´a Treaty. An important aspect of the negotiation was the continuous reference made to the Nisga´a ancient code of laws and customs still very much sustained and practiced in everyday life among the Nisga´a. Their customary rights to land and resources are clearly defined through a special Nisga´a law called *Ayuukhl Nisga´a*. The latter law represented a living tradition which offered evidencial strength to the Nisga´a cause in two vital respects:

1) it proved that the Nisga´a without doubt was a culturally viable nation, where cultural difference played a meaningful role; 2) its clear regulation of landuse patterns and control undoubtedly made the Nisga´a entitled to certain rights. Long before white man´s contact they had arranged their life based on a set of rules contained in *Ayuukhl*. This customary law was not an item for negotiation; on the other hand it served as a crucial guide line, as it gave strength to those actively taking part at the negotiation table always to have their *Ayuukhl* in mind.

To serve its purpose the complex body of traditional knowledge derived from the *Ayuukhl* needed to be made comprehensible for the other negotiation parties. Consequently the Nisga´a conducted a "Land Use and Occupancy Study", which was about law and distribution of land based on custom. The study was completed with a map defining in great detail what is considered Nisga´a lands, named "Nisga´a Land and Nass Wildlife Area". As shown, customary law discourse can have an effect on political

processes as a fundamental strategy dealing with nation-state authorities, for example in land claims negotiations. In addition 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. The strong influence the *Ayuukhl* exerted during the negotiations proved that *law* was never a foreign conception to the Nisga´a. Nisga´a life was always based on and regulated by custom/tradition. And the predominant source for this is their *Ayuukhl*, reactivated in new contexts vital for cultural survival such as legal confrontations and land claims negotiations.

A sufficient land base is necessary for the Nisga´a to secure cultural sustenance and future developments which are culturally relevant. For a very long time it has been the number one issue to be resolved. For this reason the restated Federal policy, actualizing comprehensive land claims negotiations, was very timely. The court case tested out the apparent strength of the Nisga´a claim prior to such negotiations, and the customary law discourse, focusing on *Ayuukhl Nisga´a*, became instrumental in the long-lasting negotiation process as it dealt so explicitly with the duality between tradition and modernity. All elements mentioned are crucial for the outcome, the Treaty, and how it should be evaluated in Nisga´a terms. (For a more extensive account of the customary law discourse concerning this particular case, see Svensson, 2002) In the following we will turn to the Treaty and its implementation.

The Nisga´a Final Agreement (1998) is the specific document emanating from the negotiation process. By means of ratification by the three parties involved it is formalized into a Treaty. Even if the Treaty and the *Ayuukhl* are separate units in terms of shaping Nisga´a self-governance, there is a definitive connection between the two key factors. Nisga´a traditional territory, entirely owned by the Nisga´a Nation, is expressly defined in the Treaty. In this manner the Treaty has resolved the outstanding question of land rights; Nisga´a Aboriginal title is thereby affirmed. The Treaty, furthermore, recognizes firm rights to self-government, which

makes the Agreement rather unique. In terms of real political autonomy this Agreement appears, so far, as the strongest ever to be attained by any First Nations people in Canada; for the first time a Treaty includes a clause on self-government.

Due to its culturally defined power base, firmly attached to their traditional knowledge, not the least the *Ayuukhl*, Nisga´a self-government comes close to a third level of government within the Canadian political structure; in that capacity it relates directly to the Federal and Provincial governments; at the same time it differentiates itself from common municipal governments.

As a result of the Treaty, Nisga´a governmental jurisdiction covers a broad range of community management. Their authority is affirmed regarding such fields as culture and language, issues related to employment and public works, and land use; health, child welfare, education services and marriage are other sectors of daily life over which the Nisga´a will have authority; finally the Nisga´a will have their own police force and, if so desired, they can establish their own court. The legal instrument for the latter authorities will appear as their own system of laws, which in no way should be confused with the *Ayuukhl*.

To be fully operative, Nisga´a self-government requires a *Constitution*, which will function as a political steering instrument, the number one feature following upon the Treaty. This Constitution, formulated exclusively by the Nisga´a themselves, reflects the bridge linking modernity with tradition. Nisga´a self-government is modelled accordingly: first, a central government, the *Nisga´a Lisims Government*, which in a way replaces the former Nisga´a Tribal Council which was operative during the entire negotiation process; second, a *Village Government* in each of the four local communities; third, a *Council of Elders*. The latter council will serve and uphold a guiding function vis-a-vis the two levels of Nisga´a government. By such structure, there are enough guarantees that Nisga´a policy making corresponds to their

customary law and their managing and practicing of traditional knowledge, *Ayuukhl*.

