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The Fosen Case and the Protection of Sámi Culture in Norway Pursuant to Article 27 ICCPR

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Abstract

The International Covenant on Civil and Political Rights has been a part of Norwegian law since 1999. It has, however, been of greater importance in the political sphere than in the courts. In the fall of 2021, the Supreme Court of ruled that the construction of two wind power plants were violating the rights of Indigenous Sámi reindeer herders pursuant to the Article 27 ICCPR. In the presentation, the Supreme Court's use of Article 27 is analysed in order to determine its impact on protecting Indigenous rights in Norway, including where the threshold for violation lays when interference in Sámi reindeer husbandry areas take place.

Keywords

minority law – Indigenous People – Sámi – Fosen – wind power – Article 27 ICCPR

1 Introduction and Background[1]

The International Covenant on Civil and Political Rights (ICCPR)[2] became legally binding on Norway in 1976 and was incorporated to Norwegian law with priority over other general legislation in 1999.[3] Article 27 ICCPR is an important provision for protecting the right of minorities and Indigenous peoples

1 Thanks to the anonymous peer reviewer(s) for doing a good job. The article is based on Ø. Ravna "SP artikkel 27 og norsk urfolksrett etter Fosen-dommen" (Lov og rett no. 7/2022).
2 ICCPR, adopted 16 December 1966 by UN General Assembly resolution 2200A (xxi).
3 *Act of 21 May 1999 no. 30 relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act), ss. 2 and 3.*

to enjoy their culture, including the *Indigenous Sámi* in Norway.[4] However, in Norway, ICCPR has had far greater significance in theory and in political negotiations on the legal protection of Indigenous peoples, than in case law of the judiciary.[5]

On 11 October 2021, the Supreme Court of Norway, in Grand Chamber, unanimously ruled that Norway's obligations under the Article 27 ICCPR had been violated. The violation consisted of the Norwegian Water Resources and Energy Directorate (henceforth nve) having granted licences for *Roan* and *Storheia* wind power plants on the pastures of two Sámi reindeer husbandry *siidas* (units) at Fosen in the county of Trøndelag. The parties in the case were the energy company *Fosen Vind* versus the Sámi *South-Fosen sitje* and *North- Fosen siida*.[6] The Ministry of Petroleum and Energy was a party assistant to the energy company.

The judgment, known as *the Fosen Case,*[7] is unique in Norwegian law as it is the first time the Supreme Court has concluded that an interference violates Article 27 ICCPR.[8] The historic judgment is a result of an appeal against a case to determine expropriation compensation. The fact that the reindeer husbandry *siidas* contested the legality of the interference, made the judgment a decision in principle on the scope of Article 27 of Norwegian law.

In this presentation, the Supreme Court's use of Article 27 ICCPR in the Fosen case, is reviewed in the light of the Human Rights Committee's practice and other relevant Norwegian case law. The presentation will reveal the way the Fosen case has contributed to clarify when there is a violation of Article 27

4 The Sámi are an Indigenous people who have their traditional areas in Norway, Sweden, Finland and Russia. The land that the Sámi people traditionally inhabit is called *Sápmi*. Reindeer husbandry is an important, culturally rooted livelihood for the Sámi, cf. M. Berg-Nordlie and H. Gaski, 'samer' in *Store norske leksikon* at https://snl.no/samer (visited 2 May 2022).

5 Ø. Ravna, *Same- og reindriftsrett* [Sámi and Reindeer husbandry Law], (Gyldendal, Oslo 2019), p. 166.

6 *Fosen Vind da* is a joint venture company owned by Statkraft (52.1 per cent), TrønderEnergi (7.9 per cent) and Nordic Wind Power da (40.0 per cent), a European investor consortium owned by EIP (Energy Infrastructure Partners) and the Swiss power company BKW. *Siida* is the North Sámi name for a group of reindeer herders who practice reindeer husbandry jointly on specific areas, *cf. Act of 15 June 2007 no. 40 on reindeer husbandry*, s. 51. *Sitje* is the South Sámi name for the same group.

7 hr-2021-1975-S. 'hr' is an abbreviation for Supreme Court, and here means Supreme Court case. The letter 'S' stands for Grand Chamber (11 judges), while references with the letter 'A' mean Supreme Court in Chamber (five judges).

8 An English translation of the case can be found here: https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2021-1975-s.pdf (visited 30 April 2022).

in the event of interference on Sámi reindeer husbandry areas, and in extension of this, where the threshold for interferences now lays in Norwegian law.

The case is based on the fact that in 2010, the nve decided to grant licence and expropriation permit for four wind power plants at the Fosen Peninsula in Trøndelag county.[9] The decisions were appealed by several organisations and individuals. Among these were *North-Fosen siida* and *South-Fosen sitje*. In 2013, the Ministry of Petroleum and Energy rejected all the complaints.

On 25 August 2014, *Fosen Vind* petitioned an appraisal action for measure of damages to the *siidas* for the building and operation of, among others, Roan and Storheia wind power plants. On this basis, the Ministry of Petroleum and Energy in December of the same year granted pre-accession.[10] In retrospect, it can be said that the granting was based on a miscalculated risk of the scope of ICCPR Article 27.

