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7 The prohibition to weaken the Sámi culture in international law and Finnish environmental legislation

Leena Heinämäki

1. Introduction¹

In Finland, there are around 10,000 persons who are recognised as Sámi, who are granted a constitutional status as an Indigenous people to maintain and develop their language and culture, and related linguistic and cultural self-government. Sámi traditional livelihoods, such as reindeer herding, fishing and hunting, are specifically mentioned as an integral part of their culture in the constitutional legal preparatory works.² Sámi culture is, however, very multifaceted and dynamic and cannot exhaustively be defined. Besides the language and traditional livelihoods, the Sámi culture consists of, for instance, cultural heritage and cultural expressions, handicraft *duodji* and gathering of natural products.³

The Sámi traditional way of life is threatened by many forms of competing land use, such as mining and forestry, as well as climate change.⁴ The main problem for the reindeer herding is a rapid decrease of grazing pastures.⁵ Furthermore, Sámi cultural landscapes and traditional knowledge and practices are threatened by the structural changes of the societal living, loss of Sámi languages, low profitability of traditional livelihoods and the fact that many Sámi families move away from their Homeland.⁶ Sámi traditional way of living is intimately interlinked with the sustainability of the environment, and the current environmental problems that take place or have effects in the Sámi Homeland are directly threatening the culture and rights of the Sámi.

The aim of this chapter is to analyse the legal norm of ‘prohibition to weaken the Sámi culture’ (implying the prohibition to cause significant harm), dwelling from Sámi people’s constitutional status, as well as to discuss ongoing challenges to implement this norm in practical level. The very purpose of the ‘prohibition to weaken the Sámi culture’ in the Finnish environmental legislative acts is to enforce the constitutional right of the Sámi as an Indigenous people to practice and develop their culture in present as well as guarantee the sustainability of the Sámi culture and traditional livelihoods in the future, along with the purpose of the acts to safeguard the environmental sustainability, which in itself aims at protecting Sámi cultural landscapes. An essential part of the prohibition to weaken the Sámi culture is an obligation of a respected authority/an actor in the field to carry out a cumulative impact assessment, which defines a threshold to the ‘significant’ harm, as well as

an obligation to negotiate and cooperate with Sámi representatives on the matter at hand.

This topic has so far not been thoroughly addressed in the academic research in international level. In Finland, it has shortly been discussed in the comparative research report commissioned by the Finnish government in 2017.⁷ More recently, the topic is addressed in Finnish language in a peer-reviewed legal journal, *Lakimies*, by the author of this chapter.⁸ This chapter is based on the previous publication, with a purpose to inform the international audience about the issue, as it has been previously lacking. The topic is very significant since the right of Sámi to their traditional livelihoods is one of the most important fundamental and human right for them as granted by Finnish Constitution (section 17.3) as well as, e.g., articles 27 and 1 of the International Covenant on Civil and Political Rights (ICCPR).⁹ The purpose of this chapter is to show that although the prohibition to weaken the Sámi culture is part of the fundamental and human rights of the Sámi, central governmental institutions, such as mining and environmental protection authorities, as well as Metsähallitus (the national forest and park service), do not regard it as their legal obligation to execute comprehensive cumulative impact assessment in their actions affecting Sámi. Hence, the prerequisite of maintaining and developing Sámi culture is not fully guaranteed, especially in relation to their traditional lands, waters and natural resources.

Because the very aim of the prohibition to weaken the Sámi culture is to actualise the fundamental and human rights of the Sámi, at the beginning of the article it is necessary to discuss the constitutional status of the Sámi as an Indigenous people and describe the relationship of the fundamental and human rights with the national Finnish sectoral legislation in this regard. Then, this chapter focuses on the legal basis of the prohibition to weaken the Sámi culture in international as well as in national law. Finally, the article discusses the current challenges related to the implementation of this obligation in Finnish environmental law, including relevant case law analysis.

2. The constitutional status of Sámi and the relationship of the fundamental and human rights to the national legislation of Finland

The original purpose of the specific constitutional protection of the Sámi people was to create an affirmative action for equality to ensure the conditions for the Sámi Indigenous culture to flourish and remain sustainable and to be successfully passed to the future generations.¹⁰ According to the Constitution, section 17.3, Sámi, as an Indigenous people, are granted the right to maintain and develop their language and culture, to be in line with international human rights obligations.¹¹ The Finnish constitutional reform that took place in the 1990s had, as its main purpose, to upgrade the national legislation to meet the international standards of human rights.¹² Section 22 of the Constitution states that the public authorities shall guarantee the observance of fundamental rights and liberties and human rights. In Finland, fundamental and human rights are regarded as complementary systems

in which international human rights standards define the minimum level of protection.¹³ Fundamental and human rights constitute the basis for the application and development of national sectoral legislation, which has to meet their requirements.¹⁴ Hence, national legislative acts have to be interpreted and applied in light of fundamental and human rights, as often reminded by the Constitutional Law Committee, meaning that the protection not only has to meet minimum standards of international and constitutional law but also is not allowed to be in contradiction to those standards.¹⁵ Here two recent cases in the Supreme Court serve as good examples, where the court decided that the fishing legislation that posed limitations to the Sámi traditional fishing in the name of the protection of the fish stock was contradictory to the Sámi fundamental and human rights.¹⁶

Section 121.4 grants linguistic and cultural self-government for the Sámi. The provision directly relates to the previously mentioned section 17.3. According to the legislator, the right of the Sámi to maintain and develop their culture includes the idea that Sámi themselves are allowed to decide their cultural matters and influence their future development. Hence, the cultural self-government was meant to become dynamic and that Sámi themselves could become subjects to develop it further.¹⁷ The goal of the legislator was that more substance for the self-government will gradually be created in the national sectoral legislation, particularly in the act on the Sámi Parliament.¹⁸ The purpose was to gradually meet the international human rights standards¹⁹ and advance possibilities of the Sámi to sustain, maintain and develop their language and culture as well as their social and economic conditions.²⁰ This approach relied on the premises of international human rights of Indigenous peoples, where it is regarded that Indigenous peoples should have the right to decide their own priorities and to exercise control over their own economic, social and cultural development.²¹

