INTRODUCTION

FRED BOSSELMAN AND PETER ØREBECH

When the authors of this book told people that we were working on a book about customary law and sustainable development, we often encountered puzzled looks. A few people said, "What's sustainable development?" Many more asked, "What's customary law?" Others wondered how two such disparate topics could be related?

Chapter 1 begins by briefly discussing the meaning of each of the two phrases, and suggests the nature of the linkage between them. Here we raise the question of whether and under what conditions customary law might be looked to as a way of developing natural resources in a sustainable and precautionary manner. Recent research by Elinor Ostrom and others has called attention to the key role that common-pool resources play in sustainable solutions to natural resource management . Many customary law systems employ an intricate mix of public, private and common property concepts. Sometimes such a mix can better achieve sustainability in situations where a system that adamantly relied on private or public property alone may have failed.

Chapter 2 discusses three illustrative instances of the use of customary law in natural resource management in three different areas of the world: Hawaii, Northern Norway and Greenland. By putting the case studies up front, it is our intention not only to describe the conflicts briefly, but also to get in just "enough" law so that readers can proceed to the more detailed chapters of their choice. In each of these regions, the indigenous people established customary laws that regulated the use of natural resources. In later chapters, we will return to examine how those laws have interacted with modern civil or common law systems, and how that interaction has affected the sustainability of those resources.

Before Europeans came to Hawaii, the Polynesian people had developed a complex culture based on customary law. The islands were divided into pie-shaped territories ("ahupua'a") running from the center of the island to the sea. Each territory was under the jurisdiction of an ali'i, or a noble. Within each territory, the residents engaged in agriculture,

raising products such as taro and yams. Hawaiian customary law allowed each resident of an ahupua'a to travel throughout the territory to engage in gathering activities. These activities included picking fruit, fishing, and hunting wild pigs. They also involved finding plants for medicinal or ceremonial purposes, and collecting firewood, thatching and house timbers.

Anyone engaged in legitimate gathering activities was allowed access to private land to the extent necessary to carry out the gathering activity. The king enforced rules, however, that limited both the types and the locations of certain gathering activities. These rules varied over time, but were apparently designed to conserve resources. Thus fishing might be restricted in certain seasons, and certain types of scarce plants were designated as forbidden ("kapu").

As Hawaii was absorbed into modern culture, the old gathering practices faded away. Today the State of Hawaii operates under a legal system similar to the other American states. The descendants of the Polynesians have not, however, been willing to give up their rights to engage in traditional gathering practices, and their demand to retain the rights of access to private property that prevailed under customary law is one of the main tenets of a movement to preserve Native Hawaiian culture. The conflict between this movement and the expectations of private landowners is being played out in the courts and legislature of Hawaii.

In Norway, the country's famous fjords heavily indent the coast. The Saami occupied and fished in the northernmost coastal areas once known as Lappland. Icy temperatures and typically rough seas discouraged extensive trips to distant fishing grounds. While Saami people most often settled near the fjord-bottom, Norse settlers used to dominate headlands and outer parts of islands and peninsulas. As the fish straddled deep into the fjords close to the shore, the Saami obtained much of their food from fishing in the fjords and nearby coastal waters. This system was protected under law until terminated by the new District Fisheries Act of Finmarken in 1830.

Over time, the Saami adopted improved techniques. They moved from oars to motors, from open to sheltered boats, from single hooks to longline, gill nets and purse seines. Some also switched to trawling. They treated the ocean as a common pool, open to all who used the common fishing techniques. Newcomers were welcomed, and even given directions to good fishing areas, as long as they used typical fishing methods. No individual or group had a pre-emptive right to any particular fishing area,

at least not after 1728. Over the centuries, these native fisheries never threatened stocks.

