

Sámi Legal Culture

– and its Place in Norwegian Law

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Introduction

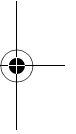
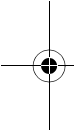
This chapter concerns the Sámi legal culture. The central issue to be addressed here is how to learn about the content of the legal culture, including its importance for application of law within the Norwegian state. The Sámi legal culture is assumed to have had greater autonomy and importance in the olden days. To understand the contents of this culture, one must therefore study the past. A substantial portion of the text will consequently deal with Sámi legal history.

Legal culture is formed by legal thinking, laws, precedents and other applications of law. In a broader perspective, legal culture also includes non-legal actors' thoughts and actions. Sámi legal culture is largely based on customs, sense of justice and material expressions of culture. This means that the distinction between narrow and wide legal culture does not apply as well as in cultures that are primarily based on written law. Although examples of the importance of customs can be found within specific areas of law such as property- and peasant law, customs are a pervasive characteristic of Sámi legal culture.

Sámi legal culture is regulated by customary law to a greater extent than modern Norwegian legal culture. Although they are not written laws, the customary laws are nevertheless rules of law. They are important within the Sámi local autonomy as well as in national and international legal application. Such rules are characterised by the fact that they have an independent legal basis, and that they are obeyed because those for whom the rules apply, feel obligated by them. Informal sanctions in cases of violation of the rules may also be characteristic.

Sámi legal culture has been discussed in the legal literature. Erik Solem's classic work *Lappiske rettsstudier* (Lappish Law studies) from 1933 and Sverre Tønnesen *Retten til jorden i Finnmark* (Right to the Land in Finnmark) from 1972

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should be mentioned. Of recent writings, *Samerett* (Sámi Law) by Susann Skogvang, with a new edition in 2009, is central.³⁸² Skogvang points out on p. 26 that “even if the Sámi people in Norway of course are subject to Norwegian norms of law, there is a distinct Sámi consciousness and tradition of law, which partly are quite different from the Norwegian. The existence of a unique Sámi legal culture is thus clear.” She calls this “Sámi law” and points out that it consists of Sámi customs and conceptions of the law.

The position of the Sámi legal cultures in Norway has changed through history. From the mid-1800s to approximately 1950, the policy of the state was to assimilate the Sámi people. Attitudes changed in the post-war period, with a greater will for recognition. In 1990 Norway became the first country to ratify the ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries.

This convention states that indigenous people’s customs and customary law should be taken into account in national legislation, and that this, in turn, should have consequences for both legislation and for the application of law by courts and administrative bodies.³⁸³ The Convention is partly incorporated through the Finnmark Act, which underlines these principles.³⁸⁴ The Sámi culture’s place beside the Norwegian is thus also a question of commitment to international law.

382. Susann Funderud Skogvang, *Samerett*, 2 ed. (Oslo: Universitetsforlaget, 2009). Other references (the list is not exhaustive) include Ánde Somby, *Juss som retorikk* (Oslo: Tano Aschehoug, 1999), Gunnar Eriksen, “Tilvenningen til samisk kultur og rettstenkning i norsk høyesterettspraksis”, *Kart og Plan* 62 (2002), Láilá Susanne Vars, “Fra lappiske rettsstudier til same- og urfolksrett”, in *Fra Driftscentralen til Teorifagbygget*, ed. Per Christiansen (Tromsø: Det juridiske fakultet, Universitetet i Tromsø, 2004), Sunde, *Speculum legale: rettspegelen: ein introduksjon til den norske rettskulturen si historie i eit europeisk perspektiv* and Wenke Brenna, *Samene i rettsystemet: en undersøkelse om språklige og kulturelle barrierer i samhandlingen mellom samiske brukere og rettsystemet i Finnmark* (Karášjohka: ČálliidLágádus, 2005). See also NOU 2001, 34 *Samiske sedvaner og rettsoppfatninger*.

383. Such as Carsten Smith, “Samiske sedvaner har plass i landets rett,” *Aftenposten*, 17 September 2004. The Convention was adopted 20 June 1989, and ratified by Norway the following year.

384. Lov 17. juni 2005 nr. 85 om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (the Finnmark Act) § 3.

Sámi legal culture in the history of law Norway and Sámi land

If one defines legal culture as a system of legislation, law application and customary law, legal history also becomes the history of legal culture. I will therefore illuminate some aspects of Sámi legal history that illustrate the significance of legal culture.

The Sámi people have to only a small degree written their own history. The fact that their legal history is described by others, who have had their own motives for writing it, should be taken into account when it is read.

The Sámi call their land *Sápmi*. This is not a country, but an area that today lies within the states of Norway, Sweden, Finland and Russia. Although the area's geographic extent is not considered to have changed significantly in the last millennium, the state sovereignty over the area has changed radically. If we focus on the oldest written source available, the chief Ottar narrative from approximately year 890 AD, we find that Ottar told King Alfred of England that he lived the farthest north of all the Norwegians.³⁸⁵ Malangen and the islands in the north probably belonged to Ottar's kingdom. The coastal landscape in Troms thus constituted the northern border of Norway in the Iron Age and Medieval times.³⁸⁶ North of the border was *Finnmørk*, which in Old Norse means Sámi land. Neither Sweden nor Russia had established any dominion over Finnmark at this time, although parts of *Sápmi* step by step became subject to them. Today's Finnmark came gradually under Norwegian dominion from the 13th century onward.

