

Including and Excluding Indigenous Religion through Law

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Introduction

As religious majorities across Western states experience rapid declines with the number of “nones” at record levels, socio-political challenges related to the proper boundaries of “religion” in society have become catalysts for fresh legislation and increased litigation. These increases have led to a media environment and larger public sphere where religion is frequently boiled down to its constituent legal parts. Indeed, one would be hard pressed to identify media debates on religion that do not in some way or form borrow from, target or in other ways relate to the legal notions of religious freedom, conscientious objections, church-state relationships, the legal protections available for religious minorities, religious hate speech, or religious discrimination.

The process whereby the categories and vocabulary of law has attained this hegemonic status in the determination of “religion” has been observed by a variety of commentators and given several different, yet overlapping labels: John Comaroff has dubbed it the “fetishism” of law; Olivier Roy has characterized it as the use of law to “format” religion, while Veit Bader has issued a warning against increased “modeling” of the organizations and recognitions of minority religions on the basis of established majority religions. Common to these accounts is the claim that the upturn in legislation and litigation on religion is a fairly recent phenomenon, and one that can be accounted for by reference to performative aspects of religious traditions in themselves, such as the “assertive rise of religiosity” (Comaroff 2009: 209), the transformations and greater visibility of religion in the public sphere (Roy 2010: 5) and the impact of Muslim presence, claims and collective actions and their influence on institutionalized regimes of governance in receiving societies (Bader 2007: 872).

While these explanations can seem tempting, even obvious, they are also single-minded and short-sighted. First, they are single-minded because they appear to boil down increased legislation and litigation on religion to a consequence of changes within “religion” itself, although these processes are clearly also part and parcel of larger societal shifts that go well beyond religions and their adherents, however resurgent or assertive they may be. There is no compelling reason why recent increases in the regulatory interest in religion should be considered in isolation from the general rise of regulations in societies everywhere: The “juridification” of society is a distinctly modern enterprise that encompasses social life in virtually all its aspects, and it has been going on for much longer than the recent interest in religion among lawmakers and adjudicators.¹

Second, analyses tied explicitly to “religion” tend to be short-sighted because they appear to link the legal frames offered by increased legislative and adjudicative interest in

¹ For an introduction to “juridification”, see Blichner and Molander 2008. For an appreciation of juridification and its interrelationship with religion, see Årsheim and Slotte 2017.

religion to its recent “resurgence” or assertiveness, although the very notion of “religion” as a standalone concept is inextricably intertwined with its early modern legal framing. Hence, the “fetishism”, “formatting” and “modeling” indexed by Comaroff, Roy and Bader are not recent changes, but have developed on the basis of interactions between law and religion that have a long genealogical trajectory that significantly complicates their delineation and differentiation.² While this developmental trajectory has certainly been affected by the onset of migration and demographic change, these effects are more scalar than substantial in nature.

Taken together, the single-mindedness and short-sightedness of dominant perspectives on the interaction between law and religion risk displacing and disembedding this interaction from its moorings within the larger field of law and from its own historical trajectory. Perceiving the upturn in legislation and litigation on religion primarily as a recently occurring consequence of “assertive” forms of religion and demographic change tells a compressed and simplified version of a much larger and more complicated story.

In this larger perspective, the regulation and adjudication of “religion” cannot be confined to the registry of conventional topics within law and religion, such as the relationship between church and state or the state of religious freedom, but encompasses the entirety of the interaction between “religion” and “law”. This interaction stretches from the issuing of building permits to “religious buildings” and the conservation of “sacred” places, to the criteria for tax-exempt status for “religious” organizations and the rules governing data collection on “religious” beliefs. Within this wider perspective, the legislative and adjudicative interest in “religion” is so granular that it escapes easy classifications as a counter-response to religious diversity and the “comeback” of religion in the public sphere. Rather, the myriad interactions between law and religion appear to be an outcrop of the modern regulatory state and its penchant for command and control.

Moreover, this penchant for command and control is not a recently occurring phenomenon, but one that has been constitutive to the modern concept of “religion”. By virtue of its conflicted origins and history of socio-political contestations, the boundaries of “religion” have always been intertwined with laws and legal regulations, oscillating between its role as a (or *the*) dominant source of law, to its role as a particularly thorny object of regulation: from the early decades following the Reformation and up to the present, the delineation of “religion” from its surroundings, be it in its doctrinal, institutional or social capacity, has been subject to intensive legislation and litigation, encompassing both state-made, ostensibly “secular” law and internal, ecclesiastical regulations with a law-like character.

In the remainder of this chapter, I will elaborate on the shortcomings and pitfalls of a simplified explanation of rising legislative and litigative interest in “religion” as a side effect of assertive religiosity and demographic change. Drawing on recent jurisprudence

² The genealogy of «law and religion», and the possibility to distinguish between the two with any kind of analytical rigor beyond, and certainly also within, the modern West, is anything but clarified. Among the classical theories of this interaction, Ernst Kantorowicz’ classical study *The King’s Two Bodies. A Study in Medieval Political Theology* (1957) and Harold Berman’s *Law and Revolution. The Formation of the Western Legal Tradition* (1983) stand out in a class of their own, offering compelling narratives of how Western canon law and theology provided the conceptual foundations for modern, ostensibly “secular” law. More recent scholarship has questioned some of the foundations of these works, see in particular Sullivan, Yelle and Taussig-Rubbo 2011, Dressler and Mandair 2011 and Kirsch and Turner 2009.

from Canadian and Norwegian courts on the rights of indigenous peoples, I will examine the shifting boundaries between “religion” and surrounding concepts, with a particular emphasis on the multiple origins of these boundaries in domestic and international legal regulations and jurisprudence. In a brief conclusion, I provide a summary of the argument and propose a general reorientation of law and religion scholarship that is attentive to competing, and overlapping concepts, discourses and genealogies in its surroundings.

The *Ktunaxa* decision

On November 3rd 2017, the Supreme Court of Canada (SCC) delivered its much awaited decision in the case of *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*.³ The case concerned the development of a ski resort in Jumbo Valley, 55 kilometers west of the town of Invermere, in the Western Canadian province of British Columbia. According to the Ktunaxa Nation, the representative body of one of the indigenous peoples residing in the area,⁴ the proposed development would drive the Grizzly Bear Spirit from Jumbo Valley, which to the Ktunaxa is known as Qat’muk.

Arguing that the departure of Grizzly Bear Spirit from Qat’muk would irrevocably impair their religious beliefs and practices, the Ktunaxa Nation sought to overturn the decision to approve the construction of the ski resort. The Ktunaxa Nation argued that the approval violated their right to freedom of conscience and religion under section 2(a) of the *Canadian Charter of Rights and Freedoms* (1982),⁵ and their rights to be consulted in cases that concern their interests under section 35 of the *Constitution Act* (1982).⁶ The Ktunaxa lost their case on all fronts, because the court found that the right to religious freedom protected under the *Charter* did not extend to a protection of the object of belief – i.e. Grizzly Bear Spirit – and because the responsible Minister had consulted the Ktunaxa Nation sufficiently.