For the tasks related to the cultural autonomy, Sámi shall elect from among themselves members of the Sámi Parliament as regulated by the Sámi Parliament Act.²² The task of the Sámi Parliament is to look after the Sámi language and culture, as well as to take care of matters relating to their status as an Indigenous people. In matters pertaining to its tasks, the Sámi Parliament may make initiatives and proposals to the authorities, as well as issue statements.²³ The Sámi Parliament has no legislative or executive powers. The main way to actualise the right to self-determination of the Sámi as an Indigenous people is through engaging in the negotiations with state authorities. According to section 9 of Sámi Parliament Act, authorities shall negotiate with Sámi Parliament in all far-reaching and important measures which may directly and in a specific way affect the status of the Sámi as an Indigenous people in the Sámi Homeland. Examples of such issues listed in section 9 are community planning; the management, use, leasing and assignment of state lands, conservation areas and wilderness areas; applications for permissions to stake mineral mine claims or file mining patents; legislative or administrative changes to the Sámi cultural livelihoods; the development of the teaching of and in the Sámi language in schools; social and health services; and any other matters affecting the Sámi language and culture or the status of the Sámi as an Indigenous people.

As mentioned, the protection under sections 17.3 and 121.4 includes traditional livelihoods,²⁴ which means, as maintained by *Guttorm*, that traditional lands, waters and natural resources used by the Sámi are contained within the frame of the self-government.²⁵ Paradoxically, however, when the linguistic and cultural self-government was established in 1995, Sámi land rights were not incorporated but the issue was left for further investigations with the aim to find a solution to meet the international human rights standards, specifically those of the ILO Convention No. 169 on the rights of Indigenous and tribal peoples. Despite several research projects commissioned by the government of Finland, Sámi land rights have not yet been established in such ways, which endorse international human rights obligations.

Since the self-government has been granted for the Sámi as an Indigenous people, international law plays an important role in determining its essential facets. Land rights are viewed as the most important aspect of any Indigenous self-government throughout the world. The government of Finland has regularly received critical remarks from international human rights bodies for omissions of the Sámi self-government, especially while failing to grant Sámi their rights to lands and natural resources.²⁶

The recognition of the Sámi as an Indigenous people in the Constitution directly links their constitutional protection to Indigenous peoples' right to self-determination in international law. Increasingly and specially after the adoption of UNDRIP, human-rights-monitoring bodies have widely started to endorse Indigenous peoples' right to self-determination and related free, prior and informed consent (FPIC), which is often viewed in practice as a qualitative negotiation and cooperation process in which Indigenous peoples have a central role from the beginning to the end and a real influence in the outcome of the process.²⁷ It is important to note that although UNDRIP does not grant an explicit *veto* right to Indigenous peoples except in some cases,²⁸ human-rights-monitoring bodies have declared that operations that may have significant or large-scale impacts on the rights and culture of Indigenous peoples must not be carried out without consent of Indigenous peoples.²⁹ FPIC has become one of the central legal principles in the field of Indigenous peoples' rights *via* legal practice and observations of the human-rights-monitoring bodies.³⁰ As acknowledged in the preparatory works of the Finnish Constitution, the specific content of international human rights is defined by the practice of human-rights-monitoring bodies.³¹ Scheinin maintains that the practice of the committees monitoring legally binding human rights treaties involves more than just giving recommendations, since they represent the most authoritative interpretation of the conventions, which member states are bound to follow.³²

As a follow-up to the observations and recommendations of the human-rights-monitoring bodies, the government of Finland, together with Sámi Parliament, is in a process of renewing the Sámi Parliament Act. In the new proposal, the rights of the Sámi as an Indigenous people are emphasised. The right of the Sámi people to self-determination is strengthened by highlighting possibilities to develop their self-government and an open possibility in the sectoral legislation to

expand their decision-making powers. The negotiation duty of the state authorities (section 9) is considerably strengthened to endorse FPIC, including also the prohibition to weaken the Sámi culture and related duty to assess cumulative impacts when carrying out actions that may affect the culture and the rights of the Sámi.³³ However, independently whether the new proposal for the Sámi Parliament Act will be accepted by Finnish Parliament, according to the guidelines made by Ministry of Justice, together with Sámi Parliament in 2019, already the current negotiation duty (section 9) has to be read in the light of human rights, specifically referring to the requirements of FPIC.³⁴

3. The prohibition to weaken the Sámi culture: its content and basis in international law

The general prohibition to weaken constitutional rights prohibits the lowering of the level of protection that already has been achieved.³⁵ Hence, the constitutional right of the Sámi to maintain and develop their culture (section 17.3) implicitly contains the prohibition to weaken the Sámi culture. The wording of section 17.3 is related to article 27 of the ICCPR, which recognises the right of the members of minorities to maintain and develop their culture.³⁶ Although article 27 considers the right of individuals as parts of groups, in the legal practice of the Human Rights Committee (HRC), collective elements are recognised, as well as positive measures to protect Indigenous peoples as groups to maintain and develop their culture.³⁷ Similarly, in the preparatory works of the current Sámi Parliament Act, it is stated that article 27 requires, similarly to section 17.3 of the Constitution, an active obligation for the state to contribute to the maintenance and development of the Sámi culture.³⁸

In its observations, the HRC reads article 27 together with article 1 (peoples' right to self-determination), which is a collective right, similarly to section 17.3, which protects the Sámi as a collective—as an Indigenous people.³⁹ Based on the recent legal practice of HRC, it can be concluded that article 27 has to be read together with and in the light of article 1,⁴⁰ which strengthens Indigenous peoples' right to maintain and develop economic and cultural lifestyle and to use and govern their traditional lands and natural resources. According to the HRC, activities that cause 'significant' or 'substantial' harm to Indigenous peoples' culture and traditional livelihoods violate their right under article 27.⁴¹ This does not, however, only mean that authorities must refrain from causing significant harm. This also requires positive measures from authorities to secure and advance maintenance and development of Sámi cultural livelihoods so that they will be sustainable also in the future.