Law and application of law may thus differ to the south or north of this geographic and cultural boundary. It is difficult to find documentation that the Sámi people living north of the border at that time constituted an independent state.³⁸⁷ However, there is no doubt that the communities here were essentially autonomous, and thus had their own legal culture.

385. Lars Ivar Hansen and Bjørnar Olsen, *Samenes historie fram til 1750* (Oslo: Cappelen akademisk, 2004) p. 67–69.

386. Hansen and Olsen, *Samenes historie fram til 1750* p. 79.

387. Erik Solem, *Lappiske rettsstudier*, Instituttet for sammenlignende kulturforskning, Serie B, Skrifter (Oslo: Aschehoug, 1933) p. 74. Solem refers to stories about kings in Old Norwegian and Icelandic literature, but states with certainty “that these stories of Lapp Kings are incorrect, if they are telling about an organized kingdom under a chief that could be called a King”. The opposite view is held by Hansen and Olsen, *Samenes historie fram til 1750* p. 125 with further references, where it is noted that the Norse sources from the 1100s about Finn kings “reinforce the assumption of the existence of Sámi chiefs in this period”. See also Hansen and Olsen, *Samenes historie fram til 1750* pp. 219–220.

Sámi custom and customary law were protected

Intuitively we could presume that the Sámi people to the south of the border would have had to adapt rapidly to the expanding Norse or Norwegian culture. This is not necessarily the case, however. Although the Sámi people were influenced by Norwegian legal culture, the *Hålogalandsrettarbota* (Hålogaland court-imposed fine) from 1313 shows that special penalty rules applied for the Sámi.³⁸⁸

The fourteenth century was a strong economic and military period of medieval Norway, so there is reason to suppose that the Sámi people sustained their autonomy long into the early modern period, since the country was hit by the plague the Black Death and the state power almost collapsed.

We also know that there were some special legal arrangements for the Sámi in Nordland and Troms in the seventeenth century, such as *Finneodel* (Sámi allodium) and the Sámi right to demand *landvare* (a special land fee), grass and ground lease.³⁸⁹ The fact that we know about these arrangements today suggests that they were made a part of Norwegian law.³⁹⁰ Distinctive features of the Sámi legal culture were recognised by the Norwegian State because Sámi law was upheld by the Norwegian legal system.

Another manifestation of Sámi legal culture is the function of *finnelensmenn* (Sámi sheriffs). In Finnmark there is documentation of *finnelensmenn* as early as the 1600s, as a kind of counterpart to *bondelensmenn* (peasant sheriffs). According to a royal letter of 1745, the duties of the *finnelensmann* included collecting taxes, undertaking summons and issuing lease letters for pastures. The *finnelensmenn* were selected among the Sámi people and had decisive authority in matters concerning migration, probate cases and debt cases.³⁹¹ Sámi law was therefore not only incorporated in Norwegian law, but institutional structures were created to ensure Sámi legal culture a place alongside the Norwegian legal system.

As the state powers of Denmark-Norway, Sweden and Russia subdued *Sápmi*, we find more examples in which the Sami legal culture is taken into consideration,

388. Sunde, *Speculum legale: rettspegele: ein introduksjon til den norske rettskulturen si historie i eit europeisk perspektiv* pp. 136–137.

389. Håvard Dahl Bratrein, *Fra steinalder til år 1700*, ed. Håvard Dahl Bratrein, Karlsøy og Helgøy bygdebok: folkeliv, næringsliv, samfunnsliv (Hansnes: Karlsøy kommune, 1989) p. 303 and Bjørn Bjerkli, “Samisk befolkning, bruk av naturen og rettighetsforhold i Nord-Troms” in NOU 2007: 14 *Samisk naturbruk og rettsituasjon fra Hedmark til Troms* p. 371–409 p. 391.

390. While the right to demand rent seems to disappear as a result of a more hard-handed Norwegian policy towards the Sámi, the Finn allodium survived for over 100 years, NOU 2007: 14 p. 392, because of conflict with Sweden in these coastal areas.

391. Håvard Dahl Bratrein, in *Historisk leksikon* ed. Steinar Imsen and Harald Winge (Oslo: Cappelen akademisk forlag, 2004) p. 112.

even though this was likely tied to issues of tax collection. We know that the eastern Sámi had a well developed legal culture in the late Middle Ages. It consisted of four *siidas*, or local societies, with core areas on both sides of the present Norwegian-Russian border. Numerous examples from the sixteenth century show that the state powers safeguarded the eastern Sámi by giving them privileges and legal protection. Since the Sámi areas were regarded as a common land at this time,³⁹² the protection was provided by both Russia and Denmark-Norway. The oldest of these documents is a deed of gift from the Grand Duke Vasiliy III of Moscow in 1517.³⁹³ The rights were confirmed in a deed from Tsar Ivan IV (the Terrible) in 1556, and further in a settlement between the tsar and the Danish-Norwegian King Fredrik II in 1563. We can also find such examples from the Swedish Lapland, such as the deed of protection King Gustav Vasa gave the Sámi in 1551.³⁹⁴ These examples show that the Sámi people had a well developed legal culture, and that the states the Sámi were subjected to found reason to provide legal protection for this culture.

