

BOOK REVIEW

Samiska rättsuppfattningar [Sámi Legal Conceptions], Juridica Lapponica 30
Elina Helander

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for Environmental and Minority Rights], 2004, 125 pages*

How does one scientifically describe and document Sámi custom and legal conceptions? In her book *Sámi Legal Conceptions*, Elina Helander ventured into exploring Sámi customs and legal conceptions relating to the use of land and water in a Sámi region.

Helander's book is based on investigations conducted by the Sámi Rights Committee in Finnmark, the northernmost county of Norway and the main Sámi habitation of Norway. This task was originally intended for the committee's legal section, whose mandate was to "investigate Sámi customs and legal conceptions to assess what importance such customs and legal conceptions must be given in this field" (NOU, 1993: 34:16). The section's majority found that it could not undertake such a project. Upon demands by Sámi organizations, the Ministry of Justice decided to assign the work to independent researchers. Helander was one of these. The book is founded on a field study conducted as part of this research project. Like other participating researchers (see Strøm Bull et al., 2001), Helander chose to publish a monograph in addition to the public report (NOU 2001:34).

The title signals legal work. The theme itself also places it soundly within the field of law. From a professional angle, however, the book cannot be considered legal literature. A closer look at its work methods reveals that it is based on conversation and interviewing informants, not on examining traditional legal sources characteristic of legal work. The objective of the author's approach has been to elicit first-hand information from individuals practising traditional Sámi activities. The author has "sought out social environments and economic activities which are very likely to be tradition-bearing". In addition to looking at the utilization of natural resources and land areas, the author focuses on the legal conceptions of the Sámi conducting such economic activity.

Charting and describing knowledge accumulated through generations has thus been a central goal. This traditional knowledge defines norms and rules governing economic activity and the ability to survive. In local communities, such traditions are expressed in various everyday contexts without being codified or written down.

A legal conception means that members of a community collectively approve and commit to compliance with given understandings of things, according to the author. She also states that Sámi communities do not have legal conceptions for every situation that is communicable on the basis of

human consciousness. This means that questions to which one would expect a direct answer might produce inadequate results. Communication must then be attempted using different methods. For example, getting informants to explain their activities may provide a legal conception without the need to ask questions.

Field interviewing was the method used for this study, which is a popular approach among social anthropologists and ethnographers, and a natural choice based on Ms Helander's educational background and research interest. The fact that the work was not based on legal research or legal dogma, in which the scientist's objective is to solve a given legal problem the same way a Norwegian court ruling would, does not mean that the book holds less value as a scientific source to legal scholars.

Norway's ratification of ILO Convention no. 169 in 1990, and the latest "enactment of the Act relating to legal relations and management of land and natural resources in the county of Finnmark (Finnmark Act) 17th of June 2005", means that Sámi customs and legal conceptions as legal sources in Norwegian law are treated differently than before, making it important to chart such customs and conceptions. This new significance is evident in the Selbu ruling (*Rettsstidene*, 2001: 769) and Svartskog ruling (*Rettsstidene*, 2001: 1229)¹ in which the Supreme Court used oral tradition as a source for the recognition of Sámi rights. Approaching the rights issue from a social anthropology perspective is thus preferable to legal preparatory work and court rulings representing the state and the legal conceptions of the authorities.

Practical experience has shown that contributions from non-legal professionals have not merely been useful, but even necessary in order to make progress with Sámi legal issues before the courts, as legal professionals through their study of the sources of law and other knowledge were unable to capture the essence of Sámi tradition and customs, and use it as a foundation for developing law. One example of such a contribution is Finnish-Ugric language Professor Knut Bergsland's central role in the Brekken ruling (*Rettsstidene*, 1968: 394), in which the Supreme Court principally determined that Sámi reindeer husbandry use *may* give rise to a right under the law.

Helander's work must also be seen in light of such a tradition. Although she defines "legal conception" in the same way as legal scholars, she is clearly not aiming at a narrow dogmatic definition of the term, but rather a more detailed description of the concept as such. She is dealing with "the conception of a population that does not reflect upon the view of the authorities, but evolves from what is considered right and true when it comes to rights and obligations in the local community" (p. 9).