Hence, the prohibition to cause significant harm under article 27 consists, on the one hand, of substantial protection: an obligation to protect the culture of Indigenous peoples so that it retains its sustainability and economical profitability in present as well as in future. On the other hand, the prohibition to cause significant harm includes procedural right for Indigenous peoples to 'effectively' participate in the decisions that concern them, in line with FPIC. The threshold of

‘significant’ harm has to be weighed case by case, taking into account the previous, present and planned activities, of which cumulative impacts have to be assessed by the respected authorities, together with the Sámi Parliament and practitioners of the Sámi traditional livelihoods.⁴² Also, Finnish legislators have summed up the requirements of article 27, as interpreted by the HRC, including the duty to consult, the prohibition to cause significant harm and related cumulative impact assessments.⁴³ In Finland, ICCPR binds directly as national law and forms a legal norm directly applicable by the state authorities.

Authorities that are responsible to decide whether certain operations are allowed should keep in mind that single activities do not necessarily exceed the threshold of significant harm. However, when their impacts are measured, other activities of the past, present and near future must be taken into consideration, which means that the threshold of significant harm may be exceeded by rather small operations. In addition, while assessing the impacts, the authorities must keep in mind the requirement of section 17.3 of the Constitution concerning the right of the Sámi to further develop their culture, which means that the Sámi culture must have enough living space so that it can evolve according to priorities set by Sámi themselves. The Sámi Parliament has maintained that already current competing land use without any new activities are significantly weakening the Sámi culture in their traditional Homeland.⁴⁴

When section 17.3 of the Constitution is read in the light of the ICCPR, the threshold of ‘significant harm’ cannot be set very high. This view is shared by the Finnish Constitutional Law Committee, which stated, in relation to the renewal of the Mining Act, that the threshold of significant harm in the Mining Act shall not be set too high but has to be interpreted in the light of the Constitution and the ICCPR.⁴⁵ This statement sets prerequisites for the economic and social activities of the state in the Sámi Homeland to seriously consider the Sámi interests.

So far, in individual cases regarding Finland, the HRC has not viewed the threshold of significant harm exceeded, which therefore means that article 27 has not been violated.⁴⁶ It is, however, important to realise that those individual cases concerned individual logging cases and not, for example, cumulative impacts of the forestry in its totality. During past decades, there has been much larger-scale logging taking place in the Sámi Homeland than what was brought to the assessment of the HRC in those individual complaints. Related to those cases, the HRC stated that if activities of the state party were more large-scale than in the current cases, it might lead to the violation of article 27.⁴⁷ In 2019, the HRC requested the government of Finland to report how the authorities define the threshold of significant harm and how this is implemented in the practice when assessing impacts of activities that directly or indirectly affect Sámi culture and traditional livelihoods.⁴⁸

Besides the Constitution and the ICCPR, the prohibition to weaken the Sámi culture indirectly dwells on other legal instruments related to Indigenous peoples. For instance, the Committee on the Elimination of Racial Discrimination (CERD) has requested the government of Finland to acquire FPIC before accepting operations that affect the traditional use and development of traditional land and natural

resources of Sámi people. The state party is asked to ensure that cultural and environmental impacts are assessed in cooperation with communities who are affected by the concerned operations.⁴⁹

As it becomes evident in the previously discussed statements of the HRC and CERD, FPIC and the prohibition to weaken Indigenous culture by causing significant harm and related impact assessments to measure the threshold are intimately interlinked. According to FPIC, Sámi people must have all necessary information at hand in order to assess the impacts of the planned actions on their culture and rights as an Indigenous people. Hence, an impact assessment has to be viewed as an essential qualitative criterion of the negotiations as well as a procedural measure to define the threshold of significant harm. Also, the view of an Indigenous people about whether the concerned activity is causing significant harm to their culture should have a strong influence on the final decision of the authorities.

3.1. The prohibition to weaken the Sámi culture and the challenges of its implementation in national environmental legislation

3.1.1. The prohibition in the mining, environmental protection and water acts

The legal practice of the HRC related to the ICCPR, which monitors the interpretation of the Constitution and sectoral legislations, was the very reason to include the prohibition to weaken the Sámi culture in the renewed Mining Act.⁵⁰ Safeguarding Sámi rights, along with safeguarding environmental sustainability, is one of the very purpose of Mining Act according to its section 1, which states that

the activities referred to in this Act shall be adapted in the Sámi Homeland, referred to in the Act on the Sámi Parliament (974/1995), so as to secure the rights of the Sámi as an Indigenous people. This adaptation shall pay due attention to the provisions of the Skolt Act (253/1995) concerning the promotion of the living conditions of the Skolt population and Skolt area, opportunities for making a living, and the preservation and promotion of the Skolt culture.

In the Sámi Homeland, mining activities mostly relate to gold digging and a few mining mineral prospecting and reservations. The requirement of section 1 of the Mining Act are fleshed out by the prohibition to weaken the Sámi culture. According to section 38,

in the Sámi Homeland, the permit authority shall—in cooperation with the Sámi Parliament, the local reindeer owners' associations, the authority or institution responsible for management of the area, and the applicant—investigate the impacts caused by activity in accordance with the exploration permit, mining permit, or gold panning permit on the rights of the Sámi as an Indigenous people to maintain and develop their own language and

culture and shall consider measures required for decreasing and preventing damage.

In this assessment, cumulative impacts have to be taken into consideration: According to section 38, any corresponding permits valid in the vicinity of the area referred to in the application as well as other forms of usage of areas interfering with the rights of the Sámi as an Indigenous people in the area that the application involves, and in its vicinity, have to be considered.

The Supreme Administrative Court has confirmed that consideration for granting permits by the concerned authority shall be based on the assessment carried out by section 38.⁵¹ According to section 50,

an exploration permit, mining permit, or gold panning permit must not be granted if activities under the permit: 1) alone, or together with other corresponding permits and other forms of land use would, in the Sámi Homeland, substantially undermine the preconditions for engaging in traditional Sámi sources of livelihood or otherwise to maintain and develop the Sámi culture 2) would substantially impair the living conditions of Skolts and the possibilities for pursuing a livelihood in the Skolt area; 3) in a special reindeer herding area, would cause considerable harm to reindeer herding. However, a permit may be granted regardless of an impediment referred to in subsection 1, if it is possible to remove such an impediment through permit regulations.