In 1751 the border between Denmark-Norway and Sweden, which also included Finland at that time, was extended to a mountain named Golmmesoave east of Tana. The Lapp Codicil,³⁹⁵ which among other things codified customary traditions of the Sámi people, was attached to the border treaty. The aim of the Codicil was to ensure that the Lappish Nation should continue to exist. Article 10, which is often referred to, gave the Sámi protection for their annual migration over the new border based on old Customary practices. The rules in the Codicil about internal Sámi legal procedures are also of interest. According to Article 15, it was decided to appoint a *finnelensmann* and two Guild Law Men in each district where Sámi people regularly moved across the border. Besides keeping order in the migration and collecting the Sámi taxes, the *finnelensmann* should also administer a Lappish Court with the authority to rule on certain types of lawsuits in the first instance, including matters of Lapp Customs. Article 22 states following:

Naar nogen Trette indfalder imellem Lapper fra en og den samme Side, angaaende enten deres Overflytninger og Stedet, hvor de under deres Overflytnings Tiid prætender at opholde sig, eller om bortkomne Rehner, Slagsmaal, Smaa Gields Sager, Lappe-Væsenet *in specie* og Lappens Sædvaner

392. The Peace Agreement between Norway and Novgorod in 1326 gave both countries rights to levy taxes between *Svjatoj Nos* (east on the Kola Peninsula) and *Lyngen* in Troms. In the peace treaty in *Teusina* in 1595, Russia gave up its claims west of Varanger. Denmark-Norway was not part here, and upheld its tax claims until 1813.

393. Einar Niemi, "Østsamene – ressursutnyttelse og rettigheter" in NOU 1994: 21 *Bruk av land og vann i Finnmark i et historisk perspektiv* pp. 299–350 on p. 323.

394. Nils Johan Päiviö, "Lappskatteländens rättsliga utveckling i Sverige", *Diedut* (2001) p. 22.

395. Første Codicil and Tillæg til Grendse-Tractaten imellem kongerigerne Norge og Sverige Lapperne betreffende 2. okt. 1751 (the "Lapp Codicil").

betræffende, kan saadanne Sager, naar de ikke kand forliges, af samme Sides Lappe-Lænsmand og hans 2de Laug-Rettes Mænd, strax afgjøres; ...

When any quarrel occurs between Lapps from one and the same side of the borders, regarding either their migration and the place where they claim the right to stay during the migration period, or about lost reindeer, fights, small debt cases, the Lapp-manner *in specie* and pertaining to Lapp Customs, can such cases, when they cannot be settled, be ruled on at once by the same part's Lapp sheriff and his Two Guild-Law Men; ...

By recognising Sámi legal customs and traditions, the Lapp Codicil attained a unique position both as law and international treaty all the way up to our time. It doesn't only deal with reindeer husbandry and use of other natural resources; the Lapp Codicil is more comprehensive than that. When it mentions the conservation of the Lappish Nations, it provides grounds for interpreting the codicil as protection of the Sámi people as a nation. The codicil thus recognises not only the Sami customs, but to a great extent also a Sami legal culture.³⁹⁶ Retrospectively, the Lapp Codicil has been mentioned as a testimony of high legal culture from the treaty states, and an expression of the ideals of the Enlightenment in terms of protecting indigenous people's interests.³⁹⁷

The doctrine of culture stages put Sámi legal culture under pressure

Sámi legal culture has, as we have seen, had a distinct place in the Norwegian culture. In the last half of the nineteenth century the "doctrine" of culture stages gained foothold. The doctrine affected views regarding who could acquire and own land, in situations where some types of use led to ownership, others to beneficial use, while still others were perceived as an innocent public right of enjoyment. In Finland as well as in Sweden and Norway, this "doctrine" became important,³⁹⁸ and in Norway the legal scholar Fredrik Stang became an advocate of the views of the doctrine.³⁹⁹

396. The Lapp codicil has received new interest as a result of the negotiations for a new reindeer grazing convention between Norway and Sweden. Swedish-Sámi reindeer herders plead now the right to pastures in Norway in accordance with the codicil; See Geir Hågvar, "Svenske samers rett til reindrift i Troms", *Lov og rett* 51 (2008). As of August 2009 a new convention has been signed by the treaty states' governments, but has not yet been passed by the Parliaments and Sámi representative organs.

397. See Hansen og Olsen, *Samenes retts historie* p. 277.

398. See Kaisa Korpijaakko-Labba, *Om samernas rättsliga ställning i Sverige-Finland: en rättshistorisk utredning av markanvändningsförhållanden och -rättigheter i Västerbotens lappmark före mitten av 1700-talet* (Helsingfors: Juristförbundets förlag, 1994) pp. 21–34.

The term “culture stages” itself reveals that it extends much further than to ranking of property acquirement. A central element in the “doctrine” was the assertion that certain cultures or human races had progressed further in development than others because of their qualities. These cultures had also the greatest development potential for the future and therefore greatest social and economical importance. The doctrine thus established a “legal” basis for ranking cultures. Sámi culture was here ranked as less worthy of protection than the majority people’s culture.

