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The Duty to Consult the Sámi in Norwegian Law

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Abstract
This article deals with the duty to consult indigenous peoples and the obligation to involve these peoples in decision-making processes in matters that concern them. After a general review of international legislation and obligations, particularly the ILO Convention no. 169 on Indigenous and Tribal Peoples, the article focuses on how these obligations are implemented towards the indigenous Sámi in Norwegian law. Here, the consultation agreement from 2005 and the Sámi Rights Committee's 2007 draft are still central. The review includes an analysis of the extent to which these duties meet international law requirements, and a deliberation on the concept of free, prior and informed consent.

Keywords: *consultation, participation, indigenous people, Sámi, ILO 169, UNDRIP, free prior and informed consent*

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1 Introduction*

1.1 Background and aims of the article

The international indigenous law debate has its roots back in the early colonial era.[1] Modern indigenous law, which concerns the rightful place of indigenous peoples in a nation state's constitutional system, has, however, only existed for approximately a century. Indigenous peoples' access to and participation in decision-making processes that concern them, and their right to be consulted are at the center of that law and also a central to indigenous peoples' internal rights to self-determination.

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The debate of indigenous peoples in a nation state's constitutional system can be traced back a century to the *League of Nations* epoch following World War I. More precisely, the debate and developments that arose in the early 1920s, when *Chief Deskaheh* (Levi General), spokesman for the *Haudenosaunee (Iroquois) Confederacy* of North America, or *The Six Nations,* brought Confederacy complaints to the League of Nations.[2] He worked – without success – to obtain international recognition of the Six Nations as a sovereign Indian nation ruled by a hereditary council of chiefs.

Subsequent developments in international indigenous law must be seen in the context of the work of the *International Labour Organization (ILO),* founded in 1919 through the Treaty of Versailles and continued under the 1944 Philadelphia Declaration.[3] As a United Nations (UN) institution tasked with the field of labor issues,[4] the ILO developed the first indigenous peoples' convention in 1957, and in 1989 *ILO Convention no. 169 on indigenous peoples and tribal peoples in independent countries* (ILO 169). *The United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), adopted in 2007, is a successor to these developments.

International indigenous law has traditionally focused on protecting against encroachments on indigenous peoples' right to enjoy their culture, including the right to land, waters and natural resources. This right currently comprises the core of the provision on protection of minorities' culture in Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR). In recent times, international indigenous law has also emphasized the right of indigenous peoples to participate in decision-making processes, notably in Articles 6, 7 and 15 of ILO 169, and in the practices of ILO's supervisory bodies.[5] These bodies, in different contexts, have stated that the principle of consultation and participation forms the cornerstone of the Convention and is the basis for its individual provisions.[6]

This article addresses the implementation of consultation and participation obligations in Norwegian law, including the extent to which these domestic laws meet international law requirements. The text begins with a brief review of Norway's affiliation to ILO 169 and UNDRIP, before examining how the duty to consult is rooted in international law. The article then analyzes how these consultation and participation obligations have been implemented in Norwegian law and then reviews recent proposals to adopt a new law on consultation. The article also deals with the concept of free, prior and informed consent.

1.2 Briefly on the history of ILO 169 in Norway

Since the 1930s, ILO has been involved in issues related to indigenous and tribal peoples, originally to protect them from being exploited in working conditions,[7] and gradually with a considerably broader approach. In 1957, as mentioned, the first indigenous convention was adopted.[8] The main objective of this Convention was to prevent discrimination of indigenous peoples and promote their integration into

the labor market. It was the first international instrument designed to protect indigenous peoples' rights. However, the Convention was based on the fact that these objectives could best be achieved through assimilation, as evidenced by its subtitle "Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations", a position already questioned by indigenous organizations by the 1960s.[9]

Norway decided in 1958 not to ratify the Convention, as the Government had determined that its provisions did not apply to the Sámi,[10] i.e. the Sámi were not an indigenous or tribal people that fell under the Convention. Prompted by the Alta Hydro Powerplant conflict in the 1970s and early 1980s,[11] the question of ratifying ILO 107 was re-examined. By then the government had concluded that the principles of the Convention did cover the Sámi in Norway.[12] However, the subsequent hearing showed that many found the Convention outdated and that it reflected a paternalistic view of indigenous peoples. The position not to ratify the Convention was thus not changed. A report also concluded that Norway did not fulfill the Convention's requirements regarding recognition of land rights for indigenous peoples.[13] It is therefore something of a paradox that Norway ratified ILO 169 ten years later – without having worked out anything particular regarding land rights issues.

In 1989, following extended consideration since the late 1970s, ILO adopted Convention No. 169. When Norway ratified the Convention in 1990 (as the first country in the world), the Norwegian Parliament assumed it applied to the Sámi in Norway.[14] The main principles of ILO169 are the right of indigenous peoples to preserve and develop their own culture, as well as the governments' duty to take measures to ensure this. In support of these principles, the ratifying states undertake to recognize the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy.

ILO 169 has been ratified by 23 states.[15] Despite relatively low international support, the main principles of the Convention can nevertheless be regarded as an expression of common international indigenous law.[16] This is underlined by the fact that UNDRIP, though not legally binding as a treaty, has been endorsed by nearly 150 countries, contains many of the same principles covered in ILO 169. Even though 23 countries seems like a small number, the Convention has been ratified by a relatively large proportion of countries with indigenous peoples within their borders (particularly in Latin America). Important too, is the pioneering Girjas Case, in which the Supreme Court of Sweden applied ILO 169 Article 8 as a general principle of international law, despite the fact that Sweden has yet to ratify the Convention.[17]

1.3 Norway's endorsement of UNDRIP

In 1993, the UN Human Rights Commission's Working Group on Indigenous Peoples presented a draft indigenous declaration.[18] The draft was further considered in a separate working group in the Commission until it was completed. This was an

important step historically, as the working group welcomed indigenous peoples to advance their own opinions on their rights in the international arena, and to make suggestions and comments.[19]

After lengthy negotiations, the declaration was endorsed by the UN Human Rights Council (successor of the Human Rights Commission) in 2006. The UN General Assembly then adopted the Declaration by an overwhelming majority on September 13, 2007. 144 states voted for the Declaration, while four states, Australia, Canada, New Zealand and the United States, voted against it.[20] Eleven states abstained.[21] The four states that voted against the Declaration, all of which are settler states with large indigenous populations, later reversed their positions and endorsed the Declaration.[22]

In the process of finalizing the Declaration, indigenous peoples' representatives worked closely with UN member states. Norway has stated that it was a driving force in the process for the adoption of the Declaration,[23] which should be underscored when considering how the Declaration is emphasized in Norwegian law.