The Mining Act includes a right of appeal for the Sámi Parliament and Skolt Sámi Village (section 165). During the years, the permits authority Tukes (the Finnish safety and chemical agency) and the Sámi Parliament have had constant disagreements regarding whether the impacts are assessed according to the requirements laid down by the Mining Act.⁵² According to the Sámi Parliament, which appeal against almost all gold panning permits, the permit authority usually did not execute cumulative impact assessment as required by section 38.⁵³ In contrast, Tukes does not view it as its legal obligation to execute any comprehensive cumulative impact assessment. Instead, it has considered the request sent to the Sámi Parliament and reindeer-herding associations to give statements with relevant information, such as maps of the area, as an adequate investigation under section 38.⁵⁴

Two years after entering into force of Mining Act, the Sámi Parliament appealed for the first time to the Administrative Court, which overruled the concerned gold panning permit of the Tukes as illegal.⁵⁵ The Administrative Court emphasised a positive interpretation of fundamental and human rights by highlighting that the purpose of section 50 of Mining Act is to implement the requirements of the Constitution, the ICCPR and the Reindeer Husbandry Act.⁵⁶ The decision was brought to the Supreme Administrative Court, which enforced the decision of the Administrative Court.⁵⁷ Both courts emphasised that section 38 requires a cooperative procedure, which is complementary to the negotiation duties of the Sámi Parliament Act, Skolt Act and Reindeer Husbandry Act.⁵⁸ The Administrative Court stated that

because the obligation in Mining Act is new, the means of action and procedures, cooperation and impact assessment should have been defined and established.⁵⁹

Yet a major and persisting problem of the application of the Mining Act is that the necessary procedure for the cumulative impact assessment has not been established to this day. In later cases brought to the Administrative Court, the court has viewed the impact assessment as adequate when Tukes has sent Sámi Parliament necessary maps of the areas and a mere list of other competing land use in the area with a simple statement that ‘multiple land use projects do not cause significant harm to the Sámi culture’.⁶⁰ Thus, despite the positive interpretation of fundamental and human rights provided by the Administrative Court in its first case, in later cases, the court has not required the mining authority to establish a proper cooperation or procedure for conducting impact assessments. In addition, the multiple statements of the Sámi Parliament and reindeer-herding cooperatives did not have any direct impacts on the decisions of the mining authority and the Supreme Administrative Court.⁶¹ In the same vein, the Supreme Administrative Court has not reconsidered the decisions but confirmed the arguments of the Administrative Court.⁶²

It must be concluded that the prohibition to weaken the Sámi culture has been explicitly written into the Mining Act, endorsing the fundamental and human rights of Sámi. The wording of the act provides in fact strong legal protection for the rights of the Sámi. In practice, however, as long as the permission authority, together with the Sámi, has not created a cooperation procedure, in which cumulative impacts are objectively and adequately assessed, the prohibition to weaken the Sámi culture remains unactualised in mining operations taking place in Finland.

From the point of view of the protection of the Sámi culture, the Mining Act is also connected to the Environmental Protection Act (527/2014), which specifies that that mining and gold panning are activities, which pose risk to pollute the environment and hence need an environmental permit. A mining permit may also need a water resource management permit regulated by the Water Act (587/2011).⁶³ These permits are considered in the same process by regional state administrative agency (AVI). The prohibition to weaken the Sámi culture has been written in section 49 of the Environmental Protection Act and chapter 2, section 8 of the Water Act.⁶⁴

From the point of view of fundamental and human rights of the Sámi, it is rather alarming and problematic that in permit applications, environmental and water permit decisions or the decisions of the Administrative Court, there is no documentation or even argumentation about whether or how the impacts to the Sámi culture have been assessed.⁶⁵ Decisions may include permission orders, such as minimising noise pollution to reindeers or prohibition to contaminate waters.⁶⁶ According to Sámi Parliament and Sámi reindeer herders, however, these permission orders are inadequate and do not take into account cumulative impacts on the Sámi culture and rights.⁶⁷

Until recently, Supreme Administrative Court had confirmed the decisions of the Administrative Court regarding the interpretation of the Environmental Protection Act.⁶⁸ However, in a decision of 25 November 2020 (KHO:2020:124), it has

reconsidered its interpretation about section 49 of the Environmental Protection Act. In its decision, the court stated that sections 17.3 and 121.4 of the Constitution as well as obligations under the ICCPR require that impacts of gold panning activities are assessed holistically, not only considering, e.g., noise pollution but also including limitations to the reindeer pastures.⁶⁹ The court also, for the first time, endorsed cumulative impact assessment by stating that other gold panning activities in the area and their cumulative impacts must be assessed and taken into consideration. The court, however, did not overrule the permit decision of AVI but made restrictions to it in order to safeguard free passage of reindeers to their grazing areas.⁷⁰ In contrast, the Sámi Parliament had required the permission to be overruled as being illegal or alternatively required much larger restrictions than the ones court ruled.⁷¹ Overall, however, the case is an important step forward since the Supreme Administrative Court, for the first time, interpreted the prohibition to weaken the Sámi culture in the light of the fundamental and human rights of the Sámi people.

3.1.2. Sámi rights in the Metsähallitus Act

Metsähallitus can be viewed perhaps as the most important state actor in the Sámi Homeland since 90% of its area is owned by the state and governed by Metsähallitus. Forestry, which is the core activity of Metsähallitus, has been seen to be in contrast to the full actualisation of the rights of the Sámi people.⁷² According to the Sámi Parliament and Sámi reindeer-herding cooperatives, forestry has throughout the decades substantially weakened the Sámi culture and traditional way of life.⁷³

To strengthen the protection of the Sámi culture, in the renewal process of the Metsähallitus Act in 2015, there was a draft to include the prohibition to weaken the Sámi culture within the act. This proposal related to the national implementation plan of the ILO Convention No. 169, which eventually did not go through in the Parliament. The deletion of the draft paragraphs, which recognised the prohibition to weaken the Sámi culture by the Ministry of Forest and Agriculture was widely criticised by international human rights bodies.⁷⁴ This decision was also opposed by the Constitutional Law Committee, which stated that the prohibition to weaken the Sámi culture paragraphs should be included because they are justified by the current fundamental and human rights of Sámi, independently of the ratification of ILO Convention No. 169.⁷⁵

Although the current Metsähallitus Act does not formally include the prohibition to weaken the Sámi culture, the constitutional rights of the Sámi are indirectly reflected in section 6, which states,

The management, use and protection of natural resources governed by Metsähallitus in the Sámi Homeland referred to in the Act on the Sami Parliament (974/1995) shall be adjusted to ensuring the conditions of the Sámi people to practice their culture, and in the reindeer herding area referred to in the Reindeer Husbandry Act (848/1990) they shall be adjusted to fulfilling the obligations laid down in the Reindeer Husbandry Act.

