

Sámi law and rights in Norway – with a focus on recent developments

Øyvind Ravna,

Professor dr.juris, UiT Norges arktiske universitet

Abstract: This chapter addresses the legal protection of the Sámi as Indigenous peoples in Norway and thus the laws that protect Sámi language, culture and way of life or, in other words, *Sámi law*. The chapter describes the development of Sámi law and Sámi legal protections over the past 30 years, with a primary focus on recent developments and current legal status. Through this review, the chapter summarises the latest advances in international law related to the Sámi, the process of surveying and recognising land rights in Finnmark (the most central Sámi area in Norway) and the latest amendments to the Reindeer Husbandry Act. Questions about the right to the usage, management and control of natural resources, or “land and water”, in the Sámi area of Norway therefore occupy a central place in this examination.

Keywords: ILO 169, ICCPR, Land Rights, Finnmark Act, Sámi, Indigenous peoples

Introduction

Over the past four decades, an extensive development of Sámi rights and legal protections for Sámi culture has occurred in the Nordic countries. Norway is considered a leading power in this expansion, which makes its progress an interesting object of study.

Due to the controversial Alta case from the 1970s and beginning of the 1980s, the Norwegian government was pushed to establish the Sámi Rights Committee and grant it a

mandate to examine the legal position of the Sámi and propose legislative amendments. This committee, which became an engine of progress in ensuring Indigenous rights in Norway, spurred the Sámi Act (1987), a constitutional amendment protecting Sámi language, culture and way of life (1988), and the Sámi Parliament (1989). In 1990, Norway was the first country in the world to ratify ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent States (ILO 169).

Thus, Norway has assumed significant legal obligations for the protection of Sámi language and culture, which include the right of the Sámi to be consulted in legislative or administrative measures which may affect them directly and participate in decision-making processes relating to natural resources pertaining to their lands. This progress continued into the first decade of the 21st century, as Norway adopted the Human Rights Act (1999), which incorporated the International Covenant on Civil and Political Rights (ICCPR) as Norwegian law, with precedence over internal legislation. In 2005, the Finnmark Act was adopted, which completed the work of the Sámi Rights Committee (I) started in 1980 when it comes to Finnmark. However, in 2001, another Sámi Rights Committee (II) was reappointed to investigate the situation in the Sámi areas south of Finnmark. At the same time, Norway was at the forefront of the adoption of the UN Declaration on the Rights of Indigenous Peoples (2007) by the UN General Assembly. This declaration presumably strengthened the legal protection of the Sámi culture as well.

In this chapter, the laws that protect the Sámi culture, language and way of life in Norway are examined. The purpose of this study is to discuss how Norway legally protects Sámi culture and language, including how the country complies with its international obligations and what place customary Sámi law holds in Norwegian law. Queries about the right to “land and water”, or the material basis of Sámi culture, consequently occupy a significant place in the analyses. Particular attention is paid to development connected to the Finnmark Act and the latest Supreme Court cases related to Sámi issues.

Until 2005, the doctrine held that the Norwegian state was the owner of unceded or unsold land in most of the Sámi areas in Norway, without any responsibilities for use rights

belonging to others beyond those evidenced by statutory laws or deeds. This has since shifted, and the area in focus today largely belongs to the Finnmark Estate, a new ownership body that represents the rights that have been transferred from the state to the people in Finnmark. On this land, a process is ongoing to clarify and recognise usage and property rights. To date, six investigative reports and two Supreme Court judgements have emerged from this recognition process in the Sámi areas of Finnmark (Finnmarkskommisjonen, Rapport Felt 1 to 6, HR-2016–2030-A, HR-2018–456-P).

The regulation of Sámi reindeer husbandry is another controversial issue, as are other intervention cases related to the Sámi use of land and water. Also, although the Parliament has adopted fishery law amendments, disputes concerning rights to marine resources in coastal areas outside of Finnmark are not yet fully resolved; however, coastal rights are not addressed in this chapter.

Background of Sámi Law in Norway

Historically, the first treaty regulating the use of land by the Sámi was The Lapp Codicil, an annex to the border treaty of 1751 between Sweden and Denmark – Norway. The codicil confirmed the Sámi right to annually cross the border with their reindeer, based on “old customs”. The codicil is generally characterised by a positive spirit and a desire to facilitate the continued existence of the Sámi nation. The pending Nordic Sámi Convention can be regarded as an extension of the codicil (The Draft Nordic Sámi Convention 2017).

From the mid-19th century, the Sámi were subjected to a targeted assimilation policy, while the state’s ownership of Sámi areas was ascertained through the state’s land doctrine and the adoption of the Land Sales Act of 1863. Although the assimilation policy gradually declined in use after the Second World War, the state’s land doctrine was, in principle, in force until 2006, when the Finnmark Act replaced the Land Sales Act of 1965.