One of the most notorious manifestations of this ranking came through the Land Sales Act of 1902. In the provisions to the act it was stated that land could only be sold to Norwegian citizens, under special consideration “to promote settling of a population suitable for the district, its cultivation and other utilisation, which can speak, read and write Norwegian and use it in their daily lives”.⁴⁰⁰

Despite the fact that the Sámi people had used the land in Finnmark for centuries, the act implied that they could become landowners only by acquiring Norwegian language and culture. Although there are hardly any examples of the act being enforced, it was a lighthouse in the assimilation policy and thus in the repression of Sámi culture. The many Norwegian surnames and farm names among settled Sámi may be seen as a result of this policy. Resistance to the act was expressed through the voice of the Sámi politician and educationist Isak Saba in his rhetorical question:

Will not the grass grow just as well on the meadow, if you speak Norwegian or Sámi? Is it not enough that the Sámi must buy land that from olden time has been theirs?⁴⁰¹

The doctrine of culture stages is based on ranking of cultures. The ranking included way of life and language. We can also presume that it involved legal and judicial opinions, as the legal culture. Erik Solem’s reason for studying the Sámi legal culture serves as an example. He stated that by studying “primitive tribes” perceptions one can investigate the legal rules particular to the different develop-

399. Fredrik Stang, *Indledning til formueretten*, ed. Fredrik Stang, Norsk formueret (Kristiania: Aschehoug, 1911) p. 3.

400. Lov 22. mai 1902 nr. 7 om Afhændelse af Statens Jord og Grund i Finnmarkens Amts Landdistrikt, the Act’s regulation (the Land Sales Act of 1902) Article 1 (my italics).

401. *Sagai Muittalegje* (*A Sámi language newspaper*) 1. mars 1906, etter Pedersen, “Statens eiendomsrett til grunnen i Finnmark”, in *Samer og Nordmenn*, ed. Harald Eidheim (Oslo: Cappelen, 1999) on p. 37. Isak Saba (1875–1921) was the first Sámi who was elected to the Storting (1907–1912). Saba is also known for having written the text of the Sami national hymn *Sámi soga lávlla*.

ment stages. It is as a part of this research the Lappish sense of justice is investigated.⁴⁰²

The view of Sámi rules of law as primitive implied that those who apply the law in general could give less consideration to Sámi customary law. The fact that one had to start practising Norwegian agriculture in order to qualify to own land was itself a force tending to displace the Sámi culture. Just as surely as the Sámi use of land could not lead to legal rights, the Sámi legal culture and customary law had to give way for Norwegian law and legal culture.

Sámi legal culture today

A dissolving culture?

Sámi legal culture has been under massive pressure in all four states where Sámi traditional land is located, especially since the late 1800s. Even so, Erik Solem could observe vibrant Sámi customs in the 1920s. When he mentioned rules about the sharing of catch within the *siida*, or how the Sámi require them to provide well for the poor in their societies, he could well be describing a living legal culture.⁴⁰³ Likewise, the right of the youngest child to take over the farmhouse and land by heritage represented a customary law.⁴⁰⁴ Solem also cited internal rules for distribution of pastures, and claimed that it was of lesser importance that the rules probably could not be brought for the courts since the Lapp themselves generally respect the rules and never go to courts to seek to have them sustained.⁴⁰⁵

The pressure on Sámi legal culture in the 1900s was also described by the Reindeer Husbandry Law Committee, appointed in 1960. Here it was stated that the system of local chairmen of reindeer pasture districts was based mainly on the old Sámi *siida* system, where *siida isit*, the *siida* leader, had extensive power. Further on it was stated that the Sámi system of *siida* and *isit* had largely been dissolved.⁴⁰⁶ The committee described not only a way to organise reindeer husbandry, but also a legal culture in disintegration. This indicated a need to establish a local body to administer reindeer husbandry based on legal rules. The committee reasoned that the *siida* leader had made both strategic and practical decisions about migration, herds and approval of earmarks, and that such an institution was no longer in place.

402. Solem, *Lappiske rettsstudier* p. 3.

403. Solem, *Lappiske rettsstudier* p. 100.

404. Solem, *Lappiske rettsstudier* p. 169.

405. Solem, *Lappiske rettsstudier* p. 189.

406. *Innstilling fra Reindrifsløvskomiteén* oppnevnt ved Kgl. Res. 29th April 1960, given 23rd of November 1966 p. 21.

To a great extent one can say that The Reindeer Husbandry law committee was correct in this description of the situation. Overgrazing and a rise in internal conflicts after the Reindeer Husbandry Act of 1978 came into force, can be traced to a legal culture in dissolution, where the state, through a new act, attempted to replace the traditional Sámi means of controlling and administering the reindeer husbandry with modern legislation.

Reindeer husbandry is nevertheless the one part of Sámi culture which has survived to the greatest extent, and for which parts of traditional customary law have now been made statutory in the Reindeer Husbandry Act.⁴⁰⁷

Renaissance

Despite its description of a culture in disintegration, the Reindeer Husbandry Law Committee was influenced by the changing view of the Sámi culture that came after the Second World War. The Sámi committee, of which the Sámi rights advocate Per Fokstad was a member, and which delivered its report in 1959, was a driving force in this development. The committee underlined the importance of mutual respect between Sámi and Norwegians, among other things.⁴⁰⁸ The report represented a break with the assimilation policy. The policy, however, was like a tanker at slow speed. Many years passed before attitudes toward the Sámi people changed in public institutions, and before “Finn” or “Lapp,” combined with a suitable adjective, were no longer used as insults. During the many years it took for this change of attitude to occur, much of the Sámi language and material culture in many villages was lost.