The Reindeer Husbandry Act, although not recognising the rights of the Sámi, encompasses the prohibition to weaken reindeer husbandry in the specific areas, including Sámi Homeland.⁷⁶ Furthermore, the Reindeer Husbandry Act includes the duty of state authorities to negotiate with reindeer-herding cooperatives when planning measures concerning state land will have a substantial effect on the practice of reindeer herding (section 53). Additionally, Metsähallitus is obliged to negotiate with the Sámi Parliament under section 9 of Sámi Parliament Act. Furthermore, in the Skolt Sámi area, the Skolt Act requires that authorities shall hear the Skolt Sámi Village Meeting in the matters that are important for the Skolt Sámi (section 56).

As maintained in the previous section of this chapter, human and fundamental rights define a minimum standard of application to the sectoral legislations that must be interpreted in the light of human and fundamental rights. This has been acknowledged in the preparatory works of the Metsähallitus Act, which states that section 17.3 of Constitution must be read together with international human rights treaties.⁷⁷ When section 6 of the Metsähallitus Act is read together with the Constitution and articles 27 and 1 of the ICCPR, it means that Metsähallitus must, in all its operations, guarantee that they do not cause significant harm to the right of the Sámi people to maintain and develop their culture and traditional livelihoods. Hence, cumulative impact assessment can arguably be seen as a legal obligation of Metsähallitus.

Metsähallitus negotiates regularly and actively both with the Sámi Parliament as well as reindeer-herding cooperatives, with whom it has made several contracts concerning the usage of forestry areas.⁷⁸ Recently, Metsähallitus has even increased cooperation and negotiations and aimed at improving its relationship with the Sámi people.⁷⁹ Metsähallitus has not, however, viewed as its legal obligation to execute any comprehensive cumulative impact assessment, which the Sámi Parliament and reindeer-herding cooperatives have requested.⁸⁰ However, Metsähallitus has recently agreed with the Sámi Parliament to apply voluntary Akwé: Kon Guidelines ‘for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities’ in the natural resource planning.⁸¹ The Guidelines that relate to the implementation of the International Convention on the Biological Diversity (CBD) have until now only been applied by Metsähallitus in its management plans concerning natural parks and wilderness areas.⁸² It should be emphasised, however, that if the aim of the Akwé: Kon process is to implement or replace the legal obligation of Metsähallitus based on the ICCPR, it should be ensured that impact assessment is executed as extensively as is required by human and fundamental rights of Sámi people.

4. Conclusion

The right to traditional Sámi livelihoods is undisputably one of the most essential fundamental and human rights of the Sámi as an Indigenous people.

The rights and status of Indigenous peoples have strongly evolved in international law during the past couple of decades. Especially, Indigenous peoples' right to self-determination including FPIC, as codified by the UNDRIP, has become widely accepted *via* legal practice and the observations of international bodies monitoring human rights conventions. In effect, this has led the government of Finland to a process of revising the Sámi Parliament Act in order to meet the requirements of international law, including FPIC and the prohibition to weaken the Sámi culture. FPIC is directly connected with the prohibition to weaken the Sámi culture since FPIC indicates a negotiation process in which an Indigenous people must have adequate and timely information regarding the impacts of the planned activities that the negotiation concerns. The threshold of significant harm is defined by cumulative impact assessment. Although the prohibition to weaken the Sámi culture dwells from fundamental and human rights, it has been specifically codified in the Finnish mining, environmental protection and water acts. Moreover, even though against preliminary attempts, it was left out from the revised Metsähallitus Act, the current Sámi rights provisions must be read in the light of fundamental and human rights, which prohibit actions that cause significant harm to the Sámi culture.

In Finland, the implementation of cumulative impact assessments related to the prohibition to weaken the Sámi culture has been problematic. Neither mining nor environmental protection authorities have established a system for cumulative impact assessments. Similarly, Metsähallitus has not viewed assessment of cumulative effects as its legal obligation. However, without assessing the impacts of each forestry operations, it is not possible to define the threshold for significant harm since, in addition to large-scale forestry, there are multiple competing land use in the Sámi Homeland. As a result, the Sámi Parliament argues that forestry projects continue to significantly weaken the sustainability of the environment and the culture of the Sámi.

Although Metsähallitus is perhaps the most central authority in Sámi Homeland that has an influence on the Sámi culture and rights, the Metsähallitus Act is not the only law that has to be interpreted and applied within the framework of fundamental and human rights of the Sámi. Examples of other essential legislations that must be read in the light of the prohibition to weaken the Sámi culture are, besides legislation relating to reindeer herding and fishing, the Nature Protection Act (1096/1996), the Wilderness Act (62/1991), the Forest Act (1093/1996), the Land Use and Building Act (132/1999) and the Act on Environmental Impact Assessment (252/2017). International comparative research on the actualisation of Sámi rights, commissioned by the Finnish government in 2017, recommends that all essential legislations affecting Sámi rights should include the prohibition to weaken the Sámi culture.⁸³ Such recommendation seems well attended since, e.g., the Nature Protection Act and the Land Use and Building Act, which are in the process of revision, include draft versions stipulating the prohibition to weaken the Sámi culture. Recently renewed Climate Act (423/2022) includes rather strong participatory rights for Sámi as well. It establishes also the Sámi Climate Council with a task to submit opinions on the climate policy plans.

However, as this chapter demonstrates, even the inclusion of the prohibition to weaken the Sámi culture in the legislative acts is not enough, especially if the cumulative effects of the activities affecting the Sámi culture and rights are not measured in adequate ways. In order to safeguard the sustainable future of the Sámi traditional livelihoods as well as the sustainability of the environment, which often go hand in hand, state authorities must acknowledge that using enough economic and human resources to assess cumulative impacts and develop adequate and functional procedures, together with relevant Sámi actors, is an unavoidable and necessary step forward.