South-Fosen sitje argued that the case had to be declined for Storheia wind power plant as it violated Article 27. The district court concluded, however, that the interference was not in conflict with the provision, which meant that *South-Fosen sitje* requested a reappraisal. After the Court of Appeal turned down the request, and the second-tier appeal to the Supreme Court was dismissed (hr-2018-862-U), the district court in June 2018 determined compensation for the damage of wind power interventions. The two *siidas* were awarded compensation for the loss of pastures, feeding in years of crisis, extra work, and costs for materials of nok 8.9 and 10.7 million, respectively.[11]

Fosen Vind and *South-Fosen sitje* petitioned for a reappraisal. *Fosen Vind* argued that the compensation was set too high, while the *sitje* principally argued that the interference of Storheia was contrary to Article 27 ICCPR, Article 1 Protocol 1 of the European Convention on Human Rights, and Article 5 (d) (v) of the International Convention on the Elimination of All Forms of Racial Discrimination (*South-Fosen sitje* also argued with subsidiary claims). The same autumn (2018), the Committee on Racial Discrimination requested a halt to construction work until the legality was clarified, which the then Minister of Petroleum and Energy Kjell-Børge Freiberg (FrP[12]) rejected.[13]

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9 Background and facts are taken from the Supreme Court case hr-2021-1975-S (Fosen) sections 12–25.

10 *Cf. Act 23 October 1959 no. 3 on the alienation of real property* (the Expropriation Act) s. 25.

11 The amount for North-Fosen also included compensation for Kvenndalsfjellet and Harbakksfjellet wind farms.

12 The Progress Party.

13 Stortinget.no: *Written question from Une Bastholm (MDG) to the Minister of Petroleum and Energy on 14 December 2018*. The rejection was based on the fact that reindeer husbandry had been considered and that the request was not legally binding.

The reappraisal before the Court of Appeal thus applied to whether the wind power plants could be legally built and in that case the calculation of compensation for damages from the development of wind power plants and power lines. The allegations that the licence for the two power plants was invalid was not heard, and compensation was awarded. There is reason to note that the Court of Appeal held that the area where the Roan wind farm was built had been lost as winter pasture, and that this threatened the existence of reindeer husbandry at Fosen, but that winter feeding would prevent a violation of Article 27 ICCPR. Due to the need for winter feeding, the compensation for the negative consequences of the power plants was set considerably higher than by the district court; about nok 44.6 million to each of the *siidas*.

Both parties appealed the reappraisal. The main question the Supreme Court had to decide was thus whether the appraisal case for measure of damages had to be denied as a result of an invalid licence.

A key question in the Fosen case was whether the courts would be able to recognise that society at large violated Sámi interest. The reason for this was not only that the two *siidas* had defended their grazing land in vain with all legal means, but also a long series of Sámi defeats in the courts in the period 2016 to 2021. Here we can point to four Supreme Court judgments and especially the attempt Jillen-Njaarke reindeer grazing district made to stop the intrusive Øyfjellet development until the legality of the decision on development was tested (lb-2020–172267). The latter case cost the reindeer owners NOK 1.77 million. A part of the picture was that the Public Court Commission had expressed that measures had to be implemented to ensure real equal treat- ment of Sámi and Norwegians in the courts.[14]

The fact that the Fosen case came up *after* the very extensive interferences had been completed, with irreversible damage as a result, and that the Ministry of Petroleum and Energy intervened in support of the energy company, meant that the case was followed carefully by the Sámi.

However, the Sámi concerns turned out to be groundless in this case, as the Supreme Court unanimously concluded that the construction of the power plants violated the reindeer herders' rights under Article 27 and was thus invalid.

In the following, we will look at ICCPR, its place in Norwegian law, how it previously has been applied in Norway, and the sentences we can extract from the Fosen case.

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14 *NOU* [Official Norwegian Report] *2019: 17 Domstolstruktur. Delutredning fra Domstolkommisjonen [The Court structure. Partial report from the Court Commission],* p. 100.

2 International Minority Law

The ICCPR is based on the Universal Declaration of Human Rights of 1948. The Covenant, which aims to ensure fundamental civil and political rights such as freedom of speech, personal security, and equality before the law, was adopted by the UN General Assembly on 16 December 1966 and entered into force on 23 March 1976. In contrast to the Universal Declaration, it is legally binding on the signatory states.

In addition to the more general civil and political rights protected by the Covenant, Article 27 safeguards the right of minorities to enjoy their culture and religion, and to use their own language. Article 27 reads as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

Assumed breaches of Covenant may, if national remedies are exhausted, be brought for the UN Human Rights Committee (HRC), cf. Articles 1 and 2 of the Covenant's Additional Protocol.[15] The HRC, which is the Covenant's monitor- ing body, hears both individual complaints and issues general statements, both providing guidance on how the Covenant is to be understood in the countries that have acceded to it.[16]

According to the wording, the provision imposes a negative obligation on the States not to deny minorities the right to enjoy their culture. However, the provision imposes a positive obligation too; to implement measures to safeguard the culture of minorities.17 Nevertheless, it is mainly the scope of the negative obligation that has been tested by the HRC.[18]

In the Fosen judgment (para. 113), it is assumed that four Committee decisions in particular shed light on what is required before the right to cultural enjoyment pursuant to Article 27 has been violated as a result of interference in traditional Indigenous livelihoods. These are the cases of Ilmari Länsman

15 Provided that the state has also acceded to the protocol.

16 The HRC is a treaty body composed of 18 experts, established by the ICCPR.

17 *CCPR General Comment* No. 23: Article 27 (Rights of Minorities). Adopted at the Fiftieth Session of the Human Rights Committee, on 8 April 1994 ccpr/c/21/Rev.1/Add.5, para. 6.2, which says that the State party is under an obligation to implement positive measures of protection, whether through its legislative, judicial or administrative authorities, or against the acts of other persons within the State party.

