Remedying the Fosen "accident" – Reflections on private law remedies in a wind mill project gone wrong

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Abstract

Two windfarms are currently in operation at the Fosen Peninsula close to Trondheim in Norway, to the detriment of the commercial viability of reindeer herding in the area. This harm is excessive and constitutes not only a private law violation of grazing rights, but also a violation for the relevant indigenous families of the international human right to exercise of culture – according to wording of a unanimous Norwegian Supreme Court administrative law case in a related matter. Our paper asks a hypothetical question, in that its starting point is that it is up to the Sami families to take legal action, both to ask a court to order the wind farm operations to cease, and/or to order the facilities to be removed. We hypothesise such an injunction suit under private law principles. We discuss an important exception to injunctive relief, conditioned upon an ex post cost benefit balancing test, in combination with generous monetary damages, thus contributing to the commercial viability of owning and herding reindeer – perhaps also supplemented by other court orders that assume co-existence between green energy production and reindeer ownership in the area. Overall, we find that the case for injunctive relief for the Sami families is not clear – either under property principles, or under international law principles for physical restitution claims. However, this assumes that the investor has not exercised "culpa" ex ante, and that the investor is liable to provide generous monetary compensation ("vederlagserstatning").

Keywords: Fosen case; wind mills; Sami rights; private law injunctive relief

1. Introduction

Two windfarms are currently in operation at the Fosen Peninsula close to Trondheim in Norway, to the detriment of the commercial viability of reindeer herding in the area. This harm is excessive and constitutes not only a private law violation of grazing rights, but also a violation for the relevant indigenous families of the international human right to exercise of culture – according to an administrative law case on a related matter unanimously decided by the Norwegian Supreme Court.[1]

As broadly covered by media, activists and some concerned lawyers claim that this so-called Fosen case shows that the Norwegian state does not adequately respect Sami rights in accordance with the Supreme Court's judgement.[2] However, the two wind farms are already operated by independent legal entities, who are unwilling to cease operation and restitute the situation. Moreover, the state is not willing to order them

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[1] See Section 3 below.

[2] See e.g. https://www.nrk.no/trondelag/stat-og-jurister-svaert-uenige-om-vindkraftanlegg-pa-fosen-er-et-menneskerettighetsbrudd-1.16170690.

to do so, either. The state, the legal entities, and the reindeer owners are as of December 2023 in talks and negotiations/mediations to solve the conflict. In fact, it was announced on Dec. 18th that the reindeer owners in Fosen South have entered into a settlement agreement, thus partially solving the conflict. Talks in Fosen North is continuing.

If the reindeer owners (in Fosen North, see above) really want the wind farms to cease and be removed, there are two venues open. First, they can sue the state and claim that it has a legal duty to order the independent legal entity (Aneo) to cease operation of and remove the wind farm, on the basis that this is the proper remedy for invalid public concessions violating Sami rights.[3] Secondly, the reindeer owners can sue the independent entity and claim the right to a private law injunction to cease and remove. This is the perspective taken in the present article.

In fact, the reindeer owners have done neither of the above. Rather, they are still in communication with the other parties with the aim of resolving the conflict. Thus, our paper asks a hypothetical question, in that its starting point is that it is up to the Sami families to take legal action, both to ask a court to order the wind farm operations to cease, and/or to order the facilities to be removed. We hypothesize such an injunction suit under private law principles, as outlined above. We discuss an important exception to injunctive relief, conditioned upon an *ex post* cost benefit balancing test, in combination with generous monetary damages, thus contributing to the commercial viability of owning and herding reindeer – perhaps also supplemented by other court orders that assume co-existence between green energy production and reindeer ownership in the area.

Overall, we find that such a case will rely on difficult judgements, and that the case for injunctive relief for the Sami families is not clear – either under property principles, or indeed under international law principles for restitution claims.

