CONSTITUTIONAL PROTECTION OF MINORITIES: THE RIGHTS AND PROTECTION OF THE SAMI POPULATION IN NORWAY

BY

EIVIND SMITH

© Stockholm Institute for Scandianvian Law 1957-2009

1. INTRODUCTION

Norway has, second only to the U.S.A., the oldest written constitution still in force. From the outset the Norwegian Constitution of May 17, 1814, included some provisions concerning what are now commonly called human rights. However, the original "catalogue" of such rights was shorter than those now found in many other countries. And even if some of the subsequent amendments to the text of the Norwegian Constitution in this field are of importance in principle, they are still only few.

Furthermore, some of the new provisions do not establish "rights" in the sense that citizens can invoke them by ordinary legal means. This raises questions both as to the intrinsic value of the new provisions and as to whether this line of constitutional development should be pursued further.

These matters have recently attracted increased attention because of an amendment to the Constitution passed by the *Storting* (Parliament) on May 27, 1988, with a qualified majority according to sec. 112 of the Constitution. The new provision in sec. 110(a) is the first in the Constitution to aim at protecting the designated interest of a minority. It safeguards the only ethnic group, besides the Norwegians themselves, to live in the land since before the foundation of Norway.

This constitutional measure should be seen against a background of the acute conflict of interest between Norwegians and Samis (Lapps)—as well as amongst the Samis themselves—during the latter part of the 1970s in connection with the project for a large hydroelectric power plant right in the core of the Sami homelands in Finnmark (Alta) in northern Norway. This conflict caused the government to appoint a commission directed to investigate various issues connected with the legal protection of the Samis. The composition and size of the Commission, as many as 18 members, is in itself an expression of the complexity of the issues thus raised.

The first major report of the Commission[1] contained recommenda-

[1] *NOU* 1984:18 *Om samenes rettsstilling* (On the legal position of the Samis).

© Stockholm Institute for Scandianvian Law 1957-2009

tions by a majority of 10 members for a new provision in the Constitution, drafted in the following way:

> It is incumbent upon the authorities of the State so to arrange matters that the Sami population is able to secure and develop its language, its culture and its society.

Before the time limit set by sec. 112 of the Constitution, an identical proposal for amending the Constitution was introduced in the *Storting*. Three years later the amendment was duly enacted.

The question of what interests and activities the draft amendment would comprise attracted much attention in the Commission and also in the subsequent discussion.[2] Also the proposal to include such a provision in the Constitution itself rather than to settle for an enactment in the future "Samis' Act" was discussed in great detail and—in the opinion of the present author—convincingly.[3]

On the other hand, the choice made, at least implicitly, between the formulation quoted, laying down a *duty* for the authorities of the State, and a provision (also) aiming at *rights* for the Samis, attracted little attention. Thus, there was less discussion of the implications of choosing the draft proposal, and subsequently, the amendment, concerning the actual content of "Samis' rights". This also concerns the possibilities for bringing court actions.

The latter circumstance must probably be seen in connection with the fact that none of the interested Samis' organizations seems to have sought a more comprehensive constitutional protection of Sami interests. Yet while the issue of constitutional protection was given a high priority in the work of the Commission, the matter of the Samis' right to land and water was referred to a later partial investigation.[4] When the Commission accepted such a procedure, it was conditioned upon the

[2] *NOU* 1984:18, particularly pp. 432 ff. and 445 ff. See further Carsten Smith, "Om samenes rettsstilling" (On the Legal Position of the Samis), *Nordisk Administrativt Tidsskrift* 1985 No. 2, pp. 101 ff., particularly pp. 109–11, where the then Chairman of the Commission briefly presents the highlights of the report (see also Carsten Smith's paper in *Lov og Rett* 1986, pp. 115–45, and H. Eidheim *et al.*, "Samenes rettsstilling" (The Legal Position of the Samis), *Nytt Norsk Tidsskrift* 1985 No. 2, pp. 76–85, particularly p. 78.

In a paper in *Lov og Rett* 1986, pp. 163–78, the then secretary of the Commission, E. Høgetveit, gives a more detailed account of the constitutional proposal of the Commission than in any other paper, but even here we find mainly an account of the contents of the Commission's proposal and very little on the choice between a "declaration of principles" and a provision on "rights", which is the focus of the present paper.

[3] *NOU* 1984:18, pp. 444–51.

[4] It is clear from the report (*NOU* 1984:18, p. 52, cf. p. 54) that this choice of priorities in the work of the Commission took place in accordance with the wish of two of the largest Samis' organizations.

© Stockholm Institute for Scandianvian Law 1957-2009

fact that it "is a matter of a more generally framed statement of principle and not the establishment of specific rights in the Constitution".[5]

The road towards constitutionally guaranteed rights for the Samis was consequently closed from the very beginning. And for the Commission it was probably closed for good. For the continuing work on matters concerning rights to land and water, so it seems, must not concern this aspect of the legal position of the Samis.

As matters stand, we are only to comply. But it is not self-evident that a constitutional provision on *certain* "rights" for Samis presupposes comprehensive and intimate knowledge of the complex matters of land law in the Sami areas. Thus presumably the material basis for the culture of the migratory Samis may be maintained without regard to the question of whether they actually own the reindeer-grazing lands or whether they just have extensive users' rights. Surely, certain questions involving a right to a language and a culture will only be loosely connected to the issues of formal rights of ownership to land in the Sami areas.

The following discussion will therefore consider what *legal* protection a constitutional provision of the kind here involved may possibly afford, and will also put the amendment of May 27, 1988, in a somewhat wider context. The new provision also provides an opportunity to evaluate the current Norwegian trend to introduce constitutional "rights" in forms that would only with difficulty include possibilities for court litigation.

The discussion will have as one of its points of departure the fact that Norway has a system of court control not only over acts of the administration but also over legislation.[6] This circumstance was established through court practice during the 19th century, and is the second oldest such system of control at national level after the American one. It is also an American-type system in the sense that all courts, albeit in the last instance mostly only the Supreme Court, have a right and duty to pass judgment on arguments of a constitutional law character in relation to legislation etc. applied in cases before them. So far there has been no serious discussion regarding the establishment of a separate constitutional court on the Continental European pattern.