The change of policy in the 1950s and 1960s, did pave the way, however, for the struggle for Sámi legal rights in the 1970s. As a consequence the state was compelled to establish the Sámi Law Committee in 1980. The committee prepared the Constitution Article § 110a, which gave the Sámi culture and language constitutional protection. The committee also prepared the Sámi Act authorizing establishment of the Sámi Parliament, opened in 1989.⁴⁰⁹ In the long run, the committee’s focus on Sámi law was a fundamental force in the development of institutional aspects of Sámi legal culture.

As mentioned in the introduction, Norwegian ratification of ILO Convention No. 169 meant that the state had committed itself to respecting indigenous

407. Lov 15. Juni 2007 nr. 40 om reindrif (Reindeer Husbandry Act).

408. *Innstilling fra Komitéen til å utrede samespørsmål (The Sámi Committee)*, given 3rd of August 1959. It also led to a report to the Storting about Sámi policy in Norway, St.meld. nr. 21 (1962–63) *Om kulturelle og økonomiske tiltak av særlig interesse for den samisktalende befolkning*.

409. Lov 12. juni 1987 nr. 56 om Sametinget og andre samiske rettsforhold (The Sámi Act).

peoples' legal customs and thus also Sámi legal culture. Through the Human Rights Act of 21st of May 1999 No. 30, the UN Covenant on Civil and Political rights of 1966 (UNCPR) was incorporated into Norwegian law. Article 27 states that:

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.

This presumably includes legal culture,⁴¹⁰ although it is beyond the scope of this chapter to discuss the details. The Court Commission's interpretation of Article 110a of the Norwegian constitution can nevertheless be significant,⁴¹¹ since the UNCPR article inspired Article 110a.⁴¹² On page 20 the Commission states that since Article 110a instructs "the authorities of the State to establish conditions enabling the Sami people to preserve and develop their language, culture and way of life," this also implies "requirements for the courts and their administration, and requirements for the judges' qualifications, knowledge and attitude".

This statement clearly shows that the Court Commission found that the courts and their administration are responsible for safeguarding consideration for Sámi language and culture, which most likely includes legal culture and Sámi customary law. The establishment of *Sis-Finnmárkku diggegoddi* (Inner Finnmark district court) in 2004 was a result of this acknowledgement. This "Sámi" court has special responsibility for safeguarding the Sámi culture".⁴¹³

The renaissance of Sámi culture has given the Sámi legal culture a broader space in Norwegian legal culture in other ways as well. In the beginning of this century two Supreme Court judgements were made that clearly indicated the importance attached to the Sámi culture by our highest court. In the *Selbu and Svartskog cases*,⁴¹⁴ Sámi customs and traditions were given priority when rules of immemorial usage were applied. The Supreme Court also emphasised that the

410. See also Skogvang, *Samerett* p. 59.

411. The Court Commission (Domstolkommisjonen) was appointed by Kgl. Res. 8th March 1996 with a mandate to investigate the administrative position of the courts in Norway. It delivered its report in April 1999 as NOU 1999: 19 *Domstolene i samfunnet*.

412. See NOU 2007: 13 *Den nye sameretten* p. 190 with further references to NOU 1984: 18 *Om samenes rettsstilling*.

413. See Chief Justice of the Supreme Court *Tore Schei's* speech at the opening of the Court 23rd of June 2004, where he points out that Inner Finnmark District Court has the important task of letting the insight and knowledge of Sami custom and customary law find expression in its decisions.

414. Published respectively in Norsk retstidende (Rt.) 2001 p. 769 and in Rt. 2001 p. 1229.

Sámi culture was oral and that this should be taken into due consideration when evaluating evidence. The possible legal significance of language differences between Norwegians and Sámi was also pointed out.

Sámi customary law and legal culture have also been increasingly included in Norwegian legislation. I have already mentioned the Reindeer Husbandry Act of 2007, where the *siida* as an institution is given a judicial function, and where the preamble states that there should be emphasis on "... culturally sustainable reindeer husbandry based on Sámi culture, tradition and custom ...". The Finnmark Act also builds on this, for example in Article 5, second paragraph, which states that the act does not "infringe the collective and individual rights the Sámi and others have acquired by prescription or immemorial usage". Other legislation, including the Consultation Agreement of 2005 illustrates the same trend.⁴¹⁵

The provisions of the Sámi Act about extended right to use the Sámi language in the judiciary, and establishment of the already mentioned *Sis-Finnmárkku Diggegoddi*, can also be viewed in this perspective. There is thus a trend towards Sámi and Norwegian legal culture to a larger extent overlapping each other.

Characteristics of the legal culture of the settled Sámi Salmon fishing in Tana

The legal culture of the settled Sámi has been less shielded from the outside world than the legal culture of reindeer husbandry. Therefore it has also been under greater pressure. In the following we will look at some customary law traditions that are still practiced in rural districts in *Sápmi*. This is done to show that Sámi customs and customary law exist as a basis for Sámi legal culture, while it simultaneously illuminates the case law practice that shows the contrasts between Norwegian and Sámi law.

