

*Routledge Research in Polar Regions*

# THE SIGNIFICANCE OF SÁMI RIGHTS

**LAW, JUSTICE, AND SUSTAINABILITY FOR THE  
INDIGENOUS SÁMI IN THE NORDIC COUNTRIES**

Edited by  
Dorothee Cambou and Øyvind Ravna



# The Significance of Sámi Rights

This book examines the significance of the rights of the Sámi people and analyses the issues raised by the recognition and implementation of these rights in the Nordic countries.

Written together by Sámi and non-Sámi experts, the book adopts a human rights approach to examine the adequacy of law and policies that seek to protect the culture and livelihoods of Sámi communities in their traditional lands and territories. The book discusses contemporary legal and jurisprudential developments in the field of Sámi rights. It examines the processes and challenges in the recognition and implementation of these rights, particularly in relation to the governance of their traditional land and resources.

The book will be of particular interest to legal scholars, political scientists, experts in the field of Indigenous peoples' rights, governmental authorities and members of Indigenous communities.

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# Preface

At the time of writing this text, the historic demonstrations in Oslo on the 500+ days of inaction on the Fosen Supreme Court verdict have just concluded. In Finland, the day after the occupation of Sámi youth and allies at the Norwegian Ministry of Petroleum and Energy started, we received news that a third government in a row failed to renew the act on the Sámi Parliament, thus continuing the human rights violations caused by the current act.

These are times of ambivalence for Sámi rights. On the one hand, we have had major victories on Sámi rights. In Supreme Courts in the three Nordic countries, we have the recent *Girjas* case from the Swedish side, concluding that the Sámi village has the right to govern hunting of small game and fishing in their territory; the fishing rights cases on the Finnish side in *Ohcejohka* and *Veahčajohka*, concluding that Sámi have constitutionally protected right to fish in their home rivers; and the *Fovsen* verdict on wind power encroachment violating the right of Sámi to practice their culture.

What is overshadowing these victories is the inaction of the Nordic states to follow up on the rulings. Although each of these cases is about a specific community, the relevance extends to the whole of Sápmi: If one Sámi community has the right to govern fishing and hunting of small game in their territory, why would another Sámi community not have the same historic rights to their territories?

Disregarding the recommendations and conclusions of international human rights bodies is also an unfortunate but evident trend in the Nordic countries. The protests in Oslo would not have needed to take place, if in 2018 Norway would have respected the request from the UN Committee on the Elimination of Racial Discrimination (CERD) to suspend construction of the wind power plant in Fosen. Instead, Norway decided to ignore this request and allow the encroachment to take place.

Both the Human Rights Committee and CERD have concluded that the current act on the Sámi Parliament in Finland causes human rights violations. Currently, Finland is violating the Sámi right to free political representation and is engaged in hybrid influencing of our representative institution, the Sámi Parliament. Rulings of human rights bodies do not seem to weigh much when it comes to political decision-making. Marginalisation of Sámi and continued violation of our right to



self-determination seem to serve the interests of certain political parties, and thus, our free political representation is under attack.

The Supreme Court rulings on Fosen wind power and Ohcejohka and Veahčajohka fishing rights are on cultural rights: We Sámi have the right to practice our culture, which means that no legislative process or encroachment should be allowed when it makes it impossible for us to continue practicing our culture. Fishing, hunting and reindeer herding are manifestations of Sámi culture, which means that our rights to these practices must be protected. The informal estimate is that around 30 laws in Finland should be updated due to the Ohcejohka/Veahčajohka fishing rights case. There is a long path ahead for making the necessary legislative changes to ensure that we will be able to practice our culture in the rapidly changing world.

Of course, the victories in Supreme Courts and human rights bodies bring hope: We can ensure our rights via courts. One big question that remains is how to make these local victories mainstream without each community having to go to court. I do not hold much faith in the political will to do that. Another question is actually making the rulings into laws: How do you ensure Sámi rights to traditional practices, such as fishing, hunting and reindeer herding, are protected? How do you define the thresholds where the right to practice one's culture is broken?

While the cases on cultural rights are significant, do they provide sufficient basis for us to develop our societies and ensure a thriving Sámi culture for the future? If the legal argument is that we should not be denied the right to practice our culture, where does this leave legislative measures and encroachments that significantly harm our cultural practices but might not completely deny the possibility to practice some aspects of our cultural practices? Where do you draw the line to ensure that traditional practices are not harmed and to make it possible for the next generation to engage in the work and learn the necessary knowledge about those practices? Many of these questions will be discussed in this anthology—which makes it an especially timely publication.

In 2023 the *Meahceduopmostuollu* (the Land tribunal) for Finnmark, as the Finnmark Commission in 2019, has found that the people of Kárášjohka own the former assumed state land in the municipality. This year we are also starting the implementation of the Montreal-Kunming Global Biodiversity Framework, which reflects a paradigm shift in conservation. Never has a global conservation instrument to this extent recognised the importance of Indigenous peoples and our rights to territories as an important tool for conservation. Sámi rights to data governance and our immaterial property are also very timely and developing topics.

Thank you to all the scholars who have contributed to this anthology! Many of you have done invaluable contributions to the work to ensure Sámi rights are respected and protected. I am sure readers will expand their knowledge on Sámi rights by reading this book.

Áslat Holmberg  
President of Sámiráđđi—Saami Council

# Acknowledgements

The editors would like to thank all participants of the NORSIL workshop series. The publication of this book would not have been possible without the involvement of several experts and academics in the organisation of the workshops and events that took place at the university of Umeå, Tromsø and Helsinki between 2019 and 2022. This also includes several members of Sámi organisations and national human rights institutions from Finland, Sweden and Norway whose contributions were particularly relevant to understand the theories and practice of law in relation to Sámi rights. The editors are also grateful for the financial support provided by the Joint Committee for Nordic Research Councils for the Humanities and the Social Sciences (NOS-HS), which supported the organisation of this workshop series and the publication of the present volume. We also extend our appreciation for the assistance provided by Marta Paricio Montesinos in editing and proofreading the references of the book. Last but not least, we are grateful for receiving the support from several Sámi representatives and scholars during the completion of this research project. We hope this book will contribute to foster knowledge and respect for the Sámi culture and strengthen academic work to pursue that endeavour.

# Contributors

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# 1 The significance of Sámi rights in the Nordic countries—an introduction

*Dorothee Cambou and Øyvind Ravna*

Sápmi, the motherland of the Sámi people, is situated in four states: Finland, Norway, Russia and Sweden. This is one of the reasons that recognition, conceptualisation and implementation of the rights of the Sámi is imbued with multiple challenges. While the Nordic countries over time have implemented laws and signed treaties in protecting these rights, the situation in Russia is more challenging, and the ongoing Russian war of aggression against Ukraine does not paint the picture brighter. Already several years before the outbreak of full-scale war, it was no longer possible to have academic collaboration with Russia, and it has therefore not been possible to include the situation of the Sámi in Russia in this anthology.

It can be agreed that the protection of Sámi rights and their effective realisation has made significant progress in the Nordic countries. In recent years, also several ground-breaking Supreme Court judgments have been ruled in the Sámi favour. Nevertheless, Sámi traditional use of lands and resources are not uncontested, in the courts, the governments and among legislators. Lack of protection is particularly visible when it comes to interventions in pastures and nature areas caused by extractive industries and the establishment of wind power plants. Such interventions may constitute threats to the livelihoods of many Sámi communities in the Nordic countries.

Addressing these issues has for several years been under the focus of the Nordic Research Network for Sámi and Indigenous Law (NORSIL). The attention was formalised with the research project titled *Transitioning towards a sustainable Nordic Society: Assessing and monitoring the implementation of the rights of the Indigenous Sámi people as a means to achieve inclusive and sustainable development*. With the financial support of a grant allocated by the Nordic Research Council, the NORSIL network organised a series of workshops to examine what societal and legal changes must occur over the next generation to ensure the legal protection of the Sámi culture in order to achieve an inclusive transition to sustainability in the Nordic countries. The workshops were organised between 2019 and 2021 at the universities of Umeå, Tromsø and Helsinki. Adopting a human-rights-based approach to sustainable development, this workshop series provided a platform to assess the progress and challenges towards the implementation of the rights of the Sámi in order to promote a sustainable and inclusive transition in the Nordic countries. It also created an opportunity for Sámi and non-Sámi scholars to discuss those matters and exchange as well as convey knowledge on the issues with NGOs,

representatives of states' institutions and the wider public during workshops and public events. The present volume is one of the outcomes of this project.

Building upon the research of the previous years, including *The proposed Nordic Saami Convention: national and international dimensions of indigenous property rights* and *Indigenous Rights in Scandinavia: Autonomous Sámi Law*,<sup>1</sup> this anthology continues to focus on the significance of Sámi issues from a legal perspective while taking into consideration environmental challenges and the limits of the law to ensure justice and sustainability. In this regard, this anthology has two objectives: First, it entails an analysis of the significance of the rights, or, more precisely, the legal protection the Sámi culture enjoys through legislation. Second, it entails an assessment of the implementation of that protection, which implies an evaluation of the actual legal protection of the Sámi communities, including their traditional lands, resources, and future as Indigenous people.

Against this backdrop, the anthology offers a timely review of the legal progress and challenges faced by the Nordic countries. Although the purpose is not to provide a complete assessment of these issues, its chapters offer a timely picture concerning some of the most recent trends and matters that feature the legal development of the protection of Sámi culture in the Nordic countries.

Noting the contextual diversity of the Sámi experiences at the national levels and the various scholarly approaches concerning the issues, all the contributors were left with a wide margin of methodological and theoretical appreciation in the preparation of their study. This is not to say that the situation of Sámi communities is not comparable across the different parts of Sápmi but just a reminder that the Sámi deals with different historical, political and legal contexts that also influence the legal situation at the different national levels. Despite the attempts to adopt the Nordic Sámi Convention which could coordinate the protection of the Sámi rights and cultures in the Nordic countries, the realisation of the protection continues to differ from one state to the others.

Considering these differences, the anthology reflects the diversity of Sámi legal experiences in the Nordic states and various academic approaches to study it. As a result, this book includes chapters targeting separate but intertwined issues such as the recognition of land rights in different contexts,<sup>2</sup> the comparative analysis of the Sámi influence in conservation governance and management<sup>3</sup> and the difficulties raised by the interpretation and implementation of legislations supporting the legal protection of the Sámi people at the national level<sup>4</sup> in relation to the governance of lands, resources and education.

In this context, this anthology also features human rights law as a backdrop to study the legal protection of the Sámi culture. Historically, international law was 'a legitimizing force for colonisation and empire rather than a liberating one for indigenous peoples'.<sup>5</sup> However, the recent development of human rights has opened an avenue to promote the protection of the culture of Indigenous peoples and guarantee their rights against the negative impacts of development significantly affecting their traditional land and resources. The 2022 decision by the Human Rights Committee, which has found that Australia has not sufficiently protected the Indigenous people of the Torres Islands against adverse climate impacts,<sup>6</sup> also emphasises that international human rights law is now taking an emerging place in ensuring protection for Indigenous peoples against the harmful effects of climate change. Hence, human



rights law constitutes one of the main and evolving yardsticks to evaluate and discuss the recognition and implementation of the protection of Indigenous people's cultures.

Although international human rights law does not have the same status all over Sápmi, its relevance is increasingly becoming grounded in national court decisions. As mentioned, we have recently had several landmark Supreme Court rulings in the three Nordic countries, each of which refers to human rights law instruments. Between 2019 and 2022, the Supreme Court decisions of *Veahčajohka*, *Fosen* and *Girjas* in Finland, Norway and Sweden, respectively, have determined that there has been a violation of the Sámi right to enjoy their culture and livelihoods.<sup>7</sup> In those judgments, the courts clearly referenced the International Covenant on Civil and Political Rights, the International Labour Organisation (ILO) Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples to justify their decisions. The importance of the ILO Convention No. 169 was also evidenced in the Karasjok report of the Finnmark Commission and the Land Tribunal subsequently confirmed the importance of the Convention.<sup>8</sup> Even though it can be argued that this development is tempered by a reluctance to endorse progressive or transformative interpretations of the rights of Indigenous peoples,<sup>9</sup> the corpus of international human rights instruments has thus become a tool for supporting the protection of Sámi culture.

Yet it is also important to acknowledge that most of these decisions remain in a state of indeterminacy and their outcomes have not brought fully fledged remedies for guaranteeing the protection of the Sámi culture in practice.<sup>10</sup> In effect, governments are still lagging in terms of taking action for implementing the court decisions, and, as already mentioned and noted in several chapters, there remains discrepancies between the promises of national legislations and the realisation of the rights of the Sámi people in practice.

From this perspective, the book is premised on one main paradox. Whereas the legal protection of the Sámi has gained increasing significance in law, its relevance and effective realisation remains contentious in practice. Over the last decades, a legal apparatus recognising the rights of the Sámi people has been consolidated. Yet Sámi representatives, researchers and international human rights bodies continue to testify from the lack of practical changes that would allow the Sámi communities to maintain their culture and develop their livelihoods within and across the borders of the Nordic countries. These shortcomings are particularly salient in the promotion of the legal protection of the Sámi people to enjoy their culture, which often lack clarity in articulating or guaranteeing the protection of the rights of the Sámi as an Indigenous people.<sup>11</sup>

Furthermore, this paradox also transpires in the sustainability field, where Nordic states appear deficient for promoting a transition that is both just and sustainable. At the forefront of this challenge is a knowledge gap concerning the situation of the Sámi people which, in the words of Krawchenko and McDonald, is 'perhaps best summarised by the phrase "no data, no problem, no action"'.<sup>12</sup> In other contexts, this is simply a lack of resources that may hamper the implementation of sustainability policies and law in a way that reflects and supports Sámi culture, education and pedagogical needs.<sup>13</sup> Finally, this challenge is also more controversially embedded in the goal of the Nordic government to promote the green shift, without taking fully into account the legal protection of the Sámi culture. As illustrated by several chapters, there is an increasing tension between the policies



which favour sustainable development, and the rights of the Sámi. Whereas Nordic governments favour the green shift, national policies and law are increasingly challenged by their negative impacts for the culture and livelihoods of Sámi communities.<sup>14</sup> In this context, it can be questioned whether law is a tool supporting a green and just transition that will ‘leave no one behind’ or an instrument which maintains a status quo facilitating or further entrenching green colonialism.

Ultimately, the legal protection of the Sámi people is in a state of transition. The development of the protection of Sámi culture over the last decades coupled with the novelty of the court rulings in the Nordic states, demonstrate that changes are taking place at the judicial levels. At the same time, much remains to be done. This development will undoubtedly continue, although experiences show that it will vary both in speed and direction. From an academic and social point of view, it is important that the scholarly focus does not weaken in the coming years.

## Notes

- 1 Nigel Bankes and Timo Koivurova (eds), *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Hart Publishing 2013); Christina Allard and Susann Funderud Skogvang (eds), *Indigenous Rights in Scandinavia: Autonomous Sami Law* (Routledge 2017). See also Stephen Allen, Nigel Bankes and Øyvind Ravna (eds), *The Rights of Indigenous Peoples in Marine Areas* (Hart Publishing 2019).
- 2 Øyvind Ravna, ‘The survey of property rights in Sámi areas of Norway—with focus on the Karasjok case’ in Dorothee Cambou and Øyvind Ravna (eds), *The Significance of Sámi Rights: Law, Justice, and Sustainability for the Indigenous Sámi in the Nordic Countries* (Routledge 2023); Malin Brännström, ‘The implementation of Sámi land rights in the Swedish Forestry Act’ in Cambou and Ravna (n 2); Leena Heinämäki, ‘The prohibition to weaken the Sámi culture in international law and Finnish environmental legislation’ in Cambou and Ravna (n 2).
- 3 Elsa Reimerson and Linn Flodén, ‘Navigating conservation currents: conditions for Sámi agency in collaborative governance and management models’ in Cambou and Ravna (n 2).
- 4 Heinämäki (n 2); Ingvild Åmot and Monica Bjerklund, ‘Sámi rights and sustainability in early childhood education and care: sustainability in everyday practices in Norwegian kindergartens’ in Cambou and Ravna (n 2).
- 5 James Anaya, *Indigenous Peoples in International Law* (1st edn, OUP 1996) 19.
- 6 *Daniel Billy and others v Australia* (Communication No 3624/2019) UN Doc CCPR/C/135/D/3624/2019 (HRC 21 July 2022).
- 7 Martin Scheinin, ‘Indigenous peoples’ right to fish: recent recognition of Sámi rights in Finland through civil disobedience and criminal trial’, in Cambou and Ravna (n 2); Dorothee Cambou, ‘The significance of the *Fosen* decision for protecting the cultural rights of the Sámi Indigenous people in the green transition’ in Cambou and Ravna (n 2); Eivind Torp, ‘The interplay of politics and jurisprudence in the *Girjas* case’ in Cambou and Ravna (n 2).
- 8 Ravna (n 2).
- 9 Mattias Åhrén, ‘The relevance of the UN Declaration on the Rights of Indigenous Peoples to vibrant, viable and sustainable Sámi communities’ in Cambou and Ravna (n 2); Cambou (n 7); Torp (n 7).
- 10 Cambou (n 7); Ravna (n 2); Torp (n 7).
- 11 Åhrén (n 9); Cambou (n 7); Scheinin (n 7).
- 12 Tamara Krawchenko and Chris McDonald, ‘Rendering the invisible visible: Sámi rights and data governance’ in Cambou and Ravna (n 2). See also Peter Dawson, ‘A human-rights-based approach to Sámi statistics in Norway’, in Cambou and Ravna (n 2); Åmot and Bjerklund (n 4).
- 13 Åmot and Bjerklund (n 4).
- 14 Brännström (n 2); Cambou (n 7); Scheinin (n 7).

## 2 The relevance of the UN Declaration on the Rights of Indigenous Peoples to vibrant, viable and sustainable Sámi communities

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### 1. Introduction

Evidence suggest that domestic laws do not ensure vibrant, viable or sustainable Sámi communities. Indeed, rather than shielding Sámi communities from harmful inroads into their lands, national legislators may facilitate such. In *Rönnbäcken* (2020), the UN Committee on the Elimination of Racial Discrimination (CERD) held that Swedish mining and environmental legislation structurally discriminates Sámi reindeer-herding communities by not prohibiting but rather paving the way for mining activities causing unproportionate harm.<sup>1</sup> In *Girjas* (2020), the Swedish Supreme Court found that domestic legal sources on Sámi land and resource rights shall be interpreted so to as far as possible dovetail with international Indigenous rights. The court thus signalled a concern that by itself, domestic law does not meet international standards and fails to acknowledge and protect Sámi land and resource rights.<sup>2</sup> In *Fosen* (2021),<sup>3</sup> the Norwegian Supreme Court ruled the establishment of a wind power plant in a Sámi reindeer-herding community's traditional land unlawful as at odds with the International Covenant on Civil and Political Rights<sup>4</sup> (ICCPR) article 27. Had the ICCPR not been incorporated into domestic law,<sup>5</sup> and the court, therefore, only had recourse to 'purely' domestic legal sources, the wind power plant would have been held lawful. These examples suggest that vibrant, viable and sustainable Sámi communities rely on international Indigenous rights finding their way into the national legal systems. Domestic legislators seemingly cannot be trusted with this task.

The foregoing shows how international law entering the national legal systems is a prerequisite for thriving Sámi communities but also that such imprints are possible. Nordic courts are open to internationalisation and national law on Sámi rights to influences of international law.<sup>6</sup> Will and means are, however, not sufficient for such impregnation. Knowledge of the law is needed too. *Girjas* and *Fosen* could be precursors of a development to come but remain rare examples of international law impacting on domestic law. Assumingly, the inertia can in large part be ascribed to a lack of cognition of Indigenous rights, as distinct from capacity to cite isolated Indigenous rights sources or conjuring mythical creatures such as 'FPIC'.<sup>7</sup>

In an effort to shed light on how international Indigenous rights law can promote vibrant, viable and sustainable Sámi communities, the chapter aspires to

outline the basis of the Indigenous rights regime, assuming that the specific rights it contains are only properly understood against the backdrop of its fundament. For that purpose, the article identifies two tangled norms at the nucleus of that base. Both stem from who Indigenous peoples are—from their core traits. It is explained how Indigenous peoples are (legally) identified by an intrinsic connection to their historically used lands, and by having formed distinct societies on these, and elaborated how these *de facto* recognitions have prompted the further acknowledgement that Indigenous peoples then hold *legal* rights to such lands and societies. The chapter further explores how it follows from that Indigenous peoples' core rights derive from their core traits that a principal objective of the international Indigenous rights regime is to protect those traits, in other words to protect Indigenous peoples' distinctiveness. Put otherwise, a right to be different is at the regime's nucleus, aligning it with the aspect of the right to non-discrimination calling for differential treatment of those different. The chapter highlights how the international Indigenous rights regime first crystallised through an interplay with the deliberations on the UN Declaration on the Rights of Indigenous Peoples<sup>8</sup> (UNDRIP or the Declaration) and, following the UNDRIP's adoption, has continued to be influenced by it. As a consequence, both the regime's discussed fundament and the concrete rights which sprout from it are, first and foremost, manifested in the Declaration. It follows, the chapter submits, that those aspiring to understand and operationalise international Indigenous rights law in a Sámi context are well advised to consult the UNDRIP as a baseline. It concludes by pointing to what basic rights then appear, in support of Sámi communities seeking to remain vibrant, viable and sustainable.

## 2. Briefly on the UNDRIP's legal status

Identifying the UNDRIP as a keystone of the international Indigenous rights regime, one may pre-emptively strike at a likely counterargument. As a declaration adopted by the UN General Assembly (UNGA), the UNDRIP is not *in itself* legally binding. Those eager to point this out tend to overlook, however, that it does not follow that the same is true for *the rights the Declaration enshrines*. A couple of examples illustrate. The Universal Declaration on Human Rights<sup>9</sup> (UDHR), too, is a declaration adopted by the UNGA: It has the same legal status as the UNDRIP. Notwithstanding, it is generally agreed that essentially all the rights the UDHR reflects are binding upon states as customary international law.<sup>10</sup> Pursuant to UNDRIP article 2, 'Indigenous . . . individuals are . . . equal to all other . . . individuals and have the right to be free from . . . discrimination'. This right thus appears in a formally non-binding *instrument*. Obviously though, one cannot, based on that, infer that the *right* is not binding upon states and that these may treat Indigenous individuals as unequal human beings and discriminate against them.

Remarks that the UNDRIP is non-legally binding are thus formally correct but also factually uninteresting. What is legally relevant is whether *the rights* the Declaration enshrines are binding; not the legal status of *the instrument in which they appear*. Whether the rights the UNDRIP reflects are legally binding or not must in

turn, as the UDHR exemplifies, be established on a case-to-case basis, by resolving whether they form part of binding customary international law.

The following explains how the UNDRIP has interplayed (also as a draft) and continues to interplay with other international legal sources. The product is not seldom customary international norms. Hence, a substantial number of the rights the Declaration enshrines are legally binding upon states. As is also clear from the following, this is for natural reasons particularly true for those rights most immediately emanating from the fundament of the international Indigenous rights regime.<sup>11</sup> As indicated, the chapter returns to which those rights are. At this point is merely underlined that its assertion that the UNDRIP is at the axis of international Indigenous rights law is not dismissed by referring to its legal status. The rights which appear in the Declaration are not binding because of appearing there. Rather, the UNDRIP is the instrument through which customary international law on Indigenous rights binding upon states is most accessible. Conversely, the described interaction implies that the UNDRIP cannot be read in isolation. To ascribe UNDRIP provisions correct meanings, these must be apprehended in light of other international legal sources.<sup>12</sup>

### **3. The international legal framework**

#### **3.1 Classical law**

To understand what international Indigenous rights are at their core, a comparison with minority rights is helpful. International law confronted minorities and Indigenous peoples<sup>13</sup> at its infancy, when essentially a European affair. To the European states, Indigenous peoples (and other peoples in foreign continents) were groups *external* to Europe; populations they encountered in their colonial aspirations. Minorities, or more accurately members of groups in minority, were *internal* to the continent; individuals with certain traits different from those of the majority but ‘European’ nonetheless. The European states responded very differently to these ‘collectives’.

From the outset, international law embraced certain rights of members of certain minority groups.<sup>14</sup> Hence, not all smaller groups were considered ‘legal minorities’. The groups the European state law-makers identified as such were populations with certain religious, cultural and/or linguistic characteristics which separated them from the majority. This understanding in turn identified which rights the law bestowed on members of such minority groups. As minorities were distinct in terms of religion, culture and/or language, minority rights were rights of the members to practice their religion, exercise their culture and use their language.<sup>15</sup>

The European law-making states’ initial stance towards Indigenous peoples stemmed from an aspiration to legitimise placing them and their lands and resources under European hegemony.<sup>16</sup> International law was promulgated to that effect. It proclaimed Indigenous peoples’ *societal structures* insufficiently developed, structured and sophisticated to constitute states, thereby disqualifying Indigenous peoples from sovereign and other *political rights*.<sup>17</sup> It further declared their *land*

and natural resource uses underdeveloped too, barring them from *private rights*.<sup>18</sup> In short, the nature of Indigenous peoples' societal organisation and of their land and resource uses was invoked to proclaim them without rights, both political and private (and as lacking status as international legal subjects).

For the present purposes, classical international law's distinction between Indigenous peoples and minorities is of interest for two reasons. It is pertinent that the international *corpus juris* from its inception (1) viewed Indigenous peoples and minorities through different lenses and (2) derived both populations' rights (or lack thereof) from their respective traits. Minorities being marked by religious, cultural and/or linguistic characteristics prompted the conclusion that their members have the right to practice their religion, exercise their culture and use their language. For their part, Indigenous peoples' societal structures and land and resource uses caught the international law-makers' attention, but initially were utilised to deprive them of rights to both. International law's positions on Indigenous peoples and minorities got entrenched over time. They were hence essentially the same post-World War II as when emerging post-Westphalia.

### 3.2 *Contemporary law: a sui generis Indigenous rights regime*

Contemporary international law has essentially continued the minority rights of the classical period. It, too, thus understands 'minorities' in terms of religion, culture and language,<sup>19</sup> and identifies minority rights based on that definition, i.e. as rights of members of such groups to practice their religion, exercise their culture and use their language.<sup>20</sup>

At first, the contemporary international normative order also embraced classical international law's position on Indigenous peoples; i.e. it ignored them.<sup>21</sup> In the late 1970s, however, it commenced revisiting this stance. At this juncture, there were two basic options. International law could have treated Indigenous peoples as minorities. This would have entitled Indigenous individuals to minority rights but blocked the development of Indigenous rights—and indeed Indigenous peoples from emerging as legal peoples. This path was not pursued though. Instead, the UN and its member states embarked on elaborating a legal regime *sui generis* to Indigenous peoples. This development maintained international law's distinction between Indigenous peoples and minorities but placed the two rights regimes on very different trajectories.

International law continued to distinguish between Indigenous peoples and minorities also when incorporating the former group into the international normative order because it identified Indigenous rights through the same method it already identified minority rights. The Indigenous rights regime happened because Indigenous peoples were held to differ from minorities. And the perceived differences, i.e. Indigenous peoples' core *traits*, became the basis for Indigenous peoples' core *rights*. In other words, Indigenous rights derive from who Indigenous peoples *de facto* are (or at least were perceived to be [as minority rights derive from the understanding of minorities]).

#### **4. The fundamentals of the international Indigenous rights regime as manifested in the UNDRIP**

##### **4.1 *The making of the UNDRIP***

Authored during a decade around 1980, the ‘Cobo report’ heralded the emergence of an international Indigenous rights regime.<sup>22</sup> Consisting of a series of progress reports with sets of conclusions and recommendations, it profoundly impacted on how the regime unfolded.<sup>23</sup> Immediate recommendations were that the UN should adopt an Indigenous rights declaration, and establish a body within its human rights system solely focusing on the rights of Indigenous peoples. In response, the UN Working Group on Indigenous Populations (WGIP) was established, holding its inaugural session in 1982. As essentially its first action, it embarked on elaborating a draft UNDRIP. Following a decade of deliberations, the WGIP presented a draft UNDRIP in 1993.<sup>24</sup> Fourteen years of further negotiations ensued, whereafter the UNGA adopted the Declaration in 2007.

The making of the UNDRIP is significant. Common grounds and arguments emanating out of the UNDRIP deliberations influenced how international Indigenous rights took form, at the same time as these rights informed the UNDRIP process. This interplay was pivotal for how the Declaration unfolded and for the trajectory of the Indigenous rights regime in general.<sup>25</sup> As elaborated in the following, that the UNDRIP crystallised in this manner, coming to embrace the same or similar norms as other international legal sources, is the main reason that many of the rights the UNDRIP enshrines reflect customary international law binding upon states and that these can only be properly understood against the backdrop of international law in general.

##### **4.2 *Fundamentals of the international Indigenous rights regime: facts***

The international Indigenous rights regime taking shape following the Cobo report in parallel with the UNDRIP deliberations thus departed from who Indigenous peoples are. Two tangled core traits came to the fore. Indigenous peoples are (legally) populations whose cultures, ways of life (including traditional livelihoods) and ultimately very identities are inexorably and inalienably interwoven with their historically used lands and who have established distinct societies on such lands. These core traits were reflected in the earliest sources forming the Indigenous rights regime and have subsequently been affirmed and reaffirmed.

As to the first, the Cobo report includes a working definition of ‘Indigenous peoples’, still the by far most cited and used of its kind.<sup>26</sup> It identifies Indigenous peoples as populations marked by a resolve ‘to preserve, develop and transmit to future generations their ancestral territories, *and* their ethnic identity, as the basis of their continued existence as peoples’ [italics here].<sup>27</sup> The Cobo definition thus places on par preservation of identity *and* land, should Indigenous peoples be able to remain as distinct peoples. Loss of *either* precludes their continued being, it assumes. The Cobo report contextualises that it is critical to understand the profound and special

relation Indigenous peoples have with their lands, as a basis for their value systems, customs, traditions and cultures—and very existence as Indigenous peoples.<sup>28</sup>

Similarly, the first 1993 draft UNDRIP article 25 provided that

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters . . . and other resources which they have traditionally . . . occupied or used, and to uphold their responsibilities to future generations in this regard.

The drafting of the UNDRIP thus started from a perception of Indigenous peoples as populations marked by a unique and inalienable relationship with their historically used lands. (Only populations with such a tie can maintain and strengthen it.) ‘Spiritual’ should not be read literary. It encapsulates how Indigenous peoples and their lands are inseparable in an all-encompassing manner, including in terms of culture and identity.<sup>29</sup> Article 25 appears in the adopted UNDRIP essentially as in the 1993 draft. Save some editorial changes, the only difference is that the reference to ‘material’ has been deleted. To the extent this at all changes the meaning of the provision, it does so in ways not relevant here.

That Indigenous peoples’ cultures, ways of life and, ultimately, identities are inexorably and inalienably tied to their historically used lands thus entered the realm of the Indigenous rights regime from the outset. It has been consistently reiterated. By example, the UN Committee on Economic, Social and Cultural Rights (CESCR) has underscored that

Indigenous peoples’ . . . ancestral lands and their relationship with nature should be . . . protected, in order to prevent the degradation of their particular way of life, including their means of subsistence . . . and, ultimately, their cultural identity.<sup>30</sup>

For its part, the CERD has succinctly and pointedly observed that it is generally accepted that Indigenous land rights are unique in that the right identifies the holder.<sup>31</sup> The presence of a link between land and people thus engenders both the conclusion that the entity with the link is an Indigenous people and that the link shall (therefore) be protected by law. As a final illustration, reference can be made to the jurisprudence of the Inter-American Court on Human Rights (IACtHR). It has repeatedly underlined how Indigenous peoples are characterised by an inherent tie to their historically used lands. For instance, in *Sawhoyamaya*, the court pronounced that

[t]he culture of . . . indigenous communities reflects a particular way of life . . . the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because they form part of their . . . cultural identity.<sup>32</sup>

In short, Indigenous peoples ‘are indigenous because their ancestral roots are embedded in the lands’.<sup>33</sup>



The second core trait, that Indigenous peoples are populations who have established distinct societies on their historically used lands, saturates the Cobo report, albeit perhaps mostly implicitly so. By example, according to the Cobo definition, Indigenous peoples are populations marked by a determination ‘to preserve, develop and transmit to future generations their existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems’.<sup>34</sup> A natural presupposition for Indigenous peoples’ identified resolve to *preserve* societal features, such as cultural patterns, social institutions and legal systems, is that they *possess* such. The Cobo report further identifies self-determination as a ‘basic precondition for [Indigenous peoples] . . . determination of their own future’.<sup>35</sup> Similarly, associating self-determination with Indigenous peoples presumes a societal organisation capable of being self-determining.

That the authors of the 1993 draft UNDRIP understood the Declaration to pertain to populations organised through their own distinct societies is reflected throughout. Perhaps most explicitly, article 4 proclaimed that ‘Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal system’. As with the Cobo definition, embedded in the articulated right is the assumption that Indigenous peoples are populations with such features. Further, article 3 postulated that ‘Indigenous peoples have the right to self-determination’. Again implicit is the existence of societies which can be self-determining. Article 3 appears verbatim in the adopted UNDRIP. Article 4 (now 5) is essentially intact too. Beyond certain editorial changes, the only difference is that ‘institutions’ has replaced ‘characteristics’, rendering it more explicit that the provision refers to features of societies.

In sum, as with their attachment to land, Indigenous peoples entered the realm of international law based on an understanding that they are populations characterised by having rooted distinct societies in their historically used land. This trait too has been confirmed by a spectrum of subsequent international legal sources, in addition to by the adoption of the UNDRIP.<sup>36</sup>

#### **4.3 *Fundamentals of the international Indigenous rights regime: facts identify rights***

Establishing what factually distinguish Indigenous peoples carries no legal implications in itself, even if done by legal sources. However, it was clear from the outset that attendant to these *facts* (established by law) were *legal consequences*.

Following article 25’s observation that Indigenous peoples are de facto tied to their lands, 1993 draft UNDRIP article 26 proceeded to postulate that ‘Indigenous peoples have the right to own . . . and use the lands . . . they have traditionally owned or otherwise occupied or used’. Thus, coupled to the acknowledgment that Indigenous peoples are factually interwoven with their historically used lands was recognition that they are then also legally tied to these. Article 26 underwent certain changes and reconstructions during the final stages of the UNDRIP deliberations, but the cited language appears largely verbatim in the adopted article 26.2.



The outlined connection between facts and law is manifested in a large number of subsequent international legal sources (in addition to in the adopted UNDRIP). Reference can, *inter alia*, be made to the previously mentioned conclusions by the CERD and the CESC. The IACtHR, too, has repeatedly affirmed that Indigenous peoples' de facto ties to their lands entail that they hold rights to these. By example, in *Sawhoyamaxa*, the court underscored that 'the close ties . . . indigenous communities have with their traditional lands and the natural resources . . . must be secured under . . . the American Convention'.<sup>37</sup> The African Commission on Human and Peoples' Rights (AfCommHPR) has aligned itself with this conclusion, following a thorough examination of international legal sources relevant to the matter including, in addition to the IACtHR's and its own case law, jurisprudence from UN treaty bodies and the European Court on Human Rights (ECtHR).<sup>38</sup>

Also, the recognition that Indigenous peoples *have* distinct societies has been accompanied by acknowledgement that they then hold *rights* to these. Following the recognition that Indigenous peoples are marked by possessing their own societies (articles 3 and 4), the UNDRIP proceeds to provide that they have the right to 'maintain and strengthen' (article 5) and determine these (article 3). Several other international legal sources too affirm that attendant to Indigenous peoples *having* distinct societies is the *right* to preserve, develop and govern these.<sup>39</sup>

#### **4.4 *Fundaments of the international Indigenous rights regime: facts motivate protection of rights***

Recognition that Indigenous peoples' cultures, ways of life and ultimately very identities are tied to their historically used lands has not only engendered acknowledgement that they *hold* rights to the lands. An additional immediate corollary to this recognition of fact was an understanding that these rights shall *be legally protected*. The 1993 draft UNDRIP article 26 provided not only that Indigenous peoples hold rights to lands traditionally used but also that they have the right to 'control' (access to) such lands. This aspect of the provision too is retained in the adopted UNDRIP article 26. Thus, also the acknowledgement that Indigenous peoples' factual ties to their historically used lands requires that the right which follow from that link shall be protected entered the rubric of the international Indigenous rights regime essentially from its inception. And again, not only the subsequent adoption of UNDRIP article 26 but an array of additional international legal sources have subsequently confirmed the norm.

By example, in *Saramaka*, the IACtHR first recalled its earlier acknowledgement in, *inter alia*, *Sawhoyamaxa* that Indigenous communities hold rights to traditionally used lands because '[w]ithout them, the very . . . cultural survival of such peoples are at stake'. It then added that '[h]ence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people'.<sup>40</sup> The AfCommHPR has concurred with the IACtHR's conclusions, again based on an extensive analysis of relevant law.<sup>41</sup> Similarly, in *Rönnbäcken*, the CERD reiterated that Indigenous land rights are unique in that the subject matter protected constitutes central elements of the right-holders' cultural identities. This, the Committee

inferred, called for protection of the Sámi reindeer-herding community's right to land.<sup>42</sup> As a final example, CESCR affirmed that Indigenous peoples' identities are tied to their lands. It has added that this obligates states to 'take measures to . . . protect the rights of indigenous peoples to . . . control . . . their communal lands . . . and resources'.<sup>43</sup>

#### **4.5 *Fundamentals of the international Indigenous rights regime: summary***

The international Indigenous rights regime as manifested in the UNDRIP and confirmed by other sources of authority took shape based on recognition that certain core traits distinguish Indigenous peoples (from minorities). In particular, two tangled features were understood to characterise such peoples. First, their cultures, ways of life (including traditional livelihoods) and, ultimately, very identities are inexorably and inalienably interwoven with their historically used lands, waters and natural resources. Second, Indigenous peoples are marked by having established distinct societies on such lands. From these *de facto core traits* have been derived Indigenous peoples' *core rights*. Attendant to such peoples' factual tie to their traditionally used lands is that they hold rights to the lands, which shall be protected. That Indigenous peoples possess distinct societies is accompanied by rights to continuously preserve, develop and determine these.

#### **4.6 *A principal objective of the international Indigenous rights regime***

The international Indigenous rights regime having as point of departure what makes Indigenous peoples Indigenous peoples identifies its principal purpose. As Indigenous peoples core rights derive from their core traits, the regime must protect those distinct traits. Put differently, at the nucleus of international Indigenous rights law is a right of Indigenous peoples to remain different. This feature aligns it with the aspect of the right to non-discrimination which calls for differential treatment of those significantly different.

As conventionally understood, non-discrimination meant equal treatment of equal situations.<sup>44</sup> Differential treatment was allowed only as a means for elevating those different in the meaning 'less developed' to the same level as the population in general.<sup>45</sup> Subsequent developments have, however, furnished the right to non-discrimination with an additional understanding. First was acknowledged that differential treatment need not amount to discrimination, are there reasonable and objective reasons for differentiation.<sup>46</sup> But not only has differentiation been *allowed*. In *Thlimmenos* the ECtHR first recalled how it 'has so far considered the right to [non-discrimination] . . . violated when States treat differently persons in analogous situations'. It then proceeded to proclaim that 'it now considers that this is not the only facet of the [right]. The right not to be discriminated against . . . is also violated when States without an objective and reasonable justification fail to treat differently persons whose situation are significantly different'.<sup>47</sup> The court thus went beyond affirming that

not all differential treatment is discriminatory, postulating that failure to treat those differently who are in a significantly different situation *can in itself be* discriminatory, absent reasonable and objective justifications *not to* differentiate. Having reiterated this position in a few subsequent cases, the ECtHR recapitulated that there is discrimination if a state either (1) treats those in analogous situations differently or (2) in certain situations fails to treat those differently whose situations are significantly different.<sup>48</sup> Other human rights institutions have concurred. By example, the CERD has held that ‘[t]o treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same’.<sup>49</sup>

International judicial institutions have highlighted the relevance of this norm in Indigenous contexts. In *Rönnbäcken* the CERD recalled that to deprive Indigenous peoples of their lands constitute a particular form of discrimination targeting them<sup>50</sup> and is thus *prima facie* discriminatory. While the Committee added that this does not shield Indigenous lands from infringements of any sort, it underscored that not only do exceptions from the general rule require proportionality. The proportionality test must also be accustomed to Indigenous communities’ cultural background, as Indigenous property rights to land are unique in that they protect Indigenous communities’ cultural identities and ways of life. The Committee accentuated that states must avoid discrimination, not only in theory but also in practice. Therefore, resolving whether there is proportionality must not be done *in abstracto*. On the contrary, such assessments shall be based on who the property rights holder is, namely an Indigenous community.<sup>51</sup> In sum, assessing whether an inroad in an Indigenous community’s land is proportionate shall be conducted based on that damage to the community’s land is damage to its culture, way of life and very identity. As these are weighty values, the societal aim which motivates the infringement must assumingly be massive for it to be lawful. The IACtHR, too, has held that the right to non-discrimination involves a need for differential treatment when applied to Indigenous peoples,<sup>52</sup> as has the AfCommHPR.<sup>53</sup>

The UNDRIP manifests also this aspect of the international Indigenous rights regime. An affirmation in the preamble that ‘indigenous peoples are equal to all other peoples’ comes with a specifier that this embeds a right to be different and to be respected as such (paragraph 2). As human rights instruments in general, the Declaration’s operative part, including the non-discrimination provisions (articles 1 and 2), shall be understood in light of the preamble.

In sum, innate in the international Indigenous rights regime is a right of Indigenous peoples to remain distinct, with a corresponding duty on states to treat them differently so that they can preserve and develop those distinct core traits which make them, them. Here, the regime finds robust support in the aspect of the right to non-discrimination which calls on states to in certain situations treat those differently who are significantly different. As mentioned, Indigenous peoples are not only significantly but singularly different. They must be said to epitomise those ‘certain situations’ which call for differentiation.

#### 4.7 Conclusions

International law never viewed Indigenous peoples and minorities through the same lenses. As it derives both collectives' core rights from their (identified) respective core traits, the minority rights and Indigenous rights regimes have taken very different trajectories. The former targets individuals *within* the majority society. At its nucleus, the latter bestows Indigenous groups, and by extension their members, with rights to exist *in parallel with* the same.

The Indigenous peoples' core traits from which their core rights derive are that their cultures, ways of life and, ultimately, very identities are inexorably and inalienably interwoven with their historically used lands and that they have established distinct societies on these lands. Being de facto tied to their lands, Indigenous peoples are also legally bound to the same, a link which is protected from severance. Having distinct societies, Indigenous peoples also have the right to preserve, develop and govern these. Corresponding to these core rights, a principal purpose of the Indigenous rights regime is to allow Indigenous peoples to preserve and develop their distinctiveness; the core traits which make them them. This feature of the regime aligns it with the part of non-discrimination law which calls for differential treatment of those significantly different. The two legal frameworks in chorus require states to treat Indigenous peoples as Indigenous peoples, allowing them to remain as distinct peoples, through preserving and developing their distinct societies, cultures, ways of life (including traditional livelihoods and other land and resource uses) and, ultimately, distinct identities.

This is the fundament of the international Indigenous rights regime. It was blue-printed in the very first documents to map out the regime, including the 1993 draft UNDRIP, and has subsequently entered the realm of law. This international law-making in large part occurred first through an interplay between the draft UNDRIP deliberations and other processes and institutions and, following the adoption of the Declaration, through the UNDRIP serving as a benchmark for or at least inspiring such processes and institutions.<sup>54</sup> Due to these interactions, the fundament of the Indigenous rights regime and the rights which sprout from it are first and foremost enshrined in the UNDRIP, as reflected in its preambular paragraph 7. It identifies an

urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.

As the layout for the fundament of the Indigenous rights regime appeared immediately and then served as the keystone upon which the regime was built, it is only natural that there is broad agreement that it forms part of customary international law.<sup>55</sup> Indeed, one can hardly talk about an international Indigenous rights regime absent this base. Concrete Indigenous rights can only be fully and properly grasped if understood against the backdrop of this fundament and must be realised in ways loyal to and supportive of it.

It may assist this understanding if mindful of that the law being a coloniser's weapon for centuries does not evidence an eternal condition. While, under classical international law, Indigenous peoples' unique ways of using lands and organising their societies barred them from their rights, under contemporary law the same qualities qualify them for such. It is precisely Indigenous peoples' unique relationship with the land which has engendered recognition that they hold private rights to these. And the resilience of their unique societies has granted them status as peoples with (political) rights as such. In short, international law has transcended from an instrument of colonialism to a supporter of Indigenous claims for equal rights to land and self-determination.<sup>56</sup> A *sui generis* international Indigenous rights law has antiqued colonial law.

### **5. Conclusions: the relevance of international Indigenous rights as manifested in the UNDRIP to vibrant, viable and sustainable Sámi communities**

If allowed to impregnate the domestic legal systems, the rights springing from the fundament of the international Indigenous rights regime as manifested in the UNDRIP can be tools for Sámi communities who wish to remain vibrant, viable and sustainable. In particular, such rights entitle Sámi communities to control their lands, deciding who enters these and for what purposes. Put differently, the rights, both private and public, bestow Sámi communities with autonomy.

The UNDRIP reiterates that Indigenous communities hold property rights to lands, waters and natural resources historically and traditionally used, exclusive or shared, depending on the circumstances (article 26.2). The right to differential treatment prescribes that the use which has established these rights is that which follows from the Sámi culture and tradition. If a Sámi community has used land in accordance with that culture and tradition, a property right has been established. Domestic law is not allowed to prescribe that the community has used land in other manners (e.g. such common to the majority culture) for property rights to materialise.

The differential treatment requirement applies also to domestic rules of evidence and similar norms. These, too, must be accustomed to Sámi communities' cultural background. This entails, *inter alia*, that the presence of a Sámi cultural landscape in the environment evidences historic use (also when only visible to an initiated eye) (compare article 27).

The UNDRIP confirms that Indigenous communities not only hold property rights to lands, waters and natural resources historically and traditionally used but are also entitled to have such rights protected (article 26.2). This side of the right to property also recruits its reach from the right to be different and to differential treatment. This entails, *inter alia*, that the proportionality test innate to the right to property shall be accustomed to a Sámi community's cultural background. Consequently, when resolving whether an inroad in such a community's land is proportionate, the damage the infringement would cause an anonymous property rights holder is of no import. Legally relevant is the damage the infringement would

cause the Sámi community *because it is a Sámi community*, i.e. the damage it would cause to the community's culturally based land uses, such as reindeer husbandry, and to the land as a basis for such.<sup>57</sup> Since, under international law, a Sámi community's land and traditional land uses are inseparable from its identity, few infringements of scale assumingly meet this proportionality test. Monetary compensation does not achieve proportionality with respect to Sámi communities in ways it does in non-Sámi contexts. Absent proportionality, the infringement may only proceed with the Sámi community's consent. The outlined norm applies irrespective of whether inroads take the form of resource extraction, other industrial activities, infrastructure, residential or recreational settlements, tourism, military activities, presence of predators due to state action, or other. Such is the scope of Sámi communities' private autonomy.

The UNDRIP reflects that the Sámi people, as a people, is bestowed with the right to self-determination, encompassing an entitlement to freely pursue its economic, social and cultural development (article 3). Sámi communities may realise this right at the local level. While the ramifications of the right to self-determination when exercised by Indigenous peoples remain largely untested, the principle of equality between peoples provides that it attaches equally to the Sámi and Fennoscandinavian peoples (article 2, preambular paragraph 2). The *right* to self-determination may be operationalised through different *processes*. Of these, self-governance/autonomy (as distinct from consultation) is expected to be the process of choice among Indigenous peoples (including the Sámi) (article 4). Hence, Sámi communities may be self-determining and autonomous at the local level, the ambit of which must be resolved taking the principle of equality between peoples into account. This political autonomy compliments the private autonomy Sámi communities enjoy based on the right to property. The former should also allow Sámi communities to shape their local societies, economically, socially and culturally, so to remain vibrant, viable and sustainable.

## Notes

- 1 *Lars-Anders Ågren and others v Sweden (Rönnbäcken)* (Communication No 54/2013) UN Doc CERD/C/102/D/54/2013 (CERD 26 November 2020).
- 2 Supreme Court of Sweden, NJA 2020 s 3 (Girjas) ss 131, 134, 147, 162. See also Eivind Torp, 'The Interplay of Politics and Jurisprudence in the Girjas Court Case' in Dorothee Cambou and Øyvind Ravna (eds), *The Significance of Sámi Rights: Law, Justice, and Sustainability for the Indigenous Sámi in the Nordic Countries* (Routledge 2024).
- 3 Supreme Court of Norway, HR-2021-1975-S (Fosen). See also Dorothee Cambou, 'The Fosen decision and its significance for protecting the cultural rights of the Sámi Indigenous people in the green transition' in Cambou and Ravna (n 2).
- 4 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
- 5 Menneskerettsloven (LOV-1999-05-21-30), § 2.
- 6 Mattias Åhrén, 'Rättigheternas renässans och samiska markanvändares egendomsrättigheter till Land' (2018) 2 Rettferd—Nordisk juridisk tidskrift 160.
- 7 Mattias Åhrén, 'Indigenous Resource Rights at Their Core (and What These Are Not)' in Dwight Newman (ed), *Research Handbook on the International Law of Indigenous Rights* (Edward Elgar 2022).



- 8 United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA A/RES/61/295.
- 9 Universal Declaration on Human Rights (adopted 10 December 1948) UNGA A/RES/217 A.
- 10 See, e.g., Louis Henkin, *The Age of Rights* (Columbia UP 1990) 19; Sir Nigel Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court' (1989) 38 *International and Comparative Law Quarterly* 333; Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995–6) 25 *Georgia Journal of International and Comparative Law* 287.
- 11 Here it cannot be explained in any detail how customary international legal norms are formed. It is only pointed out that two elements are needed. States must *objectively* act in a concerted manner (*usus*) and do so under the *subjective* impression that they are legally obligated to act accordingly (*opinio juris*). States' 'acts' are not only those occurring in the 'real world'. On the contrary, states most frequently form customary norms through their voting and other actions in the UNGA and other international fora. Such state actions and expressions of will can significantly contribute to that rights expressed in formally non-legally binding instruments become binding law. See, e.g., Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007); Olivier De Schutter, *International Human Rights Law* (3rd edn, CUP 2019) ch 4; Brian D Lepard, *Customary International Law* (CUP 2010); and, for a more theoretical approach, Martti Koskenniemi, *From Apology to Utopia* (CUP 2005).
- 12 cf. UN Human Rights Resolution A/HRC/RES/48/11 (15 October 2021), preambular para 3, and, generally, Lepard (n 11) 8.
- 13 It is of course anachronistic to refer to Indigenous populations as 'Indigenous peoples' before the concept legally existed. For simplicity, the article does so nonetheless.
- 14 These rights did not make up a coherent minority rights system. Rather, their bases were singular treaties between a few, almost always two, states, although already the Treaty of Westphalia included certain protections of members of religious minorities. See Francesco Capotorti, UN Special Rapporteur, 'Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' (1979) UN Doc E/CN.4/Sub2/384/REV 1, paras 5, 7–15; Khenikor Lamarr, 'Jurisprudence of Minority Rights: The Changing Contours of Minority Rights' (2018) 8th *International Research Association for Interdisciplinary Studies* 166–68.
- 15 David Wippman, 'The Evolution and Implementation of Minority Rights' (1997) 66 *Fordham Law Review* 597, 600; Patrick Macklem, 'Minority Rights in International Law' (2008) 6(3–4) *International Journal of Constitutional Law* Issue 547; Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities (n 14) 14.
- 16 Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (OUP 2016) 9–12 with references; Will Kymlicka, 'Beyond the Indigenous/Minority Dichotomy' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 183; Margaret Davies, *Property: Meanings, History, Theories* (Routledge-Cavendish 2007) 86.
- 17 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 34; Martti Koskenniemi, *The Gentle Civilizers of Nations* (CUP 2002).
- 18 Liliana Obregón Tarazona, 'The Civilized and the Uncivilized' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 2, 7; James Tully, *Strange Multiplicity: Constitutionalism in the Age of Diversity* (CUP 1995) 72.
- 19 For example, according to the UN special rapporteur on minority issues, minorities are 'ethnic, religious or linguistic . . . group[s] . . . that constitute less than half of the population . . . of a State whose members share common characteristics of culture, religion or

- language, or any combination of these'. See UNCHR, 'Report of the Special Rapporteur on Minority Issues: Education, Language and the Human Rights of Minorities' (2020) UN Doc A/HRC/43/47, 70.
- 20 Contemporary international law adds that the right to non-discrimination attaches to members of minorities and also provides them with certain participatory rights. See, e.g., the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted 18 December 1992) UNGA RES/61/295, in particular arts 2.1, 2.3, 3, 4.1.
  - 21 ILO Convention No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (adopted 26 June 1957, entered into force 2 June 1959) does not impact on this conclusion, as this instrument essentially aspired to integrate members of Indigenous populations into the majority society. See, generally, Luis Rodríguez-Pinero, *Indigenous Peoples, Postcolonialism and International Law* (OUP 2005).
  - 22 José R Martínez Cobo, UN Special Rapporteur, 'Study on the Problem of Discrimination Against Indigenous Populations, Conclusions, Proposals and Recommendations' (1986–7) UN Doc E/CN4/Sub2/1986/7/Add1–4 (*The Cobo Report*).
  - 23 See, e.g., James Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 62–63; Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (Routledge 2016) 5–6.
  - 24 'Report of the Working Group on Indigenous Populations on Its 11th Session' (26 August 1994) UN Doc E/CN4/Sub.2/1993/29/Annex I.
  - 25 Allen and Xanthaki (n 16) chs 1–3, 11–20 with references; Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (OUP 2016) chs 5–9.
  - 26 See, e.g., Barelli (n 23) 5; Patrick Macklem, *The Sovereignty of Human Rights* (OUP 2015) 152–53.
  - 27 *The Cobo Report* (n 22), 'paras 379–80.
  - 28 *ibid*.
  - 29 See, e.g., Claire Charters, 'Indigenous Peoples' Rights to Lands, Territories, and Resources in the UNDRIP' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 410–11.
  - 30 CESCR, 'General Comment No 21, Right of Everyone to Take Part in Cultural Life (art 15, Para 1a of the Covenant on Economic, Social and Cultural Rights)' (21 December 2009) UN Doc E/C.12/GC/21, para 36.
  - 31 CERD, 'Decision 2 (54) on Australia' (18 March 1999) UN Doc A/54/18, paras 4–7.
  - 32 *Sawhoyamaya Indigenous Community v Paraguay* (Merits, Reparations and Costs) Inter-American Court on Human Rights Series C No 146 (29 March 2006) para 118.
  - 33 Anaya (n 23) 3.
  - 34 *The Cobo Report* (n 22).
  - 35 *ibid* para 269; José R Martínez Cobo, UN Special Rapporteur, 'Final Report (Last Part) Submitted by the Special Rapporteur' (1983) UN Doc E/CN4/Sub2/1983/21/Add8, para 580.
  - 36 See, e.g., UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Canada' (7 April 1999) UN Doc CCPR/C/79/Add/105, 8; UN Human Rights Committee, 'Report of the Human Rights Committee' (2000) UN Doc A/55/40, paras 498–528; CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation' (12 December 2003) UN Doc E/C12/1/Add94, paras 11, 39; CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname' (13 March 2009) UN Doc CERD/C/SUR/CO/12, para 18. Also, Martin Scheinin, 'Indigenous Peoples Rights Under the International Covenant on Civil and Political Rights' in Joshua Castellino and Niamh



- Walsh (eds), *International Law and Indigenous Peoples* (Martinus Nijhoff Publishers 2005) 3, 10–11; Thornberry (n 16) 334–36; Federico Lenziirini, ‘The Trail of Broken Dreams: The Status of Indigenous Peoples in International Law’ in Federico Lenziirini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (OUP 2008) 73–116.
- 37 *Sawhoyamaxa* (n 32) para 118.
- 38 *Endorois Welfare Council v Kenya*, 276/03 (2009) paras 185–238.
- 39 See, e.g., Will Kymlicka, *Multicultural Odysseys—Navigating the New International Politics of Diversity* (OUP 2007) 31, 272–93; Macklem (n 26) 208; Marc Weller, ‘Self-Determination of Indigenous Peoples’ in Hohmann and Weller (n 29) with references; Åhrén (n 25) chs 5–6 with references.
- 40 *Case of the Saramaka People v Suriname* (Judgment) Inter-American Court on Human Rights Series C No 172 (28 November 2007) para 121.
- 41 *Endorois* (n 38) paras 185–238.
- 42 *Rönnbäcken* (n 1) para 6.14.
- 43 CESCR (n 30) para 36.
- 44 See, Francesco Capotorti, UN Special Rapporteur, ‘Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities’ (1979) UN Doc E/CN.4/Sub2/384/REV 1, para 241.
- 45 See, e.g., the wording of the International Convention on the Elimination of all Forms of Racial Discrimination (adopted on 21 December 1965, entered into force on 4 January 1969) UNTS 660 arts 1.4 and 2.2 and of the ICCPR arts 2 and 26. Also, Patrick Thornberry, *International Law and the Rights of Minorities* (OUP 1993) 266–68; Bertrand G Ramcharan, ‘Equality and Non-Discrimination’ in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia UP 1981) 259–61.
- 46 For an extensive overview of the described development, see Timo Makkonen, *Equality in Law, Unequal in Fact: Racial and Ethnic Discrimination and the Legal Response Theories in Europe* (Martinus Nijhoff Publishers 2011) ch 6.
- 47 *Thlimmenos v Greece* App no 34369/97 (ECHR, 6 April 2000) para 44.
- 48 *Taddeucci and McCall v Italy* App no 51362/09 (ECHR, 30 June 2016) para 81. The right to differential treatment is hence now well-established ECtHR jurisprudence. See, e.g., Pieter Van Dijk and others, *Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia 2018) 1004–5.
- 49 CERD, ‘General Recommendation No 32, The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination’ (24 September 2009) UN Doc CERD/C/GC/32, para 8; Thornberry (n 16) 133.
- 50 cf. CERD, ‘General Recommendation No 23 Indigenous Peoples’ (18 August 1997) UN Doc A/52/18 Annex V, para 3.
- 51 *Rönnbäcken* (n 1) paras 6.7, 6.10, 6.13, 6.14, 6.20.
- 52 *Saramaka* (n 40) para 103.
- 53 *Endorois* (n 38) para 196.
- 54 See Hohmann and Weller (n 29) with references.
- 55 See, e.g., Committee of the Implementation of the Rights of Indigenous Peoples, ‘Final Report’ in International Law Association Report of the Seventy-Ninth Conference (Kyoto 2020) 4, 11, 12; Committee of Rights of Indigenous Peoples ‘Interim Report’ in the International Law Association Report of the Seventy-Fourth Conference (The Hague 2010) 8, 15, 22, 23, 38; Hohmann and Weller (n 29); Anaya (n 23) 141–48; Barelli (n 23) 29, 53; Charters (n 29) 397, 410–14; Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (CUP 2007) pt II; Siegfried Wiessner, ‘The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges’ (2011) 22(1) *The European Journal of International*

Law; Mattias Åhrén, 'Recognition of Indigenous Peoples' Rights to Lands, Territories and Resources' in *State of the World's Indigenous Peoples* (5th vol, UN Department of Economic and Social Affairs 2021).

56 cf. Anaya (n 23) 4.

57 cf. *Rönnbäcken* (n 1). Here, the CERD held that a mine in a Sámi reindeer-herding community's traditional land did not meet the proportionality test and was hence unlawful as at odds with the right to property.

# 3 The survey of property rights in Sámi areas of Norway—with focus on the *Karasjok* case

*Øyvind Ravna*

## 1. Introduction<sup>1</sup>

On 11 December 2019, the Finnmark Commission presented the first of two partial reports for the outlying fields in Karasjok Municipality,<sup>2</sup> a municipality with a majority of Sámi inhabitants, situated in the Inner parts of Finnmark. In this report, which chronologically is the commission's sixth, the Commission concludes that the people of Karasjok own the former assumed state land in the municipality.

