The Nordic Sámi Convention and Self-Determination in the Nordic Context

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Abstract: There are few legal sources and little guidance on the actual content and scope of Indigenous peoples' right to self-determination. On the one hand, states fear such a right will challenge their territorial integrity. On the other, representatives of Indigenous peoples fear that such a right could end up simply creating arrangements for promotion of group interests, or what may be called corporatist mechanisms. Both parties therefore tend to emphasize what self-determination is not. In this paper, we argue that the content of this right to self-determination should not be understood as degrees of either autonomy or integration. Modern Sámi policy in Norway from the 1980s onward can to some extent be understood as not only increasing the institutional autonomy of the Sámi but also integrating them into the Norwegian political system.

Key words: Nordic Sámi Convention, Norwegian Sámi Parliament, international law, self-determination, Indigenous rights.

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It follows from the basic understanding of indigenous peoples' right to self-determination that it is exercised within the state. If an indigenous nation establish their own state, where they dominate politically and populously, they will no longer be regarded as an indigenous people, but as a people. Working closely with the state to gain control over natural resources, cultural development and political power, will reinforce interaction and interdependence between states and indigenous peoples, which can be perceived as a stimulus for further assimilation. Therefore, it is those who claim that the development of contemporary indigenous institutions for political-judicial interaction with the state are primarily forms of imitation of state systems and hence neo-colonialism. This structure undermines the possibility for indigenous peoples self-determination, cultural survival and development (Alfred 2009, Alfred and Corntassel 2005, Coulthard 2014, Kuokkanen 2011). On the other hand, it is difficult to see other options than political institutional interaction if self-determination within the state is the goal and that in a situation where indigenous people are highly dependent on significant state transfers in order to be able to achieve a standard of living comparable to others (Poelzer and Coates 2015, Falch and Selle 2018).

Historical, geographical, demographic and political contexts therefore become decisive for the form indigenous politics take in different countries, which imply that there will be great variety within indigenous politics. In international indigenous politics and law, this is often not emphasized, presumably precisely because such a contextualization easily affects the ambivalent relationship with the state. It is nevertheless a relationship that sets the premises for the content and scope of self-determination in different contexts. Although the principle of indigenous peoples' right to self-determination is universal, the specific content and reach of this right may differ in important ways. A contextualization of the right to self-determination and the corresponding institutionalization of indigenous politics, can be perceived as a deletion of this right, because it provides in one indigenous context what is not perceived as sufficient or relevant in another context. We should not ignore that the lack of and fear of a contextualization of the right to self-determination is a main reason for the lack of legal sources specifying the content and scope of this right.

The strong connection the indigenous people's right to self-determination has to the state and its political system, and ultimately that it is political and not judicial processes that will decide the content of this right, make the thinking and political space varied and rather open concerning how such rights should be understood. This political space may also be filled with suspicion of what an operationalization and concretization of such rights will do to the political climate. Often the state hears secession (dismember or impair territorial integrity) when indigenous peoples say autonomy or self-governance, and indigenous peoples hear classical interest representation (corporation) or assimilation when the state says consultations.[3] The discussion around the content of self-determination is largely dominated by a theoretical ideological understanding of a zero-sum game between self-government and political integration in the different states political system, where more of one means less of the other (Poelzer and Coates 2015, Falch and Selle 2018). These are understandings that are to a limited extent influenced by

[3] UNs Declaration on the Rights of Indigenous Peoples article 46 No. 1: *"*Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.*"*

empirical insights into how interactions between state and indigenous peoples actually take place and work. This interaction, after all, concerns quite specific issues about social processes and institutionalization of politics.

Since the content and scope of self-determination must relate to historical, geographical, demographic and political contexts, then the content of this right does not have to be understood as a zero-sum game between self-government and political integration. We will argue that the content of Indigenous peoples' right to self-determination should not be understood as degrees of either self-government or political integration, at least not in the Norwegian context. Modern Sámi policy in Norway from the 1980s onward should rather be understood as an effort to achieve both self-government through institutional autonomy and political integration through consultations arrangements into the political system. This experience and perspective along with the development within international law, is a core background to be able to understand the final negotiated draft of the Nordic Sámi Convention (NSC) released in January 2017.[4]

Already back in 1986 the Sámi Council as a Nordic Sámi umbrella NGO, proposed that working for a NSC should start. The Nordic countries and their Sámi Parliaments (Sámediggis) agreed on this in 1995 and in 1998 a working group concluded that there was a need for such a convention and that an expert group should be set down to draft such a convention. This expert group delivered its proposal in 2005. In the period between 2008 and 2010, discussions on how the negotiations between the states and the Sámediggis should be organized and who should participate went on. The Sámediggis wanted to have six autonomous negotiating groups, two from each of the three countries, i.e. autonomous representatives from the state and the Sámi parliaments. The states did not accept that and in the end, there were tripartite negotiations between the Nordic states with inclusion of representatives from the different Sámediggis in the state delegations. In practice, there were negotiations among the six groups or parties. Before the actual negotiations, the Sámediggis had negotiated among themselves, and each of them sought consensus with the corresponding Nordic state. The nature of these negotiations shows how difficult it is to achieve and practise self-determination. The negotiations took place between 2011 until 2017 when a final negotiated draft, supported by the governments and the sámi parliaments governing councils, was released. We will in this paper briefly discuss what the different legal sources say about the content of Indigenous self-determination. Then, using a model developed to understand the different forms of Indigenous authority, we will describe and discuss how self-determination can be expressed in a Nordic context, especially with reference to Norway, and how this perspective is reflected in the NSC proposal. First, however, we will give a short review of the ethno-national structures in the area and the Sámediggi of Norway as an Indigenous political institution.

