universität wien

MASTER THESIS

Titel der Master Thesis / Title of the Master's Thesis

„Current Developments in Sami Rights in Scandinavia, with a Focus on Recent Jurisprudence“

verfasst von / submitted by

Mag.ª Olivia Janicek, BA, MA

angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien, 2023 / Vienna 2023

Studienkennzahl lt. Studienblatt / Postgraduate programme code as it appears on the student record sheet:	UA 992 891
Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:	Human Rights (LL.M.)
Betreut von / Supervisor:	Ao. Univ.-Prof. Dr. René Kuppe

Acknowledgements

Primarily, I would like to thank my supervisor, ao. Univ.-Prof. Dr. René Kuppe, for his great support during the completion of the thesis.

Furthermore, I would like to give special thanks to Mr. Rune Fjellheim, former Director General of the Sami Parliament of Norway, for kindly agreeing to talk to me about current Sami issues.

Abstract (English)

The present thesis examines the current developments in Sami rights with a special focus on recent Supreme Court decisions in Norway, Sweden and Finland. In particular, the Swedish *Girjas* case (2020), the Norwegian *Fosen* case (2021) and the (two) recent Finnish *Deatnu* cases (2022) are being analysed. Furthermore, the thesis discusses major current challenges for the Sami, including the complex relationship between Indigenous and environmental rights.

Abstract (German)

Die vorliegende Arbeit untersucht die aktuellen Entwicklungen der Rechte der Sami mit einem besonderen Fokus auf aktuelle höchstgerichtliche Entscheidungen in Norwegen, Schweden und Finnland. Insbesondere werden der schwedische *Girjas* Fall (2000), der norwegische *Fosen* Fall (2021) und die (zwei) aktuellen finnischen *Deatnu* Fälle (2022) analysiert. Des Weiteren werden zentrale aktuelle Herausforderungen für die Sami diskutiert, inklusive des komplexen Verhältnisses zwischen indigenen Rechten und dem Recht auf Klimaschutz.

Table of Contents

List of Abbreviations

CEACR……..…Committee of Experts on the Application of Conventions and Recommendations

CERD……Committee on the Elimination of Racial Discrimination

ECHR……European Convention on Human Rights (1950)

EMRIP……..UN Expert Mechanism on the Rights of Indigenous Peoples

FPIC……...Free, Prior and Informed Consent

HRC……UN Human Rights Committee

IACtHR……..Inter-American Court of Human Rights

ICCPR……International Covenant on Civil and Political Rights (1966)

ICERD……International Convention on the Elimination of All Forms of Racial Discrimination (1965)

ILO Convention No. 169……Indigenous and Tribal Peoples Convention (1989)

P1 ECHR…….Protocol No. 1 to the European Convention on Human Rights (1952)

UNDRIP…….Declaration on the Rights of Indigenous Peoples (2007)

I. Introduction

For thousands of years – "since time immemorial"[1] –, the Sami have lived in the territories of present-day Sweden, Norway and Finland, developing a special relationship with their territories. However, despite that long-standing close relationship, the Sami have been denied land and territorial rights for centuries due to a specific Western concept of property and a long-term policy of forced assimilation. In recent years, though, the Supreme Courts in Norway and Sweden have increasingly recognised the rights of the Sami population, including territorial rights on areas they have traditionally settled on. This development in jurisprudence comes along with growing recognition of Sami rights in international and national legislation.

Despite those positive changes, the Sami are still struggling to get their rights acknowledged. The "standard conflict" nowadays consists in Indigenous peoples´ interest in their lands *versus* the states´ interest of exploiting natural resources within Indigenous lands.[2] An interesting question in that context concerns the relationship between Indigenous and environmental rights, which are usually seen as interconnected, fighting together against the exploitation of natural resources and climate change. Yet, they are increasingly being played off against each other, e.g., in cases of the construction of wind parks in traditional Sami territories, when a – real or supposed – environmental goal is utilised as a reason to interfere with, or even violate, Sami rights.

The present thesis shall explore the current developments in Sami rights with a special focus on recent court decisions in Norway, Sweden and Finland. In particular, the Swedish *Girjas* case (2020), the Norwegian *Fosen* case (2021) and the (two) recent Finnish *Deatnu* cases (2022) shall be analysed. While the *Deatnu* cases have received less international attention, the ground-breaking *Girjas* and *Fosen* decisions have been celebrated as milestones in the development of Sami rights. In *Girjas*, the Swedish Supreme Court found that a Sami community – and not the state – had exclusive fishing and herding rights as well as the right to transfer them to others, based on the doctrine of immemorial prescription. In *Fosen*, the Norwegian Supreme Court ruled that the licences for the construction of two windfarms in Fosen peninsula were invalid because they violated the Sami

[1] AKHTAR, Zia: "Sami peoples land claims in Norway, Finnmark Act and Proving Legal Title", in: *The Indigenous Peoples' Journal of Law, Culture & Resistance,* Vol. 7, Issue 1, 2022, p. 122.
[2] See DE MATOS, Mariana: "Cultural Identity and Self-Determination as Key Concepts in Concurring Legal Frameworks for the International Protection of the Rights of Indigenous Peoples", in: Lagrange, Evelyne et. al. (eds.): *Cultural Heritage and International Law: Objects, Means and Ends of International Protection*, e-book, Springer 2018, p. 285.

reindeer herders' cultural rights provided for in art 27 *ICCPR*. In the lesser known *Deatnu* decisions, the Supreme Court of Finland found that restrictions on Sami fishing rights were incompatible with their cultural rights enshrined in the Finnish Constitution.

In order to better understand the context of Sami rights, the thesis shall first give a brief overview of the Sami´s cultural and historic background as well as the historic justification for property and territorial rights, including the specific Western concept of property. Subsequently, the main legal sources will briefly be presented, namely, on an international or regional level, the *International Covenant on Civil and Political Rights* (1966), the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), the *ILO Convention No. 169* (1989), the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) and the – not yet ratified – *Nordic Sami Convention* (2017). On a national level, a brief overview of the Norwegian, Swedish and Finnish legislation shall be given before specifically discussing the Norwegian *Finnmark Act* (2005) and the concepts of immemorial usage and immemorial prescription.

Subsequently, the thesis will present an overview of important Norwegian and Swedish Supreme Court cases, setting aside Finnish jurisprudence due to the lack of Finnish Supreme Court cases on Sami rights. Afterwards, the above-mentioned ground-breaking recent decisions will be analysed in more detail, namely the Swedish *Girjas* case (2020), the Norwegian *Fosen* case (2021) and the (two) Finnish *Deatnu* cases (2022). It shall be noted that the *Deatnu* cases, which concern individual and not collective rights, have received considerably less international attention; yet they seem significant due to their recentness, their interesting connection with criminal law and the otherwise lack of Sami case law before the Finnish Supreme Court. In the last chapter, the major current challenges in the development of Sami rights shall be discussed, focusing on the relationship between Indigenous and environmental rights as well as on the current Norwegian *Karasjok* Case.

Concerning literature, particularly important have been several essays by Øyvind Ravna, especially his most recent ones *Sami Rights and Law in Norway – with a Focus on Recent Developments* (2021) and *Norwegian Courts and Sami Law* (2021), which both concentrate on the situation of the Sami in Norway, furthermore *The Draft Nordic Saami Convention and the Assessment of Evidence of Saami Use of Land* (2013) and, together with Nigel Bankes, *Recognition of Indigenous Rights in Norway and Canada* (2017). Other crucial sources have been the essays by Christina Allard, especially *The Nordic countries' law on Sami territorial rights* (2011) and *The Rationale for the Duty to Consult Indigenous Peoples: Comparative Reflections from Nordic and Canadian Legal Contexts* (2018).

Regarding case studies, the *Girjas* case has been the most analysed, with Allard´s and Malin Brännström´s case study *Girjas Reindeer Herding Community v. Sweden: Analysing the Merits of the Girjas Case* and Rainer Hofmann´s *Case Note Swedish Supreme Court (Högsta Domstolen), Girjas Sameby, Case No T 853-18 (23 January 2020), Recognition of Sami Indigenous People's Exclusive Right to Confer Hunting and Fishing Rights in Girjas Sameby Area* being the most important ones. There is less specific literature regarding the *Fosen* case and no significant international (English) literature at all about the recent *Deatnu* cases. When it comes to the three respective countries, most of the literature focuses on the situation in Norway, such as the above-mentioned essays by Ravna, and Sweden, especially in context of the *Girjas* case. There is less international literature specifically on Finland, likely due to the lack of case law before the Finnish Supreme Court and the fact that the Sami population in Finland is considerably smaller.[3]

With regard to the duty to consult and the concept of free, prior and informed consent, three articles have been particularly important, namely Mauro Barelli´s *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples* from 2012, Allard´s above-mentioned comparative essay *The Rationale for the Duty to Consult Indigenous Peoples: Comparative Reflections from Nordic and Canadian Legal Contexts* from 2018, and, most recently, Leena Heinämäki´s *Legal Appraisal of Arctic Indigenous Peoples´ Right to Free, Prior and Informed Consent* from 2021. Regarding the *ICCPR*, *Article 27 of the ICCPR Revisited – The Right to Culture as a Normative Source for Minority / Indigenous Participatory Claims in the Case Law of the Human Rights Committee* (2013) by Athanasios Yupsanis shall be mentioned.

The present thesis is based on English (and occasionally German) literature and, as far as available, official translations of Scandinavian court decisions. Only exceptionally, in cases where it was not possible otherwise, unofficial translations have been used for Norwegian, Swedish and Finnish court decisions.

For a better understanding, the following chart shall give an overview of the cases discussed:

[3] See Chapter 2.1.

Case	State, Year	Rights in Question	Legal Basis	Outcome for the Sami
Taxed Mountains	Sweden, 1981	Ownership and reindeer herding rights	Immemorial prescription	Mostly not successful
Selbu	Norway, 2001	Reindeer herding rights	Immemorial usage	Successful
Svartskogen	Norway, 2001	Ownership	Immemorial usage	Successful
Nordmaling	Sweden, 2011	Reindeer herding rights	Customary law	Successful
Jovsset Ánte Sara	Norway, 2017	Order to reduce the number of reindeer	Art 27 *ICCPR*, art 1 *P1 ECHR*	Not successful
Nesseby	Norway, 2018	Right to regulate user rights	*Finnmark Act, ILO Convention*	Not successful
Girjas	Sweden, 2020	Hunting and fishing rights	Immemorial prescription, *ILO Convention*	Successful
Saarivuoma	Norway, 2021	Reindeer herding rights	Immemorial usage	Mostly successful
Fosen	Norway, 2021	Reindeer herding rights	Art 27 *ICCPR*	Successful
Deatnu	Finland, 2022	Salmon fishing rights	*Constitution of Finland,* art 27 *ICCPR*	Successful

II. Basics

2.1. Historical and Cultural Background of the Sami

Having lived in the territories of present-day Sweden, Norway and Finland for thousands of years, the Sami "most likely descended from groups of tribes related to Finno Ugric peoples, who settled in Fennoscandia in the Early Neolithic era".[4] The traditional territory of the Sami comprises the northern parts of today's Norway, Sweden and Finland as well as the Kola Peninsula in Russia, jointly known by the term "Sapmi"[5] or „Lapland".[6] That said, a major part of the Scandinavian Sami nowadays lives outside Lapland, many of them in the capital regions of the Scandinavian countries.[7] Linguistically, Sami languages belong to the Finno-Ugric languages, with their languages being divided into about ten regional varieties.[8] Nowadays, though, many Sami are linguistically assimilated, even if they have largely maintained their cultural and ethnic identity.[9]

Regarding the number of Sami today, no exact figures are available, and estimates vary depending on the source, with the most common estimate being approximately 80.000 people.[10] At least half of them live in Norway,[11] with estimates of around 50.000-65.000 Sami in Norway, 20.000 in Sweden, 8.000 in Finland and 2.000 in Russia.[12] They are an ethnic minority not only in their national states but also in the territories of their original residence, with the exception of the inner regions of

[4] EIDEMILLER, YU K, et al: "History and prospects of the Saami issue", in: *Conference Series: Earth and Environmental Science 434 012004,* 2020, p. 2.
[5] AKHTAR: *Sami peoples land claims in Norway, Finnmark Act and Proving Legal Title,* p. 116.
[6] KOPONEN, Eino: "Saami: General Introduction", Chapter 7, in: Bakró-Nagy, Marianne et al. (eds.): *The Oxford Guide to the Uralic Languages*, Oxford: Oxford University Press 2021, p. 103.
[7] Ibid.
[8] Ibid.
[9] Ibid. Rem.: The numbers of Sami speakers have been estimated at more than 10,000 in Norway, fewer than 10,000 in Sweden, fewer than 3,000 in Finland and fewer than 1,000 in Russia (see ibid.).
[10] Sweden Sverige: „Sami in Sweden. With a culture that remains strong, some 20.000 Sami live in Sweden", last updated on 16/01/2023, https://sweden.se/life/people/sami-in-sweden; Northern Way: "The Sami", https://nordnorge.com/en/tema/the-sami-are-the-indigenous-people-of-the-north/. According to other estimates, there are between 50.000 and 100.000 (International Work Group for Indigenous Affairs: "Indigenous Peoples in Sápmi", https://www.iwgia.org/en/sapmi.html) or between 80,000 and 135,000 Sami overall (Northern Way: *The Sami;* CHRISTOPOULOU, Danai: "The Largest Sami Population Are in Norway and Sweden, Here´s Why", Culture Trip, 29/07/2023, https://theculturetrip.com/europe/norway/articles/sami-people-why-the-largest-population-are-in-norway-and-sweden).
[11] Northern Way: *The Sami;* CHRISTOPOULOU: *The Largest Sami Population Are in Norway and Sweden.*
[12] International Work Group for Indigenous Affairs: *Indigenous Peoples in Sápmi.* According to other estimates, 36.000 Sami – more than one third of the entire Sami community of the Scandinavian Peninsula – live in Sweden.

Finnmark[13] (Norway) and Utsjoki (Finland), where they form an ethnic majority.[14] Regarding Finnmark, this circumstance has been taken into account by the adoption of the *Finnmark Act* in 2005, which transferred the ownership of the formerly state-owned Finnmark to the private *Finnmark Estate*, aiming to give the local Sami more influence over the territory.[15]

Originally, the Sami population consisted of Sami living in the forest, whose way of life was based on hunting, fishing, and – domesticated and semi-domesticated – reindeer husbandry.[16] In the 17th century, nomadic reindeer husbandry developed, with the Sami following the reindeer herds in a seasonal cycle.[17] The Sami were predominantly organised in siidas, which consisted of several families, who jointly controlled common resource areas.[18] Nowadays, Sami herders still follow the reindeer, which are semi-domesticated animals, between different seasonal pastures.[19] Thus, reindeer husbandry still constitutes a central part of the Sami´s traditional activities, although nowadays it is practised only by a minority of approximately ten percent of all Sami.[20] Nevertheless, reindeer husbandry is still carried out over vast areas today, covering about 35-40% of the territories of today´s Norway, Sweden and Finland.[21] Despite the low number of Sami actively practising it, reindeer husbandry plays a highly significant role in court decisions, as will be shown further below.

Closely connected to reindeer-herding is (small game) hunting and fishing, which is practised for both the Sami´s own living and for sale,[22] while other revenue-producing activities include handicrafts[23] and, more recently, tourism and design.[24] The Sami nowadays are a semi-nomadic people, meaning that some members of their population still practise a nomadic lifestyle, while others live in settled communities. According to Scandinavian legislation, the Sami are considered

[13] Rem.: The northernmost part of the Norwegian mainland.
[14] EIDEMILLER: *History and prospects of the Saami issue,* p. 2.
[15] See Chapter 3.2.4.
[16] BELINA, Bernd; MIGGELBRINK, Judith: „Raum, Recht und Indigenität – Zu den Kämpfen um Landrechte indigener Völker am Beispiel der Sámi in Finnland“, in: *Peripherie,* 126/127, Münster: Verlag Westfälisches Dampfboot 2012, p. 203.
[17] Ibid.
[18] Ibid.
[19] ALLARD, Christina; BRÄNNSTRÖM, Malin: “Girjas Reindeer Herding Community v. Sweden: Analysing the Merits of the Girjas Case”, in: *Arctic Review on Law and Politics*, Vol. 12, 2021, p. 58.
[20] ALLARD, Christina: “The Nordic countries‘ law on Sami territorial rights”, in: *Arctic Review on Law and Politics*, Vol. 2, 2011, p. 4.
[21] Ibid, p. 5. Or even 50 % in Sweden, according to other sources (ALLARD, BRANNSTRÖM: *Girjas case*, p. 58).
[22] ALLARD, BRANNSTRÖM: *Girjas case,* p. 58.
[23] ALLARD: *The Nordic countries‘ law on Sami territorial rights,* pp. 4-5.
[24] Science Museum: “Climate Change in the Arctic”, 19/01/2022, https://www.sciencemuseum.org.uk/objects-and-stories/our-environment/climate-change-arctic.

both an Indigenous people and an ethnic minority at the same time.[25]

The 19th and early 20th centuries were marked by the Scandinavian states´ search for their own national identities, which eventually led to major changes for the Sami population. Norway had been part of Denmark from the 14th century until 1814, when it formed a personal union with Sweden, and only became completely independent in 1905. Finland, which had been part of Sweden for over six hundred years, became a part of Russia in 1809, and only became an independent state in 1917.[26] The search for national identities was based on the concept of "one nation, one language, and one law ",[27] which hardly left any space for Indigenous peoples. Along the way, the closing of borders, new educational systems, language policies and property law regimes were introduced, which altogether led to a destruction of the traditional Sami way of life.[28] As Kaius Tuori puts it, "what had been a group of equal citizens was slowly turned into a primitive people without land rights."[29]

When the land of Finnoscandia was divided between the national states, fixed boundaries were established between the states, subordinating traditional Sami organisations to the states´ own needs.[30] After 1848, ethnic Norwegian settlement was encouraged on Sami lands and justified with the doctrine of *terra nullius*.[31] For our purpose, it is important to note that those changes also affected the Sami´s reindeer herding. Particularly impactful to the Sami population were the closure of the Finnish-Norwegian border in 1852, when the Norwegian Sami from Finnmark lost their winter pastures and the Finnish Sami their summer pastures,[32] as well as the closure of the Finnish-Swedish border in 1889.[33] Due to those closures, free and customary migrations were no longer possible for the Finnish Sami, which caused a domino effect that led to a relocation of the Sami to northern

[25] EIDEMILLER: *History and prospects of the Saami issue,* p. 2.
[26] ALLARD, Christina: "Some Characteristic features of Scandinavian Laws and their Influence on Sami Matters", in: Allard, Christina et al. (eds): *Indigenous Rights in Scandinavia: Autonomous Sami Law,* London: Routledge 2016, pp. 50-51.
[27] BUNIKOWSKI, Dawid: "Notes on the Contemporary Legal-Political Situation of the Sami in the Nordic Region", in: Koivurova, Timo et al. (eds.): *Current Developments in Arctic Law*, Rovaniemi: University of the Arctic Thematic Network on Arctic Law 2014, Vol. 2, p. 21.
[28] BUNIKOWSKI: *Notes on the Contemporary Legal-political Situation of the Sami in the Nordic Region*, pp. 20-21.
[29] TUORI, Kaius: "The theory and practice of indigenous dispossession in the late nineteenth century: the Saami in the far north of Europe and the legal history of colonialism", in: *Comparative Legal History*, Vol. 3, No. 1, 2015, p. 152.
[30] BELINA; MIGGELBRINK: *Raum, Recht und Indigenität,* pp. 204-205.
[31] TUORI: *The theory and practice of indigenous dispossession in the late nineteenth century,* p. 159.
[32] BELINA; MIGGELBRINK: *Raum, Recht und Indigenität,* p. 205.
[33] ALLARD, Christina; SKOGVANG, Susann Funderug: "Introduction", in: Allard, Christina et al. (eds): *Indigenous Rights in Scandinavia: Autonomous Sami Law,* London: Routledge 2016, p. 4. Rem.: Only the Swedish-Norwegian border is still open for Sami reindeer herding migration (ibid., p. 4).

areas due to a shortage of herding lands and overgrazing".[34]

Only in the 20th century, "the assimilation policy gradually declined in use after the Second World War".[35] As will be seen below, recent political and legal developments have been more favourable towards the Sami, showing an increased awareness of their unique culture, history and way of life. Despite those changes, the Sami are now facing new serious threats in pollution and climate change, irreversibly affecting their environment and making it even more difficult for them to adjust to the modern world while keeping their identity.[36]

2.2. The Sami´s Struggle for Territorial Rights

In general, Indigenous peoples have a unique and distinctive relationship with their territories, which has "social, cultural, spiritual, economic and political dimensions".[37] Land and territorial rights, therefore, represent a particularly crucial issue for Indigenous peoples, constituting the "physical substratum for their ability to survive as peoples, to reproduce their cultures, to maintain and develop their organisations and productive systems".[38] This strong connection also lies in the fact that the Sami have occupied their territories already in "pre-colonial" time, occupy them nowadays and will occupy them in the future by transmitting them to future generations.[39] Consequently, it is not surprising that territorial rights have been at the centre of the Sami´s fight for more recognition in legislation as well as jurisprudence.

