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Indigenous Customary Law and Norwegian Domestic Law: Scenes of a (Complementary or Mutually Exclusive) Marriage?

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Abstract: Articles 27 and 34 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognise Indigenous Peoples' laws. Art. 34 gives Indigenous Peoples the right to maintain their juridical systems or customs in accordance with international human rights standards. Although the UNDRIP is soft law, its core is arguably customary law and, therefore, a binding source of law. For States with Indigenous People, such as Norway, the UNDRIP is of paramount importance, from a legal, political, and not least moral perspective. This paper discusses norm hierarchies and tensions that are created in the meeting between the Indigenous customary law of the Sámi and statutory domestic Norwegian law. The introduction of customary, commonly unwritten, Indigenous rules into the judicial portfolio of a State creates an obvious challenge: what is their legal status? Can Indigenous law set aside domestic statutory norms? Some might argue that due to historical wrong, Indigenous law should always take precedence when domestic law conflicts with it. While Norwegian domestic law acknowledges the precedence of certain core human rights treaties over domestic laws, the same is not valid for Indigenous rights. How then should Indigenous custom be dealt with before a court of law, and how do the different legal systems relate to each other? This paper is foremost based on theoretical, to a lesser degree also on empirical material. It discusses on a general level the relationship between different legal systems within the same State and, on a specific level, the dealing of the Norwegian courts with Sámi Indigenous laws and customs.

Keywords: Sámi; Indigenous customary law; legal pluralism; UNDRIP; TRC

Citation: Lingaas, Carola. 2022. Indigenous Customary Law and Norwegian Domestic Law: Scenes of a (Complementary or Mutually Exclusive) Marriage? *Laws* 11: 19. https://doi.org/10.3390/laws11020019

Received: 7 January 2022
Accepted: 2 March 2022
Published: 4 March 2022

1. Introduction

Norway is home to the Sámi Indigenous People, who also live in the Arctic areas of Sweden, Finland, and Russia. As other Indigenous Peoples, the Sámi have a rich tradition of mostly unwritten customs and laws that regulate relationships, occupations, land usage and distribution, culture, and civil and criminal matters (Ravna 2010, p. 149; Smith 2004, pp. 137–38; Ahrén 2004, pp. 68–69). These customs are essential to upholding the fragile relationship between people, animals, and nature. The Indigenous customary laws play an integral and fundamental role in the Sámi's way of life, spirituality, and their group identity (Heinämäki and Xanthaki 2017, p. 65; Ahrén 2004, pp. 65, 68–69). Law is one expression of the social structure of Indigenous People and, as such, part of their group identity (Kirchner 2015, p. 2; Ahrén 2004, p. 108).

As an important part of any Indigenous People's cultural heritage and knowledge systems, customary laws are passed on from generation to generation, primarily in oral or non-written manners as in folk tales, poems, songs, art, and stories (Susann Funderud 2020, pp. 85, 91; Watson 2018, p. 101; Tobin 2014, p. xx; Ahrén 2004, p. 100). As such, the legal tradition of the Sámi is quite distinct from the currently predominantly positivist legal systems that have dominated most of the world, including the Scandinavian countries, for the past 200 years. Not only are the customary laws of Indigenous peoples distinct, but they are also largely unknown and unappreciated by most non-Sámi people, including lawyers, judges, and legislators (Allard 2015, p. 49; Tobin 2014, p. 1; Ravna 2010, p. 164; Ahrén 2004, pp. 108–9).

The introduction of commonly unwritten Indigenous customary rules into the judicial portfolio of a state whose legal regime is constructed primarily on positivistic norms creates an obvious challenge: what is their legal status? What typifies Indigenous customary law, and is it the same as rules based on time immemorial use? These challenges, including the relationship between positively framed State law and orally framed Indigenous customary law, outline the research questions of this paper. Researchers pointed out that the State's "hegemonic ability to use law, positive state law, to constitute the other" has been an important tool of colonial policy (Bankes 2015, p. 9). Indeed, the failure of colonising powers to fully acknowledge Indigenous peoples' legal systems and their respect for Indigenous customary law might be understood as continued colonisation (Ahrén 2004, pp. 93, 96, 109; Heinämäki and Xanthaki 2017, p. 67).

In focusing on Norway, this paper discusses issues that arise when Sámi Indigenous customary law meets the legal system and norm hierarchy of the majority. Sámi rights and obligations are, to a lesser degree, individualised; more commonly, they are collective and foreground the extended family (Ahrén 2004, pp. 71, 78). How does a collective understanding of rights fit in a legal system that primarily litigates individual rights?[1] In litigation with competing norms, can Indigenous law set aside domestic statutory norms even if it is orally transmitted and only contained in a poem or song? (Smith 2004, pp. 139–40). This paper examines, without a claim as to comprehensiveness, how the domestic courts consider Sámi customary law. Norway has notably been interpreted as the State with the most favourable legal situation for the Sámi, increasingly acknowledging Sámi customs (Allard and Skogvang 2015, p. 5; Allard 2015, pp. 62–63).