The body of traditional knowledge embedded in the *Ayuukhl* does not only have an impact on the Nisga´a Constitution and the political structure resulting from the Treaty. In such vital areas of policy making as land use planning and establishing their own justice system, Nisga´a laws, tradition plays an equally strong role. Nisga´a laws are separate from, however not contrary to, *Ayuukhl*; at the same time this system of laws differentiates itself from Canadian Common Law and Canadian Charter of Rights and Freedom. The latter two are prevalent whenever applicable, e.g. the Nisg´a are not ascribed criminal law authority. Certain legal autonomy no doubt emanated from the Treaty process. Two sets of principles are thereby specified: principles of rights and principles of dispute resolution. These principles merge traditional legal preceptions of the Nisga´a Nation, contained 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, based on a *unique spirit, dignity* and *independence*, as reflected in Nisga´a traditions, referred to as the "Common Bowl Philosophy". Dispute resolutions are primarily founded on *values* expressed in *Ayuukhl*, specified in the following conceptualization: unity of Nisga´a Nation, collective understanding of *Ayuuk*, healing and reconciliation, dignity and respect, restoring harmony. Such Community Based Justice, merging ideas of *Nisga´a laws* with *Ayuukhl*, emphasizes *restitution* not punishment. Finally, it should be stressed that having their own Justice system has political meaning for indigenous peoples; it gives to the people their voices, power.

Implementation of the Treaty also deals with the shaping of a Nisga´a relevant academic education, a "Nisga´a studies program". Building competence to meet new challenges following upon the Treaty is met in this way. In the implementation process their own

college, *Wilp Wilxo´oskwl Nisga´a*, (Nisga´a House of Wisdom) appears as a most important institution. The same can be said about the *Ayuukhl Nisga´a Department*, under the Nisga´a Lisims Government, set up to carry out basic research focusing in particular on Nisga´a traditional knowledge. The political awareness of the strength of tradition explains the importance put on education and research in such a culture specific fashion. This, moreover, reinforces the highly diversified degree of autonomy attained through the Treaty process, instrumental in shaping Nisga´a culture political actions in the future.

We can summarize this case by stating that a land claims settlement eventually covers much more than the specific question of land rights, as it settles also the issue of self-government. The Treaty negotiations turned out to have a dual purpose, making the Nisga´a case a model for future Treaty-making processes. It has set a standard for future Treaty-negotiated forms of self-government, proving that land claims settlement and self-government are inseparable in this kind of comprehensive negotiations. (For further information about Aboriginal self-government in Canada, including the Nisga´a lesson, see D. Russell, 2000) It should also be noted that the Final Agreement is constitutionally protected, i.e. under the Constitution Act, section 35, of 1982.

c) The Ainu

Not until the 1980´s did the Ainu in Hokkaido, northern Japan, appear on the international arena. Behind this was a growing cultural awareness and mobilization on ethnic grounds among the Ainu nationally. In counteracting a long-lasting official policy of assimilation, the Ainu wanted to view themselves as a distinct people; this was based on a notion of historical uniqueness with a rich tradition, and an idea of contrast, i.e. differentiation from the dominant population of Japan (Cf. Sjöberg, 1993). In consequence the Ainu decided that their principal political goal

was to launch a legislative process to force the enactment of a new Ainu law. The new law, *Ainu Shinpo*, was to replace the old Ainu law of 1899, the so-called Hokkaido Former Natives Protection Act, a legal instrument affirming Japanese assimilation policy towards the Ainu. The main objective for the Ainu was to bring about a set of cultural and political rights; in addition, a formal recognition as *indigenous* was considered as a precondition for any resolution involving the Ainu as one partner in the dispute. Inspired by international movements, the Ainu claimed the establishment of a new kind of partnership, in which the Ainu and the national government can enter negotiations as equal parties, at least in symbolic terms. The premise for any partnership of this nature is that the Ainu are recognized as an indigenous ethnic minority, thereby being entitled to special rights. Only in this capacity, it is believed, can the prevalent assimilation policy be replaced by actual multiculturalism.