The Sami´s struggle for acknowledgment of their territorial rights is closely connected to a specific Western concept of property. According to John Locke´s labour theory, all the fruits of the earth at first "belong to Mankind in common, […] and no body has originally a private Dominion, exclusive

[34] ALLARD: *Indigenous Rights in Scandinavia: Autonomous Sami Law,* p. 20.
[35] RAVNA, Øyvind: "Sami Rights and Law in Norway – with a Focus on Recent Developments", in: Koivurova, Timo et at. (eds.): *Routledge Handbook of Indigenous Peoples in the Arctic,* London and New York: Routledge 2021, p. 143.
[36] HEINÄMÄKI, Leena: "Legal Appraisal of Arctic Indigenous Peoples´ Right to Free, Prior and Informed Consent", in: *Routledge Handbook of Indigenous Peoples in the Arctic*, London and New York: Routledge 2021, pp. 335-336.
[37] BARELLI, Mauro: "Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead", in: *The International Journal of Human Rights,* Vol. 16, No. 1, 2012, p. 1.
[38] KREIMER, Osvaldo (2003), quoted after: HEINÄMÄKI: *Legal Appraisal of Arctic Indigenous Peoples´ Right to Free, Prior and Informed Consent,* p. 338.
[39] DE MATOS: *Cultural Identity and Self-Determination as Key Concepts,* pp. 118-119.

of the rest of Mankind, in any of them."[40] However, property is established by removing a thing out of the state of nature and mixing one´s labour with it, which annexes something to it "that excludes the common right of other Men."[41] For example, picking up acorns under an oak or gathering apples from the trees as nourishment makes the acorn or apples one´s property.[42] The same theory was applied to land rights under the condition that the land has been used for agriculture.

However, Locke´s theory has been used to declare that those principles could not be applied to nomadic peoples because "private property over lands was related to cultivation of the soil", and "only a sedentary way of life of agriculturalists – associated with a "civilized society" – was supposed to give rise to "full" ownership rights."[43] In this sense, Indigenous lands have been declared to be *terra nullius,* which the government was able to appropriate as "ownerless lands"[44] – a line of argumentation designed to give legitimacy to British efforts to acquire land from the First Nations of America.[45]

In Norway, the requirement that a land had to be cultivated before ownership could be established formed the basis for a bill in 1848, which stated that the land of Finnmark was the property of the state and not of the Sami, who were not seen as eligible to own land.[46] During most of the 1900s, Norway, Sweden and Finland assumed that the Sami semi-nomadic and wide-ranging use of land did not qualify for establishing rights to land and resources, including in the *Dergafjeld* case in 1931 and the *Marsfjell* case in 1955, where in both cases the Norwegian Supreme Court found that Sami reindeer husbandry and other traditional Sami use of land and waters had to give way to Norwegian agricultural settlement.[47]

Overall, the difficulties for Sami land rights to be recognised can be summarised in three or four main reasons. First, as already elaborated above, traditional Indigenous activities were for a long

[40] LOCKE, John: *The Second Treatise of Government, Über die Regierung*, Ditzingen: Reclam 2012, Chapter 5, § 26, p. 48.
[41] Ibid., Chapter 5, § 26, p. 48.
[42] LOCKE: *The Second Treatise of Government,* Chapter 5, § 28, p. 50.
[43] KUPPE, René: "The Agricultural Argument and Sami Reindeer Breeding Rights: Reflections on Legal Philosophy in the Arctic", in: Bunikowski, Dawid (ed.): *Philosophy of Law in the Arctic,* Rovaniemi: University of Lapland 2016, p. 65. See also RAVNA, Øyvind: "The Draft Nordic Saami Convention and the Assessment of Evidence of Saami Use of Land", in: Bankes, Nigel et al. (eds.): *The proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights*, Oxford: Hart Publishing 2013, p. 181.
[44] AKHTAR: *Sami peoples land claims in Norway, Finnmark Act and Proving Legal Title,* p. 125.
[45] RAVNA: *The Draft Nordic Saami Convention and the Assessment of Evidence of Saami Use of Land,* p. 181.
[46] Ibid., p. 181.
[47] Ibid., p. 183.

time not considered to be sufficiently intensive and continuous to prove land rights or titles.[48] Second, traditional Sami activities do not leave many visible traces in the landscape, unlike activities such as forestry and farming, which makes it particularly challenging to provide evidence for their activities.[49] Third, the Sami maintain an oral culture, which is why there are very few written sources in the archives to prove their activities.[50] A result of the second and third reason is that, even if traditional Indigenous activities were in principle considered to be sufficient to establish land rights, this often still fails because the intensity and continuity of the use is too difficult to prove. As a fourth reason, the Sami, at least in Norway, had to confront the self-declared state ownership of land in the Sami territories based on a doctrine of state original title.[51]

In addition, the principle of reindeer husbandry being considered insufficient to establish land rights was applied in a clearly discriminatory way, as in two comparable cases of local Norwegian non-Sami farmers reindeer husbandry did count as evidence of existing property rights.[52] It needs to be emphasised that the judgement in the latter of the two cases came only half a year before the *Marsfjell* case, where the reindeer husbandry of the Sami was considered insufficient to establish property rights, making the discriminatory approach of the Norwegian Supreme Court apparent.[53]

This approach was finally overruled in the *Brekken* case in 1968, when the court confirmed Sami rights to hunt and fish in their traditional areas on the private property owned by others.[54] However, acquiring land rights remained difficult for reindeer herders because their use of land was not considered to be regular and intensive enough to acquire rights according to the rules on immemorial prescription or immemorial usage.[55] As recent jurisprudence has been taking the above-mentioned difficulties into account, another problem consists in the fact that many court decisions concern reindeer herding. This leaves non-reindeer herding Sami with no state-recognised rights to land and water, even if they still reside within traditional Sami territories, and despite the fact that they constitute the vast majority of the Sami population.[56] Before analysing central Scandinavian court

[48] RAVNA: *The Draft Nordic Saami Convention and the Assessment of Evidence of Saami Use of Land,* pp. 177-178.
[49] Ibid., p. 177.
[50] Ibid., p. 177.
[51] Ibid., p. 178.
[52] Ibid., pp. 183-184. Rem.: *Vang* in 1951 and *Urevassbotn og Lungsdalen* in 1954.
[53] Ibid., p. 184.
[54] Ibid., p. 184.
[55] Ibid., p. 185.
[56] ALLARD, BRANNSTRÖM: *Girjas case,* p. 59.

decisions, an overview of the most important legal sources in both international/regional as well as national law shall be given.

III. Legal Sources

3.1. International and Regional Law

3.1.1. *International Covenant on Civil and Political Rights* (1966)

The *International Covenant on Civil and Political Rights (ICCPR)* from 1966 does not contain any provision explicitly referring to Indigenous peoples. Yet at least two provisions, the right to self-determination (art 1 *ICCPR*) and the right to enjoy one´s own culture (art 27 *ICCPR*), are highly significant in the context of Indigenous peoples. According to art 1 para 1 *ICCPR*, "all peoples have the right to self-determination", which means that they "freely determine their political status and freely pursue their economic, social and cultural development." The provision contains an external aspect – the right to decide one´s state affiliation – as well as an internal aspect – the "right to decide over a people's economic, social and cultural future, in the form of control over lands and natural resources".[57] For our purpose, it is the internal aspect which is relevant.

However, the *UN Human Rights Committee (HRC),* which was the first human rights treaty body to deal with Indigenous issues regularly and substantially,[58] has so far refused to admit complaints regarding the right to self-determination (art 1 *ICCPR*), arguing that it is not an individual but a collective right.[59] Consequently, Indigenous groups must rely on their right to cultural identity (art 27 *ICCPR*) in order to bring a claim before the *HRC.* According to art 27 *ICCPR,* persons belonging to "ethnic, religious or linguistic minorities […] shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." Art 27 *ICCPR* has been understood by the *HRC* in a progressive way, interpreting the term „culture" extensively, which includes the traditional use of land resources by

[57] GRAVER, Hans Petter; ULFSTEIN, Geir: "The Sami People's Right to Land in Norway", in: *International Journal on Minority and Group Rights,* Vol. 11, No. 4, 2004, p. 340.
[58] BARELLI: *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples,* p. 14.
[59] DE MATOS: *Cultural Identity and Self-Determination as Key Concepts,* pp. 279-280, including criticism of the *HRC´s* stance.

Indigenous peoples.[60]

According to the *HRC's General Comment No. 23,* "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples."[61] They further acknowledged that this "may include such traditional activities as fishing or hunting and the right to live in reserves protected by law",[62] and that the "enjoyment of those rights may require positive legal measures of protection" by the states.[63] The requirement for the states to take positive action also extends a literal reading of art 26, which states that the rights "shall not be denied", implying only negative obligations of the states not to interfere.[64] Thus, the adoption of *General Comment No. 23* has been called a "landmark step forwards for the protection of minority cultures".[65] The goal of the protection is, according to *General Comment No. 23*, "directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole".[66] Overall, art 27 *ICCPR* serves as the "principal provision of universal significance for the safeguarding of minority and indigenous cultural rights".[67]

Importantly, art 27 refers to minorities within a state, not minorities within a province.[68] Therefore, non-Sami Norwegians cannot rely on art 27 in areas where they constitute a minority, such as Finnmark. The *ICCPR* has been fully incorporated into Norwegian law,[69] while Sweden and Finland have not directly incorporated it. As shall be seen below, art 27 *ICCPR* plays a crucial role in recent Sami court cases.

[60] BARELLI: *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples,* p. 14.
[61] *UN Human Rights Committee: CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, CCPR/C/21/Rev.1/Add.5, 08/04/1994, § 7.
[62] Ibid.
[63] Ibid.
[64] See YUPSANIS, Athanasios: "Article 27 of the ICCPR Revisited – The Right to Culture as a Normative Source for Minority / Indigenous Participatory Claims in the Case Law of the Human Rights Committee", in: Lavranos, Nikos et al. (eds.): *Hague Yearbook of International Law,* Vol. 26, Leiden, Boston: Brill Nijhoff 2013, p. 362.
[65] See YUPSANIS: *Article 27 of the ICCPR Revisited,* p. 363.
[66] *UN Human Rights Committee: CCPR General Comment No. 23,* § 9.
[67] YUPSANIS: *Article 27 of the ICCPR Revisited,* p. 409.
[68] See ibid., p. 366.
[69] Rem.: It has been incorporated via the *Human Rights Act* in 1999, see Norwegian National Human Rights Institution: "The Human Rights Framework in Norway", 13/09/2019, updated on 02/04/2020, https://www.nhri.no/en/2019/the-human-rights-framework-in-norway/.

3.1.2. ***International Convention on the Elimination of All Forms of Racial Discrimination* (1965)**

While the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* from 1965 does not explicitly mention Indigenous peoples either, the *Committee on the Elimination of Racial Discrimination* (*CERD*) has constantly affirmed that "discrimination against indigenous peoples falls under the scope of the Convention".[70] In its *General Recommendation XXIII on Indigenous Peoples* from 1997, the *CERD* calls states, *inter alia*, to „recognise and respect indigenous distinct culture, history, language and way of life"[71] as well as to "recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources".[72] Regarding territorial rights, art 5 (d) (v) *ICERD* provides the "right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: […] The right to own property".

Importantly, the *CERD* refers to the concept of free, prior and informed consent (FPIC),[73] stating that lands should be returned to Indigenous peoples "where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent".[74] For the concept of FPIC to be fulfilled, "free" implies that "no coercion, intimidation or manipulation" has taken place, while "prior" means the consent is given sufficiently in advance of the beginning of the activities with enough time for the Indigenous consultation process.[75] "Informed" implies that Indigenous peoples receive sufficient information, including information about the nature, size, pace, reversibility, scope and reasons of the project as well as a "preliminary assessment of its economic, social, cultural and environmental impact."[76] Moreover, the consultation process should be undertaken in good faith, with the guarantee of "full and equitable participation of indigenous peoples".[77] Given the "dramatic conditions and future predictions of environmental

[70] *General Recommendation XXIII on Indigenous Peoples*, Committee on the Elimination of Racial Discrimination, 08/18/1997, § 1.
[71] Ibid., § 4.
[72] Ibid., § 5.
[73] Rem.: Even though the *ICERD* itself does not mention *FPIC*.
[74] *General Recommendation XXIII on Indigenous Peoples*, § 5. Rem.: If a restitution is not possible, Indigenous people should have the right to "just, fair and prompt compensation".
[75] BARELLI: *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples,* p. 3.
[76] Ibid., p. 3.
[77] Ibid., p. 3

change in the area", the concept of FPIC is of special importance in the Arctic area.[78]

That said, a long discussion has been carried on whether states should only *seek to obtain* a consent or whether they actually *need to obtain* the consent of Indigenous peoples, meaning that Indigenous peoples would have an actual veto right.[79] This problem shall be discussed in more depth in the following chapters. Influenced by the adoption of the *UNDRIP,* the *CERD* has taken a more rigorous stance, stating that states *need to obtain* the consent of Indigenous peoples when a project is supposed to take place on their lands.[80]

3.1.3. ***ILO Convention No. 169* (1989)**

Contrary to the *ICCPR* and the *ICERD,* which do not explicitly mention Indigenous peoples, the *ILO Convention No. 169* from 1989 is the only legally binding international document still open for ratification that specifically addresses the rights of Indigenous peoples.[81] However, only 24 states have ratified the *ILO Convention* so far,[82] which constitutes a strikingly low number compared to 173 states being parties to the *ICCPR*[83] as well as 182 to the *ICERD*.[84] Nevertheless, the *ILO Convention* has been very influential in the development of an Indigenous rights regime[85] and, consequently, plays a crucial role beyond its number of ratifications.[86] For our purpose, it shall be noted that Norway ratified the *ILO Convention* already in 1990 – as the very first state in the world –, while neither Sweden nor Finland have done so yet.[87] Contrary to the *ICCPR,* though, the *ILO Convention* has not been fully adopted into Norwegian law, which means that only parts of it are

[78] HEINÄMÄKI: *Legal Appraisal of Arctic Indigenous Peoples´ Right to Free, Prior and Informed Consent,* p. 336.
[79] See BARELLI: *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples;* see also HEINÄMÄKI: *Legal Appraisal of Arctic Indigenous Peoples´ Right to Free, Prior and Informed Consent.*
[80] BARELLI: *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples,* p. 12.
[81] Ibid., p. 9.
[82] International Labour Organization: "Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169)", https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314.
[83] United Nations Treaty Collection: Depositary: "4. International Covenant on Civil and Political Rights", https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.
[84] United Nations Treaty Collection: Depositary: "2. International Convention on the Elimination of All Forms of Racial Discrimination", https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en.
[85] BARELLI: *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples,* pp. 9-10.
[86] Ibid., p. 9.
[87] International Labour Organization: *Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169).* Rem.: Norway has for a long time been considered a leading power regarding Sami rights, see Chapter 3.2.1.

fully applicable. Finland has been considering to ratify the *Convention*, but has not done so yet.[88]

Notably, the goal of the *ILO Convention* from 1989 is to protect Indigenous peoples´ way of life based on their own priorities, instead of aiming to assimilate them into national cultures, as the previous *ILO Convention* from 1957 strived to do.[89] Art 13 *ILO Convention* provides that „governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories", while art 14 demands that the "rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised."

Furthermore, "measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities." Thus, a distinction between the lands which Indigenous peoples "traditionally occupy" and lands "not exclusively occupied by them" is central to the understanding of art 14.[90] Additionally, "particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect." Another significant provision in our context is art 8, according to which, when applying national laws, "due regards shall be had to their customs or customary laws".

One of the key provisions of the *Convention* is the right to be consulted, provided for in art 6, which the monitoring body described as the "cornerstone" of the *Convention*.[91] According to art 6 para 1 (a), the duty to consult Indigenous peoples applies "whenever consideration is being given to legislative or administrative measures which may affect them directly". The provision needs to be read in combination with art 15 para 2,[92] according to which, in cases where the state "retains the ownership for mineral or sub-surface resources […], governments shall establish or maintain procedures through which they shall consult these peoples, […] before undertaking or permitting any programmes for the exploration or exploitation of such resources". As a literal reading suggests, the *ILO Governing Body* has excluded that states *need to obtain* the consent of Indigenous peoples, not

[88] See ALLARD, Christina: "The Rationale for the Duty to Consult Indigenous Peoples: Comparative Reflections from Nordic and Canadian Legal Contexts", in: *Arctic Review on Law and Politics*, Vol. 9, 2018, p. 31.
[89] GRAVER, ULFSTEIN: *The Sami People's Right to Land in Norway,* p. 346.
[90] Ibid.*,* p. 348.
[91] BARELLI: *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples,* p. 10.
[92] Ibid., p. 10.

going as far as granting them an actual veto right.[93] Nevertheless, the consultation and participation requirement "may make nation states hesitant to ratify the Convention."[94]

In the context of relocation, the *Convention* contains not only a duty to consult but explicitly includes the word "consent". According to art 16, Indigenous peoples "shall not be removed from the lands which they occupy" unless relocation "is considered necessary as an exceptional measure". In case of such an exception, "relocation shall take place only with their free and informed consent" or, when a "consent cannot be obtained […] following appropriate procedures […] which provide the opportunity for effective representation of the peoples concerned". Thus, art 16 only applies in the case of relocation and, notably, does not include a veto right either.

3.1.4. *United Nations Declaration on the Rights of Indigenous Peoples* (2007)

The *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)* was adopted in 2007 by the *United Nations General Assembly* as the "first international instrument with universal character to recognise specific rights for indigenous peoples".[95] Contrary to the *ILO Convention,* though, it is merely a declaration and therefore does not contain any binding provisions. However, it has been suggested that at least the *UNDRIP´s* provisions regarding land rights are either customary international law or contain general principles of law.[96] Furthermore, the *UNDRIP* has an important political significance due to its long-standing negotiation process, actively involving states and representatives of Indigenous organisations, and due to the fact that it was adopted in a near-unanimous decision, with the text being crafted in a legally binding language.[97] It has also played an important role in "clarifying a confused legal framework", representing "the culmination of a complex legal and political process that led to the affirmation of a number of key rights and principles" regarding Indigenous peoples.[98]

Central to the *UNDRIP*, as the "heart and soul of the Declaration",[99] stands the right to self-

[93] BARELLI: *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples,* p. 11.
[94] RAVNA, Øyvind: "The Duty to Consult the Sámi in Norwegian Law", in: *Arctic Review on Law and Politics,* Vol. 11, 2020, p. 237.
[95] DE MATOS: *Cultural Identity and Self-Determination as Key Concepts,* p. 273.
[96] Ibid., p. 276.
[97] Ibid., pp. 275-276.
[98] BARELLI: *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples,* p. 17.
[99] DE MATOS: *Cultural Identity and Self-Determination as Key Concepts,* p. 277.

determination. Thus, art 3 *UNDRIP* provides that "Indigenous peoples have the right to self-determination" and "by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development". It has been shown that the scope of protection of Indigenous land rights is similar in both the framework of cultural identity (art 27 *ICCPR*) and the framework of self-determination (art 3 *UNDRIP*).[100] De Matos has referred to the process as an "unspoken dialog between both frameworks" because the *HRC* never explicitly refers to the *UNDRIP* in its decisions.[101] Another important provision is art 26 *UNDRIP,* which, *inter alia*, states that "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired".