UNDRIP can be seen as a codification of regulations to protect indigenous cultures and to correct centuries of injustice against indigenous people historically. At the same time, the Declaration puts the spotlight on modern challenges and has socio-economic, political and cultural ambitions. The Declaration is a result of the longstanding struggle of indigenous peoples' organizations to gain international attention for the situation of indigenous peoples and to achieve recognition for their ambitions and rights.

UNDRIP is not a formally binding international convention that states can endorse by ratification. Nevertheless, it has confirmed important guidelines in the work to establish and safeguard the rights of indigenous peoples. For example, in the Nesseby Case, the Supreme Court of Norway stated that UNDRIP "must be regarded as a key document in indigenous law, among others because it reflects international law principles in the area and has been granted support from very many states".[24] UNDRIP has also turned out to be an important element in the interpretation of various legally binding international conventions. For example, in 2019 the UN Human Rights Committee interpreted ICCPR Article 27 in the light of the declaration.[25]

2 The duty to consult – a general overview

2.1 The right to be consulted and to participate in decision-making

Appropriate and effective mechanisms for consulting indigenous and tribal people regarding matters pertaining to them, is one of the cornerstones of international indigenous law,[26] enshrined in ILO 169, ICCPR Article 27 and UNDRIP. Yet, consultations and participation in decision-making is still one of the main challenges in the relationship between indigenous peoples and the majority population in many nation states. Focusing on ILO 169, where consultation and participation are central

provisions, this is a difficult issue, since it may make nation states hesitant to ratify the Convention.

ILO 169 obliges nation states, as the duty bearer under the Convention, to allow indigenous peoples to participate in decision-making processes that affect their rights, positions and interests. Consultation is an important instrument for ensuring such participation. Article 6 (a) on consultation and (b) on participation are therefore essential provisions of ILO 169 and inform interpretation of provisions of the Convention.

The main rule on the state's duty to consult is stated in Article 6 (1) (a). Further content and the framework of the duty to consult is expressed in the same provision and in Article 6 (2). Article 6 reads as follows:

1. In applying the provisions of this Convention, governments shall:
   (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
   (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
   (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

According to the wording, the duty to consult extends to application of all of the provisions of ILO 169. The duty to consult also applies when nation states consider measures that do not relate particularly to the Convention, but which nevertheless affect indigenous peoples directly.[27]

The core areas for consultation and participation comprise matters regarding the relationship between indigenous peoples and the nation state. Pursuant to Article 6 (1) (a), the duty to consult includes all cases where public bodies consider initiating legislative or administrative measures that may be of importance to indigenous peoples, including amendments to constitutional, agricultural or land laws, mineral laws, national education and health programs, and application of the Convention. This applies both to physical encroachments and legal or administrative measures that limit indigenous livelihoods, economies and opportunities to enjoy their culture. This also applies to conditions related to both material as well as intangible aspects of indigenous peoples' cultures.

Indigenous peoples shall have access to participate at all levels in the formulation, implementation and evaluation of measures and programs that affect them directly.[28]

Interference with indigenous peoples' natural resources is the other area where consultations are a prerequisite for legality. This applies both to physical encroachments and legal or administrative measures that limit indigenous livelihoods, economies and opportunities to enjoy their culture.

Who to consult will vary, depending on the nature and extent of the intervention. In questions concerning legislation and overall matters related to the Sámi people, it is obvious that the *Sámi Parliament*[29] should be consulted. Regarding reindeer husbandry legislation and general regulations on reindeer husbandry, the Norwegian Reindeer Husbandry Association is an equally important subject for consultation. Regarding interventions in specific reindeer husbandry areas, siida[30] and reindeer husbandry districts will be natural subjects for consultation. Other Sámi associations, nature users and local communities can also be natural subjects for consultation.[31]

Article 6 sets out three rules, or principles, for consultations. They are: 1) there must be a connection between the measure in question and the indigenous peoples concerned, 2) the procedure must be suitable for reaching agreements, and 3) it must be conducted with the appropriate representative body.[32] Article 6 (2) requires consultations to be conducted in "good faith", which means with a real will and with the aim of reaching agreement on or consent to the planned measures. It is not sufficient that the indigenous party be given the opportunity to "make its views known".[33]

James Anaya argues that the requirement of consultation and participation applies not only to decision-making within the framework of domestic or municipal processes, but also to decision-making within the international realm.[34] Anaya emphasizes that the UN bodies and other international organizations have already increasingly allowed for, and even solicited, the participation of indigenous peoples' representatives in their policy-making and standard-setting work in areas of concern to indigenous peoples.

Article 15 (1) ensures the right of participation in decision-making when it comes to the use, management and conservation of natural resources pertaining to indigenous peoples' lands, while Article 15 (2) provides for an extended duty of consultation. Article 15 reads as follows:

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or

> exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

The right of participation ensured in ILO 169 Article 15 (1) extends beyond being consulted, which means that indigenous peoples must have a real influence on decisions made in relation to the aforementioned resources.

Article 15 (2) provides for an extended duty of consultation in cases in which the State retains ownership of mineral or sub-surface resources or rights to other resources pertaining to lands. According to the wording, the provision undoubtedly applies to interventions caused by mineral extraction and petroleum activity. The extent to which "other rights" extend is somewhat unclear, but it must be assumed that the term also includes renewable natural resources. Article 15 (2) is designed more precisely than Article 6. In this way, it reinforces the consultation obligation in Article 6 (1).

Hans Petter Graver and *Geir Ulfstein* consider that Article 15 (2) obliges governments to establish special consultation procedures to determine the extent to which indigenous interests will be harmed as a result of exploration for mineral resources.[35] The *Reappointed Sámi Rights Committee*[36] was not prepared to extend this obligation that far and concluded, based on ILO decisions, that it was difficult to draw a distinction between the duties arising from Articles 6 and 15 (2). However, given that Article 15 (2) is a specific provision in addition to the general provision stated in Article 6, the Committee did accept that this may indicate that it is particularly important for the authorities to carry out real consultations before utilizing natural resources owned by the state.[37]

Article 27 of ICCPR also imposes a duty to consult and to let minority communities participate effectively in decision-making processes which affect them. This conclusion is anchored in the UN Human Rights Committee's interpretation of Article 27. In its general comment of 1994, the Committee stated that:

> The enjoyment of those rights [such traditional activities as fishing or hunting] may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[38]

In several complaints to the Committee, it has been an important factor in the assessment of whether a nation state has complied with their obligations related to the protection of culture, whether they have carried out real consultations with the indigenous people, or not. The most notable of these is the Poma Poma case,[39] where the Human Rights Committee found that the State of Peru had violated the rights of Ángela Poma Poma, a Peruvian citizen member of the indigenous Aymara community, under Article 27. One of the reasons for the violation, was that the claimant was deprived of the opportunity to participate in the decision-making process which affected her position. Neither the claimant nor the community to which she belongs,

was consulted at any time by the State party concerning the construction of wells in indigenous pasture lands. The Committee noted that the State party had not obtained the free, prior and informed consent of Poma Poma, stating that:

> The Committee considers that 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. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members (para. 7.6).

