SAMI PEOPLES LAND CLAIMS IN NORWAY, FINNMARK ACT AND PROVING LEGAL TITLE

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Abstract

The Sami, who straddle three Nordic countries and the Russian Federation, are an Indigenous people who have lived on their lands since time immemorial. The legal framework that governs them must take into consideration that they are a semi-nomadic people, as some of their population live in settled communities while some practice a nomadic lifestyle. Their land use bears similarities to those of the indigenous peoples of the United States, Canada and Australasia in terms of grazing and living in harmony with the environment. The Sami have been granted a dispensation that provides them partial sovereignty through the establishment of Parliamentary Assemblies in Norway, Sweden, and Finland. The establishment of these new bodies has not dissipated their need to assert ownership over land and to resist industrial exploration owing to the grant of mineral licenses that have eviscerated their rights. The issue is whether the Sami can achieve restitution by an assertion of full title to land in Norway, which has the highest percentage of Indigenous population in Scandinavia, and whether public-interest litigation based on self determination is available to them to achieve this goal. This Paper argues that the Sami can affirm their land claims in fee simple by legal processes in the courts and achieve this ownership as an indigenous right to land if that is recognized to be *sui generis*.

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Introduction

The Sami people have traditionally inhabited a territory known as Sápmi, which traverses the northern parts of Norway, Sweden, Finland, and the Russian Kola peninsula. Although the Sami are divided by the formal boundaries of the four States, they exist as a heterogeneous people defined by lifestyle rather than genealogy.[2] The Sami people's culture and traditions have evolved over several hundred years through a close connection to nature and land. Traditionally, the Sami have relied on hunting, fishing, gathering and trapping, and practiced a nomadic lifestyle similar to those of indigenous communities in the Americas.[3] This lifestyle needs examination in order to determine the probability of success in claiming land that has been appropriated and which the Sami would like to regain title based on usage.

The Sami have geographically been part of the Lapland, that is a region that covers the northern part of Norway now included in Finnmark.[4] The law governing them derives from legal relationships between the neighboring nations over which they herd their reindeer. This custom was formalised in the Lapp Codicil, signed by Sweden and Norway as part of a 1751 agreement to delineate their borders in accordance with the Treaty of Strömstad. The Lapp Codicil consists of thirty paragraphs dealing with the rights of Sámi who migrate or have a nomadic lifestyle herding reindeer.[5]

The Codicil provides Sámi with a variety of rights, including the right to choose their nationality, to be neutral in times of war, to unconditionally use the lands and waters of the other state for a small compensation, and to practice reindeer herding.[6] It also granted the Sámi of Utsjoki and Inari a full and permanent right to free trade in Norway under Article 10, which further gave the Sámi protection for their annual migration over the new border based on old customary practices. There, Sami

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[2] Melissa Stroud, *Origins and Genetic Background of the Sámi*, Sami Culture, https://www.laits.utexas.edu/sami/dieda/hist/genetic.htm (last visited Apr. 29, 2021).

[3] Harald Gaski, *The Sami People: The "White Indians" of Scandinavia*, 17 Am. Indian Culture Res. J. 115, 118 (1993).

[4] Harriet O'Brien, *The Complete Guide to: Lapland*, The Independent (Sept. 17, 2011), Independent.co.uk/travel/Europe/complete-guide-lapland-5334395.html ("'Lapland' . . . was a pejorative term deriving from the Scandinavian word lapp, meaning patch of cloth, or the Finnish lape, denoting remoteness. Today, the administrative areas of northern Finland and northern Sweden are known respectively as Lapland and Lappland; the Murmansk Oblast (administrative region) contains the Sami lands of Russia; and Norway's Finnmark is home to Sami people . . . ")

[5] The Lapp Codicil has received attention as a result of the negotiations for a new reindeer grazing convention between Norway and Sweden. Swedish-Sámi reindeer herders can invoke the right to pastures in Norway in accordance with the Codicil. *See* Geir Hågvar, *Svenske samers rett til reindrift i Troms*, 51 Lov og rett (2008). As of August 2009, a new convention has been signed by the treaty states' governments, but has not yet been passed by the Parliaments and Sámi representative organs.