Sámi Legal Conceptions consists of two relatively independent sections: part one "Sámi legal conceptions in Tana" (pp. 1–67) and part two "Rights in Deanodat" (pp. 69–125). Their independence of each other is evident in their different introductions, note system and literature list. However, both sections use the same methodology. The book is written in Swedish. Informants are also quoted in Sámi, which was the language used during

the interviews. Being able to check the original quotes is definitely an advantage for Sámi language speakers, and Sámi is also given weight as an information language. On the whole, the text is clearly written, and is thus easy to understand.

Part one deals with outfield economy, salmon fishing in the Tana River and reindeer husbandry. Outfield activities include ptarmigan snaring, cloudberry picking and inland fishing. The informants' perception was that they had previously had their own, permanent areas in which they often went ptarmigan snaring with a partner. In their resource area, which was respected by others, there were also dwellings, *gammer* (turf huts) or *stugor* (wood huts). Regarding rights, the author points out that informants commonly expressed that the Sámi had a kind of internal autonomy in relation to the state, and that this internal government was about to be lost. One informant offered this description:

Laws are made in the south. There they look into our issues on their own and send their decisions here. One has to apply for permission in order to use the outfields. For fishing in lakes, one has to be careful to investigate which lakes one is allowed to use and with which type of net. One would think that permission was in order, but according to Norwegian law, one would actually be doing something illegal (pp. 16–17).

The perception that local resources belong to the local population was a recurring theme among the informants: "Ptarmigan and cloudberry belong to the local population, just like fish". The accumulated result is reflected by the opinion of many informants; that it is not right for "the general public to have the same rights as the local population".

At the same time as local norms are emphasized, the point is also made that they are flexible. For example, rules regarding cloudberry picking are less binding than those concerning net fishing in lakes. Sámi rules are under pressure. One informant said that one "can no longer follow Sámi rules. Nothing is permitted any more, one has Norwegian laws to follow". The conception was also voiced that continuous use forms the basis for property or utilization rights. "The places belong to you, since you have used them. All areas I use are in my mind. I consider them my lands" (p. 25). This effect is reinforced by the existence of a turf hut or wood hut in the area. It is also pointed out that legislation contributes to cultural change, making it difficult to maintain customs. The informants refer in particular to the motorized travel act, regulations on turf hut and cabin construction, and net fishing rules.

Much space is dedicated to salmon fishing in the Tana River, providing descriptions of legislation, fishing methods and customs. The fact that informants have previously disregarded Norwegian legislation, fishing with drift nets across several zones or when and where it suited them, is interpreted as an expression of their own custom. It is also claimed that if one chooses to strictly abide by Norwegian law, one risks breaking with Sámi norms. The author raises the very appropriate question of whether these laws fulfil the intentions of the legislators. She gives her answer by referring to the acts in question and how difficult it is to find acceptance for them, despite the

efficient administration system for their handling. She also underlines that the local Sámi know and reflect upon the differences between Sámi legal conceptions and Norwegian laws (p. 41). Referring to John Griffith, she shows that external laws and regulations may be difficult to implement in a “semi-autonomous society”, as it is already permeated by norms (Griffith, 1986: 36). In brief, the author claims that it may be determined that the affected Sámi as a social group have developed local customs and legal conceptions to which they are more or less bound (p. 42).

In conclusion she says that “Sámi legal conceptions versus Norwegian laws” is not a question of going back in time. Quite to the point, she determines that it is rather a matter of understanding cultural difference regarding concepts such as “law, norm, custom and underlying rationality. In more detail, it deals with the origin of historical injustices, recognition and increased influence when it comes to the Sámi’s right to land and water” (p. 42).

In “Renskøtselen i Olggut Corgas” [Reindeer herding in Olggut Corgas], the discussion on the *Siida* of reindeer-herding Sámi is of particular interest. “*Siiddastallat*” is referred to as a Sámi concept meaning that people stay within a certain grazing area that they have traditionally used. The concept is explained by one informant as “eeping the reindeer within the grazing lands that we have gotten used to using”. There are also reports of agreements between the *Siidas*; areas habituated by an individual’s ancestors would belong to him/her. Another informant underlined that “one cannot just move into others’ grazing areas... These laws have not been put in writing anywhere” (p. 51).