Let us start with salmon fishing traditions in one of the richest salmon rivers in *Sápmi*. The importance of salmon as a resource for food and currency cannot be overstated in the Sámi villages of *Deatnu*, or Tana as it is called in Norwegian language. Salmon fishing has been a right which has belonged exclusively to the Sámi people in Tana from time immemorial. Sverre Tønnesen wrote that "the Sámi in 1601 still considered themselves solely entitled to the fishing and demanded payment of those who wanted to participate in the fishing."⁴¹⁶ He also

415. More about this in Skogvang, *Samerett* p. 82–83.

416. Sverre Tønnesen, *Retten til jorden i Finnmark*, vol. 2 (Bergen: Universitetsforlaget, 1979) p. 38 with further reference to (among others) Oscar Albert Johnsen, *Finnmarkens politiske historie: aktemässig fremstillet*, Skrifter (Videnskabselskapet i Kristiania) / 2 Historisk-filosofisk klasse (Kristiania: Dybwad, 1923) p. 277.

wrote that this was not because the fishing was unknown in the royal circles, who normally claimed the right to such fishing. The Sámi Law Committee shared this opinion.⁴¹⁷

The rich fishery had led to legal disputes in which Sámi customary law on salmon fishing has been tested by Norwegian courts against legislation regulating the right to fish in the river. The Tana Act is an important part of the legislation.⁴¹⁸

In a case from 1989, a person from Tana was accused of having transferred his right of fishing to a neighbour.⁴¹⁹ It could be in violation with the Tana Act, Article 1, first paragraph, even though the charge applied to participation in use of fishing nets in relation to a salmon fishing bar. The prosecuting authority stated that the fishing was in violation of the Salmon and Freshwater Fishing Act 6th of March 1964, Article 86. The district court ruled that the accused had transferred his fishing right, but did not take into account other ways in which he had contributed to illegal fishing. The Supreme Court found that lending the fishing right to a person who later exploited it in an illegal manner did not constitute participation in illegal fishing. The first instance's sentence was therefore annulled. In its verdict, the Supreme Court didn't find any reason to set aside customary practice which allowed transfer of fishing rights.

The antagonism between the local Sámi customary law and Norwegian legislation became explicit in a 2006 case. The Supreme Court ruled that the custom whereby a person outside the household could fish with permission from the holder of the right, was in conflict with Norwegian law.⁴²⁰ The case arose when a person from Tana refused to accept a fine for illegal fishing and argued that he had been fishing on his brother's right. Inner Finnmark District Court found the defendant not guilty, and concluded that the Tana Act did not prohibit the fishing, since the defendant had authority from his brother to fish in his absence. His authority to fish was in accordance with local custom and customary law.⁴²¹ The prosecution appealed. Hålogaland Court of Appeal reversed the judgement, interpreting the written law such that it was not allowed to fish using a deputy who lived outside the right holder's household. The case was appealed by the

417. NOU 1997: 4 *Naturgrunnlaget for samisk kultur* p. 280. See also Steinar Pedersen, "Laksen, allmuen og staten" in *Diedut* nr. 2 1986, Kautokeino p. 7.

418. Lov 23. Juni 1888 nr. 1 om Retten til Fiskeri i Tanavassdraget i Finmarkens Amt, med forskrift i medhold av res. 1. April 1911. In a lower court verdict in Rettens gang (RG) 1985 p. 911 customary law was weighed against statutory law. The claim that the Sámi village's right to fish with net was established before the act was adopted, which meant that persons without connection to farming had a right to fish, was rejected.

419. See Rt. 1989 p. 504.

420. See Rt. 2006 p. 13.

421. Sentence of 14. March 2005.

accused, who stated that local customary laws gave grounds for a different interpretation of the Act. The Supreme Court rejected the appeal. The first-voting judge pronounced that she could not “see that there is reason to constitute a customary law that would make exceptions to the Act’s function”.⁴²²

In these examples, Sámi customary law had to give way for Norwegian written law. In the verdict from 1989, the Supreme Court did not find a reason to criticise the transfer of rights to fish, which in 2006 was found unlawful. Although this question was not a central point in the 1989-verdict, the review nevertheless shows that a relevant local custom has been set aside by the Supreme Court.

Snare trapping and freshwater fishing

Gathering or harvesting resources in the Sámi areas has been relatively little regulated by law, with the exception of the recently adopted Finnmark Act and the general acts regulating freshwater fishing and game preservation. Customary laws regarding such harvesting, including the right to set up turf huts to support it, have thus developed a more independent legal basis than, for example, the salmon fishing in Tana.