We emphasise that our contribution might be seen as rather narrowly focusing on private law, and that it also might seem leaning too much towards an economic efficiency understanding. Karl Arne Utgård has provided thorough critical comments on the Fosen case from a public law and human rights perspective, which also broadly points in the same direction as our analysis.[4]

We proceed with our discussion in three stages, followed by a conclusion:[5]

Positive property law (Section 2); The Fosen case (Section 3); Reflections (Section 4); Conclusion (Section 5).

2. Positive property law

We do in fact have a case from the Norwegian Supreme Court, *Rt. 1991 at p. 1281 Vindmølle på Jæren*, that documents private law injunctive relief for windmill nuisances, where the windmill owner was made subject to restrictive regulations by court orders to the benefit of adjoining land owners. Related injunctive relief can clearly include the removal and restoration of land, but not if the burden of physical restoration clearly outweighs the restoration benefit.

[3] Former Norwegian Supreme Court judge Karl Arne Utgård has very recently addressed the Fosen conflict from this perspective, see footnote 4.

[4] Rett24 Dec. 6th 2023, https://rett24.no/articles/karl-arne-utgard--jeg-forstar-ikke-hvordan-noen-er-kommet-pa-at-staten-har-plikt-til-a-rive-vindmoller.

[5] For a thoroughly referenced legal dogmatic treatment underlying our paper, see Jenny Bondevik, Unntak fra rettingskrav. Om ekspropriasjonslignende unntak, PrivIus Journal of Private law 221 2023 (Master Thesis (146 pp., Open Access online), supervised by Endre Stavang).

If the right-holding Sami families sue the wind farm owners and claim for cease and remove, the wind farm owners can invoke the abovementioned exception to private law injunction. This rule can be viewed as implementing Ronald Coase's guideline, based on his institutional economics, that property rights are to be delineated in favour of the party that values them the most, when transaction costs are high.[6] In line with the vocabulary of Calabresi and Melamed, the Sami rights are thus protected by a liability rule, rather than by a property rule.[7]

The exception-to-injunctions rule does not apply if the wind farm owners have been in "culpa", i.e. violated their duty to show due care. This way of narrowing the rule may be seen as a way of ensuring that remedies and enforcement do not suffer from what Kydland and Prescott called problems of time inconsistencies.[8] Without this narrowing, the investor is protected by a generous *ex post* balancing rule, that may create incentives for *ex ante* dubious behaviour.

The positive basis for the exception-to-injunctions rule is to be found in the statute regulating private nuisances (see section 2.1). Moreover, there is strong evidence that the rule is also followed in servitudes law, e.g. when a new construction, such as a building, is found to violate a negative servitude (see section 2.2). In addition, the recent Supreme Court Case, *Trollvassbu*, strongly suggests that our rule is not only a matter of statutory law, but is indeed also a more general legal principle, (see section 2.3).

[6] R H Coase, The Firm, the Market, and the Law, Chicago and London 1988, p. 119; E Mackaay, Law and Economics for Civil Law Systems, Cheltenham 2013, p. 218.
[7] G Calabresi & A D Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. 85 Harvard Law Review 1972, pp. 1089–1128.
[8] F E Kydland and E C Prescott, Rules Rather than Discretion: The Inconsistency of Optimal Plans, 85 Journal of Political Economy 1977, pp. 473–492.

2.1 Neighbour law rules

There are different types of legal sanctions available against the person who violates his neighbours' rights. A sanction that will typically be imposed is compensation as an award of damages. Another possibility is to claim physical restitution, in order to achieve a form of material protection of the violated right. This is normally the type of solution that serves the aggrieved party best, due to difficulties in proving a financial loss (as a claim for compensation requires).

Is it possible to derive general principles for these types of situations based on case law and public policy? Can the rules about restitution in Grannelova (Act on legal relations between neighbours) be seen an expression of a more general rule that can be applied in a non-statutory manner?