The purpose of this chapter is to examine the Karasjok report, to see how the Commission anchors its findings, which significantly contradicts the five previous ones, not only because the commission for the first time concludes that the inhabitants in an investigation field collectively own the land but also because the state's previous activities as assumed landowner are assessed differently from the previous reports. The purpose is also to assess how the findings meet the requirements of international law, particularly ILO Convention No. 169 on Indigenous and tribal peoples<sup>3</sup> and thus whether they are suitable to fulfil Norway's international obligations towards the Sámi. As both property rights and the right to enjoy the culture of a people are important human rights, the chapter will reveal how Norway relates to its human rights obligations and sustainable development in this area.

The reindeer husbandry rights are not a controversial topic in the first partial report of the Karasjok field. As in previous reports, the Commission concludes, on the basis of immemorial usage, that there is a general reindeer husbandry right established within the field of Karasjok that will not be affected by changes in land ownership.<sup>4</sup> The assessment of internal reindeer husbandry rights is recently presented in the second partial report on the Karasjok Field.<sup>5</sup> Reindeer husbandry rights is therefore not a topic for this chapter.

The legal sources for this analysis will primarily be the Finnmark Act, its preparatory work including the reports of the Sámi Rights committee, as well as relevant case law and international law, such as ILO Convention No. 169. The empirical material of the study is the reports of the Finnmark Commission.

## 2. The background of the judicial survey of Finnmark and the *Karasjok* case

The judicial survey of land rights in Finnmark, as well as the Finnmark Act itself, are results of the political development and cognitions that originated during the *Alta* case.<sup>6</sup> The case encouraged the government to appoint the *Sámi Rights Committee* in 1980.<sup>7</sup> During the next two decades, the Committee proposed several measures to safeguard Sámi language, culture and way of life, including a Sámi Parliament and a constitutional amendment. The next step for the Committee was to discuss the right to land and natural resources, including a draft land act for Finnmark.<sup>8</sup> The draft meant that the state-owned land in Finnmark, which was found to be unlawful, should be transferred to an independent body, owned and governed by people in Finnmark. The Sámi Parliament and Finnmark County Council were to appoint an equal number of representatives to the board of the body. A survey of land rights was, however, not part of this proposal.

At the same time as the Sámi Rights Committee developed a new governance model for the state-owned land in Finnmark, the Norwegian Parliament ratified ILO Convention No. 169 (ILO 169). The ratification meant that Norway was legally bound to recognise the rights of ownership and possession of the Sámi over the lands which they traditionally occupy, cf. article 14 (1), to take necessary steps to identify the lands which the Sámi traditionally occupies, and to guarantee effective legal protection of such lands, cf. article 14 (2) and (3).

The ratification of ILO 169 was not, as other measures adopted to safeguard Sámi culture, based on proposals of the Sámi Rights Committee. The Committee considered, however, that Norway would meet the requirements on rights of ownership and possession of the Sámi over the lands which they traditionally occupy, without dividing the county into a specific Indigenous area. Based on an opinion that the inner parts of Finnmark, including Karasjok, were traditionally Sámi areas, while the coastal areas were mainly Norwegian,<sup>9</sup> the Committee meant the obligations of the ILO 169 could be met without dividing Finnmark if the Sámi gave up 50% of their property rights of inner Finnmark in exchange for a corresponding right of shared control over coastal Finnmark. Consequently, a joint ownership body (the Finnmark Land Administration) was proposed with equal board representation of the Sámi Parliament and the County Council of Finnmark.<sup>10</sup>

In addition, the Sámi Rights Committee proposed a locally based outlying field management board to meet the requirements of the local inhabitants' impact on the use of their natural goods.<sup>11</sup> The governance of usufruct rights would then be transferred to local communities, while property rights would be controlled by the Finnmark Land Administration. This meant that usufruct rights in the Sámi municipalities were governed locally by the Sámi, while ownership rights were governed jointly by the people of Finnmark. The Sámi Rights Committee assumed that the arrangement then complied with the requirements set out in Article 14 (1) first sentence of ILO Convention No. 169.<sup>12</sup>

When the Finnmark Act came into force on 1 July 2006, the lands held by the State Forest Company, were transferred to the Finnmark Land Administration, now under the name *Finnmark Estate* (FeFo). FeFo was in the same act defined as an independent legal entity where the Sámi Parliament and Finnmark County Council each appoint three of six board members, cf. sections 6 and 7.

Significant parts of the Sámi Rights Committee's proposal were not continued by the government in its draft Finnmark Act. This included, among others, the local governing bodies. The Sámi Parliament did not accept the draft act due to shortcomings in international law.<sup>13</sup> To strengthen the loyalty to the ILO 169, a judicial commission to identify existing rights in Finnmark was established after consultations. The locally based outfield management board with possibilities to establish local commons was, however, not included in the act. From the Sámi Parliament, it was understood that areas for local governance would be revealed as part of the judicial survey.<sup>14</sup>

The task of the judicial survey was assigned to the Finnmark Commission, which was mandated to investigate rights to land and water in Finnmark in order to 'establish the scope and content of the rights held by Sámi and other people on the basis of prescription or immemorial usage or on some other basis', cf. section 5, para. 3. The mandate is anchored in ILO 169, which is sector-monistic incorporated in section 3 of the act, which reads:

The Act shall apply with the limitations that follow from ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. The Act shall be applied in compliance with the provisions of international law concerning indigenous peoples and minorities and with the provisions of agreements with foreign states concerning fishing in transboundary watercourses.<sup>15</sup>

The Supreme Court of Norway has in the *Stjernøya* case nonetheless concluded that the incorporation of ILO 169 is limited to precede the provisions of the Finnmark Act only, which means that ILO 169 'does not regulate the substantive rules on which the rights are to be clarified on the basis of'.<sup>16</sup> In other words, ILO 169 does not precede the rules to be used to clarify the land rights on the Finnmark Estate.<sup>17</sup>

The five reports that the Finnmark Commission has completed up to December 2019 have all concluded that Finnmark Estate (FeFo) in general owns all the land areas covered by the investigations. In 2011, the Finnmark Commission selected Karasjok as investigation field no. 4. Karasjok is in the core Sámi area, which until 1751 was under Swedish jurisdiction. After almost nine years of investigations, the Commission concluded that people living in the municipality owned the land which in 2006 was transferred from the state to the Finnmark Estate. This investigation will be the subject of the further analysis in this chapter.

### **3. The Finnmark Commission's report for field 4 Karasjok**

#### ***3.1 People in the field of study have collective property rights***

The first partial report for field 4 *Karasjok* was, as already mentioned, presented on 11 December 2019. That is more than four years after the previous report,

Field 6 *Varangerhalvøya vest*, was issued. During this period the Commission has done a significant amount of work. This is not only shown by the fact that the report counts as many as 676 pages in two volumes but also evidenced by the length of the investigation, which took almost nine years. In comparison, the five previous investigations were all together completed in less than seven years.

The report concludes that people in the municipality of Karasjok are owners in common of the land, which in 2006 was transferred from Statskog SF to the Finnmark Estate. This is the first time the Commission concludes that a group of people in Finnmark enjoys collective property rights to their traditional natural resource areas.

As in previous reports, the Commission refers to the *Svartskog* case, where a local community won property rights to an outlying area in a dispute with the state. In that case, the Supreme Court describes the use in the disputed area as ‘characterized by continuity, that it has been all-encompassing, intensive and flexible’.<sup>18</sup> The Commission assumes that this is also the situation in Karasjok. It means that the requirement for use and duration for the acquisition of property rights, was met. As in previous reports, the Commission states that the question of whether the people have collective ownership to an area, depends not only on the people’s use (according to the requirements of the concept of immemorial usage), but also on the use of others and the State’s actions.

However, in contrast to previous reports, the Commission concludes unanimously that the people in the area, for many hundreds of years, have used and possessed the natural resources in a way that essentially corresponds to having collective property rights.<sup>19</sup> The question is thus not whether the people have acquired property rights through immemorial usage. Instead, it is a question of whether the established rights are extinguished, so that the state’s alleged ownership in the years from 1751 to 1980 has become a settled legal situation.

Furthermore, it is considered whether the local use had a basis in a legal opinion that corresponds to collective property rights, and in addition, it must be considered what significance the state’s activities have for the current legal situation. In other words, whether the activities have affected the local legal opinions in a way that has led to the original rights having changed in character or disappeared.

### **3.2 *The emphasis on the previous state activities***

The Karasjok report differs significantly from previous reports in terms of emphasising the state’s dispositions. In discussing these, the Finnmark Commission first shows that the UN special rapporteur on the rights of Indigenous peoples, Victoria Tauli-Corpuz, has been critical to the Commission’s conclusions weight on the state’s disposition of land and resources.<sup>20</sup> After a review of Norwegian case law, and in particular the case of HR-2018-456-P (*Nesseby*), where the Supreme Court places considerable emphasis on the state’s dispositions, the Commission finds that such dispositions must be included in the assessment in ‘an ordinary way’.<sup>21</sup> More specifically, ‘a broad assessment must be made where “the local population’s actions and opinions” are held up against the State’s (and others’) dispositions’.

With such a starting point, the Commission assesses the state's dispositions in Field 4.

A unanimous commission initially states that the historical sources show that the state to a small extent has acted as an owner over land and resources in the area until the end of the 19th century. The Commission finds that the surveying of property parcels that took place, the oldest dating back to 1811–1814 when ten parcels were measured and registered, were formalisations of established use.<sup>22</sup> There are good reasons to believe that this is a correct assessment, partly because it is supported by other recent research which have shown that the land resolution of 1775, was a land subdivision and registration act rather than an act that allowed the King's land to be given for free to people in Finnmark.<sup>23</sup>

At the same time, the assessment of the Commission deviates significantly from how the Commission has previously assessed such dispositions.

A significant number of properties were surveyed out of presumably state land after the *Land Sales Act of 1863* came into force.<sup>24</sup> After a review of these, the Commission assumes that this is mainly a survey and registration of already existing parcels<sup>25</sup> and thus not an expression of state ownership. It then assesses the period 1902 to 1965, which is the period where the next land sales act (1902), was in force. During this period, 771 plots of private properties were established in Karasjok,<sup>26</sup> which, according to the Commission, shows that the state's disposition of land and resources in Karasjok increased considerably after 1902.<sup>27</sup>

The state's exercises over land that has not been surveyed and sold to individuals, however, was modest. Although the state, until 1945, leased out relatively many outlying hayfields, some of these leases were formalisations of established use. Beyond that, the state has only made a few more typical private law dispositions of the unsold land in Karasjok.<sup>28</sup>

Thereafter, the Commission discusses the *opinio juris* that local people may have had. Here, too, reference is made to the *Svartskog* case, where it was not decisive that 14 persons in 1921 had entered into agreements with the state on hayfield leases, as it could not be

considered as evidence that these persons accepted that they were without rights in Svartskogen. The reason may as well be that they more easily than others accepted a demand from the authorities, or that they saw advantages in being assigned a specific plot.<sup>29</sup>

Nor was it decisive that five individuals had entered into such agreements in 1928 or that contracts for logging and hay-cutting were made between individuals and the state in the 1940s.<sup>30</sup>

The Finnmark Commission then assumes that also in Karasjok, someone may have considered it advantageous to have their ongoing usufruct rights formalised or to be allocated as a separate plot of land or hay field. In this respect, the Commission places significant emphasis on case law expressed in the *Svartskog* case. The opinion that the state's landowner actions have been of a modest scope, and

the way in which the local people's legal opinions have been assessed, differs significantly from previous investigations.<sup>31</sup>

Furthermore, the Commission discusses the uncertainty associated with the fact that the disposals were originally considered to have a basis in the king's property rights. According to older Norwegian common land law, the king was not the 'sole owner' of the commons but the rights holder together with other use rights holders.<sup>32</sup> Based on this, the Commission finds that disposals of the commons did not necessarily take place by virtue of a property right but were the result of a right of governance, based on a royal privilege.<sup>33</sup>

The Commission further states that 'the State dispositions over the unsold land in Karasjok were modest in content and scope and may therefore have been understood within the framework of such a privilege idea'.<sup>34</sup> Furthermore, the Commission states that in recent times, doubts have been raised about the state's ownership to parts of the land in Finnmark, such as when the mandate of the Sámi Right Committee was formulated in 1980, as well as in the preparatory work for the Finnmark Act, which states that at least 'parts of Inner Finnmark' are areas to which 'the Sámi are entitled to ownership and possession rights'.<sup>35</sup>

In an overall assessment, as mentioned by the Commission, the state's dispositions must also be held up against the local people's use and dispositions. The Commission refers here to the fact that the people of Karasjok throughout the period after 1751 have exercised a widespread, intensive and versatile use of the local outfield resources:

This use corresponds in content and scope to the use that the holder of a collective ownership right of the relevant areas will have exercised. It also appears that the population has exercised a significant degree of self-management with the utilization of resources, in that various internal distribution schemes have been in place, among other things for hayfields, cloudberry-picking and fishing lakes.<sup>36</sup>

The Commission then finds that the land use of the people of Karasjok has been dominant until the first decades after World War II: 'During this period, the population, with the exception of the use of the forest [for logging], also exercised significant control over local resource utilization'.<sup>37</sup> Reference is then made to the *Svartskog* case, where the court-appointed experts stated that Svartskogen had a status as commons for all residents in Manndalen and which people have mainly managed on their own: 'The way this has happened, without any formal governance, and with extensive and very active use, is rare elsewhere in the country'.<sup>38</sup> The Commission then states,

The population of Karasjok has at least previously managed the local resource utilization in a comparable way. Although the State gradually became established and the population has complied with the State's dispositions, local use still has a significant scope.<sup>39</sup>



Furthermore, the Commission mentions that the inhabitants did not have Norwegian as their mother tongue. It means that a large part of the people at the time did not speak Norwegian well, which must be emphasised in the assessment. Therefore, as in the Svartskog case, it must be taken into account that misunderstandings could arise in communication between Norwegians and Sámi:

It can therefore not be considered decisive that the Karasjok population has applied for purchase or lease of land in accordance with the various land sales acts or entered into other contracts with the State. This is not necessarily an acceptance of the State's land ownership. It may rather have been a consequence of the fact that a precondition for farming, was to apply for the purchase or lease of land.<sup>40</sup>

The Commission then points out, with the exception of forest resources, that the use, to a small extent only, has been subject to state regulations beyond what is based on public law regulatory legislation on utilisation times and tool use. After this, it cannot be assumed that the Karasjok people's lack of protests against the state's dispositions have had the character of law-extinguishing passivity.<sup>41</sup>

The Commission assesses the situation differently when it comes to the state's commercial forestry. Linguistic and other factors may, however, have contributed to the fact that dissatisfaction with the forestry administration has not been expressed, at the same time as forestry alone cannot provide a basis for the acquisition of property rights. Emphasising that the state's dispositions of land and resources in Karasjok, except for the period from 1902 and 1965, had a relatively limited scope, while the use of the local population has been continued to this day, the Commission finds it difficult to see that the state's dispositions have implied that the right of the local people from 1751 has expired. Nor can it be seen that the right significantly had changed its character.<sup>42</sup>

Moreover, the Commission points out that parts of the state's disposition that have a private law character have been exercised in a way that appear as public administration. That the dispositions were a result of the state's assimilation policy also weakens their weight:

It must therefore be assumed that the State's dispositions when the Sámi Law Committee was established in 1980 had not broken down the local legal opinions that had been established in Karasjok when the area became subject to Danish-Norwegian Crown's exclusive jurisdiction in 1751.<sup>43</sup>

The majority of the Commission (Gauslaa, Henriksen and Magga) thereafter expresses that the state's dispositions of land and resources in the study area for a long period had a modest scope. Towards the end of the 19th century, and especially after the Land Sales Act of 1902 came into force, the state's dispositions became somewhat larger:

However, they have not had a content that has been able to establish the State's property rights as a settled legal situation or a right on a customary

basis. The dispositions have had a public law character and have not broken down the legal opinions of a strong local collective right. Nor have they helped to establish a sufficiently broad acceptance of the State as a private landowner by the local population.<sup>44</sup>

This acknowledgement leads the majority to conclude that there are not sufficient indications supporting that the state's ownership to the unsold land in Karasjok was established as a settled situation when it was transferred to the Finnmark Estate on 1 July 2006:

This amassment of property is therefore not subject to the Finnmark Estate's property right under the Finnmark Act but is *collectively owned by the local population in Karasjok*.<sup>45</sup>

The state's dispositions have consequently not broken down opinions of strong local, collective rights to land and outfield resources by the majority of people in Karasjok.

The majority further concludes that the rights lie not with the municipality as such but with everyone who at any time are registered as residents of Karasjok. These inhabitants have an equal share in the property right, regardless of residential time and ethnic origin. The majority also points out that local rights of use 'must be respected'. This means that the recognised property right must not be exercised in such way that rights holders to particular property plots for, e.g., hunting cabins or fishing places are displaced from their rights.

The Commission's minority (Andersen and Heggelund) agrees with the majority that the right in Karasjok is reminiscent of a collective property right that could be traced back to 1751. However, the state's later dispositions in the form of property sales, leases and other transactions have affected the local legal opinions to such an extent that the state's ownership rights have been established as a settled legal situation. According to the minority, this has meant that the local people's original collective right has been extinguished and replaced by the right of use that is currently regulated in the Finnmark Act. This right is governed by the Finnmark Estate, but in such a way that the Estate must respect local rights holders in Karasjok to avoid these being displaced from their traditional uses.

### ***3.3 The importance of ILO 169 and its restorative function***

In the *Stjernøya* case, the Supreme Court concluded that the ILO 169 does not regulate the substantive rules for clarifying the land rights in Finnmark. In the Karasjok investigation, the Finnmark Commission in contrast finds reason to place considerable weight on ILO 169, stating that the convention means that no particularly strict requirements can be set for the inhabitant's legal opinions for rights to be considered established. This means that

[t]he State's expressed ownership claims will not alone be enough to deprive Sámi claimants of their good faith. In order to break down established rights

by State dispositions, a relatively large amount must be required in terms of duration, firmness, and content.<sup>46</sup>

This is repeated later in the report, where the Commission refers to ILO 169 Article 8 (1) as well as Article 26 (3) of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and expresses that these provisions mean that due regard must be put on Indigenous peoples' customs and legal opinions in national law. Consequently, no particularly strict requirements can be set for legal opinion or attentive good faith in recognising Sámi rights when applying national property law.<sup>47</sup>

The Commission also uses ILO 169 to support other parts of its conclusions. As shown, the Commission has assumed that the state's dispositions had not broken down the local rights that was all-existing in Karasjok when the area became subject to the Danish-Norwegian Crown's jurisdiction in 1751. A reason for this is that the Commission emphasises that ILO 169 Article 14 (1), first sentence, concerning the right to ownership and possession, has a *restorative function*.<sup>48</sup> The Commission refers to the *Nesseby* case, where the Supreme Court states that 'such a starting point must generally be correct and has support in the preparatory work for ILO Convention No. 169'. According to the Supreme Court, this means that 'it will not be decisive whether the State or others for a certain period have controlled areas that previously have been possessed by the indigenous population'.<sup>49</sup> Due to the factual circumstances in the *Nesseby* case, where the state's dispositions allegedly had lasted 'for several hundred years', the Supreme Court abstained from going further into the restorative function.

The Commission has found that the state's dispositions in Karasjok are not as long-lasting as in *Nesseby* and that the dispositions that are relevant to include as an expression of ownership, took place in the period from the early 20th century until the 1970s. In this regard, the Commission states,

If the Sámi use had ceased during this period, and there was no longer any connection between the use and the control that was originally exercised and the current situation, around 70 years could have been sufficient depending on the circumstances [for loss of property rights]. However, the wording 'traditionally occupy' in the first sentence of Article 14 (1) implies that it is no requirement that the indigenous peoples' exercise and use of authority must have been of the same scope and content as it originally was, in order to establish right to ownership and possession under Article 14.<sup>50</sup>

In addition to the ILO Guide of 2009, the Commission refers to the Sámi Rights Committee's International Law Group to substantiate the statement. The International Law Group assumed that in order to fulfil the condition of 'traditionally occupy', it would be sufficient 'if the use invoked as a basis for the right' had existed a few years into 1900-century.<sup>51</sup> The Commission also refers to the Ministry of Justice, which prior to the ratification of ILO 169, assumed that the situation must have persisted 'until our days'.<sup>52</sup>

The Commission then states that it is hardly necessary to go further into this:

In the same way as in the question of whether there is a settled legal situation or a formation of customary law, this [the question of property rights] will depend on an overall assessment. However, it is clear that the use of the Karasjok population has been dominant until the first decades after World War II.<sup>53</sup>

The Commission has found that the inhabitants, except for the forest, to a large degree have controlled the local resources. Furthermore, the Commission states that the local legal opinions that the right to land and outfield resources lies with the local population and not with the state are still strong. According to the Commission, this means that

[t]he unsold land in Karasjok must therefore be considered covered by the criterion ‘traditionally occupy’ in the first sentence of Article 14 (1). The restorative function of the provision must mean that around 70 years of relatively extensive exercise of State control from around 1900 will not be sufficient for the State’s dispositions of land and resources to have broken down the right that existed in 1751.<sup>54</sup>

The Commission further state that this also have to be the result if, in addition to the state’s dispositions in this period, one includes more than 40 years with fairly limited exercise before 1900 and barely 10 years until 1980 with dispositions that have less weight due to objections to state property rights.

The fact that both the Commission and the Supreme Court has emphasised the restorative function in ILO 169 Article 14 (1), means that ILO 169 holds a significant importance not only for the Karasjok study but for the overall judicial survey of Finnmark. This may also expand the narrow interpretation set by the Supreme Court in the *Stjernøya* case in such way that ILO 169 will have a greater significance in the judicial mapping in the future than it has had so far.<sup>55</sup>

#### **4. A brief analysis and conclusions**

In the Karasjok investigation, the Finnmark Commission has assessed both the legal situation and the legal history with a different approach than in previous investigations. Although the result is different from the outcome of the Supreme Court *Nesseby* case, there is little reason to doubt that the Commission has applied the law in compliance the framework of contemporary Norwegian law, international law and its purpose. The fact that the report’s main conclusion is presented with dissent does not change that view.

The Commission concludes that the government or the king’s officials in the past have not exercised ownership disposition, but rather public authority over the lands located in Karasjok. This is in accordance with other research and appears to be an apt finding. It is also not possible to find specific documentation that the king

of Denmark and, later, the king of Sweden was considered as owner of the land in Finnmark; beyond the position he may have as a territorial lord or royal highness, which supports the Commission's findings.

That the Commission concludes that the surveying, and registration of properties in the 19th century was a formalisation of established use, and not a transfer of property, is also in line with such a realisation.

When the minority of the Commission argues that state dispositions in the 20th century have affected local legal opinions to such an extent that the state's ownership rights have been established as a settled legal situation, it does not consider the asymmetric balance of power between state and local people and that the locals in any case continued to adhere to their own traditions and customs. In this sense, there is greater reason to emphasise the majority's conclusion that the local population retains the collective property rights they had when the Karasjok area came under Norwegian sovereignty in 1751.

Considering Norway's obligations under ILO 169 to recognise 'the rights of ownership and possession of the peoples concerned over the lands which they traditionally use', the Commission emphasises the Convention in a way that gives it practical significance for the judicial survey. At the same time, some may say that the Commission has challenged the Supreme Court's understanding of the scope of ILO 169 in the *Stjernøya* case. This application of law must, however, be considered appropriate, not least because the Supreme Court, in the *Nesseby* case, has confirmed that the right to restitution is a part of the ILO 169 article 14 (1) and thus is legally binding for Norway. The Supreme Court has in that case also stated that ILO 169 is of significance, regardless of its incorporation through Section 3, first sentence, of the Finnmark Act, both as a result of the second sentence and the general presumption principle in Norwegian law (para. 166). This means that the Commission's application of law follows the norms the Supreme Court has drawn up in the *Nesseby* case.

The Finnmark Commission's application of law has contributed in giving ILO 169 increased relevance for judicial survey, as assumed by the majority in the Parliamentary Standing Committee of Justice when the Finnmark Act was adopted. In this way, the Commission may, perhaps to the same extent as the Supreme Court, have helped to establish a kind of precedent, also for the courts.

Furthermore, other legal questions are posed in a different way than in previous reports, as the Commission recognises the original property right for the inhabitants and asks whether this right is retained or has been extinguished by the state's presumed dispositions of ownership. In the *Nesseby* case (para. 146), the Supreme Court has considered such a question to be inappropriate. However, with the clear examination of the historical facts, this can hardly be viewed as such an approach.

In summary, this chapter has shown that the Finnmark Commission in Karasjok has come to a different result compared to its previous investigations. The different result is, to some extent, more a consequence taking a different approach to the legal history and international law than substantive differences in factual circumstances of the investigation fields. This 'adjustment of course' has been necessary in order to meet Norway's obligations under international law. It has probably also

strengthened the legitimacy in the Sámi societies. Additionally, the adjustment has contributed to the alignment of the application of the rules on immemorial usage with a situation that reflects the historical realities in Finnmark, and further to the Sámi context, as it was done in the cases of *Selbu* and *Svartskog*.<sup>56</sup> At the same time, questions remains to be answered concerning other interest holders than the Sámi, and probably from parties in previous investigations, regarding, among others, previous practices, assessments and the predictability of the investigations.<sup>57</sup>

## **5. Aftermath and legal proceedings**

The Commission's conclusions have raised considerable debate both in the press and in political circles, where the contours of fronts that have been little visible since the Finnmark Act was adopted in 2005, now become more evident. A part of the picture is that the Finnmark Estate's administration has worked actively to ensure that the board of the Estate does not approve the Commission's conclusion. On 25 November 2020, however, a dissenting board of the Finnmark Estate approved the conclusions with the chairman's vote—a chairman appointed among the representatives chosen by the Sámi Parliament.<sup>58</sup> At the beginning of 2021, the leadership position of the board went from the Sámi side to the county council-appointed representatives, as the Finnmark Act section 7, para. 6 requires for odd-numbered years. The new appointed board, on a rather thin basis, immediately reversed its decision, which meant that Finnmark Estate no longer accepts the conclusions of the Commission.

Whether the property rights of the Karasjok inhabitants will be recognised and the titles transferred over to them is thus now a question for the courts of law to decide. In accordance with procedural rules in the Finnmark Act, the people of Karasjok must bring their claims for the Uncultivated Land Tribunal, suing the formal titleholder, the Finnmark Estate, to have a chance to have the title recognised, transferred and registered. When the deadline for filing lawsuits was reached on 11 June 2021,<sup>59</sup> many did so, for as many as 13 lawsuits were received. Two of them distinguished themselves with claims of collective property rights to all the land of the Finnmark Estate in Karasjok. The claims were raised by the Karasjok municipality on behalf of the municipality's inhabitants, the Karasjok Sámi Association, as well as five smaller community associations. A similar claim was put forward by the Guttorm group and two reindeer husbandry districts, claiming that it is the Sámi population in Karasjok who holds the title to the land of Finnmark Estate in Karasjok.

In addition, there were nine claims which concerned property rights to cabin grounds, traditional turf houses grounds and larger or smaller delimited property plots that were applied for. There were also claims for the right to extract wood for Sámi handicrafts and for the right to fish and outfield use that were requested.

It is an open question what the outcome of the disputes on collective property rights will reveal. The Land Tribunal chose to hear the smaller cases first. These were all concluded by the end of 2022, where the judgments in the Land Tribunal went in varying directions. One of these was appealed by the Finnmark Estate to the Supreme Court, which was unable to deal with the case.<sup>60</sup>

In January 2023, the court proceedings in the two cases regarding collective property rights to all former state land in Karasjok were processed jointly by the Land Tribunal.<sup>61</sup> After that, there was great anticipation attached to the outcome of the case, to whether everyone living in the Karasjok municipality, the Sámi in the municipality or the Finnmark Estate owns the former state land in Karasjok. The judgment of the Land Tribunal was presented on 21 April 2023.<sup>62</sup>

## Notes

- 1 The chapter is in parts developed from Øyvind Ravna, ‘The Survey of Use and Ownership Rights in Finnmark—A Change of Direction?’ (2021) 29(2) *International Journal on Minority and Group Rights* 316–49 <<https://doi.org/10.1163/15718115-bja10054>>. Thanks to the anonymous reviewers for useful comments.
- 2 *Finnmark Commission, Report Field 4* (2019) Vol 1–2.
- 3 ILO Convention No. 169 concerning Indigenous and Tribal People in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991, and ratified by Norway 20 June 1990) 1650 UNTS 383 (ILO Convention No. 169).
- 4 *Finnmark Commission* (n 1) Vol 1, 216.
- 5 *Finnmark Commission, Report Field 4 Interne rettsforhold i reindriften* (Internal legal Relations in Reindeer Husbandry) (2022) Vol 1–3.
- 6 See Environmental Justice Atlas, ‘Alta River Hydro Power Plant, Norway’ (31 January 2020) <<https://ejatlas.org/conflict/alta-river-hydro-power-plant-norway>> accessed 27 September 2022.
- 7 The Sámi Rights Committee was established by the Crown Prince Regent’s Res 10 October 1980, following a proposal from the Ministry of Justice, see *NOU 1984: 18 Om samers rettsstilling* (Official Norwegian Report: On the Legal Position of the Sámi) 42.
- 8 *NOU 1997: 4 Naturgrunnlaget for samisk kultur* (Official Norwegian Report: The Natural Basis for Sámi Culture).
- 9 Such a view is hardly supported by actual historical realities but is rather a result of 20th-century Norwegianisation politics (author’s note).
- 10 *NOU 1997: 4* (n 7) 222, see also 90 with reference to *NOU 1997: 5 Urfolks landrettigheter etter folkerett og utenlandsk rett* (Official Norwegian Report: Indigenous Peoples’ Land Rights According to International Law and Foreign Law) 46–47.
- 11 *NOU 1997: 4* (n 7) 222.
- 12 *ibid* 93.
- 13 *Innst. O. nr. 80 (2004–2005) Innstilling fra justiskomiteen om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke* (The Standing Committee on Justice, The Parliamentary Bill for the Finnmark Act) 14. The Sámi Parliament were at large supported by Hans Petter Graver and Geir Ulfstein, *Folkerettslig vurdering av forslaget til ny Finnmarkslov* (International Law Assessment of the Proposal for a New Finnmark Act) 3 November 2003.
- 14 Sven-Roald Nystø, former President of the Sámi Parliament, statement during testimony before the Supreme Court of Norway, HR-2018-456-P (Nesseby); see Øyvind Ravna, *Same- og reindriftsrett* (Gyldendal 2019) 450.
- 15 The translation is provided by Ministry of Justice and Public Security. Also, see *Innst. O. nr. 80* (n 12) 28. This applies in particular to article 14 (2) and (3), which require the signatory states to identify land traditionally occupied by Indigenous people and to establish adequate procedures within the national legal system to resolve land claims by these peoples. Sector-monistic incorporation means that ILO 169 is not incorporated to Norwegian law generally but in particular acts only, as the Finnmark Act.
- 16 Supreme Court of Norway, HR-2016-2030-A, para 76.



- 17 Supreme Court of Norway, HR-2017-456-P, para 102. Nevertheless, the court emphasised the *presumption principle*, which assumes that Norwegian law should be interpreted in accordance with Norway's obligations under international law.
- 18 *Finnmark Commission* (n 1) Vol 1, 154, with reference to *Norsk retstidende* 1229 (1944). Translated by the author here and elsewhere unless otherwise noted.
- 19 *ibid* 118, 154.
- 20 *ibid* 184, with reference to report of the special rapporteur on the rights of Indigenous peoples on the human rights situation of the Sámi people in the Sápmi region of Norway, Sweden, and Finland (9 August 2016) UN Doc A/HRC/33/42/Add.3, paras 23–24. The Special Rapporteur anchored her position in the UNDRIP, Article 26 (3) and ILO Convention No. 169, Article 8 (1).
- 21 *Finnmark Commission* (n 1) Vol 1, 186.
- 22 *ibid* 190.
- 23 Øyvind Ravna, 'Den tidligere umatrikulerte grunnen i Finnmark: Jordfelleskap fremfor statlig eiendom?' (2020) 133 *Tidsskrift for Rettsvitenskap* 219; cf. Kongelig Resolution 8 June 1775 ang. Jorddelingen i Finmarken samt Bopladses Udvisning og Skyldlægning sammesteds.
- 24 *Act of 22 June 1863 on the Disposal (Sale) of State land in the Rural districts of Finnmark*. The *Finnmark Commission* (n 1) Vol 1, 166, points out that in 'the meager 40 years the 1863 Act regulated the land surveys, 144 properties were established in Karasjok that can be found in today's land register'.
- 25 *Finnmark Commission* (n 1) Vol 1, 164.
- 26 *ibid* 168. Of these, there were 160 land lease plots. Also, parts of these plots are considered as subdivisions from previously established plots, typically as a result of inheritance settlements.
- 27 *ibid* 170.
- 28 *ibid* 198.
- 29 *Finnmark Commission* (n 1) Vol 1, 198, with reference to *Nrt* (Norsk Retstidende) 1229 (1248).
- 30 *ibid* 1249, 125.
- 31 Øyvind Ravna, 'Rettskartleggingen i Finnmark og reglene om alders tids bruk' (2015) 128(1) *Tidsskrift for Rettsvitenskap* 53, 78–79, where assessments of the kind made here are now in demand in the case of Field 2 Nesseby.
- 32 *Finnmark Commission* (n 1) Vol 1, 198, with reference to Thor Falkanger, *Allmenningssrett* (Universitetsforlaget 2009) 46.
- 33 Whether 'disposal' is an apt term can be questioned, and to the extent that it was, it was certainly an expression of a royal privilege. It is just as likely that what took place was the division/allotment of community land, and not disposals, see Øyvind Ravna, 'Den tidligere umatrikulerte grunnen i Finnmark: Jordfelleskap fremfor statlig eiendom?' (2020) 133 *Tidsskrift for Rettsvitenskap* 219.
- 34 *Finnmark Commission* (n 1) Vol 1, 199, with reference to Håvard Steinsholt, 'Oreigning' in Per Kåre Sky, Hans Sevatdal and Erling Berge (eds), *Eigedomshistorie. Hovudlinjer i norsk eigedomshistorie frå 1600-talet fram mot nåtida* (Universitetsforlaget 2017) 374–82, the Commission (at 32) shows to that: 'At this time the Royal Power could quite freely intervene in private rights. The idea of expropriation compensation, for example, was not formulated until the end of the 17th century and did not have immediate effect'.
- 35 *Finnmark Commission* (n 1) Vol 1, 43, 205, with reference to *Ot.prp. nr. 53 (2002–2003)* 88.
- 36 *ibid* 201.
- 37 *ibid* 204.
- 38 *ibid*, with reference to *Nrt* (n 28) 1229 (1243).
- 39 *Finnmark Commission* (n 1) 4 Vol. 1, 204. Here, the Commission clearly deviates from previous assessments, see the quotation in conclusion in section 3.2.

- 40 *ibid* 198.
- 41 *ibid* 202.
- 42 *ibid*.
- 43 *ibid* 203.
- 44 *ibid* 218.
- 45 *ibid* (highlighted by the Commission).
- 46 *ibid* 186.
- 47 *ibid* 204; United Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA A/RES/61/295 (UNDRIP).
- 48 Also referred to as *the right to restitution*.
- 49 *Finnmark Commission* (n 1) Vol 1, 203; cf. *Nesseby* (n 13) para 173. The restorative function is also referred to as *the right to restitution*. Its significance in Norwegian law is analysed in Øyvind Ravna, ‘Restitusjon og gjenoppretting i norsk urfolksrett’ (2020) 59  *Lov og Rett* 566.
- 50 *Finnmark Commission* (n 1) Vol 1, 204, with reference to ILO, *Indigenous & Tribal Peoples’ Rights in Practice—A Guide to ILO Convention No. 169* (2009) 94–95.
- 51 *ibid* 204, with reference to *NOU 1997: 5*, 49–50.
- 52 *ibid* with reference to *St. prp. nr. 102 (1989–90)* (Proposition to Parliament) 6.
- 53 *ibid*.
- 54 *ibid*.
- 55 It can also be mentioned that Uncultivated Land Tribunal, in UTMA-2017–62459 (Gul-gofjord), found no room to modify the good faith requirement to emphasise the state’s dispositions to a lesser extent, or to emphasise the principle of restitution—despite different facts such as the coastal Sámi population in the area, like the people in Karasjok, fulfilling the condition of ‘traditionally occupy’ in ILO 169 Article 14 (1).
- 56 *Nrt* (n 28) 769, 1229, respectively.
- 57 See, e.g., *The Director (of the Finnmark Estate)’s assessment of the Finnmark Commission’s Report for Field 4 Karasjok* Vol 1 (25 November 2020).
- 58 Protocol of the board meeting of the Finnmark Estate 25–26 November 2020, case 75/2020, ‘FeFos behandling av Finnmarkskommisjonens rapport for felt 4-Karasjok, bind 1’ (FeFo’s Processing of the Finnmark Commission’s Report for Field 4—Karasjok, Vol 1).
- 59 According to the Finnmark Act section 38, ‘Disputes may be brought before the Uncultivated Land Tribunal by means of written summonses at the latest one year and six months following submission of the report of the Finnmark Commission. The Tribunal is one year and six months following submission of the report of the Finnmark’.
- 60 The Land Tribunal of Finnmark, *UTMA-2021–87806* and The Supreme Court of Norway, *HR-2022-2155-U*.
- 61 *The Land Tribunal of Finnmark, UTMA-2021–86077 og UTMA-2021–086497*.
- 62 On 21 April 2023, after the editorial work on this anthology was completed, the Land Tribunal of Finnmark presented its judgment. The majority of the Tribunal (3 to 2) concluded that ‘the property right to the area in Karasjok municipality that was transferred to the Finnmark Estate upon the entry into force of the Finnmark Act, and which has not previously been sold to private individuals or which, as a result of the legal survey under the Finnmark Act, is or will be clarified belongs to others, belongs collectively to everyone who at any time has a registered residential address in the Karasjok municipality, and in such way that these have an equal share in the court’.

## 4 Indigenous peoples' right to fish

### Recent recognition of Sámi rights in Finland through civil disobedience and criminal trial

*Martin Scheinin*<sup>1</sup>

#### 1. Introduction

As in many countries, the recognition of Indigenous peoples' rights in Finland has been far from linear. In recent decades there have been important victories, such as the inclusion in the Constitution in 1995 of a provision that recognises the Sámi as the Indigenous people in Finland<sup>2</sup> and affirms their rights in line with Article 27 of the 1966 International Covenant on Civil and Political Rights (ICCPR). Contemporaneously, the Sámi Parliament Act was enacted.<sup>3</sup> Since early 1990s, we also have seen gradual but incoherent judicial recognition of Sámi rights in respect of issues such as the granting, pursuant to the Mining Act, of area reservations or exploration permits within Sámi reindeer-herding lands,<sup>4</sup> or the logging of ancient forests on Sámi lands.<sup>5</sup> By and large, the judgments in question have affirmed the *relevance* of Sámi Indigenous rights in the application of the law of the Finnish state, but they have rarely entailed that Sámi rights would have *prevailed* over competing interests. At international fora, a series of cases before the Human Rights Committee, starting from the first *Länsman* case<sup>6</sup> has, somewhat similarly, represented progress-in-principle when these cases have assisted the Committee in establishing and developing its *test* for what constitutes prohibited 'denial' of the enjoyment of a culture under Article 27 of the ICCPR.<sup>7</sup>

Negative developments have occurred, first and foremost in the issue of Sámi membership, as the Supreme Administrative Court has, in respect of the Sámi Parliament elections of 2011, 2015 and 2019, persistently ignored the right of the Sámi to internal self-determination, replacing that right by the court's own opinion on who is a Sámi.<sup>8</sup> Both the Human Rights Committee<sup>9</sup> and the Committee for the Elimination of Racial Discrimination<sup>10</sup> have, however, established that through those judicial decisions, Finland (in respect of the 2015 Sámi Parliament elections) violated the human rights treaties in question. Once again, efforts to put an end to those violations failed in March 2023 as the four-year term of the national Parliament came to an end.<sup>11</sup>

To formulate these inconsistencies in Finland's approach in institutional terms, one can say that the Ministries of Justice and Foreign Affairs have committed themselves to internationally recognised Indigenous peoples' rights, while the Ministries of Agriculture and Forestry and of Trade and Industry have stubbornly prioritised

competing economic interests. Parliament, in turn, appears to have become hostage to the views of the members of Parliament elected from the northernmost electoral district of Lappi, which includes the Sámi Homeland but where the dominant Finnish population is in numerical majority over the Sámi. These institutional features have prevailed, irrespective of changes in the political composition of the government coalition.

Although there have been clear victories for the Sámi and their rights as an Indigenous people, the question arises whether the advances are coincidental and temporary, or transformative and sustainable. In this chapter a claim is made that some or many of the achievements have transformative potential with long-lasting effect.

This chapter focuses on one specific new area of positive developments that entails the judicial recognition of Sámi rights through the *criminal process*. Insisting on the cultural significance of fishing in a family's respective traditional home river and on the capacity of the Sámi to secure that their fishing can be ecologically, economically and culturally *sustainable*, Sámi individuals have resorted to a form of civil disobedience by ignoring certain restrictions imposed by the state upon their traditional fisheries and fishing, in some cases self-reporting their presumably illegal conduct to the authorities. What follows will include a presentation of two cases decided in 2022 by the Finnish Supreme Court (the *Veahčajohka* case and the *Ohcejohka* case)<sup>12</sup> and a third case decided by the regional court of first instance, the Lappi District Court (the *Juvduujuuhâ* case), also in 2022. In all three cases, the Sámi defendants were acquitted through reasoning that in significant ways acknowledges and respects their fishing rights as constitutionally protected fundamental rights and internationally protected human rights of Indigenous peoples and demonstrates the constitutional significance of Sámi rights in the legal order of the state of Finland.

The following discussion combines the perspectives of an academic scholar of Indigenous peoples' rights, a human rights practitioner and litigator, and a non-Sámi friend of many Sámi, including the defendants in all three cases discussed.

## **2. Indigenous fishing in and under international human rights instruments**

Before delving into the three cases, a brief presentation of international and comparative sources is justified. International Labour Organisation Convention No. 169 on Indigenous and tribal peoples (1989), yet to be ratified by Finland, explicitly mentions fishing as one of the traditional or typical forms of Indigenous economic life that are of great importance for the preservation and sustainability of Indigenous cultures. Article 23 (1) of the Convention prescribes,

Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and

development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.

In contrast, the United Nations Declaration on the Rights of Indigenous Peoples (2007) makes no mention of fishing or any other specific forms of livelihood that would be constitutive for Indigenous cultures. That said, Article 26 (1) of course protects the right of Indigenous peoples to the 'lands, territories and resources' which they have traditionally owned, occupied or otherwise used or acquired, and Article 20 (1) makes explicit and comprehensive reference both to 'subsistence' and 'traditional and other economic activities':

Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

The Human Rights Committee, the treaty body overseeing the implementation of the ICCPR, has been very clear that fishing by Indigenous peoples often is a central element in their way of life and therefore protected by the ICCPR Article 27, the right of members of Indigenous peoples—as belonging to an ethnic, linguistic or religious minority within the state concerned—'to enjoy their own culture' 'in community with the other members of the group'. A path-breaking case in this respect was *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*<sup>13</sup> where the gradual destruction of the fishing and fisheries, as well as other traditional livelihoods of the tribe because of concessions related to oil, gas and timber resources in the area gave rise to the Committee establishing a violation of Article 27. As the Committee in 1994 adopted its General Comment No. 23 on Article 27, this finding was relied upon when the Committee articulated the relationship between ICCPR Article 27 and traditional or otherwise typical forms of economic life by Indigenous communities, as follows:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>14</sup>

Another important Human Rights Committee case where fishing was established as falling under the notion of culture in ICCPR Article 27 is *Apirana Mahuika et al. v. New Zealand*.<sup>15</sup> Through this case, the Committee affirmed that also modernised, commercial or industrial forms of fishing or fisheries management may fall under

the notion of culture in Article 27 when they represent the continuity and evolution of a traditional Indigenous culture, as indeed was the case for the Maori of New Zealand.<sup>16</sup>

The *Mahuika* case is also important because of the recognition by the Committee of the interpretive effect of ICCPR Article 1 upon Article 27 rights of Indigenous peoples,<sup>17</sup> supporting the idea of Indigenous self-determination in respect of traditional livelihoods and resources. Here, the *Mahuika* case, decided in 2000, built upon the Human Rights Committee's then very recent recognition of ICCPR Article 1 on all peoples' right to self-determination being applicable to the benefit of Indigenous peoples. That recognition had surfaced in the Committee's Concluding Observations in the consideration of a periodic report by Canada in 1999,<sup>18</sup> inspired by a remarkable judgment issued by the Supreme Court of Canada in 1998. This court had held that there may, within the territory of a state, be more than one 'people' that enjoy the right of self-determination of peoples. In that context, the court also had made a specific reference to the aboriginal (Indigenous) peoples of Quebec as potential beneficiaries of the right of peoples to self-determination.<sup>19</sup> One year later, the UN Human Rights Committee followed suit.

### 3. Canadian case law as a source of inspiration

As was just seen through the *Ominayak/Lubicon* case, the 1999 Concluding Observations on Canada and their influence in the *Mahuika* case, the experiences of Indigenous peoples in Canada have been important for the development of international law through the ICCPR and the Human Rights Committee as its supervisory body. Both the recognition of traditional or otherwise typical forms of livelihood—including fishing—as 'culture' (under ICCPR Article 27) and the quest for Indigenous self-determination (under ICCPR Article 1) were spearheaded by aboriginal (Indigenous) peoples in Canada. The 1998 judgment by the Supreme Court of Canada in the Quebec Secession Case triggered nothing less than a paradigm shift concerning the understanding of the right of peoples to self-determination. In short, the court held that the predominantly French-speaking population of Quebec might be a 'people' for purposes of the right of self-determination, but if that was the case, then there were also other 'peoples', including aboriginal (Indigenous) peoples, present in the same territory. Hence, an eventual process of Quebec's secession from Canada would need to respect the rights of all peoples and should proceed through a process of constitutional negotiation rather than unilateral declaration by one group. When in 1999 reviewing Canada's periodic report on the implementation of the ICCPR, the Human Rights Committee joined the paradigm shift by acknowledging that some or all of Canada's Indigenous peoples were 'peoples' for the purposes of ICCPR Article 1 and therefore enjoyed the right of self-determination, including the Article 1, paragraph 2, the right to be able to freely dispose of their natural wealth and resources and not to be deprived of their own means of subsistence.<sup>20</sup> Since then, the same approach has been applied in respect of other states where there are Indigenous peoples, in the reporting procedure under the ICCPR, and gradually also in the procedure for individual complaints when dealing with

cases initiated by Indigenous peoples. In 2018, the Committee acknowledged not only that ICCPR Article 1 has relevance in the interpretation of other provisions of the Covenant but that it also gives rise to reading into ICCPR Articles 25 and 27, the right of Indigenous peoples to 'internal self-determination'.<sup>21</sup>

Besides this indirect influence through the practice by the Human Rights Committee, the experiences of Indigenous peoples in Canada of invoking and defending their right to fish in domestic courts also served as a direct inspiration for Sámi individuals in Finland who in 2017 resorted to civil disobedience to challenge the tightened state-imposed restrictions on their fishing in ways that they experienced as a denial of their right to enjoy their own culture. This inspiration is documented in an expert witness opinion by the author of this chapter, submitted to the Lapland District Court in November 2018, as part of the proceedings in the *Veahčajohka* and *Ochjejohka* cases discussed in the following sections.<sup>22</sup> In addition to addressing issues of Finnish constitutional law and Finland's international human rights treaty obligations concerning the protection of the fishing rights of the Sámi, this opinion also cited three rulings by the Canadian Supreme Court concerning criminal cases against members of aboriginal (Indigenous) tribes who were prosecuted for unlawful fishing,<sup>23</sup> as well as two other cases by the same court where the right to fish had been addressed in the wider context of Indigenous peoples' rights.<sup>24</sup>

#### **4. The *Veahčajohka* (*Vetsijoki*) case**

In July 2017, four Sámi individuals—three women and the teenage son of one of them—engaged in fishing for salmon from the shores of *Veahčajohka*, one of the tributaries of the Deatnu (Teno) River that forms the border between Finland and Norway and is known as the best salmon-fishing river in Europe. The women, who also are Sámi politicians or activists, one of them an internationally recognised Indigenous leader, are local Sámi with recognised title to fisheries in the area. They invoked their right to fish in their home river, following a cultural tradition in their families over several generations, even centuries. Irrespective of their title-based or traditional fishing rights, the state of Finland had decided that fishing in their traditional places at traditional times would have required a daily fishing license sold for profit by *Metsähallitus*, the state enterprise for forest management. In order to protect the salmon stock in Deatnu, Norway and Finland had revised their bilateral treaty concerning the management of the river, resulting in new and stricter restrictions on fishing. In Finland, new regulations were adopted through bypassing the statutory requirement of negotiations with the Sámi, and in substance imposed very heavy restrictions on traditional and other fishing by the Sámi while making room for tourist fishing. No license quota was reserved for the Sámi, resulting in that the licences were sold out early in the year to tourists on the basis of their holiday plans, leaving nothing for those Sámi who would adjust their fishing to actual weather conditions and movements of the salmon.

The four individuals, including the teenager who was of the age of criminal culpability, were prosecuted for illegal fishing. In March 2019, the Lapland District Court acquitted them on the basis of constitutional and human rights enjoyed by



them as Indigenous Sámi. Due to the precedent value of the case, the prosecutor sought, and was granted, leave to appeal directly to the Supreme Court. On 13 April 2022, the Supreme Court acquitted the four defendants of all charges.

The Supreme Court ruling, officially known as KKO 2022:26, is a remarkable precedent, not only concerning Indigenous peoples' rights but also from a constitutional law perspective.<sup>25</sup> It is one of the very rare cases where the Supreme Court has set aside a provision of an act of Parliament to give primacy to the Constitution of Finland. Traditionally, any form of judicial review of parliamentary legislation was considered prohibited in Finland, but the reform of the Constitution in 1999 included a new Section 106 that provides to courts the power to set aside (but not to declare null and void) an act of Parliament in a concrete case where its application would be in 'manifest conflict' with the Constitution.

The Supreme Court first established that the applicable provision of law in the case was Section 10 of the Fishing Act, as amended and in force at the time of the alleged criminal offence,<sup>26</sup> and that this entailed that also Sámi individuals had to carry a valid fishing license for the kind of fishing the defendants had engaged in.<sup>27</sup> Therefore, the question for the court was whether the application of the law in force as basis for a criminal conviction of the defendants was in manifest conflict with the Constitution, as was claimed by the defendants.

The Supreme Court recapitulated that Section 22 of the Constitution, which establishes an obligation for all public authorities to ensure the enjoyment of human rights and fundamental rights, entails a duty for courts to strive for an interpretation of the law that is human-rights-friendly and constitution-conforming. Such an interpretation would, however, need to remain within the limits available under the wording of the provision that was being interpreted.<sup>28</sup> Separately from that, Section 106 of the Constitution provided for a court the possibility of giving primacy to the Constitution over another provision of law if the application of the latter would in a concrete case be in manifest conflict with the Constitution.<sup>29</sup> The requirement that the conflict must be manifest resulted in a high threshold.<sup>30</sup>

Next, the Supreme Court cited Section 17 (3) of the Constitution, according to which the Sámi, as an Indigenous people, have the right to maintain and develop their own language and culture.<sup>31</sup> Salmon fishing in the Deatnu River was firmly associated with Sámi culture, and the method of using a fishing rod, as in the case under consideration, was a part of this fishing culture.<sup>32</sup> The traditional right of the local Sámi population to fish also was a proprietary interest that fell under the constitutional protection of the right to property.<sup>33</sup> The Supreme Court cited an opinion by the Constitutional Law Committee of Parliament that had, at the time of the adoption of the new stricter restrictions for fishing in Deatnu, stated that the restrictions should have been more strongly focused on such fishing that does not enjoy the protection of Section 17 (3) of the Constitution or of ICCPR Article 27.<sup>34</sup> With reference to the case law by the Human Rights Committee, the Supreme Court affirmed that the notion of 'culture' in the latter provision included, in particular in the context of Indigenous peoples, their traditional forms of economic activity.<sup>35</sup>

The Supreme Court then engaged itself in a lengthy and rather deferential discussion about how the legislator, including the Constitutional Law Committee of

Parliament, had over several decades affirmed the constitutional status and contents of the rights of the Sámi as an Indigenous people.<sup>36</sup> It addressed the content and relevance of Section 20 of the Constitution that establishes both a right to the environment and everyone's general but abstract duties in respect of the environment.<sup>37</sup> The Supreme Court also cited the preparatory works of the legislation challenged by the Sámi defendants where it was claimed that proposed fishing restrictions, including those covered by Section 10 of the Fishing Act, were closely connected with the implementation of Section 20 of the Constitution. As some fisheries were in a poor state, fishing needed to be subjected to restrictions, in order to secure the ecological sustainability of fish stocks. The Fishing Act served securing the sustainability of fish stocks and biodiversity. It also helped in enhancing the protection of vulnerable or declining fish stocks. It was thought that through geographic, temporal and quantitative restrictions of fishing it was possible to revitalise weakened fish stocks and create conditions for profitable fishing of other species. The preparatory works had further expressed specific concern over the ecological sustainability of migratory fish stocks.<sup>38</sup> In the preparatory works, it had also been stated that the restrictions served legitimate and weighty purposes that were related to Section 20 of the Constitution. After lengthy paraphrasing of the materials, the Supreme Court quoted verbatim the relevant government bill that in 2014 had asserted, 'The restrictions do not prevent the enjoyment of traditional Sámi culture but instead in part protect the existence of sustainable fish stocks as a precondition for such enjoyment'.<sup>39</sup>

Moving to its own assessment, the Supreme Court stated that pursuant to Section 10 of the Fishing Act, Sámi individuals had been put in the same position as others, including tourists, as to the requirement to purchase a fishing licence. Due to high demand, all licences had been sold out as soon as they had become available.<sup>40</sup> The requirement of a fishing licence in Section 10 of the Fishing Act was clear and did not leave room for interpretation.<sup>41</sup> The Supreme Court stated that the constitutionally protected fishing rights of local Sámi were not unlimited, as also their fishing could be restricted pursuant to the right to the environment provision in Section 20 of the Constitution, in order to protect stocks of migratory fish.<sup>42</sup>

The Supreme Court took the view that the market-based price of the fishing license, 30 euro per day, already in itself amounted to a fundamental rights restriction upon the Sámi, for whom fishing was an essential part of their culture.<sup>43</sup> Further, the practical administering of the selling of fishing licenses, where there was no quota reserved for the Sámi and all licenses were quickly sold out due to high demand, led to the application of Section 10 of the Fishing Act to result into a substantial restriction upon fishing as a part of the culture of the Sámi as an Indigenous people.<sup>44</sup> The Supreme Court then concluded, taking into account the obligation imposed through Section 10 of the Fishing Act to purchase a specific fishing licence and the resulting actual restrictions upon the fundamental cultural rights of the Sámi, that it would be in manifest conflict, as understood under Section 106 of the Constitution, with the fundamental right enshrined in Section 17 (3) of the Constitution, to apply the provision of the act in the current case. Section 10 of the Fishing Act was set aside and not applied in the case.<sup>45</sup> All four defendants were acquitted.<sup>46</sup>

### 5. The *Ohcejohka (Utsjoki)* case

On the same day as the *Veahčajohka* case, the Supreme Court issued its judgment also in another case of civil disobedience by Sámi acting to defend their fishing rights.<sup>47</sup> The defendant, a prominent Sámi rights advocate over several decades, had engaged in salmon fishing in *Ohcejohka*, another tributary of the Deatnu River, by putting fishing nets in the traditional location where his family always had fished. He put out his net at the same time of the year as he in earlier years had done lawfully but now subject to a new government ordinance that in 2017 had prohibited any fishing with a net in the first half of August, a time when salmon could actually be caught at the location in question and when local Sámi with a share in the fisheries in earlier years had been allowed to put fishing nets for a part of the week. The defendant fished together with his children, thereby seeking to transmit the practice of fishing to the next generation as a constitutive element of the local Sámi culture, including concerning the methods, locations, equipment, vocabulary and significance of salmon fishing in *Ohcejohka*.

Criminal charges were presented against the father but not his underage children. Similar to the defendants in the *Veahčajohka* case, the defendant was fully acquitted by the Lapland District Court on the basis of constitutionally and internationally protected rights of the Sámi as an Indigenous people. The prosecutor sought and was given leave to appeal directly to the Supreme Court, which issued its ruling on the same day as in the *Veahčajohka* case.

What was reported about the Supreme Court ruling in the *Veahčajohka* case by and large also applies to the *Utsjoki* case. However, there is one significant difference: In the *Veahčajohka* case the defendants had fished without a license at a time for which a license, in principle, could have been purchased. Therefore, they were prosecuted under an act of Parliament, Section 10 of the Fishing Act. As a consequence, the Supreme Court needed to resort to the notion of a ‘manifest conflict’ in Section 106 of the Constitution in order to set aside a law passed by Parliament. In contrast, the prohibition against the use of a fishing net in the *Ohcejohka* case was derived from lower-level regulations which could be declared unconstitutional by a court pursuant to Section 107 of the Constitution, without a need to establish a ‘manifest conflict’ as the setting aside of a parliamentary statute would require.

The Supreme Court found it proven that the first half of August was a particularly important time for the exercise of Sámi fishing culture in the *Ohcejohka* River and held that the shortening of the net fishing season had targeted a time and method of fishing that were of essential significance from the perspective of the Sámi fishing culture.<sup>48</sup> Those facts did not exclude the possibility of restrictions but required an assessment of whether they remained proportionate.<sup>49</sup> Moving to the facts of the case, the Supreme Court stated that while the status of several salmon subvariants was unsatisfactory in the Deatnu River itself, the stocks were strong in the lower (northern) tributaries, including *Ohcejohka*,<sup>50</sup> and the situation did not call for new restrictions on fishing there.<sup>51</sup> The salmon stock in *Ohcejohka* appeared to tolerate the current level of fishing and sustain its salmon stock.<sup>52</sup> The Supreme Court held that the status of salmon stocks in the Deatnu River system

did justify stricter restrictions of fishing for the purpose of securing ecologically sustainable fish stocks but that the question to be assessed in the case was whether the shortening of the net fishing season in the tributary Ohcejohka had remained proportionate when applied in respect of such fishing that was a part of the fundamental cultural rights of the Sámi.<sup>53</sup> The Supreme Court also referred to statements made by the Constitutional Law Committee of Parliament that securing the sustainability of fish stocks was beneficial also for the continuity of the Sámi culture in the future and that the fishing restrictions should have been designed so that they would more heavily have impacted fishing that did not enjoy the protection of Section 17 (3) of the Constitution and ICCPR Article 27.<sup>54</sup>

The Supreme Court held that the protection of the fish stocks could have been achieved through other means than the prohibition against the use of fishing nets by the Sámi throughout the full month of August. Hence, the new restriction at issue was disproportionate.<sup>55</sup> The court summarised,

The Supreme Court concludes that the restrictions during the month of August which was significant for the enjoyment of traditional Sámi fishing culture, were so substantial that they cannot be regarded as proportionate in relation to their aims, or as necessary for the protection of migratory fish stocks. Even if Section 9 of the Ordinance on Deatnu Tributaries was related to legitimate aims associated with the constitutionally protected right to the environment, the Supreme Court finds that the said provision is in contradiction with Section 17 (3) of the Constitution that guarantees to the Sámi the right to their culture.<sup>56</sup>

As Section 9 of the said ordinance was in contradiction with Section 17 (3) of the Constitution, Section 107 of the Constitution required that the provision must not be applied and the criminal charge shall be rejected.<sup>57</sup>

## **6. The *Juvduujuuhâ (Juutuanjoki)* case**

On 12 August 2022, the same court of first instance that had decided the two cases discussed previously gave its verdict<sup>58</sup> in a third case of civil disobedience by Sámi individuals who were prepared to face criminal charges in order to protect their fishing rights and culture. Again, the defendant was a prominent member of the Sámi community, this time the vice president of the Sámi Parliament. He had engaged in fly-fishing for trout on 1 August 2020, following the long tradition of his family. The judgment has significance beyond the two earlier cases that reached the Supreme Court, as the Lapland District Court here addressed some of the questions not answered in the earlier cases. As the prosecutor did not appeal, the judgment by the court of first instance became final, even if it does not enjoy the same perception of authority as a Supreme Court judgment would.

