JOHN BERNHARD HENRIKSEN

Árbediehtu: Some legal reflections

Introduction

The debate concerning the rights of indigenous peoples has hitherto essentially addressed questions relating to their rights to land and territories, resources, language and culture. It is only in the past 20 years that the international debate has gradually begun focusing on legal issues related to indigenous peoples’ traditional knowledge. Questions concerning the rights of the Sami people to traditional knowledge have gradually become part of the academic, political and legal debates in the Nordic countries.

This development is expressed in, among other things, the form of a pilot project conducted by the Sámi allaskuvla / Sami University College in collaboration with other Sami institutions and local communities in Norway. The pilot project, entitled ”Árbediehtu: the mapping, preservation and use of Sami traditional knowledge” – which is essentially state financed – addresses in particular the importance of traditional Sami knowledge (árbediehtu) for the development and survival capacity (birgejupmi) of Sami local communities. Article 8 (j) of the UN Convention on Biological Diversity of 1992 has acted as an overarching legal frame of reference for the pilot project. Among other things, Article 8(j) recognizes that the application of indigenous peoples’ knowledge, innovations and practice can contribute towards the conservation and sustainable use of biological diversity.

The knowledge, innovations and practices of indigenous peoples are often directly connected with the natural environment inhabited or used by the indigenous people concerned. Such knowledge and practices have the greatest significance in the actual areas where they were developed in the form of in-
situ management of the eco-system. The opportunity of the Sami people to preserve and maintain their own traditional knowledge in an in-situ context is contingent on having the required access and right to use their own areas and natural resources for birgejupmi and cultural purposes.

This article has been prepared within the framework of this pilot project, and its aim is to identify some key legal issues related to the relationship between árbediehtu (traditional knowledge) and birgejupmi (survival capacity). However, the analysis goes beyond an assessment of traditional knowledge in the light of the Convention on Biological Diversity in that it also includes other relevant international principles and provisions.

The UN Convention on Biological Diversity: Knowledge, innovations and practices

The UN Convention on Biological Diversity uses the term ”traditional knowledge” to identify knowledge that has been developed through generations by a group of people living in close touch with nature. Traditional knowledge within the meaning of the Convention is in other words to be understood as collective knowledge developed by a group of people through their traditional ways of life. Such knowledge includes classification systems, empirical observations of the local natural environment, and the people’s own system of stewardship of the natural resources (CBD, Note 1997, section 84). The concept of traditional knowledge is often given the following characteristics:

1) the knowledge provides information on the physical, biological and social aspects of the natural environment in question;
2) knowledge-based norms that govern the use of the natural environment in a sustainable manner;
3) the knowledge forms the basis of systems that regulate the relationship with other users in the area;
4) the knowledge has resulted in user technologies that meet the needs of the group for sustenance, health, trade and rituals; and
5) the knowledge is based on an overarching and holistic view of existence which forms the basis for long-term and holistic decisions (CBD, Note 1997, section 85).
The term "indigenous peoples’ innovations" identifies the result of indigenous peoples’ traditional knowledge developed through empirical methods of surveying, testing and research. Such innovations are often expressed in the form of traditional technologies. The secretariat of the UN Convention on Biological Diversity identifies the following link between indigenous peoples’ knowledge and technologies: "In the context of knowledge, innovations are a feature of indigenous and local communities whereby tradition acts as a filter through which innovations occur." (CBD, Note 1997, section 86.)

The term "indigenous peoples’ practices" seeks to identify the manifestation of the knowledge and innovations of indigenous peoples, or a defined action or decision-making pattern with a basis in indigenous peoples’ knowledge and innovations (CBD, Note 1997, section 86).

Article 8(j) of the Convention on Biological Diversity recognizes that the combination of indigenous peoples’ accumulated knowledge, innovations and practices, along with the corresponding knowledge developed within the framework of modern science, can help to identify methods for the conservation and sustainable use of biological diversity. Article 17(2) therefore commits the parties to the Convention to paving the way for an exchange of information on indigenous peoples’ knowledge to take place. Furthermore, Article 18(4) establishes that the parties to the Convention shall encourage and develop methods for cooperation aimed at developing and using technologies, including the traditional technologies of indigenous peoples, in the endeavour to meet the principal objective of the Convention – a sustainable use of biological diversity.