By initiating claims related to international law principles, in addition to a Fourth World discourse more generally, the Ainu entered a new era. Ainu Shinpo was originally drafted by the Ainu through their representative body *Utari Kyokai* (the Ainu Association of Hokkaido). The proposed law embraces both *political rights*, specified as special forest rights, including rights to self-determination, and *cultural rights*, meaning a strengthening and vitalization of the cultural repertoire (The drafting process began in 1983 and a final draft was introduced to the Japanese government in 1988). Special forest rights serve as a substitution for land rights proper. The Ainu have lost their land through the colonizing process inaugerated by the Japanese dominant society in the later half of the 19th century, a policy legally formalized by the old Ainu law of 1899. In other words, land lost cannot be reclaimed, nor can land rights be reestablished; however, the idea of a home land, *Ainu Moshiri*, is still maintained and reactualized as a predominant element in the Ainu formulation of their political

agenda. It is here the conception of special forest rights comes in; these are rights to resource extraction, especially hunting and fishing rights, which mirror the Ainu tradition of a forest way of life. These forest rights do not mainly refer to subsistence; their symbolic meaning is far more important, as Ainu ceremonial life is intimately connected to a forest life style. Thereby traditional values and concerns are revived and reinforced to meet new circumstances.

In their political rhetoric the Ainu pressed for actual land rights as a constituting part of their indigenous rights claim; any recognition of such a claim points to the issue of fair compensation for all the land lost. This has to do with strategy, converting the conception of land rights into rights to compensation, representing a significant component incorporated in the complex idea of Ainu Shinpo. The legitimacy of such rights emanates from the historical fact, maintained by the Ainu, that they are the indigenous people in Hokkaido; consequently they have a historical right to what is attributed as their home land, *Ainu Moshiri*. Ainu indigenuity is founded on that perception.

Why is the concept of *indigenous* so important? Why is the formal *recognition* as indigenous crucial? The concept of indigenous is part of a current international law discourse, therefore it has strategic value. It, furthermore, plays a role in adding legitimacy to specific claims concerning cultural and political/legal rights. If the designation as indigenous was not so commonly recognized internationally, endorsed especially by the UN, it would not have such decisive import. Most Fourth World peoples are recognized as indigenous by their respective state authorities. The Ainu, on the other hand, have not yet reached that point. In order to assume basic rights essential for their survival as people, they feel they need a similar acknowledgement.

Ainu Shinpo is thought to remedy the problematic situation the Ainu face at present. As a legal instrument Ainu Shinpo is complex; it refers to the improvement of Ainu living conditions, it

implies a promotion of Ainu culture, and, finally, it is a comprehensive claim founded on indigenous rights. The first two measures can be handled by means of affirmative action; the last issue has to do with legislation, including constitutional change, a demand for rearrangement which the Japanese authorities so far have met with complete restrain and even dismissal. In this respect we can notice a most consequencial contradiction on the part of the Japanese government. The authorities are prepared to recognize not only welfare needs for the Ainu but also promotion of their cultural repertoire. At the same time, they refuse to recognize the Ainu as indigenous people despite recurring requests. It is believed that only Ainu Shinpo in total, as originally outlined by the Ainu themselves, can be effectual in trying to overcome all the difficulties and detrimental effects caused by this contradiction. Increased self-respect and cultural pride depend on being recognized as indigenous; to be efficient the continual struggle towards cultural survival requires such formal endorsement. This kind of acknowledgement is not merely of symbolic importance; its meaning is indeed real[3].

In connection to the reconstruction of the Ainu culture and Ainu ethnic identity following upon a growing cultural awereness in general, i.e. the use of a notion of "Ainuness" for clearly defined political ends (Siddle, 1996), their cultural repertoire has been revived and given new meaning in an on-going ethnopolitical struggle. Without question the cultural repertoire will be given

[3] In reinforcing their defined strategy, the Ainu frequently made use of diverse international arenas. The address to the U. N. General Assembly Dec. 1992 by Giichi Nomura, then President of the Utari Kyokai, bear witness of that. The follwing citation from the address sums up Ainu basic ideology: "*As an indigenous people living within a highly assimilationist and industrialized society such as Japan, the Ainu request that the United Nations move speedily to set international standards that guarantee the rights of indigenous peoples against various forms of ethnocide. Furthermore, as an indigenous people from the Asian region, where there has never been a tradition of considering the rights of indigenous peoples, the Ainu urgently request that the U.N. set up an international agency to clarify the situation of indigenous peoples. The Ainu desire rights of indigenous peoples, including right to self-determination as a people. We do not seek separation but a high level of autonomy based on our fundamental values of 'co-existence with nature' and 'peace through negotiation'.*" (quoted from *The History of the Ainu Movement 1988 - 1994*, Utari Kyokai, Sapporo)

extra strength and new opportunities for development based on the enactment of Ainu Shinpo.