The decision to construct a hydropower plant on the Alta-Kautokeino watercourse in 1978 forced the debate on the Sámi's rights to land and water to the forefront. To the extent that positive attitudes towards the Sámi had developed during the post-war period, the hydropower plant issue revealed how little this entailed practically in politics. Although the Alta river was ultimately dammed, the case became a turning point in Norwegian Sámi policy; in the fall of 1980, the Sámi Rights Committee was founded, which spurred the legislative push that culminated in the Finnmark Act 25 years later.

In the following three sections, I outline how Sámi uses, rights and customary law are safeguarded and regulated in Norway by both internal law and the international law to which Norway is bound, what impact Sámi law exerts and how these issues affect possibilities for the Sámi to participate in managing natural resources in Sápmi.

National legislation

Article 108 of the Constitution

The Norwegian Constitution, which is the national source of the highest law, includes a “Sámi Article”, which reads as follows:

The authorities of the state shall create conditions enabling the Sámi people to preserve and develop its language, culture and way of life.

This provision establishes a general protection for Sámi culture. In 1988, it was adopted as Article 110a, based on a proposal from the Sámi Rights Committee. During the constitutional revision in 2014, it was updated, linguistically and chronologically, as Article 108. The article outlines legal obligations primarily addressing the state authorities, which was emphasised by the Sámi Rights Committee when they drafted the provision (NOU 1984: 18, 433) and later reinforced by executive authority (St. meld. nr. 28 [2007–2008], 29) and the Supreme Court

(HR-2018–456-P, para. 91). Article 108 is modelled after ICCPR Article 27, which, according to the Sámi Rights Committee II, means that it must be interpreted in accordance with continuously applicable international law demands on Norwegian authorities (NOU 2007: 13, 191).

Little case law on Article 108 exists. However, it exerted significant impact when the Inner Finnmark District Court, a district court with Sámi-speaking judges possessing specific knowledge in Sámi customs and customary law, was established in 2004. A public investigation preceding the establishment of the Court concluded that Article 110a requires that judges possess expertise and insight into Sámi language, law and culture. This was crucial for the establishment of the Court (NOU 1999: 19, 20, NOU 1999: 22, 72).

The Sámi Act and the Reindeer Husbandry Act

The Sámi Act (1987) and the Reindeer Husbandry Act (2007) are both intended to safeguard Sámi culture. The latter, however, also provides authority for interventions in reindeer herders' livelihoods.

The Sámi Act aims “to enable the Sámi people in Norway to safeguard and develop their language, culture and way of life” (cf. Section 1–1), complementing Article 108 of the Constitution. Section 1–2 authorises the establishment of the Sámi Parliament, which is further regulated in Chapter 2. The preparatory work states that the purpose of the Act cannot be achieved without special measures towards the Sámi; “the formal equality in a narrow sense” must give way to equality in the wider sense or, in other words, “a real equality between Sámi culture and other culture in Norwegian society” (Ot.prp. nr. 33 [1986–1987], 23).

Chapter 3 deals with the Sámi language. Section 3–2 states that “[s]tatutes and regulations of particular interest to all or parts of the Sámi population shall be translated into Sámi”. The chapter ensures extended rights to use the Sámi language in the courts (cf. Section 3–4) and the health sector (cf. Section 3–5). In 2014, the government appointed a committee to study legislation and measures to protect the Sámi language in Norway. This committee has

suggested, amongst other things, that all municipalities create plans for strengthening Sámi language and culture in their service offerings and that a language area replace the current Sámi language administrative area, wherein relevant municipalities are divided into categories with differentiated obligations and responsibilities (NOU 2016: 18, 95, 99 129).

The Reindeer Husbandry Act (2007) aims at facilitating ecologically, economically and culturally sustainable reindeer husbandry. The Act emphasises the importance of Sámi traditions and customs, as demonstrated by the Sámi reindeer husbandry community, or *siida*, gaining a place in the act. The government, however, recently proposed that the ecological objective take precedence over the cultural and economic objectives (Meld. St. 32 [2016–2017]), so that ecological considerations may be emphasised more heavily than Sámi culture and requirements for economic operations when interpreting the Reindeer Husbandry Act. After consultations with the Sámi Parliament, the proposal was taken out of the bill, and not adopted by the Parliament, (Prop. 90 L [2018–2019]). Rules on making reindeer numbers available and mandatory individual marking of reindeer were however, adopted.

Section 3 states that the Act shall be applied in accordance with international law on Indigenous peoples and minorities. The rule on the burden of proof, established in Section 4, para. 2, entails that in case of dispute, landowners must prove that no reindeer-herding rights exist on their lands within the Sámi reindeer pasture area (Nrt. 2001, 769 [786–788]). Section 4, para. 1 codifies legal rules that have emerged through case law, ensuring that reindeer husbandry's legal basis stems from immemorial or historical usage.