Conflict resolution is also discussed, which is otherwise rarely found in the literature. Most conflicts were solved internally using local means of punishment, the book says. This system is still used today, at least in part. Sanctions could simply be beating, chasing away herds or even slaughtering others’ animals. For more serious conflicts, or when the need to bar blazed passages arose, Norwegian authorities would be contacted. The author does not specify the background for this.

In conclusion, Helander reveals that she has gained access to information on an old Sámi system of rules governing the use of land and water, including local custom and legal conceptions that are still more or less in force. This system builds on the traditional Sámi way of life, which is based on ecological thinking, the Sámi understanding of family, relatives, *Siidas*, close neighbours and “out-of-towners”, as well as long-term utilization of areas and resources.

Part two looks at the coastal Sámi in Vestertana and their culture, economy and resource utilization. Subsections include “Coastal Sámi industry and resource utilization” and “Resource utilization and legal conceptions”. The first is a description of fjord fishing, outfield activities and agriculture. The author highlights the differences from the inland Sámi culture in pointing out that “yoik and reindeer are not what is heard and seen” and that “in the 1950s and 1960s it was popular to lay aside your Sámi costume, hat and other ethnic Sámi items” (p. 75). In a revealing quote, one informant states

that "we belong neither on the Norwegian nor the Sámi side". As a somewhat self-evident "general rule", she offers that "preferred species for hunting are those that could be used as food for the household or its animals" (p. 78).

"Resource utilization and legal conceptions" creates expectations about the author's objectives. These expectations have generally been met in her description of customs related to snaring and inland fishing. Of particular interest is the conception that sons inherited their hunting area from their fathers (p. 93) and that it was important to be familiar with the various local groups' resource areas. Another interesting point is that there used to be special agreements between the various hunting and fishing groups regarding their use of resources, and that the participants could have more or less permanent rights established through negotiations and agreements.

The development from the 1960s and 1970s, in which the local population held a practically exclusive right to their outfield, and up to the 1980s, during which the number of non-locals in the resource areas increased dramatically, is described. Legislation currently enables outsiders to use the resources in the Sámi areas on the same terms as those who have always used them, the author says, and adds that this has contributed to "the near collapse of the old Sámi legal system regarding the utilization of outfields". This is claimed to be "contrary to Sámi customs and legal conceptions" (p. 96). Norms related to inland fishing, such as "the local population should have preference" and that "the lakes used to be shared between the various families" forms part of this legal conception. Especially the latter could be significant to the formation of customary rights. The traditions according to which different families fished in different lakes are said to date back more than a century, supported by "all informants are able to report equivalent practice of a long-term character". Fishing rights related to particular lakes also included the right to erect turf huts in that area.

The local communities are quite familiar with the discussion on outside hunters' access to the early autumn hunt using dogs. This access to hunting has also been labelled a breach with Sámi tradition. Such intense exploitation affects the local population's ability to manage the ptarmigan population. The point of view that hunting should begin on 1 October, and not 10 September, is therefore an expression of a Sámi legal conception.

The author makes an interesting observation of a *right of need* of sorts, as a form of "Sámi customary rights thinking". This is illustrated by her statement that "stealing a reindeer was more acceptable for a poor man needing food for his family than for a rich man with no such need" (p. 98). In general terms, this would indicate that a household's need would justify venturing beyond one's resource area, whereas exploitation for sale would probably require greater restraint.

Fjord fishing is also elucidated in a detailed discussion of the various kinds of marine species, including their harvesting. The discussion of the management regime includes criticism of the quota arrangement introduced in about 1900. It is said that the Sámi have their own traditions and rules for fishing, in which the type of gear makes it possible to select the catch. Individual

informants said that “the ocean is open to all. But the fjord areas in the vicinity, and their resources – especially cod and salmon – are understood to belong to the local population” (p. 114). Several individuals claimed to have lost their rights to cod fishing, for example, as a result of the quota regulation. One person said that “the coastal Sámi did not possess the power to take back their fishing rights”.

In summary, the author states that her material shows that earlier generations’ conduct and interpretations of norms created a pattern for those of the current generations, in which Sámi legal conceptions, including usage rights and customs, have been transformed to fit the needs of the present day. Moreover, “custom and age-old use touch upon the overarching conditions for coastal Sámi rights today, or how they are perceived. Those who still live here have no ambition to break with the local rules” (p. 117).