The Sámi

Sámi ethnicity arose over a large area of Fennoscandia (Scandinavian Peninsula, Finland, and Russia) in the last millennium before the Common Era. The Sámi have continuously used and inhabited

[4] Final negotiated draft of the Nordic Sámi Convention. https://www.regjeringen.no/no/tema/urfolk-og-minoriteter/samepolitikk/nordisk-samisk-samarbeid/nordisk-samekonvensjon/id86937/.

this area while interacting, and with time, increasingly intermingling with other ethnic groups. The Sámi are thus in a minority because, various groups have increasingly migrated into traditional Sámi areas since the thirteenth and fourteenth centuries to establish farming and fishing villages for commerce. With increasing contact between these groups, and concerns over boundaries, the interests of the emerging modern state in these areas likewise increased. Colonization and the increasing dominance of trade facilitated royal control over these territories (Hansen & Olsen 2004). From the late 1500s onward, the central parts of Sámi territory (Finnmark) became subject to tax collection by the monarchs of Denmark-Norway, Sweden-Finland, and Russia (Pedersen 1994). The territories of ethnic groups in northern Fennoscandia have thus come to overlap each other over the past several hundred years, with territorial control being linked to the type of resource development and the form of trading arrangement.

The Sámi economy has traditionally been based on a mix of hunting, trapping, and fishing, with the addition of reindeer husbandry and some agriculture in later times. Such an economy requires extensive use of large areas of land. The Sámi have never been numerous. Their traditional homeland, where reindeer husbandry is currently the only industry only Sámi practises, extends across much of northern Fennoscandia.[5] The Sámi inhabited this area, largely dominating the use of its resources, long before the formation of modern states. As with other Indigenous peoples, the territorial and resource base is a crucial, defining characteristic of the Sámi people and distinguishes them from other minorities. Planning and development of modern Sámi policy is therefore to a large extent based on territorial and historical considerations. According to ILO Convention No. 169, ratified by Norway in 1990 (but not by Sweden and Finland), and a decision by the Supreme Court in 2002, the Sámi are defined and understood as an Indigenous people by the Norwegian state.[6] As individuals, they thus belong to two overlapping public spheres and civil societies within the same national state, through a form of multicultural citizenship (Kymlicka 1995). They are full-fledged Norwegian citizens, having the same rights and obligations as do other Norwegian citizens, while at the same time being strongly incorporated into Norwegian society and not appearing to be political and social marginalized and segregated (Selle et al. 2015).

How many Sámi are there? No recent, person-identifiable statistics exist, such a census being difficult for both ethical and practical reasons. For the northernmost areas of Norway, Sweden, and Finland the last surveys on Sámi affiliation were carried out during the 1960s and early 1970s. These surveys are prone to several sources of error, but it is believed that Sámi today number between 50,000 and 100,000 (depending of definition), with approximately half of them living in Norway (Pettersen 2007; 2011; Berg-Nordlie 2015).

The ethno-political approach to the Sámi is structured within the framework of a unitary state. This is an important premise for development and framing of Sámi authority in Norway. Sámi policy has evolved within a large, strong state, and within what is often described as a 'state-friendly' society

[5] In Norway and Sweden, only Sámi may practise reindeer husbandry, while Finland has no such rule. As a result of Protocol 3 in the Affiliation Agreement with the EU, Finland has undertaken to strengthen Sámi reindeer husbandry.
[6] ILO Convention No.169 is a legally binding international instrument that deals specifically with the rights of Indigenous and tribal peoples. To date, it has been ratified by 22 countries, almost 23. In 1990, Norway was the first country to ratify it.

(Kuhnle & Selle 1990). Close ties between the government and various actors in civil society characterize the Norwegian political system. It has a strong tradition of NGOs advocating increased state responsibility for society and community well-being. Major social movements have been politically oriented and have likewise argued for enhanced state responsibility within their fields of interest. This orientation has given NGOs a key position in public policy-making; they are commonly affiliated with political parties, and participate in committees, panels, and hearings where policy is made. The Norwegian (and Nordic) political system substantially incorporates public interests; NGOs have maintained a strong, independent role, being at the same time independent of the political system and, oddly enough, integrated into it (Grendstad, Selle, Strømsnes & Bortne 2006). This is the framework within which the Sámi and the state meet, although Indigenous policy also differs and is further shaped by the standards of international law (Falch and Selle 2018).

A unitary state such as Norway requires not only a centralized power structure but also a longstanding ideological understanding that the state and the people are one (Fulsås 1999). Beginning in the late 1800s the Sámi faced pressure to assimilate into the majority culture of the nation state. They were as a rule excluded from representations of national history; to the extent that they were discussed, they were seen as a culturally isolated, primitive, and alien group from the east. Until the 1980s they were rarely perceived as a distinct, Indigenous people with their own political rights; rather, they were seen as Sámi-speaking Norwegians.

From the late 1960s and into the 1970s, however, a broad, international, research-based understanding of ethnicity gained broad acceptance. It stressed the role of mobility, contact, and interaction in maintaining ethnic group identity, with cultural functions playing an important role, and highlighted the fact that ethnic boundaries may show continuity even with changes to culture and other boundary markers. Such boundaries, though social, often have territorial counterparts (Barth 1969). This understanding of ethnicity brought into being a broader political understanding of the Sámi as a separate ethnic group with its own deep historical roots.

The Sámi began to forcefully mobilize culturally and politically from the late 1960s. At that time, the government was gradually softening its assimilation policy, individual Sámi institutions were becoming established, and the welfare state and welfare society were emerging. Also emerging was a highly educated younger generation of Sámi who would ask new questions about existing policies and transform the old organizational network. Overall, this provided a basis for a Sámi resource mobilisation for cultural recognition, equality and political participation as a people (Oberschall 1973). Sámi identity was used to develop new positions and organizational patterns.