The Reindeer Husbandry Act was substantially revised in 2014. The revision meant that the regional administrations, which had reindeer herders on their boards, were discontinued and their duties transferred to the county governor (Fylkesmannen). The amendment was met with criticism from the Sámi Parliament and reindeer husbandry organisations, as it was considered, amongst other issues, an intervention against Sámi self-determination and self-management (Prop. 89 L [2012–2013], 9–10).

In recent years, the act has been criticised for its strict rules in regulating and reducing the number of reindeer, as was made very clear in Supreme Court Case HR-2017–2428-A (*Sara*). The appellant, Jovsset Ante Sara, has acquired significant support, even beyond the Sámi community, and the Supreme Court decision has been sent as an individual complaint to the UN's Human Rights Committee (HRC).

The Finnmark Act, the Finnmark Estate and the process of the survey land rights

The Finnmark Act (2005) resulted from inquiries into Sámi rights to land and water which were accentuated during the Alta case and which the Sámi Rights Committee was mandated to investigate.¹ It is also a result of the commitment Norway undertook by ratifying ILO 169. Although an expert subgroup of the Sámi Rights Committee concluded that the Norwegian state owned the previously unsold or unceded land in Finnmark (NOU 1993: 34, 266), the Committee proposed abolishing this ownership (NOU 1997: 4). The rationale for this decision lays in requirements in international law and the absence of a legal basis for the state's ownership. The durability of the legal group's conclusions has recently been questioned (Ravna 2020).

Due to the Finnmark Act, the Norwegian state transferred the title of 95% of the county's area (46,000 km²) to a new legal entity, the Finnmark Estate. A primary objective of the Act, according to preparatory works, was “to replace uncertainty and dispute over the right to land and water in Finnmark with security and predictability regarding the natural basis for Sámi culture, [and] for the inhabitants' use of the outlying fields . . . based on a sustainable utilisation of resources” (Ot.prp. nr 53 [2002–2003], 7).

In the same preparatory works, the Ministry of Justice heralded “a significant historical shift to local governance and a clear statement of confidence to all the people of Finnmark, regardless of ethnic or cultural background”. This historical shift, however, has not been as significant as predicted by the Ministry. This may be because many old management traditions

have been continued by former employees of Statskog, who gained positions in the new body via statutory requirement. Furthermore, none of the local management structures proposed by the Sámi Rights Committee have been adopted.

The Finnmark Act's purpose is to facilitate the management of land and natural resources in the county of Finnmark in a balanced and ecologically sustainable manner for the benefit of the residents of the county and particularly as a basis for Sámi culture, reindeer husbandry, the use of non-cultivated areas, commercial activity and social life (cf. Section 1). Section 3 states that the law "shall apply with the limitations that follow from ILO Convention No. 169". This is a sectorial incorporation (Innst. O. nr. 80 [2004–2005], 33). In addition, "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". Beyond treaties concerning Indigenous peoples and minorities, this sentence references an agreement about fishing in the border rivers of Tana and Neiden (between Finland and Norway). Fishing in the Tana River has, since 2014, been regulated in a separate Tana Act (20 June 2014 no. 51) aimed at securing the particular rights of local people to fish in the Tana watercourse on the basis of law, immemorial usage and local custom. Section 3 of the Tana Act is worded similarly to Article 3 of the Finnmark Act.

This section (of the Finnmark Act) assumes that ILO 169 applies to the process of surveying and recognising existing rights, regulated under Chapter 5 of the Finnmark Act. The Supreme Court has, however, interpreted the scope of the incorporation more narrowly, stating that ILO 169 takes precedence only over the Finnmark Act's own provisions (Ravna 2019, 173–178). I return to that interpretation subsequently.

Of major interest is Section 5, para. 1, which states,

Through prolonged use of land and water areas, the Sámi have collectively and individually acquired rights to land in Finnmark.

Para. 2 states that the Act does not interfere with collective or individual rights acquired by Sámi and other people through prescription or immemorial usage, while para. 3 establishes the process of surveying and recognising land rights. It reads,

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, a commission shall be established to investigate rights to land and water in Finnmark and a special court to settle disputes concerning such rights, cf. chapter 5.

Section 29 authorises the establishment of the Finnmark Commission, “which, on the basis of current national law, shall investigate rights of use and ownership to the land to be taken over by Finnmark Estate”. The preparatory works explain that the wording of “current national law” is used to emphasise that Sámi customs and legal opinions are part of the law (Innst. O. nr. 80 [2004–2005], 18–19). The establishment of the Finnmark Commission and the Uncultivated Land Tribunal for Finnmark for Finnmark is anchored in ILO 169 Article 14 (Innst. O. nr. 80 [2004–2005], 28).