18 Norges institusjon for menneskerettigheter [Norwegian National Human Rights Institution], Menneskerettslig vern mot inngrep *[Human Rights Protection Against Interferences in Traditional Sámi Areas]* (Report, 2022), p. 29.

and others v. Finland (26 October 1994, ccpr-1992-511), Jouni Länsman and others v. Finland I (30 October 1996, ccpr-1995-671), Jouni Länsman and others v. Finland ii (17 March 2005, ccpr-2001-1023) and Ángela Poma Poma v. Peru (27 March 2009, ccpr-2006-1457).

In the first two Länsman cases, which dealt with interferences in reindeer husbandry related to quarrying and logging, respectively, the Committee states the obvious; that interference which denies the right to enjoy culture violates the Covenant. On the other hand, interferences that have "a certain limited impact on the way of life of persons belonging to a minority (…) will not necessarily amount to a denial of the right under article 27".[19] The question then was whether the effects of the interventions were so significant that they "effectively deny to the authors the right to enjoy their cultural rights in that region".

The third Länsman case, which also dealt with logging-related interferences in reindeer husbundry areas, does not bring much new to the table, but it can be noted that in assessing whether there is a violation, the HRC assumes that the effect of the interference must be assessed over time. Although the logging entailed extra work and extra costs for the Sámi, it did not have a scope that threatened the existence of reindeer husbandry.[20]

The most recent decision of the four is the Ángela Poma Poma case, which was based on a complaint from a member of the Aymara people.[21] The HRC states that an interference that has "a substantive negative impact" on cultural enjoyment, is violating the covenant.[22] The HRC thus clarified (and lowered) the threshold for violation.[23]

As a matter of fact, the HRC relied on the complainant's claim that thou- sands of domestic animals (llamas and alpacas) died due to groundwater drain- age and drying out of about 10,000 hectares (100 km2) of pasture used by the Aymara people.[24] The drying out was a direct result of the establishment of a water supply plant in the 1990s (the Tacna project). It ruined the complainant's and the local community's way of life, forcing the community to leave its land and traditional industry. HRC noted that these allegations were not disputed [162] by the State of Peru, who had not

19 *Ilmari Länsman and others v. Finland* (26 October 1994, ccpr-1992-511) para. 9.4.

20 *Jouni Länsman and others v. Finland II* (17 March 2005, ccpr-2001-1023) para. 10.4.

21 The Aymara are an Indigenous people in Peru, Bolivia, Argentina, and Chile. Approx. 600,000 Aymara live in a traditional way of farming and fishing in the core area around Lake Titicaca. In total, the people count 2–2.5 million.

22 *Ángela Poma Poma v. Peru* (27 March 2009, ccpr-2006–1457) para. 7.5.

23 M. Åhrén, *Indigenous Peoples' Status in the International Legal System* (Oxford University Press, Oxford 2016) p. 94, who argues that the case lowered the threshold as it previously lay where the interference effectively denied cultural enjoyment.

24 The fact is described in paras. 3.1 and 7.5 of the case.

justified the interference other than to refer to the construction of the wells in the Tacna project. After his, the HRC states:

> the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy (para. 7.6).

In addition to participation in the decision-making process, the Committee states that participation must be effective, which not only involves consultation, but that the members of the minority give their *free, prior and informed consent.* The HRC subsequently concluded that there had been a violation of Article 27 and Article 2 (3) (a),[25] read in conjunction with Article 27 (para. 8).

In addition to the four individual complaint cases, reference can be made to the ICCPR 27 General Comment No. 23,[26] which in para. 6.1, as shown, imposes an obligation to implement positive measures of protection of the State Party. Para. 6.2 further states that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under Article 27, "they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria".

Important for Indigenous Peoples, in para. 7, the HRC states 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". This means that the concept of culture also includes land and natural resources, which is often referred to as the material basis for culture. That this material bases applies in particular to Indigenous peoples also follows from the fact that

25 Article 2 no. 3 reads: "Each State Party to the present Covenant undertakes: a. to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

26 *CCPR General Comment* No. 23, *supra* note 17.

one of the Indigenous peoples' criteria is a long and permanent connection to specific land areas, cf. ilo Convention No. 169, Article 1 (1) b.[27]

The Committee's statement also means that states are not only obliged to passively accept the cultural practices of minorities; states must also actively implement "positive legal measures of protection" (para. 7). And as in the Poma Poma case, it is stated that the minorities must be ensured "effective participation of members of minority communities in decisions which affect them".

