Journal of Siberian Federal University. Humanities & Social Sciences 11 (2013 6) 1575-1591
~ ~ ~

УДК 343.211.3=511.12

The Legal Protection of the Rights and Culture of Indigenous Sámi People in Norway

Øyvind Ravna*
Faculty of Law, UiT The Arctic University of Norway,
NO-9037 Tromsø, Norway

Received 12.08.2013, received in revised form 27.09.2013, accepted 17.10.2013

The topic for this article is the rules concerning the legal protection of the Sámi culture and the Sámi as an indigenous people and minority in Norway. The review will be undertaken with reference to the three legal systems; national legislation, international law and Sámi customary law and legal culture, concluding on the current legal status. The struggle by the Sámi for the recognition of their rights to their lands and waters has been central in the development of the Sámi legal position. This part of the Sámi law, will naturally be given a central place in the review.

Keywords: indigenous people, sámi, Nordic Countries, Norway, law, legislation, International law, reindeer husbandry, ILO Convention № 169.

1. Introduction[1]

1.1. A short introduction of the Indigenous Sámi

The Sámi People is currently recognised as Indigenous People in Norway and as one of the two nations the Norwegian State is founded on. The homeland of the Sámi is presently the northern and central parts of Norway, Sweden and Finland, and the Kola Peninsula in the Russian Federation, which in Sámi language in named *Sápmi* (Sámi land). They number in total around 50 000-80 000 people who earn their income from both marine and terrestrial livelihoods such as reindeer husbandry, agriculture industries and coastal fishing. The Sámi can trace their roots in Scandinavia back more than two thousand years.

Recognizing that Norway is founded on the lands of to two peoples, the country has acknowledged that it is obliged to protect the Sámi language, culture and way of life by in adopting an amendment to the Norwegian Constitution in 1988. Norway is also obliged to identify and recognise the traditional Sámi lands, which the country has acknowledged by ratifying ILO No. 169 *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO-169).

In Finland, Sweden and Russia, the Sámi have, to varying degrees, achieved the legal protection of their language, culture and livelihoods, but as an ethnic minority rather than as an indigenous People, since none of these countries have ratified ILO-169. This chapter is limited, however, to the situation in Norway and

* Corresponding author E-mail address: oyvind.ravna@uit.no

explores the concept of Sámi law and Sámi legal status in that country.

There are three sets of norm structures or legal systems that form the framework of the Sámi Law (Skogvang 2009: 45). Firstly, it is national legislation, which in turn can be divided into constitutional law, other areas of statutory law and case law. Secondly, it is international law, where the International (UN) Covenant on Civil and Political Rights of 1966 (ICCPR) and ILO-169 are the key instruments. Thirdly, it is the Sámi's law and legal culture. In the wake of international law, Sámi legal practices were afforded increased legal status in Norway as a source of law to be used in courts.

1.2. Background, legal Developments and aim of the presentation

The protection of Sámi culture and legal rights has undergone significant change over the past three decades. If we go back to the 1970s, the matter of Sámi rights and legal protection, were centred on questions as to whether the so called Sámi-speaking Norwegian population should have the right to be educated in their own language. Even in the 1980s few people assumed that the Sámi were entitled to legal protection as an indigenous people while even the importance of their protected status as a minority in Norway was highly controversial (Gauslaa 2007: 152).

A significant change in the legal situation was triggered by the controversy over the construction of the Alta-Kautokeino hydro power plant around 1980. The controversies and political focus on the Sámi situation, led to the appointment of the *Sámi Law Committee,* and undoubtedly to the emergence of a new perspective on the Sámi's legal status and position, including changes in the State Sámi Policy the following years.

To better understand the current legal position and protection of the Sámi, including the legal developments and changes in the State Sámi Policy that have occurred in recent decades, it might be desirable with a review of legal history. However, the frame of this article does not allow it, so I will just give a very brief introduction: The Sami culture has long been under pressure in different ways. In the 1600s the Sami shamans and leaders were persecuted, where several was burned at the stake. In the following century, when a large part of the Sámi had been Christianized, their culture and way of life were gradually accepted and achieved a protected through legislation, which can clearly be seen when the national border between Norway and Sweden was settled in 1751. In late 1800 it developed, however, an assimilation policy which contributed to the disregard and neglect of both language and culture, including. The Sámi rights to lands and waters.

In the 1950s, in the wake of human development after World War II, began the rise of a New Norwegian policy with a willingness to recognize the Sami language and culture.

Despite the fact that little focus was placed on the question of the Sámi as an indigenous people before the 1980s, it is clear that the political will to recognise Sámi language and culture back in the 1950s, had significance for a positive development between the Sámi and the Norwegian Governments through the 1960s and 70s.

However, in 1978 the Norwegian parliament decided to construct the Alta-Kautokeino hydro power plant by damming one of the main rivers in the Sámi areas. This placed the ongoing debate over Sámi rights to lands and waters squarely at the centre of the national agenda and showed that post-war policy was, despite the rhetoric, worth little when it came to practical governance and the exploitation of valuable natural resources. After the famous hunger strike in front of the Norwegian Parliament, and large-scale police actions to remove the Sámi and environmental activists, construction finally began in 1981.[2]

Although the protesters did not manage to stop the power plant construction, it was a turning point in Norway's acknowledgement of its legal commitments to the Sámi people. It was also a key point in the Sámi struggle for their rights to enjoy their culture and language, including rights to lands and waters. In the autumn of 1980, as a consequence of the political tumult arising during the Alta Case, the Nordli Government had to establish the *Sámi Rights Committee*. The Committee was law committee given a mandate in four points where the first two were to examine: 1) the question of the Sámi people's legal position as regards the right to land and water; and 2) to ensure the Sámi people's ability to develop natural resources in their areas of habitation, while also recognising the non-Sámi population's interests. I should also draft new legislation (NOU 1984: 18 pp. 42–43).