In terms of neighbour law, Grannelova §§ 10 and 11 provides the opportunity to claim physical restitution where either some sort of activity, or else a building, is illegal according to neighbour law (breaching any of the sections in §§ 2–5). From this starting point there are then two exceptions; first, exceptions that can only be made as a consequence of compensation being awarded (§ 10 second paragraph and § 11), and second, exceptions that can be made regardless of any award of compensation (§ 10 first paragraph). The first form of exception is primarily based on a cost benefit analysis of performing the restitution. The cost benefit analysis is based on the one party's expenses and losses, on one side, versus the other party's benefits, on the other. If there is a clear mismatch between these interests, exceptions can be made.

As an absolute condition, the neighbour cannot have been in culpa prior to the conflict. The wording in the law itself implies a rather strict threshold, but this varies a little in case law.

If exception is to be made, the aggravated party succeeds in its remuneration claim. This sum is assessed by the court based on principles of what seems reasonable and fair. The assessment is, unlike tort law, not limited to a financial loss. This means that the assessment can also be based on future loss, or on other conditions, such as both parties' conduct.

2.2 Servitude law rules

There are similarities between the situations regulated by neighbour law and violations of negative servitudes, where the landowner has exceeded the land burden of the property and thereby violated the purpose of the servitude. In servitudes law, the same considerations apply as in neighbour law, and the system of sanctioning therefore has a resemblance (note: there is a specific court, "Jordskifteretten", with expertise in the field that handles these cases, not the ordinary courts).[9] An illustrative case is *Rt. 2011* s. 228 *Naturbetong II*, concerning a claim regarding compensation for non-economic damage in § 17. The claim was based on the beneficiary's enrichment by violating the servitude. The Supreme Court stated that there is no need for a statutory rule to claim restitution, where a negative servitude has been violated.

2.3 From rules to principles – the Trollvassbu case

A very prominent and interesting case is *HR-2022-1119-A Trollvassbu*. Here, the parties were not neighbours, but instead a landowner claiming against the owner of a cabin on the parcel of land that belonged to the landowner. The owner of the cabin had built it pursuant to agreement with the state, which was thought to own the land at that time. However, uncertainty prevailed about who owned the land in the area. Later, the conclusion was reached that the land belonged to a local farmer, who sued the cabin owner and claimed eviction and ownership of the cabin, since it was built on his land.

The Supreme Court considered whether Grannelova § 11 or lov om hendelege eigedomshøve (Act on accidentally commingled property) § 8 should be applied. The Court summarised the sources of law in section 44. While § 8, which allocated the cabin ownership to the farmer, applies directly to the case, neither the preparatory works of lov om hendelege eigedomshøve or Grannelova restrict/prevent the possibility of applying § 11, which would uphold the original cabin owner's rights conditional upon generous compensation, even though it primarily regulates a different situation. Due to the legal and political justification of § 11, the court decided that the rule can equally apply to this case. Because of this, it can be argued that the rule should have a wider area of application.

In this particular case, the rules are interpreted in a particularly purpose-oriented way – based on what appears to be reasonable and fair with regards to the result. The assessments authorized by the regulations are based on considerations of fairness and reasonableness.

Could this case be an indication that the rules, as expressed in Grannelova, apply more as *established principles* than as individual rules? One can question whether legal practice is based on analogical inferences, or whether it is a case of applying more independent non-statutory legal principles. It can be argued that one should see the application of the law as a generalization from the solution in Grannelova. Other case law substantiates this, see for example *RG-1974-38*, *RG-1992-601* and *RG-2007-1432*.

It is reasonable to see the rules in Grannelova as an expression of more established principles that exist as "*common law*", rather than

[9] Regulations of change and replacement of servitudes in servituttlova (Act on servitudes) §§ 5–8.

as narrow rules that can only be applied if the situation is directly regulated by neighbour law. This is particularly evident in the assessment of remuneration, which is based on considerations of reasonableness and fairness.