This paper points to several questions if and how Indigenous and domestic law can co-exist in a manner meaningful to all and with due respect to the historical injustices incurred by the Sámi that have had consequences until today (Norwegian National Human Rights Institution (NNHRI); Melhus and Broderstad 2020). One scholar even asserts that if "encounters between positive and customary legal traditions are to prosper they will need to be informed by Indigenous Peoples' world visions that directly link all living things, the earth and the cosmos" (Tobin 2014, p. xix).

The obligations of Norway under international law, foremost under the International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries[2] and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), to respect and protect Indigenous rights set the framework for the analysis. Although not dealing with customary Indigenous law, the recent decision by the Supreme Court of Norway in the *Fosen* case demonstrates the increasing recognition and importance of international law in the adjudication of Indigenous rights.[3]

2. Novelty

"[T]he right of Indigenous peoples to maintain their customary laws and systems continues to be a rather unexplored issue in legal literature", wrote Heinämäki and Xanthaki (2017, p. 65). They assert that Indigenous Peoples and their customary laws have been explored foremost by social or legal anthropologists, while legal experts focused on written and codified positive law (ibid.; Kirchner 2015, pp. 1, 3). This paper takes an international law perspective on Indigenous customary law, thereby helping to fill the lacuna, which was created by its exploration mainly by anthropologists and lawyers at the domestic level (Heinämäki and Xanthaki 2017, p. 67; Tuori 2011, p. 338). The recognition of Indigenous

[1] In the *Svartskog* case (Rt. 2011 s. 1229), the Supreme Court confirmed a principle of collective property rights for the Sámi population of an area, concluding that the Sámi who make up the dominant part of the valley's population, have "with their collective use of resources, not have the same tradition of thinking about property rights". Allard (2015), p. 58, discusses the paradigm shift that this judgment entailed, including the revitalisation of interest in immemorial usage as applied to collective uses and as a source of title.

[2] International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, adopted 27 June 1989 (entry into force 5 September 1991), 28 ILM (1989) 1382.

[3] HR-2021-1975-S (11 October 2021).

Peoples' right to their own legal regimes and institutions is, according to Brendan Tobin (2014, p. 1), an "extremely significant but oft-times overlooked aspect".

Indigenous Peoples are the object of considerable academic interest from numerous disciplines, as a continuously high research output witnesses (Kirchner 2015, p. 1). The Indigenous Peoples' own governance systems and legal orders include Indigenous customary laws as part of ongoing practices and perceptions about the legal validity of such practices. In legal publications, the place of Indigenous custom in the legal hierarchy or conflicts of laws is far from clear (Magga 2017, p. 274). With regard to Sámi Indigenous customary law, there are few legal publications that go beyond the domestic (private) law analysis.[4] Researchers have moreover pointed out that there is a scarcity of English language literature addressing legal aspects regarding the Sámi (Allard and Skogvang 2015, p. 3). By analysing Sámi customary laws through the prism of international law, this paper contributes to the still rather scarce legal literature on the topic (Labba 2020, pp. 215, 225). Furthermore, the paper's discussion on legal pluralism contributes to slightly closing the research gap in public international law on the topic (Labba 2020, p. 226; Berman 2012, pp. 50–51, 53).

3. The Sámi and Their Customary Laws

3.1. Historical Background

The Sámi live in Sápmi, their homeland, the geographic area of which has remained largely unchanged for the last 1000 years. In the same period, however, territorial sovereignty changed radically (Ravna 2010, p. 151; Ahrén 2004, pp. 73–92). In 1814, Norway was forced into a union with Sweden after being on the losing side of the Napoleonic Wars. It declared its independence and established its own constitution. However, Norway was not recognised as fully independent until 1905, when a plebiscite voted in favour of independence from Sweden. In this period, Norway was building a national identity, with severe implications for the Sámi (Durfee and Johnstone 2019, pp. 43–44; Ahrén 2004, pp. 83–84). In the process of population movement and the settlement of larger groups belonging to the majority population, the Sámi social and legal culture was put under pressure. As the domestic law progressed, customs had to give way (Smith 2004, p. 137; Ravna 2010, pp. 156, 156, 161, 164; Allard 2015, pp. 60–61; Ahrén 2004, pp. 73, 82). Most legal matters have since been dealt with by the judiciary of the Norwegian State that applies the laws of the majority population, which owe their legitimacy to the endorsement by the Parliament (Sand 2019, p. 685). By contrast, customary law derives its existence and content from social acceptance (Ahrén 2004, p. 63).

