Governance of Arctic Offshore Oil and Gas

Global energy problems will remain a challenge in the coming decades. The impact of climate change and the melting of polar sea ice opening up access to offshore hydrocarbon resources in the Arctic Ocean raises questions for both civil society and the scientific community over drilling opportunities in Arctic marine areas.

Disparities in approach to the governance of oil and gas extraction in the Arctic arise from fundamental differences in histories, cultures, domestic constraints and substantive values and attitudes in the Arctic coastal states and sub-states. Differing political systems, legal traditions and societal beliefs with regard to energy security and economic development, environmental protection, legitimacy of decision making and the ownership and respect of the rights of indigenous people all affect how governance systems of oil and gas extraction are designed.

Using a multidisciplinary approach and case studies from the United States, Norway, Russia, Canada, Greenland/Denmark and the EU, this book both examines the current governance of extraction and its effects and considers ways to enhance the efficiency of environmental management and public participation in this system.

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List of abbreviations

AAC	Arctic Athabaskan Council
AANDC	Aboriginal Affairs and Northern Development Canada
Aarhus Convention	UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters
AC	Arctic Council
ACAP	Arctic Contaminants Action Program
ACHR	American Convention of Human Rights
ADRDM	American Declaration of the Rights and Duties of Man
ADRIP	American Declaration on the Rights of Indigenous Peoples
AEPS	Arctic Environmental Protection Strategy
AIA	Aleut International Association
AMAP	Arctic Monitoring and Assessment Program Working Group under the Arctic Council
ANILCA	Alaska National Interest Lands Conservation Act
ANSCA	Alaska Native Claims Act
ANWR	Alaska National Wildlife Reserve
AO	Arctic Ocean
AOGS	Arctic Oil and Gas Services
AOOGG	Arctic Offshore Oil and Gas Guidelines
AP95	Common conditions for the provision of works and supplies within building and engineering in Greenland
Basel Convention	UNEP Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal
BAT	Best Available Technique
BEP	Best Environmental Practice
BIP	Business Incentive Policy (Canada)
BLM	Bureau of Land Management (U.S.)

BMP	Bureau of Minerals and Petroleum (a former Greenlandic authority now replaced by the MLSA)
BOEM	Bureau of Ocean Energy Management (U.S.)
BOEMRE	Bureau of Ocean Energy Management, Regulation, and Enforcement (U.S.)
BSEE	Bureau of Safety and Environmental Enforcement (U.S.)
CAFF	Conservation of Arctic Flora and Fauna Working Group under the Arctic Council
Cairn	Cairn Energy and its Greenlandic subsidiary Capricorn Greenlandic Exploration
CBA	Community Benefit Agreement
CEO	Chief Executive Officer
CERD	Convention on the Elimination of Racial Discrimination
CFC	Coastal Fishing Committee (Norwegian)
CJEU	Court of Justice of the European Union
CLC	International Convention on Civil Liability for Oil Pollution Damage
CLCS	Commission on the Limits of the Continental Shelf established under Anne II of the UNCLOS with the mandate set out in Article 76(8) on the limits of the continental shelf beyond 200 nm
COGOA	Canada Oil and Gas Operations Act
Commission	European Commission
COP	Conference of the Parties
Council	European Council
CSC	Convention on the Continental Shelf
CSR	Cooperate Social Responsibility
DCE	Danish Centre for Environment and Energy, Aarhus University
DOI	Department of Interior (U.S.)
EA	Environmental assessment
EBA	Economic Benefit Agreement
EBS	Environmental baseline studies
ECJ	European Court of Justice (before the Lisbon Treaty)
ECHR	European Convention of Human Rights
EDS	Electric Data Systems
EEA	European Economic Area
EEA Agreement	Agreement on the European Area, which was concluded in 1992 and entered into force in 1994
EEZ	Economic Exclusive Zone
EFTA	European Free Trade Association
EI	Extractive Industries
EIA	Environmental Impact Assessment

EIA Directive	Environmental Impact Assessment (2011/92/EU as amended by 2014/52/EU)
EIS	environmental impact statement
EISC	Environmental Impact Screening Committee
EITI	Extractive Industries Transparency Initiative
EL	Exploration Licence
EMSA	European Marine Safety Agency
EPA	Environmental Protection Agency (U.S.)
EPCM	Engineering, Procurement and Construction Management
EPPR	Emergency, Prevention, Preparedness and Response Working Group under the Arctic Council
ESA	EFTA Surveillance Authority (EEA/EFTA)
ESA	Endangered Species Act (U.S.)
Espoo Convention	UNECE Convention on Environmental Impact Assessment in a Trans-boundary Context
EU	European Union
EUOAG	EU Offshore Oil and Gas Authorities Group
EUR	Euro
FDI	foreign direct investment
FMSP	Framework Directive for Maritime Spatial Planning (2014/89/EU)
FOC	Flag of Convenience
FOC registration	Registration of ships in a state that the ships have no real connection with
FPIC	Free, Prior and Informed Consent
GCI	Gwich'in Council International
GINR	Greenland Institute of Natural Resources
GMES	Global Monitoring for Environment and Security
GNWT	Government of the Northwest Territories (Canada)
GIS	Geographic Information System
HELCOM	Baltic Marine Environment Protection Commission - Helsinki Commission
HSE	Health, Safety and Environmental standards
IBA	Impact Benefit Agreement
ICC	Inuit Circumpolar Council
ICCPR	International Covenant on Civil and Political Rights
ICES	International Council for the Exploration of the Sea
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFA	Inuvialuit Final Agreement
IFC	International Finance Corporation
ILO	International Labour Organization