The appointment of the Sámi Rights Committee was a starting point for a legislative process that resulted in the legal protection of the Sámi language, culture and way of life through a constitutional amendment (1988) and the establishment of the Sámi Parliament (1989).[3] The legal advances has also resulted in the fact that Norway was the first country to ratify ILO-169, including a legal development abolishing the old "State lands doctrine", saying that the Norwegian State was the owner of all unsold land in *Finnmark* without consideration for private usage or commonage rights of any kind.[4]

The second investigation report of the Sámi Rights Committee (NOU 1997:4) was the first major step in the process of identifying and recognizing the ownership and use rights of the Sámi traditional lands. By adopting the 2005 Finnmark Act (17 June 2005 no. 85), the state ownership of the outlying fields and mountainous areas in Finnmark County was transferred to a regional ownership body, named *Finnmarkseiendommen* (The Finnmark Estate), where the Sámi Parliament is entitled to appoint three of six members of the board. This is considered as an important element of the upholding of the ILO-169 recognition process. However, the most challenging part of the recognition process is still pending, waiting for the investigation of the *Finnmark Commission*, which is described in section 2.2 below.

The Sámi's legal position has also been advanced by developments in case law. It has, for instance, led to the recognition of reindeer herders' grazing rights; rights that are rooted in the immemorial usage of lands by the Sámi (and not just based on legislation alone). Although it has its basis in law, the courts have also held that landowners have the burden of proof if they want to claim that there are no reindeer husbandry rights on their properties within the Sámi reindeer husbandry areas. This has had an impact on the legal protection of such rights as in the renowned Selbu Supreme Court Case (2001) to which I will return in section 2.3.

Norway's minority policy and legal developments with respect to the Sámi in general, and in particular in relation to the *Finnmark Act,* are considered to be pioneering by the UN special *rapporteur* on indigenous rights S. James Anaya report on the situation of the Sámi in the Nordic Countries (2011), stating that:

> The Finnmark Act provides important protection for the development of Sámi rights to self-determination and control over natural resources at the local level, and thus forms an important example for the other Nordic countries" (para. 44).

Even if problems remain in respect of relations between the Sámi and the Norwegian State, e.g., over the right to fisheries in coastal areas (NOU 2008:5), or the legislation on the extractive industry, the Norwegian Sámi Policy thus is of interest for an international are of

interest to an international audience as kind of applicable practice.

The aim of this presentation is to review the rules concerning the legal protection of the Sámi culture and the Sámi as an indigenous people and minority in Norway.[5] The review will be undertaken with reference to the three legal systems mentioned above, including Sámi customary law and legal culture. The struggle by the Sámi for the recognition of their rights to their lands and waters has been central in the development of the Sámi legal position. This part of the Sámi law will naturally be given a central place in the review.

2. National Legislation

2.1. Constitutional Law and Sámi Rights

Article 110a of the Norwegian Constitution protects Sámi language, culture and livelihood, and reads as follows:

> It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life.[6]

This article was adopted by the Norwegian Parliament on April 21, 1988 and followed by a constitutional amendment in May of the same year. The article is based on a 1984 proposal from the Sámi Rights Committee with one of its main objectives being to overturn past assimilation and "Norwegianisation" policies. According to the Sámi Rights Committee, it put in place a legal obligation saying that Sámi language, culture and way of life must be safeguarded and given further development:

> State authorities will therefore have no legal right to pursue a policy in conflict with this principle. The provision sets the requirements for both legislation and other government actions (NOU 1984: 18, p. 433).

It should also be mentioned that the Parliamentary Standing Foreign and Constitutional Committee stated that with the adoption of the provision, the Norwegian Parliament:

> In the most solemn and binding form our legal system knows, recognised and drawn the consequences of the fact that throughout the history of Norway, there has been a particular Sami ethnic group in our country (Innst. S. nr. 147 (1997–88), 2).

The Constitutional provision is modelled on Article 27 of the ICCPR. This means that the provision must be interpreted in accordance with the "requirements of international law to the Norwegian authorities" (Sámi Rights Committee II in NOU 2007:13, p. 191). Thus, the provision creates a legal obligation for the Norwegian authorities in the formulation and implementation of the country's Sámi policy and other issues of importance to the Sámi.

There is little case law relating to Article 110a. However, Norwegian Sámi policy shows that the article has had repercussions beyond its political and moral significance. For instance, it contributed substantially to the 2004 establishment of the Sis-Finnmárkku Diggigoddi / Inner Finnmark District Court, which a district court for the Central Sámi areas with Sámi-speaking judges skilled in Sámi Culture and Sámi Customary law, and with a special responsibility to safeguard Sámi customary law (NOU 1999: 22, p. 72).

However, this commitment has not been adhered to in all instances (Ravna 2009). Admission of this reality did however contribute to the establishment, by the Courts Administration in 2010, of a working group to study "The Sámi dimension of the judiciary." The report produced by this group suggested that, based on the obligation contained in Article110a, "the Courts of law have a responsibility to safeguard the interests of the Sámi legal traditions and Sámi customary laws" (Domstoladministrasjonen 2010:21).

2.2. Other National Legislation on Sámi Issues

This section analyses some of the most important laws that specify and apply the notion of constitutional protection while highlighting Norway's international obligations to protect the Sámi culture, language and rights to lands and waters.

The Sámi Act (June 12, 1987 no. 56) aims "to facilitate that the Sámi people in Norway can maintain and develop their language, culture and way of life" (s. 1-1). It is thus complementary to Article 110a of the Constitution. Section 1-2 provides for the establishment of the Sámi Parliament, which is further regulated in Ch. 2. Chapter 3 deals with the Sámi languages. Among other things, it determines that "acts and regulations with particular interest for the Sámi population shall be translated into Sámi language" (s. 3-2). The chapter also contains rules on the extended right to use Sámi language in the courts (s. 3-4) and in the health and social services (s. 3-5). There are also rules on the right to have a paid leave of absence for education and training in the Sámi language.

The Finnmark Act (17 June 2005 no. 80) is already briefly mentioned in the introduction. The act is a direct result of Norway's obligation to comply with ILO Convention No. 169 and thus an important instrument in the protection of Sámi rights to lands and nature resources. Interestingly, although the law group under the Sámi Rights Committee concluded that the state was the owner of the outlying fields and mountainous areas of Finnmark, the Government proposed to discontinue that ownership in the bill of the Finnmark Act (Ot. Prop. nr. 53 (2002-2003)). This was done on the basis of international legal obligations, recognition of the historical rights of the Sámi, including opinions that state ownership was based on historical misunderstandings that were currently difficult to defend.