[6] Otto Jebens, *Sami Rights to Land and Water in Norway*, 55 Nordic J. Int'l L. 46, 46 (1986).

communities, referred to as Sea Sami or Coastal Sami, who settled in the coastal areas within northern Norway,[7] traditionally practiced fishing and reindeer husbandry.[8] The majority of the Sami live in Finnmark,[9] where they outnumber the settler population in the northeast of Norway.[10]

Norway is the country with the highest ratio of Sami population. They are subject to the country's legal system. Though there is a distinct Sámi customary law that derives from indigenous origins, the policy of the state from the mid-1800s to approximately 1950 was to assimilate the Sámi people into Norwegian society.[11] However, the last three decades of the 20th century witnessed changes that gave the Sami devolution and autonomous institutions such as the Sami Parliament, Sami Law Commission, Sami Cultural Commission and the Finnmark Act.

However, the rising prices of mineral and energy commodities in recent years have caused an increase in natural-resource investments in the Nordic countries. They have also fostered friction between land

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[7] The State borders that now divide the Sami homeland were established over a 200-year period, roughly from the middle of the seventeenth to the middle of the nineteenth centuries, cutting through linguistic and cultural communities and constraining reindeer-herding activities. Today, the Sami population is a numerical minority within those States and is estimated to be between 70,000 and 100,000, with about 40,000 to 60,000 in Norway, 15,000 to 20,000 in Sweden, 9,000 in Finland and about 2,000 in the Russian Federation

[8] The Coastal Sami can be considered a different group given the fact that, in the early nineteenth century, the Mountain Sami of Karasjok began to consider them as "dáčâ." This phrase indicates persons that are not Sami when it comes to their behaviour, outlook and activities and they have gone through a strong Norwegianization process. They are considered a population with Sami origins, but not as a proper Sami group. Jung Im Kim, *Coastal Identities in the Modern Age: On Diversity of Ethnic Articulation in Storfjord, North Norway* (May 15, 2010) (Masters thesis, Universeity of Tromsø), https://munin.uit.no/handle/10037/2689.

[9] Troms and Finnmark is a Norwegian county, formed on 1 January 2020 by merging the former counties of Troms and Finnmark . David Nikel, *A New Map of Norway: Meet Norway's New Counties*, Life in Norway (January 19, 2020), https://www.lifeinnorway.net/norway-new-counties.

[10] The Old Norse form of the name was Finnmǫrk and the first element is *finn(ar)*, which is the Norse name for the Sámi people. The second element is *mǫrk* which means "woodland" or "borderland." In Norse times the name referred to any places where Sámi people were living (also parts of South Norway). Oluf Rygh, Norske Gaardnavne: Oplysninger Samlede Til Brug Ved Matrikelens Revision (18th ed. 1898); Kristiania, W. C. Fabritius & Sønners Bogtrikkeri 1–7 (1924).

[11] This is the inspiration behind the establishment of the Truth and Reconciliation Commission in 2017 in Norway and the Norwegianization policy will come under investigation. The Sámi Parliament was one of the main proponents of the commission's establishment. The use and practice of the Indigenous peoples own language, culture and traditional trade will be the focus. In connection with this, the commission shall also investigate the consequences of the Norwegianization policy for the majority population in terms of discrimination and the prevalence of prejudice against the Sámi and Kvens/Norwegian Finns. Its objective is to establish the foundation of continued reconciliation between the Sámi, Kvens/Norwegian Finns and the majority population.

developers and Sami communities.[12] This is particularly the case where the Sami are struggling to preserve their land against other infrastructure projects, including mining, hydroelectric dams, and forestry projects.[13] The Sami perception is that "cultural viability is intimately related to land rights" and the "struggle for improved land rights has become more of the leading political issues in the ethnic political development."[14]

The doctrine of cultural rights emanates from the Sámi legal culture which has a distinct place in Norwegian culture. This owes its origins to the recognition by Norway that "it is obliged to protect the Sámi language, culture and way of life by in adopting an amendment to the Norwegian Constitution in 1988. Norway is also obliged to identify and recognize the traditional Sámi lands, which the country has acknowledged by ratifying ILO No. 169 Convention concerning Indigenous and Tribal Peoples in Independent Countries ("ILO 169")."[15] This "doctrine" attempts to determine who acquires rights in land and, in some circumstances, has led to land ownership, beneficial use, and or a general public right of enjoyment. The results of the doctrine have become important, and land claims cannot be separated from the cultural rights.[16]