ILO Convention No. 107	ILO's Indigenous and Tribal Peoples Convention (from 1957)
ILO Convention No. 169	ILO's Indigenous and Tribal Peoples Convention (from 1989)
IPIECA	International Petroleum Industry Environmental Conservation Association
IMO	International Maritime Organization
INAC	Indian and Northern Affairs Canada
IOGP	Industrial Association of Oil and Gas Producers
IOPC Fund Convention	International Convention on the Establishment of an International Fund
IPGs	Institutions of public governance
IPIECA	International Petroleum Industry Environmental Conservation Association
IRC	Inuvialuit Regional Corporation
IRF	International Regulators Forum
IRP	Integrated Resource Planning
ISPS Code	International Ship and Port Facility Security Code
IUCN	International Union for the Conservation of Nature
IWC	International Whaling Commission
JCNB	Joint Commission on Narwhal and Beluga
JI	Joint Implementation
JNCC guidelines	British standards for seismic surveying
LLMC 76	IMO's International Convention on Limitation of Liability for Maritime Claims of 19 November 1976
LNG	liquid natural gas
London Convention	Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters
M&As	Mergers and acquisitions
MARPOL 1973/78	IMO's Convention for the Prevention of Pollution from Ships from 1973 as modified in 1978
MEPC	Marine Environmental Protection Committee of the IMO
MET	Mineral extraction tax (Russia)
MLG	Multilevel governance
MLSA	Mineral Licence and Safety Authority (Greenland)
mmBtu	million British thermal units

MMS	Mineral Management Service (U.S.)
MPAs	Marine Protected Areas
MSC	Marine Stewardship Council
MSFD	Marine Strategic Framework Directive (2008/56/EC)
NAFO	Northwest Atlantic Fisheries Organisation
NAMMCO	North Atlantic Marine Mammal Commission
NASDAQ	National Association of Securities Dealers Automated Quotation
NEB	National Energy Board (Canada)
NEBA	Response Strategy Development Using Net Environmental Benefit Analysis
NEPA	National Environmental Act (U.S.)
NGO	Non-Governmental Organization
NIRB	Nunavut Impact Review Board
NLCA	Nunavut Land Claims Agreement
nm	nautical miles
NORSOK	Norwegian standards for adequate safety in the petroleum industry
NOU	Norwegian Official Report
NPC	Nunavut Planning Commission
NPDES	the National Pollutant Discharge Elimination System
NRt	Norwegian Legal Journal – it is a court archive journal publishing the Supreme Court verdicts since 1833.
NTI	Nunavut Tunngavik Incorporation
NUNAGIS	Self-Government of Greenland's GIS portal
NWB	Nunavut Water Board
NWNB	Nunavut Wildlife Management Board
NWT	Northwest Territories (Canada)
NYMEX	New York Mercantile Exchange
O & G	oil and gas
OAS	Organisation of American States
OCS	U.S. Arctic Outer Continental Shelf
OCSLA	U.S. Arctic Outer Continental Shelf Lands Act (U.S.)
OCTs	Overseas Countries and Territories (of the EU)
OG21 and Energi 21	Norway's two strategies on Oil and Gas in the Twenty-first Century
OJ	Official Journal of the European Union
ONRR	Office of National Resources Revenue (U.S.)
OPA	Oil Pollution Act (U.S.)
OPRC	IMO Convention on Oil Pollution Preparedness, Response and Cooperation

OPRC-HNS Protocol	The Protocol under OPPRC on Preparedness, Response and Cooperation to Pollution Incidents by Hazardous and Noxious Substances
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
OVOS	Russian acronym for the preparation of an EIA
PAME	Protection of the Arctic Marine Environment Working Group under the Arctic Council
PCB	Polychlorinated biphenyl
PIP	Preparatory Information Package
ppm	parts per million
PSA	Production-Sharing Agreement (Russian)
QIA	Qikiqtani Inuit Association
RAIPON	Russian umbrella organization, which organizes thirty-five regional and ethnic organizations of indigenous peoples in the regions where they live.
RF Government	Government of the Russian Federation
Rosnedra	Federal Agency for Mineral Resources (Russia)
Rosprirodnadzor	Federal Service for Oversight of National Resources (Russia)
Rostekhnadzor	Federal Service for Environmental, Technological and Nuclear Oversight (Russia)
SCJ	Standing Committee of Justice (Norwegian)
SEA	Strategic Environmental Assessment
SEA Directive	Strategic Environmental Assessment Directive (2001/42/EC)
SEA Protocol	Strategic Environmental Assessment Directive under the UNECE's Espoo Convention
SEIA	Strategic Environmental Impact Assessment (also called SEA)
SER	State Environmental Review
SDAP	Sustainable Development Action Plan
SDWG	Sustainable Development Working Group under the Arctic Council
SIA	Social Impact Assessment
SLA	Submerged Lands Act (U.S.)
SSA	Social Sustainability Assessment
SSRW	Same Season Relief Well
TAPS	Trans-Alaska Pipeline System
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TNG	True North Gems Greenland A/S
Treaty	Treaty of Lisbon

UK	United Kingdom
UKNBP	United Kingdom National Balancing Point
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea (also titled LOS Convention)
UNCTAD	United Nations Conference on Trade and Development
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations' Environmental Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
US	United States
USGS	United Nations States Geological Survey
WB	World Bank
WCED	World Commission on Environment and Development
WCIP	World Conference on Indigenous Peoples
WTI	West Texas Intermediate

11 Securing the coastal Sámi culture and livelihood

Øyvind Ravna and Kristoffer Svendsen

Introduction

As the rights of the indigenous Sámi have come under increased scrutiny, the situation of the coastal Sámi has been investigated by, among others, the Sámi Rights Committee and the Coastal Fishing Committee (CFC).[1] The latter was established in 2006 with the mandate to examine the right to fish along the coast of Finnmark (the extreme north-east of Norway, an area that borders Finland to the south and Russia to the east).