The development of larger-scale fishing technology created a conflict with Saami customary laws. Large trawlers with modern gear could take far more fish than was possible using traditional methods. In 1990, in order to protect the supply of fish, the Norwegian government introduced regulations limiting access to the common pool. These regulations, however, also governed traditional fishing. Saami fishermen have been unable to function effectively in this regulatory environment. They are dependent on subsistence fishing, and have not been able to meet the minimum catch requirement established by the fishing authorities as prerequisites for further fishing rights. Consequently many small-scale fishers are now denied full cod fishing rights by the government rules. The conflict between the Saami fishermen and the large-scale fishing interests has led Norwegian institutions to examine the appropriate role of customary law in Norway today. The Ministry of Justice recently published a report on this subject.[1]

Southern Greenland is at the same latitude as Norway. Greenland, unfortunately, does not enjoy the warming effects of the Gulf Stream. The vast majority of this huge island is covered by a massive ice cap, confining human occupation to the coast. Inuit people, closely related to the Inuits living in Canada and Alaska, have traditionally occupied these coastal areas. Living in a climate hostile to agriculture,[2] the Inuit developed an economy based on hunting. Whales, seals and caribou provided food, oil and skins for clothing, and bone for tools. Hunting these animals was an arduous activity most efficiently undertaken by groups. Large extended families traveled around the country to hunt different animals at different seasons. Under customary law, most forms of property were communal, shared by all members of the extended family, including foster children. The roles of men and women in traditional Inuit society were sharply delineated. Men did the hunting, which required great physical strength and endurance. Women prepared the products of the hunt; produced food and clothing; and collected water and fuel. Some of the women's responsibilities, such as cleaning and preparing sealskins, were viewed as quite unpleasant work.

As in Norway and Hawaii, globalization in Greenland has led to a decline in traditional practices. Fishing, originally a low status activity in the Inuit culture, has become economically attractive now that a number of fish processing plants have been built. Most of the employees of these plants are women, who often supply the only cash income in their

household. Traditional hunting practices persist to some degree, especially in the more remote areas of Northern Greenland, but hunting has been impacted by international pressure to reduce the taking of whales and seals. Greenland obtained home rule from Denmark in 1979, so the Greenlanders themselves have dealt with the conflict between traditional customs and modern legislation. Their ambivalence toward retaining traditional rules reflects the distinct effects modernization has had on men as opposed to women.

In Chapter 3, Jes Bjarup emphasizes the key role of Thomas Reid, the leader of the "common sense" school of Scottish philosophy, in developing an intellectual foundation for customary law. Reid viewed knowledge as a communal enterprise among human beings actively engaged in the pursuit of understanding their common world. Other animals, said Reid, "cannot lay down a rule to themselves, which they are not to transgress, though prompted by appetite or ruffled by passion."[3] But humans have the cognitive capacity to introduce customs of conduct that can serve as legal rules, and to recognize that all members of society have some common interests that induce them to regulate their conduct by certain rules.

The formation of customary law is possible because humans have the capacity to engage in the intentional activity of making rules concerning the appropriateness of human conduct using customary beliefs of what is right or wrong. Reid's interpersonal approach recognizes that humans are rational and responsible individuals facing the task of developing structures to serve human ends. One way of doing this is for humans to act both rationally and communally to create valid rules of customary law that regulate the conduct of both themselves and others. This interpersonal perspective makes room for customary law as a separate and distinct procedure alongside legislation for the making of valid legal rules.

Chapter 4 explains the customary law prerequisites as elucidated in the Anglo-American legal systems. These prerequisites determine whether any disputed custom qualifies as customary law. In England's common law system, the courts long ago established specific rules for determining the validity of local customs. These rules were concisely summarized by William Blackstone, the widely read eighteenth-century treatise writer, and are often referred to as the "Blackstonian rules."[4] New research by David Callies detailed in this chapter shows that Blackstone's analysis accurately represented the court decisions of his time, and that the English courts continue to rely on a flexible version of the Blackstonian rules.

Some historians have assumed that because the original English rules required proof that a custom had existed since time immemorial, the idea of customary law must be obsolete in England. But modern English courts are more likely just to require solid proof of "long usage"[5] that has not been interrupted by any purposeful abandonment of the customary right. The modern English courts also continue to exercise the discretion to declare invalid any "unreasonable" custom or any custom that is so indefinite that it lacks certainty or consistency. Some American courts have also relied on the Blackstonian rules to uphold customary law, although their interpretation of the rules has sometimes been hard to square with either the original or the current English version.