The Finnmark Commission began its work in the spring of 2008. As of March 2020, it has completed six fields of investigation. In the first five reports, the Commission found no areas of collective rights, Sámi property rights or use rights beyond what was previously settled in the Finnmark Act (except for the peculiar case of Gulgofjord/Vuodavuotna in Field 6; Finnmark Commission 2015, 170). The justification for these findings lies not in a lack of actual use from the concerned people or other requirements directly related to the rules of prescription or immemorial usage but rather the state’s, or the government’s, dispositions and activities as resource manager and public authority (Ravna 2019, 483–485). In its latest report, *Field 4 Karasjok*, delivered in December 2019, the Commission has placed significantly less emphasis on governmental dispositions, and it also assesses the local population’s use in a different manner than in previous reports. As a result, the Commission concludes that the local population in the Karasjok municipality has property rights to areas that are currently managed by the

Finnmark Estate. Whether the result shall remain standing is uncertain, as the conclusion was made with dissent (3–2).

The Uncultivated Land Tribunal for Finnmark, which was established in 2014 with a mandate to settle disputes arising from investigations by the Finnmark Commission, has heard 16 cases as of January 2020. An initial initiative to consider Norway’s obligations under international law vis-à-vis the Sámi – by recognising the local Sámi people’s right to control their rights of use in a January 2017 judgement concerning *Nesseby* (UTMA-2014–164739) – was reversed through the *Gulgojford* judgement in the fall of 2018. Here, efforts by the Finnmark Commission to recognise ownership rights of a coastal Sámi population were strictly rejected (UTMA-2017–62459).

Legally speaking, however, there is no reason to criticise the Finnmark Commission’s application of the law, as its general opinions and application of law were confirmed by the Supreme Court in the *Nesseby* case (HR-2018–456-P). Furthermore, the Land Tribunal has anchored its *Gulgojford* judgement on this Supreme Court case.

The Finnmark Act has been internationally upheld as an example (Anaya 2011, para 44). As the results of the surveying process have become visible, the international response has been stunning. In 2016, the UN Special Rapporteur of the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, noted that “the Commission has almost exclusively found no grounds for recognising Sámi individual or collective ownership or usage rights beyond usage rights already granted to all inhabitants in Finnmark”, after which she added that “[s]uch conclusions seem to have been motivated by the State’s active and extensive disposition of land and resources in the investigated fields which is seen to have precluded property or usage rights for the local population” (Tauli-Corpuz 2016, para 23). The Special Rapporteur then stated,

the State’s earlier dispositions as the claimant of property rights in Finnmark cannot be considered to create law in order to support its continued ownership of land. The importance of that point can be further underscored by the fact that in

many cases, the Sámi communities' severed connection to their lands and resources is a result of earlier government policies and assimilation efforts towards the Sámi. A starting point for any measures to identify and recognize Indigenous peoples' land and resource rights should be their own customary use and tenure systems.

(Tauli-Corpuz 2016, para 24)

Her point of view, however, stands in direct contrast to the Norwegian Supreme Court, which has emphasised the state's dispositions as crucial for the Finnmark Estate's mandate to govern local people's rights to their traditional lands.

International obligations

The significance of international law for Norway's commitments to the Sámi

The Norwegian legal system comprises a dualistic structure, in which international law must be implemented through an act of the Parliament to become national law. At the same time, Norway has placed considerable weight on adhering to international standards and obligations, as demonstrated by the *presumption principle* being part of Norwegian law. The principle entails that, unless otherwise expressly stated, Norwegian law shall be interpreted in accordance with the rules of international law (Ruud and Ulfstein, 68–69). This applies to both basic human rights as prohibition of torture, racial discrimination and attacks on freedom of expression, as well as specific human rights aimed at preserving the culture and languages of Indigenous peoples and minorities. Norway's emphasis on international law is shown by its ratification of ILO 169 and incorporation of the most significant human rights conventions through the Human Rights Act of 1999. Norway's active work for the UN's adoption of the Declaration on the Rights of Indigenous Peoples also demonstrates this intention. The most relevant international obligations when it

comes to protecting Indigenous culture and livelihood in Norway are International Labour Organization (ILO) Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169) and International Covenant on Civil and Political (ICCPR). But the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is also gaining more significance, which I will return to in short.

The ICCPR is, as demonstrated previously, a part of Norwegian law. Article 27 is particularly relevant to Indigenous people and ethnic minorities. The provision establishes a right for persons belonging to minorities not to be denied the right to enjoy their own culture, profess and practise their own religion or use their own language. Statements by the UN's HRC, which is the Covenant's monitoring body, shows that Article 27 not only provides minorities with protection against being denied the right to exercise their culture but also imposes "positive measures by States . . . to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language" (HRC, para 6.2).