The Finnmark Act implied that the Norwegian Parliament transferred the ownership of about 95% of the area in Finnmark (45 000 square kilometres) from the state to the new ownership body named *Finnmarkseiendommen* (The Finnmark Estate). This represents a cardinal change in the management of large lands and nature resources in the Sámi areas, ending the state ownership regime which has existed for over 200 years.

> The purpose of the Finnmark Act (s.1) is to facilitate the management of land and natural resources in the county of Finnmark in a balanced and ecologically sustainable manner for the benefit of the residents of the county and particularly as a basis for Sami culture, reindeer husbandry, use of non-cultivated areas, commercial activity and social life.

In s. 3 the Finnmark Act incorporates ILO Convention No. 169 within the scope of the Act. Of fundamental interest is s. 5, where para 1 states that "through prolonged use of land and water areas, the Sámi have collectively and individually acquired rights to land in Finnmark." The second paragraph states that this also applies to other residents in the county, which shows that the act does distinguish between rights-holders on the basis of ethnicity.

To determine the scope and content of the rights held by Sámi and other people on the basis of prescription and immemorial usage,

> a commission shall be established to investigate rights to land and water in Finnmark and a special court to settle disputes concerning such rights, cf. chapter 5.

The ownership body, the Finnmark Estate, "is an independent legal entity with its seat in Finnmark, which shall administer the land and natural resources etc., that it owns in compliance with the purpose and other provisions of this Act" (s. 6).

The Finnmark Act in s. 29 (in ch. 5) authorises the establishment of the *Finnmark Commission,* which "on the basis of current national law, shall investigate rights of use and ownership to the land to be taken over by *Finnmarkseiendommen* pursuant to section 49." The majority of the Parliamentary Standing Committee of Justice chose the wording "current national law" to reveal that Sámi customs and legal opinions shall be emphasised in the clarification process. Such sources of law should thus have a significant place in the process.

As for the Finnmark Act itself, the founding of the Finnmark Commission and the Uncultivated Land Tribunal (s. 36), is explained under the same obligations as posted to Norway in ILO Convention No. 169 Article14 (Innst. no. 80 2004 – 2005:17, Ravna 2011)

The Finnmark Commission was established in March 2008, beginning its work on the two first investigation fields in fall the same year. In March 2012 the Commission submitted its report on field 1 "Seiland and Stjernøya" (Finnmark Commission 2012). For those who expected recognition of Sámi rights to land and water as property rights or exclusive use rights, as the Finnmark Act indicates, the report is not promising. For fields 1, the Commission concluded that The Finnmark Estate owns all the land covered by the report (the previously state-owned land) with the exception of a parcel of 0.02 square kilometres (Finnmark Commission 2012: 128). The Commission has thus not recognized any kind of collective property rights related to the Sámi reindeer herders, other groups of Sámi, or other local residents (Ravna 2013). The conclusions for field 2, delivered in February 2013, goes a long way coincides with those for field 1. Also here the Finnmark Commission concludes that neither the reindeer herders nor the locals have acquired any property rights except for a private parcel of land of 0.007 km2 with two cottages and outbuildings acquired by prescription (Finnmark Commission 2013).

The Reindeer Husbandry Act (15 June 15 2007 no. 40) aims to facilitate ecological, economic and culturally sustainable reindeer husbandry (s. 1, para 1). The Act places greater emphasis on Sámi culture, tradition and customs than the previous act of 1978, which among other things appears in s. 1 where it is stated that "reindeer husbandry is to be preserved as an important basis for Sámi culture and society." This is also reflected in the fact that the *reindeer husbandry siida* (the Sámi herding community) is recognised in law, with grazing rules prepared on the basis of "principles of good reindeer husbandry based on Sámi traditions and customs" (s. 59). Section 3 states that the Act should be applied according to the international law of indigenous peoples and minorities.

Chapter 3 deals with the content of reindeer husbandry rights. The most important of these rights are the grazing privileges for the reindeer in the mountainous areas and the other outlying fields, not depending on who is the owner of the land (s. 19). The grazing rights cover the right to suitable seasonal pastures, i.e., spring, summer, autumn and winter pastures, including migration routes, calving and mating areas (ss. 20 and 22). In addition, the reindeer husbandry rights include accessory rights to housing, use of motor vehicles, fences and other facilities, wood and timber, and hunting, trapping and fishing (ss. 21 and 23-26).

Of importance here is also the codification of laws that have grown out of case law. Interesting in that regard is s. 4, para 1which states that reindeer husbandry has its legal basis in immemorial usage, while para 3 notes that Sámi reindeer husbandry enjoys legal protection under the expropriation regulations. In addition, para 2 codifies the burden of proof.

The Consultation Agreement between the Norwegian Government and the Sámi Parliament

signed May 11, 2005 is also worthy of note here. The agreement aims to contribute to the practical implementation of the state's international legal obligation to consult the Sámi

a) to achieve agreement between state authorities and the Sámi Parliament when it considers introducing laws or measures that may affect Sámi interests
b) to facilitate the development of a partnership perspective between the state authorities and the Sámi Parliament, working to strengthen the Sámi culture and society, and
c) through the development of a common understanding of the situation and development needs of the Sámi community.

In addition, the SRU II drafted a consultation Act in 2007, which is expected to be heard by the Parliament in the near future (NOU 2007:13).

The draft of the Finnmark Fishing Act, proposed by the Coastal Fishing Committee (NOU 2008: 5) was subject to extensive political debate and negotiation, although it was not adopted and probably never will be. The draft, or more correct, the discussion on the Coastal Sámi rights to maritime resources, particularly coastal fishing, has it modern starting point in the draft of the Sámi Rights Committee (NOU 1997:4) where it was acknowledged that Sámi culture and traditions must be emphasised in the management of coastal and fjord fishing in Sámi areas. In the Sámi Rights Committee draft it was also proposed free fishing available for boats under 30 feet, which is a common size for the Sámi fishermen. The proposals were not passed by the government in its draft of the Finnmark Act (Ot. Prop. nr. 53 (2002–2003)). This, in turn, led the Parliamentary Standing Committee of Justice to suggest a legal study on the Sámi peoples' and others' right to fish in the sea offshore the County of Finnmark (Innst. O. nr. 80 (2004-2005), 30-31).