This Paper takes into consideration the legal rights in land of the Sami people in Norway and the forums in which they exercise their right of self-determination. The first Part takes account of the framework under which they exercise their rights to the land on their Finnmark Estate. The second Part deals with the appropriation of Sami land for mineral extraction and the use of land and the rights doctrine. The third Part considers the claims on land and litigation for restitution of lands. The final Part examines the right of acquisition by customary usage and time immemorial. The Paper assesses the issues by evaluating relevant legislation and court cases to determine if the restoration of land by the Sami peoples is possible in the Norwegian jurisdiction.

I. Land under Communal Ownership

The Sami can be defined as an Indigenous people who live on their ancestral lands and have a strong tie to their territories because they: (a) have occupied these territories in the "pre-colonial" and "pre-invasion"

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[12] Thomas Nilsen, *Norway greenlights copper mine with tailings to be dumped in Arctic fjord*, Barents Observer (Nov. 11, 2019), https://thebarentsobserver.com/en/industry-and-energy/2019/11/norway-greenlights-copper-mine-tailings-dump-arctic-fjord.

[13] This has been acknowledged by the International Work Group for Indigenous Affairs (IWGIA) who state that "main challenges for the Sami people concern extractive industry operations." *Indigenous peoples in Sapmi*, IWGIA, https://www.iwgia.org/en/sapmi.html (last visited Nov. 8, 2021).

[14] Tom G. Svensson, *The Sami and the Nation State: Some Comments on Ethnopolitics in the Northern Fourth World*, 8 Études/Inuit/Studies 158, 158 (1984).

[15] Øyvind Ravna, *The legal Protection of the Rights and Culture of Indigenous Sámi People in Norway*, 11 J. Siberian Fed. Univ. Human. & Soc, Sci. 1575 (2013).

[16] Øyvind Ravna & Nigel Bankes, *Recognition of Indigenous Land Rights in Norway and Canada*, 24 Int'l J. on Minority and Grp. Rts. 70 (2017).

eras; (b) occupy these territories nowadays; and (c) will occupy these lands in the future, as they want to transmit to future generations their ancestral territories.[17]

The Sami people have traditionally lived as nomadic peoples in northern Norway, Sweden, and Finland within the geographical limit of Sápmi. The trajectory of their reindeer herds long determined the extent of their territorial rights.[18] Section 4 of the Reindeer Herding Act 2007 defines the range of Sami grazing land.[19] It is onerous to establish land titles in law because these were rights in common over grazing and water for which there was no specific ownership by deed.[20] The projection of their movements was intrinsic to their traditional beliefs, customs and cosmology as a nomadic peoples, and followed a life cycle similar to other Indigenous peoples.[21]

There has been a gradual process of acceptance of the Sami people as the indigenous inhabitants of the region. By a Norwegian Royal Decree of 12 July 1889 the Lapp Commission was appointed

to investigate the circumstances of the Lapps in the shires of Hedemark, South Trondheim and North Trondheim and to make proposals for the determination of the boundaries of the Lapps' common of pasture as well as for the good ordering otherwise of the relationship between these and those permanently resident in the said shires.[22]

The Lapp commission was formed on the assumption that the Sami arrived in southern Norway in the late 17th and 18th centuries.[23] This perspective has been negated by recent case law which has accepted the view that the Sami were the original peoples of the Scandinavian regions.[24]

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[17] Jérémie Gilbert, *Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples*, 14 Int'l J. on Minority and Grp. Rts. 207 (2007).

[18] Dawn Heaps, *Sami Land rights and policy driven recognition threats*, Henry M Jackson School of International Studies (June 27, 2019), https://jsis.washington.edu/news/sami-land-rights-and-policy-driven-recognition-threats.

[19] On the basis of consuetude, the Sami population has a right to conduct reindeer husbandry in the counties of Finnmark, Troms, Nordland, Nord-Trøndelag, Sør-Trøndelag and Hedmark where from old times reindeer husbandry Sami have conducted reindeer husbandry (the Sami reindeer grazing area). *See* Act relating to Reindeer Husbandry (The Reindeer Husbandry Act), ACT-2007–06–15–40 (2007) [*hereinafter* Reindeer Herding Act].