3 Norwegian Law

3.1 *ICCPR as Norwegian Law*

The International Covenant on Civil and Political Rights was ratified by Norway on 13 September 1972 and became legally binding to Norway on 23 March 1976. Through the Human Rights Act, the Covenant was incorporated into Norwegian law with priority over other legislation in 1999.[28]

Although the Supreme Court rules in the final instance, cf. Article 88 of the Constitution of Norway, statements from the HRC will have significant weight in the interpretation of the Covenant.[29] If the Committee in a com- plaint against Norway determines a violation of the Covenant, there is reason for reopening.[30]

ICCPR 27 must be seen in connection with Article 108 of the Constitution, which requires the state authorities "to create the conditions for the Sámi people to secure and develop their language, culture and social life".[31] As shown, Article 27 protects the right of minorities to practice their culture, including against encroachment on the material basis of culture. This means that there is a threshold for legal interference, and if this is passed, the interference will lead to a violation of the Covenant and thus a breach of Norwegian law.

27 Article 1 (1) b reads: "This Convention applies to: (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."

28 *Act of 21 May 1999 no. 30 on strengthening the position of human rights in Norwegian law* (Human Rights Act) ss. 2 and 3.

29 HR-2021-1975-S (Fosen) para. 102.

30 *Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes* (The Dispute Act) s. 31–3.

31 HR-2021-1975-S (Fosen) para. 99.

Thus, Article 27 means that even if an expropriation interference "is undoubtedly for more benefit than damage", as formulated in the Expropriation Act s. 2 second paragraph, and the person affected receives "full compensation", cf. the Article 105 of the Constitution, it will still not be legal if it violates the right of ethnic, religious, or linguistic minorities to practice their culture.

There is no doubt that Sámi reindeer husbandry falls under the concept of culture, or that land used for such reindeer husbandry is part of the material basis for Sámi culture, and as such is protected by the provision.[32] Reference can also be made to the preparatory work for the Reindeer Husbandry Act, which states "that the right to expropriate reindeer husbandry rights may be affected by International law that protect the Sámi as indigenous peoples".[33]

Although the HRC has discussed where the threshold for violation goes in several cases, the question has not been clarified in Norwegian law. It can i.a. be explained on the basis that the article is generally formulated, at the same time as facts in Committee practice have not fully corresponded to the circum- stances in the cases that have come before the courts in Norway.

ICCPR 27 has been appealed to the Supreme Court in a significant number of cases. In 11 of them, the court has found it necessary to rule on allegations of violation.[34] However, it is only in four cases prior to the Fosen judgment that the threshold set out in ICCPR 27 has been discussed.[35]

3.2 *Case Law Prior to the Fosen Judgment*

Before we go into the Supreme Court's reasoning for violation in the Fosen judgment, it is appropriate to look at which norms can be deduced from the Supreme Court's previous consideration of Article 27. It is natural to start with the plenary judgment in Nrt. 1982 p. 241 (Alta), where the Supreme Court acknowledged that the Sámi were protected by Article 27, but at the same time was reluctant to give the provision legal weight. Although ICCPR at this time

32 *CCPR General Comment* No. 23, *supra* note 17, para. 7.

33 *Ot.prp.* [draft law] *nr. 25 (2006–2007) Om lov om reindrift (reindriftsloven),* p. 53. *Cf.* Storting white paper *Meld. St. 25 (2015–2016) Kraft til endring – Energipolitikken mot 2030*, p. 51.

34 *Norsk Retstidende* [The Official Legal Gazette until 2015] Nrt. 1982 s. 241 (Alta); Nrt. 2001 s. 769 (Selbu); Nrt. 2001 s. 1229 (Svartskogen); Nrt. 2003 s. 1013 (Reinøya); Nrt. 2004 s. 1092 (Stongland); Nrt. 2006 s. 1382 (Utsi); HR-2016-1587-U; hr-2017-1230-A (Hjerttind); HR-2017- 2247-A (Reinøya); HR-2017–2428 (Sara); HR-2018-456-P (Nesseby); HR-2018-862-U (Fosen, where Article 27 ICCPR was referred to, but not discussed by the Supreme Court); HR- 2018-872-A (Femund Sijte).

35 Nrt. 1982 s. 241; Nrt. 2004 s. 1092 (Stongland); Nrt. hr-2017-2247-A (Reinøya); HR-2017–2428 (Sara).

only had legal weight in Norway as a result of the presumption principle, the Supreme Court's assessment of ICCPR 27 seems too dismissive in form:

> Nor can I see that the decision offers any doubt as to the minority rights invoked. Decisive for my view on this question is the actual extent of the intervention that is made here in the Sami interests. A precondition for any question of international law to arise in a regulatory case must at least be that the regulation entailed substantial and very harmful interference in such interests. Only then could one raise questions about the mentioned species. 27 had gone too close, because the intervention in the reindeer husbandry industry was so great that it threatened the Sami culture. The intervention that is taking place here, however, is far from of this serious nature.[36]

Although the extent of the interference was considered important at the time, too, the threshold was set so high that it would not be reached until the interference was so extensive that "it threatened the [whole] Sámi culture". In other words, the Supreme Court disregarded the individual protection that can be read directly out of Article 27, and which is generally the basis for complaints to be made to the HRC from individuals or specific groups.[37]

In Nrt. 2004 p. 1092 (Stongland), which concerned the validity of the protection of an area against reindeer grazing in a reindeer grazing district, Article 27 ICCPR is subject to a very brief assessment. The unanimous judgment states that Article 27 does not lead to any other assessment of the validity of the con- servation decision: "If it is to be invoked in connection with interference on industry, it must be assumed that the interference on the area is so extensive that the reindeer husbandry Sámi are 'denied the right to' exercise their busi- ness activities. This is not the case here" (para. 73).

