

Philosophy of Law in the Arctic

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The term "Arctic" is not only ecological but also mythical. The term refers to the areas which were thought to be located under the constellation 'Ursa Major' (the Great Bear).

J. Pentikäinen, *Shamanism and Culture*, Helsinki 2006, p.120.

*If we shadows have offended,
Think but this, and all is mended,
That you have but slumber'd here
While these visions did appear.
And this weak and idle theme,
No more yielding but a dream,
Gentles, do not reprehend:
if you pardon, we will mend (...).*

William Shakespeare, *A Midsummer-Night's Dream*,
Epilogue, Cambridge University Press 1924.

"

1.

What Is Philosophy of Law in the Arctic?

*Dawid Bunikowski**

Abstract

The paper focuses on the essence of philosophy of law in the Arctic. It presents its different topics and ways of thinking. The author proposes a kind of systematisation of the concept.

1. Introduction

My aim is to answer the question what legal philosophy in the Arctic is. Old legal-philosophical questions always sound like these: What is a law? What is justice?

My first impression is that Western philosophers of law must rethink own concepts, theories, models, methodologies, and narratives while conducting research on the Arctic, Arctic law, customary law and indigenous law in the Arctic. They should pay more attention to the real economic, political, environmental, and cultural processes actually happening in this region as well as to indigenous perspectives, concepts, and meanings. I think we need scholars with different academic backgrounds, who are interested in the mentioned topic (i.e. not only lawyers, but also Arctic anthropologists of indigenous religions and communities, historians, cultural ecologists or just philosophers). Inter(trans)-multi-cross disciplinarity is the clue. Also indigenous scholars are necessary in this scholarship, because they enjoy a kind of internal perspective or perception of what a law is for indigenous peoples (IP).

2. Questions

In particular, I claim that while thinking of the essence of the philosophy of law in the Arctic, I should answer two questions (I start from the Western perspective as a Western scholar):

- 1) What is "Arctic indigenous peoples' law" from the point of view of Western philosophy of law?
- 2) What is "law" for indigenous peoples in the Arctic?

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Question 1 (Q1) concerns: concepts of law, justice, morality; sources of law and status of customary law in constitutional hierarchy of sources of law; relations between law and morality; jurisdiction and legal pluralism; the rule of law, nation state, sovereignty; rights, human rights; multiculturalism, political and cultural autonomy, self-government, self-determination; the role of international law in recognising indigenous customary law and legal pluralism in the Arctic; the role of international law in resolving conflicts between states while in the Arctic. Here are the problems of moral and philosophical justification of the (universal) right of indigenous peoples to their own law as well. All ideas of protection of "distinct culture"³ come in this place, too.

These problems are quite new issues in the Western philosophy of law, which must finally redefine own paradigms and seriously take a look at some challenges, which have appeared in the Arctic recently (like climate change, indigenous rights movements).

Here we use Western terminology, models, and meanings to describe the phenomena.

In particular, contemporary legal philosophies (theories, jurisprudence) from the Arctic countries should be taken into consideration and studied (legal theories in United States, Canada, Finland, Greenland and Denmark, Iceland, Norway, Russia, and Sweden). However, it is justified to remember about legal-philosophical considerations in countries, which enjoy the status of observer states in the Arctic Council, too (i.e. France, Germany, The Netherlands, Poland, Spain, United Kingdom, People's Republic of China, Italian Republic, Japan, Republic of Korea, Republic of Singapore, Republic of India).

Question 2 (Q2) covers problems of relations of law and indigenous traditions, religions, cosmologies, mythologies or shamanism. The important relations are: the relation to land (like *sieidi*), ancestry, and the history/past (spiritual heritage) as well as the relation to people, Nature, the cosmos (cosmology). The other serious issues are: "sustainable development" (relation: man-society-Nature); unwritten law as customary laws in particular areas (like reindeer husbandry, natural resources management; fishing waters, hunting grounds, shamanism); organisation of villages or communities (like *siida*); indigenous redistribution of wealth; transmission of knowledge of *own* law; indigenous perception and value of law.

