Arctic Review on Law and Politics, vol. 5, 1/2014 pp. 4–10. ISSN 1891-6252

Fisheries in coastal Sami areas: Geopolitical concerns?

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Received February 2013, accepted March 2013

Abstract: This paper aims to analyze the fishing rights of the Sea Sami (Coastal Sami) based on international law, particularly with respect to differing views in the recommendations of the Coastal Fishing Commission 2008, and in the Government bill 2012. The main point of international law discussed is the protection of the culture laid down in UN Covenant on Civil and Political Rights article 27. There is agreement to a large extent regarding the interpretation of this article. The paper intends to delimit the area of opposing arguments in order to define any future legal battleground. The author finds that the Government bill is unsatisfactory with regard to its legal reasoning. This international law issue has, in his opinion, such wide cultural implications that the discussion ought to continue.

Key words: Fishing rights, Sea Sami culture, Coastal Fishing Commission, Government bill 2012, UN Covenant on Civil and Political Rights article 27.

1. Indigenous rights from the Coastal Fishing Commission 2008 to the new legislation 2012[1]

I shall discuss some aspects of Indigenous rights, more precisely the international law concerning fishing rights in the sea of the Sami living along the coast of Norway, often called the Sea Sami. How the Indigenous rights are respected in the

1. The article is based on a presentation to a seminar 23 January 2013 on *Economic Development in the Indigenous North*, Centre for Sami Studies, University of Tromsø.

Arctic area is – or at least ought to be – not only of legal significance, but also of more general geopolitical concern. My presentation will primarily be a discussion of the Government bill of March 2012 for new legislation on these fishing rights.[2] This legislation – enacted summer 2012 – did *not* include such rights based in international law.

The international law reasoning in the bill was, up to a point, of high quality; but then it failed, as I see it, and the mistake may have far-reaching consequences. This point of view is in fact the reason for my presentation today.

First some words on the background of this new legislation.

A Government appointed Coastal Fishing Commission gave a Report of 2008 with a chapter on the international law basis of the Sea Sami right to fish, which concluded that there is such an Indigenous right.[3] It is fair to mention that I had main responsibility for this chapter, but the Report was unanimous from a very qualified group of nine members. Based on this law conclusion, the Commission proposed new legislation on the right to fish for those living along the Coast of Finnmark County – Sami as well as others – and at the same time a new administration of fisheries outside of Finnmark.[4]

After a hearing process, consultations were conducted between the Ministry of Fisheries and the Sami parliament. The Ministry presented a draft legislation that excluded rights based in international law. After some rounds of consultations, the Sami representatives accepted a new legislation, which had certain improvements compared with the existing law. However, on the more fundamental question concerning an international Indigenous right that would have a more substantial character, the State would not give in. This result was thereafter approved by the Sami parliament, but with only a narrow majority. The Indigenous rights were a core issue.

The Government bill was presented to the Norwegian parliament in accordance with this result, and the Parliament approved the proposal.

So, here we are today. However, this international law issue has such wide cultural implications that the discussion should continue.

2. Prop. 70 L (2011–2012) Endringar i deltakerloven, havressurslova og finnmarksloven (kystfiskeutvalet).
3. NOU 2008: 5 Retten til fiske i havet utenfor Finnmark, chapter 8, pp. 249–282.
4. NOU 2008: 5, chapter 13, pp. 411–412.

2. The core problem: the reality of the protection of a culture

The main principles of Indigenous law are laid down in the UN Declaration on the Rights of Indigenous Peoples of 2007, many also in the ILO Convention No. 169 of 1989. These instruments are significant too as guidelines in the interpretation of other provisions.

Concerning the Indigenous right to fish, there is no specific provision in the international instruments. One has to build on a more comprehensive treaty article. My comments shall concentrate on the UN Covenant on Civil and Political Rights article 27, which states that persons belonging to ethnic minorities "shall not be denied the right, in community with other members of the group, to enjoy their own culture".