[5] *NOU* 1984:18, p.388, cf. pp. 42 ff. on the Commission's terms of reference.

[6] On the matter of constitutional control by the courts, see e.g. the then Chief Justice R. Ryssdal, "The Relation between the Judiciary and the Legislative and Executive Branches of Government in Norway", 57 *North Dakota Law Review* (1981), pp. 527–39, Eivind Smith, "Pays scandinaves", in L. Favoreu and J.A. Jolowicz (eds.), *Le contrôle juridictionnel des lois. Légitimité, effectivité et développements récents*, Paris/Aix-en-Provence 1986, pp. 225–82, and several papers in Eivind Smith (ed.), *Les droits de l'homme dans le droit national en France et en Norvège*, Paris/Aix-en-Provence 1990.

© Stockholm Institute for Scandianvian Law 1957-2009

The expression "it is incumbent upon the authorities of the State" in sec. 110(a) is modelled on the provision in sec. 110 on the "right to work". Therefore it is necessary first to consider the background of that provision and its legal content in comparison with the new "Samis' paragraph" (see section 2 below). Thereafter some remarks will be made on whether the "Samis' rights" discussed here and the slightly older "right to work" should enjoy the same kind of constitutional protection (section 3). In this connection it seems important to take into consideration *inter alia* the fact that "Samis' rights" aim at protecting a small minority of the Norwegian population.

Furthermore there is reason to consider the tendency from which these constitutional amendments emanate, and to which they definitely contribute, in connection with certain features of historical, foreign and international development in the field of human rights (section 4). And some remarks are needed on the formulation and tenor of a possible "Samis' paragraph" focussing rather more on rights (section 5).

2. SEC. 110 OF THE CONSTITUTION AS A MODEL

The provision enacted in 1954 as sec. 110 of the Constitution Act was a direct result of the joint political programme of all major political parties established after the liberation in 1945 and runs as follows:

> It is incumbent upon the authorities of the State so to arrange matters that every able-bodied person can make a living from gainful employment.

It is commonly said that sec. 110 deals with the "right to work". But even so this is unsatisfactory. Any provision on subjective rights to employment must take as its starting point that every able-bodied person has a right to employment, or words to that effect, whereas sec. 110 only imposes certain obligations on the "authorities of the State", primarily the *Storting* or the Government. From a legal point of view this discrepancy is extremely important, and in this respect the drafting of sec. 110 was on the part of the legislator clearly intentional.[7]

From the unemployeds' point of view this provision gives them no legal claim to employment or to the economic benefits therefrom. Hence, it is impossible to go to the administration and demand a job, nor can a suit be brought in court, as is possible when actual "rights"

[7] In *NOU* 1984:18, pp. 423 ff., a fairly comprehensive account of the *travaux préparatoires* of sec. 110(1–2) of the Constitution is given, to which the reader is referred.

© Stockholm Institute for Scandianvian Law 1957-2009

are involved. Instead, detailed implementation under sec. 110 is left to the central State authorities themselves. These must *inter alia* continually weigh the provision in relation to the economic situation in the country (and of the State) and in relation to the policy which in their view will best promote the fight against unemployment and other current problems. They will not be liable to criminal sanction nor to damages as a consequence of their policy. The courts will not be able to set aside statutes or other measures even when clearly in contravention of the duties imposed by sec. 110 of the Constitution.

It is correct that a breach of the obligation to promote full employment may in extreme cases entail consequences of a constitutional kind. Naturally it is, after all, this which ultimately constitutes the ground for considering the provision to be a *legal* one. The possible reaction is prosecution and possibly conviction in the Court of impeachment (*Riksretten*) under sec. 86 of the Constitution and the Act of May 2, 1932 (No. 1), particularly sec. 11.

However, the Court of impeachment no longer plays any role in everyday government business. Impeachment will be out of the question unless there is a clear case of violation, e.g. if the government openly declares that it will use massive unemployment to further its financial policy. Furthermore such a procedure can only take place with the consent of a majority of the *Storting*, or to be precise, the section of it called "Odelsting". But a majority will hardly consent to such an action unless they disagree with government policy. And since a parliamentary majority in a parliamentary democracy has access to much simpler and more practical means to impose its will on the government, such disagreement will almost invariably be solved in some other way than impeachment. In the last instance it will be much easier for a majority to threaten with, or arrange, a vote of censure, obliging the government to obey or to resign.

Thus, it is clear that the "duty" according to sec. 110 will in practice be carried out without any support from the threat of legal sanctions. It is also obvious that the access to such sanctions is never effective as a threat against a political majority which is forced to conduct—or has a direct interest in conducting—a policy of creating or maintaining unemployment. In addition, the sanctions which after all exist are never available for individuals or groups who might benefit from a provision on a subjective "right to work".

The provision in sec. 110(2), enacted in 1980, differs somewhat in this respect. This provision is not very precise, either, and it expressly empowers the legislator to make "detailed provisions" concerning em-

© Stockholm Institute for Scandianvian Law 1957-2009

ployees' "right to co-determination at their place of work". Within wide limits, employees and trade unions will thus be dependent on the current majority in Parliament. But it is also clear that this provision is based on a notion that there *shall* exist a certain "democracy" within working life. In extreme cases the legal consequences may thus differ from those under sec. 110(1).

A bill to Parliament with proposals for the abolition of all traces of such co-determination in Norwegian working life would at least formally entail constitutional responsibilities for its authors, most probably the government; compare what was said above regarding sec. 110(1). Furthermore, should such a bill be carried, the issue of the constitutionality of the Act, when the question of implementation arose, could be raised before a court of law, in the last instance before the Supreme Court. The court might, depending on circumstances, set the Act aside or, more precisely, refrain from applying it, since it would contravene the *presumptions* inherent in sec. 110(2). No such possibility exists in relation to sec. 110(1).

Consequently sec. 110(1) of the Constitution is more a declaration of principle than a provision on rights and duties of a legal kind. It constitutes "a general declaration of policy on which there is political unity across party lines" and it expresses a "political and moral obligation".[8] As discussed earlier, this obligation also has some legal content. But it does not go as far as empowering individuals or their associations to present any legal claim themselves. For them the provision of sec. 110(1) only serves as a declaration of principle to which they can refer in a discussion on using unemployment e.g. as a means of financial policy. The core of any argumentation to that effect must be regarded as political.