In Norway, like many civil law jurisdictions, jurists and scholars recognize a number of legal sources,[6] including customary law, as pointed out in Chapter 5.[7] The Norwegian judicial rules for validating a custom as law are quite similar to the Blackstonian rules. They operate, however, in a rather different context from the Anglo-American one. Norway has a long tradition of codification and centralization, pursuant to which the government might simply confirm the legality of social norms without relying on any judicial input. This is accomplished either through legislation or by administrative rule. Some civil law countries, including Norway, have confirmed the superiority of customary law by expressly not overturning ancient customary law when writing new legislation.

Courts have occasion to evaluate the validity of customary laws only if they are disputed. Both civil and common law judges have needed rules for deciding whether particular customs qualified as "customary law," and they have applied the rules with a degree of flexibility through general criteria such as "reasonableness." The judges appear to be using an instrumental approach in evaluating particular customs;[8] that is, they attempt to predict the result of applying the customary rule, and then determine whether that result would be satisfactory.

Chapter 6 argues that all societies must react to the need for rapid legal change, especially as relates to environmental planning in communities under stress. Modern scholarship in law, management, economics and ecology emphasizes the need for resiliency and adaptability in resource management systems in the face of unpredictable future technological, environmental and cultural change.

In recent years there have been many case studies of particular examples of the use of customary law in natural resources management. In reviewing an extensive sample of these studies, Fred Bosselman concludes that a customary law process must meet five criteria if it is to have the resiliency

to manage resources sustainably: (1) it must have recorded a history of successful adaptation; (2) it must provide a vehicle for making changes efficiently; (3) it must provide feedback mechanisms; (4) it must use fine-grained rules that are easily adjusted; and (5) it must create a balance of rights and responsibilities.

In Chapter 7, Peter Ørebech discusses the relationship of customary law to "bottom-up" democracy. In a democracy, rules should be transparent, predictable, determinate, coherent and consistent. He demonstrates that customary law meets all of these requirements. It embodies the democratic ideal in that it requires continuous public affirmation; if that fails, the traditional customary system is illegitimate and will not survive. New generations may opt for traditional solutions or may explicitly or tacitly reject them.[9]

In countries with a civil law tradition, a more positivist legal philosophy has often prevailed. Civil law countries have typically endeavoured to codify all legal rules. Such countries might be expected to be less receptive to laws based on custom than common law countries, where the gradual evolution of case law was a dominant element. Under the dominant paradigm of legal positivism, the status of legal authority granted to customary law was assigned little weight as a low priority source.[10] Sweden has clearly operated within this paradigm.[11] Other civil law countries that had originally been unreceptive to considering customary law as a primary principal source of legal authority have started to recognize its advantages.[12] Some of the legal arguments used to overcome medieval superstition demonstrate the lingering doubts held by legal positivists toward customary law. These arguments cleared the way for contractualism and exclusive state autonomy. Clearly a withering of the state would have perilous side effects. Concern over such an unlikely prospect, however, should not obscure an objective evaluation of customary law in the context of resource utilization and management strategies.[13]

Peter Ørebech compares the instrument of customary law with regulatory and market solutions. To what extent can we evaluate the effectiveness of such customary laws in comparison to distributive plurality decisions? A confident answer depends upon the conceptual design and the sustainability position within decision-making procedures. Generally it may be said that the substantive content of the customary law is not indifferent to the sustainability outcome. How people adapt to elements like internalization of externalities, personal responsibility and restoration are vital components in the process of obtaining viable resources.

In Chapter 8, Martin Chanock shows how international law and international commerce provide both opportunities and challenges for customary law in large parts of the third world. Colonial powers had delegated much of the legal administration of affairs among natives to local interlocutors. The justification for this delegation was the fiction that these backward people were applying only a static form of primitive law comparable to the ancient customs of tribal Europe. So to comply with this fiction the interlocutors had to create law that was adapted to new conditions while claiming to be old.