In the early 1970s the Norwegian authorities began making plans for a large-scale hydroelectric development on the Alta-Kautokeino watercourse, which runs through core Sámi areas. The project offered a clear target for Sámi mobilization. There were extensive and long-term protests against the decisions of the government and the Storting (the National parliament) in the period 1979-1981, including a hunger strike, occupation of the prime minister's office, and a blockade of the construction site. This mobilization, with unparalleled use of the country's police force in peacetime, became one of the most extensive and important acts of civil disobedience in Norway after the Second World War (Strømsnes & Selle 2014). The Sámi ethno-political movement took shape and spread largely due to an intense conflict

with the state over the use of land and resources. This conflict raised the question of how the Sámi themselves would relate to the state, as much as how the state would deal with the Sámi.

The Sámediggi of Norway

In 1989, the first direct election was held to a new institution in Norway, the Sámediggi. This body was established by the Storting through the *Act concerning the Sameting [the Sámi Parliament] and other Sámi legal matters* (The Sámi Act) in 1987, and through Section 110a of the Constitution of the Kingdom of Norway in 1988.[7] Elections to the Sámediggi have since been held every fourth year, at the same time as elections to the Storting.

The Sámediggi was established as a way to achieve three simultaneous and partially overlapping goals: first, recognize the Sámi's historical presence as a separate ethnic group or people; second, counteract the effects of an over 100-year-long assimilation policy; and, third, channel a potentially disruptive form of ethno-political mobilization into conventional activity within the Norwegian political system.

The Sámediggi has an ambiguous authority. The Norwegian Sámi Act created a duality in what the Sámediggi should be and how it derives its legitimacy. The Sámediggi is both an executive body and an independent political body that makes policy and is a prime mover vis-à-vis the state.[8] It derives its legitimacy from the law (the constitution, the Norwegian Sámi Act, sectoral laws, and international law) and from the Sámi people through elections. The Sámi Act actually says nothing about the role of the Sámediggi in the system of governance, other than three points: it is nationwide, Sámi elects it, and its work extends to all issues that it perceives as particularly affecting the Sámi. Therein lies the inherently high degree of dynamism in the development of the Sámediggi.

Sámi who have been registered on the Sámediggi electoral roll elects the Sámediggi. To qualify for inclusion on the Sámediggi electoral roll, self-identification and language-use criteria must be met: an applicant must both self-identify as a Sámi and have an objective link with the Sámi community (by speaking Sámi at home, by having a parent, grandparent, or great-grandparent who did so, or by having a parent who is or has been registered on the Sámediggi electoral roll).[9] The Sámediggi electorate increased from 5,500 in 1989 to about 17,000 in 2017. Nonetheless, it is still well below half of what is assumed to be the number of Sámi over 18 years of age in Norway. Turnout at elections to the Sámediggi is lower than for elections to the Storting, but higher than for county council and municipal elections. Strictly speaking, 'Sámediggi' is a collective term for a political and administrative system whose activities are organized along parliamentary lines. It is currently made up of two bodies: the Plenary Assembly and the Council. The main body of the Sámediggi is the elected Plenary Assembly. It has 39 political party-based representatives elected from seven electoral districts, which together cover the entire country, and the

[7] See Recommendation no. 79 (1986-1987) to the Odelsting (The Sámi Act) and Recommendation no. 147 (1987-1988) from the Standing Committee on Foreign Affairs concerning its recommendation for a new Section 82 in the Constitution or, alternatively, an amendment to Section 98 or a new Section 110a (Sámi rights). In amendments to the Constitution carried out in 2014, the 'Sámi paragraph' was moved to Section 108 (Recommendation no. 187 (2013-2014) to the Storting).
[8] Odelsting proposition no. 33 (1986-87), pp. 55 and 68.
[9] Sámi Act (1987), subsection 2-6, first paragraph.

number of seats for each district depends on the size of the district's electoral roll.[10] The Sámediggi Governing Council is a separate body and represents the executive authority of the Sámediggi—it is the Sámediggi's 'government' and consists of the president and four council members appointed from among the elected representatives of the Plenary Assembly. It is not statutory, having been established according to the ground rules the Sámediggi itself has adopted.[11]

The Sámediggi is today an organization with eight full-time politicians, including the Governing Council and the Plenary Assembly leadership. The administration consists of about 150 employees in seven specialized divisions and a staff for the Plenary Assembly. It is organized in such a way that policy-making and administration are integrated.

The Sámediggi's overall budget in 2018 amounted to NOK485m (about CAD74m) allocated as indicative budgets from seven ministries. Even though the total national allocation for Sámi purposes has been rather stable over the last 10-15 years, the Sámediggi has received a growing share of the allocation for Sámi purposes. Today, about half of the allocations for Sámi purposes are channelled through this institution. The budget has increased substantially through transfers to the Sámediggi of previously state-managed programs. The Sámediggi therefore largely continues earlier programs established without its participation (Fjellheim 2008), but it can now authorize spending on them.

With this overview of ethno-national structures and the Sámediggi as a political institution in Norway, we will now look into what international law, including UNDRIP, tells us about the right to self-determination and how that have an impact on Norwegian and Nordic understanding. We will then discuss the Sámi experience, using the before mentioned model of Indigenous authority.

Indigenous Peoples' Right to Self-Determination

It is broadly understood and accepted in international law that Indigenous peoples are peoples for international legal purposes and, as such, enjoy the right to self-determination. We will concentrate on what international law says about self-determinations within the different states and not on what has to do with Indigenous peoples´ right to represent themselves internationally. Indigenous rights discourse has focused on allowing Indigenous peoples to preserve and develop their own distinct societies. To this end, it is believed that they need to develop autonomous or self-governing arrangements within the state (Åhrén 2016). This belief is also reflected in UNDRIP articles 4 and 5.[12] Those articles explicitly state that

[10] The Plenary Assembly is coordinated by a plenary leadership that is responsible for planning and organizing their work. Three special committees, on planning and finance, on growth, care and education, and on industry and culture, make recommendations to the Plenary Assembly on matters referred to them. An election committee handles nominations for elections to the plenary leadership and committees. A control committee exercises parliamentary and governmental control and submits proposals to the Plenary Assembly in such cases.

