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(Un)Earthing New Pathways for a Justice Transition:

Cultivating Hope and Food on Contested Terrains in Scotland, Amazon and the Arctic

Final Report – Annex 1

Land rights and cultural survival: what are the governments' obligations?

Focus on the Arctic

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Protection of culture is often inseparable from land rights, especially in the context of extractive industries, agricultural projects, or more recently – green energy projects. It is a complex relationship to govern and regulate as the actors involved usually possess a varying degree of negotiating power and capacity, as well as relevant information. It is a government that provides licenses/permissions for private companies to operate on the land, but it is often the private companies that conduct information/public participation with local communities. It is these local communities who are most affected, but the governments often cite national benefits of specific projects to throw their support behind them.

The Arctic is a region hosting around 400 000 indigenous people across Canada, Greenland, Alaska, Norway, Sweden, Finland, and Russia. Although the Arctic is not homogenous, many areas in the region are characterised by remoteness and the legacy of extractives. Land in the Arctic is mostly in public ownership, and the impacts of climate change are already present with thawing permafrost and warming temperatures across the North.

The legal regimes across the Arctic countries, in particular with regard to the protection of indigenous rights, vary significantly. Some countries have special legal/governance or self-government arrangements with indigenous people. International legal requirements further apply across the region and establish human rights/indigenous rights protections. The legal framework that regulated the process of cultural/land rights protection has been evolving in the past decades with some notable developments in the Arctic region.

Human rights for the protection of land and culture

The notions of 'individual' and 'collective' human rights have often been juxtaposed, since the dawn of the international human rights system. Individual rights are essential for human rights protection and are expressed in documents such as the Universal Declaration of Human Rights, and binding treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). These usually begin with 'each person has

a right' or 'everyone has a right', highlighting the individual. Collective rights are important for the protection of minorities and peoples. Article 27 of the ICCPR established that:

'in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

Although there is no specific recognition of the right to land in the ICCPR or the ICESCR, in 2021 the UN Committee on Economic, Social and Cultural Rights adopted a Draft General Comment (no 26) on Land and Economic, Social and Cultural Rights. General comments hold highly authoritative interpretative power for the human rights covenants. The document acknowledges that access to land is directly linked to e.g. right to housing, right to adequate food, right to water, right to take part in cultural life.

It recognizes that 'in many social contexts, the value of land cannot be reduced to an economic asset', that it should also be seen as a 'source of social inclusion and social citizenship'. The general comment further calls for governments to 'guarantee that in all land governance processes, policies and institutions, land is not treated as a mere commodity, but that its role as a social and cultural good is recognized'.

Protecting land rights under UNDRIP

In addition to the protections under the international human rights regime, in the last 30 years, some documents specifically relating to indigenous rights have been adopted, including the United Nations Declaration on the Rights of Indigenous Peoples (2007). The UNDRIP expressly recognises self-determination as the right of indigenous peoples to 'freely determine their political status and freely pursue their economic, social and cultural development'. It recognises their rights to the 'lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'.

It further confirms indigenous peoples' rights to 'own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use (...)'. The UNDRIP also places obligations on States associated with natural resource development, such as the obligation to 'consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources'. The UNDRIP requires a positive obligation to obtain consent for any relocation and storage or disposal of hazardous materials but the wording in the resource development provision is explicitly vague to the point of inciting contention on whether indigenous people have a right to withhold consent to any resource development on their land or only have to be consulted in advance of any Government or Government-sanctioned action.

The UNDRIP does not have binding power, meaning it cannot be relied on as a legal basis for court action. However, it is not irrelevant – it inspired many national laws, and is being referred to in human rights courts (e.g. Saramaka People v Suriname, (2007) Interamerican Court of Human Rights).

Lessons from the Arctic

While extractive industries in the Arctic have a problematic history with regard to indigenous rights, today it is the green projects that are making headlines. Achieving climate goals is impossible without a significant transformation of our energy systems in a way that reduces reliance on fossil fuels and increases the share of low-carbon energy. In the Arctic, challenges presented by low-carbon energy projects can be amplified due to remoteness, the importance of sites and habitats for indigenous and local communities, and the increased impacts of climate change.

Legal challenges have been launched by indigenous groups protesting the location of wind farms in Sweden and Norway. In both cases, the wind farms interfered with reindeer herding by the local Sami people.

Cases in Sweden (Pauträsk and Norrbäck) were based on Swedish, rather than international law. The first instance court has rejected the planning permits, calling for the protection of nature, cultural environment and reindeer husbandry. This, however, was overturned on appeal and it remains to be seen if the case will proceed to a higher court.

A similar case in Norway did proceed to the Supreme Court and was decided in favour of the Sami petitioners. The Fosen case concerned Norway's largest onshore wind farm project constructed between 2016 and 2020. Development in two of the six wind farms led to important winter grazing areas being destroyed for the reindeer herding Sami. The herders claimed that the 'construction interfered with their right to enjoy their own culture', but the government authority rejected this claim. The issue was brought before the courts, unsuccessfully at first, and the construction went ahead and complete by 2020.

In October 2021, the Norwegian Supreme Court rendered its decision in favour of the petitioners. The legal basis here was article 27 of the ICCPR, protecting cultural rights.

The court established that the right does not need to be outright denied and that 'interference that has a substantive, negative impact on the possibility of cultural enjoyment' can also be seen as a violation. It further established that while a consultation is required, it does not prevent a violation. It further established that there is no margin of appreciation for economic development when it comes to article 27, meaning government cannot use it as an excuse in this case. This decision has been hailed as 'landmark; in the field of indigenous rights protection although critics point to decision coming too late.

Continued extractive activities and the upcoming green energy projects will no doubt raise future conflicts with local land users, including indigenous people. The legal framework, at present, is not concrete and detailed enough to provide adequate protection. Courts across the works are likely to have different interpretations which may lead to varying outcomes. Lessons from the Fosen case provide a positive example, but even in this case, the final decision came over ten years after the first objections and only after the wind farm has already been constructed. Access to justice remains the main road block for communities affected by industrial development worldwide.