Árbediehtu, árbemáhttu and traditional Sami stewardship practice

There is no conclusive definition of the Sami term árbediehtu. However, it is natural to understand the term as designating specific Sami knowledge that has developed over generations. Such knowledge is often closely related to the local natural environment, and it is essentially empirically-based knowledge and understanding developed through continuous interaction between the group in question and the natural environment inhabited or used by the group. Árbediehtu embraces the knowledge of how and for what purposes land areas and natural resources can best be utilized sustainably. Consequently, the term
must be regarded as falling within what the UN Convention on Biological Diversity designates as traditional knowledge of indigenous peoples.

Just as ”indigenous peoples’ innovations” originate from their ”knowledge”, Sami árbemáhttu (traditional skills, proficiency and technology) is based on árbediehtu (traditional knowledge). Árbemáhttu is a manifestation or a result of árbediehtu. It is therefore assumed here that árbemáhttu without doubt falls within what the UN Convention on Biological Diversity designates as ”indigenous peoples’ innovations”. Up until relatively recently local Sami communities have managed their own land areas and natural resources in line with their árbediehtu and árbemáhttu. Current national legislation and administrative practice in countries inhabited by the Sami have, however, deprived the Sami of the opportunity to manage their own land areas and natural resources in a way that corresponds to their árbediehtu and árbemáhttu – or their traditional stewardship systems.

The states’ obligations under the Convention on Biological Diversity

The UN Convention on Biological Diversity recognizes the important role of indigenous peoples in the conservation and sustainable use of biological diversity. Article 8(j) of the UN Convention on Biological Diversity establishes that the contracting states have an obligation to respect, preserve and continue, and promote a broader application of, indigenous peoples’ knowledge, innovations and practices provided that the relevant indigenous peoples’ consent to it. The provision also establishes a commitment on the part of the contracting states to encourage or seek solutions for an equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

The states’ obligations under Article 8(j) are expressed in the form of three key obligations:

1) Respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity;

2) Promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices;
3) Encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

In addition to this, the Convention on Biological Diversity articulates a number of other related obligations. Article 10(c) determines that the states shall protect and encourage the use of biological resources in accordance with traditional cultural practices that are compatible with the Convention’s requirements relating to the conservation and sustainable use of biological diversity. Article 10 reads as follows:

“Each Contracting Party shall, as far as possible and as appropriate:
... (c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.”

Article 17(2) includes indigenous peoples’ traditional knowledge in the matters the Convention requires the contracting parties to exchange information on in the endeavour to conserve and encourage the sustainable use of biological diversity. Article 18(4) obliges the states to encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of the Convention.

The key weakness of the Convention on Biological Diversity – viewed from an indigenous peoples’ perspective – is that the state’s legal obligation to respect indigenous peoples’ traditional knowledge, innovations and practices is subject to extensive reservations. The obligations are limited to, “as far as possible and as appropriate”, to respecting, preserving and maintaining indigenous peoples’ knowledge, innovations and practices. Article 8 states:

“Each Contracting Party, shall, as far as possible and as appropriate:... (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from utilization of such knowledge, innovations and practices.”
This reservation allows extensive freedom for the state to assume subjective and practical evaluations of whether the obligation applies in individual cases. Furthermore, the obligation in Article 8(j) has been made "subject to [the state's] national legislation". In practice, this provision sets a precedent in favour of current national legislation. These reservations have resulted in the states taking very little account of, or doing little to facilitate the use of, indigenous peoples’ knowledge, including Sami árbediehtu, when preparing legislation and administering natural resources in indigenous peoples’ areas. The Norwegian Act relating to the management of biological, geological and landscape diversity of 2009 (see The Nature Diversity Act 2009) is an example in this regard.