On the surface, the decision can seem trivial, and subordinate to the impoverished “formatting” or “modeling” of the religion of a minority on the basis of majority concepts. After all, the rights framework called upon by the Ktunaxa was designed in order to offer protection to religious beliefs and their manifestations, perfectly in line with conventional interpretations of international human rights law, which is quite specific in its refusal to offer protections for the specific contents or objects of beliefs.⁷ Arguably, viewed from this perspective, the protection requested by the Ktunaxa Nation for Grizzly Bear Spirit could be likened to the protection against the “defamation of religion” sought by the

³ 2017 SCC 54. Full text of the decision is available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16816/index.do>. Accessed 20.02.2018.

⁴ In addition to the Ktunaxa, the Shuswap also claim allegiance to parts of the area affected by the proposed construction (Peach 2016: 104). Unlike the Ktunaxa, the Shuswap have expressed their support for the proposed construction.

⁵ Section 2 reads in full: “Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.

⁶ Section 35 reads in full: “(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”

⁷ This principle is trite international law. See Bielefeldt, Ghanaea and Wiener 2015 and Taylor 2005.

Organization of Islamic Countries (OIC) at the United Nations for well over a decade, a campaign that was vigorously opposed by the Western European and Others Group (WEOG), human rights NGOs and the international civil service alike for its alleged protections for “religions” as objects of belief, rather than the freedom of individuals to choose their religious beliefs for themselves.⁸ As such, the outcome of the *Ktunaxa* decision should be unsurprising.

Multilayered Governance

Upon closer inspection, however, *Ktunaxa* quickly escapes the typical explanations offered for the increase in legislation and litigation on religion in the literature (see above). The case complex that led up to the decision, from consultations initiated by the predecessor to the development company Glacier Resorts Ltd. in 1991, and up to its final resolution in 2017, cannot be subordinated to a simplified explanatory scheme of “assertive” forms of religion and demographic change. Rather, the case and its resolution was made possible by an intricate web of legal regulations that provided the parties with the vocabulary and procedures for the framing and development of their claims. *Ktunaxa* displays tensions between (at least) four different, but intersecting modes of governance, which have been developed in order to deal with different policy goals: (1) state-driven land use management, (2) accommodation of the specific plights of indigenous peoples, (3) the general protections offered by human rights, and (4) the specific legal protections available for “religion”.

Among these, only the last mode of governance, which has been specifically developed in order to manage “religion”, can be connected to the “resurgence” or comeback of religion in the public sphere, and even this connection is tenuous in anticipation of closer inspection and substantiation. In the following, I will briefly introduce some fundamental aspects of these modes of governance, before tracing their interaction in the *Ktunaxa* decision.

(a) State-driven land use management

To Glacier Resorts Ltd. and its predecessor, the relevant legal processes to get the construction work approved and underway were the Commercial Alpine Ski Policy (CASP), developed by the Commission on Resources and the Environment (CORE). This process involved the obtainment of an Environmental Assessment Certificate (EAC) and the development of a Master Plan, which when approved led to a Master Development Agreement (MDA). Over the course of the process, the developer also had to submit an Impact Management and Benefits Agreement (IMBA), in order to mitigate the potential effects of the ski resort on the environment. These state-level regulations were overseen by the regional Minister of Forests, Lands and Natural Resource Operations, whose mandate was determined by the *Land Act*, R.S.B.C. 1996, c. 245, and the *Ministry of Lands, Parks and Housing Act*, R.S.B.C. 1996.

These regulatory layers, all of which have been developed to manage state lands while paying due attention to a complicated set of surrounding concerns involved date back to the growth of natural resource management as a growing governmental and international issue in the decades after the Second World War. Government interest in the detailed

⁸ For an overview of the defamation of religions issue, see Langer 2010.

management land use is part of the “high modernist” model of state governance developed in the West from the mid-nineteenth century and onwards, seeking to make ever-larger areas of natural and social life subject to measurement and control. According to James C. Scott, this model of state governance can be characterized by (1) the aspiration to administratively order nature and society, (2) the unrestrained use of the power of the modern state to achieve this order, and (3) a weakened or prostrate civil society that lacks the capacity to resist state-imposed designs for order and control.⁹ As the field of natural resource management has matured and grown over the years, researchers have detected a tendency towards “pathological” management strategies, under which the growth of centralized bureaucratic agencies have become distanced from the fields they are set to manage, resulting in impoverished decision-making that is not sufficiently attentive to conditions “on the ground” (Holling and Meffe 1996: 331).

(b) Indigenous Rights Claims

To the Ktunaxa Nation, on the other hand, the basis for their legal claims to protection can be traced back to the first instances of contact between indigenous peoples and European settlers on the territory of present-day Canada in the 16th century. Ranging from *ad hoc* legal arrangements about land use to comprehensive treaties regulating a wide variety of rights and entitlements, the legal framework governing the interaction between the multiple indigenous peoples of Canada and the provincial and federal governments has grown into a large and complex body of laws and regulations.¹⁰ Among these, the chief legal rule drawn upon by the Ktunaxa Nation was the constitutional provision securing the specific rights of aboriginal peoples in Canada (section 35 of the 1982 *Constitution Act*).

Unlike the high modernism characteristic of natural resource management, which is recent, technical in nature and dependent on strong state involvement, the body of regulations structuring the legal capacities and entitlements of indigenous peoples has been gradually developed over the course of several centuries, are related to fundamental rights issues and rely on the restraint on state power. This body of legal regulations has been made possible not by technical advancements and better tools for measurement and governance, but by an increasing awareness and recognition of the particular challenges facing indigenous communities worldwide and the continuous interaction between representative bodies of indigenous communities and states.

(c) Human Rights Claims

The recognition of specific rights for indigenous peoples has occurred in tandem with, and partly as a consequence of an upturn in the codification and legal recognition of human rights more generally. While the co-occurrence of the movements for indigenous rights and more generally oriented human rights have greatly advanced the prominence and status of both, their juxtaposition has also generated tensions relating to the nature,

⁹ Scott, James C. 1998. *Seeing like a state: how certain schemes to improve the human condition have failed*. New Haven: Yale University Press, 88-89.

¹⁰ At the state level, the Ktunaxa Nation and the government of British Columbia maintains a considerable number of treaties, governing forestry, economic development, land tenure, wildfires, environmental protection and a range of other issues. For a complete list, see the website of the BC government: <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/ktunaxa-nation>

interrelationship and scope of different sets of rights. This tension became evident in the *Ktunaxa* decision, as the two legal rules relied on by the Ktunaxa Nation to frame their claims have been developed with different subjects in mind – whereas section 35 of the 1982 *Constitution Act* relates exclusively to the rights of the aboriginal peoples of Canada, section 2(a) of the 1982 *Charter* is a general right to the freedom of conscience and religion, universal in scope. Importantly, none of these modes of governance provide either of the parties with a rights framework that unequivocally “trumps” that of the others in the sense indicated by Ronald Dworkin (1986). Rather, all these modes of governance rely on a delicate balancing act between opposing rights claims, where the outcome is volatile and unpredictable.

(d) Legal Claims Related to “Religion”

The indeterminacy of legal regulation and the vague nature of rights claims entails that all rights deliberations will be unpredictable to some extent. However, the combination of multiple modes of governance and rights claims based on religious beliefs made the outcome and reasoning of the *Ktunaxa* decision particularly volatile, charging the court with the unwelcome task of identifying the legal boundaries of “religion” as the centerpiece of the decision. Arguably, the choice of the Ktunaxa Nation to frame their claim as one of freedom of conscience and religion under section 2(a) of the *Charter* embroiled a fourth mode of governance in the case, that of the large and growing body of legal rules concerning “religion”, requiring the judges deciding the case to consider the wealth of earlier case-law determining the legal boundaries of religion.

