THE BRIDGE-BUILDING ROLE OF POLITICAL PROCEDURES

Indigenous rights and citizenship rights within and across the borders of the nation-state

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PREFACE

The title of the thesis–*The Bridge-Building Role of Political Procedures. Indigenous Rights and Citizenship Rights within and across the Borders of the Nation-State*–reflects my presumption that applied procedures contribute to a closer relationship between the Saami citizenry and the political community understood as a whole. The thesis is composed of four articles, framed by an introduction entitled–*The Indigenous Challenge*–and a concluding chapter entitled *The Bridge-Building Role of Political Procedures.* I emphasize deliberation as an approach to the understanding of procedures, which are seen as factors fostering mutual recognition and political integration. This presumption stems from a deliberative notion of democracy based on Habermas' proceduralist model of the constitutional-democratic state. The tension between special rights and equal treatment calls for just or fair procedures. But as these may be of a different kind, a distinction is drawn between a juridical and political approach. This is done in order to pinpoint procedural conditions that can account for increased mutual recognition and political integration, as well as for the 'bond' between indigenous rights and citizenship rights. Deliberation and citizenship becomes particularly significant in the struggles for recognition.

The development of Saami political influence implies continuous processes of restoring and maintaining self-reflexive and learning processes and restoring and maintaining trust relationships, with the Saami Parliament as the centre core of processes. Thus in chapter II–*Political Autonomy and Integration of Authority: The Understanding of Saami Self-Determination*[1]– I argue that the successful institutionalization of Saami politics is dependent on a policy grounded on two primary principles: political autonomy and integration of authority. The chapter constitutes the basis for a further inquiry of indigenous minorities' possibilities for political influence based on a deliberative understanding of democracy.

While chapter II gives an outline of the development of Saami political procedures until 2001 and points to challenges like how to ensure permanent minorities the possibility to affect the outcome of deliberation, chapter III–*Gjennombrudd ved konsultasjoner? Finnmarksloven og konsultasjonsordningen i Stortinget* (Breakthrough through consultations? The Finnmark Act

[1] Published in *International Journal on Minority and Group Rights. Special Issue on Sami Rights in Finland, Norway, Russia and Sweden*. Guest Editor Andreas Føllesdal. Kluwer Law International, 2001

and the arrangement of consultation in the Norwegian Parliament)–focuses on *consultations* as a special procedure of participation, both in a normative sense and with regard to the effects.[2] The chapter continues the theoretical route of deliberative democracy by discussing the presence and absence of deliberation in the consultations between the Norwegian Parliament's Standing Committee on Justice, the Saami Parliament and the Finnmark County Council on the Finnmark Act that took place prior to the Norwegian Parliament's passing of the Finnmark Act in 2005. Here, deliberative democracy is presented as an analytical framework for discussions on consultations as a procedure for implementing indigenous self-determination. Through consultations, principal questions are clarified so that the parties can continue their relationship on a more regular basis by means of other procedures. The nation-state proves its protective and inclusive approach towards the Saami as an indigenous people. But this development is not merely a matter between the state and its indigenous people.

Chapter IV–*Indigenous rights and limitations on the nation-state*[3]–focuses on how the role and status of the Saami are affected by the process of European integration. The challenges posed to nation-states by indigenous peoples regarding conceptions of citizenship and belonging raise not merely empirical questions but also conceptual ones. They pertain to the conceptual lenses we apply. Accordingly, clarifications are required, and I address liberal and communitarian conceptions of citizenship. The study of the states' dealing with Saami claims and the Norwegian ILO-ratification versus the non-ratification of Finland and Sweden indicates that the state authorities have taken a different approach in strategies towards Saami rights claims. Accordingly, to a varying degree, the nation-states have consolidated the place of the indigenous in the citizenry. But what if the indigenous part are *non-citizens,* but still possess rights and are affected by the policy of the neighboring nation-state?

The cross-border reindeer husbandry case brings up tensions between rights grounded in customary practices and the concept of sovereignty. The focus in chapter V–*Grenseoverskridende politikk eller interessekamp?* (Cross-border politics or struggle of interests)[4]–focuses on the bilateral handling by the states of the cross-border reindeer husbandry between Norway and Sweden. I claim that this case could turn out to be a *litmus*

[2] The article is written together with Hans-Kristian Hernes and will be published in the book *Finnmarksloven (The Finnmark Act)*, Hans-Kristian Hernes og Nils Oskal (red): Cappelen Akademisk Forlag, 2008.
[3] Published in *Democracy in the European Union. Integration through deliberation?* Erik Oddvar Eriksen and John Erik Fossum (eds): Routledge. London and New York. 2000.
[4] Unpublished

test as to how the Norwegian nation-state handles indigenous rights. Is the disagreement in the bilateral negotiations a result of a lack of concern for Saami rights, or is it the result of a struggle between different interests and a weighty sovereignty motive? The theme sheds light on how established procedures and state sovereignty are being challenged by proposals of new management solutions and dispute resolution mechanisms across borders.

Reconciliatory procedures can be discussed as both principles of institutionalization and concrete decision-making procedures. In chapter VI–*The Bridge-Building Role of Political Procedures*– I derive, from a juridical and a political position, some relevant conditions for an assessment of indicators of mutual recognition and political integration. In order to capture aspects of what has taken place lately regarding mutual recognition and political integration, I have in the last chapter drawn upon some recent empirical data not discussed in the previous articles that make up this thesis. Notwithstanding, the Saami have gained recognition based on arguments about cultural diversity and about being in a permanent minority position, which has resulted in several advances and improvements within the nation-state. But as this is not a once and for all achievement it requires processes of constantly elaborating and revising the common framework for political justification.

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Chapter I

The Indigenous Challenge

Chapter I: The Indigenous Challenge

> "Our births, lives and deaths on this site have brought us into citizenship with the land" (John Borrows 2000).

1. Institutionalization of Saami Issues

Introduction

The relationship between the Saami, as an indigenous people, on the one hand, and the respective nation-states in which they live, on the other hand, is interesting both with regard to their historical incorporation into the state and the current treatment of Saami issues. A number of processes of *institutionalization of political rights* characterize the contemporary situation. Rights issues being connected to having status as an indigenous people raises general questions about the attachment of minorities to national and supranational constitutional arrangements. These questions are topical in pluralistic liberal states, as they require a focus on established arrangements and procedures. The establishment of the popularly elected bodies–the Saami Parliaments of Finland, Norway and Sweden–together with an entrenched legal development, illustrate that there are possibilies to change established practices and procedures, despite the permanent political minority position of the Saami.

The processes of consultation on the Finnmark Act[1] between the Saami Parliament in Norway and the Norwegian Parliament's Standing Committee on Justice can be viewed as the most recent and sensational illustration of such changes. These events involve both institutional and law reforms, and can result in new practices of interaction between an indigenous people and the state, and additionally in a new constitutional practice affecting relations between the Norwegian Parliament and the government. This thesis will focus on *the development of*

[1] On the 24th of May 2005 the lower chamber of the Norwegian Parliament–the *Odelsting*, passed a new law–the Finnmark Act, and on the 17of June 2005 the law was confirmed by the upper chamber–the Lagting. The right of disposition over the land was conferred to a new landowning body, called the Finnmark Estate (Finnmarkseiendommen). The Estate will administer land and natural resources in Finnmark on behalf of all the inhabitants of the county. Up till 2005, the Norwegian state considered itself as the owner of the land in Finnmark (95% of the land area in question), and this land was managed by a special state entity called *Statskog*.

procedures regulating the relationship between the Saami and the state. More specifically, I will examine the relationship between the defense of indigenous rights and the rights of citizenship within and above the nation-state.

The Saami political development and legal processes of institutionalization illustrate an increasing complexity of the issues that characterize the national political agenda. This complexity within the nation-state, and also currently at the transnational level, requires that decision-making procedures are binding but without violating the integrity and autonomy of the individuals and collectives involved. These issues call attention to established arrangements for indigenous peoples, while at the same time raising questions that pertain to common arrangements in political communities. They illustrate a tension between indigenous rights claims that justify *procedures of influence and participation* and an understanding of citizenship rights as *equal treatment* within a community. That is, the overall focus of this thesis, with the main question being: *What political procedures apply between indigenous peoples and the state for reconciling the defence of indigenous rights with the principle of equal citizenship, and which effects can be identified?* My assumption is that the procedures applied have contributed to a closer relationship between the Saami citizenry and the political community understood as a whole, i.e. increased mutual recognition and political integration is achieved. Political integration is understood as the development of some common standards, rules and dispute resolutions mechanisms that regulate and coordinate the interaction between the Saami people and the state, and implies the necessity to extend indigenous perspectives and participation into non-indigenous affairs.[2] This is not integration understood as strategies of assimilation and the erasing of cultural identity.

In order to account for these expected effects I will explore the procedures in question. I distinguish between political and juridical procedures, and expect it is possible to point out some conditions that foster political integration. The research question requires a normative perspective which gives the notion of procedure a special moral status, meaning that there is something worthwhile about following the procedures themselves. Mutual recognition presupposes actors' ability to reflect on one's self and one's actions as well as on the reasonability of others' actions and interests. Such can be forged through institutionalized

[2] These questions are about inclusion of Saami concerns into central, regional and local politics and management, and the possibilities for power-sharing.

procedures that induce critical self-examination and justificatory processes, through which actors are forced to argue their case. Thus, I maintain that institutional reflexivity can account for effects such as increased recognition and political integration. In other words, the procedures are assumed to be able to explain increased mutual recognition and political integration. However, whether or not mutual recognition and political integration among the main political actors involved really have been realized, is an empirical question and needs to be examined. Both the normative and empirical debate is addressed throughout all the chapters of this thesis.

This thesis focuses on how established and proposed procedures regulating and protecting indigenous rights contribute to a reconciliation of indigenous rights and citizenship rights. The question of the involvement of political procedures will be addressed by examining (1) the official policy, i.e., the institutionalization of indigenous issues, especially whether the emphasis is placed more on autonomy than political inclusion with regard to established institutionalized arrangements and procedures (2) furthermore, this thesis not only examines this institutionalization as an empirical issue but also how this development relates to the conceptual lenses we apply. An examination of indigenous political participation can analytically be distinguished between a self-government versus a joint governance approach.[3] One view holds that indigenous peoples should have as much self-government as possible and that they should deal with the state in a nation-to-nation relationship (cf. Tully 1995). Another view holds that forms of participation should be designed to encourage political inclusion of indigenous peoples (cf. Cairns 2000). An assessment of these two strategies can be based on an analytical distinction between a juridical versus a political approach, both of which give the notion of procedure a special moral status. The expectation is that the distinction between a juridical and political approach will allow for a better understanding of how political principles like indigenous self-determination can be applied.

A discussion regarding procedures of influence and participation in an indigenous–state relationship necessitates a focus on the concept of self-determination. However, the intention here is not to address the comprehensive international debate on indigenous self-

[3] Government refers to political rule through responsible institutions such as the parliament and bureaucracy. It is one single line of accountability anchored in the rights of the citizens. Governance solutions represent practices of networks and horizontal forms of interaction (cf. Eriksen 2005: 11). This distinction can also be made pertaining to the exercise of indigenous political authority. The most important warrant for the Saami Parliaments is the very fact that they are bodies elected by Saami, for the Saami.

determination and especially the discussion connected to the United Nations Declaration on the Rights of Indigenous Peoples (cf. Aikio and Scheinin 2005, Anaya 2004).[4] Instead my intention is to provide insight into the issue of the *implementation of the principle of indigenous self-determination*. In my view, the major challenges concern the issue of implementation which concern, among other things, how political principles like self-determination and application of the law are tested by the public in general.[5] The public is the sphere of society in which the formation of opinions and the exchange of views take place. The indigenous claim for self-determination comprises a right to self-government, autonomy, territorial integrity and exclusive enjoyment of their own land and resources (Daes 2000: 302). These claims also pose some challenges regarding the rights and interests of 'the others.'[6] Thus, I assume that in order to implement the principle of indigenous self-determination, an integrative understanding of political participation is essential. This is fundamental for the reconciliation of the defence of indigenous rights and citizenship rights that are understood as equal treatment.

First in this chapter a short sketch of the empirical material will be presented, then an emphasis on deliberation as an approach to the understanding of procedures of indigenous influence and participation will be outlined. Procedures can be defined as the guidelines used for deliberations when considering the merits and demerits of a proposal that is in search of the appropriate point of view from which to assess questions of justice (Chambers 1996: 59). The tension between special rights and equal treatment calls for just procedures. As a point of

[4] After the Working Group on Indigenous Populations in 1993 proposed a draft declaration, there has been a long debate before the United Nations General Assembly's adoption of the Declaration, a debate where many UN member states met the draft with categorical opposition, asserting that indigenous peoples are not peoples and have no right to self-determination in international law (cf. Kingsbury 2001).

[5] A distinction can be drawn between the concepts of 'strong' and 'weak' publics. The concept of 'strong' publics refers to parliamentary assemblies and formal discursive institutions, while the concept of 'weak' publics describes deliberations outside the political system (Fraser 1992). The advantage of the 'weak' public is that it functions as a medium of unrestricted communication where new problems can be perceived more sensitively, discourses aimed at achieving self-understanding can be conducted more widely and expressively, and collective identities and interpretation of needs can be articulated with fewer compulsions than is the case in procedurally regulated public spheres (Habermas 1996: 307). This openness of the agenda of public debate implies that actors in the public sphere in civil society can articulate and contest normative discourses, for instance, those that appeared due to the Alta conflict in the end of the 1970s and beginning of 1980s. The role of the public sphere as an 'antenna' for views of opinions and new claims can be illustrated by public debates and actions concerning Saami rights in the beginning and during the 1980s. These views and claims at the periphery of the administrative complex of power were 'sluiced' into the political-administrative system (cf. chapter II). The entire change in mentality concerning Saami rights would not have been possible without these processes.

[6] Concerns regarding 'the others' in a Saami context would be the non-Saami part of the population like Norwegians, Kven, and other inhabitants in different local communities.

departure a distinction will be drawn between a juridical and political approach in order to evaluate procedures that regulate indigenous rights in light of citizenship rights, Hence, the understanding of indigenous rights and the 'bond' between indigenous and citizenship rights requires reflection on the foundation for an assessment of procedures of indigenous influence and participation. Then, a methodological approach is structured around the concept of interpretation and reflection focusing on researchers' assumptions and pre-understandings regarding the empirical field. Finally, an outline of the thesis will be presented.

The empirical material

Knowledge about the present Saami political processes of change and legal development requires a focus that spans an extensive period of time. The contemporary situation and existing opinions must be understood in light of both former and current Saami policies. Despite variations between states in their treatment of indigenous issues due to differences in history, culture, law and governance, a common feature becomes visible; namely, that the establishment of the modern nation-state caused the *political minority status* of indigenous peoples. The historical relationship between the Saami and the state can be divided into different historical periods, from non-state intervention to integration (cf. Niemi 1997). The policy of the state during different periods illuminates, on the one hand, the protective nation-state which yields a distinct shield for indigenous peoples, and on the other hand, the paternalistic nation-state characterized by an assimilationist relationship towards its indigenous people. Some indigenous peoples have been able to influence the political contexts of their respective countries by convincing the authorities and the majority populations of the legitimacy of their claims. Saami political innovations can be viewed as the result of such a learning process, and can be regarded as a successful struggle for recognition.

Until recently, the development has mainly taken place within the framework of the nation-state, and the Saami have dealt with the state partly as an opponent and partly as a co-player. In the last three decenniums, these processes can be distinguished by two stages. To begin with, Saami organizations were the state's counterpart, safeguarding their role as the most important agents for the Saami people during the 1980s. The second epoch during the 1990s was marked by an increasing Saami political institutionalization which occurred with the Saami popular elected bodies in Finland, Norway and Sweden and gradually the development

of a more formalized cooperation between the Saami parliaments. The state constituted the basic framework, contributing to the definition and development of the Saami political agenda, and to establishing procedures that aim to secure political autonomy and integration of authority.[7] But as already indicated, this is not a one-sided state achievement. The Saami themselves have pushed the perception of rights into the public political conscientiousness by appealing to human rights standards and international law. Furthermore, the nation-states are no longer alone in safeguarding the interests of the citizens, nor indigenous interests.[8] In this respect, the European Union also represents a political and institutional framework for Saami ambitions to gain political influence, and some Saami politicians have called attention to possibilities of achieving some kind of an EU–Saami alliance against recalcitrant nation-states. Another area of new political initiatives and rights claims beyond the nation-state is linked to cross-border processes like the work on the Nordic Convention of Reindeer Pastureland. So far, nation-states have been in compliance with rights claims and procedures which have been accomplished through various arrangements within the framework of a nation-state. But why is it so difficult to apply the 'lessons learned' for the 'foreign' Saami?[9] In all these epochs, the complex of rights constitutes the crucial condition for the political institutionalization and development of procedures.

The complex of rights can be separated into categories that express both recognition and political influence. Cultural rights, i.e. language and other rights of importance for maintaining cultural identity appear as a first category. Secondly, political rights concern the question of indigenous peoples' participation in the political process of forming the collective will within a state. This is a question that concerns indigenous peoples' participation as *indigenous* in exercising popular sovereignty and self-determination. Thirdly, private-law rights, i.e. common law or customary rights pertain to the question of the legal protection of indigenous peoples' customary rights to land and water. This is about the boundaries and restrictions in the regulation of indigenous peoples' customary rights to land and water independent of the state organization of public management and administration of land and

[7] By integration of authority, I understand this to be processes of including indigenous considerations into the decision-making structures of the majority society. This is the topic of the next chapter.

[8] There is a widespread consensus that functions of the state, like territorial dominion, administrative control, consolidation of collective cultural identity and achievement of political legitimacy through increased democratic participation, are all undergoing profound transformations (Benhabib 2002: 179).

[9] The concept of 'foreign' Saami is here referring to the Saami reindeer herding communities in Sweden that have reindeer grazing rights in Norway.

water. Here the concern is the question of delimiting the proper scope of popular sovereignty. The relationship between the approaches concerns the democratic ideal of popular sovereignty and the principles of the constitutional state (Rechtstaat) as it relates to indigenous people living as permanent minorities within nation-states (cf. Oskal 2001). Throughout the chapters of this thesis, the focus will mainly be on political rights, but the two last chapters will address questions of procedures safeguarding indigenous rights and the nation-state's treatment of indigenous pre-established customary usage rights to land.

2. Understanding political procedures

A deliberative understanding of procedures

Procedures in this thesis are understood both as concrete *decision-making procedures* which imply a set of rules governing the participation of the parties involved, and a set of *principles of institutionalization* of politics. For example: What principles or norms are chosen in the decision-making process that aims to regulate land rights disputes in indigenous areas? At the most general level a procedure can be described as consisting of a set of guidelines to reach a collective agreement on moral and ethical questions, and the moral principles cannot be brought in from outside, but are instead objects of rational approval which are defined as an agreement between rational agents (cf. Chambers 1996: 18, 22). Regardless of whether or not there is a concrete procedural focus, or procedures in place that can serve as a general test of the principles' validity, the notion must be associated with an institutionalized activity within formal institutions. Its usefulness is dependent on it being governed by a generally recognized set of rules (Chambers 1996: 18) from which procedurally correct decisions draw their legitimacy (Habermas 1996: 305). The establishment of procedures requires an inter-subjective agreement about the way to go about doing things. They determine how deliberations are structured through argument and are specified in regards to the matter at hand. They structure opinion and compel formation processes towards a cooperative solution for practical questions, including the negotiation of fair compromises (Habermas 1996: 307). This requires a political dialogue involving an exchange and a test of reasons needed to resolve atypical and non-standard problematic situations. The conditions for dialogue are

important for argumentation, and argumentation is deliberative only when it is dialogical–in the give and take of arguments among speakers (cf. Bohman 1996: 42).

This understanding of procedures is in accordance with a deliberative democracy model which emphasizes the sharing of reasons and encourages the dialogic features of democratic decision-making. Decisions should be reached through an exchange of reasoning among citizens, and the process should include all relevant social and political perspectives (cf. Williams 2000: 125). Thus, deliberation increases legitimacy because it includes affected parties and gives them a chance to argue their case (Eriksen 2005: 16). An important presupposition in a deliberative understanding of democracy is the claim of impartiality. The fulfillment of this ideal involves defining political processes in such a way that inequality due to the effects of unequal distribution of resources, is ruled out. Norms and institutional arrangements are valid only if all parties who would be affected by their consequences can participate in a practical discourse through which the norms are adopted (Benhabib 2002: 11). These are important features of democratic processes with regard to groups in numerically minority positions, which are dependent on a process where decisions that affect them are not only based on counting votes. In that respect, defenders of group representation and theorists of deliberative democracy are natural allies (Williams 2000: 125). “Voice, rather than votes, is the vehicle of empowerment” (Chambers 2001: 99).

Thus, my starting point is that the deliberative notion of democracy is favourable and therefore the deliberative democracy model will be the theoretical basis chosen for evaluation in this thesis. An inclusion of all relevant social and political perspectives in democratic processes must also imply that the indigenous voices and reasons are included. “Deliberation is then, not solely an instrument for reaching better decisions but also for learning through the testing of arguments” (Eriksen 2005: 17).

Nonetheless, considerations of equal treatment in a political community versus the recognition of special measures for indigenous peoples, create tensions at a practical political level. Thus, to what degree is it possible to reconcile these considerations? There will always be divergent views and interpretations pertaining to what should be considered just solutions designed for the regulation of indigenous rights and how such rights and regulations should be understood. What could count then as relevant aspects of judgement concerning just procedures? Illuminating such kinds of aspects can be achieved by making a distinction

between the juridical and political approach, a division which will be further elaborated in the next section. These two approaches can be said to follow different rationales in the ways in which they define justice.[10] This distinction exposes some important features of procedures with regard to indigenous rights. The two strategies are understood as concrete mechanisms, one is to enforce indigenous rights through law and court procedures, while the alternative would be to choose political solutions involving decision-making in government and national parliaments.

Standards of rationality and just procedures

Depending on the nature of the issues and the characteristics of the cases at hand, the concept of procedures must be discussed in view of different standards of rationality. A deliberative democracy model is concerned with the problem of political justification in the face of moral disagreement. Claims for indigenous rights on the one hand and rejection of these on the other can cause ethical and moral disputes; procedures employed for solving such disputes require different justifications which are dependent on the nature of the issues. Different measures require different reasons, which result in the employment of different procedures. The basic question of what one ought to do is differentiated according to the kind of material in need of regulation. "The meaning of 'ought' remains unspecified as long as the relevant problem and the aspect under which it can be solved are undetermined" (Habermas 1996: 159). Hence, procedures that refer to what ought to be done, must take into account the complexity of issues and rationalities at stake. Consequently, one can consider validating or invalidating principles and concrete mechanisms for interaction. Parties must agree upon what reasons count when deciding on which issues should be treated in an equal versus unequal way. In some cases, differential treatment can be justified. This implies a self-reflexive interpretation by the agents representing each party, and an institutionalizion of critical opposition and choice opportunities that can be referred to as institutional reflexivity (Eriksen 2005: 18). Reflexivity entails the public use of reason that establishes the moral point of view (Eriksen 2005: 18) from which the equal interests of all can be expressed. But this communicative power must be legally institutionalized in a legal community that also expresses an intersubjectively shared form of life, existing interest positions, and pragmatically chosen ends (cf. Habermas 1996: 152).

[10] "The concept of justice is central in the tradition of Western moral theory, and one can hardly discuss normative questions without referring to the notion of justice" (Weigård 2008a).

This intersubjectivity can also be applied to the concept of rights. According to Habermas (1996: 88):

> "rights do not immediately refer to atomistic and estranged individuals who are possessively set against one another. On the contrary, as elements of the legal order they presuppose collaboration among subjects who recognize one another, in their reciprocally related rights and duties, as free and equal citizens."

When applying the discursive and relational interpretation of rights, the arguments of the Norwegian Power and Democracy project (NOU 2003: 19)[11] lose force in terms of how they pertain to the relationship between rights and the changes in representative democracy. One of the main conclusions is that the room of political activity is restricted because the citizens are awarded specific rights, and accordingly, the courts must clarify the content of such rights. These rights are not made the subject of majority decisions. But viewing this development as a one-sided impairment of representative democracy does not take into account that political decisions drawn up by alternating majorities, under some circumstances, can appear as arbitrary and less predictable. Saami rights illustrate that minorities have to defend themselves against majority decisions. The Power and Democracy Project views the development of Saami rights as a 'juridification' of politics, moving the conflict from the political to the legal space. This assertion calls for a comment. The advances of Saami politics can be viewed as a result of political processes of dialogue and learning, which also reached a common understanding of desired solutions within the field of law. But the advances can also be understood as the result of given international legal standards and as an adaptation to international law, an interpretation which is in accordance with the Power and Democracy Project. Although there is coherence between national politics and international legal development, several issues can be understood according to conditions that are specific to Norway. Such is the matter in, for example, the *Svartskog* and *Selbu*-cases,[12] which have their origins in disagreements over land use. The decisions in the Norwegian Supreme Court reflect domestic property law. In the *Selbu* case in Southern Trøndelag, the court's majority expressed that the domestic source of law, with adjustment for the reindeer herding industry,

[11] The Norwegian Parliament decided in 1997 to start an investigation on power and democracy in Norway. The Power and Democracy Project delivered their final report in 2003 after five years of work. The main focus is put on the conditions for the representative democracy.

[12] In 2001, both the *Svartskog* and *Selbu* case reached the Supreme Court.

were sufficient proof of pasture rights (HR-Rt-2001: 769[13]). In the *Svartskog* case, the Supreme Court ruled in favour of the local population in Manndalen in the northern part of Troms County.[14] The Court concluded that the inhabitants had acquired collective ownership rights to the disputed area. The locals, who used the area, had exercised their usage over such a long period of time and in such a way that they had established ownership rights (HR-Rt-2001: 1229). These two decisions in the Supreme Court illustrate that Saami customary rights can be protected at the same level as non-Saami users' customary rights. Based on assessments that the Saami users have been using the land 'in good faith' and the consequences of adequate intensive usage, the court cases are likely to have changed the state of the law (cf. NOU 2007: 13: 315).

The entrenchment of Saami rights emphasizes the need to clarify the relationship between law and politics as far as the development of Saami politics is concerned. Thus, the following section will introduce a juridical and political approach. Through making this distinction, different features of political and juridicial procedures as conditions that make political integration possible, will be identifiable. The tension between the concepts, both in theoretical terms and as procedural strategies, reflects various practical oppositions between democracy and law.

3. The priority of the right over the political or vice versa?

In this thesis, a distinction is drawn between a juridical and political approach (Williams 1995: 53) as a point of departure when evaluating procedures for regulating indigenous rights as they pertain to equal citizenship rights. The notion of just procedures will be assessed in light of these two approaches, and will first be addressed in the analytical scheme of John Rawls and Jürgen Habermas. Then the relationship between law and politics will be treated according to different institutional and procedural contexts. One procedural strategy is to enforce indigenous rights through the court based on some defined principles and limits of 'togetherness.' The opposite strategy would be to choose political solutions that involve

[13] http://www.domstol.no/DAtemplates/Article____9612.aspx

[14] http://www.domstol.no/DAtemplates/Article____8877.aspx

decision-making in government and national parliaments, where the parties agree upon some standards and positions in order to reach common ground and come up with solutions during some deliberative processes.

The ideal of impartiality

An important subject of discussion is the question of the possibility of *impartiality*,[15] a vital ambition for political procedures. Both Rawls' and Habermas' views of procedure, respectively the 'original position' and the 'practical discourse,' imply an impartial point of view. Impartiality requires a perspective that stands above competing ideas about the good life and worthwhile ends; in this sense, what is right has priority over the good (Chambers 1996: 19).

The 'juridical' approach

According to Melissa S. Williams, the juridical approach is fundamentally procedural and is prior to politics. Justice is conceived as something that is defined analytically and applied juridically (Williams 1995: 59). Justice defines an authoritative position of impartiality, a standard that can be legitimately enforced. The juridical approach highlights the protection of the interests of freedom and the assurance of the citizens' interests in being treated as equals. The notion of impartiality as impersonality guarantees that the citizens' position as bearers of just entitlement does not vary according to differences that are arbitrary from a moral point of view. This juridical conception of justice assumes a procedural approach to principles of justice like Rawls' 'original position'[16] (Williams 1995: 54). Thus, the definition of principles of justice should be defined procedurally to ensure that justice is not subjected to the numerous distorting imperfections of the political sphere. In that respect, the Rawlsian model

[15] Before continuing let me underline that I deal with the concept of impartiality in the context of special roles where impartiality is required, like within a political or law context. In addition I do not treat impartiality as a broader formal concept, but instead as a moral concept. The distinction between equal treatment and treatment as equals goes far beyond a formalistic understanding. According to that understanding, impartiality requires that people are treated in accordance with the rights they possess and what legitimate claims are put forward, not that they are treated equally (Dworkin 1977: 227).

[16] In the 'original position' the parties involved in the process of justification are subject to those restrictions that guarantee that all arrangements grounded in purpose-rational considerations are at the same time in the interest of all parties, and hence to be accepted as rights or as just in the normative sense (Rawls 1971). The 'original position' is a highly artificial choice situation, and the parties do not resemble real people (Chambers 1996: 68). The function of the original position is limited to the choice of the most general principles of social justice in a well-ordered society (Rawls 1971, section 2).

restricts the agenda of public conversation; there is no room for deliberation between real actors.

In the procedure Rawls employs, known as the 'original position,' rational agents are placed under certain fair constraints and asked to choose principles that will govern their future interaction (Rawls 2003: 14-18). The chosen principles are just to the extent that the procedures employed for choosing them are just. The principles of justice that have been defined through a procedural framework are conceived as limits to permissible individual and governmental action (Williams 1995: 54). This juridical model of justice defines the just obligations of citizens towards one another as a process of reasoning which enables us to regard the interests of all members of society as being equally deserving of recognition (Williams 1995: 56). The approach attempts to solve multicultural conflicts through a juridical calculus of liberal rights (cf. Benhabib 2002: 21) in such a way that it ensures the impartiality of justice.

The political approach

Williams argues for an approach to defining justice as one that is political, not juridicial, where public spaces are created in which group differences can be recognized, affirmed, and can inform policy. This perspective coincides with Habermas' argument about the permeation of ethics in the constitutional state. According to Habermas (1994: 122, 123), ethical questions cannot be evaluated from the 'moral point of view' of whether or not something is equally good for everyone. Rather, impartial judgment of such questions is based on strong evaluations[17] and determined by the self-understanding and perspectival life-projects of particular groups.

The only way to avoid the pitfalls of a false impartiality is to directly introduce the perspectives of marginalized groups into the institutional context in which we define, apply, and enforce conceptions of justice. Contrary to the juridical approach, justice in the political model cannot be defined analytically, but must be defined discursively:

[17] Taylor (1989, 1995) separates between weak and strong evaluations. Pragmatic questions require only weak evaluations because we can choose between alternatives simply out of what is desirable without feeling obliged to justify our preferences. Ethical questions about one's identity and self-understanding involve strong evaluations and options based on values. The individuals must be able to make authentic choices and realize their possibilities and ambitions (cf. Eriksen and Weigård 1999: 109).

> "According to the political model, our duties of justice are not defined prior to a process of political discourse, but within it. Justice does not merely define the boundaries within which politics can take place, but is itself re-shaped as a result of public deliberation" (Williams 1995: 61).

Preferences ought not to be taken as given, for they are subject to transformation. Deliberation is one of the most important means to achieve such transformation, and the agenda of public conversation is not restricted. The reasons are convincing through dialogue, not merely because they are an outcome of fair procedures (cf. Bohman 1996: 34).

Challenges with regard to impartiality

The insight of Kymlicka's critique (1989) of the Rawlsian conception of justice as difference-blindness reveals that not even a juridical model is impartial. Also, our constructions of justice are influenced by the social positions we occupy. The freedom of citizens to choose their principles of justice cannot take place in the 'original position,' because the parties–in reality– are not free to choose in any real sense (Chambers 1996: 69). With Kymlicka's modification[18] of the liberalism of Rawls and Dworkin, new standards of justice are used as the principles that guide decisions in minority-majority relations (cf. Williams 1995: 59). Such standards are necessary because social norms that appear impartial are repeatedly biased. Those in a socially privileged position often define the common good by excluding those who have reason to see things differently (cf. Young 1997: 399). Fair terms of cooperation are not self-evident, but in the 'original position' the ends to which the participants are trying to secure, are 'given' to them. "Preferences, ideals, goals, and interests, the very things that moral choices are about, are not the subject of deliberation" (Chambers 1996: 70). However, one could claim that without rules and principles that are sufficiently settled to be understood as objects of general public knowledge, individuals' sense of living within a just and stable order is insecure. By referring to Kymlicka, Williams (1995: 62) sheds light on the fact that marginalized groups may have fewer resources in the public debate than their counterparts and can be more diffident in advancing their views. From the standpoint of the juridicial model of justice, the formal protection that forms a part of the system of justice is especially important to members of marginalized groups, for both symbolic as well as protective reasons. The amendment in the Norwegian constitution–article 110a–is illustrative

[18] Kymlicka's theory on minority rights is like Rawls' a theory of justice, a theory on distribution pursuant to needs, combined with arguments of equal treatment (Weigård 2008b).

because it signifies the collective responsibility of the state to safeguard the Saami language, culture, and society. The amendment can be seen as a constitutional limit that prevents the state from depriving the Saami of their acknowledged and accepted rights.

The critique of impartiality leads to an argument in favour of specific self-representation for groups whose voices have been excluded from deliberations about justice (Williams 1995: 60). Williams argues for a kind of impartiality on the part of the individual who attempts to interpret the requirements of justice in good faith. One needs to understand how justice is understood from the other's point of view by putting oneself in the position of the other and trying to view the situation from their perspective.

This view coincides with a discourse ethical perspective on impartiality. Discourse is directed at mutual understanding, which at a minimum, means to understand the real issues that divide you from your interlocutor and at a maximum means having a shared understanding. Impartiality is achieved not by a withdrawal from the concrete interests of the parties, but rather by becoming more attached to the concrete interests of one another. Moral assumptions do not determine how a conversation concludes or what it is about, but they will set up a framework within which there can be a search for common ground. The common ground can be an agreement to disagree, but it can also represent substantive shared interests (Chambers 1996: 100, 101). But this understanding of impartiality and justice presupposes a foundation of trust. "Citizens have to be able to trust one another to judge each other's arguments in the spirit of impartiality; to prefer justice to narrow or selfish ends" (Williams 1995: 64). Williams claims that it is the foundation of trust[19] that is missing for members of marginalized groups in contemporary liberal democracies. As a response to William's claim, one could ask what must be done to shape a foundation of trust, which implies that there is a question pertaining to the basis for citizens' loyalty in a political community. Is there something to be gained from the experiences of the Saami developing political rights, and to what degree is it plausible to assert that the Saami–as Saami–are more strongly and explicitly related to the

[19] This concept of trust can be distinguished according to the three variants: familiarity, confidence and trust (Luhmann 1988). Familiarity as a relation to the well-known functions as a strategy to reduce uncertainty; confidence in an asymmetrical relationship of power is essential for the relatively orderly function of society and the significance of confidence is increasing in complex society; trust according to Luhmann is based on an assessment of risk and the possibility of choosing among alternatives. The alternative to trust is no trust. The choice is non-participation or exit (cf. Ellingsen 2003).

national constitution than before? These questions will be addressed both in the next section and in the articles to follow.

The ideal of impartiality has been considered here from a juridicial model of justice on the one hand, which defines an authoritative position of impartiality prior to the judicial and political application, a standard that is given in the 'original position,' which can be legitimately enforced; and on the other hand, the ideal is considered from a political model of justice, where impartiality results from real discussions among affected parties, but is based on the prepolitical background entities of moral-philosophical principles. The following table presents the features of and summarises this line of argument for what can be regarded as relevant aspects of judgment concerning just procedures in the juridical and political approach:

Relevant aspects of judgment / Approach	Fair terms of cooperation	Defining justice	The understanding of impartiality
Juridical	Settled rules and principles, given preferences	Justice defined in advance of the political process, in the 'original position'	Defining an authoritative position of impartiality
Political	Ideals, principles and preferences are subject to deliberation and transformation of preferences	Discursively, justice defined within the political process, as an ideal discourse	Impartiality based on strong evaluations[20]

Political solutions versus court procedures

When the issues raise more than pragmatic questions and when a problem-solving procedure is required, two forms of collective will formation mechanisms become necessary in the absence of value consensus: goal attainment and conflict resolution (Eriksen 2005: 23). Goal attainment is collective decision-making that is based on the mobilization of support for collective goal realization, which is decided on and implemented by political and administrative institutions. "Conflict resolution is prototypically the domain of law as it involves the settling of disputes through adjudication" (Eriksen 2005: 23). The context for these adjudications can be court procedures based on domestic and internatonal law.

[20] My understanding of strong evaluations is based on Taylor's distinction between weak and strong evaluations, cf. footnote 8.

The development of Saami rights illustrates the use of both mechanisms: goal attainment through political solutions which imply deliberative processes, defining principles, and transformation of preferences; and conflict resolution through court procedures where the cases are measured against settled principles and preferences, and an authorative position of impartiality. The question as to the degree of compatibility between these two mechanisms is of utmost importance in the processes of acknowledging indigenous land rights and the establishment of institutions of self-government. On the one hand, courts can change practices and problematize former methods, understandings, and previous uses of sources and evidence, which can lead to court decisions which acknowledge indigenous land rights like in the *Selbu* and *Svartskogen* Supreme Court cases (cf. Matningsdal 2002). In common law practice, Supreme Court decisions have played an important role in changing governments' policies on land claims[21] (cf. Sanders 1998). The political system is then expected to strive for compatibility between law and political practice. On the other hand, political solutions can be a driving force and can adjust for both new legal and political institutional arrangements, like in the case of the Finnmark Act. Rights are achieved based on decisions in the national parliament and are also underpinned by obligations stemming from international law (cf. chapter III). Moreover, the treatment of the Finnmark Act falls within what James Tully (2007) calls a new tradition in the handling of minority and indigenous claims. Such situations in the past were marked by processes where norms and rights were 'given' i.e. defined in advance by courts and policy-makers. The rights were handed down to the members once and for all as definitive and final solutions.

If veiwed from the perspective of indigenous rights, the legal protection accentuated by the juridicial approach is of fundamental significance. Carsten Smith (2005) points out that Saami rights that were achieved through long time use of land and water cannot be changed by political decisions, unless by means of expropriation and compensation, a principle of the constitutional state (Rechtstaat). "Rules of court procedures in the area of legal application are meant to compensate for the fallibility and decisional uncertainty resulting from the fact that the demanding communicative presuppositions of rational discourses can only be approximately fulfilled" (Habermas 1996: 234). As stated earlier, political decisions

[21] The Calder decision of the Supreme Court of Canada on Indian ownership of traditional territories in 1973 startled the federal government. A series of Supreme Court decision from 1983 to 1996 supported Indigenous rights (Sanders 1998).

formulated through changing majorities can appear arbitary and less predictable. Rights become necessary in order to counteract this arbitrariness. Regarding indigenous land rights issues, the possible fallibility of political decisions becomes even more critical due to vulnerability linked to either lack of institutionalization of indigenous political influence or to the fact that authorities have administratively regulated away customary usage rights through political decisions (cf. Oskal 2001: 258).

The acknowledgement of indigenous land rights can be seen as a result of political or court decisions. Court decisions can be based on both domestic law and obligations derived from international law. As already discussed, the development of international legal standards and an adaptation to international law are viewed by some as an impairment of representative democracy (cf. the Norwegian Power and Democracy Project). But this argumentation fails to acknowledge, first of all, the space of political action that is created by giving marginalized groups better conditions for political participation. Secondly, it fails to acknowledge the fact that domestic law has not protected indigenous land use in the same way as non-indigenous users' rights (Oskal 2001: 258). In order to counteract the impact of such failures, international legal standards like the UN's International Covenant on Civil and Political Rights from 1966 (CCPR), article 27[22] and the ILO Convention No. 169 from 1989–which concerns aboriginal populations and tribal people in independent nations (ILO 169)–set up limits for land and resource encroachments and interventions. These standards have been enhanced by the United Nations General Assembly's adoption of the Declaration on the Rights of Indigenous Peoples on September 13th, 2007. Despite the fact that a declaration does not have the same formal and legal force as a convention, the morally binding aspects of this instrument cannot be underestimated. An overwhelming majority of 143 states voted in favour, while only Canada, Australia, New Zealand and the United States voted against and there were eleven abstentions.

This tension between domestic law–understood as a definitive authorative position–and legal standards derived from international law can be illustrated by the issue concerning the Finnish

[22] 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 practice their own religion, or to use their own language." In the Norwegian context, the interpretation of this article implies not only protection against discrimination, but measures of positive rights. This interpretation has been amplified over time by the UN's Human Rights Committee. On a more general level, it is pointed out that Article 27 only confirms generic minority rights on a first level, and does not address ethno-political conflicts (cf. Kymlicka 2007).

and Swedish non-ratification of the ILO 169; in contrast to Norway, neither Finland nor Sweden has yet ratified the convention. In Sweden there are doubts as to whether the domestic state of the law is in coherence with the convention's provisions on land and water rights (cf. Mörkenstam 1999: 194). The Swedish juridical bodies which commented on the ILO 169 review,[23] and who sketched what needed to be done domestically in advance of ratification, were much more positive towards ratification than the national political bodies (Bengtsson 2000: 45). Political reasons were given for their non-ratification position (Bengtsson 2002). Thus, Bengtsson (2000: 45) argues that a judicial approach is preferable given the experience gained surrounding the ILO-ratification debate, among other things. This debate illustrates the problems with the political approach: Who shall judge which rights are essential to a workable understanding of a just relationship between an indigenous minority and a political community? And, as will be shown in chapter V, the Norwegian and the Swedish states have been able to remove indigenous peoples' usage rights, without following the rules and procedures that are otherwise required pursuant to internal law and the principles of international human rights.

Several investigations have been conducted on the way towards ratification. The latest were done by *Gränsdragningskommissionen* (The borderline commission) (SOU 2006: 14 Samernas sedvanemarker) and *Jakt- och fiskerättsutredningen (*The hunting and fishing commission) (SOU 2005: 116 Jakt och fiske i samverkan). The mandate of the first commission was to assess reindeer pasture land areas based on contemporary law, not to suggest legal amendments. Despite the fact that the commission's conclusions do not have legal force, the foundation laid is comprehensive and builds on extensive material that can prevent future court procedures about land disputes. This statement from the commission is interesting due to the fact that the common way of dealing with conflicts over land in Sweden has been through court decisions, and the overall picture of these decisions is negative when seen from the Saami point of view. Thus, another observation of the commission was in reference to the *Selbu* case proceedings; the commission stated that similar assessments of evidence should also be possible in the Swedish court system (SOU 2006: 14: 380). These assessments illustrate the interplay between law and politics. On the one hand, contemporary domestic law forms settled principles and given preferences from which decisions are drawn.

[23] SOU 1999: 25 Samerna – ett ursprungsfolk i Sverige. Frågan om Sveriges anslutning till ILO's konvnetion nr 169.

On the other hand, public investigations lead to deliberation about and transformation of these principles and preferences, and they can remedy the weaknesses in contemporary law.