The HRC has made clear through both general statements and assessments in individual complaints that Article 27 also protects the material basis of minority culture. As such, land, waters, pastures and other natural resources of importance to traditional Sámi livelihood are protected. In this context, the HRC has stated "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" (HRC 1994, para 7). The statement shows that protections against decisions that may affect them are particularly important for Indigenous peoples.

It is therefore not doubtful that a threshold exists beyond which decisions affecting Indigenous peoples violates the Covenant. In *Ángela Poma-Poma vs. Peru* (HRC 2009, the HRC found that this threshold had been crossed when the minority group could no longer receive economic yield from their livelihood due to a state decision, which did not involve them. In the *Sara* case (HR 2017–2428-A), which arose over a dispute concerning the possibilities of the State Reindeer Husbandry Administration to reduce the numbers of reindeer in a siida in order to

limit presumed overgrazing, the Norwegian Supreme Court confirmed the ruling of *Poma-Poma* a general norm (para. 69). However, the Court found that the *ratio decidendi* of the *Poma Poma* case did not apply considering the facts of the particular case. According to the Supreme Court:

In the case at hand, it is not the majority society's interference with a minority interest that is to be balanced against the protection in ICCPR article 27. It concerns a regulation meant to protect the interests of the Sámi herders, which raises issues on how the burden of the reindeer cull is to be distributed among them. Legal principles in cases concerning encroachment of nature cannot automatically be applied in such a case ((HR 2017–2428-A, para. 71).

In other words, the Supreme Court found that the measure which imposed for Sara to reduce the number of reindeer in his herd was justified, as the dispute concerned an allocation of grazing resources within the siida (if Sara was allowed to keep his number of animals, other practitioners had to reduce more more than the Reindeer Husbandry Act's requirement for a proportionate reduction, cf. section 60). In other words, HRC's case law was not significant for *internal Sámi issues*. The decision was, however, opposed by one of the Supreme Court judges (para 109–139).

In accordance with the *Poma-Poma* case, the Supreme Court also confirmed that a representative body of the minority *generally* must have participated in and given its consent to the decision or law authorising the measure. However, the Supreme Court also found that no such requirement should be applied in the *Sara* case (para. 74–75). As the decision of the court remains controversial, the case has been appealed to the HRC, and the result is awaited with considerable interest.

Norway was the first country to ratify ILO 169, in 1990. As Norway has a dualistic legal system, international law must be incorporated or transformed to take effect as internal law. Although the legislature did not incorporate ILO 169 through the Human Rights Act in 1999, Norway is obliged to by the Convention. ILO 169 is thus an important source of law (NOU 1993: 18, 142). Amongst other issues, it demands consultations, that the customs and customary

law of Indigenous peoples should be emphasised in the courts and that Indigenous people's property rights or use rights should be recognised and secured. The legislative, executive and judicial powers in Norway have all assumed that the Sámi are covered by this obligation (Dokument 8:154 S [2010–2011], 1–5; Nrt. 2001, 769). In 2005, the ILO 169 was incorporated in a sectorial manner through the Finnmark Act, also referred to as “sectorial monism”, which is explained subsequently. Elsewhere, the ILO 169 is not incorporated but has significance in accordance with the *presumption principle* in Norwegian law, which states that Norwegian law presumes to comply with international law, particularly in cases where several interpretative alternatives to Norwegian law exist.

Article 6 obliges state authorities to consult Indigenous peoples. According to para. 1 (a), the duty of consultation appears “whenever consideration is being given to legislative or administrative measures which may affect them directly”. This article formed the basis for the agreement on consultation procedures between the government and the Sámi Parliament (2005). Held against the HCR's interpretation of ICCPR Article 27 and the UN Declaration on the Rights of Indigenous Peoples Articles 19 and 32, the duty to consult (and right to participate) under certain conditions may include free, prior and informed consent. See also the Norwegian Supreme Court in the *Sara* case (HR-2017–2428-A),² which states that conditions of consent for external interventions exist in cases “which completely tore down the livelihood of the complainant and the other members of the minority community she belonged to” (para. 74).

In 2007, the Sámi Rights Committee II proposed a consultation act requiring conditional consent (NOU 2007:13, 824). In 2018, the government presented its bill on the topic without such a requirement (Prop. 116 L [2017–2018]). On 30 April 2019, the bill was heard by the Parliament, which decided to send it back to the government for new hearings (Innst. 253 L [2018–2019]).