This process towards recognition culminated in 1997. First the Ainu attained a legal recognition in a court case, Sapporo District Court March 1997, with the explicit conclusion that the Ainu are an indigenous minority in Japan. The court stated, moreover, that the Nibutani Dam construction had caused expropriation of sacred Ainu land, which should be considered a violation of their human rights. The individual Ainu who filed the law suit did not expect to nullify an earlier decision to exploit the area for industrial purposes, but wanted mainly to draw attention to matters in principle, in particular the unsolved question of Ainu indigenousness. In that endeavour they succeeded; transferring legal recognition into political recognition, however, turned out to be more complicated.

Soon after this verdict, the new Ainu law, *Ainu Shinpo*, was passed in the Japanese Parliament, *Diet*, in May 1997. For the first time ever, the existence of the Ainu as an ethnic minority in Japan was officially confirmed; the Ainu were not, however, acknowledged as indigenous. The latter would have implied that the Ainu are entitled to certain rights based on their indigenuity, which apparently still was unacceptable.

As shown, then, the contradiction on the part of the Japanese authorities continues by means of a half-way acknowledgement of cultural diversity. The new law, which displays many charcteristics of a compromise, is named "Ainu Cultural Promotion Law"; emphasis is laid on culture and material welfare, not on rights from an international law perspective. For instance, the new law does not refer to such fundamental issues as rights to self-determination or land rights (Siddle, 2000), which indicates that the "Ainu voice" was not heard to the extent expected by the Ainu after such long strife, going back to the Ainu Shinpo Draft, 1984.

We may conclude then that the Ainu Shinpo process first involves *ethnification* of politics; the enactment of a new Ainu law is

certainly a political issue, an issue which can only be realized by means of political action, the legitimacy of which falls back on explicit ethnification. Second, the Ainu Shinpo process is an event in which ethnicity is *politicized* (Tambiah, 1994). The notion of certain welfare measures, combined with support for the Ainu cultural repertoire, is not a satisfactory solution unless it relates to the issue of indigenous rights in full scale. It is only then that the Ainu will become less marginalized and more equal, symbolically as well as from a real point of view, i.e. obtaining a position of parity in a multicultural context. Ainu ethnopolitics, no doubt, brought about political gains; a sense of Ainu nationhood, however, will continue to form part of the political rhetoric, as the issue of recognizing the Ainu as indigenous is still unsettled. And the political advantage emerging from the entire Ainu Shinpo process can be summarized as a challenge and gradual elimination of the dominant view in Japan of the Ainu as a "dying race"; instead, the Ainu appear as a nation persistently reacting to marginalization (Siddle, 1996). Ainu Shinpo is far from perfect and much remains to be accomplished, as this brief summons indicates. On the other hand, it represents a step forward in improving Ainu conditions as a distinct people, a new law for a new emerging nation within the Japanese nation-state. The nation-building process the Ainu initiated some twenty-five years ago, was heavily inspired and influenced by international law discourse. At the same time, it revitalized their rich cultural repertoire, in Siddle´s terms "a politics of memory" (Siddle, 1996), and remains the most positive aspect of the Ainu Shinpo process.

Constraints and possibilities in attaining reconcilement of divergent normative orders