The UN Human Rights Committee stated in a General Comment to this article in 1994 that "culture manifests itself in many forms", moreover, that the right may consist of enjoying "a particular culture", that this may be particularly true of "members of indigenous communities", and that this right "may include such traditional activities as fishing or hunting".[5]

But how wide-ranging is such an understanding of the article of the Covenant? This in my view is the most important legal question connected with Sami fishing rights, and also of significance to other Indigenous rights in the North. The crux of the matter is how far the protection of a culture also embraces the material basis of that culture, like fishing in our case. This is a legal problem, not a political one, and has to be analyzed as such.

The Ministry bill contains an extensive analysis of the relevant international law issues. I will now confront the reasoning in this Ministry document with the document of the Coastal Fishing Commission, in order to find the point where the two interpretations diverge. There is to be found any future legal battleground.

3. Comparing the reasoning of the Commission and the Government

The Ministry agrees "without any doubt" that the Sami are a minority, and an Indigenous people according to the law.[6] Coming to the concept of the material basis of the culture, the Ministry finds, in principle, that our article 27 may embrace such livelihoods as, for instance, salt sea fishing.[7] Like the view of the Commission.

5. General Comment No. 23 para 3.2 and para 7.
6. Prop. 70 L (2011–2012), p. 87.
7. Ibid.

The next item is whether the fishing lacks a specific cultural character, or whether its long historic traditions for both livelihood and trade in Sami coastal communities are sufficient. The Ministry concludes in favor of fiord and coastal fisheries being included in the protection of our article.[8] Like the view of the Commission.

A most practical question is whether these Sami fisheries would be legally included, even when modern technology is used. The Ministry agrees, once more, saying that modern technology is not a hindrance, as long as it is a continuation of the traditional forms of fisheries.[9] Again, like the view of the Commission.

A major issue is the authority for positive discrimination. The Ministry admits such special actions when necessary to secure the material basis of the minority culture.[10] No significant difference, as far as I can see, between the two documents.

And so on. To save time I shall bypass some other questions where one again will find more or less common ground between the Commission and the Ministry. This broad joint understanding was surprising to me when studying the bill and knowing the outcome. Where then is the battleground?

We come now to the subtitle "the extent of the legal claim". The Commission states that our article 27 is laying down a duty for state authorities to attain a result: a cultural result. The decisive test is whether the members of the minority may participate in the culture together with other members, and as regards the Sea Sami, what effect the right to fish will have on their settlements. The Ministry agrees again, and it coins the term 'resultduty' (*resultatplikt*) when speaking about the responsibility of the state.[11] So far the common view is upheld. The state responsibility according to our article 27 is thus defined by the result, which should be a protection of Sea Sami culture that still exists in fiord and coastal areas. One has to look to the cultural bottom-line in order to see whether and to what degree this state duty is fulfilled.

But then the legal thinking takes two different roads.

4. The point of divergence

The Ministry gives a condensed review of the Commission's reasoning in this connection, which is so fair and precise that I shall now quote a segment. This is the Commission's view as presented in the Ministry's summary:[12]

8. Prop. 70 L (2011–2012), p. 88.
9. Ibid.
10. Ibid.
11. pp. Ibid. 89 and 101.
12. Ibid. p. 89. My translation.

> The Commission considers the central point according to international law to be that the right to fishing shall give basis for settlement, because fishing is the basis for the culture. The Commission builds on the fact that… the people in many local communities still identify themselves as Sami. The Commission is of the opinion that these local communities are crucial to giving Sea Sami the opportunity to enjoy their culture, and if these communities should disappear, so would Sea Sami culture. This implies, according to the Commission, a state responsibility to see that Sami local communities survive, and that the right to fishing must extend sufficiently to establish a realistic basis for future settlement in Sami coastal and fiord communities. This view, according to the Commission, provides a guideline for changes necessary in the present regulatory system.

This view of the Commission I still consider to be valid reasoning. The Ministry, however, stated that it cannot adhere to these evaluations.[13] Why not? The rejections of the Ministry are short in form and, in my opinion, too short in substance.

