

IGC Draft Articles on the Protection of Traditional
Knowledge: Indigenous Peoples and Local Communities
Perspectives

Protection of Indigenous Peoples' Traditional Knowledge: Examples and Experiences from a North Sámi area in Norway

Dr. Laila Susanne Vars, Executive Director, GÁLDU
WIPO IGC 31, Geneva 19.9.2016

www.galdu.no



The International Protection of Traditional Knowledge: Comments on the IGC Draft Articles Seen From an Indigenous Sámi Perspective

- Why is there an urgent need for legally protecting Indigenous Peoples' right to their Traditional Knowledge and Cultural Expressions?
- Some experiences of the Sámi people.

Traditional Knowledge



Fake Sámi Clothing: Cultural Appropriation

Photo credit: www.Missworld.com
(1.12.2015)



Lack of knowledge or lack of respect for how to wear traditional Sámi clothing?

Photo credit: Kenneth Paulsson, Expressen.

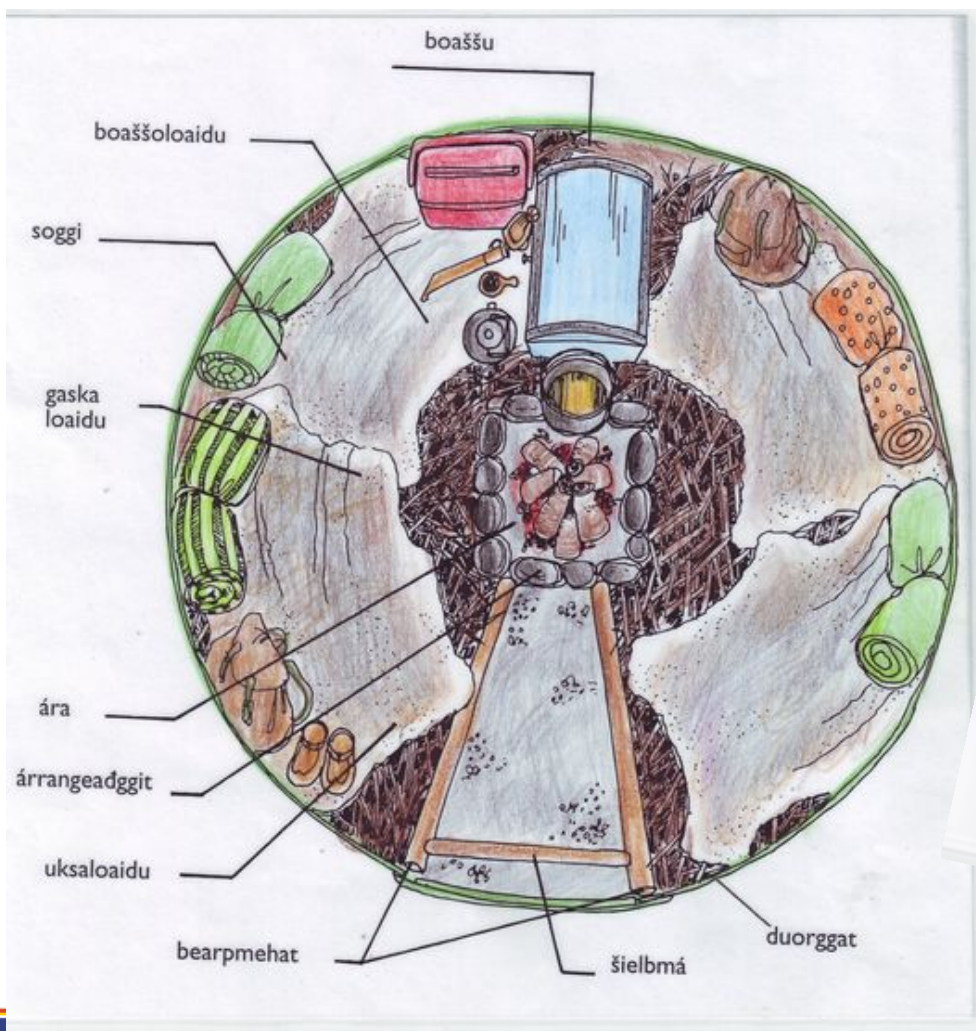


The Sámi Lávvu: Public Domain or Unauthorized Use?