The same reasoning applies in the main to the new "Samis' paragraph". However, it is conceivable that there are nuances in how the two provisions on "duty for the authorities of the State" should be understood. Written rules cannot be interpreted only with regard to their wording. Also, the *travaux préparatoires* can supply important contributions to a clarification of the import of the rules. Therefore it is possible that the *travaux préparatoires* of sec. 110(a) of the Constitution may provide arguments for interpreting the introductory phrase of that section differently than that of sec. 110 in the matter of rights.

One way of looking at the relationship between duties incumbent

[8] *NOU* 1984:18, pp. 427 and 432.

© Stockholm Institute for Scandianvian Law 1957-2009

upon "the authorities of the State" and subjective rights of "citizens" is that each legal duty entails a corresponding right. In a number of instances this will also be an adequate description of the position of the law (the buyer has a duty to pay, the seller has a claim to payment, etc.).

Such a point of departure will, however, by no means cover all public law relationships. One can easily conceive of an agency having a "duty" but not in the sense that a *private* citizen has a corresponding "right". The "duty" may exist only in relation to other agencies or authorities, e.g. a higher-ranking official or a superior authority. If one finds that the provision only protects the public interest, a private litigant will not be able to obtain a court decision that such a duty is to be respected.[9]

With this reasoning there is nothing extraordinary in the proposed "Samis' paragraph" imposing obligations on the public authorities *without* at the same time giving "rights" to the Sami population. And there is evidence that this should be the starting point for a discussion of the 1988 amendment to the Constitution.

During the final reading in Parliament nothing was said to contradict the main view of the commission on the legal meaning of the new provision. On the contrary, a number of statements from the commission, which will be discussed presently, were reiterated, *inter alia* in the memoranda from the Storting Standing Committee on matters of constitution and foreign policy.[10] Consequently the report from the Sami Commission will remain the most important source for how to understand this provision.

The main view underlying the problem discussed here concerning the "Samis' paragraph" is the statement that the words "it is incumbent upon the authorities of the State" in sec. 110(a) must be understood in the same way as in sec. 110(1): the "most important issue" is "probably" the establishment of "a *political and moral* obligation in relation to the Norwegian Samis". It is "nevertheless in principle a legal obligation laid down by such a constitutional provision". However, "there are no definite sanctions connected with non-observation of this duty on the part of the State".[11]

It is necessary also to examine the short observations by the Commission on the possible role of the courts. Here it is noted that "it is a

[9] See e.g. I.L. Backer, *Rettslig interesse for søksmål, skjønn og klage* (Legal Standing for Lawsuits, Appraisements and Appeals to Superior Administrative Authorities), Oslo 1984, pp. 53 ff., and—for constitutional law—F. Castberg, *Norges statsforfatning* (The Constitution of Norway), 3rd ed. Oslo 1964, pp. 172–73.

[10] *Innst.S.* (report of Parliamentary Standing Committee) No. 147, 1987/88.

[11] *NOU* 1984:18, p. 433 (emphasis there).

© Stockholm Institute for Scandianvian Law 1957-2009

matter of rules for protecting a minority", and that it may be "maintained that the courts have a special task in ensuring that the majority remain within the framework of the constitutional rules". Hence it would seem that it may be "assumed that our constitutional right of judicial control will in principle apply also to a constitutional provision such as the one discussed here".

This is *per se* an important factor in the construction of the provision. However, the words "in principle" express a significant reservation, which is extended in the following text. The Commission points first to the fact that the "obligation [is] framed in general and discretionary terms" so that the "provisions as a consequence of their own content leave considerable scope for the discretion of the political authorities". Secondly, the obligations "by their very nature leave the courts a limited field of action". For the section will particularly necessitate the introduction of "various kinds of support". And the possibilities of the courts to take action will be limited if the measures introduced are unsatisfactory in extent or quality.

These particular issues will be discussed more fully under section 5 below.

Further, it is conceivable that the Commission does not sufficiently stress the possibility of using the "Samis' paragraph" as a weapon against discriminatory measures, a possibility which it quite correctly touches upon. Conditions certainly are much pleasanter for the Sami population of Norway today than when the policies of assimilation or "Norwegianization" prevailed. Or proverbially, there is nothing more difficult to forecast than the future. And, at least in principle, it should already be a matter of some urgency to introduce provisions against such measures as the prohibition of "joiking", a form of Sami chanting, in school which were still in force until quite recently in some municipalities.

The Commission (or the majority of the *Storting* for that matter) would hardly disagree with this.[12] But in the view of the present author the Commission's report does not attach any particular importance to

[12] Høgetveit, *op.cit.*, p. 177, expressly states that "parts of the earlier policy of assimilation would clearly be declared unconstitutional under such a provision, should the matter come to trial". However, Mr. Høgetveit immediately makes the reservation that "the matter of constitutionality is happily of a hypothetical nature".

The statement by Carsten Smith (*Lov og Rett* 1986, p. 127) that the "provision has a *legal* impact as an absolute bar against any measure with an aim towards assimilation" (emphasis added) might be interpreted in the same way.

© Stockholm Institute for Scandianvian Law 1957-2009

this kind of need for protection when drafting the detailed provisions on the protection of Samis.

It is impossible to state with certainty how the "Samis' paragraph" may be used by the Samis and their organizations, by the Norwegian authorities and, in the last instance, by the courts. Therefore it is possible that it may have a greater impact on the subjective rights of the Samis than the provisions in sec. 110(1) of the Constitution have had for the unemployed.

As already noted, the report of the Commission does provide some support for such a position, albeit greatly qualified. Nevertheless, the main impression is that the provision on Samis' rights should be understood in the same way as that on the "right to work" in sec. 110. Above all it is imperative to realize that the words "it is incumbent upon the authorities of the State" as well as the detailed drafting of the obligation both do their best to ensure that the constitutional amendment should *not* provide such rights for the Sami population as can be enforced through the courts.