Contrary to the *ILO Convention*, the *UNDRIP* explicitly refers to the concept of FPIC instead of only to consultation, requiring states to "cooperate in good faith with indigenous peoples concerned […] in order to obtain their free prior and informed consent before adopting and implementing legislative or administrative measures that may affect them" (art 19); a similar provision applies to projects which affect the Indigenous peoples´ territories and resources (art 32). However, the original draft of the *UNDRIP* included the duty that states *require to obtain* Indigenous people´s consent,[102] while the end version of art 32 obliges states only to "consult and cooperate in good faith with the indigenous peoples concerned […] *in order to obtain* their free and informed consent prior to the approval of any project affecting their lands or territories and other resources". The crucial change, thus, consists in the wording "consult […] in order to obtain" instead of "require to obtain", denying Indigenous peoples a de facto veto right in both art 19 and art 32.[103]

In contrast, in case of "storage or disposal of hazardous materials" (art 29 para 2) as well as relocation (art 10), an absolute prohibition of the planned activities "without their free, prior and informed consent" is included.[104] In those two cases, Indigenous peoples do indeed hold a veto power to block a project that is against their will. Beyond those two cases, the extent of FPIC still remains unclear. Barelli puts FPIC in connection with the right to self-determination (art 3) because "it would seem difficult to reconcile the right of indigenous peoples to pursue freely their economic

[100] DE MATOS: *Cultural Identity and Self-Determination as Key Concepts,* p. 284.
[101] Ibid., p. 284.
[102] BARELLI: *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples,* p. 19.
[103] Ibid, p. 21.
[104] See HEINÄMÄKI: *Legal Appraisal of Arctic Indigenous Peoples´ Right to Free, Prior and Informed Consent,* p. 340.

social and cultural development with the fact that development projects could take place on their lands without their consent and regardless of the consequences that the concerned activities could have on their cultures and lives."[105] A similar observation has been made in connection with the right to "own, use, develop and control" their "lands, territories and resources", provided for in art 26.[106] To read the provision through the right to self-determination, "strengthens the consultation rights" of the *UNDRIP* compared to the *ILO Convention*.[107]

Another way to look at the extent of FPIC is making it dependent on Indigenous interests involved and the impact a project may have on them.[108] In that sense, the *UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)* has found that the *UNDRIP* does *require* consent in cases "of fundamental importance to their rights, survival, dignity and well-being",[109] leaving Indigenous peoples with an actual veto power. This view is supported by both the *HRC* and the *Inter-American Court of Human Rights (IACtHR*).[110] In light of the altogether much stronger roots of FPIC in the *UNDRIP*, Heinämäki concludes that the *ILO Convention* embodies "the spirit of FPIC", while the *UNDRIP* embodies the "body of FPIC".[111] In line with what has been said above, "there is presently a shift from consultation to consent in International law".[112]

3.1.5. ***Nordic Sami Convention* (2017)**

The *Nordic Sami Convention* first got drafted in 2005, before a revised draft from 2016 was eventually signed by all three Nordic countries in 2017. However, the *Convention* is still not ratified yet. Central to the *Convention* is art 34 para 1, which provides that "protracted traditional use of land or water areas constitutes the basis for individual or collective ownership right to these areas for the Saami in accordance with national or international norms concerning protracted usage". Importantly, according to art 34 para 3 the "assessment of whether traditional use exists pursuant to this provision shall be made on the basis of what constitutes traditional Saami use of land and water and bear in mind that Saami land and water usage often does not leave permanent traces in the environment."

[105] BARELLI: *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples,* p. 18.
[106] Ibid., p. 18.
[107] HEINÄMÄKI: *Legal Appraisal of Arctic Indigenous Peoples´ Right to Free, Prior and Informed Consent,* p. 340.
[108] Ibid., p. 341.
[109] Ibid., p. 341.
[110] Ibid., p. 341.
[111] Ibid., p. 342.
[112] ALLARD: *The Rationale for the Duty to Consult Indigenous Peoples,* p. 26.

Thus, the article tackles one of the once main obstacles for the Sami in their struggle for territorial rights, namely the lack of visible traces to prove protracted usage.

The article was modelled after art 14 *ILO Convention* but probably goes even further than the *ILO Convention*.[113] Additionally, the draft also draws on the *Selbu* case,[114] when the Norwegian Supreme Court, for the first time, held that Sami use of land was sufficient to establish reindeer herding rights on the basis of immemorial usage.[115] Art 3 was drafted in context of the problematic nature of older case law[116] regarding the fact that Sami use of land often lacked visible traces.[117] Other important provisions are the right to self-determination in art 3 as well as art 4, which regulate who is eligible to vote in the Sami parliaments. Art 17 provides the right of the Sami parliaments to be consulted before decisions on matters that concern the interests of the Sami are made.

3.2. National Law

3.2.1. Norwegian Legislation

As already indicated above, Norway has for a long time been considered a "leading power" when it comes to the expansion of arctic Sami rights.[118] A "turning point" in this development became the controversial *Alta* case in 1978 regarding the building of a hydropower plant on the Alta-Kautokeino watercourse, which eventually began to spur Sami protection.[119] As a consequence, the case led to the establishment of the *Sami Rights Committee* in 1980 and to the adoption of legislation aimed to protect the Sami, including the *Sami Act* in 1987 and a constitutional amendment protecting Sami language, culture and way of life in 1988.[120] Art 108 of the *Constitution*, which provides that "authorities of the state shall create conditions enabling the Sami people to preserve and develop its language, culture and way of life", is modelled after art 27 *ICCPR.*[121] In addition to ratifying the *ILO Convention* already in 1990, Norway was also on the forefront at the adoption of the *UNDRIP*[122]

[113] RAVNA: *The Draft Nordic Saami Convention and the Assessment of Evidence of Saami Use of Land,* p. 179.
[114] Ibid., p. 187.
[115] See Chapter 4.2.
[116] RAVNA: *The Draft Nordic Saami Convention and the Assessment of Evidence of Saami Use of Land,* p. 179.
[117] See Chapter 2.2.
[118] RAVNA: *Sami Rights and Law in Norway – with a Focus on Recent Developments,* p. 143.
[119] Ibid., p. 143.
[120] Ibid., p. 143.
[121] Ibid., p. 145.
[122] Ibid., p. 143.

and provided ground-breaking Supreme Court decisions in the *Selbu*[123] and *Svartskogen*[124] cases.

The *Reindeer Husbandry Act* from 2007, which is particularly important for our purpose, aims at facilitating "an ecologically, economically and culturally sustainable reindeer herding based on Sami culture, tradition and custom for the benefit of the reindeer herding population itself and society at large."[125] The act emphasises Sami traditions and customs, refers to international law on Indigenous peoples and minorities and, *inter alia*, places the burden of proof whether reindeer-herding rights exist on the landowners.[126] Importantly, the *Reindeer Husbandry Act* provides that within the Sami reindeer grazing area the right to reindeer herding belongs exclusively to the Sami.[127]

The right to be consulted first got installed in two *Consultation Agreements* between the state and the Sami parliament in 2005 and 2007, implementing Norway´s obligations under international law, above all art 6 *ILO Convention.*[128] The basic *Consultation Agreement* from 2005 was, in Allard´s words, "the single most important undertaking for Sami rights in Norway, in that it gives the Sami the right to participate and influence decision-making at all stages where Sami interests and cultures are directly affected."[129] The *Agreements* grant the Sami the right to be consulted in matters directly affecting them, including influence over the drafting of new legislation; that said, it does not give them any veto power.[130] According to the *Agreements*, the consultation process needs to be conducted with the Sami parliament as well as other Sami groups, such as reindeer herders.[131]

In July 2021, the consultation duty has been included in Chapter 4 of the *Sami Act,* which does not contain any veto power either. Compared to Sweden and Finland, the consultation process works rather well in Norway;[132] however, a limited examination of the *Norwegian National Human Rights Institution* has shown that particularly in land-use interference and land management matters agreement often cannot be reached.[133]

[123] See Chapter 4.2.
[124] See Chapter 4.3.
[125] § 1 *Reindeer Husbandry Act,* Norway, 2007.
[126] RAVNA: *Sami Rights and Law in Norway – with a Focus on Recent Developments,* p. 146; see also Chapter 4.2.
[127] § 4 in conjunction with § 9 and § 32 *Reindeer Husbandry Act,* Norway, 2007.
[128] ALLARD: *The Rationale for the Duty to Consult Indigenous Peoples,* pp. 28-29.
[129] Ibid., p. 29.
[130] Ibid., p. 29.
[131] Ibid., p. 30.
[132] Ibid., p. 36.
[133] Norwegian National Human Rights Institution: "Report: Human Rights Protection against Interference in Traditional Sami Areas", Chapter 7, "The Way Forward", https://www.nhri.no/en/report/human-rights-protection-against-interference-in-traditional-sami-areas/7-the- way-forward/.

3.2.2. Swedish Legislation

In Sweden, the Sami have been constitutionally recognised as an Indigenous people since 2010.[134] However, despite a lot of international criticism,[135] a ratification of the *ILO Convention* is presently "unforeseeable".[136] For a long time, Sweden had no right to consult at all, evoking criticism of lagging behind Norway and Finland.[137] In January 2022, a new law, the *Sami Parliament Consultation Order*, got adopted by the Swedish Parliament.[138] The bill is inspired by the Norwegian consultation model, the *Nordic Sami Convention* as well as recommendations from human rights´ monitoring bodies.[139] Similar to Norwegian legislation, it contains the duty to consult with the Sami parliament or other Sami representatives but does not include a veto right.[140]

Unlike Norwegian legislation, though, the Swedish law requires the issue in question to be of "significant importance" to the Sami for the consultation duty to take place.[141] In contrast, the Norwegian legislation – in line with the *ILO Convention* – only requires measures to affect the Sami people directly, without the requirement of significant importance.[142] Thus, the new Swedish consultation model represents an improvement but still falls short of the Norwegian one.

In Sweden, reindeer herding rights are regulated by the *Reindeer Herding Act* from 1971, according to which the right to reindeer herding belongs exclusively to the Sami. The right is not held by the individual Sami but by a so-called "sameby", a Sami village of which 51 exist in Sweden.[143] A sameby constitutes a legal entity that is composed of Sami individuals in a certain geographical

[134] ALLARD, BRANNSTRÖM: *Girjas case,* p. 64.
[135] See, most recently, HIRSHON, Sara: "Sweden's Secret Human Rights Violations: The Sámi Fight for the Right to Traditional Lands", Law School Student Scholarship 1145, Seton Hall University, 2022, https://scholarship.shu.edu/student_scholarship/1145.
[136] ALLARD: *The Rationale for the Duty to Consult Indigenous Peoples,* p. 27.
[137] Ibid., p. 34.
[138] HOFVERBERG, Elin: "Sweden: Swedish Parliament Adopts Sami Parliament Consultation Order", Library of Congress, 03/02/2022, https://www.loc.gov/item/global-legal-monitor/2022-02-03/sweden-swedish-parliament-adopts-sami-parliament-consultation-order/.
[139] See ALLARD: *The Rationale for the Duty to Consult Indigenous Peoples,* p. 33.
[140] HOFVERBERG: *Sweden: Swedish Parliament Adopts Sami Parliament Consultation Order.*
[141] Ibid.
[142] See Chapter 3.1.2.
[143] § 1 *Reindeer Herding Act,* Sweden, 1971. HOFMANN, Rainer: "Case Note Swedish Supreme Court (Högsta Domstolen), Girjas Sameby, Case No T 853-18 (23 January 2020), Recognition of Sami Indigenous People's Exclusive Right to Confer Hunting and Fishing Rights in Girjas Sameby Area", International Law Association, Committee on the Implementation of the Rights of Indigenous Peoples, 2020, https://www.ila-hq.org/en_GB/committees/implementation-of-the-rights-of-indigenous-peoples.

area, exercising administrative and financial functions as foreseen in the *Reindeer Herding Act.*[144]

The right to reindeer-herding, which includes the right to (small game) hunting and fishing,[145] is practised for both the Sami´s own living and for sale.[146] Despite various reform proposals, the *Reindeer Herding Act* has not been amended to properly implement Sami rights,[147] raising issues which will be further discussed in the context of the *Girjas* case.[148]

3.2.3. Finnish Legislation

In Finland, the Sami have a constitutional right to maintain and develop their own language and culture.[149] Apart from that, they are currently granted linguistic and cultural self-government only in a demarked area in the far north of Finland, the "Sami homeland".[150] Likewise, the constitutional duty to consult, enshrined in section 9 of the *Sami Parliament Act* from 1995, is geographically limited to the "Sami homeland".[151] The "Sami Homeland" encompasses about ten percent of Finland, even though some scholars claim that the traditional Sami territory is actually larger.[152]

Contrary to Norway and Sweden, the duty to consult entails consultation only with the Sami parliament, excluding local Sami groups such as reindeer-herders.[153] The scope of the duty to consult includes, *inter alia*, land management, exploration and extraction of minerals on state-owned lands, amendments in legislation related to Sami livelihoods, Sami education and Sami health care, concerning "far reaching and important measures which may directly and in a specific way affect the status of the Sámi as an indigenous people".[154] In contrast to Norway and Sweden, the right to reindeer herding does not belong exclusively to the Sami population in Finland.[155]

[144] HOFMANN: *Case Note Swedish Supreme Court*, p. 1.
[145] ALLARD, BRANNSTRÖM: *Girjas case,* p. 59.
[146] Ibid., p. 58.
[147] BRANNSTRÖM, Malin: "The Girjas Case – Court Proceedings as a Strategy to Enforce Sámi Land Rights", in: Koivurova, Timo et al. (eds.): *Routledge Handbook of Indigenous Peoples in the Arctic,* London and New York: Routledge 2021, p. 178.
[148] See Chapter V.
[149] *Constitution of Finland 1999,* section 17, para 3.
[150] *Constitution of Finland 1999,* section 121, para. 3; see ALLARD: *The Rationale for the Duty to Consult Indigenous Peoples,* p. 36.
[151] See ALLARD: *The Rationale for the Duty to Consult Indigenous Peoples,* p. 31.
[152] Ibid.
[153] Ibid.
[154] *Sami Parliament Act,* Finland, 1995, section 9 para 1; see ALLARD: *The Rationale for the Duty to Consult Indigenous Peoples,* p. 31.
[155] See *Reindeer Husbandry Act,* Finland, 1990.

After intergovernmental disagreements had caused a significant delay,[156] a proposed new *Sami Parliament Act* recently failed to get past the final committee stage in parliament, with Finland´s right-wing parties voting against it.[157] The new bill was supposed to contain Sami self-determination without any geographical limitation but has been highly controversial especially due to its criteria for deciding who is a Sami and may be registered as a voter in the Sami parliament elections.[158] On the one hand, the proposed act has brought Sami rights to the centre of national attention;[159] on the other hand, it has also raised doubts whether Sami rights are being used as "pawns in the game of Finnish national politics".[160] Given the failure to get parliamentary approval, being at the centre of national attention has eventually resulted in a setback for the Sami. Moreover, Finland planned to ratify the *ILO Convention* but has not done so yet, after a drafted bill was unexpectedly tabled in 2015.[161]

3.2.4. ***Finnmark Act* (2005)**

An essential question for the Norwegian Sami concerns the land and territorial rights of Finnmark, an area larger than Denmark in the northernmost part of the Norwegian mainland, where the Sami make up from one-quarter to one-third of the population; in parts of Inner Finnmark even around four-fifths of the population are Sami.[162] In 2005, the *Finnmark Act*[163] transferred the ownership of the once state-owned Finnmark county to a private company named *Finnmark Estate*, whose board of directors consists of three people appointed by the Norwegian Sami parliament and three people appointed by the *Finnmark County Council*, with all of them being residents of Finnmark.[164] It is, thus, now up to the *Finnmark Estate* to administer the land and natural resources,[165] which means

---

[156] MAC DOUGALL, David: "Sanna Marin´s government could collapse, as Sámi human rights laws stalled", Euronews, 14/11/2022, https://www.euronews.com/my-europe/2022/11/14/sanna-marins-government-could-collapse-as-sami-human-rights-laws-stalled.
[157] MAC DOUGALL, David: "´Sad, angry, betrayed and empty´: Sanna Marin´s human rights reforms for indigenous Sámi fails", Euronews, 24/02/2023, https://www.euronews.com/2023/02/24/sad-angry-betrayed-and-empty-sanna-marins-human-rights-legislation-for-indigenous-sami-fai.
[158] MAC DOUGALL: *Sanna Marin´s government could collapse, as Sámi human rights laws stalled;* "KORTEKANGAS, Otso; JOHNSTONE, Rachael Lorna: "In Finland, Sámi Rights Take Central Stage In National Politics": in JusticeInfo.net, 09/12/2022, https://www.justiceinfo.net/en/110023-finland-sami-rights-central-stage-national-politics.html.
[159] KORTEKANGAS, JOHNSTONE: *In Finland, Sámi Rights Take Central Stage In National Politics.*
[160] Ibid.
[161] ALLARD: *The Rationale for the Duty to Consult Indigenous Peoples,* p. 31.
[162] SPITZER, Aaron John; Selle, Per: "A Sami land-claims settlement? Assessing Norway´s Finnmark Act in a comparative perspective", in: *Scandinavian Political Studies,* 15/06/2023, https://onlinelibrary.wiley.com/doi/epdf/10.1111/1467-9477.12260, p. 6.
[163] *Act of 17 June 2005 No. 85 relating to legal relations and management of land and natural resources in the county of Finnmark (Finnmark Act).*
[164] See section 7 of the *Finnmark Act*. Rem.: To be precise, only 95 % of the ownership was transferred to the *Finnmark Estate.*
[165] See section 6 of the *Finnmark Act.*

that the population of Finnmark themselves shall indirectly decide over the administration of the land in the county.[166] Even though the primary goal of the *Finnmark Act* was to fulfill Norway´s obligation under the *ILO Convention,*[167] in particular art 14 regarding ownership, possession and use of lands, the *Finnmark Act* is ethnically neutral.[168]

A special commission called *Finnmark Commission* was set up to examine the rights of Sami as well as non-Sami locals, investigating existing ownership or limited rights, based on immemorial prescription, immemorial usage or other proprietary concepts.[169] Being ethnically neutral, the commission may find rights of Sami as well as non-Sami, either individually or collectively.[170] Disputes after the investigation of the *Finnmark Commision* may be brought before a special court, the *Uncultivated Land Tribunal for Finnmark*,[171] with the possibility to appeal to the Supreme Court.[172] The establishment of the *Finnmark Act* goes back to the above-mentioned *Alta* case, which the Sami lost, and also results from Norway ratifying the *ILO Convention.*[173] Like the *Nordic Sami Convention,* the *Finnmark Act* also draws on the *Selbu* case,[174] which will be discussed below.[175]

However, the impact of the *Finnmark Act* has not been as significant as predicted by the Ministry,[176] raising criticism that for more than a decade "neither the Finnmark Commission nor the courts had found examples of Sámi collective property rights or usage rights beyond what is already stipulated in the Finnmark Act."[177] Due to its lack of significant impact, the *Finnmark Act* has been called "not a successful settlement" and "in several ways […] dysfunctional".[178] Finally, this may change with the ongoing *Karasjok* case, where the *Finnmark Commission* did eventually find collective ownership rights of the local population – an unprecedented case which will be discussed in more detail below.[179]

[166] See *The Finnmark Act – A guide, Issued by the Ministry of Justice and the Police and the Ministry of Local Government and Regional Development* (2005), p. 2.
[167] See RAVNA, Øyvind: "The First Investigation Report of the Norwegian Finnmark Commission", in: *International Journal on Minority and Group Rights 20,* Vol. 20, No. 3, 2013, p. 444.
[168] See *The Finnmark Act – A guide* (2005), p. 2.
[169] ALLARD: *The Rationale for the Duty to Consult Indigenous Peoples,* p. 2.
[170] SPITZER, *A Sami land-claims settlement? Assessing Norway´s Finnmark Act in a comparative perspective*, p. 5.
[171] See Section 36 of the *Finnmark Act.*
[172] See Section 42 of the *Finnmark Act.* See also *Nesseby* case, Chapter 4.6.
[173] RAVNA: *Sami Rights and Law in Norway – with a Focus on Recent Developments,* p. 146.
[174] RAVNA: *The Draft Nordic Saami Convention and the Assessment of Evidence of Saami Use of Land,* p. 187
[175] See Chapter 4.2.
[176] RAVNA: *Sami Rights and Law in Norway – with a Focus on Recent Developments,* p. 146.
[177] Ibid., p. 155.
[178] SPITZER, *A Sami land-claims settlement? Assessing Norway´s Finnmark Act in a comparative perspective*, p. 17.
[179] See Chapter 6.2.

3.2.5. Concepts of Immemorial Usage and Immemorial Prescription

A crucial element of Norwegian and Swedish Sami court cases has been the application of "immemorial usage" and "immemorial prescription". Both concepts, which have their origins in Nordic peasant communities during the Middle Ages,[180] contain the obtainment of a right based on the sufficiently intensive, continuous and exclusive long-term use of a certain area in good faith.[181] While the conditions for both are similar, the main difference lies in the fact that immemorial prescription is a statutory law, while immemorial usage is based on customary law. Thus, prescription rights "have been part of written law since the medieval codes",[182] whereas immemorial usage is an old unwritten proprietary doctrine which "provides that one can establish ownership or lesser rights based upon use over time" even under somewhat vague conditions.[183]

While in Norway immemorial usage is predominantly applied by courts, in Sweden (and Finland) it is immemorial prescription, which has been codified since medieval times and was included in the Swedish *Real Property Code of 1734.*[184] Still, the three conditions for both are a certain use over a certain time period in good faith. The most obvious difference between both lies in the time period, which is much longer for immemorial usage. In Norway, prescriptive laws include „ownership prescription" with a prescriptive time period of 20 years and „usufruct prescription" with a time frame of 50 years, while for immemorial usage a longer time span from 50 to 150 years has been suggested, making it about 100 years as a "rule of thumb".[185] In Sweden, the traditional required time span of immemorial prescription is assumed to be approximately 90 years;[186] however, this has recently been adapted in the *Girjas* case by applying a more flexible standard.[187]

[180] RAVNA, Øyvind; BANKES, Nigel: "Recognition of Indigenous Rights in Norway and Canada", in: *International journal on minority and group rights,* Vol. 24, No. 1, 2017, p. 76.
[181] ALLARD: *The Nordic countries' law on Sami territorial rights,* p. 8.
[182] Ibid., p. 9.
[183] Ibid., p. 8.
[184] See ibid., p. 15. Rem.: In the 1970ies, the doctrine ended with the new *Real Property Code*, but already established rights continue to exist due to transitional rules (ibid., p. 15). Given the common history of both states, the Swedish *Real Property Code* was also applicable in Finland until recently. Since 1997, Finland has a new *Real Property Code*, but the possibility to claim immemorial prescription continues (ibid., p. 20). However, the doctrine has been more important in Sweden since Finland has had significantly fewer Sami court cases. Norway also has an *Act of Prescription* from 1966, but Norwegian courts predominantly apply immemorial usage.
[185] ALLARD: *The Nordic countries' law on Sami territorial rights,* p. 168.
[186] The Supreme Court of Sweden, *The State of Sweden v. Girjas sameby*, judgement January 23, 2020, T-853-18 (The Girjas Case), § 140. Rem.: Statutory law does not specify the required time span; however, in the literature about 90 years have been assumed (*The Girjas case,* § 140).
[187] See Chapter 5.1.