This chapter deals with the legal protection of the substantive culture and livelihood of the coastal Sámi. In the aftermath of the work of the CFC, which was not approved by the Norwegian government, two main questions must be asked. First, is the access of the Sámi people to fish and marine resources adequately protected? And Ssecond, as increased needs for energy, together with the rapidly changing climate, point toward a more active petroleum industry in the Arctic seawaters, can the threat posed by these activities be controlled relative to the coastal Sámi culture?

The first part of the analysis will elaborate on the current legal situation, examining national and international laws protecting indigenous peoples in general and the Sámi in particular. The second part will analyse the legal protection of the coastal Sámi with respect to the impacts of the oil industry, particularly oil spills. Here the approach will be the law on compensation of damages, rather than the threshold for interventions contradicting international law.

Sámi rights to fisheries and marine resources

Historical backdrop

The earliest historical records

Although the dispute over marine resources in the coastal Sámi areas can be traced back to the early twentieth century, the rights themselves are much older. The first historical record of such resources is the narrative of the Viking chief Ottar, dating from the ninth century.[2] The coastal Sámi culture

extended from the coast of Helgeland, Norway, to the Kola Peninsula in Russia. It involved both local home fishing and seasonal fisheries such as cod fishing in the Lofoten archipelago.[3] Until the thirteenth century, only the coastal Sámi used these marine resources. From that point on, the appearance of the European stock fish market resulted in an expansion of Norse settlers northwards.[4]

The fishing gear used by the coastal population was of such nature that it could not possibly have put them at risk of overfishing fish stocks. The competing interests of the well-capitalised pelagic fishing fleet, however, raised disputes as early as the early twentieth century; by the end of the century, with the new Norwegian fishery regulation of 1990, concern had emerged about injustice in the allocation of fishing quotas and rights to catch. Because the new regulation regime granted fishing rights on the basis of historical catch, the coastal Sámi lost a significant proportion of their rights, established over the centuries, because of low 'historical catch' in the three previous years.[5]

The issue of coastal Sámi rights to coastal fishing

The question of the rights of the coastal Sámi to fishing was included in the mandate that the Sámi Rights Committee had been tasked to investigate in 1980.[6] The committee found that the most appropriate way to facilitate Sámi coastal fishing along the Finnmark coastline was to provide administrative priority, including free fishing for vessels less than 10 m.[7] It also proposed that local influence in the management of the coastal fisheries should be increased. The Norwegian government, however, did not approve these proposals.

The issue of Sámi coastal fishing rights was, however, the subject of consultations between the Norwegian government's Standing Committee of Justice (SCJ), the Sámi parliament, and the Finnmark county council prior to the adoption of the Finnmark Act in 2005. In the preparatory work for the Act, the SCJ stated its awareness that coastal fishing is an important part of the livelihood of the Sámi culture, that the Sámi currently suffer from unreliable legal protection and that the Norwegian government should undertake an investigation of these issues.[8]

In acknowledgement of these points, the SCJ required the government to carry out a study of the Sámi rights to fish in the sea along the coast of Finnmark as soon as possible, including a minimum fishing quota for vessels less than 10 m. Under the guarantee that such an independent investigation would be undertaken prior to the adoption of the Finnmark Act, the parties agreed to remove this issue from their negotiations.[9]

The attempt to establish a Finnmark fishing act

The proposal of the coastal fishing committee

Based on the proposal by the SCJ and additional consultations with the Sámi parliament, the Norwegian government in 2006 established the Coastal

Fishing Committee (CFC), with the mandate to investigate the rights of the coastal Sámi and others to fish in the sea off the coast of Finnmark. In February 2008, the committee submitted a unanimous report in which it concluded that the peoples living around the fjords and along the coast of Finnmark have legal rights to fish in the mandated sea waters.[10] The basis for these rights were, first, historical use, and second, the commitments of international law protecting the exercise of culture of indigenous peoples and minorities[11] as codified in the International Convention on Civil and Political Rights (ICCPR) Article 27, stating that ethnic minorities shall not be denied the right to enjoy their own culture. These are rights that apply regardless of governmental fisheries regulations.[12] To support its conclusions, the CFC presented research conducted by Kirsti Strøm Bull. This research documented that fjord fishing has been considered as an exclusive right of the local population. According to Bull

> The use that the Sámi people from olden times exercised in the fjords was by the beginning of 1800s of such a nature that it constituted grounds for established rights. Thus there is no reason to estimate their use differently from the use that reindeer herders and others exercised on the mainland. [13]

In addition, Bull argued that '[i]n accordance with the opinion that there may be local rights to fish in sea waters, this use has been of such a nature that people in the fjords had acquired a right to this fishery.'

The CFC proposed that these rights of fishing, which were named *fjord rights,* should be codified in a new Finnmark Fishing Act in order to ensure their implementation. The committee recommended the inclusion of a right to fish for personal consumption, a right to take up fishing as a livelihood, and a right for professional fishermen to catch in order to provide the financial basis for a household.[14] In relation to the necessary governmental regulations or restrictions on fishery resources, the committee also recommended that the coastal population's right to fish to a sufficient degree should be completed by quotas. In determining such quotas, the committee stated, the substantive basis for the coastal Sámi culture and other coastal cultures in Finnmark must be secured by statutory rules. Notably, the proposed fjord right (comparable to rights in, e.g. Canada[15]) was drafted as a right relative to a geographically defined area. Such a fjord right would mean that all persons living around a fjord have the right to fish in that particular fjord, irrespective of their ethnicity.[16] The committee's report also included a proposal to establish a regional governing body – Finnmark Fisheries Management – to determine the framework of the fjord fishing right in each fjord according to specific terms in the proposed act, including the resource bases.[17] According to the draft, the management should provide necessary fishing permits for implementing the right to sea and coastal fishing.