Balancing Acts

In its decision, the court split into a 7-2 verdict in favor of the construction of the ski resort, as the majority and the minority balanced the layers of governance differently. The majority opinion held that the claim of the Ktunaxa that the departure of Grizzly Bear Spirit from Qat’muk could not merit protection from their right under section 2(a) of the *Charter* to freedom of conscience and religion. Because the claim did not violate either their right to believe in the spirit, nor in their right to give external manifestations to this belief, the claim was found to be invalid. Consequently, both the general human rights claim and the more specific claim to freedom of conscience and religion was dismissed outright.

Addressing the claim raised under section 35 of the 1982 *Constitution Act*, the majority found that the responsible Minister had consulted sufficiently with the relevant parties to clarify whether aboriginal claims to the land would be violated by the ski resort. Arguing that the Ktunaxa effectively asked the court to consider the validity of their claim that the concerned area was sacred, the majority observed that the role of the court was not to consider the contents of that claim itself, but to review whether the consultation process had been sufficiently extensive, which it found that it had. Hence, in the opinion of the majority, the concerns of nature management outweighed those of the Ktunaxa Nation.

The majority backed up its arguments on the lack of protections available for the specific mode of religiosity claimed by the Ktunaxa by extensive references to the protections available for “religion” in international human rights law (IHRL). Reviewing article 18 in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) on the freedom of religion or belief, the majority found no available protections for the “objects” of religious belief.

Strikingly, however, this extensive review did not address article 27 of the ICCPR, which grants specific protections for “ethnic, religious or linguistic minorities”, requiring states to offer accommodation for such minorities to “enjoy their own culture, to profess and practice their own religion, or to use their own language” (see below). The Human Rights Committee, which oversees the implementation of the provision, has unequivocally specified that these rights are additional to and independent of the enjoyment of the other rights in the covenant in its general comment on the article.¹¹ That the article is relevant to the status of the indigenous peoples of Canada was explicitly affirmed by the Committee in *Sandra Lovelace v. Canada* (1981).¹² While the *Lovelace* decision did not touch upon the nature and scope of the protection under article 27 for minorities to “to profess and practice their religion”, the lack of consideration of the article in the opinion of the majority is noteworthy, not least because the article potentially provides a conceptual bridge between the protections of indigenous peoples, general human rights claims and specifically religion-related claims (see below).

While the omission of article 27 from the majority opinion is particularly striking because of its general emphasis on IHRL, the minority opinion is noteworthy for its complete lack of references to IHRL. Eschewing the language and taxonomies of the UDHR and the ICCPR entirely, the minority opinion featured an in-depth analysis of the earlier jurisprudence of the SCC on section 2(a) of the *Charter*, emphasizing the two-part test developed by the court to assess religious freedom cases in the landmark 2004 decision *Syndicat Northcrest v. Amselem*.¹³ According to this test, the *Charter* obliges claimants seeking protection under section 2(a) for their religious beliefs or practices to show

- (1) that he or she sincerely believes in a belief or practice that has a nexus with religion, and
- (2) that the impugned conduct interferes with the claimant’s ability to act in accordance with that belief or practice “in a manner that is more than trivial or insubstantial”

Stressing the second step of the test, the minority pointed out that the “ability” of the Ktunaxa to act in accordance with their beliefs would be impaired because the state interference entailed by the development of a ski resort in Jumbo Valley would interfere with the possibility for the Ktunaxa to achieve spiritual fulfillment through connection with physical land. Citing *First Nations Sacred Sites in Canada’s Courts* (2006) by lawyer and indigenous rights specialist Michael Lee Ross, the minority opinion underlined the ways in which First Nations’ religion and spirituality is “rooted in the land”, distinctly different from “the Judeo-Christian faiths where the divine is considered to be supernatural”.

Concluding the minority views on the *Charter* claim, the opinion expressed its concerns that the failure of the majority opinion to take into account the spiritual connections between indigenous peoples and their land “risks foreclosing the protections of s. 2(a) of the Charter to substantial elements of Indigenous religious traditions”.

Despite this criticism, however, the minority went on to issue its approval for the Minister’s engagement in the matter, finding that the infringement of the religious

¹¹ Human Rights Committee. General Comment adopted by The Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights. General comment No. 23(50) (art. 27). 26 April 1994. CCPR/C/21/Rev.1/Add.5, para. 1.

¹² *Sandra Lovelace v. Canada*, Communication No. 24/1977, U.N. Doc. CCPR/C/OP/1 at 83 (1981), see particularly para. 14-16.

¹³ 2004 SCC 47

freedom of the Ktunaxa was conducted in a proper balancing act between conflicting interests. A key issue in this balancing act was the nature and longevity of the practices for which protection was being sought – i.e. whether there were any indications that the Jumbo Valley had been held in high esteem by the Ktunaxa prior to contact with the Europeans, and whether its preservation was “integral” to the religious practices of the group, neither of which had been verified during the consultation process under s. 35.

Hence, while the minority accepted that the Ktunaxa had a legitimate claim under section 2(a), this claim was found to be insufficiently entrenched in their cultural practices to merit the requested protection. Significantly, the alternative – in which the Ktunaxa Nation would effectively be given a veto to exclude others from pursuing activities on public lands, including the neighboring Shuswap Band, who had already approved the land development. Granting such a right would, according to the minority opinion, exceed the mandate of the responsible Minister, and was therefore not a practicable option.

Formatting religion in multilevel governance

The differing opinions expressed in *Ktunaxa* display the complexity of managing rights claims that require balancing between multiple and partly overlapping levels of governance. While both the majority and the minority found the claims of the state based on the needs of natural resource management to prevail, they viewed the interaction between these claims and those of the Ktunaxa Nation based on indigeneity, human rights and the freedom of conscience and religion differently. The majority, while recognizing that the Ktunaxa Nation had a right to be consulted because of their status as an indigenous people, found their claims to protection under the human rights provisions of the *Charter* to be manifestly ungrounded.

The minority accepted the indigenous claim, the general human rights claim and the specifically religious dimension to that claim as valid. Importantly, this move was made with the specific mode of religiosity of the Ktunaxa in mind, thereby suggesting that the special status of indigenous peoples in Canada should modulate their access to the erstwhile generally phrased protections for conscience and religion offered by the *Charter*. Granting access to this status, however, also meant subordinating to its rules for limitation: while the minority found the religious dimension to the claim to be valid, the opinion also remained unconvinced of the strength of the claim after the comprehensive consultations between the responsible minister and the Ktunaxa Nation. Consequently, the minority also rejected the claim of the Ktunaxa that their religious freedom merited the kind of protection they sought.

By subordinating the religious beliefs and practices of a minority community willing to assert and stake their claims in the legal system to a frame of reference developed with the needs of the majority in mind, the court clearly joined in the practices characterized as “fetishism”, “formatting” or “modelling” by Comaroff, Roy and Bader: Indeed, *Ktunaxa* clearly demonstrates the distance between “legal” religion and the multitudes of “lived” religion emphasized by a battery of critical scholars over the course of the last decade, a distance that has proven to be particularly harmful for minority communities (Hurd 2015, Beaman 2014, Sullivan 2005).