[11] The Sámediggi's working plan. Ground rules last revised on December 31, 2009, Section 1: 'The Sámediggi's highest body is the Sámediggi's plenary. The Sámediggi chooses from and among the Sámediggi's representatives a Sámediggi Council and plenary leadership. The Sámediggi decides any other ways and means for the conduct of its business.'

[12] UNDRIP article 4: "*Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions".* Article 5: "*Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so*

Indigenous peoples, in exercising their right to self-determination, have the right to their own decision-making institutions. Besides the UNDRIP, however, not many international legal sources state that this right includes autonomy or self-government. Several UN bodies have endorsed the UNDRIP, thus indicating its accordance with international law, but they have not given due consideration to the importance of self-government in the right to self-determination.

Some national and regional legal bodies have ruled that the right to self-determination of ethnic groups or Indigenous peoples includes arrangements for autonomy. The African Commission on Human and Peoples´ Rights has in the case of Katangese Peoples´ Congress v. Zaire ruled that all peoples have a right to self-determination and that this right may be exercised in the form of autonomy.[13] In Canada the Supreme Court in the Quebec Secession Case recognized the importance of respecting the rights of Indigenous peoples in Quebec, concluding that a state should: « …respect the principles of self-determination in its internal arrangements … ».[14] Although this can be interpreted to mean arrangements for autonomy, it need not necessarily be understood so. Denmark has affirmed that the Inuit are a people with rights as such and to that end passed the Greenland Self-Government Act. Norway, Finland, and Sweden have all stated that the Sámi people has a right to self-determination and democratically elected Sámi parliaments. It must be said that Norway has been reticent to recognize that the right to self-determination is covered by the UN's International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Although the Sámi-Nordic states have emphasized that the Sámediggis are tools for operationalizing collective rights, it is in the final negotiated draft of the NSC that they first explicitly stated that the Sámi people's right to self-determination includes self-government (see part 6). Even though relatively few legal sources state that autonomy is included in self-determination, autonomy is widely held to be key to the concept of self-determination (Åhrén 2016). There is, however, little guidance on what it means in practice. Autonomy is largely discussed in the understanding of territorial autonomy, which is demanding in multinational states where ethnic intermingling is an everyday empirical reality, even for Indigenous peoples where land and resources make up an all-important basis for culture and cultural development (Coakley 2016).

The European Charter of Local Self-Government can provide insight into what the self-government concept might include because as a convention it establishes international standards on collective rights, and because it governs relationships between public agencies or authorities. The Charter sets forth two main requirements. First, the state must establish local elected bodies and provide them with formal expertise and resources to ensure a certain degree of autonomy. Second, state governments are limited in the degree to which they may control and intervene in local self-governing authorities (Stokkstad 2011). It would be natural to assume that the right to autonomy is the right of Indigenous peoples to manage fields of activity considered particularly important for their culture, land, livelihoods,

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choose, in the political, economic, social and cultural life of the State".

[13]Katangese peoples´ v. Zaire, Comm Ni 75/92 (1995). AfCHPR expressed that: "*The issue in the case is not self-determination for all Zaireoise as a people but specifically for the Katangese* […] *self-determination may be exercised in any of the following ways: independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognisant of other recognised principles such as sovereignty and territorial integrity."*

[14] Supreme Court Judgement. Reference re Secession of Quebec (1998) 2 SCR 217. Significantly perhaps, the Supreme Court here says "internal" and not "autonomous" arrangements, as Åhrén chose to word it in his book 'Indigenous Peoples´ status in the International Legal System' 2016, pp. 109-110.

and society and to have sufficient legal authority that their representative institutions can act as primary or sole decision-makers without the state acting as an instructing and controlling agency (Anaya 2011).

Self-determination includes not only self-government but also the right to participate in, and genuinely influence, decision-making in matters that affect Indigenous peoples within a state. Consultations to obtain free, prior and informed consent from indigenous peoples who are directly affected is central to the right to self-determination (Anaya 2011). It corresponds to UNDRIP articles 18 and 19. The UN's Human Rights Committee (HRC) has in several cases ruled that ICCPR Article 1 (the right to self-determination for Indigenous peoples) is key to interpretation of Art. 27 (protection of minority culture).[15] The HRC goes far in interpreting Article 27 as giving the affected Indigenous people a right to be consulted, as part of their right to self-determination, in decisions on issues of direct importance to their material culture.[16] In its concluding observations to Norway in 2006 the HRC also stated that the consultation agreement between the Sámediggi and the State partly is in furtherance with ICCPR articles 1 and 27.[17] In 2018 the HRC states in its concluding observations to Norway that the state should ensure meaningful consultation with the Sami peoples in practice, but this time without connecting consultations directly to the right to self-determination.[18]

The UN´s Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) advises that consultations to obtain free, prior, and informed consent are crucial for the right to self-determination, being not only a procedural but also a substantive mechanism to ensure respect for Indigenous peoples.[19]

This principle, that consultations are crucial for obtaining free, prior, and informed consent (FPIC) from Indigenous peoples is present in a number of articles in the UNDRIP and is therefore key to understanding the nature of self-determination (Vars 2009).[20] There is however, an ambiguity here in the understanding of the term "obtain." The few substantive legal interpretations of this emerging

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[15] Apirana Mahuika et al. v. New Zealand (2000): *"As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27"*

[16] Sámi Right Commission (NOU 2007 : 13) Den nye sameretten.