The Lávvu: A sámi home

Drawings: Anne K. Eira, Marit Østby and Karen Marie Eira Buljo



The UN Declaration on the Rights of Indigenous Peoples Article 31:

- *1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*
- *2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.*

A Sámi Perspective on Our Traditional Knowledge: Strengths and Concerns

- **The Sámi are still here.** Resilient indigenous communities. We are survivors of harsh national assimilation politics and processes. We have our own representative political bodies and a number of civil society organizations. But: Many of the Sámi languages are distinct (unesco.org), important cultural traditions and practises and livelihoods are illegal or strongly limited according to domestic law. Implications for the traditional local Sámi economy and sustainable development.
- **Our knowledge systems and legal systems still exist.** The Sámi have managed to uphold parts of our customary law systems and our traditional social structures. But: Sámi traditional cultural livelihoods and cultural expressions are managed through domestic laws which do not protect Traditional Knowledge, and which do not contribute to the implementation of the Sámi people's right to cultural self-determination.
- The Sámi want to be able to **protect our traditional knowledge**, and we have institutions and skills to do so. But: Lack of legal protection, the return of stolen cultural objects, protection of spiritual sites and lack of funding for the strengthening of Sámi institutions which could play an important role in documentation and transmission of TK to new generations.

The Draft Nordic Sámi Convention Article 31 on Traditional Knowledge and Cultural Expressions

- *"The states shall respect the right of the Saami people to **manage its traditional knowledge** and its traditional cultural expressions while striving to ensure that the Saami are able to **preserve, develop and pass these on to future generations.**"*
- *When Saami culture is **applied commercially by persons other than Saami persons**, the states shall make efforts to ensure that the Saami people gains **influence over such activities and a reasonable share of the financial revenues.** The Saami culture shall be **protected** against the use of cultural expressions that in a misleading manner give the impression of having a Saami origin.*
- *The states shall make **efforts** to ensure that **regard** is paid to Saami traditional knowledge in **decisions** concerning Saami matters."*

The International Protection of Traditional Knowledge: Comments on the IGC Draft Articles Seen From a Sámi Perspective: The Policy Objectives

- **Provide Indigenous Peoples, other beneficiaries and States** with [legal and practical/appropriate] means including effective and accessible enforcement measures, remedies and exercise of rights.
- **Prevent** misappropriation and other forms of misuse, control the use of TK.
- **Promote** equitable sharing of benefits, through FPIC, and **promote** creation and innovation.
- **Prevent** the grant of erroneous intellectual property [patent rights] over traditional knowledge.
- **Protect** Indigenous Peoples' Traditional Knowledge

The International Protection of Traditional Knowledge: Comments on the IGC Draft Articles Seen From a Sámi Perspective: The Definition

- **Article 1: What is Traditional Knowledge? The need for an international definition that can serve as standard for domestic legislation and protection of TK.**
- **A Sámi perspective: Created, shared and transmitted (a) by ourselves, our people, our communities, our elders, women, men, youth and children in our collective context; within our livelihoods, villages or extended families in a collective context. Distinctively Sámi, but culture must be allowed to evolve. Our cultures are alive, not just something to be shown in museums.** Most of our traditional knowledge is not widely spread or protected, it's often used by others without our prior informed consent. (But what about revitalization of formerly banned traditions , e.g not "maintained" for a long period of time due to domestic restrictions, but is still an important part of our culture)
- **It's obviously linked to our cultural collective identity and cultural heritage (b) of our people, nation and local communities.** Not all Sámi traditions are similar in all Sámi areas. Great variety of cultural expressions, f.ex in traditional clothing and traditional joik/luohti (music). But Sámi traditional knowledge is always directly linked to our collective identity.
- **Our traditional knowledge is transmitted from generation to generation in our own ways,** mostly orally, through a specific use of our languages, through traditional music/luohti, storytelling, family rituals etc.