Despite these similarities, the prehistory of the case complex in *Ktunaxa* departs significantly from a perceived “resurgence” of religion, increased migration or demographic changes usually marshalled to explain the upturn in legislative and litigative

interest in religion. The legal claims formulated by the Ktunaxa, while shaped by the categories of modern human rights and constitutional language, originate in nature management policy and the specific historical circumstances concerning the interaction between the aboriginal and settler communities that have lived side by side in Canada since the 16th century, including the multiple legal settlements reached over this time period. As such, *Ktunaxa* may more fruitfully be seen as a consequence of the general growth of law in regulating ever larger parts of the built and physical environment.

Additionally, the formulation of the beliefs and conceptions of the Ktunaxa as “religion” has developed in tandem with their legal regulation in ways structurally related to the interaction between “law” and “religion” elsewhere. The basic building blocks of this “religion” within the social structures of the Ktunaxa, however, is radically different from the majority of religion cases heard by the SCC, thus rendering their claims unintelligible to the majority of the court, and not significant enough for the minority of the court to satisfy their claim. In the particular case of the Ktunaxa Nation, then, theories that legislation and litigation on religion primarily stem from migratory or demographic change appear unhelpful, as both the legislative framework and the litigative outcome appear to originate in different timeframes and different rights discourses.

The Sara Decision

Less than two months after the *Ktunaxa* decision of the SCC, the Norwegian Supreme Court (NSC) handed down its decision in the *Sara* case,¹⁴ concerning the cull of a proportion of the reindeer owned and managed by Jovsset Ánte Iversen Sara, a Sámi herder who took over his family’s share of the local *siida*¹⁵ in 2010. The cull was ordered by the Reindeer Husbandry Board, which oversees the 2007 *Reindeer Herding Act*. Under § 60 of the *Act*, each *siida* is required to apply to the Board for a maximum number of animals in its allotted area, in order to prevent overgrazing. Under its decision, Sara would be forced to reduce his proportion of the *siida* from 116 to 75 animals. Arguing that this reduction would effectively put him out of business, Sara complained to the Ministry of Agriculture and Food, which dismissed the complaint in 2014. In 2015, Sara took the case to court.

After winning unanimously in the district and appeals courts,¹⁶ Sara lost his case before the NSC in a split 4-1 decision. Unlike the lower courts, which found the cull to be in violation of article 1 of Protocol 1 to the European Convention on Human Rights (district

¹⁴ *Staten v/Landbruks og matdepartementet mot Jovsset Ánte Iversen Sara* (HR-2017-2428-A). The decision is available in English translation here: <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2017-2428-a.pdf>. Accessed 30.01.2018.

¹⁵ A *siida* is an administrative district unit within Sámi reindeer husbandry, usually composed of a number of sub-units of various sizes.

¹⁶ Inner Finnmark District Court, TINFI-2015-84532, decided on the 18th of March 2016, and Hålogaland Court of Appeal, LH-2016-92975, decided on the 17th of March 2017.

level)¹⁷ and article 27 of the ICCPR (appeals level),¹⁸ the majority opinion found the cull to be reasonably and objectively argued, and in the interests of reindeer herders in general. Like the *Ktunaxa* decision, *Sara* also featured an assessment of the rights of indigenous peoples to be consulted in decisions relating to their specific rights. Unlike the Canadian setting, where the right to consultation is constitutional, the Norwegian-Sámi system of consultation is formalized through an agreement between the Sámi parliament and the respondent Ministry.¹⁹

During the preparation of the *Reindeer Herding Act*, the Sámi parliament expressed concerns with the protection of small-scale herders, but was not heard, as the Ministry considered such protection to be conducive to “an ill-considered business structure” that would hamper the economic viability of each *siida*, a consideration that was shared by the majority of the NSC. Such economic viability has been considered by the Human Rights Committee (HRC), which oversees the implementation of the ICCPR, as a prerequisite for real-life protection of the cultural traditions of minorities (Conte and Burchill 2009: 275).

Reviewing the claim that the cull order may violate Sara’s rights under article 27 of the ICCPR, the majority assessed the legitimacy of government-sanctioned regulations enforced to protect the minority as a whole, and its potential side-effects for individual claimants. Crucially, the HRC in a 1988 decision found that the rights of a Swedish Sámi reindeer herder had not been violated despite his exclusion from a traditional Sámi reindeer cooperative, because he would be able to maintain his culturally significant practices also outside the group, and because the decision to exclude him from the cooperative was reasonable and objective, as it was adopted to conserve environmental resources.²⁰

Citing this and a number of other decisions by the HRC, the majority adopted a similar line of reasoning, finding that the cull order was based on a concern for the long-term maintenance of the Sámi cultural practice of reindeer husbandry in mind. Finally, reviewing the claim that the forced reduction would put Sara out of business, the majority stressed that his herd had been too small to be economically viable from the day he entered the *siida* and up to the present, and that the future forecasts of his business prospects were too uncertain to predict, as they would be tied in with the internal structure and distribution of the *siida*.

The minority opinion, on the other hand, found that the cull order would entail a refusal to hear the unanimous views expressed by the Sámi minority itself through the consultations with the Sámi parliament, which had been clear in its wishes to protect

¹⁷ Article 1 reads in full: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

¹⁸ Article 27 reads in full: “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 practice [sic] their own religion, or to use their own language.”

¹⁹ See Sametinget: *Konsultasjonsavtalen*. [<https://www.sametinget.no/Om-Sametinget/Bakgrunn/Konsultasjonsavtalen>]. Accessed 30.01.2018.

²⁰ *Ivan Kitok v. Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988).

herders with less than 200 animals. Countering the objection that such protection may harm the long-term business prospects of Sámi reindeer husbandry in general, the minority underscored the increased vulnerability of a *siida* arrangement dominated by a smaller number of herders.

Unlike *Ktunaxa*, where the outcome may have been expected because of the way the *Charter* right to religious freedom is designed, the outcome in *Sara* was unpredictable and surprising, for three reasons: First, because of the unanimous decisions of the lower courts, second, because of the strong position of human rights law in Norwegian policymaking and legislation,²¹ and third, because of the gradual strengthening and recognition of Sámi rights claims in the legal system.²² Obviously, neither of these reasons could or should indicate a clear-cut win for Sara's claim – nevertheless, their juxtaposition has served to render the decision controversial, particularly in the Sámi community, but also among environmental conservation researchers, who have argued that claims of overgrazing are not substantiated by available data.²³

Including and excluding indigenous religion

Taken together, *Ktunaxa* and *Sara* illustrate the complexity of multi-layered governance, where the interests of state-driven land management collide with the interests of an indigenous group, and where the claimant relies on a combination of specific indigenous rights language and general human rights claims. Unlike *Ktunaxa*, however, the *Sara* decision is inconspicuously free of references to religion or related concepts in any way or form. As such, it would appear to be a poor fit with the overall narrative of this chapter, which takes a closer look at the ways in which law and jurisprudence deals with “religion”. Nevertheless, I would like to argue to the contrary: the non-occurrence of “religion” within a case complex that is erstwhile rife with the basic ingredients of what tends to be recognized as “religion” in legal discourses (see below) goes to the heart of this investigation, as it highlights the single-mindedness and short-sightedness of dominant theories on the interrelationship between law and religion.