2.2 Right to decide own priorities

ILO 169 Article 7 states that indigenous peoples have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being. They also have the right to decide their own priorities for the development of the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. Article 7 can be seen as an extension of the obligations for consultations and participation in Article 6 as well as a cautious articulation of self-determination, and thus an indigenous counterpart to Article 1 of the UN Covenant on Civil and Political Rights. Article 7 reads as follows:

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.
2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.
3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.
4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

The 2009 ILO Guide suggests that the "development right" comprises five points, of which rights to lands, territories and resources is the last one:

> The rights of indigenous peoples to ownership, possession and use of their lands, territories and resources need to be recognized and legally protected. This is a fundamental criterion for them being able to develop their societies in accordance with their own needs and interests.[40]

The Sámi Rights Committee II has shown that the ILO monitoring bodies have often applied Articles 6 and 7 jointly. Among other things, the ILO bodies have included Article 7 in their assessment of Article 6 in a way that has expanded the scope of the latter provision beyond what follows from the wording. Likewise, the ILO bodies have expressed that Article 6 appears to be a means of fulfilling the right of indigenous peoples under Article 7 to participate in decision-making processes.[41] Thus, it can be said that Article 7 also contributes to Article 6 becoming more than just a consultation obligation, where one can imply a presumption of consent from the indigenous party.

2.3 Flexible implementation

There are significant variations among the world's indigenous peoples and the general situation in the countries that have ratified ILO 169. Key variables include the proportion of indigenous peoples in a country, their geographical distribution and the general economic development of the countries concerned. In addition, and as already noted, the Convention itself accepts that it is to be applied in consultation with the indigenous peoples concerned and that the peoples concerned have their own priorities for development. Therefore, it is not possible to specify a uniform approach to an application of the Convention's rules; the application must be designed and developed by the relevant states and indigenous peoples jointly for the relevant conditions of indigenous peoples in the country concerned.[42] Article 34 of the Convention acknowledges this reality: "The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristics of each country." This does not reduce the obligations of the ratifying States to make the provisions of the Convention effective. States do not have the right to reserve against parts of the provisions.[43]

2.4 Obtaining free, prior and informed consent – as an extension of consultation obligations

This section examines the duty to obtain *free, prior and informed consent (FPIC)* as an extension of consultation obligations. FPIC can be seen as part of indigenous peoples' right to self-determination as it allows for a greater degree of control over decisions in relation to resources. It is not possible to infer an FPIC obligation directly from ILO 169 Articles 6 and 7,[44] but the adoption of UNDRIP in 2007 has significant enhanced the normative status of this obligation.

The basic idea behind the FPIC obligation is to ensure that indigenous peoples are not forced or threatened, and that their consent is sought and freely given prior

to the approval or start of activities that take place in their traditional lands, and that may have a negative impact on them. Ultimately, the FPIC obligation means that indigenous peoples' choice to grant or withhold consent must be respected.[45]

While the UN Human Rights Committee has referenced FPIC directly or indirectly in several contexts including its General Comment on ICCPR Article 27,[46] and in its views on the Poma Poma case,[47] the UN Declaration on Indigenous Rights offers the clearest articulation of the FPIC obligation. The Declaration distinguishes between two types of provisions in this area. The first includes provisions that prohibit states from carrying out specific acts unless indigenous peoples have consented, and the next concerns provisions that require states to consult indigenous peoples in order to obtain consent before measures can be implemented.[48] The discussion here focuses on this second group of provisions as found in Articles 19 and 32 (2) of UNDRIP. Article 19 addresses FPIC in the context of legislative or administrative measures that may be of importance to indigenous peoples:

> States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 32 (2) uses the same formulation with respect to decisions that may affect indigenous peoples' land and resources, and reads as follows:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

The meaning of the concept of free, prior and informed consent is largely self-explanatory, but it can be emphasized that "free" not only excludes coercion and pressure, but also undue use of financial incentives including favorable financial agreements or "divide and conquer" tactics. This may call into question the legality of non-disclosure obligations in benefits agreements between developers and indigenous peoples, apparently entered into voluntarily but out of the public eye.[49]

"Informed" means that all information must be made available to both parties. This includes not only developers' technical plans, but also input from the indigenous people themselves, including elders who have traditional knowledge. In addition, this indicates that decision-making processes must be given sufficient time. "Consent" must be provided by leaders, representatives or decision makers who are given authority by the indigenous people themselves.[50]

While the requirement of free, prior and informed consent may be regarded as a veto right, *Mauro Barelli* argues that it cannot be understood as an absolute obligation for states to obtain consent. Barelli justifies this argument by reference, amongst

other things to the debate in the UN General Assembly when the declaration was adopted. At the same time, Barelli emphasizes that Articles 19 and 32 recognize more than just a right of participation for indigenous peoples:

> [T]he express recognition of the FPIC in the declaration, combined with strong provisions such as those on land rights and self-determination, reinforces significantly the right of Indigenous peoples to be consulted, with important consequences for the scope of the relevant provisions.[51]

Mattias Åhren also concludes that the FPIC obligation does not apply to all measures or interventions that take place after real consultations. According to Åhren, there is a *rightful sliding scale* in which indigenous peoples' views must take precedence in cases that are of fundamental importance to the indigenous people.[52] In other words, the more important a legislative act or physical intervention is to the indigenous culture, the greater the demand for consent. Åhren's approach appears reasonable and a similar principle is discernible in ILO 169 Article 8 (1) and (2) on the weight of indigenous peoples' customs and customary law.[53] The understanding implies that a commitment to obtain consent will apply to decisions affecting indigenous peoples' traditional lands, ways of life and other cultural practices anchored in the use of land and water. In matters of less direct importance, indigenous peoples should not be without influence on decisions, but do not have the last word.