The International Protection of Traditional Knowledge: Comments on the IGC Draft Articles Seen From a Sámi Perspective: Who should be the beneficiary of protection of TK?

- **Draft Article 2:** Traditional Knowledge created, held, used and developed by Indigenous peoples, **should belong to the Indigenous people as a collective.** The people need to decide how they want to manage this protection. Challenges: The criteria of TK being "maintained". A people should be the beneficiaries, this includes indigenous local communities. Some TK is created and used in some Sámi areas, not all. **The need for understanding that there are several indigenous "collectivities"- and that there must exist representative bodies for beneficiaries also on the local level.** Examples from the North Sámi area in Norway.
- **If there are no Indigenous Peoples or communities claiming rights to specific TK:** The proposal on a "national custodian" for TK of an indigenous people. Requires the FPIC of indigenous people. Should there be an indigenous custodian for indigenous TK? Should there be an international indigenous body dealing with these matters, making them an international matter of concern?
 - **Strengthening Indigenous Peoples' representation in the United Nations: Could solve this.**

Scope of protection

- Article 2: Beneficiaries: Indigenous Peoples and Local Communities. Should it include the concept of "nations"?
- Article 3: Very detailed eligibility criteria: Eligibility criteria should be dealt with under one article.
- Challenging for Indigenous Peoples: Who is to decide whether their TK is available to the general public?
- Defining "public domain" will be very difficult and perhaps not necessary, but there should be some guidelines etc. for how to understand this concept under this/these legal instruments.
- The need for a definition of "misappropriation"?

The International Protection of Traditional Knowledge: Comments on the IGC Draft Articles Seen From a Sámi Perspective

- Article 4: Sanctions and remedies: What is the role of Indigenous Peoples in ensuring enforcement procedures? The right to FPIC and the right to be **consulted**.
- Article 5: Administration of Rights: Removing the brackets and **implementing the FPIC**.
- Article 6: Exceptions and Limitations: **Too wide exceptions** (e.g.6.3) will undermine the whole aim of the legal instrument, not in accordance with UNDRIP article 31.
- Article 7: Term of protection/rights: Must be **up to the Indigenous People/Community** to determine when TK no longer needs protection.
- Article 8: Transitional measures: The need for redress and compensation. What about state establishing mechanisms/commissions on the national level for dealing with wrongs of the past? The time is overdue for protecting Indigenous Peoples TK.

The International Protection of Traditional Knowledge: Comments on the IGC Draft Articles Seen From a Sámi Perspective

- Article 10: Relationship with other international agreements: Should there be a reference to the UNDRIP? Non-diminishing clause regardign Indigenous Peoples' rights should be included.
- Article 12: Transboundary Cooperation: Important provision for Indigenous Peoples whose territories are divided by state borders. **Indigenous Peoples** should also be mentioned in 12.2, as they too need to be parties in such transboundary cooperation.

Concluding remarks

- General comments on drafting language
- Cross-cutting issues: Which are the "core issues" for Indigenous Peoples? Regional Drafting Groups?
- States should consider the extensive use of "*Where appropriate*" and "*may*"s, compared to their obligations under the UNDRIP. The need for clear language which will not leave a lot of room for interpretation.
- FPIC vs. Consultations?
- While IGC is drafting; States start developing legislation on TK based on existing national and international law. National Action Plans for implementing Indigenous Peoples rights. SWAP- process, the ongoing consideration of the mandate of the EMRIP and Special Rapporteur for the Rights of Indigenous Peoples.
 - Norway 2016: Proposed new bill (forskrift) on the rights to use Traditional Knowledge on Genetic Resources created, developed and maintained by Indigenous Peoples and Local Communities. Work in progress. Core issues: The need for definitions of "misappropriation", procedures for identifying the beneficiaries, the need for international instruments that sets the standards for national legislation. (Nagoya-protocol, Norwegian Nature Diversity Act Section 8 and 61 a)