The ministry's response

Both Sámi and local fishermen's organisations in Finnmark largely approved the CFC's draft for a Finnmark Fishing Act. The position taken by ocean trawlers and the central fishermen's association, however, was that the draft challenged their access to marine resources allocated to them under the government-approved quota system. The government apparatus, including the ministry of fishery and coastal affairs, naturally supported the ocean trawlers, leaning on the doctrine that 'the wild living marine resources belongs to the community of the country as a whole.'[18]

One of the strongest opponents of the CFC's recommendation, and a spokesman for the Norwegian government, was the Attorney-General, who, several months after the deadline of the hearing, filed a negative submission that closed the doors on the draft becoming a law bill.[19] Commenting on the submission, the Attorney-General inquired as to whether ICCPR Article 27 protected fishing with modern gear. This elicited a response from the head of the CFC, Carsten Smith, stating that 'it cannot be required that the coastal Sámi shall continue to use oars and sails in order to enjoy legal protection for coastal fishing.'[20]

Norway fails to recognise Sámi rights to fish in the sea off Finnmark

Despite the position of the local communities of the Finnmark coast and local fishermen's associations, and the recommendations of the UN special rapporteur James Anaya,[21] the Norwegian government rejected the CFC's draft bill. In the later preparatory work for the Marine Resources Act, the ministry emphasised that it did not share the opinion of the CFC that, based on international law and historical usage, there exist fishing rights for the coastal Sámi. Instead, the ministry emphasised that the present regulations are consistent with international legal obligations to the Sámi.[22]

In the final consultations in 2011, the Sámi parliament accepted an agreement with the government in which their historical rights were set aside in return for an annual quota of 3,000 tonnes of cod.[23] However, the agreement did not allay concerns about injustice among the coastal population arising from the fishery regulations of the 1990s, and the Sámi parliament did not consider the consultation as a final resolution of the dialogue in furthering the draft of the CFC.[24]

Current legislation on the rights to fish in the sea off Finnmark

Although the Norwegian government rejected the CFC's draft Finnmark Fishing Act, and consequently failed to recognise the historical rights of the coastal Sámi, it did propose amendments to the Marine Resources Act and the Fisheries Participation Act[25] which were intended to secure the Sámi

rights to marine resources.[26] The Norwegian parliament approved the bill in the autumn of 2012.[27]

In these proposals, the ministry declared that it agrees with the CFC that the concept of culture in ICCPR Article 27 covers Sámi coastal fishing rights, particularly for Sámi home-based coastal and fjord fishing built on the use of small vessels and passive gear. In contrast, with its previous position, the ministry acknowledged that this requirement does not present an obstacle to the adoption of modern technology and gear within this framework.[28]

However, the consensus ends here. Unlike the CFC, the ministry considers coastal fishing to be an issue of regional policy rather than an international legal obligation imposed on the government, arguing that the assessments of the CFC extended these rights beyond the scope of international law.[29] Consequently, the ministry does not agree with the opinion of the CFC that there exist particular rights to coastal fishing for the Sámi based on international law and historical usage. Instead, the ministry finds that the fish, as living resources, belong to the community as a whole, and that the current regulation is consistent with international legal obligations to the Sámi.[30]

The amendment to the Fisheries Participation Act includes a right to fish for all persons living in Finnmark, North Troms, and other areas with coastal Sámi settlement and owning a registered vessel less than 11 m. In addition, it includes new provisions intended to raise awareness of international legal obligations to the Sámi.[31] The new Section 1A in the Fisheries Participation Act aims to ensure that the act applies in accordance with international obligations to the Sámi and to all states, declaring that 'The act shall be interpreted in accordance with international law of indigenous peoples and minorities.' However, the provision does not entail any changes to the act beyond showing existing international legal obligations.[32] It is not clear whether the new Section 1A is an implementation of ILO Convention no. 169; but since it establishes that the act is to be applied in accordance with international law on indigenous peoples and minorities, it may be understood in such a way.

The old idea of free fishing for small vessels is partly satisfied in the amendment. Section 21 includes a right to fish cod, haddock and saithe for fishermen living in Finnmark, North Troms and areas with coastal Sámi settlement in the rest of north Norway after further determination, using vessels less than 11 m.

The amendment to the 2008 Marine Resource Act includes the possibility of establishing a Fjord Fishing Committee for Finnmark, Troms, and Nordland through a new provision in the Marine Resources Act Section 8B.[33] In addition, the amendment includes a provision in the Finnmark Act Section 29, allowing claims to rights to fishing grounds to be heard by the Finnmark Commission.

In a weak echo of the CFC's suggestions, the Marine Resource Act also codifies a provision to safeguard the Sámi material culture in the management of the fish resources in Section 7, paragraph 2, letter G, stating: 'In

managing wild living marine resources… it shall be emphasised that… the management measure is ensuring the material basis for Sámi culture.'

In the reasoning for this provision, the ministry argued that it is a fundamental consideration that management must safeguard the material basis of the Sámi culture and that the provisions of letter G represent a strengthening of indigenous rights compared with the previous legislation.[34] However, the ministry refused to take a position on the indigenous issues into account in the act before the completion of the ongoing assessments of the CFC.

We have in fact seen how the government clearly took a position on the 'indigenous issues' in the 2012 amendment once the CFC had submitted its report. Despite thorough consultations, the Sámi parliament was not able to meet this position, and the negotiations ended far from meeting the Sámi expectations.

A new provision, based on the governmental rather than the Sámi view, now forms part of the Marine Resource Act. Section 11, paragraph 6, which covers areas with a coastal Sámi population, states: 'By allocation of quotas of wild marine resources, and by other forms of regulation of these resources… there shall be placed considerable emphasis on Sámi use and what the use means for the Sámi local communities.'