Finland has not yet ratified ILO 169 either.[24] The position of the Saami in the constitution of Finland has a strong foundation which is not reflected in the law, politics, or in the administration.[25] Several investigations have been conducted regarding circumstances of ownership in Saami areas and the relationship between domestic and international law. The investigations have also provided suggestions for new managmenent solutions. The consequences of the development of international law have had an important impact on Finnish domestic law. In 1996, the Supreme Administrative Tribunal (*Högsta förvaltningsdomstolen*) suspended nine different decisions about claims awarded to mining companies in Saami areas. These suspensions were based on the CCCPR article 27 and the arguments made were that implications of mining in Saami areas for reindeer herding had not been assessed. After these decisions, the procedures in mining affairs have been changed. In the Finnish example, the importance of international legal standards are highlighted and they constitute a framework towards domestic law which can be tested and challenged.

My main assumption is that procedures in general contribute to a closer relationship between the Saami citizenry and the political community understood as a whole because they can induce critical self-examination and justificatory processes, through which actors are forced to argue their case. These political and juridical procedures could strengthen indigenous participation in exercising popular sovereignty, but could also, if needed, constrain the free exercise of popular sovereignty.

A position that favours a juridical approach leads us to advocate for laws that regulate the relationship between the Saami citizenary and the political community. Once the corrective measures are made and the procedures established, the Saami will no longer be in a disadvantaged position and mutual recognition will be obtainable. The juridical approach ensures a stronger legal protection against governmental expropriation of existing customary usage rights of different individuals and groups among indigenous people.

[24] Nyyssönen (2007) discussed why the Finnish Saami experience does not fit the same pattern as the Saami participation in Norway, where the Saami have partially succeeded in the use of the global rights discourse in land ownership cases.

[25] Draft of the Nordic Saami Convention, published 26.10.2005, p. 112.

When viewed from a political approach, all parties who are affected by political decisions and their consequences should participate in practical discourses about these matters. Impartiality is secured through shared understanding. An important feature of democratic political processes with regard to minority groups is that the process moving towards a result is not only dependent on counting votes, but on an inclusion of voices and reasons.

The two mechanisms–conflict resolution and goal attainment–are problem-solving procedures. As concrete strategies they enforce Saami rights through court procedures and political solutions. As illustrated by the strive for the recognition of rights by the Saami, both strategies can hamper or advance these efforts, but they also establish the interplay between the mechanisms. As a consequence of this interplay, the understanding of impartiality and affectedness becomes essential for the actors' comprehension of fair terms of cooperation and the definition of justice, and eventually of how we perceive just procedures. These procedural conditions will be elaborated on further in the conclusion chapter.

Even if a formal and legal position that acknowledges rights and improves political influence is achieved, there will always be a demand for protection against majority decisions. Irrespective of the degree of indigenous autonomy, the justification of these procedures, whether they aim to distinguish or integrate, would be a public process of examination and reflection which seeks to achieve mutual understanding and political learning among the citizenry as a whole. Hence, there is a need to review the 'bond' between indigenous and citizenship rights.

4. The place of the 'indigenous' in the citizenry

Equality versus cultural belonging

One of the questions this thesis examines is *the relationship between the defense of indigenous rights and the rights of citizenship within and above the nation-state*. The relationship touches upon the following fundamental question: What constitutes the basis for political order and the citizens' loyalty in political communities in ethnically complex

societies? According to Seyla Benhabib (2002: 26), the right to cultural self-expression needs to be grounded in, rather than considered an alternative to, universally recognized citizenship rights. However, given the experiences of indigenous peoples regarding various state policies, and in particular the so-called assimilation policies, the terms 'citizenship' and 'equality' are often read as an acceptance to become the same as the majority population of the state (cf. Cairns 2000). There is a great mistrust stemming from the historical experiences of indigenous peoples. The principles of equal respect and rights for each individual regardless of cultural belonging and the liberal principle of 'one person, one vote' are considered to be in conflict with the principle of acknowledging cultural recognition and protection of collective identities. Will Kymlicka's 'politics of multiculturalism'[26] (1989), Charles Taylor's 'politics of recognition'[27] (1994) and Jürgen Habermas' 'struggles for recognition'[28] (1994) all have a bridge-building function in this conflict, and demonstrate that the alleged contradiction between a policy of recognition and a principle of equal treatment is faulty.

Multiculturalism and indigenousness

Minority groups struggle for cultural recognition and accommodation of their cultural differences with majorities, and these differences are often covered by the term 'multiculturalism.' The term covers many different forms of cultural pluralism (Kymlicka

[26] Kymlicka's defence of collective rights for minority cultures and his view of cultural membership as a prerequisite of an individuals' ability to pursue a conception of the good should be regarded as a primary good in the Rawlsian sense. A main principle of citizenship is that every citizen should have a right to full and equal participation in the political, economic and cultural life of the country, without regard to any of the classifications which have traditionally kept people separate and behind the majority (Kymlicka 1989: 141). An important point for Kymlicka is how equality of citizenship is to be fairly balanced against equal respect for members as members. He incorporates cultural identity into an egalitarian vision of social justice, in which cultural membership is viewed as one of the goods essential to liberal citizenship. Kymlicka concludes that a conception of justice that takes into account the differences between cultural minorities and members of a majority culture cannot rest on a system of uniform rights for all citizens, but require special collective rights for minority cultures which protect their ability to survive.

[27] The phrase refers to the debate introduced by Charles Taylor in his essay "Multiculturalism and the Politics of Recognition" (1994). Here he "weaves together themes central to his philosophy: the development of an intersubjective conception of identity based on a dialogical model of "webs of interlocution," and his reconstruction of the philosophy of modern subjectivity in the light of demands for equal dignity and authenticity" (Benhabib 2002: 51).

[28] Habermas argues for a theory of rights that protects the integrity of the individual in the life contexts in which his or her identity is formed, and this theory is not blind for cultural differences. The state is not neutral in its relationship to cultural identities. The debate on the 'politics of recognition' is well suited to illustrate the difficulties of intercultural understanding. The question is whether it is possible to transcend the context of our own language and culture or whether all standards of rationality are bound up with specific worldviews and traditions (cf. Habermas 1994: 120, 121).

2007: 16, 17, 66) and is often used to deal with so-called 'ascriptive groups' where membership is based more on birth than volition (Williams 1995). I am aware that the term 'multicultural' covers various areas of ethno-cultural relations like immigration and accommodation of national minorities in general. The use of the term could even be extended to include various non-ethnic identity groups, and in the United States the term is often used to refer to all forms of identity politics (Kymlicka 1998: 9). Another aspect of relevance is that the politics of multiculturalism often describe relationships between cultural groups in federal systems like Canada and the United States,[29] not in unitary systems like the Scandinavian states. However, there are some common acknowledgements of relevance made in the state-minority relationship for all types of minority groups: repudiating the idea of the state as belonging to the dominant group, replacing assimilationist nation building policy and acknowledging a history of injustice (Kymlicka 2007: 66).

Regarding multiculturalism, the indigenous situation has its own history of colonization and a present day relationship with the state. But questions raised in the multicultural debate regarding (a) 'we' and 'the other' (b) incorporation into the political community understood as the nation-state and (c) self-government rights as a form of group-differentiated rights (Kymlicka 1995: 26-27, 181-186) are also of principal significance in the debate about just arrangements for indigenous peoples. Hence, these aspects in relation to the claim of indigenousness will be the focus of the following section:

a) Iris Marion Young (1997) emphasizes the structural relations between groups, and how social positioning of group differentiation provides individuals with some shared perspectives on social life. Young argues against those who claim that groups do not exist. "Group difference is a political issue because inequalities that are structured along lines of class, race, gender, physical ability, ethnicity and relationships can usually be traced between that group specific situation of culture or division of labor and the advantages or disadvantages one has" (Young 1997: 89), but group differentiation should be understood in a more relational perspective which does not entail substantive and mutually exclusive identities. The relational aspect is

[29] Kymlicka (1998) divides between territorial federalism and multination federalism. The United States provides an example of the former conception of federalism. There, federalism was not used to accommodate self-governments claims of national minorities. Instead, no territory would be accepted as a state unless national groups were outnumbered within it. With respect to Quebec, the Canadian federation illustrates multination federalism (Kymlicka 1998: 137, 138, Kymlicka 1995: 28).

emphasized even more by Benhabib (2002) who argues for a recreation and negotiation of the imaginary boundaries between 'we' and the 'others.' The 'other' is always also within us and is one of us. A relational focus is apparent, as opposed to an understanding of ethnic groups as surrounded by 'cultural walls.' The latter interpretation would assume a notion of culture as 'pure' and 'genuine.' The right to self-determination would then become a means towards isolation and separation in order to preserve 'purity' and 'genuineness.' But such a 'purity-based claim' for protection of indigenous cultures would result in 'no real' indigenous peoples in the end, and consequently nobody would claim indigenous rights (cf. Broderstad and Oskal 1998). Identities are constantly undergoing re-negotiations; however, this does not mean that the notion of identity is constructed and contingent, like many postmodern writers conclude. Despite overlapping cultural differences and similarities, our contemporary society cannot be reduced to a homogeneous culture of contingent and dissolving differences (cf. Tully 1995: 45).

A postmodern understanding would imply an elimination of any minimum of subjective identity and intersubjective intention (Guneriussen 1999: 279), and would be characterized as acultural as it views processes of development as general processes of change which are independent of cultural contexts. In opposition to this view, recognition of cultural differences must take into account the connection between cultural recognition, individual autonomy, and the public autonomy of the citizens. As Nils Oskal (2003) emphasizes, ethical political questions concerning who we are as collectives, the relationship between groups and the public goals we aim to achieve also involve questions of fair treatment between groups. But if the answer to these questions makes a claim to be valid, it cannot be reduced to *one* question of ethnic identity, and a reflection of one's identity can hardly be expressed solely as a question of fairness. On the other hand, public treatment of different groups must be regarded as a question of justice (cf. Oskal 2003: 327). This point leads to the next aspect of relevance for claims of indigenousness.

b) One important point of departure is the variation in the ways in which minorities become *incorporated* into political communities. Kymlicka (1995) makes a distinction, if not in principle, with regard to the question of incorporation between national minorities and ethnic groups where national minorities means groups with

historical roots in a given territory that wish to maintain themselves as distinct societies alongside the majority culture and demand various forms of autonomy. Ethnic groups refers to immigrant groups who do not aim to become self-governing nations alongside the mainstream society, but aim to make the larger society more accommodating to cultural differences. Benhabib (2002) criticizes this distinction between national minorities and ethnic groups, and underlines that the normative justification for it is unclear. According to Benhabib, it is no longer the distinctiveness of social cultures and the differences between their cultures that permits us to make such claims, but rather, it is claims about justice, about democratic inclusion and exclusion, that justify different treatment of groups. Benhabib claims that Kymlicka's arguments for reconciling liberalism with cultural rights are based on culturalist premises rather than on political evaluations of movements and their goals (Benhabib 2002: 65). However, Benhabib also finds the line of argument for migration and integration of ethnic groups who are not claiming autonomy versus national minorities who have not accepted conquest and assimilation, and thus demand self-governing arrangements, as plausible, "since the basis of all political legitimacy must be some form of consent of the governed" (Benhabib 2002: 63). The first group of minorities is not claiming self-government.

Further, Kymlicka (1999) makes another division between stateless nations/national minorities and indigenous peoples. Stateless nations were contenders but losers in the process of state formation; indigenous peoples were totally isolated from it. In a recent work of Kymlicka (2007), these are described as core categories which originated in Western historical processes. The indigenous non-existence in the processes of European state formation and the total neglect by the states concerning indigenous customary usufruct and land rights constitute significant reasons for groups to claim rights as an indigenous people. Accordingly, indigenous peoples view themselves as distinct 'nations' or 'peoples' whose existence predates that of the nation-state. As nations or peoples they claim the right to self-determination. This claim to an inherent right of self-government is based on a sense of being a nation located in a historical territory, and at the same time constituting a founding people with regard to the foundation of the state. They are not simply demanding a general decentralization of power to promote administrative efficiency or local democracy; rather, they are demanding recognition as distinct peoples and as founding partners, which have

maintained the right to govern themselves and their lands in certain areas (cf. Kymlicka 1998: 6). But Kymlicka does not make a sharp distinction between the rights of national minorities and indigenous peoples. The arguments maintained for indigenous peoples can just as much be employed for stateless nations or national minorities.

c) Acknowledgement of indigenous rights often depends on the dominant non-indigenous community, on the nation-state, and the international society. Indigenous peoples' struggle for self-determination usually means more co-management in decisions and competence having to do with their own affairs within the existing states. The indigenous challenge is to curb the state-centred tradition that positions the state as the supreme actor concerning self-determination. However, modern international law discourse on peace and human rights temper positivism in international law (Anaya 2004: 50). The principle of popular sovereignty equals the principle of democratic self-determination. It is the people who hold the right to self-determination, not the state in and of itself. Increased democratization and political participation have highlighted groups and individuals in their relationship with the nation-states.

In his clarification of the concept of self-determination claims, Benedict Kingsbury (2001) distinguishes between self-determination understood as an end-state model, with an independence-oriented focus established during the European decolonisation, versus a *relational model* illustrated by expectations of indigenous peoples to continue in an enduring relationship with the state in which they presently live. Despite enormous variations with regard to aspirations of autonomy regimes, all such regimes presuppose extensive relations between the autonomous institutions and other government institutions of the state and between indigenous peoples and other peoples within or outside the autonomous area. These relations require a complex framework for assignment of authority, and the aspirations of autonomy involve defining relationships with states (Kingsbury 2001: 225). Thus, the indigenous–state relationship is of utmost importance. At the same time, indigenous peoples like other peoples, are integrated into associations that lie beyond as well as below the level of the nation-state. But having the status as indigenous and the relevant political and legal arrangements that accompany it are to a large degree dependent on the

acknowledgment and action on the part of the state. Indigenous self-determination will ordinarily be applied within the framework of existing states, and the norms of self-determination are accompanied by a corresponding duty on the part of states to take the measures necessary to fully implement those norms through channels of decision-making that involve indigenous peoples themselves. "This duty is to be realized through all relevant state institutions acting within their respective spheres of competency, and it may require reforms that reach even constitutional dimensions" (Anaya 2004: 9). As we shall see, the processes and procedures accomplished in connection with the Finnmark Act could be viewed as having such constitutional magnitude.

Legal or political categories?

There are both descriptive and normative problems concerning different categorizations of minority and indigenous rights. Questions of categorization and justification of rights can be discussed both in terms of legal categories and as "a political struggle that is part of a continuous process of construction and reconstruction of these categories and of the lines between them" (Kingsbury 2001: 216).

International minority rights instruments like Article 27 in the CCPR from 1966 are important justifications addressing indigenous issues. But appealing to minority law does not capture the particular normative features concerning the question of restitution of traditional land and territories in indigenous areas. Indigenous peoples constitute a special category with regard to territorial rights and political status, a distinction affirmed in contemporary international law.[30] Thus, international normative texts like the United Nations Declaration on the Rights of

[30] With the entrance of the positivist school of the late nineteenth and early-twentieth century, international law abandoned considerations of indigenous peoples as political bodies with rights under international law. Major premises were that international law is concerned only with the rights and duties of states, international law upholds the exclusive sovereignty of states, international law is between and not above the states, and that the states that make international law and possess rights and duties under it make up a limited universe that excludes *a priori* indigenous peoples outside the mold of European civilization. Within the past decades, however, there have been significant advancements and shifts in normative assumptions, changes that have reformed systems of international law and moved it away from state-centered positivism and a growing concern for individuals and groups including indigenous peoples. The modern international law discourse of peace and human rights temper positivism in international law and "represent in significant measure the re-emergence of classical-era naturalism, in which law was determined on the basis of visions of *what ought to be*, rather that simply on the basis of *what is*,…" (cf. Anaya 2004: 26, 49, 50).

Indigenous Peoples and legal rules like ILO 169, "are beginning to establish some common understandings of legal issues that are not reached fully through adaptation of established categories and must be addressed through a normative and institutional program based on 'indigenous peoples' as a legal category" (Kingsbury 2001: 240). Elements like 'priority in time'; 'historical continuity' and 'difference' cover the traditional understanding of indigenous. A central element in ILO 169 is the historical continuity of indigenous societies in the areas they occupy which relates back to the time of the settlement of state borders. Consequently, the concept of 'land rights' and indigenous peoples' connection to their territories is of vital importance when focusing on indigenous rights.

> "Typically, indigenous peoples are the ones who came first to an area and took the land and its resources into possession or use for their own purposes. Through the long and continuous use of the land we must assume that they have developed (collective) ownership of it, although this has not always been legally acknowledged because their mode of possession has not fit easily into the Western legal concepts of private property rights to land. These circumstances often distinguish the situation of indigenous peoples from that of other cultural and ethnic minorities" (Weigård 2008a: xx).

In a further elaboration of this line of argument, Weigård (2008b: 14) develops a framework for types of minority rights that can be legitimately claimed by different categories of minority groups. While basic and general cultural rights can be asserted by all ethnic groups, stateless nations and indigenous peoples are entitled to rights of autonomy and self-government within nation-states. These public-judicial issues are again different from issues of land rights–customary rights to the use of land. In particular regarding the indigenous case, due to the lack of recognition of customary usage rights based on 'immemorial usage,' the state has been able to remove peoples' usage rights without following the rules and procedures that are otherwise required pursuant to internal law and the principles of international human rights (cf. Oskal 2001). Thus, territorial rights–rights to land and water–are legitimate indigenous rights claims. These claims concern both public rights of participation and rights of civil law and capture the unique in the situation of indigenous peoples.

This is also a political struggle with its roots dating back to the processes of state formation. Kymlicka makes a point of the isolation that indigenous peoples experienced in the processes of state formation. However, despite the states' ignorance of the indigenous presence in these processes, it should be taken into account that states have historically more or less

acknowledged the special status of indigenous peoples which was influenced by the early theorists.[31] The historical acknowledgement of Saami rights in the Lapp Codicil of 1751 is illustrative in the Fennoscandian context. The understanding of the Saami as being indigenous has been reflected both in the Saami people's self-perception,[32] but also in the state authorities' use of such expressions ever since 1700 like 'the elders,' the 'original residents' of the country, and the 'natives' (Niemi 1997). The present acknowledgement of indigenous rights at the state level, but also internationally, where indigenous peoples are subject to international law, confirms the distinct status of indigenous peoples. The Norwegian authorities' statement in a Saami–Norwegian context, illustrates this acknowledgement; i.e., that the Norwegian state is established on the territory of two peoples–the Norwegians and the Saami (White paper No. 52 to the Storting (1992-93)).

Claims of indigenousness, including rights claims, must be elaborated in the concrete context because of the experiences of indigenous peoples with regard to the foundation of the nation-state and the state building processes, with the various epochs of policy alternatives states adopted towards indigenous peoples.[33] Such a process requires a historical and legal perspective as it pertains to the relationship between the people in question and the state. One cannot only in purely normative terms explain the scope of the borders of a nation based on the civic notion meaning the territorial and social boundaries of the constitutional state (Habermas 1995, Takle 2005: 56). In the same way it is not possible to decide in purely normative terms who in each case qualify to be recognised as an indigenous people. Instead, this is a matter of self-perception and political recognition regarding both the indigenous and the surrounding society. The claim of indigenousness is legitimized by historical development. Accordingly, this question must be clarified in a social context and involves a relationship between 'us' and the 'other.'

[31] James Anaya (2004) gives an account of how the work of theorists like Francisco de Vitoria (1486-1547) who stated that Indians possessed certain original autonomous power and entitlements to land, which the Europeans were bound to respect, influenced the seventeenth-century work of Hugo Grotius.

[32] As an illustration, due to a conflict on the use of resources in the outlying pastures, some Saami people from a small coastal community in Kvænangen in the north of Troms county claimed that they had rights as "the indigenous of the country" in a resolution to the county governors in Finnmark and Troms in 1862 (Bjørklund 1985).

[33] The common characteristic of official minority policy towards the Saami people has until the post-World War II been assimilation.

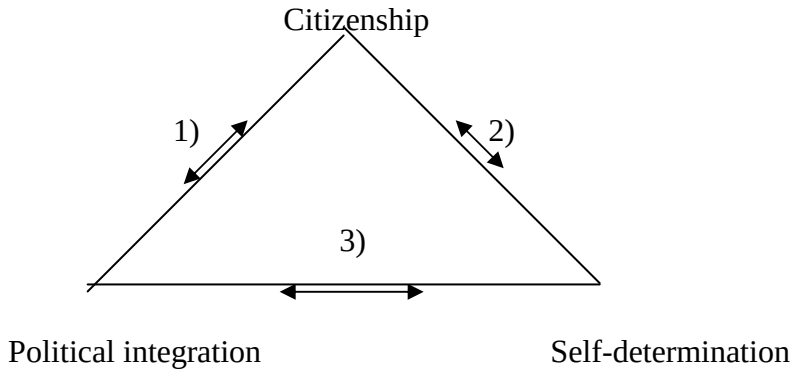
The 'bond' between indigenous and citizenship rights

The challenges indigenous rights and politics pose to the nation-state are fundamentally related to the state's ability to comply with these rights claims. John Borrows (2000) argues for an understanding of Aboriginal citizenship (in the Canadian context), which includes both a perspective of Aboriginal self-determination, but also of the need to include Aboriginal perspectives in non-indigenous actions and ideas about governing and citizenship. By claiming Borrows' line of argument, as a point of departure, I want to stress the necessity of extending indigenous perspectives and participation in non-indigenous affairs, while acknowledging that in some indigenous contexts this position can be seen as being in opposition to an understanding of self-determination, meaning that neither party should interfere in the political organization of the other. But given the fact that indigenous peoples, like the Saami relate *as citizens* to different levels of government, including their own self-governing systems, there is a need to discuss the 'bonds' between indigenous rights and citizenship rights. The development of Saami political rights indicates that the Saami as Saami are more strongly and explicitly related to the national constitution than ever before. A concretisation of this type of inclusion is the integration of the Saami in regional politics and management. Through agreements of cooperation between the Saami Parliament and the county municipalities in the traditional Saami areas of settlement, Saami politics has become an integrated part of regional politics in different sectors.[34]

The assumption is that the loyalty of the Saami citizenry towards the constitutional state has been confirmed. Through political rights, i.e., political participation, other rights have been clarified. Political rights that provide access to political participation should be the priority as the core of the notion of citizenship. "Only the rights of political participation ground the citizen's reflexive, self-referential legal standing" (Habermas 1996: 78). Thus, citizenship appears to be a political resource for the rights and duties of the Saami, not only as individual citizens, but also as an indigenous people. This close relationship between citizenship rights and indigenous rights, which implies political participation that is understood to be self-determination and joint-governing solutions, can be described visually by a triangle.

[34] The Saami Parliament has signed three cooperation agreements with the following county municipalities: Finnmark, Troms, and a common one with Nordland, Nord-Trøndelag, Sør-Trøndelag and Hedemark. Through these agreements several concrete measures have been taken in the field of language policy, among other things, and the principle of co-funding projects has also been realised. The agreements make it easier for the Saami Parliament to reach the Saami with concrete measures, like the establishment of Saami language centres.

The figure that follows demonstrates the core elements in the relational aspects between citizenship and indigenous rights, that is: political participation as the core in citizenship rights adjusts for 1) political integration and 2) self-determination, 3) at the same time, an inherent tension between a position of autonomy versus integration exists.



Political and legal integration entails the development of common standards, rules, and dispute resolution mechanisms which regulate and coordinate the interaction between the Saami people and the nation-state. This in turn triggers reflexive and self-reflexive processes which result in claims for self-determination arrangements by the Saami. As a next step, claims for autonomy arrangements can contradict political procedures where issues of relevance for the Saami are integrated into the political-administrative system of the society as a whole. Autonomy claims also concern and affect the non-Saami part of the population. Discussions often concentrate solely on aspects of either self-determination or non-participation, meaning no or minor possibilities for real influence on the part of the indigenous people. The traditional understanding of self-determination implies non-interference and independence, where the self-determining entity claims a right of non-intervention and non-interference (Young 2007: 40, 46). Affected parties are the groups and individuals within each domain of self-government. But this either-or focus fails to address the latter challenges, namely the relational aspect of autonomy versus integration. This relationship is more demanding, and challenges the taken-for-grantedness of concepts like identity, cultural distinctivness, existing frameworks of political participation and the notion of the nation-state. Exercising of authority will imply change, renewal and conflicts (cf. Pettersen 2002: 76). I find a relational approach to self-determination relating to democracy (Svensson 2002: 32, Kingsbury 2005, Young 2007: 38-57) attractive in order to capture core challenges to the implementation of indigenous self-determination. My concern here will thus

be the relational aspects of Saami political influence, and only to a minor degree I will be concerned with the direct exercise of authority of the Saami Parliament.

5. Interpretation and reflection

Empirical context and sources

The empirical investigation in this thesis seeks to evaluate and explain the official policy towards the Saami in Norway and the development of Saami politics with a special focus on the establishment of procedures for implementing this policy. Are these procedures an expression of a principle of autonomy for the Saami or of closer relations between the Saami and the Norwegians? As underlined earlier, my aim is to determine whether or not the procedures have contributed to a closer relationship between the Saami citizenry and the political community understood as a whole.

Although this thesis involves a focus on processes that span a long period of time, in terms of the empirical study the main emphasis is limited to the last three decades, from 1980 until today. As already mentioned, this period can be distinguished by three stages which are characterized by the role of the Saami organizations,[35] the institutionalization of Saami politics, and the contemporary transnational cooperation. This period is remarkable as far as the two following conditions are concerned: the change in state policy towards the Saami; and the development of interaction between the Saami Parliament and the rest of the political-administrative system at the regional, national, and transnational levels.

In 1981, the Saami organizations and the Norwegian government made an important agreement; namely that the work of the Saami Rights Commission (SRC)[36] should be divided into several separate parts, and as a first step the political issues and the question concerning the development of a representative body for the Saami should be prioritized. This implies

[35] Especially during and after the Alta conflict at the end of the 1970s and beginning of 1980s the Saami organisations managed to highlight the marginalized political position of the Saami.

[36] The first Saami Rights Commission was established in 1980. The mandate of the SRC was to detail issues regarding rights to land and water use and certain issues of a more fundamental and political character for the Saami people.

that the clarification of political rights were of main concern in the first stage, and resulted in the establishment of procedures for Saami self-representation through the popularly elected Saami Parliament. Furthermore, the established political body became the main vehicle for the successful institutionalization of Saami politics. Simultaneously the SRC continued their work with the process of clarification of Saami rights, and the issues at stake were more controversial: namely the rights to land and waters. But by securing and institutionalizing political rights through the Saami Parliament, the Saami were now able to make arguments and state specific reasons for special procedures to safeguard land rights. Procedures for safeguarding land rights were clarified through political rights as the core aspect of citizenship. This progress will be highlighted in the first parts of the thesis (the next two chapters). This analysis concentrates mainly on the macro or state level, but some references are made to the local and regional levels. This thesis' emphasis on the state level was chosen due to the state's role of restricting and empowering procedures as tools in use.

In the study of the relationship between the Saami and the state, I thus view citizenship as a central analytical category. The understanding of citizenship rights has changed from an assimilationist attitude–where individuals belonging to a minority had to assimilate in order to be regarded as citizens, via an attitude where the equality of the individual members of the state was recognized,[37]–to recognition of individuals as members of ethnic or cultural groups with a cultural identity. But this progress has mainly taken place within the different nation-states, and the concept of citizenship is dealt with on the level of the nation-state. Accordingly, one can rightfully claim that the defense of indigenous rights in the form of political arrangements and legal protection presuppose a powerful state. Subsequently, the states are supposed to safeguard the interests and needs for special measures, and defend minorities and indigenous peoples from public and private intervention. Human rights have come from being general principles in the international context to having been developed into concrete and particular rights which not only regulate the relationship between the state and its citizens, but also the affiliations among citizens within the state. Realization of human rights demands clearer responsibilities between the state and the individual. The complexity and plurality of political arrangements and institutions reinforce the demand for transparent responsibility in order to secure the rule of law. Hence, can this responsibility be addressed at

[37] According to Nyyssönen (2007: 66) these individual rights and their inclusion in the welfare state in the Finnish context, resulted in exclusion of alternative forms of citizenship and rights claims on collective forms of social organization, such as indigenousness.

levels other than the state level, or by actors other than the state (cf. Oskal 2002)? In order to address this question, the second part of the thesis (chapter four and five) discusses the safeguarding of indigenous rights within the framework of the EU and the Nordic context respectively.

The empirical material covers a complex set of developments. The primary sources are public documents produced by state institutions, including the Saami Parliament. These documents illuminate the formal aspects of the institutionalization processes, and constitute the main part of the empirical material. Normative sources such as the main plan document of the Saami Parliament, decisions in the Parliaments, Saami political programs and decisions in other political forums reveal the attitudes, intentions and demands of the debate on Saami rights. The intentions of the Norwegian authorities appear, among other places, in law documents, instructions, white papers, and parliamentary bills; of particular importance is the white paper on the principal policy of the Norwegian authorities towards the Saami that is presented once at each parliamentary period. These are the important sources in chapter two, four and five. In chapter three, the minutes from the consultations on the Finnmark Act between the Saami Parliament, the Finnmark County Council and the Norwegian Parliament's Standing Committee are also a crucial source because this study is based on a theoretical idea concerning deliberative democracy, where the point of departure is that decisions take place through the exchange of arguments. This exchange of arguments was the intention behind the consultations.

Press material is also an important source. This material is used as a source of information about public opinions on the development of Saami politics in general, and especially with regard to the process of the Finnmark Act and the cross-border reindeer husbandry case. In order to capture aspects of what has taken place lately in the processes of strenghtening mutual recognition and political integration, I have in the last chapter drawn upon some recent empirical data not discussed in the previous chapter.

The Saami Parliament has called attention to challenges concerning the lack of coherence between principles and practical policy. To what degree is there coherence between the principal policy expressed in these documents, domestic and international law, and the implementation of national policy? The question of coherence or lack of it and the importance of the consistency of legal rules are clearly of vital concern with regard to the basis for

decisions concerning just procedures for safeguarding indigenous rights. These concerns affect the prospects of succesful establishments of procedures because they impinge on the foundation of trust.

Different justifications for procedures

With Habermas' theory of communicative action[38] as a starting point I assume that the policy of securing indigenous rights can be obtained as a result of a process of deliberation, where arguments and reasons are provided in favour of such a policy. The arguments and reasons provided in favour of indigenous rights and politics have to be the type that others can support; they must be considered legitimate. Consequently, I must identify which types of arguments are used in order to gain support for the institutionalization of Saami politics. This is a useful approach when analyzing indigenous arrangements because the actors have to provide reasons for the establishment of self-government and joint-governance solutions; they are a minority with little power and few bargaining chips. Furthermore, these legal and political arrangements and procedures are dependent on the mutual understanding and acceptance among the citizenry in political communities. In order to understand the causal mechanisms of social action, reasons and arguments must be considered in an intersubjectively understood context (Sjursen 2002: 493).

The evaluation of procedures that regulate indigenous rights is based on Habermas' abstract process model of rational political will-formation (Habermas 1996: 162-168). The model functions as a methodological entrance which illuminates how the Saami political discourse can be interpreted and how different political attempts are made by the Saami for diverse reasons, including considerations of justice and cultural self-understanding. The model consists of pragmatic, procedurally regulated bargaining, ethical-political, moral and legal discourses. The arguments can analytically be divided into three different categories: pragmatic arguments, ethical-political arguments, and moral arguments (Habermas 1993). Each political discourse is connected to a notion of rationality, and political actions must be

[38] "Actors are rational when they are able to justify and explain their actions, and not only when they seek to maximize their own interests. The different forms of justifications could be material gain, but also a sense of identity or understanding of the 'good life' and reasons referring to what is just when everybody's interests and values are taken into consideration" (Sjursen 2002: 493).

evaluated based on the form of rationality they reflect. But discourse theory is often perceived as being overly idealistic and too abstract to have any empirical and practical relevance (cf. Alvesson and Sköldberg 2003). However, this model sheds light on what should be regarded as legitimate procedures according to the logic of the questions which are at issue. The various rules of argumentation are ways of operationalizing the discourse principle (Habermas 1996: 109).

With pragmatic arguments, policy is justified with reference to the output that the policy is expected to produce and is based on means-ends rationality. This involves a calculation of utility found both in pragmatic discourses and procedurally regulated bargaining. Pragmatic discourses however, extend only to the construction of possible programs and estimation of their consequences (Habermas 1996: 165), i.e., they are based on an instrumental type of rationality.[39]

Procedurally regulated bargaining involves a discourse based on resources rather than on arguments and strategic considerations of the opponent's use of resources. Other actors' dispositions must be taken into account because an agreement is needed. Bilateral negotiations, like those in the case of the cross-border reindeer husbandry industry, can be explained by means of procedurally regulated bargaining which is based on a type of strategic rationality. However, in concrete negotiations, preferences are not always clarified or settled– the situation can be open for deliberation–which involves an ambiguous division between bargaining and arguing. The end-result does not necessarily depend on the resources that each respective party possesses. Negotiations should not only be regarded strategically as games, which are based on stipulated promises and threats, but they should also be viewed as situations aiming to clarify the possibilities of agreement (Rommetvedt 1995: 116).

Ethical-political discourses are oriented towards individual and collective identity and self-understanding, and include questions about the collective 'us.' Ethical-political arguments justify established procedures for Saami rights and politics by referring to duties, responsibilities, and cultural belonging of a specific community.

[39] Decisions and justifications understood as instrumentally rational depend primarily on a correct interpretation of the situation and the appropriate description of the problem at stake, as well as the relevant information. The knowledge is uncontested, and the viewpoints depend on preferences already come into play (cf. Habermas 1996: 164). The preferences are not questioned.

This discourse makes visible e.g. the function of the Saami Parliament as a body for identity formation (Broderstad 1994/1995).

Moral discourses are about universal norms of justice, and are oriented towards the possibility to make generalizations in conflicts over rights, interests and values, like for example in the debate surrounding the Finnmark Act. The aim is not to make justifications with reference to calculations of utility or to values in a particular community, but to find justifications that rely on universal standards of justice (Sjursen 2002: 494). The arguments must be perceived as valid, i.e., true and just. Procedures and arrangements with the aim to safeguard indigenous rights, i.e. customary rights to land and rights of participation, are justified with reference to universal principles of human rights and equal opportunities.

But moral norms must be formulated in legal categories in order to be implemented. In legal discourse, the different categories of arguments are taken into consideration–pragmatic, ethical-political and moral arguments in an application discourse (cf. Habermas 1996: 232, Eriksen and Weigård 1999: 187). Legal argumentation is conceived of as a case of application discourse where the consequences are in focus. What is just is not only determined

> "by the rightness of moral judgments but, among other things, by the availability, cogency, relevance, and selection of information; by how fruitful such information proves to be; by how appropriately the situation is interpreted and the issue framed; by the rationality of voting decisions; by the authenticity of strong evaluations; and above all by the fairness of the compromises involved" (Habermas 1996: 232, 233).

In the legal discourse the political legislature decides which norms count as law and the courts settle disputes over the application of these norms. Political decisions are formulated into legal categories, and the discourse is oriented towards coherence of legal rules. Of central concern is the question of coherence between rights, legal rules and political decisions and management solutions. What can be said about the consistency in the arguments presented in favour of procedures safeguarding indigenous rights?

By means of Habermas' process model of rational political will-formation, the different justifications for procedures which are dependent on the nature of the issues are illuminated. In order to improve our understanding of considerations being made evident, it is necessary to include references to dimensions of utility, interests, values and rights.

Procedures safeguarding indigenous rights are discussed in the thesis by including different forms of justifications, both instrumental and norms-guided.

Reflection over one's own pre-understanding

The researcher has a tendency to conform to previously established patterns of thought about what are considered urgent and legitimate issues to research, and is also influenced by processes of socialization in the research community and by their role as a member of a society which may be restricted by a cultural context (cf. Alvesson and Sköldberg 2003: 133). Thus, attention must be turned towards my own role as a researcher in the field in which I have been politically engaged in previously. Theory and language matter for what one is in search of. In this respect, it concerns opinions expressed by representatives of the authorities who hold the instruments of power and the Saami as a counterpart without access to the same instruments of power. At the same time as such a distinction is made, it is important to have in mind that the Saami Parliament is a part of the political administrative system, which functions as a body with state authority and as an instrument for realizing the principal Saami policies of the state, a political mandate which is given by law and formal decisions (Broderstad 2003: 157). Also, the Saami Parliament as an institution, must be exposed to a critical appraisal, and it becomes important to test the legitimacy of structures and processes which generate certain positions and opinions in the Saami Parliamentary system. A prominent view both within the Saami and in a larger indigenous context is the emphasis on the *principle of negotiation*. This principle has become a regulative ideal in indigenous contexts. In the overall plan of the Saami Parliament 2001-2005, it states that a central task will be to introduce an obligation of negotiation between the Saami and the Norwegian authorities. This obligation is understood as something that is more than consultation and dialogue. Through real negotiators and agreements, fields of responsibilities and influence between Saami and Norwegian authorities should be settled. I myself have argued several times for the necessity of negotiation as a steering principle in the relationship between indigenous peoples and the state/majority population.[40]

[40] Cf. Broderstad, 1998: "Hvorfor snakker vi om urfolksrettigheter? Ei sammenligning mellom den canadiske og samiske urfolkssituasjonen." Presentation at the national congress of the Norwegian Saami Association (NSR) 26-29 November 1998: Cf. Broderstad, Dahl (2004): "Political Systems" in Arctic Human Development Report, Stefansson Arctic Institute, Akureyri, Iceland.

The above-mentioned emphasis on negotiations as a regulative idea in the indigenous-state organization provides a background for reflection over my own connection to this research area. The chosen focus is, of course, influenced by my own interest in Saami politics.[41] Also, the role I have occupied as a member of the Saami Rights Commission, which had as its mandate to elucidate Saami rights south of Finnmark, implies a need to clarify the basis for interpretations I make as a researcher, and a discussion of the normative presumptions for a hermeneutic approach to the focus areas of the research project. In light of those opinions of value, I understand the empirical field from, I simultaneously claim that my interpretations of the empirical reality is valid. Models for analysis of social sciences are constructed on normative assumptions, independent of one's political engagement. Regardless of the choice of problems, this option must necessarily be based on some values. By making reference to Oskal (1999), the task is to articulate the political morale which already implicitly exists in the political culture in democratic constitutional states. I insist that the connection between participant and researcher neither presupposes nor results in a merely one-sided interpretation. Irrespective of the chosen problems to be addressed, this choice must necessarily be founded on values. The research and its theories cannot be handled apart from the object of research (cf. Horkheimer 1970: 33). Every science which accepts an inclusion of objective meaning must consider the methodological implications of the participatory role of the interpreter, and the objective meaning can only be understood "from within the context of communication processes" (Habermas 1990: 28). But this does not imply that the social sciences should abandon the claim of objectivity and explanatory knowledge (Habermas 1990: 28).

Weber (1982: 169) warns against the blending of scientific discussion and a practical appraising consideration. As a normative ideal, social sciences should refrain from value judgments. But this does not mean that one should not do research on values and norms; one can conduct research on what kinds of values are manifested in a society, and how these are maintained, transferred and changed, but not assess these values or norms being positive or negative or as creditable or not. Social sciences can explain what types of values maintain the society, and can explain them according to what common norms and values the actors within given situations coordinate their aims and interests. And this can be achieved without

[41] My personal political engagement started with an interest in Saami cultural work. I had several Saami political positions from the beginning of the 1980s until the second part of the 1990s; both as a member of the national board and vice chairman together with positions as a local chairman. The main part of the engagement was related to the central and local level in the Norwegian Saami Association (NSR).

presupposed stated answers on specific moral philosophical questions like according to what kind of norms and values the actors in given situations rightly should coordinate aims and interests.[42] Weber claims, however, that every justifiable assessment of another's goals can only consist of a critique from one's own view of life. Therefore, the reader must be made aware of the basis for the interpretations of the researcher. The researcher stands in a specific position vis-à-vis the society she is studying. We always stand inside our context of a lifeworld. Our interpretation of the world is based on underlying convictions provided by the lifeworld (Habermas 1987: 125). Based on a hermeneutic approach, the interpretations are limited to and by the context. Still, one cannot conclude that the interpretations made do not constitute adequate knowledge which is based on good arguments.

Regarding the issue of the consequences of my political engagement and this research, seen in relation to the question of closeness or distance or an 'insider' versus an 'outsider' perspective, I am arguing against an 'either-or' thinking, and saying that one's own situation and fixed place can be used as an admission for reflection, conceptualization, and theoretical abstraction. Our engagement does not imply that new understandings–which extend our frames of language and culture–cannot be acquired; on the contrary, our engagement can be seen as a foundation of such acquirement. The phrase *Horizontverschmelzung*[43] a melting or merging into one anothers' horizons does not mean a withdrawal from one's own horizon or lifeworld. The lifeworld stands for those contexts of meaning that the cultural horizon through which people seek to interpret and understand their situation and their environment (Alvesson and Sköldberg 2003: 116). The concept elucidates the individual's dependence on the context, but also their way of acting as both reflexive and autonomous individuals. Individual autonomy cannot be disengaged from the lifeworld, but seen as a way of relating oneself in a certain way to one's own horizon or lifeworld. To do research is not to put oneself outside of the society of focus, but it is a particular way to place oneself inside the society, which makes the demand for reflection, meaning that critical questions regarding choices and understandings of perspectives and principles, must be addressed.

[42] This understanding of Weber is made with reference to and through discussions with Nils Oskal.

[43] It is referred to Gadamer's concept "Horisontverschmelzung" in Wahrheit und Methode (1960), Tübingen 1975.

6. Summery

This first chapter presents *procedures of indigenous influence and participation* as the main topic of the thesis by asking about what political procedures apply between indigenous peoples and the state for reconciling a defence of indigenous rights with the principle of equal citizenship. As mentioned, I assume that the procedures applied have contributed to a closer relationship between the Saami citizenary and the political community understood as a whole, i.e. increased mutual recognition and political integration is achieved. Institutional reflexivity accounts for increased recognition and political integration. However, this is an empirical question which need to be examined. Procedures are understood as both concrete deliberation and decision-making procedures which implies a set of rules governing the participation of the parties involved, and a set of principles for institutionalization of politics. Indigenous political participation can analytically be distinguished between self-government and a joint governance approach. Moreover, as a point of departure, procedures which regulate indigenous rights in light of equal citizenship rights can analytically be distinguished between juridical and political procedures which give the notion of procedure a special moral status, meaning that there is something worthwhile about following the procedures themselves.

A deliberative notion of democracy and the deliberative democracy model is chosen as the theoretical basis for this thesis' evaluation. The model concerns itself with the problem of political justification in the face of moral disagreement, and requires procedures that take into account the complexity of questions and rationalities at stake. Both the 'original position' and the 'practical discourse' embody an impartial point of view, as a basis for assessing different institutional and procedural strategies, like for example, court procedures versus political solutions. As concete strategies, they can both enforce and hamper Saami rights. In this interplay, the understanding of impartiality and affectedness are essential for our comprehension of fair terms of cooperation and definition of justice, and eventually of how we perceive just procedures.

Through deliberation, affected parties are included and can argue their case. 'Indigenous' voices and reasons are included, and the discourse is directed towards mutual understanding and can result in mutual recognition. It becomes possible to set up a framework in search of a common ground. But there has to be a foundation of trust, and the fundamental question is:

What constitutes the basis for political order and citizen's loyalty in political communities in ethnically complex societies? In this context, this is a question of the place of the indigenous in the citizenry and requires an assessment of the relational aspect between different groups, the relevance of the claims of indigenousness and the claim for self-determination. Citizenship appears as a political resource for rights and duties which are also for indigenous peoples, and there is a need to discuss the 'bonds' between indigenous rights and citizenship rights. Foundational elements in this relationship are political participation as the core citizenship rights, political integration and self-determination. In my dealing with the concept of self-determination, I favour a relational approach to self-determination (Kingsbury 2005) in order to capture core challenges of the implementation of indigenous self-determination. Based on these analytical categories, my aim is to come to a conclusion about whether the procedures have contributed to a closer relationship between the Saami citizenry and the political community as a whole, and whether mutual recognition and political integration are effects of these procedures.