That study was undertaken by a particular law committee, the Coastal Fishing Committee, which in their recommendations concluded that people living along the fjords and by the coast of Finnmark, "on the basis of historical use and the international law of indigenous peoples and minorities, have the right to fish in the sea off the Finnmark" (NOU 2008:5, p. 14). A proposal was thus made to settle this question in terms of a "fjord right" to fish. The study of the Coastal Fishing Committee shows that the Norwegian Government position is, in this context, not as free as the Marine Resources Act (June 6, 2008 No. 37) states in regulating access to fisheries in its northern seawaters (Ravna 2012: 276 – 278).

The Stoltenberg Government has refused to follow up on the Coastal Fishing Committee's unanimous recommendation but has instead adopted a rather dismissive position on the bill. An Agreement between the Norwegian Government and the Sámi Parliament was concluded in 2011 in which the latter gained recognition for the right to land 3 000 tons of cod, but did not received any recognition in respect of its claim over historical fishing rights.

2.3. Case Law Concerning the Rights to Lands and Waters

The Norwegian Courts during a long period considered Sámi use of land and water as a so-called "innocent beneficial right of use." A fundamental change in the case law however came about through two important Supreme Court judgments during a 14 day period in the spring of 1968.

In the Brekken Case (Norsk Retstidende (NRt.) 1968: 394), the Supreme Court found that the Sámi use of lands and waters "for a long time had been attached to the place and that it in its core is so fastened that it cannot simply be equated with the exercise of an innocent beneficial right of use or a public access to land" (401). This led to

the Sámi gaining legal recognition for their rights to use their traditional hunting and fishing sites on private land in the Southern Sámi areas.

In the Altevann Case (NRt. 1968: 429) the Supreme Court confirmed the lower courts' decision and stated that the flooding of Lake Altevann was "an interference with such a firm and concentrated use of pastures and fishing sites at Altevann that the acquiring authority must pay compensation" (438). The Sámi from the Swedish Sámi Communities of Talma and Saarivuoma use of these pastures and fishing sites in Norway were thus awarded compensation for expropriation in line with the prior recognition of immemorial usage.

Although the Supreme Court recognised that Sámi use could lead to the recognition of rights, it should still take several decades before Sámi reindeer husbandry use will lead to the confirmation of pastoral rights in disputes with landowners. The main reason for that was no longer that the use was not considered to establish rights, but rather that it was not considered to be sufficiently *regular and intensive* to meet the condition for the acquisition of rights of use. In three separate Supreme Court judgements on the Southern Sámi areas (NRt. 1981: 1215, NRt. 1988: 1217 and NRt. 1997: 1608), the Court evaluated the requirements of regularity and intensity in respect of the use of lands from a norm established by the farmers' use of lands. Rules that under other circumstances could have led to the confirmation of the rights of the Sámi reindeer herder thus emerged as obstacles to the recognition of such rights.

In the landmark Selbu Case (NRt. 2001: 769) the Supreme Court set the views of the three previous judgments aside. This was done by emphasising the characteristics of reindeer husbandry and the Sámi use of lands and Sámi cultural characteristics when assessing the acquiring of pastoral rights. In adopting such an approach to the legal evaluation of the questions, the Supreme Court found that the reindeer husbandry districts of *Essand and Riast-Hylling* had acquired pastoral rights in the disputed areas in Selbu municipality due to immemorial usage of reindeer pastures. By virtue of being a plenary judgment, the Selbu case is an important source of law in disputes relating to the confirmation and extension of reindeer husbandry rights. It can, as such, be deemed to represent a norm in respect of how Norwegian property law should be applied, not only in reindeer husbandry disputes, but also more generally in disputes relating to confirmation and recognition of use and ownership rights in the Sámi areas.

In this judgment, a unified Supreme Court stated that reindeer husbandry law imposes a burden on landowners to prove that pastoral rights do not exist in the reindeer husbandry areas, and that the right to practice reindeer husbandry has an independent legal basis grounded in immemorial usage.

Of particular importance here is the fact that the entire Supreme Court stated that in testing the rules of immemorial usage, the characteristics of the rights had to be emphasised, which means that the requirements for the confirmation of rights must be adapted to the Sámi's use of land in the Sámi areas. This also meant that while Sámi reindeer herders have enjoyed a nomadic way of life, similar practices in respect of other grazing animals cannot automatically be transferred to reindeer husbandry. More precisely, the first voting judge, who represented the majority of the Court, stated that reindeer husbandry demands a significant amount of land, and that the use of lands varies from year to year depending on weather, wind and the condition of the pastures:

> It can thus not be claimed that the reindeer have grazed in a particular area every year. Both for

> this reason and because of the Sámi's nomadic way of life can interruption of use not prevent acquisition of right even if it is of considerable length (NRt. 2001: 769 at p. 789).

As a consequence, the nature of reindeer herding must be taken into consideration together with grazing patterns in the evaluation of the intensity of use. The surroundings, environment, topography, pasture conditions, weather, etc., thus each have significance.

The Supreme Court has in this way adapted rules of immemorial usage such that the legal norm is today that the requirements for intensity and regularity in the use must be evaluated against a standard issued by the characteristics of the rights, and where the acquisition of such rights is considered in relation to the practice of reindeer husbandry more generally.

In this context it is clear that the Selbu Case has produced a norm as shown in the decision on fishing rights for Sámi Reindeer Herders in Tydal (LF-2008-50209).

The clarification of the legal basis of reindeer husbandry and expropriation protection has taken place through case law. This is, as we have seen, now enshrined in s. 4 of the Reindeer 2007 Husbandry Act.