The three cases discussed are commensurable in more than one way. First, the Sámi, the Nisga´a and the Ainu are all Sub-Arctic, partly Arctic, peoples. Second, they are deeply involved in

an aboriginal rights discourse to a large extent bringing together politics and law. Such combined strategy is essential for all indigenous minority groups who wish to meet the challenge of modernity, encapsulated as they are within nation-state structures. Third, focus has been laid on processes aiming at change, especially referring to clarification and improvement of their status (indigenous or not) and life conditions, generally, for these people, recognizing cultural distinctiveness. The Nisga´a Treaty process, the Sámi Rights process, and the Ainu Shinpo process without exception deal with law and politics. In different degrees they are all directed towards a counteraction of an official assimilation policy. In this respect the Nisga´a with their Nisga´a Lisims government, their own Constitution and a system of Nisga´a Laws are closest to reaching a point of real autonomy. The Sámi have acquired a sort of self-government, Sámi Parliament, with limited power, including constitutional protection of rights in principle; on the other hand, the recent special law, "Finnmarksloven", passed by the Norwegian Parliament, does not specify any substantial rights to land and water based on Sámi indigenuity, nor does it offer an essential power base specifically for the Sámi Parliament. For instance, the governing agency for land management is highly questionable.The Finnmark property, including much of original Sámi lands, is supposed to be administered by what is called the Finnmark Board of Land Management (See p. 6 concerning membership). This means adaptation to modernity, however primarily on Norwegian preconditions.

The basic change proposed deals with state-owned land (90%) of the entire county of Finnmark with substantial Sámi use rights being converted to regionally authorized land management rights, not ethnically defined. Sámi territorial rights will thereby be limited, maybe even reduced compared to former conditions. In this way the Sámi rights process at present must be reckoned as incomplete, to say the least. We can notice a striking contrast to the Nisga´a Treaty and its subsequent Constitution, which comes

very close to an adaptation to modernity appropriate to Nisga´ a interests.

The Ainu, finally, have so far obtained the poorest result. No land rights to be discussed, no political assembly instituted, and not even a formal recognition of the Ainu as an indigenous people represent in sum a severe set-back. Emphasis is placed on non-controversial issues, such as culture, more narrowly perceived, and various welfare measures; more decisive issues dealing with rights and power are deliberately left out. The Ainu Cultural Promotion Law of 1997 does not meet the aspirations and requirements of the Ainu, and the acknowledgement of the Ainu as an ethnic minority only states an obvious fact and is far from satisfactory, as the question of Ainu indigenuity remains unresolved.

The essence of the processes discussed can be attached to the following sequence of conceptions: it starts with *recognition* of status as people and rights; without such recognition of an external party relevant for the cause, for example nation-state authorities, there can be no *reconciliation*. As a fundamental prerequisite the question of recognition is extremely complex; depending on the concrete situation, that which is at stake may refer to Aboriginal title, Aboriginal rights, including land rights and rights to self-rule, status as indigenous, customary law expressing indigenous justice, legal and cultural diversity, and resource management rights. At the same time, it is expected that a proper balance between tradition and modernity is maintained (Cf. Hoekema, 1995).

Reconciliation entails: a) acceptance of cultural diversity, and b) the relinquishing of any tendency of assimilation/paternalist policy on behalf of the nation-state. Assuming these two aspects to be accomplished *plural normative orders* in one way or another can be established to serve the interests of indigenous minority peoples. For example, treaty-making processes, like the Nisga´a case, are ideal for reconciliation in the way they handle Crown sovereignty in relation to Aboriginal rights. The essence of such treaties is the explicit recognition of Aboriginal title by agreement (McKee,

2001). *Legal pluralism*, or pluralistic legality (Hoekema, 1995), does not necessarily imply two or more coexisting legal systems, but rather that the acceptance and recognition of cultural diversity, incorporating also legal plurality, i.e. people´s customs/legal perceptions, are to be considered in various legal conflict resolutions, in official courts and in other less formal fora.

Legal pluralism is a conceptional construction for placing state law and non-state law within the same society, without merging the two components into one legal system. In an earlier article (2003) I have argued that the distance between state law and non-state law is still rather great, which may cause negative implications for indigenous peoples. To shorten the distance without incorporation, thus creating a legal pluralistic order in a real sense, the two legal instruments, international law and customary law, which are mutually acknowledged, could serve as bridge-building factors. André Hoekema (1995) has penetrated in a convincing way the complexity of pluralistic legality, pointing to various elements to be included. Recognition of diversity within a nation-state depends on moral values which generate devolution of power to distinct social entities, in conjunction with the recognition of self-justice. It is, according to Hoekema, a question of making the competencies of indigenous people compatible with nation-state competencies (Hoekema, 1995: 237-38).