Viewed within the broader framework indicated in the introduction to this chapter, under which legal claims must be considered well beyond the themes dominating in current scholarship on law and religion, it quickly becomes evident that the non-occurrence of “religion” in the *Sara* decision is anything but coincidental. Rather, the exclusion of

²¹ The strength of human rights norms in Norwegian law is explicitly recognized through the *Human Rights Act* (1999), which makes a selection of treaties on international human rights including the ICCPR parts of Norwegian law and ranked above statutory law, and through the addition in 2014 of a separate chapter E (§§ 92-113) in the Constitution spelling out state obligations through the ratification of international human rights treaties.

²² Although the pace and scope of this strengthening may be disputed, the adoption of the *Finnmark Act* (2005), which created a new court for the resolution of land claims in the Northernmost region in Norway, and the decisions of the NSC in *Selbu* (Rt. 2001 s. 769) and *Svartskog* (Rt-2001-1229), both of which recognized Sámi customary rights to land use, represent major strides forward, particularly when viewed against the historical backdrop of Sámi land rights prior to the *Alta*-decision (Rt-1982-241), which represents a watershed in the recognition of Sámi rights in Norwegian law. However, on the other hand, a string of court decisions on Sámi customary rights throughout the 2000s have been overturned by the NSC after winning at the district level (Skogvang 2009: 85)

²³ See in particular the op.ed “Skandaløst av Høyesterett” by Tor A. Benjaminsen in *Dagsavisen* 10.01.2018, <https://www.dagsavisen.no/nyemeninger/skandal%C3%B8st-av-h%C3%B8yesterett-1.1081695>. Accessed 30.01.2018

religion from the case complex must be considered against the backdrop of specific historical developments within Norwegian law, whose approach to “religion” is strictly limited to issues related to equality and non-discrimination at the individual level, and inextricably tied up with the historical and continuing establishment of the Church of Norway.²⁴

Unlike Canadian law, which has a long history of domestic legislation and jurisprudence on religion,²⁵ Norwegian law has largely avoided religion, the regulation of which has only become part of Norwegian legislation and jurisprudence as a direct consequence of the influence of international human rights law: Indeed, every major legal regulation in Norwegian law that requires the determination of “religion” for legal purposes has originated in the incorporation of international human rights law.²⁶ Strikingly, however, while Norway was the first state to ratify ILO Convention no. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989) and has been an active supporter of the process that led up to the adoption of the UN Declaration on the Rights of Indigenous Peoples (2007), none of the provisions on the rights of indigenous peoples’ religion within these instruments have found their way into the Norwegian legal framework concerning the rights of the Sámi, from the *Sámi Act* (1987) and the *Finnmark Act* (2005) to the *Reindeer Herding Act* (2007).²⁷ Nor have Sámi claimants relied on the available legal remedies protecting “religion” in Norwegian law, including the religious component of the rights of minorities under article 27 of the ICCPR (see above) and the potential protection for Sámi religiosity offered in § 108 of the Constitution.²⁸

²⁴ Although church and state in Norway became “separated” through a constitutional amendment in 2012, the revamped article 16 in no uncertain terms clarifies that the Church of Norway “remains the Established Church of Norway”. See Stortinget: *The Constitution*.

<https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf>, accessed 24.01.2018.

²⁵ For an overview of Canadian legislation and jurisprudence on religion, see Beaman 2012 and Berger 2014.

²⁶ The singular most important piece of legislation in this context is the *Human Rights Act* (1999), which turned five (originally three) international human rights treaties into Norwegian law, ranked higher than regular statutory law, yet lower than constitutional norms. Additionally, a considerable number of other regulations, from singular articles to full acts, regulate religion on the basis of terminology and rules of interpretation derived from the international level. This is the case for the Constitutional § 16, the *Penal Act* (2005) § 185, the *Equality and Anti-Discrimination Act* (2017), the *Immigration Act* (2008), the *Act on Faith Communities, etc* (1969) and the *Education Act* (1998). For a discussion of the interrelationship between international and domestic laws on religion in Norway, see Årsheim 2014.

²⁷ ILO Convention article 5 (a) reads: “In applying the provisions of this Convention[,] the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals”. Article 13 (1) reads “1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.” UNDRIP article 12 reads in full: “1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.” Article 25 reads “Article 25 Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”

²⁸ The article, which was adopted in 1988, reads in full: “The authorities of the state shall create conditions enabling the Sámi people to preserve and develop its language, culture and way of Life”. According to Skogvang, the notion of “culture” should be interpreted broadly, and include “...ways of life, customs and

While the omissions of “religion” from the vocabulary of Sámi law and rights activism have certainly been affected by the lack of a legal framework that recognizes or “religionizes” Sámi cultural practices, the role of scholarship in the conception of Sámi indigeneity as isolated from “religion” cannot be ignored. Research on “Sámi religion” is mainly limited to archaeological and archival research of pre-Christian religiosity up to 1750 on the one hand (Hansen and Olsen 2004, Rydving 2004) and neo-shamanic revivalism and indigenous spirituality from the 2000s onward on the other (Fonneland 2013, Kraft 2009). During the 250 year-long gap in between, Sámi religiosity has by and large been equated with Christianity in general, and the pietistic movement spearheaded by Swedish missionary Lars Levi Læstadius (1800-1861) in particular. Læstadius and his followers were particularly intolerant and aggressive towards the pre-Christian Sámi religion (Kraft 2010: 59), a stance which may go some way towards explaining both the near-extinction of this religious form, and the later hesitance of Læstadian Sámi to rely on non-Christian forms of religion as a device with which to frame their rights struggle.

May Talking about Sámi Religion Change Things?

Discussing indigenous traditions in Talamanca, Costa Rica, Bjørn Ola Tafjord has observed a subtle shift in terminology as a new generation of community leaders have come to see “religion” and “politics” as viable distinctions between elements of what was formerly only categorized as “tradiciones indígenas” (Tafjord 2016: 561-562). Tafjord discusses these shifts as indicators of a dialectical process between the global discourse on the religions of indigenous peoples and their presumed fit with local realities (Tafjord 2016: 564). This terminological shift is not exclusive to the indigenous Bribris and Kabekirs of Talamanca: Similar patterns of transactions between global discourses and local concepts can be observed in several different cases, from the “religion-making” of the Apache in their litigation around the Native American Graves Protection and Repatriation Act in the US (Johnson 2011: 181), to the organizational and doctrinal changes within the Jehova’s Witnesses in the wake of excessive litigation (Côte and Richardson 2001) and to the tremendous influence of bureaucratic management strategies upon temple worship practices in India (Presler 2008).

Common to these processes is the willingness and ability to reinterpret and reimagine formerly entrenched and embedded social categories according to new registries offered by changed political and legal conditions. Far from being recent or unique to “religion”, as indicated by Comaroff, Roy and Bader (see above), I would suggest that this dynamic can be unearthed for virtually any significant social concept, and that it can be observed along broad historical trajectories, as suggested by the conceptual history developed by Reinhardt Koselleck (Koselleck 2002: 20-38). Applied to *Ktunaxa* and *Sara*, the question is *how* and *why* these cases relate to, and borrow their frames of reference, from different parts of the global discourse on indigeneity and indigenous rights claims in general, and to indigenous rights claims related to religion in particular.