In the post-colonial era, the new nations often tried to use their customary law as a means of strengthening national identity. But because national boundaries reflected compromises among the colonial powers more than actual cultural unity, the new nations were usually faced with the problem of dealing with a multiplicity of groups with differing customs. Meanwhile, given the new opportunity to control the exploitation of their natural resources, many of these new nations opted for centralized control and became mired in corruption and lawlessness. In this context, the claims of local groups to rights under customary law became one of the few vehicles by which such groups could contest state power. Their customary law was not static; it used local customary processes to adapt customary law to changing conditions.

As many developing nations sought to maximize current income, at least for their elites, many groups within these countries became aware of the unsustainability of the exploitation of the country's resources. Tens of thousands of grass-roots agencies throughout the world, often working in cooperation with large Northern-based non-governmental organizations (NGOs), used the language of both custom and sustainable development in an attempt to decentralize control over natural resource management. Their objective was not to return to pre-market forms of social organization but to adapt customary processes to the new conditions of growing populations, globalizing markets, depleting resources and changing technologies.

Once customary law is seen as a process of indigenous natural resources management that embodies adaptive responses, and not merely inflexible traditions, its possibilities as a vehicle for sustainable management begin to seem more realistic. This does not suggest that customary law systems are inherently conservation- oriented. Instead, it suggests that in those countries where the sole alternatives are failing bureaucratic – or kleptocratic – states and rapacious international markets, the chances of a sustainable customary alternative may well be worth considering.

Chanock emphasizes that customary law will not be able to cope with today's world if it is viewed as the diametric opposite of the modern economy. Unlike Henry Maine's vision of custom as a pre-contractual exaltation of status, Chanock argues that customary law incorporates contract and always has. Contracts are formed in the context of custom, however. Institutional arrangements, which combine contract and custom, can provide both an individual basis for consent and responsibility and a cultural basis for determining the acceptability of measures to deal with new situations.

The concept of custom has always had a specialized usage in international law. Chapter 9 examines two ways in which international law is evolving in ways that strengthen the positions of both customary law and sustainable development.

First, international institutions are increasingly relying on international organizations and NGOs to establish and administer rules for natural resource management. Many of these international agreements incorporate sustainability objectives and precautionary principles, such as those found in the agreements relating to fisheries management. The 2002 Johannesburg Summit provides a basis for hope that these goals can be incorporated into agreements with broader applicability in the future.

Secondly, the international community has started to give greater recognition to the rights of indigenous peoples to create and employ their own rules for the territory that they occupy. Canada, New Zealand and Australia have been world leaders in recognizing the importance of lending validity to the customary laws of indigenous peoples. It remains to be seen whether other countries will follow suit.

Chapter 10 returns to the three case studies outlined in Chapter 2. Hawaii, Norway and Greenland illustrate three different ways in which modern governments can react to customary laws that relate to natural resources: retention, rejection and modification. Unlike the failing states discussed in Chapter 8, each of the case studies involves the integration of customary law into a sophisticated legal system of a democratic government – a context that provides some basis for optimism. Nevertheless, the wide-ranging differences among customary law systems, and among the governments that are affected by them, suggest the need for a continuing program of research into customary law.[14]

Chapter 11 compares the many and varied reasons why policy makers decide to implement customary law. Chief amongst these are empowerment, cooperation, innovation and data collection. Indigenous and other local knowledge-source groups are much more likely to cooperate and share their wisdom with resource managers if their practices are integrated

into conservation projects and when they participate in the environmental law-making and law-interpreting process.

Chapter 11 further emphasizes a key point discussed throughout the book. Customary law is not a panacea. This chapter argues against some of the flawed reasoning behind customary law choices that can actually have adverse effects on sustainable development. Both nostalgia and privatization appeal to a sense that modern life and government control have gotten out of hand. Appeals to customary law systems must be based on rational analysis, and not on ideological sentiment. Those who wish to dominate or exclude other ethnic or user groups sometimes seek to bolster their claims with customary law arguments. Inequities based in custom, however, are no different from those imposed by positive law – injustice in search of legitimization.