Notes

- 1 This chapter is based on the following publication: Saamelaiskulttuurin heikentämiskielto ja viranomaisen aktiivinen velvoite turvata perinteisten elinkeinojen harjoittamisen ja kehittämisen edellytykset, Lakimies 1/2021 (2021), p. 3–35. Its production was funded by Kone Foundation SOPU -project (2020–2023) led by Pauliina Feodoroff. Suomen perustuslaki (Finnish Constitution) 731/1999, Ss 17.3 and 121.4.
- 2 HE 309/1993 vp (Government Bill on the Constitutional change) 65. See also Ilkka Saraviita, *Suomalainen perusoikeusjärjestelmä* (Finnish Constitutional System) (Talentum, Helsinki 2005) 446.
- 3 HE 167/2014 vp (Government Bill on Sámi Parliament Act), Para 3 a. See also Biologista monimuotoisuutta koskevan yleissopimuksen alkuperäiskansojen perinnetietoa käsittelevän artikla 8 j:n kansallisen asiantuntijaryhmän loppuraportti (The final report of article 8 j working group on CBD) (Ympäristöministeriö 2011) (Ministry of Environment) 6–8.
- 4 See, generally, Jouni JK Jaakkola, Klemetti Näkkäljärvi, Suvi Juntunen, ‘SAAMI—Saamelaisten sopeutuminen ilmastonmuutokseen—hankkeen tieteellinen loppuraportti’ (2020) Valtioneuvoston selvitys- ja tutkimustoiminnan julkaisusarja 25; Susan E Lee and others, ‘Regional Effects of Climate Change on Reindeer: A Case Study of the Muotkatunturi Region in Finnish Lapland’ (2000) 19 Polar Research 99.
- 5 Saamelaiskäräjät, Muistio, Dnro31/D.a.2/2014, 5; Paliskuntain yhdistys, *Opas poronhoidon tarkasteluun maankäyttöhankeissa* (Pohjolan Painotuote oy 2013) 17. See, generally, Jonny-Leo L Jernsletten and Konstantin Klovov, *Sustainable Reindeer Husbandry* (Arktinen neuvosto 2002).
- 6 Biologista monimuotoisuutta koskevan yleissopimuksen alkuperäiskansojen perinnetietoa käsittelevän artikla 8j:n kansallisen asiantuntijaryhmän loppuraportti (Ympäristöministeriö, kesäkuu 2011) 12.
- 7 Leena Heinämäki and others, ‘Saamelaisten oikeuksien toteutuminen: Kansainvälinen oikeusvertaileva tutkimus’ (2017) 4 Valtioneuvoston selvitys- ja tutkimustoiminnan julkaisusarja, valtioneuvoston kanslia.
- 8 Leena Heinämäki, ‘Saamelaiskulttuurin heikentämiskielto ja viranomaisten aktiivinen velvoite turvata perinteisten elinkeinojen harjoittamisen ja kehittämisen edellytykset’ (2021) 119 Lakimies 3. The original article was produced as a part of the ‘Miltä sopu näyttää?’-project, led by Pauliina Feodoroff and funded by Kone foundation.
- 9 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
- 10 Heikki Karapuu, ‘Perusoikeuksien käsite ja luokittelu’ in Pekka Hallberg and others *Perusoikeudet, Oikeuden perusteokset* (WSOYpro OY 2011) 64–87, 73.
- 11 *ibid* 65.
- 12 HE 309/1993 vp. See Veli-Pekka Viljanen, ‘Perusoikeusuudistus ja kansainväliset ihmisoikeussopimukset’ (1996) 5–6 Lakimies 788–89. See also Ihmisoikeudet.net

- 'Ihmisoikeudet Suomessa' <<http://www.ihmisoikeudet.net/ihmisoikeudet-suomessa/>> accessed 8 April 2021.
- 13 Pekka Hallberg, 'Perusoikeusjärjestelmä' in Hallberg and others (n 9) 29–59, 35; Pauli Rautiainen, 'Perusoikeuksien heikennyskielto' (2013) 3 Oikeus 261, 267–68. See also HE 309/1993 vp, 6; Riku Neuvonen and Pauli Rautiainen, 'Perusoikeuksien tunnistaminen ja niiden sisällön määrittäminen Suomen perusoikeusjärjestelmässä' (2015) 1 Lakimies 28, 44. See Martin Scheinin, *Ihmisoikeudet Suomen oikeudessa—valtiösääntöoikeudellinen tutkimus kansainvälisten ihmisoikeussopimusten valtiosisäisestä voimassaolosta sekä ihmisoikeus- ja perusoikeusnormien sovellettavuudesta Suomen oikeusjärjestyksessä* (Suomalainen lakimiesyhdistys 1991) 335.
 - 14 Rautiainen (n 12) 267–68. See also Matti Mikkola, 'Sosiaaliturvan leikkaukset Euroopan sosiaalisen peruskirjan valossa' in Katri Hellsten, Mikael Hiden and Maija Saksli (eds), *Sosiaaliset oikeudet ja sosiaaliturva* (Kela 2001) 21–27, 25–26; Paavo Nikula, 'Perusoikeudet ja Lainsäädäntö' (1999) 6–7 Lakimies 878, 881–82.
 - 15 Perustuslakivaliokunnan lausunto, PeVL 32/2010 vp—HE 273/2009 vp, Hallituksen esitys kaivoslaiksi ja eräiksi siihen liittyviksi laeiksi.
 - 16 Supreme Court of Finland, KKO:2022:25 and KKO:2022:26. See also Martin Scheinin, 'Indigenous Peoples' Right to Fish: Recent Recognition of Sámi Rights in Finland Through Civil Disobedience and Criminal Trial' in Dorothee Cambou and Øyvind Ravna (eds), *The Significance of Sámi Rights: Law, Justice, and Sustainability for the Indigenous Sámi in the Nordic Countries* (Routledge 2024).
 - 17 HE 248/1994 vp saamelaisten kulttuuri-itsehallintoa koskevien säännösten ottamisesta Suomen Hallitusmuotoon ja muuhun lainsäädäntöön, 16.
 - 18 Juha Guttorm, *Saamelaisten itsehallinto Suomessa—dynaaminen vai staattinen? Tutkimus perustuslaissa turvatun saamelaisten itsehallinnon kehittymisestä lainsäädännössä vuosina 1996–2015* (Acta Universitatis Lapponiensis 375, Lapin yliopisto 2018) 5.
 - 19 HE 248/1994 vp., 21.
 - 20 *ibid* 14.
 - 21 See, e.g., ILO Convention No. 169 concerning Indigenous and Tribal People in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention No. 169), art 7; United Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA A/RES/61/295 (UNDRIP), art 3 and 4. Heinämäki and others (n 7) 27.
 - 22 Act on the Sámi Parliament 974/1995, s 1.
 - 23 *ibid* s 5.
 - 24 HE 309/1993 vp, 65; HE 248/1994 vp, 5.
 - 25 Guttorm (n 17) 98.
 - 26 See, e.g., UN Human Rights Committee, 'Concluding Observations on Finland' (22 August 2013) UN Doc CCPR/C/FIN/CO/6, para 16; Committee on Economic, Social and Cultural Rights, 'Concluding Observations on Finland' (17 December 2014) UN Doc E/C.12/FIN/CO/6, para 9; Committee on the Elimination of Racial Discrimination (CERD), 'Concluding Observations on the Twentieth to Twenty-Second Periodic Reports of Finland, Adopted by the Committee at Its Eighty-First Session' (23 October 2012) UN Doc CERD/C/FIN/CO/20–22, paras 11, 13; CERD, 'Concluding Observations on the Twenty-Third Periodic Report of Finland' (8 June 2017) UN Doc CERD/C/FIN/CO/23, paras 16–17.
 - 27 UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), 'Free, Prior and Informed Consent: A Human Rights-Based Approach' (2018) UN Doc A/HRC/39/62, 10; See Mauro Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Development and Challenges Ahead' (2012) 16 International Journal of Human Rights; Leena Heinämäki, 'Legal Appraisal of Arctic Indigenous Peoples' Right to Free, Prior and Informed Consent' in Timo Koivurova and others (eds), *Routledge Handbook of Indigenous Peoples in the Arctic* (Routledge 2020) 335–51.