7. Outline of the thesis

In addition to this introductory section, this thesis is composed of four articles and a concluding chapter which assesses procedural conditions for an assumed mutual recognition and political integration and indicates achievements and possible pitfalls in the process of implementing Saami self-determination.

As one response to the overall question of applied procedures and their effects, chapter II– *Political Autonomy and Integration of Authority: The Understanding of Saami Self-Determination*–focuses on procedures safeguarding indigenous claims for self-government on the one hand and joint governance solutions involving procedures outside Saami control on the other. These two considerations–autonomy versus integration–may appear contradictory. However, the Saami experience has shown that self-government with an aim to control Saami affairs can be consistent with an idea of integrating these affairs into the decision-making structures of the majority. The chapter accounts for a first phase of institutionalization of Saami politics, and points out some possible tracks of increased political influence of the Saami Parliament.

The possibilities of strengthening this influence is linked to a question of political integration understood as political inclusion of the Saami as an indigenous people within the framework of the nation-state.

Chapter III–*Gjennombrudd ved konsultasjoner?Finnmarksloven og konsultasjonsordningen i Stortinget*–as another response to the overall question, focuses on procedures of contact between the Norwegian Saami Parliament, the Finnmark County Council and the state authorities in the case of the Finnmark Act. When the government in 2003 finalized their preparatory work and presented a bill for the new Finnmark Act, the Saami Parliament met the work with substantial criticism with regard to content and procedures and the process leading up to the proposed Finnmark Act. This was triggered by a strong focus on the Norwegian authorities' duty to consult the Saami– a duty derived from ILO 169. Based on a requirement from the Norwegian Parliament's Standing Committee on Justice, this conflict resulted in an independent assessment from the government. The main conclusion was that on certain important points, the bill did not fulfil the requirements of international law. The government responded by conducting a new inquiry. Based on that report, the government claimed that the bill was in accordance with international law, but an identification of rights was necessary. The situation became even more tense; the government had a 'hot potato' on their hands. Thus, the Standing Committee on Justice invited the Saami Parliament and the Finnmark County Council into consultations on the law proposal. The chapter links the process to three principal debates on possibilities arising from consultations: 1) What makes consultations different from public inquiries and bargaining? 2) Is this a way of implementing self-determination within the framework of the nation-state? 3) If this is an example of deliberative democracy, is it possible to pay scientific attention to real processes deliberations?

At the same time as claims made for recognition and accommodation of cultural diversity challenge the nation-state from within, the states are also faced with pressures to recognize and accommodate supranational associations with powerful cultural dimensions such as the EU. Thus, chapter IV–*Indigenous rights and the limitations of the nation-state*–focuses on transnational processes which aim to strengthen indigenous rights, whereas at the same time they seem to interfere with the national interests of citizenship. Clarification is made with regard to the challenges indigenous peoples pose in relation to the liberal and communitarian conceptions of citizenship.

There will be an emphasis on the limitations inherent in the nation-state, with its uniform understanding of citizenship, and the potential for international and supranational units, such as the EU, to address such limitations in order to assess questions of just procedures between indigenous peoples and the state. The article concentrates on the understanding of citizenship and conditions for mutual recognition and political integration and frameworks for just procedures more than the actual procedures themselves. This chapter requires an empirical update, which is conducted in the conclusion.

As an illustration of procedures challenging a uniform conception of citizenship and the notion of sovereignty, the focus in chapter V–Grenseoverskridende politikk eller interessekamp?–is on the bilateral negotiations between Norway and Sweden regarding the cross-border reindeer husbandry industry. This chapter addresses the issues surrounding the disagreements regarding the cross-border reindeer husbandry industry between Norway and Sweden, despite domestic acknowledgement of Saami rights in both states. The recommendations of new cross-border management solutions and dispute resolutions is discussed based on an understanding of politics as norms-ruled, emphasizing the rule of law and procedures in political dialogue and regulations of rights, the historical acknowledgement of Saami rights in the Lapp Codicil[44] and The Lapp Codicil being an annex to the border treaty of 1751 between Denmark/Norway and Sweden (including Finland); the main objective of the Codicil was "the conservation of the Lapp Nation." The Codicil distinctly states that the incorporation of the Saami areas into the two nation-states should not interfere with the established rights of the Saami beyond what was strictly necessary as a consequence of state sovereignty. One of the core clauses of the Codicil was that reindeer herding Saami were to be allowed to continue their seasonal nomadic way of life despite the arrival of the state borders which traversed their pasture areas. Is the disagreement in the bilateral negotiations a result of a lack of consideration of Saami rights? Or is it a result of a struggle between different interests and a weighty sovereignty motive? These themes illustrate that the components of citizenship principles can and do come into conflict with civil rights of the 'foreign' Saami, and also demonstrate that Saami rights issues are not merely based on a relationship between the state in question and its Saami population. The Saami have accomplished acknowledgement based on arguments about cultural diversity and being in a permanent

[44] The Lapp Codicil was a treaty between states, not a treaty where the indigenous part was included as a contradicting party. It contains a set of regulations, which for this period to a considerable extent provided the Saami people with what was in practice a form of internal self-government (Smith 1995).

minority position, which has resulted in several advances within the nation-state. But how does this recognition also relate to Saami who are non-citizens? The themes could even shed light on how established procedures and state sovereignty are being challenged by proposals for transnational solutions.

In the conclusion, the theoretical and empirical aspects of these issues will be synchronized. Given the salient principle of self-determination for indigenous peoples, as the final approach of the thesis I have chosen to focus on some concerns regarding implementation of indigenous self-determination. From a juridical and political position, I outline conditions for an assumed mutual recognition and political integration. Different issues require different procedures. Based on a concept of institutional reflexivity, I discuss trust and political influence as indicators of mutual recognition and political integration. Notwithstanding, the Saami have accomplished acknowledgement based on arguments about cultural diversity and about being in a permanent minority position which has resulted in several advances within the nation-state. But what about the use of procedures in the handling of the rights of the 'foreign' Saami? Finally, in order to conclude, I draw the lines of argument together and summaraize with regard to the thesis' main question on whether and how the procedures have contributed to a closer relationship between the Saami citizenry and the political community as a whole. This topic is of particular importance for the more general debate about what constitutes the basis for political order and citizens' loyalty in political communities in ethnically complex societies.

In what follows, I present the sub-questions of each chapter, which are used to address the main question of what political procedures apply between indigenous peoples and the state for reconciling the defense of indigenous rights with the principle of equal citizenship, and which effect can be identified as results of this reconciliation:

- How can self-government which aims to control Saami affairs be consistent with an idea of integrating these affairs into decision-making structures outside of Saami control?
- How did the consultations on the Finnmark Act contribute to changing the content and the understanding of the Act?

- Given the structural constraints inherent in the notion of a homogeneous nation-state and a uniform conception of citizenship, what are the prospects for the EU to remedy such defects with regard to indigenous groups?
- Given historical and contemporary negotiations on cross-border reindeer husbandry between Norway and Sweden, and the Saami rights development in both countries, what aspects can elucidate the breakdown in the 2005 negotiations?
- How has the distinction between a juridical and a political approach allowed for a better understanding of mutual recognition and political integration in the processes of implementing indigenous self-determination?

Chapter II

Political Autonomy and Integration of Authority: The Understanding of Saami Self-Determination

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Chapter III

Gjennombrudd ved konsultasjoner? Finnmarksloven og konsultasjonsordningen i Stortinget.

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Sammendrag

Bakgrunnen for artikkelen er behandlingen av den såkalte Finnmarksloven i Stortinget fra 2003 til 2005. Et særtrekk ved prosessen er at Stortingets justiskomité inviterte Finnmark fylkesting og Sametinget til konsultasjoner om loven, en ordning som ikke finnes i parlamentets forretningsorden og sjelden brukes i andre sammenhenger. Stortingspolitikerne betraktet konsultasjonene som en konstitusjonell nyvinning, og de fire konsultasjonsmøtene hadde øyensynlig betydning. De førte til betydelige endringer i regjeringens lovforslag, og da loven ble vedtatt skjedde det med et solid parlamentarisk flertall og tilslutning fra både Finnmark fylkesting og Sametinget. Konsultasjonene og lovprosessen innebar en stadfesting av samenes status som urfolk. I artikkelen redegjøres det for bakgrunnen for ordningen med konsultasjoner slik dette er nedfelt i internasjonale konvensjoner (spesielt ILO-konvensjon nr. 169) før det fokuseres på gjennomføringen i Stortinget. Hva var bakgrunnen, hvordan ble konsultasjonene gjennomført, og hvilke implikasjoner hadde dette? Undersøkelsen baseres teoretisk på ideen om deliberativt demokrati hvor det tas utgangspunkt i at beslutninger skjer gjennom aktørers utveksling av argumenter, slik det er lagt opp til at konsultasjoner skal fungere. Denne retningen har de to siste ti-årene vært en viktig faktor i diskusjonen om muligheter for demokrati i moderne samfunn, og i diskusjonen om mulighetene for å studere faktisk argumentasjonsutveksling.

Innledning

Finnmarksloven er en skjellsettende lov som anerkjenner at samene som urfolk har substansielle rettigheter. Loven gir rammer for tilbakeføring av statlig eiendomsrett og for identifisering og anerkjennelse av eksisterende rettigheter. Den er også skjellsettende ved at det aldri tidligere har blitt overført ansvar for et så stort landområde til regional forvaltning. Finnmarksloven er dessuten resultatet av en unik politisk prosess. Dette er ikke minst tilfelle i den to-årsperioden da lovforslaget ble behandlet i Stortinget. En årsak er at bruken av *konsultasjoner* mellom Stortingets justiskomité, Sametinget og Finnmark fylkesting innebar en fundamentalt ny behandlingsmåte i Stortinget. Bruk av konsultasjoner er unikt fordi det er en beslutningsform som innebærer at aktører ikke inngår i forhandlinger eller gjennomfører avstemninger for å oppnå en beslutning, men at spørsmål drøftes med sikte på å oppå forståelse og enighet. Aktørene er dermed ikke underordnet hverandre, men likeverdige, og de søker enighet om felles løsninger.

Bruk av konsultasjoner blir dermed en spesiell beslutningsmåte fordi Stortinget framstår som en aktør på linje med andre som må søke enighet med eksterne aktører, ikke som den part som står øverst i styringskjeden. Vil dette rokke ved statsstyrets hierarki hvor lovgiver står over andre institusjoner? Hvordan framstår forholdet mellom konsultasjonene og lovgivers beslutningsansvar? Sametinget var drivkraften for konsultasjonene. I forhold til Finnmarksloven er to innholdsmessige forhold viktige. Det ene er at loven, som var omstridt

og møtt med kritikk etter at regjeringens forslag ble presentert i 2003, ble vedtatt med stort parlamentarisk flertall. Den fikk også solid støtte fra både Sametinget og Finnmark fylkesting. Det andre poenget er at behandlingen i Stortinget innebar at Sametinget – og også fylkestinget – fikk gjennomslag på viktige områder, og at samenes folkevalgte organ utviklet en særdeles sentral posisjon gjennom konsultasjonsprosessen. Dette gjaldt ikke minst overfor sentrale myndigheter.

Konsultasjonene om Finnmarksloven er tema for denne artikkelen. Hvordan ble konsultasjonene organisert, og hvordan bidro de til å endre lovens innhold og endre oppfatningen av Finnmarksloven? På hvilken måte kan konsultasjoner bidra til å gi urfolk selvbestemmelse? Vårt poeng er at denne behandlingen er interessant i seg selv, men kan også plasseres i allmenne debatter om beslutninger. Vi skal derfor koble konsultasjonene om Finnmarksloven til tre ulike debatter.

For det første framstår konsultasjonene som en innovasjon i en norsk kontekst. Stortinget er en institusjon fylt med tradisjoner, og derfor er det i en forstand overraskende at konsultasjoner ble brukt til å utveksle informasjon, til å påvirke beslutningsprosessen og øke legitimiteten rundt lovprosessen. Samtidig er fraværet av konsultasjoner underlig fordi Norge har lang tradisjon i å involvere berørte grupper i beslutningsprosesser gjennom høringer og forhandlinger på korporative arenaer. I ulike sammenhenger er det likevel økende oppmerksomhet knyttet til konsultasjoner som virkemiddel for å koordinere aktivitet mellom politiske institusjoner og administrative nivåer. Spørsmålet er hva konsultasjoner er til forskjell fra eksempelvis høringer og forhandlinger på korporative arenaer, og hva som gjør dette til et tjenlig virkemiddel i offentlige beslutningsprosesser.

For det andre utgjør konsultasjonene en mulighet for den samiske befolkningen til å delta i beslutninger og ivareta urfolksrettigheter innenfor nasjonalstaten. Konsultasjonene kan oppfattes som et eksempel på en ordning som muliggjør minoritetsdeltakelse for å bøte på en asymmetrisk relasjon mellom minoritet og stat. Dette griper inn i to sammenhengende problemstillinger. Det ene er hvordan et urfolk – som minoritet – kan ha mulighet til å få gjennomslag for sitt syn i forhold til en – numerisk og kulturell – majoritet.

Det andre – og spesifikke i denne sammenheng – er om og hvordan konsultasjoner, ut fra ILO-konvensjon nr 169 om urfolk og stammefolk i selvstendige stater – heretter ILO 169 – er

en ordning som gir slike muligheter og dermed bidrar til relasjonell selvbestemmelse forstått som selvbestemmelse innenfor rammen av en etablert nasjonalstat (jf. Kingsbury 2005: 31ff.). Dette handler om å definere og strukturere forholdet mellom urfolk og stat. Et fokus på ILO's konsultasjons- og deltakelsesbestemmelser vektlegger nettopp et slikt prosessuelt perspektiv på selvbestemmelsesspørsmålet.

For det tredje gjøres en kobling mellom konsultasjoner og debatten om deliberativt demokrati. Det grunnleggende premisset for konsultasjoner, slik dette formuleres i ILO-konvensjonen, er at det dreier seg om likeverdig utveksling av argumenter med sikte på mulig konsensus mellom statlige myndigheter og vedkommende urfolk. Dermed er det et klart sammenfallende ideal med deliberativt demokrati som vektlegger at beslutninger skal skje ved at aktører kommer til enighet gjennom utveksling av argumenter. Ved å stille spørsmål ved om behandlingen av Finnmarksloven tilfredsstiller slike ideelle krav knytter vi oss til en ny faglig diskusjon hvor oppmerksomheten er rettet mot hvordan innslag av deliberasjon kan studeres, hvilke muligheter det er for utveksling av argumenter, og hvilke implikasjoner dette eventuelt har for beslutningsprosesser. Vårt utgangspunkt er at deliberativt demokrati gir en analyseramme som gir mulighet til å drøfte konsultasjoner som prosedyre for å implementere selvbestemmelse.

Artikkelen er organisert slik at det i neste del gis en teoretisk ramme for undersøkelsen av konsultasjoner. Deretter fokuseres det på behandlingen i Stortinget, først på organiseringen og så på selve behandlingen, før det foretas en analyse av hvilke kvaliteter prosessen hadde.

KONSULTASJONER OG DELIBERASJON

Den faglige rammen baseres på et analytisk skille hvor demokratiske beslutninger analyseres med basis i de tre idealtypene argumenter, forhandlinger og voteringer. Disse brukes i kombinasjon eller alene for å treffe beslutninger i situasjoner hvor det i utgangspunktet er uenighet mellom aktører. De to første er relevante her. I konsultasjonene fokuseres det særlig på betydningen av argumenter (deliberasjon) (Elster 1998). Deliberasjon er prosesser hvor preferanser og oppfatninger endres som følge av at aktører utveksler og drøfter argumenter i en prosess hvor de forholder seg til hva som er sant, normativt riktig, og at de opptrer sannferdig (Chambers 2003: 309). Den ideelle oppfatningen av argumentasjonsprosesser er at

disse resulterer i enighet – konsensus – mellom de involverte, men drøftingen av argumenter kan også ha konsekvenser i form av læring og utvikling av forståelse. Kraften til endring i retning av en felles oppfatning – at en aktør lar seg overbevise – ligger i argumentene selv, ikke i den status eller de maktforhold som er knyttet til aktørene som framfører dem (Dryzek 2000: 1). Deliberasjon står i motsetning til *forhandlinger* hvor aktører maksimerer egeninteresse, og forsøker å oppnå innrømmelser og påvirke andres atferd gjennom bruk av trusler og lovnader. Mulighetene for å oppnå resultater er dermed knyttet til kontroll over ressurser og evne til strategisk opptreden hvor andre brukes som et middel for egne mål (Magnette 2004: 207, Müller 2004: 397).

Et slikt skille mellom argumenter og forhandlinger er ikke opplagt. I norsk språk er ”forhandlinger” en fellesbetegnelse på ulike typer samhandling, også i situasjoner hvor det er vanskelig å se at aktører opptrer strategisk overfor hverandre. Vårt utgangspunkt er at det trenges ulike analytiske tilnærminger for tilfredsstillende å kunne analysere den komplekse samhandlingen ved politiske beslutningsprosesser. Da dreier det seg sjelden om bare forhandlinger preget av strategisk atferd. Også bruk av argumenter har betydning (Risse 2004).

Skillet mellom argumenter og forhandlinger er definert i ulike sammenhenger. Et utgangspunkt har vært diskusjoner om rasjonalitetsformer og teorien om talehandlinger som grunnlag for å studere forhandlinger (Holzinger 2005; Midgaard 1980, 1983). Også Jürgen Habermas har hatt språkteori som et sentralt premiss for å utvikle skillet mellom strategisk og kommunikativ rasjonalitet. Samtidig representerer han en posisjon hvor dikotomien mellom argumenter og forhandlinger anvendes i forhold til demokratiteoretiske posisjoner, og gis en normativ begrunnelse (Habermas 1995, Weigård og Eriksen 2004).

Det er for eksempel framhevet at rasjonell utveksling av argumenter med sikte på enighet, til forskjell fra brukt av trusler og løfter, er overlegen fordi prosessen bidrar til integrasjon, ikke til å skape konflikt, og at løsningene er bredere, mer stabile og har større legitimitet enn forhandlingskompromisser. Fordi argumentasjon forutsettes å foregå i åpenhet antas det at oppslutningen ikke bare gjelder beslutningstakerne direkte, men at aksepten også omfatter publikum som gjennom innsyn har anledning til å forstå – og eventuelt kritisere – de normer og prinsipper som legges til grunn for beslutningen (Magnette 2004).

Argumentasjonen for deliberativt demokrati er også direkte koblet til minoriteters deltakelse. Påstanden er at økonomiske demokratimodeller – basert på forhandlinger og voteringer – er ”blinde” for hensynet til minoriteter som verken kontrollerer ressurser eller har numerisk styrke. Motsatt kan deliberativt demokrati være grunnlag for reell likhet og for selvstyre, fordi beslutninger basert på argumenter gjør det mulig å bringe inn, i numerisk forstand, ”svake stemmer” og pålegge både majoriteten og minoriteten en argumentasjonsbyrde. Kjernen i diskusjonen er de innholdsmessige sidene. Deliberasjon gjør det dermed mulig å anerkjenne og respektere det ulike grupper – minoriteter i særdeleshet – selv oppfatter som grunnleggende trekk ved egen kultur og levemåte. Deliberasjon bidrar til å reise debatter om grunnleggende rettigheter, og gjør det mulig å bilegge eller skape ordninger som gir en respektfull håndtering av ulikhet i multikulturelle samfunn (Dryzek 2005; Wheatley 2003).

Vårt utgangspunkt er at konsultasjoner – ut fra de idealene som formuleres – er arrangement og prosesser som må analyseres med utgangspunkt i et deliberativt perspektiv. Ordningene – som Kontaktorganet for innvandrere og konsultasjonene om norsk kommuneøkonomi – er ment å legge til rette for drøftinger med vekt på informasjonsutveksling, skape forståelse og etablere enighet. Det skal ikke skje gjennom å utøve press mot aktørene, noe som skiller slike arenaer fra for eksempel korporative ordninger. Koblingen mellom konsultasjoner og argumentasjon gjøres spesielt tydelig i debatten om urfolks selvbestemmelsesordninger innenfor nasjonalstatene. I ILO-konvenjon nr. 169 trekkes konsultasjoner fram som et virkemiddel for innflytelse og deltakelse for urfolk, ikke minst i forhold til forvaltningen av land og vann. Konvensjonen var et sentralt utgangspunkt for utformingen av ”konsultasjonsavtalen” mellom staten og Sametinget som ble inngått i mai 2005. Både i avtalen og konvensjonen understrekes myndighetenes plikt til å rådføre seg med urfolk på bestemte forutsetninger.

Det skal skje med basis i likeverdighet, og staten plikter å etablere ”virkemidler for at disse folk fritt kan delta, minst i samme utstrekning som andre deler av befolkningen.”
Kravet til konsultasjonene er at de ”skal foregå med god vilje, i former som er tilpasset forholdene og med den målsetting å oppnå enighet om eller tilslutning til de foreslåtte tiltakene.” Dette innebærer ikke å gi et urfolk veto, men å gi likeverdige muligheter til deltakelse, og at beslutninger ikke skal krenke grunnleggende rettigheter. I de tilfeller myndighetsbeslutninger skulle stride mot urfolks interesser, ligger begrunnelsesbyrden hos myndighetene. Konsultasjoner forstås dermed ikke som en tautrekking med kontroll av

ressurser som det utslagsgivende, eller at noen av partene kan utmanøvrere hverandre. Konsultasjoner er også noe annet, og mer omfattende, enn høringer. Det er ikke tilstrekkelig med presentasjon av informasjon eller standpunkt fra den ene parten. Det skal foregå en dialog med utveksling av synspunkter. Dersom urfolk skal ha mulighet til å påvirke krever det ikke minst at konsultasjoner er beslutningsorienterte. (Anaya 2004: 153ff.) Gitt urfolks politiske status som en følge av utviklingen av relasjonen stat-urfolk, må det dermed stilles særlige krav til ordninger og prosedyrer for beslutningsfatning.

Konsultasjoner – en analyseramme

Aktørers vurderinger og beslutninger i samhandlingssituasjoner er vanskelig å observere, og derfor komplisert å studere. Studier av språklig interaksjon og betydningen av argumenter er ikke noe unntak. Vi kan aldri være sikre på at ytringer er et uttrykk for det aktører faktisk mener, eller at enighet blir iverksatt. Det krever også betydelig innsikt i sosiale relasjoner for å forstå argumenters mening og hvilke effekter de har. Fordi effekter av deliberative prosesser kan komme på sikt, er det argumentert med at slike prosesser og effekter må studeres i et historisk lys (Bohman 1996: 241).

Innenfor det ferske forskningsfeltet vi forholder oss til, er imidlertid utgangspunktet at det er mulig å undersøke innslaget av deliberasjon og vurdere effektene av dem. Forskningen preges av ulike tilnærminger. Det har blant annet vært variasjon med hensyn til hvilke institusjoner som er studert, og i forhold til om det er benyttet kvalitativ eller kvantitativ metodisk tilnærming (Holzinger 2005, Jansen og Kies 2005, Steenbergen et al 2003). Et fellestrekk ved disse tilnærmingene er å undersøke hvordan aktører forholder seg til hverandres utsagn, for eksempel ved å studere hvilken begrunnelse som brukes, om aktører inngår i reell dialog og responderer på hverandres utsagn, og hvilke virkninger dette faktisk har på utfallet. Dette er tilnærminger som legger til rette for relativt detaljerte analyseskjema, som også kan brukes som grunnlag for kvantitativ analyse slik at mange og store debatter kan sammenlignes (Steenbergen et al 2003, Bächtiger et al 2005).

Slike analyser er innrettet mot å studere hvorvidt samhandlingen mellom aktører kan betegnes som deliberasjon. Samtidig som denne typen prosessanalyse gir viktig informasjon om deliberative kvaliteter ved samhandlingen, er en innvending at det ikke tas tilstrekkelig hensyn til de innholdsmessige sidene ved interaksjonen. En alternativ tilnærming er derfor å ta utgangspunkt i hvordan aktørene begrunner sine standpunkter. Deliberasjon innebærer et

krav overfor deltakerne om å komme med gyldige argumenter som inngår i en refleksiv prosess, og hvor man gjør krav på å snakke sant, riktig og være konsistent i argumentasjonen. Poenget er at i denne prosessen tar ikke aktørenes argumentasjon bare utgangspunkt i hverandres posisjoner, slik tilfellet er ved forhandlinger, men de må i en eller annen forstand forholde seg til en *ekstern autoritet*.

Ved åpen diskusjon vil en del av denne autoriteten være publikum selv, fordi beslutningstakere må gi begrunnelser overfor publikum. I alle sammenhenger – også når det mangler et publikum – må aktører forholde seg til situasjoner som ligger utenfor dem selv. Når det skal argumenteres med hva som er sant og riktig må man forholde seg til gjeldende forhold i samfunnet. Aktører forholder seg derfor til og søker begrunnelse i slike ting som tidligere inngåtte avtaler, normer som det er enighet om, eller verifisert kunnskap som er grunnlag for "det beste argumentet" (Risse 2004: 294ff., Ulbert og Risse 2005: 352f). Konsultasjonene om Finnmarksloven innebar ikke bare endring av en etablert praksis i forhold til rettigheter og forvaltning, men også at regjeringens forslag ble gjenstand for betydelig endring. I tillegg var konsultasjonene i seg selv et helt nytt arrangement. Det framstår derfor som særlig viktig å ikke bare undersøke interaksjonen, men også analysere grunnlaget for aktørenes argumentasjon og hva som oppfattes å være gyldige argumenter.

I det følgende presenteres fire elementer – *institusjonelle rammer*, *prosess og dialog*, *argumentasjonsgrunnlag*, og *utfall* – ved deliberasjon som skal anvendes i forhold til konsultasjonene om Finnmarksloven. Dette er elementer som vi har valgt å trekke fram fordi de framheves som sentrale i litteraturen og trekkes fram i andre undersøkelser. (jf. Steiner et al 2004, Ulbert og Risse 2005,) Her framstilles dette punktvis for lettere å synliggjøre de idealene som er formulert gjennom relativt komplekse teoretiske debatter. Disse idealene framkommer i teksten til høyre som bestemte trekk som kan etterprøves. Mens enkelte kvantitative undersøkelser baserer seg på mulighetene for å utarbeide en score for innslaget av deliberasjon, og å dra klare konklusjoner, er ikke hensikten med denne oversikten å gjøre dette. De færreste beslutningsprosesser, trolig ingen, vil tilfredsstille alle ideelle kriterier. På samme måte er det heller ingen beslutninger som passer til ideelle beskrivelser av forhandlinger. Etter som enhver beslutningsprosess vil plassere seg på et kontinuum mellom deliberasjon og forhandlinger (Risse 2004: 299), er formålet her å drøfte innslaget– og fraværet – av deliberasjon ved konsultasjonene om Finnmarksloven.

Institusjonelle rammer		*Denne delen dekker de organisatoriske sidene ved beslutningsprosessen med fokus på beslutningsarenaen og deltakerne. Dette framkommer delvis formelt, men også gjennom faktisk atferd i beslutningsprosessen.*
	Åpenhet	Argumenter og beslutninger skal kunne stå seg i forhold til et publikum. Dette kan realiseres gjennom a) åpne diskusjoner, eller b) at resultatene og begrunnelsene er gjenstand for debatt i etterkant.
	Likeverdige deltakere	Aktører skal ha like muligheter til å presentere sitt syn, og standpunkt skal kun vurderes ut fra sitt innhold ikke hvem som kommer med det. Ingen deltaker skal ha vetorett i forhold til mulige alternativer, eller holde saker eller argumenter fra dagsordenen.
	Inkluderende deltakelse	Deliberativt demokrati er en inkluderende demokratiform som forutsetter både formelle beslutningstakere og publikum i det sivile samfunn. Ingen aktører skal derfor i utgangspunktet holdes utenfor, men ha mulighet til å presentere sine standpunkt.
	Dagsorden og diskurs	Deliberativt demokrati er basert på at det er mulig å diskutere alle spørsmål som har offentlig interesse. Deliberasjon må av den grunn være åpen for ulike saker og spørsmål. Spørsmål skal derfor ikke holdes utenfor dagsorden på grunn av maktforhold, etablerte normer, eller fordi det er stor uenighet.

Prosess og dialog		*Momentene er relatert til innslaget av dialog mellom aktørene med sikte på felles problemløsning.*
	Begrunnelse	Drøfting forutsetter at aktørene gir begrunnelser, og disse må ha en form som gjør at andre kan vurdere dem og gi respons.
	Dialog	Aktørene må forhold seg aktivt til hverandres synspunkter gjennom en gjensidig argumentasjonsutveksling.
	Respekt	Reell diskusjon forutsetter respekt mellom de involverte. Dette kommer til uttrykk i forhold til dialogen. Aktørene skal lytte til hverandres argumenter, respondere saklig, og akseptere andres rett til å kritisere. Respekt uttrykkes også ved å anerkjenne de spørsmål og grupper som er tema for beslutningsprosessen.
	Oppriktighet	Deliberasjon baserer seg på at aktører mener det de sier. Dette uttrykkes både ved at aktører både fører en konsistent argumentasjon, ikke opptrer opportunistisk, og at de følger opp sine utsagn gjennom praktisk handling.
	Refleksjon og problemløsning	Deliberasjon er målrettet aktivitet hvor aktører forsøker å komme fram til løsninger i situasjoner hvor de har behov for å koordinere handlinger. Det forutsettes derfor at diskusjonene har en form som gjør at aktørene reflekterer over mulige løsninger.

Argumentasjons-grunnlag		*Formålet med dette punktet er å forholde seg til de innholdsmessige sidene ved argumentasjonen og vurdere hvilke eksterne forhold aktørene trekker inn for å underbygge sine argumenter.*
	Ekstern autoritet	Deliberasjon skiller seg fra forhandlinger ved at aktørene henviser til "eksterne autoriteter." Publikum som følger beslutningsprosessen er en slik autoritet. Aktører i en deliberativ prosess vil også henvise til forhold som verifisert kunnskap, etablerte avtaler, samt eksisterende anerkjente normer.

Utfall		*Deliberasjon er en målorientert beslutningsform hvor aktører argumenterer med utgangspunkt i at konsensus kan oppnås. Hensikten med momentene nedenfor er å fange opp dette, men også på andre mulige resultater av deliberasjon.*
	Konsensus	Enighet mellom aktørene som i utgangspunket var uenige, kan være den mest entydige illustrasjonen på at det har foregått en kritisk drøfting av argumenter. Konsensus er enighet i grunnleggende forstand. Aktørene gir samme begrunnelse for utfallet, og de vil følge dette opp.
	Felles forståelse, midlertidige overenskomster	Drøfting kan føre til etablering av midlertidige overenskomster basert på gjensidig akseptable begrunnelser. Dette kan skje ved at aktørene velger å fjerne saker fra dagsordenen hvor de er grunnleggende uenige. En annen mulighet er at aktørene kommer fram til et grunnlag som gjør at samarbeidet kan fortsette.
	Læring og tillit	Drøfting av argumenter innebærer en læringsprosess. Dette kan være av praktisk art, i form av større forståelse om egne og andres normative oppfatninger, og ved at det utvikles relasjoner til andre aktører.

KONSULTASJONENE I STORTINGET

Den empiriske framstillingen er delt i tre. Først gis det en oversikt over konsultasjonenes organisering og gjennomføring (jf. de forannevnte elementene institusjonelle rammer og prosess og dialog). Andre del som angår det forannevnte argumentasjonsgrunnlaget, er en drøfting av dialogens innhold med utgangspunkt i noen sentrale diskusjonstema ved Finnmarksloven. Tredje del diskuterer i hvilken grad utfallet er et resultat av konsensus og felles forståelse, og i hvilken grad det har funnet sted læring.

Organisering, gjennomføring og prosess

Organiseringen av konsultasjonene

Konsultasjonene med fylkestinget og Sametinget ble gjennomført som separate møter, som med unntak for fjerde gang, var lukket for allmennheten.[45] De i alt åtte møtene hadde en varighet på mellom halvannen til to og en halv time. Med unntak av siste gang varte konsultasjonene med Sametinget lengst. Samtidig er det andre iøynefallende og interessante forskjeller. Dette gjelder *deltakelsesmønsteret* hvor Sametinget gjennomgående hadde flere personer enn fylkestinget som tok ordet i diskusjonen med justiskomiteen. Både sametingspresidenten, visepresidenten og Arbeiderpartiets gruppeleder var aktive, men president Sven-Roald Nystø framstod som den mest markante ved å fronte en oppfatning av hva konsultasjoner skulle være og ved å stille krav til innholdet i Finnmarksloven. Sametingspresidentens aktive rolle motsvares av fylkesordføreren. Helga Pedersen holdt de fleste innleggene og i en konsultasjon møtte hun alene. Blant justiskomiteens 12 medlemmer var spesielt fire representanter engasjert under alle konsultasjonene. Dette gjaldt komitéleder og saksordfører Trond Helleland (H), Finn Kristian Marthinsen (KrF), Knut Storberget (Ap) og Inga Marthe Thorkildsen (SV). Deres oppgave var å innlede til diskusjon, men etter hvert som partiene – og fraksjonene – ble tydeligere på egne politiske standpunkter gikk de klarere over til å profilere disse. Fremskrittspartiet var nesten fraværende, og tok kun ordet for å informere om at partiet ville stemme nei til lovforslaget.

Sammenlignet med de to andre partene og særlig Finnmark fylkeskommune, var Sametingets representanter – fra Norske Samers Riksforbund (NSR) og Arbeiderpartiet (Ap) – samkjørte. Grunnlaget var tingets plenumsbehandling av regjeringens lovforslag i mai 2003 som førte til et bredt kompromiss mellom NSR og Ap med kritikk og krav til endringer. Delegasjonen fra fylkeskommunen hadde en sammensetning som synliggjorde de politiske motsetningene i fylkestinget knyttet til Finnmarksloven. På tilsvarende vis var det også politiske spenninger i justiskomiteen, som ble særlig synlige mot slutten i arbeidet med fraksjonsmerknadene. Arbeidet endte imidlertid med et relativt bredt kompromiss mellom Arbeiderpartiet og regjeringspartiene Høyre, Kristelig Folkeparti og Venstre. Fremskrittspartiet avviste loven og varslet at de ønsker å si opp ILO 169 ved første anledning, mens Sosialistisk Venstreparti

[45] Åpningen av den fjerde konsultasjonen var en konsekvens av stor mediedebatt i Finnmark. Komitéleder informerte i sin innledning at han dagen før konsultasjonen, hadde kontaktet stortingspresident Kosmo som sa det var mulig med en åpen konsultasjon hvis partene var enige i det. Deretter ble fylkesordfører Pedersen, sametingspresident Nystø og gruppelederne i komiteen kontaktet.

leverte et alternativt forslag der hovedinnvendingene særlig berørte allmennhetens rettigheter og spørsmålet om identifisering og avklaring av eksisterende rettigheter.[46]

En ytterligere forskjell er at Sametinget ga flest *skriftlige innspill*. Mens kommentarene fra fylkeskommunen ble presentert direkte i konsultasjonene, og var basert på vedtak i fylkestinget og fylkesutvalget, presenterte Sametinget i alt sju notater. Notatene var i noen grad svar på justiskomiteens spørsmål, men vel så mye egne utredninger med forslag til utforming av lovteksten. Sametingets utredninger kom som et tillegg til det grunnlagsmaterialet som ble oversendt komiteen. Dette besto av regjeringens forslag, den uavhengige folkerettslige vurderingen, en folkerettslig vurdering fra Utenriksdepartementet og dets folkerettslige ekspert, Carl August Fleischer. I tillegg besvarte justisminister Odd Einar Dørum spørsmål komiteen hadde stilt regjeringen. Partienes skriftlige vurderinger ble presentert i utkastene til komitéinnstilling som ble utarbeidet foran de to siste konsultasjonene.

Konsultasjoner som prosess

Formålet med konsultasjonene var å imøtekomme forpliktelsene i ILO 169 om urfolks medvirkning. Det lå likevel ingen klar plan bak gjennomføringen og hvilken rolle konsultasjonene skulle ha. Dette illustreres ved usikkerheten om hvilken posisjon Finnmark fylkesting og Sametinget skulle ha i forhold til justiskomiteens endelige lovforslag før behandlingen i Odelstinget. Tidsrammen var også uklar, og konsultasjonene foregikk i to deler med flere måneders mellomrom. Også arbeidsformen framstod som uklar. Hva var da konsultasjoner, og hva skilte konsultasjoner fra høringer?

Det var først og fremst Sametinget som var forberedt på hva konsultasjonene skulle innebære og hvordan de kunne gjennomføres. Med utgangspunktet i folkeretten og særlig med referanse til ILO 169, presenterte tinget i første konsultasjonsmøte et notat om statens konsultasjons- og forhandlingsplikt med urfolk. Både Justiskomiteens leder og Sametingets president poengterte at myndighetene med grunnlag i folkeretten har plikt til å konsultere urfolk, men som sametingspresidenten understreket ”gode og legitime innenrikspolitiske hensyn” tilsier at også fylkeskommunen bør konsulteres.

[46] Jf. Innst.O.nr.80 (2004-2005), pkt 7 Komiteens merknader

Justiskomiteens leder poengterte at det var et mål å finne en form som stimulerte til konstruktiv meningsutveksling og som kunne bringe partene nærmere hverandre. Konsultasjonene skulle være annerledes enn høringer, de skulle gi mulighet til å stille spørsmål begge veier.

I andre konsultasjon problematiserte Nystø at Sametinget informerte og presenterte sitt syn, men ikke ble gjort kjent med komiteens synspunkter. Justiskomiteens leder framhevet at det var en usedvanlig situasjon at parter utenfor komiteen vil påvirke og utforme merknadene. Han lovet imidlertid at foreløpige komitémerknader ville bli lagt fram i forkant av neste møte. Utkastene kom ni måneder senere, til tredje konsultasjon, etter at komitémedlemmene hadde arbeidet med posisjoner i egne partigrupper. Prosessen hadde tatt tid, noe komiteens leder Trond Helleland mente var positivt fordi posisjonene hadde endret seg underveis. Fra Sametingets side stilte man seg derimot svært kritisk til det lange oppholdet mellom andre og tredje konsultasjon. Det reflekteres blant annet gjennom sametingspresidentens brev til statsministeren og de parlamentariske lederne i november 2004 hvor de bes om å engasjere seg for å sikre at loven utformes slik at samiske rettigheter ivaretas i tråd med folkeretten. Forespørselen om et møte ble avslått av statsministeren. Presidenten fikk imidlertid møte kong Harald i desember 2004, og vel en måned senere signaliserte justiskomiteen at de var klare til nye konsultasjoner.[47]

Konsultasjoner som dialog

Selve konsultasjonene framstår som en ryddig prosess. Den var også *formell* i den forstand at møtene ble ledet av saksordføreren - komiteens leder - og ved at henvendelser til de to andre partene gikk via delegasjonslederne. Dette forhindret ikke at andre fra delegasjonen tok ordet, men delegasjonslederne ble – i kvantitative termer – dominerende. Diskusjonen var regulert og formalisert ved at det skulle utarbeides et lovforslag basert på regjeringens proposisjon, noe som la premisser for temaene som skulle behandles. Betydningen av de formelle sidene avspeiler seg også i at konsultasjonene etter hvert ble en diskusjon rundt hva en flertallsløsning skulle inneholde og hvem som ville støtte den. Det er et poeng at man fra starten var opptatt av innholdet i og begrunnelsen for ulike elementer ved loven.

[47] Jf. sametingsdokument til plenumsbehandling, Sak 19/05.

Vi har pekt på problemene ved å definere og iverksette konsultasjonene som noe annet enn høringer, og at partiene i Stortinget først i andre halvdel av konsultasjonene kom med skriftlige innspill overfor Finnmark fylkesting og Sametinget. Fylkestinget og Sametinget hadde på sin side dokumentert sitt ståsted gjennom vedtak som var gjort i forhold til regjeringens forslag, og – for Sametingets vedkommende – også gjennom utredningene som ble lagt fram. Slik sett oppstod det en form for skjevhet i forhold til skriftlige innspill. Det samme kan sies når det gjelder "høringselementet," der det var representantene i komiteen som rettet spørsmål til de andre institusjonene for å få synspunkter og informasjon for oppklaring. Samtidig er dette "høringselementet" mest synlig i de første konsultasjonene. Fjerde konsultasjon med fylkeskommunen kan brukes som illustrasjon på at det ikke eksisterer noen absolutt grense mellom høring og dialog. I møtet ble det vekslet mellom situasjoner hvor fylkeskommunens representanter kommenterte justiskomiteens forslag, som ble notert ned for videre innstillingsarbeid og på den andre siden en diskusjon mellom komitémedlemmene og fylkespolitikerne. I det aktuelle møtet ble dette utnyttet forskjellig av justiskomiteen selv. Komiteens leder (og saksordfører), Trond Helleland, var særlig opptatt av å få synspunkter på det videre arbeidet, mens Arbeiderpartiets komitemedlem Knut Storberget involverte seg tydeligere i det substansielle innholdet av diskusjon med fylkeskommunen og andre komitérepresentanter.[48]

At idealet om dialog – i forhold til idealet om gjensidig utveksling av argumenter – får svak støtte innebærer at det kun er deler av konsultasjonene som kan karakteriseres som deliberasjon. Dette er ikke overraskende tatt i betraktning strenge idealer som ingen beslutningsprosess kan tilfredsstille fullt ut. Samtidig er det nødvendig å utdype observasjonene fra konsultasjonene.

En annen organisering med flere konsultasjoner kunne utviklet dialogen, men det er for det første et poeng at behandlingen av Finnmarksloven i tillegg til å involvere mange deltakere ikke minst innebar en omfattende dagsorden. Å tilfredsstille kravene til en deliberativ prosess i forhold til alle deler av loven, ville derfor krevd en svært omfattende og ressurskrevende meningsutveksling. Det er ikke uten videre gitt at dette ville ført til et annerledes resultat. For det andre er det et moment at konsultasjoner som dette – med justiskomiteens spesielle status – innebærer en begrensning på dialogen.

[48] Jf. diskusjonen rundt SVs vurderinger, referat fra s 26.

Dialog ville vært et reelt alternativ i en situasjon hvor alle de tre institusjonelle aktørene skulle legge fram lovforslaget. I dette tilfellet var det komiteens ansvar å utarbeide forslaget, og dette arbeidet skjedde på grunnlag av – ikke i – konsultasjonene. En konsekvens var ordningen som gjorde at Sametinget og Finnmark fylkesting ble gitt anledning til å uttale seg før behandlingen i Odelstinget. Slik sett ble det etablert en mekanisme – av maktmessig art – som innebærer at Sametinget og fylkestinget kunne sagt nei dersom komiteens innstilling ikke innfridde deres forventninger, altså en mulighet til å si nei til hele forslaget. Men samtidig hadde disse to "eksterne" aktører ikke mulighet i siste runde til å påvirke deler i lovforslaget slik selve konsultasjonene hadde gitt anledning til.