In addition to the judgments on reindeer husbandry rights, the Svartskog Case should also be highlighted (NRt. 2001: 1229). Based on the rules of immemorial usage, the Supreme Court found here that the local people of Manndalen in the County of Troms, which is populated predominantly by people of Sámi origin, had acquired title to property registered to the Norwegian State as an owner. In assessing the current law, it should however be noted that the legislation relating to the Finnmark Act highlighted these judgments as a guideline for how the traditional Sámi use of lands shall be considered as the basis for the acquisition of a right.

3. International Law

3.1. Article 27 of the International Covenant on Civil and Political Rights

Through the Human Rights Act (21 May 1999 No. 30), The International Covenant on Civil and Political Rights (ICCPR) of 1966 was incorporated into Norwegian law with precedence over other legislation except for the Constitution. Article 27 of the ICCPR reads as follows:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The provision states that minorities are free to use their own languages and enjoy their own cultures and religions. Statements from the UN Human Rights Committee (HRC), which is the monitory organ of the Covenant, show that this article not only provides protection against minorities being denied such rights, but that it also imposes an obligation on states to take positive measures to support minority languages and cultures. In its General Comment No. 23 the HRC (HRC, report, vol. 1, 1994), stated:

> Although the rights protected under Article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group (para. 6.2).

The Sámi Rights Committee II (NOU 2007: 13, p. 190-1) emphasise that the statement shows the relationship between the ICCPR Article 27 and Article 110a of the Norwegian Constitution.

ICCPR Article27 also includes protection of the substantial basis of the minority culture, i.e., pastures and other natural environments that are of importance for Sámi traditional livelihoods. In the same report, it is also stated that the committee understands culture to be manifested in many forms:

> including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law (para.7).

The provision thus sets up a threshold for intervention that could threaten the exercise of Sámi culture and livelihoods. The statement also points out that this protection from intervention applies in particular to indigenous peoples. In the 2008 White Paper on the Norwegian Sámi policy (St.meld. nr. 28 (2007-2008), 33), the Government endorsed this position as it approved the Ministry's statement that:

> In relation to the Sámi as indigenous people, it is a common interpretation that the provision [ICCPR Article 27] also covers the substantial premises for the Sámi total cultural exercises, also referred to as the natural resource basis for Sámi culture.

The Comments of the HRC also show that modern ways of exercising traditional culture embedded in industries and livelihoods, such as coastal fishing and reindeer husbandry, also enjoy protection under Article 27. As a former Chief Justice of the Supreme Court and head of the Sámi Rights Committee, dr. Carsten Smith ironically replied to the Attorney's submission to the Coastal fishing Committee (NOU 2008: 5); "it cannot be claimed that the Sámi shall continue to use oars and sails to enjoy the protection of coastal fishing" (Smith 2010: 22).

Article 27 of the ICCPR is an important legal provision with a content that provides protection against infringement in respect of natural resources and Sámi traditional lands, where it sets up a framework (even though it is not precise) for how far such interventions can go. The comments of the HRC show that it can be applied to interventions in Sámi coastal, river or inland fisheries. Article 27 also includes a protection against intervention in terms of the Sámi reindeer husbandry industry. This notwithstanding, it must be admitted that the obligation continues to have a greater practical significance in terms of legislative processes and political negotiations than in case law.

3.2. ILO Convention No. 169

As already noted, Norway ratified ILO Convention No. 169 in 1990. Even if the legislature omitted to incorporate it through the 1999 Human Rights Act, the convention remains a significant source of law which among other things sets up requirements for consultations, for indigenous customs to be emphasised in decision-making processes, and for indigenous land rights to be identified and recognised.

In Norway, there is a broad that the Sámi people are covered by the definition of indigenous peoples in Article 1. By ratifying the Convention, Norway has thus committed itself to protect the Sámi lands and culture. Article 2 includes a governmental responsibility in respect of "developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity."

Article 6 encompasses the government's duty to consult indigenous peoples. According to para (1)(a), the obligation to consult includes all cases where public bodies are considering implementing legislative or administrative measures that may have a direct impact on indigenous people. This led to the agreement on consultations between the

Norwegian Government and the Sámi Parliament in 2005, described above.

Article 8 encompasses the respect for indigenous customs and customary law. Paragraph (1) states that "In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws." This provision helps to actualise Sámi customs and customary law as a source of law (see below). This will in particular apply to the legal identification process in Finnmark, since the ILO Convention is incorporated in the Finnmark Act, and since the legislature has placed great emphasis on fulfilling its international obligations in framing the Finnmark Act. Article 8 (2) of the ILO-169 states that necessary procedures shall be established to resolve conflicts, which may arise in the application of this principle.

Of particular interest here however is the question of the legal ranking of indigenous customary laws when they are in conflict with national statutory law. This is discussed by SR C II, which does argue that indigenous customs are not unconditionally entitled to prevail (NOU 2007:13, p. 222).

Article 14 states that indigenous peoples have rights of ownership and possession over their traditional lands. The purpose of this article is that the use of lands that indigenous people have traditionally used shall be recognised and given legal protection. The international law group under the Sámi Rights Committee has noted that "if the population has been sufficiently established in the area, and they have also been the only ones to use this area, the demands of actual possession can normally be regarded as having been fulfilled" (NOU 1997:5, p. 35). Article 14, especially 14 (2) and (3) has been of significant importance in the adoption of the Finnmark Act and the establishment of the Finnmark Commission. Number (3) reads: "Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned." The Finnmark Commission is supposed to provide such an adequate procedure.

Article 15 encompasses indigenous peoples' rights to participate in the management of natural resources. It places restrictions on the state authorities in regulating the exploitation of land and natural resources in indigenous areas. In para 1, the article states that indigenous people have the right to participate in the use, management and conservation of such resources. In Article 15 (2) the requirement for an extended consultation duty is set out.

> In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands…

Furthermore, this paragraph states that indigenous peoples shall, "wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities."

It has however been questioned whether the 2009 Norwegian Minerals Act, which provides for increased landowner fees to the Finnmark Estate instead of providing direct benefits to the representative Sámi body, The Sámi Parliament, is consistent with Article 15 (2), see Skogvang (2010: 63-67).