Indigenous Religions and International Human Rights Law

Numerous international human rights standards provide indigenous peoples with opportunities to bring “religion” into the process of framing their rights claims. These

religious opinions” (Skogvang 2009: 189). This understanding is also in line with the considerations of the law commission preparing the amendment (NOU 1984: 18 *Om samenes rettsstilling*, 10.8.6).

standards range from general human rights provisions available to everyone and provisions specifically developed with minority protections in mind, and to provisions that exclusively relate to indigenous peoples. These protections spring from different rights generations, and have come about under different political conditions to attend to the needs of different constituencies. Additionally, these protections enjoy very different levels of status and enforceability, both in international and domestic law and jurisprudence. Taken together, they provide indigenous peoples with an intricate web of jurisprudential tools and strategies, the successful combination of which is crucial for their capacity to win landmark court cases, both domestically and internationally.

(a) General human rights provisions on religion

The general protections offered for “religion” in international human rights law have been developed on the basis of a “world religions” template, with a Protestant-infused pre-eminence of “belief” as the primary locus of religion as its distinctive hallmark.²⁹ While a broad number of treaties, declarations and resolutions provide different protections for “religion”,³⁰ article 18 of the ICCPR represents the undisputed conceptual core of “religion” in international human rights law. The subdivision in the article, between an inviolable *forum internum* of “thought, conscience and religion” and a *forum externum* of “worship, observance, practice and teaching” that is subject to strictly circumscribed limitations,³¹ is instructive for most other regulations of “religion” at the international level.

Despite the importance of article 18 as an “umbrella” for other notions of religion in international law (see below), several adjustments of the belief-centered protection offered by the article can be found in surrounding provisions: Protections from discrimination, hate speech and persecution expand the notion of “religion” to cover more loosely defined religious identities and ways of life.³² Crucially, while protections for religion were formerly reviewed in isolation from other protective grounds, recent jurisprudence and monitoring practice has increasingly come to appreciate the “intersectionality” between religion and grounds like gender, race and language.³³

(b) Protections for minority religion

While the international protection for religion as a matter of shared or individual beliefs and identities originated in the aftermath of the world wars of the 20th century, international legal protections for religious minorities have a much longer genealogy. As a prerequisite for the resolution of armed conflicts and the successful integration of new territories in established imperial structures, the granting of a variety of limited rights for

²⁹ The literature on the origins and boundaries of protections available for “religion” in international human rights law is extensive and highly contentious. For the purposes of this particular article, the Protestant “bias” of the protections available for “religion” is mainly related to the role of Protestant church bodies in influencing the phrasing of article 18 of the Universal Declaration of Human Rights. See in particular Nurser 2005 and Lindkvist 2013.

³⁰ For a comprehensive overview of the relevant standards, see Lerner 2012.

³¹ According to article 18(3), limitations can only be applied if they are “...prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”.

³² One of the most striking examples of this expansion can be found in international refugee law, which operates with a tripartite subdivision of “religion” into beliefs, identities and ways of life. See Gunn 2003.

³³ See Berry 2011 for an appreciation of the “intersectionality” between religion and race under the Convention on the Elimination of Racial Discrimination (1965).

religious differences among distinct subgroups in society has been an established political strategy for millennia (Preece 1997, Neff 1977). Until the advent of the modern human rights regime,³⁴ such utilitarian adaptations represented the sole means by which “religion” was regulated under international law.

Following the rise of the modern, unitary nation state as the primary model of political organization in the 18th and 19th centuries, the recognition of minority rights rapidly morphed into a potential threat to ethnic, linguistic and religious cohesion. After a gradual demise in the early 20th century,³⁵ the potential for minorities to act as bearers of rights was excluded altogether during the drafting of the Universal Declaration of Human Rights (UDHR) in 1948, only to be partly resurrected in the ICCPR in 1966. The demise of minority rights corresponds closely with the rise of the modern human rights regime and the hegemony of individual rights in established nation states. As a consequence, the reintroduction of minority rights to the international sphere in 1966 has left the relationship between this set of rights and surrounding rights indeterminate and imprecise. This is particularly the case for the rights of religious minorities, whose protection has largely become subordinate to the general protections available for members of such minorities under article 18 of the ICCPR (Ghanea 2012: 61).

(c) Protections for indigenous religion

Like minority rights, the international legal recognition of the rights of indigenous peoples has a much longer prehistory than the individually oriented rights usually associated with the modern human rights regime (see above). While the present legal, political and social category of “indigenous” is a distinctly modern idea linked to the rise of a global movement in support for the legal recognition of the plight of indigenous peoples, particularly from the 1980s and onwards (Niezen 2012, Kingsbury 2006), the prehistory of this movement can be traced back centuries. Like the minority issue, the international legal recognition of the rights of indigenous peoples is intimately related to the rise of the modern nation state.

Unlike the minority issue, however, the relationship between nation states and indigenous peoples has been decisively influenced by imperial expansions and colonialism, as imperial centers have developed their legal relationship to indigenous groups through the adoption of a long and broad list of bi- and multilateral treaties spelling out the conditions for their interaction. As a consequence of this prehistory, indigenous peoples generally enjoy a much stronger claim to self-determination and sovereignty in international law than do other minorities, although the strength of this claim has only solidified into concrete legal concessions over the course of the last decades. Simultaneously, assimilationist policies targeting indigenous peoples have been particularly aggressive and comprehensive, as states have sought to eradicate their languages and ways of life, both of which have been considered unsuited for life in modern nation states. In both of these processes, the religion of indigenous peoples has played a vital role, interchangeably acting as an absence, an interesting novelty, an offensive and

³⁴ The cohesion and identifiability of a modern human rights “regime” is not clear-cut or easily settled. For the purposes of this article, I refer primarily to the rapid rise in normative instruments, institutional structures and civil society actors working with human rights following the conclusion of the Second World War.

³⁵

threatening ideology, or, more recently, as a uniquely well-tuned tool for biological conservation.

Current international legal regulations on indigenous religion have been developed on the presumption that indigenous religion, unlike other religious forms, has a set of substantive elements that are entitled to specific protections that differ distinctively from other religions. This presumption finds its fullest realization in the UNDRIP, where article 12 secures the right to “manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites”. Moreover, article 25 offers protection for the “spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources”. These substantive protections for indigenous religiosity and their relationship to land differ considerably from both general and minority-related protections, both of which primarily prevent states from encroaching upon the rights of individuals and collectives to interfere with their religious beliefs, practices and identities.³⁶

Framing Indigenous Religion through International Human Rights Law

In the formulation of their rights claims, the Ktunaxa Nation and Jovsset Ánte Sara chose to rely on very different framing strategies: to the Ktunaxa Nation, the conservation of Jumbo Valley/Qat'muk threatened the very grounds upon which their spiritual connections to the land were based. Reviewing the relevant Canadian legislation on the matter, it would appear to make sense to rely on section 2(a) of the *Charter*, which is modelled on the general protections for religious freedom in the ICCPR and other instruments: After all, the prospective development would render the spiritual beliefs and practices of the Ktunaxa devoid of meaning and significance, as pointed out in the SCC minority opinion.