In addition to Articles 18 and 32, UNDRIP also requires free, prior and informed consent in other contexts. Article 10 requires, in addition to agreement on full compensation and opportunities for relocation, free, prior and informed consent before indigenous peoples can be relocated from their territories. Similarly, Article 29 (2) provides that states cannot store or dump hazardous materials on the land of indigenous peoples without the free, prior and informed consent of the concerned peoples.

The UN General Assembly confirmed the content of the Declaration in the Outcome Document it adopted on September 22, 2014.[54] In particular, states confirmed their support for the obligation to obtain consent prior to the adoption of laws and administrative measures affecting indigenous peoples, as well as plans or decisions representing interventions in indigenous peoples' territories.

2.5 A brief summary of the international standard

International law has developed significantly since ILO 169 was adopted with its emphasis on the duty to consult. In particular, the adoption of UNDRIP by the UN General Assembly in 2007 suggests that the content of the duty to consult has become more extensive. In a Nordic context, decisions by both the Norwegian Supreme Court HR-2018-456-P (Nesseby) and the Swedish Supreme Court T-853-18 (Girjas) have emphasized the increased importance of both ILO 169 and UNDRIP in both domestic and international law.

The duty to consult has not yet been developed into an unconditional duty to obtain consent prior to any development planned in areas significant to indigenous peoples. However, as mentioned above, there is some support for a sliding scale in which indigenous peoples' views must take precedence in conflicts with fundamental importance to the indigenous people. As Åhren concludes:

> in instances when good faith consultations between states and indigenous peoples fail to produce consensus, the right to self-determination provides that the position of the indigenous people prevails over that of the majority people/the state in certain, but far from all, instances.[55]

A crucial factor here is a proportionality assessment of the effect of the proposed development on the indigenous people as well as the importance of the development for the majority society and the state. While a proportionality assessment may not be required as a matter of law, it is clear that a development that destroys the livelihood of an indigenous people will be a breach of ICCPR Article 27, which cannot be justified by a sliding scale; it is not even obvious that consent from the concerned people will rectify this situation.

The article now turns to examine how Norway has implemented the duty to consult in domestic law.

3 Implementation of the duty to consult in Norwegian law

3.1 Procedures for consultations between state authorities and the Sámi Parliament

Norway ratified ILO 169 in 1990 and is thus obligated to consult the Sámi People in Norway whenever consideration is being given to legislative or administrative measures which may affect them. In the following, I will look more closely at how this obligation is implemented in Norwegian law. I first examine the procedures for consultations between the state authorities and the Sámi Parliament and then consider the proposal for a consultation statute and the government's handling of the draft act. I also examine the consultation obligations of the Finnmark Estate. The Finnmark Estate is the successor to the state's ownership interest in the Finnmark area of Norway but also the body to represent the ownership interests of the people of Finnmark. Finnmark is a part of the northernmost county and the most central Sámi area in Norway. Finally, I will look at how free, prior and informed consent is implemented in Norwegian law.

The state's consultation obligations were elaborated during negotiations on the Finnmark Act in 2004–2005. In particular, the Norwegian Government and the Sámi Parliament agreed upon *Procedures for consultations between state authorities and the Sámi Parliament*, often referred to as "The Consultation Agreement".[56] These procedures were subsequently approved by the Parliament, and as such are the normative guidelines that regulate Norway's consultation obligations enshrined in ILO 169 Article 6. The purpose of the procedures, as stated in the preamble, is to:

a) Contribute to the implementation in practice of the State's obligations to consult indigenous peoples under international law;
b) Achieve agreement between State authorities and the Sámi Parliament whenever considering legislative or administrative measures that may directly affect Sámi interests;
c) Facilitate the development of a partnership perspective between State authorities and the Sámi Parliament that contributes to a strengthening Sámi culture and society; and
d) Develop a common understanding of the situation and development needs in Sámi society.[57]

The agreement was a milestone in Sámi participation and self-governance rights when it was adopted, especially considering the fact that efforts to adopt a consultation statute, as will be further elaborated on below, had been on hold for more ten years.[58] This affords the consultation agreement great practical importance.

The agreement applies to the government and its ministries, directorates and other subordinate state agencies or activities in matters that may affect Sámi interests directly, including legislation, regulations, specific or individual administrative decisions, guidelines, measures and decisions. The duty to consult the Sámi Parliament applies to all material and intangible forms of Sámi culture, including matters concerning land administration and competing land utilization, livelihoods, reindeer husbandry, fisheries, agriculture, mineral exploration and extraction activities, power plants, preservation of cultural heritage, biodiversity and nature conservation.

The Consultation Agreement is still the foremost consultation tool for the Sámi in Norway. The Finnmark Act, the Reindeer Husbandry Act, the Planning and Building Act and the Mineral Act were all drafted after consultations enshrined in the agreement. The Parliamentary Standing Committee of Justice, commenting on the Finnmark Act, which pioneered this area, referred to the process as a constitutional innovation.[59]

International indigenous law has progressed significantly since 2005 such that the Agreement no longer is in the forefront of international law.

3.2 Drafting a consultation act

In the same year that UNDRIP was endorsed by 144 nation states at the UN General Assembly, the Sámi Rights Committee II submitted a draft consultation act for consideration by the Norwegian Government. According to the draft, the Sámi Parliament, together with other Sámi right-holders and interests, e.g. reindeer herders and representatives of Sámi communities, have a right to be consulted to the extent they may be directly affected by the measures at issue. The practice of ILO supervisory bodies shows that the duty to consult should not be confined to the indigenous peoples' highest representative bodies only, but should also extend to societies and

local interests.[60] The Sámi Rights Committee II points out that in specific cases, it may be particularly relevant to consult rights-holders and other interests at the local level.

The purpose of the draft act is to ensure a continued natural basis for, and protection of, Sámi material cultural practice in accordance with the Norwegian state's obligations under international law. Section 1 says that the Act applies with the limitations that follow from ICCPR Article 27 and ILO 169, and that the Act must be applied in accordance with provisions on indigenous peoples and minorities in international law.

Chapter 3 of the draft act deals with consultations and consultation procedures. Beginning with section 13 it provides that when state authorities prepare legislation, individual decisions and other decisions covered by the act, Sámi stakeholders have the right to be consulted to the extent that the relevant measures can be of direct importance to them. The same applies when these authorities prepare regulatory measures or other measures concerning the use, utilization or disposal of land and resources in traditional Sámi areas.