In HR-2017-2247-A (Reinøya), the interference in question consisted of the conversion of a road route and the establishment of a ferry berth in the rele- vant reindeer grazing district. With reference to the Committee's practice, the majority concluded that "The Human Rights Committee's practice [shows] that it takes a good deal before the interference becomes of such a seriousness that Article 27 has been violated. Against this background, and which I shall now justify, it is clear that the interferences in the case here do not constitute a violation of Article 27" (para. 128). The minority did not discuss Article 27 but agreed with the majority's general understanding of the Article (para. 150).

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36 Nrt. 1982 s. 241 (Alta) pp. 299–300.

37 *Optional Protocol to the International Covenant on Civil and Political Rights*, Article 2.

In HR-2017-2428-A (Sara), the Supreme Court conducts a broad discussion of the threshold for interference. The majority of the Court states that the Court of Appeal, with reference to the Poma Poma case, had assumed that ICCPR 27 sets requirements that reindeer herders must be guaranteed a financial out- come from the husbandry. The majority did not support this view in the case in question. In contrast to the Poma Poma case, Sara was not the result of an interference by society at large against a minority interest: “This is a regulation that is intended to safeguard the interests of the reindeer husbandry Sámi, and which raises questions about how the burden of the reindeer herd reduction should be distributed between them. Judgments in cases of encroachment on nature cannot be automatically transferred in such a case” (para. 71).

Based on assessment of older Committee practice, the majority concluded that in this type of internal situation, there is no requirement that the individual must be guaranteed a financial dividend.[38] In the following, the significance of the minority having been given a say and the decision-making process is considered. It is assumed here that the authorities have a duty to consult, where the question is what is more specific in this duty (para. 72). Reference is made again to the Poma Poma case, which concerned:

> An interference by the authorities which completely tore away the livelihood of the complainant and the other members of the minority community to which she belonged. In such a case, it seems clear that the violation must be established, if the consent of the minority has not been obtained in advance. But this cannot be transferred to a case like ours (para. 74).

The majority of the Court thus assumes that an interference of the kind and scope seen in the Poma Poma case will be a violation if consent is not given. It is also a question whether consent will repair the violation, given that the minority will then not be able to enjoy their culture-based industry. Anyhow, there is a requirement for effective participation for the minority people.

However, the first-voting judge[39] of the Supreme Court stated that it will vary from case to case what such a right of participation entails: “In a case that primarily concerns conflicts of interest between individuals or groups within the minority, I find no basis for claiming that the minority has actually

38 *Sandra Lovelace v. Canada* (30 July 1981, ccpr-24–1977); *Kitok v. Sweden* (27 July 1988, ccpr-197–1985); *Apirana Mahuika et al. v. New Zealand* (27 October 2000, ccpr-547–1993).

39 The first-voting judge is the judge in the Supreme Court who reads out and casts the first vote on the verdict. In cases of dissent, that judge will generally represent the majority.

influenced the decision" (para. 75). He further states that a decision that is intended to safeguard the reindeer herding Sámi's interest as a group, does not entail a violation if the regulation "appears to be factual, reasonable and necessary" (para. 94). And according to the judge, the decision on a proportional reduction in the number of reindeer was in line with these conditions.

The minority of the Court found that Article 27 had been violated as reindeer reduction was not well justified (para. 110). Furthermore, he could not see that the threshold for interference is in principle different in cases where it was made for the benefit of others than the minority itself, than in cases such as the present one (para. 115).

4 The Norms of the Fosen Case

4.1 *What Does It Take for an Offense to Exist?*

The Fosen case concerns an industrial interference that can be compared with the Poma Poma case, but without it being as extensive. The question at stake is whether the interference violates the right of two reindeer herding *siidas* to practice their culture. Article 27 ICCPR sets a threshold for the administrative discretion, and based on the precedence of the article in Norwegian law, the decision to grant licences for a powerplant will be invalid if this threshold has been passed.

In order to decide where the threshold for violation lies, the Supreme Court uses case law from the HRC. The most relevant here is the aforemen- tioned Poma Poma case. Having quoted and translated "a substantive negative impact", the first-voting judge pronounces: "Against this background, my *con- clusion* is that there will be a violation of the rights in Article 27 ICCPR if the interference has a substantive, negative impact on the possibility of cultural enjoyment" (para.119, highlighted by the first-voting judge).

Furthermore, the first-voting judge states that the interference does not have to be as extensive as in the Poma Poma case. The threshold is still high, but not as high as the wording of the ICCPR sets out, as there does not need to be a total denial before a violation appear. Following the Reinøya case (hr-2017- 2247-A), the boundary for a violating interference lay somewhere between the intervention in that case and that in the Poma Poma case.[40] The Fosen case clarifies that the intervention must not be as extensive as in the Poma Poma case to violate Article 27.

40 Ravna, *supra* note 5, p. 159.

[168]

The Supreme Court does not emphasise the consequences of the interference in question solely to determine whether there has been a violation; with reference to the Jouni Länsman I case, the court states that the interference must be seen in connection with other measures, both earlier and planned: "It is the different activities taken together that may constitute a violation" (para. 119).