[17] CCPR/CNOR/CO/5 April 25, 2006 Concluding observations of the Human Rights Committee: *"The Committee welcomes the Agreement entered into by the State party and the Sameting on 11 May 2005 setting out procedures for consultation between central government authorities and the Sameting, as well as the adoption of the Finnmark Act, which is in furtherance of articles 1 and 27 of the Covenant."*

[18] CCPR/C/NOR/CO/7 25 April 2018. Concluding observations of the Human Rights Committee: "*The State party should: Ensure meaningful consultation with the Sami peoples in practice and adopt a law for consultations with a view to obtaining their free, prior and informed consent, in consultation with them;"*

[19] The UN´s Expert Mechanism on the Rights of Indigenous Peoples also states in its Advice No. 2 (2011): *"Article 3 of the Declaration on the Rights of Indigenous Peoples mirrors common article 1, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Consequently, indigenous peoples have the right to determine their own economic, social and cultural development and to manage, for their own benefit, their own natural resources. The duties to consult with indigenous peoples and to obtain their free, prior and informed consent are crucial elements of the right to self-determination. […] the right of free, prior and informed consent needs to be understood in the context of indigenous peoples' right to self-determination because it is an integral element of that right.*"

[20] UNDRIP art. 15 2, 17 2, 30, 36 2 and 38 give the state a duty to consult. Art. 10, 11 2, 19, 29 2 and 32 2 give the state a duty to consult to obtain free, prior, and informed consent from Indigenous peoples.

international norm have moved back and forth between a strong interpretation of FPIC as a requirement and a weaker one of FPIC as a suggestion (Papillon and Rodon 2016). This ambiguity is by some used to justify a clearly expressed view that consultation is only a right to a process with no material rights and is therefore unrelated to self-determination (Åhrén 2016). We find it hard to reconcile such a position both concerning the nature to self-determination and the content of consultations.

Self-determination is obviously more than consultations, and consultations are more than a right to a process. Process and content are interdependent. When consultation is required to exercise the right to self-determination, as for the final negotiated draft of the NSC (se part 6), it, too, is necessarily a material right. In some cases and situations, the state must obtain absolute consent for its decisions; this will depend on the relative importance of the issue to the Indigenous people. In addition, this will often be matters related to other material rights in international law concerning issues such as language, education, land and resources. In other words, consultations are a manifestation of the relationship between the two parties, and must respect the right to self-determination. Self-determination is a much broader concept than self-government and goes beyond the mere right to be consulted (Kuokkanen 2009, Åhrén 2016). Self-determination is in our opinion linked both to self-government and to consultation arrangements. These two core features of self-determination produce independence on the one hand and integration on the other. They act as two simultaneously and not necessarily competing forces or dimensions. With this understanding of self-determination for Indigenous peoples, we have the basis for a model of Indigenous authority, and this model may be used to analyze various Indigenous situations, including as we shall see in part 6 the interpretation of the Nordic Sámi Convention.

Indigenous authority and the Sámi experience in Norway

Indigenous power seems to have two main aspects or dimensions: the right to self-government, and the right to political integration through consultation arrangements between the state and the Indigenous people to reach consensus on decisions and measures (Falch & Selle 2015; Vars 2009; Broderstad 2008). These two dimensions and the relationship between them, both connecting to our discussion in part 4 and informed by international law, can be illustrated by the following model of Indigenous authority.

		Degree of political integration	
		High	Low
Degree of self-government	High	Self-determination	Territorial autonomy
	Low	Corporatism	Co-optation

We believe it is indeed possible to distinguish two dimensions that reinforce each other, i.e., both of them may increase or decrease simultaneously. The modalities of self-determination flow from negotiations or consultations between the government and the Indigenous people, and need not take the form only of territorial autonomy. Self-government would thus be limited to states, as in a federation, or to territories where Indigenous people are predominant, but this limitation is inconsistent with a modern (anthropological) understanding of ethnicity and with international legal developments in the field of Indigenous peoples' rights (Falch & Selle 2015).

Indigenous authority is a specific kind of regional authority, being based on premises that do not apply to what we commonly call regionalization, even though our two dimensions of self-determination correspond broadly to those of self-governance and multi-level governance, both of which are greatly emphasized in international research on regionalization (Zürn, Wälti & Enderlein 2010). Unlike our model of Indigenous authority, regionalization studies assume a pervasive, well-defined territory that includes all citizens, while the multi-level governance mainly takes place between different levels of management (Hooghe & Marks 2010; Hooghe, Marks & Schakel 2010). Nevertheless, it is important to emphasize that the Indigenous authority is of a distinctive character where it is about authority of a people within an established state structure.

Self-determination, as an international legal standard for Indigenous authority, does not assume that Indigenous peoples have territorial autonomy, but it requires that states respect and protect the territoriality of Indigenous people. By linking self-determination to the dimensions of political integration (consultations, multi-level governance, or shared rule/jurisdiction) and self-government (autonomy), we are building a general model of Indigenous authority where specific self-governing regions have varying degrees of territoriality. The understanding of territoriality is defined against sovereignty or "territorial integrity" and is used in the sense of a defined geographical area.

Our model of Indigenous authority presents four ideal-type situations where the two dimensions - self-government (autonomy) and political integration (consultations, multi-level governance, or shared rule/jurisdiction) - have different values. In reality, we see gradual transitions and empirically mixed forms whether we look at the overall picture or at specific administrative and social aspects. There is also change over time. Self-government does not have to exist in all fields of activity that have consultations for there to be a 'self-determination' ideal type. Here, we look at the overall picture: the space for Indigenous policies will be different in a federation, as opposed to a unitary state, but not necessarily more extensive (Smith 2010, Falch & Selle 2015). The four ideal types are as follows:

- *Self-determination* exists when an Indigenous people has a high degree of self-government in matters of great importance. There is simultaneously a high degree of consultation on laws, financial constraints, and measures that contribute to political integration. Consultations can also be built into the governance structure in form of multi-level governance or shared rule arrangements.

- *Territorial autonomy* exists when an Indigenous people has a relatively high degree of self-government and a rather low degree of political integration through consultations, despite interaction and meetings with the state in many fields of activity. This ideal type comes closest to a conservative understanding of the right to self-determination. It corresponds to decolonization or devolution of power to 'islands'

that are clearly distinct from the governing power, such as the self-government granted to Greenland. This is also the category that most states fear when self-determination of Indigenous peoples is debated.