³ The phrase comes from *R v Sparrow*, [1990] 1 S.C.R. 1075. The case concerned aboriginal fishing rights. See also this summary: http://casebrief.wikia.com/wiki/R_v_Sparrow. Another leading case of the Supreme Court of Canada on aboriginal rights was *R v Van der Peet*, [1996] 2 S.C.R. 507, establishing the Distinctive Culture Test (the clue was that both the relationship of aboriginal peoples to the land and the distinctive cultures and societies of aboriginal peoples must be taken into consideration by courts).

Here we use indigenous terminologies, narratives, and meanings to describe the phenomena, following the anthropological theory by Juha Pentikäinen⁴.

Indigenous scholars, by the nature of the state of things, are first invited to work on Question 2, but Western scholars are not excluded if they follow Pentikäinen's advice that scholars should use indigenous meanings and terminologies⁵.

3. Perspectives and topics

To sum up this part of considerations, we have two perspectives in our research:

- 1) Western philosophy of law on indigenous law in the Arctic (Q1),
- 2) Arctic indigenous philosophy(ies) of law (Q2).

Therefore, although indigenous law seems highlighted in Question 1, not only indigenous peoples' law in the Arctic is the most important subject there, but also other philosophical-legal issues, which are very related to indigenous law and interests or just to the region called the Arctic⁶, are equally crucial. These are as follows:

- values of law (international, state, indigenous, customary etc.) in the Arctic: justice, diversity, peace, energy justice, the environment,
- transnational governance, indigenous governance beyond state borders, changing sovereignty, changes of the rule of law, political decisionism (Schmitt etc.), multiculturalism, justice and injustice in the Fourth World,
- Western legal theory about environmental law, the right to clean climate, and restorative justice,
- some classic topics in Western legal theory (like functions of law, sources of law) or legal anthropology (like interlegality⁷).

While Q1 says what we (West) say about them (IP, IP's law, rights, cultures, the Arctic) or how we want to use our theories (like legal pluralism) to describe their legal artefacts or just help them, Q2 says what they say about themselves (IP's law, culture) and us (Western theories, law, culture).

⁴ See how this idea was expressed in these essays: J. Pentikäinen, *Shamanism and Culture*, Helsinki 2006.

⁵ *Ibidem*, p. 86.

⁶ Also non-indigenous peoples live in the Arctic. The Arctic is administered rather by states and state governments than by indigenous peoples themselves still. So this non-indigenous perspective of law must be also taken into consideration in order to "catch" the true picture of imaginations of law in the Arctic.

⁷ See more: A. Hoekema, *European Legal Encounters Between Minority and Majority Cultures: Cases of Interlegality*, "Journal of Legal Pluralism" 2005, vol. 5, pp.1-28. Hoekema prefers to speak about 'local law' than 'customary law'. He argues that it is well known that often, surely in present days, indigenous peoples pick part of the dominant law and mix this somehow with their own law. Hoekema calls it 'interlegality'. See also: T. G. Svensson, *Interlegality, a Process for Strengthening Indigenous Peoples' Autonomy: the Case of Sámi in Norway*, "Journal of Legal Pluralism" 2005, vol. 51, pp. 1-78.

4. Clash of values

Western societies chose own way of building a nation state. They invented concepts like commonwealth, sovereignty, democracy, and the rule of law. They started to colonise the Arctic and the indigenous nations like the Inuit in Greenland, Canadian Indians, Sami in Scandinavia and northern Europe. This is not like that these indigenous societies and communities had not known their ways of something what we call democracy, law, and sovereignty. They knew them without us. They had the law and philosophy. Let us give two short examples of indigenous concepts. First, Rauna Kuokkanen shows e.g. the problem of the philosophy (logic) of the gift⁸. The philosophy of gift was the basis of indigenous peoples' relationships and communities and all the rules of social life as well as rituals and beliefs. Secondly, Mattias Åhrén describes the old Sami customary laws concerning natural resources management and their social, legal and political organisation. He uses terms such as *siida* or *norraz*, or *kärreg*⁹. Generally speaking, Western scholars as (even) internal outsiders or (rather) external outsiders know rather little about both. (There are some great exceptions).

Importantly, the West brought civilisation by violence. The West came with a sword and gun to make the Arctic Western. The West came with own meanings and in the name of own conceptions. Of many conceptions, nation state paradigm, progress, the Enlightenment were the most important. Nevertheless, this was against the traditional ways of life of the

⁸ R. Kuokkanen, *The Logic of the Gift: Reclaiming Indigenous Peoples' Philosophies*, [in:] T. Botz-Bornstein, J. Hengelbrock (eds.), *Re-Ethnicizing the Minds? Cultural Revival in Contemporary Thought*, Amsterdam-New York 2006, pp. 251-271.