The new provision is intended to emphasise Norway's international responsibility towards indigenous peoples and minorities in the management of wild living marine resources, where the ministry refers to ICCPR Article 27.[35] Furthermore, it is argued that the provision adds an additional dimension by emphasising the Sámi use of these resources, and that the Sámi coastal communities should be prioritised in the allocation of quotas. The provisions will consequently be an authority for additional quotas for allocation to vessels participating in the open group, and for new provisions in the Fisheries Participation Act, Section 21.[36] According to the ministry, the provision, in combination with other regulations, is intended to contribute to ensuring that future Norwegian fisheries law will clearly act within the framework of international law.

At present time, it is difficult to say what impact the scattered attempt to acknowledge international law protecting Sámi culture in the two acts mentioned above will have, particularly since independent and historical rights to fishing are not recognised and consequently do not provide independent legal bases for such rights. Although the acts include some statements of principle, local fishermen can be granted increased quotas and the appointment of a Fjord Fishing Committee is proposed, there is no recognition of an enhanced right for the coastal Sámi to participate in the governance of fish resources, which would have been a natural consequence of a recognition of their historical rights. Consequently, the amended acts are very different from the proposals of the CFC for safeguarding the coastal Sámi culture.

The absence of adequate recognition of and safeguards for the coastal Sámi culture has been acknowledged internationally. Recently, the UN

Committee on the Elimination of Racial Discrimination (CERD), in a concluding observation on Norway, expressed its concerns as follows:

> The 2012 amendments to the fisheries legislation (the Marine Resources Act, the Fisheries Participation Act, and the Finnmark Act) did not recognise that the Sámi have established rights to fisheries and other renewable marine resources in the Sámi coastal area, and that the legal frameworks may therefore not be able to withstand future reform.[37]

The CERD therefore recommends that the state party review the fisheries legislation and ensure that it fully recognises the Sámi fishing rights, based as they are on immemorial usage and local customs.[38]

The Sámi rights to legal protection from damage to the marine environment caused by oil spills

The impact of oil spills on the environment

The extent and magnitude of harm inflicted on people, property, environment, and communities caused by petroleum spills from vessels and offshore oil rigs and installations can be tremendous. The *Exxon Valdez* and Deepwater Horizon oil spills demonstrated the environmental and communal effects of large oil spills, while smaller oil spills from vessels and offshore installations in Norway have caused minor damage to the environment. As a result of the *Exxon Valdez* oil spill in the Gulf of Alaska, local herring and salmon stocks were destroyed. The herring population has been so low that there has been no herring fishing during 15 years after 1989.[39] Previous oil spill accidents show that reliance on fishing, clean water and clean beaches for enjoyment and living can be drastically affected by oil spills. In relation to the coastal Sámi, there is particular reason to focus on oil tankers along the Norwegian coast.

Both Norway and Russia are contracting parties to the International Convention on Civil Liability for Oil Pollution Damage (the CLC Convention) and its 1992 replacement Protocol,[40] which regulate liability for oil-pollution damage resulting from maritime casualties involving oil-carrying ships. Both countries have also focused on the consequences of a possible oil spill from platforms in the wake of the Deepwater Horizon accident, either by confirming national legislation or by enforcing their own national regulatory regime, as well as by conducting inquiries into the accident and comparing it to their own national oil industry. Both countries are aware of the risks of oil-pollution damage from both offshore exploration and production and seagoing oil transportation, and of the huge ecological damage that oil spills may cause. There has accordingly been a focus on emergency preparedness, something that possesses its own challenges.[41] However, the

Norwegian government currently argues that the new EU Offshore Safety Directive applies only to Norway's land territory, internal waters, and territorial waters and not to the economic exclusive zone (EEZ), the continental shelf, or the high seas.[42]

Norway has extensively examined the effects of such an accident in the Barents Sea, and its environment agency has warned against low emergency preparedness in the Barents Sea and possible large pollution damage before the oil is removed.[43] Simultaneously, the current clean-up infrastructures are not ideal. Conventional oil booms (floating barriers used to contain an oil spill) do not perform in most sea conditions,[44] and the chemicals used to dissolve oil on water can themselves cause additional damage to marine life.[45] Lack of sound emergency preparedness could have direct consequences for the extent of pollution damage. The growth in exploration and production in the northern parts of Russia has resulted in increased transportation of oil by seagoing vessels in the Barents region, something that, again, increases the risk of oil spills from these vessels in northern Norway.[46]

Precise details of the consequent harm to the environment are generally disputed. The environmental characteristics of sea areas also vary. The report of the Norwegian Forum for Cooperation Concerning Risk[47] points out the very different environmental characteristics in the Barents Sea and in the Gulf of Mexico, and tries to a very limited extent to say something about the vulnerability of these characteristics. The conclusion is that the Barents Sea contains a sensitive ecosystem.

Regulation of compensation for damage to the marine environment caused by oil spills in Norway

Regulation does not assist in defining compensable damage

The Norwegian Maritime Code,[48] adopting the position of the CLC Convention of 1992, contains provisions[49] regulating liability for oil-pollution damage resulting from maritime casualties involving oil-carrying ships, while the Norwegian Petroleum Act[50] regulates liability for pollution damage as a consequence of effluence or discharge of petroleum from a facility.[51] Under the Maritime Code, the owner of the vessel is liable without fault for pollution damage,[52] while the Petroleum Act places no-fault liability on the licensee for pollution damage.[53] A vessel owner's liability is limited, unless intent or gross negligence is proven,[54] while a licensee carries unlimited liability for its pollution damage.[55] The Maritime Code defines 'pollution damage'[56] as:

a Damage or loss caused outside the ship by contamination resulting from the escape or discharge of oil from the vessel. In addition to loss of profit, damage through impairment of the environment nevertheless

only compromises the costs of reasonable measures of reinstatement which have been or will be adopted.

b Expenses, damage or loss in consequence of reasonable measures adopted after an event which causes or entails an immediate and considerable risk of damage as mentioned in letter a, and the purpose of which is to prevent or limit such damage.