In compensation for the longer time period, the intensity of use is more lenient for immemorial usage, even accepting interruptions and discontinuities, e.g., due to seasonal or weather conditions.[188] While interruptions lasting over two years mean that an ownership prescription is broken, the more flexible doctrine of immemorial usage may still be applied.[189] Thus, immemorial usage on the one hand requires a much larger time span but on the other hand makes the establishment of a right easier due to a lower threshold regarding the intensity of the use and a higher acceptance of interruptions. The longer time span is seen as compensation for the fact that the owner of the land has a reduced opportunity to react to the use of the claimant, if it is not always visually obvious.[190]

Another difference consists in the fact that courts are given a larger margin of appreciation to freely assess all facts together in immemorial usage cases, e.g., allowing a less intensive land use to be compensated by a longer period of use and *vice versa.*[191] This can be explained by the fact that immemorial prescription targets settled lifestyles and visible land uses, whereas customary law is unwritten and thus easier to adapt.“[192] According to prescriptive rules, „the prescriptive usage is required to be of the same scope as the usage that the lawful owner or right holder would have made of the land“.[193]

When it comes to the requirement of good faith, this condition equally applies to immemorial usage and immemorial prescription.[194] However, for collective immemorial usage of land the threshold for good faith is lower than for prescription since it lacks relevance if a few of the users are not in good faith.[195] Usually, the requirement of good faith is seen as the most difficult one to assess.[196] In addition to the requirement that the claimant of the land needs to be prudent and honest, the basis for the evaluation is not what the claimant knows, but what they should have known, having actively searched for knowledge.[197]

In line with what has been said above, it is clear that courts have struggled for a long time to properly

[188] ALLARD: *The Nordic countries‘ law on Sami territorial rights,* p. 169.
[189] Ibid., p. 168.
[190] RAVNA, BANKES: *Recognition of Indigenous Rights in Norway and Canada,* p. 79.
[191] ALLARD, *The Nordic countries‘ law on Sami territorial rights,* p. 10. See, however, Chapter 5.1. regarding prescription.
[192] ALLARD, BRANNSTRÖM: *Girjas case,* p. 66.
[193] RAVNA, BANKES: *Recognition of Indigenous Rights in Norway and Canada,* pp. 78-79.
[194] ALLARD: *The Nordic countries‘ law on Sami territorial rights,* p. 11.
[195] Ibid., p. 11.
[196] RAVNA, BANKES: *Recognition of Indigenous Rights in Norway and Canada,* p. 80.
[197] Ibid., p. 80.

take into account the specific and less intensive use of Indigenous peoples´ territories. For example, in the *Trollheimen* case of 1981, the Norwegian Supreme Court did not consider the requirement of intensive usage fulfilled, since "the reindeer just occasionally came into an area".[198] In the following, an overview of significant court cases shall be given before subsequently turning to three recent Supreme Court cases.

IV. Overview of Court Cases

4.1. *Taxed Mountains* (Sweden, 1981)

The Swedish *Taxed Mountains* case from 1981 marked the first case – and for the following decades the only case – where the Sami were at least semi-successful before a Supreme Court. The complex case involved Sami claims on both ownership and reindeer herding rights regarding an area known as the "Taxed Mountains", close to the Norwegian border.[199] Eventually, the Swedish Supreme Court held that the reindeer herding right was a strong usufruct right,[200] namely a constitutionally protected right based on immemorial prescription that does not depend on an additional statute.[201] As mentioned above, reindeer herding is carried out on about 35-40 % or even some 50 % of Sweden´s land surface, with both private and public estates being utilised.[202] Therefore, the decision of the Swedish Supreme Court to qualify the reindeer herding right as a constitutionally protected usufruct right has also been significant to various other reindeer herders.

With regard to ownership, though, the court ruled that the Sami land use was not sufficiently intensive or exclusive to establish ownership based on immemorial prescription and, consequently, the state was the owner of the area due to a decree of 1683.[203] However, for the first time ever the court accepted the idea that in general the Sami may acquire ownership through reindeer herding, hunting and fishing based on immemorial prescription,[204] even if in the concrete case the land use was not seen as sufficiently intensive or exclusive.

[198] RAVNA, BANKES: *Recognition of Indigenous Rights in Norway and Canada,* p. 79.
[199] ALLARD: *The Nordic countries' law on Sami territorial rights,* pp. 17-18.
[200] Ibid., p. 18.
[201] ALLARD, BRANNSTRÖM: *Girjas case,* p. 58.
[202] See Chapter 2.1.
[203] ALLARD: *The Nordic countries' law on Sami territorial rights,* p. 18.
[204] Ibid., p. 18.

4.2. *Selbu* (Norway, 2001)

Considering the fact that for a long time the Sami semi-nomadic way of life had been seen as insufficient for establishing land rights, the *Selbu* and *Svartskogen* cases from 2001 have been described as a "major turning point" and a "paradigm shift"[205] in Norwegian Sami rights.[206] The *Selbu* case concerned the right to reindeer husbandry in two privately owned areas in the Municipal Authority Area of Selbu in central Norway.[207] The case was not decided on the basis of already established international provisions but merely on the basis of national law, following the concept of immemorial usage.[208] In contrast to previous jurisprudence, the Norwegian Supreme Court regarded the land use of the Sami as sufficient to establish a reindeer herding right on the basis of immemorial usage.[209]

As part of the judgement, the Norwegian Supreme Court identified the above-mentioned three conditions for the application of immemorial usage, namely a certain amount of use over a long period of time in good faith as to the legitimacy of the use.[210] The court emphasised the specificities of traditional reindeer husbandry and the nomadic lifestyle of the Sami, which require a different approach than the activities of non-Sami grazing animals.[211] *Inter alia*, it took into account the fact that pasturage may vary from year to year depending on the weather conditions, which is why a yearly pasturage in a specific area cannot be required, and, consequently, pauses in the land use need to be accepted in order to fulfil the criteria of immemorial usage.[212] As already explained above, the concept of immemorial usage is more flexible than immemorial prescription, allowing for interruptions and a lower intensity of usage, while on the other hand requiring a much larger time span.[213] The latter requirement was regarded as fulfilled by the court, taking into account a usage during at least the whole 20th century.[214]

Another essential part of the judgement was the emphasis of the court on the fact that Sami usage

[205] RAVNA: *The Draft Nordic Saami Convention and the Assessment of Evidence of Saami Use of Land,* p. 188.
[206] ALLARD: *The Nordic countries' law on Sami territorial rights,* p. 7.
[207] See *Selbu*: Supreme Court of Norway, serial number 4B/2001, judgement 21 June 2001.
[208] ALLARD: *The Nordic countries' law on Sami territorial rights,* p.12.
[209] Ibid., p. 13.
[210] See RAVNA: *The Draft Nordic Saami Convention and the Assessment of Evidence of Saami Use of Land,* p. 188. See also Chapter 3.2.5.
[211] ALLARD: *The Nordic countries' law on Sami territorial rights,* p. 13.
[212] Ibid., p. 13.
[213] See Chapter 3.2.5.
[214] ALLARD: *The Nordic countries' law on Sami territorial rights,* p. 13.

often does not leave visible traces in the landscape.[215] As one judge pointed out, the nomadic lifestyle of the Sami needs to be taken into account as well as their use of mostly organic material which, due to its decay and returns to nature, is unlikely to leave physical evidence of use of the land.[216] Moreover, another important aspect of the *Selbu* case consists in the decision of the court to lay the burden of proof upon the property owners if the case regards pasture areas within the Norwegian reindeer herding area.[217] This reversal of the burden of proof is based on the Norwegian *Reindeer Husbandry Act*, which was amended in 1996 in order to create the presumption that pastoral rights exist in reindeer husbandry as long as no other legal situation is proven.[218]

Thereby, the Norwegian Supreme Court set aside three earlier cases where it had regarded reindeer herding use as not sufficiently intensive and continuous.[219] As mentioned above, both the *Finnmark Act* and the *Nordic Sami Convention* draw on the *Selbu* case, with the latter stating that the "assessment of whether traditional use exists pursuant to this provision shall be made on the basis of what constitutes traditional Saami use of land and water and bear in mind that Saami land and water usage often does not leave permanent traces in the environment."[220] As Ravna points out, another reason why the *Selbu* case is so crucial lies in the fact that the judgement was "a plenary decision of the Norwegian Supreme Court and, as such, a substantial source of law."[221]

4.3. ***Svartskogen*** **(Norway, 2001)**

While the *Selbu* case was ground-breaking as the first time ever the Sami were granted reindeer herding rights by the Norwegian Supreme Court, the *Svartskogen* case from the same year constituted the first time the Sami were granted property rights. In the latter case, the court had to decide whether the state or the local Sami were the owners of a land area in northern Norway, including an area called "Svartskogen".[222] Thus, contrary to the *Selbu* case, which dealt with rights on a privately owned territory, the opponent in the *Svartskogen* case was the state. The area in question was used for farming, hunting and fishing by a local community comprised of a Sami

[215] RAVNA: *The Draft Nordic Saami Convention and the Assessment of Evidence of Saami Use of Land,* p. 197.
[216] Ibid., p. 192.
[217] ALLARD: *The Nordic countries' law on Sami territorial rights,* p. 12.
[218] Ibid., pp. 188-189.
[219] ALLARD: *The Nordic countries' law on Sami territorial rights,* p. 12.
[220] Art 34 para 3 *Nordic Sami Convention.*
[221] RAVNA: *The Draft Nordic Saami Convention and the Assessment of Evidence of Saami Use of Land,* p. 197.
[222] ALLARD: *The Nordic countries' law on Sami territorial rights,* p. 14.

majority.[223]

Like the *Selbu* case, the *Svartskogen* case was decided based on the concept of immemorial usage. The court found an overall sufficiently intensive use over a period of more than 100 years and held that, because of the nature of a communal use, it was not necessary that all members of the community had used the area regularly and intensively.[224] The court also saw the criterion of good faith fulfilled, even if there was evidence that the state had at times tried to regulate and seize the lands; however, for the most part it had not pursued those efforts.[225] Furthermore, there had never been any disputes with neighbouring communities regarding the land use, strengthening the argument of the exclusivity of the usage.[226]

4.4. ***Nordmaling*** **(Sweden, 2011)**

After the *Taxed Mountains* case in 1981, it took 30 years until another case related to Sami rights was brought before the Swedish Supreme Court. While in the *Taxed Mountains* case the court had ruled that the Sami land use was not sufficiently intensive or exclusive to establish ownership,[227] the *Nordmaling* case eventually marked the first time the Swedish Sami were fully successful before the Supreme Court. The case was brought before the courts by some hundred private landowners in Nordmaling Municipality, Northern Sweden, who sued three Sami villages, claiming that no right to winter-pasture existed on their properties.[228] Eventually, the Swedish Supreme Court rendered a judgement similar to the Norwegian Supreme Court in the *Selbu* case.

Contrary to the *Taxed Mountains* case, the adversary in the *Nordmaling* case was not the state but private landowners.[229] Also, while the *Taxed Mountains* case concerned reindeer herding rights on year-around areas, the *Nordmaling* case concerned reindeer herding rights on winter-pasture areas. At the time, this distinction seemed important because, contrary to the *Taxed Mountains* case, the court based its decision in the *Nordmaling* case on customary law instead of immemorial prescription. Therefore, at the time of the judgement, it was not clear whether that meant that the

[223] ALLARD: *The Nordic countries' law on Sami territorial rights,* p. 14.
[224] Ibid., p. 14.
[225] Ibid., p. 15.
[226] Ibid., p. 14.
[227] See Chapter 4.1.
[228] ALLARD, Christina: "Case review: The Swedish Nordmaling Case", in*: Arctic Review on Law and Politics,* Vol. 2, No. 2, 2011, p. 225.
[229] Ibid., p. 225.

concept of customary law should in the future be applied to *all* cases concerning reindeer herding rights or only to cases concerning winter-pasture areas, while cases concerning year-around areas required an application of immemorial prescription.[230] Nevertheless, the judgement was described as an "elegant and convincing solution of the problems"[231] and as "rare to see in Swedish courts where the element of judge-made law is restrained and subordinate".[232]

4.5. *Jovsset Ánte Sara* (Norway, 2017)

In *Jovsset Ánte Sara*, a 25-year-old leader of a siida unit had to reduce his reindeer herd from 116 to 75 animals due to a decision of the *Reindeer Husbandry Board* based on section 60 subsection 3 of the *Reindeer Husbandry Act*.[233] The Norwegian Supreme Court had to assess whether the decision constituted a violation of the Sami´s right to enjoy their own culture under art 27 *ICCPR* and/or of the protection of property under the first additional protocol to the *ECHR*.[234] The court referred to a Peruvian case before the *HRC* from 2009, *Angela Poma Poma v Peru,*[235] according to which a measure violates art 27 *ICCPR* "when the minority group could no longer receive economic yield from their livelihood due to a state decision, which did not involve them."[236] However, the court stated that, contrary to the *Poma Poma* case, the Norwegian order in question did not concern a "greater society´s interference with a minority interest" but rather intended to protect the interests of the Sami reindeer herders themselves as a group.[237]

Thus, the court regarded the *HRC´s* case law as not significant for *internal* Sami issues, since, if Sara had been allowed to keep his number of animals, other practitioners would have had to reduce their reindeer disproportionately.[238] Because overgrazing had been a problem for decades,[239] a reduction of the number of reindeer was necessary out of concern for the reindeer husbandry;[240] moreover, the measure was deemed to be objective and reasonable,[241] with prior consultations between the

[230] ALLARD: *Case review: The Swedish Nordmaling Case,* p. 225. Rem.: The issue was later resolved in the *Girjas* decision, see Chapter 5.1.
[231] BENGTSSON, Bertil: "Nordmaling verdict – a short comment", in: *Svensk Juristtidning,* 2011, p. 527.
[232] ALLARD: *Case review: The Swedish Nordmaling Case,* p. 227.
[233] *Jovsset Ánte Sara:* Supreme Court of Norway, HR-2017-2428-A, Case No. 2017/981, judgement 21/12/2017, § 2, § 8.
[234] *Jovsset Ánte Sara,* § 31.
[235] See also Chapter 5.2.2.
[236] RAVNA: *Sami Rights and Law in Norway – with a Focus on Recent Developments,* p. 149.
[237] *Jovsset Ánte Sara,* § 71.
[238] RAVNA: *Sami Rights and Law in Norway – with a Focus on Recent Developments,* p. 149.
[239] *Jovsset Ánte Sara,* § 80.
[240] *Jovsset Ánte Sara,* § 81.
[241] *Jovsset Ánte Sara,* § 94.

authorities and the Sami Parliament.[242] Also, Sara´s "reindeer herd was so small that he could hardly profit from the activity" even before the order, since, at the time he became a siida leader, there were already too many reindeer in the district.[243] As a consequence, the order did not violate art 27 *ICCPR,*[244] and the court did not find any violation of the *ECHR* either.[245]

4.6. ***Nesseby* (Norway, 2018)**

In the *Nesseby* Case, the Norwegian Supreme Court had to decide in a dispute regarding who may regulate fishing, hunting and the use of natural resources in Nesseby, Finnmark.[246] As elaborated above, the *Finnmark Act* provides for the possibility to appeal a decision of the *Uncultivated Land Tribunal for Finnmark* to the Supreme Court.[247] The question in the case at hand was whether a local organisation led by Sami members only had user rights based on immemorial usage or, additionally, also the right to manage and administer the resources which the user rights were tied to.[248] According to the Supreme Court, the local organisation only had non-exclusive user rights, while the right to regulate user rights, namely to determine who may hunt and fish, remained to the *Finnmark Estate* as the owner of the land.[249]

The Supreme Court argued that the use of the disputed area by the local organisation had not been exclusive, since other groups had also made substantial use of the area.[250] Unlike the *Svartskogen* case, the disputed area in the *Nesseby* case is not distinctively demarcated, leaving it open for the exploitation of natural resources by inhabitants living outside the area.[251] As a consequence, those non-exclusive rights were not seen as sufficient to set aside the management authority of the *Finnmark Estate* as the landowner of the area.[252] Thus, the case does not concern ownership but the

[242] *Jovsset Ánte Sara,* § 90.
[243] *Jovsset Ánte Sara,* § 87.
[244] *Jovsset Ánte Sara,* § 94.
[245] *Jovsset Ánte Sara,* § 105.
[246] HOFVERBERG, Elin: "Supreme Court: Finnmark Estate Agency has Right to Regulate Fishery, Hunting and Use of Natural Resources in Finnmark", Library of Congress, 30/03/2018, https://www.loc.gov/item/global-legal-monitor/2018-03-30/norway-supreme-court-finnmark-estate-agency-has-right-to-regulate-fishery-hunting-and-use-of-natural-resources-in-finnmark/.
[247] See Chapter 3.2.4.
[248] HOFVERBERG: *Supreme Court: Finnmark Estate Agency has Right to Regulate Fishery, Hunting and Use of Natural Resources in Finnmark.*
[249] Ibid.
[250] *Nesseby,* Supreme Court of Norway, HR-2018-456-P, Case No. 2017/860, judgement 09/03/2018, § 150.
[251] *Nesseby,* § 152.
[252] *Nesseby,* § 156.

use of lands not exclusively occupied by Indigenous peoples, which is why art 14 para 1 second sentence *ILO Convention* needs to be applied.[253] While the local organisation claimed that the management system in the *Finnmark Act* did not meet the requirements of the *ILO Convention,*[254] the Supreme Court did not see any violation of the *Convention.*

4.7. ***Saarivuoma*** **(Norway, 2021)**

The *Saarivuoma* case concerns the right of the Swedish Saarivuoma Sami village, northern Sweden, to graze their reindeer on the Norwegian side of the border.[255] For a long time, reindeer herding across the Swedish-Norwegian border has been a controversial issue between different Sami groups as well as between Sami and non-Sami populations.[256] As the Norwegian Supreme Court acknowledged, herding in that area has its roots far back in time and took place already before the border between Norway and Sweden was drawn in 1751.[257] However, due to the *Reindeer Grazing Act* from 1972, which Norway unilaterally continued after its expiration in 2005, the Swedish Sami had to give up their cross-border grazing rights.[258] Thus, the Saarivuoma Sami claimed they still had the exclusive right to reindeer herding in the disputed area.[259] The Supreme Court decided by a majority of 4-1 that grazing rights did exist due to immemorial usage regardless of any limitations in Norwegian statutory law.[260]

The case represents another example where the doctrine of immemorial usage prevails over statutory law, making it illegal for a regulation to take away an already established right. Despite ruling that the grazing regulation was illegal, though, the court decided by a 3-2 majority that the Sami were not entitled to any compensation by the state – a decision that drew heavy criticism from the Sami.[261] The court explained the non-compensation by the fact that the provisions were based on a treaty between Sweden and Norway, making it the responsibility of Sweden to ensure that the Swedish

[253] *Nesseby,* § 174.
[254] *Nesseby,* § 175.
[255] *Saarivuoma Sami:* Supreme Court of Norway, HR-2021-1429-A, Case No. 20-164328SIV – HRET, judgement 30/06/2021.
[256] HOFVERBERG, Elin: "Norway: Supreme Court Defines Extent of Swedish Sami Reindeer Herder Rights", Library of Congress, 28/07/2021, https://www.loc.gov/item/global-legal-monitor/2021-07-28/norway-supreme-court-defines-extent-of-swedish-sami-reindeer-herder-rights/.
[257] *Saarivuoma Sami*, § 5.
[258] RAVNA, Øyvind: "Norwegian Courts and Sami Law", in: *Arctic Review on Law and Politics,* Vol. 12, 2021, p. 183; *Saarivuoma Sami*, § 6.
[259] *Saarivuoma Sami*, § 11.
[260] *Saarivuoma Sami*, § 234.
[261] RAVNA: *Norwegian Courts and Sami Law,* p. 184.