3. ARE THERE GOOD REASONS FOR PROVIDING "SAMIS' RIGHTS" WITH THE SAME CONSTITUTIONAL PROTECTION AS THE "RIGHT TO WORK"?

A main theme in the discussion on a "Samis' paragraph" until the constitutional amendment of May 27, 1988, was whether the provision should be given in the Constitution itself or only in the planned legislation concerning Samis. The result was, as we have seen, that the "Samis' paragraph" was included in the Constitution and, more generally, became a part of Norwegian constitutional law.

Yet, in the group of norms which in relation to other rules of law rank as constitutional, there is a dividing line between those with legal effects only in relation to the authorities concerned and those which (also) may be invoked by someone outside the State apparatus (i.e. by "citizens").

It is commonly held that the prohibition according to sec. 112 on changing the "spirit" or "principles" of the Constitution is an example of the first kind of norms: to be sure, Parliament is bound by this prohibition but it is, as Constitutional Legislator, itself master as to the content of the limits imposed by such a prohibition and it decides itself when the limits have been transgressed.[13] The principal rules of Norwe-

[13] Cf. e.g. J. Andenaes, *Statsforfatningen i Norge* (The Constitution of Norway), 6th ed. Oslo 1986, pp. 39 ff.

© Stockholm Institute for Scandianvian Law 1957-2009

gian parliamentarianism, at least in the most important applications[14] such as the duty of the government to resign after a vote of censure, are other examples of the same kind.

At the other end of the scale we find primarily the constitutional provisions on human rights; perhaps the most familiar are sec. 96 (punishment without due process of law), sec. 97 (ban on retroactive legislation), sec. 100 (freedom of speech and freedom of the press) and sec. 105 (right of ownership). In addition to these we find in this area of the law some norms created by the courts without express support in the wording of the Constitution.[15] The Supreme Court has recently declared that it will attach particular importance in the field of human rights to provisions aiming at the "protection of the personal freedom or security of the individual".[16] Historically as well as today, the economic protection to which the old text of the Constitution attaches considerable importance has played a major role in court practice.

In consequence of what was said under section 2 above, the provision in sec. 110(1) must without doubt be classified under the category of (purely) internal provisions. This, also, indicates an important aspect of the constitutional status of this provision. As the legal effects of the new "Samis' paragraph" are in the main identical, this provision, too, should be put in the same category of constitutional rules. Together, the two provisions will differ from other constitutional rules affecting what we call human rights.

Thus, the new provision contributes to establishing some sort of a tradition in Norway concerning the drafting of constitutional provisions in this field. This will in section 4 below be discussed in a broader historical and international context. However, we will first examine whether the character of "Samis' rights" is such as to justify putting them, together with the "right to work", in a peculiar constitutional niche, the primary feature of which is that it does *not* establish "rights" in the proper sense of the word.

The Commission on the Rights of Samis confines itself to a brief

[14] Cf. the comments on this issue in Eivind Smith, "Den såkalte 'læren om negativt flertall'" (The so-called doctrine of negative plurality), *Nytt Norsk Tidsskrift* 1985 No. 4, p. 56.

[15] The most important example is the increasing number of direct applications by the courts of international norms on human rights. For another example of recent court practice, see judgment 1983 NRt 1004, at pp. 1017–18 concerning the requirement for "respect of human life".

[16] The quotation is from Supreme Court judgment (*in pleno*) 1976 NRt 1, at p. 5; cf. the parallel statements from the dissident judges at p. 22.

© Stockholm Institute for Scandianvian Law 1957-2009

comparison between the area covered by sec. 110(1) of the Constitution and the area covered by the proposed "Samis' paragraph".[17] The point of departure is, quite correctly, the fact that these areas are "very different". However, the main importance is attached to the similarities which in the view of the Commission can be noticed: both provisions will "probably" constitute "a general guideline on the content of which there is broad political consensus". Neither of the provisions expresses any "criticism" of the attitudes or actions of government authorities up until the moment of enactment; they only express promises for the future, in our case to "pursue a positive policy in regard to Sami culture". Neither provision provides any effective guarantee that the goals set—in our case the "propagation of Sami culture"—will actually be reached. And both provisions seek to elevate "the platforms of the political parties to a higher level and ... [to make] them the binding promises of Society".

> With regard to the points concerning the certainty of realizing underlying goals, legal rules can never be regarded as predictions of actions nor of factual circumstances; they are *norms* directed towards acting agents. And in the present case the norms do not even concern the factual development of unemployment or of Sami culture, but the duties of the authorities in relation to these.

There is little to object to in the observations of the Commission, except perhaps that political slogans of this type do not automatically deserve inclusion in the Norwegian Constitution. However, these observations have little weight in relation to the arguments than can be raised *against* treating "Samis' rights" on an equal footing with the "right to work" in this respect.

A crucial point here is touched upon by the Commission when discussing the words "no guarantee of success" just mentioned. Here "external counterforces [opposing the propagation of Sami culture] are also strong in this area. But the actions required from the State authorities are more limited, and consequently easier to fulfil."

One can accept this too. But full discussion of these questions should take into account the fact that an actual "right to work" is almost unthinkable in a political and economic system such as ours. The level of employment is a function of a number of circumstances, e.g. international trade and price- and wage development, and the level of employment in its turn affects these circumstances. It seems likely that a legal claim to work can only be introduced in conflict with fundamental

[17] *NOU* 1984:18, p. 427.

© Stockholm Institute for Scandianvian Law 1957-2009

features of the kind of society we belong to and which most of us embrace.

> The claim to certain economic security (unemployment benefits, etc.) regardless of the current labour-market situation is a different matter, and need not be discussed here.

Thus, there are very weighty reasons why sec. 110(1) must remain as it is. However, it is difficult to perceive any circumstance of equivalent weight which would block the introduction of a "Samis' paragraph" with subjective rights for the individuals and groups concerned, i.e. a provision on "rights" in the proper meaning of the word.