Autonomy exemplifies the final link in this sequence, connecting law and society. Attaining cultural-political autonomy for indigenous people does in no way challenge nation-state sovereignty. It is primarily a question of *devolution of power*, not separation from a nation-state arrangement. The notion of reconciliation presumes devolution of power in a real sense, not only symbolically in the form of verbal phraseology. As demonstrated, the Nisga´a come closest to establishing their own power base, which reflects functional autonomy. The Sámi have lately moved in that direction; the recent law on the issue of land rights, though, seems to have caused a standstill, at least

temporarily, in the process towards autonomy. When it comes to the Ainu, to this day there is very little autonomy to speak of. In other words, the Nisga´a are at present in a stage of consolidating progress obtained, while both the Sámi and the Ainu are forced to continue their struggle for autonomy in cultural as well as in political terms, considered a prerequisite for their survival as people. In the Sámi case the process towards autonomy is still unsettled and open, whereas for the Ainu the process seems to be closed, at least for the time being, as a result of recent legislation.

Common for these nations is also the manner in which they made use of a legal strategy for political ends, i.e. entering the legal arena of the dominant state societies to test their rights in principle in courts. The Calder, Nisga´a (1973), the Alta case, Sámi (1981), and the Nibutani case, Ainu (1997) all attempted to gain a clarification and a legally approved recognition of aboriginal rights, platform from which future ethnopolitical action could be launched.

As there is a built-in conflict of interest between an indigenous minority people and the larger society and its dominant population, the resulting change of the comprehensive tranformational processes, as here exemplified, not infrequently ends in the form of compromise. This state of affairs constrains desired solutions defined by the rather powerless minority party. Looking at the three cases, the Nisga´a appear as the only people having real negotiation power. The Sámi have long wanted to be in a similar position; in the end they managed to demand something similar to actual negotiations to revise the proposed enactment "Finnmarksloven", thereby obtaining a legal framework for action more in tune with Sámi inherent rights and their unquivocal status as indigenous. For the Ainu, negotiation power is still non-existent. As demonstrated, the opportunity to enter negotiations more readily opens opportunities for influencing the end result than the formal procedures of expert inquiries preceding legislation. In Canada the Nisga´a lesson serves as a model for the continual

treaty-making processes. Currently more than eighty self-government negotiations are taking place, all looking at the Nisga´a treaty (Russell, 2000: 55).

What has been said so far points to evident contradictions, a situation which may come close to what is referred to as anomie. Both the Sámi Rights Commission and the Ainu Shinpo process, despite thorough preparation for legislation, concluded with new laws disregarding ethnic uniqueness. Consequently, neither the Sámi nor the Ainu are currently ascribed rights to land and water based on ethnicity and aboriginality. This is far from the original intention; only the Nisga´a have been able to avoid such contradictory, non-comitted resolution. Through negotiation they attained a Treaty, clarifying and confirming their inherent rights as people concerning rights to land, title rights, and to self-government.

Land rights is a corner stone in developing the political and legal position of any indigenous people. It constitutes a power base; at the same time it has symbolic significance. The attachment to land, the notion of a home land - be it *Nass/Lisims, Sápmi* or *Ainu Moshiri* - forms part of contemporary rhetorical articulation; in a similar way it is a constituent element leading to actual empowerment.

Another common feature we can observe among indigenous people is the *customary law discourse*. Customs and their own legal perceptions are universal properties; the shape the discourse takes, on the other hand, is rather unique. In the general ethnopolitical strategy discussed, customary law appears as an important element, adding both strength and legitimacy to claims advanced. The advantage of the conception of customary law, furthermore, derives from its common use in state law; the legal views founded on custom are both accepted and considered relevant by the legal establishment of society. The difference relates to whether customary law is part of written law or mainly expressed as non-

written law. The latter is usually the case regarding customary law among indigenous people; for this reason its evidential power will in many instances be questioned. One outstanding question to be resolved, therefore, is to have aboriginal customary law clearly recognized as a *source of law*, i.e. its actual force in legal decision making procedures.