By committing to this line of argument, however, the Ktunaxa Nation also agreed to subordinate their claim to the erstwhile religion jurisprudence within Canadian law, which has so far been dominated by more conventional religious claims for exemptions and accommodation. Additionally, framing their rights claim under a religion or belief provision, the Ktunaxa Nation implicitly agreed to a proportionate balancing between their religious and spiritual beliefs and the rights and freedoms of others, as specified in the ICCPR article 18 (3), a balancing act which contributed to the defeat of their legal claim.

Arguably, the more specific protections offered for the religion of minorities under article 27 of the ICCPR may have provided a more weighty argument for the preservation of Jumbo Valley/Qat'muk: unlike the general protections for religious freedom, the rights of minority communities have been constructed with the preservation of the minority as a specific and explicit aim. The downside of such a litigation strategy would obviously be the relatively weak status of the ICCPR in Canadian law, and the tendency of international monitoring bodies to exclude “religion” from their jurisprudence on article 27, both of which would weaken the claim of the Ktunaxa Nation. Finally, while appealing to the UNDRIP would seem the obvious choice for an indigenous group, Canada was one of only

³⁶ In addition to these standards, which can be found in legal instruments and declarations adopted by the UN General Assembly, a broad range of provisions from “softer” legal sources also provide indigenous peoples with opportunities to frame their rights claims. While these provisions can be of tremendous importance, they fall beyond the scope of this article.

a handful of states to vote against the declaration, which has no binding legal status in Canadian law. Nevertheless, appealing to the framework of UNDRIP might have helped the Ktunaxa Nation embed their claim within a larger international movement that could have had some moral weight in the Canadian court system.

Jovsset Ánte Sara, on the other hand, relied on the centrality of reindeer husbandry to the maintenance of the Sámi as a distinct indigenous people, with its cultural traditions related to land use from time immemorial in the framing of his claim. While this claim specifically contested the cull order, the larger backdrop of the court case, as in all cases dealing with Sámi law,³⁷ was centuries of interaction between state power and Sámi sovereignty, with the boundaries of the latter as the crucial matter at hand. These twin aspects – the preservation of the distinctive culture of the Sámi and the contested boundaries between sovereignty and indigenous self-determination in the distribution of land claims – are constitutive of the global discourse on indigeneity.

Hence, although neither reindeer husbandry nor sovereignty can be characterized as “religious” within the terminology of the general provisions on the freedom of religion or belief in international human rights law, their centrality to the preservation of the Sámi as a minority under article 27 of the ICCPR and to the special relationship of indigenous peoples to their traditional lands under the UNDRIP would both seem to suggest a potential expansion of the claims that could have been lodged by Sara: rather than the singling out of “culture” as the distinctive element of article 27, a claim that would be more attentive to the combined “cultural” and “religious” aspects of reindeer husbandry to the preservation of the Sámi as a distinct indigenous group may have altered the outcome of the case.

This is especially so if the claim would be read in conjunction with the explicit connections established between religion, spirituality, culture and land both in the UNDRIP article 12 and 25, and in ILO Convention no. 169 article 13. Framing the legal claim in this fashion would be in line not only with the centrality of these concepts to the movement for indigenous rights, but also with the growing appreciation of “intersectionality” between different human rights claims in international human rights law. This appreciation has been particularly important within the practice of the Committee on the Elimination of Racial Discrimination, whose narrow mandate has forced an increased appreciation of the boundaries between “race” and surrounding concepts, particularly “religion” (Ghanea 2013, Thornberry 2010, Alves 2008), and may also become more relevant to the Human Rights Committee, which oversees the implementation of the ICCPR.

Whatever developments may take place at the international level, however, Sámi legal claims will always have to start in the domestic legal system,³⁸ which has so far been less than forthcoming in its recognition of the potential relevance of “religion” for the framing of Sámi legal claims. Within the large number of government-commissioned reports on the past, present and future of legislation on Sámi issues, “religion” plays a peripheral role, with cultural claims related to language rights and land use taking up the majority of

³⁷ “Sámi law” is not a unified concept with clear-cut boundaries. For the purposes of this article, I rely on Susann Funderud Skogvang’s definition, which includes both the internal legal traditions of the Sámi and the body of regulations and decisions affecting the Sámi directly or indirectly, domestically and internationally (Skogvang 2009: 25-26).

³⁸ Before legal claims can be considered at the international level, they have to go through the relevant domestic legal procedures, or “the exhaustion of domestic remedies”. See ICCPR article 41 (c).

legislative and litigative interest. Similarly, legislation and litigation on “religion” has so far not discussed Sámi issues. Tellingly, the sole reference to Sámi cultural practices in the 465 page Stålsett report (NOU 2013: 1), which laid out the foundations for Norwegian law and policy on religion and belief, was provided by a citation from the hearing concerning a new *Animal Welfare Act* in 2008, during which the Jewish community claimed Sámi traditional practices of slaughter received beneficial and discriminatory support in comparison to traditional Jewish slaughter methods, which are expressly forbidden.³⁹

However, while Sámi rights claims have so far evaded religion as a framing device, the layers of governance surrounding and influencing the framing of such claims are constantly in flux. From the international discourse on religious rights, minority rights and indigenous rights to the notion of “religion” in Norwegian law and the boundaries between Sámi neo-shamanic, cultural and spiritual expressions, the conditions for the formulation of rights claims are continuously reinterpreted and renegotiated. Across these intersecting fields of discourse, multiple pathways are possible. Rather than shutting the door or insisting on the preeminence of either of these pathways, scholarship on indigeneity, law and religion should provide sound analytical frameworks that can indicate their existence, interrelationship and origins, in order to escape truncated versions of the relationship between law and religion as a recently occurring issue caused by “assertive” forms of religiosity, or the relationship between indigeneity, law and religion as fixed and finalized.

Conclusion

Legislation and litigation on “religion” cannot be boiled down to the recent “assertiveness” of religious groups, nor is it a recent or singular phenomenon that is particular to “religion” or the specific time in which we live. Rather, the ways in which policies, legal frameworks and jurisprudence give shape to “religion”, whether as a source, object or context for the ways in which religion can be legally framed, happens in close interaction with a wide array of overlapping discourses, and has a long and complicated genealogy that suggests multiple origins. Only by ignoring these overlapping discourses and genealogies can the story of law and religion be told as one of a recent judicial interest in religion fueled by the assertiveness of a select group of religions and their believers.

As an antidote to such selective amnesia, the decisions in *Ktunaxa* and *Sara* offer vital correctives to the short-sightedness and single-mindedness of much current theorizing on law and religion. Embedded within larger questions of indigeneity, land management and different categories of human rights protections, the rights claims and judicial resolutions adopted by the Canadian and Norwegian Supreme Courts amply demonstrate the “protean” nature of religion as a subject matter for law, as observed by Winnifred Sullivan (2004: 322).

Perhaps more importantly, however, the occurrence of “religion” in *Ktunaxa* and the non-occurrence of “religion” in *Sara* are indicative of the agency and independence, not only of the specific claimants in these two cases, but of all actors involved with and affected by the growth of legislation and litigation, both on “religion” and on other subjects. Far from being left with a powerless and disenfranchised “lived religion” distorted and

³⁹ See under 20.7.4.3. The analogy was dismissed by the Stålsett commission, with reference to recommendations from the council of animal welfare ethics.

dismembered by the categories imposed by the legal system, actors involved in legislative and litigative activism are fully capable of choosing their own strategic paths of “lawfare” to achieve their goals, whether these paths truly correspond with their internal conceptions of “religion” or not.

