A CENTURY OF NORWEGIAN RESEARCH INTO SÁMI RIGHTS

BY

HENRY MINDE

Innately lawless: that is the official stereotype of indigenous peoples. By discussing the Sámi's understanding of their rights to their land one helps to counter that stereotype. (Alf Isak Keskitalo)

This article is concerned with the research carried out in Norway into Sámi rights between about 1870 and 1970. An authoritative judgement as to what this covers is that of Carsten Smith, Chief Justice of the Supreme Court:

> Though it includes the particular rights pertaining to the Sámi as individuals, it is primarily concerned with their collective rights as a people and economic unit. It concerns Sámi rights under Norwegian law and legal precedent as well as their rights under international law. It is a matter of political, economic and cultural rights. A discussion of these questions takes us to the heart of the grounds for the rules of law in society.[1]

As a historiographical topic, Sámi rights are of interest because research in the area has been both decidedly interdisciplinary and, at times, politically controversial. Besides, as Smith indicated, it touches the foundation of legal rights and links Sámi rights to the development of Norwegian jurisprudence and its relationship with politics. It is therefore reasonable to focus on how, within different research approaches, the *legitimacy* of special Sámi rights has been discussed. It is also among the attitudes to the question of the legitimacy of Sámi rights that the present writer has found it appropriate to distinguish between four different orientations.

* *a historical-customs orientation* which in all essentials embraces Torkel H. Aschehoug's discussion, in his work on state administration, of rights relating to reindeer herding,
* *a legal-positivist orientation,*[2] represented by a group of jurists, histor-

[1] Samerett – Gamle rettskilder og ny rettsdisiplin. Institutt for rettsvitenskap. Skriftsserie nr. 1, University of Tromsø, 1987, p. 3.

[2] The terms "legal positivism" and "legal realism" are here used in the sense normally adopted in Scandinavian jurisprudence. They should not, therefore, be confused with the concepts of "realism" and "positivism" as used in philosophy.

ians and linguists who, during negotiations with Sweden around the turn of the century, advised the Norwegian authorities on the reindeer-grazing lands and, after the first World War, in the border negotiations with Finland,

* *a comparative-customs orientation* which during the inter-war years emerged in Erik Solem's work on Sámi legal studies. This work should be seen in the context of activity at the Institute for Comparative Research in Human Culture, and
* *a legal-realism orientation*, for which the single most important contribution was given by Sverre Tønnesen when defending his doctoral thesis in 1972. Subsequent contributions should be seen in relation to this study.

In one sense this division breaks with the tendency to present Norwegian legal history as a wholly "realist" tradition, running straight from the mid-nineteenth century up to the present day.[3] The point is that A. M. Schweigaard, the founder of this tradition, gave a practical and utilitarian justification for legal rules based on the idea of natural rights and constantly relevant norms.[4]. But if one examines a more limited area, such an approach proves less fruitful. For within the context of Sámi law, arguments based on legal theory are strikingly different. Here we shall examine how far these orientations stem from scientific theory, ideological currents or contemporary political interests.

Several recent historical studies have focused on the role played by political interests and viewpoints in all kinds of Sámi-related research.[5] Regarding jurisprudence in particular it has besides been emphasized that in Norway the view has "always been that jurisprudence is not only legal dogma, but also legal politics". And, continues Smith in the above-mentioned lecture on Sámi rights, "it is a scholar's right, many would

[3] E.g. Erik Anners, *Den europeiske rettens historie*, Oslo 1983, pp. 350 ff. Since my paper was first published David R. Doublet and Jan Fridthjof Bernt have given a thorough treatment of the epistemology of the different orientations mentioned therein, especially the significance of legal realism. Doublet and Bernt, *Retten og vitenskapen*, Bergen, 1993, pp. 116 ff.; and pp. 165 ff.

[4] Cf. Rune Slagstad, *Rett og politikk*. Universitetsforlaget, Oslo, 1987, pp. 36ff.

[5] See Alf Isak Keskitalo, "Research as an inter-ethnic relation", in *Samfunnsforskning og minoritetssamfunn*, Acta Borealia, B.Humaniora. No. 13. Tromsø, 1978; Helge Salvesen, "Tendenser i den historiske sameforskning – med særlig vekt på politikk og forskning", in: *Scandia*, 1980, pp 21 ff; Henry Minde, "Fra "tålt bruk" til "legitime rettigheter"", in: *Hefte for kritisk juss*, 1980:3-4, pp. 34 ff; Bjørnar Olsen, "Norwegian Archaeology and the People without (Pre-)History: or how to create a myth of a uniform past", in *Archaeological Review from Cambridge*, 1986, pp. 25 ff.

also say his duty, to give his reasoned opinion as to what the legal rules *ought* to be."[6] (author's italics).

Thus, seen in the context of the earlier literature and taking into account the controversial nature of the research area, the links with the political circumstances must be given special attention. These links are, in the literature referred to, analysed in terms of academic/political dichotomies. Such dichotomies are however far from being simple or transparent. To reconcile them questions will be asked in two areas: regarding (1) the ties between Sámi rights and the development of jurisprudence and (2) the work of different scholars seen in the light of the historical circumstances of which they form a part. Therefore the focus will be on how different schools of jurisprudence can be seen as an intervening category *between* politics and academic research.

I The historical-custom orientation

From way back, the Sámi territories, *Sápmi*, have provided an arena for the activities of three kingdoms as they expanded northwards – the Danish/Norwegian, the Swedish/Finnish and the Russian.

All of them justified their claims by asserting that the people who lived there, the Sámi, belonged to them. The situation changed when the unified nation states fixed their frontiers in *Nordkalotten* (roughly the area north of the Arctic circle) by the treaties of 1751, with an addendum, the so-called "Lapp codicil" between Denmark/Norway and Sweden/Finland and in 1826 – with an addendum in 1834 – between Norway and Russia.[7] Through these agreements the Sámi received a special status: even if the frontiers were now fixed, this was not to disturb the Sámi's ancient right to move freely between the countries, with his reindeer and his trade goods. During the 19th century these special agreements led to conflicts between the countries concerned. Besides, economic and cultural conflicts arose *within* the Nordic countries, between the reindeer-herding Sámi and the expanding agricultural, forestry and mining interests. In turn this led among other things to a joint Swedish-Norwegian commission that laid before the Norwegian and Swedish parliaments a proposal for changes in the Lapp Codicil.

It is against this background that the problem was raised as an issue in Norwegian legal circles. In his major work on the Norwegian constitution

[6] *Op.cit.*, p. 2 ff.

[7] Both treaties with annexes are published in *Norges traktater*, vol. I, Oslo, 1966.

Torkel H. Aschehoug gave an elementary synopsis of Sámi rights based on his interpretation of the Lapp Codicil.[8] He went on to turn the demand raised in the Norwegian parliament by spokesmen for the farmers, into a question of human rights:

> The question is whether the rights granted, by the Lapp Codicil, to the Sámi of one kingdom within the borders of another, can be abrogated or changed by the one kingdom without the approval of the other.[9]

The conclusion drawn by Aschehoug was that the Swedish reindeer-herding Sámi continued to have the right of unfettered movement within Norway and that this right was an integral part of the boundary agreement itself. The Codicil could not, therefore, either be suspended on its own, or ended arbitrarily by *one* party.

Aschehoug is not, however, content with this, in that he asks what legal implications there would be for the Sámi if the Lapp Codicil was cancelled. The answer to this was later to become a stumbling block for Norwegian authorities and scholars, since Aschehoug claimed that the earlier legal position, that obtaining before the Codicil, would again apply, "be brought back to life".

Aschehoug thus traces the source of Sámi rights not only to actual laws, but in the last instance to *the uncodified legal situation before the codicil.* The Sámi right to graze their reindeer on privately owned land on the hillside pastures had been described by the 1866 Commission as something of a "split property right".[10] However Aschehoug goes further than the Commission in that he clearly and unambiguously regards the Codicil as a codification of an already *existing* legal position.[11]

Aschehoug's dogmatic legal interpretation of the Lapp Codicil must seem to us surprising, given the ideological and political currents of the time, with their growing national assertiveness against Sweden, and a steadily stronger social-Darwinist cultural consensus. And in addition there were many aspects of Aschehoug's own position which inclined towards another view, as the historians Knut Einar Eirksen and Einar Niemi have pointed out:

> Aschehoug (...) deduced from poor economics to weak morals. This viewpoint also led to a negative view of groups and cultures with other values or

[8] T.H. Aschehoug, *Norges nuværende Statsforfatning* (Norway's Constitution Today), vol. I, Christiania 1875, pp. 69 ff. (Revised version in 1891).

[9] *Ibid.*, pp 72 f.

[10] Cf. Knut Robberstad, "Kløyvd eigedomsrett", in *Lov og rett*, 1963, pp. 162 ff.

[11] Cf. Otto Jebens, "Om Lappekodisillen av 1751", in *Tidsskrift for Rettsvitenskap*, 1986, pp. 215 ff.

in an economically weak position – like the Sámi or the Kven.[12]

Their representation of Aschehoug's policy for the minorities was that they should be "civilised" by a policy of education and assimilation that was morally and social-Darwinistically based.

Such a representation is based on the political views expressed by Aschehoug in his capacity as a member of the Poor Law Commission of 1856. It encapsulates the opinion, held by Aschehoug and the Commission, of the *coastal population* of *Finnmark* (the northermost county in Norway) which both then and later was seen as "lacking in economic sense" and "unconcerned about the future".[13] But a corresponding policy of assimilation for the reindeer-herding nomads, be they Norwegian or Swedish, is not to be found in Aschehoug's interpretation of the Lapp Codicil. On the contrary he expressly disassociated himself from the Norwegian view that one should not accept the justification of Sámi rights. How could Aschehoug come to a view of the Codicil that so decidedly broke with contemporary political interests?

A leading feature of Aschehoug's academic output was his casuistic handling of problems: an approach he had taken over from Schweigaard. What directed the presentation was the empirically based data, more than the total synthesis. This form of analytical approach was for Aschehoug combined with the historical school's view that every legal system is tied to its historical roots.[14] It appears, therefore, that the material presented by the 1866 Commission was important for his assessment of Sámi rights.

Furthermore Aschehoug considered that natural conditions determined the nature of social organization. He says, in line with this, that custom "springs out of the Sámis' way of life and the natural conditions where they dwell".[15] Natural conditions for, and the way of life of, the Sámi who lived as farmer-fishermen on the coasts were often, at that time, described as being totally different from those of the nomadic reindeer herders. From a social-Darwinist point of view it was wholly possible to conceive that it was the reindeer-herding nomads who were best suited to life in the mountains and, therefore, that they were ill-suited to other life styles. If such were the case this would be grounds for giving them legal protection even if they were not completely "civilised".

[12] Knut Einar Eriksen and Einar Niemi, *Den finske fare. Sikkerhetsproblemer og minoritetspolitikk i nord 1860-1940.* (The Finnish menace: Boundary problems and minority policy in the North 1860-1940), Oslo-Bergen-Tromsø, 1981, p. 43.

[13] Anne-Lise Seip, *Vitenskap og virkelighet.* Oslo, 1975, pp. 94 ff.

[14] Seip, *op.cit.*, p. 175; and Slagstad, *op.cit.*, p. 187.

[15] Quotation from Seip, *op.cit.*, p. 187.

On the other hand, Aschehoug did not discuss the Sámi's general right to their basic natural resources. Characteristically enough the question had not received much attention from Frederik Brandt who was professor of real property law. In a textbook that appeared in 1867 he noted briefly that Finnmark was "the property of the Norwegian state" *because* it had been colonized by immigrants who were not owners of the land.[16]

But what then of the Sámi who in Finnmark in 1865 constituted 44% of the population of the county? The thinking might have still been the same as it had been amongst the Danish/Norwegian negotiators prior to the Lapp Codicil in the middle of the eighteenth century: then the authorities had embraced a two-stage theory in support of the Danish King's claim to sovereignty over Finnmark.[17] First a general right of possession had arisen through the Sámi's use of the land. And then *Sápmi* had been brought under the control of the Norwegian king. It is reasonable to see Brandt's theory as a development of seventeenth-century theory. Norwegian migration to Finnmark, from the late Middle Ages onwards, must be seen, from his point of view, as a third element, though one that did not alter the established legal position. From Brandt onwards the state of "lawlessness" pertaining to the population of Finnmark was also that of the Norwegian population that had migrated there.

Looking outside the country's borders we see that Aschehoug's view of the legal foundation and the legal content of Sámi rights was not peculiar to him at that time. For instance, whilst the 1866 Commission's proposals were under discussion in the Swedish parliament in 1871, Johan Nordström, the Keeper of the Public Records and professor of jurisprudence, held a long disquisition on legal history. On the basis of references to a series of other authorities, both legal and historical, Nordström argued that the Sámi even had rights under the laws of property:

> Their right to the *Lappmark* in the kingdom whose subjects they are is thus a historically-based right of property and their rights in the *Lappmark* of the other kingdom is a form of restricted covenant, though a property right nonetheless.[18]

It could be objected here that this was presented orally in a particular political situation: pro-Sámi views were undoubtedly of benefit to Sweden

[16] Fredrik Brandt, *Norsk tingsret*, Christiania, 1878, pp. 181 ff.
[17] Jebens, *op.cit.*, p. 303.
[18] *Riksdagstryck* (Swedish Parliamentary Papers) 1871, Part 1, Vol 3, p.1896.

in the issue of reindeer grazing rights. But Nordström's testimony has a natural place in what he called "the general international law between Christian states", i.e. a direct reference to normative principles that had their historic roots in natural law.

As the main content of Nordenström's speech was clearly concerned with the Sámi's rights in *Sweden*, it is easy to believe that he had a legal perception that was outside and independent of the foreign-policy situation. The significance of these scholarly discussions of Aschehoug and Nordström is also increased by the fact that in the area of internal law they are so much in agreement. It is easy to believe that Aschehoug knew of Nordström's contribution and that his exegesis of 1875 was influenced by it. It is also worth noting that Aschehoug stuck to his 1875 conclusions when a revised version of the book was published in 1891, the only changes consisting of an update to the section on rights, to incorporate the *Felleslapp* (Joint Lapp) Law of 1883.

Within the 'historical-customs' orientation, there were few, but nevertheless key scholars whose contribution was to thematise Sámi rights in political and academic circles, as a particular question of international law. Sámi rights were discussed in the light of a superficial knowledge of Sámi culture and history. Research into the culture of Sámi society was not yet a university subject. One could expect that the general turnround in policy affecting the minorities from the middle of the nineteenth century had early opened the way for a national and economic policy angle in the literature on Sámi rights. But neither Aschehoug's analysis nor Nordström's speech to the Swedish parliament confirm our expectations. In a matter on which scholarly and political considerations clearly diverged, it seems that in both cases it was the former that carried the greatest weight.

II The legal-positivist orientation

Developments within Sámi law must necessarily be seen in the light of the Norwegian authorities' aim (from the end of the nineteenth century onwards) of restricting the grazing rights of the Swedish Sámi from the *Kjølen* (the mountain range separating Norway and Sweden) to the islands off *Nordland* and *Troms*, and the fishing rights of the Skolte Sámi on the Russian border in Finnmark.

The matter was brought to the fore when, in 1897, the Norwegian parliament set up a commission to assess what Norway could dare to

presume when the Joint Lapp law ran out. The Commission concluded, in its report of 1904,[19] that Norway had the right to abrogate the Lapp Codicil with the eventual closing of the frontier as a result. A corresponding position was taken by the Norwegian members of the Skolte Commission in 1899, in negotiations with Russia.[20] Following a demand from the Swedish authorities, the rights of the reindeer-herding nomads were made one of the four matters for discussion at the negotiations over the ending of the Union of Norway and Sweden, held at Karlstad in 1905. The result was that the Norwegian authorities must abandon their principle goals in exchange for some minor concessions on the Joint Lapp Law of 1883. But arising out of local demands, both from farmers on the Norwegian side of the border and reindeer-herding Sámi on the Swedish side, the matter was regularly discussed between the Norwegian and Swedish authorities right down to the signing of the Convention in 1919.[21]

Whilst the reindeer-herding Sámi received the constant support of the Swedish state, the situation of the Skolte Sámi quickly developed into an economic and cultural catastrophe. The support they had had from the Russian authorities against the Norwegian offensive was lost when the area became a part of Finland at the end of the First World War. Not only were they affected directly by the fighting between the "red" and the "white" Russians, but Finland went along with Norway's purchase of the Skolte Sámi's rights for 12,000 gold kroner, and their old grazing lands were set aside for mining and forestry. Even though the Finnish authorities had promised that the interest from the gold kroner should be used for the benefit of the Skolte Sámi, within a few years they had become dependent on welfare payments, and a thorn in the flesh of the Finnish authorities.[22]

From the setting up of the Lapp Commission in 1897 down to at least the signing of the Reindeer Grazing Convention of 1919 and the conclusion of the negotiations over the frontier with Finland, a series of leading jurists, historians and specialists in Sámi language and culture were engaged for different tasks. A key figure in this work was Peder Kjerschow, the secretary of the Lapp Commission. He was the link between

[19] Indstilling fra den ved Storthingets Beslutning af 27de Juli 1987 og Kongelig Resolution af 9de September s.A nedsatte kommission, der har havt at tage under Overveielse, hvilke Lovregler m.v. vedkommende Lappevæsenet (...), Kristiania 1904 ("Report 1904").

[20] Astri Andresen, *Sii'daen som forsvant. Østsamene i Pasvik etter den norsk-russiske grensetrekningen i 1826.* Sør-Varanger Museum. Kirkenes, 1989, pp. 101 ff.

[21] Erling Lae, Fra Karlstadkonvensjon til Reinbeitekonvensjon. Unpublished B.A. thesis. Department of History, University of Oslo, 1977.

[22] Andresen, *op.cit.*, pp. 151 ff.

departmental circles and individual scholars engaged in their various tasks.[23]

The economic and legal development of the reindeer-herding Sámi and the Skolte Sámi on the Norwegian, Swedish and Russian (later Finnish) sides of *Sápmi*, was also to occupy a central place in the national security game, from the end of the nineteenth century down to the years after the Second World War.[24] Many too has stressed that from the end of the nineteenth century the legal position of the Sámi was strongly influenced by the ideology of social Darwinism,[25] which provided the foundation for what could be judged to be a rational policy. This appears clearly in the report of the Lapp Commission. The grounds for the proposals were from the pen of Kjerschow. It was argued that a policy which did not pay regard to "the inexorable law of development (...) would be in conflict with the idea of the social system and at best would be fruitless.[26] The Sámi reindeer-herding community was looked upon as "an historical carry-over" which acted as "a drag on the development of more deserving and appropriate social interests".[27] Here we have a demonstration of ideology used to justify purely economic motives. The ideological arguments were drawn upon to limit the cross-border migration. All in all, Norwegian policy towards the minorities, as made by the Lapp Commission of 1897, ended by denying the Sámi the right to exist as a cultural and social entity. The goal of the Commission was to regulate the reindeer herding so that in its "final phase" it would do the least possible harm to agriculture.[28]

It was then the state that hired scholars and, via instructions and terms of reference, went a long way towards determining what problems and perspectives should be researched. This was most apparent in the work of Absalon Taranger and Nikolaus Gjelsvik, both to become professors of jurisprudence, who published their reflections in the Lapp Commission's actual report (1904), though their names and posts were not given. Also the book of historian Oscar Albert Johnson on Finnmark, though published in the proceedings of the Academy of Sciences,[29] was produced on the initiative of the Foreign Office. Johnson was given the

[23] Cf. Lae, *op.cit.*, pp. 110 ff.

[24] Eriksen and Niemi, *op.cit.*, pp. 187 ff.

[25] Gunnar Eriksson, "Utlåtande i Skattefjällsmålet i hovretten", *Samernas vita bok* III, Vol. I. Stockholm 1975; Salvesen, *op.cit.*, pp. 33ff; Minde *op.cit.*; and Eriksen and Niemi *op.cit.*, p. 32; pp. 325 ff.

[26] Report 1904, p. 196.

[27] *Ibid.*

[28] Andresen, *op.cit.*

[29] Oscar Albert Johnsen, *Finmarkens politiske historie*, Kristiania, 1923.

assignment so as to underpin Norway's plan for expansion and to counter corresponding Finnish demands.[30] But even those authors who stood outside the milieu have declared that they had the same motives without necessarily having to say so directly in what they published. This was the case with that well-known man of letters Carl Schøyen who in a newspaper put it quite bluntly:

> My book *Tre stammers møte* (Three Tribes Meet) from beginning to end seeks to reply to the voluminous literature which, from the Swedish side, has been directed against our policy towards the Sámi.[31]

Such an admission is additional evidence that the writer's personal motives can be traced back to contemporary cultural and political viewpoints. A positive attempt was made to protect the greater society's interests in the research carried out on Sámi rights. But how successful was the attempt?

The historian Helge Salvesen believes that the research on the Sámi, carried out around the period which saw the end of Norway's union with Sweden, was focused on the clash between the majority population of the national state and the Sámi minority. The position individual researchers took on this conflict went a long way towards determining the results they came to. According to Salvesen it was in Norway "unlikely that research was carried out which went against national policy"[32] and the research "made its contribution to the conflicts of interest".[33] However if we examine the research into Sámi rights in relation to the development of legal theory, such a *direct* sequence of cause and effect is difficult to defend.

The leading theorist, Francis Hagerup, went in for the autonomy of jurisprudence (that is to say a stronger functional division between policy and scholarship) and a more academic approach to it. Law should be a science about norms and within norms. Hagerup was a spokesman for what in Scandinavian jurisprudence is called "legal positivism" or "the constructive school". This placed special stress on the legislative process as the crucial factor in legitimising the law.[34]

In the area of property rights the implication of legal positivism was that one was primarily concerned with the analysis of legal concepts and categories from the viewpoint of deductive thought and the geometric

[30] Erikson and Niemi, *op.cit.*, pp.167 ff.
[31] *Tidens Tegn* 10.10.1919.
[32] Salvesen, *op.cit.* p. 37.
[33] *Ibid.* p. 31.
[34] Cf.Slagstad, *op.cit.*, pp. 60 ff.

ideal. The "substantial" understanding of ownership was little given to comprehending the often complicated and shifting conditions in a pre-industrial society, be they amongst the small farmers in the south-western part of the country[35] or amongst the reindeer-herding Sámi of the North. Such an emphasis on written law as the source of rights and such a formulation of the concept of property made it difficult for jurists to imagine that the Sámi's hunting, fishing or nomadic reindeer herding could create any kind of property rights. These views found support in the general understanding, which we have seen already, that reindeer herding as a means of livelihood was in its "final stages" and that the Sámi as an ethnic group were in their "eventide". Social groups who thus had disintegrated needed no legal protection.

This was demonstrated in the area of international law by Gjelsvik. His assessment of the Lapp Codicil for the Commission of 1897 came out strongly against the views of Aschehoug. An assumption was that the Codicil was explicit and exhaustive. One could not possibly: "have thought of the possibility of attaching greater strength to any provision other than that which was expressly stated".[36]

It was difficult for Gjelsvik to imagine that the Sámi had any right to migrate across frontiers, since this had not been expressly laid down in earlier agreements. The judgement was additionally "constructive" in so far as he tries to show, on the basis of a comprehensive analysis of what was stated explicitly in the paragraphs of the Codicil and the concepts used there, that there was an internal logic that could provide answers on controversial questions. He took as his starting point the statement in the Codicil of "a tolerant and reciprocal accommodation" and reasoned that this meant that the Norwegian and Swedish negotiators had consciously drawn a distinction between "legal right" ("droit") and "customary right" ("usage toléré"). That the normative foundation of the Codicil stood or fell by an understanding of Sámi rights as accepted practice was underpinned by what Gjelsvik asserted was the justification for the Codicil:

> If before there was a certain element of common ownership of subjects and the state, then through the Boundary Treaty and the accompanying Codicils, one would seek to bring this common ownership to an end.[37]

Thus it was a clarification of *the question of sovereignty* that should have been the main matter, not only for the Boundary Treaty as such, but also

[35] Robberstad, *op.cit.*, p. 164.
[36] Report 1904, p. 99.
[37] *Ibid.* p. 102.

for the work on the Codicil. That Aschehoug had "overlooked" this, had, according to Gjelsvik misled him into emphasising the significance of customary law for the Codicil. The politically decisive question – whether the Swedish reindeer-herding Sámi had only a customary right of access which could be withdrawn at any time – he answers, therefore, in the affirmative. Gjelsvik had, in other words, demonstrated how Norway could, on judicial grounds, get round Aschehoug.

The international law expert Arnold Ræstad, who had been Foreign Minister from 1921 to 1922, sought to underpin Gjelsvik's analysis with historically-oriented works on the foreign policy front. He believed that in the period before nomadic reindeer herding came into existence, "one could scarcely imagine that the Sámi had known of any property rights or exclusive right to use the land".[38] The most he could conceive was that the *Norwegian* reindeer-herding Sámi had acquired a right of use as a kind of servitude. The Swedish nomadic Sámi had, on the other hand, sharply limited rights before the Lapp Codicil:

> the Swedish Sámi after the Treaty of Stettin (1570) and the agreement of 1624, had the right to hunt and fish and trade in Norway, and, as a necessary adjunct to these rights, to graze their reindeer during their stay in Norway. The Sámi had no grazing rights outside these cases.[39]

Contrary to Aschehoug, Gjelsvik and Ræstad rejected the view that earlier agreements were an expression of a local legal custom. And in addition they interpreted these agreements in a way which jurists and historians today describe as very restrictive and to some degree misleading.[40] To the extent that the legal positivist orientation was concerned with the state of property rights amongst the Sámi, people like Ræstad took as their starting point concepts and methods which presupposed a property right as understood in an agrarian and a more "civilised" society. Accordingly the logical consequence was that, to all intents and purposes, the legal position of the Sámi was seen as the result of legal developments *outside* Sámi society, since it was understood that Sámi rights were explicitly and wholly given by the authorities.

We see that jurists of this persuasion, came to define Sámi rights as being based on custom ("*tålt bruk*"). That is to say there was no fixed

[38] Arnold Ræstad, "Lappeskatten og lappenes rettigheter i Norge før 1751", *Festskrift til J. Qvigstad*, Tromsø Museums Skrifter, vol. II, Tromsø 1928, p. 233.

[39] Arnold Ræstad, "Fra Stettin til Strömstad. De norsk-svenske renbeitespørsmål og grenseopgjøret 1751", in *Historisk tidsskrift*, 1930-33, vol. 29, p. 420.

[40] Arne G. Arnesen, Samenes stilling i folkeretten, in *Dieðut* 1983, no. 4, pp. 158 ff; Jebens, *op. cit.*, pp. 234 ff; and Ove Bjarnar, "Hvordan lappekodicillen ble til", *Dieðut* 1989:1, Nordic Sámi Institute, Guovdageaidnu/Kautokeino, p. 62.

property to tie the rights to, even though in Finnmark there was no doubt that the Sámi were there "first". *Finnmarksvidda* (the vast area above the treeline that made up most of the county of Finnmark) was, therefore, without further ado reckoned to be "unoccupied" territory. Knut Spilling's analysis (he was a senior magistrate) in 1920 of property rights in the forests of Finnmark is, in this respect, an illustrative example of the constructive school's deductive approach. He based his conclusions on the South-Norwegian concept of "common land" ("*allmenning*"), where the farm and its forest were the main elements. The regulations accompanying the Royal Decree of Land Allotment of 1775, were interpreted in this light. He put little emphasis on how the different means of livelihood and living conditions had evolved *before* the decree made it possible to own private parcels of land for agricultural purposes.[41]

Compared with the previous generation of scholars, we must contend that legal positivism led to a sharp break. As regards their content, Sámi rights were greatly reduced and their justification a matter of controversy. The theory of *usage toléré* led to Sámi rights being left to the mercy of the authorities' *political* and *administrative* decisions. The Lapp Commission of 1897 proposed that the Sámi even should be forbidden access to the courts to appeal against administrative decisions "on the grounds of ancient custom".[42]

So far, however, we have only established that Sámi rights, through legal positivism, were considerably influenced by contemporary ideas. But is it possible, as Salvesen argues, to demonstrate that scholars had non-academic reasons for the way they wrote and the conclusions they came to? Here we shall discuss three instances.

The first shows how problematic it is to decide whether a piece of research breaches contemporary academic standards. One example is Gjelsvik's 1904 study already mentioned. The text was part of a continuing political debate between the Norwegian and the Swedish authorities. But the actual form of the work is academic and is marked by an intricate – and difficult to fathom – logical argument characteristic of this orientation. As shown above, the work is very much a theoretical discussion within the legal positivist tradition. All the same we hazard the conclusion that when Gjelsvik got round Aschehoug, focused on the

[41] See Knut Spilling, *Av Finmarkens skogret.* Bilag til Norsk rettstidende. Kristiania 1920 and cf. Sverre Tønnesen, *Retten til jorden i Finnmark.* Institutt for offentlig retts skriftsrie, Universitetet i Bergen 1972, pp. 179 ff; and Steinar Pedersen, "Laksen, allmuen og staten. Fiskerett og forvaltning i Tanavassdraget før 1888", *Diehut*, Nordic Sámi Institute, Guovdageaidnu 1986, no. 2, pp. 30 ff.

[42] Report 1904, p. 198. In fact this proposal was never laid before Parliament.

question of sovereignty and took the liberty of ignoring custom, it was because the political context was not to be misconstrued. The aim was to establish a legal theory which got round Aschehoug and supported the Norwegian viewpoint in the conflict with Sweden.

The second case takes us back to 1906 when Ræstad was working as a civil servant in the Foreign Office. The right of the Russian Sámi in the Pasvik Valley to fish from the Norwegian side (the river formed the border between the two countries) was questioned. Ræstad concluded in an internal memorandum that it was not possible to defend the Norwegian views either legally or in terms of international law. On this occasion the Department accepted Ræstad's conclusion as good law, but considered nevertheless that salmon fishing by the Sámi must be stopped. The Department continued to work on the matter at a political level, by putting practical difficulties in the way of the fishermen and – as Ræstad himself had recommended – by setting legal pitfalls.[43] Thus the Foreign Office worked to change the economic and social circumstances so that the situation regarding Sámi rights became irrelevant. As a loyal civil servant Ræstad clearly agreed to follow this *politically* based strategy. But it is nevertheless difficult to interpret this as a mixing of the roles of jurist and politician; rather he moved between these roles.

On a third occasion, in 1920-21, the Foreign Office was more active in seeking to get the desired *judicial* result. The Skolte Sámi had now become Finnish citizens and the political question was whether a restrictive covenant in international law (the Sámi's right to fish) followed a piece of land when it changed hands i.e. was Norway bound by the 1834 treaty with Russia? It was hardly an accident that Gjelsvik together with his professorial colleague Mikael H. Lie was given the job of providing a legal opinion. Clearly he was to repeat his analysis from the 1904 Report. "As expected", writes Andresen,[44] Gjelsvik and Lie concluded that the restrictive covenant based on the Boundary Treaty of 1834 was no longer valid. We get in other words the same situation that Aschehoug tried to present in relation to the Lapp Codicil. What would happen if the named paragraph on the fisheries was dropped? Gjelsvik's and Lie's answer to this question must, however, have come as a surprise to the Department, especially when the earlier refutation of Aschehoug is taken into account. They argued, namely, that the Sámi right was a sort of property right since:

> from time immemorial they have had the right to fish for salmon in the rivers

[43] Andresen, *op.cit.*, pp. 110ff; p. 118.
[44] *Ibid.*, p. 152.

> which now belong to Norway (...) and with regard to this right (...) the understanding is clear that it is a right in civil law and that its legal basis is not dependent on the protocol of 1834.[45]

They also maintained that the Sámi had a right to fish on the grounds of ancient use. That such a right was not dependent on an explicit affirmation in legal form from the State's side, is in complete agreement with Aschehoug's old view.

The official Norwegian view wavered somewhat after this opinion was given, but, if the Norwegian national interest was to be taken care of, it soon emerged that the conclusions of Gjelsvik and Lie must be buried. Ræstad, who was then Foreign Minister, stated clearly that the right was based solely on the 1834 protocol. The wish of the Department for a different conclusion was brought to the professors' attention, but they held to their earlier viewpoint. The Department was forced, therefore, to turn to a county governor, a departmental head and a bachelor of law in order to get an opinion with the desired conclusions.[46]

We can only speculate as to the grounds for Gjelsvik's stubborn denial of his 1904 views on Sámi rights. First, if the most far-reaching parts of his 1904 theory were politically motivated, there were now good *political* grounds for beating a retreat. For his theory had been abandoned by the Norwegian authorities in their dispute with the Swedes, when the issue of reindeer grazing was highlighted, during negotiations on the dissolution of the union in 1905. Prime Minister Michelsen (a lawyer by training) gave the Norwegian parliament two reasons for this retreat: (1) it was not primarily the two states *own* interests that the Lapp Codicil should take care of, as Gjelsvik had thought, but rather the fundamental needs of the reindeer-herding Sámi. (2) If the dispute was brought before the arbitration court, the prime minister expected that the court would stress that the Sámi were the first to occupy the frontier districts (he used the term "*urinnvåner*"). Otherwise considerations based on any recognition of "primogeniture" were pretty remote from the milieu round Kjerschow and for that matter that of the Norwegian Foreign Office.[47] There is an alternative *academic* explanation: Gjesvik and Lie in 1921 had to get to grips with an actual case. The fact that they had to examine people's living conditions and not just theoretical concepts, could have made a difference. The latter is easiest for a young man, and Gjelsvik was now 17 years older and had become a professor. This last explanation can be

[45] *Ibid.*, p. 152, cited from Andresen.
[46] *Ibid.*, p. 153.
[47] Lae, *op.cit.*, pp. 145ff; cf. Jebens, *op.cit.*, pp. 224 ff.

seen as an incremental one in that we could imagine that Gjesvik considered his new position to be both judicially correct and politically desirable.

In contrast to the historical-customs orientation, that of the legal-positivists dominated consideration of Sámi rights for a long time. The background to the strong position reached by this orientation was the general ideological and economic development which clearly affected society as a whole and research into Sámi rights in particular. Academically both internal and external factors worked in the same direction, in that we got a development in the field of Sámi rights that was parallelled in the world generally. The European colonial powers in Africa started with their own legal perceptions and ignored the complex local rights of property and usage on the assumption that all were free to occupy the land.[48]

In addition, within the Scandinavian states, the nation states had direct interests that conflicted with those of the Sámi. In Sweden, Nordström's sympathetic view of the Sámi's rights to resources was countered by the legal historian Åke Holmbäck. Basing his argument on the collection of documents made by one of the leading "lappologists", K.B. Wikund, he was convinced that the Sámi in, for example, the Torne Lappmark, which after 1751 came within Norway's frontiers, did not have property rights. They had, he believed, used the resources of the land in common.[49]

In Norway, expertise on Sámi conditions was organized, on the initiative of the state, into several disciplinary areas and the result of the research in history and jurisprudence was that the Sámi "disappeared" into the domain of ethnography. The political-rights dimension disappeared as research into Sámi conditions became tied to "Lappology", where the interest in their language and culture replaced that of rights and policies for the minorities. And since the very existence of the Sámi as a cultural and social entity had been questioned, their legal situation in Norway, as an ethnic minority, came "completely out of line with legal developments internationally", as mentioned by the Sámi Rights Committee in 1984.[50] The legal-positivist orientation dominated legislative activity in this area right down to the 1970s. Thus in the *travaux préparatoires* to the current Reindeer Herding Law of 1978 it is stated that:

* the right to carry on reindeer herding etc in reindeer grazing districts

[48] Max Gluckman (ed.), *Ideas and Procedures in African Customary Law*, Oxford 1969.

[49] Åke Holmbäck, "Om lappskattelandsinstitutet och dess historiska utveckling", *SOU* 1922:10, pp. 164 ff.

[50] *NOU* 1984, vol. 18, p. 242 f.

"is based entirely on the law itself" (and, therefore, by implication could be changed).

* historical factors such as settlement and population conditions do not play a decisive role "in a judicial discussion"
* the Sámi have exercised a *de-facto* use without any form of property right or any legally-based authority for their activity
* The Sámi's rights in this area were little different to the common rights enjoyed by all Norwegian citizens (*allemannsrett*)[51]

Each of the statements refers back to the legal-positivist view of Sámi rights. In passing the Law the parliament explicitly stated that it "had not decided the foundation of the Reindeer Herding rights".[52] However, the tenacity of these statements are still being upheld both in jurisprudence[53] and law courts.[54] My original assertion that they were about to be consigned to obscurity,[55] has indeed proved to be wrong.

III The comparative-customs orientation

The first break with the view of Sámi rights that was based on the legal positivist's orientation or the constructive school's approach came in 1920. The senior resident magistrate in Tana at that time, Erik Solem, published an article which he called "The understanding of law amongst the Sámis". The article was based on the knowledge he had acquired

[51] *Ot.prp.*nr. 9 (1976-77): pp. 41ff. (Norwegian Parliamentary Papers).

[52] *Innst. O.* nr. 37 (1977-78), p. 6. (Norwegian Parliamentary Papers).

[53] A Working Group on property rights, a sub-committee under the Sámi Rights Committee, states as folows: "It may be correct to say that common or general rights of reindeer herding can only be established, *strictly speaking,* through legislation" (my italics) (*NOU* 1993:34, p. 233). Later in the report Working Group concludes that the state of the law based on case law in earlier periods expressing contemporary perceptions of that period, "cannot simply be changed bacause, if the legal view of today had been asserted in the past, one would then have reached a different conclusion". To this they add: "Corresponding points of view must also be applied to the change which has taken place in international law in this field, particularly during the last 10–15 years." My short comment, however, is that these arguments, in effect, take the doctrine of *terra nullius* for granted, in the sense that the Working Group do not ask what rights Sámi do have, but rather to ask *if* there is any basis for Sámi rights. Ironically, in the words of 1984 Report, the arguments are completely out of line with international legal developments.

[54] Recently, a high court in Norway (Hålogaland lagmannsrett) stated: "The current law of reindeer herding is based on (...) that the right to practice reindeer herding is fully determined in law, in such a way that this right has the extent and the content which is determined by the law at any time." (Judgement 31. March 1995 in Appeal-case nr. 138/1994 A).

[55] Minde 1991, p. 553.

since taking up his post in Tana in 1912. Many years later Solem said that he soon noticed "that the Sámis understanding of what the law was did not always coincide with the official view".[56] Solem moved to a post in the south of Norway in 1921 but got the opportunity, in part through the new Institute for Comparative Research in Human Culture, in Oslo, to complete a larger study in 1933.[57]

The *basis* of Sámi law was not a question that was tackled directly by Solem, he being content to deal with it in a footnote. On the other hand he took strong issue with Kjerschow, whose views had been reproduced in several parliamentary bills:

> In my opinion this legislation cannot be said to provide the authority for the reindeer-herding Sámis' undoubted right to grazing. That right is, in Finnmark, so old and time-honoured that there is scarcely an opportunity to forbid it, even if no law giving that kind of sanction is to be found.[58]

It was the legal-positivist's one-sided emphasis on the state authorities' legislative will that was being attacked here. Solem raised no further debate on the grounds of Sámi rights. In fact on the whole he was little concerned with property rights in resources. He was, for the most part, content to underline the collective character of Sámi rights which, he believed, went back to their social *siida* organization.[59]

Solem's project was an examination of how custom sprang out of "the realities of life". He investigated the customs and legal perceptions of the reindeer-herding Sámi in Finnmark, within different aspects of life. An important part of the investigation was to track down what was intrinsically Sámi and what had come as a result of external influences,[60] an approach which was then of central importance in the cultural sciences. A supporter of Solem's work was the former Minister of Justice and Professor of Jurisprudence, Fredrik Stang. This contact is a great help in placing Solem's work in a legal-historical context.[61]

Stang was concerned with the relationship between law and the development of society, especially how customs were created in different social

[56] Erik Solem, "Gamle rettssedvaner, særlig hos lappene", *Rig*, 1947, p. 58.
[57] Erik Solem, *Lappiske rettsstudier*, (Studies in Sámi Law), Oslo 1933.
[58] *Ibid.*, p. 189.
[59] *Ibid.*, pp. 187 ff.
[60] *Ibid.*, pp. 1 ff.
[61] Gaute Skirbekk deals with the anthropologically inspired research in Norwegian jurisprudence and the significance of Fredrik Stang's and Erik Solem's studies. Although Skirbekk discusses a different topic – i.e. family law – his analysis of the influence of scientific thinking and international commitments is identical to my presentation – and was published simultaneously with mine (in Norwegian). Skirbekk, "Rettsantropologi i norsk rettsvitenskap" in *Tidsskrift for rettsvitenskap*, 1991:4, pp. 449 ff.

strata. With regard to property rights, Stang noted that the development of society could have "created different practices", both historically and observable at the present time. The reason was "changes in the use of the land".[62] The view that rules of law were influenced by changes in society was an effect of French legal thought; from the interest of Durkheimian sociology in comparative methods and studies of the functional character of social norms. In opposition to Hagerup, Stang believed that legal science must be receptive to the social sciences. It is against this background that we must see Stang's support both of the study of Norwegian peasant rights and Solem's studies of the Sámi.[63] The stress laid here on "the realities of life" and the interest in the cultural and social sciences anticipated the legal realism of the post Second World War era.