Article 8 deals with the customs or customary law of Indigenous peoples. In (1), it is stated that “[i]n applying national laws and regulations to the peoples concerned, due regard shall

be had to their customs or customary laws”. The provision ensures customary Sámi law as a source of law.

Article 14 deals with Indigenous people’s rights of ownership and possession of the lands they have traditionally occupied. The purpose of the provision is the legal recognition of traditional use by Indigenous peoples. The Sámi Rights Committee’s International Law Group has described it as the following:

If a group of people has had a fairly permanent presence in the area, and at the same time have been the only ones who have used the area, the requirements for actual possession will normally have to be seen as fulfilled. If others also have used the area, the use of the group of Indigenous people must have been dominant in relation to the use that has been made by others.

(NOU 1997: 5, 35)

Dominant, and not necessarily exclusive, use is thus sufficient to meet the requirements. This viewpoint has been confirmed by the courts, most recently by the Supreme Court in the *Nesseby case* (HR-2018–456-P, para. 170).

Article 14 (2) states that “[g]overnments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession”, while (3) states that “[a]dequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned”. These two commitments are the direct argument for establishing the Finnmark Commission and the Uncultivated Land Tribunal for Finnmark (Ravna 2019, 451).

The right to property is also protected under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) Article 5 (d) (5). This has recently been invoked in the controversial wind power case at Fosen in the South Sámi reindeer husbandry area (Trøndelag County). The Norwegian state has here rejected a request from the

Committee on the Elimination of Racial Discrimination (CERD) for a temporary halt in development until a final assessment has been made.

As ILO 169 is incorporated in a sectorial manner by the Finnmark Act, ILO 169 will presumably apply to the process of surveying land rights in Finnmark. The range of incorporation has been evaluated by the Supreme Court in the *Stjernøya Case* (HR-2016–2030-A). A unanimous Court found that ILO 169 takes precedence over only the Finnmark Act's own provisions – as opposed to over the application of all law applied in the surveying process. The first voting judge referred to the preparatory work when reasoning that the incorporation faced this limitation and then stated, “Even though the Act regulates the procedures for clarifying rights, it does not regulate the substantive rules that the rights shall be clarified on the basis of” (Section 76). This means that ILO 169 does not take precedence over the rules of prescription and immemorial usage, which, according to the Finnmark Act Section 5, paragraph 3, shall be applied as a basis for clarifying rights to land and natural resources in Finnmark. The standpoint has been confirmed in *Nesseby Case* (HR-2018–456-P), where the Supreme Court found that the Finnmark Estate, not a local Sámi community, had the right to manage and control the rights that had already been recognised by the Finnmark Commission.

On 23 January 2020, the Swedish Supreme Court delivered a judgement in favour of the Girjas Sámi community in a lawsuit against the Swedish state over a long-standing dispute over the right to administer hunting and fishing rights in the Girjas reindeer husbandry area (T 853–18). Although ILO 169 has not been ratified by Sweden, the Court actively uses the Convention to reason for the use of Sámi customs and customary law when applying national law. The Court also states that although the Convention has not been ratified by Sweden, section 8 (on customs or customary laws) can be considered an expression of a general principle of international law. Following this decision, it will be difficult in Norwegian law to interpret ILO 169 as the Norwegian Supreme Court has done in the two aforementioned cases.

Although it is beyond the scope of this chapter to make a comprehensive analysis of the use of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), it is important to note

how the declaration has been put in use in Norway. Despite the Stoltenberg government having noted that it “sets out important guidelines in the further work to determine what rights Indigenous peoples have” (St. meld. nr. 28 [2007–2008], 34), the UNDRIP has not been applied notably in Norwegian courts. In the *Nesseby* case, however, all 17 judges agreed that the UNDRIP “must be regarded as a central document within the Indigenous people’s law, among others because it reflects principles of international law in the area and has received support from very many states” (Section 97). This statement shows that the Court meant that the declaration contains provisions of international customary law. The first voting judge nonetheless stated that this was not of direct importance for the present case.

In addition to the principle of free, prior and informed consent, the UNDRIP incorporates *the right to restitution* in Article 28. In the *Nesseby* case, the Supreme Court agreed that ILO 169 Article 14 (1) ensures such a right (HR-2018–456-P, para. 173). Due to the historical facts of the case, the rule was not applied. In the Karasjok report, where the actual situation is different, the Finnmark Commission exercises the right to restitution (Finnmarkskommisjonen, Rapport Felt 4) when it found that the inhabitants, and not the Finnmark Estate, are the landowners.

International criticism

As demonstrated previously, Norway has been criticised by the UN Special Rapporteur of the Rights of Indigenous Peoples. Norway has also been subject to criticism from other UN agencies for how the country has treated its Indigenous obligations in recent years.