Erik Solem points out that snare trapping is mentioned in old literature about the Sámi, and “that they often went to legal proceedings against each other about such trapping places”.⁴²³ Of the more recent works *Samiska rättsuppfatningar* (Sámi Legal Conceptions) of Elina Helander can be mentioned. Based on interviews, she writes about customary law relating to snare trapping, cloudberry picking and freshwater fishing areas in Tana. Her informants assume that they have the right to use certain areas for snare trapping. These trapping areas are respected by others, and the informants also have the right to set up huts in the area. Helander also demonstrates that the Sámi informants think that they have a kind of internal autonomy over the practising of this hunting tradition, and that they at the moment stood in danger of losing this autonomy.⁴²⁴

One should be careful about using oneself as a source. I will only mention that in my own youth, I participated in snare trapping for grouse a few winters. We received traditional knowledge about where to place the snares from older Sámi: father or his friends and hunting partners. In the same way we were also given knowledge about the practice and use of the resources; in other words, customary laws. It was also common to put up turf huts in the trapping area, although this had been more common in the old days, when trappers might live in the mountains for several months. For the snare to catch well, the capture area

422. See paragraph 15 in the judgement.

423. Solem, *Lappiske rettsstudier* p. 87 with further reference.

424. Elina Helander, “Samiska rättsuppfatningar”, *Juridica Lapponica* 30 (2004) p. 16.

had to be peaceful, and the snares needed to be spaced at a certain distance. This was probably the reason why the trapping areas were separated and delimited by natural terrain boundaries such as valleys, lakes, rivers and watersheds.

Through the Norwegian courts, Sámi hunting and fishing have been limited to being a household right.⁴²⁵ The right to snare trapping had no such limitation. The snare-caught grouse were for sale. The birds, which were trapped in the freezing cold winter, were easy to store, and the trapper seldom if ever took a bird to eat. It was more common to eat net-caught fish, at least early in the winter season. Snare trapping based on old customary traditions is a form of hunting that still is allowed by Norwegian law.⁴²⁶

The right to set up turf huts and other buildings in relation to nature harvests

The right to put up turf huts or *goahiti* has largely been regulated by Sámi customs. According to common practice, one had the right to build huts in one's own resource areas. The turf hut could not be built larger than necessary, and one should use materials from the place, for example, birch and peat, if we exclude the floor, doors and window. Those who used the resource area also had a right to stay in the hut, which meant a ban on locking the door. The owners or owner families had preferential right of use, however.

This customary autonomy was violated when the Finnmark jordsalgsstyre (Finnmark Land Sales Board), which administered the so-called unregistered state land in Finnmark, adopted a Turf Hut-article which stated that by "license granted by the Land sales office turf huts may ... be built outside special deposited cottage areas to cover necessary needs for shelter to: a) Business Operations, b) Mountain safety service c) Shelter etc. for walkers during storm".⁴²⁷

This regulation can be viewed as an intervention in a Sámi right based on customs and immemorial usage. Several disputes about the right to build huts

425. See Rt. 1968 p. 394 (Brekken) and Frostating lagmannsrett, sentence 4. des. 2008, LF-2008-50209 (Tydal).

426. See Forskrift om jakt- og fangsttider samt sankning av egg og dun for jaktsesongene fra 1. april 2007 til og med 31. mars 2012, given in accordance with the Lov 29. mai 1981 nr. 38 om viltet. See also Forskrifter for vern av visse samiske områder (Stabbursdalen Varangerhalvøya) which states that use of woody materials (twigs) in snare trapping is allowed.

427. Forskrift 3. oktober 1967 om salg og feste gjeldende for Finnmark jordsalgskontor, Finnmark's subsequent amendments of 27 October 1983, § 17, given in accordance with Lov 12. mars 1965 om statens umatrikulerte grunn i Finnmark and Forskrift 15. juli 1966 nr. 3418 om salg, bortfeste og forvaltning av statens umatrikulerte grunn, Finnmark.

came up in the wake of the Regulations in 1980s and 1990s. Some of the local people adapted to the regulation by alleging that huts built after the regulation, were restorations of older buildings. This was often accepted at the start. A requirement of leasehold for the turf huts was little practiced, and was later replaced by a requirement for a turf hut-statement.

Most of the disputes concerning the right to build huts and cottages were never brought to court. They were often resolved by negotiations, or possibly as a complaint to a superior administrative body.⁴²⁸

The *Koiutouta case*, however, was brought to court. This case concerned a dispute regarding the right to a modern mountain hut used for sheep husbandry, which belonged to a person from a Sámi and Kven family.⁴²⁹ In 2004, when Hålogaland Court of Appeal settled the appeal,⁴³⁰ the claimant stated that the previous legal authority, Hålogaland land consolidation court of appeal, had neglected to consider the Sámi/Kven aspect of the case. He alleged that the Land Consolidation Court of Appeal, according to the ILO Convention No. 169 articles 14 and 4 No. 2, pertaining to international law, was obligated to facilitate traditional Sámi/Kven agriculture. The Hålogaland Court of Appeal did not present an opinion on whether the building could stand on such a basis. Instead, the court stated that the appellant's "interest in this can be viewed under an indigenous perspective, namely the exercise of traditional Sámi agriculture. On the other hand, such a construction will be contrary to the interests of reindeer husbandry, which is another important Sámi livelihood. International law sources do not provide guidance in such cases". The Court of Appeal then accepted the demand for demolition from Statskog SF (The state ownership enterprises).⁴³¹

The review in this section shows that customary law concerning the right to build turf huts and other traditional buildings has come into conflict with Norwegian legislation. The recently appointed Finnmark Commission has the task

428. See e.g. decision by Statens landbruksforvaltning 29th of June 2004, archive no. 2004/3710 SBU SFA, about the reversal of a former decision about demolition of 19th of December 2001, Sauna turf hut by 3. Bjørnevann i Tana municipality – Ole Ravna. As Ola Ravna is my father I do not find it correct to go further into the case.