The Commission also touches upon another, important, difference between the field covered by sec. 110(1) and the new "Samis' paragraph". The difference is that the discussion on "Samis' rights" concerns a typical minority problem. In a certain sense one can maintain that this is also the case for sec. 110(1), as long as unemployment does not reach proportions unknown to us since the second world war. However, belonging to a minority group is hardly a significant characteristic of the unemployed in Norway, nor of those who risk losing their jobs, and sec. 110(1) (as well as the joint political programme of 1945) did not seek to deal with a problem of this nature. On the contrary, it was an important and central aspect of Norwegian economic and political life.

On this point the situation of the Sami population is entirely different. Even though adequate delimitation of this group is difficult, it is clearly a minority group according to ethnic, linguistic and cultural criteria; a reasonable current estimate of the number of Samis in Norway is about 40,000, i.e. less than 1 per cent of the total population. And here lies the point of departure for the work on constitutional protection of Sami interests and for separate legislation on self-determination for the Sami minority and for Sami areas (see Act of June 12, 1987 No. 56 concerning the Sami Council and other Sami legal matters). This cannot but constitute a *decisive* difference between the scope of sec. 110(1) of the Constitution and a "Samis' paragraph".

This difference must be seen in connection with one of the most important tasks of the legal system, i.e. to guarantee that the majority and powerful groups do not infringe upon certain fundamental interests of individuals or minorities in a general sense. This is evident in a number of fields such as administrative law, the law of non-profit organizations and in company law, as well as in family law, commercial law, etc. However, the fundamental expressions of this principle are

© Stockholm Institute for Scandianvian Law 1957-2009

found in the constitutional sphere, or more exactly, in the Norwegian tradition of establishing rights which can be invoked even against parliamentary decisions. Today the fundamental principles of human rights probably enjoy wide popular support in Norway. And in perspective we may see that this is precisely a matter of protection of minorities against the majority.

The discussion of "Samis' rights" can also be placed within such a tradition.[18] But it is then imperative to realize that real "rights" only exist to the extent that there is adequate protection for the protected positions. As already indicated, this precondition has traditionally, and for a very long time in Norway, been fulfilled through the authority of the courts to decide whether the acts of Parliament and other authorities are within the limits set by constitutional law. As will be discussed in section 4 below, similar systems emanating from old legal traditions have also become established in many other Western democracies.

Regardless of any judgment on such a system or on its political implications, "rights" for a minority do not exist as long as in the last instance the political majority alone is competent to decide what those rights mean and whether they have been infringed in the past. The new "Samis' paragraph" concerns the legal position of a defined minority within the Norwegian population. Yet it is content with a formulation that, as a main rule, bestows no "rights" on the Samis.

Concerning unemployment and its economic implications, there is hardly any other solution than to leave the final responsibility for policy-making to the highest political organs in Norway. Putting such a responsibility in the hands of a majority in Parliament with regard to the fate of a small minority of the population is quite a different matter. To be sure, the Samis enjoy the same civil rights as any other Norwegians. Hence, they formally have the same opportunity to be represented in Parliament as any other group. In practice, however, this will occur only to a very limited extent. And in a situation (imaginary, of course) where "Norwegian" and "Sami" interests clash in Parliament, the Samis will never be able to exert influence through a numerically significant group of their representatives.

If the intention really is to give the Sami minority certain rights in relation to the majority, this cannot be achieved by letting the other, much stronger party to the conflict decide the matter in the final instance. Since—despite the clearly political implications of the constitu-

[18] Regarding constitutional protection for minorities in other countries, see the summary in *NOU* 1984:18, pp. 410 ff.

© Stockholm Institute for Scandianvian Law 1957-2009

tional provisions—it is a matter of legal rights, and seen in relation to the Norwegian tradition of conflict resolution through legal decisions, it would have been natural to give the courts a more central position.

The complex procedural and substantive rules which the courts must follow and under which they are accustomed to work do not in themselves guarantee that all decisions in conflicts between the majority and a minority will be for the minority, but this is not their purpose. What the rules aim at, and what they will eventually realize, is to guarantee that the weaker party will get a fair hearing, and particularly, will be able to present the relevant facts and arguments of the case. This cannot always be said about other methods of authoritative decision-making available in our societies.

4. THE CONSTITUTION AS A VEHICLE OF CITIZENS' "RIGHTS"

As already indicated, the Norwegian system of constitutional control by the courts of statutes and statutory instruments passed by the *Storting* means that every court may decide in a concrete case whether key provisions contravene the Constitution or whether—if not—they can be included in grounds for a decision. In practice, however, virtually all cases where the question of constitutionality is open to doubt will eventually be decided by the Supreme Court.

At least after about 1880, the development of constitutional control in Norway has to some extent been influenced by knowledge of corresponding activities of the United States Supreme Court, and by the reactions to this.[19] However, in Norway, the control system naturally arises primarily from the particular circumstances of Norwegian constitutional development.

In Norwegian public discussion the constitutional control exercised by the courts has to a large extent been noted as a "political" phenomenon.[20] Much of the heat generated can be explained by the differing opinions of the participants as to whether this is an order created by the courts and used to interfere in matters where they should, rather,

[19] Cf. *inter alia* the discussion on this matter in Eivind Smith, "Rettslig håndheving av konstitusjonelle normer—i Europa og i Norge" (Adjudication of Constitutional Norms —in Europe and in Norway), *TfR* 1983, pp. 77–131, at pp. 77–80 with further references.

[20] Not least the well-known, now more than twenty-years-old, discussion between Professors J.A. Seip and J. Andenaes can be seen as a very clear expression of this. The highlights of the discussion have been printed in several publications, e.g. in *Lov og Rett* 1965.