Sami´s rights were respected.[262]

V. Recent Decisions: *Girjas*, *Fosen* and *Deatnu* cases

5.1. *Girjas* (Sweden, 2020)

5.1.1. Overview

After *Taxed Mountains* in 1981 and *Nordmaling* in 2011, the *Girjas* decision in January 2020 is only the third case before the Swedish Supreme Court that dealt with the recognition of Sami rights.[263] Similar to reindeer herding rights in the two prior cases, *Girjas* concerns hunting and fishing rights, which are closely connected to reindeer herding rights, as § 25 of the Swedish *Reindeer Herding Act* also includes the right to (small game) hunting and fishing.[264] Different from the two prior cases, though, the *Girjas* case concerns the Sami´s *exclusive* rights to exercise hunting and fishing as well as the right to confer such rights to others without the consent of the State. In the latter regard, the case resembles the afore-mentioned Norwegian *Nesseby* case two years earlier.

In Sweden, a reform in 1993 resulted in less Sami influence, allowing for hunting and fishing rights to increasingly be granted not only to local people but to a larger share of the population, including European Union citizens.[265] The Sami protested strongly against the reform since hunting and fishing by other people can lead to disturbance among the reindeer and, consequently, cause the animals to leave the area.[266] The case at hand was brought before the Swedish Supreme Court by the „Girjas Sameby“,[267] a Sami reindeer herding community consisting of about 120 members, who claimed exclusive small game hunting and fishing rights within a state-owned area in the northernmost part of Sweden.[268] In addition, Girjas Sameby claimed to have the right to transfer those hunting and fishing rights to others without the consent of the state, while the state cannot do so, or, alternatively,

[262] *Saarivuoma Sami*, § 156; HOFVERBERG: *Norway: Supreme Court Defines Extent of Swedish Sami Reindeer Herder Rights*.
[263] ALLARD, BRANNSTRÖM: *Girjas case,* p. 58.
[264] HOFMANN: *Case Note Swedish Supreme Court*, p. 1. Rem.: While Nordmaling was about reindeer herding rights and not about hunting and fishing, the court notes that hunting and fishing is closely connected to reindeer herding, since hunting and fishing has usually been practised in connection with reindeer herding – therefore, judgements of reindeer herding are also relevant to hunting and fishing (*Girjas:* Supreme Court of Sweden, Case No. T-853-18, judgement 23/01/2020, § 149). See also § 25 *Reindeer Herding Act,* Sweden, 1971.
[265] ALLARD, BRANNSTRÖM: *Girjas case,* p. 59.
[266] Ibid., p. 60.
[267] Rem.: A sameby (Sami village) is a legal entity of which 51 exist in Sweden, see Chapter 3.2.2.
[268] ALLARD, BRANNSTRÖM: *Girjas case,* pp. 60-62

that such leases should be decided jointly by Girjas Sameby and the state.[269] The state requested the Supreme Court to dismiss the Sami community´s claim in its entirety.[270] Eventually, the Swedish Supreme Court decided unanimously that Girjas Sameby has both exclusive fishing and herding rights as well as the right to transfer them to others without the consent of the State, while the state does not have those rights.[272]

5.1.2. Main Arguments

The Sami community based its claim on three alternative legal grounds, namely, either on the *Reindeer Herding Act*, or – as in the *Taxed Mountains* decision – on immemorial prescription, or – as in the *Nordmaling* decision – on customary law.[272] Regarding the first ground, the Supreme Court found by a majority that Girjas sameby did not have exclusive reindeer herding rights based on the *Reindeer Herding Act*, as §§ 31–34 *Reindeer Herding Act* grants those rights to the state.[273] Indeed, § 31 *Reindeer Herding Act* explicitly prohibits the Sami to grant leases to others. In that regard, Girjas sameby additionally claimed that the leasing system determined in §§ 31–34 violated both the *Constitution of Sweden* and the *European Convention on Human Rights* because it was discriminatory and constituted a violation of the right to property.[274] However, as the decision was eventually based on other grounds, a possible violation of the *Constitution* or the *ECHR* did not have to be assessed by the court.[275]

The main question, therefore, was whether immemorial prescription or customary law should be applied. Contrary to *Nordmaling*, the court decided to base its decision again on immemorial prescription, which stems from the *Real Property Code* of 1734. The court emphasised that customary law has been primarily important as a complementary source of law and concluded that immemorial prescription must be applied first, with the option to turn to customary law only if the concept of immemorial prescription could not be applied reasonably in a specific case.[276]

[269] *Girjas,* §§ 4-5.
[270] *Girjas,* § 5.
[271] *Girjas,* § 4.
[272] *Girjas,* § 6.
[273] *Girjas,* §§ 123-124.
[274] *Girjas,* § 8.
[275] Rem.: The state conceded that §§ 31–34 *Reindeer Herding Act* should not be applied if the court found that the state did not hold the right to hunt and fish in the area (*Girjas,* § 10). Therefore, the court did not have to assess whether §§ 31–34 *Reindeer Herding Act* violates the *Constitution* or the *ECHR.*
[276] *Girjas,* § 133.

Nevertheless, the court decided to adapt the doctrine of immemorial prescription, taking into account the particularities of reindeer husbandry and allowing for more flexibility as it has been done in *Nordmaling* with regard to customary law.[277] Crucially, the court based its assessment on all criteria together, allowing for example to compensate a less intensive land use by an extensive time-period.[278] By applying some of the more relaxed standards of customary law to immemorial prescription, Allard notes a „cross-fertilisation between the rules for immemorial prescription and customary law" in both *Nordmaling* and *Girjas*.[279]

While the court pointed out that the required time span of immemorial prescription traditionally is assumed to be approximately 90 years,[280] it decided not to work backwards 90 years from the present day as the "normal" approach would have been.[281] Instead, the court undertook a thorough historical investigation, concluding that, while it was not possible to say with certainty whether before the end of the Middle Ages any Sami rights had been developed,[282] at least from the 16th century onwards, Sami populations were continuously hunting and fishing in the area concerned.[283] Therefore, at the latest in the middle of the 18th century, Sami rights were definitely established.[284] An important part of the court´s assessment consisted in the evaluation of documents on the historic land use of the area in question (investigations, government bills, court protocols and church records) as well as the hearing of scholars of history, law and historical ecology.[285] As the historical evidence of the area concerned is very limited,[286] adjacent areas were considered by the court, always taking into account the specificities of the area in question, including the fact that the area belongs to the most remote part of Lapland, where Swedish authority probably was established later than elsewhere.[287]

After the establishment of Sami rights in the 18th century was determined, another question was whether those rights might have been extinguished due to the state´s ongoing attempts to colonise the area. For an already established right to cease to exist, it is required that either the right holders waive their right or that the right is extinguished by legislation or expropriation, both of which must

[277] *Girjas,* § 148.
[278] ALLARD, BRANNSTRÖM: *Girjas case,* p. 69; see also Chapter 3.2.5.
[279] ALLARD, BRANNSTRÖM: *Girjas case,* p. 68.
[280] *Girjas,* § 140. Rem.: Statutory law does not specify the required time span; however, in the literature about 90 years have been assumed (*Girjas*, § 140). See also Chapter 3.2.5.
[281] ALLARD, BRANNSTRÖM: *Girjas case,* p. 69.
[282] *Girjas,* § 171.
[283] *Girjas,* § 189.
[284] *Girjas,* § 189.
[285] ALLARD, BRANNSTRÖM: *Girjas case,* p. 63.
[286] *Girjas,* § 165.
[287] *Girjas,* § 165.

be clear and definite.[288] Even though, from the second half of the 17th century onwards, the crown encouraged the colonisation of Lapland,[289] there is no information on whether the crown questioned or restricted either the Sami's hunting and fishing rights[290] or the Sami´s right to confer those rights to others.[291]

While the state did call into question the Sami´s control over the area in the 18th and 19th century, none of these measures constituted a clear and sufficiently definitive contestation of the Sami's hunting or fishing rights for those rights to be extinguished.[292] Another interesting aspect of the case concerns the burden of proof. While the court held that the burden of proof on whether a Sami right is established rests on the claimant – as usual in Swedish civil law cases –, it placed the burden of proof regarding the termination of such a once established right on the state.[293] With regard to evidence, the court took into account the fact that for a long time the Sami had no written sources,[294] and that, throughout history, the state has had significantly greater opportunities to document older conditions.[295] Consequently, certain inconsistencies in the historical material may be accepted when the burden of proof is placed on the Sami.[296]

An essential aspect of the case lies in the court´s strong reference to international law. Even though Sweden has not ratified the *ILO Convention*, the court referred to art 8 para 1 *ILO Convention*, according to which, when applying national laws, due regard shall be paid to Indigenous customs or customary laws.[297] In the court´s view, the provision constitutes a general principle of international law and, therefore, is not dependent on Sweden ratifying the *Convention.*[298] Moreover, the court referred to art 26 and 27 *UNDRIP,* art 27 *ICCPR* and art 14 *ILO Convention*.[299] According to Allard, the court´s emphasis on international law standards protecting Indigenous peoples was „unexpected"[300], as it is "novel for the Supreme Court in a Sami rights case to ground its decision in

[288] *Girjas,* § 215.
[289] *Girjas,* § 180.
[290] *Girjas,* § 189, § 213.
[291] *Girjas,* § 206, § 213.
[292] *Girjas,* § 217.
[293] *Girjas,* § 161; ALLARD, BRANNSTRÖM: *Girjas case,* pp. 64-65.
[294] *Girjas,* § 162.
[295] *Girjas,* § 162.
[296] ALLARD, BRANNSTRÖM: *Girjas case,* p. 65.
[297] *Girjas,* § 130.
[298] *Girjas,* § 130.
[299] *Girjas,* § 162.
[300] ALLARD, BRANNSTRÖM: *Girjas case,* p. 63.

international human rights law, especially in the context of domestic property law".[301]

5.1.3. Implications

The case stands at the end of a more than 10-year dispute between Girjas sameby and the Swedish State,[302] which Allard describes as a „David and Goliath" narrative".[303] The decision was met with enormous attention in Sweden[304] and, consequently, got called a „milestone of the development of Sami law in Sweden".[305] The exclusivity of the Sami´s right constitutes a crucial development that sets the case apart from *Taxed Mountains* and *Nordmaling* as well as from the Norwegian *Selbu* decision. The case also differs from *Nesseby*, where the non-exclusivity of the rights resulted in the court´s ruling that the Sami´s rights were insufficient to set aside the management authority of the *Finnmark Estate* as the landowner of the area.

An immediate consequence of the decision was that the *County Administrative Board*, which had been responsible for granting hunting and fishing licences, closed its administrative system for the area on the same day the court released its decision."[306] Furthermore, the Swedish Government announced the establishment of an investigation regarding the need to amend the *Reindeer Herding Act*. Pre-hearings occurred during the autumn of 2020 with Sami representatives and others regarding the scope of such an investigation.[307] Additionally, the case may also have legal significance for Finland, which shares the provision on immemorial prescription in its *Real Property Code*.[308]

However, Allard also notes "increased racism and conflict between groups of Sami as well as between Sami and Swedish locals", stemming "from centuries old Sami politics and the early division between reindeer herding Sami and non-reindeer herding Sami who have no recognised territorial rights."[309] This addresses a crucial issue, namely the fact that non-reindeer herding Sami constitute the vast majority of Sami, while court cases are mostly referring to reindeer herding rights. Thus, Hofmann doubts whether new legislative steps will be taken, "given the fact that the

[301] ALLARD, BRANNSTRÖM: *Girjas case,* p. 64.
[302] RAVNA, Øyvind: "A Sámi Community Wins Case against the Swedish State in the Supreme Court", in: *Arctic Review on Law and Politics*, Vol. 11, 2020, p. 19.
[303] ALLARD, Girjas case, p. 57.
[304] HOFMANN: *Case Note Swedish Supreme Court*, p. 1.
[305] RAVNA: *A Sámi Community Wins Case against the Swedish State in the Supreme Court',* p. 19.
[306] ALLARD, p. 71.
[307] ALLARD, BRANNSTRÖM: *Girjas case,* p. 57.
[308] Ibid., p. 71.
[309] Ibid., p. 57.

judgement has been heavily criticised not only by non-Sami local hunters and fishers, who fear that Girjas sameby might issue fewer and/or more expensive hunting and fishing permits, but also by those Sami who are not members of a sameby and, therefore, in the same legal position as non-Sami persons wishing to hunt and fish."[310] After the judgement, several threats of violence against members of Girjas Sameby have been reported.[311]

5.2. *Fosen* (Norway, 2021)

5.2.1. Overview

Another significant recent development in Sami rights – and arguably the most far-reaching one – stems from the Norwegian Supreme Court´s *Fosen* decision in October 2021. The case concerns two windfarms located in Fosen peninsula, Trøndelag county, where two Sami siidas – a southern and a northern group – practise reindeer husbandry in their respective parts of the district.[312] The two windfarms were built after in 2010 the *Norwegian Water Resources and Energy Directorate* had issued licences to build four windfarms on the Fosen peninsula, including the two windfarms in question, with the Roan windfarm being located within the pasture of the northern group and the Storheia windfarm within the pasture of the southern group.[313] It should be noted that the wind park with altogether six windfarms is stated to be the largest onshore wind power project in Europe.[314]

After the licence holder *Fosen Vind* had brought an appraisal action for measure of damages, the Court of Appeal issued a reappraisal, granting damages to the siidas that exceeded by far those measured by the District Court.[315] Consequently, *Fosen Vind* appealed against the Court of Appeal's measure of damages to the Supreme Court, while both siidas requested that the appraisal be ruled inadmissible by the Supreme Court because the construction of the windfarms violated the Sami reindeer herders' rights to culture under art 27 *ICCPR* as well as their right to own property under art

[310] HOFMANN: *Case Note Swedish Supreme Court*, pp. 7-8.
[311] LILJESTRÖM, Elias; "Sweden´s indigenous groups report death threats after landmark court win", The Local, 30/01/2020, https://www.thelocal.se/20200130/swedens-indigenous-groups-report-death-threats-after-landmark-court-%20win.
[312] *Fosen Windmill:* Supreme Court of Norway, HR-2021-1975-S, Case No. 20-143891SIV-HRET, Case No. 20-143892SIV-HRET and Case No. 20-143893SIV-HRET, judgement 21/10/2021, § 7.
[313] *Fosen Windmill,* § 3, § 8.
[314] LINGAAS, Carola: "Wind Farms in Indigenous Areas: The Fosen (Norway) and the Lake Turkana Wind Project", Opinio Juris, 15/12/2021, http://opiniojuris.org/2021/12/15/wind-farms-in-indigenous-areas-the-fosen-norway-and-the-lake-turkana-wind-project-kenya-cases/; *Fosen Windmill,* § 6.
[315] *Fosen Windmill,* § 12, § 20.

5 (d) (v) *ICERD*, making the licence decisions invalid.[316]

According to the *Ministry of Petroleum and Energy,* the area around the Roan windfarm could still be used for reindeer husbandry even after the construction of the windfarm, even if it demanded increased work on the part of the reindeer herders.[317] With regard to the Storheia windfarm, the Ministry acknowledged that the windfarm would turn out to be "negative" for reindeer husbandry but nevertheless assumed that the area would not be lost for winter pasture.[318] While the Court of Appeal found that both Storheia and the eastern part of the Roan windfarm were in practice lost for late winter pastures, it still did not find a violation of any Sami righst due to the possibility to introduce winter feeding of the reindeer, paid for by a compensation.[319] The Supreme Court, though, eventually ruled that both windfarm projects were invalid because they violated the Sami reindeer herders' rights provided for in art 27 *ICCPR*.

5.2.2. Main Arguments

The key issue was to assess whether the licences in question violated either art 27 *ICCPR* and/or art 5 (d) (v) *ICERD* as the two Sami siidas were arguing. With regard to art 27 *ICCPR,*[320] the Norwegian Supreme Court first declared that "it is clear that the Sami people is a minority within the meaning of Article 27, and that reindeer husbandry is a form of protected cultural practice."[321] This view is in accordance with the interpretation of the *HRC,* which in its *General Comment No. 23* explicitly stated that Indigenous culture includes "a particular way of life" and "may include such traditional activities as fishing or hunting".[322] The Supreme Court further stressed the "collective nature" of art 27, emphasising the fact that reindeer husbandry is practised in community, which makes it "difficult to draw a sharp distinction between the individuals and the group".[323]

Furthermore, the court had to assess the question whether art 27 allows for a margin of appreciation or at least a "balance […] against other interests of society" as the state argued.[324] The court referred

[316] *Fosen Windmill,* §§ 22-24, § 30, § 40, § 48.
[317] *Fosen Windmill,* § 10.
[318] *Fosen Windmill,* § 10.
[319] *Fosen Windmill,* §§ 19-20.
[320] According to art 27, "ethnic, religious or linguistic minorities […] shall not be denied the right, in community with the other members of their group, to enjoy their own culture"; see also Chapter 3.1.1.
[321] *Fosen Windmill,* § 101.
[322] See Chapter 3.1.1.
[323] *Fosen Windmill,* § 106.
[324] *Fosen Windmill,* § 52.

to the considerations of the *HRC*[325] and concluded that art 27 allowed for neither a margin of appreciation nor a proportionality assessment.[326] Indeed, the court even found that from the wording of art 27 the right did "not allow the States to strike a balance between the rights of indigenous peoples and other legitimate purposes" and, therefore, appeared to be absolute.[327] Nevertheless, art 27 is not absolute in the sense that an interference automatically amounts to a violation (as it is the case with very few rights, such as the prohibition of torture). Thus, as will be seen below, an interference of art 27 only constitutes a violation if a certain threshold is met. Furthermore, the court argued that art 27 may possibly still allow for a balancing of interests in case of conflict between different human rights, which includes the right to a good and healthy environment.[328]

However, in the present case no collision between basic rights "has been demonstrated" by the state,[329] since, in the court´s words, ""the green shift" could also have been taken into account by choosing other – and for the reindeer herders less intrusive – development alternatives."[330] In particular, the court pointed to the fact that the government had first considered several other wind park projects before deciding on Roan and Storheia, despite constant warnings of the negative consequences for reindeer husbandry.[331] Therefore, the court did not treat the case at hand as a case in which different human rights – Indigenous rights *versus* environmental rights – are in conflict with each other and, consequently, did not have to further consider a potential balancing of interests.

Another crucial aspect of the case concerns the meaning of the term "denied", which raises the question of where the threshold for a violation lies.[332] Referring to rulings from the *HRC,* the Supreme Court concluded that "there will be a violation of the rights in Article 27 *ICCPR* if the interference has a substantive, negative impact on the possibility of cultural enjoyment." The *HRC* established a "combined test of ´consultation and sustainability´" in order to assess whether there has been a violation of art 27.[333] In other words, measures must be taken to ensure the effective participation of the minority groups in decisions that affect them,[334] and, additionally, minorities

[325] *Fosen Windmill,* § 125, 128.
[326] *Fosen Windmill,* § 129.
[327] *Fosen Windmill,* § 124. Except for the possibility of a derogation in time of public emergency, see art 4 *ICCPR.*
[328] *Fosen Windmill,* § 143.
[329] *Fosen Windmill,* § 143.
[330] *Fosen Windmill,* § 143.
[331] *Fosen Windmill,* § 143.
[332] *Fosen Windmill,* §§ 111-112.
[333] See YUPSANIS: *Article 27 of the ICCPR Revisited,* p. 384.
[334] See ibid., p. 383.

must still be able to economically benefit from their traditional activities after the interference.[335] Thus, an interference amounts to a violation only if the consultation and sustainability test is not met.