From the 1850s to the 1960s, the Norwegian State practiced a Norwegianisation policy, by which the Sámi were exposed to policies of forced assimilation, marginalisation, and discrimination (Allard and Skogvang 2015, p. 4; Ahrén 2004, pp. 83–85). They became the object of the so-called doctrine of culture stages, which asserted that certain human "racial" groups, due to their inherent qualities, were on a higher developmental level than others. The doctrine provided the (pseudo-)scientific foundation for the discriminatory treatment of the Sámi, who were considered "primitive tribes" (Ravna 2010, pp. 154–55; Ahrén 2004, pp. 81–82). Although official assimilation or integration policies were abandoned, the Sámi still today suffer from the consequences. In all core life indexes such as health, education, employment, freedom from discrimination, etc., the Sámi score lower than the majority population (NNHRI).[5] This uneven and historically strained relationship between the Sámi and the majority population was transplanted into the law and the legal thinking (Watson 2018, p. 99; Allard 2015, p. 60; Smith 2004, p. 138).

Today, Norway is characterised by a plurality of domestic norm systems: one formal and dominant, the other informal and subordinate. Although the legal order of the non-

[4] Examples are Ravna (2010), pp. 149–65; Heinämäki and Xanthaki (2017), pp. 65–82; Labba (2020), pp. 215–32; Ahrén (2004), pp. 63–112. Sámi customary law has been quite extensively researched by legal anthropologists. See Svensson (2003, 2005).

[5] This holds true for all Indigenous Peoples, see Henriksen (2008), p. 48; Kirchner (2015), p. 1.

Sámi majority is clearly dominant, two parallel legal regimes exist, the State's and the Sámi's. It is thus a pluralistic legal system with at least two normative systems in the same social sphere (Otis 2018, p. 207; Berman 2012, p. 13). The Sámi Indigenous legal system interfaces with national and international law, and together, they create an intertwined system of legal governance (Labba 2020, p. 226). Since this pluralistic legal system is characterised by the centrality of the State legal system, it falls squarely into the definition of State legal pluralism (Tuori 2011, p. 336; Labba 2020, p. 226). The norm hierarchy between Indigenous customs and domestic laws makes it challenging for the Indigenous peoples to enforce their customs, laws, and legal system on the domestic level.

3.2. Characteristics

The Sámi, who traditionally live(d) in small societies, are used to dealing with conflicts by means of peacemaking or mediation, thus in a more unorganised and indirect manner than a trial before a court of law (Susann Funderud 2020, p. 85). Therefore, Sámi customary law is based on a sense of justice and material expressions of culture (Ravna 2010, p. 149). The rules have the purpose of mediating in order to enable a peaceful co-existence and collaboration between (extended) families and groups rather than to declare a winner or loser as in a formal legal trial (Susann Funderud 2020, p. 86; Ahrén 2004, pp. 71–73). The norms' collective aspect is clearly foregrounded.

Crafted according to the traditional ways of living of the Indigenous People, Indigenous customary laws find their strength in the adaptability and fluidity, which enables their adjustment to new societal, environmental, and other developments. Moreover, the law's flexibility and continuity ensure that traditional practices, sacred teachings, and knowledge acquired from nature observations remain applicable and enforceable in community governance and traditional resource management systems (Tobin 2014, p. 7). The Sámi legal culture, characterised by distinct traditions and conceptions of law, is unique and unlike the domestic legal system (Susann Funderud 2020, p. 22; Ravna 2010, p. 150). Among the different Sámi societies, there are notably distinct cultural and legal traditions, leading to distinct customary laws, often depending on the traditional occupation of the Sámi (Susann Funderud 2020, p. 85; Ahrén 2004, pp. 68–71). Although Sámi (customary) laws are not written laws and lack recognition in national law, they nonetheless are rules of law that are obeyed by those who feel obligated by them (Ravna 2010, p. 149; Labba 2020, p. 226). Despite the declaration of the former Supreme Court Justice of Norway, Carsten Smith, that "the recognition of Sami customs will be in accordance with old legal understanding in the country and can be enriching for the country's overall legal life" (Smith 2004, p. 137), the Sámi customary law is not (yet) accepted as substantive law that is legally binding and enforceable (Ravna 2010, pp. 164–65).

4. Consequences of Norm Collisions and Confrontations

4.1. Introduction

In its encounter with the national judiciary, Sámi customary law faces, in theory, three alternatives: either it is set aside in preference of other (predominantly written) domestic sources of law, or it is integrated into and become part of the legal proceedings, usually in combination with other legal sources, or it exists alongside domestic law in a parallel, autonomous legal system. Each alternative creates challenges on a normative level with negative consequences for the Indigenous Peoples. The first alternative might breach the obligations of the State under international law to respect Indigenous legal regimes, while the second alters the character of Indigenous customary laws and creates an overlap between the Sámi and domestic legal culture. The third is for the Sámi the probably most favourable solution; however, there remain unanswered issues, such as the personal, territorial, material jurisdiction of an autonomous Sámi legal system. The first two alternatives are subsequently sketched.

4.2. International Legal Obligations

The right to customary laws and the corresponding obligation by States to protect it is enshrined in three legal instruments: Art. 27 of the International Covenant on Civil and Political Rights (ICCPR), the ILO Convention No. 169, and the UNDRIP. The following discussions focus on the two latter instruments since they specifically protect Indigenous People. Art. 27 ICCPR notably provides a valuable legal basis in the litigation of Indigenous rights but is formulated more broadly to protect the enjoyment of the culture of "ethnic, religious or linguistic minorities". Since most Indigenous Peoples are minorities, this provision is available and important to them.