- 28 UNDRIP (n 20) arts 10 and 29.2. See Mauro Barelli, 'Free, Prior and Informed Consent in the UNDRIP: Articles 10, 19, (29 (2) and 32 (2))' in Jessica Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 247–69.
- 29 See, e.g., *Ángela Poma v Peru* (Communication No 1457/2006) UN Doc CCPR/C/95/D/1457/2006 (HRC 27 March 2009); *Saramaka People v Suriname* (judgment) Inter-American Court on Human Rights Series C No 172 (28 November 2007).
- 30 See, generally, Sebastian Johannes Rombouts, *Having a Say—Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf 2014); Tara Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law' (2011) 10 *Northwestern Journal of International Human Rights* 54; Leena Heinämäki, 'Global Context—Arctic Importance: Free, Prior and Informed Consent, a New Paradigm in International Law Related to Indigenous Peoples' in Thora Martina Herrmann and Martin Thibault (eds), *Indigenous Peoples' Governance of Land and Protected Territories in the Arctic* (Springer 2016) 209–40; James Anaya and Sergio Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples' (2017) 4 *University of Toronto Law Journal* 435.
- 31 See HE 309/1993 vp perustuslakien perusoikeussäännösten muuttamisesta, 5–9.
- 32 Martin Scheinin, 'The Work of the Human Rights Committee Under the International Covenant on Civil and Political Rights and Its Optional Protocol' in Raija Hanski and Martin Scheinin (eds), *Leading Cases of the HRC* (Åbo Akademi University 2003) 23. See also Jakob Möller and Alfred de Zayas, *United Nations HRC Case Law 1977–2008: A Handbook* (Engel Verlag 2009) 8.
- 33 Saamelaiskäräjälain muutosta valmistelevan toimikunnan mietintö (Oikeusministeriö, Mietintöjä ja lausuntoja 2021:21).
- 34 Oikeusministeriön ja Saamelaiskäräjien muistio saamelaiskäräjälain 9 §:n neuvotteluvollisuudesta, OM 2/551/2017, 23 November 2017.
- 35 Perusoikeuskomitean mietintö, KM 1992:3, s. 163. See Rautiainen (n 12) 267.
- 36 Martin Scheinin, 'Oikeus omaan kieleen ja kulttuuriin' in Pekka Hallberg and others (eds), *Perusoikeudet. Oikeuden perusteokset* (Werner Söderström Lakitieto Oy 1999) 533–59, 545.
- 37 UN Human Rights Committee, 'CCPR General Comment No 23: Article 27' (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5, para 6.2.
- 38 HE 190/1995 vp laeiksi saamelaiskäräjistä annetun lain ja saamen kielen käyttämisestä viranomaisissa annetun lain muuttamisesta, 10.
- 39 Matti Niemivuo, 'Saamelaiset ja perusoikeudet' in Kai Kokko (ed), *Kysymyksiä saamelaisten oikeusasemasta* (Lapin yliopiston oikeustieteellisiä julkaisuja 2010) 92–110, 100.
- 40 See, e.g., *Tiina Sanila-Aikio v Finland* (Communication No 2668/2015) UN Doc CCPR/C/124/D/2668/2015 (HRC 20 March 2019); *Klemetti Näkkäljärvi and others v Finland* (Communication No 2950/2017) UN Doc CCPR/C/124/D/2950/2017 (HRC 18 December 2019).
- 41 See, e.g., *Ángela Poma Poma v Peru* (n 28) para 27; *Lubicon Lake Band v Canada* (Communication No 167/1984) UN Doc Supp. No 40 (A/45/40) at 1 (1990) (HRC 26 March 1990) para 1.
- 42 See *Jouni Länsman and Eino Länsman v Finland* (Communication No 1023/2001) UN Doc CCPR/C/83/D/1023/2001 (HRC 17 March 2005).
- 43 HE 132/2015; HE 167/2014; See also MMM, työryhmämuistio 2014:2.
- 44 Saamelaiskäräjien lausunto Dnro:67/D.a.4/2016.
- 45 Perustuslakivaliokunnan lausunto, PeVL 32/2010 vp—HE 273/2009 vp, Hallituksen esitys kaivoslaiksi ja eräksi siihen liittyviksi laeiksi.
- 46 *Ilmari Länsman and others v Finland* (Communication No 511/1992) UN Doc CCPR/C/52/D/511/1992 (HRC 8 November 1994); *O Sara and others v Finland* (Communication