- *Corporatism* exists when an Indigenous people has a low degree of self-government and a high degree of political integration through stakeholder participation. This type of situation largely resembles a corporative structure, where NGOs provide input to public authorities. This governance structure has been prevalent in the Nordic countries. Corporatism may also exist when participation in decision-making is more focused on consultation as a right to a process than as a material right, an outcome many Indigenous peoples fear in debate on self-determination.

- *Co-optation* exists when the state has a high degree of domination and control, at the expense of social movements and interest groups. The state maintains strong oversight and control when delegating public authority, while acting alone on overall decisions.

This model of Indigenous authority does not have territoriality as an overarching premise, although it is fully compatible with territorial forms of authority. Self-government may be exercised in specific fields of activity; it may be territorial, but not necessarily so; and this territoriality may vary depending on the field of activity. Alongside the dimension political integration it is possible to find different arrangements implying that participation and consultations are built into the governance structures such as shared rule or multi-level governance. These are governing structures that allow for different territorial arrangements.

Based on this model of Indigenous authority, we will discuss the development of Sami self-determination through the Sámediggi of Norway.

Self-government

There has been a significant expansion of duties assigned to the Sámediggi since it was established in 1989. It was given funding responsibilities largely in two rounds. The first round was in 1993, when the Sámediggi took over funding for municipalities and county councils in the field of Sámi language management. At that time it was given authority over financial subsidies for raising and educating children in the Sámi language. It also took over the Norwegian Cultural Council's funding of Sámi culture, as well as grants for Sámi publishing ventures, art organizations, and art centres. The second round was in 2002, when the Sámediggi took over management of programs for artist stipends, exhibition fees, Sámi museums, heritage sites, municipal bookmobiles, and Sámi theatre and festivals.

Sámediggi-managed funding programs are to varying degrees territorially or individually oriented. The Sámediggi itself has adopted a business funding program that includes 21 municipalities entirely and 10 partially. The program's scope and extent has been gradually extended in recent years. There are no territorial or individual ethnic criteria for cultural grants, which are given in a discretionary manner for projects that will likely contribute to Sámi culture.

Aside from taking over funding responsibility for Sámi purposes, the Sámediggi has also in some fields been given authority to administer legislation. In 1994 it assumed responsibility for Sámi cultural heritage management, which, however, was transferred to the Sámediggi by regulation and not by law. It thus manages cultural heritage while being responsible to the Ministry for exercise of this authority. In principle, this authority is non-territorial, since the Sámediggi manages Sámi cultural heritage anywhere in Norway. In practice, however, it is limited to those territories in which the Sámi currently practise reindeer husbandry and have historically exploited other resources.

Sámi power was greatly strengthened in 2005 when the Storting adopted a new law on legal matters and land and resource management in the county of Finnmark (the Finnmark Act). The law changed the Indigenous legal framework and implied recognition of accrued Sámi rights to land and resources. It established a landowning body called the Finnmark Estate, a commission for mapping of land rights, and a court for resolution of disputes over the commission's reports. The Act, whose content had largely been shaped by Sámi activism, was passed after consultations between the Sámediggi and the Storting's Standing Committee on Justice (Hernes 2008).

The Finnmark Estate has extensive decision-making power over land and resources; its board has three representatives from the Sámediggi and three from the Finnmark County Council. Legally, it is a private law body that protects Sámi ownership of land in Finnmark; politically, it is a level of government that exercises a form of shared rule, multi-level governance, or shared jurisdiction between Sámi and Norwegians over a defined territory (Falch and Selle 2018).

Managing land and resource rights entails far more than issues of ownership and usage rights. Public authorities have considerable power to regulate the use of privately-owned areas under the Planning and Building Act and a series of special laws. Since 2009, when the new planning provisions of the Planning and Building Act came into force, the Sámediggi has had the authority to raise objections to any land-use plan or regional plan and, if its concerns about the impact on Sámi culture or commercial activity are inadequately addressed, to refer the objections to the Ministry.[21] No land-use plan will be approved until agreement is reached on the objection or until the matter is finally decided in the Ministry.

Under the Sámi Act's language rules, the Sámediggi works to protect and develop the various Sámi languages (see note 1). Specifically, terminology is determined and measures implemented to strengthen Sámi languages. In 2015 the Sámediggi allocated NOK79m (about USD11m) for this purpose. Under the Sámi Act, Sámi and Norwegian are languages of equal worth and status, but the Act specifically limits this equality to an administrative district that currently encompasses 11 municipalities.

In 1998 the Education Act gave the Sámediggi the authority to issue regulations on curricula for Sámi language education in elementary schools and in junior and senior high schools, as well as for special Sámi subjects, such as *duodji* (traditional crafts) and reindeer husbandry in senior high school. For subjects such as history and social studies, the Sámediggi may only work with the Ministry of Education to prepare draft curricula, and the Ministry approves them. Within the Sámi language administrative area, everyone has a right to learn the language and be educated in it. All Sámi children have the right to learn the Sámi language, no matter where they reside or how few require it, but for Sámi to be used as a general

[21] Planning and Building Act (2008), Subsections 5-4 and 8-4.

teaching language outside the Sámi administrative area more than ten pupils in a municipality must request it.

Reindeer husbandry is likewise a right determined by territorial and individual ethnic criteria. The reindeer husbandry area is defined in the Reindeer Herding Act and covers about 40 per cent of Norway's land area.[22] Although reindeer herding is the only industry specific to Sámi culture, the Sámediggi has no direct authority over it. This significant and surprising restriction on its power is due to reluctance by the Sámi organization of reindeer herders.

Political integration

The extension of the Sámediggi's sphere of authority since its establishment in 1989 is one matter; the development of its role in government decisions that may affect the Sámi is quite another. In this respect, the big change in the Sámediggi's role came in 2005 with the signing of an agreement on procedures for consultation between government authorities and the Sámediggi. These procedures were adopted by royal decree. The Sámediggi thus gained significantly greater influence and responsibility in negotiating laws and measures that matter to the Sámi community. The consultation procedures set the ground rules on how the government authorities and the Sámediggi should communicate and see consensus on decisions that may directly affect the Sámi.[23] The Sámediggi is placed in an entirely new and more clearly defined position in relation to the state, with participation in political decision-making now formalized. Although such procedures do not always work as intended and the state may at times assert its authority, the Sámediggi is no longer a purely advisory body, or an interest group, but a fully informed formal participant in public decision-making. A completely new framework has been established for the relationship between the state and the Sámediggi.