The Petroleum Act defines 'pollution damage'[57] as:

> Pollution damage means damage or loss caused by pollution as a consequence of effluence or discharge of petroleum from a facility, including a well, and costs of reasonable measures to avert or limit such damage or such loss, as well as damage or loss as a consequence of such measures. Damage or loss incurred by fishermen as a consequence of reduced possibilities for fishing is also included in pollution damage.

Preparatory works to the Petroleum Act give examples of certain types of damage that would qualify as pollution damage. For the purposes of this analysis, it may be noted that harm inflicted to wildlife in the sea and on land, the soiling of beaches and fishing gear, and the closure of a water area as an impediment to fishing are included.[58] The preparatory works confirm that compensable pollution damage must fulfil the prerequisites for every type of damage compensable in delict law, including the prerequisite of economic loss.[59] Neither the main delict statute, the Damage Compensation Act,[60] nor the other instruments of delict legislation notably assist much in defining compensable damage.[61] The concept of 'pollution' in connection to 'damage' must be read in conjunction with the supplementing legislation, the Pollution Control Act.[62] It is inaccurate to state that the core of delict law is that the injured party should not be positioned worse financially with the injury than if it was not inflicted when damage is inflicted to the natural environment.

Damage to the natural environment is often considered as an infringement of non-economic interests. Infringed natural environmental interests enjoy protection in delict law, and are compensable under the Maritime Code and the Petroleum Act. Protection is expressed through the guiding restoration principle, applying compensation for costs of 'reasonable measures' to restore the environment back to its original state without adhering to strict economic delict requirements. However, there is no requirement that the natural environment (the injured party) should be placed in the same position as if the injury had never occurred. This indicates a softening of the economic character prerequisite, to some extent, so as to compensate damage to the environment.[63] It is the economic character of the necessary and foreseeable expenses of the reasonable and appropriate activities to restore, replace or clean the natural resources that is compensable.[64] This view reflects a conversion or commercialisation,[65] which essentially gives

the infringement of a non-economic interest an economic value through the execution of measures to avert or limit the infringement of the non-economic value. The measures can be objectively assessed as reasonable and appropriate, and given a specific monetary value.

Furthermore, private property rights generally enjoy a higher level of legal protection than unowned natural sources.[66] Damage inflicted to private property and the consequential loss of economic character are compensable.[67] To illustrate, a hotel may have a beach or beautiful natural skerries in front of it. The property owner of this hotel is compensated for damage to the property based on the reduction in sales value and any loss to the property's commercial activity. The hotel's property may also suffer environmental damage that, in itself, does not reduce the property's sales value, such as damage to trees that as a result must be cut down or waterfront vegetation that must be removed. Damage to the environment that cannot be determined by a measurable reduction in the property's sales value is compensated through necessary environmental restoration or replacement costs.[68] Damage to certain natural resources is harder to valuate due to the absence of individual ownership, which would reflect the human measurement of a monetary value of the damage to the owner. Similarly, compensation of damage to 'un-owned' natural resources is executed based on compensation of necessary costs for reasonable environmental restoration and replacement measures. If restoration or replacement is not possible, then only clean-up costs are compensated. This is the same position taken in the Pollution Control Act, in which the reasonable costs of restoring the general public's rights of commons (*allemannsretter*) for non-commercial purposes, such as angling and the use of uncultivated land for private leisure purposes, are protected and compensated.

Protection of Sámi interests

As a result of oil spills, the Sámi fishermen may experience loss of commercial and community fishing opportunities. Sea areas could be closed for fishing, new fishing licences would be halted, fewer fishing licences would be issued, and/or the caught fish would reflect a quality below the standard required for human consumption. The fishermen are directly injured parties, even though in consequence of harm to the ocean. These types of loss to fishermen are expressly protected in delict law,[69] including losses related to limitations on fishing opportunities and reduction of spawn (resulting, again, in the reduction or loss of fish stock)[70] and loss of complete or partial fishing grounds due to pollution damage.[71] As mentioned above, the preparatory works to the Petroleum Act affirm compensation for '… loss that follows directly from a relevant water area for shorter or longer period of time is damaged, for example that fishing and shipping become hindered.…'[72]

In summary, both compensation of loss to income and profits and damage to property (equipment, etc.) lie within the scope of pollution damage

covered by the act. That said, documenting losses may become a challenge for Sámi fishermen. The Alaska Native subsistence case, in the aftermath of *Exxon Valdez,* showed how the Alaska Natives documented their losses through lost sales, missing return on capital, and margin calculations to a lesser extent than the ocean fishing fleet.[73] Furthermore, Sámi claims may also be rejected based on legal requirements for documentation of the causation between the oil spill and the economic loss, and by a balance-of-interest exercise made by a Norwegian court, the outcome of which is dependent on the factual circumstances.

Without going into a detailed discussion of the definition of fisherman protection afforded by the Petroleum Act,[74] use of the phrase in its ordinary sense to mean 'a person engaged in fishing' would include most groups in society engaged in fishing as a cultural and traditional part of that society. The coastal Sámi could be directly affected by an oil spill, as the oil could permanently or temporarily destroy traditional Sámi fishing areas. The Sámi (and others) traditionally engage in local fishing in inshore waters with passive equipment and smaller fishing boats and return home every day.[75] This fishing activity is conducted in combination with other types of trade or commerce. Compensability depends on the exercise of use, a defined and limited group of fishermen, a limited geographical fishing area, and dependence on the activity.[76] In the Kåfjord case, which was decided by a small majority,[77] the Norwegian Supreme Court granted compensation for expropriation for the infringement of public interests.[78] The case concerned the question of whether the decision made by the Norwegian authorities in leasing the rights to perform hydropower activities was an expropriation of the local fishermen's rights and of the common interest, which made coastal fishing more difficult. The fishing interest could be considered exclusive due to its strong geographical limitation, because the population engaged in local fishing of cod in the inner part of the fjord arm, and because this fishing interest had, from an early period, constituted a considerable part of the population's household economy. The court confirmed the stand taken in another Supreme Court case: that if a claim for compensation of a loss due to water regulation was not based in a right, the use must be '… so concentrated and specific that it outwards appears essentially as the exercise of a right.'[79]