Literature

Alves, José A Lindgren. 2008. “Race and Religion in the United Nations Committee on the Elimination of Racial Discrimination.” *University of San Francisco Law Review* 42 (4): 941–82.

Ghanea, Nazila. 2013. “Intersectionality and the Spectrum of Racist Hate Speech: Proposals to the UN Committee on the Elimination of Racial Discrimination.” *Human Rights Quarterly* 35 (4): 935–54. doi:10.1353/hrq.2013.0053.

Bader, Veit. 2007. The Governance of Islam in Europe: The Perils of Modelling. *Journal of Ethnic and Migration Studies* 33: 871–886. doi:10.1080/13691830701432723.

Beaman LG, ‘Aboriginal Spirituality and the Legal Construction of Freedom of Religion’ (2002) 44 *Journal of Church and State* 135

Beaman LG, ‘Deep Equality as an Alternative to Accommodation and Tolerance’ (2014) 27 *Nordic Journal of Religion and Society* 89

Berman, Harold J. 1983. *Law and Revolution: The Formation of the Western Legal Tradition*. Cambridge, Mass.: Harvard University Press.

Berry, S. E. 2011. “Bringing Muslim Minorities within the International Convention on the Elimination of All Forms of Racial Discrimination--Square Peg in a Round Hole?” *Human Rights Law Review* 11 (3): 423–50. doi:10.1093/hrlr/ngr014.

Blichner, Lars Chr, and Anders Molander. 2008. Mapping Juridification. *European Law Journal* 14: 36–54.

Comaroff, John L. 2009. Reflections on the Rise of Legal Theology: Law and Religion in the Twenty-First Century. *Social Analysis* 53: 193–216. doi:10.3167/sa.2009.530112.

Conte, Alex, and Richard Burchill. 2009. *Defining Civil and Political Rights. The Jurisprudence of the United Nations Human Rights Committee*. Farnham: Ashgate.

Côté, Pauline, and James T Richardson. 2001. Disciplined Litigation , Vigilant Litigation , and Deformation : Dramatic Organization Change in Jehovah ’ s Witnesses. *Journal for the Scientific Study of Religion* 40: 11–25. doi:10.2307/1388177.

Dworkin, Ronald. 1986. *Law’s Empire*. Cambridge Mass.: Harvard University Press.

- Fonneland, Trude A. 2013. "Sami Tourism and the Signposting of Spirituality. The Case of Sami Tour: a Spiritual Entrepreneur in the Contemporary Experience Economy". *Acta Borealia* 30(2): 190–208.
- Ghanea N, 'Are Religious Minorities Really Minorities?' (2012) 1 *Oxford Journal of Law and Religion* 57 <https://academic.oup.com/ojlr/article-lookup/doi/10.1093/ojlr/rwr029>
- Gunn, Jeremy. 2003. The Complexity of Religion and the Definition of "Religion" in International Law. *Harvard Human Rights Journal* 16: 189–215.
- Hansen, Lars Ivar, and Bjørnar Olsen. 2004. *Samenes historie fram til 1750*. Oslo: Cappelen Akademisk Forlag.
- Holling, C.S., and Gary K. Meffe. 1996. Command and Control and the Pathology of Natural Resource Management. *Conservation Biology* 10: 328–337. doi:10.1046/j.1523-1739.1996.10020328.x.
- Hurd ES, *Beyond Religious Freedom: The New Global Politics of Religion* (Princeton University Press 2015)
- Kantorowicz, Ernst. 1957. *The King's Two Bodies. A Study in Medieval Political Theology*. Princeton: Princeton University Press.
- Kirsch, Thomas G, and Bertram Turner. 2009. *Permutations of Order. Religion and Law as Contested Sovereignities*. Farnham: Ashgate.
- Kraft, Siv Ellen. 2010. The making of a sacred mountain. Meanings of nature and sacredness in Sápmi and northern Norway. *Religion* 40(1): 53–61.
- Kraft, Siv Ellen. 2009. Sami Indigenous Spirituality : Religion and Nation- building in Norwegian Sápmi. *Temenos* 45: 179–206.
- Langer, Lorenz. 2010. The Rise (and Fall?) of Defamation of Religions. *Yale Journal of International Law* 35: 257–263.
- Lerner, Natan. 2012. *Religion, Secular Beliefs and Human Rights*. 2nd ed. Leiden, Boston: Martinus Nijhoff Publishers.
- Lindkvist, Linde. 2013. The Politics of Article 18: Religious Liberty in the Universal Declaration of Human Rights. *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 4: 429–447.
- Mandair, Arvind, and Markus Dressler, ed. 2011. *Secularism and Religion-Making*. Oxford: Oxford University Press.
- Neff SC, 'An Evolving International Norm of Religious Freedom: Problems and Prospects' (1977) 7 *California Western International Law Journal* 543

- Nurser, John. 2005. *For All Peoples and All Nations. Christian Churches and Human Rights*. Geneva: World Council of Churches Press.
- Peach, Ian. 2016. Who speaks for whom? Implementing the Crown's duty to consult in the case of divided Aboriginal political structures. *Canadian Public Administration* 59: 95–112. doi:10.1111/capa.12150.
- Preece Jennifer J., 'Minority Rights in Europe: From Westphalia to Helsinki' (1997) 23 *Review of International Studies* 75
- Presler, Franklin A. 2008. *Religion under bureaucracy. Policy and administration for Hindu temples in south India*. 2nd ed. Cambridge: Cambridge University Press.
- Roy, Olivier. 2013. Secularism and Islam: The Theological Predicament. *The International Spectator* 48: 5–19.
- Rydving, Håkan. 2004. *The End of Drum-Time. Religious Change among the Lule Saami, 1670s-1740s*. 3rd ed. Uppsala: Uppsala University.
- Skogvang, Susann Funderud. 2009. *Samerett*. 2nd ed. Oslo: Universitetsforlaget.
- Sullivan, Winnifred Fallers. 2004. Beyond "Church and State". *Advances in the Study of Religion and Law*. In *New Approaches to the Study of Religion 2 Textual, Comparative, Sociological and Cognitive Approaches*, ed. Randi R. Warne, 2:321–344. Berlin, New York: Walter de Gruyter.
- Sullivan WF, *The Impossibility of Religious Freedom* (Princeton University Press 2005)
- Sullivan, Winnifred Fallers, Robert A Yelle, and Mateo Taussig-Rubbo, ed. 2011. *After Secular Law*. Stanford: Stanford Law Books.
- Taylor, Paul M. 2005. *Freedom of Religion - UN and European Human Rights Law and Practice*. Cambridge: Cambridge University Press.
- Thornberry, Patrick. 2010. "Forms of Hate Speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)." *Religion and Human Rights* 5 (1): 97–117.
- Årsheim, Helge and Pamela Slotte. 2017. "The Juridification of Religion?". In *Brill Research Perspectives on Law and Religion* 2(1), pp. 1-89.
- Årsheim, Helge. 2014. Legal Secularism? Differing Notions of Religion in International and Norwegian Law. In *Secular and Sacred? The Scandinavian Case of Religion in Human Rights, Law and Public Space*, ed. Rosemarie van den Breemer, José Casanova, and Trygve Wyller, 123–152. Göttingen: Vandenhoeck&Ruprecht.