3.3. Other International Legal Obligations of Norway

Norway has endorsed the UN Convention on Biological Diversity, the European Charter

on Regional or Minority Languages and the Council of Europe Framework Convention on the Protection of National Minorities. These obligations also have legal effect in relation to the Sámi people. It should also be noted that The UN Special *Rapporteur* Anaya has emphasised the importance of the fact that Norway has ratified these conventions.

Other international instruments of interest include the 2007 United Nations Declaration on the Rights of Indigenous People. Since many of the commitments in this Declaration are also enshrined in ILO Convention No. 169 there is little need to discuss this issue here. However, we should note that Article 21 of the Declaration follows Article 27 of the ICCPR in requiring that states implement effective measures to ensure the development of the social and economic conditions of indigenous people. The 2005 draft Nordic Sámi Convention will also likely prove to be an important international legal instrument at least if, in the near future, the negotiations end in a treaty in the form of the present draft. However, the analysis of that document is also beyond the scope of this chapter.

The 1950 European Convention on Human Rights (ECHR), Protocol 1 Article 1, also retains some significance as a rule of law in the Norwegian courts when it comes to the legal protection of reindeer husbandry. For example, the Supreme Court decision NRt. 2006: 1382 on a dispute between a reindeer owner and the Reindeer administration on the closing down of a reindeer herding unit, found that the Reindeer Administration under the Norwegian Ministry of Agriculture and Food was not entitled to proceed with the said closure because, among other things, it violated the protecting of property under ECHR, protocol 1, Article 1.

The legal clarification Process (see section 2.2 above) enshrined in the Finnmark Act can also be discussed in relation to the obligations of the ECHR, including the provision for trials to be held within a reasonable time, contained in Article 6 (Ravna 2011).

4. Sámi Law

4.1. Sámi Legal Traditions and Customary Law

Sámi legal traditions and customary law such as Sámi internal autonomous regulations constitute The Sámi law. Although this is not a written law it is binding in nature. It is important both in relation to Sámi autonomy and also in the application of national Norwegian law related to the Sámi. Moreover, it has significance for negotiations in respect of bilateral and multilateral agreements and treaties between states that have a Sámi population and the Sámi people, see e.g., the 2005 Draft Nordic Sámi Convention.

Sámi law has an independent legal basis; it is complied because people who are subject to them feel bound by them. Norway's ratification of ILO Convention No. 169 and subsequent policy developments, have given Sámi law a formal place in Norwegian law. This means that Sámi customary law should be considered both in the legislative process and in the application of the law.

This legal development also meant that Sámi law has increasingly become a part of Norwegian statute (e.g., in parts of the reindeer husbandry legislation). The Finnmark Act is to some extent also built upon the foundations of Sámi legal traditions. Thus, in s. 5 it states that the Act does not infringe the "rights of the Sámi and others have gained by prescription or immemorial usage."

Except for the previous Finnmark land legislation and the general legislation on fishing and wildlife conservation, harvesting of outlaying fields in the Sámi areas has to a relatively small extent been regulated by statutory law. Customary law has thus played a significant role

in its regulation. The well-known judge and legal scholar Erik Solem (1933), showed that the Sámi often had disputes regarding hunting grounds in respect of the snare trapping of grouse. In her study Elina Helander (2004) notes that Sámi informants claimed to have some sort of internal autonomy for the exercise of this trapping tradition, and that now they are in danger of losing it.

The right to build the Sámi *guohti* (a traditional Sámi turf hut), is another tradition that has largely been regulated by Sámi customs. This tradition was challenged when the state forest company, which managed the unregistered state property of Finnmark, adopted a regulation in 1967 saying that such turf huts only could be raised with the permission granted by the state forest company and on certain conditions.

Other Sámi customs such as: conflict resolution, the importance of family relationships, child rearing and hereditary succession still play a role in the modern life of Sámi people (Skogvang 2009: 85-93).

4.2 Sámi Law in the Norwegian Courts

To date, the use of Sámi customary law as a source of law in the courts is still in its initial phase. It therefore remains difficult to draw robust conclusions on its ultimate legal significance. Thus far, case law points to the fact that Sámi law has faced significant problems in working harmoniously with Norwegian law as the two have often collided with considerable force, and where the Supreme Court has placed strict requirements on quality and clarity on Sámi customary law.

In its 2001 ruling (NRt. 2001: 1116) the Supreme Court held that the tradition of letting dogs run free in the woods in the summer, not had a quality that let it prevail over the Norwegian Wildlife Act. Additionally, a case brought in relation to the spring hunting of ducks in the Sámi municipality of Kautokeino failed as it was not considered to be a custom that deserved legal protection by the courts, (see: NRt. 1988: 377).

The question of the significance of Sámi customary law in the slaughtering of reindeer has also been heard by the Supreme Court on two occasions (NRt. 2006: 957 and NRt. 2008: 1789). In neither cases did the Sámi parties claim that particular methods of killing the reindeer, namely, by shooting with a small-calibre rifle or killing with a knife to the heart (which was not in compliance with the 1974 Animal Welfare Act), were justified by Sámi customary law. It must, however, be noted that the government has shown some willingness to accept Sámi customary traditions, e.g., in regulations in respect of the methods of killing reindeer (Regulations July 30, 2008 on the use of the curved knife) and by allowing spring hunting for ducks (Regulation May 2, 1994 on the quota regulation of spring hunting for ducks).

In addition, when it comes to fishing for salmon, case law exists to show that Sámi customary law is set aside when it contradicts Norwegian law. For example, in a decision about fishing in the River Tana (NRt. 2006: 13), the Supreme Court, somewhat surprisingly, stated that the customary law saying that a person outside the household is allowed to fish with the authority (proxy) of the right holder, was contrary to the 1888 Tana Act. Thus such fishing was unlawful. The above-mentioned Selbu Case (NRt. 2001: 769) shows however that the Supreme Court has emphasised traditional Sámi knowledge and customs related to the use of the lands in settling a claim on rights to reindeer husbandry pastures.