The Sámi stakeholders mentioned (in section 14) are the Sámi Parliament and Sámi rights holders, including reindeer herding siida and reindeer husbandry districts, representatives of Sámi interests linked to the use and exploitation of land and resources, representatives of Sámi public culture interests and representatives of Sámi communities. The draft also includes other institutions, entities and interests when appropriate.

Of particular interest are the obligated state authorities (mentioned in section 15). The Sámi Rights Committee noted that ILO's practice shows that the duty to consult not only applies to the state as the exerciser of public authority, but also to bodies that exercise landowner rights in traditional indigenous peoples' areas on behalf of the state.[61] So in addition to the Government, ministries, directorates, and other government agencies and entities at the central, regional and local levels, section 15(c) of the Committee's draft act contains provisions aiming to cover these entities. Those mentioned include Statskog SF (State Forests Company), The Finnmark Estate[62] and other independent legal entities, all of which are subject to public scrutiny and which by virtue of ownership or legislation have the authority to dispose of the use of land and resources in traditional Sámi areas.

Section 15 (b) includes counties and municipalities. The Sámi Rights Committee II had pointed out that the state has a duty according to international law to provide appropriate procedures for consultations at both the county and municipal levels. The draft addresses this issue. The consultation procedures of 2005 only apply to State bodies and thus the entities mentioned in paragraphs (b) and (c) were not covered by the 2005 Consultation agreement.

The draft act also proposes a requirement for conditional free, prior and informed consent for measures in areas that are particularly important for Sámi culture. I will return to this below.

3.3 The Government's Consultation Bill

Processing of the draft by the legislature has been time-consuming. However, in September 2018, more than 10 years after the Sámi Rights Committee submitted its draft, the Conservative government of *Erna Solberg* presented a bill based on the draft. The Bill on Consultations was presented as a proposal for amendments to the Sámi Act of 1987, not as an independent act. According to the Government, the act would facilitate more effective and better consultations between public authorities and the Sámi Parliament and other affected Sámi interests. The bill would also make the rules more accessible to the consultants. It was also pointed out that good consultation procedures could provide the public bodies with a better basis for decision-making.[63]

The Government further proposed that consultation duties not be limited to land and resource matters, but should include all types of cases that could directly affect Sámi interests. This means that the commitment includes all intangible and material parts of Sámi culture. For intangible culture, the duty shall applies throughout the country, while for matters concerning the material basis of Sámi culture, in other words land and the natural bases for Sámi culture, the bill proposes that the rules shall apply to measures and decisions proposed for traditional Sámi areas.[64]

The provisions of the Sámi Rights Committee's draft sections 13, 14 and 15 (see above) are largely included in the bill, which means the Government agreed that not only the Sámi Parliament, but also Sámi right holders, including reindeer herding siida and reindeer husbandry districts, as well as representatives of Sámi interests linked to the use and exploitation of land and resources etc. all have a right to be consulted.[65] However, the Government did not include the provision on the Finnmark Estate's duty to consult, which I will return to below. Regarding counties and municipalities, the Government took the view that the duty to consult at these administrative levels can be implemented through adjustments to already established participation schemes and case management processes.[66] The proposed provisions are not intended to apply in cases where the Sámi Parliament has the right of objection under section 5–4 of the Planning and Building Act.[67]

The Sámi Rights Committee's proposal for conditional free, prior and informed consent, is not included in the Government's bill. Therefore, it can be argued that the bill does not fully comply with UNDRIP with respect to the matters covered by Articles 19 and 32 (2) of the Declaration.

The Solberg Government's consultation bill has not been adopted. Despite hearings on the Bill in 2008 and 2009, the Parliamentary standing committee of Local Government and Administration announced in February 2019 that the bill will be sent back to the Government for new hearings. This decision drew a strong and negative reaction from the President of the Sámi Parliament.[68] The reason for new hearings was mainly that it had taken more than ten years since the Sámi Rights Committee II first submitted its proposal for a consultation act, and that much

had happened during that period of time.[69] Thus, it was the failure of the two governments of Stoltenberg (Labour) and Solberg (Conservative) to promote the bill within reasonable time, that resulted in the bill not being dealt with by the Parliament. However, the failure to promote the bill was likely due to opposition from county and municipal authorities to the imposition of consultation duties on them similar to those of state authorities.

The bill has now been through its second hearing, which had a deadline February 29, 2020. The hearings show that a large majority of the hearing bodies, including municipalities in the Sámi areas, endorse the bill.[70]

3.4 Consultation obligations for the Finnmark Estate

The Government's bill does not adopt the Sámi Rights Committee proposal to impose a duty to consult the Sámi Parliament or other Sámi interests in the Finnmark Estate. The reasoning for this is partly that the Finnmark Estate is regarded as a private landowner and partly because the Sámi Parliament is ensured participation in the Estate through the appointment of board members.[71] There are also special case-handling rules in the Finnmark Act (section 4 and 10) in matters concerning change in the use of uncultivated lands held by the Estate. That said, preparatory work on the bill suggests that if the Finnmark Estate makes decisions that constitute the exercise of public authority, it may be subject to the duty to consult parties other than the Sámi Parliament with regard to these decisions.[72]

Consequently, the Finnmark Estate, unlike the State Forest Company, which is the landowner body of state lands in other parts of Norway, will generally not be covered by the duty to consult if the bill is adopted.

In its hearing statement on the bill, the board of the Finnmark Estate, took the view that it is subject to the duty to consult under Articles 6 and 15 of the ILO Convention because it exercises the authority of public law and that this should be enshrined in the act.[73] The Director of the Estate, who was not prepared for the board's proposal, and who supported the government's bill, argued, in turn, somewhat surprisingly, that the Estate already had a duty to consult enshrined in the Finnmark Act, section 18.[74]

Regardless of the outcome of the legislative process in the Norwegian Parliament, the Finnmark Estate has acknowledged having the duty to consult on other occasions. In the Supreme Court case of Nesseby (HR-2018-456-P), the Finnmark Estate argued that guidelines must be established for how the Finnmark Estate should take into account the use rights of peoples in the local communities, as well as procedures for consultation and co-operation between these communities and the Finnmark Estate (para. 160).[75] This was unanimously agreed upon by the Supreme Court. At the time, the First Voting Judge (the speaker of the Court) stated that "the Finnmark Estate must naturally organize its administration in accordance with section 27 of the [Finnmark] Act,[76] to the extent necessary, adapt

to the established rights recognized through the Finnmark Commission's report" (para. 161).