Despite the provision in Article 8(j) being formulated in a way that establishes a vague legal commitment on the part of the state to respect, preserve and maintain indigenous peoples’ knowledge, innovations and practices, the provision is nonetheless extremely important in that it recognizes that indigenous peoples’ knowledge, innovations and practices are significant for the preservation and sustainable use of biological diversity. Among other things, this recognition is relevant when applying other international provisions governing indigenous peoples’ rights to their own knowledge, culture, land areas and resources. Article 22(1) of the Convention on Biological Diversity is also clear in the sense that it establishes no limits on the obligations the contracting parties may have on the basis of other instruments under international law. This means, among other things, that it is natural to consider the state’s overall commitments vis-à-vis the Sami taking into account other international conventions and instruments, including the state’s obligations under international human rights law.

**Indigenous peoples’ free, prior and informed consent**

As stated above, the Convention on Biological Diversity imposes requirements for the consent of indigenous peoples in cases where others seek to apply their knowledge, innovations and practices. The principle of indigenous peoples’ Free, Prior and Informed Consent (FPIC) is recognized in several international human rights instruments and legal practice under international law, including ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent
Countries (referred to below as the ILO Convention; see ILO Convention 2003) and the United Nations Declaration on the Rights of Indigenous Peoples (The Indigenous Peoples Declaration) of 2007 (see Declaration 2007).

Article 16(2) of the ILO Convention refers to FPIC in relation to enforced relocations. Article 7 of the ILO Convention also states that indigenous peoples shall ”have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use.” Traditional knowledge must be considered to fall within the provision of Article 7 (even if this is not expressly stated in the text), because traditional knowledge is to a great extent tied in with the land areas indigenous peoples inhabit, and traditional knowledge must also be considered to fall within what are here designated as ”institutions”. Indigenous peoples’ right to decide their own priorities for their own process of development must be considered as meaning, among other things, that FIPC applies to external decision-making processes that affect indigenous peoples, i.e. processes where others than the indigenous peoples themselves have decision-making authority in issues that concern them.

Furthermore, Articles 2, 6 and 15 of the ILO Convention oblige the states to consult indigenous peoples in order to gain their informed participation and consent. Article 6(2) provides that such consultations shall be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

The United Nations Declaration on Indigenous Peoples goes slightly further than the ILO Convention in its recognition of the FPIC Principle, in that this principle is included in several of the declaration’s provisions:

- Article 10 [FPIC in connection with enforced relocations]
- Article 11(2) [FPIC in connection with initiatives aimed at remedying violations of indigenous peoples’ cultural, intellectual, religious and spiritual property]
- Article 19 [FPIC before adoption and implementation of legislative or administrative measures that may affect indigenous peoples]
- Article 28(1) [FPIC in connection with the adoption of measures to remedy violations of indigenous peoples’ rights to land areas and resources]

3 Translation of this publication into Norwegian, see ILO-konvensjon 2008.
• Article 29(2) [FPIC relating to storage of harmful materials in indigenous peoples’ land areas]
• Article 32(2) [FPIC in connection with projects affecting their lands or territories and other resources]

Moreover, the Declaration on Indigenous Peoples contains several provisions that refer to the state’s obligation to consult indigenous peoples in matters that affect them.

Article 4 of the Declaration on Indigenous Peoples recognizes that, in the exercise of their right to self-determination, indigenous peoples have the right to autonomy or self-government in matters relating to their “internal and local affairs.” It seems natural to assume that indigenous peoples’ traditional knowledge falls under the concept of indigenous peoples’ “internal and local affairs”. Furthermore, the free pursuance of their economic, social and cultural development, cf. Article 3 of the Declaration on Indigenous Peoples, is closely linked to managing their own traditional knowledge.

Several of the United Nations human rights monitoring bodies refer to the FPIC Principle in their legal practice. As an example, the UN Committee on the Elimination of Racial Discrimination expresses the following (CERD: General Recommendation XXIII, section 4 (d):

”[T]he Committee on the Elimination of Racial Discrimination calls upon States to ensure that members of indigenous peoples have rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.”