⁹ See: M. Åhrén, *Indigenous Peoples' Culture, Customs, and Traditions and Customary Law -- the Saami People's Perspective*, *Arizona Journal of International & Comparative Law* 2004, vol. 21(1), pp. 63-112.

See also more about Sami customary law in Western scholars' narratives: E. Niemi, *Sami History and the Frontier Myth: A Perspective on the Northern Sami Spatial and Rights History*, [in:] H. Gaski (ed.), *Sami Culture in a New Era. The Norwegian Sami Experience*, Davvi Girgi OS, Karasjok 1997, pp. 62-85; T. G. Svensson, *Indigenous Rights and Customary Law Discourse: Comparing the Nisga'a and the Sámi*, "Journal of Legal Pluralism and Unofficial Law" 2002, vol. 47, pp. 1-35; Ch. Allard, S. Funderud Skogvang (eds.), *Indigenous Rights in Scandinavia: Autonomous Sami Law*, Farnham: Ashgate Publishing 2015; D. Bunikowski, *Indigenous Peoples, Their Rights and Customary Laws in the North: the Case of the Sámi People in Scandinavia and Russia*, [in:] M. Lähteenmäki, A. Colpaert (eds.), *East Meets North - Crossing the Borders of the Arctic*, "Nordica Geographical Yearbook" 2014, vol. 43 (1), pp.75-85; D. Bunikowski, *Sámi Reindeer Husbandry as a Way of Life: On Culture, Philosophy, Cosmology, and Law*, [in:] T. Koivurova, W. Hasanat (eds.), *Current Developments in Arctic Law 2015*, vol. 3, University of the Arctic Thematic Network on Arctic Law, Rovaniemi 2015, pp. 3-6;

See also chosen Sami scholars' narratives on Sami laws and culture:

K. Näkkäläjärvi, *Reindeer Earmarks as a Sámi Cultural System*, [in:] J. Pennanen, K. Näkkäläjärvi (eds.), *Siidastallan. From Lapp Communities to Modern Sámi Life*, The Inari Sámi Museum, Inari 2003, pp. 140-147;

K. Näkkäläjärvi, J. Pennanen, *The Assimilation of Sámi Reindeer-Herding Administration into the Finnish Government*, [in:] J. Pennanen, K. Näkkäläjärvi (eds.), *op. cit.*, pp. 66-67; K. Näkkäläjärvi, *J. Pennanen, Reindeer Herding and the Cycle of the Seasons*, [in:] J. Pennanen, K. Näkkäläjärvi (eds.), *op. cit.*, pp. 62-63; J. Pennanen, *Reindeer Herding - the Defining Cultural Element in the Circumpolar Region*, [in:] J. Pennanen, K. Näkkäläjärvi (eds.), *op. cit.*, pp. 60-61; J. Porsanger, *A Close Relationship to Nature - The Basis of Religion*, [in:] J. Pennanen, K. Näkkäläjärvi (eds.), *op. cit.*, pp. 151-155.

indigenous peoples in the Arctic. Who lost and who won in this battle is a rhetorical question. The West depreciated and almost destroyed the indigenous heritage of the Arctic. Now the indigenous rights movement is strong. It seems that there are some pangs of conscience on the Western side, too. The indigenous peoples' fate stirred up compassion around the world. *Historical Justice* requires more recognition of indigenous rights. Nowadays then Western philosophy, also legal philosophy, may help to resolve some problems we are still facing in our politics. As said Aristotle, there is no a happy society if only part of the society is happy. Aristotle himself says so: "One should call the city-state happy not by looking at a part of it but at all the citizens."¹⁰

5. Concluding remarks

To sum up, there are two ways in the philosophy of law in the Arctic. One, as we see, is *morally* stronger, and it is about indigenous legal philosophies (Q2). These legal philosophies are the indigenous legal philosophies, which are based on indigenous philosophies at all. Here we have e.g. the philosophy of gift, described by Rauna Kuokkanen, or the old Sami customary laws, described by Mattias Åhrén. Generally, indigenous scholars are able to present these philosophies better than Western scholars (even if the latter are not excluded).