3. The Fosen case

In the Fosen case, the Supreme Court declared the permissions to install and operate wind turbines on land with reindeer grazing rights, granted by the Norsk Vassdrags- og Energidirektorat, void (being a licence to build, own and operate windmills and a right to expropriate grazing rights). This implies that the relevant legal entity (Aneo, in Fosen North) does not have the necessary permissions to carry on operating the windmills. From a perspective based on neighbour law, as discussed above, this means that the windmills stand on foreign land (compare Grannelova § 11).

If there was a question of restitution in this case, could the principles in neighbour law be suitable for solving the conflict? If so, how would the outlined principles translate into unwritten law? If applicable, the question of physical restitution will depend on which of the parties has a predominance of interests and whether Fosen Vind was in culpa or not.

First, let us look at the problem from the perspective of Fosen Vind. Physical restitution will imply extensive expenses, loss of both expected income and also of expenses incurred with building the windmills. It can be questioned whether this interest is equally worthy of protection if the owner of the initiative is granted the right to bring compensation claims against the state, so that their personal loss is reduced. Is the state more likely to carry the responsibility due to the permissions being granted in the form of an official permit?

Another question is to what extent Fosen Vind had been in culpa. In cases where a party has obtained the necessary permission to carry out a type of activity, there is rarely any form of guilt arising from the party conforming to a public decision. Although it should be noted that in this case, the company was met with strong protests (the demonstrations). This could play a role in the measurement of compensation.

Next, let us look at the problem from the perspective of the Sami right holders. In a perspective based on law of property, grazing rights are a form of right of use. These types of rights normally have a weaker protection than the property right itself. The right of grazing is, however, protected by the right to cultural practice, which is an important normative value and right for indigenous peoples (see especially reinbeiteloven (Act on reindeer grazing) § 1 and Grunnloven (Basic Law) § 108). This right is protected from interference through the International Covenant on Civil and Political Rights (ICCPR) article 27. Note that there is no room for a balancing of interests when deciding whether there is a breach or not of article 27 (HR-2021-1975-S section 124).

This does not, however, mean that the possibility of applying a balancing of interests is simultaneously cut off, when the impact of the human rights violation is assessed. Even if the permissions given in the case are a breach of article 27, the question remains, what are the legal effects of this? Relevant rules include: ICCPR article 2 (3) a: the person whose rights has been violated shall have an "effective remedy". And also UN Human Rights Committee (HRC) on "effective remedy" in General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004). According to paragraph 15 of the General Comment "cessation of an ongoing violation is an essential element of the right to an effective remedy." In other words, it is crucial that the violation of human rights ends. Furthermore, according to paragraph 16: "article 2, paragraph 3,

requires that States Parties make reparation to individuals whose Covenant rights have been violated". The human rights committee does not say anything about which specific measures are meant by "make reparation".

In the case *Poma Poma v. Peru* (Communication No. 1457/2006), the UN Human Rights Committee states that ICCPR article 2 (3) (a) entails that "the State party is required to provide the author an effective remedy and reparation measures that are commensurate with the harm sustained". In other words, the State must provide effective remedies and reparative measures that are proportionate to the damage that has occurred.

Based on international law, a proportionality assessment should be undertaken when deciding on which measures should be taken to mitigate the human rights' violation. When assessing which types of reparative measures one is obliged to undertake, there are two cases that are relevant in particular.

First, in the *Chorzow factory* case (Germany v. Poland, PCIJ, Collection of judgments, Series A. no. 9, July 26 (1927) s. 47–48), it is stated that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". Second, in the *Pulp Mills* case (Argentina v. Uruguay, ICJ Judgment of 20 April 2010), it is stated that "[w]here restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both."

If the rules of international law are to be taken into account, international law practice and statements from HRC show that the question is based, to a large extent, on the same principles as those used in the balancing of interests in neighbour law. Thus, there is not really a contradiction between private law principles and remedies in public international law.