A unanimous Supreme Court also supported the First Voting Judge's statement that "it will be necessary to conduct consultations between the right holder and the Finnmark Estate, such as the attorney of the Finnmark Estate explained from his desk at the Supreme Court".[77]

If the Finnmark Estate had been an ordinary private landowner, the argument of the Government not to include the Estate under the duty to consult, would probably have been valid. However, the Estate is not an ordinary private landowner. This fact together with the Nesseby case, implies that the Finnmark Estate must have a duty to consult Sámi rights holders.

3.5 Free, Prior and Informed Consent in Norwegian Law

UNDRIP has two principal provisions on consultations, Articles 19 and 32 (2), which, under particular conditions, require *free, prior and informed consent* (see section 2.2 above). In this context, consider the ILO Guide of 2009, which states that since adoption of UNDRIP, there has been general consensus regarding implementation of indigenous rights at the national level to ensure that international instruments bring about necessary changes for indigenous peoples around the world.[78] As shown above, the Supreme Court of Norway has stated that UNDRIP "must be regarded as a key document in indigenous law, among others because it reflects international law principles in the area and has been granted support from very many states". This means that the declaration has substantial legal significance. It can also be mentioned that the Swedish Supreme Court used UNDRIP as the legal basis for a Sámi community's right to control hunting and fishing rights in their area.[79]

In its draft of the consultation act the Sámi Rights Committee II proposed a statutory requirement for conditional free, prior and informed consent for measures in areas that are particularly important for Sámi culture. The proposed section 10 reads as follow:

> Measures that are planned to be located in areas that are particularly important for Sámi material cultural practice, such as areas where it is recognized or will be recognized ownership rights in accordance with state international law obligations, and areas which have a significant impact on the exercise of reindeer husbandry, coastal and fjord fishing, or other Sámi material cultural activities, and which can have a significant negative impact on the future use of these areas, can only be implemented if overriding society considerations so indicate.
>
> When considering measures to be implemented as mentioned in the first paragraph, consultations shall be conducted with the Sámi Parliament and the affected Sámi user interests, cf. §§ 13 et seq. If no agreement is reached on how the measure shall be implemented, it shall, as a general rule, not be implemented.[80]

Considering that the Government did not include this provision in its consultation bill, it is important to assess whether this omission is consistent with Norway's international obligations as discussed above.

As reviewed above, the FPIC duty is rooted in a number of sources including UNDRIP, ILO 169 Article 6 (as interpreted in light of UNDRIP) and ICCPR (which is incorporated into Norwegian law through the 1999 Human Rights Act). In particular the UN Human Rights Committee has interpreted a consultation and participation requirement in ICCPR Article 27. In several complaint cases, this requirement has been an important factor in the Committee's assessment of whether or not a state has complied with its obligations related to the protection of culture and carried out real consultations with the indigenous people. As mentioned above, the most prominent of these cases is the Poma Poma Case, where the Human Rights Committee found that the State of Peru had violated the rights of Ángela Poma Poma under Article 27.

The view has become important in Norwegian law. In Jovsset Ánte Sara vs. the Norwegian State,[81] Sara argued that an administrative decision to reduce Sara's reindeer herd from 116 to 75 animals, violated his rights under ICCPR Article 27. The Hålogaland Court of Appeal agreed and adopted the same rationale as in the Poma Poma case.

The Supreme Court did not find this to be a correct application of the law. It took the position that an administrative decision to reduce the number of reindeer under section 60 of the Reindeer Husbandry Act could not be compared with the Poma Poma case:

> The Poma Poma case concerned interference by the authorities that completely ripped off the basis of existence of the appellant and the other members of the minority community to which she belonged. In such case, it is clear that violation has taken place if no prior consent had been obtained from the minority.[82]

The Sara case, which concerned a decision that regulates the relationship between reindeer herders in safeguarding Sámi reindeer pastures was considered a measure that was in the minority's interest as a group.[83] The Supreme Court therefore found that Article 27 was not violated by not obtaining prior consent to the reduction decision.

4 Conclusion

For several decades, Norway has been among the leading countries globally in legally safeguarding indigenous cultures and land rights. This was highly visible when Norway became the first country in the world to ratify ILO 169 in 1990. Already then it was possible to argue that the duty to consult could be part of international customary law, which became more evident when the UN Human Rights Committee revealed its position in its general interpretive comment on Article 27

in 1994. Ratification meant that Norway undertook a responsibility to ensure the duty to consult the Sámi under ILO 169 Article 6, which in turn has been realized under the consultation agreement of 2005. However, indigenous law has developed significantly in this area since 2005, including the adoption of UNDRIP in 2007, which enshrines the principle of free, prior and informed consent. The consultation agreement is therefore no longer an innovation that puts Norway in the driving seat of international law.

In the Nordic context, it can be pointed out here that the Supreme Court of Norway, in the Nesseby Case, affirmed that parts of UNDRIP reflect principles of international law, while the Supreme Court of Sweden, in the Girjas Case, confirmed this by applying UNDRIP Article 26. The Supreme Court of Sweden also applied ILO 169 Article 8 (1), stating that the provision (and others) can be considered to express a general principle of international law.

Perhaps the most central part of these obligations is precisely the duty to consult. In that light, it is surprising that the proposed consultation statute fails to include the Sámi Rights Committee's proposal for a provision on conditional free, prior, informed consent. It was also unexpected that the Norwegian Parliament failed to adopt the government's consultation bill, and instead sent it back for new hearings and negotiations. How the draft bill will be handled the next time it is re-examined by legislators, will be a litmus test of whether Norway still can be said to be at the forefront of international indigenous rights. Here, Prime Minister Erna Solberg, who was Minister for Sámi Affairs and the negotiator responsible when the consultation agreement was signed in 2005 under the Bondevik Government, has a particular responsibility.

NOTES

* Thanks to Nigel Bankes and the two anonymous reviewers for useful and thorough comments.

1. S. James Anaya, *Indigenous Peoples in International Law,* 2nd ed. Oxford University Press 2004, 16–19, and Mattias Åhren, *Indigenous Peoples' Status in the International Legal System,* Oxford University Press 2016, 8–10.
2. Anaya, *Indigenous Peoples in International Law*, 57; S. James Anaya and Luis Rodriguez-Pinero, "The Making of the UNDRIP", Jessie Hohmann and Marc Weller (red.), *The UN Declaration on the Rights of Indigenous Peoples, A Commentary,* Oxford University Press 2018, 38–62 [40]. See also The Canadian Encyclopedia, "Deskaheh", https://www.thecanadianencyclopedia.ca/en/article/levi-general (20.01.2020).
3. The Philadelphia Declaration (adopted at the ILO 26th Conference in Philadelphia on May 10, 1944) re-established the traditional goals of ILO in two new directions: the importance of human rights to social policy and the need for international economic planning, adapted to the new realities post World War II.
4. ILO has 187 member states, where governments, employers, and workers' organizations meet with the goal of developing plans and programs to promote dignified working conditions for both sexes. The organization is headquartered in Geneva, Switzerland. International Labour

Organization, "About the ILO", http://www.ilo.org/global/about-the-ilo/lang--en/index.htm (20.01.2020).