Árbediehtu is an important part of the Sami cultural heritage. The UN guidelines for protection of the cultural heritage of indigenous peoples (Draft Principles 2000) assert that indigenous peoples must have control of research concerning their cultural heritage, and that their free, prior and informed consent is a precondition for conducting research in areas related to their cultural heritage:

”The prior, free and informed consent of the [indigenous] owners should be an essential precondition of any agreements which may be made for the recording, study, display, access, and use, in any form
whatsoever, of indigenous peoples’ heritage.” (Draft Principles 2000, section 9)

The proposed guidelines state furthermore that researchers shall not publish information they have obtained from indigenous peoples or research findings achieved with the assistance of indigenous peoples without their consent:

"Researchers must not publish information obtained from indigenous peoples or the results of research conducted on flora, fauna, microbes or materials discovered through the assistance of indigenous peoples, without the traditional owners and obtaining their consent to citation or publication and provide compensation when commercial benefit is generated from such information.” (Draft Principles 2000, section 31.)

This is of key importance to projects or processes where the objective is the preservation of ărbediehtu outside the area in which it was developed.

The FPIC Principle comprises four conditions, all of which must be met before the consent of indigenous peoples can be regarded as free, prior and informed consent: (1) that it has been granted freely; (2) that it was granted in advance (prior to initiation); (3) that it was granted on an informed basis; and (4) that it is to be regarded as consent.

The condition for the consent to have been granted freely entails among other things that no form of coercion, force or pressure by external forces must have been involved, including the offer of economic advantage (unless this is part of an agreement or contract). There must be no suggestion of ”sanctions” vis-à-vis the person or group in question should they choose not to grant their consent.

The condition whereby consent must have been granted prior to the initiation of the project (prior consent) means that the relevant indigenous people must have granted their free consent prior to the start-up of the project or initiative. The project must not be initiated furthermore before the group in question has completed its internal process, and a conclusive agreement has been entered into for the implementation of the project or initiative.

The condition whereby consent must have been granted on an informed basis means among other things that the group in question shall have access to all available information (facts, figures, advantages, disadvantages, etc), and
sufficient time to obtain points of view and opinions from the members of the group. The information must be available in their own language or the language that is most common among the members of the group.

The condition whereby consent must have been granted by the relevant indigenous people means that a conclusive agreement or contract must exist with their representatives and in accordance with the relevant group’s structure or decision-making processes.

Article 67 of ILO Convention No. 169 establishes an obligation to consult in matters that may have a direct impact on indigenous peoples and contains provisions as to how the consultation process with indigenous people should be handled. This provision also provides guidelines with respect to FPIC Processes, although the content of the FPIC Principle goes further than the principle on ordinary consultations. The principle states that the government shall consult the people in question by means of appropriate procedures, and particularly through their representative institutions, when considering the introduction of legislation or administrative measures that may affect them directly. In addition, the provision states that the consultations taking place shall be held in good faith, in forms adapted to the prevailing conditions and with the objective of achieving agreement on or consent to the proposed initiatives. Consultations shall be held with affected groups of indigenous peoples. It is for example insufficient to only consult the Sami Parliament or the Sami Council on the question of mapping, preservation and use of local Sami traditional knowledge. In the first instance, it is the affected Sami individuals, groups or communities that need to be consulted in these cases.

The question of which procedures to apply when consulting indigenous peoples is equally important as the question of who to consult: the procedures to be applied when consulting the group in question will depend on the circumstances. If the consultation is to serve its purpose it needs to be adapted to the individual circumstances, as well as being meaningful, sincere and transparent (The ILO Convention, Handbook 2008, 17).

Indigenous peoples’ representative institutions may include such traditional institutions as siida, village councils, popularly elected representatives, locally elected or appointed leaders plus more modern institutions such as the Sami Parliament. The decision as to which institutions should be regarded as ”representative” must always be made in the light of the situation at hand,
where among other things account must be taken of the type of knowledge in question.

The key point is that the possessors or owners of Sami traditional knowledge, or the relevant Sami community, must grant their free, prior and informed consent to the mapping, archiving and use of such knowledge and that they fully understand the significance and consequences of handing over this knowledge to others. The FPIC Principle also entails that external actors and interests must accept the right of the possessors of traditional knowledge to decline to grant their consent, and to subsequently withdraw their consent if, for example, they become aware of circumstances that were unknown at the time they gave their consent.