Allow us to emphasise: Based on private law principles, the threshold limits defining unlawfulness, that ideally should be estimated upfront (*ex ante*), take on another form and structure than the sanctioning rules, that are applied later in time (*ex post*). This crucial distinction is also in operation under the international law that is to be respected in Fosen. Thus, even under this international law, the two wind farms already installed and in operation, may continue without physical restoration, but then contingent on generous monetary compensation. See also the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) Article 35, combined with note (11), emphasizing equity and reasonableness, closely resembling Norwegian property law, as described above.

However, international law operates with an aggravating requirement for there to be a "disproportionality", by using "a burden out of all proportion" or "materially impossible" as a threshold. This means that the question in the Fosen case is whether a question of restitution constitutes a burden out of all proportion, or whether instead it is materially impossible.

4. Reflections

The rule that we have both outlined and suggested for application, equally in the Fosen case, is that the remedy for violating reindeer grazing rights should be damages rather than an injunction, provided an *ex post* cost benefit analysis (CBA) is clearly or extremely in favour of the investor, and also that monetary compensation is generous, compared to traditional tort law principles. Our reflection concerns the CBA inherent in the rule, on the one hand, and the economic function of the damages remedy, on the other.

Regardless of which qualification require-

ment is used based on national law it is the interests of the parties that are the central starting point for the analysis. Because of the protection of Sami right holders given by the ICCPR article 27, it can be questioned whether a cost benefit analysis is both applicable and legitimate. The problem is that CBA is inspired by utilitarianism as a moral philosophical model. This type of analysis assumes that it is possible to address all interests within the analysis. It can be argued that there must be a limit to which rights are suspended in accordance with a CBA. Rights protected by the ICCPR article 27 could be an example of those kinds of rights. This type of moral philosophy has its roots within natural law.

Another challenge in using CBA to determine the best solution, is that not every interest can be easily compared. A fundamental problem in law is that there can be a difference in valuation. This applies particularly to qualitative differences between what is being compared, otherwise known as incommensurability. The solution in Grannelova is to compensate the violated part if he or she does not have preponderance of interests. However, the interests that are being evaluated are the losses to one party (that easily can be calculated to a financial amount) versus the benefits to the other party (which often are not related to a specific amount of money).

Would it be possible to measure a satisfactory compensation for suspending the grazing rights in the Fosen case? This raises further and even harder questions: How much is the Sami people's grazing rights, and thereby their right to enjoy their own culture, worth? Would it be possible to give such a generous amount of compensation that this right can be suspended? Indigenous people's right to enjoy their own culture is a crucial part of the Sami's rights as a minority group. ICCPR article 27 could be seen as a limit to rights that could be suspended as a result of a cost benefit analysis, in the sense that they are non-negotiable. A kind of idea that deontic considerations must trump economic ones.

In an environmental perspective, however, our rule appears to be a reasonable way to solve the conflict, as it might yield both a more sustainable utilization of resources and also a solution that would avoid wasting resources. With generous damages to the reindeer herders, our rule might benefit both parties without harming outsiders, i.e. be viewed as approximately Pareto improving.[10] By measuring damages generously, this could even contribute to the commercial viability of the herding, and thus eliminate the human rights violation.[11]

5. Conclusion

To conclude, the case for injunctive relief for the Sami families is not clear – either under property principles, or under international law principles for physical restitution claims. However, this assumes that the investor has not exercised "culpa" *ex ante*, and that the investor is liable to provide generous monetary compensation ("vederlagserstatning"). We hope that the parties in Fosen North are negotiating in good faith in the shadow of this rule.[12]

[10] Louis Kaplow and Steven Shavell, Fairness versus welfare. London: Harvard University Press, 2002.

[11] The parties in Fosen South that have now settled, agree that the human rights violation has been eliminated. New grazeland has been offered, as well as monetary compensation of 175 million NOK.

[12] As mentioned, the parties in Fosen South has, as announced on Dec. 18th 2023, settled the conflict, thus eliminating the human rights violation there.