- No 431/1990) UN Doc CCPR/C/50/D/431/1990 (HRC 24 March 1994); *Eino Länsman v Finland* (Communication No 671/1995) UN Doc CCPR/C/58/D/671/1995 (HRC 22 November 1996); *Anni Äärelä and Näkkäljärvi v Finland* (Communication No 779/1997) UN Doc CCPR/C/73/D/779/1997 (HRC 4 February 1997); *Ilmari Länsman v Finland* (Communication No 1023/2001), UN Doc CCPR/C/83/D/1023/2001 (HRC 17 March 2005).
- 47 See, e.g., *E Länsman v Finland* (n 45) para 10.7; *I Länsman v Finland* (n 45) para 10.2.
- 48 UN Human Rights Committee, 'List of Issues Prior to Submission of the Seventh Periodic Report of Finland' (2 March 2019) UN Doc CCPR/C/FIN/QPR/7.
- 49 CERD (n 25) paras 16–17.
- 50 HE 273/2009 vp kaivoslaiksi ja eräksi siihen liittyviksi laeiksi, 24.
- 51 Supreme Administrative Court of Finland, KHO 2014:111, 25.6.20014, T 1988.
- 52 Saamelaiskäräjien lausunto kaivoslain muutosesityksen johdosta sekä esitys kaivoslain toimeenpanoon liittyvien ongelmien ratkaisemiseksi, Lausunto 27 April 2016, 251/D.a.4/2016; See Heinämäki and others (n 6) 78–84.
- 53 Saamelaiskäräjien lausunto kaivoslain muutosesityksen johdosta sekä esitys kaivoslain toimeenpanoon liittyvien ongelmien ratkaisemiseksi, 19 May 2016, 281/D.a.4/2016, 1.
- 54 Pohjois-Suomen hallinto oikeuden päätös, 1 September 2016, diaarinumero 00940/15/7203.
- 55 *ibid.* See also Heinämäki and others (n 6) 79–80.
- 56 *ibid.*
- 57 Supreme Administrative Court of Finland, KHO 2014:111, 25.6.20014, T 1988.
- 58 *ibid.*
- 59 *ibid.*
- 60 Pohjois-Suomen HAO, 4 October 2016, T 16/0309/1, 16/0311/1, 16/0312/1, 16/0313/1, 16/0314/1, 16/0315/1, 16/0310/1.
- 61 *ibid.*
- 62 Supreme Administrative Court of Finland, KHO 16 March 2018, 3282/1/16; 16 March 2018, 382/1/17.
- 63 Ks. vesilain (587/2011) 3 luku: Luvanvaraiset vesitaloushankkeet.
- 64 Ympäristösuojelulaki (527/2014) 49 §:n 1 mom. 6 kohta; 191 §:n valitusoikeus Saamelaiskäräjille ja Kolttien kyläkokoukselle; Vesilaki (587/2011) 2 luvun 8 §; Saamelaiskäräjien valitusoikeus (15 luku 2 §:n 6 kohta).
- 65 Aluehallintovirasto, Lupapäätös Nro 66/2018/1 Dnro PSAV113355/201 7 Annettu julkipanon jälkeen 6 July 2018; Pohjois-Suomen Aluehallintovirasto, Lupapäätös Nro 95/2020 Dnro PSAVI/1209/2020 7 July 2020; Vaasan hallinto-oikeuden 13 June 2019 päätös nro 19/0141/2, Dnro 01012/18/5399.
- 66 *ibid.*
- 67 15 July 2019 Dnro: 491/D.a.5/2019 Saamelaiskäräjien valitus ympäristönsuojelulain mukaista ympäristölupaa ja vesilain mukaista vesitalouslupaa koskevassa asiassa liittyen Pohjois-Suomen aluehallintoviraston 6 July 2016 antamaan päätökseen nro 66/2018/1 Viite Pohjois-Suomen aluehallintoviraston päätös nro 66/2018/1 ja Vaasan hallinto-oikeuden päätös nro 19/0141/2, dnro 01012/18/5399.
- 68 Supreme Administrative Court of Finland, KHO 12 December 2018 päätös, Dnro 3168/1/17.
- 69 Supreme Administrative Court of Finland, KHO 2020:124.25 November 2020, taltionumero 4268.
- 70 *ibid.*
- 71 15 July 2019 Dnro: 491/D.a.5/2019 Saamelaiskäräjien valitus ympäristönsuojelulain mukaista ympäristölupaa ja vesilain mukaista vesitalouslupaa koskevassa asiassa liittyen Pohjois-Suomen aluehallintoviraston 6 July 2016 antamaan päätökseen nro 66/2018/1 Viite Pohjois-Suomen aluehallintoviraston päätös nro 66/2018/1 ja Vaasan hallinto-oikeuden päätös nro 19/0141/2, dnro 01012/18/5399.

- 72 Kaisa Raitio, *You Can't Please Everyone—Conflict Management Practices, Frames and Institutions in Finnish State Forests* (Joensuu yliopisto 2008) 246.
- 73 Peltonen Lasse and others, *Saamelaiden kotiseutualueen valtion metsien käytön ristiriidat ja ratkaisumahdollisuudet* (Metsähallitus 2020).
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- 75 PeVL 1/2016 vp— HE 132/2015 vp, 5.
- 76 Reindeer Husbandry Act 848/1990, s 2.2.
- 77 HE 132/2015 vp, 10.
- 78 HE 132/2015, 47.
- 79 See Lasse and others (n 72) 50.
- 80 *ibid.*
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- 82 *ibid* 2. See Akwé: Kon ohjeet, Ympäristöministeriö, Ympäristöhallinnon ohjeita 1/2011.
- 83 Heinämäki and others (n 6) 510.