Before presenting some citations from the judgment, it is worth pointing out that the case of the defendant, a Sámi individual prosecuted in a criminal trial for illegal fishing, was extremely strong. The law lives and develops both through hard cases

where the outcome could go either way and through cases where one party, here the defendant, has all the trump cards. Among the matters that the defendant was able to demonstrate were (1) that his family had been fishing at the exact location for more than 500 years; (2) that Finnish law acknowledged Sámi fishing rights as constitutionally protected property; (3) that the trout stock, which was at issue, was very strong and sustainable in the river in question; and (4) that he had learned the exact methods and locations for fishing trout in the river as a child and it was essential for the transmission of Sámi fishing culture to new generations that fishing could be conducted at specific locations at a specific time and during specific weather conditions. This was not a hard case for the judge as to the outcome.

Exactly for that reason it is admirable that the court did not choose an easy way out by acquitting the defendant on narrow or technical grounds but was prepared to address the question of Indigenous Sámi rights in substantive terms. The most remarkable passage in the court's verdict reads,

Through the Inari fishing regulations of 2020, the right of local Sámi to exercise their traditional fishing in their traditional fisheries and during well-known traditional times of their fishing has been rendered nugatory, and the transmission of the tradition of Sámi fishing to future generations has been prevented. The defendant would not have been allowed to fish, even had he purchased a fishing permit. The question pertains to the very core of Sámi rights protected by the Constitution . . .

Here, the court affirmed the intergenerational nature of Indigenous peoples' rights and the crucial aspect of transmitting a living culture, represented in the practice of traditional or otherwise typical Indigenous livelihoods, to new generations. The two Supreme Court rulings discussed, although favourable to the Sámi defendants, had missed this important aspect.

As to the question of reconciling the sustainability of Sámi culture and livelihoods with the ecological sustainability of fish stocks, the court did find the protection of fish stocks as such as a legitimate aim that could justify subjecting also Sámi fishing to some restrictions. But the fishing regulations challenged by the defendant failed the test of permissible limitations upon constitutional or human rights on multiple grounds. On this issue, the court stated,

The restrictions imposed upon traditional Sámi fishing culture have been so substantial that they cannot be regarded as proportionate in respect of their aim. It has not been shown in the case that the restrictions, as imposed upon the Sámi, would at the time in question have been necessary as measures serving the protection of fish stocks, taking into account that restrictions could have been directed more heavily towards persons whose fishing does not enjoy protection under Section 17 (3) of the Constitution or Article 27 of the ICCPR.

The ordinance containing the 2020 fishing regulations—i.e. not an act of Parliament—was found to be in conflict with Section 17 (3) of the Constitution

concerning fundamental cultural rights of the Sámi. Pursuant to Section 107 of the Constitution, the court was under an obligation not to apply the ordinance, and the criminal charges had to be rejected.

## 7. Significance and limitations of the three judgments

The three recent Finnish court cases represent remarkable progress in the judicial recognition of the Sámi people's rights as an Indigenous people. Five important positive features of the cases can be listed as follows: (1) Fishing as an activity was recognised as an important aspect of the Sámi culture, whose recognition extended to the place, time and methods of fishing. (2) The Finnish courts did not find it necessary to resort to constructing a 'frozen rights' doctrine that would seek to limit the recognition of fishing as constitutive for Sámi culture, to specific traditional fishing practices which might not even exist today.<sup>59</sup> (3) The three judgments presented affirm the justiciability of the Sámi rights clause in Section 17 (3) of the Constitution and of ICCPR Article 27, which has been incorporated into Finnish law, with the consequence that as constitutional rights the rights of the Sámi as an Indigenous people can be relied upon with the effect of setting aside and not applying also statutory law adopted in the form of an act of Parliament. (4) As the Supreme Court made explicit in the *Veahčajohka* case, treating Indigenous Sámi exactly as non-Indigenous persons may in itself constitute a violation of Sámi rights. Here, the Supreme Court followed the approaches of the European Court of Human Rights in the *Thlimmenos* case<sup>60</sup> and the Committee for the Elimination of Racial Discrimination in the case of *Lars-Anders Ågren et al. v. Sweden*<sup>61</sup> in that treating differently situated persons identically may amount to prohibited discrimination. (5) The Finnish courts made an effort to include ecological sustainability and everyone's responsibilities over the environment in their assessment of Sámi rights and their permissible restrictions, thereby affirming that reconciliation is possible between the imperatives of ecological sustainability and the sustainability of an Indigenous people's culture.

Despite these important positive, and in part even transformative, features the three judgments discussed also demonstrate shortcomings and weaknesses. Finnish courts missed important opportunities for clarifying and applying Indigenous peoples' rights in at least three respects: (1) The Supreme Court failed to address the issue of the *transmitting* of a culture from generation to generation as a key aspect of the very notion of culture.<sup>62</sup> Its two judgments are totally silent of the important fact that the defendants were not only fishing but also were teaching their children to fish, thereby transmitting a living Sámi fishing culture to new generations. This aspect was, however, addressed by the Lapland District Court in the *Ohcejohka* case,<sup>63</sup> as well as in the *Juvduujuuhâ* case,<sup>64</sup> where the defendant did not have his children with him on the occasion for which he was prosecuted.<sup>65</sup> (2) The courts treated fishing by Sámi as a culturally important *activity*, but still just as an activity, rather than a form and forum of social life: They did not address the role played by fisheries and fishing in the community life of the Sámi,<sup>66</sup> including its importance for the preservation and development of Sámi languages, or the social, spiritual,

ceremonial or artistic significance of fish, fishing or fisheries. (3) The courts made no reference to Sámi self-determination over their traditional fisheries as a possible pathway to the reconciliation between ecological sustainability and the sustainability of the Sámi culture. The underlying paternalistic assumption of the Finnish courts in question still appears to be that it is for the authorities of the Finnish state to determine what is needed to protect the environment, while the principles of necessity and proportionality require that some space is left for cultural activities of the Indigenous Sámi.

The three Finnish court cases discussed in this chapter contain a promise of a transition, with a potential of transformation. Through civil disobedience by individual Sámi, the district court with jurisdiction over the Sámi Homeland as well as the Supreme Court were positively challenged to elevate the recognition of the right of the Sámi, as an Indigenous people in Finland, to a new level. The right of the Sámi to enjoy their own culture was recognised as justiciable, to the degree that its protection may require setting aside laws passed by the Parliament of Finland. Whether this transitional promise will materialise as a transformation that allows for the reconciliation between environmental sustainability and the sustainability and transmission to new generations of the Sámi culture will depend on whether Finnish courts and Finnish society will be prepared also to accept the idea of Sámi self-determination.

A true transformation in the recognition of Indigenous peoples' rights would, particularly in the age of climate change and the threat it poses in the Arctic, entail respect for the right of the Sámi people to self-determination, including concerning the reconciliation between ecological sustainability and the sustainability of living Sámi culture and its transmission to new generations. It is for the Sámi themselves to retain their Indigenous distinctiveness and to adapt their living culture to challenging new circumstances. The close connection of the Sámi with the ecosystem and their accumulated knowledge of the status of it should give rise to the state and all public authorities trusting in Sámi self-determination over their fisheries as a cornerstone in the inclusion of intergenerational sustainability in the management of fisheries, including any decisions concerning the targeting of eventual fishing restrictions.

## Notes

- 1 The author wishes to thank Anne Nuorgam and Piia Nuorgam for background discussions, and the latter also for valuable comments on a draft version of this chapter.
- 2 The clause on the right of the Sámi, as an Indigenous people, to maintain and develop their own language and culture was first inserted into the 1919 Constitution through the fundamental rights reform of 1995, and subsequently, in 1999, it became Section 17 (3) of the new Constitution that entered into force in the year 2000.
- 3 Act on the Sámi Parliament (17 July 1995).
- 4 See Supreme Administrative Court of Finland, KHO 1999:14.
- 5 See Supreme Court of Finland, KKO 1995:117.
- 6 *Ilmari Länsman and others v Finland* (Communication No 511/1992) UN Doc CCPR/C/52/D/511/1992 (HRC 8 November 1994).



- 7 However, in *Anni Äärelä and Ilmari Näkkäläjärvi v Finland* (Communication No 779/1997) UN Doc CCPR/C/73/D/779/1997 (HRC 24 October 2001), the Committee established a violation of the fair trial provision of Article 14 ICCPR, even if it held that the facts of the case did not allow it to establish a violation of Article 27.
- 8 For examples, see Supreme Administrative Court of Finland, KHO 2011:81, KHO 2015:145, KHO 2019:90 and KHO 2021:48.
- 9 *Tiina Sanila-Aikio v Finland* (Communication No 2668/2015) UN Doc CCPR/C/124/D/2668/2015 (HRC 1 November 2018).
- 10 *Anne Nuorgam and others v Finland* (Communication No 59/2016) UN Doc CERD/C/106/D/59/2016 (CERD 22 April 2022).
- 11 On 24 February 2023, the Constitutional Law Committee of Finland's Parliament decided, by a vote, that it did not have the time to consider Government Bill No 274 of 2022 on an amendment of the Sámi Parliament Act, despite the Sámi Parliament having expressed its explicit support to the Bill. See Constitutional Law Committee, 'Minutes of the Meeting of 24 February 2023' <[https://www.eduskunta.fi/FI/vaski/Kokous-Poytakirja/Sivut/PeVP\\_140+2022.aspx](https://www.eduskunta.fi/FI/vaski/Kokous-Poytakirja/Sivut/PeVP_140+2022.aspx)> accessed 22 May 2023.
- 12 In Finland, court cases are generally identified through a number which may be a yearbook number for published cases and file number for unpublished cases. Names of individuals are on public record but usually not published, even in the yearbooks of the highest courts. In this chapter, the cases discussed have been named according to the river where the fishing took place, using their Sámi language names: *Veahčajohka* (Finnish: *Vetsijoki*), *Ohcejohka* (Finnish: *Utsjoki*) and *Juvduujuuhâ* (Finnish: *Juutuanjoki*). The official case numbers are given in the footnotes accompanying the discussion of each case.
- 13 *Chief Bernard Ominayak and the Lubicon Lake Band v Canada* (Communication No 167/1984) UN Doc CCPR/C/38/D/167/1984 (HRC 26 March 1990).
- 14 UN Human Rights Committee, 'General Comment No 23: Article 27 (Rights of Minorities)' (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5, para 7. The second sentence of the paragraph has a footnote that refers not only to the *Ominayak/Lubicon* case (n 12) but also to the Committee's Final Views in the case of *Ivan Kitok v Sweden* (Communication No 197/1985) UN Doc CCPR/C/33/D/197/1985 (HRC 27 July 1988) where it had in 1988 been established that also reindeer herding by Indigenous Sámi falls under the notion of culture in ICCPR Article 27.
- 15 *Apirana Mahuika and others v New Zealand* (Communication No 547/1993) UN Doc CCPR/C/70/D/547/1993 (HRC 27 October 2000).
- 16 *ibid* paras 9.3–9.4.
- 17 *ibid* para 9.2.
- 18 UN Human Rights Committee, 'Concluding Observations on Canada' UN Doc CCPR/C/79/Add.105 (7 April 1999) paras 7–8.
- 19 Supreme Court of Canada, *Reference Re Secession of Quebec* (1998) 2 SCR 217, para 139.
- 20 UN Human Rights Committee (n 17).
- 21 *Tiina Sanila-Aikio v Finland* (n 8). The author of the current chapter served as the applicant's counsel in the case. The Committee's conclusions in paragraph 6.11 of its Final Views include the following finding: 'The Committee considers that the Supreme Administrative Court rulings affected the rights of the author and of the Sami community to which she belongs to engage in the electoral process regarding the institution intended by the State party to secure the effective internal self-determination and the right to their own language and culture of members of the Sami indigenous people . . . Accordingly, the Committee considers that the facts before it amount to a violation of the author's rights under article 25, read alone and in conjunction with article 27, as interpreted in light of article 1 of the Covenant'.
- 22 Martin Scheinin, 'Selvitys Lapin käräjäoikeudelle' (Expert Opinion at the Request of Defense Counsel), 4 November 2018 (in Finnish, on file with the author).

- 23 Supreme Court of Canada, *R v Sparrow* (1990) 1 SCR 1075; *R v Gladstone* (1996) 2 SCR 723 and *R v Marshall* (1999) 3 SCR 456 (No 1) and 533 (No 2).
- 24 Supreme Court of Canada, *Delgamuukw v British Columbia* (1997) 3 SCR 1010 and *Haida Nation v British Columbia* (2004) 3 SCR 511.
- 25 Supreme Court of Finland, KKO 2022:26.
- 26 *ibid* para 13.
- 27 *ibid* para 16.
- 28 *ibid* para 18.
- 29 *ibid* para 19.
- 30 *ibid* para 20.
- 31 *ibid* para 21.
- 32 *ibid* para 22.
- 33 *ibid* para 23.
- 34 *ibid* para 24.
- 35 *ibid* para 25.
- 36 *ibid* paras 26–31.
- 37 *ibid* paras 32–34.
- 38 *ibid* para 35.
- 39 *ibid* para 36.
- 40 *ibid* para 37.
- 41 *ibid* para 38.
- 42 *ibid* para 42.
- 43 *ibid* para 43.
- 44 *ibid* para 44.
- 45 *ibid* para 45.
- 46 *ibid* para 46.
- 47 Supreme Court of Finland, KKO 2022:25.
- 48 *ibid* para 36.
- 49 *ibid* para 37.
- 50 *ibid* para 39.
- 51 *ibid* para 40.
- 52 *ibid* para 41.
- 53 *ibid* para 45.
- 54 *ibid* para 47.
- 55 *ibid* para 48.
- 56 *ibid* para 49.
- 57 *ibid* para 51.
- 58 Lapland District Court (Lapin käräjäoikeus), judgment No 22/130234 of 12 August 2022 (final).
- 59 For Canadian case law on frozen rights, see John Borrows, ‘Frozen Rights in Canada: Constitutional Interpretation and the Trickster’ (1997) 22 *American Indian Law Review* 37. For an early rejection by the Human Rights Committee of a frozen rights doctrine under ICCPR Article 27, see *Ilmari Länsman and others v Finland* (n 5) para 9.3.
- 60 *Thlimmenos v Greece* (Application No 34369/97), European Court of Human Rights, Grand Chamber judgment of 6 April 2000, para 44.
- 61 *Lars-Anders Ågren and others v Sweden* (Communication No 54/2013) UN Doc CERD/C/102/D/54/2013 (CERD 18 November 2020) paras 6.11–6.22.
- 62 Concerning the intergenerational core aspect of Indigenous peoples’ right to enjoy their own culture under threats caused by climate change, see *Daniel Billy and others v Australia* (Communication No 3624/2019) UN Doc CCPR/C/135/D/3624/2019 (HRC 21 July 2022) para 8.14: ‘the Committee considers that the information made available to it indicates that the State party’s failure to adopt timely adequate adaptation measures to protect the authors’ collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and

*sea resources* discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture. Accordingly, the Committee considers that the facts before it amount to a violation of the authors' rights under article 27 of the Covenant' (emphasis added). For an *amicus curiae* brief in the case, submitted to the Human Rights Committee by the author of this chapter and focusing on the intergenerational nature of the right to culture, see Martin Scheinin, 'Amicus Curiae Brief by Professor Martin Scheinin in the Case of "Daniel Billy and others (Torres Strait Islanders) v Australia"' by the UN Human Rights Committee' (2022) Bonavero Report 2/2022.

- 63 Lapland District Court (Lapin käräjäoikeus), judgment No 19/109280 of 6 March 2019, 6: 'on the basis of matters brought up by the defendant, the restrictions must be regarded as having significantly weakened the transmittal of the enjoyment of culture to the younger generation'.
- 64 Lapland District Court (n 57) 9.
- 65 In the same court's judgment in the *Veahčajohka* case, the intergenerational transmittal of fishing culture is mentioned in the court's summary of the defendants' arguments. See District Court of Lapland (Lapin käräjäoikeus) judgment No 19/109281 of 6 March 2019, 11.
- 66 *Veahčajohka* and *Ohcejohka* are both tributaries of the river Deatnu, which forms the border between Norway and Finland and cuts Sámi society into two groups, as inhabitants of two states, with a bilateral treaty concerning the river but also each with their own fishing regulations. As the fishing occurred in tributaries located on the Finnish side of the river, the issue of cross-border social life and fishing culture did not arise. In a subsequent fourth case, however, the Lapland District Court followed the same approach as in the three cases discussed in the chapter and rejected the criminal charges against the Sámi defendant who had engaged in salmon fishing in the Deatnu using a traditional drift net, see Judgment No. 23/127932 of 7 July 2023.

# 5 The significance of the *Fosen* decision for protecting the cultural rights of the Sámi Indigenous people in the green transition

*Dorothee Cambou*<sup>1</sup>

## 1. Introduction

On 11 October 2021, the Supreme Court of Norway, in the form of its grand chamber, ruled unanimously that the decision to construct the Fosen wind energy project, one of Europe's largest land-based wind energy projects, violates the cultural right of the Sámi people to reindeer husbandry.<sup>2</sup> The Supreme Court decision is a landmark ruling because it established for the first time a violation of the cultural rights of the Sámi people as protected under Article 27 of the International Covenant on Civil and Political Rights (ICCPR). Completed in 2020 after numerous protests by Sámi communities and environmental organisations, the project's impacts concerns two of the six wind farms included in the Fosen project, which are located in the grazing district where Sør-Fosen sijte and Nord-Fosen siida (Sámi herding communities) have practiced reindeer husbandry since time immemorial. Against the project, the Sámi communities have claimed that the project violates their cultural rights to reindeer husbandry owing to the loss and deterioration of their reindeer pastures caused by the construction and operationalisation of the Fosen power plants. As they explain, with its numerous turbines, the industrial complex threatens to jeopardise the sustainability of their livelihoods including their minority language and way of living.<sup>3</sup>

At the same time, the Fosen wind project, which is owned in majority by the state of Norway together with foreign investors,<sup>4</sup> was approved by the government in the light of its negative impacts on Sámi reindeer husbandry but also its significance for the green shift.<sup>5</sup> During the licensing process, public authorities (the Norwegian Water Resources and Energy Directorate and the Ministry of Petroleum and Energy) recognised that the large-scale project would have a negative impact on the conduct of reindeer husbandry but not so much as to entail a violation of the rights of the Sámi reindeer herders as protected under Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and other relevant legal instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>6</sup> In opposition to the project, several claims have therefore been raised in petitions by Sámi communities and non-governmental organisations in national courts and at the international level.<sup>7</sup> After a petition to the Committee on the Elimination of Racial Discrimination (CERD), the committee

requested in 2018 that the Norwegian government halt the project temporarily.<sup>8</sup> However, the project went ahead over those objections while national lawsuits were still pending.<sup>9</sup>

In opposition to the decision of the Court of Appeal,<sup>10</sup> the Supreme Court found in 2021 a violation of Article 27 of the ICCPR. In its judgment, the court established that the Fosen project constitutes a threat to the survival of reindeer husbandry and distinctively concluded that the proposed mitigation measures, in the form of winter-feeding, could not compensate for the harm because these measures deviated significantly from traditional herding practices and were not adequately assessed by public authorities.<sup>11</sup> Although the court did not clarify whether the wind turbines should be dismantled, this ruling therefore concluded a lengthy judicial battle that established the invalidity of the licences of the Fosen project as its construction violates the human right of the Sámi to enjoy their own culture.

The purpose of this chapter is to examine the content of the *Fosen* decision and assess its contribution to interpret Article 27 of the ICCPR, which protects the right of the Sámi to culture. To this aim, the chapter first provides the background to the case by focusing on the protection of the rights of the Sámi people in Norway, and more particularly as enshrined under Article 27 of the ICCPR. Subsequently, the chapter examines the main tenets of the court decision in interpreting Article 27 of the ICCPR in the light of international law and describes its main specificities. From this perspective, the chapter underlined that the *Fosen* judgment is a landmark case which features significant elements for applying and interpreting Article 27 of the ICCPR in relation to the protection of the culture of the Sámi. This includes the admissibility of the Sámi as party to the case, the methods to interpret the impacts of development projects on the livelihoods of the Sámi, the definition of the right to benefit from reindeer husbandry, the significance of consultation and the importance of the green transition to interpret the right to culture. However, the chapter also concludes by questioning whether the judgment is not too little too late, more specifically as the government procrastinates on taking action for upholding the judgment of the Supreme Court. Although a landmark case, the significance of the *Fosen* judgment is therefore yet to be further contemplated.

## **2. The protection of the cultural rights of the Sámi people in Norway: a background**

### **2.1 *The rights of the Sámi people in Norway***

Nearly 40 years after the Supreme Court decision in the *Alta-Katokeino* case,<sup>12</sup> the *Fosen* decision re-actualises the centrality of human rights in responding to the claims of the Indigenous Sámi people, as well as its uncertainties. In 1982, the Norwegian government decided to authorise the construction of the Alta hydroelectric dam, an instrumental project to increase the energy supply and self-sufficiency of northern Norway. In its decision, the court indicated that the loss of winter grazing caused by the flooding of their area was not severe enough to cause a human rights violation.<sup>13</sup> Owing to a demanding threshold of violation, subsequent court

cases have similarly rejected Sámi claims that decisions affecting their cultural livelihoods are in violation of their human rights to culture.<sup>14</sup> At the same time, recognition of the rights of the Sámi people has also improved over the years. Despite its judicial outcome, the political controversy of the Alta conflict marked a turning moment in the history of the Sámi people as it drove important national legal reforms for recognising the rights of the Sámi in Norway. Under Norwegian law, the rights of the Sámi are now enshrined in the Constitution, which stipulates in its Article 108 the government's responsibility to 'create conditions enabling the Sámi population to preserve and develop its language, culture and way of life'. ILO Convention No. 169, concerning Indigenous and tribal peoples in independent countries, also forms an important backdrop against which Norwegian law has consolidated recognition of the rights of the Sámi as an Indigenous people to consultation, land and natural resources.<sup>15</sup> In 2007, the government of Norway also endorsed the UN Declaration on the Rights of Indigenous Peoples (UNDRIP),<sup>16</sup> together with 144 other nation-states. Despite its status as a soft law instrument, the UNDRIP formalised the international recognition of the right of the Sámi people to self-determination. Finally, the ICCPR, with its Article 27, which formally protects the right to culture of persons belonging to minorities, provides one of the main legal bases for protecting the cultural rights of the Sámi to their traditional livelihoods.<sup>17</sup> Since the incorporation of the ICCPR through the Norwegian Human Rights Act in 1999, the provision is part of Norwegian law and takes precedence over other legislations.<sup>18</sup> As a result, despite its focus on the individual protection of persons belonging to minorities groups, Article 27 has been increasingly used as a basis for Sámi herding communities to claim the protection of their collective rights against development projects threatening their culture and livelihoods in Norway, more particularly the right to practice reindeer husbandry.<sup>19</sup>

## **2.2. *The right to culture as protected under Article 27 of the ICCPR***

From an international legal perspective, the protection afforded by Article 27 of the ICCPR goes beyond the mere duty of the state to respect the right to culture of the members of minority groups. In effect, the interpretation of the provision has evolved over the years towards the obligations for states to protect the rights of the members of Indigenous groups 'in community with the other members of the group', 'to enjoy their own culture including their traditional economic activities'.<sup>20</sup> As ascertained by the Human Rights Committee (HRC) in charge of supervising and interpreting the ICCPR, Article 27 guarantees the rights of members of Indigenous communities constituting a minority to their traditional livelihoods such as fishing, hunting and reindeer husbandry as well as its modern development.<sup>21</sup> To protect the enjoyment of those rights, the HRC has also established that the provision may require from states parties 'positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them'.<sup>22</sup> Importantly, the HRC has also gradually recognised the interpretative effect of ICCPR Article 1 upon Article 27 in support of the idea that Indigenous peoples have the right to self-determination,<sup>23</sup> including

their right to freely dispose of their traditional resources.<sup>24</sup> These changes reflect the increasing influence of the UNDRIP to interpret the Covenant provisions in a manner that favours the collective aspects of Indigenous peoples' rights. However, the HRC has not clearly defined what measures states parties should take to consolidate the right of Indigenous peoples to self-determination in practice.

In effect, the main contribution developed by the HRC concerns its clarification of the requirements for assessing what interference with a minority culture constitutes 'denial' in the sense of Article 27. According to the HRC, 'measures that have a substantive negative impact on the author's enjoyment of her right to enjoy the cultural life of the community' amount to a denial of the right under Article 27.<sup>25</sup> Conversely, this also means that measures which have 'a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under Article 27'.<sup>26</sup> In this context, the crux of judicial conflicts concerning Article 27 lies in defining what types of measures constitute an interference of the right to culture and, more controversially, whether those measures have crossed the threshold for violation.

To define what type of interference may constitute a violation of Article 27, the Committee has established a combined test of 'meaningful consultation of the group' with an assessment of 'the sustainability of the Indigenous or minority economy'.<sup>27</sup> While the test has been used consistently by the HRC in its decisions, the substantial and procedural requirements to implement it have also evolved over the years. With regard to the standards of meaningful consultation, the HRC interpretation has evolved from a weak understanding of the right to consultation towards an interpretation that supports the principle of Free Prior and Informed Consent (FPIC).<sup>28</sup> As contended in the 2009 *Poma Poma v Peru* decision, where the HRC found a violation of Article 27, in order to ensure meaningful consultation, 'participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community'.<sup>29</sup> With this ruling, the HRC marked a breakthrough by underlining the importance of FPIC in its decisions for the first time. Although the decision did not further clarify what the duty to consult based on FPIC implies in effect, with its statement the HRC made an additional contribution to the development of its interpretation of the rights of Indigenous peoples, which buttresses the importance of FPIC as a cornerstone of the rights of Indigenous peoples and the protection of their right to culture as recognised in the UNDRIP.<sup>30</sup>

In relation to its sustainability test, the HRC interpretation has also developed in light of its decision concerning development projects that affect Indigenous groups, most specifically Sámi communities. In its *Länsman* decisions issued in the 1990s, the HRC has clarified that authorities must consider the past, present and future effects of projects in order to assess the magnitude of interference with the rights of the members of minority groups.<sup>31</sup> From this standpoint, it is now argued that certain projects with minor impacts may entail a violation of Article 27 of the ICCPR because their cumulative impacts, taken together with other projects, can lead to breaching the threshold of violation of the provision.<sup>32</sup> However, there are very few instances in which a violation of the right of Indigenous peoples to



culture has been established in practice. And whether this is a positive sign can be called into question.<sup>33</sup> In effect, authorities benefit from a wide margin of discretion in assessing the impacts of projects and apply legal rules ‘based on the best possible judgment’.<sup>34</sup> Establishing the best possible judgment is however a difficult exercise. As the Norwegian Water Resources and Energy Directorate notes, it is ‘difficult to say specifically about which interventions entail an excessive burden on Sámi culture, and what it means to “deny” Sámi cultural practice in relation to the UN Convention on Civil and Political rights Article 27’.<sup>35</sup> Furthermore, beyond the interpretation of law, establishing the best possible judgment is also difficult because authorities relies upon challenging assessments and balancing of interests among parties who often share contradictory positions and asymmetrical relations.

This situation is particularly salient in the licencing process of wind energy, which involves important knowledge controversies regarding the impacts of wind turbines on reindeer husbandry. In summary, scholarship, which does not stand in agreement regarding the extent of the impacts of wind turbines on reindeer husbandry, is divided between two schools. One school has argued for several years that the impacts of wind turbines on reindeer is not as significant as formerly assumed,<sup>36</sup> while other researchers have demonstrated that wind turbines can have significant negative effects on the conduct of reindeer husbandry.<sup>37</sup> Owing to the lack of knowledge consensus in the field, it has been noted that ambiguities over the impact of wind projects are strategically used by companies to promote their projects<sup>38</sup> and that the decisions of Norwegian authorities pertaining to the licencing process of wind energy projects in conflict with reindeer husbandry have been inconsistent.<sup>39</sup> To justify their decisions to support wind projects, Norwegian authorities usually give reasons ranging from material to procedural and global ecological considerations. From a material perspective, licencing authorities recognise the negative impacts of wind energy projects to some extent, but usually prescribe remedial measures to alleviate possible interferences. This includes mitigation measures in the form of construction adjustments, winter feeding and transport to alternative pastures, which often translates into monetary compensation for reindeer-herding communities and allegedly prevent a breach of Article 27 of the ICCPR. From a procedural perspective, consultation procedures are also used to legitimise the licencing process.<sup>40</sup> In accordance with Norwegian law, Sámi communities, including the Sámi Parliament, must be consulted in the licensing process of wind energy.<sup>41</sup> National standards are enshrined in ILO Convention No. 169 and further explicated in the consultation agreement and sectoral legislations.<sup>42</sup> Using this framework, Norwegian authorities have indicated that Norwegian law is in compliance with international law and supports self-determination requirements as enshrined in the UNDRIP via its consultative procedures established with the Sámi Parliament.<sup>43</sup> Finally, justifications for authorising wind energy projects are further grounded in the policy aim to promote the green shift, whose benefits according to the Norwegian authorities ‘outweigh the disadvantages this may have for reindeer herding’.<sup>44</sup>

While those arguments formed the basis for the licensing approval of the Fosen project, each one of them has however been called into question by the Supreme

Court in its decision over the validity of the licences for the project. In that regard, the next sections focus on examining the specificities of the judgment.

### **3. The conclusions of the *Fosen* decision and its contributions to interpret Article 27 of the ICCPR**

In assessing the validity of decisions on licensing and expropriation for the Fosen wind power development, one of the key issues for the Supreme Court was to decide whether the development of the project was in violation of the reindeer herders' rights as guaranteed under ICCPR Article 27. In this regard, the court decision rejected both the contentions from Fosen Vind and the Ministry of Petroleum and Energy to support the project as it found a violation of the provision. The next sections examine the court's arguments and its contributions for interpreting Article 27 of the ICCPR both in the light of the interpretation of the HRC and the former Supreme Court rulings.

#### **3.1 *The significance of collective rights and access to justice***

At the outset of the *Fosen* case, the question of the admissibility of the siida as party to the case was rather surprisingly raised as a point of contention. Specifically, the Ministry of Petroleum and Energy, as an intervener for Fosen Vind, claimed that the siidas were not in the capacity to invoke the minority protection provided under the human rights covenant because 'Article 27 ICCPR protects physical persons only, not groups of individuals'.<sup>45</sup> As it explained in its contention, the siidas were not entitled to appeal to the HRC because they were neither conferred with individual rights nor were they 'allowed under procedural law to represent their members in a lawsuit'.<sup>46</sup>

However, these arguments were rejected by the Supreme Court. Considering obligations under international law, which according to the court 'have great significance in this regard', it concluded instead that siidas, as bearers of collective rights can invoke individual reindeer herders' rights under Article 27 in Norway.<sup>47</sup> Against the Ministry's assertion, the court recalls the interpretation of the HRC, which has already several times specified that Article 27 entails that individuals who belong to minorities have the right to enjoy their own culture 'in community with the other members of their group'.<sup>48</sup> As argued by the court, such understanding has been confirmed in several decisions of the HRC, including the *Lubicon* case, where the Committee has upheld the collective protection afforded by Article 27 of the ICCPR to the concerned Indigenous community as a whole.<sup>49</sup> While human rights law traditionally focuses on the protection of individual rights, it is thus well established that Article 27 of the ICCPR protects both individuals in a minority and the group as such.<sup>50</sup>

Against this background, the Supreme Court was therefore able to confirm that the two siidas have the capacity to invoke the minority protection in Article 27 of the ICCPR on behalf of the reindeer herders. As the court explained, it was already clear from previous court rulings and the Reindeer Husbandry Act that siidas 'may

have a limited capacity to sue and be sued'.<sup>51</sup> However, it has not been confirmed in previous rulings whether siidas could act as a party and invoke individual reindeer herders' rights under Article 27 on their behalf. With its conclusion, the Supreme Court therefore dispels any doubts concerning the right for siidas to claim protection for the cultural rights of Sámi reindeers so that the entire arguments presented by the Ministry that tempered with the right of the Sámi to access to justice should now also be ruled out once and for all.

### 3.2 *The significance of interference*

Beyond the question of its subject, as already explained, one of the main issues concerning the interpretation of Article 27 of the ICCPR concerns its threshold for violation, a threshold that had never been found to be breached in former Supreme Court cases. To determine this threshold in the *Fosen* case, the Supreme Court made a comprehensive review of several cases,<sup>52</sup> including four rulings from the HRC that clarify what it takes to violate the right to cultural enjoyment under Article 27.<sup>53</sup> Unsurprisingly, the court found that these rulings provided little indication about the definition of the threshold, other than specifying that the impact of measures involving a violation must be substantial in order to count as a violation.<sup>54</sup> Based on this finding, the court therefore concluded that the threshold for violation is therefore high but also underlined that it is not limited to violations that would cause a total denial of the right to benefit of culture.<sup>55</sup> Instead, the first voting judge, in line with the HRC interpretation, found that there will be a violation of the rights in Article 27 of the ICCPR if the interference has a substantive, negative impact on the possibility of cultural enjoyment.<sup>56</sup> In its decision, it also noted that 'the effect does not need to be as serious as in *Ángela Poma Poma v. Peru*, where thousands of livestock animals were dead as a result of the measure, and the author had been forced to leave her area'.<sup>57</sup>

On this basis, the Supreme Court makes four contributions. First, it rejects the contention of *Fosen Vind* that a violation would require a total denial of the right. Second, it also suggests an interpretation of a threshold for violation in less demanding terms than what has been ascertained by the HRC in the *Poma Poma* case. At the same time, the *Fosen* decision also confirmed that the impact must be 'considerable' or 'significant' in order to breach the threshold for violation. In this context, what is perhaps a more remarkable feature of the *Fosen* decision is its clarification of the means for assessing the significance of the harm rather than the definition of the threshold. In this regard, the court has now confirmed in line with the HRC that measures impairing the rights of the Sámi must be assessed in context with other measures, both previous and planned. As stated by the court, '[i]t is the different activities taken together that may constitute a violation'.<sup>58</sup> In this respect, *Ravna* also explains,

The *Fosen* judgment clarifies that it is *the overall, cumulative effects* that are to be used as a basis for assessing whether an intervention has a significant, negative impact, which now probably also applies when assessing whether an interference is to the significant disadvantage of the reindeer husbandry.<sup>59</sup>

In other words, with such interpretation, the *Fosen* decision confirms the importance of considering the cumulative effects of projects to assess possible violation of Article 27, something that the Supreme Court had been unwilling to consider or acknowledge in its former decisions.<sup>60</sup>

Finally, an important but concealed contribution of the *Fosen* decision lies in its consideration of Sámi knowledge for assessing the significance of the impact. Specifically, the Supreme Court emphasises on the fact that ‘The court of Appeal has placed significant weight on a presentation held by senior lecturer Anna Skarin from the Swedish University of Agricultural Sciences in Uppsala’ and had also ‘relied on several other expert witnesses and reindeer herders with experience from windfarm areas’.<sup>61</sup> In her capacity as expert witness for Nord-Fosen siida, Anna Skarin, whose identity was specifically pinpointed by the court, shared an expert assessment that did not only contrast in result but also in methods with the assessment provided by experts working for Fosen Vind and national authorities. The reports presented by Skarin have shown that impacts from wind power on reindeer are severe and that the cumulative impacts of the Fosen wind project will threaten the future existence of reindeer herding in the area. In addition, Skarin’s findings included both scientific and Indigenous knowledge, as they were co-produced with Sámi reindeer communities, which importantly contrast with the methods employed by Fosen Vind consultants.<sup>62</sup>

In this regard, the decision of the court in the *Fosen* case exhibits the importance played by knowledge co-production for assessing the harm caused by wind projects on the livelihoods of Sámi communities.<sup>63</sup> The use of Sámi knowledge and its importance for the court ruling is also further upheld by the Supreme Court judgment as it decided to set aside the conclusion of the Court of Appeal concerning the impact of mitigation measure on the cultural right of the reindeer herders because ‘[t]his issue has not been given a broad and thorough assessment, and general reindeer husbandry interests have not been heard’.<sup>64</sup> In other words, because the Court of Appeal acted with discretion and without regards for scientific expertise or traditional knowledge, the Supreme Court consequently concluded that it could not validate its decision.

Hence, noting its first emphasis on scientific expertise, the *Fosen* decision nonetheless signifies the importance of including both scientific and traditional knowledge for assessing the impacts of measures on the cultural rights of the Sámi.<sup>65</sup> In this respect, the *Fosen* decision is important because it does not fully sustain the dominance of the Western orthodox knowledge system that usually constrains Sámi Indigenous claims in courtrooms.<sup>66</sup> From this lens, the significance of the *Fosen* decision lies, therefore, in the fact that it may provide a basis to question how Sámi knowledge is taken into account in future cases and, perhaps a means to challenge the prevalence of epistemic injustices in the Norwegian legal system.

### **3.3 *The significance of the right to benefit from reindeer husbandry***

The contribution of the *Fosen* decision for interpreting Article 27 of the ICCPR is also connected with its interpretation of the cultural right of the Sámi to benefit

from reindeer herding which, as explained by the court, ‘entails the protection of the traditional economic activities of the Sámi’.<sup>67</sup> In line with the HRC interpretation which also underlined the importance of ‘the sustainability of the Indigenous or minority economy’ as a basis to protect Indigenous culture,<sup>68</sup> the determining element for assessing the interference of the Fosen power plants on the cultural rights of the Sámi was therefore whether the *siidas* ‘will continue to benefit from their traditional economy’.<sup>69</sup>

On this basis, the court made several distinctive points that are useful for interpreting the right to benefit from reindeer husbandry. First, it asserted the significance of economic profitability as one of the central factors in its decision. As it explained, because reindeer husbandry is a form of cultural practice while at the same time a way of making a living, it entails considering how the profitability of business was impacted by the Fosen project to assess the interference of the right to cultural enjoyment.<sup>70</sup> This finding reflects the HRC conclusions that the materiality of a violation in relation to the cultural rights of the Sámi communities can be demonstrated through the loss of income, which in the case of the protection of the rights of the Sámi people can be triggered by the reduction of the number of reindeer due to the loss or deterioration of available land pastures. On this basis, the Supreme Court was therefore able to establish a violation of Article 27 because the ‘development project will ultimately eradicate the grazing resources to such an extent that it cannot be fully compensated by the use of alternative pastures’.<sup>71</sup> As it also explained, the loss of pastures caused by the Fosen project would likely cause a significant reduction of the number of reindeer, which entailed that the herders ‘may no longer benefit from the business, or at least profit from it to an extent that is proportionate to the efforts’.<sup>72</sup> With this conclusion, the court therefore rejected the argument of Fosen Vind that contended that the interference of the Fosen project was not the cause of the negative effect on the economy of reindeer herders, who have always been dependent on subsidies and would arguably never be able to make a living regardless of the interference.<sup>73</sup> In contrast, the court concluded that reindeer herders had always managed with subsidies and that the interference caused by the Fosen project was therefore the cause of the negative impact on the economy.<sup>74</sup> Henceforth, the court concluded that the impact on the business activity of the reindeer-herding communities caused an interference with their right to benefit from their culture.

But the lack of business profitability was not the only factor considered by the court in establishing whether the right of the Sámi to benefit from reindeer husbandry had been violated. While making profit and the question of financial compensation was a central piece of the *Fosen* case, the judgment of the Supreme Court also alludes to an interpretation of the right to benefit from reindeer husbandry that exceeds this understanding. This is most notably reflected in the discussion concerning mitigation measures to alleviate the impact of the Fosen project on the conduct of reindeer herding. In their claim, Fosen Vind had also argued that compensation for winter feeding costs would prevent a violation. In this regard, the remaining question for the court to assess was whether the substantive negative effects caused by Fosen wind turbines could be mitigated by way of providing

compensation. To this question, the Court of Appeal had ruled, ‘with some doubt’, that such a loss could be compensated by using artificial feeding.<sup>75</sup> As it explained, monetary compensation to support winter feeding would notably provide the herders a guarantee for the reindeer’s survival in late winter and therefore avoid a loss of profit linked to the reduction of the number of reindeer.<sup>76</sup> In contrast, the Supreme Court examined the question of using the proposed remedy of winter feeding—a method that is not traditionally used by Sámi reindeer herders—to mitigate the negative impacts of the Fosen project, and decided that such mitigation measures were not an adequate scheme to prevent a violation of Article 27.<sup>77</sup> In its assessment, the court stressed that this ‘model deviates considerably from traditional, nomadic reindeer husbandry’ because it would entail keeping half the herd within a relatively small fenced-in area for around 90 days each winter.<sup>78</sup> In addition, it also underlined the lack of information on such a model for either reindeer husbandry or animal welfare, based on experience from other countries, as well as the lack of consultation with reindeer herders themselves.<sup>79</sup> Although the court did not conclude that winter feeding was *per se* in violation of the right to culture, it indicated that this measure was ‘burdened with so much uncertainty’ that it could ‘not determine whether Article 27 of the ICCPR has been violated’.<sup>80</sup>

On this account, the Supreme Court therefore opposed the finding of the Court of Appeal for its inadequate consideration of the importance of the ‘traditional’ aspect of the economy of the Sámi communities. This is a noticeable finding insofar as it emphasised the importance of looking beyond the question of profitability to assess a possible violation of the right of the Sámi to their traditional economy and livelihoods. Protecting the economy of Indigenous communities does not only require upholding their right to benefit from their business. It also includes the obligation to protect them against measures that would force their cultural adaptation into an economic model that challenges their subsistence activities. As Kuokkanen describes, ‘[B]esides an economic occupation, subsistence activities are an expression of one’s identity, culture, and values’.<sup>81</sup> In relation to the Sámi, the right to benefit from reindeer husbandry should therefore entail the protection of the sustainability of the Indigenous or minority economy in a holistic sense that goes beyond monetary consideration and the characterisation of reindeer husbandry as a meat producing business.<sup>82</sup> The right should be interpreted to include protection for the ecologic and knowledge systems that form the basis upon which Sámi communities practice reindeer husbandry.

While such an interpretation may seem logical given the focus of Article 27 on the protection of right to culture, the fact that the validity of companies’ compensation schemes in the form of winter feeding had never been decisively challenged in national court before implies that the *Fosen* decision could also influence future decisions.<sup>83</sup> With its conclusions in the *Fosen* case, the Supreme Court may therefore open the doors to novel considerations regarding the protection of reindeer husbandry that will require courts to assess in future cases what the protection of the ‘traditional’ aspects of this activity entails and whether compensation schemes such as winter feeding are compatible with Article 27 of the ICCPR. More generally, the court decision displays the importance of looking beyond financial

profitability to define what the right to benefit from a ‘traditional’ economy entails and therefore also challenges the prevalent reductionism that characterises what Indigenous economy and the right to benefit from it means under Western law.

### 3.4 *The significance of consultation*

The duty to consult Indigenous peoples is part of customary obligations recognised in several human rights instruments.<sup>84</sup> It is also part of the requirements established by the HRC to establish whether an interference of cultural rights qualifies as a violation. As indicated by the HRC, ‘[T]he enjoyment of those rights may require . . . measures to ensure the effective participation of members of minority communities in decisions which affect them’.<sup>85</sup> In line with the HRC interpretation, the Supreme Court recalls in the *Fosen* decision the importance of consultation to assess possible violations of Article 27 of the ICCPR. In its decision, the court explains that ‘it is essential whether the minority has been consulted’ but also notes that ‘whether and to which extent the minority has been consulted cannot be decisive’.<sup>86</sup> From this perspective, the premise of the court argument is that ‘[c]onsultation with the minority is an important factor, but cannot in itself prevent violation if the negative effects are substantive’.<sup>87</sup>

As the court explains, ‘[i]f the consequences of the interference are sufficiently serious, consultation does not prevent violation’.<sup>88</sup> With this finding, the court ascertains the instrumentality of consultation to assess a violation of Article 27 but also underlines that consultation in the form of ‘close dialogues’ are by no means sufficient to ensure protection to the cultural rights of the Sámi.<sup>89</sup> In other words, with this statement the decision also implies that the government is not allowed to consult itself away from its responsibility to protect the culture of the Sámi.<sup>90</sup> Whereas the conduct of consultation is often used by states parties and companies to demonstrate that the right of Indigenous groups has been guaranteed, the court statements buttress that the right to culture is a substantive right that must be protected at its core. In short, consultation procedures do not legitimise substantive harms.

At the same time, the Supreme Court also indicates in a more ambiguous statement that ‘it is not an absolute requirement under the Convention that the minority’s participation has contributed to the decision, although that, too, may be essential in the overall assessment’.<sup>91</sup> In this regard, the court argument is in line with its previous jurisprudence according to which there is no requirement that consultation based on an informed prior consent must be obtained.<sup>92</sup> However, it also contrasts with a more progressive interpretation of the HRC as it seemingly plays down the obligation to consult Indigenous peoples in affairs that concern them. In particular, the court statement contrasts with the *Poma Poma* decision, which requires FPIC from Indigenous communities in order for participation in decision-making to be effective.<sup>93</sup> From this standpoint, it can therefore be concluded that the *Fosen* decision does not ascertain the duty to consult based on FPIC as recognised in instruments concerning the rights of Indigenous peoples, such as the UNDRIP.

On the other hand, the court decision perhaps went as far as necessary for the purpose of the case. By establishing a violation of the human rights of the Sámi in



the *Fosen* case with a unanimous quorum, the conclusions did not warrant further specification about the interpretation of the duty to consult. In its judgment, the court simply recalls ‘that, with effect from 1 July 2021, provisions on consultation have been included in chapter 4 of the Sámi Act’ and that ‘[i]n Proposition to the Storting 86 L (2020–2021) paragraph 4.2, the Ministry accounts for the Sámi right to self-determination and the significance of consultations’.<sup>94</sup> On this basis the court concluded that it saw ‘no reason for going into more detail on this topic’.<sup>95</sup> In accordance with the court judgment, the question of the right of consultation based on FPIC, which remains a central issue of contention for the Sámi, other Indigenous communities and human rights scholars more generally, remains therefore a matter to be tackled elsewhere.

### **3.5. *The significance of the ‘green shift’ and the human right to a healthy environment***

In the context of the race towards carbon neutrality, what also makes the *Fosen* judgment significant is the fact that the decision features the conflict between the protection of human rights and the promotion of the green transition. In the light of the objectives to curb carbon emissions,<sup>96</sup> Fosen Vind has argued that the green shift should be considered in assessing interferences with the human right to culture of the Sámi communities,<sup>97</sup> a claim supported by the Ministry of Petroleum and Energy as it had also concluded that ‘the benefits of renewable energy production outweigh the disadvantages this may have for reindeer herding’ when authorising the licence for the Fosen project.<sup>98</sup> Such position, contested by Sámi representatives as an assertion of green colonialism,<sup>99</sup> was on the other hand also rejected by the Supreme Court decision.

As the court recalls in accordance with international human rights law, the fact that the right to culture is absolute implies that governments cannot curtail its protection through discretionary measures. In contrast with several other provisions of the UN Covenant, Article 27 does not allow the state to limit the application of the protection to certain conditions or pursuant to its margin of appreciation.<sup>100</sup> In this regard, the Supreme Court has also indicated in the *Fosen* decision that Article 27 ‘does not allow for a proportionality assessment balancing other interests of society against the minority interests’.<sup>101</sup> As also explained by the Sámi Right Committee, ‘this is a natural consequence of the justification for the provision. Its minority protection would quickly become ineffective if the majority population were to be able to limit it based on an assessment of their legitimate needs’.<sup>102</sup> Therefore, as implied in the *Fosen* decision, this also means that the state is not allowed to trump the right of a minority to enjoy its culture for the purpose of economic development, regardless of its legitimate support by the democratic majority or its crucial importance for society.

Based on the interpretation provided by the HRC, the court, however, also explains that the green shift may be relevant when the right to a good and healthy environment constitutes a conflicting basic right with the right to culture. As explained by the court, ‘in situations where the rights in Article 27 conflict with

other rights in the Convention, the conflicting rights must be balanced against each other and harmonised. A possible outcome of this is that Article 27 must be interpreted strictly'.<sup>103</sup> Furthermore, because the HRC also 'allows for a balancing in cases where the interests of an individual in a minority group stand against the interests of the group of as a whole', the court also indicates that the same balancing of interests may be necessary if the provision conflicts with other basic rights, more specifically the right to a good and healthy environment'.<sup>104</sup> As explained by the first voting judge, 'In a given case, the right to a good and healthy environment may, in my view, be such a conflicting basic right. In other words, the consideration for "the green shift" may be relevant'.<sup>105</sup>

Notwithstanding, the court did not ultimately find a conflict between the right to a healthy environment and the right to culture in the *Fosen* case. In particular, it pointed out that the Norwegian authorities had considered a number of wind projects in the Fosen area but decided to grant a license for these projects despite having knowledge of their negative consequences for reindeer husbandry. Thus, if the court recognised the potential relevance of the green shift for assessing interference with Article 27, it also concluded in the *Fosen* case that 'the green shift could also have been taken into account by choosing other—and for the reindeer herders, less intrusive—development alternatives'.<sup>106</sup> On this basis, and notwithstanding the urgency of the climate situation, the decision in the *Fosen* case indicates that the public interest in supporting the green shift cannot override the rights of members belonging to minority groups.<sup>107</sup> Instead, public authorities should ensure that the implementation of the human right to a healthy environment takes the rights of minority Indigenous groups into account and protect them against the substantive negative impacts caused by the development of renewable energy projects. While the *Fosen* decision may thus be read as a judgment fostering the call for a green and just transition, it remains to be seen whether such decision will act as a catalyst for change in the way public authorities make decision about future wind projects affecting the traditional territories of the Sámi communities.<sup>108</sup>

#### 4. Conclusion

Until the *Fosen* case, never in Norway, or in any country with Sámi people, had the Supreme Court established a violation of the human rights of the Sámi people to culture based on Article 27 of the ICCPR. With its decision in the *Fosen* case, the Supreme Court therefore provides a landmark ruling which has both legal and political ramifications. In this chapter, the analysis focused essentially on the legal analysis of the court and its significance to interpret Article 27 of the ICCPR. In this regard, the *Fosen* decision is significant for at least five main reasons.<sup>109</sup> First, the decision has confirmed that *siidas*, as bearers of collective rights, have the capacity to act on behalf of individual Sámi reindeer herders for claiming protection of their right to culture.

Second, the *Fosen* judgment provides clarification about the threshold for violation of Article 27 of the ICCPR and the methods to assess such violations. In line with the HRC interpretation, the Supreme Court has confirmed high requirements

for proving a breach of the provision: ‘there will be a violation of the rights in Article 27 ICCPR if the interference has a substantive, negative impact on the possibility of cultural enjoyment’.<sup>110</sup> At the same time, it has also specified that the interference does not require to be a total denial of the right and confirmed that an assessment of an interference of the right to culture requires to take into consideration the cumulative impacts of projects—that is, the effects of past, present and planned future projects. The fact that the court decision displays both scientific and traditional knowledge as a basis for its ruling is also an important aspect of the judgment as it challenges the dominance of Western knowledge in the assessment of projects affecting Sámi Indigenous communities and therefore counteract the prevalence of epistemic injustices in court decisions.

Third, the *Fosen* decision also clarifies the meaning of the cultural rights of the Sámi people and the importance of protecting their subsistence economy. As the *Fosen* decision underpins, the right to culture entails both the right to profit from reindeer husbandry as an economic livelihood and to sustain its cultural aspects. As a result, mitigation measures that compensate for a lack of profitability, but which are culturally inappropriate to compensate for the substantial negative effects on the right to benefit from reindeer husbandry are inadequate for preventing a human rights violation. In comparison with other national decisions, in Norway and Sweden, this finding is important because it challenges the current prevalence of mitigation schemes in the form of winter feeding, which have frequently legitimised projects interfering with the conduct of reindeer husbandry.<sup>111</sup> From this perspective, the *Fosen* decision also ascertains the importance of looking beyond the status of reindeer herders as business meat producers, whose rights to benefit from their livelihoods would be limited to the profit engendered by the reindeer industry. Thus, although the court does not displace the idea of modernity, it can at least be credited for seeking to protect the Sámi Indigenous economy in a way that does not confine their livelihoods to the model of Western economic development.

Fourth, the *Fosen* decision also underlines that consultation does not prevent violation. In other words, procedural safeguards in the forms of close dialogues between project developers and Sámi communities cannot justify a breach of the right to culture. With this finding the *Fosen* decision offers an important finding that challenges consultation procedures and corporate dialogues as the predominant governance prescription for mediating conflict between Indigenous communities and business developers.<sup>112</sup> In the context of the green transition, consultation is assuredly considered a necessary instrument for guaranteeing human rights, but as the *Fosen* case illustrates, it is a double-edged sword that can either support Indigenous self-determination or legitimise green colonialism when it perpetuates decisions that deprive Indigenous communities from the benefits of their lands and livelihoods. On this note, even if the *Fosen* judgment does not support the right of the Sámi to consent, the decision is significant because it calls into question the instrumentalisation of consultation as a means to guarantee the protection of human rights.

Finally, the *Fosen* decision also underlines that the ends do not justify the means. As the judgement indicates, while the green shift is relevant to assess the

impact of wind energy projects on the rights of minority groups, in the case of *Fosen*, the project could have been promoted by choosing less intrusive development for the reindeer herders. In other words, the *Fosen* decision suggests that a balancing of rights between the right to culture and the right to a healthy environment cannot displace the responsibility of the state to protect the cultural rights of Indigenous minorities against substantial interference, even when such interference would be legitimated by the public interest in addressing the climate emergency. From this perspective, the decision provides an important illustration of the limitations that lies in the sustainable development discourse when it is applied at the expense of the human rights of minorities and Indigenous groups. The decision is therefore a valuable contribution for developing the interpretation of human rights to a healthy environment and the discourse on just sustainabilities.<sup>113</sup>

At the same time, the contributions of the *Fosen* decision pale into insignificance so long as the authorities do not take the judgment seriously. More than 500 days after the decision, the government is still looking for a solution to ensure the co-existence of the wind power plants with reindeer husbandry, a solution that appears dubious since the Supreme Court has ruled that neither winter feeding nor other measures will offer sufficient compensation.<sup>114</sup> The inaction of the government has resulted in a massive mobilisation of the Sámi communities that recalls the Alta event four decades ago and which therefore also raises questions about what lessons have been learnt so far. In addition, the decision has also gained international attention as the situation seriously calls into question the Norwegian government's respect for the Supreme Court decision and its commitments towards human rights. From a business perspective, the *Fosen* decision also sends mixed signals as the court ruling demonstrates weakness in the Norwegian licencing process for wind energy projects that could challenge the legality of ongoing and future development plans and therefore decelerates the green shift, for better or for worse.

Hence, the ball is now out of the courtroom and the significance of the *Fosen* decision is stuck in political limbo.

## Notes

- 1 The author thanks Øyvind Ravna as well as the anonymous peer reviewers for their valuable comments towards the improvement of this chapter.
- 2 Supreme Court of Norway, HR-2021-1975-S (*Fosen*). An English translation of the court decision is available at <<https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2021-1975-s.pdf>> accessed 23 July 2022. See also Øyvind Ravna, 'The Fosen Case and the Protection of Sámi Culture in Norway Pursuant to Article 27 ICCPR' (2023) 30(1) *International Journal on Minority and Group Rights* 156–75.
- 3 Trond Risto Nilssen, 'South Saami Cultural Landscape Under Pressure' in Håkon Hermanstrand and others (eds), *The Indigenous Identity of the South Saami: Historical and Political Perspectives on a Minority Within a Minority* (Springer International Publishing 2019); See also Eva Maria Fjellheim, 'Through Our Stories We Resist: Decolonial Perspectives on South Saami History, Indigeneity and Rights' in *Indigenous Knowledges and the Sustainable Development Agenda* (Routledge 2020).

- 4 Fosen Vind is a joint venture between Norwegian and European investors: StatKraft (52.1%), Nordic Wind Power (40%), and TrønderEnergi (7.9%) with an estimated investment of NOK 11bn.
- 5 Det grønne skiftet (Regjeringen No 22 October 2021) <<https://www.regjeringen.no/no/tema/klima-og-miljo/innsiktsartikler-klima-miljo/det-gronne-skiftet/id2879075/>> accessed 23 July 2022. Interestingly, the document, which was updated after the Fosen decision, does not mention onshore wind energy but focuses on offshore projects.
- 6 *Fosen* (n 1) paras 9–10. See also NVE (Norwegian Water Resources and Energy Directorate), ‘Bakgrunn for vedtak (Background for licensing decisions)’ 2010. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
- 7 Society for Threatened Peoples Switzerland & BKW Group (OECD, 2020); Reuters, ‘Norway to Build Wind Farm Despite Concerns of Reindeer Herders’ <<https://reut.rs/2Th88jo>> accessed 23 July 2022.
- 8 Saami Council, ‘Confound by Norway’s Disrespect of CERD’s Request in the Fosen Case’ (2018) <<https://www.saamicouncil.net/news-archive/confound-by-norways-disrespect-of-cerds-request-in-the-fosen-case#:~:text=On%202021%20December%202018%2C%20Norway,Sjtte%20Sámi%20reindeer%20herding%20community>> accessed 23 July 2022.
- 9 This was due to the Ministry giving consent to pre-accession for the developer, Fosen Vind, in 2014, based on the right to begin development before the expropriation discretion had been decided: see Act on Expropriation of Immovable Property (Expropriation Act, 1995) s 25. The district court decisions of 2017 and 2018 concern separate issues addressing the question of compensation due to expropriation of the property rights of Fovsen Njaarke (Inntrøndelag District court’s decision on the 15th of June 2018 (14–139974SKJ-INTR) and Inntrøndelag District court’s decision on the 28th of June 2018 (14–136323SKJ-INTR)) and the validity of the licensing decision for Storheia wind power plant (Inntrøndelag District court’s decision on the 15th of June 2018 (14–139974SKJ-INTR).
- 10 Frostating Court of Appeal’s judgment on the 8th of June 2020 (LF-2018-150314, LF-2018-150323, LF-2018-150327).
- 11 *Fosen* (n 1) para 151.
- 12 Supreme Court of Norway, Case HR-2004-1128-A (Alta).
- 13 In the case, violation of the right of the Sámi people as a minority was addressed under Article 8 of the European Conventions on Human Rights, which guarantees the right to private life.
- 14 Among the decisions connected to interferences cases are Supreme Court of Norway, HR-2017-2428-A (Sara); HR-2017-2247-A (Reinøya), Rt. 2004 s, 1092 (Stongland) and Rt. 182, 241 (Alta). For an analysis of the case law before the judgment see Ravna (n 1).
- 15 Norway was the first state in 1990 to ratify ILO Convention No. 169 concerning Indigenous and Tribal People in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention No. 169). In addition, several legal instruments have further substantiated this protection, including the Reindeer Husbandry Act/Act relating to Reindeer Husbandry (2007), the Finnmark Act/Act relating to legal relations and management of land and natural resources in Finnmark (2005) and the Consultation Agreement/Procedures for consultations between state authorities and the Sámi Parliament/Regjeringen (2005).
- 16 United Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA A/RES/61/295 (UNDRIP).
- 17 UN Human Rights Committee, ‘CCPR General Comment No 23: Article 27’ (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5, para 7.
- 18 Act relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act, 1999), ss 2–3.
- 19 *Kitok v Sweden* (Communication No 197/1985) UN Doc CCPR/C/33/D/197/1985 (HRC 27 July 1988).