The UN Human Rights Council’s Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) differentiates between consultations and the FPIC Principle in their study of indigenous peoples’ right to partake in decision-making processes that affect them. EMRIP concludes that the FPIC Principle must be interpreted in the light of the right of indigenous peoples to self-determination, and establishes that FPIC is more comprehensive than the right to be consulted. EMRIP articulates the following, among other things:

”The right of indigenous peoples to free, prior and informed consent forms an integral element of their right to self-determination. Hence, the right shall first and foremost be exercised through their own decision-making mechanisms. As the right to free, prior and informed consent is rooted in the right to self-determination, it follows that it is a right of indigenous peoples to effectively determine the outcome of decision-making processes impacting on them, not a mere right to be involved in such processes.” (EMRIP, 2010, section 41)

**Who owns the rights to Sami traditional knowledge?**

The FPIC Principle actualizes *inter alia* issues related to questions concerning the ownership of traditional knowledge. As an example, the question may be raised regarding who should be considered as the right person to grant free, prior and informed consent to the mapping, archiving and use of traditional Sami knowledge? This issue is also closely related to the question of establishing databases for árbediehtu. In general, it may be said that it is the
person or group that possesses or owns such knowledge that is the correct authority in an FPIC Principle context.

It must be assumed that all árbediehtu has owners or custodians, either in the form of Sami individuals, families, groups, local communities or the entire Sami people. Who it is that possesses, acts as custodian of or owns, depends on the knowledge in question. For example, árbediehtu relating to limited and very local matters may be possessed/owned by an individual person, family or small group, whereas other forms of information of a more general nature may be possessed by a far larger group. It is difficult to assume that all traditional Sami knowledge is collective knowledge that is possessed or owned by the entire Sami people. The question as to who is the right person/group to grant its consent for the mapping, archiving and use of Sami traditional knowledge must therefore be decided in each specific case.

Such an approach would accord with recognized international principles for the protection of the cultural heritage of indigenous peoples:

Every element of an indigenous peoples’ heritage has owners, which may be the whole people, a particular family or clan, an association or community, or individuals, who have been specially taught or initiated to be such custodians. The owners of heritage must be determined in accordance with indigenous peoples’ own customs, laws and practices. (Draft Principles 2000).

**Various interdependent international standards**

Árbediehtu is, as already mentioned, often closely related to and developed through the Samis cultural or traditional use of the natural environment. The Sami’s opportunity to utilize and make practical use of their own territory and associated resources is not just an important precondition for the preservation and use of traditional Sami knowledge, but also constitutes an important material precondition for the Sami culture and way of life.

Árbediehtu is not just part of the material basis of Sami culture, but also represents the exercise of Sami culture. Árbediehtu’s multifaceted nature and role ensures that its preservation and application is not limited to the conservation of biological diversity, because it also has other important aspects that can be articulated in terms of law, particularly in the light of international human rights standards. The following factors indicate that it
is also natural to assess the rights of the Sami to their own knowledge in the light of international human rights standards:

1) Árbediehtu is often linked to and developed through the Samis use and stewardship of the natural environment. Therefore, the Sami people’s right to use their own areas, water and natural resources is a vital requirement for their possibility to preserve, use and pass on such traditional knowledge.

2) Sami culture is closely related to the use and exploitation of the Sami’s own lands, water and natural resources. Therefore, the use of lands, water and natural resources constitutes another key material precondition for Sami culture, at the same time as which such use and exploitation is also a precondition for the preservation, use and development of certain aspects of Árbediehtu.

3) Árbediehtu is part of Sami culture, while also constituting a material precondition for Sami culture. The maintenance of Sami culture and Árbediehtu depends on the Sami territories also being used for traditional purposes in the future for the pursuance of traditional livelihoods, lifestyles and forms of harvesting in line with Sami stewardship systems.

4) International human rights instruments and practices recognise the rights of indigenous peoples to land areas, natural resources and culture. Human rights recognise that indigenous peoples have a unique relationship with their territories, and that their culture is often expressed through their use of their own territories and natural resources, including through their lifestyles, hunting, trapping, fishing and utilization of other natural resources.

**The United Nations Declaration on the Rights of Indigenous Peoples**

Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (Indigenous Peoples Declaration) recognizes that indigenous peoples have the right to maintain, control, protect and develop their traditional knowledge. The provision also recognizes corresponding rights in relation to
several correlated issues, including cultural expressions, technologies, genetic resources, designs, etc.:

”(1) Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. (2) In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.” (Indigenous Peoples Declaration 2007, Article 31.)