She concludes that “A prerequisite for the livelihood of the coastal Sámi is that they possess priority rights to the various natural resources within their settlement area. They live off nature, and their subsistence in the area depends on its resources”.

Elin Helander has performed a significant piece of research structured so that the result is a book worth reading. The work is done with a hands-on approach, emphasizing finding concrete expressions for custom and legal conceptions in a given Sámi area. Those who seek knowledge about the conceptions, traditions and customs of Sámi breadwinners related to the use of land and water in a Sámi core area will find what they are looking for within these pages.

This book documents economic traditions and customs dating back to the time when a combination of livelihoods was an important part of the economy of the permanently settled Sámi population (*dálon*). The traditions of the reindeer-herding Sámi have been recorded, as well. Those familiar with Sámi economic activities would recognize the conceptions offered by these informants. The fact that no new information is given is not a drawback in this context. Quite the contrary, confirmation is provided that we are dealing with established traditions and customs. The new, and positive, is that the information is recorded and presented as custom, which in my opinion provides valuable documentation of Sámi economic activity as found – in the past and in the present – in Tana municipality. Exactly this aspect, to be able to recognize traditions and conceptions whose existence is known for the most part, but which are seldom mentioned in print, make this book very interesting to read.

There is nothing new about conceptions and customs being documented through a scientific approach. However, such an extensive report on a limited Sámi core area in this part of Finnmark County has, to my knowledge, not been done before. Consequently, this collection of knowledge about customs and occupations that are still practised, but no longer pay, and which may thus vanish with the people who exercise them today, is itself of great value. This type of work will become even more significant in the light of the emphasis likely to be devoted to Sámi customs in the forthcoming rights identification work in Finnmark County.

Still, one cannot avoid pointing out that the information offered is not very systematic, in part difficult to check in retrospect, and that the research method is described only in general terms. If Sámi legal conceptions are to function as a practical legal source, this work is not precise enough. In the “Båndtvang” ruling [legally enforced duty to keep dogs on a leash] (*Rettstidene*, 2001: 1116), the Supreme Court stated that “if an indigenous custom is to prevail against such a legal provision, this custom must be clear in its content and possess a special quality”. In addition to content and good faith of the user, it is also common to require that the user group and time aspect must be relatively clearly defined. When informants are kept anonymous, quantification of use and the user group becomes difficult, as does checking the information later. Some statistical material could have been provided, such as how many informants within a certain area supported the opinions that the author chose to report. This would clearly have strengthened the study in relation to the user group and thus the definition on which the author herself has chosen to base the legal conception. Quantifications such as “some”, “many” and “a few” indicate something about how many are behind a conception, but are not precise enough for a scientific presentation. A comparison between the expressed conception and how it was practised would have strengthened the documentation of the custom’s content, whereas a clearer distinction between the informants’ perceptions and the author’s opinion in general would have lent more weight to the report. Also, the “questionnaire” used by the author should have been included in an appendix.

The author’s express objective was to look into the issues from the perspective of the local Sámi population (p. 5). She is an experienced Sámi researcher with a background from a geographical area close to her research object, and as such, she had the best starting point for being what social anthropologists would call a “researcher with a view from within” or a researcher at an emic level (Hylland Eriksen, 1995: 26–27). This position provides many advantages to that of an “outsider”. She masters the language and understands the culture, which provides easy access to informants and a better foundation for a holistic interpretation.

A close relationship between the researcher and the research object can, however, cause problems. The objective role of the researcher may come under pressure, in which he or she risks becoming a spokesperson for the opinions of the informants rather than supplying independent research work. It is common within legal science to separate between *de lege lata* and *de lege ferenda* discussions. The first applies to the law as it is, whereas the latter relates to discussions on what one feels should become applied law (legal policy). Both forms of legal analysis are fully acceptable and even desirable in legal scientific work, provided the researcher clearly states when he or she is applying legal dogmatics as opposed to legal policy. This separation is not as distinct in the field of social anthropology, but is still evident.