- 20 CCPR General Comment No 23 (n 16); See also *NOU 1984: 18*, Om samenes rettsstilling/ On the legal position of the Sámi, 24.
- 21 CCPR General Comment No 23 (n 16) paras 3.2, 7.
- 22 *ibid.*
- 23 *Tiina Sanila-Aikio v Finland* (Communication No 2668/2015) UN Doc CCPR/C/124/D/2668/2015 (HRC 20 March 2019).
- 24 See also *Aparina Mahuika and others v New Zealand* (Communication No 547/1993 27) UN Doc CCPR/C/55/D/547/1993 (HRC 27 October 2000) para 9.2.
- 25 *Angelà Poma Poma v Peru* (Communication No 1457/2006) UN Doc CCPR/C/95/D/1457/2006 (HRC 27 March 2009) para 7.5.
- 26 *Ilmari Länsman and others v Finland* (Communication No 511/1992) UN Doc CCPR/C/52/D/511/1992 (HRC 8 November 1994) para 9.4.
- 27 Martin Scheinin, 'Indigenous Peoples' Land Rights Under the International Covenant on Civil and Political Rights' (2004) Norwegian Center for Human Rights 7. See also CCPR General Comment No 23 (n 16).
- 28 This interpretation is particularly visible when we compare the Länsman communications (n 25) to HRC *Angelà Poma Poma v Peru* (n 24).
- 29 *Poma Poma v Peru* (n 24) para 7.6.
- 30 See also Inter-American court of Human Rights *Saramaka People v Suriname* (2007) Series C No 172, paras 129–37; African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya* (2010), 276/2003, para 291.
- 31 *Ilmari Länsman v Finland* (n 25); *Jouni E. Lansman v Finland* (Communication No 671/1995) UN Doc CCPR/C/58/D/671/1995 (HRC 30 October 1994) paras 10.1–7.
- 32 See Leena Heinämäki, 'The Prohibition to Weaken the Sámi Culture in International Law and Finnish Environmental Legislation' in Dorothee Cambou and Oyvind Ravna (eds), *The Significance of Sámi Rights* (Routledge 2023).
- 33 Until this day, the HRC has only established in a few decisions a violation of Article 27 of the ICCPR: i.e. *Lubicon Lake Band v Canada* (Communication No 167/1984), *Poma Poma v Peru* (n 24); *Tiina Sanila-Aikio v Finland* (n 22).
- 34 *ibid* para 141.
- 35 NVE (Norwegian Water Resources and Energy Directorate), 'Bakgrunn for vedtak (Background for Licencing Decisions)' 2010, 15, 140.
- 36 Jonathan E Colman and others, 'Is a Wind-Power Plant Acting as a Barrier for Reindeer Rangifer Tarandus Movements?' (2012) 18 *Wildlife Biology* 439.
- 37 Anna Skarin and Birgitta Åhman, 'Do Human Activity and Infrastructure Disturb Domesticated Reindeer? The Need for the Reindeer's Perspective' (2014) 37 *Polar Biology* 1041; Anna Skarin, Per Sandström and Moudud Alam, 'Out of Sight of Wind Turbines—Reindeer Response to Wind Farms in Operation' (2018) *Ecology and Evolution* 9906.
- 38 Eva M Fjellheim, 'Wind Energy on Trial: Epistemic Controversies and Strategic Ignorance in Norway's Green Energy Transition' Submitted in April 2023 to Arctic Review on Law and Politics (forthcoming).
- 39 Else Grete Broderstad, 'International Law, State Compliance and Wind Power Gaelpie (Kalvvatnan) and Beyond Else Grete Broderstad' in Monica Tennberg, Else Grete Broderstad and Hans-Kristian Hernes (eds), *Indigenous Peoples, Natural Resources and Governance* (Routledge 2022) 29–30.
- 40 Broderstad (n 38).
- 41 For more information about the licensing process and Sámi rights see Even Vegard Dalen and Amanda Villaruel, 'Det folkerettslige vernet av Sámiske interesser i konsesjonsbehandlingen' (NVE 2019) Report <<https://nve.brage.unit.no/nve-xmlui/handle/11250/2597924>> accessed 23 July 2022.
- 42 For a summary of the duty to consult the Sámi People in Norway see Christina Allard, 'The Rationale for the Duty to Consult Indigenous Peoples: Comparative Reflections from Nordic and Canadian Legal Contexts' (2018) 9 *Arctic Review* 25, 28–31;



- Øyvind Ravna, 'The Duty to Consult the Sámi in Norwegian Law' (2020) 11 *Arctic Review* 233.
- 43 See UN General Assembly, 'Official Record (Norway)' (13 September 2007) UN Doc A/61/PV.107, 22. However, this interpretation is questionable since consultation does not equate self-determination: Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (OUP 2016) 135–36.
- 44 OED, 'Vindkraft og kraftledninger på Fosen—Klagesak' (2013) <<https://web-fileservice.nve.no/API/PublishedFiles/Download/200700502/761649>> accessed 23 April 2023.
- 45 *ibid* paras 57, 103.
- 46 *ibid* para 57.
- 47 *ibid* para 110.
- 48 CCPR General Comment No 23 (n 16).
- 49 *Fosen* (n 1) para 105.
- 50 As explained its general comment, 'although the rights protected under Article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion'.
- 51 *ibid* paras 106–8.
- 52 Among the national decisions mentioned were the Supreme Court of Norway's cases HR-2017-2428-A (Sara); HR-2017-2247-A (Reinøya).
- 53 *Fosen* (n 1) para 113.
- 54 *ibid* paras 116.
- 55 *ibid* paras 118–19, 52.
- 56 *ibid* para 119.
- 57 *ibid*.
- 58 *ibid*.
- 59 Ravna (n 1) 168.
- 60 *ibid*. Ravna made this conclusion as the court failed to take cumulative impacts into account in one rather similar decision concerned with the Norwegian Reindeer husbandry Act.
- 61 *Fosen* (n 1) para 89.
- 62 Anna Skarin, private correspondence with the author (2023), Fjellheim (n 38).
- 63 Fjellheim (n 38).
- 64 *Fosen* (n 1) para 169.
- 65 This is in accordance with Section 9 of the 2009 Norwegian Nature Diversity Act which states that both science and Sámi knowledge shall be included as a basis for official decisions that affect biological, geological and landscape diversity.
- 66 On this point, see also the work from Fjellheim (n 38).
- 67 CCPR General Comment No 23 (n 16) para 7.
- 68 Scheinin (n 26).
- 69 With regard to the consultation test, the court underlined the importance of consulting the minority community in the licencing process, but also concluded that '[i]f the consequences of the interference are sufficiently serious, consultation does not prevent violation'. See also *Poma Poma v Peru* (n 24) para 7.6.
- 70 *ibid* para 134.
- 71 *ibid* para 136.
- 72 *ibid* para 137.
- 73 *ibid* paras 138.
- 74 In some respects, this finding is also noticeable as it counteracts the HRC assessment of the Lansman case where the committee was unable to decide, on the basis of the information available, that the impacts of logging was the cause for the decline of economic profitability of several reindeer herders, as opposed to other, external, economic factors, in *Jouni E. Lansman v Finland* (n 30) para 10.6.
- 75 *ibid* para 145.



- 76 *ibid.*  
 77 *ibid* paras 149–51.  
 78 *ibid* para 150.  
 79 *ibid.*  
 80 *ibid* para 151.  
 81 Rauna Kuokkanen, ‘Indigenous Economies, Theories of Subsistence, and Women: Exploring the Social Economy Model for Indigenous Governance’ (2011) 35(2) *American Indian Quarterly* 218.  
 82 Fjellheim (n 38).  
 83 This also applies to the situation of Sweden. Dorothee Cambou, ‘Uncovering Injustices in the Green Transition: Sámi Rights in the Development of Wind Energy in Sweden’ (2020) 1 *Arctic Review on Law and Politics* 310–33; Dorothee Cambou and others, *Reindeer Husbandry vs Wind Energy: An Interdisciplinary Analysis of the Pauträsk and Norrbäck Court Decisions in Sweden* (Routledge 2021).  
 84 UNGA, ‘Declaration on the Rights of Indigenous Peoples’ (2007) UN Doc A/RES/61/295, arts 20, 32. ILO, Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989) art 6.  
 85 CCPR General Comment No 23 (n 16) para 7.  
 86 *Fosen* (n 1) para 121.  
 87 *ibid* para 34.  
 88 *ibid* para 121.  
 89 *ibid* para 142.  
 90 This was also mentioned in (*NOU 2007a*: 208–9), see also Broderstad (n 38) 30.  
 91 *Fosen* (n 1) para 121.  
 92 See *Sara* (n 13) paras 74–75.  
 93 *Poma Poma v Peru* (n 26) para 7.6.  
 94 *Fosen* (n 1) para 122.  
 95 *ibid.*  
 96 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS 315.  
 97 *Fosen* (n 1) para 54.  
 98 OED (n 43).  
 99 Tråante Declaration (Saami Council 2017) para 26.  
 100 *ibid* para 123.  
 101 *ibid.*  
 102 *NOU 2007: 13 A Den nye sameretten/The new Sámi law*, 196.  
 103 *ibid* para 130.  
 104 *ibid* paras 130–31.  
 105 *ibid* para 131.  
 106 *Fosen* (n 1) para 143.  
 107 As indicated in *Poma Poma*, ‘Measures Must Respect the Principle of Proportionality so as Not to Endanger the Very Survival of the Community and Its Members’ *Poma Poma v Peru* (n 24) para 7.6.  
 108 Moreover, it is important to note that the human right to a healthy environment is understood to include procedural and substantive elements that specifically pertain to the protection of the rights of Indigenous peoples. See report of the special rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc A/HRC/37/59 (2018).  
 109 In this regard, the conclusions concur in most part with the analysis provided by Ravna (n 1).  
 110 *Fosen* (n 1) para 119.  
 111 In Sweden many projects are adopted on this basis, Cambou (n 82).

- 112 Eva Maria Fjellheim, ‘“You Can Kill Us with Dialogue”: Critical Perspectives on Wind Energy Development in a Nordic-Saami Green Colonial Context’ (2023) 24(1) *Human Rights Review* 25.
- 113 Julian Agyeman and Bob Evans, ‘“Just Sustainability”: The Emerging Discourse of Environmental Justice in Britain?’ (2004) 170 *The Geographical Journal* 155.
- 114 *Fosen* (n 1) para 146.

# 6 The interplay of politics and jurisprudence in the *Girjas* case

*Eivind Torp*

## Introduction

In January 2020 the Supreme Court in Sweden announced its verdict in the so-called *Girjas* case.<sup>1</sup> The case examined whether members of the Girjas Sámi village in northern Sweden or the Swedish state in its capacity as landowner, had the right to decide upon fishing and game hunting in the traditional area of the Sámi village. Immediately after the Supreme Court gave its verdict in the case, the Office of the Chancellor of Justice—which had represented the state in the process that had occupied Swedish courts for more than ten years—stated that the issue was of political nature and should have been solved through the political system.<sup>2</sup> Additionally, the verdict has been analysed to have major political consequences. Some researchers have argued that the verdict undermines parts of the legal framework of the Swedish state,<sup>3</sup> others that one consequence of the verdict is that the Sámi gain expanded rights versus the state,<sup>4</sup> and that the verdict implies that the Swedish state is subject to sections of ILO Convention No. 169.<sup>5</sup> The case has created debate in legal circles and some lawyers have described the verdict as sensational.<sup>6</sup> It is undoubtedly an example of juridification<sup>7</sup> and the ruling of the Supreme Court have had some immediate political consequences.<sup>8</sup>

In the following I intend to analyse the interplay of politics and jurisprudence in the *Girjas* case. Above all, it is of interest to elucidate the political consequences of the verdict. Firstly, I will give a few examples of how the phenomenon of juridification has been discussed in the Swedish context. Secondly, I will clarify the legal and political background behind the *Girjas* case. Thirdly, I will discuss the legal reasoning of the Supreme Court in some questions that could be understood to foremost be of political nature. Finally, I will focus on the political consequences of the verdict.

### 1. Judicialisation—the Swedish context

Since the last decade of the 20th century, there has been an increased focus on the phenomenon of judicialisation in different legal forums in Sweden.<sup>9</sup> Judicialisation, however, is an ambiguous concept which has been defined in different ways.<sup>10</sup> In this chapter, the perspective is foremost the process that has been labelled as

judicialisation, defined as the expansion of the province of the courts at the expense of politicians and/or administrators.<sup>11</sup> The EU membership, a general internationalisation and increasing focus on human rights have meant a more important and powerful position for jurisprudence and the judicial system in Swedish society.<sup>12</sup> A result of this development is a better protection for individuals against violation of integrity or encroachment from the state. On the other hand, it has been debated whether verdicts from the courts go against decisions taken by the political system.<sup>13</sup> The general pattern is that the judicial system has gained power in the society and reduced the room of manoeuvre for politicians.<sup>14</sup> The development means that politically sensitive questions are decided upon by persons without democratic support.<sup>15</sup> The picture indicates a potential conflict between the judicial and the political systems where both systems claim legitimacy at the expense of the other part. This means that the study of the judicial system has to include the importance of political aspects or more precisely, the interplay of politics and jurisprudence.

Jurisprudence stresses the importance of differentiating between politics and law: That which belongs in the legal sphere should be kept separate from the political sphere, and vice versa. This essentially applies to all legal practice. One of the areas this *politics versus law-axiom* plays out is in the constitutional principle that political bodies should not interfere with judicial operations of the courts while the courts, as well as public authorities, should be factual and objective.<sup>16</sup> At the same time there is an obvious connection between law and politics in that it is political decision-making bodies that make decisions on social order in which the judicial system and all laws are a part.

Within analytic jurisprudence, the ability to distinguish between a legal argument versus a policy argument in legal questions is important. This is particularly relevant to legal fields that are subjects of great political interest and may therefore be influenced by temporary or one-sided lobbying. However, what constitutes law and what constitutes politics remains debated, especially in relation to the status of international law. In the Swedish dualist system, which considers international law to be a separate legal system, courts are bound to apply domestic law only. In other words, international law does not have relevance unless it is incorporated by the government into domestic law. Yet because it is acknowledged that Sweden must abide by international treaties, as well as agreements and norms generally recognised by international law,<sup>17</sup> courts must grapple with whether to treat international law as sources of law.<sup>18</sup> In this context, the decision of the courts, including its treatment of international law, is at the interplay between jurisprudence and politics.

There are several reasons for selecting the legal process as the *Girjas* case for a study of the interplay of politics and jurisprudence. Firstly, the case concerns hunting and fishing rights, which automatically involves powerful stakeholder groups.<sup>19</sup> Secondly, the case touches on fundamental rights for the Sámi people in Sweden, which recurrently are debated in different political bodies in the Swedish society. Thirdly, Sweden has on several occasions been criticised on the international arena for its insufficient handling of the question of Sámi rights due to its lack of consideration of international human rights law in relation to the right of Indigenous peoples.<sup>20</sup>

## 2. The background of the *Girjas* case

At the core of the litigation was the question of who has the right to administer and decide upon the fishing and game hunting in the traditional area of the Girjas Sámi village. Is the state the landowner, or is it the members of the Girjas Sámi village?<sup>21</sup> Girjas Sámi village claimed that, primarily, they had the sole right and that, secondarily, they shared the right together with the state.

According to the Reindeer Herding Act, members of the Girjas Sámi village have the right to fish and hunt game but the state holds the right to administer and decide upon the fishing and game hunting in the area.<sup>22</sup> This has been the regime since the first Reindeer Herding Act of 1886.<sup>23</sup> There has been ambiguity over whether the state holds the right to administer these rights in its capacity as the landowner or as a consequence of the lack of organisation in the Sámi society of the late 1800s. The legal arrangement that the state holds the right to administer hunting and fishing have been contested by the Sámi villages but had not led to any serious legal conflicts until the state suddenly, as landowner, claimed the right to distribute additional rights to exercise fishing and game hunting in parallel to the right of the Sámi villages.<sup>24</sup> Thus, the understanding of the actual paragraph in law changed as a result of political action: During the 1980s the interest in game hunting and fishing had increased considerably, and hunting and fishing organisations indicated that there was a need to expand areas to carry out these activities. The government changed the legal rules concerning fishing and game hunting according to its new understanding of its rights,<sup>25</sup> which resulted in an immense number of new hunters in the areas where members of the Sámi villages had previously hunted with a limited number of competitors.<sup>26</sup>

Political protests from Sámi politicians had no impact on the government or other parts of the political system in Sweden. Further, the political changes implemented in the early 1990s resulted in an increasing number of conflicts between Sámi reindeer herders and game hunters. Game hunting and reindeer herding in the same geographical area proved to be much more difficult to combine than the politicians had estimated. At the end of the 1990s, conflicts regarding game hunting in grazing areas for reindeer were frequently reported in the local media in northern Sweden.

Eventually political support came from an unexpected source: At the end of the 1990s, a public inquiry was set up to investigate the possibilities for Sweden to ratify ILO Convention No. 169 on Indigenous and tribal peoples in independent countries, and in its scrutiny of the Reindeer Herding Act, the inquiry expressed,

The regulations governing reindeer husbandry, hunting and fishing have evolved gradually. These rules have not been clearly defined, which to my mind, has contributed to the conflicts that exist today. The rules regarding Sámi hunting and fishing rights and the regulation of the size of the winter pasture lands are a few examples.<sup>27</sup>

As a result of the recommendations from the inquiry into Sweden's ratification of ILO Convention No. 169, a new public inquiry was set up to investigate the rights

to fishing and hunting in the traditional areas of Sámi villages. With reference to the present context, the inquiry arrived at two important conclusions:

1. The legal regulations on fishing and hunting rights for the Sámi are unclear and cause conflicts.<sup>28</sup>
2. Questions concerning whether the Reindeer Herding Act reflects the fundamental rights of the Sámi must be addressed in a court of law.<sup>29</sup>

These conclusions were naturally of great interest for the congregation of Sámi villages in Sweden. It should be remembered that at least one highly qualified lawyer, engaged by the inquiry, concluded that the Sámi hold the rights to administer game hunting and fishing in their traditional areas.<sup>30</sup> It is likely that the conclusions presented by the inquiry inspired action: If no steps were taken to change the poorly functioning regulations on fishing and hunting within the political system, steps had to be taken by the Sámi through the judicial system.

In retrospect, it is fair to say that that the *Girjas* case largely came about due to specific priorities of the political system.<sup>31</sup> The first was the change of legal rules concerning fishing and game hunting in the traditional areas of Sámi villages, and the second was the lack of response to the signals and recommendations from two public inquiries. Under these circumstances it was an obvious step for the congregation of the Sámi Villages in Sweden to take legal action and identify the most suitable Sámi village for a litigation process. After some investigations they ended up with Girjas Sámi village as the most suitable for the legal process.

### **3. The legal reasoning of the Supreme Court**

The majority of the comments on the ruling of the Supreme Court in the *Girjas* case stress the significance of the court's statements about ILO Convention No. 169.<sup>32</sup> As the convention has not been ratified by Sweden, such statements could be understood as a form of political step from the Supreme Court. Consequently, it is of interest to examine the nature of the statements made by the court. In the following, I will discuss the statements given by the court on the ILO Convention and, after that, investigate other areas of the court's ruling that could be understood to be of a political nature.

There is no doubt that ILO Convention No. 169 has been rejected by the political system in Sweden: Parliament is not in favour of a ratification and on a number of occasions during the ten-year period of the *Girjas* lawsuit process, the government made it clear that Sweden would not ratify the convention.<sup>33</sup> Furthermore, at the time the lawsuit was in progress in the Supreme Court, the Swedish prime minister expressed that a ratification was not at all on the agenda for government.<sup>34</sup> On the basis of the rejection of the ILO Convention by Swedish politicians, it is of course of interest to examine what the Supreme Court expresses about the convention.

The Supreme Court refers to the ILO Convention in two specific sections of the reasoning for its judgment. The first instance is in reference to the court's reasoning on customary law. The court expresses,

According to ILO Convention No. 169 article 8.1, necessary consideration should be given to indigenous peoples' customs and customary law when applying national law. The convention has not been ratified by Sweden but, in this factual issue, it must be considered to express a general principle within international law. When solving conflicts connected to Sámi land rights the enforcement of this principle means that established Sámi customs shall be observed.<sup>35</sup>

The second time the court mentions the ILO Convention is merely as an additional reference to the court's primary reference in law, which is article 27 in the UN Declaration on the Rights of Indigenous Peoples. The court states that article 14.2 of ILO Convention No. 169 expresses the same understanding of evidentiary requirements and the entire reference is set within brackets.

The fact that the court refers to these two articles in its verdict reasoning has been understood by some as meaning that ILO Convention No. 169 is in certain parts applicable in Sweden, despite the rejection of the convention by the political system.<sup>36</sup> However, this has been explained as a far-reaching conclusion.<sup>37</sup> In terms of the second reference to the convention, it is quite clear that no conclusion could be drawn beyond the obvious fact pointed out by the court: Both sources of law that were referred to express the same understanding.

When the court refers to article 8.1 in the ILO Convention, it is done in the context of the court discussing the importance of Sámi customs. In its reasoning related to this question, the court refers to article 27 of the UN International Covenant on Civil and Political Rights (1966) and article 26 of the UN Declaration of Rights of Indigenous Peoples (2007). However, the starting point for the Supreme Court's reasoning on Sámi customs is the Swedish Constitution and how the regulation regarding the Sámi is to be understood. The court concludes that it is reasonable to interpret the regulations in the constitution in light of international law, 'even though there has been no formal incorporation'.<sup>38</sup>

It has been argued that the court's reasons for its verdict is an example of 'customary international law', which implies that 'states are bound without an act of incorporation' by the ILO Convention's provisions.<sup>39</sup> In this regard, the most important conclusion to be drawn comes from the Supreme Court's approach to its legal analysis: Regulation about the Sámi in the Swedish Constitution is to be interpreted in light of international law. From a legal perspective, this is of course of importance to future disputes.

In the present context, it is necessary to return to the initial question: Has the Supreme Court, through its statements regarding the ILO Convention, taken a position on a political matter? There is of course a possibility that the argument of the court could be understood as a political act, but it is essential to observe that the court's reasoning is based on legal premises. Thus, the most logical understanding



of the court's position on ILO Convention No. 169 is that it is a deduction in jurisprudence rather than an indication of a political character.

I will now deal with the sensitive topic that only those Sámi who are members of Sámi village hold the rights to game hunting and fishing in traditional Sámi areas.<sup>40</sup> As the legal process only included members of the Girjas Sámi village the Supreme Court was not confronted by this fact as a question of importance for their verdict. In the legal reasoning, however, the court gave some statements which might be of importance for the understanding of the nature of this fact, which could turn out to have political implications. As mentioned, the Supreme Court concluded that the Girjas Sámi village had the right to decide on fishing and game hunting in the traditional areas of the Sámi village, based on the fact that the Sámi population alone had been using the natural resources in the area since time immemorial.<sup>41</sup> This right was established at least as early as in the mid-1700s. Due to this reasoning, the court had to make a tenable legal link between the Sámi population in the area in the mid-1700s and today's members of Girjas Sámi village.<sup>42</sup> The court thereby starts by asking itself what is required for the extinction of established rights according to Swedish legal principles. The answer it comes to is that either the holder of the rights must give up (submit) their rights or the rights must be extinguished through legislation or expropriation. Furthermore, the submission of the rights and any extinction have to be explicit and obvious.<sup>43</sup> Since the mid-1700s there have been instances of submission of rights, but the court concludes, 'None of these were explicit or obvious in a way required for an extinction of established rights'.<sup>44</sup> Furthermore, no expropriation of rights had been done. Therefore, the question the court had to decide upon was the possible implication of the legislation on reindeer herding.

The first Reindeer Herding Act of 1886 states that the Sámi had specified rights to fish and hunt in their traditional areas. It should be remembered that the early legislation on reindeer herding did not define or specify the Sámi people. At the time a large portion of the Sámi population was occupied in other business than reindeer herding. The purpose of the legislation was, however, to set up a legal framework for reindeer herding and clarify the rights of the Sámi people to land and water, considering their traditional engagement in reindeer herding as well as hunting and fishing. The Supreme Court summarises their understanding of first Reindeer Herding Act of 1886 in the following words:

The 1886 Act implied an important news by the fact that the rights connected to reindeer herding, including the rights to fish and hunt, included only the reindeer herding part of the Sámi population. This was indeed not expressed in the text of the Act but appeared of the context and by later following Reindeer Herding Acts.<sup>45</sup>

This leads the Supreme Court to a conclusion of major importance:

The effect of the law may be considered to be that the right to exercise reindeer herding which before the 1886 Act belong to every single Sámi in the

area was passed over to those who became members in the Sámi village in the area, in this case the Girjas Sámi Village.<sup>46</sup>

And consequently:

The right to fish and hunt which belonged to all Sámi in the area at the time when the 1886 Act was introduced, may be considered to have been passed over to the members of the Sámi village.<sup>47</sup>

The Supreme Court uses the expression ‘passed over’,<sup>48</sup> which indicates that there has been a factual transition—something, such as a specific right, has been passed over from an earlier holder to a new holder, and the number of rights is the same before and after the transaction. That was, however, not the case in situation examined by the Supreme Court: No rights were passed over to new holders, who did not already have the same rights. It is—above all in legal contexts—difficult to speak in terms of ‘passing over rights’ in a situation where all parts at the starting point have the same rights and some are excluded from their rights in the end. Nevertheless, the court sticks to this expression and, unfortunately, does not elaborate the further effects of their understanding of the 1886 Act.

The judging of the Supreme Court is, however, explicit: The Sámi who did not exercise reindeer herding were excluded from their fishing and hunting rights according to the 1886 Act. This means that the established rights were extinguished for those who did not become, or were rejected as, members of a Sámi village. Unfortunately, the Supreme Court does not present any further discussion concerning their own requirements—*explicit and obvious*—for an extinction of rights.

Just how Sámi rights should be distributed amongst the Sámi people has been a controversy of a political nature for a long period of time in Sweden.<sup>49</sup> Against this background it is plausible, even likely, that the position taken by the Supreme Court on this question will end up having implications in the political sphere.

What could these implications be for the internal Sámi discussions? As indicated by several Sámi debaters, the legislation on reindeer herding has divided the Sámi population in Sweden into two separate groups: those who are members of Sámi villages, who hold rights to land and natural resources, and those who are not members in Sámi villages, who have no rights to land and natural resources.<sup>50</sup> Frequent requests have been made to the Swedish government to address this situation, so far without any result. The ruling of the Supreme Court indicates that the latter group of Sámi actually ‘don’t have a case’ as the regulation of rights should be understood as explained by the court. This is of course a serious setback in the political arsenal of this group of Sámi.

Further, the Supreme Court’s decision may also mean some implications for positions taken by the Swedish Parliament and the Swedish government. For a long time, the understanding of Sámi rights among the political institutions has been that *some* Sámi individuals who are not members of Sámi villages, but who have fished and hunted through several generations, actually have the right to carry out hunting and fishing in traditional Sámi areas.<sup>51</sup> This position is based on investigations by

public inquiries and confirmed by political decisions.<sup>52</sup> Furthermore, it is explicitly expressed in legal regulations.<sup>53</sup> The position taken by the Supreme Court is in this question not in harmony with the reasoning by different political institutions in the Swedish society.

The position taken by the Supreme Court also confirms a legal peculiarity which is inbuilt in the Reindeer Herding Act: As membership of a Sámi village is decided upon by the Sámi villages exclusively, access to civil rights on an individual Sámi level consequently depends on the decisions taken by an assembly of a private law nature.<sup>54</sup>

#### **4. Political consequences of the Supreme Court's verdict**

An immediate effect of the verdict was that several Sámi villages in Sweden started to prepare their applications to the regional authorities to be allowed to manage fishing and game hunting in their traditional areas.<sup>55</sup> At least one Sámi village has submitted a lawsuit claiming its rights to administer game hunting, fishing and elk hunting on their traditional areas, and other Sámi villages are preparing to take similar steps.<sup>56</sup>

The verdict of the Supreme Court has also led to political tensions and, to a certain degree, political mobilisation among Sámi political parties. *Jakt- och fiskesamerna*, the largest political party in the Sámi Parliament which mainly represents Sámi that are not members of Sámi villages, has expressed its disappointment in the verdict and its concern that giving Sámi villages the right to administer fishing and game hunting is foremost a question of making money.<sup>57</sup> On the other hand, *Guovssonásti*, a party which mainly represents Sámi people who are members of Sámi villages, argues that the Reindeer Herding Act should be changed so that all Sámi villages have the right to manage fishing and game hunting within their traditional areas.<sup>58</sup>

The most important effect of the judgment is, however, the public inquiries that has to be done as a consequence of the verdict. As a consequence of the legal reasoning of the Supreme Court, the state has to examine the basics of the Reindeer Herding Act and review the reasoning for Sámi rights. This is of course a major step concerning Sámi rights in general but turns out to be rather complicated in practice as the outcome of the judicial process is attached to the legal reasoning by the Supreme Court: As the court concluded that the rights of the members of the Sámi village were based on Sámi utilisation and presence in the area since time immemorial, the rights of other Sámi villages in Sweden are depending on historical conditions in each separate Sámi village.<sup>59</sup> One major task for the public inquiry assigned for the mission to sort out these questions is to clarify the historical conditions in the area for each Sámi village in Sweden.<sup>60</sup> This is of course a huge and complicated task but also an exceptional mission for a public inquiry. The inquiry's suggestion, that the historical conditions are the same for the absolute majority of the Sámi villages in Sweden as they are for Girjas Sámi village, has already caused impetuous reactions.<sup>61</sup> The contraposition between Sámi reindeer herders and the general public with an interest of fishing or game hunting in the mountain area (coincident with the traditional Sámi areas) is increasing. Furthermore, the number

of conflicts between representatives of tourism business in the mountain area and Sámi villages are continuously inflating. All together this makes the future situation with reference to Sámi rights complicated and uncertain. Furthermore, the political situation is far more complicated after the *Girjas* process compared to what it was before: The political space of manoeuvring is now restricted, partly by the verdict which clarifies that something has to be done with Reindeer Herding Act and partly by the legal reasoning of the Supreme Court that local historical conditions are crucial for the picture of rights of hunting and fishing. Concerning the political system, there are reasons to believe that the Parliament will reject the most far-reaching proposals from the public inquiry but, still, will be faced with a situation that requires political action. Hopes have been expressed that the *Girjas* case could be the event that ends the ‘fear to touch’ approach that Swedish politicians have had to Sámi questions.<sup>62</sup> On the other hand, it has been pointed out that ‘factual strengthening of Sámi rights’ is an unlikely outcome of the case.<sup>63</sup> Anyhow the conflicts in the traditional Sámi areas of the Sámi villages can be assumed to increase and lead to troublesome situations for the parties involved. Nevertheless, it seems reasonable to conclude that the *Girjas* case is another example of an ongoing shift in Sweden whereby the judicial system has gained power at the expense of the political system.<sup>64</sup> The decision by the Supreme Court gave the question on Sámi rights to administer fishing and game hunting within the whole mountain area of Sweden—coinciding with Sámi traditional areas for all Sámi villages in Sweden—an immediate actuality in the Swedish society. Different groups—reindeer herders, Sámi outside Sámi villages, hunters, leisure-time fishers and tourist organisations—are now mobilising according to their specific interests, waiting for decisions by the responsible political bodies. The Supreme Court’s legal clarification of the question in focus in the *Girjas* case could, however, lead to political decisions that divide the reindeer-herding Sámi in Sweden into different categories of rights holders.

A final question could be raised: Is a verdict of the Supreme Court a sustainable solution to a question that, in its core, is of political character? Several facts indicate the opposite. Reverse interests have eventually questioned the reasoning of the Supreme Court,<sup>65</sup> and political pressure on the government has led to the announcement of new terms of reference for the public inquiry.<sup>66</sup> According to the new terms of reference, the inquiry should consider the interests of other parts of the population (in a local as well as in a national perspective) and regard them in all their suggestions. In summary, there is no indication that the ruling of the Supreme Court in the *Girjas* case has had any significance concerning the attitude to the ILO Convention No. 169 among Swedish political organs.

## Notes

- 1 Supreme Court of Sweden, NJA 2020 s. 3 (*Girjas*).
- 2 *Dagens Nyheter* (Stockholm, 14 April 2020).
- 3 Kaisa Raitio and Anette Löf, ‘Statens roll efter Girjasdomen’ (The Role of the State After the *Girjas* Verdict) (*Dagens Arena*, 1 March 2020) <<https://www.dagensarena.se/essa/statens-roll-efter-girjasdomen/>> accessed 22 April 2021.

- 4 Noomi Egan, 'Girjasdomen kan få stor betydelse för samernas rättigheter' (The Girjas Verdict May Have Great Significance for the Rights of the Sámi) (*Dagens Arena*, 29 January 2020) <<https://www.dagensarena.se/essa/statens-roll-efter-girjasdomen/>> accessed 22 April 2021.
- 5 Malin Brännström in Tor L Tuorda, 'Insatt jurist analyserar Girjasdomen' (*Tor Tuorda*, January 2020) <<https://kvikkjokk.nu/insatt-jurist-analyserar-girjasdomen/>> accessed 22 April 2021.
- 6 Marie Hagsgård, 'Politik Sápmi—Rättigheter som delar Sametinget' (*Sveriges Radio*, 8 April 2021) <<https://sverigesradio.se/avsnitt/1704926>> accessed 1 June 2021.
- 7 Eivind Torp, 'Rättsliga följer av HD:s dom i Girjasålet' (2021) *Svensk JuristTidning* (Swedish Periodical for Jurisprudence) 921.
- 8 Regeringskansliet, 'Utredning kommer tillsättas för en översyn av rennäringslagstiftningen' (Sveriges Regering/Press Release Swedish Government, 23 July 2020) <<https://www.regeringen.se/pressmeddelanden/2020/07/utredning-kommer-tillsattas-for-en-oversyn-av-rennaringslagstiftningen>> accessed 12 May 2022.
- 9 Torbjörn Vallinder, 'When the Courts Go Marching' in Barry Holmström (ed), *'Sweden' in the Global Expansion of Judicial Power* (New York UP 1995).
- 10 Lars C Blichner and Anders Molin, 'What Is juridification' (2005) Working Paper 14, Center for European Studies, Oslo University, Oslo.
- 11 Maurice Sunkin, 'Judicialization of Politics in the United Kingdom' (1994) 15(2) *International Political Science Review* 125.
- 12 Leila Brännström, 'Juridik som politik och behovet av kritik' in Petra Hall and Lisa Pelling (eds), *Rätten till rättvisa* (Premiss förlag 2017).
- 13 Fredrik Wersäll, 'En offensiv Högsta domstol. Några reflektioner kring HD: S rättsbildning' (2014) *Svensk JuristTidning* 1; Petter Asp, 'Straffrätten—i går, i dag och i morgon' (2016) 100 *Svensk JuristTidning* 138.
- 14 Fredrik Wärsell, 'Ökad domarmakt och makten över domstolarna' (2017) *Svensk JuristTidning* 1.
- 15 Carl Josefsson, 'Domstolarna och demokratin' (2015) *Svensk JuristTidning* 40.
- 16 This is explicitly expressed in the Swedish constitution (regeringsformen), ch 1, para 9.
- 17 Act (1953:770) on the Compliance with International Law with regard to Criminal Liability of Certain Foreigners.
- 18 Michael Bogdan, 'Application of Public International Law by Swedish Courts' (1994) 63 *Nordic Journal of International Law* 4–6.
- 19 Hunting and fishing in the mountain area represent the interest of a solid part of the Swedish population, mostly organised in different associations.
- 20 CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination: Sweden' (21 August 2008) UN Doc CERD/C/SWE/CO/18; CCPR 'Concluding Observations of the Human Rights Committee: Sweden' (7 May 2009) UN Doc CCPR/C/SWE/CO/6; Council of Europe, 'Memorandum to the Swedish Government: Assessment of the Progress Made in Implementing the 2004 Recommendations of the Council of Europe Commissioner for Human Rights' (16 May 2007) CommDH (2007)10.
- 21 The question of ownership of the land was not contested by the Girjas Sámi village in the court case. See Girjas (n 1) s 37 and Girjas lawsuit 2009-05-11, T 323–09, s 3.1.5.
- 22 Reindeer Herding Act, para 25.
- 23 There are no public statistics on the scope or economic importance of fishing and hunting of Swedish Sámi villages.
- 24 Prop. (Governmental Bill) 1992/93:32, 131–52.
- 25 Rennäringsförordningen (1993:384) (Regulation on reindeer herding), para 3.
- 26 It was, in contrast to the new situation, a restricted number of individuals given license by the state.
- 27 SOU 1999:25, 25.
- 28 SOU 2005:116, 58, 79, 82. See also SOU 1999:25, 15.

- 29 SOU 2005:116, 174, 181, 196. See also SOU 1999:25, 134, 152, 171, 267.
- 30 It should be remembered that a minority of the judges in the Supreme Court in the *Girjas* case concluded that the Sámi village holds the rights to administer hunting and fishing in the area according to the Reindeer Herding Act, *Girjas* (n 1) ss 98–166. See also Mauritz Bäärnhielm, ‘Jakt- och fiskerätten i renskötselområdet’ (2005) SOU 17.
- 31 Eivind Torp, ‘Girjas-målet och statens inställning i frågan om rätten till jakt och fiske i fjällen’ in Patrik Lantto and Eivind Torp (eds), *Vänbok till Lars Thomasson* (Umeå UP 2018).
- 32 Øyvind Ravna, ‘Sameby har vunnet over svenske staten’ (*Nordlys*, 24 January 2020) <<https://www.nordnorskdebatt.no/sameby-har-vunnet-over-den-svenske-staten/o/5-124-20343>> accessed 5 June 2021; Christina Allard and Malin Brännström, ‘Girjas sameby mot staten: En analys av Girjasdomen’ (2020) *Svensk JuristTidning* 429; Marie Hagsgård, ‘Politik Sápmi—Rättigheter som delar Sametinget’ (*Sveriges Radio*, 8 April 2021) <<https://sverigesradio.se/avsnitt/1704926>> accessed 1 June 2021.
- 33 Tobias Poggats, ‘22 års väntan—när antas ILO-169?’ *Sveriges Radio* (26 August 2011) <<https://sverigesradio.se/artikel/4664135>> accessed 27 January 2015; Jörgen Heikki, ‘Sverige säger åter nej till ILO 169’ (*Sveriges Radio*, 27 January 2015) <<https://sverigesradio.se/artikel/6078103>> accessed 19 June 2015; ‘Ännu ett svenskt nej till ILO 169’ (*Sveriges Radio*, 19 June 2015) <<https://sverigesradio.se/artikel/6194176>> accessed 5 July 2022.
- 34 ‘Löfven tycker inte att Sverige ska skriva under ILO 169’ (*Sveriges Radio*, 23 August 2018) <<https://sverigesradio.se/artikel/7028101>> accessed 22 April 2021.
- 35 *Girjas* (n 1) s 130.
- 36 Christina Allard and Malin Brännström, ‘Girjas sameby mot staten: En analys av Girjasdomen’ [2020] *Svensk JuristTidning* 429.
- 37 Eivind Torp, ‘Rättsliga följder av HD:s dom i Girjas-målet’ (2021) *Svensk JuristTidning* 921.
- 38 *Girjas* (n 1) s 94.
- 39 Ravna (n 32).
- 40 Approximately 10% of the Sámi population in Sweden are members of a Sámi village.
- 41 *Girjas* (n 1) s 205.
- 42 *ibid* ss 219–21.
- 43 *ibid* s 215.
- 44 *ibid* s 217.
- 45 *ibid* s 219.
- 46 *ibid*.
- 47 *ibid* s 221.
- 48 In Swedish ‘övergått’.
- 49 I am referring to different opinions and debates in the Sámi Parliament in Sweden over the last three decades.
- 50 Israel Ruong, *Samerna i historien och nutid* (*The Sámi in History and at Present Time*) (Vuxenskolan 1982) 189; Lars Anders Baer, ‘The Sámi—an Indigenous People in Their Own Land’ in Birgitta Jahreskog (ed), *The Sámi National Minority in Sweden* (Almqvist and Wiksell 1982) 11–23; Johannes Marainen, ‘The Swedish-Norwegian Convention on the Right of the Migratory Sámi to Reindeer Grazing Lands’ in Jahreskog (n 50) 62–77; Lars Thomasson, *Samerna, in Jämtland och Härjedalens historia del 5* (Östersund: Jämtlands läns museum 1990) 703–820.
- 51 SOU 1975:99, 221–35.
- 52 SOU 1990:91, 77–197 and prop. 1992/93:32, 177–80.
- 53 Rennäringsförordningen (The regulation of reindeer herding) (1993:384) para 5.
- 54 Reindeer Herding Act, paras 1, 11, 12. See also Prop. (Governmental Bill) 1992/93:32, 88–93.

- 55 Jörgen Heikki, 'Samebyar i Arjeplog söker lokal förvaltning' (*Sveriges Radio*, 19 February 2021) <<https://sverigesradio.se/artikel/samebyar-i-arjeplog-soker-lokal-forvaltning>> accessed 21 April 2021.
- 56 Andreas Söderlund, 'Talma sameby stämmer staten om jakt- och fiskerätten' (*Sveriges Television*, 20 May 2022) <<https://www.svt.se/nyheter/sapmi/talma-sameby-stammer-staten-om-jaktratten>> accessed 20 May 2022.
- 57 Fanny Renman, 'Jag är rädd att samebyn bara ser detta som ett sätt att tjäna pengar' (*Sveriges Television*, 23 January 2020) <<https://www.svt.se/nyheter/inrikes/jag-ar-radd-att-samebyn-bara-ser-detta-som-ett-satt-att-tjana-pengar>> accessed 21 April 2021.
- 58 Klara Lundmark and Jörgen Heikki, 'Vill att alla samebyar ska ha rätt att förvalta jakten och fisket' (*Sveriges Radio*, 19 April 2021) <<https://sverigesradio.se/artikel/vill-att-alla-samebyar-ska-ha-ratt-att-forvalta-jakten-och-fisket>> accessed 21 April 2021.
- 59 There are 51 Sámi villages in Sweden.
- 60 Dir 2021:35.
- 61 Tobias Indén, 'Girjasdomen ger klen vägledning om jakten och fisket i fjällen' (*Dagens Nyheter*, 14 May 2022) <<https://www.dn.se/debatt/girjasdomen-ger-klen-vaegledning-om-jakten-och-fisket-i-fjallen/>> accessed 1 June 2021.
- 62 Peter Nobel, 'Samerna, staten och sanningen' (2021) 87 *Advokaten* nr 3.
- 63 Bertil Bengtsson, 'Girjas-domen' (2020–21) 1 *Juridisk Tidskrift* 179–80.
- 64 Eivind Torp in Anneli Marainen, 'Expert: Politikerna förlorare i Girjasålet' (*Sveriges Radio*, 6 September 2018) <<https://sverigesradio.se/artikel/7037676>> accessed 1 June 2021.
- 65 Indén (n 61).
- 66 Dir. N 2022:58.



# 7 The prohibition to weaken the Sámi culture in international law and Finnish environmental legislation

*Leena Heinämäki*

## 1. Introduction<sup>1</sup>

In Finland, there are around 10,000 persons who are recognised as Sámi, who are granted a constitutional status as an Indigenous people to maintain and develop their language and culture, and related linguistic and cultural self-government. Sámi traditional livelihoods, such as reindeer herding, fishing and hunting, are specifically mentioned as an integral part of their culture in the constitutional legal preparatory works.<sup>2</sup> Sámi culture is, however, very multifaceted and dynamic and cannot exhaustively be defined. Besides the language and traditional livelihoods, the Sámi culture consists of, for instance, cultural heritage and cultural expressions, handicraft *duodji* and gathering of natural products.<sup>3</sup>

The Sámi traditional way of life is threatened by many forms of competing land use, such as mining and forestry, as well as climate change.<sup>4</sup> The main problem for the reindeer herding is a rapid decrease of grazing pastures.<sup>5</sup> Furthermore, Sámi cultural landscapes and traditional knowledge and practices are threatened by the structural changes of the societal living, loss of Sámi languages, low profitability of traditional livelihoods and the fact that many Sámi families move away from their Homeland.<sup>6</sup> Sámi traditional way of living is intimately interlinked with the sustainability of the environment, and the current environmental problems that take place or have effects in the Sámi Homeland are directly threatening the culture and rights of the Sámi.

The aim of this chapter is to analyse the legal norm of ‘prohibition to weaken the Sámi culture’ (implying the prohibition to cause significant harm), dwelling from Sámi people’s constitutional status, as well as to discuss ongoing challenges to implement this norm in practical level. The very purpose of the ‘prohibition to weaken the Sámi culture’ in the Finnish environmental legislative acts is to enforce the constitutional right of the Sámi as an Indigenous people to practice and develop their culture in present as well as guarantee the sustainability of the Sámi culture and traditional livelihoods in the future, along with the purpose of the acts to safeguard the environmental sustainability, which in itself aims at protecting Sámi cultural landscapes. An essential part of the prohibition to weaken the Sámi culture is an obligation of a respected authority/an actor in the field to carry out a cumulative impact assessment, which defines a threshold to the ‘significant’ harm, as well as

an obligation to negotiate and cooperate with Sámi representatives on the matter at hand.

This topic has so far not been thoroughly addressed in the academic research in international level. In Finland, it has shortly been discussed in the comparative research report commissioned by the Finnish government in 2017.<sup>7</sup> More recently, the topic is addressed in Finnish language in a peer-reviewed legal journal, *Lakimies*, by the author of this chapter.<sup>8</sup> This chapter is based on the previous publication, with a purpose to inform the international audience about the issue, as it has been previously lacking. The topic is very significant since the right of Sámi to their traditional livelihoods is one of the most important fundamental and human right for them as granted by Finnish Constitution (section 17.3) as well as, e.g., articles 27 and 1 of the International Covenant on Civil and Political Rights (ICCPR).<sup>9</sup> The purpose of this chapter is to show that although the prohibition to weaken the Sámi culture is part of the fundamental and human rights of the Sámi, central governmental institutions, such as mining and environmental protection authorities, as well as Metsähallitus (the national forest and park service), do not regard it as their legal obligation to execute comprehensive cumulative impact assessment in their actions affecting Sámi. Hence, the prerequisite of maintaining and developing Sámi culture is not fully guaranteed, especially in relation to their traditional lands, waters and natural resources.

Because the very aim of the prohibition to weaken the Sámi culture is to actualise the fundamental and human rights of the Sámi, at the beginning of the article it is necessary to discuss the constitutional status of the Sámi as an Indigenous people and describe the relationship of the fundamental and human rights with the national Finnish sectoral legislation in this regard. Then, this chapter focuses on the legal basis of the prohibition to weaken the Sámi culture in international as well as in national law. Finally, the article discusses the current challenges related to the implementation of this obligation in Finnish environmental law, including relevant case law analysis.

## **2. The constitutional status of Sámi and the relationship of the fundamental and human rights to the national legislation of Finland**

The original purpose of the specific constitutional protection of the Sámi people was to create an affirmative action for equality to ensure the conditions for the Sámi Indigenous culture to flourish and remain sustainable and to be successfully passed to the future generations.<sup>10</sup> According to the Constitution, section 17.3, Sámi, as an Indigenous people, are granted the right to maintain and develop their language and culture, to be in line with international human rights obligations.<sup>11</sup> The Finnish constitutional reform that took place in the 1990s had, as its main purpose, to upgrade the national legislation to meet the international standards of human rights.<sup>12</sup> Section 22 of the Constitution states that the public authorities shall guarantee the observance of fundamental rights and liberties and human rights. In Finland, fundamental and human rights are regarded as complementary systems

in which international human rights standards define the minimum level of protection.<sup>13</sup> Fundamental and human rights constitute the basis for the application and development of national sectoral legislation, which has to meet their requirements.<sup>14</sup> Hence, national legislative acts have to be interpreted and applied in light of fundamental and human rights, as often reminded by the Constitutional Law Committee, meaning that the protection not only has to meet minimum standards of international and constitutional law but also is not allowed to be in contradiction to those standards.<sup>15</sup> Here two recent cases in the Supreme Court serve as good examples, where the court decided that the fishing legislation that posed limitations to the Sámi traditional fishing in the name of the protection of the fish stock was contradictory to the Sámi fundamental and human rights.<sup>16</sup>

Section 121.4 grants linguistic and cultural self-government for the Sámi. The provision directly relates to the previously mentioned section 17.3. According to the legislator, the right of the Sámi to maintain and develop their culture includes the idea that Sámi themselves are allowed to decide their cultural matters and influence their future development. Hence, the cultural self-government was meant to become dynamic and that Sámi themselves could become subjects to develop it further.<sup>17</sup> The goal of the legislator was that more substance for the self-government will gradually be created in the national sectoral legislation, particularly in the act on the Sámi Parliament.<sup>18</sup> The purpose was to gradually meet the international human rights standards<sup>19</sup> and advance possibilities of the Sámi to sustain, maintain and develop their language and culture as well as their social and economic conditions.<sup>20</sup> This approach relied on the premises of international human rights of Indigenous peoples, where it is regarded that Indigenous peoples should have the right to decide their own priorities and to exercise control over their own economic, social and cultural development.<sup>21</sup>

For the tasks related to the cultural autonomy, Sámi shall elect from among themselves members of the Sámi Parliament as regulated by the Sámi Parliament Act.<sup>22</sup> The task of the Sámi Parliament is to look after the Sámi language and culture, as well as to take care of matters relating to their status as an Indigenous people. In matters pertaining to its tasks, the Sámi Parliament may make initiatives and proposals to the authorities, as well as issue statements.<sup>23</sup> The Sámi Parliament has no legislative or executive powers. The main way to actualise the right to self-determination of the Sámi as an Indigenous people is through engaging in the negotiations with state authorities. According to section 9 of Sámi Parliament Act, authorities shall negotiate with Sámi Parliament in all far-reaching and important measures which may directly and in a specific way affect the status of the Sámi as an Indigenous people in the Sámi Homeland. Examples of such issues listed in section 9 are community planning; the management, use, leasing and assignment of state lands, conservation areas and wilderness areas; applications for permissions to stake mineral mine claims or file mining patents; legislative or administrative changes to the Sámi cultural livelihoods; the development of the teaching of and in the Sámi language in schools; social and health services; and any other matters affecting the Sámi language and culture or the status of the Sámi as an Indigenous people.

As mentioned, the protection under sections 17.3 and 121.4 includes traditional livelihoods,<sup>24</sup> which means, as maintained by *Guttorm*, that traditional lands, waters and natural resources used by the Sámi are contained within the frame of the self-government.<sup>25</sup> Paradoxically, however, when the linguistic and cultural self-government was established in 1995, Sámi land rights were not incorporated but the issue was left for further investigations with the aim to find a solution to meet the international human rights standards, specifically those of the ILO Convention No. 169 on the rights of Indigenous and tribal peoples. Despite several research projects commissioned by the government of Finland, Sámi land rights have not yet been established in such ways, which endorse international human rights obligations.

Since the self-government has been granted for the Sámi as an Indigenous people, international law plays an important role in determining its essential facets. Land rights are viewed as the most important aspect of any Indigenous self-government throughout the world. The government of Finland has regularly received critical remarks from international human rights bodies for omissions of the Sámi self-government, especially while failing to grant Sámi their rights to lands and natural resources.<sup>26</sup>

The recognition of the Sámi as an Indigenous people in the Constitution directly links their constitutional protection to Indigenous peoples' right to self-determination in international law. Increasingly and specially after the adoption of UNDRIP, human-rights-monitoring bodies have widely started to endorse Indigenous peoples' right to self-determination and related free, prior and informed consent (FPIC), which is often viewed in practice as a qualitative negotiation and cooperation process in which Indigenous peoples have a central role from the beginning to the end and a real influence in the outcome of the process.<sup>27</sup> It is important to note that although UNDRIP does not grant an explicit *veto* right to Indigenous peoples except in some cases,<sup>28</sup> human-rights-monitoring bodies have declared that operations that may have significant or large-scale impacts on the rights and culture of Indigenous peoples must not be carried out without consent of Indigenous peoples.<sup>29</sup> FPIC has become one of the central legal principles in the field of Indigenous peoples' rights *via* legal practice and observations of the human-rights-monitoring bodies.<sup>30</sup> As acknowledged in the preparatory works of the Finnish Constitution, the specific content of international human rights is defined by the practice of human-rights-monitoring bodies.<sup>31</sup> Scheinin maintains that the practice of the committees monitoring legally binding human rights treaties involves more than just giving recommendations, since they represent the most authoritative interpretation of the conventions, which member states are bound to follow.<sup>32</sup>

As a follow-up to the observations and recommendations of the human-rights-monitoring bodies, the government of Finland, together with Sámi Parliament, is in a process of renewing the Sámi Parliament Act. In the new proposal, the rights of the Sámi as an Indigenous people are emphasised. The right of the Sámi people to self-determination is strengthened by highlighting possibilities to develop their self-government and an open possibility in the sectoral legislation to

expand their decision-making powers. The negotiation duty of the state authorities (section 9) is considerably strengthened to endorse FPIC, including also the prohibition to weaken the Sámi culture and related duty to assess cumulative impacts when carrying out actions that may affect the culture and the rights of the Sámi.<sup>33</sup> However, independently whether the new proposal for the Sámi Parliament Act will be accepted by Finnish Parliament, according to the guidelines made by Ministry of Justice, together with Sámi Parliament in 2019, already the current negotiation duty (section 9) has to be read in the light of human rights, specifically referring to the requirements of FPIC.<sup>34</sup>

### **3. The prohibition to weaken the Sámi culture: its content and basis in international law**

The general prohibition to weaken constitutional rights prohibits the lowering of the level of protection that already has been achieved.<sup>35</sup> Hence, the constitutional right of the Sámi to maintain and develop their culture (section 17.3) implicitly contains the prohibition to weaken the Sámi culture. The wording of section 17.3 is related to article 27 of the ICCPR, which recognises the right of the members of minorities to maintain and develop their culture.<sup>36</sup> Although article 27 considers the right of individuals as parts of groups, in the legal practice of the Human Rights Committee (HRC), collective elements are recognised, as well as positive measures to protect Indigenous peoples as groups to maintain and develop their culture.<sup>37</sup> Similarly, in the preparatory works of the current Sámi Parliament Act, it is stated that article 27 requires, similarly to section 17.3 of the Constitution, an active obligation for the state to contribute to the maintenance and development of the Sámi culture.<sup>38</sup>

In its observations, the HRC reads article 27 together with article 1 (peoples' right to self-determination), which is a collective right, similarly to section 17.3, which protects the Sámi as a collective—as an Indigenous people.<sup>39</sup> Based on the recent legal practice of HRC, it can be concluded that article 27 has to be read together with and in the light of article 1,<sup>40</sup> which strengthens Indigenous peoples' right to maintain and develop economic and cultural lifestyle and to use and govern their traditional lands and natural resources. According to the HRC, activities that cause 'significant' or 'substantial' harm to Indigenous peoples' culture and traditional livelihoods violate their right under article 27.<sup>41</sup> This does not, however, only mean that authorities must refrain from causing significant harm. This also requires positive measures from authorities to secure and advance maintenance and development of Sámi cultural livelihoods so that they will be sustainable also in the future.

Hence, the prohibition to cause significant harm under article 27 consists, on the one hand, of substantial protection: an obligation to protect the culture of Indigenous peoples so that it retains its sustainability and economical profitability in present as well as in future. On the other hand, the prohibition to cause significant harm includes procedural right for Indigenous peoples to 'effectively' participate in the decisions that concern them, in line with FPIC. The threshold of

‘significant’ harm has to be weighed case by case, taking into account the previous, present and planned activities, of which cumulative impacts have to be assessed by the respected authorities, together with the Sámi Parliament and practitioners of the Sámi traditional livelihoods.<sup>42</sup> Also, Finnish legislators have summed up the requirements of article 27, as interpreted by the HRC, including the duty to consult, the prohibition to cause significant harm and related cumulative impact assessments.<sup>43</sup> In Finland, ICCPR binds directly as national law and forms a legal norm directly applicable by the state authorities.

Authorities that are responsible to decide whether certain operations are allowed should keep in mind that single activities do not necessarily exceed the threshold of significant harm. However, when their impacts are measured, other activities of the past, present and near future must be taken into consideration, which means that the threshold of significant harm may be exceeded by rather small operations. In addition, while assessing the impacts, the authorities must keep in mind the requirement of section 17.3 of the Constitution concerning the right of the Sámi to further develop their culture, which means that the Sámi culture must have enough living space so that it can evolve according to priorities set by Sámi themselves. The Sámi Parliament has maintained that already current competing land use without any new activities are significantly weakening the Sámi culture in their traditional Homeland.<sup>44</sup>

When section 17.3 of the Constitution is read in the light of the ICCPR, the threshold of ‘significant harm’ cannot be set very high. This view is shared by the Finnish Constitutional Law Committee, which stated, in relation to the renewal of the Mining Act, that the threshold of significant harm in the Mining Act shall not be set too high but has to be interpreted in the light of the Constitution and the ICCPR.<sup>45</sup> This statement sets prerequisites for the economic and social activities of the state in the Sámi Homeland to seriously consider the Sámi interests.

So far, in individual cases regarding Finland, the HRC has not viewed the threshold of significant harm exceeded, which therefore means that article 27 has not been violated.<sup>46</sup> It is, however, important to realise that those individual cases concerned individual logging cases and not, for example, cumulative impacts of the forestry in its totality. During past decades, there has been much larger-scale logging taking place in the Sámi Homeland than what was brought to the assessment of the HRC in those individual complaints. Related to those cases, the HRC stated that if activities of the state party were more large-scale than in the current cases, it might lead to the violation of article 27.<sup>47</sup> In 2019, the HRC requested the government of Finland to report how the authorities define the threshold of significant harm and how this is implemented in the practice when assessing impacts of activities that directly or indirectly affect Sámi culture and traditional livelihoods.<sup>48</sup>

Besides the Constitution and the ICCPR, the prohibition to weaken the Sámi culture indirectly dwells on other legal instruments related to Indigenous peoples. For instance, the Committee on the Elimination of Racial Discrimination (CERD) has requested the government of Finland to acquire FPIC before accepting operations that affect the traditional use and development of traditional land and natural

resources of Sámi people. The state party is asked to ensure that cultural and environmental impacts are assessed in cooperation with communities who are affected by the concerned operations.<sup>49</sup>

As it becomes evident in the previously discussed statements of the HRC and CERD, FPIC and the prohibition to weaken Indigenous culture by causing significant harm and related impact assessments to measure the threshold are intimately interlinked. According to FPIC, Sámi people must have all necessary information at hand in order to assess the impacts of the planned actions on their culture and rights as an Indigenous people. Hence, an impact assessment has to be viewed as an essential qualitative criterion of the negotiations as well as a procedural measure to define the threshold of significant harm. Also, the view of an Indigenous people about whether the concerned activity is causing significant harm to their culture should have a strong influence on the final decision of the authorities.

### ***3.1. The prohibition to weaken the Sámi culture and the challenges of its implementation in national environmental legislation***

#### *3.1.1. The prohibition in the mining, environmental protection and water acts*

The legal practice of the HRC related to the ICCPR, which monitors the interpretation of the Constitution and sectoral legislations, was the very reason to include the prohibition to weaken the Sámi culture in the renewed Mining Act.<sup>50</sup> Safeguarding Sámi rights, along with safeguarding environmental sustainability, is one of the very purpose of Mining Act according to its section 1, which states that

the activities referred to in this Act shall be adapted in the Sámi Homeland, referred to in the Act on the Sámi Parliament (974/1995), so as to secure the rights of the Sámi as an Indigenous people. This adaptation shall pay due attention to the provisions of the Skolt Act (253/1995) concerning the promotion of the living conditions of the Skolt population and Skolt area, opportunities for making a living, and the preservation and promotion of the Skolt culture.

In the Sámi Homeland, mining activities mostly relate to gold digging and a few mining mineral prospecting and reservations. The requirement of section 1 of the Mining Act are fleshed out by the prohibition to weaken the Sámi culture. According to section 38,

in the Sámi Homeland, the permit authority shall—in cooperation with the Sámi Parliament, the local reindeer owners' associations, the authority or institution responsible for management of the area, and the applicant—investigate the impacts caused by activity in accordance with the exploration permit, mining permit, or gold panning permit on the rights of the Sámi as an Indigenous people to maintain and develop their own language and



culture and shall consider measures required for decreasing and preventing damage.

In this assessment, cumulative impacts have to be taken into consideration: According to section 38, any corresponding permits valid in the vicinity of the area referred to in the application as well as other forms of usage of areas interfering with the rights of the Sámi as an Indigenous people in the area that the application involves, and in its vicinity, have to be considered.

The Supreme Administrative Court has confirmed that consideration for granting permits by the concerned authority shall be based on the assessment carried out by section 38.<sup>51</sup> According to section 50,

an exploration permit, mining permit, or gold panning permit must not be granted if activities under the permit: 1) alone, or together with other corresponding permits and other forms of land use would, in the Sámi Homeland, substantially undermine the preconditions for engaging in traditional Sámi sources of livelihood or otherwise to maintain and develop the Sámi culture 2) would substantially impair the living conditions of Skolts and the possibilities for pursuing a livelihood in the Skolt area; 3) in a special reindeer herding area, would cause considerable harm to reindeer herding. However, a permit may be granted regardless of an impediment referred to in subsection 1, if it is possible to remove such an impediment through permit regulations.