5. NOU (Norwegian Public Report) 2007: 13 Den nye sameretten, 131.
6. NOU 2007: 13, 217, with further reference to Ilolex: 062003PRY169 para. 4, 092004PRY169 para. 8 og Ilolex: 162000ECU169 para. 31. See also Indigenous & Tribal Peoples' Rights in Practice: A guide to ILO Convention No. 169, International Labour Standards Department, 2009, 59.
7. Joshua Castellino and Cathal Doyle, "Who Are 'Indigenous Peoples'? An Examination of Concepts Concerning Group Membership in the UNDRIP", Hohmann and Weller (eds.), *The UN Declaration on the Rights of Indigenous Peoples, A Commentary* Oxford University Press 2018, 7–37, 19.
8. Indigenous and Tribal Populations Convention No. 107, Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, adopted in Geneva, 40th ILC session, 26 June 1957.
9. NOU 2007: 13, 173.
10. NOU 1980: 53 Vern av urbefolkninger, 7.
11. Environmental Justice Atlas, Alta River Hydro Power Plant, Norway, https://ejatlas.org/conflict/alta-river-hydro-power-plant-norway (27.08.20).
12. NOU 1980: 53, 19–24. See also Hanne Hagtvedt Vik and Anne Julie Semb, "Who Owns the Land? Norway, the Sámi and the ILO Indigenous and Tribal Peoples Convention", *International Journal on Minority and Group Rights* 20 (2013), 517–550 [523–525].
13. NOU 1980: 53, 38–41.
14. Innst. S (A proposition for the Parliament), no. 197 (1989–90), 1.
15. ILO, Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314 (20.01.2020).
16. Dokument 16 (2011–2012), 215 with further reference to NOU 2007: 13, 214.
17. The Supreme Court of Sweden, The State of Sweden v. Girjas sameby, judgement January 23, 2020, T-853-18 (The Girjas Case).
18. Anaya and Rodriguez-Pinero, "The Making of the UNDRIP", 45. The UN Human Rights Commission was a body under the UN Economic and Social Council, working with human rights in cooperation with the UN High Commissioner for Human Rights. In 2006, the Human Rights Commission was replaced by the UN Human Rights Council.
19. Anaya, *Indigenous Peoples in International Law*, 63–64.
20. United Nations – Indigenous Peoples, Department of Economic and Social Affairs, United Nations Declaration on the Rights of Indigenous Peoples and St.meld. nr. 28 (2007–2008), 34.
21. Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa and Ukraine.
22. United Nations – Indigenous Peoples, Department of Economic and Social Affairs, United Nations Declaration on the Rights of Indigenous Peoples (online).
23. St.meld. (Government white paper) nr. 28 (2007–2008) Samepolitikken, 35.
24. Supreme Court of Norway, Finnmark Estate and others vs. Unjárgga gilisearvi / Nesseby community association (HR-2018-456-P), para. 97.
25. UN Human Rights Committee, Tiina Sanila-Aikio vs. Finland (Communication No. 2668/2015), views adopted 1 January 2019, para. 6.8 og 6.9.
26. See supra note 6.
27. Prop. (Law Bill) 116 L (2017–2018) Endringer i sameloven mv. (konsultasjoner), 28.
28. Indigenous & Tribal Peoples' Rights in Practice, A guide to ILO Convention No. 169 (2009), 61.

29. *The Sámi Parliament* is a representative advisory body established in 1987 according to the Sámi Act (12 Juni 1987 no. 56) section 1–2. Sweden and Finland established similar bodies in 1992 and 1995, respectively.
30. The reindeer husbandry *siida* is a community of members who engage in reindeer herding together on common pastures, formalized in the Reindeer Husbandry Act (2007) section 51.
31. Prop. 116 L 81 (2017–2018) Endringer i sameloven mv. (konsultasjoner), 81–87. This is discussed in more detail in sections 3.2 and 3.3 below.
32. ILO Convention on Indigenous and Tribal Peoples, 1989 [No. 169], a manual (2003), 17.
33. Compare to Supreme Court of Norway case Reinøy reinbeitedistrikt and others vs. Troms fylkeskommune v/regionvegkontoret (HR-2017-2247-A (Langsund)) where it, quite unexpected, was presumed sufficient that "the reindeer husbandry interests have been given good opportunity to make their views known" (para. 121).
34. Anaya, *Indigenous Peoples in International Law,* 153–154.
35. Graver and Ulfstein, Folkerettslig vurdering av forslaget til ny Finnmarkslov (2004).
36. The Sámi Rights Committee was reappointed by Royal Decree of 1 June 2001 according to a recommendation by the Ministry of Justice and the Police. The reappointed committee is often called *The Sámi Rights Committee II*, as also referred to hereinafter.
37. NOU 2007: 13, 1044.
38. Human Rights Committee, CCPR General Comment No. 23: Article 27 (Rights of Minorities) Adopted at the Fiftieth Session of the HRC, on 8 April 1994, CCPR/C/21/Rev.1/Add.5, General Comment No. 23, para. 7.
39. Human Rights Committee, Ángela Poma Poma vs. Peru, Communication No. 1457/2006, views adopted March 27, 2009.
40. Indigenous & Tribal Peoples' Rights in Practice, A guide to ILO Convention No. 169 (2009), 118.
41. NOU 2007: 13, 218 with further reference to Ilolex: 162006MEX169 para. 36.
42. Indigenous & Tribal Peoples' Rights in Practice, A guide to ILO Convention No. 169 (2009), 184.
43. Indigenous & Tribal Peoples' Rights in Practice, A guide to ILO Convention No. 169 (2009), 184.
44. ILO 169 Article 16 (2) sets up FPIC as a condition for relocation of indigenous people from their land. Yet, there is no reason to pursue this intrusive measure for the purposes of this article.
45. Leena Heinämäki, "Global Context – Arctic Importance: Free, Prior and Informed Consent, a New Paradigm in International Law Related to Indigenous Peoples" in Thora M. Herrmann and Martin Thibault (eds.) Indigenous Peoples' Governance of Land and Protected Territories in the Arctic, Springer 2016, 220 with reference to U.N. Commission on Human rights, Sub-Comm. On the Promotion and Protection of Human Rights Working Group on Indigenous Populations, Working Paper: Standard-Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent, 57, U.N. Doc. E/CN.4/Sub.2/AC.4/2005/WP.1, 2005 (July 14, 2005)
46. See supra note 34.
47. See supra note 39 and last part of section 2.1 above.
48. Barelli, Mauro, "Free, Prior, and Informed Consent in the UNDRIP" in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples, A Commentary,* Oxford University Press 2018, 247–269 [249].
49. ICCPR Article 27 sets a threshold for intervention in the culture of minorities. This can hardly be passed even if it happens voluntarily according to an agreement.

50. Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples. An Introductory Handbook, Indigenous Bar Association, Winnipeg, 2011, 19 with further reference to Andrea Carmen, "The Right to Free, Prior, and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress", Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action, Purich Publishing Ltd, Saskatoon, 2010, 124–145.
51. Barelli, "Free, Prior, and Informed Consent in the UNDRIP", 253.
52. Åhren, *Indigenous Peoples' Status in the International Legal System,* 140–141.
53. NOU 2007: 13, 221–222. See also Jens Edvin Skoghøy, *Rett og rettsanvendelse,* Universitetsforlaget, Oslo 2018, 212, who writes that Article 8 (2) should be interpreted in such a way that more is needed to intervene in the internal affairs of indigenous peoples than in cases where it is a question of balancing the interests of the nation state against indigenous peoples' interests. Such an understanding means that there will only be a degree of difference between (1) and (2), so that the weight of Sami customs in relation to Norwegian law will increase the closer one is to the core of the Sami inner life and cultural practice.
54. Resolution adopted by UN General Assembly 22 September 2014 (A/RES/69/2, with reference to A/69/L.1). Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples. Resolution adopted by the General Assembly on 22 September 2014, paragraphs 3 and 20.
55. Åhren, *Indigenous Peoples' Status in the International Legal System,* 138.
56. *Prosedyrer for konsultasjoner mellom statlige myndigheter og Sametinget*, see Regjeringen, Prosedyrer for konsultasjoner mellom statlige myndigheter og Sametinget (2005).
57. Regjeringen, Prosedyrer for konsultasjoner mellom statlige myndigheter og Sametinget (2005). See also Indigenous & Tribal Peoples' Rights in Practice, A guide to ILO Convention No. 169 (2009), 66–67.
58. In NOU 2007: 13 the Sámi Right Committee II presented a proposed consultation act. In the fall of 2018, the Government forwarded av bill, Prop. 116 L (2017–2018) to the Parliament. The bill aims to include a chapter on consultations in the 1987 Sámi Act. The Parliament sent the bill back to the government, allegedly because of a lack of hearings. At the time of writing, the bill has yet to be considered by the Parliament.
59. Innst. O. (Setting to the Parliament) nr. 80 (2004–2005) Innstilling fra justiskomiteen om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (the Finnmark Act), 15.
60. NOU 2007: 13, 132.
61. NOU 2007: 13, 132.
62. The Finnmark Estate is the landowner body governing previous state land in Finnmark. According to the Finnmark Act (ss. 6 and 7), "the Finnmark Estate is an independent legal entity with its seat in Finnmark which shall administer the land and natural resources, etc. that it owns in compliance with the purpose and other provisions of this Act. The board of the Estate shall be governed by a board consisting of six persons. Troms and Finnmark County Council and the Sámi Parliament shall each elect three members, each with a personal deputy.
63. Prop. 116 L (2017–2018), 6.
64. Prop. 116 L (2017–2018), 6.
65. Prop. 116 L 81 (2017–2018), 81–87.
66. Prop. 116 L (2017–2018), 6.
67. The Planning and Building Act (27. juni 2008 no. 71) section 5–4 para. 3 reads: "The Sami Parliament can raise objections to such plans [municipal land-use plans and zoning plans] on issues that are of material importance to Sami culture or business practice" (my translation).

68. Steinar Solaas, "– Er det en egen standard for Samiske lovsaker?", *Ságat,* February 12, 2019.
69. Innst. 253 L (2018–2019) Innstilling til Stortinget fra kommunal- og forvaltningskomiteen om Endringer i sameloven mv. (konsultasjoner), 13 and 18.
70. Steinar Solaas, "Konfliktområdet", *Ságat,* March 18, 2020.
71. Prop. 116 L (2017–2018), 97.
72. Prop. 116 L (2017–2018), 97. However, this obligation does not appear in the bill itself.
73. The Finnmark Estate, Svar på høring om endringer i Sameloven mv., letter to KMD – Same- og minoritetspolitisk avdeling, 19/2208 –5, March 19, 2020.
74. The Finnmark Estate, Høringsvar – forslag til endringer i sameloven mv., case 19/2020, March 18, 2020. Section 18 requires the Finnmark Estate to provide the rights holders in an area prior notification and the opportunity to express their opinions pursuant to the provisions of section 16 of the Public Administration Act, before the Finnmark Estate makes a decision that may have legal or actual consequences for them.
75. See also Ravna, Same- og reindriftsrett (2019), 182.
76. Section 27 regulate further conditions for utilization of renewable resources and restrictions on such utilization, Para 1 provides that "The Finnmark Estate may issue further rules for utilization of renewable resources […]. The Finnmark Estate may stipulate that utilization is subject to issue of a permit. Conditions may be provided in the permits."
77. At para 195. See also the Finnmark Commission, Annual Report 2018, 5, where it is stated that "The Supreme Court states that the local people's use rights are recognized and must be respected, and that consultations between the right holders and the Finnmark Estate will be necessary" (my translation).
78. Indigenous & Tribal Peoples' Rights in Practice, A guide to ILO Convention No. 169 (2009), 5.
79. See supra note 15 (The Girjas Case), para. 131.
80. NOU 2007: 13, 56, cf. 824 (my translation). An English translation of the reasoning of the bill is given at NOU 2007:13, 131–136 (to be found online).
81. Staten v/Landbruks- og matdepartementet vs. Jovsset Ante Iversen Sara (LH-2016-92975 and HR-2017-2428-A). An English translation of the Supreme Court judgement is found here: https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2017-2428-a.pdf (15.06.20).
82. HR-2017-2428-A para 74.
83. HR-2017-2428-A para 76 and 78.