Finally, Chapter 12 offers the authors' conclusions and suggestions for further research. The study of customary law's potential for improving the sustainability of development is in its infancy. It deserves careful attention from objective observers who can analyze why it often works and often does not.

We intend to take up the challenge of construing alternatives to "governmental control and command." Duncan A. French said: "For many developed States a key challenge is how to achieve sustainable development without a return to centralized planning, an anathema to most States with developed market economies."[15] This book proposes that "bottom-up systems" – practices that develop customary law systems – play a critical role in achieving viable social systems. It is all about local practices serving as examples of conduct that meet our obligations toward future generations.

Charles E. Larmore states that "Examples, it is urged, have the task of persuading us to do our duty. They excite the imagination and the passions in a way in which, supposedly, moral rules and reason in general are less able to do; and since most of us are not motivated most of the time by rules and reason alone, examples serve an indispensable function."[16] People rely on examples when deciding how to act. Examples play a considerable role in moral deliberation.[17] Only good practices, however, become acknowledged customary law. We believe that Joseph L. Sax is right to assert that still valid, ancient usage reflects "a scientific, knowledge-based recognition of the importance of estuaries and wildlife, of diversity and biological productivity, and of the possibilities for sustainable development."[18] Science is constantly revealing new truths about the web of life through validated ecological findings. These discoveries often confirm the ancient practices embodied in customary law.

It should be said that the chapters can be read alone or in any sequence that might interest the reader. Our intent is that the chapters be more connected than just some collection of short stories; our hope is that they contribute constructively to each other. On the other hand, any single chapter may stand alone as well. They are all critical links in the chain that is being forged between the legal institution of customary law and the political norm of sustainability.

Endnotes

1. NOU Peter Ørebech, *Sedvanerett i fisket. Sjøsamene i Finnmark* [*Fisheries Customary Law. The Coastal Saami*] (Statens forvaltningstjeneste, Oslo, 2001), p. 34.
2. The Norse settlers in Greenland grew barley during the fourteenth century, but when temperatures dropped sometime around the sixteenth century, this population vanished.
3. Thomas Reid, *Essays on the Active Powers of Man*, in *The Works of Thomas Reid* (ed. by Sir William Hamilton, reprint with intro. by Harry M. Bracken, Georg Olms Verlag, Hildesheim, 1983), Essay III, Part III, Ch. VIII, p. 596b.
4. Sir William Blackstone, *Commentaries on the Laws of England* (London, John Murray, 1857), vol. 1.
5. See e.g., *New Windsor Corp. v. Mellor*, [1974] 2 All ER 510, 511. See discussion at pp. 166–170 below.
6. Paul Ricoeur, "The Plurality of Sources of Law" (1994) *Ratio Juris* vol. 7, no. 3, pp. 272–286.
7. "Customary law is among these sources. Law and custom interact, but neither can be fully reduced to the other." Ekkehart Schlicht, *On Custom in the Economy* (Clarendon Press, Oxford, 1998), p. 191.
8. "An instrumentalist judge will see himself or herself as an officer of government charged with contributing to the good society according to his or her conception of what that is." Dale Nance, *Law & Justice* (1st edn., Carolina Academic Press, Durham, 1994), p. 88.
9. For example, Papua New Guinea adopted a constitution that provides that the courts should treat local custom as law in preference to imported common law, while the neighboring Solomon Islands have made proof of custom quite difficult. Jennifer Corrin Care and Jean G. Zorn, "Statutory Developments in Melanesian Customary Law" (2001) *Journal of Legal Pluralism*, vol. 46, p. 50. See also Manfred O. Hinz, "The Conflict between the Constitution and Customary Law – Conflicts between System and Concepts," in Karin Fisher-Buder (ed.), *Human Rights and Democracy in Southern Africa* (New Namibia Books, Windhoek, 1998), p. 168 ("Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid . . .").