Indigenous rights and citizenship rights: contradictory or coherent?

Else Grete Broderstad, Centre for Sámi Studies, University of Tromsø

Thank you for the invitation. I appreciate the opportunity to present my paper, and to be a part of the discussion on indigenous peoples' right to political participation. In the invitation it is stated that the conference will address principal policy issues and major conceptual and pragmatic challenges and constraints in realizing different kinds of participation. My take on this is a focus on the 'bonds' between indigenous and citizenship rights. By addressing this concern, I am indicating the existence of a form of reconciliation between indigenous and citizenship rights. But first of all a couple of introductory remarks: talking about indigenous participation, and in particular political participation, its crucial to take into account the different contexts indigenous peoples are situated in, and have to relate to in their struggles for recognition due to variations in history, and political, legal and welfare systems. That said, I am convinced that the lessons we learn from each other: from the experiences we are collecting, the battles we are losing and the victories we are gaining are comparable and transferable.

Outline

I. Conceptual clarifications

- Central components of citizenship… and indigenous rights

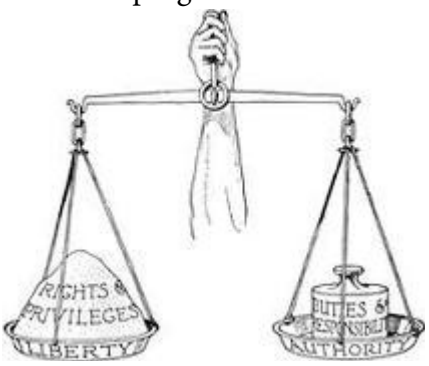
II. The ties between indigenous rights and the rights of citizenship

- Legal protection related to the participatory aspects of indigenous rights
- Political rights related to the participatory aspects of indigenous rights

First, I'll comment on central conceptual components of rights as rights are intrinsically linked to participation and vice versa, and secondly I'll examine the ties between indigenous rights and citizenship rights by linking together central aspects of citizenship rights– that is legal protection and political rights, with central participatory aspects of indigenous rights.

A conceptual clarification

Citizenship rights



The components of citizenship and the role of political rights
First generation: civil rights
Second generation: political rights
Third generation social and welfare rights
Fourth generation: minority and indigenous rights

The reason I am making a point out of citizenship and citizenship components, is due to the salient role of political rights. By making use of the political rights we have as citizens, the Sámi movement revealed new aspects and arguments of rights and participation and shed new light on Sámi-Norwegian relations. The results are recognition in the meaning of international and domestic law as well as the establishment of political arrangements. It is through the political rights of participation that other rights have been identified and recognized. The Sámi movement made use of the political rights of citizenship: the freedom of association, the freedom of speech and even civil disobedience when other means became insufficient.

Let me just add that one way to approach the concept of citizenship is the classic way to divide it into bundles of rights (as you see in the box above) starting out with a first generation of civil rights followed by a second generation of political rights, and then a third generation of social and welfare state rights and a fourth generation of minority and indigenous peoples' rights. This order in development may be characteristic for western liberal democratizes, but what about the range of order of citizenship rights of new emerging economies? Could social rights be developed prior to political rights? I pose this question as a critique to this classic approach.

Yet another take on this is on the one hand to distinguish between citizens' formal status-legal and political rights and duties in their relationship to the nation-state, which of course is vital to indigenous people; and on the other the affiliations the members of a society have to political, social and economic institutions of that society… this substantial dimension would even embrace those individuals without a citizenship. At this time I will not elaborate more on the understandings and the content of citizenship, instead we will move forward to the next main concept of my talk, namely indigenous rights.

A conceptual clarification

Indigenous rights

- Cultural rights The right to self determination
- Political rights
- Land rights… legal protection necessary
- in order to counteract the arbitrariness of political decisions

Indigenous rights can of course be categorized in a variety of ways like cultural, political and land rights, as well as emphasized by the collective right of self-determination as the salient dimension of indigenous rights, and the end line of all efforts. The most prominent expression of this development is the United Nations Declaration on the Rights of Indigenous Peoples adopted by the UN General Assembly September 13th 2007, in which Article 3 states that indigenous peoples have a right to self-determination. But what does self-determination imply in a complicated demographic landscape, within the complexity of legal and political relations? I do not aspire to provide an answer, but I will conclude by pointing out one approach to this debate.

Indigenous rights understood as rights to land and water would be about property and usage rights implying more substantial legal perceptions. With reference to land rights of indigenous peoples, the fallibilities of political decisions become even more critical due to a lack of institutionalization of indigenous influence or because of the fact that authorities have regulated away or removed customary rights of indigenous peoples through political decisions. The legal protection offered to citizens by means of the constitutional state has not protected the indigenous use of land areas in the same manner as non-indigenous user rights. Thus, legal protection is necessary in order to counteract the arbitrariness of political decisions.

For that reason, the 2001 Norwegian Supreme Court cases of Svartskog and Selbu, became salient in terms of representing a paradigmatic change. In the Svartskog case the local population of the village of Manndalen in Troms County, was awarded collective ownership rights to an outlying field area– the so-called area of Svartskogen. The case of Selbu, in the county of South Trøndelag, dealt with reindeer herding groups of Essand and Riast/Hylling who were awarded pasture rights on private property within the district of the reindeer herding area. The Supreme Court states in both cases that the distinctive features characterizing the Sámi use of land must be taken into account, and the Court signals that the conditions for acquiring legal rights through immemorial usage must accommodate Sámi legal reasoning and Sámi use of recourses.

A conceptual clarification

- A "negative" aspect, passive protection
- A positive aspect, a duty of activity upon the nation-state
- A procedural aspect, real influence, consultations and negotiations, but self determination?

Indigenous rights – a procedural approach

For this purpose, with indigenous participation as the red thread, I prefer a procedural approach in order to account for the understanding of participation in a Sámi-Norwegian context which could be divided into three stages of progress. This is a development parallel to the evolvement of indigenous rights as "bundles" of rights in international law.

In the first phase I place the traditional readings of Article 27 of the International Covenant on Civil and Political Rights from 1966, which are rights preventing discrimination or "passive" rights. When Norway ratified CCPR the relationship to the Sámis was not regarded as relevant (Minde 2003). Not until the Alta struggle was this connection activated, and in 1982 and '83 the Human Rights Committee thoroughly examined Norwegian position towards Sámis. The perceptions changed and in 1984 the Sámi Rights Commission is doubtless in their case that Article 27 allows for measures of positive rights.

The Norwegian Parliament followed this reading, implying that the nation-state has to actively contribute to developing Sámi culture, as well as embracing the material aspects of a minority culture. We are talking about active or positive rights that are recognized, and an admission of a duty of activity upon the nation-state, all this as a result of an increased Sámi political participation and involvement.

This positive aspect of participation is further developed into a procedural aspect, which is asserted in a Sámi-Norwegian context through the consultations prior to the decision on the Finnmark Act and the 2005 consultation agreement between the government and the Sámi Parliament. For those of you unfamiliar with the content, let me explain that the Finnmark Act was adopted by the Norwegian Parliament in May/June 2005, and that the right of disposition over the land in Finnmark was conferred to a new landowning body called the Finnmark estate. Also in May 2005 the Sámi Parliament and the Norwegian government entered into a consultation agreement.

Many of the provisions of the ILO convention No. 169 concerning aboriginal populations and tribal people in independent nations, can be read in view of a procedural perspective. The surveillance bodies of ILO have stated that consultations and active participation constitute the core elements of ILO 169. (In a statement from the surveillance bodies of ILO in a 2003 observation statement to Paraguay's report on compliance of the Convention, it is stated that

consultations and active participation constitute the core elements of ILO 169.) In current interpretations of Article 27, the ILO 169 provisions on consultation and participation, and the UN Human Rights Conventions' Article 1 on the right to self determination, the procedural aspect of indigenous rights is retrieved.

I started out by indicating the existence of a form of reconciliation between indigenous and citizenship rights. The terms citizenship and equality are often read as an acceptance to become the same as the majority population of a state. The principles of equal respect and rights for each individual regardless of cultural belonging and the liberal principle of 'one person, one vote' are considered to be in conflict with the principle of acknowledging cultural recognition and protection of collective identities. Different regimes of autonomy presuppose extended relations between indigenous institutions and other institutions within as well as outside indigenous areas cf. Kingsbury (2000). John Borrows (2000) argues for an understanding of Aboriginal citizenship in Canada, which implies a perspective on indigenous autonomy and self-determination, but also a need to include these perspectives into a debate on citizenship. I share this view. The fact that the Sámi relate as citizens to different levels of authority, including their own self-governing system, necessitates a debate about the bounds between indigenous and citizenship rights.

Development of the participatory aspects of indigenous rights / Citizenship-Functions	The "negative" aspect	The "positive" aspect	The procedural aspect
The legal protection of citizenship	1) Traditional cultural protection, nonintervention.	2) Obligations of international law: a duty on the state to be active, i.e. recognition, and call for legal decisions and policy efforts.	3) Acknowledging that the ordinary obligations of the constitutional state also protect indigenous use of land.
Political rights as citizenship	4) Variation of ascription of belonging and loyalty. A right to internal disagreement and a right to exit.	5) A new understanding of Sami-Norwegian relationships. Political participation, autonomy arrangements.	6) How to understand and implement autonomy and self-determination? By means of a relational form for self-determination?

As an attempt to respond to my initial assumption of reconciliation between indigenous rights and the rights of citizenship, I present the table above summarizing some lines of arguments. One may claim that the image I am presenting of the development in Norway is too ideal, but I am insisting on the explanatory sense of my account. Of course the step between national policy and local implementation may be a lengthy one, as we will hear more about in the following presentations.

Back to the table; the main functions of citizenship: legal protection and political rights, are linked to the participatory aspects of indigenous rights, the negative, the positive and the procedural aspects, in order to shed light on the developmental stages that I have accounted for.

(1) Thus, the traditional protection of culture implying non-state intervention becomes evident, a condition not corresponding with modern indigenous politics.

(2) On the other hand, in the next column; at the next stage where legal protection of citizenship is linked to the positive aspect, a duty on the nation-state to be proactive is acknowledged and furthermore adjusts for recognition, support and efforts. This is the stage set for the Sámi political institution meetings. This is the mid-80's with the establishment of the Sámi Parliament, the Sámi Act and Norway's Constitutional Amendment. It is in this period where political rights are acknowledged.
(3) As a result of this legal and political development, Sámi customary rights and use are being incorporated into the legal system, and the legal protection that is provided to citizens through the constitutional state also protects the indigenous use of land, illustrated through the Supreme Court cases of Selbu and Svartskog. Here the importance of public debate and of learning is revealed. The court decisions discuss earlier use of sources, evidences, methods and conceptions, grounded in domestic law and legal understanding. The use is considered to have a lawmaking character and therefore needs to be included in the legal protection of land use.
(4) Returning to the negative aspects as linked to the function of political rights-membership and political participation is about indigenous and minority individuals' right to internal disagreement and individual diversity. Anyone is free to choose to exit. There are still many people that could have registered themselves in the Sámi electoral roll for the purpose of taking part in the election to the Sámi Parliament, but they have not done so, which does not necessarily mean that they are ignorant of this option of participation. Their lack of interest may even express an active choice, and a right to internal disagreement.
(5) However, the political rights to participation essential to autonomous arrangements are not impaired, and coincide with the core political rights of citizenship. Through these political rights, other rights are clarified. Thus, citizenship is a political resource, not only for the individual citizen, but for the Sámis as an indigenous people. By making use of those means of communication available in the public sphere, the Sami political movement has pursued new issues, presented new arguments and placed Sámi-Norwegian relationships in a new light. Debates of recognition have also affected the self-understanding of the majority. This is not only a one-sided development. It is not only a development within the Sámi political field, or within the Sámi community. It is also a relational aspect, and may even shape what it means to be Norwegian.
(6) In the last column of the table, the procedural aspect coincides with the political rights we have as citizens, included as indigenous citizens. This is about the aspirations of self-determination, and particularly about the implementation of self determination. As I said earlier; there are no easy solutions in a complicated demographic, legal and political landscape, so I have found it useful both in a theoretical and practical or empirical sense to apply the concept of relational self-determination (Svensson 2002: 32, Kingsbury 2005, Young 2007: 38-57.) We are all situated in a reality that is demanding. Concepts we may take for granted, such as identity, cultural distinctiveness, existing frameworks of political participation and the notion of the nation-state are challenged. What about those cases where there is no clear distinction between a Sámi and a Norwegian issue? Exercising of authority will imply change, renewal and conflicts (cf. Pettersen 2002: 76).

I find a relational approach to self-determination relating to democracy attractive in order to capture core challenges to the implementation of indigenous self determination. Additional strengthening of Sámi political authority is hardly gained by walking alone in the meaning of non-interference, and require participation in political arrangements as it contributes to common understandings. Therefore, the consultations lead the way. Citizens, including Sámi citizens, have to exercise their autonomy in common, participate in political processes in common, specify justified interests and standards, and agree upon relevant concerns in order to decide when similar issues should be equally treated and when different issues need to be conducted in a diverse manner.

The Two Row Wampum Belt

Let me end this presentation by showing you an image of how the relationship between rights can be interpreted. This is the two row wampum belt, with three parallel white rows of pearls, divided with two rows of purple pearls, which became an important symbol for the First Nations by the Great Lakes during their contact with the British during the 1600 and 1700s. One conception of this belt is drawn up by the political scientist Gerald Alfred or Taiaiake. His point is that the two purple rows, in which the first symbolizes the First Nations and the second the settlers, in symbolic terms never meet, and therefore never interfere in each others' political organization. Self determination implies non-interference.

The lawyer John Borrows from the Chippewas of Nawash First Nation utilizes the same belt and the same symbolic meaning. However, he emphasizes that the three white lines balance the message of autonomy, and symbolizes a shared destiny and reciprocal dependence. The principle of autonomy has to be read and conceptualized together with an idea of citizenship tying people together. The two purple rows– indigenous and settlers, are separate nations, but the political voyage happens in the same water with conflicting and mutual challenges.

As you may have detected, this is a message I endorse.