Seen in relation to the emphasis that may be placed on customs and legal conceptions in future legal clarifications in Finnmark County, one must still be able to impose strict requirements as to the “testability” and objectivity of

works like this one. The author's Sámi perspective sometimes seems to wander into the field of legal political considerations without saying so. This is clearly the case when she points out that "it is obvious" that the local population consider themselves to hold the right to use land and water, and that this right of use "is considered so strong that it is comparable to ownership rights, individual or collective". Or when it is assumed that "in large parts of North Norway there are two legal systems functioning in practice, the customary one and the laws applied by the Norwegian state" (p. 42), without offering a more detailed analysis.

The fact that the information cannot be checked may easily turn the informants' conceptions into undocumented claims rather than legal conceptions, and the author's analysis at times as views on legal policy. That is a pity, particularly as these individual conceptions may well express customs generally accepted and practised as regards rights and obligations. Thus, if this conception had been better documented, we might have been able to discuss a customary right.

More rigorous methods would thus have been desirable in order to identify whether the informants' conceptions were representative of customary rights in general, and not merely individual beliefs. The statement that "the Sámi in question as a social group have developed local customs and legal conceptions to which they are more or less bound" would have appeared more authoritative, and not just a more or less documented claim. The same must be said about the statement "it is obvious that the distinction between usage rights and property rights has been and is of secondary importance to the traditional use of the resources of land and water" (p. 55). A more stringent approach would probably have been better suited in presenting the "right" in such a manner that it could be used as a source before a court.

Some legal conceptions are missing, such as norms for picking unripe cloudberries. It is strange that the author chose to look at drift-net fishing as a traditional Sámi activity in relation to Norwegian legislation rather than enclosure fishing [*stengselsfiske*], which is much older (Nesheim, 1947: 158). In my opinion, viewing the informants' disregard of the law in fishing when and where it suited them as an expression of custom and not intentional breach of the law (poaching) should have been presented as a problem. The same applies to "the poor man's right of need" to steal reindeer. Another possible discussion would be why some reindeer conflicts are solved internally while others are brought to the authorities. Yet another issue would be the significance of traditions being under pressure and perhaps not being followed to the same degree as they used to be.

There are some factual errors, although not many. The Tana River and the Canadian Miranuchi system are presented as the significantly largest salmon-carrying watercourses emptying into the Atlantic Ocean. The rivers Ponoï and Varzhuga at the Kola Peninsula are left out, as is the Pechora flowing through the areas of our neighbours the Nenets and Komi in northeast Europe. With its 1800 km, it is obviously larger than the Tana River. The author may be excused, though, as this error originates in an official Norwegian report (NOU, 1999: 9:47).

The description of the conflict between Norwegian law and Sámi norms is characterized by insufficient knowledge about the former. Norwegian law does provide for long-term use as a foundation for rights acquisition, for example in the Act on Prescriptive Rights [*lov om hevd*] of 9 December 1966, in which use indicated by the existence of permanent facilities contributes to supporting claims for rights acquisition through customary use.

Social anthropology works have already been used by the courts², and such works will probably hold even greater weight in the future. This implies that the “legal anthropology” as well as the type of work undertaken by Helander should be given greater attention when it comes to acquiring necessary legal sources in order to identify and determine rights within the Sámi areas. Here it is essential that Sámi legal conceptions are documented with an adequate precision so that they may function better as legal sources.

Despite these reservations, it must be said that Helander has described usage, customs, outfield harvesting traditions and her informants’ legal conceptions in a good and pertinent manner. Her emphasis of how important it is for the Norwegian state to emphasize the local population’s legal conceptions and needs in order to prevent a widening of the gap between legislation and reality – an opinion shared by the undersigned – should be noted by those whom this issue concerns. The work is an important contribution, both to charting Sámi communities’ use and harvesting of their outfields and to casting light on Sámi legal conceptions.

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Notes

¹ A journal publishing all Supreme Court decisions.

² Refer, for example to Bjerkli & Thuen (1997), which was used in the Svartskog case. The researchers, Trond Thuen and Bjørn Bjerkli, at the Institute of Social Anthropology at the University of Tromsø, had been appointed specialists for the case and prepared this report for the hearing. Bjerkli also served as a specialist during the appeal before the Supreme Court (*Retts Tidene*, 2001: 1229), during which he also gave an oral statement.

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