In addition to the three instruments, the Nordic Saami Convention that aims at regulating cross-border Indigenous property rights must be mentioned (Koivurova 2008). After being in the making for more than fifteen years, the negotiations ceased in 2017. The proposed Convention is a significant initiative to safeguard and develop autonomous bodies, livelihoods, culture, languages, and way of life of the Sami population with the lowest possible interference of the imposition of national borders.[6] Arguably, the 46 draft provisions reveal an emerging understanding of Indigenous rights among the Nordic countries. Its draft Art. 9 specifically stipulates that the "states shall show due respect for the Saami people's conceptions of law, legal traditions and customs".[7] Furthermore,

> the states shall, when elaborating legislation in areas where there might exist relevant Saami legal customs, particularly investigate whether such customs exist, and if so, consider whether these customs should be afforded protection or in other manners be reflected in the national legislation. Due consideration shall also be paid to Saami legal customs in the application of law.[8]

As to be further elaborated below, the weight that international law gives to Indigenous customary law could indicate that Sámi customary laws should be recognised as legal rules at the same level as statutory domestic laws (Ravna 2010, p. 165).

The ILO Convention No. 169 is ratified by 24 States, among other Norway, the only State Party with a Sámi Indigenous People. Sweden, Finland, and Russia have neither ratified the ILO Convention No. 169 nor its still valid predecessor, the ILO Convention No. 107 of 1957. The subsequent discussion focuses on the ILO Convention No. 169, which is forthcoming in the protection of Indigenous customary laws and legally binding for the State Parties. Its Art. 8 upholds the substantive right of Indigenous peoples to retain their own customs, customary laws, and institutions:

> Article 8
>
> (1) In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
> (2) These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

The provision distinguishes between customs and customary law, suggesting that they are distinct concepts. Custom can be defined as the actual practice, whereas customary law consists of "customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system

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[6] The cross-border movement of reindeer was the core issue in the Norwegian Supreme Court judgment HR-2021-1429-A (30 June 2021) and in the earlier *Altevatn* case (Rt-1968-429). In the Northern cape, the reindeer herding Sámi have moved with the reindeer between the winter pastures inland and the spring, summer, and autumn pastures closer to the coast. The border between Norway and Sweden was determined by the border treaty in 1751, and this border cut across the Sámi areas of use (HR-2021-1429-A, para. 79). See for a discussion, (Bull 2021a).

[7] Nordic Saami Convention, https://www.regjeringen.no/globalassets/upload/aid/temadokumenter/sami/sami_samekonv_engelsk.pdf, accessed 1 March 2022.

[8] Ibid.

that they are treated as if they were laws".[9] Indigenous customary law, as a sub-category of customary law, has been defined as "the body of customs, norms and associated practices, which have been developed or adopted by Indigenous or local communities, whether maintained in an oral or written format, to regulate their activities" (Tobin 2014, p. 10). Art. 8 obliges States to respect the customs and customary laws of Indigenous Peoples when applying national laws and regulations, whereby the criteria of paragraph 2 are cumulative, meaning that Indigenous customs can only be restricted if they are incompatible with the national legislation and human rights standards (ILO International Labour Standards Department 2009, p. 82).

The Norwegian majority legal system is characterised by dualism whereby international legal obligations must be translated into domestic law in order to give rise to rights and obligations. At the same time, the so-called principle of presumption determines that Norwegian law shall be interpreted in accordance with Norway's obligations under international law. Especially in human rights law, the jurisprudence by the Norwegian Supreme Court indicates a high threshold to deviate from international law and its interpretation by international courts. Norwegian domestic law has been interpreted as to concur with treaty obligations. The increased importance of human rights and indigenous law points to a decreased significance of dualism (Strand and Larsen 2017, pp. 84–107). Hence, it should be assumed that it is the Norwegian State's intention that its domestic legislation and jurisprudence comply with its obligations under human rights law and indigenous law. This assumption is strengthened by the continued strong support of Norway of UNDRIP, as explained below.

Norway voted in favour of UNDRIP, the most influential contemporary instrument that aims at strengthening the position of Indigenous Peoples and has contributed to carving out rights and their interpretation (Johnstone 2018, p. 73). In Arts. 27 and 34, it recognises Indigenous Peoples' laws. Art. 34 gives Indigenous Peoples, among others, the right to maintain their juridical systems or customs in accordance with international human rights standards. UNDRIP is so-called soft law, meaning it is not legally binding. As a UN General Assembly resolution, it cannot constitute customary law, but it can express *opinio juris*, which might be complemented by corresponding State practice. Only one year after its adoption, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people considered UNDRIP "an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples" and, as such, a "yardstick" upon which State conduct would be measured.[10] UNDRIP reaffirms customary law and treaty law (Johnstone 2018, p. 74). Thus, although legally non-binding, the core of UNDRIP's provisions is arguably customary law and, as such, a binding source of law.