The Mining Act includes a right of appeal for the Sámi Parliament and Skolt Sámi Village (section 165). During the years, the permits authority Tukes (the Finnish safety and chemical agency) and the Sámi Parliament have had constant disagreements regarding whether the impacts are assessed according to the requirements laid down by the Mining Act.<sup>52</sup> According to the Sámi Parliament, which appeal against almost all gold panning permits, the permit authority usually did not execute cumulative impact assessment as required by section 38.<sup>53</sup> In contrast, Tukes does not view it as its legal obligation to execute any comprehensive cumulative impact assessment. Instead, it has considered the request sent to the Sámi Parliament and reindeer-herding associations to give statements with relevant information, such as maps of the area, as an adequate investigation under section 38.<sup>54</sup>

Two years after entering into force of Mining Act, the Sámi Parliament appealed for the first time to the Administrative Court, which overruled the concerned gold panning permit of the Tukes as illegal.<sup>55</sup> The Administrative Court emphasised a positive interpretation of fundamental and human rights by highlighting that the purpose of section 50 of Mining Act is to implement the requirements of the Constitution, the ICCPR and the Reindeer Husbandry Act.<sup>56</sup> The decision was brought to the Supreme Administrative Court, which enforced the decision of the Administrative Court.<sup>57</sup> Both courts emphasised that section 38 requires a cooperative procedure, which is complementary to the negotiation duties of the Sámi Parliament Act, Skolt Act and Reindeer Husbandry Act.<sup>58</sup> The Administrative Court stated that

because the obligation in Mining Act is new, the means of action and procedures, cooperation and impact assessment should have been defined and established.<sup>59</sup>

Yet a major and persisting problem of the application of the Mining Act is that the necessary procedure for the cumulative impact assessment has not been established to this day. In later cases brought to the Administrative Court, the court has viewed the impact assessment as adequate when Tukes has sent Sámi Parliament necessary maps of the areas and a mere list of other competing land use in the area with a simple statement that ‘multiple land use projects do not cause significant harm to the Sámi culture’.<sup>60</sup> Thus, despite the positive interpretation of fundamental and human rights provided by the Administrative Court in its first case, in later cases, the court has not required the mining authority to establish a proper cooperation or procedure for conducting impact assessments. In addition, the multiple statements of the Sámi Parliament and reindeer-herding cooperatives did not have any direct impacts on the decisions of the mining authority and the Supreme Administrative Court.<sup>61</sup> In the same vein, the Supreme Administrative Court has not reconsidered the decisions but confirmed the arguments of the Administrative Court.<sup>62</sup>

It must be concluded that the prohibition to weaken the Sámi culture has been explicitly written into the Mining Act, endorsing the fundamental and human rights of Sámi. The wording of the act provides in fact strong legal protection for the rights of the Sámi. In practice, however, as long as the permission authority, together with the Sámi, has not created a cooperation procedure, in which cumulative impacts are objectively and adequately assessed, the prohibition to weaken the Sámi culture remains unactualised in mining operations taking place in Finland.

From the point of view of the protection of the Sámi culture, the Mining Act is also connected to the Environmental Protection Act (527/2014), which specifies that mining and gold panning are activities, which pose risk to pollute the environment and hence need an environmental permit. A mining permit may also need a water resource management permit regulated by the Water Act (587/2011).<sup>63</sup> These permits are considered in the same process by regional state administrative agency (AVI). The prohibition to weaken the Sámi culture has been written in section 49 of the Environmental Protection Act and chapter 2, section 8 of the Water Act.<sup>64</sup>

From the point of view of fundamental and human rights of the Sámi, it is rather alarming and problematic that in permit applications, environmental and water permit decisions or the decisions of the Administrative Court, there is no documentation or even argumentation about whether or how the impacts to the Sámi culture have been assessed.<sup>65</sup> Decisions may include permission orders, such as minimising noise pollution to reindeers or prohibition to contaminate waters.<sup>66</sup> According to Sámi Parliament and Sámi reindeer herders, however, these permission orders are inadequate and do not take into account cumulative impacts on the Sámi culture and rights.<sup>67</sup>

Until recently, Supreme Administrative Court had confirmed the decisions of the Administrative Court regarding the interpretation of the Environmental Protection Act.<sup>68</sup> However, in a decision of 25 November 2020 (KHO:2020:124), it has

reconsidered its interpretation about section 49 of the Environmental Protection Act. In its decision, the court stated that sections 17.3 and 121.4 of the Constitution as well as obligations under the ICCPR require that impacts of gold panning activities are assessed holistically, not only considering, e.g., noise pollution but also including limitations to the reindeer pastures.<sup>69</sup> The court also, for the first time, endorsed cumulative impact assessment by stating that other gold panning activities in the area and their cumulative impacts must be assessed and taken into consideration. The court, however, did not overrule the permit decision of AVI but made restrictions to it in order to safeguard free passage of reindeers to their grazing areas.<sup>70</sup> In contrast, the Sámi Parliament had required the permission to be overruled as being illegal or alternatively required much larger restrictions than the ones court ruled.<sup>71</sup> Overall, however, the case is an important step forward since the Supreme Administrative Court, for the first time, interpreted the prohibition to weaken the Sámi culture in the light of the fundamental and human rights of the Sámi people.

### *3.1.2. Sámi rights in the Metsähallitus Act*

Metsähallitus can be viewed perhaps as the most important state actor in the Sámi Homeland since 90% of its area is owned by the state and governed by Metsähallitus. Forestry, which is the core activity of Metsähallitus, has been seen to be in contrast to the full actualisation of the rights of the Sámi people.<sup>72</sup> According to the Sámi Parliament and Sámi reindeer-herding cooperatives, forestry has throughout the decades substantially weakened the Sámi culture and traditional way of life.<sup>73</sup>

To strengthen the protection of the Sámi culture, in the renewal process of the Metsähallitus Act in 2015, there was a draft to include the prohibition to weaken the Sámi culture within the act. This proposal related to the national implementation plan of the ILO Convention No. 169, which eventually did not go through in the Parliament. The deletion of the draft paragraphs, which recognised the prohibition to weaken the Sámi culture by the Ministry of Forest and Agriculture was widely criticised by international human rights bodies.<sup>74</sup> This decision was also opposed by the Constitutional Law Committee, which stated that the prohibition to weaken the Sámi culture paragraphs should be included because they are justified by the current fundamental and human rights of Sámi, independently of the ratification of ILO Convention No. 169.<sup>75</sup>

Although the current Metsähallitus Act does not formally include the prohibition to weaken the Sámi culture, the constitutional rights of the Sámi are indirectly reflected in section 6, which states,

The management, use and protection of natural resources governed by Metsähallitus in the Sámi Homeland referred to in the Act on the Sami Parliament (974/1995) shall be adjusted to ensuring the conditions of the Sámi people to practice their culture, and in the reindeer herding area referred to in the Reindeer Husbandry Act (848/1990) they shall be adjusted to fulfilling the obligations laid down in the Reindeer Husbandry Act.

The Reindeer Husbandry Act, although not recognising the rights of the Sámi, encompasses the prohibition to weaken reindeer husbandry in the specific areas, including Sámi Homeland.<sup>76</sup> Furthermore, the Reindeer Husbandry Act includes the duty of state authorities to negotiate with reindeer-herding cooperatives when planning measures concerning state land will have a substantial effect on the practice of reindeer herding (section 53). Additionally, Metsähallitus is obliged to negotiate with the Sámi Parliament under section 9 of Sámi Parliament Act. Furthermore, in the Skolt Sámi area, the Skolt Act requires that authorities shall hear the Skolt Sámi Village Meeting in the matters that are important for the Skolt Sámi (section 56).

As maintained in the previous section of this chapter, human and fundamental rights define a minimum standard of application to the sectoral legislations that must be interpreted in the light of human and fundamental rights. This has been acknowledged in the preparatory works of the Metsähallitus Act, which states that section 17.3 of Constitution must be read together with international human rights treaties.<sup>77</sup> When section 6 of the Metsähallitus Act is read together with the Constitution and articles 27 and 1 of the ICCPR, it means that Metsähallitus must, in all its operations, guarantee that they do not cause significant harm to the right of the Sámi people to maintain and develop their culture and traditional livelihoods. Hence, cumulative impact assessment can arguably be seen as a legal obligation of Metsähallitus.

Metsähallitus negotiates regularly and actively both with the Sámi Parliament as well as reindeer-herding cooperatives, with whom it has made several contracts concerning the usage of forestry areas.<sup>78</sup> Recently, Metsähallitus has even increased cooperation and negotiations and aimed at improving its relationship with the Sámi people.<sup>79</sup> Metsähallitus has not, however, viewed as its legal obligation to execute any comprehensive cumulative impact assessment, which the Sámi Parliament and reindeer-herding cooperatives have requested.<sup>80</sup> However, Metsähallitus has recently agreed with the Sámi Parliament to apply voluntary Akwé: Kon Guidelines ‘for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities’ in the natural resource planning.<sup>81</sup> The Guidelines that relate to the implementation of the International Convention on the Biological Diversity (CBD) have until now only been applied by Metsähallitus in its management plans concerning natural parks and wilderness areas.<sup>82</sup> It should be emphasised, however, that if the aim of the Akwé: Kon process is to implement or replace the legal obligation of Metsähallitus based on the ICCPR, it should be ensured that impact assessment is executed as extensively as is required by human and fundamental rights of Sámi people.

#### **4. Conclusion**

The right to traditional Sámi livelihoods is undisputably one of the most essential fundamental and human rights of the Sámi as an Indigenous people.

The rights and status of Indigenous peoples have strongly evolved in international law during the past couple of decades. Especially, Indigenous peoples' right to self-determination including FPIC, as codified by the UNDRIP, has become widely accepted *via* legal practice and the observations of international bodies monitoring human rights conventions. In effect, this has led the government of Finland to a process of revising the Sámi Parliament Act in order to meet the requirements of international law, including FPIC and the prohibition to weaken the Sámi culture. FPIC is directly connected with the prohibition to weaken the Sámi culture since FPIC indicates a negotiation process in which an Indigenous people must have adequate and timely information regarding the impacts of the planned activities that the negotiation concerns. The threshold of significant harm is defined by cumulative impact assessment. Although the prohibition to weaken the Sámi culture dwells from fundamental and human rights, it has been specifically codified in the Finnish mining, environmental protection and water acts. Moreover, even though against preliminary attempts, it was left out from the revised Metsähallitus Act, the current Sámi rights provisions must be read in the light of fundamental and human rights, which prohibit actions that cause significant harm to the Sámi culture.

In Finland, the implementation of cumulative impact assessments related to the prohibition to weaken the Sámi culture has been problematic. Neither mining nor environmental protection authorities have established a system for cumulative impact assessments. Similarly, Metsähallitus has not viewed assessment of cumulative effects as its legal obligation. However, without assessing the impacts of each forestry operations, it is not possible to define the threshold for significant harm since, in addition to large-scale forestry, there are multiple competing land use in the Sámi Homeland. As a result, the Sámi Parliament argues that forestry projects continue to significantly weaken the sustainability of the environment and the culture of the Sámi.

Although Metsähallitus is perhaps the most central authority in Sámi Homeland that has an influence on the Sámi culture and rights, the Metsähallitus Act is not the only law that has to be interpreted and applied within the framework of fundamental and human rights of the Sámi. Examples of other essential legislations that must be read in the light of the prohibition to weaken the Sámi culture are, besides legislation relating to reindeer herding and fishing, the Nature Protection Act (1096/1996), the Wilderness Act (62/1991), the Forest Act (1093/1996), the Land Use and Building Act (132/1999) and the Act on Environmental Impact Assessment (252/2017). International comparative research on the actualisation of Sámi rights, commissioned by the Finnish government in 2017, recommends that all essential legislations affecting Sámi rights should include the prohibition to weaken the Sámi culture.<sup>83</sup> Such recommendation seems well attended since, e.g., the Nature Protection Act and the Land Use and Building Act, which are in the process of revision, include draft versions stipulating the prohibition to weaken the Sámi culture. Recently renewed Climate Act (423/2022) includes rather strong participatory rights for Sámi as well. It establishes also the Sámi Climate Council with a task to submit opinions on the climate policy plans.

However, as this chapter demonstrates, even the inclusion of the prohibition to weaken the Sámi culture in the legislative acts is not enough, especially if the cumulative effects of the activities affecting the Sámi culture and rights are not measured in adequate ways. In order to safeguard the sustainable future of the Sámi traditional livelihoods as well as the sustainability of the environment, which often go hand in hand, state authorities must acknowledge that using enough economic and human resources to assess cumulative impacts and develop adequate and functional procedures, together with relevant Sámi actors, is an unavoidable and necessary step forward.

## Notes

- 1 This chapter is based on the following publication: Saamelaiskulttuurin heikentämiskielto ja viranomaisen aktiivinen velvoite turvata perinteisten elinkeinojen harjoittamisen ja kehittämisen edellytykset, Lakimies 1/2021 (2021), p. 3–35. Its production was funded by Kone Foundation SOPU -project (2020–2023) led by Pauliina Feodoroff. Suomen perustuslaki (Finnish Constitution) 731/1999, Ss 17.3 and 121.4.
- 2 HE 309/1993 vp (Government Bill on the Constitutional change) 65. See also Ilkka Saraviita, *Suomalainen perusoikeusjärjestelmä* (Finnish Constitutional System) (Talentum, Helsinki 2005) 446.
- 3 HE 167/2014 vp (Government Bill on Sámi Parliament Act), Para 3 a. See also Biologista monimuotoisuutta koskevan yleissopimuksen alkuperäiskansojen perinnetietoa käsittelevän artikla 8 j:n kansallisen asiantuntijaryhmän loppuraportti (The final report of article 8 j working group on CBD) (Ympäristöministeriö 2011) (Ministry of Environment) 6–8.
- 4 See, generally, Jouni JK Jaakkola, Klemetti Näkkäljärvi, Suvi Juntunen, ‘SAAMI—Saamelaisten sopeutuminen ilmastonmuutokseen—hankkeen tieteellinen loppuraportti’ (2020) Valtioneuvoston selvitys- ja tutkimustoiminnan julkaisusarja 25; Susan E Lee and others, ‘Regional Effects of Climate Change on Reindeer: A Case Study of the Muotkatunturi Region in Finnish Lapland’ (2000) 19 Polar Research 99.
- 5 Saamelaiskäräjät, Muistio, Dnro31/D.a.2/2014, 5; Paliskuntain yhdistys, *Opas poronhoidon tarkasteluun maankäyttöhankeissa* (Pohjolan Painotuote oy 2013) 17. See, generally, Jonny-Leo L Jernsletten and Konstantin Klovov, *Sustainable Reindeer Husbandry* (Arktinen neuvosto 2002).
- 6 Biologista monimuotoisuutta koskevan yleissopimuksen alkuperäiskansojen perinnetietoa käsittelevän artikla 8j:n kansallisen asiantuntijaryhmän loppuraportti (Ympäristöministeriö, kesäkuu 2011) 12.
- 7 Leena Heinämäki and others, ‘Saamelaisten oikeuksien toteutuminen: Kansainvälinen oikeusvertaileva tutkimus’ (2017) 4 Valtioneuvoston selvitys- ja tutkimustoiminnan julkaisusarja, valtioneuvoston kanslia.
- 8 Leena Heinämäki, ‘Saamelaiskulttuurin heikentämiskielto ja viranomaisten aktiivinen velvoite turvata perinteisten elinkeinojen harjoittamisen ja kehittämisen edellytykset’ (2021) 119 Lakimies 3. The original article was produced as a part of the ‘Miltä sopu näyttää?’-project, led by Pauliina Feodoroff and funded by Kone foundation.
- 9 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
- 10 Heikki Karapuu, ‘Perusoikeuksien käsite ja luokittelu’ in Pekka Hallberg and others *Perusoikeudet, Oikeuden perusteokset* (WSOYpro OY 2011) 64–87, 73.
- 11 *ibid* 65.
- 12 HE 309/1993 vp. See Veli-Pekka Viljanen, ‘Perusoikeusuudistus ja kansainväliset ihmisoikeussopimukset’ (1996) 5–6 Lakimies 788–89. See also Ihmisoikeudet.net



- 'Ihmisoikeudet Suomessa' <<http://www.ihmisoikeudet.net/ihmisoikeudet-suomessa/>> accessed 8 April 2021.
- 13 Pekka Hallberg, 'Perusoikeusjärjestelmä' in Hallberg and others (n 9) 29–59, 35; Pauli Rautiainen, 'Perusoikeuksien heikennyskielto' (2013) 3 Oikeus 261, 267–68. See also HE 309/1993 vp, 6; Riku Neuvonen and Pauli Rautiainen, 'Perusoikeuksien tunnistaminen ja niiden sisällön määrittäminen Suomen perusoikeusjärjestelmässä' (2015) 1 Lakimies 28, 44. See Martin Scheinin, *Ihmisoikeudet Suomen oikeudessa—valtiösääntöoikeudellinen tutkimus kansainvälisten ihmisoikeussopimusten valtiosisäisestä voimassaolosta sekä ihmisoikeus- ja perusoikeusnormien sovellettavuudesta Suomen oikeusjärjestyksessä* (Suomalainen lakimiesyhdistys 1991) 335.
  - 14 Rautiainen (n 12) 267–68. See also Matti Mikkola, 'Sosiaaliturvan leikkaukset Euroopan sosiaalisen peruskirjan valossa' in Katri Hellsten, Mikael Hiden and Maija Saksli (eds), *Sosiaaliset oikeudet ja sosiaaliturva* (Kela 2001) 21–27, 25–26; Paavo Nikula, 'Perusoikeudet ja Lainsäädäntö' (1999) 6–7 Lakimies 878, 881–82.
  - 15 Perustuslakivaliokunnan lausunto, PeVL 32/2010 vp—HE 273/2009 vp, Hallituksen esitys kaivoslaiksi ja eräiksi siihen liittyviksi laeiksi.
  - 16 Supreme Court of Finland, KKO:2022:25 and KKO:2022:26. See also Martin Scheinin, 'Indigenous Peoples' Right to Fish: Recent Recognition of Sámi Rights in Finland Through Civil Disobedience and Criminal Trial' in Dorothee Cambou and Øyvind Ravna (eds), *The Significance of Sámi Rights: Law, Justice, and Sustainability for the Indigenous Sámi in the Nordic Countries* (Routledge 2024).
  - 17 HE 248/1994 vp saamelaisten kulttuuri-itsehallintoa koskevien säännösten ottamisesta Suomen Hallitusmuotoon ja muuhun lainsäädäntöön, 16.
  - 18 Juha Guttorm, *Saamelaisten itsehallinto Suomessa—dynaaminen vai staattinen? Tutkimus perustuslaissa turvatun saamelaisten itsehallinnon kehittymisestä lainsäädännössä vuosina 1996–2015* (Acta Universitatis Lapponiensis 375, Lapin yliopisto 2018) 5.
  - 19 HE 248/1994 vp., 21.
  - 20 *ibid* 14.
  - 21 See, e.g., ILO Convention No. 169 concerning Indigenous and Tribal People in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention No. 169), art 7; United Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA A/RES/61/295 (UNDRIP), art 3 and 4. Heinämäki and others (n 7) 27.
  - 22 Act on the Sámi Parliament 974/1995, s 1.
  - 23 *ibid* s 5.
  - 24 HE 309/1993 vp, 65; HE 248/1994 vp, 5.
  - 25 Guttorm (n 17) 98.
  - 26 See, e.g., UN Human Rights Committee, 'Concluding Observations on Finland' (22 August 2013) UN Doc CCPR/C/FIN/CO/6, para 16; Committee on Economic, Social and Cultural Rights, 'Concluding Observations on Finland' (17 December 2014) UN Doc E/C.12/FIN/CO/6, para 9; Committee on the Elimination of Racial Discrimination (CERD), 'Concluding Observations on the Twentieth to Twenty-Second Periodic Reports of Finland, Adopted by the Committee at Its Eighty-First Session' (23 October 2012) UN Doc CERD/C/FIN/CO/20–22, paras 11, 13; CERD, 'Concluding Observations on the Twenty-Third Periodic Report of Finland' (8 June 2017) UN Doc CERD/C/FIN/CO/23, paras 16–17.
  - 27 UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), 'Free, Prior and Informed Consent: A Human Rights-Based Approach' (2018) UN Doc A/HRC/39/62, 10; See Mauro Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Development and Challenges Ahead' (2012) 16 International Journal of Human Rights; Leena Heinämäki, 'Legal Appraisal of Arctic Indigenous Peoples' Right to Free, Prior and Informed Consent' in Timo Koivurova and others (eds), *Routledge Handbook of Indigenous Peoples in the Arctic* (Routledge 2020) 335–51.



- 28 UNDRIP (n 20) arts 10 and 29.2. See Mauro Barelli, 'Free, Prior and Informed Consent in the UNDRIP: Articles 10, 19, (29 (2) and 32 (2))' in Jessica Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 247–69.
- 29 See, e.g., *Ángela Poma v Peru* (Communication No 1457/2006) UN Doc CCPR/C/95/D/1457/2006 (HRC 27 March 2009); *Saramaka People v Suriname* (judgment) Inter-American Court on Human Rights Series C No 172 (28 November 2007).
- 30 See, generally, Sebastian Johannes Rombouts, *Having a Say—Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf 2014); Tara Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law' (2011) 10 *Northwestern Journal of International Human Rights* 54; Leena Heinämäki, 'Global Context—Arctic Importance: Free, Prior and Informed Consent, a New Paradigm in International Law Related to Indigenous Peoples' in Thora Martina Herrmann and Martin Thibault (eds), *Indigenous Peoples' Governance of Land and Protected Territories in the Arctic* (Springer 2016) 209–40; James Anaya and Sergio Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples' (2017) 4 *University of Toronto Law Journal* 435.
- 31 See HE 309/1993 vp perustuslakien perusoikeussäännösten muuttamisesta, 5–9.
- 32 Martin Scheinin, 'The Work of the Human Rights Committee Under the International Covenant on Civil and Political Rights and Its Optional Protocol' in Raija Hanski and Martin Scheinin (eds), *Leading Cases of the HRC* (Åbo Akademi University 2003) 23. See also Jakob Möller and Alfred de Zayas, *United Nations HRC Case Law 1977–2008: A Handbook* (Engel Verlag 2009) 8.
- 33 Saamelaiskäräjälain muutosta valmistelevan toimikunnan mietintö (Oikeusministeriö, Mietintöjä ja lausuntoja 2021:21).
- 34 Oikeusministeriön ja Saamelaiskäräjien muistio saamelaiskäräjälain 9 §:n neuvotteluvollisuudesta, OM 2/551/2017, 23 November 2017.
- 35 Perusoikeuskomitean mietintö, KM 1992:3, s. 163. See Rautiainen (n 12) 267.
- 36 Martin Scheinin, 'Oikeus omaan kieleen ja kulttuuriin' in Pekka Hallberg and others (eds), *Perusoikeudet. Oikeuden perusteokset* (Werner Söderström Lakitieto Oy 1999) 533–59, 545.
- 37 UN Human Rights Committee, 'CCPR General Comment No 23: Article 27' (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5, para 6.2.
- 38 HE 190/1995 vp laeiksi saamelaiskäräjistä annettu lain ja saamen kielen käyttämisestä viranomaisissa annettu lain muuttamisesta, 10.
- 39 Matti Niemivuo, 'Saamelaiset ja perusoikeudet' in Kai Kokko (ed), *Kysymyksiä saamelaisten oikeusasemasta* (Lapin yliopiston oikeustieteellisiä julkaisuja 2010) 92–110, 100.
- 40 See, e.g., *Tiina Sanila-Aikio v Finland* (Communication No 2668/2015) UN Doc CCPR/C/124/D/2668/2015 (HRC 20 March 2019); *Klemetti Näkkäljärvi and others v Finland* (Communication No 2950/2017) UN Doc CCPR/C/124/D/2950/2017 (HRC 18 December 2019).
- 41 See, e.g., *Ángela Poma Poma v Peru* (n 28) para 27; *Lubicon Lake Band v Canada* (Communication No 167/1984) UN Doc Supp. No 40 (A/45/40) at 1 (1990) (HRC 26 March 1990) para 1.
- 42 See *Jouni Länsman and Eino Länsman v Finland* (Communication No 1023/2001) UN Doc CCPR/C/83/D/1023/2001 (HRC 17 March 2005).
- 43 HE 132/2015; HE 167/2014; See also MMM, työryhmämuistio 2014:2.
- 44 Saamelaiskäräjien lausunto Dnro:67/D.a.4/2016.
- 45 Perustuslakivaliokunnan lausunto, PeVL 32/2010 vp—HE 273/2009 vp, Hallituksen esitys kaivoslaiksi ja eräksi siihen liittyviksi laeiksi.
- 46 *Ilmari Länsman and others v Finland* (Communication No 511/1992) UN Doc CCPR/C/52/D/511/1992 (HRC 8 November 1994); *O Sara and others v Finland* (Communication

- No 431/1990) UN Doc CCPR/C/50/D/431/1990 (HRC 24 March 1994); *Eino Länsman v Finland* (Communication No 671/1995) UN Doc CCPR/C/58/D/671/1995 (HRC 22 November 1996); *Anni Äärelä and Näkkäljärvi v Finland* (Communication No 779/1997) UN Doc CCPR/C/73/D/779/1997 (HRC 4 February 1997); *Ilmari Länsman v Finland* (Communication No 1023/2001), UN Doc CCPR/C/83/D/1023/2001 (HRC 17 March 2005).
- 47 See, e.g., *E Länsman v Finland* (n 45) para 10.7; *I Länsman v Finland* (n 45) para 10.2.
- 48 UN Human Rights Committee, 'List of Issues Prior to Submission of the Seventh Periodic Report of Finland' (2 March 2019) UN Doc CCPR/C/FIN/QPR/7.
- 49 CERD (n 25) paras 16–17.
- 50 HE 273/2009 vp kaivoslaiksi ja eräksi siihen liittyviksi laeiksi, 24.
- 51 Supreme Administrative Court of Finland, KHO 2014:111, 25.6.20014, T 1988.
- 52 Saamelaiskäräjien lausunto kaivoslain muutosesityksen johdosta sekä esitys kaivoslain toimeenpanoon liittyvien ongelmien ratkaisemiseksi, Lausunto 27 April 2016, 251/D.a.4/2016; See Heinämäki and others (n 6) 78–84.
- 53 Saamelaiskäräjien lausunto kaivoslain muutosesityksen johdosta sekä esitys kaivoslain toimeenpanoon liittyvien ongelmien ratkaisemiseksi, 19 May 2016, 281/D.a.4/2016, 1.
- 54 Pohjois-Suomen hallinto oikeuden päätös, 1 September 2016, diaarinumero 00940/15/7203.
- 55 *ibid.* See also Heinämäki and others (n 6) 79–80.
- 56 *ibid.*
- 57 Supreme Administrative Court of Finland, KHO 2014:111, 25.6.20014, T 1988.
- 58 *ibid.*
- 59 *ibid.*
- 60 Pohjois-Suomen HAO, 4 October 2016, T 16/0309/1, 16/0311/1, 16/0312/1, 16/0313/1, 16/0314/1, 16/0315/1, 16/0310/1.
- 61 *ibid.*
- 62 Supreme Administrative Court of Finland, KHO 16 March 2018, 3282/1/16; 16 March 2018, 382/1/17.
- 63 Ks. vesilain (587/2011) 3 luku: Luvanvaraiset vesitaloushankkeet.
- 64 Ympäristösuojelulaki (527/2014) 49 §:n 1 mom. 6 kohta; 191 §:n valitusoikeus Saamelaiskäräjille ja Kolttien kyläkokoukselle; Vesilaki (587/2011) 2 luvun 8 §; Saamelaiskäräjien valitusoikeus (15 luku 2 §:n 6 kohta).
- 65 Aluehallintovirasto, Lupapäätös Nro 66/2018/1 Dnro PSAV113355/201 7 Annettu julkipanon jälkeen 6 July 2018; Pohjois-Suomen Aluehallintovirasto, Lupapäätös Nro 95/2020 Dnro PSAVI/1209/2020 7 July 2020; Vaasan hallinto-oikeuden 13 June 2019 päätös nro 19/0141/2, Dnro 01012/18/5399.
- 66 *ibid.*
- 67 15 July 2019 Dnro: 491/D.a.5/2019 Saamelaiskäräjien valitus ympäristönsuojelulain mukaista ympäristölupaa ja vesilain mukaista vesitalouslupaa koskevassa asiassa liittyen Pohjois-Suomen aluehallintoviraston 6 July 2016 antamaan päätökseen nro 66/2018/1 Viite Pohjois-Suomen aluehallintoviraston päätös nro 66/2018/1 ja Vaasan hallinto-oikeuden päätös nro 19/0141/2, dnro 01012/18/5399.
- 68 Supreme Administrative Court of Finland, KHO 12 December 2018 päätös, Dnro 3168/1/17.
- 69 Supreme Administrative Court of Finland, KHO 2020:124.25 November 2020, taltionumero 4268.
- 70 *ibid.*
- 71 15 July 2019 Dnro: 491/D.a.5/2019 Saamelaiskäräjien valitus ympäristönsuojelulain mukaista ympäristölupaa ja vesilain mukaista vesitalouslupaa koskevassa asiassa liittyen Pohjois-Suomen aluehallintoviraston 6 July 2016 antamaan päätökseen nro 66/2018/1 Viite Pohjois-Suomen aluehallintoviraston päätös nro 66/2018/1 ja Vaasan hallinto-oikeuden päätös nro 19/0141/2, dnro 01012/18/5399.

- 72 Kaisa Raitio, *You Can't Please Everyone—Conflict Management Practices, Frames and Institutions in Finnish State Forests* (Joensuu yliopisto 2008) 246.
- 73 Peltonen Lasse and others, *Saamelaiden kotiseutualueen valtion metsien käytön ristiriidat ja ratkaisumahdollisuudet* (Metsähallitus 2020).
- 74 Heinämäki and others (n 6) 38.
- 75 PeVL 1/2016 vp— HE 132/2015 vp, 5.
- 76 Reindeer Husbandry Act 848/1990, s 2.2.
- 77 HE 132/2015 vp, 10.
- 78 HE 132/2015, 47.
- 79 See Lasse and others (n 72) 50.
- 80 *ibid.*
- 81 Toimintamalli Akwé: Kon -ohjeiden soveltamisesta Metsähallituksen ja Saamelaiskäräjien välisessä yhteistyössä: Hyväksytty Saamelaiskäräjien kokouksessa 4/2019 (30 October 2019), 6 § 1 <<https://www.samediggi.fi/2019/11/05/saamelaiskarajat-hyvakysi-toimintamallin-akwe-kon-ohjeiden-soveltamisesta-metsahallituksen-ja-saamelaiskarajien-valisessa-yhteistyossa/>> accessed 7 April 2020.
- 82 *ibid* 2. See Akwé: Kon ohjeet, Ympäristöministeriö, Ympäristöhallinnon ohjeita 1/2011.
- 83 Heinämäki and others (n 6) 510.

# 8 The implementation of Sámi land rights in the Swedish Forestry Act

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## 1. Introduction

The protection of the rights of the Sámi people to land in forest areas is elemental for guaranteeing human rights and promoting a sustainable and equitable use of forest areas. As widely recognised in international law, respect for the land rights of Indigenous peoples is both significant for preserving the livelihoods of communities and instrumental to sustainable development and a sound management of forest.<sup>1</sup> When the international community agreed on 17 Sustainable Development Goals (SDGs) in 2015, the preconditions and needs of Indigenous peoples were explicitly acknowledged.<sup>2</sup> Since access to land and resources is crucial for the survival of Indigenous peoples, securing their title to land should be a central part of the implementation of the SDGs.<sup>3</sup> In international law, this is declared in Article 26 of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), where it is stated that Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. It is further stated that Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. Article 26 of the UNDRIP further stipulates that states should give legal recognition and protection to these lands, territories and resources. Article 32 of the UNDRIP also stipulates the obligation to consult Indigenous peoples when development projects affect their land and natural resources. Hence, a crucial aspect of the realisation of sustainable development is the recognition and protection of Indigenous land rights within the various national legal systems.

In Sweden, reindeer herding and the access to reindeer-grazing lands in forest areas is fundamental for the Sámi culture.<sup>4</sup> In 1977, the Swedish Parliament recognised the Sámi as an Indigenous people,<sup>5</sup> and since 2011, a specific section in the Swedish Constitution states that the Sámi people's opportunities to maintain and develop their own cultural and community life shall be promoted.<sup>6</sup> The provision aims to express that the Sámi people is regarded as an Indigenous people, and that reindeer herding is a central part of the Sámi culture.<sup>7</sup> In addition, the reindeer-herding Sámi have land rights on their traditional territories, and these rights are

recognised as private property rights.<sup>8</sup> At the same time, the forest areas in which most of the traditional land of the Sámi is situated are owned by private landowners. Hence, parallel property rights exist on the same land, namely, the right of the Sámi to use the land and those of landowners, which include their rights to exploit the forest as regulated through the Forestry Act (1979:429).

However, with an increasing number of conflicts between Sámi communities and landowners over the use of forest areas, it is questioned whether the Swedish legal system is adequately protecting the rights of the Sámi Indigenous people to land and natural sources.<sup>9</sup> In fact, even if the Indigenous status of the Sámi people is declared in the constitution and even if Sweden is a country with high standards in the fulfilment of human rights, the implementation of Sámi land rights has been highly controversial.<sup>10</sup> Sweden has so far not ratified the ILO Convention No. 169, which is the central treaty in relation to Indigenous peoples.<sup>11</sup> And when UNDRIP was adopted in 2007, the Swedish government declared that it must maintain a balance between competing interests of different groups living in the same areas and that ‘Article 28 of the UNDRIP does not give the Sámi people the right to redress for regular forestry by the forest owner’.<sup>12</sup> This statement displays the complex legal and political situation that prevails on a national level when it comes to the implementation of Sámi land rights. The state’s position can be explained by the economic value that natural resources, particularly forest and minerals have for landowners, private companies and the nation as such. It is feared that implementing Sámi land rights would hinder the current extensive use of natural resources.<sup>13</sup> As a result, the political system has so far failed to strengthen the protection of Sámi land rights, despite the criticism from international human rights institutions.<sup>14</sup>

This chapter analyses and discusses the recognition and protection of Sámi land rights in the Swedish Forestry Act. It explores to what extent Sámi land rights have been recognised and implemented in the forestry legislation and to what extent Sámi reindeer herders can influence decisions about how forest areas are utilised, to ensure their ability to use the land for reindeer herding. In summary, the chapter argues that the Forestry Act does not provide an adequate protection of the land rights of the Sámi. On this account, the following chapter is divided as follows. First, the chapter describes the land use conflict between reindeer herding and forestry. Second, an analysis of the development of the rights of the Sámi people to land in Sweden is provided. Third, the chapter focuses on the Forestry Act and the way that the relation between forestry and Sámi reindeer herding is regulated. Specifically, the analysis explains how the Forestry Act fails to protect Sámi land rights. In the conclusion, the chapter also proposes reforms in the legislation to improve the legal situation to provide better protection to the land rights of the Sámi.

## **2. Reindeer herding, forestry and parallel property rights**

Since the inland ice melted about 10,000 years ago, reindeer have migrated between different land areas in what is now the northern parts of Sweden. Eventually, the Sámi started to domesticate the reindeer, and over time, reindeer herding

evolved.<sup>15</sup> Today, reindeer herding constitutes a vital part of the traditional Sámi subsistence system and the Sámi culture.<sup>16</sup> Reindeer herding is also a carrier of traditional knowledge and language. Reindeer owned by Sámi reindeer herders graze in the mountain areas and the boreal forests, migrating between different seasonal grazing areas. Access to pastures, connectivity and diversity of pasture areas, and peaceful grazing without disturbances from human activities and predators are key aspects within reindeer herding.<sup>17</sup> Some 50% of Sweden's land surface is subject to reindeer herding,<sup>18</sup> and a large part of this area consists of forestland. During the snow-free period of the year, reindeer graze on a wide range of plants.<sup>19</sup> During the winter, reindeer survive by feeding primarily on lichens, which they find under the thick snow cover and dig for with their large hooves. Arboreal lichens growing on the tree stems and branches also contribute to their diet during winters, especially when thick or icy snow prevents them from digging.<sup>20</sup> Access to winter-grazing grounds is generally the primary limitation on reindeer herding in Sweden since it is decisive for how many reindeers that can be held by the Sámi.<sup>21</sup> In other words, to continue reindeer herding in the future, access to large forest areas for grazing is a precondition.

During the last decades, intense forest management practices have had predominantly far reaching negative effects on reindeer herding.<sup>22</sup> Although Sweden is a country with large forest areas, forestry have increasingly caused loss and fragmentation of grazing areas.<sup>23</sup> Clear-cutting and soil scarification make the ground lichens difficult for the reindeer to access and feed on. Moreover, a decreasing proportion of old forests in the landscape limits the supply of pendant lichens. Fragmentation of the landscape caused by forest roads and clear-cuts makes it also more difficult for the herders to move and keep the reindeer herds together. An additional problem is the choice of replantation method within forestry, where tree species like *Pinus contorta* are causing problems for reindeer grazing.<sup>24</sup> In addition to forest activities, Sámi reindeer herding is carried out in parallel with other land uses, such as mining, hydroelectric power, wind energy, outdoor life and tourism. During the last decades, these competing land uses and climate change have limited the grazing areas and the space for adaption.<sup>25</sup>

In Sweden, a large number of private landowners, both large forest companies and individuals, own the forest areas. Accordingly, land ownership is a parallel property right to land to the Sámi land rights in the northern parts of Sweden. Landownership includes the right to carry out forestry, and forest management is primarily regulated through the Forestry Act.<sup>26</sup> In the Forestry Act, there are specific sections stipulating how the landowner should consider the needs of reindeer herding when carrying out forestry.<sup>27</sup> Hence, the meaning of the Forestry Act is relevant for Sámi reindeer herding and the implementation of Sámi land rights.

In parallel with the Forestry Act, the voluntary certification systems Forest Stewardship Council (FSC) and Programme for the Endorsement of Forest Certification Schemes (PEFC), regulate how forestry can be conducted by the landowners that have chosen to be affiliated. In both systems, there are rules regarding the considerations that should be taken in relation to Sámi reindeer herding when logging is carried out. According to the Swedish Constitution, the state is responsible

for regulating private law relationships (Instrument of Government [1974:152], Chapter 8, Article 2, Section 1). Since the Swedish state has no influence over the voluntary certification systems, an analysis of the certification schemes falls outside the purpose of the chapter. In the next sections, the chapter therefore examines the content of the Sámi rights to land and to which extent these rights are protected under the Forestry Act, which is the most relevant legal framework for governing relations between Sámi reindeer herders and landowners in the use of forests areas.

### 3. The historical context and the development of Sámi land rights

The complex legal situation of today, with parallel property rights to the same land, can only be understood in the light of historical events and measures taken by the Swedish Crown, such as the colonisation of the northern areas and the demarcations processes (Swe: *avvittringar*) carried out. Up until the middle of the 18th century, forest areas in the inland of the northern parts of Sweden, were mainly used by nomadic Sámi for, e.g., reindeer herding, fishing, hunting and gathering.<sup>28</sup> The present situation with parallel land rights is the result of a colonisation process when the Crown encouraged people to move into these northern areas during the 18th century, for instance, by providing tax reductions.<sup>29</sup> Through the colonisation and the demarcation processes, forestlands became private property.<sup>30</sup> These processes were carried out to separate private land from the land that was governed by the state and meant that forests were divided between private landowners and considered as private property.<sup>31</sup>

As the importance of forestry increased and the value of forest grew, governmental control over the logging became tighter. During the first half of the 20th century, forestry became more and more industrialised, and the way logging was carried out changed and intensified.<sup>32</sup> From the 1950s, clear-cutting became the dominant logging method. This means that all trees in a stand are felled and replaced with new trees plants. Clear-cutting has affected the reindeer-grazing lands negatively.<sup>33</sup>

The conflict of interest between forestry and reindeer herding has been known and handled by the state for more than 100 years.<sup>34</sup> However, for a long period there was no legislation that regulated the conflict. It was not until 1991 that special provisions about the consideration to reindeer herding were implemented into the Forestry Act, to strengthen the protection of the Sámi reindeer herding.<sup>35</sup>

Another reason for today's complex legal situation is that the Swedish state's attitude towards Sámi land rights has varied over time. During the end of the 19th century, the Swedish state considered reindeer herding to be based on customary rights.<sup>36</sup> However, in the beginning of the 20th century the Swedish state began to express the view that Sámi land use was based on what was termed as the 'the Lapp privilege',<sup>37</sup> meaning that the law was the foundation of the right to use land and that the state could regulate Sámi land use through new or amended legislation.<sup>38</sup> Sámi representatives opposed the state's position and claimed that they were holders of real property rights and that these rights were older than the Swedish settlers, and that this had to be acknowledged.<sup>39</sup> Thus, the status of Sámi land rights came to be under dispute for most of the 20th century. The described unclear judicial



situation has affected the legal situation of today since the applicable legislation is still based on the understanding that Sámi land use is based on ‘the Lapp privilege’.

Today, one of the most important legislations regulating the right to land of the Sámi people is the Reindeer Herding Act (SFS 1971:437), which regulates how reindeer herding can be carried out. Reindeer herding is practiced in 51 so-called Sámi reindeer-herding communities (RHC; Swe: *sameby*).<sup>40</sup> Each RHC is a legal entity, constituting a geographical area, a form of economic association and a social community between the RHC members.<sup>41</sup> The Reindeer Herding Act divides reindeer-grazing land into year-round grazing land, where reindeer herding can be carried out the entire year, and winter grazing land, where reindeer herding can be carried out only during the winter period.<sup>42</sup>

While the Reindeer Herding Act provides the main framework for governing reindeer-herding activities, other legislation, such as the Forestry Act and Mining Act (1991:45), also affects reindeer herding and how Sámi land rights can be carried out. However, even if there is legislation of relevance, it is primarily through case law that the meaning of Sámi land rights have developed during the last decades. Case law has clarified that Sámi land rights are based in the longtime use of land and that they are private property rights.<sup>43</sup> This was first elucidated in 1981 by the Swedish Supreme Court in the *Taxed Mountain* case (Swe: *Skattefjällsdomen*). In 1966 several RHCs and individuals in the province of Jämtland sued the Swedish state and claimed full ownership rights to the property in dispute, located in the taxed mountains. They also claimed different limited rights to the same areas. The Swedish state maintained that the state was the owner of the areas in dispute and that the Sámi only held special rights stated in the Reindeer Herding Act. In this regard, the Supreme Court came to the conclusion that the Sámi part had not proven that it was the owner of the area. At the same time, the court also clarified the legal nature of the reindeer-herding right as based on the longtime use of land through the judicial concept of *immemorial prescription* (Swe: *urminnes hävd*) and, therefore, not dependent upon a statute for its existence.<sup>44</sup> Furthermore, the Supreme Court also concluded that this right was a civil-law-based right, protected by the Constitution as private property against coercive measures without compensation, in the same manner as land ownership.

In 2011 the Supreme Court confirmed in the *Nordmaling* case that the right to graze reindeer in the coastal area was based on the longtime use of land as customary rights.<sup>45</sup> A large number of landowners had sued three RHCs in the province of Västerbotten and claimed that they had no right to graze their reindeer on the land of the landowners during the winter. Hence, the legal question at stake was whether the RHCs had the right to winter pasture on the properties concerned. The RHC’s claim that they had land rights to winter grazing was approved by the Supreme Court. This court case therefore confirmed the legal status of Sámi land rights as private property rights.

More recently, the *Girjas* case in 2020, about the right to small game hunting and fishing in the high mountain areas, has also clarified that Sámi land rights include a right to decide on land use that is not recognised in the Reindeer Herding Act.<sup>46</sup> In 2009, the Girjas RHC, supported by the reindeer-herding organisation

SSR and all RHCs, sued the Swedish state and claimed exclusive hunting and fishing rights in relation to the state on land governed by the state. Based on the longtime use of land, the Supreme Court found that the Girjas RHC has the right to decide on licenses to hunt and fish in the area, even if this is explicitly prohibited in Section 31 of the Reindeer Herding Act. In the judgment, the Supreme Court also clarified that international Indigenous peoples law is of relevance when courts and public authorities are making decisions that concerns Sámi land use.<sup>47</sup> From this perspective, the *Girjas* case is a landmark case that has elucidated the need for changes in the legislation to implement and secure Sámi land rights.<sup>48</sup> As a consequence of the judgment, the Swedish government has appointed a public commission to propose changes in the legislation regulating reindeer herding and other forms of Sámi land use.<sup>49</sup>

To sum up, it is clearly elucidated within the Swedish legal system through case law that Sámi land rights are private property rights, protected by the Constitution through the Instrument of Government, Chapter 2, Article 15. This means that the RHCs and the Sámi reindeer herders have the right to use land for reindeer grazing, the right to make decisions about land use and the right to benefit economically from resources located on those lands. Yet as the next section demonstrates, these rights are not fully protected in the Swedish Forestry Act.

#### **4. The Forestry Act and the protection of reindeer herding: public interest and property rights**

##### *4.1 Public interests and private property rights*

Sámi reindeer herding is a public interest that shall be regarded when logging is carried out, and at the same time, reindeer herding is based on private property rights. In this section, these two legal elements within Swedish real estate law—public interests and private property rights—are described. When a legal assessment is carried out, it is necessary to distinguish these legal elements from each other since they have different functions within the legal system. Section 4.1 describes the different legal functions of public interests and private property rights. In section 4.2 the dimension of reindeer herding as a public interest in the Forestry Act is analysed, and section 4.3 analyses if Sámi land rights have been recognised and implemented in the Forestry Act in a relevant way in correspondence with their character as property rights.

The Forestry Act is primarily a public law statute, foremost governing the relationship between the Swedish state and the landowner, and the focus is on administrative measures to govern forests and its use. The Swedish Forestry Agency is supervising that the forestry legislation is properly applied by the landowner.<sup>50</sup> In this regard, the purpose of the Forestry Act is to govern the forest and its competing uses, some of which are designated as public interests such as timber production and reindeer herding.<sup>51</sup>

The legal element ‘public interest’ is a method to designate general values and needs that are important from a societal perspective, and that should be evaluated

when land use measures are planned and carried out.<sup>52</sup> The political system has appointed several public interests in the legislation, such as for example military, environmental and infrastructural needs.<sup>53</sup> The system with pointing out public interests also includes the balancing of different, often opposing, public interests concerning the land use in a specific area. A public interest is not connected to a specific rights holder, and it is the Swedish state through the public authorities that supervises that a public interest is taken into account in various situations. As already mentioned, both timber production and reindeer husbandry are designated as public interests in the Forestry Act.

Private property rights, on the other hand, have the legal function within real estate law to regulate the rights holders' capability to use, make decisions about and benefit economically from the specific property.<sup>54</sup> Another function of private property rights is that they offer protection for the rights holders' legal position in relation to others.<sup>55</sup> A property right belongs to a judicial person and aims to give this subject a legal position in relation to the certain property. Legislation should regulate the relationship between various holders of property rights, especially when there are parallel private property rights to the same land, such as land ownership and Sámi land rights. Private property rights and the protection for these rights have had, for a long period of time, a subordinate role within the Swedish legal system,<sup>56</sup> and the meaning of the legal implications of property rights within Swedish real estate law has been quite unclear.<sup>57</sup> However, during the last decade this has started to change, as the meaning of the constitutional protection of private property has developed through court cases.<sup>58</sup>

#### ***4.2 Protection of reindeer herding as a public interest***

Section 1 in the Forestry Act stipulates that 'the forest is a national asset and a renewable resource that shall be managed so it provides a valuable yield while maintaining biodiversity'. This reflects that timber production and environmental considerations are regarded as equal goals in the Forestry Act.<sup>59</sup> Timber production is regarded as an important public interest because of the socio-economic values and because it is important for the country's exports.<sup>60</sup> In Section 1 it is also stated that the landowner, when using the forest shall consider other public interests. According to the preparatory works, cultural heritage, outdoor life and Sámi reindeer husbandry is to be regarded as such a public interest.<sup>61</sup> Arguments for defining reindeer husbandry as a public interest that have been presented in the preparatory works are general values such as the importance of reindeer herding within the Sámi culture and the need for protection for reindeer herding in relation to other types of land use.<sup>62</sup> The regulation of consideration to reindeer husbandry as a public interest in the Forestry Act is clearly influenced by arguments relating to the protection of other public interests in the Forestry Act, such as environmental considerations and cultural heritage.

From the wording of the relevant sections in the Forestry Act and from the preparatory works that guides the interpretation of the law, it is clear that the legal protection of reindeer herding is primarily based on the view that this type of land

use is a public interest that requires protection in relation to other exploitation of land. This follows a pattern from the 1960s onwards, where focus has been on how to solve the balancing between various interests in relation to land use instead of a discussion about the conflict between holders of land rights.<sup>63</sup>

Pointing out both timber production and reindeer husbandry as public interests in the Forestry Act opens up for a balancing between these two general values. In addition, following from the wording in the Forestry Act and statements in the preparatory works, timber production is a prioritised value in relation to reindeer husbandry when deciding on how forest areas should be utilised. For example, it is stated in the preparatory works that the protection of reindeer herding should not prevent ‘a rational forestry’, referring primarily to financial aspects.<sup>64</sup> Since financial arguments are pronounced, reindeer husbandry is considered as less important economically than timber production.<sup>65</sup> Consequently, it is primarily the public interest of timber production that motivates the legal permissibility of extensive damages to the reindeer-grazing lands and thus on the property of the RHCs. This way of regulating the relationship between forestry and reindeer herding through the system of public interests clearly circumscribes the consideration that is taken to the later and the level of protection that it is granted.

By privileging timber production and a ‘rational forestry’, the state likewise favours the private property rights of the landowners. In addition, it also stems from the implementation of the Forestry Act that the rights of the RHC are not adequately protected as private property rights, an argument demonstrated in the next section.

### **4.3 Protection of Sámi land rights as property rights**

This section analyses if Sámi land rights have been recognised and implemented in the Forestry Act in a relevant way in correspondence with their character as property rights. The analysis is based on legal mechanisms that are usually used when the relationship between private property rights is regulated within Swedish real estate law: (1) a requirement of mutual consideration, (2) agreements, (3) the right to appeal to court and (4) economic compensation if damages occur on the property.

A central legal mechanism to regulate property rights relationships is a *requirement of mutual consideration*.<sup>66</sup> This type of regulation means that the rights holders involved must adjust the measures carried out on the property with respect to the other rights holder’s conditions and needs.

In the Forestry Act, there are specific sections that regulate the consideration that the landowner should take in respect of reindeer husbandry when carrying out forestry. Before felling, the landowner shall for instance notify the Forestry Agency about how the planned measures will meet specific values that are specified in Section 14, for instance, measures to meet the interest of reindeer husbandry within the year-round area. According to Section 15, if the forest area is situated within the high mountain area in the west, where it is considered more difficult to establish new forest, the landowner must apply for a permit from the Forestry Agency

in order to log. In this case, the landowner must also provide information about measures to meet the needs of reindeer husbandry.

In addition, Section 31 in the Forestry Act stipulates a general requirement of consideration on all land where reindeer husbandry is carried out, including winter grazing areas. In such areas, the landowner shall take designated consideration to reindeer husbandry when logging is planned and executed. This shall be done by adjusting the size and location of the harvesting site or by leaving groups of trees on harvest sites as well as along migrations routes. The landowner shall also make necessary adjustments when forest roads are constructed. When planning and implementing the forestry measures, it is stipulated that the aim shall be that the RHC concerned should have annual access to grazing areas and to vegetation that is needed in areas for gathering, moving and resting the reindeer.

However, even if these sections exist in the Forestry Act, the *requirement of mutual consideration* is not adequately implemented in the legislation to regulate the relation between the forestry measures of the landowner and the reindeer herding of the RHC as a rights holder. On the contrary, it has been explicitly expressed in the preparatory works that the protection of reindeer herding should not prevent 'a rational forestry'.<sup>67</sup> This means that the legislation allows damages to the reindeer-grazing land. As a consequence, the interest of private landowner pursuing timber production is favoured in principle by the Forestry Act.

Another section in the Forestry Act that stipulates a requirement of consideration is Section 13 b. It is stipulated that if logging leads to such an essential loss of pasture that it affects the admitted number of reindeer that can be held by a RHC, the logging cannot be carried out. This is also the case if the logging means that gathering and migration of reindeer herds would become impossible. However, the fact that Section 13 b has so far never been used by the Forestry Agency to prohibit logging demonstrates that it is generally considered by public authorities that forestry does not violate the interests of reindeer herding as protected under the Forestry Act.<sup>68</sup> To sum up, the requirement of mutual consideration is not implemented in the Forestry Act.

Another legal mechanism within the Swedish real estate law that regulates private property rights relations is the ability to enter into *agreements* with others.<sup>69</sup> However, the Forestry Act does not give the RHCs the opportunity to enter into agreements with the landowner about the use of forest areas. Instead, a form of consultation process is prescribed in Section 20 of the Forestry Act.<sup>70</sup> This type of consultation gives a very weak form of opportunity to influence and protection for the RHCs and their land rights. According to this section, it is enough if the landowner gives the RHC opportunity to consultations before clear felling. However, there is no requirement that the landowner should adjust the forestry measures according to the information from the RHC or inform the Forestry Agency about the opinions that the RHC has presented. Furthermore, the duty to consult is circumscribed in the prescriptions issued by the Forestry Agency.<sup>71</sup> The obligation to consult does not apply for forestry units with less than 500 hectares of productive woodland and if the harvested area is smaller than 20 hectares. This means that the obligation to consult is severely limited.

Additionally, the geographical scope of protection also restricts the duty to consult RHC. Section 20 in the Forestry Act is only valid in areas where reindeer herding can be carried out during the entire year (*åretruntmarkerna*).<sup>72</sup> Consequently, the requirement to consult does not include the winter grazing areas, which are of crucial importance for reindeer herding. To sum up, the Forestry Act does not give the RHC the opportunity to enter into agreements about the forestry measures on grazing lands.

Other legal mechanisms in real estate law to protect private property rights is *the right to appeal to court* if a decision has negative effects on the property.<sup>73</sup> When a notification of clear felling is handed in to the Forestry Agency by the landowner, the RHC is usually not given the opportunity to comment on the planned logging. Neither is a written decision about the planned logging sent out to the RHC by the Forestry Agency. Consequently, the RHC cannot influence the decision-making or appeal against a decision about logging to have the conflict of interest tested in court. This means that the RHC is denied a relevant legal standing in the notification process that corresponds with their property rights. Accordingly, there is no proper access to justice for the RHC in the Forestry Act.

An additional legal mechanism in regulations about property rights relations is *economic compensation* when damages occur on the property.<sup>74</sup> In the Forestry Act, there are no sections about economic compensation to RHCs when loss of grazing lands occurs. In the preparatory works, it has been concluded that the RHCs could have a right to economic compensation; however, to have this tested, the RHC must turn to the courts in a civil law proceeding.<sup>75</sup> This type of court proceeding entails many legal challenges for the RHC as a plaintiff. For example, in a situation where the case is lost, the RHC takes the risk to pay the total costs of the trial.<sup>76</sup> Furthermore, the RHC has the burden of proof in relation to the damages or loss of grazing lands. This means that all the necessary evidence must be provided to convince the court that the losses of forest areas are caused by forestry measures. This can be a difficult assignment since reindeer herding is affected of many other land users as described earlier. And since the Forestry Act stipulates the consideration that the landowner has to take in relation to reindeer herding, there is a risk for the RHC to initiate this type of court proceeding. So far, there are no national precedents where the issue of economic compensation has been tested in court.

In summary, this analysis of the Forestry Act shows that legal mechanisms that are usually implemented in legislation to handle property rights relationships within real estate law are not included in the Forestry Act. Consequently, the forestry legislation does not give the RHCs the opportunities to dispose the grazing land and make decisions about it that correspond with the Sámi land rights' character as property rights. On the contrary, there is an exclusion in the Forestry Act from the decisions about how the forests are managed and utilised. Hence, the legislation does not give the RHC the possibility to influence important decisions about land use and be effectively protected against potential damages and adequately compensated.

## 5. Conclusions

As described, Sweden recognised the Sámi people as an Indigenous people already in 1977, and reindeer herding has been acknowledged as a central aspect of Sámi culture. In addition, case law has clarified that Sámi land rights are private property rights based on the longtime use of land. Accordingly, there is a general recognition of Indigenous law and Sámi land rights within the Swedish political and judicial systems. However, this chapter reveals a gap between the general recognition of Sámi land rights and the specific legislation that regulates the relationship between Sámi reindeer herding and forestry.

During the legislative processes that have taken place since the *Taxed Mountain* case in 1981, there has been an obvious lack of analysis of how Sámi land rights as private property rights should be implemented within the Swedish legal system. In the preparatory works, there are only vague references to Sámi land rights as title to land and the legal consequences of this. Instead, the protection of reindeer herding has mainly focused on reindeer herding as a public interest. Hence, the protection of reindeer herding is not primarily based on the fact that there are property rights that should be secured. Instead, the emphasis is on promoting reindeer herding as an industry, as opposed to the right of a specific RHC to practice reindeer herding as a rights holder. This significantly weakens the Sámi reindeer herding in relation to forestry and the landowner's right to land.

As Sámi reindeer herding is primarily regarded as a public interest in the Forestry Act, this opens up for a balancing of opposing land uses, as timber production is also appointed as a public interest to consider when forestry is carried out. This way of dealing with, or failing to deal with, the conflict between land ownership and the Sámi land right constitutes a manifest deficiency in the forestry legislation from a private property rights perspective. This means that the RHCs are given only a limited opportunity through law to influence the outcome of the most critical question of all, the access to enough grazing lands for the reindeer. This manifests a failure to implement Sámi land rights in the Forestry Act, which represents a regulatory framework that neglects rather than enforces the protection of Sámi land rights.

The analysis shows that Sámi land rights to a very limited extent have been recognised and secured in the forestry legislation. Sámi land rights and the duty of the state to provide the Sámi with influence over decision-making have not been properly implemented into the forestry legislation. These shortcomings of the Swedish forestry regulations are not unique. On the contrary, studies of other parts of the legal system, such as the Swedish Mining Act, has visualised a general lack of recognition of Sámi land rights within the Swedish real estate system.<sup>77</sup>

As described in the beginning of this chapter, securing Indigenous land rights and giving Indigenous peoples influence on decision-making is a central part of the implementation of the rights of Indigenous peoples as recognised international law. The various nations where Indigenous people live must find ways to secure Indigenous land rights within their national political and legal systems. Hence, the failure to implement Sámi land rights in the Swedish Forestry Act can also be



described as a deficiency in endeavouring human rights as well as in a sustainable and just use of the land.

To achieve a just and sustainable development in line with the rights of Indigenous peoples, there is an urgent need for a legislative reform. Both adequate procedural regulations and substantive regulations concerning the protection of Sámi land rights are required. There are several legal mechanisms that could be incorporated in the Forestry Act to regulate the relationship between the landowner and the RHC in a more sustainable way, which also would correspond with the existing property rights regime within Swedish real estate law. One legal mechanism that could be implemented is a requirement of negotiations instead of the weak consultation process of today in Section 20 of the Forestry Act. Negotiations would mean that the landowner and the affected RHC would have to collaborate on how forestlands should be utilised. The Consultation Act (2022:66) that has been adopted in 2022 does not strengthen the RHCs' legal position in this respect since consultations is only required by public institutions.

Another legal mechanism that could be included in the Forestry Act is a requirement of agreements, with a consent mechanism that also corresponds with the principle of free prior and informed consent.<sup>78</sup> A third legal mechanism that could be implemented in the forestry legislation is economic compensation for damages to and loss of grazing land. A fourth legal mechanism that could be implemented is access to judicial review. For instance, a special instance could be adopted that could mediate between the parties and announce a judgment on the matter if an agreement cannot be reached by the parties involved. This type of legal mechanisms would give the Sámi RHCs a stronger position to influence how forests are managed, leading to a more sustainable land use.