© Stockholm Institute for Scandianvian Law 1957-2009

abstain. Although rarely expressed in recent years, there are reasons to think that this turn of the discussion has contributed to creating (or maintaining) a widespread, somewhat skeptical attitude towards "constitutional control" in Norway. This applies to the courts themselves as well as to the community in general.[21]

It seems reasonable to assume that this fact, in conjunction with the extremely limited occurrence of new and relevant provisions on human rights in the Norwegian Constitution,[22] has contributed to the significant decline in the number of "settings-aside" of statutory provisions by the courts since the 1930s. As will be discussed presently, this means a development towards the British position on the relationship between the courts and Parliament. Notions such as "it is incumbent upon the authorities of the State" in secs. 110 and 110(a) of the Norwegian Constitution can only contribute to a continued development along this line. On the other hand, however, constitutional jurisprudence from the mid-seventies seems to represent a certain renaissance of this part of the Supreme Court's activities.[23]

However, the more exact definition of the concept "politics" will in many cases be decisive for the development and results of discussions on this point; thus, any legal decision will in some sense be a "political" one. Nor can there be an aim in itself to exclude as many "political" matters as possible from the courts' activities.[24] The core of the matter is rather to investigate what issues—e.g. in connection with certain kinds of minority protection—should be treated by the courts, how, and possibly whether the courts in certain matters should be particularly careful not to exercise their discretion to overrule that of a parliamentary majority.[25]

[21] The *legitimacy* of constitutional control by the courts in our time in Norway is scrutinized in Eivind Smith, "Rettslig binding av politisk handlefrihet?" (Legal Restrictions of Political Freedom of Action?) in Eivind Smith (ed.), *"Jus" og "politikk" i det norske statsliv* ("Law" and "Politics" in Norwegian Governmental Life), Oslo 1989, pp. 117 ff. Here as elsewhere, a more positive view of constitutional control is expressed.

[22] Cf. *inter alia* T. Opsahl, "Menneskerettighetenes plass i det norske statssystem" (The Position of Human Rights in the Norwegian State System), in Smith (ed.), *op.cit.* (note 21), pp. 101 ff., and several papers in Smith (ed.), "Les droits de l'homme dans le droit national en France et en Norvège", *op.cit.* (note 6).

[23] On the "renaissance" in recent constitutional jurisprudence, see the present author's article in Eivind Smith (ed.), "Les droits de l'homme dans le droit national en France et en Norvège", *op. cit.*, pp. 89–117.

[24] Compare in this context *inter alia* Carsten Smith, *Høyesterett—et politisk organ?* (The Supreme Court, a Political Organ?), Institutt for privatrett, Universitetet i Oslo, stensilserie No. 85 (1982).

[25] See also the references in footnotes 16 and 19 above on the declared position of the Norwegian Supreme Court in this matter and its American model.

© Stockholm Institute for Scandianvian Law 1957-2009

Further, there is reason to consider the increasing interest in—and probably adherence to—ideas of human rights in Norway and abroad. After the second world war this interest has manifested itself *inter alia* in Norway being a signatory to the international norms and procedures established in Western Europe and under the United Nations. This involves at least implicitly the acceptance of the notion that certain minority rights should be protected even in relation to decisions made by a majority in constitutionally correct forms.

It is obvious that this situation must have an impact on the discussion of corresponding issues in Norway. It is certainly not satisfactory to accept that international organs, e.g. the European Court of Human Rights in Strasbourg, have jurisdiction in relation to Norwegian legislation, while at the same time—out of concern for "democracy" or for similar reasons —to reject a similar role for the Norwegian Supreme Court.

It seems likely that the recent tendencies towards a more active stance noticeable in the practice of the Supreme Court should to some extent be seen against the background of an increased awareness of the potential importance of constitutional control for the protection of human rights, including those of minorities.[26]

Finally, the issue of constitutional control by the courts and of the existence of proper "rights" at this level, should be seen against the background of the situation in some countries which, historically and ideologically, are close to Norway. The geographical position of Norway has always occasioned close contact with the British isles, and the British system of government has been an important source of inspiration for the development of Norway's own form of parliamentarianism. Therefore there is much evidence that the British doctrine of *the sovereignty of Parliament* has exercised considerable influence—and perhaps continues to do so—on Norwegian thinking in these matters, including constitutional control of the activities of the *Storting*.

Thus it is perhaps not so strange if parts of the political debate in Norway, also, since the rise of parliamentarianism have been reluctant to afford the courts a position which in a certain sense is superior to Parliament's and hence also to that of the currently elected majority.

In a system such as the Norwegian one a superior position of this kind can never be anything but temporary and incomplete. If the parliamentary majority is large enough it will always be able to change the constitutional norms on which the activities of the courts are based. On numerous occasions the majority will also find other ways to realize its

[26] See footnote 23 above.

© Stockholm Institute for Scandianvian Law 1957-2009

political aims than those which have been shown to conflict with the Constitution. In addition, the Norwegian situation is different from the British in that Norway, at least as a point of departure, has a written constitution. This makes it natural—though not logically necessary—to maintain that the Constitution must be superior to day-to-day legislation and that it can be made subject to litigation in the courts in this respect.

The actual sovereignty of Parliament even in Great Britain is hardly as strong as the formal point of departure may indicate. For parliamentary legislation takes place in an environment permeated by previously established, indeed old, legal rules and principles. And as the exact contents of any piece of legislation naturally are not always clear, the courts will often be able to reach legally correct solutions which are not always identical with those Parliament aimed to establish.

Furthermore, the doctrine of parliamentary sovereignty in relation to the courts is now under pressure even within the British legal system.[27] The reason, it is said, is *inter alia* the increased interest in human rights, precisely as in Norway. Another explanation is that the British through membership of the EEC have confronted—and for that matter accepted—a legal system presupposing a hierarchy of norms and having a system of court control through the European Court of Justice in Luxembourg. Such a system corresponds with Continental thinking in the field, which is far more strongly impermeated in Norway.

What is most important in this connection is, however, that the English legal system at this particular point is becoming more and more of a rarity in the contemporary world. "Constitutionalism" has become extremely widespread in the sense that almost all states have a written constitution. It must of course be admitted that this development has produced differing results and that far from all "constitutions" are worth much more than the paper they are written on. Nevertheless, the notion of a hierarchy of written norms now dominates the scene. And in a number of countries, particularly in our part of the world, this notion has led to the introduction of various systems of constitutional control by the courts, including control of the constitutionality of the acts passed by legislators. It should be noted that this trend now has grown strong even in most of the former "Eastern" European countries.

As already mentioned, Norwegian scholars and others have followed

[27] See e.g. A. Lester, "Fundamental Rights: The United Kingdom Isolated?", *Public Law* 1984, pp. 46 ff., and more recent writings in this field. See also the instructive overview in J. Dutheil de la Rochère, "Le pouvoir judiciaire et les libertés au Royaume-Uni", *Pouvoirs* No. 37, 1986.

