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Customary Law in Norwegian Land  
Tenure with some observations on its  
application.

General remarks on customary law

- "Sources of law": How to solve a legal question?
- To a great extent: where does *the judge* "find" the law?
- Traditionally, two sources:
  - the formal law (including statutory orders based upon statutory law)
  - customary law

## General (continued)

- Obviously: this attitude is too narrow
- A decision must be reached even when formal and customary law do not give an answer
- Today, a broad approach : There are many factors which the judge is entitled to take into consideration. The difficulty often being the balancing of the allowable factors (the weight attributed to each factor)

## General (continued)

- Today: the role of customary law greatly reduced
  - the volume of formal law immensely increased
  - the same applies to statutory orders
  - the impact of precedents
  - the legal literature

## Customary law – even today

- However, customary law is still of some importance in some respects
  - commercial law
  - land law - which is our topic

## What is Customary law?

- Starting point: Customary law:
  - how people (or a number of persons)
  - behave (actively or passively)
  - throughout a number of years
  - with the jointly held understanding that the behaviour is "law" (the behaviour reflects a legal right)

- The delimitation of customary law is difficult
- We have concepts like
  - good faith (acquisition in good faith etc.)
  - reasonable/unreasonable/fair/unfair
  - willingly (of his own free will)
- The contract act § 36:
- "The court may set aside , wholly or partly, a contract if it would be unreasonable or contrary to good business behaviour to apply it" (my free translation).
  - reasonable/unreasonable will reflect what is considered so by a not too small number of people during a period of time prior to the time of judgment.
  - such opinions may be perceived as being on a higher level than customary law ("principles" more than concrete law)

## Codification of customary law

- To a great extent: customary law has been codified
- An example:
  - Public right of access (Norwegian : allemannsrett): a right appertaining to and enjoyed by all citizens
  - very old traditions : right of way over private property, berry picking etc.
  - codified in an act of 1957
  - further extended (i.a.) by usage/general opinion and by the courts
  - a development from "innocent right" to a real right

## Codification of customary law (continued)

- Other examples ( often a mixture of customary law and new law):
  - right of co-owners
  - neighbour law
  - fishing /hunting
  - grazing
  - fencing

## Adverse possession (right acquired by prescription, in good faith)

- This legal institution has old roots, to some extent based on formal law
- The basic requirements:
  - use of land belonging to another, without justification
  - ordinarily for 20 years
  - the user must act in good faith (believe that he is entitled to the use exercised)

## The "cousin" of adverse possession

- "User since time immemorial" (Norwegian: alders tids bruk)
- This institution – with no clear basis in formal enactments – has not been codified, but refined by scholars and court judgments
  - use
  - long time
  - good faith
- Often a wide circle of users
- Comparison with adverse possession

## Common land

- Land in which the local farmers (and to some extent local non-farmers) enjoy specific rights (with state or local ownership)
- This is a legal institution with modern legislation
- However, the materail rules depend to a great extent upon 'old usage'
  - who has the right?
  - what kind of rights
  - to what extent can such rights be utilized?

## The sami situation

- Originally a nomadic population with reindeer herding as their living – in particular in North Norway but also in the southern parts
- As for the common land:
  - there is a modern codification
  - this codification refers, however, to a great extent to old usage/customs, defining such customs as legal rights

## The Finnmark county

- Originally considered as state owned country
- Now a legislation of 2005, conferring the so-called state owned area to a special, new-created legal entity (Finnmarkseiendommen)
- However with clear reservations that there may exist – based upon customs – legal rights
  - for the sami population, and
  - other inhabitants in Finnmark
- The questions of whether and to what extent there exist customs of a legal character are to be decided by a special court

## Customary law – illustrated by border line questions

- Property borders
  - the rights of the shore owners out in the salt water
    - where the seabed tilts sharply
    - alternatively to 2 meters depth
    - rights outside these limits , e.g. to seaweeds
  - the right of the shore owners out in fresh water
    - state owned part of the lake?

## Border line questions (continued)

- How deep in the underground stretches the right of the land owner?
  - minerals/oil
  - storing space
  - tunnels
  - water reservoirs



## Local customs

- To some extent touched upon before (e.g.,state owned part of a lake, right to seaweed)
- Local customs pleaded e.g. in respect of
  - grazing
  - fishing
  - hunting
- Often unsuccessfully pleaded
  - lack of evidence regarding consistency and/or belief of exercising a legal right
  - contrary to formal law