Thus, Article 31 determines that indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, as expressed through human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. Indigenous peoples also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. The provision also determines that the states shall take effective measures to recognize and protect the exercise of these rights in conjunction with indigenous peoples. The rights affirmed in the Declaration on Indigenous Peoples are recognized as minimum standards for the survival and dignity of indigenous peoples (Indigenous Peoples Declaration 2007, Article 43).

**International human rights**

The principle of territorial sovereignty is the historical basis of international law, including in relation to the dispositions of the State. However, the advance of convention-based protection in the field of human rights, including the rights of indigenous peoples, has considerably reduced national states’ freedom of action. The protection of indigenous peoples’ rights under international law goes beyond legally binding conventions. For example, it
applies to the United Nations Declaration on the Rights of Indigenous Peoples. The Declaration on the Rights of Indigenous Peoples is not a legally binding convention, but it has nonetheless a significantly binding effect on the state in that it is in principle limited to applying existing legally binding human rights standards to the specific historical, cultural, economic and social circumstances of indigenous peoples (Anaya 2008, sections 34–43; EMRIP 2009, sections 27-40, Annex section 7).

International human rights articulate the rights and freedoms of individuals (individual rights) and peoples (collective rights). These apply regardless of legal or societal systems (Opsahl 2002, 25; Høstmælingen 2003, 27–28). In other words, human rights are to be considered as universal rights that establish barriers for the interventions a national state can make in those rights, or permit others to make.

Indigenous peoples’ right to culture

Indigenous peoples’ right to culture is robustly protected by international law. This protection also comprises the material basis of the culture, and is laid down in Article 27 of the International Covenant on Civil and Political Rights (ICCPR), and associated legal practice. Article 27 of ICCPR holds that ”In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”. The practice of the United Nations Human Rights Committee – the monitoring body of the ICCPR – shows that indigenous peoples are able to invoke rights under ICCPR Article 27 despite the wording of the provision referring only to minorities.

The cultural protection laid down in Article 27 also comprises the material basis of the Sami culture. The Human Rights Committee has on several occasions stated that indigenous peoples’ special affiliation with their own traditional land areas and natural resources are important to the state’s duty to protect their right to enjoy their own culture. This appears inter alia in the Committee’s general comments on Article 27 ICCPR (UN HRC, General Comment No. 23):
”The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspects of these rights of individuals protected under that article – for example, to enjoy a particular culture may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.” ⁴

This means among other things that the traditional use of the natural resources that forms a large part of birgejupmi, ”the art of survival”, falls under the protection of culture in Article 27 ICCPR. This interpretation of Article 27, along with the Committee’s statements in a number of individual complaint cases, makes clear that the states are obliged to protect the material basis of indigenous peoples’ culture, including their traditional lifestyles, livelihoods and use of lands and resources (UN HRC, Communications 1984–2001).

In considering a Sami complaint against the Swedish State in 1984–85, the UN Human Rights Committee established for the first time the connection between Sami culture and reindeer husbandry – in the so-called Kitok case. The Committee concluded that Sami reindeer husbandry falls under Article 27 because it forms a vital part of the Sami culture (Kitok v Sweden 1985). In the Kitok case the Committee stated that although the regulation of economic activities is normally a matter for national authorities, the economic activity itself will nonetheless come under the protection of Article 27 if it is important to the culture of the indigenous people in question. There are no reasonable legal grounds to limit this to Sami reindeer husbandry because in this context reindeer husbandry must be placed on an equal footing with other forms of traditional, culturally based Sami utilization of natural resources in Sami territories.

This indicates that Article 27 establishes clear limits as regards the freedom of the state to regulate traditional Sami utilization of their own territories. The key principle is that the state shall neither adopt nor permit measures that could significantly harm the basic conditions for Sami culture and Sami livelihoods. The UN Human Rights Committee has maintained this interpretation of Article 27 ICCPR in a number of subsequent individual complaints by indigenous peoples (UN HRC, Communications 1984–2001).