Concerning this matter, there has been a ground-breaking case before the *HRC* in 2009, namely *Angela Poma Poma v. Peru,*[336] which concerned the Peruvian government´s decision to authorise the construction of several wells in an area where Indigenous people had raised alpacas and llamas for thousands of years. As a consequence, the ecosystem got destroyed, the wetlands were drying out and many animals perished, depriving local Indigenous families of their subsistence.[337] In its decision, the *HRC* found that neither the consultation nor the sustainability requirement had been met, explicitly demanding that measures must not "endanger the very survival of the community and its members".[338] Hence, the construction of the wells constituted a violation of art 27 *ICCPR.*

As mentioned above, the Norwegian Supreme Court already explicitly referred to *Poma Poma* in *Jovsset Ánte Sara* in 2017.[339] In that case, however, the Supreme Court found that the test established by the *HRC* did not apply to *internal* Sami issues, since the implementation of the restrictive measures had the goal to protect the interests of the Sami reindeer herders as a whole.[340] In contrast, the Supreme Court did follow the *HRC´s* sustainability test in *Fosen*, even arguing that the negative effect on Indigenous peoples did "not need to be as serious as in *Ángela Poma Poma v. Peru,* where thousands of animals died, and the claimant was forced to leave the area.[341]

Therefore, it was seen as sufficient that the construction of the windfarms in *Fosen* would "ultimately eradicate the grazing resources to such an extent that it cannot be fully compensated by the use of alternative pastures",[342] which would "most likely" lead to a dramatic reduction of the numbers of reindeer.[343] Such a reduction of reindeer would in turn "entail that the herders may no longer benefit from the trade, or at least that the profit will no longer be proportionate to the efforts".[344] Regarding the matter of evidence, the Supreme Court relied on the evidentiary findings of the Court of Appeal, as it saw no sufficient reason to set aside the Court of Appeal´s finding that the

[335] See YUPSANIS: *Article 27 of the ICCPR Revisited,* p. 384.
[336] See also Chapter 4.5.
[337] See YUPSANIS: *Article 27 of the ICCPR Revisited*, p. 396.
[338] See ibid., p. 397.
[339] See Chapter 4.5.
[340] See Chapter 4.5.
[341] *Fosen Windmill,* § 119.
[342] *Fosen Windmill,* § 136.
[343] *Fosen Windmill,* § 136.
[344] *Fosen Windmill,* § 137.

above-mentioned areas were in practice lost as winter pastures.[345] Thus, the sustainability requirement was clearly not met, leading to a violation of art 27 *ICCPR.*

Concerning winter feeding, which the Court of Appeal suggested as a solution, the Supreme Court found that "winter feeding according to the Court of Appeal's model deviates considerably from traditional, nomadic reindeer husbandry" and "has never been tried out in Norway", nor "has information been provided on the effect of such a model […] based on experience from other countries."[350] Therefore, the Supreme Court did not accept the suggested model of winter feeding as a solution.[351] With the finding of a clear violation of art 27 *ICCPR*, the additional claim of a violation of art 5 (d) (v) *ICERD* was not assessed by the court.[352]

5.2.3. Implications

Despite the clear-cut and unanimous decision of the Big Chamber of the Supreme Court, there has been no implementation of the *Fosen* judgement by the Norwegian government so far. In particular, the two major windmills in question are still on the ground in full operation. While the Sami have been urging the government to follow up on the Supreme Court decision, the state has been hoping to find a solution other than dismantling the windfarms, such as adding sufficient mitigating measures to secure the economic basis for reindeer herding activities.[353]

Recently, the government proposed an investigation plan, looking for potential changes with the aim to keep the turbines in operation, while the Sami reject an investigation with the argument that the issue has already been comprehensively investigated in the last 15 years.[354] At their celebration of the one-year anniversary of the judgement, the *Norwegian Sami Association* stressed that "the battle

[345] *Fosen Windmill,* § 97.
[346] *Fosen Windmill,* § 120.
[347] *Fosen Windmill,* § 120.
[348] *Fosen Windmill,* § 121.
[349] *Fosen Windmill,* § 121.
[350] *Fosen Windmill,* § 149.
[351] *Fosen Windmill,* § 154.
[352] *Fosen Windmill,* § 154.
[353] FOUCHE, Gwladys; SOLSVIK, Terje: "Norway in legal quandary after wind turbines ruled a threat to reindeer herders rights", Reuters, 02/11/2022, https://www.reuters.com/world/europe/norway-legal-quandary-after-wind-turbines-ruled-threat-reindeer-herder-rights-2021-11-02/; ANDREASSEN, Bjørn Lønnum: "Reindeer herders want Norwegian wind farm demolished", in: *Nordic Labour Journal*, 25/03/2022, http://www.nordiclabourjournal.org/i-fokus/in-focus-2022/theme-the-green-shift/article.2022-03-18.6489804485.
[354] HELTNE, Lars: "Reindeer herding and wind power must coexist, says Norwegian minister – despite Sami disagreement", Energy Watch, 25/11/2022, translated by Catherine Brett & Daniel Pedersen, https://energywatch.com/EnergyNews/Renewables/article14630703.ece.

isn't won until the wind turbines have been taken down and the destruction has been cleaned up".[355] Indeed, it seems unclear what possible alternative solutions might consist of, especially given the fact that the Supreme Court already did not accept the suggested solution of winter feeding.

Still, it is likely that the Norwegian state will take Sami rights more carefully into account when deciding on future projects in order to avoid another expensive failure. The judgement might also have consequences for other wind park projects which are already planned, like the windfarm project in Øyfjellet, where the investor is considering withdrawing.[356] Whether any legislative changes will be adopted, remains unclear, given the apparent reluctance of the government to implement changes.

Despite Norway´s role at the forefront of Sami rights, there seems to be a clear discrepancy at the moment between the Supreme Court´s protection of Sami rights on the one hand and the Norwegian government´s refusal to implement them on the other. The failure to remove the turbines has prompted a Sami politician to criticise that Norway is „willing to put their relatively good reputation in the world at stake by not following up on their own higher Supreme Court decisions".[357]

5.3. *Deatnu* (Finland, 2022)

5.3.1. Overview

Despite the lack of Sami rights cases before the Finnish Supreme Court for a long time, the Finnish Sami recently gained victories with two Supreme Court decisions, which did not concern collective but individual rights. The cases concern fishing in a 200-km watercourse on the border between Finland and Norway, called "Deatnu" (in the Sami language) or "Tana" (in Norwegian), where the Sami have been fishing for thousands of years regardless of the respective national borders.[358]

The first case had its origin in August 2017, when A, a local Sami, deliberately fished for salmon in

[355] NELSON, Kjersti: "We won the Fosen case – but the battle isn´t won until the wind turbines are taken down", Energy Watch, 14/10/2022, translated by Christoffer Østergaard, https://energywatch.com/EnergyNews/Renewables/article14494764.ece.
[356] See Chapter 6.1.
[357] SALONEN, Saara-Maria: "A year after Supreme Court verdict, Fosen wind farm still stands amid soaring energy crisis", The Barents Observer, 12/10/2022, https://thebarentsobserver.com/en/indigenous-peoples/2022/10/year-after-supreme-court-verdict-fosen-wind-farm-still-stands-amid.
[358] See PEDERSEN, Steinar: "Salmon Sans Borders", in: *Samudra, the Triannual Journal of the International Collective in Support of Fishworkers,* No. 54, 2009, https://www.icsf.net/wp-content/uploads/2021/06/497-1.pdf, p. 4.

the Utsjoki river, a tributary river to Deatnu, outside the permitted fishing period.[359] According to art 9 of the *Government Decree on Fishing in the Tenojoki Tributaries (Decree 297/2017),* which is based on the Finnish *Fishing Act*, fishing with nets is seasonally prohibited after July 31, with no exemption provided for the Sami.[360] According to the *Fishing Act*, a person fishing in an area where fishing is prohibited or restricted or during a time when fishing is prohibited, is committing a fishing offence and shall be sentenced with a fine.[361] When the prosecutor charged A for a fishing offence, A admitted to fishing as described in the charge but yet denied he had committed a fishing offence.[362] In April 2022, the Supreme Court found that the restrictions on fishing in art 9 *Tenojoki Tributaries Decree* were incompatible with section 17 para 3 of the *Constitution of Finland,* which grants the Sami the right to develop their own culture.[363]

In the second case, A, B, C and D, four local Sami, were fishing in the Vetsijoki river, another tributary river to Deatnu, without a fishing permit.[364] Similar to the first case, the Supreme Court found a violation of the Sami´ s right to enjoy their own culture because fishing permits were limited and sold out quickly, and the local Sami were not given preference but instead were treated just like fishermen from outside, who do not enjoy a special constitutional protection.[365]

5.3.2. Main Arguments

Given the similarity of the two cases, the following analysis will focus on the first case. According to section 52 of the *Fishing Act*, the government can issue decrees on the restriction of fishing in a water area where the vitality or return of a certain fish species or stock has degraded or is in danger of degrading.[366] Furthermore, the existing *Treaty between Finland and Norway on Fishing in the*

[359] *Deatnu I:* Supreme Court of Finland, KKO 2022:25, judgement 13/04/2022, § 2; Supreme Court of Finland: "KKO 2022:25, Fishing restriction imposed on the Sámi indigenous people and its relationship to their fundamental rights (fishing offence)", Case Summary in English, Diary number: R2019/424, 13/04/2022, https://korkeinoikeus.fi/en/index/ennakkopaatokset/shortsummariesofselectedprecedentsinenglish/2022_1/kko202225.html.
[360] HOFVERBERG, Elin: "Finland: Supreme Court Rules on Sámi Indigenous Rights to Fish", Library of Congress, 09/05/2022, https://www.loc.gov/item/global-legal-monitor/2022-05-09/finland-supreme-court-rules-on-sami-indigenous-rights-to-fish/.
[361] *Deatnu I,* §§ 1-2; Supreme Court of Finland: *KKO 2022:25, Case summary in English.*
[362] Supreme Court of Finland: *KKO 2022:25, Case summary in English.*
[363] See also Chapter 3.2.3.
[364] *Deatnu II:* Supreme Court of Finland, KKO 2022:26, judgement 13/04/2022, § 1; Supreme Court of Finland: "KKO 2022:26, Fishing restriction imposed on the Sámi indigenous people and its relationship to their fundamental rights (game offence)", Case Summary in English, Diary number: R2019/425, 13/04/2022, https://korkeinoikeus.fi/en/index/ennakkopaatokset/shortsummariesofselectedprecedentsinenglish/2022_1/kko202226.html; HOFVERBERG: *Finland: Supreme Court Rules on Sámi Indigenous Rights to Fish.*.
[365] *Deatnu II,* § 44; HOFVERBERG: *Finland: Supreme Court Rules on Sámi Indigenous Rights to Fish.*.
[366] *Deatnu I,* § 6; Supreme Court of Finland, *KKO 2022:25, Case summary in English.*

Tenojoki River System even obliges the respective states to issue national regulations in order to protect fish stock and secure sustainable fishing.[367]

The main question before the Supreme Court was whether the restrictions on fishing in art 9 of the *Tenojoki Tributaries Decree* were compatible with section 17 para 3 of the *Constitution of Finland,* which provides that the Sami have the right to develop their own language and culture. In line with the above-mentioned interpretation by the *HRC,* the court confirmed that the protected Sami culture included reindeer herding, fishing and hunting,[368] explicitly referring to art 27 *ICCPR* and the *HRC´s* understanding of the term "culture".[369]

Another question concerned the requirement of environmental protection, as the objective of the restriction was to grant a healthy environment in accordance with the responsibility for the environment enshrined in section 20 of the *Constitution of Finland.*[370] In the case at hand, the Supreme Court held that in general restrictions were acceptable under the *Fishing Act* since the fish stocks and especially the migratory fish stocks had been in a weakened state.[371] However, with regard to fishing restrictions aimed at the Sami, it must be taken into account that Salmon net fishing belongs to the traditional cultural activities of the Sami, and, in addition, that the first half of August has been a particularly significant fishing month for the Sami.[372]

Nevertheless, the right of the Sami to enjoy their own culture provided for in section 17 para 3 of the *Constitution* is not absolute and can, according to the court, in principle be restricted in order to protect fish stocks, if the proportionality requirement is met.[373] In particular, the court had to assess whether shortening the legal fishing season by about 1 ½ months was proportionate to the benefit of protecting the salmon stock.[374] Moreover, the Supreme court notes that the protection of fish stock also serves the interest of the Sami themselves, who can only pursue their traditional fishing when the fish stock is held at a sustainable level.[375] In that regard, the argumentation resembles the

[367] *Deatnu I,* § 7; Supreme Court of Finland, *KKO 2022:25, Case summary in English.*
[368] *Deatnu I,* § 19; Supreme Court of Finland, *KKO 2022:25, Case summary in English.*
[369] *Deatnu I,* § 22.
[370] *Deatnu I,* § 23; Supreme Court of Finland, *KKO 2022:25, Case summary in English.*
[371] *Deatnu I,* § 33; Supreme Court of Finland, *KKO 2022:25, Case summary in English.*
[372] *Deatnu I,* § 36; Supreme Court of Finland, *KKO 2022:25, Case summary in English.*
[373] *Deatnu I,* § 37; Supreme Court of Finland, *KKO 2022:25, Case summary in English.*
[374] *Deatnu I,* § 37; Supreme Court of Finland, *KKO 2022:25, Case summary in English.*
[375] *Deatnu I,* § 37; Supreme Court of Finland, *KKO 2022:25, Case summary in English.*

Norwegian *Jovsset Ánte Sara* case, where the Norwegian Supreme Court held that the restrictive measure to reduce the number of reindeer benefitted the Sami themselves as a group.

However, in the case at hand only eight out of 15 salmon stocks have been deficient, while the state of the stocks varies by region,[376] with the Utsjoki river not facing immediate needs for measures to prevent the reduction of fish stock.[377] Consequently, the court found that the concrete restrictions in question could not be considered proportionate in order to protect the fish stocks,[378] also in light of the fact that restrictions could have been directed primarily at non-Sami fishing that does not enjoy special constitutional protection.[379] Thus, the restrictions violated the constitution since the fishing stock – if even necessary at all – could have been adequately protected by other less intrusive means.

5.3.3. Implications

Similar to *Fosen*, the *Deatnu* cases present a scenario which potentially could have led to a conflict between two fundamental rights, namely Indigenous *versus* environmental rights. However, in both *Fosen* and *Deatnu,* the courts concluded that there was no environmental necessity for the restrictions, since other less intrusive measures would have been possible. Additionally, in the first *Deatnu* case there was not even any need for immediate action in the respective sections of the rivers at all, with the Salmon stocks not being in such a weakened state to need immediate help. However, the question of Indigenous and environmental rights shall be further discussed in Chapter 6.1.

A crucial aspect of the judgement concerns the requirement to aim restrictions primarily at non-Sami fishers, who do not enjoy special constitutional protection. Similar to *Girjas*, this may potentially lead to conflicts between Sami and non-Sami fishers, as the latter may be temporarily unable to pursue their profession. In that context, it shall be noted that in Finland also the right to reindeer herding does not belong exclusively to the Sami, arguably adding to a situation where a country is less used to treat the Sami with preference due to their specific cultural rights. Compared to the lengthy *Girjas* and *Fosen* judgements, the *Deatnu* decisions are much shorter and have, so far, evoked little international attention.

[376] *Deatnu I,* § 39; Supreme Court of Finland, *KKO 2022:25, Case summary in English.*
[377] *Deatnu I,* § 40; Supreme Court of Finland, *KKO 2022:25, Case summary in English.*
[378] *Deatnu I,* § 48; Supreme Court of Finland, *KKO 2022:25, Case summary in English.*
[379] *Deatnu I,* §§ 47-48; Supreme Court of Finland, *KKO 2022:25, Case summary in English.*

VI. Major Current Challenges

6.1. Indigenous and Environmental Rights

One of the major issues at the moment concerns the relationship between Indigenous rights and environmental rights. As the climate crisis is becoming increasingly urgent, the right to a clean, healthy and sustainable environment has recently been acknowledged as a human right by the *UN Human Rights Council*[380] and the *UN General Assembly*[381] in non-binding resolutions. Furthermore, the right to life,[382] right to health[383] and right to food[384] are well-established human rights which are interconnected with environmental requirements. Mostly, e.g., in case of deforestation or the extraction of fossil fuels on Indigenous territories, Indigenous and environmental rights are not only fighting on the same front but are seen to be genuinely interconnected.[385]

It also needs to be noted that Indigenous peoples are among the first ones to be affected by climate change, seeing their way of life threatened by, *inter alia,* deforestation, a loss of vegetation, melting glaciers and the decline of animals.[386] The Sami, in particular, are being affected by changes in traditional seasons and unpredictable temperatures, which also affect the reindeer´s sustenance, especially due to the decline of lichen, which constitutes the reindeer´s main food source.[387]

Besides being affected negatively, Indigenous peoples may also play a significant positive role in contributing to combat climate change. According to a UN report, many Indigenous peoples are better forest managers than non-Indigenous ones and, therefore, could play a crucial role to fight deforestation;[388] it has also been suggested that traditional Indigenous knowledge could help to

[380] *The human right to a clean, healthy and sustainable environment:* resolution / adopted by the *UN Human Rights Council,* HRC/RES/48/13, 08/10/2021.
[381] *The human right to a clean, healthy and sustainable environment:* resolution / adopted by the *UN General Assembly,* A/RES/76/300, 28/07/2022.
[382] Art 6 *ICCPR*, Art 2 *ECHR*. Regarding the right to life and climate change see the decision of the *UN Human Rights Committee: CCPR/C/127/D/2728/2016,* 23/09/2020.
[383] Art 12 *ICESCR*.
[384] Art 6 *ICESCR*.
[385] Office of the High Commissioner for Human Rights: "Protecting indigenous peoples´ rights is a "collective fight", 03/11/2021, https://www.ohchr.org/en/stories/2021/11/protecting-indigenous-peoples-rights-collective-fight.
[386] United Nations Department of Economic and Social Affairs. Indigenous Peoples: "Climate Change", https://www.un.org/development/desa/indigenouspeoples/climate-change.html.
[387] Science Museum: *Climate Change in the Arctic.*
[388] Food and Agriculture Organization of the United Nations: Regional Office for Latin America and the Caribbean: "Forest governance by indigenous and tribal peoples", https://www.fao.org/americas/publicaciones-audio-video/forest-gov-by-indigenous/en/.

provide resource-efficient and sustainable solutions for tackling climate change.[389]

Despite all that, more and more cases emerge where Indigenous and environmental rights are being played off against each other, which makes the Sami increasingly worried about having their rights compromised in the name of environmental protection. In that context, the term "green colonialism" has been coined to describe the opposition to climate action in traditional Sami territories, which includes wind farms, railways and mining projects for minerals needed for electric vehicle batteries.[390] With increasing resistance against – real or supposed – climate action, environmental and Indigenous rights are in some cases suddenly not fighting on the same side but being put opposite each other.

In fact, the construction of wind parks constitutes a serious worry for the Sami, as reindeer may be negatively affected by noise and visual disturbances, the impact of new roads built in the area of the construction of the wind parks as well as cumulative effects in landscapes that are already fragmentated, aggravating the already existing threats to reindeer grazing.[391] Accordingly, studies "have shown that reindeer avoid going near wind power parks, which affects their grazing behaviour and places more pressure on the smaller amounts of land available for grazing, impacting the longer-term sustainability of those lands".[392] Thus, the already negative effects on reindeer husbandry caused by climate change may be further aggravated by measures introduced to mitigate climate change.

It should also be noted that the Sami have already had negative experiences with the building of hydropower plants in the past, such as the above-mentioned controversial Norwegian *Alta* case in 1978,[393] which marked the beginning of the "modern Sami-rights era".[394] Another negative experience was the construction of hydropower plants in Finland in the 1960ies, which forced the relocation of hundreds of Finnish Sami, tearing apart their networks.[395] Thus, potential oppositions between Indigenous and environmental rights are not new; however, they have become increasingly

[389] ZILLIACUS, Johanna: "Green coloniality of power over Sámi in Finland?", Social Exclusion, 30/03/2022, https://blogs.abo.fi/socialexclusion/2022/03/30/green-coloniality-of-power-over-sami-in-finland/.
[390] Ibid.
[391] CAMBOU, Dorothée: "Uncovering Injustices in the Green Transition: Sámi Rights in the Development of Wind Energy in Sweden", in: *Arctic Review on Law and Politics,* Vol. 11, 2020, pp. 315-316.
[392] ZILLIACUS: *Green coloniality of power over Sámi in Finland?*
[393] See Chapter 3.2.1.
[394] SPITZER: *A Sami land-claims settlement? Assessing Norway´s Finnmark Act in a comparative perspective*, p. 2.
[395] ZILLIACUS: *Green coloniality of power over Sámi in Finland?*

urgent due to the growing challenges of the climate crisis.

Despite those supposed oppositions between Indigenous and environmental rights, it needs to be stressed that in many cases there is no genuine opposition but rather a danger that environmental protection is used as a pretext to realise a project that interferes with Indigenous rights. Considering that a human rights interference usually has to be necessary in order to reach a legitimate goal, the necessity requirement will not be met if there are other less intrusive means to reach an environmental goal. As the *Fosen* and *Deatnu* judgements have shown, the courts did not treat those cases as actual conflicts between Indigenous and environmental rights, since other solutions would have been possible, making the interference not a necessity to reach an envisioned environmental goal. Especially in *Fosen*, the Supreme Court emphasised that the government had considered several other wind park projects, with no necessity to decide for the Fosen area out of all options.

At the moment, another windfarm project in Øyfjellet, Norway, planned by a Swedish energy company, is threatening the cultural rights of a local Sami group.[396] However, in the wake of the *Fosen* judgement, the investor of the project in Øyfjellet is considering to withdraw, stressing the requirement for such a project to "respect the rights of indigenous peoples and other vulnerable groups".[397] If the investor is indeed withdrawing, this would mean that the *Fosen* judgement is already showing immediate consequences, even if the Norwegian government is, so far, not implementing any changes. A halt of the project would indeed seem reasonable, even more so since the similarities between Øyfjellet and Fosen are striking, with both projects "competing to be the largest wind energy intervention in reindeer husbandry areas".[398] In any case, possible human rights violations regarding the project in Øyfjellet are to be settled by a Norwegian District Court;[399] the case is still ongoing as of July 2023.