[20] *Id.*

[21] Leena Heinamaki & Thora Martina Hermann, Experiencing and Protecting Sacred Natural Sites of Sami and other Indigenous Peoples *277 (2017)*.

[22] Dokument nr. 93 (1889) Norsk nasjonalforsamling.

[23] This prevailing immigration theory was advanced in Y Nielsen, *Lappernes fremrykning mod syd i Throndhjems stift og Hedemarkens amt*, 1 Aarbog (Christiania Norske Geografiske Selskab ed., 1891).

[24] In Inge Sirum v. Esslan Reindeer Pasturing District [2001], No. 4B/2001 791–92, the Supreme Court held that the older Norwegian authorities such as the Lapp Commission report must be evaluated in the background of the culturally specific attitudes prevailing in relation to the Sami at the time.

The legal framework must reconcile the concepts of Sami land rights and ownership with their nomadism.[25] Unlike Native American tribes, the Sami are not recognized as "sovereign" nations by the Norwegian federal government. There is also no treaty relationship underwriting a bilateral *accord* in law, such as that which exists between the Canadian government and the First Nations. However, the Sami in Norway have been able to achieve representation and an acknowledgement of their rights as a minority group through a process that began with the Sami Council in 1956 which, along with five other representative organizations of Indigenous peoples, has Permanent Participant status at the Arctic Council, the most important intergovernmental body in the Arctic region.[26] The Sami delegation has focused on developing their language, culture, and communal life in order to establish rights that will ensure the survival and growth of their culture in their ancestral areas of settlement.[27]

These goals were acknowledged in an amendment to the Norwegian constitution which came in the aftermath of the International Labour Organization's (ILO) 1989 Convention 107, which was revised and re-titled the Indigenous and Tribal Peoples Convention, 1989 (No. 169). This convention recognized Indigenous peoples' right to self-determination within a nation-state while setting standards for national governments regarding Indigenous peoples' economic, sociocultural and political rights, including the right to a land base. Norway was the first country to ratify the Convention in 1990 and is still the only nation state with a Sami minority to do so.[28]

The change of policy by the Norwegian Parliament's Sámi Law Committee, established in 1980, promulgated the Sámi Act that inaugurated the Sámi Parliament, which sat for its first session in 1989.[29] There were further legislative steps designed to process claims by the Sami

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[25] Lars Ivar Hansen & Bjornar Koninklijke Olsen, *Hunters in Transition: An Outline of Early Sami History (*2014).

[26] The Sami Council has observer status in the Sami Parliamentary Council, which is the cooperative body of the Sami Parliaments of Finland, Norway and Sweden. The Sami in Russia who are represented in the Sami Council have a permanent participation status in the SPR cooperation. Representations, Sami Council, https://web.archive.org/web/20200313094633/http://www.saamicouncil.net:80/en/about-saami-council/representations.

[27] Harald Gaski, Sami Culture in a New Era: The Norwegian Sami Experience *223* (1997).

[28] This makes securing land rights in Finland more difficult as 90 percent of the Finnish Sami land belongs to the government. Emily J. Getz, *Indigenous People Are Fighting Finland's Plan to Log Ancient Forests*, TakePart (March 24, 2016) https://web.archive.org/web/20201108153249/http://www.takepart.com/article/2016/03/24/finland-old-growth-arctic-boreal-forest-reindeer-sami-indigenous-land.

[29] Sámediggi, or the Sámi Parliament of Norway, is elected by and among the Sámi people. It is an elected national assembly for the Sámi and thirty-nine representatives are elected by seven constituencies every fourth year.

peoples and determine their legal and resource rights.[30] The Finnmark Act of 2005[31] final text emphasizes that the purpose of the Act is to facilitate ecologically sustainable management of lands and resources for the benefit of all residents of the County of Finnmark, and in particular for the Sami culture, social life, their land use and livelihoods. The final text places greater emphasis on the recognition of land and natural resources in being the basis for Sami culture. Moreover, the wording public at large (people who are not residents of the county) was deleted from the text.[32]