In principle, the consultation procedures exist to comply with obligations under international law; in practice, they clarify the rules on how interests should be protected and the role of the government and the Sámediggi in this effort. The consultations are intended to be in good faith with a view to achieving agreement or consent. Among other things, respect must be shown mutually for the other party's interests, values, and needs. The Sámediggi therefore has a real opportunity to influence both the process and the outcome of matters on which it is consulted.[24] The obligation to consult applies to matters that may directly affect the Sámi, the aim being to clarify the probable impact of a law or measure. It is largely up to the Sámediggi to decide which matters require consultation.[25] Such matters include most forms of general cultural expression (including language) and material interests (including land, resources, area

[22] The Reindeer Herding Act (2007), Section 4, first paragraph states that 'The Sámi population has the right, based on immemorial usage, to practise reindeer husbandry within those parts of the counties of Finnmark, Troms, Nordland, North-Trøndelag, South-Trøndelag and Hedmark where Sámi reindeer herders of old have practised reindeer herding (the Sámi reindeer herding district)'. According to Section 9 of the Act, only persons of Sámi ancestry with the right to brand reindeer have the right to own reindeer, while according to Section 32 only persons of Sámi ancestry have the right to brand reindeer.

[23] The basis of the established consultation procedures was prepared by an administrative working group with three members from the Ministry of Local Government and Regional Development and two members from the Sámediggi. In April 2005, the working group submitted a report in which various procedures were proposed and assessed.

[24] Sámi Right Commission NOU 2007:13 *Den nye sameretten.*. See subsection 17.5.8.2. Sámi Act (1989).

[25] Subsection 2-1, first paragraph, states: 'The business of the Sámediggi is any matter that in the view of the parliament particularly affects the Sámi people.'

planning and environment). Consultations are a form of shared rule, multi-level governance, or shared jurisdiction whose intended purpose is to achieve agreement between the Sámediggi and government authorities before decisions that affect the Sámi are made. They also have a clear territorial dimension. Many consultations deal with the territorial scope of various schemes, especially resource legislation and measures for economic development, cultural institutions, and language strengthening and training.

The Nordic Sámi Convention. The contextual Nordic and international law as a playing field

The final negotiated draft of the NSC was released in January 2017 after negotiations for over five years. In article 4 **'Right to self-determination'** of the NSC it is stated that (our translation):

> *The Sámi people have the right to self-determination. By virtue of that right they freely determine their political status and their economic, social, and cultural development.*
> *Self-determination is exercised through self-government in internal issues as well as through consultations on issues that may have a particular significance for the Sámi.*

Articles about the *Sámediggis*, *self-government,* and *consultations* follow up this general provision.

In article 12 **'The Sámi Parliaments'** it is stated that (our translation):

> *In each of the State Parties to this Convention there shall be a Sámi Parliament, which is the supreme Sámi body in the country. The Sámi Parliament represents the Sámi people and is elected through general elections among the Sámi in the country.*
>
> *Provisions on election of the Sámi Parliaments are provided by law.*
> *The Sámi Parliaments shall have such responsibilities and such tasks as to enable them to achieve the Sámi's right to self-determination.*
> *The Sámi Parliaments' tasks are stipulated by law. The Sámi Parliaments decide independently what other issues they want to work with and comment on.*

In Article 14 **'The Sámi Parliament's right to self-government'** it is stated.

> *The Sámi Parliaments make independent decisions on the questions that they, under national law, are responsible for, as well as other issues that they are dealing with.*

In Article 17 **'Consultation'** it is stated

> *By legislation, on decisions or other measures that may have a particular significance for the Sámi, the state must consult the Sámi Parliament. Consultation will take place in good faith, and agreement with or consent from the Sámi Parliament shall be obtained before decisions are made. States must immediately inform the Sámi Parliament when they start work on such issues.*

Article 15 deals with the fact that the Sámi Parliaments can enter into cooperation with national, regional and local units, Article 16 that states should work for that the Sámi parliaments can cooperate and establish joint organizations across borders, and Article 19 deals with the Sámi Parliaments international representation.

The proposed NSC provisions on the right to self-determination are quite similar to those in UNDRIP articles 3, 4, 18, 19, and 46. The wording is, however, somewhat different and more clearly obliges the State to provide a legal system for genuine exercise of self-determination. The NSC also differs from the UNDRIP by clearly linking self-determination to an Indigenous representative body—the Sámediggis, which are understood to be public bodies for the exercise of Sámi authority and not private bodies for Sámi individual or group rights.[26]

In addition, the two aspects of self-determination—*self-government and political integration* — are specified as the means for exercising self-determination. Both are central to understanding the right to self-determination of Indigenous peoples and, as we have seen, are clearly derived from international law. In the NSC, they are also derived from the experience of modern Sámi policy.