Meanwhile, the Swedish government announced in March 2022 to give a United Kingdom-based firm the right to open an iron mine in a Sami reindeer area known as "Gallok" or "Kallak", Northern

[396] HOLMBERG, Áslat: "Saami Council shares Norwegian Investment Bank´s concern for human rights violations in Øyfjellet", Saami Council, 26/08/2022, https://www.saamicouncil.net/news-archive/storebrandoyfjellet.
[397] ROHMANN, Romy: "Investor vurderer å trekke seg", Steigan.no, 07/09/2022, https://steigan.no/2022/09/investor-vurderer-a-trekke-seg/.
[398] Ibid.
[399] HOLMBERG: *Saami Council shares Norwegian Investment Bank´s concern for human rights violations in Øyfjellet.*

Sweden, near the Laponia national parks, which have been made a *UNESCO* world heritage site.[400] The project has been heavily criticised by the *UNESCO,* the *Swedish National Sami Association* as well as human rights experts and activists around the globe, evoking negative impacts of the planned mine on reindeer herding as well as on cultural heritage.[401] In that context, it should be noted that Sweden holds 60 % of Europe´s identified iron ore deposits and is responsible for 90 % of Europe´s iron ore extraction, with most mines being located in Sapmi.[402] Thus, there have been lots of worries among the Swedish Sami about the mining industry and Indigenous rights,[403] with mining even being described as a "method for colonization".[404]

Even though there is still a list of requirements to be fulfilled for the project in Gallok to receive a final approval,[405] the Sami are highly worried about the possible impacts of such a project, specifically criticising a lack of consultation and participation.[406] A study has shown that the local Sami have already been experiencing considerable psychosocial distress due to the long-lasting uncertainty of the project and the potential disappearance of their traditional livelihood.[407] In any case, the definite permission of the project is dependent on an approval of the Swedish Environmental Court, whose decision is still pending.[408]

For a long time, Indigenous peoples´ organisations have stressed the importance of a "just transition" to a green economy which is implemented in conformity with human rights, including Indigenous peoples´ right to land, culture and self-determination.[409] In that sense, a recent scholarly approach

[400] MCGWIN, Kevin: "Schweden gibt grünes Licht für Eisenbergwerk Gállok", Polar Journal, 04/04/2022, https://polarjournal.ch/2022/04/04/schweden-gibt-gruenes-licht-fuer-eisenbergwerk-gallok/; UNESCO: „Gállok-Mine bedroht Sami und das Weltkulturerbe Laponia", Voices: 26/08/2021, https://gfbv-voices.org/unesco-gallok-mine-wird-negative-auswirkungen-auf-das-weltkulturerbe-laponia-haben/.
[401] UNESCO: *Gállok-Mine bedroht Sami und das Weltkulturerbe Laponia;* AHLANDER, Johan: „UN advisers urge Sweden to stop mine in home of indigenous Sami", Reuters, 10/02/2022, https://www.reuters.com/world/europe/un-advisers-urge-sweden-stop-mine-home-indigenous-sami-2022-02-10/.
[402] BLÅHED, Hanna; SAN SEBASTIAN Miguel: ""If the reindeer die, everything dies": The mental health of a Sámi community exposed to a mining project in Swedish Sápmi", in: *International Journal of Circumpolar Health*, Vol. 80, No. 1, 2021, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8259850/.
[403] See TARRAS-WAHLBERG, Hakan; SOUTHALAN, John: „Mining and indigenous rights in Sweden: what is at stake and the role for legislation", Mineral Economics, Vol. 35, 2022, https://link.springer.com/article/10.1007/s13563-021-00280-5.
[404] Lawrence and Åhrén (2017), as cited in: TARRAS-WAHLBERG, SOUTHALAN: *Mining and indigenous rights in Sweden: what is at stake and the role for legislation.*
[405] MCGWIN: *Schweden gibt grünes Licht für Eisenbergwerk Gállok.*
[406] BLÅHED, San Sebastian: *"If the reindeer die, everything dies": The mental health of a Sámi community exposed to a mining project in Swedish Sápmi".*
[407] Ibid.
[408] MCGWIN: *Schweden gibt grünes Licht für Eisenbergwerk Gállok.*
[409] CAMBOU: *Uncovering Injustices in the Green Transition,* pp. 312-313.

"promotes a broader conception of justice that includes distributional, procedural and recognition aspects of justice",[410] arguing that "sustainability transformations cannot be considered a success unless social justice is a central concern".[411] As Cambou elaborates, all three aspects may be relevant in context of the Sami.

Using the example of Sweden, the distributional aspect concerns questions regarding an "apparent north-south divide in the placement of wind turbines",[412] especially considering that wind projects are more likely to be approved "in areas with higher proportions of unemployed workers and non-workers, as opposed to areas where a higher proportion of the population is highly educated".[413] In this context, a "lack of attention paid to Sámi concerns" has been suggested, questioning "whether the development of wind energy is inequitable and unfair towards the Sámi people in Sweden".[414] Yet, in the Norwegian *Fosen* case exactly this aspect has been taken into account, when the Supreme Court criticised the government to opt for the Fosen area out of all possible areas. Thus, the Norwegian Supreme Court appears to have taken an important step towards a more just distribution of climate-related projects.

From a procedural point of view, Cambou points out that "Sami interests have rarely prevented the development of wind power in Sweden",[415] contrary to local governments, which "play a key role in the determination of wind development" due to a "municipal quasi-veto".[416] That way, the lack of procedural rights of Sami reindeer herders[417] contributes to distributional injustices when deciding on the location of a new project. It remains to be seen whether this may change in the context of the above-mentioned new *Sami Parliament Consultation Order* adopted in January 2022; however, as elaborated above, the new law does not contain a veto right and even requires the issue in question to be of "significant importance" to the Sami for the consultation duty to take place.[418]

The third aspect, recognition injustice, concerns the role of the judiciary in the context of wind

[410] CAMBOU: *Uncovering Injustices in the Green Transition,* p. 313.
[411] BENNETT et al., "Just Transformations to Sustainability", in: *Sustainability*, Vol. 11, No. 14, 2019, as cited in: CAMBOU: *Uncovering Injustices in the Green Transition*, p. 313.
[412] CAMBOU: *Uncovering Injustices in the Green Transition,* p. 316.
[413] Ibid., p. 316.
[414] Ibid., p. 317.
[415] Ibid., p. 316.
[416] Ibid., p. 319.
[417] Ibid., pp. 319-320.
[418] See Chapter 3.2.2.

energy projects.[419] With regard to Sweden, Cambou criticises that "few lawsuits have led to a rejection of a permit for wind energy projects on the grounds of an incompatibility with the interest of the reindeer husbandry industry."[420] While courts are more likely to reject a project if it demonstrably might lead to a complete end of reindeer husbandry, they are less likely to do so if they don´t expect a complete end, arguing that *some* disruption of reindeer husbandry may be acceptable in order to achieve an environmental goal.[421] In several cases, projects are approved if additional safeguard measures are being taken, such as prior consultations with the Sami.[422]

In this context, a major challenge for future environmental projects regards the concept of FPIC, which the Scandinavian states are – to varying degrees – not fully implementing yet. In particular, none of them is following the approach of the *UNDRIP,* which explicitly refers to consent and not just consultation and which does *require* consent in cases of fundamental importance to Indigenous rights, survival, dignity and well-being.[423] An implementation of the higher standard of the *UNDRIP* would provide Indigenous peoples with an actual veto power in the above-mentioned cases. However, Sweden and Finland have so far not even implemented the requirements of the *ILO Convention,* let alone the higher standard of the *UNDRIP.* Additionally, another issue concerns the question of whom to consult, as the representatives of the Sami groups are not necessarily the right holders respectively those affected by a measure. Contrary to Norway and Sweden, the duty to consult in Finland entails consultation only with the Sami parliament, excluding local Sami groups such as reindeer herders.

6.2. ***Karasjok* Case (Norway, 2023)**

Apart from environmental issues, the recognition of Sami territorial rights in areas they have traditionally settled on constitutes an ongoing challenge. This is especially true regarding Finnmark, where the *Finnmark Act* of 2005 transferred the ownership of the formerly state-owned Finnmark county to a private company named *Finnmark Estate*.[424] As already elaborated above, the *Finnmark Commission* was set up to examine existing ownership or other rights of both Sami and non-Sami locals, with the possibility to bring disputes before a special court, the *Uncultivated Land Tribunal*

[419] CAMBOU: *Uncovering Injustices in the Green Transition,* p. 322.
[420] Ibid., p. 322.
[421] Ibid., p. 323.
[422] Ibid., p. 323.
[423] See Chapter 3.1.4.
[424] See Chapter 3.2.4.

for Finnmark, whose decisions may eventually be appealed to the Supreme Court.[425] However, criticism has been raised that more than a decade after the introduction of the *Finnmark Act* no additional Sami collective property or usage rights have been found,[426] with some even qualifying the *Act* as "dysfunctional".[427]

This only changed in 2019, when the *Finnmark Commission* published its report regarding an area called "Karasjok", a Norwegian Municipality in Finnmark near the Finnish border. Karasjok, where the Sami form an ethnic majority, is a "hub of traditional Sami reindeer-herding" and also home to the Sami Parliament.[428] By a 3-2 majority, the *Finnmark Commission* concluded that the ownership rights to Karasjok belonged to the local population and not to the *Finnmark Estate* – a finding that was confirmed by the *Uncultivated Land Tribunal* in an unprecedented ruling in April 2023.[429]

The case had been brought before the *Uncultivated Land Tribunal* by two separate lawsuits, one from the Karasjok Sami association[430] and one from another Sami group, the Guttorm group.[431] Before the court, three different positions were raised, arguing that the area in question belonged either to the *Finnmark Estate* or to the local Sami population or to the *whole* local population, including non-Sami locals.

The Karasjok Sami association argued that the area in question belonged to all residents of Karasjok regardless of ethnicity. They relied their claim on a centuries-long control over the area by the local population, which can be compared to the control of an owner, whereas the state has, in their view, never acquired ownership of the area.[432] Importantly, the Karasjok Sami association stressed that the ownership rights – or, subsidiarily, collective rights of use – belonged to the entire population of the area, not just the Sami, because the right holders are not ethnically but geographically determined.[433]

The Guttorm group, on the other hand, claimed that the land belonged exclusively to the Sami

[425] See Chapter 3.2.4.
[426] RAVNA: *Sami Rights and Law in Norway – with a Focus on Recent Developments,* p. 155; see Chapter 3.2.4.
[427] SPITZER, *A Sami land-claims settlement? Assessing Norway's Finnmark Act in a comparative perspective*, p. 17, see Chapter 3.2.4.
[428] SPITZER, *A Sami land-claims settlement? Assessing Norway's Finnmark Act in a comparative perspective*, p. 2.
[429] Ibid., p. 6; *Karasjok*: Uncultivated Land Tribunal for Finnmark, Case No. 21-086077TVI-UTMA and Case No. 21-086497TVI-UTMA, judgement 21/04/2023, p. 8.
[430] *Karasjok*, p. 8.
[431] *Karasjok*, p. 8.
[432] *Karasjok*, pp. 10-11.
[433] *Karasjok*, p. 12.

population, arguing that including the non-Sami population of Karasjok would be contrary to art 14 *ILO Convention No. 169,* which, in their view, requires full and not only partial recognition of ownership.[434] Not surprisingly, the *Finnmark Estate* objected to both claims, insisting that the state has, for a long time, acted as an owner through a series of dispositions and regulations.[435] Eventually, the court sided with the Karasjok Sami association, deciding the ownership of the disputed area belongs to everyone with a registered residential address in Karasjok.[436]

In its argumentation, the court stressed that from early on the use of the area in question by the local population had been stable, almost exclusive and sufficiently intensive throughout the year, including, *inter alia*, hunting, fishing, grazing and mowing.[437] According to the court, the use of the area in Karasjok can be compared to the use in the above-mentioned *Svartskogen* case,[438] taking into account the bad command of Norwegian of the local Sami population, which makes the communication between Norwegians and Sami difficult.[439] Thus, no particularly strict requirements should be placed on the population's legal opinions in order for rights to be established.[440]

Nevertheless, the court acknowledged that after the year 1902 the state's dispositions reached a scope and content that may have been suitable to establish ownership rights.[441] In 1980, however, the *Sami Court Committee* was asked by the state to investigate existing rights in Finnmark, which appears as an acknowledgement by the state that the area of Finnmark may have other owners than the state.[442] Consequently, the court did not regard the period after 1980 as relevant, resulting in a time span of approximately 80 years in which the state may have established ownership rights.[443] Particularly in the years between 1902 and 1965, the state made dispositions similar to those of an owner, such as small land sales or leases to private individuals, which may have been suitable to establish ownership rights.[444]

[434] *Karasjok*, p. 14.
[435] *Karasjok*, p. 15
[436] *Karasjok*, p. 78.
[437] *Karasjok*, p. 79.
[438] *Karasjok*, pp. 79-80; see Chapter 4.3.
[439] *Karasjok*, p. 80.
[440] *Karasjok*, p. 80
[441] *Karasjok*, p. 85.
[442] *Karasjok*, p. 85.
[443] *Karasjok*, p. 86.
[444] *Karasjok*, p. 86.

However, referring to the *Nesseby* judgement, the court also emphasised the restorative function[445] of art 14 para 1 first sentence *ILO Convention*[446]*,* which raises the question of how long that restorative function lasts and whether approximately 80 years of dispositions by the state are sufficient for the state to establish ownership rights. With reference to the *Inter-American Court of Human Rights,* the court emphasised the requirement that the Indigenous peoples´ unique relationship to their lands continues to exist until today.[447] Since this is the case in Karasjok, 70-80 years of dispositions by the state were regarded as insufficient for the state to establish ownership.[448] Additionally, the court deemed the state´s dispositions different from those of a typical owner, as they included clear elements of social governance with the goal of agricultural development and Norwegianization rather than financial gains.[449]

As a next step, the court had to deal with the question of whether the ownership right belonged to the whole local population or only those of Sami origin.[450] In this regard, the court referred to the *ILO's* expert committee *(CEACR),* which stated in 2004 that, despite the *ILO Convention´s* recognition of special Indigenous rights, the "Convention does not, however, contemplate depriving other parts of the national population of the rights they have also acquired through long usage".[451] Furthermore, according to the *Finnmark Commission*, there has not been a widespread legal opinion that the rights would only belong to the local Sami population[452] as residents other than the Sami have clearly taken part in the usage of the area.[453] Consequently, the court decided that the ownership of the disputed area belongs to everyone with a registered residential address in Karasjok.[454]

However, the *Finnmark Estate* already appealed to the Supreme Court, whose decision is expected within the next year.[455] Given the high stakes and possible implications, the case was called "the trial of the century" by a Norwegian Sami newspaper,[456] while others have stated that a Supreme Court

[445] *Karasjok*, p. 79.
[446] "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised", see Chapter 3.1.3.
[447] *Karasjok*, p. 87.
[448] *Karasjok*, pp. 87-88.
[449] *Karasjok*, p. 86, p. 88.
[450] *Karasjok*, p. 89.
[451] *Karasjok*, p. 90.
[452] *Karasjok*, p. 90.
[453] *Karasjok*, p. 90.
[454] *Karasjok*, p. 78
[455] SPITZER, *A Sami land-claims settlement? Assessing Norway´s Finnmark Act in a comparative perspective*, p. 8.
[456] Ibid*.,* p. 2.

ruling against the Sami would "render the Finnmark Commission largely obsolete".[457] Thus, the case is also perceived as a test for the *Finnmark Act*, which so far has not been regarded as successful by various observers. The case is especially crucial due to the fact that it concerns an area with some of the highest Sami population density – hence, non-recognition of Sami rights there would seriously dash the Sami´s hope for land recognition elsewhere.[458]

VII. Conclusion

The previous analysis has shown that the Sami have recently been successful before the Supreme Courts in all three Nordic countries. The *Girjas* decision has been highly significant in recognising the Sami´s *exclusive* hunting and fishing rights, including the right to transfer them to others without the consent of the state; additionally, it has clarified that such rights need to be based first on immemorial prescription and not customary law. The judgement also confirms that a right established by immemorial prescription prevails over the wording of statutory law to the contrary. Furthermore, the court put an emphasis on international law by referring to the *ILO Convention* and the *UNDRIP*, even though Sweden has not ratified the *ILO Convention,* and the *UNDRIP* is non-binding.

The *Fosen* decision has been highly important by rendering a landmark judgement on the Sami´s cultural rights; however, the implementation of the decision is still pending. In contrast to the former Norwegian cases that were successful for the Sami, *Fosen* was not based on Norwegian law but directly on art 27 *ICCPR,* which seems to strengthen Norway´s international legal obligations concerning Indigenous rights. At the same time, the Norwegian government´s reluctance to follow up on the unanimous Supreme Court decision seems worrisome and constitutes a stark contrast to Norway´s otherwise exemplary role of being the country with the highest level of Sami protection. Thus, at the moment there appears to be a clear discrepancy between the Supreme Court´s protection of Sami rights on the one hand and the Norwegian government´s refusal to implement them on the other hand.

Similar to *Fosen*, the Sami´s cultural rights also prevailed in the *Deatnu* cases. Even though the

[457] SPITZER, *A Sami land-claims settlement? Assessing Norway´s Finnmark Act in a comparative perspective*, p. 17.
[458] See ibid., p.

Deatnu decisions are based on the *Constitution of Finland*, the court explicitly referred to art 27 *ICCPR* and the *HRC´s* understanding of culture, putting an emphasis on international law. That way, all three decisions made a strong reference to international law, even though *Girjas* and *Deatnu* were primarily based on national law. Importantly, the court stressed in *Deatnu* that possible restrictions need to be directed towards non-Sami fishers, who cannot rely on specific constitutional protection, which may lead to conflicts between Sami and non-Sami fishers, if the latter temporarily cannot pursue their profession.

A crucial issue at the moment concerns the relationship between Indigenous and environmental rights. Instead of fighting on the same side – as it usually is the case –, there has been a growing worry among the Sami that environmental rights may be used as a pretext to implement certain projects on their territories. As the Norwegian Supreme Court indicated, a scenario may arise in which Indigenous and environmental rights do indeed have to be balanced against each other. Nevertheless, the above-discussed cases have shown that often there is no real necessity for an interference due to the possibility of introducing other less intrusive measures in order to reach an environmental goal. Thus, in both *Fosen* and *Deatnu,* the courts did not treat the cases as genuine conflicts between two human rights, since the issues at hand could have been solved in a different way without interfering with the rights of the Sami.

The recent Supreme Court cases show that the rights of the Sami are increasingly recognised. Nevertheless, a lot of challenges remain, as the Sami are currently fighting for their rights in several places, from the Øyfjellet wind park to the iron mine in Gallok to the question of territorial rights in Karasjok. Given the high stakes involved, the ongoing *Karasjok* case is especially significant to the Sami´s struggle for territorial rights. While the decisions of the *Finnmark Commission* and the *Uncultivated Land Tribunal* to acknowledge the ownership of the local population in Karasjok have been unprecedented, the final decision of the Supreme Court is still pending.

In Norway, it remains to be seen whether the government will eventually implement the *Fosen* judgement in a way that is consistent with the Supreme Court decision. In light of *Fosen,* it is also unclear whether other planned wind park projects will still be realised as intended or rather moved to other locations outside Sami areas. In Finland, the Sami recently suffered a setback when the proposed new *Sami Parliament Act* failed to get past the final committee stage in parliament. In Sweden, there seem to be the most legislative deficiencies concerning Sami rights, ranging from the country´s non-willingness to ratify the *ILO Convention* to the outdatedness of the *Reindeer Herding*

Act to the inadequate duty to consult, requiring the issue in question to be of "significant importance" to the Sami. Thus, in Sweden, protection is primarily provided by the courts and not by legislation, which has recently been confirmed by the *Girjas* judgement. Altogether, it has become clear that despite the recent Sami victories before the national Supreme Courts, there are still a lot of challenges remaining.

Bibliography

AHLANDER, Johan: „UN advisers urge Sweden to stop mine in home of indigenous Sami", Reuters, 10/02/2022, https://www.reuters.com/world/europe/un-advisers-urge-sweden-stop-mine-home-indigenous-sami-2022-02-10/ (last accessed on 06/08/2023).

AKHTAR, Zia: "Sami peoples land claims in Norway, Finnmark Act and Proving Legal Title", in: *The Indigenous Peoples' Journal of Law, Culture & Resistance,* Vol. 7, Issue 1, 2022, pp. 115-138.

ALLARD, Christina: "Case review: The Swedish Nordmaling Case", in*: Arctic Review on Law and Politics,* Vol. 2, No. 2, 2011, pp. 225-228.

ALLARD, Christina: "Some Characteristic features of Scandinavian Laws and their Influence on Sami Matters", in: Allard, Christina et al. (eds): *Indigenous Rights in Scandinavia: Autonomous Sami Law,* London: Routledge 2016, pp. 49-64.

ALLARD, Christina: "The Nordic countries´ law on Sami territorial rights", in: *Arctic Review on Law and Politics*, Vol. 2, No. 2, 2011, pp. 159-183.

ALLARD, Christina: "The Rationale for the Duty to Consult Indigenous Peoples: Comparative Reflections from Nordic and Canadian Legal Contexts", in: *Arctic Review on Law and Politics*, Vol. 9, 2018, pp. 25-43.