In 2015, the CERD noted that despite the Finnmark Act’s recognition of the collective and individual rights of the Sámi to land and water, no recognition occurs in practice, which gives the rights limited protection. The CERD also criticised Norway for not following up the Sámi Rights Committee II proposal. In its recommendation, the CERD proposed that Norway “[f]ollow up on the proposals of the Sámi Rights Committee, including by establishing an

appropriate mechanism and legal framework, and identifying and recognising Sámi land and resource rights outside Finnmark” (CERD 2015, para 30 [b]).

In the examination of Norway’s seventh periodic report on measures taken to implement and safeguard the rights recognised in the ICCPR, the HRC also directed criticism against Norway for not having followed up the recommendations of the Sámi Rights Committee II from 2007. In its recommendation, the HRC proposed that Norway “[e]nsure effective and speedy follow-up to the proposals of the Sámi Rights Committee of 2007 regarding land and resource rights in Sámi areas outside of Finnmark” (HRC 2018, para. 37 [e]).

In January 2019, the CERD reiterated its criticism of the failure to follow up the proposal of the Sámi Rights Committee II and expressed concern: “That the Government has not yet complied with the Committee’s recommendation in its previous observations regarding the legal recognition of rights and resources outside of Finnmark” (CERD 2018, para. 30 [b]).

Sámi law

Sámi customs and legal traditions constitute Sámi law

Sámi customs and legal opinions constitute Sámi law, although it is seldom included in statutory legislation. Such law has significance not only internally amongst the Sámi but also in national law. Furthermore, it is important for the negotiation of bi- or multilateral treaties and conventions between the states that have a Sámi population. These rules may constitute residual remnants of a separate, Sámi legal system, as well as rules developed in a more modern context. They are characterised by having their own legal basis and being complied with due to an opinion of obligation amongst those committed.

Norway’s ratification of ILO 169 has strengthened the legal significance of Sámi law and given it a place within Norwegian law, which must be emphasised by both legislators and

practitioners. These developments also entail that Sámi legal rules have become more statutory, for example, in the Reindeer Husbandry Act.

The harvesting of outland resources in Sámi areas has, to a relatively small extent, been regulated by law, except the recently adopted Finnmark Act and the general laws on inland fishing and wildlife. Private relations have largely been regulated by customary law. For example, for the snare trapping of ptarmigans, Erik Solem notes that it is mentioned in older literature about the Sámi and “that they often went to remedy themselves concerning such trapping sites” (Solem 1933, 87). Elina Helander further notes that the Sámi participants in her study stated that they possess an internal autonomy for the practice of this hunting tradition and that they are now in danger of losing it. She also notes the belief in a right of use to land and water: “This right of use is considered so strong that it can be equated with a property right, individual or collective, since certain areas are used customarily by different groups during different parts of the year” (Helander 2001, 458).

In the following, I concentrate on customs that have been addressed by the courts. Other Sámi customs can also be elucidated, such as the right to simple housings, as turf huts, in commons to support outland harvesting.

Sámi law in Norwegian courts

It has been difficult for Sámi law to prevail when it contradicts Norwegian statutory legislation. For example, the Supreme Court has concluded that the tradition of letting dogs run freely in outlying areas during the summer (when a period of leash enforcement exists) should not take precedence over the Wildlife Act (Nrt. 2001, 1116). Furthermore, spring hunting for ducks in the municipality of Kautokeino is not, according to the Supreme Court, a custom deserving of legal protection (Nrt. 1988, 377).

The question of the significance of customary Sámi law has also been tested by the Supreme Court regarding the slaughtering of reindeer (Nrt. 2006, 957, 2008, 1789). In no

judgements has the claim that customary methods of slaughtering – killing via a small-calibre rifle and a cardiac punch with knife – prevail over the animal welfare act been upheld. However, the legislature has been willing to regulate Sámi customs related to reindeer butchery methods and the spring hunting of ducks by adopting regulations allowing and regulating such activities (Regulation 2008, 2013).

Furthermore, the courts have heard cases of customs related to traditional salmon fishing with nets. Of several judgements regarding fishing in the Tana River, one case stands out, published in (Nrt. 2006, 13). In this case, the Supreme Court, unlike the lower courts, found that allowing a person outside of the household to fish on the authority of a relative (who held the fishing rights) violated the Tana Act of 1888. Here, the accused refused to accept a fine for illegal fishing, as he had been fishing on his brother's rights. The Inner Finnmark District Court acquitted the accused, stating that such fishing was in accordance with local custom and legal opinion. On the contrary, the first voting judge of the Supreme Court found that she could “hardly see that there is a basis for ascertaining a customary law that should make exceptions to the system of the law” (para. 15). Recently, a Finnish first-instance court set aside a Finnish act on fishing in the Tana on the grounds that the act violates Sámi law (Paltto 2019). The judgement has been appealed, and it will be interesting to follow this case, which may also impact Norwegian law.