The RHCs and their members are not satisfied with the situation of today since they cannot influence decisions on how the forest is used in a proper way. This has led to a situation where the conflicts between the forestry industry and the RHCs have increased during the last years. As the politicians have failed to implement Sámi land rights in the Forestry Act, many RHCs believe that mobilisation and protests are the only alternatives, and the conflict level is getting stronger by the day. If the Swedish politicians choose not to engage in reforms, a continued high level of conflict about forestry in Sápmi is to be expected. To contribute to a sustainable use of the natural resources in the north of Sweden and to realise the rights of Indigenous peoples, there is an urgent need to implement Sámi land rights in a better way in the Swedish forestry legislation.

## Notes

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- 37 SOU 1923:51 p. 101, 123, prop. 1928:43, 54.
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- 40 Reindeer Herding Act, s 6.
- 41 Each RHC has a name, such as Luokta Mavas RHC (Swe: *Luokta Mavas sameby*). For geographical location of the RHCs, see Sámediggi <<https://www.sametinget.se/8382>> accessed 1 September 2023. Note that Sámi who own no reindeer constitute the vast majority of Sámi in Sweden. Non-reindeer-herding Sámi have no state-recognised land rights. This is the result of state policy and legislation, separating nomadic Sámi, especially in the mountainous areas, from other Sámi who became permanent residents in houses.
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- 67 Prop. 1990/91:3, 19, 53.
- 68 Information by email from the Forestry Agency, 22 October 2021.
- 69 Torgny Håstad and others, *Civilrättens grunder* (Iustus 2016) 18.
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- 72 Reindeer Herding Act, s 3.
- 73 See, e.g., the Administrative Procedure Act (2017:900) s 33.
- 74 See, e.g., the Tort Liability Act (1972:207) ch 2, s 1.
- 75 Prop. 1971:51, 136; Prop. 1992/93:32, 98, 107–9.
- 76 The Code of Judicial Procedure, ch 18, s 1.
- 77 Kaisa Raitio, Christina Allard and Rebecca Lawrence, 'Mineral Extraction in Swedish Sápmi: The Regulatory Gap Between Sámi Rights and Sweden's Mining Permitting Practices' (2020) 99 *Land Use Policy*, ch 3.
- 78 See, e.g., United Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA A/RES/61/295 (UNDRIP).

# 9 Navigating conservation currents: conditions for Sámi agency in collaborative governance and management models

*Elsa Reimerson and Linn Flodén*

## 1. Introduction<sup>1</sup>

The conservation of natural resources and biological diversity is a core aspect of global environmental efforts and policies, including the United Nations' *2030 Agenda for Sustainable Development* and its Sustainable Development Goals (SDGs). Setting aside areas for protection continues to be an important part of efforts to fulfil these global goals of biological diversity and the conservation of coastal, marine and terrestrial ecosystems, as well as an important national and local environmental policy instrument.<sup>2</sup> Moreover, protected areas are viewed as potential contributors to a range of other goals and targets for sustainable development—from climate change adaptation to food and water security, disaster risk reduction, and human health and well-being. However, there are ongoing debates over the possibility to combine environmental and socio-economic development goals in and through protected areas.<sup>3</sup>

Historically, protected areas have commonly been implemented and managed based on a strict and exclusive view of environmental protection, departing from understandings of certain natural landscapes as 'wild' or 'untouched'—often with severe consequences for traditional owners and local users of those landscapes.<sup>4</sup> Recent decades have seen significant shifts in dominating conservation discourses, with collaborative and participatory governance approaches now being held forward as potential vehicles to reach a range of goals (including the SDGs).<sup>5</sup> It has also been argued that Indigenous peoples' rights to self-determination are essential to sustainable development, as sustainability and conservation of biological and cultural diversity rest on Indigenous peoples' knowledge of and stewardship over key ecosystems.<sup>6</sup> Nonetheless, protected areas often continue to be sites of contestation and conflict—not least in relation to the rights of Indigenous peoples.<sup>7</sup>

In Sápmi, the set-aside of large tracts of land for nature protection impacts Sámi reindeer herding and other Sámi land uses in several ways. These impacts differ between countries, forms of protection and individual protected areas. The shift in dominating conservation discourses towards a preference for collaborative and participatory approaches is visible here, too, but opportunities and mechanisms for Sámi participation and influence vary, depending on the national contexts. In this chapter, we will discuss the intersection of conservation and Sámi rights on

the Norwegian, Swedish and Finnish sides of Sápmi, with a particular focus on collaborative arrangements for protected areas and the ways in which discourses on conservation, collaboration and Indigenous peoples shape conditions for Sámi agency in relation to the governance and management of landscapes for environmental protection.

We use ‘governance’ to refer to the overarching processes of political negotiation and decision-making that result in objectives for, and legislation and regulation of, conservation and protected areas. ‘Management’ refers to the activities carried out to fulfil the objectives, implement the legislation, and enforce the regulation.<sup>8</sup>

By ‘discourses’, we mean systems of rules or practices, produced and reproduced through language, that form the meaning and identity of objects and subjects.<sup>9</sup> We understand political agency to be shaped through the discursive positioning and categorisation of individuals and groups, and through the articulations of the contextual conditions for their actions.<sup>10</sup>

## **2. Indigenous peoples and conservation**

Across the world, there is considerable geographical overlap between areas set aside for nature conservation and Indigenous peoples’ lands, and the social, economic, and political consequences of protected areas for Indigenous communities have often been extensive.<sup>11</sup> Discourses of conservation also converge with discourses of Indigenous peoples, and both share a legacy of colonial constructs and relationships. Protected areas have, in general, been regarded as a means for state authorities to protect and secure ‘untouched’ and ‘wild’ natural landscapes from the perceived threats of human activities, civilisation and modernisation. Colonial discourses have constructed Indigenous peoples as ‘primitive’ and ‘uncivilised’ and their traditional lands as ‘wild’, ‘unused’ and ‘empty’. Conservation policies have ignored and suppressed Indigenous peoples’ presence, practices and ways of relating to their lands—including successful environmental stewardship and systems of self-determination and governance.<sup>12</sup> The ideal of protecting pristine, people-free ‘wilderness’ and the strict spatial separation between conservation and use fail to realise and acknowledge the ways in which Indigenous and local peoples have interacted with and shaped highly diverse landscapes.<sup>13</sup>

During recent decades, the criticism of traditional, hierarchical nature conservation governance and management practices has increased.<sup>14</sup> The conservation policy field is undergoing a paradigm shift, where strict management forms without consideration of local knowledges and effects for local communities are increasingly being replaced with collaborative and decentralised modes of protected area governance and management. Collaborative approaches are associated with a range of potential benefits for both environmental and social outcomes, including the strengthening of local stewardship, local empowerment and the recognition and protection of Indigenous rights.<sup>15</sup> This paradigm shift also includes greater recognition of the links and mutual reinforcement between biological and cultural diversities and acknowledgement of the potential contributions of traditional and ecological knowledge to conservation.<sup>16</sup>

Furthermore, the colonial legacies permeating nature conservation are being criticised and scrutinised by researchers and Indigenous rights advocates, and conservationists increasingly acknowledge the need for nature conservation policies to be implemented and managed in collaboration with Indigenous peoples, in ways compatible with their rights, governance systems and knowledge.<sup>17</sup> Connected to international advances in human rights and a result of Indigenous political mobilisation towards and within international bodies, these shifts have opened up new opportunities for Indigenous peoples in relation to protected areas on their lands.<sup>18</sup>

However, collaborative conservation governance and management arrangements do not always deliver the positive social outcomes expected.<sup>19</sup> Nor do they always or automatically lead to equal inclusion of Indigenous peoples—or entail adequate recognition of their status as self-determining peoples.<sup>20</sup> Discourses of protected areas still hinge on a separation of nature and culture, which remains visible in notions of conservation and use as conflicting concepts and works to justify the prioritisation of conservation objectives over Indigenous control over their territories. Continued critical scrutiny of the contexts and conditions for inclusion and participation, the distribution and relationships of power and the consequences of collaborative conservation arrangements for the political agency of actors involved is therefore necessary.<sup>21</sup>

### **3. Protected areas in Sápmi**

A large proportion of the areas set aside for conservation in Norway, Sweden and Finland are located on Sámi lands, and large parts of Sápmi on the Norwegian, Swedish and Finnish sides are thereby set aside under some form of environmental protection.<sup>22</sup> The main forms of protection in all three countries include national parks and nature reserves, although the definition and content of the conservation categories differ between the countries, particularly concerning nature reserves. Nature reserves in Norway and Finland are smaller and more strictly protected than in Sweden, where they can be much larger and may have less restriction on human activities.<sup>23</sup> The protected area categories of ‘protected landscapes’ in Norway and ‘wilderness areas’ in Finland add a less restrictive form of area protection in these countries, including protection of cultural landscapes and with the possibility to allow for traditional use to continue in the protected area.<sup>24</sup>

All three countries have taken on international conservation commitments through the Convention on Biological Diversity (CBD) and the World Heritage Convention (WHC) and are members of the International Union for Conservation of Nature (IUCN). Sweden and Finland, as member states of the European Union (EU), are bound by EU conservation policies and are part of the Natura 2000 network.<sup>25</sup> All these international frameworks widely promote or prescribe collaboration and local participation in protected area governing. The CBD, the IUCN and the WHC also have guidelines or other mechanisms specifically targeting states’ responsibilities towards Indigenous peoples and Indigenous peoples’ inclusion and participation in conservation governance and management.<sup>26</sup>



Protected areas in Norway are designated by the government (after approval by the Parliament) under the Nature Diversity Act of 2009.<sup>27</sup> The Norwegian Environment Agency (NEA) has delegated authority to approve management plans and monitor implementation of the Nature Diversity Act. The management of protected areas has traditionally lied with the county governors (CGs; regional state authorities). About 17% of the land area is under statutory protection, mostly as national parks (representing about 56% of the total area set aside for protection), nature reserves (13%) or protected landscapes (30%).<sup>28</sup>

In Sweden, protected areas are primarily designated under the Environmental Code of 1998.<sup>29</sup> National parks are designated by the government after approval by the Parliament. Other protected areas are commonly established by the county administrative boards (CABs; regional state authorities) or the municipalities. The Swedish Environmental Protection Agency (SEPA) monitors and coordinates implementation of the Environmental Code, and management authority for most protected areas lies with the CABs. Sweden's protected areas amount to almost 15% of its total land and inland water area, the majority set aside as national parks (12% of the total protected area) and nature reserves (84%).<sup>30</sup>

In Finland, protected areas are established by the government (after approval by Parliament for national parks and larger nature reserves, independently for smaller areas) under the Nature Conservation Act of 1996.<sup>31</sup> The 12 wilderness areas in the northernmost part of the country were established pursuant to the Wilderness Act of 1991.<sup>32</sup> Implementation, management and monitoring duties for areas under both legislations lie with the state-owned enterprise Metsähallitus. Finland has set aside about 10% of its area for nature protection, of which national parks represent the largest proportion (approximately 40%).<sup>33</sup>

The mountainous areas of Sápmi on the Swedish and Norwegian sides comprise a large proportion of the total area set aside for protection in those countries—for example, Norrbotten County holds over 85% of the total national park area in Sweden, and almost 60% of the national park area in Norway is situated in the officially recognised Sámi reindeer-herding area.<sup>34</sup> In Finland, over 60% of the area recognised by the Finnish government as the Sámi Homeland area<sup>35</sup> is set aside as protected areas or wilderness areas.<sup>36</sup>

The impact of protected areas on Sámi land uses varies between countries, forms of protection and individual protected areas, as site-specific regulations can be stipulated in management plans for each area.<sup>37</sup> Previous research on Sámi rights and conservation issues<sup>38</sup> suggests that protected areas may benefit Sámi interests, when they safeguard against industrial development and other encroachments. However, dominating discourses of nature and conservation do not always correspond well with Sámi environmental notions, and Sámi rights are often subordinated other environmental goals and commitments. Moreover, Sámi use of land and natural resources may clash with the interests of other parties, and protected areas can—from a Sámi perspective—be perceived as intrusive, difficult to influence and obstructing Sámi land uses.

The relationship between Sámi rights and conservation also needs to be understood in relation to Sámi experiences of colonisation and to current developments

of Sámi rights.<sup>39</sup> From the late 1800s until the mid-1900s, the states' Sámi policies built openly on colonial and racist assumptions of the Sámi as ineligible for land ownership and unqualified for self-government.<sup>40</sup> The remnants of these constructions are still present in contemporary legislation and policy.<sup>41</sup> While Norway has come significantly further in the recognition of Sámi rights, none of the states have fully realised Sámi rights to self-determination and self-management of natural resources in practice. The last decades have seen significant progression towards recognition and realisation of Sámi rights, but the development is uneven across Sápmi, and the mechanisms in place for Sámi rights in relation to conservation issues differ between the countries.<sup>42</sup>

#### **4. Conservation governance and management in Sápmi**

In Norway, Sweden and Finland, environmental governance and management has historically been largely centralised, with low levels of local influence and control. They are all part of and influenced by the global paradigm shifts in conservation governance and management and have—to varying degrees—moved towards more collaborative and participatory approaches.<sup>43</sup> The national implementation of international commitments and the impact of discourses articulated in and through international arenas also vary between the countries.<sup>44</sup>

Norway and Sweden have both recently issued new legislation on Sámi consultation rights—Norway through the amendment of the 1987 Sámi Act<sup>45</sup> and Sweden through a new law.<sup>46</sup> However, the policy trajectories of these laws differ between the countries. Norway ratified the ILO Convention No. 169 (ILO 169) in 1990, and a general consultation agreement between the Norwegian government and Sámediggi has been in place since 2005.<sup>47</sup> In addition, Sámi inclusion and participation in protected area governance and management in Norway has been regulated through a separate agreement on consultation on nature conservation matters between the Norwegian government and the Norwegian Sámediggi since 2007.<sup>48</sup> After the introduction of new legislation for nature conservation in 2009 and a new, decentralised management model for large protected areas in 2010, Sámi participation in protected area management has taken place in the form of Sámi representation on local national park boards (NPBs).<sup>49</sup>

Sweden has not ratified ILO 169, and before the 2022 consultation law, state obligations to consult the Sámi in decision-making processes concerning or affecting land and natural resources on Sámi lands has been lacking.<sup>50</sup> As will be discussed in the following, Sámi reindeer-herding communities have secured influence over the management of the Laponia World Heritage Site, but outside of Laponia, means and mechanisms for Sámi influence over protected area governance and management have been limited.<sup>51</sup> The new consultation law marks a potentially important change. As this chapter will discuss, there are also other recent events and ongoing processes that might indicate a potential change in both discourse and policy practice regarding the governance and management of protected areas on the Swedish side of Sápmi—although the effects of this remain largely to be seen.

In Finland, Sámi rights to consultation and influence in protected area governance and management are specified in the Sámi Parliament Act.<sup>52</sup> They are geographically limited to the Sámi Homeland area in the northernmost part of the country.<sup>53</sup> In addition, since 2011, the Finnish Sámediggi and Metsähallitus use jointly established working methods based on the Akwé: Kon Voluntary Guidelines for protected area planning and management in the Sámi Homeland area.<sup>54</sup>

In the following sections of this chapter, we will use the 2010 Norwegian decentralisation reform of protected area management, the potential change in both discourse and policy practice indicated by developments in Sweden, and Finland's implementation of the Akwé: Kon Guidelines as a basis to discuss spaces for Sámi agency in protected area governance and management.

#### **4.1 Norway: large-scale decentralisation**

The 2010 reform allows the Ministry of Environment and Climate to delegate the management of national parks and other large, protected areas to inter-municipal NPBs, if a majority of the affected municipalities in each area agrees. The NPBs are appointed by the ministry after nominations from municipal councils, county councils and the Sámediggi, with the degree of Sámi representation determined based on each area's importance for Sámi culture and industry. Of the 42 NPBs established as of 2022, the Sámediggi has appointed representatives in 21. The Sámediggi appointees represent Sámi interests and the Sámi people in their capacity as Sámi persons and are not subject to instruction from the Sámediggi.<sup>55</sup>

The NPBs' mandates can include development and revision of protected area management plans, assessments of individual applications for exemption from protected area regulations, and management activities to safeguard the conservation values of protected areas.<sup>56</sup> Management plans are subject to approval by the NEA. The county governors have the right to appeal NPB decisions to the NEA. The ministry has the power to instruct the NPBs and may revoke an NPB's authority and mandate if it finds its decisions or activities inconsistent with relevant legislation or regulations.<sup>57</sup>

An analysis of the 2010 reform<sup>58</sup> shows that Sámi space for agency is both enabled and restrained by the discourses of decentralisation and local protected area management in Norway. Connections to international Indigenous rights law and the promotion of Sámi rights within existing structures enable space for Sámi agency through consultation and consideration of Sámi interests. Emphasis on Sámi contributions to conservation objectives enables space for the protection and promotion of Sámi traditional knowledge. However, the analysed material<sup>59</sup> also emphasises that conservation will be prioritised over user interests and that protected areas are not a means to protect any form of use, industry or cultural practice over others.<sup>60</sup> This could limit or qualify recognition of Sámi rights, traditions or knowledge on its correspondence with or perceived contributions to conservation objectives. Sámi participation under the reform mainly takes place within arrangements modelled on conventional, centralised structures, leaving less space

to fundamentally change or challenge dominating relationships of power, divisions of responsibilities or management objectives.<sup>61</sup>

Studies of the reformed management model have pointed out that different goals, aims and priorities between local and national levels have led to conflicts and that different understandings of both the meaning of conservation and how management should be organised have affected the implementation and legitimacy of the model.<sup>62</sup> Tension has also emanated from different opinions of the role and function of the NPBs, and there is some disagreement on whether the reform does, in fact, increase local control over conservation.<sup>63</sup> Sámi representatives on NPBs seem to be more critical of the functioning and results of the management than others. They also express that non-Sámi NPB members and other actors in advisory capacities lack sufficient understanding of reindeer herding and other Sámi land uses.<sup>64</sup>

#### **4.2 *Sweden: from singular examples to substantial shift?***

In 2013, the Swedish government delegated significant management authority over the Laponia World Heritage Site to Laponiatjuottjudus, a non-profit organisation consisting of representatives from the reindeer-herding communities (RHCs) in the area, the two municipalities within whose territories Laponia is situated, the CAB and the SEPA.<sup>65</sup> This arrangement constituted a break from the traditionally centralised Swedish structure of protected area governance and management and was the first in its kind in terms of Sámi influence and control on the Swedish side.<sup>66</sup>

Laponia includes four national parks, two nature reserves and the lands of nine RHCs.<sup>67</sup> It was inscribed on the World Heritage List in 1996 based on both natural and cultural criteria, with the living cultural heritage of the reindeer-herding Sámi a central argument for the nomination. After almost 15 years of negotiations, the RHCs were able to secure significant influence and control over the management of the site through a collaborative management arrangement where Sámi representatives hold the majority on the board of directors of the managing organisation, Laponiatjuottjudus,<sup>68</sup> and where efforts have been made to adapt the management structure to traditional Sámi organisational practices.<sup>69</sup> The arrangement is not yet permanent. Its current term ends in June 2025. In recent years, the future of Laponiatjuottjudus has at times seemed uncertain, as both municipal and Sámi actors have considered leaving the organisation over disagreements on its order of operation and division of positions within the board.<sup>70</sup>

While it has been critically discussed, not least as regards Sámi influence and control,<sup>71</sup> the Laponia management arrangement still stands out, both nationally and internationally, as a novel policy initiative that actively engages with Indigenous and Sámi rights. As it was first implemented, involved actors consistently described Laponiatjuottjudus and its working methods as a unique and extraordinary arrangement, intimately tied to the specificities of that site. Previous research has suggested that this could make it harder to use Laponia to argue for strengthened Sámi rights and influence over other protected areas.<sup>72</sup>

However, developments in recent years might indicate a shift in conservation policy and practice on the Swedish side of Sápmi. In 2008, the SEPA identified the Vålådalen-Sylarna-Helags area in the southern part of the Swedish mountain range as suitable for a new national park. The proposed park would be Sweden's largest and almost entirely made up by core reindeer-grazing areas. In 2015, the SEPA and the Jämtland CAB initiated a collaborative national park process. During the following years, a committee comprising several local actors and three RHCs jointly developed goals and overarching objectives for a potential park. In 2019, the process ended with a decision to not establish a new national park in this area.<sup>73</sup> The demands, claims and opposition of the RHCs appear to have been crucial for that decision.<sup>74</sup>

In studies of both Lapponia and Vålådalen-Sylarna-Helags, we have found a tension between inherent and instrumental values accorded to Sámi influence and participation, which may affect the space for Sámi agency. In Lapponia, arguments for Sámi influence rely both on the positioning of the Sámi as an Indigenous people with rights according to international law and on a positioning of Sámi culture, knowledge and practices as conditions for the World Heritage values of the site. The latter, which ascribes a more instrumental (rather than intrinsic) value to Sámi influence and participation, could work to limit Sámi space for agency, as it qualifies Sámi influence in a more far-reaching way.<sup>75</sup> In Vålådalen-Sylarna-Helags, state actors similarly tend to connect the inclusion of local Sámi actors to the assumed contributions of reindeer husbandry to conservation values.<sup>76</sup> The national park process and its collaborative form does not appear to be significantly influenced by Indigenous rights discourses—instead, it tends to reproduce notions of the Sámi as a minority in Sweden and local Sámi actors as one among other groups of local stakeholders.<sup>77</sup>

The national park process in Vålådalen-Sylarna-Helags appears to be influenced by dominating discourses on nature conservation and states' control over Indigenous peoples' territories, but the analysis of the process indicates that the dominating positions of those discourses may be transforming. In the final stages of the process, agreement from all involved stakeholder organisations on the purpose and goals for the national park was established as a requirement for continuation. When some of the RHCs opposed the park, the process was terminated. While the government agencies do not frame this as an implementation of free, prior and informed consent (FPIC) as a right of the Sámi as an Indigenous people, this could be understood as an expansion of space available for Sámi agency and claims within Swedish nature conservation policy and practice.<sup>78</sup>

#### **4.3 Finland: Akwé: Kon Guidelines**

The Akwé: Kon Guidelines provide a voluntary mechanism for the implementation of Article 8(j) of the CBD. They outline a protocol for cultural, environmental and social impact assessments regarding developments on, or likely to impact on, traditional lands of Indigenous peoples and prescribe involvement of Indigenous people in all stages of the management and land use planning process.<sup>79</sup> In 2010, Finland

became one of the first countries worldwide to pilot the practical application of the Akwé: Kon Guidelines in the preparation of a management and land use plan for the Hammastunturi Wilderness Area. The Hammastunturi pilot followed the recommendations from a national working group on implementation of Article 8(j) of the CBD, which also included the objective of adopting a permanent procedure for the implementation of the Akwé: Kon Guidelines in Metsähallitus' operations, and was carried out in cooperation between Metsähallitus and the Finnish Sámediggi.<sup>80</sup> Departing from this work, the Sámediggi and Metsähallitus have developed an operating model<sup>81</sup> based on the Akwé: Kon Guidelines, which has been used in several wilderness areas and other protected areas since 2011.<sup>82</sup>

A central tenet of both the Hammastunturi pilot and the jointly developed operating model is the appointment by the Sámediggi of an Akwé: Kon working group of Sámi traditional knowledge holders, in addition to nominating members to a broader collaborative stakeholder panel required under Metsähallitus' planning procedures. During the process of drafting or revising management and land use plans, these working groups assess the impacts of the proposed plans on Sámi culture and traditional land use.<sup>83</sup> Before the implementation of the Akwé: Kon Guidelines, environmental impact assessments were included in management and land use plans, and the Sámediggi carried out their assessment of impacts on Sámi culture after the finalisation of such plans.<sup>84</sup>

The application of the Akwé: Kon Guidelines in Hammastunturi and subsequent cases has been described as representing a significant step to improve Sámi participatory rights<sup>85</sup> and as having the potential to develop into a collaborative management practice that leads to equity and efficiency in decision-making, legitimacy and increased local capacity.<sup>86</sup> The application of the Akwé: Kon Guidelines also seem to have promoted the use of Sámi traditional knowledge in planning.<sup>87</sup> The Sámediggi and Metsähallitus have both been generally pleased with the process.<sup>88</sup>

However, work under the Akwé: Kon Guidelines struggles with a lack of resources.<sup>89</sup> Previous research has also highlighted challenges related to the (lack of) recognition, acknowledgement and integration of Sámi cultural values, customary governance and management rules and practices, and traditional knowledge in the Finnish legal and political system, and has criticised the limitations of Sámi influence on the outcome of decision-making.<sup>90</sup> Moreover, some raise concerns about articulation of Sámi land use practices (in particular, reindeer herding) as negatively impacting conservation objectives.<sup>91</sup>

Studies of the application of the Akwé: Kon Guidelines on the Finnish side of Sápmi thus indicate that it has widened the space for Sámi agency in and through participation in management planning, as the appointment and influence of Akwé: Kon working groups works to create arenas for Sámi influence and control over protected area management in the Sámi Homeland area. The application of the Akwé: Kon Guidelines seems also to have increased the space for use of traditional Sámi knowledge in the management of protected landscapes. However, the space for Sámi agency appears circumscribed by the organisation of Sámi participation and influence in and through conventional governance and management structures,

by a lack of resources on part of the Sámediggi, and by understandings of how Sámi land uses relate to conservation objectives.

## **5. Conclusion: spaces for Sámi agency in protected area governance and management**

As discussed, the examples of policies and practices concerning protected areas in Sápmi on the Norwegian, Swedish and Finnish sides can be understood as somewhat different adaptations of the shift towards collaborative arrangements for protected area governance and management—and illustrate the countries' partially different approaches to Sámi rights. They show that different articulations of Sámi rights, participation and influence construct partly different spaces for Sámi agency.

Understandings of Sámi rights, both in relation to Indigenous rights and in relation to conservation objectives, appear to be important for Sámi space for agency across Sápmi. In Norway, we have argued that connections to international Indigenous rights law work to enable space for Sámi agency but that there is a tension between conservation and Sámi use that might limit or qualify Sámi discretion in relation to protected areas. In Sweden, the parallel articulations of inherent and instrumental values as the basis for Sámi influence and participation might—depending on which becomes more prominent in the discourse—enable certain spaces for agency while limiting others. The reproduction of notions of the Sámi as a minority or a group of stakeholders among others, rather than an Indigenous people, likely also has consequences for Sámi agency in governance and management processes.<sup>92</sup> Finland's application of the Akwé: Kon Guidelines means that the space for Sámi agency has been considerably widened in relation to most of the land and environmental governance and management in the Sámi Homeland area, since protected areas make up such a large proportion of the land use there.

While connections are consistently made to international Indigenous rights law and the status of the Sámi as a people, the dominating discourses on Sámi rights in relation to protected area governance and management tend to focus on participation and influence in and through conventional, state-centred structures. Norway structures Sámi participation in protected area management mainly within arrangements modelled on conventional Norwegian structures, which might limit the space to challenge these structures or argue for radically different alternatives.<sup>93</sup> In Finland, critics point to a lack of recognition of Sámi rights and culture in other land-use legislation as a challenge also to the work under the Akwé: Kon Guidelines, and question the actual influence of the Sámi on decision-making outcomes.<sup>94</sup> On the Swedish side, the Laponia management organisation still stands out, and the general Swedish mechanisms for participation and influence have, until very recently, included little explicit recognition of Sámi rights.<sup>95</sup>

This tendency to frame the realisation of Sámi rights as something primarily done through incorporation of Sámi participation into national systems and collaborative structures can be critically discussed in terms of what Ragnhild Nilsson terms 'a political dilemma': to what extent is it possible for Indigenous peoples to define and constitute themselves, and to set up their own procedures and institutions,



within the confines of the norms and frameworks of the states?<sup>96</sup> Collaborative and participatory arrangements for protected areas on Indigenous peoples' lands do seem to create spaces for Sámi agency and recognition of Sámi rights and thus to development that could be sustainable both for the Sámi and for the landscapes and biological diversity of Sápmi. On the other hand, such arrangements do also entail risks of qualifying, limiting or closing spaces to speak and act from positions that radically differ from or question dominating discourses of sustainability, human-nature relationships, environmental stewardship and Sámi rights.

## Notes

- 1 Elsa Reimerson conceptualised the study, developed the methodology, conducted the investigation process and data collection, co-wrote the first draft of the manuscript and was responsible for the manuscript revision. Linn Flodén contributed to the investigation and analysis and co-wrote the first draft. Both authors have read and agreed to the final version of the manuscript.
- 2 According to the International Union for Conservation of Nature (IUCN), one of the world's most influential conservation organisations, a protected area is 'a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values'. Further detailed using a category system based on management objectives, the IUCN's definition provides a basis for discussing practices of conservation through area protection. Note, however, that definitions and categorisations of protected areas in national legislation and policy do not always correspond directly to the IUCN's. See Nigel Dudley (ed), *Guidelines for Applying Protected Area Management Categories* (Best Practice Protected Area Guidelines Series No 21, IUCN 2013) 8, 10–24.
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# 10 A human-rights-based approach to Sámi statistics in Norway

*Peter Dawson*

## 1. Introduction<sup>1</sup>

The collection and disaggregation of statistical data to allow for comparison between different segments of the population has long been regarded as an important component of the fulfilment of states' human rights obligations, and more recently the Sustainable Development Goals.<sup>2</sup> Despite this, Norway does not disaggregate statistical data by ethnicity or Indigenous status, citing concerns over privacy and data protection, quantifying ethnic group representation and the potential for misuse of data. The few Sámi-specific data sources that are available in Norway are fragmented and do not provide an adequate evidence base for monitoring human rights and sustainable development, preventing discrimination or improving policy and service delivery on issues of importance to Sámi communities. While there are legitimate risks and challenges associated with the collection and disaggregation of Indigenous data, in Norway they are often presented as insurmountable. The consensus among international human rights bodies, however, is that they can be addressed through institutional, legal and technical safeguards. According to the human-rights-based approach, Indigenous peoples are not only entitled to disaggregated statistical data but also to adequate safeguards and data governance arrangements to protect and control their data. This chapter draws on existing research and document analysis to discuss the human rights framework in relation to the collection of Sámi statistics in Norway.

## 2. General human rights obligations concerning statistical data

There is no legally binding human rights obligation to disaggregate statistical data by ethnicity or Indigenous status, but it is difficult for states to fulfil their human rights obligations without such data. Firstly, states are required to take necessary steps to give effect to human rights and to submit regular reports to UN treaty bodies, which are established to monitor their progress over time.<sup>3</sup> This requires states to provide UN treaty bodies with relevant statistical data to help them make an informed assessment, including data concerning the segments of the population that are most vulnerable to human rights abuses.<sup>4</sup> Secondly, states are required to guarantee the enjoyment of all human rights without discrimination, pursue a

policy of eliminating discrimination and adopt special measures to secure substantive equality of disadvantaged groups.<sup>5</sup> Without disaggregated data, it is difficult to determine whether there are inequalities between groups in the enjoyment of their human rights and whether adequate steps are taken to address them.<sup>6</sup>

In light of this, most UN treaty bodies, both in their reporting guidelines and general comments, note that states should disaggregate official statistics by ethnicity and/or Indigenous status.<sup>7</sup> In addition, six UN treaty bodies have recommended that Norway disaggregate official statistics by ethnicity and/or Indigenous status, highlighting that the absence of such data prevents Norway from monitoring Sámi and minority rights, measuring discrimination and developing adequate measures to overcome it.<sup>8</sup>

While the obligation to collect adequate statistical data for human rights monitoring was implied in earlier human rights treaties, more recent treaties contain specific provisions regarding data disaggregation. Most notably, Article 31 of the Convention on the Rights of Persons with Disabilities (CRPD) and Articles 11 and 12 of the Council of Europe Convention on Preventing and Combating Violence against Women (Istanbul Convention) require states parties to collect disaggregated statistical data, including data concerning vulnerable ethnic minorities.<sup>9</sup>

The UN Office of the High Commissioner for Human Rights (OHCHR) has developed a comprehensive framework and methodology to assist states in developing statistical indicators to monitor human rights.<sup>10</sup> The OHCHR framework emphasises that human rights indicators require both administrative data and survey data that is disaggregated by the prohibited grounds of discrimination, including ethnicity and Indigenous status. Otherwise, the situation of the people most vulnerable to human rights abuses remains invisible.<sup>11</sup>

### **3. Indigenous rights and statistical data**

Disaggregated statistical data is crucial in enabling Indigenous peoples to exercise their distinct collective rights under international and national law, including rights to self-determination, equality and non-discrimination, lands, resources, cultures and languages. As distinct peoples with a collective right to self-determination, Indigenous peoples are entitled to adequate statistical data to inform their decision-making processes and development planning.<sup>12</sup> Without such data, it is difficult for Indigenous peoples to measure the changes that are occurring within their communities for planning and policy purposes, to present their needs and priorities to government and to assess the effectiveness of existing programmes.<sup>13</sup>

Since its first session in 2002, the UN Permanent Forum on Indigenous Issues (UNPFII) has called on states to ensure that self-identification questions for Indigenous peoples are included in statistical collections and that Indigenous peoples fully participate as equal partners in all stages of data planning, collection, analysis and dissemination.<sup>14</sup> In response, all UN member states have committed to ‘working with indigenous peoples to disaggregate data’, but ‘the particular situation of indigenous peoples often remains invisible within national statistics’.<sup>15</sup>

The principle that Indigenous peoples have rights to access, use and exercise governance over the collection, ownership and application of their own data is increasingly referred to as ‘Indigenous data sovereignty’.<sup>16</sup> Premised on the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), Indigenous data sovereignty emphasises the central role that data plays in empowering Indigenous peoples to exercise their self-determination and is increasingly being recognised in international human rights forums.<sup>17</sup> This work has been driven by the research and advocacy efforts of the Global Indigenous Data Alliance (GIDA) and the national Indigenous data sovereignty networks in Australia, New Zealand, Canada and the United States. Researchers from the Nordic countries have also been involved in GIDA and steps are being taken towards establishing a similar network for the Sámi area.

Indicator frameworks and data analysis tools for monitoring the implementation of Indigenous peoples’ rights have also been developed by various stakeholders. At the international level, the Indigenous Navigator project includes a framework of statistical indicators and open-source tools for monitoring Indigenous peoples’ rights under the UNDRIP, including rights to lands and territories, cultures, languages and traditional economic activities.<sup>18</sup> A notable example at the national level is the New Zealand Treasury’s Living Standards Framework, which includes a set of Indigenous-specific indicators based on Māori rights, perspectives and worldviews.<sup>19</sup>

#### **4. The role of data in the 2030 agenda for sustainable development**

State’s human rights obligations regarding data disaggregation are also reflected in the Sustainable Development Goals (SDGs), many of which are linked to core international human rights standards and overlap with the recommendations of UN treaty bodies.<sup>20</sup> The 2030 Agenda for Sustainable Development pledges to ‘leave no one behind’ and emphasises the need for data disaggregation to measure progress towards its implementation.<sup>21</sup> In SDG target 17.18, for example, states commit to ‘increase significantly the availability of high-quality, timely and reliable data disaggregated by income, gender, age, race, ethnicity, migratory status, disability, geographic location and other characteristics relevant in national contexts’.

Both the OHCHR and the UNPFII highlight that states’ official statistical collections should include Indigenous-identifiers, particularly self-identification and language, to capture any inequalities faced by Indigenous peoples across all the SDGs.<sup>22</sup> Similarly, the UN General Assembly encourages states to include disaggregated data on Indigenous peoples in their voluntary national reviews.<sup>23</sup> While there have been some improvements in addressing data gaps concerning the SDGs in recent years, the situation of Indigenous peoples often remains invisible.<sup>24</sup> A global framework of statistical indicators to monitor the implementation of the SDGs and ensure accountability was adopted by the UN General Assembly in 2017 and available data for each state can be accessed from an online platform launched in 2021.<sup>25</sup>

## 5. Ethnicity data in Europe

Studies indicate that approximately 66% of countries include some form of ethnicity variable in their official statistical collections.<sup>26</sup> The regions where an ethnicity variable is most common are Oceania (84%), North America (83%), South America (82%) and Asia (64%), while countries in Europe (50%) and Africa (41%) are the least likely to collect data on ethnicity. Of the 90 countries that are known to include Indigenous peoples, about half (51%) separately identify Indigenous peoples in their national statistical collections.<sup>27</sup>

Human rights bodies within the Council of Europe and the European Union have expressed concern over the lack of disaggregated ethnicity data in the region. The European Commission Against Racism and Intolerance (ECRI) has been the most active, publishing several general and state-specific recommendations on the topic.<sup>28</sup> For example, in its fourth report on Norway in 2009, ECRI recommended that the Norwegian authorities collect ethnicity data to monitor the human rights of different ethnic groups and their experiences of discrimination and disadvantage, while ensuring that this is done with due respect for the principles of confidentiality, informed consent and voluntary self-identification.<sup>29</sup>

In a 2007 study, ECRI noted that concerns over data protection and privacy are often raised by European states as barriers to the collection of ethnicity data, when the opposition may be based on political beliefs regarding the legitimacy of ethnicity as a descriptive category, even for anti-discrimination purposes.<sup>30</sup> Others note that the scepticism towards ethnicity data in Europe may be related to the abuse of ethnic registers during World War II and the fact that some European countries have had ethnically homogenous populations for much of their history.<sup>31</sup> Simon notes that despite a significant increase in the number of countries collecting ethnicity data over the past decade in response to recommendations from international human rights bodies, there is still an 'enduring resistance of "statistical blindness" to ethno-racial diversity in Europe'.<sup>32</sup>

The European Commission has raised similar concerns in its reports to the European Parliament and the Council.<sup>33</sup> It has also published a Handbook on Equality Data and a review of data collection practices in EU member states, which note that despite improvements in ethnicity data collection in Europe, there is no systematic approach within or between states, the sharing of best practices is uncommon and existing data is often inadequate or underutilised.<sup>34</sup> The Commission says this is due to a lack of awareness among European states about how ethnicity data can be collected, the benefits this can bring and misunderstandings regarding the privacy and data protection implications. They also highlight the complexity of the issues at hand, which often require expertise in multiple areas of law and social science.<sup>35</sup> To harmonise national approaches across Europe and address the imbalances in data collection for different vulnerable groups, the Commission established the Subgroup on Equality Data in 2018, which produced a set of guidelines, practical tools and other resources.<sup>36</sup>

## **6. The historical development of Sámi statistics in Norway**

From the mid-19th century until the mid-20th century, the Sámi people and Norway's five national minorities—the Jews, Kvens/Norwegian Finns, Forest Finns, Roma and Romani/Tater—were subjected to invasive and discriminatory research based on pseudoscientific theories of racial superiority. These theories, now widely discredited, sought to separate humans into racial categories and place them on an evolutionary scale from the most 'primitive' to the most 'civilised' based on physio-anthropological features.<sup>37</sup> Official population statistics produced in Norway during this period, while separate to race research, were influenced by the same theories of racial superiority.<sup>38</sup> In particular, census data was used to inform policies which attempted to assimilate the Sámi and national minorities into an ethnically homogenous Norwegian population, as well as security policies aimed at demonstrating a uniform national identity in the regions bordering Finland and the former Soviet Union.<sup>39</sup>

From 1845 to 1930, most Norwegian censuses registered the number of Sámi and Kven people based on ancestry/descent. From 1890 to 1930, questions on Sámi and Kven languages were also included. The number of people registered as Sámi in Norway throughout this period ranged from around 15,000 to 20,000, but the exact methods and criteria used to identify individuals during census counts varied.<sup>40</sup> Although Sámi and Kven people were formally recognised as Norwegian citizens, they were never referred to as Norwegian in official statistics because Statistics Norway adopted a race-based definition of nationality.<sup>41</sup>

In the 1946 census, it was deemed inappropriate to include specific questions on ancestry/descent due to their association with biological theories of race and the use of population registers to identify minorities during the Nazi occupation of Europe in World War II. However, in the lead up to the 1950 census, several public authorities urged Statistics Norway to resume the collection of statistics regarding the Sámi and Kven. Statistics Norway decided as a compromise to include questions on Sámi and Kven languages in some selected municipalities within the three northernmost counties of Norway. As a result, only 8,778 people were registered as Sámi in the 1950 census and this figure was never accepted as accurate. In the 1950 Census Booklet, Statistics Norway justified this approach by arguing that Sámi and Kven people who did not speak their language were largely assimilated into broader Norwegian society.<sup>42</sup>

In 1970, at the request of the Nordic Sámi Council, Statistics Norway included an additional four questions on Sámi ethnicity and languages in a separate census questionnaire for residents of 45 select municipalities within the three northernmost counties of Norway. The main reason for including the separate questionnaire was that 'Sámi organisations believed that to perform their work they needed better statistical information on the scope and distribution of the Sámi population and data on their living conditions' (translated by the author).<sup>43</sup> The 1970 census was the last to collect any Sámi-specific data.

The results, analysed by Professor Vilhelm Aubert, showed that of the 113,874 people living in those three counties, there were roughly 28,000 people registered

Main Sources of Sámi Statistics in Norway Today			
Data Source	Geographical Scope	Criteria or Data Based on Sámi Ethnicity/Descent	Criteria or Data Based on Sámi Language
Sámi Parliament Electoral Roll	National	✓	✓
Sámi language variable in the Population Register	National		✓
STN Area Register Data	21 municipalities and 10 sub-municipal areas in Nordland, Troms and Finnmark counties		
Register of individuals engaged in Sámi reindeer herding	Reindeer herding areas in Innlandet, Trøndelag, Nordland, Troms and Finnmark counties	✓	
Register of children in kindergartens offering Sámi language education	National		✓
Register of students in primary and secondary schools offering Sámi language education	National		✓
SAMINOR II Study	25 municipalities in Trøndelag, Nordland, Troms and Finnmark counties	✓	✓

with some Sámi ancestry or language affiliation, and 9,175 people that self-identified as Sámi.<sup>44</sup> However, Aubert stressed that there were underreporting issues due to the social stigma associated with publicly identifying as Sámi, the way the questions were framed and the exclusion of several significant Sámi areas.<sup>45</sup> On this basis, he said there were probably at least 40,000 people in Norway with Sámi ancestry or language affiliation.<sup>46</sup> Aubert also speculated that Oslo, which was not included in the questionnaire, could have one of the largest Sámi populations in the country.<sup>47</sup> In the absence of more recent and robust data, Aubert's rough estimate

of the total Sámi population in Norway and his speculation regarding Oslo are still used today.<sup>48</sup>

Aubert noted that the effects of assimilation policies, which he measured in the shift from Sámi to Norwegian language between generations, varied greatly between different areas.<sup>49</sup> In the areas where Norwegian settlement had historically been most noticeable, especially along the coast, descendants of Sámi speakers were far less likely to self-identify as Sámi or report speaking a Sámi language.<sup>50</sup> For example, in the 1930 census, 61% of people in the Kvænangen municipality were registered as speaking a Sámi language or having Sámi ancestry.<sup>51</sup> However, in 1970, only 5.1% of people in Kvænangen reported speaking Sámi and 1.1% self-identified as Sámi.<sup>52</sup>

In the 1970s and 1980s, protests over the damming of the Alta/Kautokeino river put Sámi rights on the national political agenda for the first time in Norway, triggering a series of institutional and legal reforms. One of these reforms was the establishment of the Sámi Parliament in 1989 and the Sámi Parliament Electoral Roll (SER) as an official register of the individuals who are eligible to vote and stand as candidates in Sámi Parliament elections. The criteria for enrolment in the SER, as set out in section 2–6 of the Sámi Act (1987), combine elements of Sámi ethnicity, ancestry and language use, with applicants required to make a declaration that they both self-identify as Sámi and have a familial connection to the Sámi language within three generations. With these reforms, ‘the framework for “being Sámi” in Norway had changed significantly’, and it became increasingly accepted to publicly acknowledge one’s Sámi affiliation.<sup>53</sup>

At the same time, there was a growing need for statistical data on the Sámi people to monitor living conditions and inform evidence-based policymaking. In 1995, an official report highlighted the lack of adequate statistics on the health and living conditions of the Sámi people as a barrier to improving health services.<sup>54</sup> In 1999, the first president of the Sámi Parliament, Ole Henrik Magga, highlighted the need for statistical data to assess the implementation of Sámi policy and to bolster arguments for reform.<sup>55</sup> However, the demand for Sámi statistics could not be reconciled with the scepticism towards ethnicity data among both public authorities and Sámi communities.

As a compromise, official reports started to include statistics relating to all residents, both Sámi and non-Sámi, within municipalities in northern Norway that were included in the Sámi Parliament’s Business Grant Scheme.<sup>56</sup> This geographic approach was then adopted by Statistics Norway in 2006 when it began producing a biannual publication called Sámi Statistics (Samisk Statistikk) and the relevant geographic area, known as the STN Area, has since been expanded several times. While the STN Area was never intended to provide a representative sample of the Sámi population, it is still used as a proxy for Sámi settlement areas in northern Norway and as the basis for official Sámi statistics today.

In addition, the Directorate of Agriculture maintains a register of individuals engaged in Sámi reindeer herding and the Directorate of Education maintains registers concerning children who undertake Sámi language education in kindergarten, primary school and secondary school. Statistics from these registers are presented together with the STN Area data in the Sámi Statistics publication.



Given the limitations of official Sámi statistics, the evidence base for Sámi policy in Norway has mostly been built on academic research. A key development in this regard was the establishment of the Centre for Sámi Health Research at the Arctic University of Norway in 2001, which conducts a population-based study on health and living conditions in central and northern Norway known as the SAMINOR Study. Unlike official statistical collections, the SAMINOR Study includes 11 questions regarding self-perceived ethnicity, ethnic background and home language for Sámi and Kven respondents, allowing the data to be disaggregated for these two groups. The Centre has completed two surveys, one in 2003–2004 with 16,865 participants and one in 2012–2014 with 11,600 participants, about 35% of whom report having a Sámi background.<sup>57</sup> A third SAMINOR survey will be conducted between 2023 and 2025.

Another key development was the establishment of the Expert Analysis Group for Sámi Statistics in 2007, which produces an annual report called *Sámi Numbers Speak* (*Samiske Tall Forteller*) aimed at analysing available statistical data and identifying knowledge gaps.<sup>58</sup> Several articles in this publication have discussed the limitations of the geographic approach to official Sámi statistics and the potential benefits of an ethnicity variable in administrative registers.<sup>59</sup>

Proposals to compile some form of register-based statistical data on the Sámi population have been discussed within the Sámi Parliament for many years.<sup>60</sup> These discussions have generally focused on the need for higher quality Sámi statistics on the one hand, and the risks associated with collecting ethnicity data on the other, particularly in light of historical misuse.<sup>61</sup> Nevertheless, there seems to be general agreement within the Sámi Parliament that the current geographic approach to official Sámi statistics in Norway has significant shortcomings and that proposals for improvement should be investigated.<sup>62</sup>

### ***6.1 The current approach to Sámi statistics in Norway and options for reform***

Like its Nordic neighbours, Norway no longer conducts a traditional census and instead compiles official population statistics by linking data from the country's extensive administrative registers, supplemented by smaller population surveys where necessary. This approach has several benefits, including reduced costs, a lower response burden on individuals and more regularly updated high-quality data. However, Sámi statistics largely sit outside this system, relying on a patchwork of sources that are either underutilised, restricted to small geographic areas or cannot be disaggregated by Sámi ethnicity.

Statistics Norway has access to over 80 administrative registers, several of which include variables that identify people by immigrant status, refugee status, gender, age and disability, allowing official population statistics to be disaggregated for these specific groups. Aside from the SER, which is not currently used for general statistical purposes, information on citizens' ethnic backgrounds is not collected in administrative registers, so official population statistics cannot be disaggregated for the Sámi people.<sup>63</sup>

As a result, we do not know the size of the Sámi population in Norway, the geographic, age or gender distribution of Sámi people or how any of these characteristics change over time. There is no basis for producing official statistics on the socio-economic status of the Sámi population, so there are no national figures on topics such as Sámi health, housing, employment, education, social security or economic development. Nor are there national figures on Sámi people's access to and interactions with public services, comparable to those available for the broader Norwegian population and for immigrant groups.

For example, there is no available data on the number of Sámi children in the child welfare system in Norway and whether their rights to Sámi language and culture are adequately safeguarded. This makes it difficult for the Child Welfare Services to implement their obligations under Articles 30 and 20(3) of the UN Convention on the Rights of the Child and Section 1–8 of the Norwegian Child Welfare Act, and for the Sámi Parliament and others to monitor the situation over time.

While the STN Area data currently used to produce official Sámi statistics is compiled from administrative registers, it is not disaggregated by Sámi ethnicity and is limited to a small number of rural areas in northern Norway.<sup>64</sup> This raises serious questions about the relevance and representativeness of the sample given that it includes a substantial number of non-Sámi residents and excludes all the larger towns and cities in northern Norway, all the Southern Sámi areas and the rest of southern Norway.<sup>65</sup> The exclusion of urban areas is particularly concerning given the evidence that a growing proportion of Indigenous peoples worldwide are living in cities, including the Sámi people.<sup>66</sup>

The SAMINOR study goes some way towards addressing the gaps in official statistics and provides valuable insights into the health and living conditions of the Sámi people. It has also pioneered the development of Sámi self-identification questions, which are now used in the Public Health Surveys of Nordland County (January 2020) and Troms and Finnmark County (May 2019), as well as the Rural to Urban Living Survey (2014) and the Arctic Adolescent Health Study (2003–2005). However, public health surveys alone do not provide an adequate evidence base for monitoring human rights and sustainable development as they focus mostly on self-reported health issues, are limited to selected municipalities, and are only conducted once a decade. The surveys are also resource intensive as they often involve sampling all residents within a particular geographic area, making it costly to increase their frequency or scope.

Academic research studies like SAMINOR indicate that Sámi people face unique human rights challenges in areas such as health, disabilities, violence and abuse, language and culture, discrimination and hate speech, among others. But without national register and survey data, it is difficult to assess the prevalence and extent of these issues, how they are changing over time or whether policy responses are effective. These knowledge gaps have real consequences for Sámi people and communities, perhaps best summarised by the phrase 'no data, no problem, no action'.

The specific data sources and collection methods that are required to monitor Sámi rights vary depending on the issue in question. For example, the most

effective way to monitor the rights of Sámi children in the child welfare system would be to introduce Sámi self-identification questions in the data collection forms used by the Child Welfare Services. Similar questions could be added to the data collection forms used by the police and other support services to monitor cases of hate speech or domestic violence against Sámi people, but these would need to be supplemented by nationally representative survey data to capture experiences that have not been formally reported.

The only existing administrative data source capable of providing a nationally representative sample of the Sámi population in Norway is the SER. As of June 2021, there were 20,541 Sámi people registered on the SER, spread across 329 of Norway's 356 municipalities, a figure which has increased by more than 300% since 1989. While there are Sámi people in Norway who are not registered in the SER, either because they do not meet the eligibility criteria or because they choose not to vote in Sámi Parliament elections,<sup>67</sup> the SER would still provide a more representative sample of the Sámi population in Norway when compared to the STN Area data. In fact, about half of the Sámi people registered in the SER do not live within the STN Area and are thus not represented in Statistics Norway's only official publication of Sámi statistics.

There are two main ways the SER could be used to compile Sámi statistics: (1) a sample of individuals registered on the SER could be invited to participate in surveys and/or (2) the SER could be linked to data in other administrative registers, such as health, education or employment registers. In a legal and technical sense, the SER can be used for both purposes if the Sámi Parliament chooses to do so. When an individual is added to the SER, this is already linked to their personal data in the Central Population Register, which is then processed and maintained by the Norwegian Tax Administration (Skatteetaten).<sup>68</sup> Section 81 of the Regulations on Sámi Parliament Elections sets out the conditions for access to and use of the SER and specifically allows the Sámi Parliament to grant access to public bodies and researchers for scientific purposes.<sup>69</sup> While the SER was renamed in 2008 to clarify its primary purpose as a Sámi electoral roll, the committee that recommended the name change underscored that it would have no impact on the ability of the Sámi Parliament to approve access to the SER for research purposes.<sup>70</sup>

The Sámi Parliament has, for many years, granted access to the SER to Statistics Norway for the purpose of publishing statistics on the number and distribution of Sámi voters and to academic researchers conducting surveys on issues related to voting, political participation and civil society.<sup>71</sup> The SER is also made available for public inspection prior to Sámi Parliament elections.

However, use of the SER for broader research purposes has been more contentious. Between 2005 and 2009, the Sámi Parliament's Executive Council granted the public broadcaster (NRK Sápmi) access to the SER to conduct media use surveys, but subsequent requests were denied once this responsibility was transferred to the Plenary Leadership in 2010.<sup>72</sup> The politicians who drove this shift in policy argued that granting access to the SER for purposes other than *electoral research* may be perceived as a breach of trust and lead to less confidence in the Sámi Parliament and potentially fewer enrolments in the SER. Similar concerns were raised in

2019 when the Sámi Parliament considered a proposal to register Sámi ethnicity in administrative registers and in 2020 when the National Human Rights Institution published a report highlighting the need to improve Sámi statistics.<sup>73</sup> While some members of the Sámi Parliament believe these concerns can be addressed through appropriate safeguards and data governance arrangements, others are opposed to any form of register-based Sámi statistics.

As was the case in 1950, allowing people to self-identify *as Sámi* in official statistical collections remains controversial in Norway, while allowing people to self-identify *as a Sámi language speaker* is less contentious. In 2017, in response to an expert report highlighting the need for more adequate statistics on Sámi languages,<sup>74</sup> the Sámi Parliament asked Statistics Norway for advice on potential solutions. Statistics Norway recommended constructing a sample of the Sámi population by linking existing and historical data sources, including the SER and the reindeer-herding register, which could then be used to conduct national surveys on language use.<sup>75</sup> Their proposal was not adopted, and instead legislation was amended making it possible for individuals to register their use of up to three Sámi languages in the Central Population Register.<sup>76</sup> A secure online registration form was then developed and launched by the Tax Administration and the Sámi Parliament in 2019.<sup>77</sup> While this is a positive step forward, it is not intended to provide a representative sample of the Sámi population for broader statistical purposes, particularly as there a substantial number of Sámi people who do not speak a Sámi language.

In 2021, the Sámi Parliament in Sweden granted researchers from Umeå University access to its electoral roll to produce both survey data and register data on a range of topics.<sup>78</sup> The Sámi Parliament was involved in all stages of the project, and given the high response rate and the lack of pushback from Sámi communities, the researchers concluded that most Sámi people in Sweden viewed this particular design as safe to participate in.<sup>79</sup> This may encourage the Sámi Parliament in Norway to consider a similar approach in the future.

## **6.2 *The risks and challenges associated with Sámi statistics***

When asked by UN human rights bodies, the Norwegian government provides the following reasons for not disaggregating official statistics by ethnicity: difficulties in quantifying Indigenous and ethnic group representation, concerns regarding privacy and confidentiality, the potential misuse of statistical data, and scepticism towards ethnicity data collection among the Sámi and other minority groups.<sup>80</sup> While these are all legitimate concerns, the consensus among international human rights bodies is that they can be addressed through institutional, legal and technical safeguards that are built into the human-rights-based approach and guarantee participation, self-identification, transparency, privacy and accountability.<sup>81</sup>

Regarding difficulties in quantifying Indigenous and ethnic group representation, the main challenge is deciding whether to use subjective, objective and/or surrogate measures of ethnic identity.<sup>82</sup> Another related challenge is that many people identify with multiple ethnicities and an individual's ethnic affiliations may change

over their lifetime. While these issues are complex, they have been considered in detail by several UN and European human rights bodies, which all recommend that the identification of Indigenous peoples and ethnic minorities in official statistical collections should be based on voluntary self-identification by the individuals concerned, who should also have the option of indicating multiple or no ethnic affiliations.<sup>83</sup> Self-identification questions should primarily relate to ethnic identity/self-perception, ethnic origin/ancestry and language use so that statistical samples of the Indigenous population can then be compiled using one or more of these variables. The Sámi ethnicity questions used in both the SAMINOR Study and the SER are consistent with this approach, but the SER criteria require individuals to both regard themselves as Sámi *and* have an affiliation with the Sámi language within three generations.

Several stakeholders in Norway have also expressed concerns regarding privacy and confidentiality should an ethnicity variable be introduced in official statistical collections. However, national statistics offices are obligated to respect the right to privacy under both Norwegian and international law, which includes adopting effective measures to ensure that any personal data they collect is anonymised, confidential and used exclusively for statistical purposes.<sup>84</sup>

Personal data is also protected under the EU General Data Protection Regulation (GDPR), which is incorporated into the Norwegian Personal Data Act.<sup>85</sup> Under GDPR Article 5, personal data must be processed lawfully, fairly and transparently, consistent with the ‘purpose limitation’ and the principles of data minimisation, accuracy, storage limitation, integrity, accountability and confidentiality. The lawful bases for processing personal data and special categories of sensitive personal data (including ethnicity data) are set out in GDPR Articles 6 and 9, supplemented by Chapter 3 of the Norwegian Personal Data Act. These include situations where the data subject has given consent, where the processing is necessary for the state to carry out its legal obligations or where the processing is necessary for research or statistical purposes and the public interest in the statistics project clearly outweighs any potential risks or disadvantages for the data subject. The collection of sensitive personal data must also ‘be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject’.<sup>86</sup>

Despite this, there is a common misconception in Norway and some other European states that the collection of ethnicity data is prohibited under European privacy and data protection law.<sup>87</sup> However, several UN and European bodies have confirmed that European data protection law establishes conditions under which the collection and processing of ethnicity data is allowed.<sup>88</sup> The director of the Norwegian Data Protection Authority has also confirmed that Norwegian data protection law allows for the collection of ethnicity data, provided that appropriate safeguards are in place.<sup>89</sup>

The potential misuse of statistical data is also a consideration, as history shows that when ethical and human rights safeguards are not in place, ethnicity data can be misused for discriminatory purposes.<sup>90</sup> Today, it is prohibited under both international and Norwegian law to use statistical data to discriminate against Indigenous

peoples and other minority groups, and several institutional safeguards are in place to prevent this.<sup>91</sup> However, there may still be instances where the misuse of statistical data to stigmatise a vulnerable group does not reach the threshold of unlawful discrimination. For example, statistical data is sometimes used reductively to perpetuate negative stereotypes, and figures are sometimes published without explanation of the factors accounting for disparities.<sup>92</sup> National statistics offices are expected to take steps to prevent predictable misinterpretation or misuse of data in this regard, such as by providing supplementary information to contextualise the data.<sup>93</sup>

Misuse of Sámi statistics can also be prevented by implementing data governance arrangements that ensure effective participation of the Sámi Parliament, in accordance with the principle of Indigenous data sovereignty. In 2019, the Sámi Parliament adopted Ethical Guidelines for Sámi Health Research, which among other things state that Sámi collective consent must be obtained before initiating Sámi health research projects.<sup>94</sup> The Sámi Parliament has delegated the authority to grant such consent to an expert committee which meets monthly to assess research applications.<sup>95</sup> Similar data governance arrangements could potentially be adopted for other uses of Sámi data outside the health field, including, for example, the use of the SER or other register data by academic researchers, the national statistics office and other public bodies.

Discussions regarding the potential risks and challenges of collecting data on Sámi ethnicity are often based on an incorrect assumption that no such data is collected today, when in fact there are Sámi identifiers in several population surveys, the Central Population Register, the reindeer-herding register and the education registers. Paradoxically, the risks and challenges associated with Sámi ethnicity data already exist in Norway, but because the available data sources are so fragmented and underutilised, we have seen few of the benefits.

## **7. Conclusion**

The human rights framework outlined in this chapter provides detailed guidance on the rationale for and the methodology of Indigenous data collection, as well as the safeguards that must be in place to protect Indigenous peoples' data. Implementing this framework in Norway will require the cooperation of several institutions with different mandates and expertise, alongside community awareness-raising efforts. If the human-rights-based approach is adopted, statistical data can be a powerful tool in empowering the Sámi people to claim and exercise their rights and to pursue their self-determined economic, social and cultural development.

