4 Indigenous peoples' right to fish

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

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1. Introduction

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

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

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

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

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

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

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

2. Indigenous fishing in and under international human rights instruments

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

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

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

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

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

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

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

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

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

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

3. Canadian case law as a source of inspiration

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. Significance and limitations of the three judgments

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

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

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

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

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

Notes

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

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

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

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

63 Lapland District Cout (Lapin käräjäoikeus), judgment No 19/109280 of 6 March 2019, 6: 'on the basis of matters brought up by the defendant, the restrictions must be regarded as having significantly weakened the transmittal of the enjoyment of culture to the younger generation'.

64 Lapland District Court (n 57) 9.

65 In the same court's judgment in the *Veahčajohka* case, the intergenerational transmittal of fishing culture is mentioned in the court's summary of the defendants' arguments. See District Court of Lapland (Lapin käräjäoikeus) judgment No 19/109281 of 6 March 2019, 11.

66 Veahčajohka and Ohcejohka are both tributaries of the river Deatnu, which forms the border between Norway and Finland and cuts Sámi society into two groups, as inhabitants of two states, with a bilateral treaty concerning the river but also each with their own fishing regulations. As the fishing occurred in tributaries located on the Finnish side of the river, the issue of cross-border social life and fishing culture did not arise. In a subsequent fourth case, however, the Lapland District Court followed the same approach as in the three cases discussed in the chapter and rejected the criminal charges against the Sámi defendant who had engaged in salmon fishing in the Deatnu using a traditional drift net, see Judgment No. 23/127932 of 7 July 2023.