The court interpreted this to mean that for an interest to be protected, the exercise of the use that was the reason for the protection must have been to some extent exclusive and must have had a significant economic impact on the users.[80]

If the coastal Sámi have indeed suffered an infringement of their local public fishing interests, they may as a consequence have a stronger connection to such fishing interests, as fishing in their local surroundings is a strong part of the coastal Sámi culture – especially in view of the fact that the sea Sámi culture is currently fragile and endangered.[81] Additional ethical, moral, and cultural considerations, as well as international agreement obligations, may also have an impact on this issue.

Protection in delict law of collective rights and rights of common

Previously, only specific or special interests of economic character were protected by the delict rules. A special interest can be seen as an individual right protected by the aim of relevant legislation. Delict law protects individuals' proprietary rights, which include the right and the ability to transfer the property from one person to another and the power to use the property and to exclude others from it. Hence, neither collective rights nor rights of common were protected in delict law. This has changed to some degree with the development of case law.

Rights of common are often considered to be a benefit located in water, ocean or the air, which in delict law are not considered protected, because no private property rights can be identified in these public benefits.[82] Some examples of rights in common are the right to fish in the ocean or in public lakes, the right to collect seaweed and sea tangle beyond the point of where the private property rights end, swimming, and access and berry-picking on uncultivated land.[83] Rights of common are vested in members of the public at large, including Sámi individuals, but not limited only to Sámi individuals.

Collective rights are rights belonging to a collective, which means that the rights can be exercised only by members of the collective.[84] Sámi collective rights are an example of such rights.[85] The collective's interests are protected in delict law, but not the interests of the members of the collective.[86] Members of the collective can be limited by a class of specific individuals or by a geographical area.[87]

Putting these protected rights into perspective, then, rights of common are not limited by an identifiable circle of individuals and hold weaker protection in delict law than collective rights. In other words, protection in delict law can be considered a sliding scale, with the strongest protection for individual rights, somewhat weaker protection for collective rights, and the weakest protection for rights of common.

Conclusion

We have seen above how the Norwegian government rejected the CFC's draft bill safeguarding fishing as the basis for the coastal Sámi culture. Instead, it proposed a far less binding legislation, which has since been approved by parliament. Although these amendments include some statements of principle, it is currently difficult to say what impact they will have in protecting the coastal Sámi culture.

The presentation above shows that both Norwegian and international compensation law is primarily aimed at safeguarding economic, tradable interests and private property. This creates additional challenges for the coastal Sámi communities, who cannot invoke title of their fishing grounds, shorelines or other areas, and are less able than the ocean fishing fleet to document losses through lost sales, missing return on capital, and margin calculations.

The weak protection currently in place for the historical rights of the coastal Sámi in the context of the growing oil industry and increased tanker transport makes it urgent to raise the question whether Norway is complying with its international legal obligations to protect the coastal Sámi culture. This question, in turn, implies that, rather than languishing in the archives of the ministries, this topic should be out in the public eye being addressed by governments, parliamentary representatives, Sámi politicians and local politicians – the latter two of these undoubtedly having coinciding interests.

A tanker accident on the coast of Finnmark could undoubtedly mean the devastation of the basis for the coastal Sámi culture. The emphasis of this provision, which is incorporated into Norwegian law with precedence in case law, seems today, however, to be very far from the realm of applicable legal arguments and case law. ICCPR Article 27, which states that ethnic minorities 'shall not be denied the right… to enjoy their own culture' and which is intended to protect indigenous peoples and, particularly, their access to fishing and harvesting of other natural resources as a material basis for their culture,[88] deserves to receive renewed attention – not only by scholars and Sámi politicians, but, in particular, by the Norwegian government and parliament.

Notes

1 Respectively NOU 1997:4 (Norwegian Official Report, 'Naturgrunnlaget for samisk kultur [The natural basis for Sami culture],' Oslo, 1997), and NOU 2008:5 (Norwegian Official Report, 'Retten til fiske i havet utenfor Finnmark [The right to fish in the sea off Finnmark],' Oslo, 2008).
2 Hansen and Olsen 2004, 67. See also Ravna 2014, 313–321, which Chapter 2 in parts is elaborated on.
3 Sametinget 2004.
4 Pedersen, S., 1994, 'Bruk av land og vann i Finnmark i historisk perspektiv [Use of land and water in Finnmark in historical perspective],' NOU [Norwegian Official Reports] 1994:21, 83.
5 NOU 1997:4, 308, Ravna 2014, 313.
6 NOU 1997:4, 304–318.
7 NOU 2008:5, 40.
8 Innst. O. nr. 80 2004–2005 (Innstilling O nr. 80 fra Justiskomiteen om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke [Recommendation of Justice Committee on legal rights and management of land and natural resources in Finnmark county/Parliamentary bill for Finnmark Act]. Oslo), 30.
9 Ibid. 15, 30–31.
10 NOU 2008:5, 13, 14.
11 Ibid. 250.
12 The provisions under ICCPR are paramount to the Norwegian fisheries regulation (see 1999 Human Rights Act section 2 and 3), while the historic rights have a basis in immemorial customary law usage, see the CFC in NOU 2008:5, 250.
13 Ibid. 156.
14 Ibid. 5, 14.
15 Harris and Millerd 2010, 82–107.
16 NOU 2008:5, 14.