## **Notes**

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- Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) arts 2 and 16; International Convention on the Elimination of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 66 UNTS 195 (ICERD) arts 2–7 and 9; Convention on the Elimination of Discrimination Against Women (adopted 1 March 1980, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) arts 3–5 and 18; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) arts 4 and 44(1); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) arts 4 and 35.
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# 11 Rendering the invisible visible

## Sámi rights and data governance

*Tamara Krawchenko and Chris McDonald*

### 1. Introduction

The Sámi are the only Indigenous people in Sweden and have an estimated population of around 20,000 to 40,000. A more precise population count is unknown as Sweden does not collect any statistical information based on ethnicity. Across the broader Sápmi region, the Sámi population is estimated at around 70,000 to 80,000, with the majority residing in Norway.<sup>1</sup> Sweden does not collect official statistics based on ethnicity or Indigenous status, and as a result, data limitations make it difficult to provide an assessment of the well-being of Sámi people in Sweden. There is data related to the occupation of reindeer husbandry, which enables statistical analysis related to this activity (e.g. size, gender and prices), but this is only an estimated 15% of the total Sámi population in Sweden. The geography of the Sámi can also be delimited by the 19 municipalities that belong to the administrative area of the Sámi language, and the 51 *sameby* areas, but many Sámi live outside of these areas, including in the largest cities.<sup>2</sup>

Statistics can be one element of an overall approach to advancing the rights of Indigenous peoples. It is important to note that statistics are more than just numbers—they *construct power relations, shaping social realities and thus conveying a powerful truth*.<sup>3</sup> The racist and discriminatory manner in which the Swedish census has historically treated and enumerated the Sámi is a reason for ongoing distrust. For example, historical state census has defined Sámi as an ‘unproductive’ group alongside prisoners and later on, narrowly defined ‘authentic’ Sámi as only those who participate in reindeer husbandry.<sup>4</sup> State enumeration has ignored self-identity and instead imposed colonial categories and values. This history is important to recognise as it shapes relations today. More generally, statistics are by necessity an abstraction of socio-economic practices and the natural environment and therefore inadequately capture key elements that Indigenous people value, such as culture and traditional knowledge.

There are ongoing debates as to whether statistics are ontologically antithetical to Indigenous worldviews. Weighing in on this debate, Walter and Andersen, in *Indigenous Statistics: A Quantitative Research Methodology*, reject this notion, asserting that quantitative methodologies are simply tools that can be shaped in different ways, including in ways that are compatible with Indigenous



worldviews and that the failure to engage with such methodologies grants colonial actors power.<sup>5</sup> This chapter takes a similar perspective, arguing that, in the case of Sweden, a lack of visibility of Sámi peoples in official statistics can be problematic as it obscures group identity and conditions. Statistics are used by governments to inform policies and the allocation of resources and are used by civil society organisations to advance their interests in political and policy debates. The rights of the Sámi people are linked to statistics and data governance and the quest for sustainability in its multiple forms—from understanding economic participation of the Sámi people to cultural reproduction, well-being and environmental sustainability. Indigenous data sovereignty ultimately means that Sámi should decide whether data collection is *in the first instance* important and needed and, if it is, how that data should be structured, produced, owned and shared, thus overcoming historical legacies of discrimination in the collection and use of statistics.

This chapter shares research and findings that are part of a programme of research on *Linking Indigenous Communities with Regional Development* by the Organisation for Economic Co-operation and Development (OECD)—an international institution whose country membership is composed of 38 of the world’s advanced economies, including Sweden. This research was conducted under the authority of the OECD’s Regional Development Policy Committee (RDPC) with the inclusion of Indigenous leaders and communities in multiple countries.<sup>6</sup> Indigenous leaders were included as peer reviewers in the project team, through workshops and meetings, and providing comments on draft reports and papers. This included representatives from the Sami Parliaments of Norway, Sweden and Finland and the Saami Council.<sup>7</sup> The Swedish case study was made possible through the support of the Ministry of Enterprise and Innovation of Sweden and involved the close cooperation of the Sámi Parliament of Sweden.<sup>8</sup> This chapter shares findings from the Swedish study alongside comparative practices.

The OECD’s comparative work has focussed on how to include Indigenous assets, community infrastructure (physical capital), the transmission of traditional knowledge (human capital), control over access and use of traditional lands (natural capital) and Indigenous language and culture (cultural capital) in regional development strategies. This work recommended four areas to enable the participation of Indigenous peoples in regional development policies:

1. **Statistics and data governance**—consistent identification, disaggregation of data, specific population surveys and data inclusion and ownership.
2. **Entrepreneurship**—place-based approach, access to finance, entrepreneurial skills and preferential procurement.
3. **Activating and supporting land development**—local planning authority, data, coordination with other land regulators, acquisition and leasing, and support for agreement-making.
4. **Local institutions**—policy coherence, intergovernmental coordination, meaningful participation and local capability.



The landscape of data collection *for, with and by* the Sámi people in Sweden is extremely limited. This chapter proceeds in three parts: (1) outlines the links between Sámi rights and data governance in Sweden, (2) provides an overview of the data landscape for Sámi statistics and (3) reflects on how data collection and data governance could be improved in Sweden. Please note that the term ‘Sámi people’ is used here to mean Sámi society as a whole.

## 2. Sámi rights and data governance

Sámi rights are inextricably linked to data governance—they structure how the Sámi are officially recognised in Sweden and how data *about them and by them* is collected and used. The Sámi are recognised in Swedish law as both a national minority and as an Indigenous people as well as within the framework of common legislation for all Swedish citizens. While the Sámi are a singular Indigenous group, their identity is diverse and is complicated by the fact that the treatment of the Sámi in national law across the four countries of Sápmi differs. The way Sámi identity and rights are recognised in law has wide-ranging implications for such matters as self-determination, land rights, public support for Sámi education, languages and cultural programming. These rights also matter in terms of the ways in which they shape and reproduce traditional Indigenous livelihoods such as reindeer husbandry.

The Swedish Parliament recognised the Sámi as an Indigenous people in 1977 and as one of Sweden’s five national minorities in 1999.<sup>9</sup> Internationally, Sweden has not yet ratified the International Labour Organization (ILO) Convention No. 169<sup>10</sup> concerning Indigenous and tribal peoples, which sets self-identification as the fundamental criterion for determining indigeneity and associated rights to self-determination, land and natural resources for Indigenous peoples. In 2011, the Swedish Constitution was amended to explicitly recognise the Sámi as a people and the importance of preserving and developing a cultural and social life of their own. Sweden also voted in support of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (but with a note of explanation); supported the 2014 Outcome Document of the World Conference on Indigenous Peoples and has supported several other United Nations resolutions and initiatives concerning the rights of Indigenous peoples.<sup>11</sup> In 2005, an expert group representing the governments of Finland, Norway and Sweden and the respective Sámi Parliaments of these countries agreed to develop a Nordic Saami Convention which would outline joint Nordic approaches to safeguard and strengthen Sámi rights to preserve and develop their language, culture, livelihoods and community life with the least possible hindrance of national borders. This convention has yet to be ratified by all countries and is not yet in force.

In terms of national minority rights, the state has an obligation to promote the ability of Sámi and other national minorities to maintain and develop their culture and language in Sweden. However, when it comes to the expression of the rights of the Sámi people as an *Indigenous people*, a major distinction is made between those Sámi with membership in *samebyar* and those without. The

term *sameby* (or *samebyar* for plural), which translates to Sámi village or Sámi reindeer-herding community, is used to describe the economic and administrative association created to organise reindeer husbandry within its geographic area. *Samebyar* are not villages in the sense of being built up communities; rather, they are an economic and administrative association (cooperative enterprise) created to organise the reindeer husbandry within its geographic area and its members retain certain hunting and fishing rights (but not control over fishing and hunting).<sup>12</sup> There are 51 *samebyar* in Sweden covering approximately one-third of the surface area of the country. These constitute areas/lands where the traditional trade of reindeer husbandry is permitted and carried out (reindeer husbandry area/*renskötselområde*). The Royal Decree of 1683 has often been used to verify the state's claim that the land in the north is the property of the state of Sweden. In 2020, Sweden's Supreme Court affirmed the Girjas Sámi district's exclusive rights to hunting and fishing, thus concluding a 30-year struggle to control their ancestral land.

Reindeer husbandry has great cultural and economic significance for the Sámi people and has been declared a matter of Swedish national interest (in the environmental code), emphasising the possibility of preserving reindeer-grazing rights on private and state-owned land, according to law. According to Sweden's Reindeer Husbandry Act (1971:437), the right to conduct reindeer husbandry and its related trades is based on prescription from time immemorial and belongs exclusively to the Sámi people (as in Norway). However, only Sámi who are members of a *sameby* are, according to the act, allowed to exercise this right. As such, Sweden has largely interpreted Indigenous rights as based on one aspect of traditional livelihoods. The *sameby* decide for themselves who can be a member. Most of the Sámi are not members of a *sameby* and, as such, are legally prevented to practice reindeer husbandry and do not have hunting and fishing rights on the *sameby* land. In other words, they are on equal footing with other Swedish citizens by law. The special treatment of reindeer herders descends from the first Reindeer Grazing Act in 1886 and has caused great opposition and division among the Sámi. If one has not inherited a right to reindeer husbandry within a *sameby*, it is very difficult to become a member of one due to the shortage of reindeer-grazing lands and hence a hesitancy of *sameby* members to open activities to more members; it is up to the *sameby* to accept new members. On the other hand, this can also have contributed to the fact that it still is possible to make a living from reindeer herding and there are those who work full-time as reindeer herders. The 1971 Reindeer Husbandry Act implemented 'a herding fee and a voting system that favoured the larger herders; this eventually drove out the smaller herders and caused them, and subsequently their children, to lose the land and water rights associated with *sameby* membership'.<sup>13</sup> In practice, membership to *sameby* is passed down to family members.<sup>14</sup> Further, there are state-mandated thresholds on herd size in each area which limit the expansion of these activities. The thresholds are set with consideration to the long-term sustainability of the grazing lands. In sum, the rights to reindeer husbandry, hunting and fishing structure community identity and economic behaviour alike.

With respect to reindeer husbandry, the application of these rights fundamentally requires access to land and has led to growing land use conflicts between, for instance, reindeer herders and mining and energy developments, the forestry industry, private landowners in areas of reindeer winter grazing and between those practicing small-game hunting on crown land above the cultivation line. For example, the clear-cutting of large areas of forests has been shown to reduce tree lichen for reindeer grazing.<sup>15</sup> Research by Hahn (2000) finds that Sámi rights have eroded since the time of the first Reindeer Grazing Act in 1886 when the Swedish state had a clear position on conflicts (and associated rights) that was relatively favourable to the Sámi.<sup>16</sup> Competing land uses in these territories have increased—particularly in the case of developments that are considered a matter of national interest, such as forestry, energy infrastructure and mining.

While the Swedish state identified the Sámi as a linguistic minority and as Indigenous rights holders stressing fishing and hunting rights alongside reindeer herding, Sweden's Sámi Parliament Act (an elected political body and a government agency that carries out mandated administrative tasks) has its own more encompassing definition of who is Sámi: A Sámi is a person who

- considers himself/herself to be Sámi (subjective), and
- ensures that he or she has or has had the Sámi language spoken at home, or
- ensures that any of his or her parents or grandparents have or have had the Sámi language spoken at home, or
- has a parent who is or has been listed on the electoral roll of the Sámi Parliament (objective).<sup>17</sup>

This definition includes both subjective (self-identification) and objective elements. In carrying out its administrative responsibility of reindeer husbandry, the Sámi Parliament presents annual statistical summaries on reindeer herding and *sameby* and collects data about the types of businesses its membership.<sup>18</sup> Meanwhile, the Swedish government's recognition of Sámi rights and identity stress the importance of cultural reproduction (language and culture rights) alongside Indigenous rights associated with traditional activities (hunting, fishing, reindeer herding). Given that data on ethnicity is not collected by the Swedish state, how can the state know that these rights are being met? How can one understand changes in conditions over time? The following section provides an overview of statistical studies that address the Sámi in Sweden, highlighting significant gaps in knowledge.

### **3. The data landscape—what is known**

There are few comprehensive statistical studies of the Sámi, and in particular, a lack of studies that examine multiple dimensions of well-being over time. The Swedish Agency for Economic and Regional Growth has developed municipal level well-being data, but it is not possible to distinguish the Sámi people within it.<sup>19</sup> There are, however, smaller studies—qualitative case studies, sample surveys,

etc.—which have examined socio-economic indicators for the Sámi and the non-Sámi populations that can offer some insights. For example, a 2015 study on the living conditions and quality of life of Indigenous peoples included assessment of the Sámi in Sweden.<sup>20</sup> The sample for the study was drawn from the voter registration list of the Sámi Parliament of Sweden and, although limited, does provide some important insights about the well-being of the Sámi people.

In 2021, the Sámi Parliament in Sweden commissioned researchers from Umeå University to conduct a national survey called SámiHET using the Sámi Parliament's electoral roll and the Swedish reindeer-herding register.<sup>21</sup> The survey contains questions regarding self-reported health, access to health services, exposure to violence and discrimination, as well as Sámi identity and languages. In another project called SámiREG, the researchers will link the electoral roll with data in Sweden's health registers to assess ethnic inequalities in cardiovascular disease, cancer and mental health.

The majority of studies about Sámi well-being have focused on health outcomes, including mental health.<sup>22</sup> A 2019 systematic review by Mienna and Axelson of somatic health in the Sámi population across Norway, Finland, Sweden and the Kola Peninsula in Russia provides a good overview of the range of health related studies to date<sup>23</sup> as does the 2011 overview of the state of Sámi health and living conditions by Sjölander, who together with colleagues at the Southern Lapland Research Department in Vilhelmina have developed a number of important studies in this area.<sup>24</sup> There is no official statistical data on the Sámi people as business owner managers Sámi. Far more is known about those Sámi who participate in what are considered traditional livelihoods and who live in the reindeer husbandry area situated in the Swedish parts of Sápmi, foremost the regions of Norrbotten, Västerbotten, Jämtland and the northernmost part of the region of Dalarna, because these activities are captured by reindeer industry codes in official statistics (as opposed to ethnic identification). However, it has been estimated that less than 20% of the Sámi population is connected to reindeer herding.<sup>25</sup>

There are several recent government-funded studies that help to fill in some of the knowledge gaps on Sámi well-being. For example, in 2015, the government commissioned the Sámi Parliament to compile knowledge about psychosocial ill health among the Sámi people in Sweden. This knowledge overview was conducted to provide support to the Public Health Agency of Sweden and the relevant county councils in work to design culturally appropriate psychological interventions. In 2017, the government granted Västerbotten County Council, together with Jämtland County Council, Norrbotten County Council, the Sámi Parliament and Swedish Sámi organisations SEK 3,000,000 to develop a knowledge-based network about Sámi health outcomes. The three-year project will be used to develop a Centre for Sámi Health, which will work to increase the availability of culturally relevant healthcare that is accessible in the Sámi language. In 2018, the Swedish government supported a population-based study (Health and living conditions in Jokkmokk Municipality, HALDI) led by Per Axelsson at Umeå University, which seeks to establish the health status of the Sámi and Swedish populations in the municipality of Jokkmokk. The study will be structured in a manner that is like that

of an earlier Norwegian health study led by the Sámi Centre for Health Research at the Arctic University of Norway (UiT)—thus facilitating comparability between the two countries. This project and the previously mentioned studies address the need for improved understanding of Sámi healthcare needs and enhanced capacity to deliver culturally adapted health services. However, significant knowledge gaps remain in a wide variety of other subject areas.

The lack of statistical data on the Sámi in Sweden makes it very difficult to understand group characteristics—e.g. how many individuals self-identify as Sámi in the country—and to capture both the nature of their economic activities and to provide an assessment of well-being and potential inequalities. For example, within Sweden’s official statistics system (SOS system), businesses owned by Sámi people cannot be separated from Swedish ones. Hence, there are no statistics on Sámi enterprises in the Swedish statistical system, nor is data collected at the programming level (e.g. how businesses owned by the Sámi access government programmes). The exception to this is data on reindeer-herding companies which have their own identity marker in the Swedish Standard Industrial Classification (SNI) system of the SOS. Consequently, there are far more economic studies of Sámi based on reindeer-herding identity than that of the broader Sámi community due to ease of identification. There are, for example, no studies or in-depth assessments concerning economic participation of the Sámi people residing in the country’s urban areas.<sup>26</sup> The ECRI has recommended that ‘the authorities carry out a study on the possible needs of members of the Sámi community residing in urban areas, in particular in Stockholm, in the areas of education, health, employment and housing’.<sup>27</sup> Reindeer-herding Sámi, therefore, have much greater prominence in the academic literature on contemporary Sámi conditions and outcomes. This, in turn, shapes community identity and politics. This greater visibility can lead to the assumption that those who practice reindeer herding are ‘true’ and ‘authentic’ in contrast to other Sámi people.<sup>28</sup>

#### **4. Improving data collection and data governance**

The lack of comprehensive and comparable longitudinal data renders the conditions and experiences of the Sámi people largely invisible. Sweden, by law, has specific obligations to Sámi in terms of the protection of their language and culture, to ensure that they are not discriminated against and to ensure land rights. A lack of data on how these rights are being realised and respected makes it difficult to know if they are being fulfilled.<sup>29</sup> Where data does exist to serve this role, it is often fragmented or siloed in such a way as it is not useful to inform policies. For example, *samebyar* collect their own land use data in their reindeer management plans, but there is no Swedish agency with the responsibility of publishing that data within Sweden. *Samebyar* are careful about sharing and making these plans public as they might be used by the industry or other stakeholders in a wrongful manner. Consequently, when a local municipality makes a land plan, they often do not know which *samebyar* should be contacted as stakeholders in the process (as reported in interviews).

Sweden is not alone in having a lack of statistical data on its Indigenous population. In 2018, only 6 of the 12 OECD member countries with Indigenous populations collected disaggregated data on Indigenous peoples, whilst 16 collected data on race or ethnicity and all collect data on proxies such as country of birth.<sup>30</sup> Data collection in these countries is centralised in national statistical agencies, such as Australian Bureau of Statistics in Australia, Statistics Canada, Mexico National Institute of Statistics and Geography, Statistics New Zealand, and the United States Census Bureau, which are responsible for the data on Indigenous peoples in the population census. For many countries, this is the only source of data on Indigenous peoples. Only few countries have sample surveys that are targeted to collect socio-economic information on Indigenous peoples.<sup>31</sup> Data availability has many limitations across OECD member and non-member countries and many of the existing data sources are not specifically designed for Indigenous peoples.

Within Scandinavia, both Norway and Finland also do not collect data on ethnicity in official statistics. In some cases, a lack of an Indigenous identifier in the statistical system can be compensated with geographic data based on where Indigenous peoples live. This is only applicable in the case where there is clear delineation of an Indigenous territory with a predominately Indigenous population, which in most jurisdictions is not the case. This approach has been utilised by Statistics Norway, together with the Sámi Parliament and the Nordic Sámi Institute (*Sámi Instituhtta*), to develop statistics relating to residents of particular areas in northern Norway that qualify for support from the Sámi Parliament's Business Grant Scheme, despite the fact that a significant number of non-Sámi Norwegians also live in those areas. Geographical parameters are also inadequate proxies for the Sámi population in Sweden since they do not live in distinct communities separate from the broader population. Rather, their *sameby* land rights relate to use across a wide territory. Meanwhile, in Finland, reindeer herding is not solely a Sámi occupation, and as such, the system of identification through industrial codes cannot be used as a proxy identifier. This raises the broader issue of a lack of comparable statistics across Sápmi.

There are ongoing discussions on the need for statistics on minority and ethnic groups in Sweden.<sup>32</sup> Participants in the study noted that they believed the collection of Indigenous data was either not possible or difficult under the European Union's General Data Protection Regulation (GDPR) (*as reported in interviews*). Although the GDPR does prohibit the collection of data based on ethnicity as a *general rule*, it is possible to collect such data if at least one of several exceptions apply, including where the data subject has given consent or where the processing is necessary for research or statistical purposes and the public interest in the statistics project clearly outweighs any potential risks or disadvantages for the data subject. Provided ethnicity data is collected under at least one of these lawful bases, it is then subject to additional conditions and safeguards under the GDPR.<sup>33</sup> If these conditions were met in Sweden with the Sami people, then the information could be potentially collected through Sweden's survey on living conditions which examines a range of variables over time and which would facilitate comparative analysis



between groups. The following section elaborates on some potential avenues for action.

## **5. Potential avenues for action**

The landscape of data collection on Sámi people and communities (and all other ethnic minorities) are fragmented. Resources are needed to determine what is currently captured and known and by whom and to analyse how data from these sources could potentially be compiled in a comparable manner to develop a more robust picture of the socio-economic conditions of the Sámi people. Potential data sources include Sámi schools, centres of Sámi health, the Sámi Parliament, *samebyar*, Sámi business associations, municipalities, granting agencies and universities/academic institutes. The range of actors involved presents a coordination challenge, and there is further a need to develop guidance involving the Sámi people, local communities, and organisations on how data collection and dissemination might proceed in an ethical, culturally sensitive and useful manner. University research institutes fulfil this role in part. These efforts require long-term funding to produce comprehensive and longitudinal data. Moreover, there is a need to better connect these efforts and instrumentalise them to improve public policy and interactions with industry in northern Sweden.

While there are a wide range of academic studies that examine the Sámi, these studies tend to be small in scale, with limited geographic and community representation and are rarely structured to facilitate comparisons between the Sámi versus non-Sámi of outcomes or longitudinal analysis. Given the lack of official statistics in Sweden, there is a particular need for research grants directed to fill this gap. The public sector in Sweden finances research and development through grants paid directly to higher education institutions and through support for research councils, sectoral research agencies and research foundations. County councils and municipalities also fund research, mainly in healthcare and social services. Sweden's largest research funding agency—the Swedish Research Council—does not have any targeted funding programmes for Sámi researchers or the study of Sámi. This stands in contrast to the research granting councils of Australia, Canada and Norway where there are specific funding streams for research on Indigenous peoples and communities and, in the case of Canada, funding directed specifically to Indigenous researchers.

Another hindrance to improved research and data on Sámi livelihoods and well-being of the Sámi people is a lack of clear ethical guidelines on Sámi research. There is uncertainty among researchers on ethical guidance and how to relate to current legislation around research ethics as well as a need for directions on how to conduct research in a culturally appropriate manner. The need for ethical guidelines in the conduct of research on the Sámi has been raised by the Sámi Parliaments in Finland, Norway and Sweden; however, guidelines have yet to be developed.<sup>34</sup> Research ethics guidelines for Indigenous research in Canada, New Zealand and Australia serve as useful examples of how this could be pursued; however, any Swedish guidelines need to be uniquely adapted. For example, Sámi research ethics



guidelines may be best structured to facilitate comparative research across the four countries encompassing Sápmi. Norway's Sámi Parliament has developed ethical guidelines on health research which could form the basis of a broader Sápmi-wide framework.<sup>35</sup>

The Sámi Parliament is responsible for the production of some statistics (e.g. on the reindeer industry) but has limited resources and a limited mandate with which to develop and monitor indicators in such areas as industry/business, culture and social development. The Sámi Parliament reports having difficulty fulfilling existing requirements for reporting and analysis—a point which the Swedish Office of the Auditor General has reiterated on several occasions.<sup>36</sup> In its most recent budget reporting (2018), the Sámi Parliament has noted a growing need for data and statistics on a wide range of measures related to mining and forestry in the northern regions, climate change impacts and the need to better understand the nature of Sámi businesses, language and culture.<sup>37</sup> While the Sámi Parliament has a voting list of 8,700 people which could be a useful source of data, it cannot use this list to produce statistics due to the prohibition of government agencies collecting data on ethnicity. The Sámi Parliament of Sweden has advocated taking on a larger role in data collection which would require additional resources and staff. There is no resolution with the government on this issue. This connects to broader debates about the importance of Indigenous data sovereignty—that is, having Indigenous peoples in control of their own data content.<sup>38</sup> Allocating a competency to the Sámi Parliament for Sámi economic statistics and reporting for policy development and regulatory decision making (with resources) could include (1) a standardised approach to reindeer husbandry plans (which describe how *samebyar* use land for reindeer husbandry), which could be extended to include strategic priorities for future land use, and (2) a report on the annual state of the Sámi economy, which provides an overview of trends in reindeer and non-reindeer related economic activities, and that highlights best practices innovations in different categories (e.g. reindeer herding, *duodji*, women, youth, etc.). A cooperation agreement between the Sámi Parliament and other key state, regional and local economic development agencies (e.g. Agency for Economic and Regional Growth) on economic statistics to govern cooperation on data and information and share expertise/secondment could support such efforts. Such endeavours would require enhanced capacity within the Sámi Parliament to fulfil this expanded role and, in the case of reindeer husbandry plans, would need to involve all *samebyar*.

Finally, there is a need to better reflect/capture Sámi practices in official statistics. For example, the lack of industry (SNI) codes for other Sámi-owned companies makes it difficult to maintain and update data and to demonstrate the value of Sámi business activities. Sámi handcrafters cannot use national statistics as a business rationale because Sámi *duodji* are not identifiable therein. To show the extent of Sámi entrepreneurship, a business inventory on each specific sector would be required. Sámi sector organisations have their own membership registers, but there are many companies that are not affiliated with any trade association. Were a prefix for Sámi businesses and commercial activity to be added to the SNI system for statistics, relevant data could be collected and changes over time could be monitored.

This would make it possible to describe and demonstrate the importance of Sámi businesses. Furthermore, while the Sámi Parliament collect information on Sámi businesses through a voluntary process (business self-identify), this information could be expanded by developing a searchable directory. As an example, Indigenous business directories have been established in Canada and Australia to increase procurement opportunities for businesses and to increase business visibility.

## 6. Conclusion

A lack of quality and disaggregated data on Indigenous peoples has long been raised in international fora such as the United Nations Permanent Forum on Indigenous Issues. As noted by Kukutai and Taylor in their edited volume on *Indigenous Data Sovereignty*,

The absence or lack of data that reflect where and how many Indigenous peoples there are, and how they are faring in relation to the realisation of their individual and collective rights is directly related to the weakness of governments and intergovernmental bodies in formulating and implementing Indigenous-sensitive decisions and programs.<sup>39</sup>

This has raised the growing need for more effective and inclusive forms of data collection and data disaggregation on Indigenous peoples, including measures that could help to support the implementation of the Sustainable Development Goals in relation to realising Indigenous peoples' rights. This is inclusive of the collection of data on issues that are priorities for Indigenous peoples, such as access to land and waters and the transmission of traditional knowledge and language, which may not be included in these mainstream frameworks. What these researchers emphasise is that 'any such initiative must be firmly positioned in an Indigenous (rights) approach, including the right of the Indigenous peoples to themselves determine, define, and hold ownership over such initiatives and databases'.

In Sweden, genuine and equal partnerships with Sámi institutions, and in particular the Sami Parliament, should be front and centre for any discussions on what data should be collected and how it should be utilised to advance the rights of the Sami people, if at all. This discussion includes the identification of the Sámi and how that is operationalised in statistical frameworks and discrete research projects, the priorities for Sámi research and data with Sámi people and organisations, and the governance of this data (ownership and use). Reindeer husbandry land use plans are a case in point. *Samebyar* presently hold their own detailed data on land use, while the Sámi Parliament has a different data set which is less detailed and which is critiqued for representing the view of the Swedish state. These plans are government-financed. *Samebyar* can be hesitant to share their detailed data on how land is used by their herders because it can be misconstrued; reindeer herding needs to be extremely adaptable to changing conditions and data from one or even several years does not necessarily represent future use. Furthermore, while this data captures the movement of reindeer herds, it does not capture the depth

of traditional knowledge which is not mapped and yet equally important to understanding the industry and how land is used. Traditional knowledge that has been accumulated through a deeply historical and ongoing physical and spiritual connection that the Sámi have with the landscape is essential to sustainable land and water management. However, it may not be captured through point in time data, or consent may not be given for it to be shared in a format that is used for regulatory decision-making. If land use is viewed as static by industry or governments and mechanisms do not exist for control and use of traditional knowledge in regulatory decision-making, this could result in sub-optimal land-use decisions and erosion of Indigenous rights. It is thus important to consider from the perspective of the Sámi how data can be interpreted and what restrictions and possibilities there should be in terms of access and use. Similarly, slaughter statistics are readily available but are also sometimes critiqued for not capturing ‘non-monetary’ values and thus framing herding as an industry as opposed to a traditional livelihood and cultural carrier. Genuine partnerships with Sámi people and organisations are essential to resolving questions about what data is collected and how that data is constructed, collected and used. As stated in the introduction, statistics construct power relations. Through Indigenous data sovereignty and effective partnerships there is potential to reconstruct these power relations to meet Sámi goals for rights recognition and well-being.

## Notes

- 1 Sápmi is the name the Sami people give to their traditional territory, which stretches across the northern areas of Norway, Sweden and Finland and across the Kola Peninsula in the Russian Federation.
- 2 SLiCA, ‘Survey of Living Conditions in the Arctic’ (2015) <[https://iseralaska.org/static/living\\_conditions/](https://iseralaska.org/static/living_conditions/)> accessed 25 September 2021.
- 3 Maggie Walter and Chris Andersen, *Indigenous Statistics: A Quantitative Research Methodology* (Left Coast Press 2013).
- 4 Per Axelsson, ‘Official Statistics and Indigenous People-the State of Play and Recent Developments’ (16th IAOS Conference, Paris, September 2018).
- 5 Walter and Andersen (n 3).
- 6 OECD, *Linking Indigenous Communities with Regional Development in Canada, OECD Rural Policy Reviews* (OECD Publishing 2020); OECD, *Linking the Indigenous Sami People with Regional Development in Sweden* (OECD Publishing 2019) <[https://www.oecd-ilibrary.org/urban-rural-and-regional-development/linking-the-indigenous-sami-people-with-regional-development-in-sweden\\_9789264310544-en](https://www.oecd-ilibrary.org/urban-rural-and-regional-development/linking-the-indigenous-sami-people-with-regional-development-in-sweden_9789264310544-en)> accessed 22 April 2020; OECD, *Linking Indigenous Communities with Regional Development in Australia* (OECD Publishing 2020).
- 7 For an overview of the methodology utilised in this project please refer to the note on methodology in OECD, *Linking Indigenous Communities with Regional Development* (OECD Publishing 2019).
- 8 The 2019 OECD study *Linking the Indigenous Sami People with Regional Development in Sweden* entailed field research in northern Sweden alongside an in-depth questionnaire completed by both the Ministry of Enterprise and Innovation of Sweden and the Sami Parliament of Sweden. The authors are indebted to Patrik Johansson and Lena Lind (Ministry of Enterprise and Innovation) for their project management and to numerous officials from the Sami Parliament of Sweden, in particular, Matilda Månsson, Lars

Anders Baer, Per-Olof Nutti, Marita Stinnerbom, Stefan Mikaelsson, Ingela Nilsson, Anne Walkeapää, Rickard Doj, Lars-Ove Sjöjn, Peter Benson, Patrik Sällström and Leif Juogda, for the in-depth analysis they have provided and their high level of engagement with the OECD team. All errors and omissions are the authors' own. The content of the paper is the sole responsibility of the author(s) and should not be reported to reflect the opinion or as being endorsed by the OECD.

- 9 National minority recognition as determined by the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM).
- 10 ILO Convention No. 169 concerning Indigenous and tribal people in independent countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention No. 169) art 13.
- 11 United Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA A/RES/61/295 (UNDRIP) art 5.
- 12 See Eivind Torp, 'The Interplay of Politics and Jurisprudence in the Girjas Court Case' in Dorothee Cambou and Øyvind Ravna (eds), *The Significance of Sámi Rights: Law, Justice, and Sustainability for the Indigenous Sámi in the Nordic Countries* (Routledge 2024).
- 13 Rasmus Kløcker Larsen and others, 'Sami-State Collaboration in the Governance of Cumulative Effects Assessment: A Critical Action Research Approach' (2017) 64 *Environmental Impact Assessment Review* 67.
- 14 Tilda Ponten, 'Mineral Extraction in Sápmi' (Master's thesis, Public International Law, Uppsala University 2015).
- 15 Per Sandström and others, 'On the Decline of Ground Lichen Forests in the Swedish Boreal Landscape: Implications for Reindeer Husbandry and Sustainable Forest Management' (2016) 45 *Ambio* 415 <<https://pubmed.ncbi.nlm.nih.gov/26754169/>> accessed 25 September 2021. See also Malin Brännström, 'The Implementation of Sámi Land Rights in the Swedish Forestry Act' in Cambou and Ravna (n 10).
- 16 Thomas Hahn, 'Property Rights, Ethics and Conflict Resolution Foundations of the Sami Economy in Sweden' (2000) 23 *Rangifer*.
- 17 The main varieties of the Sami language are North Sami, Eastern Sami, Central (Lule) Sami and Southern Sami, encompassing nine dialects. An estimated 6,000 Sami in Sweden speak North Sami, 800 Sami in Sweden and Norway speak Lule Sami, and 700 in Sweden and Norway speak South Sami. All of the varieties of the Sami language are recognised by Swedish law and thus have the same level of protection despite the number of users. Sametinget, 'Budgetunderlag 2018–2020' <<http://www.regeringen.se/contentassets/dd95ef69eafa4f6dadca0c2b7855652/regeringsforklaringen->> accessed 25 September 2021.
- 18 At least 3,700 Sami companies were registered in 2014, according to statistic from the Sami Parliament's company register on reindeer herders. The data in this register is based on applications from those companies who applied for EU support and who participated in activities and competence development through EU projects. The number of companies listed is the minimum amount.
- 19 Tillväxtverket, 'BRP+ Breddat Mått På Utveckling' (2021) <<https://tillvaxtverket.se/statistik/regional-utveckling/brp-breddat-matt-pa-utveckling.html>> accessed 25 September 2021.
- 20 Birger Poppel (ed), *SLiCA: Arctic Living Conditions: Living Conditions and Quality of Life Among Inuit, Saami and Indigenous Peoples of Chukotka and the Kola Peninsula* (Nordic Council of Ministers 2015).
- 21 Jon Petter A Stoor and Miguel San Sebastián, 'A Population-Based Study on Health and Living Conditions Among Sámi in Sweden: The SámiHET Study' (2022) 81(1) *International Journal of Circumpolar Health*.
- 22 See, e.g., Lotta Omma, Mikael Sandlund and Lars Jacobsson, 'Suicidal Expressions in Young Swedish Sami, a Cross-Sectional Study' (2013) 72 *Int J Circumpolar Health* <<https://www.tandfonline-com.ezproxy.library.uvic.ca/doi/abs/10.3402/ijch.v72i0.19862>> accessed 25 September 2021.

- 23 Christina Storm Mienna and Per Axelsson, 'Somatic Health in the Indigenous Sami Population—a Systematic Review' (2019) 78 *International Journal of Circumpolar Health* <<https://www.tandfonline-com.ezproxy.library.uvic.ca/doi/abs/10.1080/22423982.2019.1638195>> accessed 27 September 2021.
- 24 Per Sjölander, 'What Is Known About the Health and Living Conditions of the Indigenous People of Northern Scandinavia, the Sami?' (2011) 4 *Global Health Action* </pmc/articles/PMC3195409/> accessed 25 September 2021.
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- 27 *ibid* 27.
- 28 Patrik Lantto and Ulf Mörkenstam, 'Sami Rights and Sami Challenges' (2007) 33 *Scandinavian Journal of History* <<https://www.tandfonline.com/doi/abs/10.1080/03468750701431222>> accessed 27 September 2021.
- 29 Yamam Al-Zubaidi, 'The Role of Statistics in Fighting Discrimination: The Need for Strategies and Credibility' (2012) *The Swedish Equality Ombudsman: Stockholm* <<http://www.do.se/sv/Material/Statistikens-roll-i-arbetet-mot-diskriminering/>> accessed 27 September 2021.
- 30 Carlotta Balestrai and Fleischer Laura, *Diversity Statistics in the OECD: How Do OECD Countries Collect Data on Ethnic, Racial and Indigenous Identity?* (OECD Publishing 2019) <[https://www.oecd-ilibrary.org/economics/diversity-statistics-in-the-oecd\\_89bae654-en](https://www.oecd-ilibrary.org/economics/diversity-statistics-in-the-oecd_89bae654-en)> accessed 25 September 2021.
- 31 For example, the Aboriginal and Torres Strait Islanders Social Survey and Aboriginal and Torres Strait Islanders Health Survey in Australia and the Aboriginal People Survey (2012, 2017) in Canada.
- 32 Axelsson (n 4).
- 33 UNGA, 'Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive Follow-Up to the Durban Declaration and Programme of Action' (4 August 2017) UN Doc A/72/287 <<https://digitallibrary.un.org/record/1304009?ln=en>> accessed 18 April 2022.
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- 36 Sametinget, 'Budgetunderlag 2018–2020' 16 <<http://www.regeringen.se/contentassets/dd95ef69eafa4f6dadcac0c2b7855652/regeringsforklaringen->> accessed 27 September 2021.
- 37 *ibid*.
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# 12 Sámi rights and sustainability in early childhood education and care

## Sustainability in everyday practices in Norwegian kindergartens

*Ingvild Åmot and Monica Bjerklund*

### 1. Introduction<sup>1</sup>

The chapter explores how everyday practices in Sámi early childhood education and care institutions (ECECs) play a role in promoting values, attitudes and practices for more sustainable communities.<sup>2</sup> The article also underlines how Sámi ECEC practices can inspire ECECs in general how to develop a more sustainable environment in everyday life.

Norway is founded on the territory of two peoples: Norwegians and Sámi. The Sámi, the minority population, are defined as Indigenous people. The concept of Indigenous peoples in international law underlines a strong relationship with nature and the preservation of traditional Indigenous institutions. This distinguishes Indigenous peoples from other minorities.<sup>3</sup> Furthermore, Indigenous peoples share norms and values that are important for sustainable livelihoods.<sup>4</sup> In general, Indigenous societies' knowledge of sustainable and resilient ways of living is often manifested in the use of multiple natural resources and a high diversity of crops, as well as in specific techniques and technologies for executing activities in environmentally friendly and cost-effective ways.<sup>5</sup> Indigenous knowledge can be seen as living processes passed on from generation to generation with a close relationship to nature, tradition and the past.<sup>6</sup> These processes retain a spiritual relationship with nature, a continuity with a mystical past and a holistic worldview—including environmental wisdom.

From this perspective, education is also primordial for maintaining and developing Indigenous cultures and is conceived as a learning-for-life experience often based on learning by doing. Experiential learning is typically used, such as practical demonstrations and oral approaches through storytelling, myth narration, metaphors and songs. Women and elders also play a special role as custodians of traditional knowledge, culture and biological diversity.

Bearing this in mind, Indigenous environmental values can be described through five principles that highlight the connection between the present and the past, honouring traditions leading to respect for the environment, connecting and identifying with nature, seeing that health and well-being depend on the environment and understanding that the environment provides sustenance.<sup>7</sup> Similarly, Sámi claim that their most important values are nature, use of nature, family traditions,



traditional Sámi industries and the Sámi language.<sup>8</sup> While the Sámi concept of time is cyclic,<sup>9</sup> Sámi values can also be divided into four dimensions: traditional Sámi values, modern Sámi values, contact with nature and the experience of marginalisation.<sup>10</sup> These values might also be important values in the socialisation of Sámi children, which must then be also considered in their education.

In Norway, all ECECs are regulated by the *Norwegian Framework Plan for Kindergartens*.<sup>11</sup> This plan lays down statutory regulations for kindergartens based on the act relating to kindergartens (the Kindergarten Act)<sup>12</sup> and the UN Convention on the Rights of the Child (UNCRC).<sup>13</sup> The regulations for operating ECECs lay down specific values, which are connected to the development of sustainable communities, starting at the first step along young children's educational path. Specifically, it is noted that 'Kindergartens shall promote democracy, diversity and mutual respect, equality, sustainable development, life skills and good health'.<sup>14</sup> According to these regulations, sustainability is, therefore, an important subject in Norwegian ECECs where children shall learn to 'look after themselves, each other and nature'.<sup>15</sup> Concomitantly, this also means that Sámi ECECs play an important role in promoting values, attitudes and practices for more sustainable communities.

In addition, the Norwegian legal framework includes regulatory instruments that establish that the government has a particular responsibility for safeguarding the interests of Sámi children and their parents. This includes Article 108 of the *Norwegian Constitution*,<sup>16</sup> which stipulates that the authorities shall create conditions enabling the Sámi population to preserve and develop their language, culture and way of life. Concerning education, it can also be inferred from Indigenous and Tribal Peoples Convention (No. 169), which was adopted by Norway in 1990, that the government should guarantee that Sámi communities 'have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community' while at the same time ensuring that 'education programmes and services are developed and implemented in cooperation with them to address their special needs'.<sup>17</sup> According to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which Norway adopted in 2007, this also means that education programmes and services shall incorporate Sámi 'histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations'.<sup>18</sup>

In effect, these provisions are further specified in the regulations for the Framework Plan.<sup>19</sup> In the Framework Plan, it is noted that,

On account of the special rights extended to indigenous peoples, Norway has a particular responsibility for safeguarding the interests of Sámi children and their parents, cf. Article 108 of the Norwegian Constitution, Article 30 of the UNCRC and the ILO Convention.<sup>20</sup> Sámi kindergarten children shall be supported in preserving and developing their language, their knowledge and their culture irrespective of where in Norway they live.

The framework also establishes that 'Sámi kindergartens shall promote the children's Sámi language skills, strengthen their Sámi identity, and promote Sámi values, culture and traditions'.<sup>21</sup> It also provides general pedagogical guidelines



including the requirement for kindergarten to ‘adopt traditional learning and working methods on the children’s terms and in a present-day perspective’. As for sustainability, the framework plan also states that Sámi ECECs ‘shall build on a Sámi understanding of nature to help ensure that the children can live in harmony with nature, make use of and harvest the land and develop respect for natural phenomena’.<sup>22</sup>

However, a recent study from NORCE<sup>23</sup> points out that ECECs find ambiguities in the terms used in the Framework Plan for the Norwegian Kindergarten relating to the content of Sámi ECECs. In addressing terms such as ‘Sámi understanding of nature’, resources are needed to provide more content and recommendations for practice in the ECECs. In other words, the Norwegian Framework Plan does not further specify how Sámi education and pedagogy should be implemented in practice, which also translates in the feeling of teachers working in Sámi ECEC being ‘trapped between demands made by the national curricula and their desire to implement culture-based teaching’.<sup>24</sup>

This chapter aims to show how terms from the Framework Plan are turned into practical work to ensure the development of a Sámi understanding of nature and sustainability in Sámi ECECs. In other words, this chapter discusses how Sámi ECEC practices contribute to a more sustainable community by addressing the following research question: How do Sámi ECECs’ practices aim to contribute to a more sustainable community and a Sámi understanding of nature and sustainability? In this context, the chapter mainly focus on sustainability in nature and the environment and on social inclusion and culture. For this purpose, the chapter briefly presents the background of and historical lines for this study and describes the theoretical and methodological perspectives at the heart of this analysis. Subsequently, the following sections describes its findings and then discuss in which ways ECECs contribute to foster sustainable education for the Sámi communities.

## **2. Background: Sámi ECECs in Norway**

In 2016, almost 1,000 children were attending Sámi kindergartens in Norway.<sup>25</sup> In recent years, the number of Sámi kindergartens has increased, and in 2019 there were 65 establishments that were either Sámi kindergartens or had a special Sámi department. The Regulations for the Framework Plan lay down that

all children shall learn to look after themselves, each other and nature. Sustainable development covers the natural environment, economics and social issues and is key to preserving life on earth, as we know it. Kindergartens therefore play an important role in promoting values, attitudes and practices for more sustainable communities.<sup>26</sup>

As already mentioned, the Framework Plan also states that Sámi ECECs ‘shall build on a Sámi understanding of nature to help ensure that the children can live in harmony with nature, make use of and harvest the land and develop respect for natural phenomena’.<sup>27</sup> According to these regulations, sustainability is therefore

an important subject in Norwegian ECECs where children shall learn to look after themselves, each other and nature.

In general, environmental education is becoming an increasingly important learning area in ECECs and resonates with a wider acknowledgement of and appreciation for the role of knowledge in early childhood education.<sup>28</sup> There has been an increase in sustainability issues in early development research over the last decade.<sup>29</sup> Most research on children's understanding of the natural environment has been conducted on children living in urban contexts, often close to universities.<sup>30</sup> However, little research has been conducted on the usefulness of early childhood education programs that focus on environmental sustainability in the context of ECECs.<sup>31</sup> One study does, however, show that children attending ECEC develop more nuanced understandings of the environment through systematic pedagogical approaches teaching them how to take care of nature.<sup>32</sup> Another study of children's awareness of the environmental components in sustainable development in Norway also shows that children in general are most aware of the importance of correctly disposing waste.<sup>33</sup> They are also concerned about the negative consequences of cutting down animals' forest habitats and air pollution from fossil-fuel vehicles. Some research has been conducted on the traditional approach to ecological awareness in different ethnic groups.<sup>34</sup>

However, the authors have not been able to locate research on Sámi ECECs' emphasis on environmental sustainability, other than Nutti's study which shows how Sámi teachers 'between demands made by the national curricula and their desire to implement culture-based teaching, but . . . nevertheless had many ideas for themes via which culture could be linked to teaching'.<sup>35</sup> This might indicate that the national curricula is not perceived as sufficiently open for the Sámi teachers to conduct education in accordance with the Sámi population's own needs and culture. In this regard, the following study is an attempt to fill in this research gap.

### **3. Theoretical perspectives and methods**

The authors find support for this research in a socio-cultural perspective on learning.<sup>36</sup> Learning and taking part in knowledge development depends on cultural context. Humans are cultural beings who interact and reflect with others in everyday activities. Socio-cultural perspectives on learning and human thinking and action are concerned with how individuals and groups acquire and exploit physical and cognitive resources. The main issues here are what can be achieved in a culture or society and what can individual members manage to do: How is collective knowledge reproduced in individuals, and what parts of collective knowledge will the individual come to master? Learning from a socio-cultural perspective means focusing on (1) the development and use of intellectual, psychological and/or language tools; (2) the development and use of physical implements or tools; and (3) communication and the different ways people develop types of collaboration in their collective everyday doings. These three aspects interact, where socio-cultural resources are created and passed on to children through communication. In a socio-cultural perspective, it is not possible to avoid learning; the question is

rather about what the child learns. Learning means taking part in the imparting of knowledge and skills and developing the ability to use them productively in new social practices.

This chapter is empirically based on group and individual interviews with Sámi ECEC practitioners that were conducted during the project *Sámi ECECs as a health-promoting arena*, where the main focus was on Sámi ECECs promoting of children's well-being.

This study has been conducted in Sámi ECECs that were established to ensure the specific rights of Sámi children. Sámi children live all over Norway and just a minor portion of them attend specialised Sámi ECECs. The authors have no data to show how Sámi or other Norwegian ECECs in general work to promote Sámi values and contribute to a more holistic perspective on nature and sustainability.

Seven ECECs participated. As they were spread around different regions of Norway, they offered varying research contexts. Some were in local Sámi communities in the north, and some were ECECs in more populated areas: three urban (>20,000 inhabitants) and three rural (<5,000 inhabitants). The study proposal was approved by the Norwegian Centre for Research Data (NSD) and the project complied with the ethical guidelines established by the National Committee for Research Ethics in the Social Sciences and the Humanities (NESH) (2018).<sup>37</sup> An information and invitation letter that was sent to the ECEC directors was approved by the local authority and distributed to the staff. The staff were anonymous to us until they had given their consent to participate and the parents had consented on behalf of their children. Participation in the study was voluntary.

The analyses are conducted by *stepwise-deductive induction* as a qualitative research strategy. In this approach, the qualitative research was aimed 'at developing concepts, models, or theories according to a paradigm that gradually reduces complexity'.<sup>38</sup> It is grounded on an inductive principle, meaning that the analysis began with raw data and then moved towards concepts and theories through incremental deductive feedback loops. A focus on sustainability was grounded in the data, as this appeared to be an important issue when it comes to how the staff described the Sámi ECECs as health-promoting arenas. To synthesise the excerpts presented in the data material (relevant due to their focus on sustainability), they were grouped under inherent terms as 'in vivo' codes. The next step was to sort this material into empirically based focused codes and then into three main categories to show how sustainable practices are conducted in ECEC practice: (1) myths and narration, (2) traditional knowledge passed from one generation to the next and (3) Sámi markers.<sup>39</sup> During this process, the authors knowledge on substantial perspectives about sustainability and Indigenous lifestyle increased, and inductive categories were developed.<sup>40</sup>

From a methodological perspective, this study also carefully took into consideration historical and personal background that may influence research linked with the subject of Sámi right and culture. Since only one of the two researchers leading this study is Sámi, it has been crucial to treat this subject area with respect and to bear in mind the historical fact that research and the school system have been part of the colonisation of the Sámi people.<sup>41</sup> Together with most other Indigenous

peoples, Norwegian Sámi share a history of forced cultural assimilation and a recent history of political mobilisation and revival. The colonisation and assimilation of the Sámi people culminated in the nation-building policies primarily based on monocultural norms, called Norwegianisation. Due to the assimilation policy and colonisation processes, the Sámi population has not have been able to promote their own understandings of sustainability and nature in institutions created in a Norwegian context. This include those related to Sámi education such as the ECECs, which is the object of this study.

#### **4. Findings**

The ECECs, spread around Norway, have a variety of environmental and geographical conditions: from being in the centre of big towns, depending on buses for access to nature, to locations close to the woods, mountains, fishing spots and other natural resources. Different environmental conditions mean different challenges when conducting what is often referred to as Sámi pedagogy. Even so, there are also many similarities when it comes to how the staff aimed to contribute to a more sustainable community and a Sámi understanding of nature and sustainability.

What this study's findings demonstrate is that the staff in Sámi ECECs *promote* values, attitudes and practices for more sustainable communities by integrating traditional Sámi culture in their ordinary everyday pedagogy. In addition, they also adapt traditions to fit the different ECECs' environments and contexts. The findings are divided into three categories showing approaches to pedagogical practises promoting sustainability: (1) myths and narration, (2) traditional knowledge passed from one generation to the next and (3) Sámi markers.

All three categories are related to protecting nature and sustainability. Primarily, protecting nature and sustainability appears to be the essential theme in the findings and is the overarching perspective in the pedagogical practices used by Sámi ECECs. The informants state that the most essential value base in the ECEC is awareness of and respect for all life on earth and not overusing natural resources. As one informant puts it,

It's also about taking care of nature, not leaving our carbon footprints. . . .  
Just this thing about life and death, I mean experiencing good and bad things that happen throughout the seasons. Coming across dead animal carcasses, that and hunting. Gathering, harvesting. That this is part of us, it's not something unnatural. Rather it's a natural part of being human and living on earth.  
But still, we must respect all living beings.

In other words, the value base in the ECEC is about learning to live in nature and manage natural resources in a sustainable way. When the staff explain how they use natural resources by harvesting potatoes, collecting seaweed and gathering fruit, berries and grain for one's own use, they are implicitly imparting the sense of close contact with natural resources. Fishing is also mentioned by several ECECs as an important resource. All the ECECs make it a priority to be aware of butchering

reindeer and utilising the meat, intestines and hides of reindeer in the traditional way. One of the staff member says, for instance,

Reindeer butchering is an annual ECEC activity every autumn. In recent years we have taken the children on overnight trips for this. Afterwards they prepare various Sámi dishes in the ECEC, and in accordance with tradition they use the whole animal. They prepare not only meat dishes, but for example also food made from animal blood. The children ask for pancakes mixed with animal blood in the ECEC.

In this processing of reindeer meat, the staff also tell us that they adapt to recent Norwegian food traditions, such as using reindeer meat in tacos served in the ECEC.

One of the staff members who belongs to an ECEC which focuses on presenting its education philosophy in a global context describes how they highlight sustainability thematically:

How to work with this idea about sustainability? It can be a bit hard to understand. So we need to help the children understand that this is not only about Sámi ECECs. We have to think holistically. We have to think about and include everyone. Everything is connected to everything. We're really dependent on playing on the same team with everyone else. That we can make the children understand that we're mutually dependent on each other. So, we often look at the globe: there's Africa. How do people live in Africa? What kind of challenges might they have that we don't? So, we expand the children's horizon, but remain anchored in Sámi values and ways of thinking without losing ourselves when considering others.

In this context, the educator explains the importance of connecting Sámi traditions with the concept of sustainability, describing it in this way:

We often tell children that we must not overconsume and pollute. We knead this in with the themes we're working on. Because this is so obvious today. Sustainability and pollution are so relevant today. But these are words the children don't really understand. So you need to bring it down to earth. Like making up fairy tales about pollution and sustainability. Make fairy tales, use concrete objects with them. And then you need to present this to the children in a good, understandable, and very concrete way.

As described here, many of the ECEC staff members relate this focus on sustainability to traditional ways of presenting existential and salient topics to the children in connection with their upbringing and cultural identity.

#### **4.1 *Myths and narrations***

While the Sámi markers make a visible connection to the Sámi inheritance, the use of mythical narrations and storytelling brings the Sámi culture to life as they

are intertwined in the daily activities as a kind of life perspective, focusing on the importance of the interdependence between human beings, nature and religion. In one of the ECECs, the educator stated,

Today, when out walking and after taking a break, when we were emptying the rest of the coffee, which was still warm, I said ‘Now you need to watch out, because now I’m pouring out warm coffee or warm water here’. And this of course means I’m telling the ‘subterrestrial’ so they won’t get warm coffee over them. And it’s that type of thing. We put them into so many stories, and there are many Sámi tales where the mythical subterrestrial help us humans.

Here the mythical stories are connected to everyday practice, thus vividly illustrating the Sámi culture’s clear focus on the connection between humans and nature. In this context the staff also talked about how these tales function as methods for supporting the children’s upbringing:

The telling of fairy tales is part of children’s upbringing, at home and in the ECEC. Scaring the children is putting it too simply. So, they don’t do what they might have wanted to do. We have to spend a lot of time on understanding the underlying intention. It’s part of the culture that we can say has worked, and that it is also done with a touch of humour: that the children know it’s really nonsense. But they still develop respect and don’t go into the river because they know Stallo<sup>42</sup> is there. They can be caught by the current.

In small everyday actions, the mythical narratives are linked to the activities in the ECEC, as one of the educators tells us when describing what they did when remodelling their physical-activity room,

We asked the room for permission to build, you know, a play corner in the room, where the youngest can wander in and out. In this nook we have various animals from Sámi mythology, and things that are found as part of the fauna and flora. The fox, wolverine, wolf, bear and reindeer. In this way the children can go and feel the hide of the various animals, sense them.

The mythical narratives are clearly present in the everyday chores, while the staff attach varying degrees of importance to specific activities that bring Sámi mythology to life:

Today I arranged a meditation journey with the children. I told the children that today we’re going to travel with our thoughts. [In a secretive voice.] Then they lie there, and I take them on a drum trip where I joik [joik: Sámi song or singing] softly. And then I guide them through the animals we can meet: reindeer and a Sámi goddess. Then we sit up afterwards. And hold hands in a circle. And I interview the children, one by one. I ask them if they would like to share what they encountered on their trip. ‘Yes’, a boy said. ‘Today I met Jesus on my trip’. Then he told us in detail about Jesus. And I turn to

the next child. She had met Sarakka. We have talked a lot about the goddess in the ECEC. And Sarakka caressed her chin. I tell them ‘Do you know what I saw; Sarakka told me that I needed to put my ear close to the ground. And there, there the Wind God had hidden. And the Wind God breathed lots of new energy into me. And the Wind God told me that the children in the Sámi ECEC were really good at going on meditation trips’. So I take things and bind everything together. It’s a great way to work with children!

All this shows how mythical narratives work as part of the upbringing itself—in teaching what is perceived as right or wrong—but they also function as a link between humans and nature and as a reinforcement of human responsibility for listening to and looking out for the forces found in nature. Several ECECs report how older generations, such as grandparents, bring mythical narratives and traditional knowledge into the ECEC.

#### **4.2 Traditional knowledge passed from one generation to the next**

This category underlines the importance of family ties. As one of the informants states,

I just have to listen to the grandparents, because that’s what we grew up knowing, that they have power and are powerful.

Several of the staff highlight the relevance of incorporating the older generations when working on preserving and developing Sámi culture in the ECEC. In the words of one of them,

Grandmothers have also been invited into the ECEC with traditional knowledge, for example sewing *skaller* (traditional Sámi footwear).

Here it is also important to note the Sámi perspective on raising children in the way that participation is encouraged, where the focus is on learning by doing and using real tools and natural materials in play and activities. They all describe how traditional activities with the children tend to stand out as the opposite of the traditional Norwegian ECEC, as one staff member says,

Sámi children do not use play kitchens—they take part in the activities in the kitchen. They are accustomed to taking part in preparing food. This is part of our educational philosophy, that the children take part in what we do.

There is a common expectation and descriptions of how children learn by doing, by participating in adult work and work processes:

Children are allowed to take part in adult activities and work processes.



This way of working in a didactic way is linked closely to what is described as closeness to nature and coping on one's own:

It is special for our ECEC that the children learn how to handle a knife, and that they can start a fire. Yes, and managing outdoor life, or managing life. And to be independent.

The goal of autonomy and the ability to support oneself recurs in many statements, and in various ways this is emphasised using Sámi markers in the ECECs.

### **4.3 Sámi markers**

When the staff in the Sámi ECECs focus on sustainability and traditional knowledge, they are engaged in how Sámi markers underline the connection to Sámi traditions and Sámi culture.

Bearing in mind that the ECECs are spread across Norway, the opportunities for experiencing the local sense of Sámi belongingness vary widely. In ECECs with less natural contact with nature, extra importance is attached to making Sámi culture visible in the physical indoor environment by, for example, having a rocking reindeer instead of a rocking horse, having a *lavvo* (Sámi tent) and sleigh indoors, and generally making very many Sámi artefacts available to the children, including posters on the walls, the use of colours and dolls with *kofter* (Sámi costumes). They describe how Sámi ECEC educational philosophy is an identity marker that is close to mythology, nature and traditions:

We have to create the optimal spaces. We have reindeer hides, we have sheep fur, we have loads of Sámi props on the walls. We have drums. This week we worked a lot with images of gods—goddesses and gods—in Sámi mythology. We have posted images of gods, the children are allowed to draw pictures of gods, and we have arranged an art exhibition and hung pictures of gods on the walls in the section.

The technological world has also gained a foothold in the Sámi ECECs. One of the urban ECECs told us how they used YouTube as a source to expand the children's repertoire of Sámi belonging by searching for and showing video clips of Sámi things.

## **5. Discussion**

Through the research question, we have explored how Sámi ECECs' practices aim to contribute to a more sustainable community and a Sámi understanding of nature and sustainability. From international law we know that the concept of Indigenous peoples underlines a strong relationship with nature, the preservation of some traditional institutions (including reindeer herding) and other land and water uses. This

distinguishes Indigenous peoples from other minorities. In this chapter we have pointed to the overarching perspective on environmental sustainability as a main value in the Sámi ECECs' pedagogical work. Furthermore, we have described how this perspective enters the practical work by using myths and narrations. Having a focus on how traditional knowledge passes from one generation to the next and Sámi markers seems to be essential in facilitating Sámi values and traditions. In this discussion, we will focus on the way pedagogical work for a sustainable community takes form.

### *5.1 From policy to pedagogical practice*

Educational institutions are important arenas for decolonisation efforts and serve as a counterbalance to colonisation, both within and outside the ECEC.<sup>43</sup> At the same time, Sámi ECECs are governed by the same laws and regulations as Norwegian ECECs, but they have their own description in the *Regulations for the Framework Plan (2017)*.<sup>44</sup> Decolonisation in ECECs might take place on many levels, one of them being how the teachers transform laws and regulations into pedagogical practices that aim to impart a Sámi-culture-based perspective on sustainability.

ECEC teachers' didactics and approaches to teaching have great impact on their practices. The Kindergarten Act (2005) and the Framework Plan (2017) underline the Sámi children's right to learn about their Sámi culture and inheritance.<sup>45</sup> The staff put much effort into constructing the children's knowledge of Sámi culture by focusing on environmental sustainability, with close connections to social inclusion in the Sámi community. These aspects are closely linked to the values promoted in ILO Convention No. 169 that establishes the right of Indigenous peoples to have control over their social and cultural development.<sup>46</sup>

Bearing this in mind, the authors examine the findings through a socio-cultural approach and highlight Indigenous environmental values while also pointing out some challenges and limitations in the study. It seems that the ECEC staff in this study are mainly impacted by the statutory use of Framework Plan in their practices, as they engage in activities described there (for example, to 'make use of and harvest the land'). The right of the Sámi to education as defined in ILO Convention No. 169<sup>47</sup> is hence implemented on a practical level in the ECECs in this study through national law (the Kindergarten Act).