This brings us to the aspect of *codification*. In some cases codification of customary law may be advantageous and consequently desirable. The Sámi and the Ainu have lost much of the traditional knowledge on which their customary rights were orally sustained. However, after new basic research has been done, such codification is contemplated as positive. It is believed that it would facilitate conflict resolutions in the legal arena if they could refer to their codified customs/legal perceptions. As a contrast the Nisga´a maintain that their customary law, *Ayuukhl*, should remain oral. If it were transformed to a written document accessible to anyone, the risk for misinterpretation, or misuse, by various external parties, would be too great. Otherwise, to sustain this vast and rather complex body of knowledge, essential for Nisga´a identity, recording and converting the knowledge into a written text to be used for educational purposes is required. The Nisga´a with their autonomy are coping with this dilemma at present, compromising between educational needs and the balance between tradition and modernity, where tradition to a large extent connects to oral sustenance and transmittance. Having their own Constitution, their own Nisga´a Laws, they believe it is important to vindicate, at least publicly, the oral characteristic of their *Ayuukhl*.

For indigenous people a functional balance is desirable between rigid codification, in the sense of state law, and retaining the flexible nature of indigenous justice (Cf. Hoekema, 2001: 304). For this reason formal recognition of customary rights and its relevance in modern legal decision making appears far more important than codification per se. If codification of the same set

of rights is presumed, it should be modelled in accordance with legal standards traditionally ascertained by the indigenous people in question. Thereby a notion of diversity pertaining to codification is introduced. Obviously such differentiation falls back on the commonly accepted cultural plurality. Recent developments in the courts also point to an emerging acceptance of oral evidence, i.e. customary law and traditional knowledge being referred to as an adequate source of law. (See, e.g., Delgamuukw v. BC, Canadian Supreme Court, 1997)

Their own initiated *research* reflects cultural diversity and is essential for the relevant competence building the Nisga´a, the Sámi and the Ainu currently are engaged in. This research is governed by the interconnection between *tradition* and *modernity*, it is institutionalized and manned by indigenous personnel, and specific research projects are carried out jointly by indigenous and non-indigenous scholars. The establishment of the Ayuukhl Nisga´a Department (2000), the Nordic Sámi Institute (1973), and the Ainu Research Center (1994) represent steps in the right direction, emphasizing research as a strategic means to gain new grounds politically.

The case material described and analyzed are all about *politics of recognition*. In its form of action as well as goal orientation, each event is basically political, and it has to do with meeting the challenge of diversity, be it cultural, political or legal. A model for regional multiculturalism may be conceptualized as direct consociation, which means explicit state recognition of indigenous self-government related to a specific territory and based on customs (Hoekema, 2001: 295). Only the Nisga´a come close to such a position, however not completely, whereas the Sámi and the Ainu still are far from reaching that stage. If diversity did not have meaning, the aim towards formal recognition of cultural distinctiveness, including associated power, rights, promotion of culture, etc., would not have such import.

This points to the final aspect of the transformational occurrences treated, that of *nation-building*. Regardless of the outcome of each particular case, they have all contributed to a unification and mobilization of aboriginal people founded on ethnicity to engage in actively shaping their own nation. Such actions continuing for twenty or more years, are markedly conducive to nation-building, which undoubtedly should be viwed as a positive aspect of the above cross-cultural processes focusing mainly on legal concerns. Never before have the Nisga´a, the Sámi and the Ainu appeared as united people in the same manner working for common goals. This improvement on the ideological level has come to stay and is independent of the final outcome of the cases in question. To cope with new problems, fundamental conflicts of interests, and the challenge of diversity, defining themselves and being recognized as a nation are the most decisive steps towards real empowerment and autonomy, regardless of population size.

In summing up, what lessons of generality can be drawn from the argument pursued? Of the three strategies for change available, that of negotiation seems to give the greatest dividend, whereas both legal testing in court and enactment through legislation only to a limited degree generate favorable results. Notwithstanding strategy chosen, depending on the specific situation, i.e. whether there is a matter of choice or not, the time factor is comparable, the processes towards change are markedly slow and long-lasting occurrences. In most cases, for nation-states reaching compromises seem to prevail over a political will to actual devolution of power. Lastly the position of the majority society is often contradictory. Explicit recognition of cultural difference is not accompanied by the acknowledgement of substantial political and legal rights leading to relative autonomy, factors on which cultural distinctiveness are founded. Assets counteracting the constraints relate to international law, in particular the legitimate force of aboriginal rights discourse and the effect of nation-

building uniting relatively powerless indigenous people for common goals.