© Stockholm Institute for Scandianvian Law 1957-2009

fairly closely the developments in the United States, particularly since the second world war, as regards the weight attached by the United States Supreme Court to matters of fundamental human rights (in contradistinction to economic rights, etc.). The development towards the establishing of separate constitutional courts, in several cases with wide jurisdiction and extensive court practice, which has taken place in all the major countries of continental Europe since the second world war is less well known in Norway, as well as in the other Nordic countries.[28] This development is very clear, however, and it is obviously not limited to the early post-war period and the anti-nazi reaction developing into a great interest in human rights based on notions of natural law. It should also be noted that the Swedish Parliament in 1979 for the first time passed an Act which provides for a certain, albeit rather limited, court control of parliamentary decisions.[29]

In such a context Norway, with its old and well established, although comparatively cautious, system of constitutional control, is no exception. We risk becoming one, however, if the post-war tendency in Norway to view the Constitution as a vehicle for pure directives to the powers of the state instead of also one for real "rights" for the citizens continues or proceeds much further. An extended use of provisions on duties "incumbent on the authorities of the State" rather than of provisions on civic rights will provide an important contribution towards a development in the direction of a British type of constitutional system. To the same extent Norway will distance itself from the dominating tendency in most of the countries in the neighbourhood.

5. THE DRAFTING AND CONTENTS OF A PROVISION ON "SAMIS' RIGHTS"

Even though it would be desirable to lay down rules conferring proper "rights" on the Sami minority, the issues to be protected must be of a kind where protection through "rights" is suitable. As noted earlier, the Commission's view may appear to be that the "Samis' paragraph"

[28] See further Smith, "Rettslig håndheving av konstitusjonelle normer . . .", *op.cit.*, and the gradually increasing international writing in the field.

[29] The Form of Government Act of 1974, ch. 11, sec. 14, which limits the competence of the courts to occasions of "evident error". See further on this provision and other developments in Swedish law, e.g. Smith, *op.cit.* footnote 6 above, and *ibid.*, "Rettslig prøving av lovgivning og regjeringsbeslutninger" (Judicial Review of Legislation and Government Decisions) in T. Segerstedt *et al.*, *Rättssäkerhet och demokrati* (The Rule of Law and Democracy), Stockholm 1985, pp. 117–36.

© Stockholm Institute for Scandianvian Law 1957-2009

concerns matters which in principle do not concern proper rights in the sense that they should be handled by the courts.[30]

However, such a view is not easy to understand. Surely it is not satisfactory to enact a provision which merely establishes that the Sami population has a "right to its language", etc. For such a provision may only to a very limited extent satisfy the desire that the State, in addition to abstaining from "negative" intervention, should contribute to the safekeeping and development of Sami culture through positive measures. But it should be possible to draft a provision covering both sides of the problem.

If we start from the presumption that such a provision must cover both sides of what we may call the area of protection, and also assuming that the Samis as a group, in the same way as under the new "Samis' paragraph", shall be ensured an active part in the formation of any supportive measure, the provision might run as follows:

> The Sami population has a right to its own language, culture and social life. It is incumbent upon the authorities of the State to arrange matters so that the Sami population is able to maintain and develop benefits stemming from this right.

The present author does not object strongly to a clause on duties incumbent on "the authorities of the State" *per se*, provided, however, that this is not the only means of protection for the interests of a minority of the Norwegian population. And no doubt the provision in the first sentence of the above draft will be decisive for the *legal* consequences of such a clause. It establishes that for the Samis it concerns not only factual circumstances and aspirations, but also matters which may, depending on circumstances, be subject to litigation, ultimately, in the courts. A clear provision to that effect is lacking in the "Samis' paragraph" now in force.

> The provision suggested above is *not* intended to be a final proposal for the drafting of such a paragraph: several other possibilities are conceivable. One should therefore not attach so much importance to the details of this version that the most important question is overlooked, i.e. that the protection of "rights" for a minority cannot as a rule be achieved by the method now chosen in Norway.
>
> The matter of *who* shall have legal standing to act with regard to Samis' rights will not be discussed here.

A mere re-formulation on these lines is, however, insufficient to refute

[30] Cf. particularly *NOU* 1984:18, p. 433.

© Stockholm Institute for Scandianvian Law 1957-2009

the Commission's view on access to justice under a "Samis' paragraph" proclaiming actual "rights". As mentioned in section 2 above, the Commission stresses the fact that the courts' scope for influencing or forcing the initiation of positive measures such as grants is very limited. A few words should also be added on the possible consequences of the fact that the wording, as regards the more precise subjective rights, appears to be rather vague.

First, according to the Commission, the courts are unable to "force through government grants and other forms of positive measure". This, however, is an evident misunderstanding. It is beyond doubt that the courts in certain circumstances *can* make judgments involving the Treasury—which in the last instance is the appropriating authority of the *Storting*. The question is only *when* such an outcome is justified.

Naturally there must be legal grounds for such a judgment. Ordinary legislation and indeed the Constitution itself can provide such grounds, as well as legal rules on limitations in the competence of the administration in relation to citizens as well as rules on compensation in tort.

We can for example imagine that the Samis' rights to their own language can only be enforced if the comprehensive schools are rendered able to provide adequate education in Sami language or that official documents with relevance to Samis are made out also in Sami. Anyone applying to place a child in a Sami comprehensive school, but refused a place because of lack of room in that school, will, depending on circumstances, have a claim that the refusal be set aside as unlawful. Anyone with sufficient legal interest in the matter will also be able to demand a court judgment on whether his rights under the guidelines on instruction in the Sami language laid down in an Act or in the Constitution have been respected.[31] And anyone who has suffered a loss through infringement of the fundamental rules on education may claim compensation from the relevant municipal or state authorities.[32]

> In addition, anyone who has not received a sum due, e.g. old age pension, will have a claim for payment. But such a situation is hardly relevant to the types of provision discussed here.