But added to this is a second more general ideological element which, to a greater extent, separated this orientation from the contemporary mainstream *within* Sámi law. Stang took the initiative, in the shadow of the first World War, to set up an Institute for Comparative Research. On its establishment he became chairman of its council. The work broke with the social-Darwinist view of civilization's development. It was precisely Stang's pluralistic and universalistic cultural view that Solem took up in his obituary of Stang:

> Even if different cultures display national peculiarities, closer examination reveals many points of contact and similarities, (...) This research shows the highly relative character of different cultures and counsels caution in one's judgement of them. At the same time it shows the common foundation of all culture and, therefore, provides the preconditions for a stronger feeling of human solidarity.[64]

Solem makes clear that he shares the views he ascribes to Stang, as a result of his own research experience. We see here one aspect of a culturally conservative current of opinion in Norway which comes to an understanding of minorities in general and the legal situation of the Sámi in particular. It is from this perspective that one must see the initiative behind a symposium entitled "Historical insight into the legal situation in the Sámi districts". This took place in 1973 at the same Institute for Comparative Research in Human Culture.[65]

If we ignore Solem's (and Stang's) more pluralistic cultural view, their

[62] Fredrik Stang, "Ret og kultur", *Samtiden*, pp. 436.

[63] Fredrik Stang, "Norsk Bonderet", *Tidsskrift for Retvidenskab*, pp. 381 ff; and (Review of Erik Solem: "Rettsopfatningen hos Finnene".) in *Tidsskrift for retsvitenskap*, pp. 414 ff.

[64] Erik Solem, (Obituary of Professor Fredrik Stang), *Tidsskrift for retsvitenskap*, p. 15.

[65] Knut Bergsland (ed.), *Samenes og sameområdenes rettslige stilling historisk belyst.* Universitetsforlaget, Oslo/Bergen/Tromsø 1977.

receptivity towards the cultural and social sciences and rejection of the constructive school's teaching on the foundation of Sámi rights, we see them placed firmly in the tradition of Norwegian "realism". And even today, as we shall see, Solem's work has produced no actual follow-up, with one exception. It would, therefore, appear somewhat pretentious to describe Solem's work, and Stang's support of it, as an orientation. But we repeat that we here confine ourselves to research into Sámi rights. It is this orientation which has done most to direct attention towards the internal development of Sámi society, be it socio-economic conditions or customs and legal perceptions. And contrary to the legal-positivist orientation we must conclude that, for the most part, the research sprang from inherently academic approaches. However given the ideological climate which dominated minorities policy and social debate between the wars, Solem's research findings were seen as being of little relevance for politico-legal development.

IV The legal-realism orientation

Within Sámi research, a paradigm shift took place around 1970. Explanations of the sudden change were the political mobilization of the Sámi, the question of the environment, and the international focus on human rights. The change shows in the terminology used in Sámi research. Between the wars Solem had written about "studies of Lappish rights" and thought of local ethnic customs. Tomas Cramer, the Sámi *ombudsmann* had, from the 1960s, insisted on "the Sámi right to land and water", i.e. limiting the legal area to rights in resources. Around 1980 we hear of Sámi rights in connection with the *general* rights of minority and indigenous populations. Given the authorities' earlier position, it was quite sensational for the Norwegian government to refer several times to the "Sámi's legitimate rights" during the Alta and Sámi protest movements in the autumn of 1979. Official committees in both Norway and Sweden later endorsed the new terminology in that they entitled their reports *Om samenes rettstilling* (On the position of Sámi rights)[66] and *Samerätt och sameting* (Sámi law and the Sámi parliament).[67] This shift in the use of concepts illustrates a radical reformulation of the questions

[66] *NOU* 1984, vol. 18.
[67] *SOU* 1989, vol. 14.

both scholars and politicians have asked themselves in this disciplinary area.[68]

How far was this due to political interests such as the political mobilization of the Sámi with its breakthrough in the 1960s? An important break with the legal-positivist position on Sámi rights in Norwegian jurisprudence did not come until the autumn of 1973 when Sverre Tønnesen defended his doctoral thesis *Retten til jorden i Finnmark* (The right to land in Finnmark). The disputation took place just at the time Trygve Bratteli was forming a new Labour government, and there were rumours that the doctoral candidate was also a candidate for the post of Minister of Justice.[69]

Like Solem 50 years earlier, Tønnesen had been struck by the peculiarities of the legal situation in Northern Norway when, in 1962, he was appointed to a post with the Hammerfest police. He wrote about this in a newspaper article, at the time he was completing his doctoral thesis.

> The further north one travels in Norway, the fewer the rights the local population has to land and water. This is clearly connected with the fact that the population in the most northerly areas have lived in the Sámi culture.[70]

Tønnesen ascribed the difference in the legal situation to the fact that several ethnic groups occupied that part of the country. Further, from the point of view of fairness, he clearly objected to the negative discrimination he believed the population of Finnmark and especially the Sámi, had been exposed to:

> Jurists have not at all been willing to recognize that the population of Finnmark had any rights prior to 1751. The rights which they later received either were "acts of charity" or they had had to buy them from the State.[71]

The moral indignation at the plight of the population of Finnmark is clear here. But I have found no further political or politico-judicial involvement in the question of Sámi rights other than this newspaper piece and the doctoral thesis. It appears likely, in other words, that the

[68] On the political mobilization of the Sámi and the Norwegian minority policy in this period, see: Henry Minde, "The Sami movement, the Norwegian labour party and Sami rights", *L'image de l'autre*, Étrangers – Minoritaires – Marginaux. Vol. 2. Sous la direction d'Hélène Ahrweiler. 16e Congrès International des Sciences Historiques. Stuttgart 1985, pp. 402 ff. On research, see: Henry Minde: The Post-War Sámi Society in Norwegian Historiography. Paper presented to the First international Conference of Arctic Social Sciences, Québec, 1992.

[69] Personal communication from Professor Gudmund Sandvik, one of the examiners of the doctoral thesis.

[70] *Ságat* 25.06.70.

[71] *Ibid.*

contemporary research paradigm was decisive for the research he carried out "in the evenings and nights after a demanding day at work".[72]

Seen in the broader context of judicial history, one would have expected a "paradigm shift" in jurisprudence to have taken place earlier. Developments within the law itself had already in part modified the older legal-positivist approach. *The Altevann*[73] and *the Brekken*[74] judgements in the Supreme Court in 1968 had supported Sámi interests in that both went a long way towards accepting old and time-honoured practices of usufruct ("*alders tids bruk*") as the foundation of the law. As regards reindeer herding, it was said that the Sámi "from ancient times" had established and secured a right to use and that infringements of this could lead to claims for damages. Tønnesen's penetrating analysis of these judgements underlined their character as the precedents they were later to become.[75]

In a legal context "Scandinavian realism" caught on in earnest just after the second World War. The following characteristics have come to be attached to this:

* an analytical and empirical approach to investigations of the legal system. To take a stand on normative questions was not reckoned to be a scholarly endeavour. The ideal was the holistic approach to science of the Vienna school,
* a view of law as a tool in the hands of the politicians, with the result that law and politics merged,
* a tendency to see legal problems in a sociological empirical context,
* a tendency for sociologically inspired legal research to present legal ideals along the lines of social criticism.