For det tredje er det likevel grunn til å være varsom med en konklusjon om at konsultasjonene ga dårlige vilkår for bruk av argumenter. Referatene illustrerer at fylkestinget og Sametinget fikk mulighet til å presentere sine standpunkt i forhold til loven, hvor både spørsmål og diskusjoner innebar at de var underlagt en *argumentasjonsbyrde* ved at det ble krevd begrunnelse for standpunkt som de hadde inntatt i vedtak og dokumenter. Dette skjedde først i forhold til regjeringens forslag i Ot.prp. nr 53 (2002-2003), etter hvert med grunnlag i materialet som Justiskomiteen utarbeidet. Begge de to eksterne institusjonene uttrykte tilfredshet med den prosessen som komiteen hadde gjennomført.[49] Vi har tidligere pekt på at den formelle organiseringen skapte en skjevhet mellom partene, og begrenset mulighetene for meningsutveksling. Samtidig er det grunn til å trekke fram at argumentasjonsbyrden også omfattet justiskomiteen, som måtte presentere, gi begrunnelser og engasjere seg i diskusjoner med de to andre aktørene samtidig som vurderinger og standpunkt skulle begrunnes i forhold til egne partigrupperinger.

Argumentasjonsgrunnlag, refleksjon og problemløsninger

Når det gjelder de innholdsmessige sidene ved argumentasjonene i de fire konsultasjonene og i posisjonsnotatene mellom partene, samt i brevutvekslingen mellom Sametinget og regjeringen drøftes og berøres mange substansielle forhold. Her velger vi å fokusere på spørsmålet om folkerettslige forpliktelser fordi nettopp folkeretten gjennom hele prosessen framstår som en ekstern autoritet som alle andre tema prøves mot.

[49] Jf. Fylkesordfører Helga Pedersens avslutning av siste konsultasjon: "Jeg vil takke justiskomiteen for de konsultasjonene vi har hatt. Det har vært veldig nyttig og veldig konstruktivt. Jeg synes dialogen her har vært veldig bra. Dere har lagt lista veldig høyt for alle de andre komiteene!". (Referat fjerde konsultasjon, s 45)

Folkerettslige forpliktelser, herunder rettighetsidentifisering og avklaring

Med utgangspunkt i vår forståelse av begrepet "ekstern autoritet" vil folkerettslige normer kunne ses om et uttrykk for en slik autoritet. Sametinget er den part i prosessen som sterkest poengterte de folkerettslige forpliktelsene og folkerettens grunnlag for lovarbeidet, og som kritiserte lovforslaget (Ot.prp. nr 53 (2002-2003)) for ikke å ligge innenfor folkeretten. Regjeringens formuleringer var ansett for svake fordi man bare fastslo at norsk rett forutsettes å være i samsvar med folkeretten (presumpsjonsprinsippet). Sametinget mente at loven må ta utgangspunkt i ILO 169, og ikke bare forutsette et best mulig samsvar med konvensjonen. Fra tingets side argumenterte man med at folkeretten er i stadig endring, og at urfolksretten ikke er noe unntak.

Sametingets sterke kritikk av regjeringens lovforslag omfattet både prosedyremessige og substansielle forhold. Blant annet dreide det seg om at forslaget ikke samsvarte med konsultasjons- og deltakelsesbestemmelsene i ILO 169, noe som resulterte i at Justiskomiteen 19.06.03 ba regjeringen skaffe til veie en uavhengig kvalifisert vurdering av lovforslaget. I forkant av dette hadde ILO's ekspertkomité kommentert prosessen og bedt regjeringen og Sametinget om å "renew discussions on the disposition of land rights in Finnmark, in the spirit of dialogue and consultation embodied in Articles 6 and 7 on Convention No. 169." Justiskomiteens inngripen i forkant av konsultasjonene er et iøynefallende trekk ved prosessen. Departementet engasjerte professorene Geir Ulfstein og Hans Petter Graver, og deres utredning ble oversendt Stortinget 03.11.03. Konklusjonen var at lovforslaget på viktige punkter ikke var tilstrekkelig for å oppfylle ILO 169. Blant annet gjaldt det spørsmålet om Finnmarkseiendommens styresammensetning som hadde fått mye medieoppmerksomhet. Sametinget hadde tidlig poengtert at spørsmålet om styresammensetning måtte ses i sammenheng med det totale bildet og det samlede resultat av konsultasjonene. Justiskomiteen ba om Regjeringens vurdering av utredningen. I svaret støttet Regjeringen seg på en utredning fra Utenriksdepartementets rettsavdeling,[50] og hevdet at utkastet til Finnmarkslov "er innenfor folkeretten, men for i ivareta konvensjonens målsettinger med henblikk på å identifisere opparbeidede individuelle og kollektive rettigheter kan det være hensiktsmessig å vurdere

[50] Vurdering av dokument offentliggjort 3/11-2003 om "Folkerettslig vurdering av forslaget til ny Finnmarkslov" av Carl August Fleischer, professor dr. juris. Utenriksdepartementets rådgiver i folkerett. Vurderingen retter en omfattende kritikk av Graver og Ulfsteins fortolkninger og konklusjoner av forståelse av ILO 169 og da særlig artikkel 14.

supplerende tiltak." Regjeringen mente at lovforslaget ikke var i strid med Norges folkerettslige forpliktelser.[51]

Denne uenigheten om folkerettslig fortolkning ønsket Sametinget en avklaring på under andre konsultasjon. Fra Justiskomiteens side ble det understreket at det ikke vil være mulig å komme fram til full enighet i spørsmålet om "hva som er folkerettslig riktig." Komitélederen poengterte imidlertid at begge folkerettslige vurderinger konkluderte med at hvis et lovforslag skulle være i tråd med folkeretten, måtte det gjennomføres supplerende tiltak i forhold til regjeringens framlagte lovforslag. Dette gjaldt særlig kravet om identifisering og manglende kartlegging av rettigheter. Erkjennelsen om at "utviklingen i Finnmark har ført til en rettstilstand som er markert annerledes enn ellers i landet," førte til at flertallet med unntak av FrP og SV, mente at "disse eksisterende rettigheter, så vel samenes som andres, skal kartlegges og anerkjennes gjennom en egen kommisjon og en særdomstol." SV ønsket en kommisjon, men mente at forslaget måtte ut på en høringsrunde (Innst.O.nr.80 (2004-2005)).

I konsultasjonene uttalte Storberget at Aps ønske om en folkerettslig vurdering ikke først og fremst var et juridisk spørsmål, men at "folkeretten faktisk er i et samspill med politikken og er en del av politikken også. Den skaper noen rammer for oss, den setter noen føringer i forhold til hvor vi skal legge lista." Disse utsagnene illustrerer at problemstillingen om folkerettslige fortolkninger for det første er et uttrykk for en spenning mellom nasjonal politikk og internasjonal rettsutvikling. For det andre reiser den et teoretisk spørsmål om forholdet mellom rett og politikk. Justiskomiteen valgte å fokusere på det prosessuelle aspektet i stedet for å vektlegge en juridisk folkerettslig fortolkning. Også Justis- og politidepartementet understreket at forpliktelsene i ILO 169 i vesentlig grad er prosessorientert (jf brev av 06.04.04). Problemstillingen setter søkelys på spenningen mellom en definert autorativ posisjon forstått som en juridisk standard med gitte regler versus en posisjon der standarder for samhandling defineres og utvikles og dermed inngår i en politisk prosess. Selv om folkeretten utgjør en ekstern autoritet, må de argumenter som grunnes i folkeretten testes som gyldige ikke bare gjeldende.

[51] Brev fra Justis- og politidepartementet v/statsråden til justiskomiteen, datert 6. april 2004 og 14. juni 2004.

I arbeidsdokument 2 foreslo Sametinget å inkorporere ILO 169 i Finnmarkslovens § 3 om forholdet til folkeretten, og under tredje konsultasjon framhevet Sametinget at ILO 169 eksplisitt skulle nevnes i § 3 om forholdet til folkeretten. I følge Sametinget burde det framgå at ILO har forrang i forhold til norske lovbestemmelser. Men man ville "åpne opp for en dialog om andre løsninger." Hovedpoenget var at loven må ta utgangspunkt i ILO 169 og ikke bare forutsettes å ha et best mulig samsvar i anvendelse av loven. Sametingspresidenten foreslo dessuten at en annen løsning kunne være at ILO 169 tas inn i menneskerettighetsloven § 2. Regjeringspartiene ønsket imidlertid ikke Sametingets forslag om en forrangsbestemmelse for ILO 169, inntatt i loven, men påpekte at ILO 169 er en viktig rettskildefaktor, og hovedutfordringen er å finne gode løsninger i tråd med folkeretten. I følge regjeringspartiene måtte vurderingene være tuftet på folkeretten og på politiske vurderinger om hva som er mest hensiktsmessig. Ved tvil om hvorvidt norske lovbestemmelser oppfyller internasjonale forpliktelser, vil domstolene tolke den nasjonale loven i overensstemmelse med folkeretten så langt dette er mulig og ikke direkte i strid med lovteksten. Storberget argumenterte med at hvis man gjennom lovarbeidet lager en lov som gjenspeiler grunnlaget for samiske rettigheter vil det overflødiggjøre debatten om hvorvidt man skal inkorporere hele eller deler av ILO-konvensjonen. Komitéflertallet viste til at det er mye uklarhet rundt tolkningen av ILO 169, noe som gjør den lite egnet for inkorporasjon (jf Innst. O. nr. 80 (2004-2005): 33).

Det endelige resultatet førte til en delvis inkorporering av ILO 169 i Finnmarksloven, og kan ses som et gjennomslag for Sametingets krav på dette punktet. Sametinget fikk videre gjennomslag for kravet om identifisering av urfolks landområder og løsning av landrettighetskrav som en konkretisering av ILO 169, artikkel 14. Sametinget mente at rettighetsspørsmålene ikke kunne håndteres av de ordinære domstolene, men av et kartleggende organ samt en særdomstol. Dette illustrerer betydningen av folkeretten som ekstern autoritet som gir rammer for nasjonal håndtering av urfolksspørsmål. Den utgjør et rammeverk for utprøving av argumentenes gyldighet. Men Sametinget fikk ikke den substansielle folkerettslige avklaringen de ønsket på hva som var riktig fortolkning. Basert på referatene fra de fire konsultasjonene må debatten om det folkerettslige fundamentet uansett ses som en reell debatt med meningsbrytninger der alle aktørene underbygger sine argumenter med folkeretten. Saken illustrerer at dette ikke er snakk om en høringsprosess, men en utveksling av argumenter der partene i felleskap ender opp med et kompromiss.

DISKUSJON

Utgangspunktet for denne artikkelen er en analyse av behandlingen av Finnmarksloven. Analysen er basert på spørsmålet om konsultasjoner er en relevant beslutningsmåte i forholdet mellom urfolk og nasjonalstatlige myndigheter, slik det legges opp til med utgangspunkt i ILO 169. For å analysere dette har vi tatt utgangspunkt i teori om deliberativt demokrati for å etablere et teoretisk rammeverk. Avslutningsvis vender vi nå tilbake til dette rammeverket. Er disse konsultasjonene et eksempel på deliberasjon? Hva gjør konsultasjoner basert på deliberasjon egnet til å behandle den typen som reises i Finnmarksloven? Hvilke utfordringer er knyttet til konsultasjoner i en sammenheng som dette?

Konsultasjonene som deliberasjon

Vi starter med prosessen og utfallet, hvor flere trekk skaper avstand i forhold til ideelle krav ved deliberasjon. Konsultasjonene endte med en løsning som samlet tilslutning fra de involverte. En del av kritikken som ble rettet mot regjeringens forslag var også blitt borte. Utfallet kan likevel ikke tolkes som uttrykk for en konsensus. Rent formelt var det justiskomiteen, ikke Sametinget eller fylkestinget, som la fram forslaget. Organiseringen med atskilte konsultasjoner gjorde at det heller ikke ble lagt opp til enighet mellom alle tre partene. Samtidig som det var uenighet i Stortinget, uttrykt gjennom standpunktene til SV og Frp, illustrerer fjerde konsultasjon at motsetningene heller ikke var borte i fylkestinget. Dette kunne forventes med utgangspunkt i et deliberativt perspektiv. Vi har også pekt på at konsultasjonene ikke var noen entydig arena for argumentasjonsutveksling, og at selve organiseringen nesten med nødvendighet gjorde det vanskelig å etablere likeverdighet mellom komiteen og de to eksterne aktørene. Endelig er det grunn til å trekke fram manglende åpenhet ved konsultasjonene.

Slik sett framstår behandlingen av Finnmarksloven som eksempel på at idealet om konsensus sjelden blir en realitet. (Deveaux 2005, Tully 2007) En grunn er fortsatt uenighet, i dette tilfellet står vi overfor en prosess hvor det også var institusjonelle hindre. Det mest problematiske med institusjonelle faktorer som medførte hindringer er ikke nødvendigvis vanskelighetene med å oppnå konsensus. Svakheten er heller at Sametinget og Finnmark fylkesting ikke møttes til felles konsultasjoner, der de hadde hatt mulighet til å utvikle en

felles forståelse som hadde vært utgangspunkt for arbeidet etter at loven var vedtatt og Finnmarkseiendommen ble en realitet. En annen svakhet knytter seg til konsultasjonene som, sammenlignet med idealer for deliberasjon, var en lite åpen prosess. For utenforstående var det vanskelig å gi kommentarer, og argumentasjonen til de involverte ble i liten grad prøvd mot et kritisk publikum. Dette ville krevd en mer omfattende prosess, men kunne bidratt til å sikre loven større legitimitet.

På den andre siden: Selv om fylkestinget og – særlig – Sametinget stilte krav til lovens innhold, er det vanskelig å karakterisere konsultasjonene som forhandlinger hvor strategisk tautrekking sto i forgrunnen. Dette fordi konsultasjonene for det første var preget av en *argumentasjonsbyrde* hvor det var forventninger om at de institusjonelle aktørene måtte presentere og begrunne ulike standpunkt dersom de skulle ha mulighet til å påvirke lovforslaget. For det andre er det grunn til å trekke fram *refleksjonsbyrden* der aktører skal vurdere og respondere på hverandres synspunkter. Dette elementet ved konsultasjonene er problematisert på grunnlag av formelle ulikheter mellom aktørene, og fordi gjensidig meningsutveksling tidvis ikke var et framtredende element. Dessuten gjorde lukketheten at aktørene ikke ble tvunget til å forholde seg til en åpen offentlighet. Samtidig var et refleksivt element til stede ved konsultasjonene fordi partene måtte forholde seg direkte til hverandres standpunkter. I konsultasjonene måtte partene respondere på hverandre, enten dette gjaldt i forhold til spørsmål eller andres utsagn. De måtte også ta stilling til skriftlig informasjon og dokumentasjon i form av folkerettslige vurderinger, Sametingets notater, eller fraksjonsmerknader. Disse var direkte rettet mot lovteksten og ble en del av partenes meningsutveksling. Endelig er det grunn til å trekke fram at aktørene måtte vurdere innspill utenfra i form av direkte henvendelser og omtale i media.

Vi har tidligere pekt på at det generelt sett er vanskelig å måle om det er utveksling av argumenter som fører til at standpunkt endres. Det er tilfelle også i forhold til Finnmarksloven, blant annet fordi konsultasjonene utgjorde en av flere arenaer der saken ble drøftet. Medlemmene av justiskomiteen måtte for eksempel forholde seg til diskusjoner i sine partigrupper og partiet for øvrig. I forhold til et deliberativt perspektiv er imidlertid et interessant og viktig aspekt at konsultasjonene ble brukt til problemløsning og til å utvikle standpunkt. At loven ble endret på vesentlige områder krevde i seg selv innsats. Partene gjennomførte en temmelig nitid og detaljert muntlig gjennomgang av standpunkter, og de var beslutningsorientert i den forstand at det ble lett etter bestemmelser og formuleringer som

skulle inn i loven. Implikasjonen er samtidig at aktørene måtte forholde seg til forslag og momenter gjennom å utvikle standpunkt underveis i samarbeid med andre. Sametinget var den av de institusjonelle aktørene som i utgangspunktet framsto med klarest definerte oppfatninger, men disse ble også konkretisert gradvis – i form av notater og innlegg – som en følge av spørsmål og alternative forslag i konsultasjonene.

Konsultasjoner, anerkjennelse og rettigheter

Diskusjonen om Finnmarksloven dreide seg om mange og sammensatte spørsmål, som styresammensetning i Finnmarkseiendommen, en overføring av omfattende arealer, forholdet mellom urfolk og nasjonalstat og mellom samene og den norske befolkningen i Finnmark. I grunnleggende forstand dreide det seg om en lovgivingsprosess for anerkjennelse av rettigheter. Behandlingen av Finnmarksloven faller inn i det James Tully (2007) kaller en ny tradisjon i behandlingen av krav fra urfolk og minoriteter. Motstykket, som preget situasjonen tidligere, var prosesser hvor rettigheter ble ”gitt” i den forstand at de ble definert av domstoler og politikere. Dette skjedde ut fra en oppfatning om at tildelinger var engangshendelser fordi rettigheter for grupper av befolkningen kunne fastsettes en gang for alle.

Endringen innebærer en dreining med viktige implikasjoner. Den innebærer en demokratisering i den forstand at spørsmål om rettigheter behandles gjennom det Tully – i bred forstand – definerer som dialog. I dette perspektivet skjer beslutninger ved en samhandling som har sitt utgangspunkt i utveksling av argumenter med mulighet til strategisk samhandling, og hvor man ifølge Tully vil ha vansker med å komme til enighet. Demokrati og dialog er viktig av to hovedgrunner. En grunn er at rettigheter ikke er entydig og endelig definert, men at forståelsen av og innholdet i dem utvikles over tid. Det er en konsekvens av at aktører lærer, og ved at diskusjoner fører til engasjement fra andre. Debatten om rettigheter vil ikke ha noe endelig svar, men må være åpen for jevnlig revurdering. (jf. Deveaux 2005:351f) Den andre grunnen er at rettigheter ikke forstås som noe tildelt eller gitt, men at de krever andres anerkjennelse. Dermed må det etableres beslutningsprosesser som gir mulighet for å etablere en relasjon mellom aktører.

Både behandlingen av Finnmarksloven og den generelle samepolitiske og samerettslige utviklingen passer inn i forhold til nyvendingen som James Tully beskriver. Den samiske befolkningen oppnådde anerkjennelse basert på argumenter om kulturell forskjellighet og en permanent minoritetsposisjon som resulterte i etableringen av Sametinget og sameparagrafen i

grunnloven. Videre har diskusjonen vært knyttet til krav om urfolks selvbestemmelse i land og vanndebatten, og anerkjennelse av land og vannrettigheter som eiendoms- og bruksrett. Denne diskusjonen framstår som en konsekvens av anerkjennelsen i den første fasen. Både Finnmarksloven i seg selv og konsultasjonene i forkant av denne, kan ses på som tiltak for å realisere sentrale aspekt ved samisk selvbestemmelse. Men selvbestemmelseskravet og kravet om anerkjennelse av land og vannrettigheter er samtidig vanskeligere å realisere fordi dette spørsmålet i større grad enn samepolitiske deltakelsesrettigheter generelt og kulturelle og språklige rettigheter, direkte angår situasjonen til den øvrige befolkningen. Når det gjelder behov for ressurstilgang og næringsutøvelse berøres rettighetshavere og bruksberettigende uavhengig av etniske skillelinjer. Dette berørthetsspørsmålet takles imidlertid i Finnmarksloven ved at loven tilrettelegger for en forvaltning som skal sikre større grad av samisk innflytelse og for prosedyrer som skal anerkjenne rettigheter for grupper og enkeltpersoner uavhengig av etnisitet.

I lys av argumentasjonen til James Tully burde en tilfredsstillende behandling av Finnmarksloven innebære dialog mellom aktører, fordi den anerkjennelse som kreves kan oppnås gjennom slik interaksjon. I den sammenheng er det et interessant poeng at det er vanskelig å gå direkte fra folkerettslige forpliktelser til lovteksten. En ting er at det var strid om fortolkningen av sentrale dokumenter, som i seg selv krevde en politisk prosess. Men diskusjon var et nødvendig element ikke bare som et ledd i å oppnå en folkerettslig avklaring, men også for å oppnå den nødvendige aksept og forståelse fra andre. Slik sett illustrerer behandlingen av Finnmarksloven at spørsmål av denne typen ikke utelukkende kan løses juridisk, men at det er rom for og nødvendig med den type politiske prosesser som åpner for akseptasjon og som i neste omgang øker lovens legitimitet. Denne prosessorienteringen i folkeretten innebærer dermed en operasjonalisering knyttet til den relevante konkrete urfolkskontekst.

I denne prosessen blir dermed folkeretten viktig i forhold til å identifisere hvilke muligheter som foreligger, og til å definere hva som er gyldige argumenter. Eksemplene som er presentert tidligere viser at folkerettslige rammer var viktige ved konsultasjonene, og var et sentralt utgangspunkt for at det i det hele tatt var grunnlag for å overføre myndighet til et regionalt styringsorgan – styret for Finnmarkseiendommen og for å etablere identifiserings- og avklaringsordningene. I forhold til det folkerettslige utgangspunktet og kravet fra samisk hold om å avklare rettigheter til land og vann er det et poeng at loven – i forhold til

identifisering av rettigheter – ble gjort etnisk nøytral. Enhver som kan grunngi sin bruk basert på prinsippet om alders tids bruk og andre former for rettserverv, vil kunne få kartlagt og anerkjent eksisterende rettigheter. Det dreier seg om sivilrettslige forhold og universelle rettigheter som gjelder alle i samme situasjon.

Konsultasjonene og beslutninger

Konsultasjonene om Finnmarksloven i Stortinget utgjør en særegen prosess. De kan også betraktes som en suksess, slik mange av talerne gjorde ved behandlingen av Finnmarksloven i Odelstinget. To forhold – flertallskoalisjoner og tillit – illustrerer likevel at konsultasjoner også er sårbare prosesser.

Idealet om deliberasjon hvor aktører utvikler felles standpunkt gjennom prøving av argumenter er ofte et ideal om enhetlige aktører. ”Problemet” med disse konsultasjonene er at de institusjonelle aktørene – med unntak for Sametinget – er koalisjoner med tidvis uklart ståsted og hvor standpunktene vurderes og utvikles i andre fora, som partigruppene. Slik sett kan resultatet oppleves som uklart og usikkert helt til det siste. Situasjonen ble i noen grad unngått i forhold til Finnmarksloven fordi det, riktignok bare måneder før loven skulle vedtas, utviklet seg en større koalisjon mellom Arbeiderpartiet og regjeringspartiene – Høyre, Venstre og Kristelig Folkeparti. Dermed ble innholdet i loven langt på vei avgjort i komiteen, og det kunne føres samtaler med sikte på å oppnå et resultat. Sett i forhold til utgangspunktet om sikring av urfolks rettigheter ville situasjonen vært en annen, og langt mer risikabel, uten flertall og ikke minst hvor flertallskoalisjonene hadde vekslet. Det er mulig at gjennomføring av konsultasjoner i seg selv virket disiplinerende på partiene slik at de søkte stabile koalisjoner, men vekslende politiske konstellasjoner vil i lignende situasjoner innebære et usikkerhetsmoment.

Konsultasjonene var et svar på et tillitsproblem mellom norske myndigheter – regjeringen – og Sametinget. I noen grad greide man å bygge tillit gjennom drøftinger av alternativer til regjeringens lovforslag. Tilliten var imidlertid relativt skjør. At regjeringen gikk mot deler av den uavhengige folkerettslige vurderinger (Graver og Ulfstein) og sluttet seg til synspunktene til UDs folkerettsekspert, Carl August Fleischer, skapte tvil og usikkerhet. Langt mer problematisk var det lange oppholdet mellom andre og tredje konsultasjon. Dette skapte frustrasjon som gjorde at det ble stilt spørsmål ved Stortingets intensjon, og om det var grunnlag for å gjennomføre konsultasjonene.

Konsultasjoner er lansert som et alternativ som kan bidra til å sikre urfolk innflytelse, men også stor grad av selvbestemmelse. Som vist fikk Sametinget gjennomslag for viktige krav, men ikke på alle områder, for eksempel i forhold til kystfiske. Sametinget måtte også akseptere at det ikke fantes et entydig folkerettslig fundament som det var mulig å utlede innholdet i Finnmarksloven på. Likevel la konsultasjonene til rette for at alle partene i dialogen ble pålagt en argumentasjonsbyrde som styrket prosessen og utfallet av denne. Konsultasjonene framstår som en realisering av formålet med og konkretisering av bestemmelsene i ILO 169. Slik sett utgjør konsultasjonene prosedyrer som anerkjenner at de involverte partene er likeverdige. Prosedyrene utvikles i forhold til en folkerettslig ramme, samtidig som det er i selve prosessen at argumentene prøves og brynes mot hverandre.

Litteratur:

Anaya, S. James (2004): *Indigenous Peoples in International Law.* Oxford: Oxford University Press.

Bohman, James (1996): *Public Deliberation.* Cambridge, Mass.: The MIT Press.

Bächtiger, Andrè, Markus Spörndli, Marco R. Steenbergen and Jürg Steiner (2005): ”The Deliberative Dimensions of Legislatures”. *Acta Politica*, **40**:225-238.

Chambers, Simone (2003): “Deliberative Democratic Theory”. *Annual Review of Political Science*, **6**:307-26.

Deveaux, Monique (2005): “A deliberative approach to conflicts of culture”. I Avigail Eisenberg and Jeff Spinner-Halev (ed): *Minorities within Minorities. Equality, Rights and Diversity.* Cambridge: Cambridge University Press.

Dryzek, John S. (2000): *Deliberative Democracy and Beyond. Liberals, Critics, Contestations.* Oxford: Oxford University Press.

Dryzek, John S. (2005): "Deliberative Democracy in Divided Societies: Alternatives to Agonism and Analgesia", *Political Theory,* **33**: 218-42.

Elster, Jon (1998): “Introduction”. I Jon Elster (ed): *Deliberative Democracy.* Cambridge: Cambridge University Press.

Graver, Hans Petter og Geir Ulfstein: ”Folkerettslig vurdering av forslaget til ny Finnmarkslov.”http://www.regjeringen.no/nb/dep/jd/dok/rapporter_planer/rapporter/2004/Folkerettslig-vurdering-av-forslaget-til.html?id=278377 (Trykt som ”The Sami People's Right to Land in Norway”. *International Journal on Minority and Group Rights,* 11 (2004):337-377.

Habermas, Jürgen (1995): “Tre normative demokratimodeller: Om begrepet deliberativ politikk”. I Erik Oddvar Eriksen (red): *Deliberativ politikk. Demokrati i teori og praksis.* Oslo: TANO.

Holzinger, Katharina (2005): “Context or Conflict Types: Which Determines the Selection of Communication Mode”. *Acta Politica,* **40**:239-254.

Jansen, Davy and Raphaël Kies (2005): “Online Forums and Deliberative Democracy”. *Acta Politica*, **40**:317-335.

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

Kingsbury, Benedict (2005): ”Recontructing Self-Determination: A Relational Approach”. I Pekka Aikio and Martin Scheinin (ed): *Organizing the Right of Indigenous Peoples to Self-Determination*. Åbo: Institute for Human Rights, Åbo Akademi University.

Magnette, Paul (2004): “Deliberation or bargaining” Coping with constitutional conflicts in the Convention on the Future of Europe”. I Erik Oddvar Eriksen, John Erik Fossum and Augustìn Josè Menèndez (ed): *Developing a Constitution for Europe*. London: Routledge.

Midgaard, Knut (1980): “On the Significance of Language and a Richer Concept of Rationality”. I Leif Lewin and Evert Vedung (eds): *Politics as Rational Action*. Dordrecht: Reidel Publishing Company.

Midgaard, Knut (1983): “Rules and Strategy in Negotiations: Notes on an Institutionalist and Intentionalist Approach”. *European Journal of Political Research, **11**:151-166.*

Müller, Harald (2004): “Arguing, bargaining and all that: communicative action, rationalist theory and the logic of appropriateness in International Relations”. *European Journal of International Relations,* **10** (3):395-435.

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

Risse, Thomas (2004): ”Global governance and communicative action”. *Government and Opposition,* **39** (2): 288-313.

Steenbergen, Marco R., Andrè Bächtiger, Markus Spörndli, and Jürg Steiner (2003): “Measuring political deliberation”. *Comparative European Politics,* **1**:21-48.

Steiner, Jürg; Andrè Bächtiger, Markus Spörndli and Marco R. Steenbergen (2004): *Deliberative Politics in Action. Analysing Parliamentary Discourse.* Cambridge: Cambridge University Press.

Tully, James (2007): ”The Practice of Law-Making and the Problem of Difference: An Introduction to the Field”. I Omid A. Payrow Shabani (ed): *Multiculturalism and Law: A Critical Debate*. Cardiff: University of Wales Press.

Ulbert, Cornelia and Thomas Risse (2005): “Deliberately Changing the Discourse: What Does Make Arguing Effective?” *Acta Politica*, **40**:351-367.

Weigård, Jarle og Erik Oddvar Eriksen (2004): “Deliberasjon og demokrati”. I Knut Midgaard og Bjørn Erik Rasch (red): *Demokrati – vilkår og virkninger*. Bergen: Fagbokforlaget.

Wheatley, Steven (2003): “Deliberative Democracy and Minorities”. *European Journal of International Law,* 14: 507-27.

Chapter IV

Indigenous rights and the limitations of the nation-state

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Chapter V

Grenseoverskridende politikk eller interessekamp?

Unpublished

Grenseoverskridende politikk eller interessekamp?

1. Innledning

I løpet av 2005 satte media fokus på vanskelige forhandlinger mellom Norge og Sverige om ny reinbeitekonvensjon. Etter at reinbeitekonvensjonsforslaget ble avgitt i mai 2001 av den norsksvenske reinbeitekommisjonen av 1997, ble det klart at mye gjenstod før Norge og Sverige kunne bli enige. 1972-konvensjonen ble derfor forlenget fram til 30. april 2005[52] uten at partene etter forhandlingsfristens utløp, maktet å komme fram til en felles plattform og enighet i saken. Dermed ble Lappekodisillen,[53] et folkerettslig dokument fra 1751, gjeldende.

Problemkomplekset involverer ulike forhold som sedvanemessig bruk, den historiske forståelsen og statenes regulering av samiske rettigheter og offentlig politikk på tvers av statsgrenser. Et gjennomgående trekk ved statenes håndtering av den grenseoverskridende reindriften har vært forhandlinger som har resultert i beitekonvensjoner mellom de to land. Det er et tankekors at saken som i 1905 voldte størst bry under Karlstad-forhandlingene, igjen førte til en mellomstatlig konflikt i 2005 da Norge markerte 100 år som selvstendig stat. Dessuten er saken paradoksal gitt den pågående samerettslige utviklingen. I Norge har Høyesterett gjennom flere avgjørelser[54] slått fast reindriftsrettens selvstendige rettsgrunnlag og bruksrett ut fra alders tids bruk. Reindriftsretten i Sverige er grunnet i urminnes hävd.[55] Reindriften både i Norge og Sverige er altså en selvstendig rett etablert gjennom sedvane og henholdsvis alders tids bruk og urminnes hävd.

Med dette utgangspunkt spørres det om *hva som kan belyse hvorfor det innen forhandlingsfristens utløp ikke ble oppnådd enighet i forhandlingene om den grenseoverskridende reindriften.* Skyldes det interessekamp der partene har klare interesser knyttet til utfallet, eller har uenigheten sin årsak i manglende ivaretakelse av rettighetshensyn

[52] Ot.prp. nr. 75 (2004-2005) Om lov om endringer i lov 9. juni 1972 nr. 31 om reinbeiting i henhold til konvensjon av 9. februar 1972 mellom Norge og Sverige om reinbeite.
[53] Vedlegg til grensetraktaten av 1751 mellom Danmark/Norge og Sverige/Finland.
[54] Brekken-saken (Rt. 1968, s. 394, Altevann-saken (Rt. 1968, s429), Selbu-saken (Rt. 2001, s. 769).
[55] Det svenske ervervsgrunnlaget "urminnes hävd" ligger nært opp til "alders tids bruk." I begge tilfeller dreier det seg om rettsdannelse med grunnlag i tradisjonell og langvarig bruk.

begrunnet i alders tids bruk og urminnes hävd? Her dreier det seg nemlig om en historisk rettighetsanerkjennelse som stiller andre krav til konfliktløsning enn det interessepolitikken gjør. Problemene er ikke av ny dato og fordrer et fokus på bakgrunnen for konflikten. I artikkelen trekkes en historisk linje fra Lappekodisillen via utviklingen fra 1905 til 1972-konvensjonen. Videre settes søkelys på forslaget til ny reinbeitekonvensjon og grenseoverskridende forvaltnings- og tvisteordninger (Norsksvensk Reinbeitekommisjon 2001) og forhandlingene i kjølvannet av dette forslaget. Aktualiteten av Lappekodisillen som folkerettslig instrument har vært et gjennomgående tema i forhandlingene mellom Norge og Sverige siden midten av 1800-tallet og fram til dagens forhandlinger om ny reinbeitekonvensjon. Hvordan har det seg at et over 250 år gammelt regelverk fortsatt volder hodebry i 2005-forhandlingene mellom Norge og Sverige?

Drøftingen av de aktuelle problemene baseres på offentlige dokumenter i saken, og drøftingen av Lappekodisillen gjøres med utgangspunkt i historisk og juridisk forskningsarbeid på området. I analysen skiller jeg mellom en teoretisk tilnærming av politikk som henholdsvis interessebasert og normstyrt. Er uenigheten et resultat av at interesser står mot hverandre og at hensynet til statlig suverenitet og makt er tungtveiende? Eller kan manglende rettighetsivaretakelse kaste lys over den oppståtte uenigheten? Er dette i så fall en mangel som kan forklares med at synet på Lappekodisillens historiske rettighetsanerkjennelse endres over tid? Reinbeitekommisjonens forslag til nye grenseoverskridende forvaltnings- og tvisteløsninger grunner seg imidlertid i Lappekodisillens rettighetsanerkjennelse, og drøftingen av disse forslagene baseres på en forståelse av normstyrt politikk som vektlegger rettsnormer og prosedyrer for politisk dialog og rettighetsregulering. Samtidig belyser interessepolitikkmodellen partenes opptreden og de hensiktsmessige løsningene innenfor forhandlingsinstitusjonen. Kompromisser kan oppnås, men rettighetsforhold kan ikke avklares. Spenningen mellom interesse- og rettighetshensyn fordrer dermed et fokus på prosedyrer og institusjonelle rammer for hvordan motstridende normer skal avveies slik at enighet etableres, og involverer en normativ argumentasjon for viktigheten av slike prosedyrer.

2. Interesse- versus normstyrt politikk

Statenes historiske anerkjennelse av samiske rettigheter, senere lovgivning og politiske forhandlinger er forhold som på den ene siden berører statlig interessepolitikk og suverenitetsspørsmål, og på den andre siden allmenngyldige rettighetsforståelser. Disse spørsmål drøftes med utgangspunkt i henholdsvis en *interessepolitikkmodell* der mellomstatlig samhandling preges av et strategisk handlingsmodus og uttrykkes gjennom ordinære forhandlinger mellom stater, og en modell hvor politikken er *normstyrt* med en tilhørende forståelsesorientert handlingsinnstilling der deliberative prosedyrer framstår som en mekaniske for å forklare offentlig politikk.[56] Mens det i lys av interessepolitikkmodellen foretas en empirisk analyse av problemkomplekset, drøfter modellen for normstyrt politikk normative argumenter som skiller seg fra forhandlingssituasjonen. Interessepolitikkmodellen preges av formålsrasjonell handling koordinert gjennom resultatorientering, mens den normstyrte politikkmodellen bygger på kommunikativ rasjonalitet.[57] Aktørene er kommunikativt rasjonelle i den grad de ivaretar sine mål i den utstrekning dette får kvalifisert aksept hos andre (jf Eriksen og Weigård 1999: 68). Men ofte trengs institusjonelle strukturer for å sikre legitime deliberasjons- og beslutningsprosesser. Legger eksisterende strukturer til rette for en gjensidig forståelse blant involverte i den grenseoverskridende reindriften?

Gitte interesser og null-sum spill

I interessepolitikkmodellen tas forhold mellom stater opp gjennom diplomati og inter-governmentale forhandlinger mellom sektorer av den utøvende statlige myndighet som ivaretar nasjonale og sektorbaserte interesser. Aktørene i forhandlingssituasjonen innehar en strategisk handlingsinnstilling og velger under hensyntaken til andre aktørers evne til å gjøre rasjonelle valg (Eriksen 1994: 99). Som beslutningstype kan strategiske forhandlinger belyses ved hjelp av begrepet 'bargaing' som innebærer å engasjere seg i

[56] Deliberativ politikk viser til den rolle gjensidige overveielser spiller i å oppnå felles mening og få fattet kollektive beslutninger. Det fokuseres på prosedurale aspekter ved politiske overlegninger, og på former for fellesskap og enighet for å etablere et stabilt styresett (Eriksen og Weigård 1999:153). En deliberativ politikkforståelse avhenger av ei institusjonalisering av prosedyrer der politisk menings- og viljesdannelse står i sentrum.

[57] Kommunikativ rasjonalitet viser til Habermas' teori om kommunikativ handling, der rasjonalitet knyttes til subjekt-subjekt relasjonen mellom kommuniserende og samhandlende individer. Handlinger blir styrt av den felles virkelighetsforståelse eller konsensus som etableres gjennom språklig dialog. Språklige dialog forutsetter stillingtaken til bestemte implisitte gyldighetskrav (Eriksen og Weigård 1999:14, 15).

> ”communication for the purpose of forcing or inducing the opponents to accept one’s claim. To achieve this end, bargainers rely on threats and promises … Bargaining power does not derive from the ’power of the better argument’, but from material resources, manpower and the like” (Elster 1992: 15).

Mellomstatlige forhandlinger kan foregå på flere nivå. Statenes suverene status innebærer at de er autonome i den forstand at de velger om de vil inngå i regulerte samarbeidsformer og underskrive en pakt som kan legge begrensinger på eget handlingsrom. På et gitt territorium har kun en stat suverenitet, staten kan underkaste seg eller velge å se bort fra folkerettslige forpliktelser uten at det påvirker dens formelle suverenitet (jf Wæver 1992:54). Statene er primærsubjektene, framstår som suverene og skaper mesteparten av retten gjennom internasjonale forhandlinger, traktater og fast praksis. Likevel må statene forstås som begrensede rasjonelle aktører uten full oversikt over all informasjon og alternativer (Simon 1945).

Forhandlerne må komme fram til et resultat som både kan aksepteres av den andre staten og av viktige grupper i eget land. Disse kan avgjøre om forhandlingene igangsettes, om de blir avbrutt eller leder fram til et forhandlingsresultat (Putnam 1988, Hekland 2005:14). I reinbeitekonvensjonsforhandlingene er det enkelte lands reindriftsorganisasjoner viktige aktører, og kontakten mellom organisasjonene og staten er av sentral betydning. I lys av interessepolitikkmodellen forventes det derfor at statenes ”egne” interesseorganisasjoner har vært avgjørende for at det innen fristen ikke ble oppnådd enighet i forhandlingene.

Forhandlingene baseres på ressurser heller enn argumenter og mål-middel rasjonalitet. Gjennom forhandlinger og tautrekking oppnås kompromisser som leder til gjensidige fordelaktige løsninger. Interessepolitikkmodellens andre hovedforklaring på forhandlingsbruddet knyttes an til en forståelse av samhandlingen som tautrekking der det best tenkelige resultat for den enkelte part framstår som et null-sum spill der den ene taper beiteområder på bekostning av den andre. Et optimalt resultat for Norge vil være en reduksjon av reinbeiteområder for ”svensk” rein, mens den beste løsning for Sverige vil være det motsatte. Partene må oppnå og sikre seg en størst mulig del av kaka. Men et problem er at eventuelle løsninger basert på egennytte er grunnleggende ustabile. Sammenbrudd kan oppstå fordi det i praksis lett dannes misnøye eller mistenksomhet på grunn av en situasjon der en part tror at den andre ikke bidrar like mye som en selv. Dessuten kan samhandling og avtaler brytes hvis det oppstår en situasjon som byr på mer lukrative resultat for den ene parten

(Eriksen 1994: 100). Det kan også oppstå en stillingskrig der det gjelder å holde ut til motparten gir seg. I en situasjon der en avtale krever tilslutning fra begge parter vil den parten som nekter å slutte seg til et avtaleforslag ha et sterkt maktgrunnlag. I lys av interessepolitikkmodellen, kommer forhandlingene til kort fordi hensynet til de respektive gruppers nasjonale interesser ikke gjør det mulig å oppnå enighet. Forhandlingsresultatet tilfredsstiller ikke disse interessene.

Normkollisjon og anvendelsesdiskurs

Den forståelsesorienterte handlingsinnstillingen i en modell for normstyrt politikk innebærer at begrunnelser for offentlig politikk gjøres med referanse til en forståelse av hva som er godt for et aktuelt fellesskap og hva som er normativt gyldig for kretsen av berørte parter. For det første kan politikk legitimeres med referanse til gruppens selvforståelse og hva den representerer. Statsborgerne utgjør et rettsfellesskap lokalisert i tid og rom. Medlemmenes integritet er beskyttet i den grad de oppnår status som rettighetsbærere (Habermas 1994: 192). Som medlemmer i det statsborgelige rettsfellesskapet beskyttelses vi som enkeltindivider i staten, som partsborgere og medlemmer av forskjellige fellesskap innenfor staten.

Den grenseoverskridende reindriften reiser imidlertid spørsmål som ikke kun kan løses med henvisning til de rettigheter og plikter som omfattes av statsborgerskapet. Rettsfellesskapet forstått som et statsborgerfellesskap versus et fellesskap på tvers av statsgrensene illustrerer at det er andre berørte enn statens borgere. Rettigheter gjelder ikke kun egne borgere, men også ”fremmede” samers bruk av områder basert på sedvane og alders tids bruk. I hvilken grad har slike sivile rettigheter vært beskyttet mot statlig inngripen, og hva har vært ansett som rimelig inngripen? Derfor må det for det andre spørres om hva som anses som riktig og rettferdig når det gjelder forvaltning av land og vann som berører andre enn statens egne borgere. Politikk legitimeres ut fra prinsipper som kan anerkjennes som rettferdig for alle parter uavhengig av spesielle interesser, oppfatninger av det gode liv og kulturell identitet. Slike moralske normer fordrer en rettferdiggjørelsesdiskurs som krever at alle interesser tas hensyn til og bedømmes upartisk (Eriksen og Weigård 1999: 187). Er det slik at like rettigheter og respekten for hver borger skyldes ens individuelle status som juridisk person, eller skyldes det ens medlemskapsstatus som tilhørende et partikulært politisk fellesskap? Kan andre enn statens egne innbyggere framstå som berørte parter (jf Cohen 1999)?