First, says the Ministry, the Commission does not distinguish clearly between the state's *international law responsibilities* on the one hand, and on the other hand, the state's *policy goals* concerning strengthening of coast and fiord fishing in the north of Norway. My reply would be that the text of the Commission, as well as my speech today, is aimed at the *international law* consequences of our article 27. Law is law, even if the law points in the same direction as good national policy. If there is coherence in the results aimed at in law, as well as in national policy, the effect of this coherence should tend to be positive, and certainly not negative, with regard to the legal interpretation.

Secondly, states the Ministry, the future of settlements in these areas will also depend on social factors other than fisheries. This is no doubt true. My reply would nevertheless be that one can hardly see trades, other than fishing-related activities, which may have an equal Sami cultural impact in these communities. The extent of fishing rights will be a primary element in the state's influence on the viability of Sea Sami culture.

The Ministry then concludes, without much more argumentation, that *the rules on regulation* of the fisheries *were in conformity* with the duty of the state in securing the basis of the Sea Sami culture.[14]

This is their unreserved legal conclusion, in spite of the broad common ground of reasoning with the Commission.

13. Ibid. p. 89.
14. Ibid.

5. Probably the last chance for the state

Let me now indicate a continuation of the discussion based on this common ground.

In order to judge whether the present rules fulfill the requirements of international law, one must evaluate the development and the present situation of Sea Sami culture. The strength of the culture seen in totality will signify the fulfillment. One cannot say whether the regulations of the fisheries are in conflict or in conformity with state responsibility, solely by reading the regulations. The answer would depend on the government's use of the regulations and the real effect on Sea Sami communities.

The Sea Sami were the segment of Sami people most badly hurt by the Norwegian assimilation policy lasting a hundred years. The legal situation changed successively, among other reforms, when in 1972 the UN Covenant on Civil and Political Rights was ratified by Norway. During the following period there has been a change in the general Sami policy of the state. One can see some elements of cultural revitalization. However, the Sea Sami overall have experienced a continuous decline in population, in fishing activities, and in use of the Sami language. The Commission's Report gives a broad account in this regard.[15] In describing the result, the Commission employs the characterization "*fem på tolv*", five minutes before midnight, to describe the urgency of the Sea Sami situation.

This situation, combined with the trend of continuous decline, is the cultural 'result' that should indicate the success of the state's 'resultduty'. Several statements in the Commission document are to the effect that the state must make strong interventions to secure the basis for Sea Sami to preserve their cultural community identity. The Report speaks about "probably the last chance" of the state to redress some of the negative effects of earlier discriminatory policy decisions, and to reach the goal of securing the Sea Sami future.[16] The final statement in the advice of the Report emphasizes that a vigorous push (*et krafttak*) is necessary.[17] The law proposal points to changes that the Commission, against this background, considers adequate and fair.

How then is the "result" which the Ministry is looking to, regarding its legal interpretation, to be achieved?

In the Ministry document it is difficult to find any analysis of the present cultural status. An attachment gives a statistical report of development in the Norwegian

15. NOU 2008: 5, chapter 6, pp. 161–208.
16. Ibid. p. 371, p. 408.
17. Ibid. p. 408.

fishing trade.[18] This survey shows that the fisheries in Sea Sami areas have more *negative* development than other areas of north Norway.[19] One should expect this finding to be a strong argument in favor of *positive* action. However, the legal consequences of the findings are glossed over by concluding that the causes of the negative development are complex. My comment is that our article 27 is concerned primarily with the cultural bottom-line, that is, with resolution of the predicament, rather than its cause.

Taking into account all the common ground between the Commission and the Ministry, it is hard to understand this leap to the bill's legal conclusions.

Finally, the position of the Ministry is not directly a denial of an international law-based right to some fishing. The Ministry is thus speaking about the limits or the frames of international law, but without indicating how such frames should be drawn. However, words must converge with reality. What worth has a "right" – a Sea Sami right "to enjoy their own culture" – if the trend is allowed to continue without legal intervention in the negative direction towards a very uncertain future?

18. See vedlegg 2, pp. 146–170.
19. Prop. 70 L (2011–2012), pp. 101–102.