Beyond these examples, Sámi customary law has faced significant difficulty in being recognised by the courts. This can perhaps be explained by the fact that the courts of appeal are not yet sufficiently adapted to protect Sámi customary law. But it can probably also be explained by the fact that customs that have been tried in courts,

have lacked the legal quality required to obtain legal protection (NRt. 2001: 1116). According to Skogvang (2009: 75-6), the Supreme Court in criminal matters, with the exception of the 2006 judgment on salmon fishing in Tana, has evaluated the legal sources correctly.

Finally, it should be noted however that the courts of law in the Sámi areas have over time become more aware of their duties in respect of familiarising themselves with Sámi customary law.

5. Conclusion

The Sámi people, including their legal and substantive culture, were subject to a grinding process of assimilation into the Norwegian state from the 1800s up to the post war period. Partly as a result of the focus on international human rights law after the World War II, views in respect of Sámi culture, rights and customary law, slowly began to change.

In the nearly 70 years that have passed since the end of World War II, Sámi language and culture has achieved increasing recognition and legal protection, both through national legislation, case law and in relation to international human rights obligations to which Norway step by step has committed itself. This also reasoned in that Sámi customary law to some extend has being recognised as a source of law beyond the Sámi internal autonomy. Therefore, Sámi Law can currently be interpreted through three legal systems of law: The Norwegian statutory and casual law, Sámi customary law and international human rights treaties.

Norway is constitutionally committed to protect Sámi language, culture and society, which among other things has contributed to the establishment of the Inner Finnmark District Court in 2004, a court with a special responsibility to safeguard Sámi language, culture and legal traditions. Sámi legal traditions and land rights are also given protection and recognition through Norway's ratification of ILO Convention No. 169. This protection is strengthened by the incorporation of the convention into the Finnmark Act. The ratification of ILO Convention No. 169 implies not only that Sámi ownership and possessions to traditional lands shall be recognized, but also that Sámi legal traditions and customary law should be given a more prominent place in Norwegian law.

Through case law it has been acknowledged that the legal basis for reindeer pastoral rights is immemorial usage – in such a way that Sámi reindeer herders are given economic compensation in relation to encroachments on their pastures. These rules are now codified in the 2007 Reindeer husbandry Act. In addition, the landowners – and not the Sámi herders – in cases of disputes have the burden of proving that reindeer husbandry rights do not exist on their private land if situated in the Sámi reindeer herding area. Case law shows that the Supreme Court has been able to adapt and interpret the provisions of Norwegian property law in such a way that these rules, to a large extent, also are able to protect Sámi use lands, waters and rights to natural resources. In other areas of law, however, progress has not been as prominent.

When the 1999 Human Rights Act was passed, the international human rights conventions were incorporated into Norwegian law and given precedence. Even if the incorporation did not include the ILO-169, this has contributed to the strengthening of the legal position of the Sámi, in particular through the ICCPR Article 27.

Despite a solid foundation in law, there still remain major challenges in respect of emphasising Sámi law as a legal instrument and source. One such challenge relates to the clarification of the hierarchy between Sámi law and other legal sources in cases where contradictions arise.

There are also challenges to be faced in the implementation of the international conventions that protect Sámi language as well as both substantive and legal culture under Norwegian law.

A current question that challenges both obligations in international law and internal legislation, concerns the Sámi rights to fish in the coastal areas outside Finnmark. The Coastal Fishery Committee concluded that people living by the fjords and along the coast of Finnmark possess historical rights to fish in these areas but the government has been reluctant to acknowledge this. This means that rules saying that immemorial usage create rights, an accepted norm when it comes to pastoral rights in the mountains and outlying fields, does not reach beyond the slopes of the shoreline. This also means that the debate on the right to fish in the coastal areas of *Sápmi* will continue into the future.

Questions about self-determination and the extent of the rights to both non-renewable and renewable natural resources on land have also not been resolved. The question of renewable natural resources leads us back to the Finnmark Act.

Although the legislature here has shown a willingness to recognise Sámi rights to lands and waters, there is still a long way to go to actually achieving this goal in practice. One problem may lie in imprecise nature of the rules in relation to the Finnmark estate's management of land rights, which were on occasion practised in a contrary manner to local interests. Furthermore, the *de facto* extent to which Sámi rights to lands and waters in Finnmark are recognised by legislators, depends heavily on the legal identification processes initiated through the Finnmark Act and the Finnmark Commission. These processes are currently on-going and there are both procedural and the substantive questions remain to be resolved. The Finnmark Act in itself might be considered as recognition of Sámi rights to lands and waters. However, the the expected recognition of Sámi lands and waters is still pending, as the reports of the Finnmark Commission so far has not recognized Sámi ownership or exclusive use rights. As the settled cases creates precedents for the coming cases, the future is not promising for those who are waiting for recognition of Sámi ownership rights or use rights cases, while it can be asked if rejecting such rights are in accordance with the Finnmark Act and the international commitments in the ILO-169.

This means that we can surely agree with the UN Special *Rapporteur* on the Rights of Indigenous peoples, James Anaya, when he in relation to the Finnmark Act and the identification and recognition process, stated that "the adequacy of the established procedure is not yet known."

---

1 This article is elaborated on Øyvind Ravna, "Sámi Rights and Sámi Law in Norway", *Polar Law Textbook II* (ed. Natalia Loukacheva), Nordic Councils of Ministers, 2013(a): 270–293.

2 About the Alta Case, see http://www.galdu.org/govat/doc/eng_damning.pdf (accessed 4 September 2013).

3 About the Sámi Parliament of Norway, see http://www.galdu.org/govat/doc/eng_samediggi.pdf (accessed 4 September 2013). The Constitutional amendment is reviewed in section 2.1 below.

4 Finnmark is the northernmost county on the Norwegian mainland and the most central Sámi area.

5 The rules concerning the legal protection of the Sámi and the Sámi culture are also rules that frames a central part as the *Sámi Law* as an academic discipline. The UN interpreting of culture implies that it also includes the rights to land and natural resources as well as the capacity to maintain traditional livelihoods. Sámi Law may also include those parts of Norwegian law where the cultural differences between the Sámi and the majority society implies that the law works differently (Skogvang 2009:25).
Sámi law can also be understood as Sámi internal lawgiving, e.g., unwritten rules rooted in Sámi culture as customary law, aimed to regulate the relations and use of natural resources etc., between the members of Sámi societies as well as to outsiders. If we include customary practices, legal opinions, legal thinking and application of the law, both formal and informal, this concept can be referred to as Sámi legal culture (Ravna 2010:149).