Den grenseoverskridende reindriftsproblematikken illustrerer problemet med normkollisjon og balansering av verdier. I lys av en normstyrt politikkmodell legitimeres politikk ut fra hva som er godt for et aktuelt fellesskap, men også ut fra hva som er normativt gyldig for kretsen av berørte parter. Disse berørte viser til en historisk rettighetsanerkjennelse, og argumenterer for betydningen, aktualiteten og konsekvensen av denne anerkjennelsen. Argumenter som bygger på kontekstuelle verdinormer med referanse til samiske og statsborgerfellesskap og universelle rettighetsbaserte normer som grunner seg i sivilrettslige forhold, gjør at en må etterspørre hvilke normer som er relevante og passende i den spesielle situasjonen. Men problemet er at rettferdiggjorte normer kan komme på kollisjonskurs. Hvordan skal man da finne ut av normativt relevante trekk ved situasjonen? Her kan deliberasjon som mekanisme for handlingskoordinering i en normstyrt politikkmodell bidra til å avklare hva som er rettferdiggjorte normer og hvordan de skal iverksettes. Rettferdiggjorte normer kan imidlertid stå mot hverandre, og hva kreves da for å løse problemet? Ved hjelp av en anvendelsesdiskurs (Günther 1989) spør en etter hvilke normer som er relevante og passer i den spesielle situasjonen. En tar hensyn til empiriske saksforhold, tilgjengelig informasjon, reelle maktforhold, hvilke verdier som står på spill og balansering av ikke-generaliserbare interesser (Eriksen og Weigård 1999: 187, 188), og er opptatt av konsekvensene og hvordan iverksetting av rettferdiggjorte normer virker. Anvendelsesdiskursbegrepet ”kaster lys over den juridiske argumentasjonsstruktur,” slik at forståelsen av rettsfellesskapet og den institusjonelle rammen som trengs for at argumentasjonen om hvilke normer som passer til et gitt saksforhold kan utspille seg fritt (Eriksen og Weigård 1999, Habermas 1996: 234). Dermed tydeliggjøres at den grenseoverskridende reindriftsdiskursen mangler rammer og prosedyrer for å løse problemet med rettferdiggjorte normer på kollisjonskurs.

Her presenterer jeg en antakelse om at uavklarte rettsforhold utgjør en viktig del av årsaken til problemene. Privatrettslige forhold for de ’fremmede’ samer antas å komme i motstrid med nasjonale interesser som suverenitets- og territorialitetshensyn. At det ikke eksisterer andre mekanismer enn forhandlingsarrangementet for å avklare slike forhold, kan ses i lys av et generelt problem med hensyn til menneskerettigheter, nemlig en manglende form for institusjonalisering av slike rettigheter (jf Eriksen 2003: 358). Derfor setter artikkelen søkelys på de foreslåtte institusjonelle ordningene for regulering av den grenseoverskridende reindriften. Hva var argumentene for å etablere disse? Ved å tydeliggjøre disse begrunnelsene belyses samtidig problemet med at reindriften ikke er anerkjent som rettsfelleskap på tvers av riksgrensene, og står uten noen politisk organisasjonsform som kan fremme

fellesskapsnormer. Slik sett utgjør forslaget om egne prosedyrer for avklaring og ivaretakelse av rettigheter et potensial når det gjelder å erkjenne og institusjonalisere rettsfellesskap. I et historisk lys framstår Lappekodisillen av 1751 som et svar på disse utfordringene.

3. Har den historiske rettighetsanerkjennelse aktualitet?

Historisk anerkjennelse

Siktemålet med Lappekodisillen var at "den lappiske nasjon skulle bestå," og i forarbeidene[58] heter det eksplisitt at "… Er denne Overflyttelse fra det eene Rige til det andet ganske nødvendig til den Lappiske Nations Conservation, ...". Samenes overflyttingsrett må betraktes som en rettighet av folkerettslig karakter siden den var hjemlet i en traktat inngått mellom statene (Hansen og Olsen 2004: 283). Lappekodisillen fastslår at innlemmelsen av sameområdene i de to statene ikke skulle gripe inn i samenes etablerte rettigheter, enten disse bestod i eiendoms- eller bruksrettigheter, utover det som var strengt tatt nødvendig som følge av utstrekningen av statlig suverenitet. I følge datidens juridiske analyse hadde alle folkeslag visse naturlige og umistelige rettigheter (Hansen og Olsen 2004: 278). Grensekommissær Schnitler som gjennomførte en rekke vitneavhør i tiden 1742-45 som grunnlag for grenseforhandlingene, uttalte: "Den Lappiske Nation har i ældgamle Tider været et frit Folk, indtil Naboerne, de Norske, Svenske og Novgorodske Russer have tvunget dem til, at være sig Skatt-Skyldige" (Schmitler III, i Hansen og Olsen 2004: 279). Men slike standpunkter kunne i opplysningstidens ånd kombineres med strategiske utenrikspolitiske hensyn der samenes rettigheter tjente som brekkstang for statlige pretensjoner (Hansen og Olsen 2004: 261-280). Likevel er det grunn til å framheve kodisillens normative aspekt. Uten å ta dette i betraktning er det vanskelig å forklare hvorfor statene valgte å ta med en slik "heftelse" som kodisillen utgjorde, og som dessuten ble fastslått uten at samene selv framstod som part i prosessen.

Grensetraktatens inklusjon av kodisillen kan ses i lys av det faktum at grensetrekningen berørte samene i et stort sammenhengende område fra Femunden/Jämtland til Nordishavet. Områdene på begge sider av Kjølen var statenes felles interesseområder og samtidig nesten utelukkende bebodd av samer. Som følge av grensedragningen kunne samer på henholdsvis

[58] Betenkning fra de danske juristene Hielmstierne og Stampe fra 1750 produsert som et ledd i grenseforhandlingene (Hansen og Olsen 2004: 278).

svensk og norsk side risikere å miste hevdvunne historiske beiterettigheter i det land de ikke var definert som statsborgere. Et av kjernepunktene i kodisillen var derfor at samene fortsatt skulle kunne foreta sesongflyttinger selv om det nå var kommet statsgrenser på tvers av beiteområdene.[59] I kodisillens § 10[60] begrunnes grensebeitetrafikken med samenes behov, og at flyttingene skjer i overensstemmelse med gammel sedvane.

Et annet hovedelement er regler for hvor den enkelte same skulle være statsborger (NOU 1997:5). I sørlige områder måtte statstilhørighet velges hvis man hadde sommerskatteland[61] på begge sider av grensen, hadde man vinterskatteland på den ene siden tilhørte man dette landet. Fra Salten og nord til Kautokeinos grense, kunne man velge statstilhørighet hvis man hadde sommerskatteland på norsk side og vinterskatteland på svensk side (NOU 1984:18: 170). Kodisillen fastsetter også regler for regulering av ektefellers statsborgerskap avhengig av skatteland og antall rein.[62] Reguleringene av statsborgerlig tilhørighet knyttet opp mot besittelse av skatteland kan vitne om at skattelandsbesittelse ble forstått som en individuell og kollektiv rettighet der samene som individer i et rettssamfunn skulle sikres visse rettigheter. Men samene selv var ikke nevnt som parter i disse prosessene, i tråd med den klassiske liberalismens forståelse av 'the rule of law' ivaretatt uten en demokratisk komponent bestående av deltakende borgere.

Kodisillen inneholder et sett av omfattende reguleringer som i praksis utstyrte samene med en form for indre selvstyre (Smith 1995). Bruks- og rettsforhold fulgte samisk sedvanerett også i den beskjedne grad statene utøvet myndighet (NOU 1984:18: 168, 169).[63] En sakkyndig arbeidsgruppe for Samerettsutvalget (NOU 1997:5) poengterer at Lappekodisillens innhold baseres på en erkjennelse av at samiske eiendoms- og bruksrettigheter eksisterte og "at kodisillen ikke fratok rettighetene eller begrenset utøvelsen av dem utover det som var strengt

[59] Ved Russlands sperring av grensen mellom Norge og Finland i 1852 ble norske samer imidlertid utelukket fra å nytte retten til vinterbeite i tidligere svensk lappmark i Nord-Finland.
[60] "Saasom Lapperne behøve begge Rigers Land, skal det efter gammel Sædvane være dennem tilladt, Høst og Vaar, at flytte med deres Rehn-Hiorder over Grendsen ind i det andet Rige. Og herefter som tilforn, lige med Landets Undersaatter, undtagen paa saadanne Steder, som her neden meldes, at betiene sig af Land og Strand til Underholdning for deres Dyr og sig selv, da de venligen skal imodtages, beskyttes og hielpes til Rette…"
[61] Skattelandsinstitusjonen ble på 1600- og 1700-tallet praktisert i sameområdene på svensk side. Innenfor det norske rettssystemet fantes ikke en tilsvarende skattelandsinstitusjon, og samisk rettsvern må ses i lys av særnorske institusjoner som bygselsystemet og allmenningsretten. For en nærmere redegjørelse, se Hansen og Olsen (2004: 284-297, 298-305).
[62] Dersom en same hadde en hustru fra det annet land og hun hadde eget skatteland eller flere rein enn han, kunne han uten hindring eller avgift bli undersått i hennes land. Men dersom mannen hadde flere rein skulle hustruen følge mannen (NOU 1984:18: 170).
[63] Hvert "District" som flyttet over grensen skulle beskikkes av en lappelensmann og to lagrettsmenn som i praksis var samer, og det var gitt regler for samisk rettspleie kalt "Lappe-Ret".

nødvendig som følge av grensetrekningen mellom Norge, Sverige og Finland." Folkerettsgruppen hevder at Lappekodisillen baserer seg på de samme grunnleggende rettsprinsipper som mange andre land i den tid bekjente seg til: At ervervelse av statlig suverenitet over et område ikke opphevet private – individuelle eller kollektive rettigheter som allerede eksisterte, selv ikke hvor slike rettigheter ennå ikke var nedtegnet eller presisert. Følgelig sammenlignes kodisillen med "Magna Carta"[64] fordi den erkjente at samenes rettigheter skulle bestå selv om samene nå ble underlagt en norsk og svensk statsmakt.[65] Det har altså siden grensen ble trukket i 1751 eksistert folkerettslige forpliktelser mellom de to statene for å sikre samer fra svensk side rettigheter på norsk territorium og vis versa. Lappekodisillen instituerte et internt samisk rettssystem, og skulle hindre at samene mistet hevdvunne beiterettigheter i det land de ikke var definert som statsborgere. Slik sett utgjorde samene et historisk rettsfelleskap og "de fremmede samer" framstod som berørte parter selv om de ikke hadde medlemsstatus.

Aktualiteten av kodisillens prinsipper

På et felles plenumsmøte i Jokkmokk i februar 2005 understreker alle tre sametingene Lappekodisillens aktualitet, og at den anerkjenner samene som ett grenseoverskridende folk i tråd med moderne folkerett. Politikk legitimeres med henvisning til forestillinger om et samisk fellesskap og rettigheter på tvers av statsgrensene. Også den norsksvenske reinbeitekommisjonen av 1997 viser til Lappekodisillens historiske rettighetsanerkjennelse. Formålet med ny reinbeitekonvensjon skal være å opprettholde, fremme og videreutvikle den grenseoverskridende reindrift for de samer som har behov for reinbeite i det andre land. Forklart i samepolitiske hensyn, tradisjonelle grensekrysninger og samiske bestrebelser på institusjonsoppbygging, argumenteres det for at praktiseringen av en bilateral konvensjon best kan løses av mellomstatlige organer med avgjørende beslutningsmyndighet (Innstilling til Norsk-Svensk Reinbeitekommisjon av 1997, s. 125, heretter omtalt som Innstillingen). Begrunnelsene knytter an til verdien av et samisk fellesskap.

[64] Begrepet refererer til kong John som på Runnymede i 1215 ble tvunget til å akseptere at innbyggerne – de føydale stormenn ikke ble fratatt etablerte rettigheter til tross for kongelig suverenitet (NOU 1997: 5: 73). Dette engelske frihetsbrevet utgjør grunnsteinen i den engelske statsforfatningen og har blitt stående som et symbol på grunnleggende menneskerettigheter (Hansen og Olsen 2004: 278).

[65] I "Norges nuværende Statsforfatning" (1875) legger T. H. Aschehoug til grunn at selv om Norge skulle ha rett til å si opp Lappekodisillen, ville ikke det gi Norge rett til å stenge grensen for svensk reindrift. Dette fordi det før kodisillen ble vedtatt, var etablert en sedvanemessig overflyttingsrett som var "udsprungen av Lappernes Leveviis og Naturen i de Egne, hvor de oppholde sig" (NOU 2007: 13: 309).

Det refereres til universelle rettigheter som gjør krav på å bli ivaretatt uavhengig av statsborgerskap. Argumentene knytter an til et samisk rettsfellesskap på tvers av statsgrensene.

Rettighetshensyn begrunner forslagene om å etablere nye mellomstatlige organer for forvaltning og tvisteløsninger. I konvensjonsforslagets artikkel 7 foreslås det opprettet to faste organer felles for begge land; et *forvaltningsorgan* - den norsksvenske reinbeitenemnden[66] og ett *overprøvingsorgan* - den norsksvenske overprøvingsnemnden for grenseoverskridende reindrift.[67] Utgangspunktet er at den som driver med rein i det andre land skal ha samme rettigheter og plikter som landets egne reindriftsutøvere. Riksgrensene som administrative hindringene skal så langt som mulig tas bort (jf kommentarene til konvensjonstekst i Innstillingen, s. 137).[68] Ens rettigheter som juridisk person skal ivaretas, rettsfellesskapet skal inkludere de "fremmede" samer. Dette forsterkes med referansen til Den europeiske konvensjon om menneskerettigheter, artikkel 6 som sikrer at tvister som involverer sivile rettigheter og plikter skal kunne prøves av en domstol. Derfor foreslås det at overprøvingsnemnden skal ha en sammensetning og saksbehandling som oppfyller Europakonvensjonens krav til domstol. Forslaget legger til grunn at statene må ta hensyn til internasjonale rettighetsregimer, og at ulike rettigheter kan håndteres på ulike nivå.

En overføring av rettslige kompetanser fra staten til nemndene ville innebære styrkede rettigheter for reindriften, men også at reindriften selv ble tilført ansvar og plikter.[69] En slik tolkning forsterkes av konvensjonsforslagets artikkel 9 som gir samebyer og reinbeitedistrikter rett til å inngå samarbeidsavtaler om reinbeite utover det som framgår av konvensjonsområdeprotokollen.[70] Det ønskes stimulert til samarbeid, og heter at reindriften

[66] Av oppgavene som foreslås tillagt nemnden kan nevnes vedtak om hvem som skal bruke beitene og når, høyeste reintall, regler for flytting og konvensjonsgjerder. Sentrale, regionale og lokale myndigheter i hvert land skal sende saker på høring til nemnden før vedtak fattes som kan berøre den grenseoverskridende reindriften.
[67] Nemnden skal behandle saker vedrørende overtredelser av konvensjonen, anvendelser eller tolkninger av denne eller klage på enkeltvedtak. Disse kan oversendes fra reinbeitenemnden, myndigheter, samebyer og reinbeitedistrikter, enkeltpersoner og regjeringene i fellesskap. Enkeltpersoner kan klage på reinbeitenemndens vedtak i saker som faller inn under art. 6 i Europarådets konvensjon om beskyttelse av menneskerettighetene og grunnleggende friheter, som verner om retten til å prøve menneskerettigheter for domstolene. Domstoler og andre myndigheter i hvert land skal underrette begge nemndene om saker som gjelder den grenseoverskridende reindriften.
[68] I følge artikkel fem skal reindriften utøves i samsvar med de rettigheter og plikter som følger av nasjonal lovgivning i det land reindriften utøves i om ikke noe annet er sagt i konvensjonen.
[69] Et poeng som understrekes av lederen i SSR Per Gustav Idivuoma i personlig meddelelse 02.06.05.
[70] Konvensjonsområdeprotokollen er vedlagt konvensjonsforslaget som beskriver de formelt fastsatte grensene for konvensjonsområder og grensebeiteområder som er foreslått etablert i Norge og Sverige. I aktuelle tilfeller beskrives også beitetider (jf Innstillingen, s. 159).

bør få mulighet til å ta eget ansvar for frivillig grenseoverskridende samarbeid. Slik vil særlig berørte parter bli gitt en mer framtredende rolle enn praksis har vært så langt. Dette poenget følges opp i artikkel 43 i utkast til Nordisk samekonvensjon (2005) der det legges opp reindriftsgrupper på begge sider at grensen skal kunne inngå lokale avtaler.

En slik utvikling vil være i tråd med et perspektiv som legger vekt på å definere statens riktige form, omfang og begrensninger i lys av prosesser og muligheter i det sivile samfunn. Statens kompetanser og kapasiteter blir rekonstruert og omstrukturert, ikke bare svekket (Held 2002: 14). Suverenitet kan ses på som et relasjonelt begrep, og ikke bare et selvrefererende (Benhabib 2004: 21). Legitim autoritet er koplet til moralske og rettslige termer, til ivaretakelsen av menneskerettigheter og demokratiske standarder (Held 2002: 17). Rett og politikk står i et komplementært forhold til hverandre, politikken skal realisere kollektive mål, mens retten legitimerer og autoriserer politikken (jf Eriksen og Weigård 1999: 192).

Det svenske Sametinget stiller seg positiv til opprettelsen av en reinbeitenemnd og en overprøvingsnemnd: "En mellanfolklig organisation ger en god grund för både bevakning av gällande regler och att ta ställning til uppkomna behov av förändringar i konventionen" (Betänkande av 20.12.01).[71] Sametinget i Norge er positiv blant annet fordi nemndene vil øke rettssikkerheten til reindriftsutøvere i de to land (jf møtebok 02/02 fra plenum). Det vises til rettighetshensyn og prinsippet om alders tids bruk, det faktum at det foreligger samiske beiterettigheter som de to statene må ta hensyn til og at en svekkelse av retten til grenseoverskridende reindrift vil innebære en svekkelse av reindriftsretten generelt. Sametingenes aktualisering og fortolkning av Lappekodisillen som et instrument for samisk rettighetsanerkjennelse står i motsetning til tidligere statlig forståelse. Etter hvert ble nemlig kodisillen behandlet som et rettighetsinstrument for 'et fremmed lands innbyggere,' et syn som holder stand helt fram til moderne tid reflektert i forhandlingene som resulterte i 1972-konvensjonen.

[71] Reinbeitekommisjonen begrunner også forslagene med effektivitetshensyn, og viser til 1972-konvensjonen som ikke fremmet samarbeid over grensene og krevde involvering av Storting og Riksdag for mindre endringer (jf kommentarene i Innstillingen, s. 137). På grunn av raske samfunnsendringer er det viktig at det finns "en mellomstatlig myndighet som samordner forekommende divergerende interesser og tar raske avgjørelser, etter initiativ fra involverte parter eller på eget initiativ" (Innstillingen, s. 125). Det foreslås at regjeringene i fellesskap kunne utvide og innskrenke myndighetsområdet til nemndene som dermed avlaster statlige myndigheter (kommentar til konvensjonstekst, s. 147). Staten kan tilegne seg andre former for kontroll og fordeler (jf Indset 2001). At det ved tvister ikke vil være nødvendig med en statlig innblanding, vil fra et myndighetsståsted kunne anses som en fordel.

Norske myndigheter ønsket å si opp Lappekodisillen og begrense reindriften fra svensk side, mens svenske myndigheter opprettholdt synet om Lappekodisillens uoppsigelighet.

4. Interessekamp om beiteområder

Statlig suverenitet og handlingsevne

Som senere utvikling viser, ble det reindriftssamiske rettsfellesskapet på tvers av statsgrensene stadig svekket gjennom lovgivning[72] og reguleringer. Betydningen av riksgrensene ble forsterket[73] og innebar at mange reindriftssamer mistet viktige sesongbeiter i det "andre land." Etter krav fra Sverige ble samenes rett til fortsatt å flytte over grensen et tema under Karlstad-forhandlingene (Strøm Bull 2005: 430). Under disse forhandlingene og etter 1905 ville Norge si opp Lappekodisillen og begrense reindriften fra svensk side[74] ut fra ideen om at staten kan velge om man vil ta hensyn til folkerettslige føringer. Men Norge fikk ikke medhold i kravet om at den grenseoverskridende reindriften måtte opphøre og at svenske reindriftssamer ikke lenger skulle få ha sommerbeite i Norge. I Norge ønsket man å få oppmerksomheten vekk fra rettsprinsippene og over på de "hensiktsmessige løsninger" (Lae 2003). Særlig var hensynet til den økende jordbruksbefolkningen i Troms førende (Berg 1995).

Resultatet av forhandlingene var at Norge måtte akseptere det svenske kravet om at Lappekodisillen ikke ensidig kunne sies opp. Norge fikk imidlertid gjennomslag for at overflyttinger ikke skulle skje før 15. juni med mindre været gjorde det nødvendig, men en senere voldgiftsdom[75] underkjente Norges oppfatning om overflyttingstid. I ettertid søkte man fra norsk side under de videre forhandlingene med Sverige å redusere betydningen av konvensjoner og gammel sedvanemessig bruk. Et norsk ankepunkt var at lappekodisill og

[72] Lappekodisillen gjaldt uendret fram til 1883 da den såkalte felleslappeloven avløste kodisillen. Den bilaterale loven begrenset samenes rett til grenseoverskridende beite i henholdsvis Norge og Sverige (Strøm Bull 2005: 426).
[73] Grensetraktatene mot Finland og Russland hadde også betydning for samene, men disse forhold vil ikke bli berørt her.
[74] Denne konklusjonen om at Norge burde si opp Lappekodisillen ble framført av Lappekommisjonen av 1897. Kommisjonen ble nedsatt for å vurdere nye lovregler etter at Felleslappeloven av 1883 var trådt ut av kraft (Strøm Bull 2005: 427-430).
[75] Lae (2003) gir en grundig redegjørelse for foranledningen, forhandlingene og forhandlingsbruddet, begrunnelsene og selve voldgiftssaken i 1909 som var delt i to avdelinger. Første avdeling skulle omfatte måten de nødvendige opplysningene skulle tilveiebringes, andre avdeling gjaldt selve tvisten. Saken kom aldri så langt som til andre avdeling.

Karlstad-konvensjonen fastslo ”et fremmed lands innbyggeres rett til bruk av norske ressurser” (Lae 2003: 90).

Senere reguleringer førte til ytterligere begrensninger av beiterettighetene. 1919-konvensjonen gjennomgikk noen endringer i 1949.[76] De praktiske innskrenkningene var betydelige, men de rettslige forhold ble ikke berørt, ”slik at ”de i høi grad indviklede tvistespørsmaal av retslig og historisk art” fra 1919 og 1905 forble uavklarede statene imellom også etter 1949” (NOU 1984:18: 195). Utviklingen kan ses på som en prosess der den norske stat søker å forsterke sin suverene rolle og evne til å besitte og sikre egne interesser. Forpliktelsen Norge påtok seg i Karlstad-konvensjonen om ikke å si opp kodisillen, ble senere i alle år etter sterkt kritisert i Norge, men under forhandlingene i 1949 tok man ikke opp dette spørsmålet fordi man antok at nomadiserende reindrift i Sverige ville være forsvunnet i løpet av 10-15 år, en utvikling som ville medføre at kodisillen og artikkel 1 i Karlstadkonvensjonen ved utløpet av det aktuelle tidsrom ville ha tapt sin praktiske betydning (St. prp. nr 136 (1962-63): 1, 2). I de nye forhandlingene som pågikk på begynnelsen av 1960-tallet, ønsket norsk side ytterligere beskjæringer i beiteområdene i Norge og opphevelse av Karlstad-konvensjonen, noe som i første omgang ble avvist fra svensk side.[77] Den svenske forhandlingsdelegasjonen la fram et konvensjonsutkast som opprettholdt bestemmelsen om Lappekodisillens uoppsigelighet, noe som i sin tur Norge avviste. Norsk side ønsket å oppnå

> ”lettelser i de materielle bestemmelser som regulerer det svenske reinbeite i Norge. Et viktigere ønskemål var imidlertid å få gjennomført en prinsipiell endring som gikk ut på å *befri* Norge fra den i tid ubegrensede adgang for Sverige, som er beskrevet overfor, til å la svensk rein beite i Norge. Det ble gjort gjeldende at de svenske samers adgang til å la sine rein beite i Norge måtte baseres på frivillig samtykke fra norske myndigheter, og ikke på en *gammel bestemmelse som ikke passer inn i forholdet mellom to selvstendige stater*. De norske synspunktene måtte imidlertid liten forståelse hos de svenske forhandlerne” (St. prp. nr 136 (1962-63): 2), (mine uthevinger).

Utsagnet synliggjør Norges behov for å hevde suverenitet som ny nasjonalstat. Lappekodisillen ble sett som arvegods fra en tid da Norge var under fremmed styre. Dessuten, ved å ikke gå inn på rettslige spørsmål, behøvde heller ikke statene å gå inn på spørsmål om kompensasjon for tidligere og framtidige inngrep.

[76] Karlstad-konvensjonen ble i 1919 avløst av en ny reinbeitekonvensjon som ble iverksatt i 1923. Disse ble i 1949 oppdatert i en ny konvensjon, og medførte ytterligere innskrenkninger av de svenske beiteområdene i Norge. Fra norsk side ble det hevdet at hensynet til jordbruk, fedrift, sauehold og dels også norsk reindrift var begrunnelsen for dette (NOU 1984:18: 195).

[77] På norsk initiativ ble det innledet forhandlinger i 1959 som fortsatte fram til 1963 uten å komme fram til et resultat (NOU 1984:18: 196).

En ny blandet norsk-svensk reinbeitekommisjon ble nedsatt med et mandat av teknisk og praktisk natur. Kommisjonen skulle ikke befatte seg med rettsspørsmål (St. prp. nr 136 (1962-63): 5). I 1967 kom kommisjonen fram til en enstemmig utredning som ble ansett som gunstig for Norge og som la grunnlaget for de nye forhandlingene om 1972-konvensjonen. Pakkeløsningen var at Karlstad-konvensjonen skulle oppheves, men ikke Lappekodisillen (NOU 1984: 18: 195, 196). I forkant av etableringen av den norsk-svenske kommisjonen, satte norsk side som vilkår at det ble tatt hensyn til norske interesser, "blant annet ved at det ble åpnet adgang til å overføre fra Finnmark til de svenske beiteområder i Troms enkelte samefamilier som ikke kan finne tilfredsstillende næringsgrunnlag for sin reindrift i Finnmark." (St. prp. nr 136 (1962-63): 3). På 1950- og 60-tallet skjer det nemlig en omlegging av beitebruken i noen sommerbeiteområder på norsk side. Flere områder som var brukt av svenske samer stod nå tomme og ble tatt i bruk av norske reindriftssamer, blant annet fordi myndighetene ønsket at de norske samene tok i bruk sommerbeitene i Troms for å minske trykket i næringen i Finnmark.[78] Svenske myndigheter måtte akseptere en umiddelbar innflytting av 2000 rein fra Finnmark til Troms selv om det gikk på bekostning av svenske konvensjonsbeiter (Sara 1998: 215).

Samtidig med en utvikling som begrenser de svenske reindriftssamenes bruk av de norske sommerbeiteområdene, tilkjenner Høyesterett i 1968 to svenske samebyer – Saarivuoma og Talma - erstatning for betydelige tap av beiteland etter en vassdragsregulering i Altevann i Troms, og slår fast at samenes rett til å bruke området hviler på alders tids bruk (Rt. 1968 s. 429, Strøm Bull 1997: 42, 43).[79] Det er verd å merke seg at Norges Vassdrags- og Elektrisitetsvesen i forhandlinger med reindriften kom fram til en avtale om erstatning for tapt reinbeite, boplasser og fiske. Men Utenriksdepartementet støttet av Landbruksdepartementet ville ikke godkjenne avtaleforslaget. Det departementale synet var at reinbeitekonvensjonen av 1919 ikke gav samer rettigheter i det andre landet, de eneste som hadde rettigheter etter konvensjonen var statene. Spørsmålet om tiltak og erstatning var en sak som kun angikk de to nasjonalstatene (jf Berg 1999). Saken gikk derfor til Overskjønnsretten (1965) og til Høyesterett (1968). Høyesterett slo fast at den samiske bruken av området hadde et

[78] Linder (2004) refererer i denne sammenheng til et notat til Utenriksministeren av 18. februar 1963 og til PM fra UD, 2/9 1970.

[79] Førstevoterende uttaler at: "Når det gjelder saksforholdet, legger jeg som overskjønnsretten til grunn at slekt etter slekt i det distrikt hvor byene ligger, i hvert fall i ett hundreår før grensen ble fastlagt i 1751, har hatt boplasser ved Altevann med stabbur, skillegjerder, båter og annen redskap de trengte, og at lappene senere årvisst har brukt området med beite og fiske. Man må da som overskjønnsretten kunne fastslå at fra gammel historisk tid har lappene i dette område etablert og festnet en nødvendig bruk i næring." Det var ingen dissens i Høyesterett i denne saken (Linder 2004: 16).

ekspropriasjonsrettslig vern. Det var altså snakk om en privatrettslig rett som ikke var skapt av statenes lovgivning, men en rett som samene selv hadde ervervet, ”en urminnes hävd” (Linder 2004: 15). På grunn av dommens direkte relevans for den grenseoverskridende reindriften ville det være naturlig å anta at avgjørelsen fikk betydning for 1972-konvensjonen, og svenske samer så da også denne som et verktøy i forhandlingene med Norge (Linder 2004: 20). Men fra svensk statlig hold støttet man ikke synet om at Altevanndommen skulle tas opp i forhandlingene, og ville ”inte heller stöta sig med norrmännen” (Päivio 2006). Svenske myndigheters håndtering av den grenseoverskridende reindriften fram mot 1972-konvensjonen synes å følge et etablert mønster der man aksepterte norske krav om å holde rettsspørsmålene utenfor (jf. Norberg 2007: 70, 71).

Forhandlingsdelegasjonene gikk ut fra at konvensjonen så langt den rekker, når den ble omsatt til intern rett, skulle gi en prinsipiell og uttømmende regulering av reinbeitingen i det andre land. Utover konvensjonen kom nasjonal reindriftslovgivning til anvendelse i den utstrekning det framkom av konvensjonsteksten (St. prp. nr. 106 (1971-72): 5, 24). Den nye reinbeitekonvensjonen av 1972 mellom Norge og Sverige begrenset samenes rettigheter til sommerbeite i Norge fra 13.760 til 3.940 km2 (Innstillingen 2001: 43, 45). Områdene i Nordland ble redusert med 67% og i Troms med 70% (St. prp. nr. 106 (1971-72): 1). Norberg (2007: 85), som var den svenske forhandlingslederen i 2003, betegner dette for Norge som en ”mycket stor diplomatisk seger och ett lika stort svenskt nederlag. I ett slag hade norrmännen förmått den svenska regeringen att utan något som helst anspråk på erstättning ge bort huvuddelen av de svenska samernas sedvanegrundade betesrätter i Norge.” Når det gjelder synet på framtidig reindrift over riksgrensene etter 1972-konvensjonens utløp, het det fra norsk side:

> ”Hverken notevekslingen eller forslaget om den blandede kommisjon innebærer noen rettslig forpliktelse for partene til å la reinbeitingen over riksgrensene fortsette etter utløpet av den nye konvensjon. Begge parter vil således stå fritt til å vurdere problemkomplekset på ny når gyldighetsperioden på 30 år er utløpt.” (St. prp. nr. 106 (1971-72): 8).

Man antar at det ikke foreligger noen annen folkerettslig forpliktelse enn reinbeitekonvensjonene. Et hovedpunkt er at flyttlappers adgang til reinbeiting i Karlstad-konvensjonen skal oppheves, og at klausulen om at Lappekodisillen ikke ensidig kan oppsies av en av partene, faller bort (St. prp. nr. 106 (1971-72): 1). Fra svensk side er det ”sterke indikasjoner” på at man står på sitt gamle standpunkt om at statene har en gjensidig

folkerettslig forpliktelse til å holde grensene åpne så lenge reindriftssamene har behov for det. Men man ønsket ikke å sette dette på spissen, det svenske standpunktet var at Lappekodisillen ikke lenger var et brukbart regelverk og 1972-konvensjonen ble ansett å gi nødvendig sikkerhet for at reindriftssamenes interesser ville bli ivaretatt også etter år 2002 (NOU 1984: 18: 197, 198).

Stat, organisasjoner og forståelsen av konsultasjonsplikt

Samtidig med innskrenkede beiterettigheter for svenske samer, er etterkrigstiden en periode hvor norske reindriftssamer organiserer seg og etter hvert styrker sin innflytelse på norsk reindriftspolitikk. Norske Reindriftssamers Landsforbund (NRL) etableres i 1948, og har siden 1976 hatt forhandlingsrett med staten og ført selvstendige årlige forhandlinger. Som reindriftens næringsorganisasjon er man en del av den institusjonaliserte autoritetsstruktur, typisk for de skandinaviske landene der organiserte interesser i samfunnet er forbundet med beslutningsstrukturer i staten som kan betegnes som samfunnskorporativisme (jf Eriksen og Hernes 1989: 253). NRL ivaretar en viktig rolle som talerør for reindriftssamenes partsborgerrettigheter, og spiller følgelig en sentral rolle også i forhandlingene om den grenseoverskridende reindriften. Selv om dette er forhold som tas opp gjennom inter-governmentale forhandlinger mellom sektorer av den utøvende statlige myndighet, inngår NRL i de sektorbaserte interessene. Både statlige og ikke-statlige aktører opererer på tvers av nasjonale grenser.

En ny reinbeitekonvensjon skulle fra og med 2002 avløse 1972-konvensjonen, men denne ble forlenget med 3 år fram til 30. april 2005. Basert på driftsforhold, beiter og erfaringer med 1972-konvensjonen, foreslo den norsksvenske reinbeitekommisjonen konkrete tildelinger av grensebeiteområder (konvensjonsområder) til reinbeitedistrikter og samebyer i det andre land (jf Innstillingen, s105-123). Reindriftsnæringen på norsk side stilte seg negativ til forslagene, og hevdet at norsk reindrift ville få dårligere rammevilkår. NRL anbefalte et nytt grunnlag for sluttforhandlinger med Sverige (høringsuttalelse av 03.11.01). Svensk side uttrykte ikke samme motstand mot forslagene, og så i hovedtrekk sine interesser ivaretatt (Ot.prp. nr 75 (2004-2005): 2, 3), men Svenska Samernas Riksförbund (SSR) og noen samebyer hadde innvendinger mot noen foreslåtte områdeavgresninger (Regeringens skrivelse 2004/05:79).

I etterkant av høringsrunden ble det nedsatt et forhandlingsutvalg som ikke kom fram til løsninger.

I den svenske regjeringens redegjørelse til Riksdagen het det at vanskelighetene med å oppnå enighet først og fremst gjaldt hvilke områder i Sverige og Norge som det andre landets reineiere "får använda för sommar- respektive vinterbeten. Redan i ett tidligt stadium av förhandlingarna gjorde den norska förhandlingsdelegationen klart att man från norsk sida, mot bakgrund av remisskritiken i Norge, inte kunde acceptera en reglering av renbetesområdena i enlighet med Renbeteskommissionens förslag." I oktober 2004 ble det holdt et møte mellom den svenske og norske landbruksministeren, og den etterfølgende utvekslingen av synspunkter viste at partene "skiljer sig åt i väsentliga hänseenden, främst vad avser betesområdenas omfattning. En överenskommelse om innehållet i en ny konvention synes därför inte vara nära förestående" (Regeringens skrivelse 2004/05:79).

Høringene på norsk side viste at kommisjonsinnstillingen var omstridt. I næringskomiteens innstilling til Odelstinget om ny lov for midlertidig regulering av svensk reinbeiting (se under) ble reindriftsnæringens negative holdning påpekt (Innst. O. nr. 98 (2004-2005)). Tilgang til eller reduksjon i beiteområder framstod som avgjørende for hvordan man stilte seg til kommisjonsforslaget og videre framdrift. Ulike interesser var knyttet til beslutningsutfallet: i svensk interesse økte beiteområder, i norsk interesse reduksjon i den svenske beitebruken. Slik som i Karlstad-forhandlingene var det et mål for Norge å begrense svensk reinbeiting, "i Sverige var det et mål å sikre svenske reindriftssamer størst mulig alburom i Norge" (Lae 2003: 15). Løsningsforslagene fra kommisjonsinnstillingen på spørsmålet om beiteområder var ikke optimale sett fra de respektive nasjonale parters og organisasjonenes ståsted.

I en redegjørelse[80] til Riksdagen[81] påpekte den svenske regjeringen at det er vanskelig å forutse Lappekodisillens funksjon i praksis og at dette skulle tale "för en förlängning av 1972 års konvention tills denna kan ersättas av en ny överenskommelse mellan länderna." Imidlertid viste man til argumenter fra SSR om at samebyene ikke vil være tjent med en

[80] Denne redegjørelsen er forberedt sammen med Sametinget, Statens jordbruksverk, länsstyrelserna i Jämtlands, Västerbottens og Norrbottens län samt Svenska Samernas Riksförbund og den svenske reinbeiteforhandlingsdelegasjonen (Regeringens skrivelse 2004/05:79 Upphörande av 1972 års svensk-norska renbeteskonvention).

[81] Se Miljö- och jordbruksutskottets betänkande 2004/05:MJU12 av 15. mars 2005

forlengelse av 1972-konvensjonen.[82] I oktober 2004 fremmet det svenske Sametinget samme synspunkt og hevdet at en forlengelse ville utgjøre en risiko for samebyene "i ett civilrättsligt perspektiv." Den svenske regjeringen konkluderte med at det ikke bør skje en forlengelse av hensyn til reineierne og dette er redegjort for i en note til Det norske utenriksdepartementet av 21. januar 2005. Etter at forhandlingene ikke førte fram besluttet derfor den svenske regjeringen og Riksdagen at de ikke ønsket en ytterligere forlengelse av 1972-konvensjonen etter dens utløp per 1. mai 2005 (jf Regeringens skrivelse 2004/05:79), og henviste til kodisillen som grunnlag for det grenseoverskridende reinbeite fra 1. mai 2005. Dette var ikke den norske regjeringen enig i, og fastholdt at 1972-konvensjonen måtte forlenges med ytterligere tre år inntil en ny konvensjon kom på plass.

For å unngå en uklar rettstilstand fremmet den norske regjeringen et forslag overfor Stortinget om en ny lov som midlertidig skal regulere svensk reinbeiting i Norge (Ot.prp. nr. 75 (2004-2005)). Lovforslaget ble vedtatt av Odelstinget 14. juni 2005 (Innst. O. nr. 98 (2004-2005)). Under Odelstingets behandling uttrykte landbruksminister Sponheim at "det er nødvendig å gjøre dette vedtaket, slik at vi beholder den rettstilstanden vi har hatt i Norge fra 1972, som grunnlag for de forhandlinger som nå raskt må komme i gang." Saksordfører Ryan konstaterte følgende:

> "Vi har et problem når den svenske riksdagen gjør et vedtak der man sier at man skal praktisere et regelverk fra 1751, som gir svenske reindriftssamer mer landområder i Norge, mens det norske storting vedtar å praktisere 1972-regelverket, som da betyr noe annet" (referat, møte i Odelstinget 14.06.05).

Både saksordføreren og landbruksministeren understreket alvoret i ulikt regelverk og rettstilstand mellom de to land og behovet for å få forhandlingene "tilbake på det nødvendige sporet." Som det framgår av Innst. O. nr 98 (2004-2005), vedtas loven etter konsultasjoner med det norske Sametinget og NRL:

> "Landbruks- og matdepartementet har i henhold til ILO-konvensjonens artikkel 6 foretatt konsultasjoner med Sametinget og Norske Reindriftsamers Landsforbund. NRL har gitt sin tilslutning til at den forvaltning som foreslås i denne proposisjon var den beste løsningen av dagens situasjon. Sametinget ser behovet for en regulering i tillegg til Lappekodisillen, men presiserer at de ikke ønsker innført noen ny

[82] Våren og sommeren 2004 gjennomførte den svenske forhandlingsdelegasjonen møter med samtlige berørte samebyer. Alle ville avvikle 1972-konvensjonen. På SSR-landsmøtet i Vilhelmina, var det enighet om å motsette seg en forlengelse og et brev ble der og da overlevert den svenske jordbruksministeren (Norberg 2007: 94, 95, 96).

> rettstilstand som er til hinder for fremtidige løsninger og som endrer den folkerettslige situasjonen."

Her kan to forhold påpekes. For det første reagerte Sametinget i Norge på at loven framstod som en ensidig norsk handling som skal regulere svenske samers beiterettigheter på norsk side. Denne ensidigheten påpekes i et felles brev[83] til den norske og svenske statsministeren fra den norske sametingspresidenten og den svenske styrelsesordförande for Sametinget som er betenkt "…. over at det igangsettes ensidige tiltak fordi ensidige tiltak fra en part vil kunne utløse ensidige tiltak fra den andre part. Dette vil kunne forringe et framtidig forhandlingsklima og dermed muligheten for en løsning." Sametingene peker på at det har prinsipiell samepolitisk betydning at både "sametingene og de som berøres av den grenseoverskridende reindriften får mulighet til å komme fram til en løsning." Brevet indikerer at det norske Sametinget ikke var tilfreds med gjennomføringen av konsultasjonene. For det andre må det spørres om hvem som ble konsultert gitt departementets påpekning om at konsultasjonene skjedde i tråd med artikkel 6 i ILO 169. Et klart krav i ILO 169 er at de som er direkte berørt skal konsulteres. Loven handler i hovedsak om svensk reindrift i Norge, og de svenske reindriftsutøverne er dermed en gruppe som endringene i reinbeiteloven vil få direkte betydning for. Retten til å bli konsultert etter ILO 169 betinger ikke et statsborgerskap i den stat som er konvensjonspart. Hvis vedkommende urfolksgruppe har rettigheter, er de et direkte rettssubjekt etter ILO 169. Dette innebærer at representanter for de svenske samebyene med beiterettigheter i Norge, skulle vært konsultert i samsvar med ILO 169 art 6, men ble ikke det. En ny midlertidig lov for å regulere svensk reinbeite i Norge, kan fra et norsk ståsted ses på som et forsøk på å få til en funksjonell løsning som tvinger svensk reinbeiting til å følge 1972-regelverket fordi dette sikrer norske interesser best mulig i forhold til andre alternativer. Problemet er imidlertid at lovvedtaket strider med Norges folkerettslige forpliktelser. For det første bryter vedtaket med Lappekodisillen som på det tidspunkt vedtaket gjøres, er gjeldende i mangel av ny konvensjon. Dette førte til politisk reaksjon fra det norske og svenske sametinget, og den svenske utenriksministeren påtalte at loven "inte står i överensstämmelse med Norges folkrättsliga åtaganden enligt kodicillen."[84] For det andre unnlater Norge klart i strid med konsultasjonsbestemmelsene i ILO 169, å konsultere de svenske samene.

[83] Brev av 28.04.05 til statsminister Kjell Magne Bondevik, Norge og statsminister Göran Persson, Sverige.
[84] Brev fra utenriksminister Laila Freivald av 11.05.05 til den norske kollega (Norberg 2007: 106).

I etterkant av sametingenes felles brev uttalte NRL at man ikke ønsket en sterk involvering fra sametingenes side i nye forhandlinger.[85] Det var ikke ønskelig med andre aktører enn de direkte berørte. NRL syntes ikke å se et potensial i sametingskanalen, i motsetning til strategien på svensk side der SSR og Sametinget spilte mer på lag.[86] NRLs strategivalg kan blant annet ses i lys av organisasjonens mangeårige erfaring som part i ordinære forhandlinger der næringsaktørstrategier må vektlegges. Til forskjell fra næringsorganisasjonene og statene som parter, er sametingene nye i denne gamle konflikten.[87] Ofte kritiserer de statene for manglende oppfyllelse av folkerettslige krav og minstestandarder, og vektlegger folkeretten som rettsnor for statenes urfolkspolitikk. Lappekodisillen erkjenner at "de fremmede samer" har rettigheter i det andre land grunnet i sedvane og alders tids bruk. Dessuten begrunnes den samiske urfolksstatusen i samisk bruk og besittelse av områder før statsdannelsene fant sted (jf ILO 169, art. 1, pkt. 1, b). Derfor kunne man forventet at det norske Sametinget som var premissgivende i konsultasjonene om Finnmarksloven (Broderstad og Hernes 2008), i klar tekst hadde påpekt bruddet på statens konsultasjonsplikt overfor de svenske samene som ble begått i forkant av at Stortinget vedtok den midlertidige loven som regulerer svensk reinbeiting i Norge.