It states in its preamble that the "management of land and natural resources" of Sami are to be "balanced ecologically and in a sustainable manner for the benefit of the residents and to promote Sami culture, reindeer husbandry, use of non cultivated areas, commercial activity and for their social life." Section 3 establishes a nexus with the ILO Convention by stating it shall apply the Act in compliance with provisions of international law.[33]

The Finnmark Act affirms the ability of Sami peoples to "establish rights by the prolonged use of land and water areas" that they have "collectively and individually acquired to land." The Act does not interfere with rights acquired by means of "prescription and ceremonial usage," and further recognizes rights acquired by "reindeer herders on such a basis or pursuant to the Reindeer Herding Act" of 2007. This provision ensures that the interests of the Sami peoples are taken into account in national legislation and the application of law by courts and administrative bodies. It provides machinery for identifying and recognizing existing rights of use and ownership as part of an ongoing process of surveying and recognizing such rights in Finnmark on areas previously considered to be state-owned.[34]

The Sami people do not own any rights akin to the English concept of fee simple on lands that have been granted to them by the state.[35] The

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[30] The Human Rights Act No. 30 (May 1999) incorporates the UN Covenant on Civil and Political Rights (UNCPR) into Norwegian law.

[31] Lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark (Finnmarksloven) [hereinafter Finnmark Act], LOV-2005–06–17–85, https://lovdata.no/dokument/NL/lov/2005–06–17–85, *translation of current version of act at* https://lovdata.no/dokument/NLE/lov/2005–06–17–85 (Act No. 85 of June 17, 2005 relating to Legal Relations and Management of Land and Natural Resources in the County of Finnmark).

[32] John B. Henrikson, *The Finnmark Act (Norway), A Case Study*, *in* Research on the Best Practices for the Implementation of the Principles of ILO Convention No 169 20 (2008).

[33] Article 3 states: "Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination." International Labour Organization [ILO], *Indigenous and Tribal Peoples Convention, C169*, art. 3, C169 (June 27, 1989).

[34] This identification process is to be performed by a body called the Finnmark Commission under Article 29 (first paragraph), while a special court, the Land Tribunal for Finnmark settles any disputes arising after the Commission has investigated a "field" or specified area.

[35] "The freehold estate [is] one of only two forms of ownership of land that, under

fee-simple absolute in possession is a common-law concept based of a bundle of rights in land where the estate can be owned concurrently by those who have ownership, or possession as in a leasehold interest in land. In common-law countries the "fee-simple absolute is a highly modifiable bundle of rights that may be substantially diminished in the protection and furtherance of the collective well-being" and it can give shape to "the historic formulations of public values served by governmental intervention within our property systems and the permissible dimensions of the alteration that may be caused within those systems."[36]

This lack of a fee-simple right is significant because it deprives the Sami of a proprietary right, as attested by the former Special Repportaur for Indigenous Peoples, James Anaya, who has argued that the Finnmark Act offers a "possible basis and mechanisms to identify and effectively protect land and resource rights of the Sami people in Finnmark."[37] However, Anaya has identified that the "reindeer industry, which mainly in northern regions is still the primary means of Sami living, is especially endangered through competing land use."[38] This economic reality is relevant because the "oil and gas industry has, in particular, threatened the grazing areas significantly."[39]

The courts have acknowledged in principle that Sami land use results in land ownership rights such as in *Erik Anderson v. The Norwegian State* ("Svartskogen case")[40] where the Norwegian Supreme Court found in favor of the Sami parties, ruling that the Sami community had acquired collective ownership to a parcel of land through communal utilization since time immemorial. Anaya has noted Sami people have been able to avail themselves of the "implementation of rights and that there should be further demarcation of indigenous land."[41]

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the Law of Property Act 1925, can exist as a legal estate [. . .] All others take effect as equitable interests. Fee simple indicates ownership that is not liable to end upon any person's death, with the expiration of time, or on the failure of a particular line of heirs. Absolute means that the owner's rights are not conditional or liable to terminate on the occurrence of any event (except the exercise of a right of re-entry – Law of Property (Amendment) Act 1926). In possession means that the owner's rights are immediate, thus future interests do not qualify, but possession need not imply actual physical occupation (for instance, a person in receipt of rents and profits can be said to be in possession)." Overview: fee simple absolute in possession, Oxford Reference, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095813406 (last visited Nov. 9, 2021).