6 http://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/ (accessed 8 September 2013).

References

1. Anaya, James, *The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland,* 2011 see http://unsr.jamesanaya.org/docs/countries/2011-report-sapmi-a-hrc-18-35-add2_en.pdf (accessed 10 September 2013).

2. Domstoladministrasjonen, "Den samiske dimensjon i rettsvesenet;" 2011 http://www.domstol.no/upload/DA/Internett/domstol.no/Aktuelt/2011/Rapport%20samisk%20dimensjon%20i%20rettsvesenet.pdf (accessed 10 September 2013).

3. Finnmarkskommisjonen, *Rapport felt 1 Stjernøya / Seiland,* 20 March 2012, see http://www.domstol.no/upload/FINN/Rapporter,%20utredinger%20og%20kunngjøringer/Rapporter/Felt%201%20rapport%20-%20den%20trykte.pdf (accessed 10 September 2013).

4. Finnmarkskommisjonen, *Rapport felt 2 Nesseby,* 13 February 2013, see http://www.domstol.no/upload/FINN/Rapporter,%20utredinger%20og%20kunngjøringer/Rapporter/Finnmarkskommisjonen_rapport_felt_2_Nesseby_nettversjon.pdf (accessed 10 September 2013).

5. Gauslaa, Jon. "Utviklingen av sameretten de siste 25 årene og betydningen for arealforvaltning og rettspleie" in Øyvind Ravna (red.), *Areal og eiendomsrett,* (Oslo: Universitetsforlaget, 2007): 151–180.

6. Helander, Elina. "Samiska rättsuppfatningar," *Juridica Lapponica* (30) 2004, Rovaniemi, Arctic Centre.

7. Human Rights Committee, Report vol.1, General Assembly Official Records, 49th Session. Supplement no. 40, General Comment No. 23, adopted on 50th Session, 8 April 1994.

8. Innst. S. nr. 147 (1997-88) *Innstilling fra Utenriks- og konstitusjonskomitéen angående ny § 110 a i Grunnloven om samiske rettigheter.*

9. Innst. O. nr. 80 (2004-2005) *Innstilling fra justiskomiteen om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (finnmarksloven).*

10. Ot.Prop. nr. 53 (2002-2003) *Om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (Finnmarksloven).*

11. NOU 1984:18 *Om samenes rettsstilling.*

12. NOU 1997:4 *Naturgrunnlaget for samisk kultur.*

13. NOU 1997:5 *Urfolks landrettigheter etter folkerett og utenlandsk rett.*

14. NOU 1999:22 *Domstolene i første instans.*

15. NOU 2007:13 *Den nye sameretten.*

16. NOU 2008: 5 *Retten til fiske i havet utenfor Finnmark.*

17. Ravna, Øyvind,"Hensynet til samisk språk og kultur ved organiseringen av domstolene", *Kart og Plan* (69) 4/2009: 205-215.

18. Ravna, Øyvind,"Sámi Legal Culture – and its Place in Norwegian Law," *Rendervous of European Legal Cultures*,(Bergen: Fagbokforlaget, 2010):149-165, see http://uit.no/ansatte/oyvind.ravna (accessed 10 September 2013).

19. Ravna, Øyvind," The Process of Identifying Land Rights in parts of Northern Norway: Does the Finnmark Act Prescribe an Adequate Procedure within the National Law?," *The Yearbook of Polar Law,* (3), 2011:423-453, see http://uit.no/ansatte/oyvind.ravna (accessed 10 September 2013).

20. Ravna, Øyvind, "Legal Protection of Coastal Sámi Culture and Livelihood in Norway," *The Yearbook of Polar Law,* (4), 2012: 261–278.

21. Ravna, Øyvind, "Sámi Rights and Sámi Law in Norway", *Polar Law Textbook II* (ed. Natalia Loukacheva), Nordic Councils of Ministers, 2013(a): 270–293, see: http://www.norden.org/no/publikationer/publikasjoner/2013-535(accessed 10 September 2013).

22. Ravna, Øyvind, "The First Investigation Report of the Norwegian Finnmark Commission", *International Journal on Minority and Group Rights* (20), 2013(b): 443–457, see http://booksandjournals.brillonline.com/content/10.1163/15718115-02003005;jsessionid=2012onk9r268a.x-brill-live-01(accessed 10 September 2013).

23. Skogvang, Susann F., *Samerett*, 2nd ed., Universitetsforlaget, Oslo 2009.

24. Skogvang, Susann F., "Ny minerallov og samiske rettigheter," *Lov og Rett,* no. 1-2, 2010: 47-67.

25. St.meld. nr. 28 (2007-2008) *Samepolitikken*.

26. Smith, Carsten. "Retten til fiske i havet utenfor Finnmark," *Arctic Review on Law and Politics* (1) 2010: 4-27.

27. Solem, Erik. *Lappiske rettsstudier,* Inst. for sammenliknende kulturstudier, Oslo 1933.

Юридическая защита прав и культуры малочисленного народа саамов в Норвегии

Ойвинд Равна
Юридический факультет,
Арктический университет Норвегии,
Норвегия, Тромзо, NO-9037

Темой данной статьи является законодательство, касающееся правовой защиты культуры саамов и саамов как малочисленного народа Норвегии. Анализ будет проводиться со ссылкой на три правовых системы, включая право саамов и правовую культуру, исходя из текущего правового статуса. Борьба саамов за свои права на земли и воды является центральной в развитии правовой позиции саамов. Таким образом, этой части законодательства саамов будет уделено наибольшее внимание в статье.

Ключевые слова: малочисленные народы, саамы, страны Северной Европы, Норвегия, право, законодательство, международное право, оленеводство, Конвенция Международной организации труда № 169.