5. Hvorfor er ikke forhandlingsmekanismen tilstrekkelig?

Gjennomgangen viser at forhandlingene var preget av "hensiktsmessige løsninger" der partene framstod som statsbaserte grupper. Sakens karakter tilsier da også at reindriften forholder seg til sin egen stat. Særlig synliggjøres dette på norsk side med NRLs nære institusjonaliserte kopling til styringssystemet. Disse relasjonene er viktige for å sikre reindriftens muligheter til initiativ, påvirkning av vedtak og iverksetting av beslutninger. En selvsagt oppgave for en næringsorganisasjon er å ivareta interessene til egne medlemmer. Samtidig fører den tette forbindelsen mellom stat og organisasjoner til en ekspanderende stat med bestemte interessekonstellasjoner, mål-middelrelasjoner, forståelseshorisonter, forutsigbare problemdefinisjoner og løsningsforslag (Eriksen og Hernes 1989: 262). Koplingen mellom stat og egne interesseorganisasjoner fører i en forhandlingssituasjon til

[85] Uttalelse fra NRLs tidligere leder Aslak J. Eira til NRK Sámi Radio 02.05.05.
[86] Det nære forholdet mellom SSR og det svenske Sametinget bekreftes av leder i SSR Per Gustav Idivuoma i personlig meddelelse 02.06.05.
[87] Begge sametingene og representanter for næringen er representert i den nye forhandlingsdelegasjonen. Arbeidet er i skrivende stund ikke ferdigstilt.

begrensede alternativer, noe som synes å være en hovedforklaring på at det ikke ble oppnådd enighet innen fristens utløp. Inntrykket av partenes opptreden som statsbaserte grupper bekreftes i det følgende:

> ”Det er særlig i to spørsmål man står langt fra hverandre. Det ene spørsmålet er fordelingen av beiteområdene, og det andre er et svensk ønske om å ta med en vidtgående konstatering av rettstilstanden vedrørende privatrettslige beiterettigheter i konvensjonen. Bak begge disse forhold ligger en oppfatning på svensk side, om at de svenske samebyer fra gammelt av har hatt en rett til reinbeite i Norge, som «urettmessig » er blitt tatt fra dem ved de forskjellige reinbeitekonvensjoner, senest ved reinbeitekonvensjonen av 1972. Man har fra norsk side ikke kunnet akseptere en slik konstatering av rettstilstanden som svensk side har foreslått. Det må være domstolene som tar standpunkt til hvilke privatrettslige rettigheter som foreligger og hvilke konsekvenser de tidligere reinbeitekonvensjonene eventuelt har hatt i den forbindelse” (Innst. O. nr 98 (2004-2005)).

En naturlig konsekvens er et hovedfokus på spørsmålet om økning versus reduksjon av beiteområder, og dette null-sum-spillet kan ytterligere forklare forhandlingsbruddet. Den uavklarte rettighetssituasjonen gjør det vanskelig å finne løsninger, og forsterker de ustabile aspektene ved situasjonen. Løsninger som framstår som et resultat av forhandlinger kan i neste runde framstå som urettferdige og uakseptable. Det er klart at til tross for en tydelig Høyesterettsdom har man fra norsk politisk hold ikke sett det hensiktsmessig med en avklaring av rettighetsspørsmålene. En av begrunnelsene for å opprette nye mellomstatlige organer for forvaltning og tvisteløsninger begrunnes med at det råder mistro mellom administrative myndigheter i det ene land og reindriftsutøvere i det andre, og til en viss grad også mellom landenes administrative myndigheter.[88] Gjennomgangen av sentrale aktørers syn, reaksjonene på kommisjonsinnstillingen og forhandlingsposisjonene forsterker inntrykket av mistro mellom norsk og svensk side. På grunn av mistenksomhet partene imellom er det grunn til å anta at legitimitetsgrunnlaget i samhandlingssituasjonen var heller tynt, og at dette ikke ble forbedret ved at Norge vedtok en ensidig lov. Heller ikke svensk håndtering av saken synes å ha bidratt til styrket tillit, fra norsk side oppfattes det som om ”at Sverige har brutt forhandlingene ved å si opp avtalen” (Reindriftsnytt nr 1, mars 2005:19, med avtale henvises det til 1972-konvensjonen). Følgelig kan bruddet i forhandlingene betraktes som rasjonelt, partene opptrer strategisk rasjonelt og kan anta at deres syn vil vinne fram i neste runde. Men problemet er at gyldigheten til sentrale synspunkter ikke blir testet.

[88] Jf kommentarene til konvensjonstekst i Innstillingen, s. 137.

Reindriftssamer fra svensk side påberoper seg rettigheter ved å vise til prinsippet om alders tids bruk og sedvanemessige rettigheter som er anerkjent i Lappekodisillen. Samer fra norsk side hevder som et motsvar at sedvanemessige rettigheter opparbeides ved at reindriftsretten i seg selv er kollektiv. Flytter man fra et område, videreføres retten til andre reineiere i det fraflyttede området.[89] Opphører reindriften i et område, overtar andre retten til reindrift i det de overtar bruken av det aktuelle området. Samme resonnement legges til grunn av Kjell Eliassen, leder av den norske forhandlingsdelegasjonen:

> "På norsk side mer vi at store beiteområder i Norge som tidligere har vært brukt av svenske samebyer, ble oppgitt frivillig. (…….) Og vårt syn er – og det er så vidt jeg forstår i tråd med den fremherskende oppfatning i reindriftsnæringen – at når en reindriftsenhet trekker seg ut av et reinbeiteområde, og området blir stående tomt, så har andre reindriftsamer rett til å ta det i bruk" (Eliassen 2007: 168).

Lars Norberg (2007) hevder på den annen side at de svenske samene i forkant av 1972-konvensjonen ble fratatt mesteparten av sine beiteområder på norsk side, uten at samene gav samtykke og langt fra mottok kompenasjon for tap av beiteområder. I følge Norberg er dette er et sivilrettslig overgrep i strid med nasjonal lovgivning og internasjonale menneskerettighetsregimer. Skranker for regulering av samisk bruk av land uavhengig av statlig styring og forvaltning av land og vann, må også forventes å gjelde for personer og grupper som med grunnlag i sedvane og alders tids bruk har opparbeidet seg rettigheter.

Begge parter viser til sedvanemessige rettigheter. Slike forhold som kontinuitet i bruk av områder, brudd på bruk, når tid bruken opphørte og årsaken til opphørt bruk, er spørsmål som vanskelig kan avklares gjennom forhandlinger fordi det her er snakk om besittelse og tap av rettigheter. Tap av sivil- og privatrettslige rettigheter reiser videre spørsmål om kompenasjon. Forhandlingsinstitusjonen kan bidra til kompromisser om beiteområdebruk, men ikke til en avklaring av rettighetsforhold. I den grad begge sedvaneforståelsene kan påberope seg å være rettferdiggjort, spørres det om hvordan en slik rettsnormkollisjon skal håndteres. I lys av anvendelsesdiskursbegrepet kreves en prosedyre hvor alle relevante trekk ved situasjonen gis lik behandling (Eriksen og Weigård 1999: 187).

[89] Jf blant annet oppslag i Ságat 14.05.05 om ulike beiteinteresser mellom Saarivuoma sameby i Øvre Soppero og Hjerttind/Altevatn reinbeitedistrikt i Troms. Se også KRDs nyhetsliste: Samiske nyheter - 10. mai 2005: "Slår tilbake mot svenske samer". I uttalelsen fra Per Mathis Oskal heter det bl.a. "Det er nemlig slik at man har rettigheter i et område, så lenge man driver reindrift der. Men reindriftsretten i seg selv er kollektiv. Flytter man til andre områder, videreføres retten til andre reineiere." Poenget med at beiteretten følger de som har brukt områdene i den senere tid, uttrykkes også i artikkelen: "Svensk reindrift kan aksjonere" i Reindriftsnytt – Boazodoallo oddasat nr 1- mars 2005. Oskal var medlem i forhandlingsutvalget i den fasen av prosessen som her er omtalt.

Slik sett framstår juridiske prosedyrer og den foreslåtte tvistenemnden som et svar på utfordringen med å avklare sedvanemessige rettigheter. Likeså vil forslaget fra Samerettsutvalget om kartlegging og anerkjennelse av eksisterende rettigheter i de tradisjonelle samiske områdene fra og med Troms fylke og sørover (NOU 2007: 13, kap. 12, 13), kunne bli et slikt avklaringsredskap.

Gruppen av berørte parter som kan påberope seg rettferdiggjorte normer strekker seg ut over statsborgerfellesskapet. Problemene oppstår fordi forhandlingsarrangementet ikke tar høyde for denne kompleksiteten og fordi forhandlinger ikke egner seg som mekanisme for å avklare rettighetskrav. Derfor må for det første argumenter for offentlig politikk ikke bare referere til et samisk eller politisk fellesskap, men også må vise til berørte utenforståendes rettigheter. For det andre kreves deliberative prosedyrer for å kunne avklare hva som er relevante normer fordi forhandlinger ikke kan si noe om hvilke normer som er riktig når det oppstår rettsnormkollisjoner og uenighet om empiriske saksforhold. Det gjelder å definere og velge ut spesielle trekk ved situasjonen som normativt relevante. Gjennom deliberative prosedyrer kunne en tatt stilling til hvordan Lappekodisillens rettighetsanerkjennelse har relevans for dagens grenseoverskridende reindrift.

I lys av en slik situasjon blir det viktig å finne institusjonelle løsninger som partene kan enes om, som oppleves som rettferdige og framstår som stabile. Dette er ikke til å unngå fordi saken i tillegg til å gjelde ordinære næringsinteresser, også omfatter grunnleggende rettighetsspørsmål som framtvinger et søkelys på prosedyrer for ivaretakelse og regulering av slike rettigheter. Debatten om rettighetsvern og adekvate prosedyrer for problemløsning må ta høyde for at konfliktlinjene ikke bare går mellom stater og statsbaserte grupper, men også på tvers av kulturelle fellesskap med motstridende interesser.

6. Nye samiske rettsfellesskap?

Etter hvert ble de rettsprinsipper som lå til grunn for Lappekodisillen fraveket i håndteringen av den grenseoverskridende reindriften. Statene ønsket mer ”hensiktmessige” løsninger. Den økende spenningen som etter hvert oppstod mellom ”rettighetshensyn” basert på samisk grenseoverskridende selvregulering av reindriften og ”interessehensyn” var ikke i samme grad tilstede i 1751.

At disse hensynene etter hvert kom på kollisjonskurs må ses i sammenheng med nasjonalstatlige interesser, koloniseringen av blant annet indre Troms og senere utvikling med konkurranse om beiteområder.

Spenningen mellom ”rettighetshensyn” og ”interessehensyn” ble forsterket gjennom ny lovgivning og reguleringer. Norsk side lyktes i å holde sedvaneproblematikk og rettighetsspørsmål borte fra sakskartet. NOU 1984:18 viser til at det er snakk om sedvanedannelse med faste bruksmønstre og kontinuerlig bruk som har vært utviklet og hevdet i forhold til andre bruks- og rettspretendenter. Den norske motviljen mot Lappekodisillen kan forstås ut fra at det foreligger et folkerettslig grunnlag for en slags svensk servitutt eller heftelse over norsk territorium som innebærer en suverenitetsbegrensning til fordel for Sverige:

> ”Det er neppe så mye forpliktelsen overfor reindriftsamene som har vært uønsket, som det at den svenske stat skulle ha en traktatfestet adgang på ubestemt tid til å få et ord med i myndighetsutøvelsen over norsk territorium. Det er suverenitetsforholdet mellom statene som har vært fokusert, ikke spørsmålet om en gjensidig, solidarisk forpliktelse for statene overfor reindriftsamene i begge land. Det er ikke uten videre gitt at Norge har avvist en forpliktelse av denne art, bygd på lokal folkerettslig sedvanerett” (NOU 1984:18: 199).

I 1972 beskrev norske myndigheter dette som følger: ”Mangelen på reell gjensidighet med hensyn til fordeler av reinbeiting over grensen innebar imidlertid at Lappekodisillen særlig ble hvilende på Norge, som et evigvarende servitutt” (St. prp. nr. 106 (1971-72): 2).

Gjennomgangen har da også vist at uenigheten innen forhandlingsfristens utløp må ses i lys av statenes tidligere håndtering av saken der norske suverenitetshensyn var tungtveiende, og der svenske standpunkt gikk ut på å ikke sette saken på spissen. Dette kan illustreres med at Sverige ikke gjorde Altevanndommen relevant for 1972-konvensjonen. ”Den svenska delegationen hade inget intresse att använda denna dom i förhandlingarna, och detta gjordes inte heller. Dessa argument kunde tänkas slå tillbaka i Sverige och samernas rätt där” (Päivio 2007). I forhandlingene som brøt sammen i 2005, er koplingen mellom stat og interesseorganisasjon tydelig. Ingen av partene ser seg tjent med løsningsforslagene. Interessepolitikk belyser uenigheten når det gjelder synet på beiteområdetilgang der den ene part taper på bekostning av den andre.

Men uenigheten kan ikke kun forstås ut fra en strategisk handlingsinnstilling hos partene. Gjennomgangen viser at rettighetsspørsmål hele tiden har vært en del av debatten. Rettighetskrav i seg selv kan selvsagt ses som et uttrykk for interessekamp, men hvorvidt disse kravene fortjener anerkjennelse kan ikke avgjøres i forhandlinger preget av tautrekking og ut fra hvem som har størst makt og besitter flest ressurser. Antakelsen om at rettighetsspørsmål ikke har vært tungtveiende hensyn i statenes håndtering av saken, bidrar også til å belyse stridighetene. Uten at rettighetene blir tatt hensyn til, må en anta at framforhandlende løsninger fortsatt vil framstå som ustabile. Nettopp en slik erkjennelse vedrørende problemer med manglende identifisering og anerkjennelse av rettigheter, lå til grunn i Finnmarkslovprosessen. Saken illustrerer at rettsnormer kan stå mot hverandre, samtidig som normene kan rettferdiggjøres og påberopes som gyldige for de aktuelle fellesskap. For å kunne ta stilling til normkollisjon om sedvanemessige rettigheter kreves prosedyrer som sikrer deliberasjon om rettsnormenes sammensatte gyldighetsgrunnlag. Derfor påpekes nødvendigheten av prosedyrer som ville ha tilrettelagt for både politiske løsninger og juridiske avklaringer, og bedre bidratt til gjensidig forståelse for hverandres situasjon. Det er gjennom prosedyrene vi kommer fram til svarene, disse kan heller ikke tas for gitt, men må kunne kritiseres og prøves igjen. Rammene for en slik rettslig debatt må fastsettes gjennom en politisk diskurs. Prosedyrene garanterer ikke riktige svar, men garanterer at resultatene kan testes på nytt dersom det er grunn til å tvile på riktigheten i svarene (jf Eriksen og Weigård 1999:14).

Fokus må settes på prosedyrer og institusjonelle rammer for hvordan motstridende normer skal avveies illustrert med forslagene om grenseoverskridende forvaltnings- og tvistenemnder. Det kreves en diskurs om politiske løsninger og praktiske spørsmål og en juridisk diskurs om vern og regulering av sivil- og privatrettslige forhold. I den grenseoverskridende reindriften må det åpnes opp for at politiske beslutninger kan treffes og rettigheter reguleres på et annet nivå enn det nasjonalstatlige, noe Nordisk samekonvensjon (2005) også legger opp til gjennom forslaget om inngåelse av lokale avtaler mellom reindriftsgrupper på tvers av statsgrensene. Slik sett er dette generelle spørsmål som belyser hvordan substatlige og transstatlige grupper kan utfordre statens handlemåte og suverenitet.

Lappekodisillen synes å være forut for sin tid. Som et datidig folkerettslig instrument anerkjente den samiske rettigheter og sedvanemessig praksis. Men også i Lappekodisillen reflekteres dilemmaet mellom rettighetsanerkjennelse og statsborgerskapets prinsipp om å

tilhøre et partikulært politisk fellesskap. Kodisillen i seg selv ble et redskap for å bøte på dette. Dermed kan det trekkes en rød tråd fra Kodisillen til dagens forslag om grenseoverskridende løsninger som framstår som en institusjonell mekanisme som kan ivareta til dels motstridene hensyn og rettsnormer.

Referanser:

Benhabib, Seyla (2004) *The Rights of Others. Aliens, Residents and Citizens*. Cambridge University Press

Berg, Bård A. (1999) *Den samiske retten til reindrift ved overgangen til et nytt århundre*. Prøveforelesning for doctor artium-graden ved Det samfunnsvitenskapelige fakultet, Universitetet i Tromsø, 1999

Berg, Roald (1995) *Norsk utenrikspolitikks historie*. Bd. 2. Norge på egen hånd 1905-1920. Oslo

Broderstad, E. G. og Hernes, H-K. (2008) 'Gjennombrudd ved konsultasjoner? Finnmarksloven og konsultasjonsordningen i Stortinget' in Hans-Kristian Hernes and Nils Oskal (red): *Finnmarksloven.* Oslo: Cappelen Akademisk, 2008 (forthcoming).

Cohen, Jean L. (1999) 'Changing Paradigms of Citizenship and the Exclusivenss of the Demos.' In *International Sociology*, Vol 14 (3): 245-268, 1999, SAGE (London, Thousand Oaks, CA and New Delhi)

Eliassen, Kjell (2007): 'De norsk-svenske reinbeiteforhandlinger 2003-2005. Hva består problemene i?' I *Grenseoverskridende reindrift før og etter 1905*. Broderstad, Niemi, Sommerseth (red.) Skriftserie, Senter for samiske studier, nr 14. Universitetet i Tromsø

Elster, Jon (1992) 'Arguing and Bargaining in the Federal Convention and the Assemblee Constituante' in Malnes, R. og Underdal A. (red) *Rationality and Institutions*, Oslo: Universitetsforlaget

Eriksen, Erik Oddvar (1994) 'Den politiske diskurs - fra konsensus til modus vivendi?' I *Den politiske orden*, Eriksen, E. O. (red.) Tano

Eriksen, Erik Oddvar (2003) *Why a Charter of Fundamental Human Rights in the EU?* Reprint. No 26, November 2003, ARENA

Eriksen, Erik Oddvar, Hernes, Hans-Kristian (1989) 'Korporativisme og demokrati' I *Norsk Statsvitenskapelig Tidsskrift* 3/89, 251-265

Eriksen, Erik Oddvar, Weigård, Jarle (1999) *Kommunikativ handling og deliberativt demokrati. Jürgen Habermas' teori om politikk og samfunn*. Fagboklaget

Günther, Klaus (1989) 'A Normative Conception of Coherence for a Discursive Theory of Legal Justification' *Ratio Juris* 2:155-166

Habermas, Jürgen (1994) ’Om den interne forbindelsen mellom rettsstat og demokrati’ I Eriksen, E. O. (red) *Den politiske orden*, Tano

Habermas, Jürgen (1996) *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*. The MIT Press, Cambridge, Massachusetts

Hansen, Lars Ivar, Olsen, Bjørnar (2004) *Samenes historie fram til 1750*. Cappelen Akademisk Forlag

Hekland, Bård (2005) *Kampen om Kaspiahavet 1991-2004*. Hovudfagsoppgåve i statsvitenskap. Universitetet i Tromsø

Held, David (2002) ‘Law of States, Law of Peoples: Three Models of Sovereignty’ In *Legal Theory*, 8 (2002), 1-44. Cambridge University Press

Indset, Marthe (2001) *Subsidiaritetsprinsippet i EU etter IGC-1996*. ARENA Report No 6/2001

Innst. O. nr. 98 (2004-2005) *Innstilling fra næringskomiteen om lov om endringer i lov 9. juni 1972 nr 31. om reinbeiting i henhold til konvensjon av 9. februar 1972 mellom Norge og Sverige om reinbeite*

Lae, Erling (2003) *Karlstadkonvensjon til reinbeitekonvensjon*. Dieđut Nr. 4 – 2003, Kautokeino: Nordisk Samisk Institutt

Linder, Björn (2004) *Svenska samers rätt i Norge. En studie av svenska renskötande samers rätt i Altevatnområdet*. Examensarbete. 20 poäeng. Umeå universitet. Juridiska institutionen

Norberg, Lars (2007) *Begrav mitt hjärta vid Udtjajaure*. Emma publishing

Nordisk samekonvensjon. Utkast fra finsk-norsk-svensk-samisk ekspertgruppe. Avgitt 26. oktober 2005

Norske Reindriftsamers Landsforbund: Høringsuttalelse av 03.11.01

Norsk-Svensk Reinbeitekommisjon av 1997: Innstilling, avgitt mai 2001

NOU 1984: 18 *Om samenes rettsstilling*

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

NOU 2007: 13, Bind A og B *Den nye sameretten. Utredning fra Samerettsutvalget*

Odelstinget: Referat fra møte 14.06.05

Ot.prp. nr. 75 (2004-2005) *Om lov om endringer i lov 9. juni 1972 nr.31 om reinbeiting i henhold til konvensjon av 9. februar 1972 mellom Norge og Sverige om reinbeite*

Päiviö, Nils Johan (2007) ’Gränsöverskridande renskötsel. Historisk belysning.’ I NOU 2007: 14 *Samisk naturbruk og rettssituasjon fra Hedmark til Troms. Bakgrunnsmateriale for Samerettsutvalget*

Putnam, Robert D. (1988) ‘Diplomacy and Domestic Politics: The Logic of Two-level Games’ i *International Organizations*, 42, 3: 427-460

Regeringens skrivelse 2004/05:79 ”Upphörande av 1972 års svensk-norska renbeteskonvention” av 03.02.2005 til Riksdagen

Reindriftsnytt – Boazodoallo oddasat Nr 1- mars 2005, 39. årgang

Sametinget i Norge:

Møtebok 02/02, sak 18/02: Innstilling fra Norsk-svensk reinbeitekommisjon av 1997
Brev av 28.04.05 fra det norske og svenske Sametinget til den norske og svenske statsminister: Reinbeitekonvensjonen mellom Norge og Sverige

Sametinget i Sverige:

Forslag til remissyttrande fra styrelsen: Betänkande avgivet av svensk-norska renbeteskommissionen av år 1997
Høringsuttalelse av 20.12.01 til Regeringskansliet, Jordbruksdepartementet: Betänkande avgivet av svensk-norska renbeteskommissionen av år 1997

Sara, Ole K. (1998) ’Norske reindriftsmyndigheters syn på kodisillen og ny reinbeitekonvensjon’ i *Lappekodisillen. Den første nordiske samekonvensjon?* Dieđut nr 3/1998, Kautokeino: Sámi Instituhtta

Simon, Herbert A. (1945) *Administrative Behavior*. New York: Free Press

Smith, Carsten (1995) ‘The Development of Sami Rights since 1980’ i Brantenberg, T., Hansen, J., Minde, H. (eds) *Becoming Visible*. Centre for Sami Studies, University of Tromsø

St. prp. nr 136 (1962-63) *Om samtykke til inngåelse av visse avtaler med Sverige vedrørende Reinbeitespørsmålet*. Tilrådning fra Utenriksdepartementet av 31. mai 1963, godkjent ved kongelig resolusjon samme dag

St. prp. nr 106 (1971-72) *Om samtykke til ratifikasjon av en konvensjon av 9. februar 1972, med tilhørende protokoll og noteveksling, mellom Norge og Sverige om reinbeite*. Tilrådning fra Utenriksdepartementet av 10. mars 1972, godkjent ved kongelig resolusjon samme dag

Strøm Bull, Kirsti (1997) *Studier i reindrifsrett*. Tano Aschehoug

Strøm Bull, Kirsti (2005) ’Lappekodisillen og 1905’ i Mestad, O., Michalsen, D. (red), *Rett, nasjon, union. Den svensk-norske unionens rettslige historie 1814-1905*. Universitetsforlaget

Wæver, Ole (1992) *Introduktion til Studiet af International Politikk*. Forlaget Politiske Studier. Institut for Statskundskab. København

Chapter VI

The Bridge-Building Role of Political Procedures

Chapter VI: The Bridge-Building Role of Political Procedures

1. Introduction

The possibilities proposed within theoretical debates concerning indigenous rights and the institutionalization of indigenous issues provide various answers as to how indigenous rights can be accommodated in democratic polities. In this thesis the focus has been on how political procedures between indigenous peoples and the state can explain mutual recognition and political integration in light of the deliberative understanding of democracy. The government of a state must be representative of all the people, not simply the majority. If there is a lack of consensus between long established minorities whose cultural traditions pre-date the establishment of the state and the dominant majority, the basis of legitimacy for majority rule is absent (cf. Wheatly 2003: 511, 519).

Recognizing these relationships in theoretical and political debates calls for special procedures of influence, participation, recognition of land claims and self-government arrangements for indigenous peoples. The basic idea that indigenous peoples have a right to internal self-determination is widely endorsed throughout the international community (Kymlicka 2007: 208). This is most explicitly stated in Article 3 of the UN Declaration on the Rights of Indigenous Peoples: "Indigenous peoples have the right of self-determination. By virture of that right, they freely determine their political status and freely pursue their economic, social and cultural development."[90] The Declaration recognizes indigenous rights over territory and resources, as well as rights to autonomous legal, political and cultural institutions, and provides evidence that the very strategy of developing targeted norms is legitimate and effective (Kymlicka 2007: 272).[91] Given the salient principle of self-determination for indigenous peoples, I have chosen to address some conditions concerning the implementation of the principle of Saami self-determination as a premise for answering the main question of what political procedures apply between indigenous peoples and the state

[90] In exercising this right to self-determination, indigenous peoples have the "right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions" (UN Declaration on the Rights of Indigenous Peoples, Article 4).

[91] A main concern for Kymlicka (2007) is the lack of global targeted norms directed at national minorities. "The sharp distinction in legal status between indigenous peoples and national minorities is creating a number of paradoxes and perverse effects that may ultimately destabilize the indigenous track itself" (p. 273).

for reconciling the defense of indigenous rights with the principle of equal citizenship. By doing so I also examine how reflexive procedures have contributed to effects like mutual recognition and political integration.

The introduction chapter presented a juridical and a political approach for how the indigenous population and the state can relate to one another. The approaches constitute an analytical tool from which I derive some relevant aspects of judgment and distinct features of the understanding of indigenous self-determination as in the Saami case, and from which I expose relevant assessments of political procedures regarding the terms of cooperation and the definition of justice. The procedures yield an impartial point of view, an important presupposition in a deliberative understanding of democracy. Norms and institutional arrangements are valid only if all parties who would be affected by their consequences can participate in a practical discourse through which the norms are adopted (Benhabib 2002: 11).

The juridicial model of justice defines an authoritative position of impartiality prior to the judicial and political application, a right-based normative framework of self-determination. In a political model of justice, impartiality results from real discussions among affected parties. Based on this division, I raise the following questions in order to conclude the discussions presented in the thesis: *How has the distinction between a juridical and a political approach allowed for a better understanding of mutual recognition and political integration in the processes of implementing indigenous self-determination?* Institutionalized procedures can induce critical self-examination and justificatory processes through which actors are forced to argue their case. Institutional reflexivity accounts for increased recognition and political integration. How can the degree of trust, political influence and inclusion of Saami concerns in a common political and legal framework be indicated in order to come to a conclusion concerning the realization of the effects of mutual recognition and political integration?

So far the most prominent outcome of this development is the use of consultations prior to the Norwegian Parliament's decision on the Finnmark Act, a development which has taken place within the framework of the unitary nation-state and which has strengthened the place of the indigenous in the citizenry. The nation-state proves its protective and inclusive approach towards the Saami as an indigenous people.[92] But what if the indigenous are non-citizens, but

[92] This policy of recognition is of a more recent date, going back about three decades. The integrative character of post-war processes in the Nordic countries and the development of the welfare state imply that the Saami are

still possess rights and are affected by state policies like in the cross-border reindeer husbandry case? This case could turn out to be the litmus test in how the Norwegian nation-state handles indigenous rights. Thus, in summing up I will question the nation-state's use of procedures in handling indigenous rights within and across the border. Why is it so difficult to apply the 'lessons learned' in the Saami-Norwegian context for the 'foreign' Saami?

The question posed above related to the juridical and political positions, is first addressed by outlining considerations which need to be taken into account in an assessment of alternative procedures. These considerations can be regarded as procedural conditions for an assumed mutual recognition and political integration. Different issues require different procedures. Besides, as mentioned in the introduction, I assume the procedures have strengthened the 'bonds' between Saami and citizenship rights; these effects will be discussed in the subsequent section. Based on a concept of institutional reflexivity, trust and political influence are regarded as indicators of mutual recognition and political integration. By doing this my intention is to point to the gains but also possible pitfalls in the process of implementing Saami self-determination. Notwithstanding, the Saami have gained recognition based on arguments about cultural diversity and about being in a permanent minority position which has resulted in several advances within the nation-state. But this consolidation of the Saami citizenry has only to a varying degree taken place in Finland and Sweden. Thus, has EU-membership any implications in this respect? Moreover, does recognition within the Norwegian nation-state also relate to the Saami who are non-citizens? In the fourth section I sum up the problems associated with applying procedures in the cross-border reindeer husbandry dispute. Finally and, in order to conclude, I will draw the lines of argument together and summaraize with regard to the thesis' main question on whether and how the procedures have contributed to a closer relationship between the Saami citizenry and the political community as a whole. This topic is of particular importance for the more general debate about what constitutes the basis for political order and citizens' loyalty in political communities in ethnically complex societies.

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not a disadvantaged group when it comes to social inequalities and poverty. Another aspect of this policy of equality resulted, however, in standardization and further cultural assimilation.

2. Prospects of impartiality and affected parties

The two positions presented in the introduction–the juridical and political–emphasize different conditions as they relate to indigenous political participation and protection of rights. Is it possible to achieve impartiality in political processes in such a way that inequality between equal legitimate interests is avoided and do all affected parties have the possibility to participate in a practical discourse through which norms are adopted? The procedures generate principles of justice that do treat all individuals as equals and define the *subjects* and *limits* of public policies. In this regard, subjects of public policies pertain to indigenous peoples' participation *as indigenous* in exercising popular sovereignty and self-determination within the framework of the nation-state. Limits of public policies pertain to the question of legal protection of indigenous peoples' customary rights to land and water.[93]

In the sections to follow, I will first discuss the limits of public policies from the juridical position, i.e. legal protection of customary land rights as it appears in the debate on the Finnmark Act. Secondly, seen from a political position, I will address the possibilities of inclusion and participation in common procedures. Furthermore, as a response to the different types of disputes in question, the need for different procedures will also be highlighted.

The juridical position

Legal protection of customary land rights

A widely accepted legal norm is that anyone who can provide the reasons for their land use based on principles of immemorial usage and other forms of acquisition of legal rights are entitled to have existing rights recognized. Indigenous peoples' customary rights shall be protected at the same level as other non-indigenous users' customary rights within the nation-state. These issues turn out to be about private and universal rights that apply to everyone in the same situation, but this understanding cannot be taken for granted. In the Saami case, the nation-state has considered itself the owner of large areas of land in a private-legal sense.

[93] I am aware that in the article on political autonomy and integration of authority in this thesis' second chapter, I am not paying attention to the necessity of separating political participation rights from land rights understood as private rights in need of protection from public policies. My review of ownership and possession rights of ILO 169 only focuses on indigenous peoples' participation in autonomy and joint governance arrangements (Broderstad 2001: 160, 161).

This state of the law has been contested by legal experts and Saami themselves. State authorities have reluctantly admitted that the role of the state as the simultaneous executive authority and owner has been blurred. This admission became evident in the preparatory work for the Finnmark Act. The government stated that based on the recent legal domestic development and on the development of international law it is difficult to conclude for certain that the state can maintain its right of ownership. The state acknowledged the need to distinguish between state supervisory authority and owner possession (cf. Ot. Prp. No 53 (2002-2003): 62, Innst. O. nr. 80 (2004-2005)). The result of this admission was that the formerly state-owned land was conferred to a new land-owning body called the Finnmark Estate.[94] In addition, an arrangement to identify and recognize existing land rights in the county of Finnmark was established by law. The recognition of indigenous peoples' customary rights to land and water finds expression in section five of the Finnmark Act, where it is maintained that the act "does not interfere with collective and individual rights acquired by Sami and other people through prescription or immemorial usage. This also applies to the rights held by reindeer herders on such a basis or pursuant to the Reindeer Herding Act." The survey and recognition commission shall investigate rights of use and ownership to the land taken over by the Finnmark Estate. If the involved parties are not in agreement with the commission's conclusions, even after mediation, the dispute shall be considered by a special court–the Uncultivated Land Tribunal for Finnmark (cf. chapter five of the Finnmark Act). The Norwegian Parliament's Standing Committee on Justice emphasized that the work of the commission and the tribunal must be based on current law, the task is solely to identify established rights of groups and individuals, existing rights that the right-holders have not obtained on "paper" (Innst. O. nr 80 (2004-2005)).

As highlighted in the third chapter of this thesis, despite different interpretations of the impact of obligations derived from ILO 169, the legal experts involved presented an unambiguous reading regarding the necessity to identify and recognize existing Saami rights to land and water. Moreover, this right does not only relate to Saami groups and individuals, but to all who are in the same situation. Surveying and recognizing rights based and justified on the indigenous experience contribute to the unveiling of similar injustices experienced by non-

[94] The Finnmark Estate *(Finnmarkseiendommen)* is an independent legal entity which shall administer the land and natural resources that it owns. The board of the estate is composed of three members elected by the Saami Parliament and three members elected by the Finnmark County Council.

Saami. The survey and recognition arrangement stands out as a right-based normative framework from which rights of all those affected can be expressed, thus the claim of impartiality regarding affected parties is safeguarded within this framework. The norms chosen are basically principles of the constitutional state, implying that there are some limitations and restrictions put on the government regarding indigenous customary rights. There are no factual or normative reasons for treating indigenous peoples' customary use in a different way than the customary use of other citizens. A majority of the Committee on Justice referred to this understanding when they stated that in principal terms the Saami have through immemorial usage gained rights to land in Finnmark. These rights are obtained independent of ethnic origins (Innst. O. nr 80 (2004-2005): 15). The juridical approach highlights preferences, principles and rules in an authoritative position of impartiality which applies to all parties in the same situation. Rights become necessary in order to counteract the arbitrariness of political decisions. They stand out as preconditions for public policies at the same time as the legal claims "presuppose collaboration among subjects who recognize one another, in their reciprocally related rights and duties, as free and equal citizens" (Habermas 1996: 88).

The political position

Participation and the prospects of impartiality

Taken from the second position–the political one–impartiality can be achieved by securing self-representation of groups into the deliberations about justice. Justice becomes a question of establishing the terms of mutual recognition so that everybody's interests and values are taken into account (Eriksen 2005: 266). The role of public spaces in which group differences can be recognized, affirmed and inform policy, and where justice is reshaped as a result of public deliberation, becomes decisive. Deliberations which occur in public improve the quality of political justification and decision-making (cf. Bohman 1996: 26). The deliberative model focuses upon non-coercive and non-final processes of opinion formation in an unrestricted public sphere. Within deliberative democracy there is no presumption that moral and political dialogues will produce normative consensus, but the dialogues in the public sphere will contribute to substantiated reasons in the public and enhance the civil virtues of democratic citizenship by cultivating the habits of mind of public reasoning and exchange (Benhabib 2002: 115). Benhabib (2002: 8) argues that the task of democratic equality is to

create impartial institutions in the public sphere and civil society where the struggle for recognition of cultural differences and the contestation for cultural narratives can take place without domination. The main focus is put on institutional aspects, on the possibilities to achieve impartial institutions and procedures.

But is it possible to achieve impartial institutions or procedures? Is it possible to avoid structural bias when there is an inequality of social power? According to Young (1990), the ideal of impartiality is an idealist fiction:

> "It is impossible to adopt an unsituated point of view, and if a point of view is situated, it cannot stand apart from and understand all points of view. It is impossible to reason about substantive moral issues without understanding their substance, which always presupposes some particular social and historical context; and one has no motive for making moral judgments and solving moral dilemmas unless the outcome matters; unless one has a particular and passionate interest in the outcome" (Young 1990: 104-5).

Williams (2000: 142, 143) argues that deliberative processes must be transformative, they must correct the past biases of social arrangements in ways that other models of deliberative democracy seldom contemplate, yet at the risk of being even more utopian than the ordinary understanding of deliberative democracy. But according to Williams this is not a utopian ideal and it is possible to motivate privileged groups to listen to the claims of marginalized groups because of a desire to be just, or at least to be able to justify one's position, and a need to stem conflict in order to avoid costs. In this respect the indigenous movement is illustrative: the results of the legal and political achievements could be viewed as a way to align former unjust political practices, and a way to avoid conflicts that could discredit the good reputation of the state. For many Western countries it also becomes a question of good practices. Derived from this line of argument, the motive of the common good of justice and the motive of interest are much more closely intertwined than prevailing models of deliberative democracy admit. The problem with overly idealistic models of deliberative democracy remains as long as deliberative democracy continues to assume a sharp disjuncture between a politics of interest and a politics of deliberation. However, if we think of politics "as consisting of a continuum between perfect solidarity and the unbridled battle of interests," the capacity for political processes to approximate the ideal of impartiality will depend upon social circumstances, in particular the degree to which marginalized groups are politically mobilized, and the structure of political institutions (Williams 2000: 143, 144). As the consultation process on the

Finnmark Act illustrates, political procedures can create incentives for deliberation, and it is possible to move, at least, in the direction of consensus, although a rational consensus can be regarded as a utopian goal. A model of public reason based on a rational consensus which rests on identical convictions (Habermas) has thus been criticized for being too strong for many contexts of political deliberation and too demanding in order to accommodate difference in multicultural societies (Bohman 1996: 89). Eriksen and Weigård (1999: 296, 297) opt for a less demanding concept of consensus that is a working agreement which rests on reasonable reasons. This is a category with a weaker form of consensus than the rational one, but is achieved in an argumentative way, not by threats or use of force (Eriksen 2007).

To what degree then, is the goal of reaching consensus obtainable within a self-government arrangement? Participation in a self-government context implies some form of power-sharing mechanisms, an internal autonomy which could be regarded as a maximalist reading of a right to effective participation (cf. Kymlicka 2007: 241). A critique of such a nation-to-nation relationship is that it undermines the integrative processes with regard to minority groups. The politics are "putting up 'cultural walls' around ethnic groups, and thereby eroding our ability to act collectively as citizens" (cf. Kymlicka 1999: 15). But as Kymlicka concludes by analyzing the merits of multiculturalism in Canada, this policy is not a rejection of integration, but a renegotiation of the terms of integration. These are questions that deal with the political culture, and call for discourses that push beyond contested interests and values and engage the participants in a process of self-understanding by which they become reflectively aware of the deeper consonances in a common form of life (cf. Habermas 1996: 165). But still, minority groups are "vulnerable to backlash and retreat, particularly if critics are able to raise fears that it may after all be a threat to human rights or state security" (Kymlicka 2007: 121). This point about vulnerablity is also of relevance for indigenous peoples. The built-in asymmery in majority and minority attitudes make indigenous peoples anxious as well. Members of the majority believe that they have gone beyond the call of duty and expect minorities to be grateful for the adoption of minority politicies. Members of minorities think that this adoption is the bare minimum required to acknowledge and remedy earlier injustices. "This disjunction in attitueds can be an ongoing source of resentment and distrust, even when there is a (temporary) consensus on the details of a particular policy" (cf. Kymlicka 2007: 121n). The vulnerability that marks the permanent minority position carries the risk of policies that are not supportive as a consequence of existing and potential negative majority attitudes, and amplifies the need for some kind of autonomy where procedures

regulate the relation between the state and the community in question. In the Saami example, the Saami Parliament as an autonomous political body (cf. chapter II), could counter such potential negative trends and contribute to reaching an understanding of the norms in question, and even share a situational understanding of the intended applications of these norms with the majority. Discourses in multicultural societies often require negotiation of shared, situational understandings (Benhabib 2002: 12). Thus, an indigenous political strategy that only relies on the traditional perspective of self-determination based on the logic of decolonization–meaning that neither party should interfere in the political organization of the other–could run the risk of failing in its efforts to build shared situational understandings. Accordingly, the relational approach to self-determination (cf. chapter I) captures and illuminates the gains of developing a principle of integration of authority as it is addressed in chapter II. Based on this review, political participation and self-representation appear as salient conditions in order to approach impartiality and consensus.

Different rationalities, different procedures

What is the foundation for political decisions? Are decisions realized due to a mutual exchange of arguments, where the goal is to reach agreement, or are they realized through use of power, voting mechanisms and manipulations (Eriksen 1994b: 98)? Strategic action indicates a point of view where actors make choices with regard to other peoples' ability to make rational choices. The concept intercepts how decision-making procedures take the shape of bargaining or games. Whether the involved parties are interested in cooperation or not depends on the prospects for a best possible result for themselves. There are different interests attached to the outcomes of the decisions, it becomes vital to calculate what the most profitable strategies are given the dispositions of other actors (Eriksen 1994b: 99, 100). The quest is to find how groups can reach a breakthrough for their preferences in the best possible way. In this thesis, negotiations in the cross-border reindeer husbandry case are elucidated based on a strategic understanding of rationality. Bargaining is guided towards reaching decisions and operates on a more regular basis. Each of the parties has a power base which they can mobilize in a strategic tug of war. Compromises are achieved and lead to mutual favourable solutions, like in wage negotiations.

Although such interactions can be analyzed by means of the concept of strategic action, the rules of the game must be tested in moral discourses. Furthermore, negotiations can include

elements of communicative rationality, and are thus not mere bargaining. The indigenous experience has illuminated how 'new' interests have been defined and legitimated in the public sphere and 'sluiced' into the political-administrative system. In these 'negotiations,' which result in arrangements for protection of indigenous rights and indigenous influence, it is the good arguments, not the bargaining force that can be said to be the decisive factor. This development has come about through indigenous participation in the public debate, and transformed pre-existing assumptions about what is right and fair for indigenous peoples. "Compromise formation cannot simply replace moral discourses; this is why political will-formation cannot be reduced to compromise" (Habermas 1996: 167).

In the indigenous context the term 'negotiation' has been presented as a way of solving potential conflicts where the indigenous part and the nation-state relate to one another in a nation-to-nation relationship. A former president of the Saami Parliament expressed this understanding of negotiation as follows:

> "This obligation means much more than merely consultation and dialogue. It must entail mutual obligations. Delineating the spheres of responsibility for Sami and Norwegian authorities should be accomplished through negotiations and agreements. Creating a mutual understanding of a number of basic criteria for collaboration is required" (Nystø 2001).