In an official statement on the rights of Indigenous Peoples, the Nordic–Baltic countries, including Norway, declared their strong support of UNDRIP, including its emphasis on the right to self-government and participation, which the respective countries considered central to ensure that the rights of Indigenous Peoples are respected (Nordic-Baltic Statement on the Rights of Indigenous Peoples 2017). This paper will not further elaborate on the right to self-government as an aspect of the right to internal self-determination as prescribed by Art. 1(2) of the UN Charter. However, the argument made here is that Norway, as a State with an Indigenous People, "strongly supports" (ibid.) and respects the rights contained in UNDRIP. This argument is endorsed in the only judgment by the Norwegian Supreme Court that mentions UNDRIP. Despite not considering it relevant to the facts at hand, UNDRIP is "a central document within Indigenous law, as it reflects the international law principles in the field and gained support from a large number of

[9] Intergovernmental Committee on Intellectual Property and Genetic Resources, *Traditional Knowledge and Folklore, Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, UN Doc. WIPO/GRTKF/IC/25/INF/7 (7 May 2013), Annex, p. 8.

[10] Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to the Human Rights Council, UN Doc. A/HRC/9/9 (11 August 2008), para. 85.

states".[11] In mentioning "international law principles", the Supreme Court seemingly refers to general principles of law as a source of law recognised in Art. 38(1)(c) of the Statute of the International Court of Justice (ICJ). The reference to the "support from a large number of states" could be interpreted as an acknowledgment of their customary character, as mentioned in Art. 38(1)(a) ICJ Statute.

By assuming that Art. 34 UNDRIP prescribes binding customary law, Norway has a legal obligation to maintain and recognise the Sámi's juridical system or customs. The question of whether this obligation includes an active duty to fully accept or incorporate Indigenous customary laws as equal components of the domestic legal system or a more passive duty to simply respect and acknowledge their existence remains open. The geographical extension of these laws is yet another unresolved issue, meaning that a State might fully accept Indigenous customary laws; however, consider them applicable to a certain part of the State territory only, usually where the Indigenous Peoples reside. Such split territorial application is, however, in practical terms only feasible where there is a clear geographical distribution—and separation—of the population of a State.[12] The fact that such separation might have been the result of past colonisation, land appropriations, forced relocations, and the creation of reservations will not be further explored.

On a general level, the determination of the conformity of States with their international legal obligations is problematic in that this determination remains within the power of the State organs itself (e.g., its courts) or, on a global level, the UN and its Member States. Thus, the State, represented by its majority population, is mandated to evaluate its own performance, which is, from an Indigenous perspective, not an unproblematic issue.[13]

4.3. Altering the Character of Indigenous Customary Law

The second alternative regards the absorption of Indigenous laws into the domestic legal regime. The enforcement of a claim based on Indigenous customary law, which is not mirrored in written legal sources, happens before a competent legal organ, usually a court. Such legal enforcement necessitates the pronunciation of Indigenous customary laws. Once Indigenous customary rules are mentioned and contained in writing in judgments or deliberations, they are spelled out. As such, they are available not only to the Sámi but become accessible to the general public, including the majority population. The Indigenous customary rules, which are characterised by their ephemeral, constantly changing nature and their resistance to the constraints of written legal systems, then run the risk of being consolidated and fixed (Tobin 2014, p. xvii). The inclusion of Sámi law into the written law of the State leads to the same result: the Sámi legal culture is absorbed by the domestic legislation (Ravna 2010, p. 164).

The consequences are two-fold: the customary Indigenous rules lose their flexibility and possibility to evolve, and the Sámi lose their ownership. They are no longer the rules of the Indigenous Peoples alone but are transformed into commonly accessible rules of the whole society. These outcomes are significant since the Indigenous, oral, customary law is transposed into positive—written—law of the majority, definite, inflexible, and

[11] Supreme Court of Norway, HR-2018-456-P (9 March 2018), para. 97.

[12] In Norway, the Act relating to legal relations and management of land and natural resources in Finnmark (Finnmarksloven, see https://lovdata.no/dokument/NLE/lov/2005-06-17-85, accessed 1 March 2022) regulates the management of land and natural resources in the county of Finnmark, where traditionally the largest number of Sámi lived. In Section 3, the Act stipulates "The Act shall apply with the limitations that follow from ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. The Act shall be applied in compliance with the provisions of international law concerning Indigenous peoples and minorities (. . .)". By 'international law' the provision aims at the (explicitly mentioned) ILO Convention No. 169 and furthermore ICCPR Arts. 1(2) and 27, the UN Convention on Biological Diversity and UNDRIP, which due to its large global support has become increasingly important. The (implicit) inclusion of UNDRIP could arguably be interpreted as signifying that Sámi customary law can set aside conflicting rules of the Finnmark Act.