ALLARD, Christina; BRÄNNSTRÖM, Malin: "Girjas Reindeer Herding Community v. Sweden: Analysing the Merits of the Girjas Case", in: *Arctic Review on Law and Politics*, Vol. 12, 2021, pp. 56-79.

ALLARD, Christina; SKOGVANG, Susann Funderug: "Introduction", in: Allard, Christina et al. (eds): *Indigenous Rights in Scandinavia: Autonomous Sami Law,* London: Routledge 2016, pp. 3-8.

ANDREASSEN, Bjørn Lønnum: "Reindeer herders want Norwegian wind farm demolished", in: *Nordic Labour Journal*, 25/03/2022, http://www.nordiclabourjournal.org/i-fokus/in-focus-2022/theme-the-green-shift/article.2022-03-18.6489804485 (last accessed on 06/08/2023).

BARELLI, Mauro: “Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead”, in: *The International Journal of Human Rights,* Vol. 16, No. 1, 2012, pp. 1-24.

BELINA, Bernd; MIGGELBRINK, Judith: „Raum, Recht und Indigenität – Zu den Kämpfen um Landrechte indigener Völker am Beispiel der Sámi in Finnland“, in: *Peripherie,* 126/127, Münster: Verlag Westfälisches Dampfboot 2012, pp. 190-217.

BENGTSSON, Bertil: “Nordmaling verdict – a short comment”, in: *Svensk Juristtidning,* 2011, pp. 527-533.

BLÅHED, Hanna; SAN SEBASTIAN, Miguel: ““If the reindeer die, everything dies”: The mental health of a Sámi community exposed to a mining project in Swedish Sápmi”, in: *International Journal of Circumpolar Health*, Vol. 80, No. 1, 2021, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8259850/ (last accessed on 06/08/2023).

BRANNSTRÖM, Malin: “The Girjas Case – Court Proceedings as a Strategy to Enforce Sámi Land Rights”, in: Koivurova, Timo et al. (eds.): *Routledge Handbook of Indigenous Peoples in the Arctic,* London and New York: Routledge 2021, pp. 174-186.

BUNIKOWSKI, Dawid: “Notes on the Contemporary Legal-Political Situation of the Sami in the Nordic Region”, in: Koivurova, Timo et al. (eds.): *Current Developments in Arctic Law*, Rovaniemi: University of the Arctic Thematic Network on Arctic Law 2014, Vol. 2, pp. 20-25.

CAMBOU, Dorothée: “Uncovering Injustices in the Green Transition: Sámi Rights in the Development of Wind Energy in Sweden”, in: *Arctic Review on Law and Politics,* Vol. 11, 2020, pp-310-333.

CHRISTOPOULOU, Danai: “The Largest Sami Population Are in Norway and Sweden, Here´s Why”, Culture Trip, 29/07/2023, https://theculturetrip.com/europe/norway/articles/sami-people-why-the-largest-population-are-in-norway-and-sweden (last accessed on 06/08/2023).

DE MATOS, Mariana: “Cultural Identity and Self-Determination as Key Concepts in Concurring Legal Frameworks for the International Protection of the Rights of Indigenous Peoples”, in:

Lagrange, Evelyne et. al. (eds.): *Cultural Heritage and International Law: Objects, Means and Ends of International Protection*, e-book, Springer 2018, pp. 273-292.

EIDEMILLER, Yu K, et al: "History and prospects of the Saami issue", in: *Conference Series: Earth and Environmental Science 434 012004,* 2020.

Food and Agriculture Organization of the United Nations: Regional Office for Latin America and the Caribbean: "Forest governance by indigenous and tribal peoples", https://www.fao.org/americas/publicaciones-audio-video/forest-gov-by-indigenous/en/ (last accessed on 06/08/2023).

FOUCHE, Gwladys; SOLSVIK, Terje: "Norway in legal quandary after wind turbines ruled a threat to reindeer herders rights", Reuters, 02/11/2022, https://www.reuters.com/world/europe/norway-legal-quandary-after-wind-turbines-ruled-threat-reindeer-herder-rights-2021-11-02/ (last accessed on 06/08/2023).

GRAVER, Hans Petter; ULFSTEIN, Geir: "The Sami People's Right to Land in Norway", in: *International Journal on Minority and Group Rights,* Vol. 11, No. 4, 2004, pp. 337–377.

HEINÄMÄKI, Leena: "Legal Appraisal of Arctic Indigenous Peoples´ Right to Free, Prior and Informed Consent", in: Koivurova, Timo et at. (eds.): *Routledge Handbook of Indigenous Peoples in the Arctic,* London and New York: Routledge 2021, pp. 335-351.

HELTNE Lars: "Reindeer herding and wind power must coexist, says Norwegian minister – despite Sami disagreement", Energy Watch, 25/11/2022, translated by Catherine Brett & Daniel Pedersen, https://energywatch.com/EnergyNews/Renewables/article14630703.ece (last accessed on 06/08/2023).

HIRSHON, Sara: "Sweden's Secret Human Rights Violations: The Sámi Fight for the Right to Traditional Lands", Law School Student Scholarship 1145, Seton Hall University, 2022, https://scholarship.shu.edu/student_scholarship/1145 (last accessed on 06/08/2023).

HOFMANN, Rainer: "Case Note Swedish Supreme Court (Högsta Domstolen), Girjas Sameby, Case No T 853-18 (23 January 2020), Recognition of Sami Indigenous People's Exclusive Right to Confer

Hunting and Fishing Rights in Girjas Sameby Area", International Law Association, Committee on the Implementation of the Rights of Indigenous Peoples, 2020, https://www.ila-hq.org/en_GB/committees/implementation-of-the-rights-of-indigenous-peoples (last accessed on 06/08/2023).

HOFVERBERG, Elin: "Finland: Supreme Court Rules on Sámi Indigenous Rights to Fish", Library of Congress, 09/05/2022, https://www.loc.gov/item/global-legal-monitor/2022-05-09/finland-supreme-court-rules-on-sami-indigenous-rights-to-fish/ (last accessed on 06/08/2023).

HOFVERBERG, Elin: "Norway: Supreme Court Defines Extent of Swedish Sami Reindeer Herder Rights", Library of Congress, 28/07/2021, https://www.loc.gov/item/global-legal-monitor/2021-07-28/norway-supreme-court-defines-extent-of-swedish-sami-reindeer-herder-rights/ (last accessed on 06/08/2023).

HOFVERBERG, Elin: "Supreme Court: Finnmark Estate Agency has Right to Regulate Fishery, Hunting and Use of Natural Resources in Finnmark", Library of Congress, 30/03/2018, https://www.loc.gov/item/global-legal-monitor/2018-03-30/norway-supreme-court-finnmark-estate-agency-has-right-to-regulate-fishery-hunting-and-use-of-natural-resources-in-finnmark/ (last accessed on 06/08/2023).

HOFVERBERG, Elin: "Sweden: Swedish Parliament Adopts Sami Parliament Consultation Order", Library of Congress, 03/02/2022, https://www.loc.gov/item/global-legal-monitor/2022-02-03/sweden-swedish-parliament-adopts-sami-parliament-consultation-order/ (last accessed on 06/08/2023).

HOLMBERG, Áslat: "Saami Council shares Norwegian Investment Bank´s concern for human rights violations in Øyfjellet", Saami Council, 26/08/2022, https://www.saamicouncil.net/news-archive/storebrandoyfjellet (last accessed on 06/08/2023).

International Labour Organization: "Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169)", https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 (last accessed on 06/08/2023).

International Work Group for Indigenous Affairs: "Indigenous Peoples in Sápmi",

https://www.iwgia.org/en/sapmi.html (last accessed on 06/08/2023).

KOPONEN, Eino: "Saami: General Introduction", Chapter 7, in: Bakró-Nagy, Marianne et al. (eds.): *The Oxford Guide to the Uralic Languages*, Oxford: Oxford University Press 2021, pp. 103–112.

KORTEKANGAS; Otso; JOHNSTONE, Rachael Lorna: "In Finland, Sámi Rights Take Central Stage In National Politics", JusticeInfo.net, 09/12/2022, https://www.justiceinfo.net/en/110023-finland-sami-rights-central-stage-national-politics.html (last accessed on 06/08/2023).

KUPPE, René: "The Agricultural Argument and Sami Reindeer Breeding Rights: Reflections on Legal Philosophy in the Arctic", in: Bunikowski, Dawid (ed.): *Philosophy of Law in the Arctic,* Rovaniemi: University of Lapland 2016, pp. 62-70.

LAWSON, Richard: "The Finnmark Act—A Guide (English Translation)", The Ministry of Justice and the Police and the Ministry of Local Government and Regional Development, 2005.

LILJESTRÖM, Elias; "Sweden´s indigenous groups report death threats after landmark court win", The Local, 30/01/2020, https://www.thelocal.se/20200130/swedens-indigenous-groups-report-death-threats-after-landmark-court-%20win (last accessed on 06/08/2023).

LINGAAS, Carola: "Wind Farms in Indigenous Areas: The Fosen (Norway) and the Lake Turkana Wind Project", Opinio Juris, 15/12/2021, http://opiniojuris.org/2021/12/15/wind-farms-in-indigenous-areas-the-fosen-norway-and-the-lake-turkana-wind-project-kenya-cases/ (last accessed on 06/08/2023).

LOCKE, John: *The Second Treatise of Government, Über die Regierung,* Ditzingen: Reclam 2012.

MAC DOUGALL, David: "´Sad, angry, betrayed and empty´: Sanna Marin´s human rights reforms for indigenous Sámi fails", in: Euronews: 24/02/2023, https://www.euronews.com/2023/02/24/sad-angry-betrayed-and-empty-sanna-marins-human-rights-legislation-for-indigenous-sami-fai (last accessed on 06/08/2023).

MAC DOUGALL, David: "Sanna Marin´s government could collapse, as Sámi human rights laws stalled" , Euronews, 14/11/2022, https://www.euronews.com/my-europe/2022/11/14/sanna-marins-government-could-collapse-as-sami-human-rights-laws-stalled (last accessed on 06/08/2023).

MCGWIN, Kevin: “Schweden gibt grünes Licht für Eisenbergwerk Gállok“, Polar Journal, 04/04/2022, https://polarjournal.ch/2022/04/04/schweden-gibt-gruenes-licht-fuer-eisenbergwerk-gallok/ (last accessed on 06/08/2023).

NELSON Kjersti: “We won the Fosen case – but the battle isn´t won until the wind turbines are taken down”, Energy Watch, 14/10/2022, translated by Christoffer Østergaard, https://energywatch.com/EnergyNews/Renewables/article14494764.ece (last accessed on 06/08/2023).

Northern Way: “The Sami”, https://nordnorge.com/en/tema/the-sami-are-the-indigenous-people-of-the-north/ (last accessed on 06/08/2023).

Norwegian National Human Rights Institution: “Report: Human Rights Protection against Interference in Traditional Sami Areas”, Chapter 7., “The Way Forward”, https://www.nhri.no/en/report/human-rights-protection-against-interference-in-traditional-sami-areas/7-the-%20way-forward/ (last accessed on 06/08/2023).

Norwegian National Human Rights Institution: “The Human Rights Framework in Norway”, 13/09/2019, updated on 02/04/2020, https://www.nhri.no/en/2019/the-human-rights-framework-in-norway/ (last accessed on 06/08/2023).

Office of the High Commissioner for Human Rights: “Protecting indigenous peoples´ rights is a “collective fight”, 03/11/2021, https://www.ohchr.org/en/stories/2021/11/protecting-indigenous-peoples-rights-collective-fight (last accessed on 06/08/2023).

PEDERSEN, Steinar: “Salmon Sans Borders”, in: *Samudra, the Triannual Journal of the International Collective in Support of Fishworkers,* No. 54, 2009, pp. 4-7, https://www.icsf.net/wp-content/uploads/2021/06/497-1.pdf (last accessed on 06/08/2023).

RAVNA, Øyvind: “A Sámi Community Wins Case against the Swedish State in the Supreme Court”, in: *Arctic Review on Law and Politics*, Vol. 11, 2020, pp. 19-21.

RAVNA, Øyvind: “Norwegian Courts and Sami Law”, in: *Arctic Review on Law and Politics,* Vol. 12, 2021, pp. 179–185.

RAVNA, Øyvind: “Sami Rights and Law in Norway – with a Focus on Recent Developments”, in: Koivurova, Timo et al. (eds.): *Routledge Handbook of Indigenous Peoples in the Arctic,* London and New York: Routledge 2021, pp. 143-158.

RAVNA, Øyvind: “The Draft Nordic Saami Convention and the Assessment of Evidence of Saami Use of Land”, in: Bankes, Nigel et al. (eds.): *The proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights*, Oxford: Hart Publishing 2013, pp. 177-205.

RAVNA, Øyvind: “The Duty to Consult the Sámi in Norwegian Law”, in: *Arctic Review on Law and Politics,* Vol. 11, 2020, pp. 233-255.

RAVNA, Øyvind: “The First Investigation Report of the Norwegian Finnmark Commission”, in: *International Journal on Minority and Group Rights 20,* Vol. 20, No. 3, 2013*,* pp. 443-457.

RAVNA, Øyvind; BANKES, Nigel: “Recognition of Indigenous Rights in Norway and Canada”, in: *International journal on minority and group rights,* Vol. 24, No. 1, 2017, pp. 70-117.

ROHMANN, Romy: “Investor vurderer å trekke seg“, Steigan.no, 07/09/2022, https://steigan.no/2022/09/investor-vurderer-a-trekke-seg/ (last accessed on 06/08/2023).

SALONEN, Saara-Maria: “A year after Supreme Court verdict, Fosen wind farm still stands amid soaring energy crisis”, The Barents Observer, 12/10/2022, https://thebarentsobserver.com/en/indigenous-peoples/2022/10/year-after-supreme-court-verdict-fosen-wind-farm-still-stands-amid (last accessed on 06/08/2023).

Science Museum: “Climate Change in the Arctic”, 19/01/2022, https://www.sciencemuseum.org.uk/objects-and-stories/our-environment/climate-change-arctic (last accessed on 06/08/2023).

SPITZER, Aaron John; Selle, Per: “A Sami land-claims settlement? Assessing Norway´s Finnmark Act in a comparative perspective”, in: *Scandinavian Political Studies,* 15/06/2023, https://onlinelibrary.wiley.com/doi/epdf/10.1111/1467-9477.12260 (last accessed on 06/08/2023).

Supreme Court of Finland: “KKO 2022:25, Fishing restriction imposed on the Sámi indigenous people and its relationship to their fundamental rights (fishing offence)”, Case Summary in English, Diary number: R2019/424, 13/04/2022, https://korkeinoikeus.fi/en/index/ennakkopaatokset/shortsummariesofselectedprecedentsinenglish/2022_1/kko202225.html (last accessed on 06/08/2023).

Supreme Court of Finland: “KKO 2022:26, Fishing restriction imposed on the Sámi indigenous people and its relationship to their fundamental rights (game offence)”, Case Summary in English, Diary number: R2019/425, 13/04/2022, https://korkeinoikeus.fi/en/index/ennakkopaatokset/shortsummariesofselectedprecedentsinenglish/2022_1/kko202226.html (last accessed on 06/08/2023).

Sweden Sverige: „Sami in Sweden. With a culture that remains strong, some 20.000 Sami live in Sweden.”, last updated on 16/01/2023, https://sweden.se/life/people/sami-in-sweden (last accessed on 06/08/2023).

TARRAS-WAHLBERG, Hakan; SOUTHALAN, John: „Mining and indigenous rights in Sweden: what is at stake and the role for legislation”, Mineral Economics, Vol. 35, pp. 239–252, 2022, https://link.springer.com/article/10.1007/s13563-021-00280-5 (last accessed on 06/08/2023).

TUORI, Kaius: “The theory and practice of indigenous dispossession in the late nineteenth century: the Saami in the far north of Europe and the legal history of colonialism”, in: *Comparative Legal History*, Vol. 3, No. 1, 2015, pp. 152–185.

UNESCO: „Gállok-Mine bedroht Sami und das Weltkulturerbe Laponia“, Voices: 26/08/2021, https://gfbv-voices.org/unesco-gallok-mine-wird-negative-auswirkungen-auf-das-weltkulturerbe-laponia-haben/ (last accessed on 06/08/2023).

United Nations Department of Economic and Social Affairs. Indigenous Peoples: “Climate Change”: https://www.un.org/development/desa/indigenouspeoples/climate-change.html (last accessed on 06/08/2023).

United Nations Treaty Collection: Depositary: “2. International Convention on the Elimination of All Forms of Racial Discrimination”,

https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en (last accessed on 06/08/2023).
United Nations Treaty Collection: Depositary: "4. International Covenant on Civil and Political Rights", https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (last accessed on 06/08/2023).

YUPSANIS, Athanasios: "Article 27 of the ICCPR Revisited – The Right to Culture as a Normative Source for Minority / Indigenous Participatory Claims in the Case Law of the Human Rights Committee", in: Lavranos, Nikos et al. (eds.): *Hague Yearbook of International Law,* Vol. 26, Leiden, Boston: Brill Nijhoff 2013.

ZILLIACUS, Johanna: "Green coloniality of power over Sámi in Finland?", Social Exclusion, 30/03/2022, https://blogs.abo.fi/socialexclusion/2022/03/30/green-coloniality-of-power-over-sami-in-finland/ (last accessed on 06/08/2023).

Legal Sources

Act of 12 June 1987 No. 56 concerning the Sameting (the Sami parliament) and other Sami legal matters (the Sami Act), Norway, 12/06/1987, amended on 11/06/2021.

Act of 17 June 2005 No. 85 relating to legal relations and management of land and natural resources in the county of Finnmark (Finnmark Act), Finland, 17/06/2005.

Constitution of Finland, Finland, 11/06/1999.

Fishing Act, 286/1982, Finland, 1982, last amended in 2003.

General Recommendation XXIII on Indigenous Peoples, Committee on the Elimination of Racial Discrimination, 08/18/1997.

Government Decree on Fishing in the Tenojoki Tributaries (Decree 297/2017), Finland, 2017.

Indigenous and Tribal Peoples Convention (No. 169), International Labour Organization, 27/06/1989.

International Convention on the Elimination of All Forms of Racial Discrimination, United Nations General Assembly, Resolution 2106 (XX), 21/12/1965.

International Covenant on Civil and Political Rights, United Nations General Assembly, Resolution 2200A (XXI), 16/12/1966.

Procedures for Consultations between State Authorities and Samediggi of 11 May 2005, Norway, 2005.

Real Property Code, Finland, 12/04/1995.

Real Property Code, Sweden, 1734.

Reindeer Herding Act, Sweden, 1971.

Reindeer Husbandry Act, Finland, 1990.

Reindeer Husbandry Act, Norway, 2007.

Sami Parliament Act, Finland, 1995.

Sami Parliament Consultation Order, Sweden, 27/01/2022.

The human right to a clean, healthy and sustainable environment: resolution / adopted by the UN General Assembly, A/RES/76/300, 28/07/2022.

The human right to a clean, healthy and sustainable environment: resolution / adopted by the UN Human Rights Council, HRC/RES/48/13, 08/10/2021.

Treaty between Finland and Norway on Fishing in the Tenojoki River System, 2017.

UN Human Rights Committee: CCPR/C/127/D/2728/2016, 23/09/2020.

UN Human Rights Committee: CCPR General Comment No. 23: Article 27 (Rights of Minorities),

CCPR/C/21/Rev.1/Add.5, 08/04/1994.

United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly Resolution 61/295, 13/07/2007.

Cases

Angela Poma Poma v. Peru: Human Rights Committee, CCPR/C/95/D/1457/2006, decision 27/03/2009.

Deatnu I: Supreme Court of Finland, KKO 2022:25, judgement 13/04/2022.

Deatnu II: Supreme Court of Finland, KKO 2022:26, judgement 13/04/2022.

Fosen Windmill: Supreme Court of Norway, HR-2021-1975-S, Case No. 20-143891SIV-HRET, Case No. 20-143892SIV-HRET and Case No. 20-143893SIV-HRET, judgement 21/10/2021.

Girjas: Supreme Court of Sweden, Case No. T-853-18, judgement 23/01/2020.

Jovsset Ánte Sara: Supreme Court of Norway, HR-2017-2428-A, Case No. 2017/981, judgement 21/12/2017.

Karasjok: Uncultivated Land Tribunal for Finnmark, Case No. 21-086077TVI-UTMA and Case No. 21-086497TVI-UTMA, judgement 21/04/2023.

Nordmaling: Supreme Court of Sweden, Case No. T 4028-07, judgement 27/04/2011.

Nesseby: Supreme Court of Norway, HR-2018-456-P, Case No. 2017/860, judgement 09/03/2018.

Saarivuoma Sami: Supreme Court of Norway, HR-2021-1429-A, Case No. 20-164328SIV – HRET, judgement 30/06/2021.

Selbu: Supreme Court of Norway, Case No. 4B/2001, judgement 21/062001.

Svartskogen: Supreme Court of Norway, Case No. 5B/2001, judgement 05/10/2001.

Taxed Mountains: Supreme Court of Sweden, NJA 1981, judgement 29/01/1981.