Exactly this premise of reaching mutual understanding and a possible agreement become an important motivation in the procedural application. In contrast to rationality, understood as efficient adaptation and manipulation of the surroundings in order to realize subjective preferences, appears communicative action. Common sense has another side, what Habermas captures in the concept of communicative rationality. This type of action is based on a deliberative process where the actors, through open and sincere considerations, attempt to reach mutual understanding and common opinions about what should be done, which implies a procedural understanding of rationality. The answers can always be challenged, criticized and tried again. The right answers are not given once and for all, the process guarantees that we can test the results again if we doubt their validity (cf. Eriksen and Weigård 1999: 14). The test is discursive; principles are just to the extent that they could be objects of agreement within a practical discourse. But a socially valid norm cannot claim to be right simply on the grounds that it is in fact recognized. The task of a discursive moral theory is to formalize, clarify, and universalize the unavoidable presumption that behind every valid norm stands a

good reason and, in doing so, to proceduralize the "diffuse, fragile, continually revised, and only momentarily successful communication" by which we unreflectively renew social norms (Chambers 1996: 97). It is only possible to say something about rationality if political decision-making can be justified in a free, public exchange of arguments between affected and competent actors.

In order to cope with different disputes, the introduction chapter presented Habermas' process model of rational political will-formation as a methodological entrance. The process model adjusts for argumentation procedures other than the moral one. Also, not only opinion-formation processes but will-formation processes are included in a normative discourse theory. The ideal of impartiality can be obtainable with the help of a discourse principle, which is neutral with respect to morality and law but still has a normative content. The discourse principle refers to action norms in general and states that "just those action norms are valid to which all possible affected persons could agree as participants in rational discourses," and it "is only intended to explain the point of view from which norms of action can be impartially justified." The principle presupposes that practical questions can be judged impartially and decided rationally (Habermas 1996: 107-109) because political actions must be evaluated based on the form of rationality they reflect. Different measures require different reasons, which result in the employment of different procedures. The basic question of what one ought to do is differentiated according to the kind of material in need of regulation.

The need to differentiate according to the kind of prevailing issue can be illustrated by different types of procedures of influence directed towards state authorities: hearings, bargaining and consultations. This is a relevant distinction also in state-indigenous contact due to the way we comprehend the concepts, as they may imply different degrees of influence and participation on the indigenous part, and different degrees of obligations on the part of the national authorities. Hearings are an incorporated and institutionalized practice, also in the relationship between Saami interests and state authorities. The main problem is that those parties involved have little ability to thoroughly influence the decisions and as a procedure of indigenous influence and participation it is far from the ambitions of self-determination. Bargaining has already been given an account in the fifth chapter. The negotiatons between Norway and Sweden in the cross-border reindeer husbandry case illustrate the logic of bargaining where each of the parties has a power base they can mobilize in a strategic tug of war.

Another aspect of contact between indigenous peoples and state authorities has been brought into focus namely in consultations with ambitions and prospects of reaching consensus. When fundamental questions of indigenous rights need to be clarified consultations appear to be a kind of contact where emphasis is placed more on arguments, learning and dialogue. Moreover, it is expected that state authorities have the burden of providing reasons if their interests oppose the interests of indigenous peoples (cf. chapter III). Thus, the character of consultations promises more stable agreements than solutions based on strategic action which takes the shape of bargaining. The procedures are developed within a framework of international law, but at the same time it is in the process itself that the arguments are tried and honed against each other. The consultation articles of ILO 169, together with ILO-practice, are in this respect the most prominent instruments framing the current development of this type of procedure. In addition, consultations are referred to in the United Nations Declaration on the Rights of Indigenous Peoples. It is consistently used in describing how the states shall act with regard to the measures needed, where statements like the following are used: "states in consultation and cooperation …" or "states shall consult and cooperate …"[95].

Yet, despite the distinctions outlined here, it must be added that in real politics there will always be a mix of bargaining and consultations. And in addition, 'negotiation' can be regarded as a kind of category in between, but closer affiliated with bargaining than arguing. One can also argue that the content of the concepts of 'consultation' versus 'negotiation' in an indigenous-state context involves the same logic and aspires to reach the same goals. Consultations and negotiations are expected to be carried out between equal parties in a nation-to-nation relationship; and the parties aim for mutual understanding and recognition. In this sense bargaining is not an adequate concept to cover what actually happens due to the fact that the indigenous part has little power and few bargaining chips, and has to provide principal reasons for the establishment of self-government and joint-governance solutions. However, via a joint working group drafting the consultation agreement between the Saami Parliament and the government, the administrative staff representing the Saami Parliament presented an understanding of 'negotiations' as more binding than consultations. Moreover, it says that the state is obligated to negotiate with the Saami Parliament, meaning that the state

[95] Cf. United Nations Declaration on the Rights of Indigenous Peoples, preamble and articles: 15, 17, 19, 30, 32, 36 and 38.

is obligated to establish a dialogue with the parliament concerning efforts and decisions which aim to obtain consensus or agreement between the parties. This is done in such a way that decisions cannot be made or efforts implemented without an obtained agreement. It is also stated that the concept of 'negotiation' will not be used further in the draft document.[96]

What then are the practical consequences of a distinction between the concept of negotiation and consultation? Why not insist on using negotiations as the most far-reaching method of institutionalized contact? My response is to ask if all issues are negotiable and then return to my starting point in the first chapter which said that ethical and moral disputes require different procedures depending on the nature of the issue. If negotiations imply understanding procedures as a type of bargaining then how can indigenous peoples' customary rights to land usage, like any other usage right established and based on immemorial use, be subject to bargaining based on a presumption of give-and-take? These issues are disputes over legal norms and application of norms, not disputes over interests that can be balanced and managed away (cf. Strøm Bull 2003: 215). This question leads me to the cross-border reindeer husbandry case where negotiations understood to mean bargaining have been the characteristic way of handling the situation. However, before I embark on the final discussion of procedures in handling indigenous rights across borders, I will tie together the realization of mutual recognition and political integration based on the empirical review from the previous chapters. In order to do the necessary empirical review, I will also need to draw upon some recent empirical data because the data on the continuous development of Saami political influence is not discussed in the previous articles that compose the thesis.

3. Terms of cooperation and aspects of justice

Based on the above-mentioned judgments, aspects of indigenous political participation and protection of rights as they relate to the two positions are accounted for. An ideal condition for cooperation from the political position emphasize the inclusion of marginalized groups[97]

[96] The Ministry for Regional and Local Affairs and the Saami Parliament: Report from the working group from the 20th of April 2005.

[97] The notion of 'marginalized' refers to a generalized usage of the term. A main message of this thesis is that the Saami have been able to influence the political context of the Norwegian nation-state by convincing the authorities and the majority population of the legitimacy of their claims, and thus empowered themselves. To

in political processes and the implementation of self-determination is relational, implying that indigenous perspectives and participation is extended into non-indigenous affairs. The political position clarifies that in order to protect rights; the aspiration of impartiality is sought through the participation of affected parties. Regarding just considerations in the protection of rights, the juridical position illuminates that the protection of indigenous peoples' customary rights concerns private law and universal rights, norms that relate to all parties in the same situation, and imply an impartial position prior to the juridical and political application. But as the indigenous experience reveals, the legal institutionalization of these norms cannot be taken for granted. As accounted for in the introduction, rights become necessary in order to counteract the arbitrariness of political decisions formulated through changing majorities. Legal institutionalization is needed for effective cooperation to come about. Law is a medium for stabilizing behavioural expectations. Agreements have to be institutionalized and terminated in formal contracts. Agreements on rights, laws or contracts make them binding on all the member in the same way, law is an action system that confers upon all the same obligations (Eriksen 2003: 61, Habermas 1996: 107).

The implications of institutional reflexivity

Such a perspective emphasizes *institutional reflexivity* (Eriksen 2005: 18), defined by Giddens (1991: 20) as "the regularized use of knowledge about circumstances of social life as a constitutive element in its organizations and transformations." This refers to the way institutions compels actors to generate knowledge and use it reflexively. Procedures trigger processes of justification and explanatory practices as they confer upon the actors the duty to give reasons. They institutionalize a reason-giving practice. Questions are asked and answers given when actors have to obey by the rules of the game - the procedures - and there is no other way than to argumentatively solve problems and resolve conflicts. Institutional reflexivity entails communication over communication and reflection over the selection of selections, hence the possibility of continuous improvement (Eriksen 2005: 18). However, a question about the ability to adapt to changes depends on the political and legal contexts and on the opportunities for adaption. I ascribe to this concept an understanding of an ability to

describe the Saami as a marginalized group will in many respects appear as outdated and as a clientification. However, it should not be concealed that within several areas of society the situation for Saami culture and language is marginalization and Saami language and culture can even be characterized as being on the edge of extinction. The empowerment and political influence of the Saami is exactly what should counteract such a development.

reflect on one's self and one's own actions, and an institutional capacity of critical self-examination where institutions are forced to argue their case. Based on my understanding of deliberative democracy and a normative perspective on the worthiness of choosing procedures, I highlight the ability to take the other's point of view–a self-reflective institutional point of view, as a central aspect of institutional reflexivity. Deliberative theory based on communicative rationality constitutes the reflexive approach (Eriksen 2005: 10). Such an ability has implications for the capacity of institutional learning, on self-knowledge and self-conception, and furtheremore on the capacity for implementation. Depending on the horizon of the understanding, the horizon of possibilities is clarified.

> "The reflexive approach sees cooperation as a response to societal problems, and institution formation as a response to the indirect consequences of such cooperation, which increasingly catches on and has polity consequences. Polity-building is the result of deepened integration driven by intelligent problem-solving, but problem-solving leads to juridification, to more legal regulation, which again triggers claims to democracy and reflexive juridification, …"(Eriksen 2005: 12).

Even if this description is related to the dynamics of integration in the European Union, the same train of thought is relevant within the field of Saami politics. Solving common problems has led to more cooperation, trust relationships have been built and new areas of common concern have been discovered. But this development has also spurred new questions about the legitimate basis for the scope of measures that require autonomy procedures and those that have to be handled by joint-governance procedures.

The usefulness of this approach in the relationship between the system of the Saami Parliament and other political institutions stems from the fact that the Saami Parliament, to a large degree, lacks mechanisms for external sanctioning. The Saami Parliament has regulational authority (*forskriftskompetanse*) within a few fields; the regulation of the flag from the Saami Act;[98] some educational programs of the Act of Education;[99] and directions for resource management regarding changes in the use of uncultivated land in Finnmark

[98] The Saami Act, § 1-6, the Saami flag.

[99] The Act on Education § 6-4, educational programs for Saami language in primary and high school and educational programs for separate Saami subjects in secondary/high school.

which is regulated in the Finnmark Act.[100] The Saami Parliament has been delegated authority within the field of Saami cultural heritage by authority from the Ministry of the Environment, but this authority is not altered in the Act concerning cultural heritage (Cultural Heritage Act). So this type of decision-making authority and the exercising of duties in terms of a public-legal character is not widespread. However, I am aware of the ongoing process of evaluating a more formal independent role for the Saami Parliament where, among other things, questions of the Saami Parliament being its own legal entity and proposals of new budget procedures are discussed.[101] Notwithstanding, I claim that the reflexive approach, a problem-solving procedure that considers knowledge and qualifies relevant normative perspectives in order to establish mutual understanding and agreement becomes particulary important regarding the prospects of success–whether it be the expansion of both formal and effective decision-making authority and real influence understood as joint-governance.

Has mutual recognition and political integration been gained?

Building trust relationships

The dialogical character of recognition at the level of both the intimate and the public sphere presupposes a continuous dialogue with significant others (Taylor 1994: 32, 33, 37). The demands for recognition imply protection of the basic rights of individuals as human beings– the content of these policies has been the equalization of rights. It also implies acknowledgement of the needs of individuals as members of cultural groups. Recognition means the distinctiveness of one's own unique identity is valued and the politics of recognition is that of the positive valuation of difference, that is, a positive affirmation of others' values and identities (Taylor 1994: 38). But according to Habermas (1994: 134) such a positive evaluation is not necessary. A politics of recognition can be ensured through constitutional or political legal means, which in turn integrate and foster citizens' allegiance to a common political culture, while recognizing that their polity is also permeated by different ethics: different notions of the common good. Moreover, struggles for legal and

[100] According to the Finnmark Act § 4, the Saami Parliament issues guidelines for assessing the effect of changes in the use of uncultivated land on Saami culture, reindeer husbandry, use of non-cultivated areas, commercial activity and social life. The guidelines shall be approved by the Ministry.

[101] Cf. Report from a joint working group on the formal position of the Saami Parliament and budget procedures, delivered the 27th of April 2007. The members of the group came from the Saami Parliament, the Ministry of Justice, the Police and the Ministry of Labour and Social Inclusion.

political recognition of a minority call into question and modify the existing forms of reciprocal recognition of other members (individuals, other minorities, and majorities) of the larger system of government of which the minority is a member.

> "Next, the number of other members affected are almost always more than one, so these struggles cannot, except in the most simplified cases, be conceptualized as two-member struggles between self and other, master and slave, bourgeois and proletarian, minority and majority, minority and the state, or individual and collective ….That is, struggles over recognition are relational and mutual rather than independent, and multiple rather than dyadic. In a word, they are complex struggles 'over' recognition, not simply 'for' recognition…." (Tully 2007: 21).

Struggles for recognition imply both ethical-political and moral discourses about self-understanding and norms of mutual recognition. In addition, such struggles entail problematization of established methods, understandings, and previous or customary uses of sources and evidence with regard to current law, thus this becomes a legal discourse which formulates legal categories for implementation and application.

Lack of trust characterized the relationship between representatives for the Saami movement and the Norwegian authorities during and after the Alta-conflict in the late 1970s and early 1980s. The conflict was over the building of a hydro-electric power station on the Alta River. Demonstrations, civil disobedience and a hunger strike resulted in a national and international 'floodlight' on the Norwegian state's dealing with its Saami population. The power station was built, but a common adage is that the Saami 'lost the battle, but won the case.' In 1981, a Saami Rights Commission was appointed which can be regarded as a step towards building a trust relationship. The mandate of the commission was to detail issues regarding rights to land and water use and certain issues of more fundamental and political character for the Saami people. The work was thus divided into several separate parts. It was decided that as a first step political issues and the question of a representative body for the Saami should be given priority. In order to cope with the crisis, state authorities were forced to involve Saami organizations in policy-making processes. By means of established procedures like public investigations and hearings, the Saami gained political results and recognition for important principles based on arguments regarding cultrual difference and being in a permanent minority position (cf. chapter II). Simultaneously, the Saami were active and played an important role in the processes of negotiations prior to the 1989 adoption of the ILO 169 (Minde 2001: 117-120). The most prominent outcomes of the Rights Commission's work

resulted in the Sami Act (1987), a constitutional amendment (1988) and the establishment of the Sami Parliament (1989). The commission continued its work, and the result from the second stage of work is the report on land rights in Finnmark County from 1997.

In this summary my concern will be on the expected *institutional recognition* between the Saami Parliament and the main political surroundings. These are defined to be two relationships due to their significant roles as co-players for the Saami Parliament's contribution in developing a supra-framework for the implementation of Saami self-determination: a) Troms county municipality and the Saami Parliament; and b) the interaction between the Ministry of Justice, the Norwegian Parliament's Standing Committee on Justice and the Saami Parliament prior to the passing of the Finnmark Act.

The Saami Parliament and Troms County Municipality

From the prevailing focus which only concentrated on central state-authorities, gradually the focus of the Saami Parliament also included regional, and to some extent, local authorities. In addition, in order to amplify and implement, for instance, Saami language rights, other institutions were given responsibility of their own as the second chapter pointed out.[102] Moreover, the cooperation agreements between the Saami Parliament and the county municipalities in all traditional Saami settlement areas in Norway, have strong expressions of mutual recognition between the Saami Parliament, local and regional Saami actors and county municipalities. As mentioned in the second chapter, this type of cooperation can be seen as conditional in the process of implementing Saami political measures. In what follows, I will refer to the cooperation agreement between Troms county municipality and the Saami Parliament due to its significance and as an illustration of institutional learning and implementation capacity.

In the early 1990's, the Saami Parliament criticized Troms county municipality for their planning work which lacked any reference to Saami concerns. The then mayor of Troms county municipality admitted that the policy was backwards compared to the national

[102] As accounted for, the municipalities of Karasjok, Kautokeino, Nesseby, Porsanger, Tana (all in Finnmark county) and Kåfjord (Troms county), were included in the language management area from the beginning. But the extension of this management area can be regarded as a slow process. After the inclusion of the language regulations into the Saami Act in 1990, only two municipalities have been added to the management area. Tysfjord municipality in Nordland county was included in 2006 and the municipality of Snåsa in Nord-Trøndelag in 2008.

development of Saami politics, and changes were needed. Afterwards, this opend up avenues for new ideas, followed by an administrative position that had responsibility for dealing with Saami issues in the county municipality and the establishment of a county advisory committee for Saami affairs.[103] Even more, the Barents Cooperation established a common arena as one of many cooperations, for political leaders from the regional level like Troms county municipality and the Saami Parliament. Recognizing that conversations about Saami issues also had to be carried out in the 'home areana' resulted in the development of a formalized meeting practice. Thus, from beginning with informal meetings, continuing with more planned ones, which became settled in formal meetings, this finally resulted in a cooperation agreement.[104] Troms had become the 'pathfinder' in the development of Saami politics within a regional framwork, and was the first county municipality to sign an agreement of cooperation with the Saami Parliament in 2002/2003. The chief editor of Nordlys, the largest newspaper in Northern Norway described this agreement as an important premise for shaping futher development. "Formally, the agreement is about strenghtening Saami language and culture, but it is also the beginning of clarifing the status between the Saami Parliament and a regional popular elected political body".[105] The then president of the Saami Parliament underlined that neither the county municipality nor the Saami Parliament gave up authority or competence, rather, both of the bodies are jointly empowered. The president also emphasized "the integrative force" of the agreement, the objective was "to negotiate the Saami into Troms county municipality."[106] Nystø has emphasized that the "strategy was one of building trust, and such a process must have a concrete substance."[107] In addition to securing and developing the Saami language, culture and society, the agreement aims to coordinate policy development in areas that the parties may find natural in order to secure a sustainable and a future-oriented society for indigenous peoples and other northern inhabitants. The follow-up for the agreement is accounted for in annual status-reports to the Saami Parliament and the

[103] This committee was composed of four members of the Troms county municipality and three representing Saami organizations in Troms. It was established in 1995 and abolished in 2003 when the responsibility for Saami affairs was undertaken by the County council as a result of the introduction of a parliamentary system in Troms county municipality.

[104] Personal communication: Raimo Valle (18.01.08), who has been the administrative person responsible for the Saami political field in the Troms county municipality since the position was established in 1994 until he became State secretary in October 2007.

[105] Cf. Nordlys 16.09.2002: "På sporet av noe viktig" by Hans Kr. Amundsen, editor in chief of Nordlys.

[106] Cf. Nordlys 11.09.2002: "En avtale for framtiden" by Sven-Roald Nystø, president of the Saami Parliament 1997-2005.

[107] Personal communication: Sven-Roald Nystø, 24.01.08.

Troms county municipality. The agreement has recently been revised because several of the measures have been completed and new needs and cases have arisen. A review of the agreement and the work illuminate the broad scope of cooperation measures. The "products" have been delivered and are concrete language and cultural measures for, among others, local Saami communities, secondary schools, and adult education. In addition, the agreement has resulted in cooperation measures on areas of primary industries and questions of land use management. Furthermore, a shared understanding of the necessity to take adequate measures in order to secure Saami language and culture has been developed. I regard this to be successful cooperation, a description shared by many of the politicans of the Saami Parliament when they discussed the revised agreement in the November plenary of 2007.

When the county government of Troms presented a report–*Fylkestingsmelding nr 1/2005 Grep om egen utvikling*–with ambitions and objectives to have a strong common region in Northern Norway, they also included the indigenous dimension as a part of the regionalization debate. It is worth mentioning that the report states that a future, regional, popularly elected body needs to clarify its relationship with the Saami Parliament and to keep high standards in the follow-up of national and international law concering indigenous peoples. However, paradoxes have arisen. When the plenary of Troms county municipality opposed a proposal regarding the right to complain and raise objections before the Saami Parliament in matters of significant importance to Saami culture in the new planning section of the Planning and Building Act which was based on a motion from the, floor because they worried about the impact of such an influence,[108] this attitude does not correlate with the recognition reflected in the cooperation agreement and the policy document. This lack of congruence illustrates a point mentioned earlier in this chapter about vulnerability; possible pitfalls in trust-building processes can appear and being in the minority position implies a risk of non-supportive policies. Hence, trust relationships must be restored and maintained. Political cooperation can be vulnerable, and it is the responsibility of the political actors of both the Saami Parliament and the county municipality to 'keep the fire burning.' The implication of the cooperation agreement becomes even more enhanced because it represents institutionalized competence and responsibility. Annual reviews and separate meetings within the different field of issues and ordinary administrative contact, constitute a superior framework for learning and

[108] Cf. minutes from a consultation meeting the 23rd of April, 2007 between the Saami Parliament and the Ministry of the Environment, and minutes from the plenary of Troms county municipality on the 11th of June 2007.

reflexive self-understanding. The county municipality also attends to issues of political relevance for the Saami, while the policy of the Saami Parlimament affects fields that expand on the traditional understanding of Saami matters.

The Saami Parliament, the Ministry of Justice and the Norwegian Parliament's Standing Committee on Justice

In April 2003, the Government had finalized their preparatory work, based on the 1997 Report from the Saami Rights' Commission. On the 4th of April 2003 a bill for a new Act–the Finnmark Act concerning the land management of Finnmark County (Ot.prp. nr 53/2002-2003) was presented. But the Saami Parliament was displeased with the bill. The criticism was substantial with regard to its content, the bill lacked proper identification and recognition of Saami rights. The criticism also covered procedural matters–the process leading to the proposed Finnmark Act. According to international obligations, the Saami Parliament had not been consulted. The situation was marked by conflict; the bill was strongly criticized and different opinions existed about whether the process had truly been consultations. The Ministry of Justice referred to the processes of contact with the Saami Parliament and the Finnmark County Council as a special process of contact (Ot. prp. nr 53 (2002-2003):125). According to the ministry, the parties had been presented with the main solutions and the principal considerations the proposal was based on. The Saami Parliament, on the other hand, stressed the relevance of ILO 169. In its report to the ILO for the period ending in July 2003, the Saami Parliament highlighted procedural issues. A central principle and underlying philosophy of ILO 169 is the right of indigenous people to be able to speak for themselves, and to take part in the decision-making processes as they affect them. The Saami Parliament claimed that the proceedings leading to the proposed Finnmark Act were not in compliance with the consultation and participation articles of ILO 169.

This was triggering a strong focus on the authorities' duty to consult the Saami on Saami interests, a duty derived from ILO 169. The convention emphasizes consultations as a tool for indigenous influence and that the states have a duty to consult indigenous peoples. Especially Article 6 is described as a cornerstone of the convention. The disagreement between the Saami Parliament and the Ministry of Justice is referred to in the assessments of the expert committee of the ILO in response to the Norwegian report for the period ending in July 2003. The committee concluded their review by requesting that the government and the Saami

Parliament "renew discussions on the disposition of land rights in Finnmark, in the spirit of dialogue and consultation embodied in Articles 6 and 7 on Convention No. 169."

In June 2003, the Norwegian Parliament's Standing Committee on Justice required an independent assessment from the Government. This assessment from November 2003 was carried out by two legal experts who concluded that on important points the bill did not fulfill the requirements of international law. The government responded with a new inquiry published in February 2004. Based on this report, the government claimed that the bill was in accordance with international law, but an identification of rights was needed. The situation became even more stalemated; the government had a "hot potato" on their hands. Thus, the Standing Committee on Justice invited the Saami Parliament and the Finnmark County Council to consultations on the law proposal. As accounted for in the third chapter, this is a unique way of dealing with legislative measures. In the Norwegian context, the Act is the result of a unique political process. This procedure has never been used before, neither in the order of business of the Norwegian Parliament, nor in the involvement of external institutions in decision-making processes. It is a fundamentally new mode of treatment for legislative measures in the Norwegian Parliament.

Thus, the aftermath of the 2003 proposition is not marked by trust between the actors involved, and it is sensational that the Committee on Justice intervened in the process. This new direction must be regarded as a step towards building trust through discussions on the bill. But as accounted for in the third chapter, this trust was relatively fragile due to the long pause between the second and third consultations.

Based on these two important illustrations, it is credible to claim that relationships of trust have been developed between the Saami Parliament and its political co-players. Non-participation or exit has never been an alternative for the Saami, who has all the time used arguing as a way to move forward. However, the examples also illuminate the importance of institutionalized frameworks where such processes of trust-building can take place. Institutionalized procedures comprise such frameworks and allow new issues to be raised, which contributes to clarifying issues of principal concern and can be a remedy for vulnerability and possible pitfalls in trust-building processes.

Political integration understood as strengthened Saami political influence

In order to examine whether or not political integration among main political actors involved have really been realized I have chosen to focus on processes of extending Saami perspectives and participation into non-Saami affairs, a development chapter II describe as 'integration of authority.' This is about inclusion of Saami concerns into central, regional and local politics and management, and the possibilities for power-sharing. In chapter IV, I account for an understanding of citizenship where the citizens are not only to be included as abstract individuals, but also as legal subjects with a particular cultural identity (Oskal 2002: 252). The fact that every legal community and democratic process securing basic rights is inevitably permeated by ethics, and the fact that empirically and normative decisions depend on the composition of the citizenry of the nation-state (Habermas 1994: 126), requires that indigenous peoples and minority groups have to be adequately represented and be able to participate in real terms in the processes of political decision-making in order for them to secure democratic justice. The legal state is penetrated by ethics, and the legal system is not ethical or culturally neutral. Thus, the citizens not only have a right to cultural identity, it also becomes necessary to ask how such an identity can be made relevant within the constitution and how ethno-cultural identity legitimately can influence the recognition of legal claims and distribution of political rights (Oskal 2002: 254, Habermas 1998). Thus, political integration implies political influence and participation also on the part of the indigenous. When the Saami Parliament participates in institution-building and processes that require common solutions, does this participation trigger reflexive processes of institution-building? To what degree are Saami concerns included in a commen legal framework?

The second chapter accounts for three ways of increased influence and expansion of authority for the Saami Parliament: a) transfer and delegation of management tasks from central authorities to the Saami Parliament; b) increased influence and competence due to direct dialogue between the Saami Parliament and central authorities; and c) increased influence as a result of the work of the Saami Rights Commission. Already in 1986, the first leader of the Saami Rights Commission–Carsten Smith foresaw these three tracks for the expansion of authority. In retrospect, they constitute a framework for structuring the progress of increased influence and Saami-political authority.

a) Track one: Delegation of management tasks emphasizing the Saami Parliament as a body with delegated authority derived from the central government of the state. The basis for legitimacy is altered in the understanding of the parliament as an affected

party, entitled to a voice in the same way as other affected parties. The mechanisms of influence are hearings and lobbying activity towards governmental authorities. Meetings and other forms of contact between the central government and the Saami Parliament concerning Saami matters has been an important way to build the authority of the Saami Parliament. This track was the first established and has been developed on political as well as administrative levels. One major output has been the transferring of state subsidy schemes to the Saami Parliament, resulting in a greater degree of internal authority.

b) Track two: Direct dialogue between equal parties conditioned by a framework that secures effective influence on decision-making processes. The establishment of the consultation agreement of May 2005 between the Saami Parliament and the government with the aim to reach consensus can be regarded as a significant advance in the relationship between the state and its indigenous people.
c) Track three: Political processes as a consequence of public investigations from the Saami Rights Commission on land rights and land management. The salient illustration is the process prior to the passing of the Finnmark Act. A new process regarding land rights and management in traditional Saami settlement areas south of Finnmark is expected to take place in the years to come.

In what follows, I will comment on the implications of the second and third track due to the significance of these procedures concerning the development of effective political influence of the Saami Parliament. Even if the focus on the consultation agreement of 2005 implies involving new empirical data at this late stage in the thesis work, I regard this as necessary in order to identify the assumed reconciliation effects of political procedures. I underline that my concern in this thesis has been the relational aspects of Saami political influence, and I have only to a minor degree been concerned with the direct exercise of authority of the Saami Parliament.

The consultation agreement between the government and the Saami Parliament

On the 11th of May 2005 the Saami Parliament and the government entered into a consultation agreement which regulates the relationship between the government of the state and the Saami Parliament.[109] The working group responsible for drafting the agreement

[109] Prior to the agreement, a working group with members from the Saami Parliament and the Ministry of Local Government and Regional Development assessed the judicial basis of the right of the Saami to be consulted in

underlined that it is less expedient to have continual debates about how the consultation obligations under international law should be understood. Everybody would profit from a consultation arrangement because it would create predictability and decision-making legitimacy, among other things. Meanwhile the group stated that it would be a challenge to establish procedures that yield predictability and trust-building.

The consultation obligations of ILO 169 are regarded as important premises for the agreement, and the objectives are to contribute to the implementation of the state's obligations to consult indigenous peoples under international law. It is also an objective to achieve agreement between state authorities and the Saami Parliament whenever consideration is being given to legislative or administrative measures that may directly affect Saami interests in order to facilitate the development of a partnership perspective between state authorities and the Saami Parliament and to develop a common understanding of the situation and developmental needs of the Saami society.

Furthermore, the procedures for consultations apply to the Saami Parliament, the government and its ministries, directorates and other subordinate agencies and their activities including state-owned enterprises such as *Statskog*, and to state enterprises whenever they exercise public administrative authority by delegation from a superior state authority. The obligation to consult the Saami Parliament is applicable to different types of matters that may affect the Saami directly, such as preparation of legislation, regulations, guidelines and decisions (e.g. in governmental reports to the national parliament–the *Storting*). The geographical areas are the whole of the traditional Saami settlement area, i.e. Saami reindeer grazing areas, and municipalities that are of interest to Saami cultural heritage which applies to issues of relevance for the material foundations of culture.

According to a Royal Degree on the 1st of July 2005, the main elements of the consultation procedures are as follows: the Saami Parliament must achieve complete information on relevant issues on all stages of the procedures; the Saami Parliament must be given time to assess relevant questions and provide feedback; if agreement is regarded as being obtainable, the consultations should not be terminated; if agreement is not achieved, the view of the Saami Parliament must be passed on to other ministries and in propositions to the Norwegian

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cases that directly impact them. The working group presented its report on the 20th of April 2005. The agreement was signed by the president of the Saami Parliament Sven-Roald Nystø and the minister Erna Solberg.

Parliament; provisional information between state authorities and the Saami Parliament can be exempted from the public disclosure if it is authorized by law; minutes shall be kept of all consultation meetings.

An important point of departure is that the consultations shall take place in good faith, with the objective of achieving agreement on the proposed measures. This means the process of consultations with the Saami Parliament is something more than an ordinary public process through which appropriate bodies are invited to consider various proposals (processes of hearings), as the parties must sincerely and genuinely seek to reach an agreement on the proposed measures. This also means that state authorities are under an obligation to initiate consultations with the Saami Parliament and make all necessary efforts to achieve an agreement even though the state authority concerned may believe that the likelihood of achieving an agreement is limited. However, the agreed procedures for consultations do not dictate that an agreement or consent on the proposed measures must always be reached.

In the consultation guidelines[110] from the Ministry of Labour and Social Inclusion of the 23rd of June 2006 it is stated, among other things, that the procedures will "lay the ground for a partnership perspective between State authorities and the Sami Parliament," which is also stated in the objective of the consultation agreement. The consultation procedures "are to be regarded as normative guidelines. This entails that State authorities and the Saami Parliament can jointly choose to disregard the procedures in matters where other rules and procedures have been established".

Regular half-yearly meetings between the Ministry and the Saami Parliament are conducted. Prior to these meetings the minister responsible for Saami affairs informs other ministers about the meeting and about what will transpire at the meeting. A review of public minutes[111] from the consultation meetings between the Saami Parliament and the Ministry for Labour

[110] The Saami Parliament has not been part of the preparation of these guidelines, and has emphasized that the guidelines cannot be given priority over the consultation agreement. (Personal communication: Torvald Falch, senior advisor in the Saami Parliament, 30.01.08.

[111] So far, the minutes from the following meetings are public: the 14th of December 2005; the 30th of June 2006; the 12th of December 2006; 4th of June 2007.

and Social Inclusion[112] illuminates, among other things, that the Saami Parliament brings to the table problems that they are experiencing such as that various ministries do not involve the Saami Parliament or that they are too late to involve the parliament on issues of concern to the Saami. One year after entering into the agreement, at the second half-yearly meeting, the Saami Parliament claimed that several ministries had the perception that the Saami Parliament must be consulted. But problems had also arisen; despite obtaining an agreement, it happened that opinions have changed in the ministries after consultations with the Saami Parliament and this was regarded as an infringment on the agreement. The Ministry of Labour and Social Inclusion stated that they will discuss these problems with those ministries that the Saami Parliament seeks to have better cooperation with. In the minutes from the next meeting, in December 2006, the Saami Parliament underlined that there is a desire to consult on the political level, but there is a problem on the administrative level. Another difficulty they experienced is that the Saami Parliament is regarded as a special or sector interest, and thus ignored based on arguments that bills or political decisions are of natiaonl interest. A corresponding critique from the Saami Parliament was also presented in the meeting on the 4th of June 2007.

The review of minutes from four meetings reveals that the Saami Parliament and the government-system are in an activation period which calls attention to several problems concerning interpretation and implementation. However, despite these different views, the parties continue to cooperate and to reach for working agreements in an argumentative way. The fact that the agreement was established and put into force must be regarded as a clear achievement for the struggles of the Saami Parliament to obtain political influence. According to the Council of the Saami Parliament the contact with the authorities has improved after the implementation of the consultation agreement. However, challenges arise and are linked to a confined ability of the ministries to act and a lack of information during the processes, among other things.[113] But despite these initial problems; this agreement will in itself function to establish trust, and as a common agreement it will entrust actors to engage in communicative relations. It must be expected that the formalization of the agreement through a Royal Decree will reinforce the implementation of the agreement in the government-system, directorates

[112] After the change of government in 2005, the department responsible for Saami political affairs was moved from the Ministry of Local Government and Regional Development to the Ministry of Labour and Social Inclusion.

[113] Cf. Draft by the Council of the Saami Parliament for the annual report for 2007 of the Saami Parliament, 07/5345.

and other subordinate agencies whenever they exercise public administrative authority by delegation from a superior state authority.

The consultation process on the Finnmark Act

A study of the consultations on the Finnmark Act reveal how the consultations led to a significant change in the government's proposal. The results received unanimous approval from the parties involved, the procedures can be viewed as a concretization of the obligations of the ILO 169, and the outcome was developed in relation to a framework of international law. The consultations became 'appropriate procedures' undertaken 'in good faith.' Besides, it was through the process that the arguments were challenged and tested. To a certain extent one could claim that the procedures themselves were redesigned to encourage a more inclusive deliberation between the indigenous citizenry and the state. In this way the state, together with the political representatives of the Saami, developed its own procedural response to indigenous claims for land rights and political influence. Consultations as a procedure in managing principal issues of relevance to the Saami, can thus be viewed as a way of implementing indigenous self-determination within the framework of the nation-state. Consultations contribute to building a trust relationship where the parties recognize each other. Through consultations principal questions are clarified so that the parties can continue their relationship on a more regular basis by means of other procedures.

The consultation process on the Finnmark Act illustrates the suitability of problem-solving procedures understood as deliberation because this type of procedure is linked to reflection, reason-giving and reaching common understanding. Actors must argue when opinions differ and consensus on a common metric is missing. In this way deliberation reaches deeper than bargaining and voting (cf. Eriksen 2005: 16). And it is exactly the force of reasons, the insights into good reasons that had behavioral consequences during the consultations on the Finnmark Act (cf. chapter III). According to Eriksen (2005: 16), merits of rational deliberation can be: a) improvements in information and judgement as in the case of the Finnmark Act's consultation process; b) shaping of preferences and transforming of opinions conductive to collective will formation, the consultations were used as a problem-solving tool and to develop points of view; c) constrain political power-holders out of the moral value of deliberations; during the consultations arguments were tested, common solutions developed, and a relationship of trust between the parties emerged.

But as pointed out in the third chapter, several features of the process reveal that the ideal of consensus seldom becomes a reality. In this connection two problems can be highlighted: institutional obstacles and the question of openness or publicity.

a) The first problem has to do with the fact that the Saami Parliament and the Finnmark County Municipality did not participate in *common* consultations even though each of them was an observer in the other's consultations. A possible and expected outcome of common consultations could have been a shared understanding regarding the work after the passing of the Act and after the Finnmark Estate became a reality. There is criticism of the Saami Parliament for issuing provisional guidelines for assessing the effect of changes in the use of uncultivated land without holding a public hearing, including with the county municipality and the municipalities, among others, which illustrate that a common understanding was missing–at least in the initial stage of the implementation phase (cf. media-publicity in May and June 2006). A counter response to common consultations is that it is the Saami Parliament on behalf of the Saami people that holds the right to be consulted according to ILO 169 and the UN Declaration on the rights of indigenous peoples. Furthermore, it can just as well be regarded as sufficient that each institution separately ensure 'its own' interests, given institutional roles and resources. But is there a way to comply with the norm of participation for all affected parties? As pointed out in the second and third chapter, resource governance and land managament measures affect the whole of the population in local Saami settlement areas, not only the Saami. It is a question of affectedness, and the procedures established must take into account 'the others,' and include the interests of both the Saami and non-Saami part of the population in resource governance and land managament measures. In these issues regional and local authorities representing 'the other' become legitimate partners. Saami politics dealing with material rights frequently has a territorial dimension–it affects everybody within a certain area. But whose responsibility is it to safeguard the interests of all those who are affected? One view holds that the 'indigenous point of view' is held by the Saami Parliament while state authorities would have to carry the overall responsibility of including all other affected parties in issues of common concern. Given the obligation derived from international law about consultations on principal matters which are to be carried out in a nation-to-nation relationship, it becomes the responsibility of the state to secure the participation of affected 'others.'

But given an increasing expansion of authority and political influence of the Saami Parliament, is it possible to maintain this line of argumentation? The Saami Parliament insists on representing something more than 'particular interests.' Do they then represent more general or public interests within a given territory? If so, what is the scope of limits for the involvement of the Saami Parliament? Can they simultaneously insist on being both a political body safeguarding superior concerns and at the same time limit their scope of interest to a defined Saami group? These questions make visible the challenges of the taken-for-grantedness of concepts like identity, cultural distinctiveness, and existing frameworks of political participation. I do not aspire to provide an answer to these challenges, but insist on the significance of raising these questions as they relate to both the Saami Parliament and its main political surroundings like county municipalities and state authorities, which have implications for institutional learning, self-knowledge and self-conception, and furtheremore on the capacity for implementation of policy.

b) A second problem has to do with openness or publicity, and implies that the arguments of those involved should be tested against a critical public. Exept for the last consultation on the Finnmark Act, the other three were closed to the public. The public sphere is the foundation for deliberative politics because it is here that power and political decisions affecting the citizens can be tested and justified. But the public can damage the sincere conversation as well. Thus, closure also appears as a mechanism for a rational exchange of views and public disturbances can be avoided. But eventually this mechanism must be combined with publicity (cf. Eriksen and Weigård 1999: 260, 261, 290, 291). The debates and processes of the Finnmark Act visualize a tension between deliberative practices in the public sphere and will-formation and decision-making in parliamentary assemblies. The significance of this tension is amplified in indigenous and minority issues. Indigenous peoples often face problems in the public debate when their reason-giving is perceived as unreasonable within established ways of thinking, and when questions of moral character are at stake. Conflicts, understandings and interpretations of indigenous land rights are illustrative of this point. As already accounted for, it has not been an obvious shared understanding that the principles of the constitutional state imply that there are some limitations and restrictions put on governments regarding indigenous customary rights. As the media debate unveiled, the understanding of there being an unjust state of the law was not shared among the population in Finnmark nor among the politicians at the initial stages of the process (cf. chapter III). The reasons given for those who criticized the Finnmark Act and wanted to maintain the status quo can, of course, be as valid

as those who supported the new state of the law. Yet, the learning aspect in this process appears to be of vital concern. Land rights questions in indigenous areas are often complex, and solutions require changes with regard to territorial, functional and institutional arrangements. Obvious solutions do not necessarily appear due to the complexity of the issues. Thus, established patterns for ideas remain as the most confident, also in the public opinion formation, which continue to be taken-for-granted assumptions. Presumably the presence of a plurality of points of view should strengthen our judgments and decisions, but Chambers (1996: 9) points out some pragmatic objections with regard to deliberative democracy as a model for bringing consensual solutions to public disputes. One of these is that procedures of deliberative democracy, particularly when contrasted with negotiations, appear to require a level of civic, or at least democratic virtue which is too demanding for the average citizens of modern liberal democracies. And it can be objected to on the grounds that the procedures are unruly, inefficient, and the outcomes are difficult to measure. Williams (2000: 134) makes a similar point that the demands of a deliberative process which is responsive to social differences are even greater than the demands of deliberative democracy generally. Accordingly, in these matters, the importance of opinion-formation internally as well as in the political-administrative system becomes important. 'Strong publics'–like parliamentary assemblies and institutionalized bodies–are not only arenas for decision-making based on established points of view in the 'weak' public. This is an important point due to the fact that members of dominant cultural groups are likely to be well represented in deliberation in the public sphere, like in the media (cf. Wheatly 2003: 514).

In the above-mentioned consultation agreement between the Saami Parliament and the government, consultations may be exempted from public disclosure provided it is authorized by law. However, it is "a prerequisite that the principle of expanded public disclosure is practised, and that the final positions of the parties in individual matters are made public." According to the guidelines, the "background for the provision is that the possibility to exempt documents from public access will probably be a prerequisite for sharing of information with the Sami Parliament about ideas and points of view at an early stage in the policy process." The logic of this provision must be related to the state authorities' right to keep public documents from public access at an early stage in the policy process (cf. the Freedom of Information Act). However, this is a question of demanding balance and legitimacy for both the Saami Parliament and the governmental machinery. In those cases

issues are kept away from public access, the reasons for this 'nondisclosure' must be communicated to the public.

Political integration through legislation and the significance of court cases

As mentioned earlier, legal institutionalization is needed for effective cooperation to come about. Political decisions are formulated into legal categories, and the discourse is oriented towards coherence of legal rules. Regarding the safeguarding of indigenous rights, the question of coherence between rights, legal rules and political decisions and management solutions, are of high topicality.

Two salient characteristics concerning the legislative development of Saami rights is a) the interaction between national legislation and international law, and b) the question of consistency and application of legal rules.

a) Important motives for international law affecting indigneous peoples are protection against interventions (a negative aspect), implementation of positive special measures (a positive aspect) and an increased emphasis on participation and real and effective influence (a procedural aspect) (cf. NOU 2007: 13: 824). The Saami Rights Commission's first comprehensive review (NOU 1984: 18) of the UN's International Covenant on Civil and Political rights from 1966 (CCPR), Article 27, resulted in an important legal adjustment. Considerations grounded in protective and 'special measure' arguments formed the basis for the passing of the Saami Act in 1987 and the constitutional amendment in 1988. Norwegian authorities adopted this interpretation of the obligations derived from Article 27. The Saami Act and the constitutional amendment thus reflect such a legal protection for indigenous peoples and the establishment of the Saami Parliament becomes a response to a demand for positive measures to secure the material foundation for the protection of Saami culture. After the Human Rights Act incorporated the UN Conventions on economic, social and cultural rights and political and civil rights and the European Human Rights Convention in 1999, the significance of Article 27 has been amplified and the conventions became part of Norwegian legislation.