[31] Corresponding issues have been discussed in relation to legislation on "rights" to education, social services, etc. See e.g. S. Eskeland, "Ressurser, rettssikkerhet og forvaltningens ansvar" (Resources, the Rule of Law and the Responsibility of the Administration) in *Festskrift til Torstein Eckhoff*, Oslo 1986. See also the annual report of the Parliamentary Ombudsman, *Årsmelding* 1985, pp. 38 ff. and the further discussion there.

[32] Compare H.M. Michelsen, "Det offentliges ansvar for mangelfull undervisning" (Public Authority Responsibility for Unsatisfactory Teaching), *Lov og Rett* 1970, pp. 339–52 and the ensuing debate on court practice in this area.

© Stockholm Institute for Scandianvian Law 1957-2009

A judgment for compensation (or payment of money due) may entail Treasury expenditure directly. Indirectly, judgments of the first two kinds mentioned above may also entail such expenditure, e.g. through the requirement that the Sami comprehensive school be financially enabled to fulfil its obligations, provided, of course, that the fundamental rules are not changed. And all the various kinds of judgment discussed here may affect interpretation of the fundamental rules in the area and, consequently, the very content of the obligations that the authorities have, or have not, respected.

Since such decisions can cost money, the courts may in borderline cases, out of concern for the *Storting's* constitutional control of Treasury expenditure, be somewhat reluctant to set their own discretion over that of Parliament concerning what expenditure is necessary and, in the last instance, what is financially justifiable. However there is no theoretical doubt that court decisions are binding upon the exercise of parliamentary granting powers. The question is only *what* binding effects on the exercise of these powers may be assumed to follow from the provisions, e.g. one in the Constitution on certain "rights" for the Sami population.

Further, the courts will in certain cases be able to review the details of state decisions and their implementation regarding appropriations and other positive measures. Once more, the starting point must be the provisions laid down e.g. in a "Samis' paragraph" in the Constitution or other enactments regulating the exercise of government authority, including appropriations. It is perfectly possible that such positive measures might be discriminatory, or in some other way contravene the provisions involved.

In such cases the courts will be unable to call directly for new expenditure to set right any harm done. But they will be able to set aside any unfair aspects of the provisions and any decisions that contravene the legal rules, cf. the discussion above on the possible formal effects of court activities. This alone will not ensure an increase of the financial resources at the disposal of e.g. the Sami population. Nevertheless the existing resources would presumably be allocated in a better way, which may be of considerable importance in itself. Furthermore, such judgments may contribute to clarifying the limits of such rules, and they may provide useful precedents.

Finally one cannot disregard the fact that there will always, and not least in the uncertain future, be a need for protection against "negative" measures against the Sami population and its interests (see section 2 above). Human rights have a tremendous importance, in principle,

© Stockholm Institute for Scandianvian Law 1957-2009

even in societies—such as present-day Norway—where few seem currently to be under serious threat. But in Norway, too, we should think twice before assuming that this situation is necessarily permanent.

> As will be clear from the above, no sharp line of demarcation can be drawn between "positive" and "negative" measures from the State in relation to the Sami population or other minorities, nor between the effects of provisions conferring "rights" on the individuals and groups concerned and provisions merely charging "the authorities of the State" with obligations. For this reason alone one should be careful not to limit the perspective from the outset in a way that precludes any later legal development.

The second principal objection against a "Samis' paragraph" as a provision on "rights" is that the import of such "rights" is too wide and too vague to be amenable to treatment using legal means. This view is based upon the principal descriptions of the protected area in the Commission's report and in the constitutional amendment itself. This objection will not automatically be relevant for a provision which, after careful investigation, is enacted to protect rights to land and water, cf. section 1 above on the limitations in the terms of reference in this respect.

The central words in this discussion are "language", "culture" and "social life". Judging from how those notions are discussed in the *travaux préparatoires*, and extensively, too, they are hardly less precise than those used in numerous other pieces of legislation. On the other hand, there may admittedly be problems in deciding when those "rights" are actually implemented in a legally satisfactory way. This gives reason to admit that some of the underlying choices are, and should be, left to "political" rather than "legal" discretion. In this respect it is therefore far from obvious that the practical difference between a provision on "rights" and a "Samis' paragraph" will always be so important.

A detailed discussion of these matters will also have to consider how a provision on "rights" will be used in subsequent legal argumentation and in court practice. Any original unclarities in a written statutory rule may be gradually cleared up by subsequent court decisions. And the fact that some issues may appear uncertain does not preclude reasonable precision with regard to more extreme situations, e.g. so that there is no doubt that negative discrimination constitutes a violation of the provisions.

On the other hand, this uncertainty as to the contents of a provision on Samis' rights might give cause for a certain restraint on the part of the courts in putting their discretion before that of Parliament. This attitude is familiar from several fields of Norwegian law. But it does not

© Stockholm Institute for Scandianvian Law 1957-2009

from the outset tend to bar completely the possibilities of court intervention.

On these grounds, the present author cannot see any sufficient reasons for practically preempting, through statutory texts and *travaux préparatoires*, a further development of the Sami population's constitutional protection through court practice.

6. CONCLUSION

The preceding discussion provides good reasons for a re-evaluation of the detailed drafting of the "Samis' paragraph". What seems particularly important is the fact that the provision, in its present form, and seen in conjunction with the Commission's report and the statements made in the *Storting*, contributes to a development of the *Rechtsstaat* on the constitutional level away from established legal traditions in Norway. The contribution thus given by the "Samis' paragraph" is contrary to the dominating tendency in our part of the world to guarantee constitutional rights with legal means.

That the provisions do contribute to such a development is because the "Samis' paragraph" coincides with the provision on clear obligations "incumbent on the authorities of the State" already enacted in the Constitution (sec. 110). This also coincides with the gradual development in many fields towards a reduced role of the very old, written Norwegian Constitution in the field of protection of rights. And the contribution is a particularly strong one since it, as opposed to sec. 110, is made through a provision intended for the protection of a small minority in the Norwegian population.

The apparent development in this area is, in the view of the present author, particularly unfortunate, since the legal mechanisms required if we are to speak of proper "rights" are particularly suitable for the protection of minorities in relation to the majority of the population and amongst its elected representatives.

© Stockholm Institute for Scandianvian Law 1957-2009