And there is another way (Q1). This second way goes through Western legal theory (philosophy) and its considerations on justice, environmental issues, minority rights etc. In this Western philosophy of law we combine both legal philosophy and moral and social philosophies. What we can propose as an interesting stuff *for the Arctic*, borrowing from Aristotle, Cicero¹¹, St. Thomas¹², Justinian¹³, Immanuel Kant¹⁴, John Austin¹⁵, Herbert Hart¹⁶, Brian Tamanaha¹⁷, and Ronald Dworkin¹⁸, if any, is the question yet unanswered.

¹⁰ Aristotle, *Politics*, VII.9.1329a22–3, Translation: Barker, Ernest, revised by Richard Stalley, Oxford 1995.

¹¹ See: Cicero, *On the Laws (De Legibus)*, available at <http://www.nlnrac.org/classical/cicero/documents/delegibus> (04.02.2016). Cicero pointed out that all humans are naturally equal, instead of living in different cultures. They all enjoy one universal and common law based on reason and Nature: *Troubles, joys, desires, fears wander through the minds of all similarly. And if persons have different opinions, it does not follow that those who worship dog and cat as gods are not tormented by the same superstition as other races. Moreover, what nation does not cherish kindness, benevolence, or a soul that is grateful for and mindful of a benefit? What nation does not despise, does not hate the haughty, the nefarious, the cruel, the ungrateful? Since from these things it may be understood that the whole race of human beings has been united among themselves, the final result is that knowledge of living correctly makes persons better.* (Cicero, 31).

¹² See: St. Thomas Aquinas, *Summa Theologiae, Of the Essence of Law*, available at <http://www.newadvent.org/summa/2090.htm> (22.02.2016). He indicates the most important aim of law in this way: *Consequently, since the law is chiefly ordained to the common good, any other precept in regard to some*

These two ways, poetically speaking, should march together, like two sides of the same coin, like two birds in one pair, like two soldiers of the same battalion. Of course, the Arctic indigenous legal tradition is more spiritual, always related to Nature. Western legal philosophy is more "rational" and procedure-oriented nowadays. But not always it was like it is now. Western philosophical traditions are deeply spiritual also. For example, Nature was the most important criterion for the Greeks or Romans. Philosophy of Stoicism is one of the idiosyncratic signs of this attitude. However, these two ways of thinking are different like different are environments in which these ways of thinking and doing things have been adopted and developed for centuries. Probably, we enjoy also different imaginations of what a legal philosophy is. The aim is to make them both get together in the Arctic. The way is to traverse by progressing steadily and rhythmically in this new science and enkindle new notions.

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individual work, must needs be devoid of the nature of a law, save in so far as it regards the common good. Therefore every law is ordained to the common good.

¹³ See: Justinian's Code (534), The Institutes of Justinian (Book I. Of Persons, I. Justice and Law), available at <http://classes.maxwell.syr.edu/His381/InstitutesofJustinian.htm> (03.02.2016), where it is stated: *Justice is the constant and perpetual wish to render every one his due (Justitia est constans et perpetua voluntas jus suum cuique tribuere).*

¹⁴ See: I Kant, *Grounding for the Metaphysics of Morals: with On a Supposed Right to Lie because of Philanthropic Concerns*. Hackett 1993 (1785), trans. J. W. Ellington, where he asks for universal principles, which are absolute and unconditional, and where the categorical imperative is formulated (p. 30): *Act only according to that maxim whereby you can at the same time will that it should become a universal law without contradiction.*

¹⁵ On what a law is (in terms of legal positivism and utilitarianism): J. Austin, *Lectures on Jurisprudence* (5th ed. 1885).

¹⁶ On the essence of law in the Western world (and rather the Anglo-Saxon one): H.L.A. Hart, *The Concept of Law*, Oxford 1961.

¹⁷ See especially his papers on legal pluralism: B. Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, "Sydney Law Review" 2008, vol. 30, pp. 375-411; B. Z. Tamanaha, *The Folly of the "Social Scientific" Concept of Legal Pluralism*, "Journal of Law and Society" 1993, vol. 20 (2), pp. 192-217.

¹⁸ See especially his books on law and justice, and rights: R. Dworkin, *Law's Empire*, Cambridge, MA, Harvard 1986; idem, *Taking Rights Seriously*, Cambridge, MA, Harvard 1977.

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