[13] Similar reflection by Bankes (2015), p. 13: an "important tool of the colonizing state is the ability to authoritatively constitute the other by such techniques as defining who is indigenous, who is entitled to membership and who has access to particular resources and livelihoods".

available to all. This accessibility makes the rules transparent and foreseeable, and hence in conformity to the positivist conception of the legal regime of the State. At the same time, the Indigenous customary rules that guide and regulate Sámi legal matters are no longer characterised by their orality and the passing down of legal traditions through generations (Ravna 2010, p. 165). The exclusivity of the customary law for the concerned Sámi no longer exists. Instead, in being spelled out and included in oral and written proceedings of a judicial system that is not theirs, the rules are removed from their control and legal domain and inserted into the legal system of the majority.[14] However, it can be argued that the recognition of Sámi customary law in either judgments or in statutory law is a sign of recognition of the Sámi legal culture and possibly a positive aspect of reconciliation (Ravna 2010, p. 165).

While Indigenous customary laws survived extended periods of marginalisation, assimilation policies, and repression, their inclusion in judgments, where judges apply primarily positivistic sources of law, alters the character of the customary law. It could even be argued that the power balance seemingly tips in favour of the majority's legal system, reinforcing experiences of dominance, submissiveness, and uneven power distribution. In the perspective of the Sámi population, this disturbance of balance could be perceived as yet another interference into their Indigenous society. It should not be ruled out that an inquiry of customary law's specificity and its legal quality by a court of the majority society might be perceived as a culture-relative assessment.

4.4. A Symbiosis?

Yet another perspective advocates for a completely new view of the law, where the hierarchies are removed and replaced by pluralistic systems that ideally foreground the relationship of man with the earth and exist in a symbiotic relationship (Tobin 2014, p. xxi). Legal pluralism recognises that law is constructed through the contest of various norm-generating communities. Thus, the law does not solely reside in officially state-sanctioned commands (Nollkaemper 2013, pp. 96–98; Berman 2012, pp. 12–13, 50–51; Tamanaha 2000, p. 298). The idea of legal pluralism is implemented, to a varying degree, in most countries where two or more parallel legal systems co-exist, complementary or in competition with each other, explicitly acknowledged or informally accepted or tolerated (Berman 2012, pp. 12–14; Engle Merry 2007, p. 151; Tamanaha 2000, pp. 313–14). Pluralistic legal systems are commonly described as "informal justice systems", since often (unwritten and informal) tribal or Indigenous legal systems exist alongside the (written and formal) legal system of the State or its administrative divisions. These non-State justice systems challenge positivist conceptions of the rule of law and the administration of justice by the State (Berman 2012, p. 15; Engle Merry 2007, p. 156). There are certainly disadvantages, especially risks of discrimination or human rights violations due to inopportune or outdated informal justice rules. If only certain parts of the concerned population, for example, male men, are allowed to bring their case before these systems, it will hinder access to justice for women and minors (Berman 2012, pp. 118–19; Engle Merry 2007, pp. 163–64). At the same time, these systems have numerous advantages for the individuals involved, ranging from accessibility, geographical closeness, familiarity with the rules and proceedings, perceived fairness, low costs, and efficiency in terms of the swiftness of the process and implementations of the rulings (Kötter et al. 2015; Kötter 2012). Importantly, the informal systems embody a community-based and -led response, thus a bottom-up rather than a State-centred top-down approach. In rural and/or indigenous societies, geographically and culturally removed from the State's influence, these informal justice systems can provide game-changing community justice services.[15]

[14] Ravna (2010), p. 164, notes that when the Sámi customary law has been heard in the (Norwegian) courts, it has often been without regard for cultural difference.

[15] See for example the case of Ethiopia, (Hiil/Justice Dashboard 2021).

Although Norway is already characterised by a pluralistic legal system, it cannot be claimed that hierarchies between the systems are removed. In the hypothetical event that the State legal system was to be complemented by a fully equivalent legal system of Sámi (customary) law, claims brought before and decided by a Sámi institution based on unwritten, orally transmitted customs would have the same legal value as court decisions. The full implementation of legal pluralism would be achieved when the minority legal system built on oral traditions is equivalent to the majority legal system built on positive law. Logically, this construct would entail the consequence that a Sámi claim could be heard before a court of the majority legal system, based on oral Indigenous customary law, which would have the same legal value as written laws that were approved by the national parliament. Vice versa, a claim based on positive law could be heard before a legal institution of the Indigenous society, the decision of which would be legally enforceable on par with a regular judgment. With regard to States with Indigenous People, the best-known example of an (arguably) successful implementation of a pluralistic legal system is probably Canada, where English common law, French civil law, and Indigenous law are acknowledged as equivalent (Otis 2018).