References

Ainu Shinpo (1984). *New Law concerning the Ainu people* (Draft adopted at the General Assembly of the Utari Kyokai, Sapporo)

Ainu (1994). *The History of the Ainu Movement 1988 - 1994*. Utari Kyokai, Sapporo

Asch, M. (ed.) (1997). *Aboriginal and Treaty Rights in Canada* Essays on Law, Equality, and Respect for Difference. UBC Press, Vancouver

Assies, W., van der Haar, G., Hoekema, A. (eds.) (2001). *The Challenge of Diversity* Indigenous Peoples and Reform of the State in Latin America. Thela - Thesis, Amsterdam

Calder (1973). *Verdict Supreme Court of Canada*, Calder v. the Queen. Calder 1973/SCR 373. Ottawa

Cassidy, F. (ed.) (1992). *Aboriginal Title in BC, Delgamuukw v. the Queen*. Oolichan Books, Lantzville, BC

Culhane, D. (1998).*The Pleasure of the Crown* Anthropology, Law and First Nations. Talon Books, Burnaby, BC

Geertz, C. (1983). *Local Knowledge* Further Essays in Interpretive Anthropology. Basic Books, New York

Herbert, C. (1991). *Culture and Anomie* Ethnographic Imagination in the Nineteenth Century. The Univ. of Chicago Press, Chicago

Hoekema, A. (1995). *Some reflections on modernity and law today or: the making of a pluralistic legality* . Amsterdam/Leiden

Macklem, P. (2001). *Indigenous Difference and the Constitution of Canada*. Univ. of Toronto Press, Toronto

McKee, C. (2000). *Treaty Talks in British Columbia* Negotiating a Mutually Beneficial Future. UBC Press, Vancouver

Nisga´a (1996). *Nisga´a Treaty Negotiations Agreement in Principle.*

Nisga´a (1998).*Nisga´a Final Agreement.* Federal Treaty Negotiation Office

NOU (1984). *Om samenes rettsstilling.* Norges offentlige utredninger NOU 1984:18. Universitetsforlaget, Oslo

NOU (1993). *Rett til forvaltning av land og vann i Finnmark.* NOU 1993:34, Oslo

NOU (1997). *Naturgrunnlaget for samisk kultur*. NOU 1997:4, Oslo
NOU (1997). *Urfolks landrettigheter etter folkerett og utlandsk rett*. NOU 1997:5, Oslo
NOU (2001). *Samiske sedvaner og rettsoppfatninger*. NOU 2001:34, Oslo
Ot.prp (2003). *Om lov om rettsforhold og forvaltning av grunn og naturresurser i Finnmark fylke* (Finnmarksloven) Ot.proposisjon nr 53 (2002-2003). Det Kongelige Justis- og Politidept., Oslo
Siddle, R. (1996). *Race, Resistance and the Ainu of Japan*. Rouledge, London
Siddle, R. (2000). *The Ainu in Japan*, in Leslie E. Spoersel (ed.) Endangered Peoples of SE and E Asia. Struggles to Survive and Thrive. Greenwood Press, Westport, Conn.
Sjöberg, K. (1993). *The Return of the Ainu* Cultural Mobilization and the Practice of Ethnicity in Japan. Harwood Academic Press, Chur, Swizerland
Svensson, T. (1997). *The Sámi and Their Land. The Sámi v. the Swedish Crown* A study of the legal struggle for improved land rights: the Taxed Mountains Case. Novus forlag, Oslo
Svensson, T. (ed.) (1999). *On customary Law and the Saami Rights Process in Norway*. Senter for samiske studier Skriftserie Nr 8, Tromsø
Svensson, T. (2002). *Indigenous Rights and Customary Law Discourse* case: comparing the Nisga´a and the Sámi. Jrl of Legal Pluralism Nr 47
Svensson, T. (2003). *Formal and Informal Aspects of the Conception Legal Pluralism: Contemporary Customary Law Discourse among two Aboriginal Peoples - the Nisga´a in Northern BC and the Sámi in Norway*. Papers of the XIII International Congress Vol. III. International Center for the Study of Nature, Environment and Culture, Kathmandu, Nepal
Tambiah, S. (1994).*The Politics of Ethnicity* in Robert Borofsky (ed.) Assessing Cultural Anthropology. McGraw-Hill Inc., N.Y.
Taylor, C. (1992). *Multiculturalism and "The Politics of Recognition"*. Princeton Univ. Press, Princeton, New Jersey
Åhrén, M. (2003). *Søksmål vil stoppe Finnmarksloven*,Interview Ságat Nr 86

Reiceved: *April 19, 2008*
Accepted: *August 30, 2008*