17 Ibid. 15.
18 Marine Resources Act 2008 (Lov 6. Juni 2008 nr. 6 om forvaltning av viltlevande marine ressursar [Law of 6 June 2008 No. 6 on the management of wild living marine resources], Oslo), 2.
19 Regjeringsadvokaten 2009.
20 Smith 2010, 22.
21 Anaya 2011, para. 80.
22 Prop. 70 L 2011–2012 (Endringar i deltakerloven, havressurslova og finnmarksloven (kystfiskeutvalet) [Changes in the Participation Act, the Marine Resources Act and the Finnmark Act (Coastal Fishing Committee)], parliamentary bill, Oslo), 7.
23 Sametinget 2011.
24 Ibid.
25 Act 26. March 1999 No. 15 on the Right to take part in Fishing and Hunting (the Participation Act).
26 Prop. 70 L (2011–2012), 7.
27 Amendment 21 September 2012 No 66 of Fisheries Participation Act, Marine Resources Act and Finnmark Act (Lov 21 September 2012 nr. 66 om endringar i deltakerloven, havressurslova og finnmarksloven, Oslo).
28 Prop. 70 L (2011–2012), 88.
29 Ibid. 89.
30 Ibid. 99.
31 Ibid. 8, 126.
32 Ibid. 122.
33 Ibid. 8, 122.
34 Ot.prp.nr. 20 2007–2008 ('Om lov om forvaltning av viltlevande marine ressursar (havressurslova) [On the law on the management of wild living marine resources (Marine Resources Act)],' parliamentary bill, Oslo), 183.
35 Prop. 70 L (2011–2012), 123.
36 Ibid. 124.
37 Committee on the Elimination of Racial Discrimination, 'Concluding observations on the twenty-first and twenty-second periodic reports of Norway,' CERD/C/NOR/CO/21–22 28 August 2015, para. 29 (d).
38 Ibid. para. 30 (f).
39 Kennedy 2010.
40 CLC Convention (International Convention on Civil Liability for Oil Pollution Damage, adopted 29 November 1969, entry into force 19 June 1975; replaced by 1992 Protocol, Entry into force 30 May 1996).
41 Agreement between Norway and the Russian Federation 1994 (On cooperation to combat oil spills in the Barents Sea, Moscow, 28 April 1994).
42 Concerning this issue see Chapter 4, 'The EU's Role as a Facilitator in the Development of Standards for Offshore Hydrocarbon Extraction in the Arctic'.
43 Norwegian Environment Agency 2013.
44 Nilsen 2012, 4–6.
45 NOU 1982:19, 'Generelle lovregler om erstatning for forurensningsskade [General law on compensation of pollution damage]' (Norwegian Official Reports, Oslo), 80.
46 Karlsen 2013, 14 ff.
47 Forum for Samarbeid om Risiko 2010.
48 Act no 39 of 24 June 1994.
49 The Maritime Code's section 191.
50 Act no 72 of 29 November 1996. [Where? This is just the name of Act, location in act in note 51]

51 Chapter 7, Petroleum Act 1996 (Lov om petroleumsvirksomhet, 29 November 1996, No. 72, Oslo).
52 Section 91, Maritime Code 1994 (Lov om sjøfarten 24 June 1994, No. 39, Oslo).
53 Section 7 (3), Petroleum Act.
54 Section 194, Maritime Code.
55 Section 7 (3), Petroleum Act.
56 Maritime Code, 191.
57 Section 7 (1), Petroleum Act.
58 NOU 1981:33, 'Erstatningsansvar for forurensningsskade som følge av petroleumsvirksomhet på norsk kontinentalsokkel [Liability for pollution damage resulting from the petroleum activities on the Norwegian Continental Shelf],' Norwegian Official Reports, Oslo, 35.
59 Ibid.
60 Act No. 26, 13 June 1969.
61 Koch 2010, 250–281.
62 Act No. 6, 13 March 1981. See further Svendsen 2015, 166.
63 NOU 1981:33, 35.
64 Rettens gang 1979, 715 and NOU 1982:19, 143.
65 Askeland 2010, 1–72; Stavang 2007, 38; Monsen 2010, 20–21.
66 Jing 2013, 34–38.
67 Lov om skadeserstatning [Damage Compensation Act], 13 June 1969, No. 26, Oslo), s. 4–1.
68 Norsk retstidende (NRt). 2015, 216
69 Petroleum Act, section 7 (1) and Maritime Code, section 191.
70 Ot.prp.nr. 25 1988–1989 ('Om lov om endringer i lov 22. mars 1985 nr. 11 om petroleumsvirksomhet [On the law amending the law of 22 March 1985 No. 11 relating to petroleum activities], parliamentary bill, Oslo), 26 and 32.
71 Ibid. opposite Hammer, et al. 2009, 534.
72 NOU 1981:33, 35.
73 Duffield, Neher and Patterson. 2014, 53.
74 Petroleum Act, section 7 (1).
75 NOU 2008:5, 383.
76 Skogvang 2012, 197–204.
77 Three out of the five judges; two of the judges did not support the stand of the majority.
78 Norsk retstidende (NRt). 1985, 247.
79 Norsk retstidende (NRt). 1969, 1220 at 1226.
80 Norsk retstidende (NRt). 1985, 247 at 251–252.
81 NOU 2008:5, 393.
82 NOU 1982:19, 81–84; and Aasland 1985, 45.
83 Aasland 1985, 56.
84 Pedersen and Sørheim 2012, 272.
85 Norsk retstidende (NRt). 2001, 769 and 1229.
86 Pedersen and Sørheim 2012, 272.
87 Ibid.
88 Human Rights Committee, General Comment No. 23, Article 27, CCPR/C/21, adopted in 50th Session, 8 April 1994, para. 7.

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