At the same time, there is a missing link between the national and international regulation of the Sámi ECEC and the everyday practice. The teachers strive to fill the missing links by implementing their knowledge of Sámi culture and practices concerning nature and sustainability in the education practice. They develop Sámi didactics that frame sustainability. Yet the teachers have little or no guidance from pedagogy in mainstream ECECs in making the pedagogy Sámi. However, this is an important issue because adopting mainstream pedagogy will also imply a risk of colonisation of the Sámi ECEC, which translates in their feeling of being trapped between the requirements in the national curricula and the desire to implement culture-based teaching.<sup>48</sup>

At the same time, this study also shows how the informants interpret and transform cultural knowledge into pedagogical practices according to connection to

nature and environmental sustainability. The autonomy of the staff seems to grow, and the cultural heritage they activate generates a culturally adjusted pedagogy implying a decolonisation of the pedagogy.<sup>49</sup> In this regard, this chapter describes the way staff members communicate about the Sámi culture and traditions to a socio-cultural approach to learning.<sup>50</sup> Through myths, narrations and the active use of the Sámi language, they stimulate children's intellectual, physiological and Sámi-language development. Sámi markers, tools and handicrafts accentuate cultural identity and values. The transfer of Sámi knowledge provides platforms for managing life, being independent and generating cultural heritage for the children. These aspects interact. Socio-cultural resources are created and passed on to children through communication, learning by taking part in the imparting of knowledge and skills, and developing the ability to use them productively in new social practices, such as when they serve reindeer meat in tacos, use snowmobiles and search YouTube for a variety of examples of Sámi life. In a way, by using and integrating sustainability education with the creative and expressive myths, art and music (*joik*) in Sámi culture, a holistic picture of sustainability is presented to the children.<sup>51</sup>

Culture-based teaching gives Sámi children the opportunity to learn about their heritage and thus gain a strong Indigenous identity. In this socio-cultural learning process, it appears to be essential for the staff to mediate sustainable ways of living by passing on knowledge of how humans and the ecosystem are linked together.<sup>52</sup> For example, by warning the 'subterrestrial' of the hot coffee and highlighting a holistic worldview, the staff make the Indigenous culture of the Sámi people part of the daily life in the ECEC and in that way they intertwine their daily practices with a societal foundation based on Sámi values. In the excerpts from the interviews, staff members exemplify how they stress the importance of preservation of biodiversity and regenerative capacity and emphasise the importance of reusing and recycling nature's resources. All this is then clearly linked to Morelli's operationalisation of environmental sustainability.<sup>53</sup> He describes this as a three-legged table comprising environment, economy and society. There is a dualistic relationship between human beings and the ecosystem they inhabit, serving as the foundation for a responsible socio-economic system. The informants in this study seek to balance this relationship in practice in their everyday life in ECEC.

## **5.2 From Sámi traditional areas to urban areas**

Mainstream understandings of pedagogical strategies that encourage sustainability in ECECs are often based on instrumental program approaches<sup>54</sup> and in cities close to universities.<sup>55</sup> However, this study, covering the long country of Norway, reveals that different contexts requires different practical arrangements, which should allow that sustainable pedagogy in Sámi ECECs support the building of a personal and political identity of Sámi children as members of an Indigenous people.<sup>56</sup> In this regard, all the Sámi ECECs strive to fulfil the requirements in the national curricula while also seeking to adapt the daily practices to fit into the local environment. For this purpose, when access to nature is limited, the staff uses Sámi outdoor

gear indoors and tries to build a sense of belonging to the Sámi markers in other ways than the Sámi ECECs located in established Sámi districts. In addition, the ECEC teachers model sustainable practices concerning food traditions by teaching children to exploit all parts of the reindeer for food production and by supplying the children with toys based on natural materials to use in their play. Using all parts of the reindeer and harvesting food in nature might also be linked to economic sustainability by addressing the level of (over)consumption in modern society.

However, ECECs in big cities do not have the same opportunity as ECECs in Sámi core areas to participate, for example, in the reindeer slaughter. The informants solved this pragmatically by buying slaughtered reindeer meat: Sustainability practices are therefore adapted to the context of the ECEC and unite old traditions with today's possibilities in rural and urban areas. Yet this also highlights educators' challenges when trying to follow Sámi traditions in an urban environment, while those children who grow up close to traditional Sámi areas retain traditions much more naturally.<sup>57</sup> This can affect the children's identity as Sámi and undermine their legal rights as Indigenous people. An innovative way to address this is to allow children from Sámi ECECs in an urban context to travel on cultural trips to Sápmi to experience their own language and culture in the north, as already practiced in some Sámi ECECs in Norway. It must be taken into consideration that this is an expensive practice, often depending on governmental funding to make it possible.<sup>58</sup>

The findings constitute a counterbalance to the exotification of Sámi culture. There is variation in how the Sámi ECECs teach children to be self-reliant and to look after each other and nature and in how these ECECs promote values, attitudes and practices for more sustainable communities. Nonetheless, there are undeniable similarity in how the staff in ECECs underline the sustainable perspectives based on so-called Indigenous environmental practices.<sup>59</sup> Examples of these are how elderly people in our data actively participate in some of the Sámi ECECs in our samples (as paid 'Sámi grandmothers') and how myths and narrations focus on the connection between present and past and the holistic approach to life and nature. Respect for traditions leads to knowledge of handicrafts and the ability to work with tools. Having a high degree of respect for the environment requires a keen focus on connecting and identifying with nature, as health and well-being depend on the environment. Nature and sustainability are parts of Sámi culture and identity and play an important role in the quality of life.<sup>60</sup> However, arguments concerning a special relation to nature do not always rely on a real relation to nature but are more about building a personal and political identity as an Indigenous people.<sup>61</sup> The ECEC staff discuss with the children how different cultures have different approaches to sustainability practices and to the environment. In this way, they do not stop at presenting Indigenous perspectives on sustainability; they also have a multicultural approach—preparing children for a global and diverse society.

## **6. Conclusion**

Some of the major global challenges in our time, such as global warming and climate change, require cooperation across established cultural and national divisions.

Indigenous peoples' perspectives are an important part of understanding what these challenges entail.<sup>62</sup> In this regard, international and national law<sup>63</sup> supports in some extents the right of the Sámi to their own education, which also mandates that Sámi ECEC shall focus on sustainability and the relationship with nature. The future trend is that all areas in society—both the majority population and Indigenous peoples—will increasingly focus on sustainability issues as well.<sup>64</sup> In this context, Sámi perspectives and the way Sámi kindergartens highlight sustainability in a holistic perspective can be a guide for how ECECs in general can draw attention to this subject area.

There is no single education and learning model for environmental sustainability in the international and national regulations of education for sustainability. Each community should tailor content to the interests of its inhabitants.<sup>65</sup> In general, ECECs have a clear role in preparing current and future citizens and in aiding societies to make the necessary transitions to sustainability.<sup>66</sup> Orienting children in ECECs towards sustainable development must begin from birth, both at home and in the wider community. Both the international and national legal frameworks mentioned here must be addressed holistically. They need to be translated into the ECEC context, to reflect culture, ethnicity and Indigenous rights, to support children's right to participation and to be fulfilled as they are intended. That education for sustainability based on the exercise of discretion in the interpretation and application of the legislation is thus both a challenge and a strength.

## Notes

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# 13 Sámi rights in the sustainable transition—concluding remarks

*Christina Allard*

## 1. Introduction: connecting Sámi territorial rights, sustainable development and SDGs

This chapter brings some of the topics addressed within the chapters of the book to the forefront, topics that have united across the texts. Before embarking on that voyage, it is necessary to sketch a context to the connections between Sámi territorial rights, sustainable development and the Sustainable Development Goals (SDGs).

Ancestral lands are fundamental for Indigenous peoples—any threat to their ancestral lands is a threat to their way of life. Thus, the protection of their territories is of utmost importance to Indigenous peoples. Within this vein, Indigenous peoples have unique and sacred relationships with their lands, territories and resources, and these relationships are essential to Indigenous peoples' survival, identities and well-being.

The United Nations Declaration on the Rights of Indigenous Peoples<sup>1</sup> (UNDRIP) recognises the importance of land for Indigenous peoples and affirms their right to own, use, develop and control their lands and resources. The UNDRIP includes the rights to maintain and strengthen their spiritual, cultural and economic ties to their lands, as well as to participate in decision-making processes that affect their lands and resources.<sup>2</sup> Indigenous peoples' connections to land are based on their deep understandings of the natural world and the interdependence between humans and the environment. Any infringement on Indigenous peoples' land rights is a violation of their human rights and undermines their ability to maintain their cultural identity and ways of life.<sup>3</sup>

The International Labour Organization (ILO) Convention No. 169,<sup>4</sup> which Norway has ratified but Sweden and Finland still have not, also stresses the importance of recognition and protection of rights pertaining to traditional territories.<sup>5</sup> The UNDRIP and ILO Convention No. 169 are the most comprehensive human rights instruments relevant for illuminating the fundamental importance of recognising rights to land and waters for Indigenous peoples, including for the Sámi in Scandinavia (Norway, Sweden and Finland). In this concluding chapter, the concept of 'territorial rights' is applied as an umbrella term for Sámi traditional activities—such as reindeer herding, hunting and fishing—that take place on Sámi ancestral

lands.<sup>6</sup> These continued Sámi traditional activities, are also protected as cultural rights under article 27, the International Covenant on Civil and Political Rights (ICCPR),<sup>7</sup> since ‘culture manifests itself in many forms, including a particular way of life associated with the use of land resources’, and is especially true with respect to Indigenous peoples.<sup>8</sup>

Due to multiple pressures over the last century, Sámi access to reindeer-grazing areas has diminished; industrialisation, infrastructure development and climate change are the primary factors behind this phenomenon. Warmer winters have led to an increase in snow and ice formation, making it challenging for reindeer to find food, and building of roads, mines, and wind farms has also fragmented the natural habitat, making it difficult for the animals to move and find new grazing grounds. Combined, these factors have severely impacted traditional Sámi reindeer herding ways of life and are threatening the cultural identity of the Sámi people.

A recent study mapping cumulative pressures and climate changes in northern Norway, Sweden and Finland concluded that 60% of the lands designated for reindeer grazing were affected by *multiple* land use pressures; even more concerning is that only 15% of this vast area remains undisturbed from competing human land uses.<sup>9</sup> The pressures included in the analysis were intensive forestry, land-based industrial facilities (e.g. wind power, mines), road and railway networks (including other types of human infrastructure), outdoor tourism, predator presence and temperature change.<sup>10</sup> These infrastructures and other types of pressures are fragmenting the landscape, making it more difficult to access available grazing areas. Herders are, as a result, increasingly forced to use trucks to move reindeer between pastures, causing, in turn, changes to their traditional practices. Due to multiple pressures and decreasing grazing lands, the adaptation capacity and flexibility of options for the reindeer herders are seriously diminished.<sup>11</sup>

Thus, the cumulative effects of existing and planned industries and other competing land and water uses are real and pressing; land use conflicts are by no means declining. Moreover, conflicts over land in northern Scandinavia are expected to increase due to the ongoing sustainability transition for combating climate change (commonly referred to as ‘green transition’), which will intensify the cumulative pressures and further reduce grazing lands; new ‘green’ projects require lands for their industries and infrastructure. This sustainability transition is increasingly referred to as ‘green colonialism’ by Indigenous politicians and individuals.<sup>12</sup> The notion of green transition instead reinforces existing power imbalances and may further result in the displacement and marginalisation of Indigenous communities that have been sustainably managing their lands and resources for generations.

The diminishing lands for reindeer herding in northern Scandinavia have significant implications for sustainable development. Following the Brundtland report, sustainable development aims to meet the needs of the present without compromising the ability of future generations to meet their own needs. The reindeer herding livelihood, including hunting and fishing, has been an integral part of the Sámi culture and heritage for centuries. Not only does the loss of grazing lands affect the livelihoods of the Sámi people, but it also poses a threat to the sustainability of the entire region’s ecosystem. For example, reindeer herding is often seen as a means

to preserving the mountain landscape in accordance with national environmental objectives of Sweden and Norway, and free-ranging grazing may counteract climate-driven changes on vegetation.<sup>13</sup> The Sámi people have developed unique knowledge and practices for the management of the natural resources and ecosystems that are critical for the sustainability of the region. Therefore, it is essential to recognise the role of Sámi communities in sustainable development and the management of natural resources and biodiversity, as well as to support their efforts to maintain their traditional livelihoods and culture.

The 17 Sustainable Development Goals (SDGs), established by the United Nations in 2015 to address global challenges, not the least to eradicate poverty, are interconnected and aim to balance economic, social and environmental sustainability while ensuring that human rights are respected, protected and fulfilled. The SDGs connect sustainability issues with human rights objectives, which is of the utmost importance for Indigenous peoples and not least because they face specific social, economic and environmental vulnerabilities and unique challenges related to cultural preservation and the recognition of territorial rights.<sup>14</sup> The individual SDGs recognise the importance of Indigenous knowledge, rights and participation in decision-making processes,<sup>15</sup> but there are critiques about how they have been implemented and given effect so far.<sup>16</sup> Indigenous peoples have a wealth of knowledge and practices that can contribute to sustainable development, including traditional ecological knowledge, and their involvement is crucial for the effective implementation of the SDGs.

This takes us to the aim of this concluding chapter; based on the different contributions within this book, this last chapter addresses topics that have united across the texts and highlights the progress and challenges faced in the Scandinavian states to secure the rights of the Indigenous Sámi people in a broader sustainability context. This exercise is done through illuminating three themes that ‘stood out’ in the chapters: (1) the increased significance of human rights law, (2) competing land and water uses within Sámi territories, and (3) Sámi invisibility within the larger society. The following text unfolds accordingly and lastly provides both a brief conclusion and discussion.

## **2. Increased significance of human rights law**

This section highlights the increased significance of international and domestic human rights in Norway, Sweden and Finland in dealings with Sámi territorial rights. Several authors have addressed and commented on this potential shift emerging in domestic case law and in relation to mapping of rights in Finnmark, Norway. This has great importance for solving cases mindful of Sámi as an Indigenous people and may tip the scales in the favour of the Sámi party, as well as in issues concerning competing interest with ‘green’ industries. One part of this alleged shift is that domestic courts, to a larger extent than before, interpret and apply constitutional provisions and international human rights law. This is shortly addressed in subsection 2.2. The Swedish *Girjas* case in 2020, in which the Supreme Court stated that certain parts of the ILO Convention No. 169 were binding despite Sweden not being party to the Convention, has caused discussion.

### 2.1 *Interplay between international, foreign and state laws*

Several of the authors of chapters in this book highlight the increasing role of international legal norms in solving domestic cases concerning Sámi territorial rights. With respect to the assessment of potential collective property rights in Finnmark, Norway,<sup>17</sup> Ravna expresses that the result of the Finnmark Commission's report on the Karasjok field study, released in 2019 and through which the Commission, for the first time, found that collective ownership existed, was due to the Commission taking a different approach to legal history and international law and not differences in factual circumstances of the Karasjok area. In said report, the Commission refers to both ILO Convention No. 169 and the UNDRIP in support of its findings.<sup>18</sup> Ravna states that this change in interpretation of circumstances is necessary to meet Norway's obligations under international law.<sup>19</sup> Of particular interest is that the Commission for the first time applies the restorative function (right to restitution) in the ILO Convention No. 169 Article 14 (1), which the Land Tribunal for Finnmark also does in its hearing of the case.

Evident from Ravna's chapter, the Karasjok report was unique. According to the Commission, the inhabitants of the Karasjok municipality, with a Sámi majority, owned the former state land; this decision was appealed, and in spring 2023 the Land Tribunal for Finnmark released its verdict—the majority of the Tribunal (three of the five judges) held that the registered inhabitants of Karasjok hold collective property rights to the area.<sup>20</sup> The decision is appealed to the Norwegian Supreme Court.

The landmark case *Fosen*<sup>21</sup> concerns the interpretation of Article 27 of the ICCPR. The Norwegian Supreme Court, in this case and for the first time ever, held that there was a violation of ICCPR Article 27; the wind energy project in question was found to be in violation of the cultural rights of two Sámi reindeer herding communities within the affected southern reindeer herding area. In her chapter analysing the *Fosen* case and in terms of Sámi rights in the 'green transition', Cambou puts forward that the *Fosen* decision features unique elements in its interpretation of Article 27.<sup>22</sup> Cambou discusses that the *Fosen* decision suggests an interpretation of a threshold for violation in less demanding terms than what has been ascertained by the HRC.<sup>23</sup> She also explains that the Norwegian Court has, in *Fosen*, declared that activities interfering with reindeer herding in the area examined must be assessed together with previous and planned measures, thus including cumulative effects in the overall assessment of a possible violation, while it also declared clearly that ICCPR Article 27 does not allow for proportionality assessments that balance the majority population's needs as superior to minority interests.<sup>24</sup> In relation to addressing mitigation measures, Cambou points to the significance of the fact that the court held that winter feeding in fences could not compensate for the harm from the wind farms because such a measure deviates significantly from traditional reindeer herding practices and thus would not prevent a violation of Article 27.<sup>25</sup> The court's interpretation, she emphasises, amounts to a protection against measures that would force Sámi reindeer herders to adopt an economic model that would alter their subsistence activities.<sup>26</sup>

In addition, Cambou highlights the Norwegian Supreme Court's position in *Fosen* that the right to culture is a substantive right and thus must be protected at its core—consultation procedures conducted by the state and companies with the affected Sámi and the Sámi Parliament of Norway, however inclusive and effective, do not, according to the court, legitimise substantive harms done within Sámi territories.<sup>27</sup> As a landmark case applying international human rights law in Norway and within the context of 'green energy' developments, *Fosen* is, indeed, important. An obvious outcome of the *Fosen* case is also that it will influence future decisions in Norwegian courts concerning interpretation of ICCPR Article 27, and my understanding is that *Fosen* most likely will, as well, have some influence on the application of the Article 27 in Finland and Sweden; this development is particularly important when assessing the threshold for violations under the ICCPR Article 27 as now clearly includes cumulative effects into the equation.

The *Girjas* case (NJA 2020 s. 3), decided in early 2020 by the Swedish Supreme Court, generously refers to international human rights instruments in its decision, such as the ILO Convention No. 169, ICCPR and UNDRIP.<sup>28</sup> Torp discusses the *Girjas* case in his chapter, and in contrast to the other authors commenting on international law on Indigenous rights, he, on the one hand, seems to argue that this decision poses a challenge to the supremacy of the Swedish legal order, rather than viewing it as necessary progress to support the recognition of Sámi territorial rights (see the next subsection for more on this).<sup>29</sup> On the other hand, the current Swedish situation, he argues, is a consequence of the lack of political action to recognise Sámi rights, which, as a result, transforms political questions into litigations.<sup>30</sup> Therefore, he continues, durable solutions from the political system are needed.<sup>31</sup>

In relation to recent Finnish case law, both Heinämäki and Scheinin stress the importance of applying international human rights law to Sámi cases.<sup>32</sup> Heinämäki, in her chapter, assesses the legal norm 'the prohibition on weakening Sámi culture' in Finnish sector legislation (the mining, environmental protection and water acts).<sup>33</sup> This norm means a prohibition against causing significant harm, arising from the constitutional status of Finnish Sámi. She argues that since environmental sustainability and sustainability of the Sámi culture go hand in hand, Finnish sector legislation, aiming at safeguarding sustainability, includes a prohibition to weaken Sámi culture.<sup>34</sup> Heinämäki highlights the importance of Finland's Supreme Administrative Court decision (KHO 2020:124) from 2020, a case concerning gold panning.<sup>35</sup> In this case, Finland's Supreme Administrative Court held that constitutional provisions protecting Sámi rights, along with the obligations under the ICCPR, must be interpreted holistically when considering any effects on reindeer pasture relating to the planned gold-panning activities (and not only limited to general effects of noise pollutions and such).

For the first time, Heinämäki states, the court endorsed using cumulative impact assessment to evaluate other activities in the area, taken into consideration together, which is in line with Article 27 of the ICCPR.<sup>36</sup> Even though the permit in question was not overruled, Heinämäki explains, this case is an important step forward, because the court did interpret the national provision in the light of both the Finnish constitutional and international human rights of the Sámi people.<sup>37</sup>

In his chapter, Scheinin discusses three Finnish cases from 2022 concerning Sámi fishing rights.<sup>38</sup> What is especially interesting here is that these cases came about as an act of civil disobedience by Sámi individuals to ‘stress test’ the legal system, and the Sámi defendants were all acquitted of the criminal charges. In all three cases, the Finnish courts refer to both constitutional provisions and international human rights obligations of Finland, in addition to acknowledging the importance of fishing as a part of Sámi culture. Two of the cases were decided by the Finnish Supreme Court and one by the District Court. Within this, Scheinin refers to the *Veahčajohka* case (KKO 2022:26) as a particularly remarkable case, whereby the Supreme Court, as a result of judicial review, actually set aside a provision of a Finnish act because it contradicted the Constitution of Finland.<sup>39</sup> Scheinin concludes that these three cases display the important relationship between ecological sustainability and cultural sustainability, along with a promise of a legal transition (setting aside acts of Parliament).<sup>40</sup>

Equally interesting is that Scheinin, in his chapter, reveals influence in these cases in Finland from Canadian case law, thus also exhibiting foreign law as a source of legal inspiration in domestic cases.<sup>41</sup> Thus, in his analysis, legal influences in these three decisions come from three directions.<sup>42</sup> *First*, as an inspiration from Sámi individuals who fished while knowingly contravening state-imposed restrictions, many of the cases from the Supreme Court of Canada concern criminal law cases regarding fishing and have substantially advanced Indigenous rights in Canada.<sup>43</sup> *Second*, Scheinin himself had submitted an expert witness opinion in two of the three cases, to the District Court in 2018, wherein he referred to a few Canadian Supreme Court criminal cases against members of First Nations who were prosecuted for unlawful fishing.<sup>44</sup> *Third*, experiences from Indigenous communities in Canada and Canadian cases have been important for the development of international law through ICCPR Article 27 and the Human Rights Committee (e.g. *Ominayak/Lubicon* and *Mahuika* cases).<sup>45</sup> Scheinin argues that this has all amounted to a paradigm shift concerning the understanding of the right of peoples to self-determination; the Human Rights Committee has acknowledged the importance of ICCPR Article 1 in interpreting other provisions of the Covenant, reading into (ICCPR) Articles 25 and 27 a right to ‘internal self-determination’ for Indigenous peoples.<sup>46</sup>

This interplay with foreign (other states’) law in Scandinavian states is especially significant due to the fact that the legal status of the Sámi people differs between the three Scandinavian states despite being one people. It is thus deducible and highly recommended that courts keep up with the case law and legal developments in neighbouring countries, even if case law and precedents are not formally binding. One example of such an inspiration can be seen in the *Nordmaling* case (NJA 2011 s 109),<sup>47</sup> whereby the Swedish Court of Appeal explicitly referred to the similar *Selbu* case (Rt 2002 s 769) from the Norwegian Supreme Court; the Swedish Supreme Court, in resolving the matter in 2011, however, did not do the same. It is, nonetheless, obvious in the manner that the Swedish Supreme Court reasoned the case that it was knowledgeable in regard to the content of the Norwegian Court’s reasoning.



Åhrén, in turn, firmly suggests in his chapter that Sámi communities must rely on international Indigenous rights in finding their way in the state legal systems; he argues that domestic legislators cannot be trusted with this task.<sup>48</sup> Courts in the Scandinavian states are, today, open to include international law concerning Indigenous rights, such as has been done in the *Girjas* and *Fosen*<sup>49</sup> cases. Another example Åhrén provides is that of *Rönnbäcken* (2020), whereby the UN Committee on the Elimination of Racial Discrimination (CERD) stated that Swedish mining-related law discriminates against Sámi reindeer herding communities through promoting mining activities and, in turn, causing disproportionate harm.<sup>50</sup>

Åhrén emphasises two international norms to be of key relevance in his chapter: (1) the recognition of land rights, and (2) the protection of Indigenous people's distinctiveness, or a right to be different, flowing from the principle of non-discrimination.<sup>51</sup> Both norms are also manifested in the UNDRIP. The latter norm relates to the wish of Indigenous peoples to remain distinct, and with it comes a corresponding duty of states to treat them differently, as such, so that Indigenous peoples can, in fact, preserve and develop those distinct core traits. Åhrén also recalls that, historically, international law never viewed Indigenous peoples and minorities through the same lenses, having established two branches of rights, and that minorities exist within the majority society, whereas Indigenous peoples, as *peoples* with recognised (internal) self-determination, exist parallel to the majority society.<sup>52</sup>

In their chapter on Sámi rights and protected areas in the three Scandinavian states, Reimerson and *Flodén* interpret the critique against colonial discourses happening on the international arena and current responses therein as a paradigm shift.<sup>53</sup> States have previously described Indigenous traditional territories as 'wild', 'unused' and 'empty', and Indigenous peoples as 'primitive' and 'uncivilised', which in some instances continues today. Quite recently this international shift has started to permeate Scandinavian discourses on protected areas, replacing stereotypes that top-down conservation forms with collaborative and decentralised models. This shift is another example of the influences of the international legal framework on national practices, a theme of this section.

As these authors explain, collaborative approaches have potential benefits for both environmental and social outcomes, including, for example, the recognition and protection of Indigenous rights.<sup>54</sup> Nevertheless, discourses regarding protected areas still hinge upon the separation of nature and culture, causing potential conflicts with Indigenous communities' holistic view of the natural world, such as with the Swedish Laponia World Heritage Site. Reimerson and Flodén point to the fact that, in Finland, the Akwé: Kon Guidelines<sup>55</sup> have proven to be a success; these guidelines provide a voluntary mechanism for the implementation of Article 8(j) of the UN Convention on Biological Diversity (CBD).<sup>56</sup> Finland became one of the first states to apply the Akwé: Kon Guidelines, in the preparation of a management and land use plan for the Hammastunturi Wilderness Area with cooperation between Metsähallitus and the Finnish Sámi Parliament, substantially improving Sámi participatory rights.

## 2.2 *The role of national courts*

How a national court tackles the case before them has immense importance for the outcome and especially so for Sámi communities that, to a larger extent, rely on international human rights for protecting their rights and culture. In his chapter, Torp brings attention to the roles of the courts and, by extension, whether national courts should have increased authority or not ('the expansion of the province of the courts at the expense of politicians and/or administrators', at p 73).<sup>57</sup> As a way of example, Torp refers to the *Girjas* case (NJA 2020 s. 3), which was decided in early 2020 by the Swedish Supreme Court. This landmark case concerned the exclusive small-game hunting and fishing rights of the Girjas reindeer herding community vis-à-vis the Swedish state, addressing whether Girjas had the right to lease out these rights to third parties or not and despite an explicit prohibition to do so in an act. The Swedish Supreme Court held unanimously that Girjas, in fact, has such rights, based on protracted uses via immemorial prescription. The *Girjas* case is long and complex.<sup>58</sup> Within this context, Torp rightfully questions if it is prudent that courts, instead of broadly based public law commissions, solve such complex matters pertaining to Sámi territorial rights.<sup>59</sup> Indeed, courts only solve the issues at hand and, thus, deliver on a patchwork of cases while leaving remaining issues for another day.

On the other hand, and in line with what Åhrén suggests, while Scandinavian Sámi traditionally have relied upon states' governments' commissions and bills, this trust has increasingly grown thin.<sup>60</sup> At least in Sweden, law proposals have not passed the Parliament, and as a result, many issues remain unresolved for decades. Controversy regarding small-game hunting and fishing in the mountain areas of Sweden was one of these unsettled issues; if the national legislator does not have the ambition to tackle an issue, who then shall solve the matter? Matters of conflict and the protection of fundamental rights that may be at stake are the task of courts, particularly supreme courts, to set a precedent for. In other words, the Sámi may not have an alternative path but to turn to the courts for an authoritative solution.

In his chapter, Torp aims to analyse the interplay between law and politics within the *Girjas* case; he argues that the case is an example of 'juridification', or 'judicialisation'—that politics have influenced the interpretation of relevant law, which rather could be expressed as judicial activism following Torp's argumentation.<sup>61</sup> However, Torp finally concludes that the court's reference to the ILO Convention No. 169 in the decision must be understood as based on legal interpretation, not a political position by the court concerning the Convention, and this author agrees.

The matter of the court's potential for activism (i.e. law-making functions) must be placed into context.<sup>62</sup> The Swedish Supreme Court has, for more than a decade, begun to approach some cases with what could be labelled as a 'rights-based perspective'; Brännström refers to a few of these cases in her chapter analysing property rights of forest owners and reindeer herders.<sup>63</sup> These cases have nothing to do with Indigenous Sámi rights but, rather, the protection of property rights from unlawful infringements, based on Swedish constitutional provisions and the European Convention on Human Rights. Such an approach by the Swedish Supreme

Court, to rely upon both the Constitution and international human rights, is probably a game-changer in Sámi rights cases both today and in the future. Additionally, Scheinin has stressed the importance of such approaches in the three recent Sámi fishing cases in Finland (see the previous subsection).<sup>64</sup>

Historically, Swedish (and Finnish) courts have had a weak position within the political and legal system—compared to Norway—but that is now changing.<sup>65</sup> Some of the recent Swedish Supreme Court cases have been viewed by some as controversial and have thus spurred legal debate among Swedish lawyers as to whether the Swedish Supreme Court has overstepped its original mandate to *interpret* the law and not make law.<sup>66</sup> In this light, the *Girjas* case, as well as the cases referred to by Scheinin and Heinämäki, must be understood as part of a shift towards an increased autonomy of the higher courts in Sweden and Finland, with a focus on the respect for Indigenous peoples human rights. The chapters by Cambou and Ravna attest to the immensely important steps taken in Norway, concerning competing land uses on Sámi reindeer-grazing lands from new wind farms, decided by the Supreme Court, and the recognition of collective territorial rights in Karasjok, decided by the Finnmark Commission and the Land Tribunal for Finnmark (see section 2.2).<sup>67</sup> Also here a national court along with the Commission/Tribunal was responsible for the shift.

### **3. Competing land and water uses on Sámi territories**

Section 3 engages with the seriousness of competing land and water uses on traditional Sámi territories, which several chapter authors bring to the forefront. This is accentuated by the sustainability transition that currently happens in Sápmi. Sámi communities across Scandinavia continue the battle to preserve their rights and cultures in multiple arenas and by all means available; there are increasing conflicts not only with the state, but industry proponents, local politicians and inhabitants alike. An important aspect of preserving Sámi culture and territorial rights is Sámi (ecological) knowledge, to which subsection 3.2 turns to. The Sámi traditional knowledge, transmitted from one generation onto the next, is in fact essential for cultural survival. This is also one aspect of why Sámi reindeer herding communities commonly oppose planned (‘green’) industry projects. The application of Sámi traditional knowledge is essential in assessing negative impacts of such industry developments, balancing the dominant use of Western scientific knowledge.

#### **3.1 *Historical context, protection of rights and a just sustainability transition***

Sámi territorial rights are rooted in Sámi historical presence, occupation of lands and long-standing natural resource uses, something that is recognised under the ILO Convention No. 169 and the UNDRIP. It is difficult to fully comprehend Sámi rights today without this context or contemporary Sámi rights claims. Historical dimensions from various angles are brought to light especially in the chapters by Ravna, Scheinin, Brännström, and Reimerson and Flodén.<sup>68</sup> Despite general recognition of Sámi territorial rights in legislation and case law having historical roots

(particularly regarding reindeer herding rights), there is a gap between the recognition of and the protection of the rights. Protective measures based on international human rights can relate to both the protection of property and/or protecting the culture and livelihood of reindeer herding and other forms of traditional Sámi industries.

Both Brännström and Heinämäki address the above gap that is in sector legislation; Brännström does so in relation to the Swedish Forestry Act, 1979, which regulates the relationship between Sámi reindeer herding and forestry, and Heinämäki does so regarding Finnish sector legislation vis-à-vis the norm of ‘prohibition on weakening Sámi culture’.<sup>69</sup> In Swedish forestry legislation (and other sector legislation, such as the Swedish Minerals Act), Sámi reindeer herding is primarily regarded as a public interest, which allows, in turn, for a balancing of opposing land uses, especially given that timber production also is regarded a public interest to consider in Sweden where forestry is carried out.<sup>70</sup> This displays a regulatory framework that neglects, rather than enforces, the protection of Sámi reindeer herding rights within the context of Swedish forestry. At the same time, despite an effort to implement the legal norm of prohibition on weakening Sámi culture (and not to cause significant harm) in various environmental and natural-resource-related legislation in Finnish law, there remain deficits in the practical implementation of this norm.<sup>71</sup> An essential part of this legal norm of prohibition consists of an obligation of state agencies (or in some instances a proponent) to carry out a cumulative impact assessment of a proposed project so as to assess the threshold of ‘significant harm’, posing also an obligation to consult with Sámi representatives. The implementation of the cumulative impact assessment in legal application has proven to be especially difficult.

These identified gaps in Swedish and Finnish legislation (relevant also in the context of Norwegian legislation) pose important questions for a just sustainability transition, as discussed in section 1; who shall bear the burden of sustainability and climate change measures? In other words, the existing legal framework does not offer a sufficient protection for Sámi territorial rights which might thus be sacrificed in the ‘green transition’. Sámi have expressed, along the lines of Indigenous peoples around the world, that, while a green transition is needed, such a transition cannot be based on colonial practices and needs to be just and fair, thereby extending the concept of green colonialism to the ongoing exploitation of Sámi territories.<sup>72</sup>

Cambou’s chapter, analysing the *Fosen* case, displays an excellent example of how it is possible to strike a balance between the protection of Sámi culture, in this case in the form of the reindeer herding livelihood, and the large-scale carbon-free energy production that in fact denied the right of the small Sámi communities to enjoy their own culture in this area.<sup>73</sup> The Norwegian Supreme Court indicated that the wind farm could have been proposed while choosing a less intrusive site, for the interest of the reindeer herders. Cambou comments, thus, that *Fosen* offers a valuable contribution to the development of the interpretation of the human right to a healthy environment while, at the same time, mainstreaming

a discourse on just sustainabilities and vis-a-vis Sámi communities.<sup>74</sup> Hence, Sámi territorial rights are not only about recognition but, equally important, effective protection in relation to opposing land and water uses. As Heinämäki puts it, the Sámi traditional way of life is seriously threatened by multiple forms of competing land uses, such as forestry and mining, and, on top of that, the effects of climate change.<sup>75</sup> Several of the authors of the chapters in this book refer to increased land use conflicts.

Because of insufficient protection and haste due to the sustainability transition, Sámi communities across Scandinavia are fighting hard to preserve their rights and cultures in multiple arenas and on multiple platforms; there are increasing conflicts with the state, with industry proponents and, quite often also, with local politicians and inhabitants who support new industries providing work opportunities and state tax revenues.

### **3.2 Sámi (ecological) knowledge**

To understand why Sámi communities often oppose planned industry projects, one must take into account Sámi holistic worldviews that have been passed down for generations. Åmot and Bjerklund, in their chapter on early Sámi childhood education and sustainability practices, are thereby touching upon the fundamental questions of Sámi (ecological) knowledge and how it is transmitted to younger generations (intergenerational exchange).<sup>76</sup> According to their study, the protection of nature and environmental sustainability appear to be the central themes in the teachers' everyday pedagogy.<sup>77</sup> One essential value that was emphasised, they observed, was respect for all life on earth and not overusing natural resources.<sup>78</sup> In particular, Åmot and Bjerklund saw that Sámi narratives and myths were being used to teach Sámi children and with a clear focus on the interconnectedness between humans and nature.<sup>79</sup> Moreover, they observed there was a focus on 'learning by doing' and using real tools and natural materials and, within that, with a clear goal of autonomy and the ability to support oneself if needed.<sup>80</sup>

This intergenerational exchange, the transmission of traditional knowledge—including knowledge related to the environment and use of resources—is essential for cultural survival. Scheinin has, in relation to the *Juvduujuuhâ* case, which was decided by the Finnish District Court in 2022, highlighted that the court determined that fishing restrictions in fact prevented the tradition of Sámi fishing that was to be passed on to future generations—namely, for the children themselves that had joined the fishing trip.<sup>81</sup> In other words, the Finnish District Court affirmed the intergenerational nature of Indigenous peoples' rights as represented in the practice of traditional or otherwise typical Indigenous practices, as well as the importance, therein, to next generations. The two Finnish Supreme Court rulings discussed by Scheinin had, in fact, missed this important aspect.

There are more general aspects of the use of Sámi ecological knowledge equally important, such as the inclusion of other knowledge systems but the

Western-oriented. With respect to the application of the Akwé: Kon Guidelines in Finland, Reimerson and Flodén comment that the process, itself, seems to have promoted the use of Sámi traditional knowledge in dealings and cooperations with state agencies.<sup>82</sup> Apart from new practices in Finland, the Norwegian *Fosen* case emphasises the importance of Sámi traditional knowledge; *Cambou* discusses this aspect of the decision in her chapter.<sup>83</sup>

In *Fosen*, the Norwegian Supreme Court heavily relied on one expert witness, Anna Skarin, and the research presented, which encompassed both Western science and traditional Sámi knowledge. These inputs highlighted the significant adverse effects of wind farms on reindeer and the studies included the results of ‘co-production of knowledge’ involving Sámi reindeer herders. Therefore, *Cambou* concludes that another important aspect of the *Fosen* case is that it raises the question of Indigenous knowledge for assessing negative impacts of development projects; it offers an avenue to challenge the dominance of Western science causing injustices that Sámi usually face in litigations, constraining Sámi claims in impact assessment processes and in courtrooms.<sup>84</sup>

#### 4. Sámi invisibility within the larger society

This section draws attention to Sámi invisibility in society at large, meaning statistical invisibility and the focus is placed on the lack of comprehensive statistical data related to Sámi as an ethnic group. In fact, statistics are more than just numbers. Governments are informed by statistics to implement policies and use such data in decisions regarding the allocation of resources. Statistics are used by civil society organisations to advance their position in policy and legislative processes. The lack of statistical data in the Scandinavian states has wide-ranging consequences related to the Sámi. Nonetheless, gathering statistical data is still a controversial issue among Sámi.

Within Scandinavia, neither Norway, Sweden nor Finland collect data on ethnicity in official statistics, meaning that there are serious deficits in statistics related to Sámi as an Indigenous people as well as significant gaps in knowledge in all three states. As *Krawchenko* and *McDonald* discuss in their chapter, concerning Sweden but nevertheless relevant for all three states, the lack of comprehensive and comparable longitudinal data means that it is precarious knowing whether Sámi rights, in general, are being realised and respected within the state.<sup>85</sup> Indeed, without such data, it is very difficult to understand, for instance, how many individuals self-identify as Sámi in the state or the extent of Sámi entrepreneurship, which, in turn, makes it almost impossible to assess potential inequalities.<sup>86</sup> In his chapter relating to Norway, Dawson attests to similar experiences.<sup>87</sup> Under such conditions, the actual legal and economic situations of the Sámi are, to a great degree, invisible within the larger society.

As indicated, the lack of comprehensive disaggregated or Sámi-related data has far-reaching consequences,<sup>88</sup> not least in the prevention of assessments of implementations of Sámi-related policies. Such an absence of data surely has widespread repercussions on Sámi culture, identity, and progress in society. Without reliable ethnicity-related statistics, it becomes almost impossible to direct policies towards



the Sámi community or know the effects as such because there is no understanding of the conditions of their daily life, well-being or changes over time. Both chapters in this book that are devoted to ethnic data (Dawson and Krawchenko & McDonald) argue that having proper statistics is a crucial element to an overall approach in advancing the rights of the Sámi.<sup>89</sup>

Data governance is closely linked to Sámi rights in the sense that the two co-determine how Sámi are officially perceived and how their rights are recognised in law. Under Swedish law, Krawchenko and McDonald explain, the Sámi are recognised as a national minority, as an Indigenous people and, as well, under general laws applicable to all Swedes (the latter applies especially those Sámi who are not members of a Sámi reindeer herding community).<sup>90</sup> An additional consequence, then, may be that, in some respects, where extensive data does exist regarding a segment of the Sámi population (such as the reindeer herding Sámi in Sweden), such data, in turn, creates biases when not considering other Sámi groups within the Sámi society. Greater visibility for Sámi reindeer herding, argue Krawchenko and McDonald, can lead to the assumption that those who practice reindeer herding are ‘true’ and ‘authentic’ in comparison to other Sámi groups.<sup>91</sup> Such disproportionate visibility amongst different groups within the Sámi society can therefore produce problems.

Evident from the chapters by Dawson and by Krawchenko and McDonald, the importance of Indigenous data has been discussed internationally for some time, such as in the United Nations Permanent Forum on Indigenous Issues.<sup>92</sup> Today, statistics on Indigenous peoples are seen as an important tool for ensuring that states monitor and meet their human rights obligations, including most recently in relation to the UN Sustainable Development Goals (SDGs). In one guide published by the UN Office of the High Commissioner for Human Rights (OHCHR), it is stated that, in relation to the 2030 Agenda, states have collectively stressed the need for more systematic data disaggregation to help achieve and measure the SDGs.<sup>93</sup> Within this context, each state should support the protection, respect and fulfilment of human rights.

The OHCHR guide provides ‘general guidance and elements of a common understanding’ on a so-called human-rights-based approach to data (HRBAD).<sup>94</sup> Such an approach brings data stakeholders together to develop communities of practice that improve the quality, relevance and use of data and statistics consistently, all in accordance with international human rights norms and principles.<sup>95</sup> The roles of Indigenous peoples in these processes are important, such as in the data collection process as a means to improve data quality; the OHCHR guide stresses the need for involvement of Indigenous communities in the processes, in particular because such inclusion, in turn, might support capacity-building and helps to ensure the relevance and accuracy of the data collection.<sup>96</sup>

The importance of claiming sovereignty over Indigenous data as a means of reclaiming control over Indigenous knowledge and ways of knowing is important today is evident from the chapters by Dawson and by Krawchenko and McDonald and has been discussed in literature. These shifts are essential to challenging the ways in which Indigenous peoples have historically been excluded from decision-making processes related to their own lives and communities. Therefore, Indigenous communities must assert their sovereignty over data and other forms of



knowledge production in order to promote Indigenous self-determination.<sup>97</sup> This understanding is, today, known as Indigenous data sovereignty.<sup>98</sup> The concept ‘Indigenous data sovereignty’ is becoming increasingly important as Indigenous communities seek to reclaim their autonomy and self-determination in the digital age. In short, Indigenous data sovereignty is crucial for Indigenous communities to exercise their right to self-determination, protect their cultural heritage and challenge the ongoing legacy of colonialism and discrimination.<sup>99</sup>

Indigenous data sovereignty is of course relevant also for the Sámi people. Concerning data collection and governance, Dawson, Krawchenko and McDonald emphasise the need for Norway and Sweden to establish genuine and equal partnerships with Sámi institutions, in particular the Sámi Parliament, and that the concept of data sovereignty should apply to any discussions regarding how data should be utilised to advance Sámi rights.<sup>100</sup> Although the section focuses on Sweden and Norway, similar challenges exist in Finland.

Given the importance of such tools, why do comprehensive Sámi-related statistics not exist? One answer to this deficit is scepticism from the Sámi society in gathering such data. Anchored in historical events, there is an ongoing distrust on the Sámi side regarding the states’ intentions.<sup>101</sup> For example, the Swedish state censuses historically have defined Sámi as an ‘unproductive’ group, alongside prisoners, and, later on, restrictively defined ‘authentic’ Sámi as only those who participate in reindeer herding—which was a racist and discriminatory manner in which to manipulate data.<sup>102</sup> Unfortunately, the same history applies to Norway. During the last part of the 1800s and the former half of the 1900s, the Norwegian state population statistics produced were invasive and discriminatory and based on pseudoscientific theories of racial superiority; the 1970 census was, in fact, the last of its kind to collect any Sámi-specific data in Norway.<sup>103</sup> The three Scandinavian countries no longer conduct traditional state censuses but compile, instead, official population statistics by linking data from extensive administrative registers which are, in turn, supplemented by smaller population surveys where necessary.<sup>104</sup> This data collection process is not helpful for creating comprehensive Sámi statistics, as such statistics would be found largely outside the administrative systems. Instead, existing Sámi data is often restricted to small geographic areas or cannot be disaggregated by Sámi ethnicity. As a result, even the sizes of the Sámi populations in these states are unknown.

To summarise, statistics are power and can be used as means to an end, to back Sámi claims; therefore, statistics are more than just numbers. Statistics are used by governments to inform policies and the allocation of resources, and statistics are used by civil society organisations to advance their interests in political and policy debates.<sup>105</sup> Therefore, there are wide-ranging consequences related to the lack of statistical data regarding the Sámi, not only in Norway and Sweden, which are the focuses of the two related chapters in this book, but also in Finland. If ethnicity-related data is not collected, Krawchenko and McDonald ask, how can a state know that rights are being met or understand changes in conditions over time?<sup>106</sup> Lastly, this also means that there exist no comparable statistics across these three states in Sápmi.

## 5. Brief conclusion and discussion

The individual chapters of this book cover a wide range of topics; this concluding chapter brings some of the topics addressed within those chapters to the forefront, themes that have united across the texts. This chapter has displayed both progress and challenges faced in respect to the recognition and protection of Sámi territorial rights within the three Scandinavian states, and it is evident that all three states have problems, as such, but in different ways and depending on the legal contexts of each state.

A general insight from state-specific reports by chapter authors of this book is that domestic courts, today, seem more willing than before to address constitutional and international human rights law in resolving the cases before them, and it is likely that this development will continue and even increase. This trend seems to apply, also, to the Finnmark Commission and its appellate body, the Land Tribunal for Finnmark, at least concerning the recent *Karasjok* case, whereby collective ownership had been acquired by immemorial usage (*alders tids bruk* in Norwegian). That state courts interpret and apply international law regarding Indigenous rights is today becoming more common and should not be understood as an act of politics or overstepping the courts' authority (see section 2.2).

A rather new theme in the Scandinavian Sámi rights discourse is the matter of reliable and comprehensive Sámi statistics. The lack of such data has noticeable consequences. For example, it is difficult to assess the effects of new or established Sámi-related policy or whether Sámi rights are recognised and respected within a country. This is a remarkable deficit. Measures should also be put in place for Sámi data sovereignty, especially as means to exercise their right to self-determination, protect their cultural heritage and challenge the ongoing legacies of colonialism and discrimination in the Scandinavian states. This is also important as Indigenous communities around the world seek to reclaim their autonomy and self-determination in the digital age.

Something that is particularly worrying is the haste in which the new industrialisation and sustainability transitions are taking place in the Scandinavian North, whereby Sweden has a clear ambition to be the leading state in such changes from a European (and global) perspective. The protection of Sámi territorial rights is not established firmly yet, and with multiple land use pressures, the landscape will become even more fragmented. Reindeer herders are being forced to accept new industries and infrastructures on their grazing areas, in turn needing to adapt and change grazing patterns as well as provide their reindeer with supplementary food (especially during winter). Here, the Norwegian Supreme Court's interpretation of Article 27 of the ICCPR in the *Fosen* case can be helpful for moving away from currently standard mitigation measures, such as compensatory winter feeding for reindeer, towards the direction of supporting 'traditional', nature-based measures, such as the reindeer's winter grazing. With an increased fragmentation of grazing areas, flexibility with respect to alternative areas for grazing is, however, diminishing; available grazing areas have, over the past decades, substantially decreased year by year. This change is a serious and real threat to the future of the Sámi

reindeer herding culture, Sámi languages and Sámi traditional knowledge and ways of life. To properly assess cumulative pressures, which Heinämäki emphasises in her chapter, it is necessary to make cumulative impact assessments in relation to all permitting processes, to then monitor whether the threshold of Article 27 (ICCPR) is met in an area, denying Sámi in their community the right to enjoy their culture.<sup>107</sup>

Because of the seriousness of these issues, we can expect an increase of land use conflicts within Sámi traditional territories and in appeals made regarding permit decisions. The role of the state courts becomes paramount, then, in the respecting and protection of Sámi territorial rights and their rights to enjoy their culture, as well as in the providing of a fair and just balance between the differing rights and interests, environmental protection and climate change needs. This is within the scope of the courts' role. However, the states also need to follow and implement the Supreme Court decisions protecting Sámi territorial rights and culture, something that has proven to be difficult for the Norwegian government concerning the two wind farms in the *Fosen* case that have yet to be dismantled despite the court's decision. The aftermath of the Swedish *Girjas* case has, so far, led to the establishment of a Public Law Commission in Sweden to, for instance, analyse if Sámi reindeer herding communities other than Girjas, within the Swedish North, have acquired the same rights as Girjas to lease their rights to small-game hunting and fishing to other persons. So far, the existence of the necessary political will to change the relevant legislation is dubious,<sup>108</sup> and most likely a lack of political will result in a series of new lawsuits against the Swedish state on the matter.<sup>109</sup>

Finally, to come full circle to where we started: Land is essential to Indigenous peoples, and so it is to Sámi communities. The protection of their territories and rights is of the utmost importance; any threat to Sámi lands is a threat to their way of life, including their distinctiveness as an Indigenous people, which is put forward by Åhrén in his chapter. Even if a sustainability transition to combat climate changes indeed is necessary, there is an evident risk that new industries in the Scandinavian North easily trump in a balancing of interests vis-à-vis the protection of Sámi territorial rights and culture—industries benefit from a larger public support both in terms of a 'greening' industrialisation and increased employment in rural areas. Should we really accept such unjust violations for 'the greater good'?

## Notes

1. United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA A/RES/61/295 (UNDRIP).
2. *ibid* arts 25–26, 32.
3. *ibid* art 8.
4. ILO Convention No. 169 concerning Indigenous and Tribal People in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention No. 169).
5. See, e.g., *ibid* arts 14–15.
6. cf. James Anaya, *Indigenous Peoples in International Law* (OUP 2004) 143.
7. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

- 8 UN Human Rights Committee, ‘CCPR General Comment No 23: Article 27’ (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5, para 7.
- 9 Marianne Stoessel, Jon Moen and Regina Lindborg, ‘Mapping Cumulative Pressures on the Grazing Lands of Northern Fennoscandia’ (2022) 12(16044) *Scientific Reports*. The study considers changes over the last 60 years of grazing lands for reindeer and sheep; effects caused by hydroelectric dams or power lines are not included.
- 10 *ibid.*
- 11 *ibid.* For more information, see e.g., Åsa Larsson Blind, ‘Pathways for Action: The Need for Sámi Self-Determination’ in Tim Horstkotte and others (eds), *Reindeer Husbandry and Global Environmental Change—Pastoralism in Fennoscandia* (Routledge 2022).
- 12 Including during the recent 22nd session of the Permanent Forum on Indigenous Issue at the UN headquarters in New York City on 20 April 2023. See Jenni Monet, ‘“Green Colonialism”: Indigenous World Leaders Warn Over West’s Climate Strategy’ *The Guardian* (23 April 2023) <<https://www.theguardian.com/world/2023/apr/23/unindigenous-peoples-forum-climate-strategy-warning>> accessed 28 April 2023.
- 13 Stoessel, Moen and Lindborg (n 9).
- 14 Rishabh Kumar Dhir, *Sustainable Development Goals—Indigenous Peoples in Focus* (International Labour Organization 2016).
- 15 See particularly the SDGs 12–17 that are important for Indigenous peoples.
- 16 See, e.g., Johannes M Waldmüller, Mandy Yap and Krushil Watene, ‘Remaking the Sustainable Development Goals: Relational Indigenous Epistemologies’ (2022) 41(4) *Policy and Society*; Jacobo Ramirez and Steffen Böhm, ‘For More Pluralistic Critiques of Colonialism: A Response to Dunlap’ (2021) 82 *Energy Research & Social Science*; Dorothee Cambou, ‘Uncovering Injustices in the Green Transition: Sámi Rights in the Development of Wind Energy in Sweden’ (2020) 11 *Arctic Review on Law and Politics*.
- 17 This assessment system exists due to Norway’s obligations regarding the land rights provisions in ILO Convention No. 169. The Finnmark Commission is tasked to investigate the existence of Sámi land rights in Finnmark County and was established via the Finnmark Act 2005.
- 18 Øyvind Ravna, ‘The survey of property rights in Sámi areas of Norway—with focus on the Karasjok case’ in Dorothee Cambou and Øyvind Ravna (eds), *The Significance of Sámi Rights: Law, Justice, and Sustainability for the Indigenous Sámi in the Nordic Countries* (Routledge 2023).
- 19 *ibid.*
- 20 The Land Tribunal of Finnmark, UTMA-2021–086077 and UTMA-2021–086497, decided on 21 April 2023.
- 21 Supreme Court of Norway, HR-2021–1975-S (*Fosen*).
- 22 Dorothee Cambou, ‘The significance of the *Fosen* decision for protecting the cultural rights of the Sámi Indigenous people in the green transition’ in Cambou and Ravna (n 18).
- 23 *ibid.*
- 24 Although there is also no room for a proportionality assessment, it may, according to the Supreme Court, be necessary to strike a balance if Article 27 conflicts with other basic rights, such as the right to a good and healthy environment.
- 25 Cambou (n 22).
- 26 *ibid.*
- 27 *ibid.*
- 28 See also Christina Allard and Malin Brännström, ‘Girjas Reindeer Herding Community v Sweden: Analysing the Merits of the Girjas Case’ (2021) 12 *Arctic Review on Law and Politics*, chs 4–5.
- 29 Eivind Torp, ‘The interplay of politics and jurisprudence in the *Girjas* case’ in Cambou and Ravna (n 18).

- 30 *ibid.*
- 31 *ibid.*
- 32 Leena Heinämäki, 'The prohibition to weaken the Sámi culture in international law and Finnish environmental legislation' in Cambou and Ravna (n 18); Martin Scheinin, 'Indigenous peoples' right to fish: recent recognition of Sámi rights in Finland through civil disobedience and criminal trial', in Cambou and Ravna (n 18).
- 33 Heinämäki (n 32).
- 34 *ibid.*
- 35 *ibid.*
- 36 *ibid.*
- 37 *ibid.*
- 38 Scheinin (n 32).
- 39 *ibid.*
- 40 *ibid.*
- 41 *ibid.*
- 42 *ibid.*
- 43 *ibid.*
- 44 *ibid.*
- 45 *ibid.*
- 46 *ibid.*
- 47 The case concerned winter pasture rights, on private lands, for three reindeer herding communities.
- 48 Mattias Åhrén, 'The relevance of the UN Declaration on the Rights of Indigenous Peoples to vibrant, viable and sustainable Sámi communities' in Cambou and Ravna (n 18).
- 49 The case concerned the lawfulness of a large wind farm. See *Fosen* (n 21).
- 50 Åhrén (n 48).
- 51 *ibid.*
- 52 *ibid.*
- 53 Elsa Reimerson and Linn Flodén, 'Navigating conservation currents: conditions for Sámi agency in collaborative governance and management models' in Cambou and Ravna (n 18).
- 54 *ibid.*
- 55 These are voluntary guidelines on how to assess cultural, environmental and social impacts, regarding development projects likely affecting Indigenous traditional territories, including sacred sites.
- 56 Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD); *ibid.*
- 57 Torp (n 29).
- 58 Allard and Brännström (n 28).
- 59 Torp (n 29).
- 60 See also Christina Allard, 'Some Characteristic Features of Scandinavian Laws and Their Influence on Sami Matters' in Christina Allard and Susann Funderud Skogvang (eds), *Indigenous Rights in Scandinavia—Autonomous Sami Law* (Ashgate 2015) 51.
- 61 Torp (n 29)
- 62 See, e.g., Mattias Derlén and Johan Lindholm, 'Judiciell aktivism eller prejudikatbildning? En empirisk granskning av Högsta domstolen' (2016) vol 2 Svensk Juristtidning (SvJT) 143–58.
- 63 Malin Brännström, 'The implementation of Sámi land rights in the Swedish Forestry Act' in Cambou and Ravna (n 18).
- 64 Scheinin (n 32).
- 65 Christina Allard, *Renskötselrätt i nordisk belysning* (Makadam 2015) 311–15 with references; Allard (n 60) 52–55.
- 66 See the individual articles in the special issue ('Högsta domstolen—50 år som prejudikatinstans') in Volume 5–6 2022 of Svensk Juristtidning (SvJT), as well as individual articles in the special issue ('Svensk Juristtidning 100 år') 2016. See also e.g., Fredrik

- Wersäll, ‘En off ensiv Högsta domstol. Några refl ektioner kring HD:s rättsbildning’ (2014) vol 1 Svensk Juristtidning 1–8; Ola Wiklund, ‘Om Högsta domstolens rättsskapande verksamhet—löper domstolen amok?’ (2014) vol 4 Svensk Juristtidning 335–47.
- 67 Cambou (n 22); Ravna (n 18).
- 68 Ravna (n 18); Scheinin (n 32); Brännström (n 63); Reimerson and Flóden (n 53).
- 69 Brännström (n 63); Heinämäki (n 32).
- 70 Brännström (n 63).
- 71 Heinämäki (n 32).
- 72 See the Sámiráddi/Saami Council declarations: Váhtjer Declaration 2022, preamble p 3 and Tráante Declaration 2017, para 26 < <https://www.saamicouncil.net/en/declarations>> accessed 13 May 2023.
- 73 Cambou (n 22).
- 74 *ibid.*
- 75 Heinämäki (n 32).
- 76 Ingvild Ámot and Monica Bjerklund, ‘Sámi rights and sustainability in early childhood education and care: sustainability in everyday practices in Norwegian kindergartens’ in Cambou and Ravna (n 18).
- 77 *ibid.*
- 78 *ibid.*
- 79 *ibid.*
- 80 *ibid.*
- 81 Scheinin (n 32).
- 82 Reimerson and Flodén (n 53).
- 83 Cambou (n 22).
- 84 *ibid.*
- 85 Tamara Krawchenko and Chris McDonald, ‘Rendering the invisible visible: Sámi rights and data governance’ in Cambou and Ravna (n 18).
- 86 *ibid.*
- 87 Peter Dawson, ‘A human-rights-based approach to Sámi statistics in Norway’, in Cambou and Ravna (n 18).
- 88 Data disaggregation means breaking down large data categories into more specific subcategories. When data are broken down, such as by ethnic groups, they can show the unique differences among groups and reveal significant disparities.
- 89 Dawson (n 87); Krawchenko and McDonald (n 85).
- 90 Krawchenko and McDonald (n 85).
- 91 *ibid.*
- 92 Dawson (n 87); Krawchenko and McDonald (n 85).
- 93 UN Office of the High Commissioner for Human Rights (OHCHR), ‘A Human Rights Based Approach to Data’ (2018) 2. Data is here used as ‘a generic term, including but not limited to statistics. It is seen as encompassing a wide range of quantitative or qualitative standardized information compiled by national statistical offices as well as other governmental or non-governmental entities, whether at local, national, regional or global level’. See *ibid* fn 1.
- 94 *ibid.*
- 95 *ibid.*
- 96 *ibid* 3, fn 8.
- 97 See further Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (3rd edn, Zed Books 2021); Tahu Kukutai and John Taylor (eds), *Indigenous Data Sovereignty: Toward an Agenda* (Australian National UP 2016); Marie Battiste (ed), *Reclaiming Indigenous Voice and Vision* (British Columbia UP 2000).
- 98 Dawson (n 87); Krawchenko and McDonald (n 85).
- 99 *ibid.*
- 100 *ibid.*
- 101 *ibid.*
- 102 Krawchenko and McDonald (n 85).

- 103 Dawson (n 87).
- 104 *ibid.*
- 105 Krawchenko and McDonald (n 85).
- 106 *ibid.*
- 107 Heinämäki (n 32).
- 108 At the time of writing (Summer 2023), unity among the political parties for forwarding legal proposals on Sámi small-game hunting and fi shing in the Law Commission is lacking. See Jörgen Heikki, 'Ingen enighet i Renmarkskommittén—M, SD och KD reserverar sig' (*Sameradion*, 19 June 2023) <<https://sverigesradio.se/artikel/ingenighet-i-renmarkskommitten-m-sd-och-kd-reserverar-sig>> accessed 20 June 2023.
- 109 The Talma reindeer herding community has already on 18 May 2020 handed in a lawsuit against the Swedish state claiming their exclusive hunting and fi shing rights.



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