Ongoing discussion about the Norwegian realist tradition in social science and jurisprudence is relevant to Sámi research. Rune Slagstad argues, with the support of the social theorist Dag Østerberg, that both Vilhelm Aubert and law professor Torstein Eckhoff came, indirectly, to approach natural law within the context of human rights.[76]

It was Aubert in particular – originally a lawyer, but later established sociology as a discipline in Norway – who involved himself in the Sámi's

[72] Obituary in *Bergens Tidende*, 24.01.1979.
[73] *NR* 1968, pp. 429 ff.
[74] *NR* 1968, pp. 394 ff.
[75] Tønnesen, *op.cit.*, pp. 170 ff.
[76] Rune Slagstad, "Norwegian Legal Realism since 1945", 35 *Scandinavian Studies in Law*", pp. 215 ff (1991). (Translated from the paper "Norsk rettsrealisme etter 1945", *Tidsskrift for rettsvitenskap*, pp. 385 ff.)

situation. It was clear to him that both the Norwegian legal and political systems had sprung out of situations and problems that were of an entirely different character to those found in the Sámi situation. If one studies the development of the Sámi's cultural and property rights, Aubert believed that: "One is talking about a form of special treatment and about dividing lines that have been built into the institutional structure of Norwegian Society."[77] This *negative* form of special treatment had existed even though "here one was dealing with the original people of an area, who came first to the area and were the first to exploit it."[78] Political solutions to such a structural injustice in relations between a nation state and an ethnic minority as Aubert describes it, are naturally difficult to find within an approach sceptical of all normative standards, where what matters is the struggle for power, and where the result for the ethnic minorities is pre-ordained. Aubert never defended such a "cynical" realism, but rather a legal realism which consisted of describing the legal code and the judicial system as these exist in practice, the sooner to set these against justice in the sense of natural law.[79] We shall see how far this description of legal realism, in a "moral" variant, agrees with Tønnesen's reappraisal of Sámi rights.

The definition and use of the concept of property itself is central to our understanding of the break with the older teaching for which Tønnesen was responsible. Initially he was strongly critical of the constructive school which, he believed, was the main reason for the different treatment of the north and south of the country – "jurists formed notions as to what was required to acquire a right on the basis of living conditions in the southern part of the country and, for that matter, in Europe too."[80]

On the other hand the legal realists disassociated themselves from the concept of property as being different from the law's varying contents and effects or, as is stated by Brækhus and Hærem: "If the content of the right of property, the individual owner's justification, is taken away, there is nothing left."[81] The central point in this "functional" understanding of property is that the law is elastic and negatively limited. The question

[77] Vilhelm Aubert, "Ein nasjonal eller ein sosial minoritet?", in Lina R. Homme (ed.) *Nordisk nykolonialisme.* Oslo 1969, p. 28.

[78] *Ibid.*, p. 25.

[79] Dag Østerberg, "Vilhelm Aubert. Politikken og samfunnsforskningen", *Nytt Norsk Tidsskrift*,1988:4, p. 29.

[80] *Ságat*, 25.06.1970.

[81] Sjur Brækhus and Axel Hærem, *Norsk tingsrett.* Oslo 1964, p. 377.

is who holds the "residuary right" i.e. the economic value of goods that are not already disposed of.[82]

It is true that we do not find an explicit definition of the rights of ownership or use in Tønnesen's dissertation.[83] He simply concurs with "the modern point of view" and "today's measure", supporting the strong criticism of earlier judicially "erroneous inferences". To understand the intricate legal situation he approached the topic from three directions: (a) a legal historical analysis which looked at regional differences, (b) a separate (because their origins are dissimilar) discussion of individual kinds of rights regarding their firmness in use and age, (c) an assessment of the legal position of actual claimants to rights e.g. the ethnic category "Sámi".

Quite vital is the fact that Tønnesen raises the problem of how the theory of state property rights came into being. For Tønnesen it appears directly illogical to accept the older teaching's presumption that Sámi usage could not create rights, whilst at the same time accepting the theory that the state had always been the owner of the land in Finnmark. Previously jurists had taken as their *starting point* the Royal Decree of Land Allotment of 1775. Tønnesen was sceptical about a purely legal-positivist analysis in that he believed:

> to interpret the decree of land allotment of 1775, one must understand the prior historical tradition in that such knowledge is necessary for understanding what actually was decided in 1775"[84]

Even if Tønnesen's original project was to give a legally dogmatic analysis of existing law, he was also forced, therefore, to carry out a "lengthy" review of legal history. The account of Sámi history serves the function in the dissertation of providing the concrete evidence for its main thesis: that the area was *common land* ("*allmenning*"). And the appraisal of rights of property and usage were carried out for different periods eg. the 1600s:

> If one is to call that which one finds a *property right* pertaining to the group depends surely on what one understands by property right. (...) What was clear was that the local community had sole right to the benefits which at that time it was necessary to have the sole right in, namely hunting, gathering and fishing. The consciousness of rights in Sámi land, as elsewhere in Norway, was practically – not theoretically – orientated.[85]

[82] *Ibid.*, 18 ff.
[83] Tønnesen, *op.cit.*
[84] *Ibid.*, p. 4.
[85] *Ibid.*, p. 55.

This approach was also adopted when, in conclusion, Tønnesen discusses who can be seen to own the "state's unregistered land" in Finnmark. Here the Sámi as an ethnic group were excluded; only the state and the local population could in his opinion, be actual claimants, on the grounds of a legal technicality. He stresses that the key question is to be decided by who possesses the "residual right" ("*restretten*").[86]

With this Tønnesen demonstrated the relevance of both the functional understanding of what property was and of historical enquiries into Sámi rights. His criticism of the legal-positivist orientation is twofold. Besides the "judicial error" it slid into, on the grounds of an untenable judicial analogy with development in the southern part of the country, it was this orientation which was to a great extent ignorant of what the actual situation was and how it had developed in *Sápmi*. For Tønnesen it was clear that individual scholars were not at fault: it was not ill will or discriminatory attitudes. The misunderstandings were rooted in an inadequate judicial method; namely the constructive method, which for Tønnesen assumed an almost demonic character.

It was evident from the contributions of both examiners of the doctoral thesis that they had allowed themselves to be convinced both by Tønnesen's account of the legal history and by his analysis of current law. The formula "nothing of importance to object to" was repeated several times by Eckhoff before he concluded by saying that "his objections were small by comparison with the positive".[87] The legal historian Gudmund Sandvik agreed by saying "I am well on the way to being convinced by the doctoral candidate's arguments in support of his thesis".[88] and he added: "This dissertation teaches us to think in a new way about the right to land in Finnmark, and it must have an effect."[89]

This last remark underlines an element of concern to both examiners and shows that they – together with the doctoral candidate – were securely anchored in the legal-realism tradition. It was also obvious that they were faced with a new instrument for judicial reform. It was natural, therefore, that Sandvik should ask in what way the doctoral candidate and his examiners were politicians. And in the answer Sandvik himself gave, he emphasises the political aspects of jurisprudence:

> But with his dissertation, the doctoral candidate seeks to teach his readers

[86] *Ibid.*, pp. 301 ff.

[87] Torstein Eckhoff, Unpublished MS, held at the examination of Sverre Tønnesen's doctoral thesis, 12. oktober 1973.

[88] Gudmund Sandvik, "Retten til jorda i Finnmark. Opposisjon ved Sverre Tønnesens doktordisputas 12. oktober 1973", *Hefte for Kritisk Juss*, 1980:3/4, p. 26.

[89] *Ibid.*, p. 33.

> *to think in a new way* about the right to land in Finnmark. (...) If he manages this, then his dissertation will constitute a political act in the normal meaning of the word, because it affects the Finnmark people who think about such problems and all those in our society who will take decisions on them (Italics added).[90]

It is clear, in other words, that the examiners not only believed the dissertation to be convincing at subject level, but that it also exposed the necessity of a legislative rethink. The dissertation indicated a dramatic change of view as to the legal right to resources in Finnmark. The change can be expressed, in brief, thus: previously the Sámi's lack of rights had been a product of the Norwegian people's history, but for the future *the rights not only of the Sámi, but also of the Norwegian people were tied to Sámi history.*

V Concluding remarks and the way ahead

I have followed the decisive changes in researching Sámi rights, over a hundred-year period from roughly 1870-1970. Like previous writers I have demonstrated how political controversies and ideological currents have affected this research. But I have also been forced to modify the previously firmly held opinion that political interest groups directly caused researchers "to present a predetermined answer and then to support it with pretty random data scraped together uncritically", to cite the historian Jørn Sandnes' judgement of recent Sámi research.[91]

It would appear to have been generally more fruitful to try to understand how different orientations have sprung out of the ideological and political currents of the period. Such orientations can then be seen as an intervening category between politics and scholarship instead of creating an academic/political dichotomy.

Additionally this approach has brought out the character and content of the dramatic changes in Sámi rights, around the turn of the century; from a historical-customs orientation to one of legal positivism and, in the post-war period, particularly around 1970, from still-dominant legal positivism to a situation where legal realism in a version described as 'moral" challanged the former.