To the surprise of many, when the final negotiated draft was released in January 2017 there was several negative reactions from Sámi organisations that the right to self-determination had been diluted. The Sámi Parliament in Finland ordered two expert assessment by professor in international law, Martin Scheinin and Mattias Åhrén respectively, while the Sámi Parliament in Norway asked for an expert assessment from professor in international law Geir Ulfstein. Scheinin believes that the provision in Article 4, second paragraph, in the same way as UNDRIP, can be interpreted as diluting self-determination. However, Scheinin emphasizes at the same time that this provision does not define the right of self-determination to be merely self-government and consultations, since especially chapter 2 of the proposal also concretizes several other forms of self-determination. He therefore believes that Article 4, second paragraph, must be understood as an emphasis on certain dimensions of self-determination. Ulfstein believes that the restriction in article 4, second paragraph, has a design that corresponds to UNDRIP Articles 4, 18 and 19 and are understood to be within international law. However, Åhrén believes that the final negotiated draft directly limits self-determination to merely being a right to consultations in all matters except pure internal affairs. Furthermore, Åhrén believes that the right to self-determination has a clear appraisal against consultations because this is understood as a purely procedural right (Åhrén 2017). Scheinin and Ulfstein, on the other hand, argue that consultations are one, but not an exhaustive, dimension of self-determination. They also find that Article 17 of the negotiation proposal satisfies the principle of free prior and informed consent (Scheinin 2017, Ulfstein 2017). Based on these assessments, the three Sámi Parliaments in Norway, Sweden and Finland asked in June 2018 the states to adjust the negotiated draft by removing the second paragraph in Article 4 because:

> Self-government and consultations in order to obtain a free prior and informed consent are two key dimensions of the right of self-determination, but not the only forms that this right can be expressed, as also stated in chapter two of the negotiated draft (Sámi Parliamentary Council 2018). The states who requested for specific proposals of adjustments of the negotiated draft, have not yet responded to the proposal. In other words, the proposal is now in a diffuse and contested stage.

[26] It is possible to envisage the Sámediggis managing, or co-managing with state or regional institutions, collective Sámi land rights. Such management will then have to be done in a climate of respect for local communities as the actual bearers of ownership or usage rights. In any case, such management deals with rights of a private nature.

In Sámi self-determination what we see?

In Sweden, the Sámediggi receives its authority from the Ministries, which can also considerably guide and overrule how it exercises authority. There is no real functioning arrangement for consultation. The UN's Special Rapporteur on the Rights of Indigenous Peoples has therefore recommended that Sweden should introduce reforms to ensure Sámediggi independence of state authorities (Anaya 2011). In Sweden, the Sámediggi seems to be directly co-opted by the state political system (Falch & Selle 2015; Lawrence & Mörkenstam 2016). In September 2017, the government in Sweden sent to public hearing a proposal of legislative provisions on consultations with Sámi interests.[27] Consultations between the government and the Sámediggi in Sweden on this proposal are in process and have not yet been finalized (2018).

In Finland, the Sámediggi is independent, but has virtually no self-government, being essentially a partner for discussions with the state government and state agencies. Nevertheless, for certain matters in defined home regions the Sámediggi of Finland can veto certain land encroachments. In the model of Indigenous authority, the Sámediggi of Finland operates perhaps at the border between corporatism and co-optation.

In Norway, institutional autonomy co-exists with decision-making authority in some areas of society and with consultations on legislation and administrative measures. In June 2018, the Sámediggi in Norway gave its support to a governmental legislative proposal for provisions of consultations in the Sám act. This legislative proposal does not come easy and had been consulted about as far back as since 2012.[28]

Sámi authority may be said to correspond to the 'self-determination' ideal type. There are nonetheless several problems with categorizing Sámi authority in Norway as 'self-determination.' There is virtually no political integration in the form of consultations about the financial basis of Sámi political institutions, and the Norwegian political system seems to have trouble bringing special interests into its general budgeting processes. Nor does the Sámediggi have any form of tax-varying power; in many fields of activity, it has less economic freedom of action than do municipalities (Borge 2010). Here the Sámediggi system collides with expectations of what is possible in a unitary state. Varying degrees of fiscal autonomy are no rarity in federal system that provide Indigenous peoples with territorial autonomy, but such systems may limit Indigenous power through other mechanisms (Selle et al. 2015; Smith 2010).

Consultations processes that sometimes are best characterised by the government authorities understanding of the Sámediggi as an advisory body, point in direction of the Sámediggi as a corporative institution. The Sámediggi has on occasion claimed that it has been asked to make suggestions and offer views on how best to implement government positions that had already been decided. In such a situation,

[27] Sweden's Ministry of Culture 2017 Ds 2017:43 Konsultation i frågor som rör det samiska folket.

[28] The Sámediggis Resolution Sak SP 029/18 Endringer i sameloven – konsultasjoner. Ministry of Local Government and Modernisation draft legislative proposal of amendments to the Sámi Act – Consultations, 11. Mai 2018.

the consultations are more like briefings and explanations than meaningful discussion to make decisions.[29] For example, the Sámediggi was not consulted when the Storting was considering a major constitutional revision in 2014, including a proposal to amend constitutional provisions relating to the Sámi. Because the Sámediggi had received much of its authority before consultation procedures were established and may be subject to state management and control, the relationship between the state and the Sámediggi still has corporatist features. Today, using the model, it may be fair to say that the Sámediggi of Norway operates at the borders of self-determination and corporatism.

The NSC provisions on the Sámi people's right to self-determination are to a large extent derived from experience with a Sámi policy where the Sámediggis are the core institutions. The negotiated draft of the NSC was further informed by the international legal basis for the Sámi people to exercise their right to self-determination. Institutional autonomy and political integration are two key means for achieving genuine Sámi self-determination. The Sámediggis have advanced to different degrees on these two dimensions, but none of them in our opinion meets the requirements for self-determination, the Norwegian case included.

We are of the opinion that the NSC provides an enhanced opportunity to achieve self-determination for the Sámi people. To this end, there must be changes to state policy and legislation on the Sámediggis. The Sámi, working through their Sámediggis, must also have clear expectations of the change that they themselves are resolutely striving to achieve. In other words, the onus is on the Sámediggis to use the NSC and other international legal instruments to achieve true self-determination. This is often easier said than done, particularly in a political context as demanding and complex as that of the Sámi in the Nordic North.

[29] The Sámediggi's report on ILO Case 056/2013, and its report to the ILO for the period from June 1, 2008 to May 31, 2013. See in particular subsection 4-11. See also Falch & Selle (2015) and Broderstad, Hernes & Jenssen (2015) for a discussion of the extent to which the consultation arrangement has worked as intended.

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