The significance of Article 27 has also later been emphasized, especially by the Human Rights Committee of the UN. In 1999 and 2000 the Committee started to address the right of

self-determination[114] specifically in the context of indigenous peoples.[115] The right to self-determination is used as a normative standard in the application of Article 27 (cf. Scheinin 2000/2005: 179-199). Article 1 becomes an aspect of interpretation of Article 27, what Scheinin (2000/2005: 181) addresses as a school of interdependence in legal reasoning, meaning that provisions in a law are being informed and enriched by other provisions in the same law and possibly by other instruments as well. The consultation and participation obligation derived from Article 27 has been an important factor in the assessments of the Committee as to whether the states have complied with their obligations related to the protection of culture and whether they have carried out real consultations with indigenous peoples or not.

In the process of the Finnmark Act the interaction between national legislation and international law became particularly evident and the act has partly incorporated ILO 169. The Act shall apply with the limitations that follow from ILO 169, and it should be applied in compliance with the provisions of international law concerning indigenous peoples and minorities.[116] In itself, the Finnmark Act can be regarded as an expression of the salient interaction between national legislation and international law. An illustration of this interaction appears from the debate between the Saami Parliament and the Committee on Justice accounted for in chapter III. Despite different views regarding the question of the possibility to give an exact interpretation of international law, the responsibility of the state to consult indigenous peoples and to identify and acknowledge existing rights is indisputable. The breakthrough of the use of consultations as a procedure must be understood from the salient significance of consultations and effective participation in international law.[117]

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[114] "The right to self-determination is secured to all peoples in identical terms in Article 1 of both the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR)" (Scheinin 2000/2005: 179).

[115] Article 1 is addressed in the Committee's observation of Norway in October 1999, where the Committee states that "as the Government and Parliament of Norway have addressed the situation for the Sami in the framework of the right to self-determination, the Committee expects Norway to report on the Sami people's right to self-determination under article 1 of the Covenant, including paragraph 2 of that article." ((Scheinin 2000/2005: 192).

[116] The Act shall also be applied in compliance with the provisions of agreements with foreign states concerning fishing in trans-boundary watercourses (like the Tana River bordering Norway and Finland).

[117] http://www.ilo.org/ilolex/english/iloquery.htm. ILO-practice reveals that the clear majority of the numbers of complaints on states' treatment of indigenous rights concern infringement of the consultation articles of ILO 169 (cf. NOU 2007: 13: 828). Out of twelve settled complaints by July 2007, six concerned Mexico, two Colombia and the remaining four Boliva, Peru, Ecuador and Denmark/Greenland. Ten of the cases were asserted about infringement on Article 6.

b) When changes in existing legislation are made, several examples illustrate that Saami concerns are being incorporated or are in a process of being included in the law text. This development has been reinforced after the consultation agreement between the Saami Parliament and the government. According to the Saami Parliament web-page, several consultations on law proposals have been completed. Noteworthy are the consultations on the Reindeer Husbandry Act, Ocean Resources Act (*havressursloven*), Planning and Building Act, Nature Protection Act and the Mining Act. This new development must be understood in light of the fact that Norwegian authorities want their policies in the Saami political field to be in accordance with the standards of international law, while simultaneously domestic developments can stipulate how international legal development occurs within the indigenous field (Josefsen 2007).

Moreover, the Norwegian Parliament has questioned whether the Saami achieve equal treatment by the court system and if Saami customary practices are just slightly reflected in court decisions (Josefsen 2007, St. meld. nr 23(2000-2001)). As accounted for in chapter V, the Supreme Court case–the *Altevann* case in 1968, together with the Supreme Court ruling in the *Brekken* case (Rt 1968 s 394), established a right to reindeer husbandry based on customary law and immemorial usage, and that this legal basis limits the possibilities of the authorities to regulate reindeer husbandry unless by means of expropriation and compensation. But despite these principal rulings, the Supreme Court has later deviated from these views and based their decisions on legal custom and law sources from the assimilation period, like in the so-called *Aursunden* case[118] (1997). However, as already accounted for, the *Selbu* and *Svarskogen* cases from 2001 represent a shift in the paradigm (which also could be said about *Altevann* and *Brekken*), and illustrate that Saami customary rights can be protected at the same level as non-Saami users' customary rights. The cases have set a precedent (Strøm Bull 2003: 217). Based on assessments that the Saami users have been using the land 'in good faith' and as a consequence of adequate intensive usage the court cases are likely to have changed the state of the law. In both court cases, the Supreme Court held and pointed out that their rulings were in accordance with ILO 169, but that the decisions were based on national

[118] "The *Aursunden* case dealt with the right to use privately owned uncultivated land as reindeer pasture. In this case, neither the Norwegian authorities' new Saami policy, nor international legislation, nor previous rulings were taken into account" (Josefsen 2007: 13). The Supreme Court rejected claims from the reindeer herders of the right to use land as pasture areas. This rejection was based on the view that the reindeer herding husbandry "hinders development of more justifiable and suitable public interests, the limits for its claim are given" (cf. Josefsen 2007: 13).

law. It is noteworthy that this legal recognition is anchored in just domestic property law. “Existing law also has to be interpreted in new ways in different contexts in view of new needs and new interests” (Habermas 1994: 108). The system of rights also incorporates collective goals articulated in struggles for recognition (Habermas 1994: 124).

This short review emphasizes legislation being a barrier for political decisions formulated through changing majorities. Legislation secures permanent attention; it relieves the involved actors from arguing their case from a starting point. Thus, the law contributes to effective decision-making and to a process of building trust and recognition. As pointed out in the above-mentioned court cases, the law implies a problematization of former methods, understandings, and previous uses of sources and evidence with regard to current law, thus this becomes a legal discourse which formulates legal categories for implementation and application. But as pointed out, setbacks may appear. Moreover, challenges emerge connected to the application of law. As Strøm Bull (2003) accounts for, decisions in Supreme Court cases acknowledging customary practices have in several occasions lacked compliance in the administrative system.

By means of procedures like the cooperation agreements between the Saami Parliament and the county municipalities, the consultation agreement between the Saami Parliament and the government, the consultations prior to the passing of the Finnmark Act and legislative means, significant advances are identified when it comes to institutional recognition and political integration. Within the nation-state, this development can be regarded as a form of consolidation. But does this consolidation take place at the sacrifice of a pan-Saami or cross-border perspective? Does the recognition also relate to the Saami who are non-citizens? This is the focal point for the next section where I question the nation-state’s use of procedures in handling indigenous rights within and across the border in the cross-border reindeer husbandry dispute. Why is it so difficult to apply the ‘lessons learned’ in the Saami-Norwegian context for the ‘foreign’ Saami?

4. Legal claims and adequate procedures across state borders

The rights of citizenship are connected to the political community understood as the nation-state where the state is a geographically confined and sovereign entity with clearly defined demos that most standards of democratic governance have been derived (cf. Eriksen and

Fossum 2000: 3). A nation-state as a territorial, national, and social state is equipped with administrative power that accommodates democracy insofar as a political-cultural collective has to be adequately integrated, and adequately autonomous in geographic, social, economic and military respects (cf. Habermas 2003: 89). The defence of indigenous rights in the shape of political arrangements and legal protection also presupposes such a powerful state. But is this protection only limited to the citizens of the state?

Does the order of Westphalia strike back?

The indigenous dimension of EU

Claims made for recognition and accommodation of cultural diversity challenge the nation-state from within, at the same time as the states are faced with pressures to recognize and accommodate supranational associations with powerful cultural dimensions such as the EU. Chapter IV of this thesis discusses the traditional understanding of the rights of citizenship with regard to a defense of indigenous rights in view of an impaired nation-state. When writing the article that forms chapter IV, I assumed that the impacts of the EU as a normative context would have clear implications on the nation-state's treatment of indigenous issues. The EU has developed a policy on indigenous peoples well. This policy is, first of all, linked to development co-operation of the Community.[119] Since 1999 indigenous rights have been included in the thematic prioritizing of the European Initiative for Democracy and Human Rights, implying financial support for development projects. According to the guidelines, there is a focus on the integration of indigenous concerns into EU-policy, consultations with indigenous peoples and support within different target areas. But does this external policy of the EU in the development cooperation form a basis for policy of an internal relevance?

To some degree, Saami concerns have been included in the policy areas like 'lesser used languages,' regional policy programmes like within the earlier 'target one programme' and the sector of agriculture and within the Interreg-programmes. Also, the Northern Dimension of the EU has elucidated indigenous concerns, but another question is whether these policy statements have any real effect for Saami and indigenous influence on policy areas of the

[119] http://ec.europa.eu/external_relations/human_rights/ip/index.htm

North (Broderstad 2003). The Northern Dimension partnership now consists of four actors; the EU, Iceland, Norway and Russia.[120] The new Northern Dimension Policy Framework Document can be regarded as an impairment of the former Northern Dimension Policy regarding indigenous influence.[121] Given the salient role of Norway in recognition and integration of Saami rights, what are the prospects of Norway to be conductive in developing an indigenous voice in Northern policy? The reason to expect Norway to take a leading role is based on experiences gained. The Finnish and Swedish experience reveals that despite an EU-request for ratification of ILO 169,[122] neither of the two states has ratified the convention. As the first chapter accounts for, this state-position can be explained out of an anxiety concerning the convention's provisions on land and water rights. Further, the experiences gained in the Norwegian-Saami context regarding clear improvements in consultation and participation procedures ought to invite to a Swedish (and Finnish) ratification of ILO 169. According to Mörkenstam (1999: 242, 253, 255) there is a need for a change in Swedish Saami politics and a need for awarding the Saami a real political space of action. The Swedish Saami Parliament has, however, taken over the management of several tasks of reindeer husbandry[123] unlike the Norwegian situation, and by doing this have increased their administrative authority. But the 'political space of action' of the Norwegian Saami Parliament i.e. their political influence achieved during these last years is more comprehensive than what is the case for their Saami kin on the other side of the border, and can to a large degree be seen in relation to the ratification and application of ILO 169.

Regarding the role of the European Union as a framework for the Saami to gain political influence, one has to ask through which Saami political channels such influence can be accomplished. Both the system of the Saami Parliaments and non-governmental organizations (NGO) represent particular channels for political influence. Compared with the system of the Saami Parliament, the Saami Council has managed to establish a clearer EU focus in its work,

[120] For more information about the Northern Dimension Policy, see: http://ec.europa.eu/external_relations/north_dim/index.htm

[121] Personal communication: Sven-Roald Nystø 24.01.08.

[122] Already in 1994, the EU-Parliament called on the Member States "to show their determination to provide tangible protection for indigenous peoples by acceding to ILO-Convention 169 and by calling on other states to do the same" (A3-0059/94: Official Journal of the European Communities).

[123] From 1 January 2007 several task were transferred from *Jordbruksverket* and county administrative boards to the Saami Parliament.

despite its limited resources (Broderstad 2003).[124] This difference in how EU-issues are handled can be explained based on both practical-political concerns and more principal ones. The Saami Council has a long-standing experience in international indigenous policy work and lobbying activities, while the Saami Parliaments have concentrated their efforts within the respective nation-states. The question is also of a more principal character. The nation-state constitutes the most important framework for the Saami Parliaments, and the individual Saami Parliaments are responsible to and receive their legitimacy from the national electorate. The views of the electorate become a concern for the politicians. Thus, the relatively low interest in the Norwegian Saami Parliament for EU-related policy can be perceived within such a frame of understanding. Also, Saami politicians carry the 'glasses of the nation-state.' The border of the nation-state makes the Saami act as state-based groups rather than pan-Saami groups (cf. Erikson 1997: 130, 144). This assumption directs me towards the next issue of 'state policy' across state borders, namely the cross-border reindeer husbandry case.

The use of procedures in handling the rights of the 'foreign' Saami

Chapter V accounts for bilateral negotiations as procedures for handling the reindeer husbandry pasture issues in the border areas between Norway and Sweden, and addresses the question of what could explain the disagreement between Norway and Sweden regarding the cross-border reindeer husbandry despite a domestic acknowledgement of indigenous rights in both states. Why is it so difficult to apply the 'lessons learned' in the Saami-Norwegian context for the 'foreign' Saami? This issue deals with questions like legal protection and barriers to regulation affecting the 'foreign' Saami in the other country. The theme demonstrates that Saami rights issues are not only a relationship between the state in question and its Saami, but involve cross-border multi-level relationships between states and indigenous peoples. The mutual recognition established between the Norwegian nation-state and its Saami represented by the Saami Parliament is not only a two-sided recognition. As pointed out earlier in this chapter, struggles over recognition are relational and mutual rather than independent and multiple rather than dyadic. They are complex struggles 'over' recognition, not simply 'for' recognition…." (Tully 2007: 21).

[124] This understanding of the situation is also shared by the former president of the Saami Parliament Sven-Roald Nystø, who has been engaged as advisory for the EU-work of the Swedish Saami Parliament regarding the Northern Dimension, personal communication: Sven-Roald Nystø 24.01.08.

Chapter V accounts for an acknowledgement extending back in time. The cross-border reindeer husbandry Saami can even plead to the Lapp codicil concerning their right to move with their herds across the state-borders. The significance of the 250 year old document lies exactly in this acknowledgement. Their right to move is indisputable, and the Supreme Court of Norway stated in 1968 that this is a right the Saami have obtained based on immemorial usage. Moreover, the Supreme Court ruled that the Saami are entitled to an expropriating legal protection based on the use of the areas. Still, this case illustrates the tension between the rule of law and the concept of sovereignty. As accounted for, even if the Saami have legal status as right-bearing individuals based on their immemorial land-use across state borders, the policy of the state has been marked by a reluctance towards the Lapp codicil because the rights aknowledged in the codicil are understood as a form of encumbrance. The right of the Swedish Saami for grazing land is seen as subject to an easement.

The procedures for dealing with the conflict–the bilateral negotiations between Norway and Sweden–have had the character of bargaining. The problem is that bargaining is characterized by a tug of war and the result is fundamentally unstable. This type of procedure is unsuitable and unable to handle questions of legal rights. But without taking into account the complex context of rights, negotiated solutions will continue to be unstable. As chapter V accounts for, new procedures are required in order to secure legal clarifications and political solutions.

The conflict is about land use, where reindeer husbandry groups oppose each other. Mutual recognition is hardly present and the situation in several border areas is characterized by a lack of trust between the involved parties.[125] Their organizations are state-based and compose parts of state delegations. The organisations represent the interests of their members. In addition this is also a conflict between states, involving questions of sovereignty and a burden for the Norwegian state. Both the states and organizations are 'old' parties in the conflict. In addition, 'new' actors have entered the stage, namely the Saami Parliaments. Individual Norwegian and Swedish Saami appointed by the Saami Parliaments are included as members of their respective national negotiation teams. As accounted for, the Saami Parliaments often criticize the nation-states for not fulfilling their obligations derived from international law and they emphasize internatinal law as a guide for the states' indigneous policy. An important

[125] However, a few reindeer herding districts on the respective Norwegian and Swedish sides have made their own agreements on the use of pasture areas and other issues (cf. Samefolket nr 1/2008).

argument for the Saami Parliaments is that the indigenous status is based on use and possession of areas before the establishment of the states (cf. ILO 169, Art. 1, pkt. 1, b), precisely a form of use and possession aknowledged in the Lapp codicil as a right of the 'foreign' Saami in the other state based on customary law and immemorial usage. However, only to some degree these principal concerns have been pinpointed in the Saami Parliaments' way of dealing with this conflict.[126] The Saami Parliament did also criticize Norwegian authorities for the one-sidedness in the passing of the preliminary Act regulating Swedish reindeer grazing, which indicates that they were dissatisfied with the consultations. But they did not directly point out that the Norwegian state infringed on the duty to have consultation towards the Saami from the Swedish side when the Norwegian Parliament, in June 2005, passed the preliminary Act. The present legislation is regareded as illegitimate due to the process prior to the passing of the Act in the Norwegian Parliament (cf. chapter V). An extenuating circumstance is that in the guidelines for the consultation, the government agreement of June 2006 points out that "it will be natural to consult affected Sami reindeer herding communities in Sweden whenever such communities have reindeer grazing rights in Norway. However, State authorities in Norway are under no obligation to consult with the Sami Parliament in Sweden, which only has authority in Sweden."

The lesson learned is that inter-governmental bargaining which has been *the* way of handling the case since 1905 cannot solve the problems alone. Inter-governmental bargaining does not contribute to stable solutions that are perceived as legitimate. But is it possible for the parties in the conflict to modify their interpretations of the prevailing framework and to expand the pool of available solutions? What are the prospects of taking into account right claims for the 'foreigners'? The juridicial approach illuminates that some rights are prior to those anchored in citizenship; the above-mentioned right-based framework clarifies that private and universal rights apply to all parties in the same situation. Those conditions derived from the juridical approach–protection of customary rights through surveying and recognition arrangements, and those conditions derived from the political approach–political participation and self-representation, could be complied with through new management solutions and dispute resolution mechanisms, like those proposed in the report from the Norwegian-Swedish Commission on Reindeer Pasture Areas (1997) and the new proposals from the Saami Rights Commission on a survey and recognition arrangement for customary Saami land use. The

[126] The Saami Parliament addresses Saami rights concerns and the principle of immemorial usage in the hearing document (minutes 02/02 from the plenary) regarding the report from the Norwegian-Swedish Commission on Reindeer Pasture Areas (1997).

situation calls for procedures of consultations where it becomes possible to agree upon principles for cooperation. The character of this case also calls upon procedures of problem-solving and the use of legal procedures in order to deal with justified norms which oppose each other like interpretations of what customary usage rights imply.

5. Political procedures reconciling indigenous rights with citizenship rights

Since the early 1990's the Saami Parliament has developed into a political body with a real say. Increasingly, consultations have replaced hearing processes as a contact mechanism between the Parliament and Norwegian state authorities. New practices of interaction between the Saami as an indigenous people and the state have been established. Moreover, the Saami Parliament has strengthened its position at the county municipality level. The growing political influence of the Saami Parliament seems to continue, and will also be about the formal position of the parliament (cf. Report on the formal position of the Saami Parliament and budget procedures of 27th of April 2007).

The understanding of procedures as the independent variable of the thesis has been discussed as both a principle of institutionalization and concrete decision-making procedures. Regarding the first perception, the distinction between a juridical and a political approach elucidate salient conditions that make political integration possible. The juridical approach highlights that the protection of indigenous peoples' customary rights is about private law and universal rights. These preferences, principles and rules are in an authoritative position of impartiality which applies to all parties in the same situation. Rights become necessary in order to counteract the arbitrariness of political decisions and they stand out as conditions for public policies. This debate is about what can be made the subject for political considerations and what can be regarded as pre-conditions for the formulation of public policies. The question illustrates a tension between the rule of law–barriers to democracy and popular sovereignty. Yet, the political position emphasizes the inclusion of marginalized groups in political processes. The political position clarifies that in order to protect rights; the aspiration of impartiality and consensus is sought by securing the participation of affected parties. Thus, these aspects–legal preferences, principles and rules and political participation and self-representation–constitute conditions that makes mutual recognition and political integration possible.

Mutual recognition and political integration imply an inter-subjective understanding that changes relationships and affects the self-understanding of both the majority and the minorities (cf. chapter II). Critical reflection on one's own culture is promoted. New discourses arise from ethical-political discourses, and are an unavoidable part of politics which is also reflected in the legal system. As processes of political integration imply equality before the law, they simultaneously establish room and respect for differences. This implies processes of constantly revising a common framework for political justification. Due to political participation anchored in the rights of citizenship, the Saami achieved a salient breakthrough in political influence. Citizenship constitutes a common framework for political participation that makes it possible to achieve consensus about principles and implementation of procedures. It is possible to reach consensus, or at least to move towards consensus, even if it implicates different but reciprocal acceptable reasons or disagreement on the case in point but a common agreement on procedures for dispute resolution. Outcome might fall short of rational consensus but still be the result of a deliberative process based on inter-subjectively justifiable reasons. The result can be a working agreement – an in-between consensus (Eriksen 2007).

According to a deliberative understanding of procedures, different measures require different reasons, which result in the employment of different procedures. This is a point of departure for discussing the second perception about concrete decision-making procedures. Procedures employed for solving ethical and moral disputes require different justifications which are dependent on the nature of the issue. This is illustrated by different types of procedures of influence directed towards state authorities: hearings, bargaining and consultations. However, the content of the concepts of 'consultation' versus 'negotiation' in an indigenous-state context can be said to involve the same logic. I still claim that there is a reason for making a distinction between the concepts. First of all, derived from the juridical position, a salient condition expresses that not all issues are negotiable. Indigenous peoples' customary rights to land usage, like any other usage right established and based on immemorial use, cannot be subject to bargaining based on a presumption of give-and-take, which has been the way of regulating the question of pastures for cross-border reindeer husbandry. Secondly; derived from the political position, the character of consultations promises more stable agreements than solutions based on strategic action which takes the shape of bargaining. The procedures are developed within a framework of international law, but at the same time it is in the

process itself that the arguments are tried and honed against each other. The consultation articles of ILO 169, together with ILO-practice, are in this respect the most prominent instruments framing the current development of this type of procedure. Through consultations principal questions are clarified so that the parties can continue their relationship on a more regular basis by means of other procedures.

By means of procedures like the cooperation agreements between the Saami Parliament and the county municipalities, the consultation agreement between the Saami Parliament and the government, the consultations prior to the passing of the Finnmark Act and legislative means, significant advances are identified when it comes to institutional recognition and political integration. These results express both a principle of autonomy for the Saami and closer relations between the Saami and the political community. The ability to build trust and political influence depends on an autonomous Saami Parliament. A representative political body had to be in place before the development of procedures of political inclusion. For every new demand for political influence it was not necessary for the Saami Parliament to start from scratch. The increasing contact has affected and resulted in common learning among the involved parties. The processes have been deliberative, not bargaining or negotiations in the conventional sense. Step by step the Saami Parliament has been empowered, and as accounted for in the third chapter, the parliament stands out as the one defining and supplying the premises in the content of the consultations and the Finnmark Act. The chapter also accounts for the significance of international law as a framework for national policy, but also for the different procedures and the importance of discerning them. Doubtless, the Saami have gained acknowledgement. Learning and reflexive self-understanding, both in the context of the Saami Parliament and the political surroundings, characterize the current situation. The inclusion of Saami concerns in a common legal framework is expanding. There are even signs of changes in the way of handling the cross-border reindeer husbandry issue illustrated by the admission from the government that it “will be natural to consult affected Sami reindeer herding communities in Sweden whenever such communities have reindeer grazing rights in Norway.”

Accordingly, challenges appear, and impel discussions on the taken-for-grantedness of concepts like identity, cultural distinctiveness, existing frameworks of political participation and even the notion of the nation-state. Discussions of an understanding of self-determination as non-interference and independence versus a relational approach of self-determination stand

out as significant both in theoretical and practical-political terms. My point of departure for the value of reconciling the defence of indigenous rights with the principle of equal citizenship, directs me to argue for an integrative understanding of political participation and a relational approach to self-determination. My main concern has been the relational aspects of Saami political influence, and I have only to a minor degree discussed the direct exercise of authority for the Saami Parliament. Nevertheless, I also claim that in order to succeed with an expansion of authority, a relational approach to self-determination is required because empowerment depends on arguments and shared understandings.

List of references

Chapter I and VI

Aikio, P., Scheinin, M. (2005) *Operationalizing the Rights of Indigenous Peoples to Self-Determination*. Institute for Human Rights, Åbo Akademi University

Alvesson, M., Sköldberg, K. (2003): *Reflexive Methodology. New Vistas for Qualitative Research*. SAGE Publications

Amundsen, H. K. (2002) 'På sporet av noe viktig' Kommentar i Nordlys, 16.09.2002

Anaya, S. J. (2004) *Indigenous peoples in international law*. Second edition. Oxford University Press

Bengtsson, B. (2000) Några samerättsliga frågor. I *Svensk Jurist Tidning*, årgång 85, 2000, s. 36-46

Bengtsson, B. (2002) Samiska sedvanor och domstolarna; en kommentar. I *Konferanse om samenes selvbestemmelsesrett som urfolk*. Rapport Det juridiske fakultet og Senter for samiskestudier, 2002

Benhabib, S. (2002) The Claims of Culture. Equality and Diversity in the Global Era. Princeton University Press

Bjørklund, I. (1985) *Fjordfolket i Kvænangen: fra samisk samfunn til norsk utkant 1550-1980*. Universitetsforlaget

Bohman, J. (1996) *Public Deliberation. Pluralism, Complexity and Democracy*. The MIT Press, Cambridge, Massachusetts, London, England

Borrows, J. (2000) ''Landed' Citizenship: Narratives of Aboriginal Political Participation', in W. Kymlicka and W. Norman (eds) *Citizenship in Diverse Societies* Oxford University Press

Broderstad, E. G. (1994/1995) *Samepolitikk - interessemaksimering eller identitetsskaping?* hovedfagsoppgave, Institutt for samfunnsvitenskap, Tromsø: Universitetet i Tromsø, 1994, også utgitt som notat i serien LOS Nord-Norge, 1995

Broderstad, E. G. (1998) *Hvorfor snakker vi om urfolksrettigheter? Ei sammenligning mellom den canadiske og samiske urfolkssituasjonen*. Presentasjon på landsmøtet til Norske Samers Riksforbund, 26.-29. november 1998

Broderstad, E. G. (2000) 'Indigenous rights and the limitations of the nation state.' In *Democracy in the European Union - Integration through deliberation?* Eriksen, E. O. and Fossum, J. E. (eds). Routlegde, London

Broderstad, E. G. (2001) 'Political Autonomy and Integration of Authority: The Understanding of Saami Self-Determination' in *International Journal on Minority and Group Rights. Special Issue on Sami Rights in Finland, Norway, Russia and Sweden*. Guest Editor: Andreas Føllesdal. Kluwer Law International, 2001

Broderstad, E. G. (2003) Urfolkspolitisk innflytelse i en ny europeisk kontekst. I Bjerkli, B. og Selle, P. (red) *Samer, makt og demokrati. Sametinget og den nye samiske offentligheten*, Gyldendal akademisk

Broderstad, E. G. and Dahl, J. (2004) 'Political Systems' in Arctic Human Development Report, Stefansson Arctic Institute, Akureyri, Iceland.

Broderstad, E. G. og Hernes, H-K. (2008) 'Gjennombrudd ved konsultasjoner? Finnmarksloven og konsultasjonsordningen i Stortinget' in Hans-Kristian Hernes and Nils Oskal (red): *Finnmarksloven.* Oslo: Cappelen Akademisk, 2008 (forthcoming).

Broderstad, E. G. og Oskal, N. (1998) 'Beskyttelse av kulturer eller kulturelle samfunn og individer'. Kronikk i Finnmark Dagblad og Sagat, mars 1998

Cairns, A. (2000): *Citizens Plus. Aboriginal Peoples and the Canadian State*. UBC Press, Vancouver, Toronto

Chambers, S. (1996) *Reasonable Democracy. Jürgen Habermas and the politics of discourse.* Cornell University Press. Ithaca and London

Chambers, S. (2001) 'A Critical Theory of Civil Society', in Chambers, S. and Kymlicka, W. (eds) *Alternative Conceptions of Civil Society*, Princeton: Princeton University Press

Daes, E-I. (2000) 'Protection of the World's Indigenous Peoples and Human Rights,' in Symonides J (ed) *Human Rights: Concept and Standards*. Aldershot: Ashgate/UNESCO

Dworkin, R. (1977) *Taking Rights Seriously*. Harvard University Press

Ellingsen, M-B. (2003) *Fortellinga om kompetansesamfunnet. Om tillit og risiko i et regionalt utviklingsprosjekt*. NORUT Samfunnsforskning AS

Eriksen, E.O. (1994) 'Den politiske diskurs - fra konsensus til modus vivendi?' I E. O. Eriksen (red). *Den politiske orden*. Tano

Eriksen, E.O. (2003) 'Why a Constitutionalised Bill of Rights.' In Eriksen, E. O., Fossum, J. E. and Menéndez, A. J. (eds), *The Chartering of Europe. The European Charter of Fundamental Rights and its Constitutional Implications*. Nomos Verlagsgesellschaft. Baden-Baden

Eriksen, E.O. (2005) 'Reflexive integration in Europe.' In Eriksen, E. O. (ed) *Making the European Polity. Reflexive integration in the EU*. London: Routlegde, pp. 9-29

Eriksen, E.O. (2007) 'Democratic legitimacy – working agreement or rational consensus?' in N. Gilje and H. Grimen (eds). *Discursive Modernity*. Oslo: Universitetsforlaget

Eriksen, E. O., Weigård, J. (1999) *Kommunikativ handling og deliberativt demokrati. Jürgen Habermas' teori om politikk og samfunn*. Fagboklaget

Eriksen, E. O. and Fossum, J. E. (2000) 'Post-national integration.' In Eriksen, E. O. and Fossum, J. E. (eds).*Democracy in the European Union - Integration through deliberation?* Routlegde, London

Erikson, J. (1997) *Partition and redemption: a Machiavellian analysis of sami and Basque patriotism*, PhD-dissertation, Umeå: Umeå Universitet, Statsvetenskapliga institutionen

Fraser, N. (1992) 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' In Calhoun, C. (ed) *Habermas and the Public Sphere*. Camebridge, Mass.: The MIT Press

Giddens, A. (1991) Modernity and Self-Identity: Self and Society in the Late Modern Age, Cambridge: Polity Press
Guneriussen, W. (1999) *Å forstå det moderne*. Tano Aschehoug
Habermas, J. (1987) *The Theory of Communicative Action*. Bd. 2. Boston: Beacon Press
Habermas, J. (1990) 'Reconstruction and Interpretation in the Social Sciences'. In *Moral Consciousness and Communicative Action*. Polity Press
Habermas, J. (1993) 'On the Pragmatic, the Ethical, and the Moral Employments of Practical Reason.' In *Justification and Application: Remarks on discourse Ethics*, Cambridge MA: MIT Press, pp 1-17
Habermas, J. (1994) 'Struggles of recognition in the democratic constitutional state', in A. Gutman and C. Tylor (eds) *Multiculturalism: Examining the Politics of Recognition*, Princeton: Princeton University Press
Habermas, J. (1995) 'The European Nation-state, Its Achievements and its Limits. On the Past and Future of Sovereignty and Citizenship,' in *Mapping the Nation*. Verso.
Habermas, J. (1996) *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*. The MIT Press, Cambridge, Massachusetts
Habermas, J. (1998) The nation, the rule of law, and democracy. The inclusion of the Other: Studies in political theory, (eds): Cronin, Ciaran and De Greiff, Pablo, Camebridge: MIT, 1998
Habermas, J. (2003) Making Sense of the EU. Toward a Cosmopolitan Europe. In *Journal of Democracy*, Volume 14, Number 4, October 2003
Horkheimer, M. (1970) 'Tradisjonell og kritisk teori.' I Kalleberg, R. (red) *Kritisk teori. En antologi over Frankfurter-skolen i filosofi og sosiologi*. Gyldendal norsk forslag
Josefsen, E. (2007) *Norsk lovgivning og forvaltning – samiske rettigheter*. Gáldu Cala – Tidsskrift for urfolksrettigheter Nr 1/2007
Kingsbury, B (2001) *Reconciling five competing conceptual structures of indigenous peoples claims in international and comparative law*. New York University, Journal of International Law and Politics, volume 34, fall 2001, number 1
Kingsbury, B. (2005) 'Reconstructing Self-Determination: A Relational Approach.' In Aikio, P. and Scheinin, M. (eds) *Operationalizing the Rights of Indigenous Peoples to Self-Determination*. Institute for Human Rights, Åbo Akademi University
Kymlicka, W. (1989) *Liberalism, Community and Culture*, Oxford: Clarendon Press.
Kymlicka, W. (1995) *A Liberal Theory of Minority Rights*, Oxford: Clarendon Press.
Kymlicka, W. (1998): *Finding Our Way. Rethinking Ethnocultural Relations in Canada*. Toronto Oxford New York. Oxford University Press
Kymlicka, W. (1999): 'Theorizing Indigenous Rights', *University of Toronto Law Journal* 49, 2
Kymlicka, W. (2007): *Multicultural Odysseys. Navigating the New International Politics of Diversity*. Oxford University Press
Luhman, N. (1988) 'Familiarity, Confidence, Trust: Problems and alternatives.' In Gambetta, D. (ed.), *Trust: Making and breaking cooperative relations*. 94-107. New York: Basil Blackwell
Matningsdal, M. (2002) Samiske sedvaner og domstolene. I *Konferanse om samenes selvbestemmelsesrett som urfolk*. Rapport Det juridiske fakultet og Senter for samiske studier, 2002
Minde, H. (2001) 'Sami Land Rights in Norway: A Test Case for Indigenous Peoples.' In *International Journal on Minority and Group Rights. Special Issue on Sami Rights in Finland, Norway, Russia and Sweden*. Guest Editor Andreas Føllesdal. Kluwer Law International
Mörkenstam, U. (1999) *Om "Läppärnes privilegier." Föreställningar om samiskhet i svensk samepolitik 1883-1997*. Stockholms universitet. Statsvetenskapliga institutionen

Niemi, E. (1997) 'Kulturmøte, etnisitet og statlig intervensjon på Nordkalotten. Et historisk perspektiv', i *Den nordiska mosaiken*, Uppsala: Uppsala universitet Humanistdagarna 15-16 mars, rapport, pp. 261-272.

Nystø, S-R. (2001) Citizenship, self-government, self-determination: A comparison of Aboriginal peoples in Canada and Saami people in Norway. Presentation at a seminar on self-determination in Oslo, 5 November 2001. Organizers: The Nordic Association for Canadian Studies, the Embassy of Canada and the Norwegian Ministry of Local Governments and Regional Development

Nystø, S-R. (2002) 'En avtale for framtiden,' side-3 innlegg i Nordlys 11.09.2002

Nyyssönen, J. (2007)*"Everybody recognized that we were not white" Sami Identity Politics in Finland, 1945-1990*. Thesis submitted for the degree of Doctor Artium. University of Tromsø, Faculty of Social Sciences, Department of History

Oskal, N. (1999) 'Kultur og rettigheter'. I *Samer og nordmenn*, Eidheim, H. (red), Cappelen Akademisk forlag, Oslo

Oskal, N. (2001) 'Political Inclusion of the Saami as Indigenous People in Norway.' In *International Journal on Minority and Group Rights. Special Issue on Sami Rights in Finland, Norway, Russia and Sweden*. Guest Editor Andreas Føllesdal. Kluwer Law International

Oskal, N. (2002) 'Det sivile samfunnet og det politiske organiserte selvstyret.' I Oskal, N. (red), *Samisk selvbestemmelse*, Diedut, nr 2, 2002

Oskal, N. (2003): 'Samisk offentlighet og demokrati på norsk.' I Bjerkli, B. og Selle, P. (red) *Samer, makt og demokrati. Sametinget og den nye samiske offentligheten*, Gyldendal akademisk

Pettersen, H. (2002) 'Metodiske, retsteoretiske og retsfilosofiske problemstillinger i mødet mellem retskulturer.' I *Konferanse om samenes selvbestemmelsesrett som urfolk*. Rapport Det juridiske fakultet og Senter for samiske studier, 2002

Rawls, J. (1971) A Theory of Justice. Harvard University Press

Rawls, J. (2003) *Justice as Fairness. A restatement*. Edited by Erin Kelly. The Belknap Press of Harvard University Press. Camebridge, Massachusetts. Third printing 2003

Rommetvedt, H. (1995) 'Strategi og deliberasjon i offentlige beslutningsprosesser.' I Eriksen, E. O. (red) *Deliberativ politikk. Demokrati i teori og praksis*. Tano

Samefolket nr 1/2008: Ett temanummer om staten, rennäringen och riksgränsen

Sanders, D. (1998) 'The report of the Royal Commission on Aboriginal Peoples: Seeking coherence in Canadian Aboriginal Policy.' In Broderstad, E. G. (red) *Samiske rettigheter – utfordringer lokalt, regionalt, nasjonalt og internasjonalt*. Skriftserie nr 5, Senter for samiske studier, Universitetet i Tromsø

Scheinin, M. (2000/2005) 'The Right to Self-Determination under the Covenant on Civil and Political Rights.' In Aikio, P and Scheinin, M (eds) *Operationalizing the Right of Indigenous Peoples to Self-Determination*. Institute for Human Rights Abo Akademi University

Sjursen, H. (2002) Why Expand? The Question of Legitimacy and Justification in the EU's Enlargement Policy. In *Journal of Common Market Studies*, Vol. 40, No 3, September 2002, p 491-513

Smith, C. (1986) *Samerett og samepolitikk*, NNT 2/86.

Smith, C. (1995) The Development of Sami Rights since 1980. In *Becoming Visible*. Brantenberg, T., Hansen, J., Minde, H. (eds) Centre for Sami Studies, University of Tromsø

Smith, C. (2005) 'Rett for samer og nordmenn', artikkel i Aftenposten 13.04.05

Strøm Bull, K. (2003) 'Samiske sedvaner som rettsgrunnlag for medbestemmelse? Muligheter og begrensninger innenfor norsk offentlighet.' I Bjerkli, B. og Selle, P. (red.) *Samer, makt og demokrati. Sametinget og den nye samiske offentligheten*, Gyldendal akademisk

Svensson E-M. (2002) 'Självbestämmande – Definitioner, begreppsutveckling och systematisering i en filosofisk, rättslig och politisk kontext.' I *Konferanse om samenes selvbestemmelsesrett som urfolk*. Rapport Det juridiske fakultet og Senter for samiske studier, 2002

Takle, M. (2005) *Changes in German Policy on Immigration. From Ethnos to Demos?* Dissertation submitted to the Department of Political Science, Faculty of Social Sciences, University of Oslo

Taylor, C. (1989) 'Cross-Purposes: The Liberal-Communitarian Debate' In *Liberalism and the Moral Life*, Cambridge (Massachusetts)

Taylor, C. (1994) The Politics of Recognition' in A. Gutman and C. Taylor (eds) *Multiculturalism: Examining the Politics of Recognition*, Princeton: Princeton University Press

Taylor, C. (1995) *Philosophical arguments*. Harvard University Press

Tully, J. (1995) *Strange multiplicity. Constitutionalism in an age of diversity*, Cambridge University Press, Cambridge, Great Britain

Tully, J. (2007) 'The Practice of Law-Making and the Problem of Difference: An Introduction to the Field.' I Omid A. Payrow Shabani (ed): *Multiculturalism and Law: A Critical Debate.* Cardiff: University of Wales Press

Weber, M. (1982) Samfunnsvitenskapenes "objektivitet" i *Makt og byråkrati*, Gyldendal norsk forlag, Oslo

Weigård, J. (2008a) 'Is There a Special Justification for Indigenous Rights?' in Henry Minde (ed.) with Harald Gaski, Svein Jentoft and Georges Mindré: *Indigenous Peoples: Self-determination, Knowledge, Indigenity.* Delft: Eburon, 2008

Weigård, J. (2008b) 'Om det normative grunnlaget for urfolksrettigheter' in Hans-Kristian Hernes and Nils Oskal (red.): *Finnmarksloven.* Oslo: Cappelen Akademisk, 2008 (forthcoming)

Wheatley, S. (2003) 'Deliberative Democracy and Minorities.' In EJIL Vol. 14 No. 3, 507-527

Williams, M. S. (1995) 'Political and Juridical Approaches to Justice towards Groups.' In Dunne, M., Bonazzi, T. (eds.) *Citizenship and Rights in Multicultural Societies*. Keele University Press

Williams, M. S. (2000) 'The Uneasy Alliance of Group Representation and Deliberative Democracy.' In Kymlicka, W. and Norman W. eds *Citizenship in Diverse Societies*, Oxford University Press

Young, I. M. (1990) *Justice and the Politics of Difference.* Princeton University Press

Young, I. M. (1997) 'Difference as a Resource for Democratic Communication.' In Essays on Reason and Politics. *Deliberative Democracy*. Bohman, J and Rehg, W. (ed). The MIT Press Cambridge, Massachusetts, London

Young, I. M. (2007) Two Concepts of Self-Determination. In *Global Challenges. War, Self-Determination and Responsibility for Justice*. Polity Press

Public documents:

Official reports:

- Nordisk samekonvensjon. Utkast fra finsk-norsk-svensk-samisk ekspertgruppe. Avgitt 26. oktober 2005
- Norsk-Svensk Reinbeitekommisjon av 1997: Innstilling, avgitt mai 2001
- NOU 1984:18 Om samenes rettsstilling
- NOU 2003: 19 Makt og demokrati. Sluttrapport fra Makt- og demokratiutredningen
- NOU 2007: 13, Bind A og B Den nye sameretten. Utredning fra Samerettsutvalget
- SOU 1999: 25 Samerna – ett ursprungsfolk i Sverige
- SOU 2005: 116 Jakt och fiske i samverkan
- SOU 2006: 14 Samernas sedvanemarker

Parliamentary documents:

- St. meld. nr 52 (1992-93) Om norsk samepolitikk
- St. meld. nr 23(2000-2001) Førstedomstolene i fremtiden
- Odelstingsproposisjon nr 33 (1986-87) Om lov om Sametinget og andre samiske rettsforhold (sameloven)
- Ot. prp. nr. 53 (2002-2003) Om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (Finnmarksloven)
- Innst. O. nr. 80 (2004-2005) Innstilling fra justiskomiteen om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (finnmarksloven)

Other documents from the government and the Saami Parliament:

- Rapport fra arbeidsgruppe: Prosedyrer for konsultasjoner mellom statlige myndigheter og Sametinget. Avlevert til Kommunal- og regionalministeren og Sametingspresidenten 20. april 2005
- Prosedyrer for konsultasjoner mellom statlige myndigheter og Sametinget, avtale av 11. mai 2005
- Kongelig resolusjon av 28. juni 2005, Kommunal- og regionaldepartementet
- Guidelines for Consultations between State Authorities and the Sami Parliament and other Sami Entities [Norway] The Royal Ministry of Labour and Social Inclusion, 23 June 2006
- Protokoller fra konsultasjonsmøter mellom Sametinget og arbeids- og inkluderingsministeren: 14.12.05; 30.06.06; 12.12.06; 04.06.07
- Protokoll fra konsultasjonsmøte 23.04.07 mellom Sametinget og Miljøverndepartementet
- Sametingets formelle stilling og budsjettprosedyrer. Rapport avlevert 27. april 2007 fra en felles arbeidsgruppe mellom departementene og Sametinget
- Forslag til Sametingets årsmelding 2007 fra sametingsrådet, 07/5345.

International law documents:

- UN's International Covenant on Civil and Political Rights from 1966
- ILO-convention no 169 concerning indigenous and tribal peoples in independent countries, Kommunaldepartementet, Norge
- United Nations Declaration on the Rights of Indigenous Peoples

Troms fylkeskommune:

- Avtale om samarbeid mellom Sametinget og Troms fylkeskommune av 23. januar 2002
- Fylkestingsmelding nr 1/2005 Grep om egen utvikling
- Protokoll fra fylkestingets møte 11. juni 2007

Web-pages:

Regjeringens samepolitikk:
http://www.regjeringen.no/nb/dep/aid/tema/Samepolitikk.html?id=1403

Sametinget om konsultasjoner:
http://www.sametinget.no/artikkel.aspx?MId1=1&AId=2208&back=1

Troms fylkeskommune: samepolitikk:
http://www.tromsfylke.no/default.aspx?subcat=626&art=3813

International Labour Organization
http://www.ilo.org/ilolex/english/iloquery.htm

EUs external relations:
The EU's Human rights & Democratisation Policy
http://ec.europa.eu/external_relations/human_rights/ip/index.htm
The Northern Dimension
http://ec.europa.eu/external_relations/north_dim/index.htm