That the overall effects of total interferences; including the previous ones, is decisive for whether there is a violation, the Supreme Court had previously rejected. In hr-2017-1230-A (Hjerttind), where it was assessed whether an intervention was in violation of the Reindeer Husbandry Act s. 63 para. 1, the Supreme Court refused to withdraw the effect of a gradual development of cabins (leisure housings), arguing that it had to be handled at the political level. The court could only rule on the new cabins. The Fosen judgment clarifies that it is *the overall, cumulative effects* that are to be used as a basis for assessing whether an intervention has a significant, negative effect, which now probably also applies when assessing whether an interference is to the significant disadvantage of the reindeer husbandry pursuant to the Reindeer Husbandry Act s. 63 para. 1.

4.2 *The Importance of Consultations, Participation, and Consent*

Although the consequences of the measure carry the most weight, the Supreme Court states, with reference to the all-mentioned Committee cases, that "it is also essential whether the minority has been consulted during the process" (para. 120). At the same time, it is not an unconditional requirement that the minority's participation has influenced the decision. Consultations are thus not decisive, but on the other hand a factor that is a part of the assessment of whether the cultural protection has been violated: "If the consequences of the interference are sufficiently serious, consultation does not prevent violation. On the other hand, it is not an absolute requirement under the Covenant that the minority's participation has contributed to the decision, although that, too, may be essential in the overall assessment" (para. 121).

The Supreme Court consequently clarifies that consultations are important, but that it is not decisive that the minority's participation and position have influenced the decision. And more important; if the consequences of the interference are large enough, consultations will not prevent the violation. In other words, contractors or states cannot prevent a violation by consultations.

In contrast to hr-2017-2428-A (Sara), the significance of free, prior and informed consent is not discussed in the Fosen case. In the Sara Case, the majority of the Court states that "in such a case [as in the Poma Poma case] it seems clear that violation must be established, if the consent of the minority

has not been obtained in advance" (para. 74). Compared with the Fosen case para. 121 and the statement from the Poma Poma case para. 7.6, the conclusion is that consent will be a highly relevant element in the assessment, but that it alone cannot repair the legality of a sufficiently large interference. This also applies if consultations have affected the decision that prompted the intervention.

Unlike in hr-2017-2428-A (Sara), the importance of *free, prior, and informed consent* is not discussed in the Fosen judgment. The Sara judgment states that "[in] such a case [as the Poma Poma case] it seems clear that violation must be established, if the consent of the minority has not been obtained in advance" (para. 74). This means that there is a requirement for consent in the event of an interference that has a substantive negative impact on the minority's livelihood.[41] Compared with section 121 of the Fosen judgment and the statement in section 7.6 in the Poma Poma case, it can further be concluded that consent will be a highly relevant element in the assessment, but hardly repairing the legality of a sufficiently large intervention.

4.3 *Who Should Be Consulted or Required Consent?*

The Supreme Court found it clear that the two *siidas* affected by the interferences, and who are the bearers of the collective grazing rights to reindeer husbandry, have party capacity for the issues the Supreme Court should decide in the case (para. 110).[42] This largely clarifies who has the right to be consulted or can give consent. If we look at the Poma Poma case, the Committee states that "neither the author nor the community to which she belongs was consulted", which in a similar way indicates who is to be consulted. In Norwegian law, it is also natural to repeal the Sámi Act,[43] which in s. 4-2 states that "[in] cases mentioned in § 4-1 [legislation, regulations and other decisions or measures that could directly affect Sámi interests], the Sámi Parliament and other representatives of affected Sámi interests have the right to be consulted".

According to the preparatory work, those who constitute "other representatives of affected Sami interests" are those who are directly affected by the measure.[44] This coincides with the legal entities mentioned in the previous section.

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41 *Cf.* Norges institusjon for menneskerettigheter [Norwegian National Human Rights Institution], *supra* note 18, p. 36.

42 The question, which may seem obvious, *cf. NOU 2007: 13* p. 193, arose because the state on a principled basis claimed that Article 27 only protects individuals, not legal persons, or groups (para. 103).

43 *Act of 12 June 1987 no. 56 on the Sámi Parliament and other Sámi legal matters (the Sámi Act).*

44 *Prop.* [draft law] *86 L (2020–2021) Endringer i sameloven mv.*, p. 108.

It is further stated in the proposition that in the question of who in the reindeer husbandry industry is representative and should be consulted, a distinction must be made between legal and regulatory cases and individual intervention cases. In the latter cases, it will be natural to consult the right holders, normally represented by the individual reindeer grazing district. It is further pointed out that the district board in the reindeer grazing district represents the reindeer husbandry interests in the district, cf. the Reindeer Husbandry Act s. 44, and must therefore normally be regarded as representative of the interests in matters that affect the interests of the district.[45] Following the Fosen case, it has been clarified that the *siida*, as bearers of the collective grazing rights (and which is closest to the actual cultural practice), has party capacity in intervention cases. It is then natural to conclude that they are also the subject of consultations and to give consent.[46]

In the same place in the proposition, the ministry also states that in larger area cases, "the Sámi Parliament (…) will be an important actor when it comes to assessing the entirety of the interference, and whether it should be permitted". Here, the ministry goes a long way in obliging the state to obtain consent from the Sámi Parliament before major land encroachments can be carried out.