One crucial argument for the implementation of an officially recognised pluralistic system and the interconnected legal empowerment (Domingo and O'Neil 2014) of the Sámi is the aspect of reconciliation, which is commonly a topic in post-conflict states (Napoleon 2019; Grenfell 2013; Wilson 2000; Thompson 1996). Moreover, in post-colonial or settler States, the issue has surfaced, primarily in connection with the establishment of Truth and Reconciliation Commissions (TRC). The Canadian TRC asserts that the purpose of reconciliation is to repair,

> "damaged trust by making apologies, providing individual and collective reparations, and following through with concrete actions that demonstrate real societal change. Establishing respectful relationships also requires the revitalization of Indigenous law and legal traditions". (Truth and Reconciliation Commission of Canada 2015, p. 16)

Norway is neither a post-conflict nor a classic colonial State. Nonetheless, the historically unequal relationship between the majority population and the Indigenous Sámi that was characterised by hierarchical thinking, discrimination, and assimilation certainly is, at the very least, in terms of grave consequences, comparable to colonial States. In the past decade, Norway, Sweden, and Finland all established their own TRC. To date, none has completed its work (yet). The mandate of the Norwegian TRC does notably not include any reference to reconciliation by means of revitalisation of Sámi law and legal traditions.

In addition to its importance for reconciliation, scholars have argued that the effective recognition of Indigenous customary law is necessary for and dependent upon the realisation of Indigenous peoples' right to self-determination (Labba 2020, p. 227; Magga 2017, p. 274; Tobin 2014, p. xix; Ahrén 2004, pp. 108, 112). The interference into and the consolidation of customary laws can therefore have far-reaching consequences that can alter the relationship between the Indigenous Peoples and the nation State. The next section discusses a selection of cases before Norwegian courts that discuss Sámi customs and customary laws.

5. Norwegian Case Law on Sámi Customary Law

Norwegian law does not expressly recognise Indigenous custom as a basis for a legal claim. Nevertheless, several court cases have acknowledged Sámi customary rules as a legal source (Allard 2015, p. 60; Ahrén 2004, p. 102). The *Selbu* case of 2001 before the Norwegian Supreme Court is considered a turning point of legal recognition on traditional land rights in Norway (Bull 2015, pp. 90–93; Allard 2015, pp. 58–59; Smith 2004, p. 138). The Court recognised documentation of the historical land use as a legitimately acquired right and ruled in favour of the Sámi reindeer herders. The landowners, who demanded a ban on reindeer grazing on private land, lost. The case was not adjudicated under Norway's international treaty obligations, but the Court held the national legal rules on

the immemorial usage (in Norwegian: *alders tids bruk*) were sufficient as a legal source (Fjellheim 2013; Bull 2001, p. 47; Ahrén 2004, p. 102; Smith 2004, p. 138).[16] From a historical perspective, scholars have pointed out that the reference to such immemorial usage is lamentable because it perpetuates the discussion of who was here first (Fjellheim 2013).

The recent Norwegian Supreme Court case of *Fosen* of 2021, twenty years after the *Selbu* case, marks yet another landslide in the domestic adjudication of the rights of Indigenous People. Unlike *Selbu*, *Fosen* was adjudicated under international law (Lingaas 2021). The Court unanimously ruled that the wind park on the Fosen peninsula violated Art 27 ICCPR and the Sámi's right to culture in the form of reindeer husbandry and the nomadic, seasonal movement of reindeer. *Fosen* is considered ground-breaking for affording legal protection to the Sámi based exclusively on international law, especially considering the competing economic investments, green energy considerations, and political interests (Lingaas 2021; Bull 2021b). *Fosen* did not consider Indigenous customary laws.

Sámi customs did, however, play a central role in a recent case before the Appeals Committee of the Norwegian Supreme Court.[17] The case dealt with the customary hunt of ducks in Keitokeino in circumpolar Norway. Traditionally after the long winter period, once the ice recedes in early/mid-May, the Sámi hunt ducks for nutrition. With reference to Art. 8 ILO Convention No. 169, Keitokeino municipality and the Sámi parliament both considered it important to uphold this traditional practice. However, considerations of biodiversity, environmental protection, and sustainable use of biological resources underlie the Wildlife Act that prohibits hunting during the breeding and hatching season (Bull 2021c). Although the Sámi were given a dispensation, a man shot a duck one week before the granted hunting period of ten days. He was conditionally sentenced to prison for fourteen days, a fine of 15,000 NOK (approximately 1,500 Euro), lost his hunting license for one year, and had his rifle revoked.[18] He claimed Sámi customs and alleged the limitation of the hunt was contrary to Art. 8 ILO Convention No. 169. The Court of Appeal, however, held that a balance must be struck between the content and quality of the Sámi custom against the need for a national rule and the interests on which it is based.[19] The man's allegations were not heard. Instead, the Appeals Committee held that the considerations behind the hunting restrictions outweighed the hunting traditions of the Sámi that were somewhat more flexible as to time and place. In its view, Sámi custom cannot lead to impunity for hunting ducks beyond the permitted period.[20]