429. The term *kven* is used of descendant Finnish immigrant families in northern Norway.

430. LH-2003-14370.

431. The case was appealed to The Supreme Court, which dismissed the case, see HR-2004-2033-U. Mandatory demolition was not complied with. In a request for legal enforcement, Inner Finnmark District court 10th of February 2006 found that *finnmarksloven* had changed the state of the law in such way that there was reason not to allow such legal enforcement. After appeal to the Hålogaland Court of Appeal, see Rettens gang (RG) 2007 p. 140, the decision was reversed. The case was later reconciled, which meant that the building was not demolished.

of deciding the position of the Sámi legal culture and customary law and the extent to which they should be protected.

Sámi legal culture in the future

In this article I have made an excursion into the Sámi legal culture. Like language and other culture, the legal culture has also been exposed to pressure as a result of assimilation policies, the culture stage doctrine and the accompanying legal management. Sámi rights experienced a renaissance with the *Alta case* in the late 1970s, which led to the establishment of the Sámi Law Committee. Gradually the Sámi culture attained constitutional protection. In this article I have examined parts of the Sámi legal culture in practice by the permanent residents, which is still alive, despite encounters and inroads from Norwegian legal culture. Overall, this review shows that the Sámi legal culture did not succumb to assimilation pressure through “the dark century,” from the mid 1800s to the post-war period. Perhaps the reason is that this is not only a legal culture, but a complete culture with its own language, own traditions and material expressions, that has been standing on its own for a long time. Sámi legal culture has been linked to customs, cultural expressions and oral tradition, and it has been institutionally independent. Accordingly, it has been difficult to subdue. An example is the *Svartskog case*.

This situation is probably changing, as part of the Sámi legal culture is now established within the written law.

One thing is to hold on to your own legal culture in internal affairs, another is sticking to it when you don't get institutional approval, and among other things, risk criminal penalties. The examples presented here and other precedents show that Sámi customs have faced much opposition in the Norwegian courts. When such customary law has been heard, it has often been without regard for cultural differences.

One of the main reasons for creating the Inner Finnmark District Court was consideration of the Sámi customary law. Precedents show that the courts of appeal often have overruled Sámi customs and judicial opinions accepted by the “Sámi” Inner Finnmark District Court.⁴³² Although the Sámi culture enjoys legal protection according to Article 110 a in the Norwegian Constitution, parts of the Sámi legal culture that function well are nevertheless disregarded in courts, as we see in the case about authority fishing in Tana. Today it appears that Sámi legal customs, distinctive characteristics and cultural expression are mainly taken into account in land rights disputes such as the *Selbu and Svartskog cases*.

432. Besides those cases referred to above, Skogvang, *Samerett* pp. 71–81, has referred to a whole series of similar cases within criminal law and child welfare law.

In the review of Sámi legal culture today, I have limited my discussion to the characteristics of residents' Sámi legal culture as related to salmon fishing and field harvesting. Small game hunting, in which the Sámi people traditionally hunted grouse after the birds had their white winter coats, could also have been mentioned. Sámi spring duck hunting is yet another example, as it has now been admitted by the authorities as a trial case in Kautokeino.⁴³³ Other Sámi legal traditions are also relevant, such as dispute resolution outside the court.

Although it can be debated how far Sámi customary law can reach in conflicts with Norwegian written law, both the weight international law gives to such customaries and the tolerance we have to demand from the Norwegian legal culture, would indicate that Sámi customary laws have to be recognised as legal rules. This implies that Sámi substantive law should be recognised as legally binding norms in Norway. Perhaps equally important, Sámi legal culture must be strengthened through court proceedings. This was emphasised by the Court Commission, which defined the responsibilities of the courts, their administration and the judges.

When we see that the "Sámi" Inner Finnmark District Court's decisions repeatedly are overturned in the courts of appeal, it raises the question of whether the courts fulfil their constitutional requirements. It also raises the question of whether a separate Court of Appeal with responsibility for Sámi cases should be established, or at least whether special arrangements are needed in the existing courts. Similarly, one must ask why there is no requirement for knowledge of Sámi culture and language within the land consolidation courts, which hear many land rights disputes and thus rule over important parts of the material basis for the Sámi culture.

Norway is established on the territory of two nations: Sámi and Norwegian. The state must therefore safeguard the Sámi legal culture through legislation, appropriate courts and predictable legal practice. That the Sámi rules of law are increasingly statutory is an important sign of recognition of the Sámi legal culture. At the same time, the Sámi legal culture is characterised by orality, customary law and traditions, which there also has to be room for in the future. Finally, I believe that it is up to the Sámi people to make use of the rules created by their predecessors' customary use of natural resources through time immemorial. Whether the rules of law are presented in written form, or as non-statutory rights with the protection Norwegian law is required to give the Sámi legal culture, is then of subordinate importance.

433. Despite this the Supreme Court found that such hunting was illegal in a sentence published in Rt. 1988 p. 377.