4.4 *No Room for Proportionality Assessments*

The Court refers to the Poma Poma case para. 7.4 where it is stated that the consideration of economic development cannot undermine the rights protected under ICCPR 27. This is a highlighting that Article 27, in assessing whether the threshold for interference has been exceeded, does not allow for a pro- portionality assessment where the interests of the minority people is weighed against other considerations: "At the outset, the wording of Article 27 does not allow the States to strike a balance between the rights of indigenous peoples and other legitimate purposes. The rights appear to be absolute, however so that they can be derogated from in time of public emergency, see Article 4" (para. 124).

It is further stated that Article 27 ICCPR in this area differs from several other rights provisions in the ICCPR, e.g., Article 12 on the right to freedom of movement, Article 18 on freedom of religion or belief, Article 19 on freedom of expression and Article 22 on freedom of association. After reviewing relevant practice and literature, the first-voting judge states:

45 *Ibid.*, p. 109.

46 This has little practical significance here as the Fosen reindeer grazing district consists of the two *siida, who* are parties to the case.

[171]

> Against this background, the clear starting point must be that no margin of appreciation is granted under Article 27, and that it does not allow for a proportionality assessment balancing other interests of society against the minority interests. This is a natural consequence of the reason for the provision, as the protection of the minority population would be ineffective, if the majority population were to be able to limit it based on its legitimate needs (para. 129).

This position, which the Supreme Court takes from HRC case law, shows that except for national crisis situations, the states are not given a margin of discretion according to Article 27. Thus, the public interests as such, cannot be balanced against the interests of the minority. When the Supreme Court does not follow the argument that the "green shift" can justify the interference (para. 143), it can be seen as an expression of that there is no room for such a proportionality assessment.

We note, however, that the Court, with reference to Kitok v. Sweden, state that if ICCPR 27 conflicts with other rights under the Covenant, they must be weighed against each other and harmonised in the case of a conflict. According to the first-voting judge, hr-2017–2428 (Sara) para. 76 is based on such a balance of interests.

4.5 *Outcome From Culturally Based Trade Is Required*

The Supreme Court shows that the HRC has emphasised that "the members of the minority must still be guaranteed an economical outcome" (para. 132). The starting point is that it is the cultural practice that is protected under Article 27. Reindeer husbandry is a form of protected cultural practice and at the same time a way of living:

> The economy of the trade is therefore relevant in a discussion of a possible violation. The relevance must be assessed specifically in each individual case and must depend, among other things, on how the economy affects the cultural practice. In my view, the rights in Article 27 are in any case violated if a reduction of the pasture deprives the herders of the possibility to carry on a practice that may naturally be characterized as a trade (para. 134).

Although the Court states that it must be evaluated specifically in each case, the Supreme Court clarifies that an upper threshold for violation in the context of reindeer husbandry is when the liveable economic income no longer is

apparent. The wording of the Court also indicates that the threshold may be lower, without him explaining it in more detail.

Specifically, it is pointed out that the two power plants are part of the largest onshore wind power project in Europe and that the development has meant that the area has completely changed its character. With reference to the Court of Appeal's assessment of evidence, the judge states that the interferences lead to the *siidas* losing winter grazing on important land they use in late winter: "The development will ultimately eradicate the grazing resources to such an extent that it cannot be fully compensated by the use of alternative pastures. As a result, the reindeer numbers will most likely have to be dramatically reduced" (para. 136).

Fosen Vind argued that the reasons for why a weakened economy threatens the reindeer husbandry, are found in the industry's low revenue and dependence on government subsidies. The Supreme Court does not agree, stating that "it is the interference that causes the negative effect on the economy" (para. 138).

A key factor in the assessment is that the South Sámi culture is particularly vulnerable, and that the reindeer husbandry industry is the mainstay of both culture and language. Having stated that the interference does not lead to a total denial of reindeer husbandry at Fosen, the first-voting judge concluded, after an overall assessment, that the wind power development will have a significant negative effect on their ability to cultivate this culture (para. 141). Without satisfactory remedial measures, there is thus a violation of Article 27 ICCPR, and the licensing decision will then be invalid (para. 144). Thus, it must be discussed whether mitigating measures can prevent infringement.

4.6 *Remedy Measures Must Be Culturally Adapted*

Remedy measures by the authorities or the expropriator that reduce the disadvantages of an interference must, as a starting point, be taken into account when assessing whether Article 27 is violated. The first-voting judge states that such measures may, depending on the circumstances, contribute to the interference not reaching the threshold for violation (para. 147). In this context, it is also pointed out that reindeer husbandry, according to general expropriation compensation principles, has a duty to adapt the husbandry as long as the economic basis itself is not disturbed. The judge further states that "[t]o which extent the possibility of adaptation is also relevant in the assessment of whether Article 27 has been violated, has not been addressed" (para. 148).

Interesting in light of the development that has taken place after the judgement was settled (the power plant is still in full operation, where the

authorities are still looking for mitigating measures), is that the judge states that the issue is not discussed further "as I cannot at any rate see how the licence decision may be upheld with the reasoning provided by the Court of Appeal" (para. 148).[47] It is pointed out here that the model for winter feeding differs significantly from traditional, nomadic reindeer husbandry. It therefore appears "uncertainty as to whether such a system is compatible with reindeer herders' right to enjoy their own culture under Article 27" (para. 149). This is an important acknowledgement, also because it is not stated in HRC case law, which means that interferences that are mitigated by measures that result in Sámi reindeer husbandry becoming 'something else' than Sámi husbandry, easily will be illegitimate.