⁴ Underlined by the author.
Norwegian legislation and international covenants

The legal obligations of the state towards the Sami, including with respect to their cultural rights, are not limited to international law, since the state also has internal legal obligations with regard to creating conditions to enable Sami culture to be preserved and passed on to future generations. This obligation also applies to árbediehtu, as traditional Sami knowledge is an important part of Sami culture.

It follows from section 110(a) of the Norwegian Constitution that "[I]t is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life." The provision sets forth an obligation on the part of Norwegian authorities to create conditions for the preservation of Sami culture. There is also broad consensus that Article 27 ICCPR and the Norwegian Constitution, section 110(a) impose identical requirements on the state as regards protection of Sami cultural rights and the obligation to create conditions enabling the preservation of Sami culture (Smith 1990, 507 ff.). In other words, the provision must be interpreted on the basis of the state’s obligations under international law.

Section 110(c) of the Norwegian Constitution and the Norwegian Human Rights Act of 1999 contribute to reinforcing the position of human rights in Norwegian legislation. Section 110(c) of the Constitution determines that it is incumbent on the Norwegian authorities to respect and ensure human rights and that specific provisions on the implementation of international treaties thereon shall be determined by law. This provision has been followed up by subsequent legislation, including the Human Rights Act (Act No. 30 of 21 May 1999). The Human Rights Act gives the International Covenants on Civil and Political Rights (ICCPR), and Economic, Social and Cultural Rights (ICESCR) respectively, equal status with Norwegian law. Section 3 of the Human Rights Act also affords these covenants precedence in cases where there may be a difference between the covenants’ provisions and Norwegian legislation. The principle of precedence differs from the principle that normally regulates the relationship between Norwegian and international laws. The general principal rule in Norway is that in the event of discrepancy, Norwegian law takes precedence over international human rights covenants.

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5 This provision was included in the Norwegian Constitution in 1988.
In other words, it follows from international law, the Norwegian Constitution and the Human Rights Act that the state has a legal duty to give the Sami real opportunities to protect and develop their culture, including árbediehtu. Current Norwegian law establishes no effective legal protection for árbediehtu, however, and creates conditions to only a minor extent enabling the preservation, use and maintenance of such knowledge.

With the exception of the right to undertake reindeer husbandry, the Sami are to a great extent equal to the rest of the population as regards the right to utilize the natural resources in their own territories. This has directly negative consequences for the preservation and use of árbediehtu. In many ways, the Norwegian Nature Diversity Act is an expression of the state’s lack of understanding and respect for the Sami’s rights to culture, land and resources. Although the Nature Diversity Act is a legislative measure that has arisen partly out of Norwegian obligations under the UN Convention on Biological Diversity, the Act is essentially silent regarding the Sami’s rights and interests in matters that fall under the objective scope of the Act. The same problem emerges in relation to other Norwegian legislation that is of immense significance for the conditions governing the use and preservation of árbediehtu, such as the Finnmark Act, the Act on motorised traffic in outlying areas and river systems⁶, the fishery legislation, the Act relating to salmon fishing and inland fishing, the Wildlife Act.

References


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Ethical guidelines for the documentation of árbediehtu, Sami traditional knowledge

Documentation of the traditional knowledge of indigenous peoples is becoming increasingly common; one reason for this is that such knowledge is becoming ever weaker and even in some cases disappearing. This is partly due to the increasing influence of Western ways of life on indigenous communities and the passing away of the older generation, taking with them a great deal of the knowledge. Indigenous peoples themselves are today often in the forefront in demanding that traditional knowledge be collected, preserved and passed on to the younger generations, and the indigenous peoples also want to be primarily responsible for such work (Burgess 1999). Traditional knowledge ranges from the limited traditions of specific families or areas to the more comprehensive traditions which the Sami people have in common, regardless of district affiliation. A Sami tradition can be very local in character and thus only apply to a small geographic area. Other Sami may not be familiar with the tradition, because they come from a locality where different customs developed (Gaup 2008). A myriad of different traditions is an expression of cultural wealth, and is also a reflection of how knowledge is adapted to the distinct ecological niches or environments found in Sápmi (Samiland).

The aim of the present article is an attempt to create guidelines for how árbediehtu (Sami traditional knowledge) should be documented without exploiting the culture. The article must therefore be regarded as a contribution to an ongoing discussion.