Although the Selbu case directly depends not on Sámi customary law, but rather on an emphasis on the Sámi customary use, of nature and pastures, it shows that the Supreme Court has emphasised Sámi customs and the use of nature by ruling on the rights of reindeer pastures (Nrt. 2001, 769 [789]). The same is the situation in the Svartskog case, where the Supreme Court emphasized Sámi customary use, Sámi culture and legal opinions of when it concluded that people in a village Troms county had acquired property rights to their common land through immemorial usage. This took place despite the fact that the state had a registered title to the disputed property. (Nrt. 2001, 1229).

Nevertheless, Sámi law has encountered difficulties in being recognised and accepted as a source of law in Norwegian courts (Skogvang 2017, 63–76). Although progress has occurred in

the acceptance of the duty of the courts to acquire knowledge of customary Sámi law, this knowledge has not become far reaching.

Conclusion

The view of Sámi law and culture has varied over time, as assimilation policies have gradually been replaced by positive attitudes towards Sámi culture. This has led to a legal protection of Sámi language and culture, through national legislation, case law and international obligations undertaken by Norway. Customary Sámi law has simultaneously been recognised as a source of law beyond internal Sámi autonomy.

In Article 108 of the Constitution, Norway has undertaken a duty to safeguard Sámi language, culture and way of life. The ratification of ILO 169 means that customary Sámi law and legal traditions are recognised as Norwegian law, as are the rights of the Sámi to own, use and manage their traditional lands. Despite the seemingly contrary tendency of the Supreme Court, the importance of ILO 169 was strengthened by the incorporation of the Finnmark Act, which itself is a recognition of Sámi rights to land and water (cf. Section 5 of the Act). It can here be referred that the Supreme Court has confirmed that ILO 169 anchored the right to restitution in Article 14, which is emphasized during the survey of land rights in Finnmark.

When the Human Rights Act was adopted in 1999, the most crucial international human rights conventions were given precedence over other Norwegian law. This has also strengthened the protection of Sámi culture, particularly through ICCPR Article 27. Among others, the Covenant sets limits on what interventions can be made in Sámi resource areas.

However, legal developments in recent years have shown that despite international obligations and extensive internal legislation, customary Sámi law has not received that much attention in Norwegian law. In addition, the significance of the international treaties protecting the Sámi language and culture that Norway has endorsed seems to have been reduced by the restrictive interpretations of the Supreme Court. The *Sara* case, the *Stjernøya* case and the

Nesseby case are examples of this. Despite a solid legal foundation, Sámi law and legal protection still face significant challenges in Norway. In addition to the aforementioned Supreme Court cases, these challenges also manifest through the Finnmark Commission's investigations, the 2014 changes to the Reindeer Husbandry Act and other disputes over reindeer numbers and forced reduction of reindeer. Nevertheless, the latest investigation report of the Finnmark Commission suggests that a change in the direction of the law and outcome can be expected when it comes to the coming survey of land rights in Finnmark.

Questions about self-determination and the self-management of renewable resources have also been pushed into the background of the law. In terms of the Finnmark Act, which, in Section 5, recognises Sámi rights to land and waters, this recognition is currently far from being realised in practice. One issue concerns imprecise regulations regarding the management of outlying lands in Finnmark, which imply that the local populations have not been given the influence their legal basis would indicate. Another issue is that questions raised about the Sámi right to land and water in Finnmark can only be answered after the surveying of the rights by the Finnmark Commission has been completed. This process has been considerably more time consuming than anticipated, as a result of both unnecessary time spent in the start-up phase and time-consuming procedural rules. This means that it will still take many years before ownership and use rights questions are answered; in the meantime, continuous new interventions, through extractive industries, wind power plant constructions and other means, will occur.

In general, it must be said that the social and political situation for the Sámi in Norway is satisfactory. Nevertheless, there is reason to keep an eye on legal the developments. The most precarious issues in recent years can here be linked to three factors: first, the way in which the Norwegian Supreme Court has interpret the incorporation of ILO 169 into the Finnmark Act; second, the way in which the Supreme Court has understood the scope of protection under ICCPR Article 27 in so-called “internal Sámi issues”; and finally, the survey of land rights in Finnmark, where, until December 2019, neither the Finnmark Commission nor the courts had found examples of Sámi collective property rights or usage rights beyond what is already

stipulated in the Finnmark Act. The Finnmark Commission's latest report, however, suggests, as mentioned, that other outcomes may be expected in future investigations.

Notes

¹ An English (non-updated) translation of the law can be found here:

<https://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-085-eng.pdf>

² An English translation of the judgement can be found here:

<https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2017-2428-a.pdf>

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