After this, the Court finds that there are such great uncertainties to the Court of Appeal's scheme with winter feeding that it cannot matter whether Article 27 ICCPR is violated, after which he concludes that the licence decision violates the reindeer owners' rights under the Covenant provision and is there- fore invalid (paras. 151 and 153).[48]

Mitigation measures that entail operational reorganisation that deviates significantly from traditional, nomadic reindeer husbandry, such as permanent periods of feeding, can thus not make a measure that is offensive, legal. The same applies to measures that in other ways are incompatible with the reindeer owners' right to practice their culture, such as forced mechanical animal transport instead of traditional relocation. The same applies to measures that can challenge animal welfare, such as keeping reindeer herds in concentrated areas over time or exposing them to long and demanding transportation. When the Supreme Court also points to regulatory challenges, it means that it must be reasonably certain that the measure can be implemented in practice.

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47 In a letter from the Ministry of Petroleum and Energy to the Norwegian Reindeer Husbandry Sámi National Association, the Sámi Parliament and others of 13 December 2021, the Ministry states that "a process is needed that aims to clarify whether there can be mitigating measures that can ensure the rights of reindeer husbandry under Article 27 ICCPR, and otherwise make the changes to the licences that are necessary for achieve this. The Ministry hereby notifies that the Ministry, in addition to taking a position on a possible additional application, of its own initiative will consider what changes in the licences are necessary to ensure the reindeer husbandry's international law protection". As of 1 April 2022, the power plants are still in operation without it having been decided which mitigating measures are to be implemented.

48 On the effect of invalidity, *see* I. L. Backer, "Fosen-dommen: Prosessuelle og forvaltningsrettslige sider" [The Fosen judgment: Procedural and administrative law aspects], *Lov og Rett* 2022.

[174]

5 Concluding

In the Fosen case, the Supreme Court of Norway takes both a principled and concrete position on when an interference violates Article 27 ICCPR. This is done by building on HRC case law which is adapted to Norwegian law and Sámi culture. As the Committee's case law is relatively limited and is beginning to mature, there is room for additions and further clarifications from the Norwegian courts, which naturally also will have a closer relation to the facts and legal conditions in Norway.

The Fosen judgment clarifies that in Norway, an interference that leads to *substantive, negative impact* for the opportunity to practice a culture-based industry principally will be offensive to the rights under Article 27. Specifically, there will be a violation if the Sámi reindeer herders are unable to use their winter pastures, or in other ways not able to exercise their livelihood without significant, non-traditional remedy measures. The Supreme Court has, in addition to the size of the interference, emphasised four factors. It is 1) the cumulative effects of the interference, 2) the extent to which consultations have influenced the decisions, 3) whether the minority still has economic benefits from their traditional trade, and 4) that any mitigating measures do not contribute to reindeer husbandry deviating significantly from traditional Sámi reindeer husbandry. Most important here is factor 3.

The Supreme Court also clarifies that there is no room for proportionate assessments between the benefits to society and the cultural protection of the minority.

Most of these points are derived from HRC case law; perhaps apart from the premise that remedy measures must be culturally sensitive. If one relates to HRC practice as an important source of law, something the Norwegian courts should obviously do, there is no reason to doubt that the judgment is correct.

The Fosen case shows that the threshold for interference is high. However, it is far lower than what the Ministry had argued it was in the Fosen case.

The Fosen case also raises a debate about Norwegian expropriation legislation. There are several aspects of it that could be discussed considering the need for protection and recognition of Sámi land and resource rights. Here, I will only point at the rule on pre-accession in the Expropriation Act s. 25. It means that interferences which by their nature may be unlawful according to e.g., Article 27 ICCPR, can be implemented before it is legally decided that they are not.[49] Our legal system can hardly live with a rule that gives access to 'sell the skin before the bear is shot'.

49 *Ibid.*

[175]

For the HRC's interpretation of Article 27 ICCPR, the Committee's methodological approach edicts that the judgment hardly will be very relevant. On the other hand, it may have an impact on neighbouring countries with Sámi people, a fairly similar legal system and which also implements the 'green shift' by raising wind power plants.

And what about Norway? As a unanimous Grand Chamber ruling, one should assume the judgement will be of great importance for ongoing and future interference cases in Sámi reindeer husbandry areas. In contrast to Fosen, where there was a certain amount of uncertainty as Norwegian case law was lacking – such uncertainty is no longer present. Naturally, one should assume the ruling will be of great significance for the remaining work and legal repairing in the Fosen case. Almost a year after the sentencing, however, there has been little willingness on the part of the authorities to comply with the verdict and to stop the ongoing human rights violations.

The Ministry of Petroleum and Energy has instead opened to consider further remedy mitigating. The space does not allow a discussion of the legality of such an approach. At the same time, it is difficult to imagine that the wind turbines can continue to roll at Fosen, at least to a significant extent, without questions being asked about the Norway's ability and willingness to comply with its obligations to the Sámi under international law, and not least, Norway's ability to comply with its own court decisions under national law.