As Sámi rights to land and water have been on the political agenda since the second half of the nineteenth century, there were good

[90] *Ibid.*, p. 24.

[91] Jørn Sandnes, *Nord-Skandinaviens historia i tvärvetenskaplig belysning.* Acta Universitatis Umensis 24, Umeå, 1980. pp. 285 f.

grounds for jurists to work on the problems; given the Norwegian tradition, almost a duty. We have seen that when Aschehoug concluded that Norway was obliged to accept the "Swedish" Sámi's right to reindeer herding whilst Gjelsvik believed that the Sámi had no other rights than those which at any time had been laid down in written law, we are well on the way to an expression of theoretical thought upon what creates law.

For the legal-positivist approach to Sámi research which, for example, Gjelsvik shared, academic theory and the politics of interest were two sides of the same coin. That makes it difficult to determine which weighed the heavier for the individual scholar, even when we have, in a way, a good idea as to the origins of a particular piece of research. But taken together and viewed as a scholarly approach, there can be little doubt that these factors led to a transparent worsening of the Sámi's legal situation which, additionally, posterity would label as being out of step with the prevailing situation in international human rights.

One would, perhaps, expect that the opposition to the legal positivists' interpretation of, Sámi rights would have been inspired by and come from the Sámi political organizations. Such was not demonstrably the case. This does not mean that the Sámi political movement of the 1960s was insignificant. For all we know it could have alerted Tønnesen to the problem, since, in any case, he refers to some of the pronouncements emanating from Sámi quarters. It was, however, the legal-realism school's "functional" view of property that he was able to use as a weapon against the constructive school's limited recognition of legal developments at a local level. I have also pointed out elsewhere that the methodological rapprochement in Sámi research that Tønnesen brought about was very similar to the changes that took place in the study of property rights in non-western societies in the 1960s. But not even here is it possible to establish any direct links because, for example, the legal concepts used by Tønnesen "had a home-made quality" as Eckhoff put it; a comment that contained both a measure of praise and criticism.[92]

What direction have developments taken in the post-Tønnesen period? Given my perspective here, I point out just three features of that development.

[92] Eckhoff, *op.cit.*

A Research into Sámi rights has been institutionalized and politically defined as a national task

The Sámi Institute was established in Kautokeino in 1973 as the result of a decision of the Nordic Council of Ministers. The aim was to serve the Sámi people with a view to improving their position socially, culturally, legally and economically. One of the major projects initiated by the Institute was "a critical enquiry into and presentation of the legal history, rights and practices of usufruct in the Sámi areas". A question which emerged in political circles was whether research into Sámi rights, including the project at the Sámi Institute, should remain a Sámi concern, as it had been at the beginning of the twentieth century, or be turned into a national task. Parliament rejected in 1975 a proposal to set up a commission that would "formulate law to protect the rights to natural resources of the local population in Sámi areas".[93] When the Alta affair erupted in 1979 such a Commission had to be set up. It was appointed in October 1980 with the then Professor of Law Carsten Smith as its first chairman (1980-1985). Thus this field of research was quite literally brought in from the cold to the warmth of departmental and parliamentary corridors. The first report published in 1984[94] resulted in the *Samelov* of 5 June 1987, a statute establishing an elected, representative and consultative Sámi assembly for Norway, and in the amendment of 21 April 1988 to the Constitution, Section 110a: "It is incumbent on the government authorities to take the necessary steps to enable the Sámi population to safeguard and develop their language, their culture and their societal life."[95]

[93] Parliamentary Proceedings, Debates etc. in the 1974-75 Parliament, p. 3604.

[94] *NOU* 1984:18.

[95] On this constitutional amendment, see e.g. Eivind Smith, "Constitutional Protection of Minorities: The Rights and Protection of the Sami Population in Norway", in *Scandinavian Studies in Law* 1990, pp. 237 ff. After my paper was written, the Sámi Rights Committee published two long reports by experts in history and jurisprudence: "Rett til og forvaltning av land og vann i Finnmark", *NOU* 1993:34 and "Bruken av land og vann i Finnmark i historisk perspektiv", *NOU* 1994:21. The first includes a special study by Gudmund Sandvik on the historical development of property right in Finnmark county. Both Sandvik and the majority in the Working Group on Property Rights – a sub-committee of the Sámi Rights Committee – who wrote the report, questioned some of Sverre Tønnesen's conclusions in his doctoral thesis of 1972. As a result of a long historical process, the majority concludes that "the State's right of property to land in Finnmark, including the interior, was established prior to the recent developments in international law". However, the report has been disputed, see e.g. Terje Brantenberg and Henry Minde: "Are Sami Nothing but Common Northerners?", in *Indigenous Affairs* 1994:1, pp. 60 f.; and Terje Brantenberg and Henry Minde, "Introduction", in Terje Brantenberg, Janne Hansen and Henry Minde (eds.): *Becoming Visible. Indigenous Rights and Self-Government.* Center for Sámi Studies, University of Tromsø, 1995.

B Sámi rights in the light of international developments

"Academic" research into Sámi rights was first formulated and discussed as a question of international law. But as Norway and Sweden, through the reindeer grazing agreement of 1919, settled the delicate issue by themselves, and since Norway was able to purchase the fishing rights of the Skolte Sámi in East Finnmark after the end of the first World War, the international lawyers lost interest in the Sámi. When the question was again raised in earnest, it was no longer as a matter between states, but from a human-rights perspective, namely an ethnic minority or an indigenous people's right to degrees of self determination and to cultural development, as expressed in the 1966 United Nations' Human Rights Convention, regarding civil and political rights. Since that time there had been a tangible international effort to further establish those rights.[96] Legislative work of this kind leaves behind it a comprehensive and visible body of material which should be of interest to many kinds of scholar, including historians. A committee of experts carried out an enquiry for the Sámi Rights Committee into the development of international law.[97] It is, therefore, to be hoped that this work will be carried further, to see whether research into this aspect of Sámi rights may be based on a kind of natural rights' foundation which goes beyond legal realism; or whether it can be incorporated into this by anchoring human rights in a linguistic-philosophical logical analysis, a contract theory such as John Rawls' or Habermas', in rules of procedure for an argument in practical morality.

C From a Norgwegian to a Sámi perspective?

We have seen that research into Sámi rights up to and including that of Tønnesen, whether it be academically or politically motivated, was carried out by jurists with a non-Sámi background – in terms of origin, milieu or research affinity. Even if Tønnesen and especially Solem were interested in popular understanding of the law, Sámi rights were written about in relation to prevailing legal terminology. Such a perspective was challenged by individual social anthropologists who believed that one ought to describe the legal situation so that it could be understood by people using their own terminology and understanding their ideological

[96] See e.g. Terje Brantenberg, Janne Hansen and Henry Minde, *op.cit.*
[97] The *NOU* 1984:18, pp. 154 ff.

universe.[98] Such a demand, seen from the point of view of an ordinary practising lawyer, could lead to impossible legal source problems.[99]

Nevertheless we have an example of a jurist who has tried to take seriously the challenge presented by individual anthropologists – and, perhaps, some Sámi; namely Geir Hågvar in his proposal for an enquiry into nomadism and property rights. Rather interestingly, in order to get to grips with "the distinctive nature of Sámi legal development" he refers back to Stang and Solem and tries to analyse the law as an aspect of the Sámi social situation.[100] Such an anthropologically inspired research project was not unknown either within a modern legal realism tradition,[101] but is – with the above exception – surprisingly absent from the examination of Sámi rights. Surprising, not least because a unanimous Sámi rights committee under the chairmanship of Carsten Smith took as its starting point that a just legal system presupposes that "adequate" regard be taken of the minority's own values and legal perceptions.[102]

[98] John Comaroff and Simon Roberts, *Rules and Processes: The Logic of Dispute in an African 'ontest*, Chicago 1981.

[99] Torgeir Austenå, "Samiske rettigheter til land og vann", in *Lov og rett*, 1986, pp. 146-53.

[100] Geir Hågvar, "Nomadisme og eiendomsrett", *Dieđut* 1989:1, pp. 128-148.

[101] Per Stjernquist, "Soccialantropologiska innfallsvinklar inom rättsforskningen", in, nders Bratholm (et.al., ed.): *Samfunn-Rett-Rettferdighet*, Tano 1986. See also note 62 above.

[102] *NOU* 1984:18, p. 379.