The case dealt with Sámi custom and not Sámi customary law. Art. 8 ILO Convention No. 169 notably distinguishes between custom and customary law but provides both the same protection. As shown above in Section 4.2., Art. 8(1) reads: "In applying national laws and regulations to the people concerned, due regard shall be had to their customs or customary laws". While the courts acknowledged the customary duck hunt, it was not able to outweigh considerations of biodiversity of the domestic law. This raises the question of whether "due regard" (in Norwegian: *tilbørlig hensyn*) to the custom was had. The deliberations of the lower courts, which the Appeals Committee agreed with, did not deny or contest the traditional duck hunt. Indeed, national regulations allowed it for a limited scope and number of birds even during the hatching seasons. Thus, the decision concurs with the legal obligations of Norway under Art. 8(1). The requirements of Art. 8(2) are somewhat more challenging since the right to retain the customs is restricted to those that are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Three points: first, in this case, the custom was neither in competition with fundamental rights nor human rights, but rather concerns

[16] On different proprietary concepts related to protected uses, see Allard (2015), pp. 56–58. The concept of immemorial usage has three basic conditions: a certain use, over longer time that has occurred in good faith (ibid., p. 58). These three factors were stipulated in the *Selbu* case (Rt. 2001, s. 769).

[17] Norwegian Supreme Court, Appeals Committee, decision HR-2021-00863-U.

[18] Ibid., para. 4.

[19] Ibid., para. 11.

[20] Ibid., paras. 28–29.

of biodiversity and sustainability.[21] Second, the provision presupposes a competition (and perhaps even an incompatibility) between Indigenous customs and "the national legal system", with the latter being the system of the majority superimposed onto the Indigenous minority.[22] Third, does the retention of customs include the Indigenous People's own determination of time, place, duration, etc.? Applied to the present case, if the custom involves hunting ducks at a specific period of time and place for a specific duration, then arguably—under a narrow reading of ILO Convention No. 169—the domestic regulation did not allow the Sámi "the right to retain their own customs". This was, in effect, the conclusion by the Sámi Parliament: the spring hunt has strong cultural roots in the Sámi population and has historically been carried out in a sustainable manner with customary legal rules based on traditional knowledge. It considered the current national rules not to be compatible with Sámi custom on spring hunting of ducks and therefore in violation of rights of the Sámi under Art. 8 ILO Convention No. 169 and Art. 27 ICCPR.[23] Note that the Sámi parliament mentions customary law (and not only custom), thereby attaching more legal weight to the spring hunt traditions.

Another point is the domestic requirement that the "content and quality" of the Sámi customs must be balanced against the "need for a national rule".[24] It presumes that the national rules are of sufficient content and quality that the Sámi custom has to be measured against for reasons of legal predictability and foreseeability. The *quality* of a (legal) rule is an issue of its legitimacy and a prerequisite for the right to a fair trial. The evaluation of the *content* of an Indigenous rule is more debatable since it falls under the authority of the majority judge. Do judges who are not Sámi objectively have the capacity and ability to evaluate the content of a Sámi customary rule? (Smith 2004, p. 140; Ahrén 2004, p. 109).

6. A Short Conclusions

The relationship between Norwegian majority law and Sámi Indigenous customary laws is shifting and still in the making. Its course has yet to be fully staked out. While newer case law indicates increased respect of international law and the protection to members of minority and/or Indigenous People, it works with the assumption that the legal system of the majority is the primary legal system of the State. Customary laws of the Sámi have a subordinate place within this system, and courts set strict requirements for their judicial acceptance.

The right of Indigenous Peoples to maintain their juridical systems or customs and its implementation in the domestic legal system is an issue that requires more attention from the Courts and from legal research. The relevant provisions of Arts. 27 and 34 UNDRIP and their alleged status as customary norms have not been matters of judicial scrutiny yet, but there are indications as to an understanding of their importance and possibly also their binding nature. The larger, more theoretical discussion of this paper focused on norm hierarchies and the tensions that are created when positivistically formed national law meets unwritten customary Indigenous law. The issues of historical injustice, assimilation, and supremacy of the written laws of the majority framed the reflections of legal positivism and the encounter of two very different legal systems within the territory of the same State. The questions are how these legal systems can and should co-exist and what the implications of this co-existence are for the concerned Sámi. This paper was not able to

[21] From an environmental perspective, one might argue that biodiversity and sustainability are indeed fundamental rights. However, these are (currently) not defined as fundamental rights in domestic Norwegian law.

[22] In Norwegian case law it is uncontested that the Sámi are a minority in the sense of Art. 27 ICCPR. See for instance Norwegian Supreme Court, case HR-2017-02428-A (21 December 2017), para. 55 or HR-2018-456-P (9 March 2018), para. 95.

[23] Sámi Parliamentary Council (2020) under reference to a report by the Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz of 2016 who confirmed that spring hunting was an important part of the Sámi culture in Kautokeino.

[24] This requirement was also discussed in the *Dog leash* case (Rt. 2001 s. 1116), which was the first time the Norwegian Supreme Court applied Art. 8 ILO Convention No. 169. For a discussion, see Allard (2015), p. 61.

provide a conclusive answer to these questions but made an argument for a structure that provides more legal autonomy to the Sámi.

Funding: This research received no external funding.

Institutional Review Board Statement: not applicable.

Informed Consent Statement: not applicable.

Data Availability Statement: not applicable.

Conflicts of Interest: The authors declare no conflict of interest.

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