[36] Donald M. Carmichael, *Fee Simple Absolute as a Variable Research Concept*, 15 Nat. Res. J. 749 (1975).

[37] James Anaya (Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people), *The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland*, ¶ 48–9, 53–4, U.N. Doc. A/HRC/18/35 (Jan. 12, 2011).

[38] *Id.* at ¶ 55.

[39] *Id.* at ¶ 56.

[40] Erik Anderson v. Norwegian State [2001], No. 5B ("Svartskogen" case) [hereinafter *Svartskogen*].

[41] Anaya, *supra* note 37, at ¶ 81.

The grant of rights on land must consider Article 14(2) of ILO Convention 169 ("Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession").[42] Professor *Malgosia Fitzmaurice* who holds a chair of public international law at the Department of Law, Queen Mary University of London argues that "identification procedures related to land rights in the Norwegian Finnmark Act are not appropriate."[43] There is a direct relevance to the "compatibility of the Finnmark Act with ILO Convention No. 169 (especially Art. 14 with regards to ownership and rights of use, as there are no special rights for Sami exploitation of resources in the Finnmark Act)."[44] Tanja Joona, Associate Professor of International Law at the University of Lapland, argues that this law "replaces the acknowledged rights of possession and ownership in ILO Convention No. 169 with a lower classified right to participation in management which this could be a violation of Article 14 II of ILO Convention No. 169."[45]

The Sami cannot be deemed to avail themselves of the right of fee simple in possession because, unlike the Australian Land Councils ("ALC"), the existing Sami Parliaments are also governmental authorities. Margret Carsten, a post doctoral independent researcher in Indigenous rights argues, "even if the Sami Parliaments in Norway and Finland dispose of consultation rights in a similar manner as the ALCs to their examples, the Sami Parliaments can only be called an extenuated version of indigenous self-determination. The absence of jurisdiction over traditional land is particularly relevant."[46]

However, the Finnmark Act is an important development and a positive step in securing indigenous land rights. While ownership and user rights, individually or as a group, come into effect occasionally in the regular Norwegian court system, the issue remains that outside of the Finnmark areas there are no special procedures for the identification of Sami land and resource rights. Although the identification process pertaining to existing land rights in accordance with the Finnmark Act is currently underway, pursuant to Anaya, the adequacy of the established procedures is by no means evident.[47]

The identification process is a result of court judgments which have led to an acknowledgment that the state ownership of so-called "unsold"

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[42] ILO, *supra* note 33, at ¶ 14.2.

[43] Malgosia Fitzmaurice, *The New Developments Regarding the Saami Peoples of the North*, 16 Int'l J. on Minority and Grp. Rts. 67, 74 (2009).

[44] *Id.* at 109

[45] *See* The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights (Nigel Bankes and Timo Koivurova, 2013).

[46] Margret Carstens, *IndigeneLand-und Selbstbestimmungsrechtein Australienund Kanada unter besonderer Berücksichtigungdesinternationalen Rechts* 170, 340, 347 (2000) (Legal doctoral thesis) (available at Deutsche Hochschulschriften).

[47] Margret Carstens, *Sami Land Rights: The Anaya Report and the Nordic Sami Convention*, 15 J. on Ethnopols. and Minority Issues in Eur. 75 (2016).

or "unregistered land" in Finnmark bespeaks an obsolete legal opinion which "the Norwegian state can no longer stand within."[48] It was also found by the government that there could be "private or collective rights based on prescription or immemorial usage" of the former state land.[49] This scheme would be defined by customary usage as rights in land in accordance with the area designated for the Sami population under the Finnmark Act.[50]

The Sami, like most indigenous peoples, celebrate an oral culture. Until quite recently, the Sami had no written language, meaning there are few deeds to land proving title or usage of land.[51] Those in existence originated from outsiders such as Norwegian, Danish and Swedish officials, traders and missionaries.[52] In April 1988, the Norwegian constitution framed Article 100a, which stipulates "it is the responsibility of the authorities of the State to create conditions enabling the Sámi people to preserve and develop its language, culture and way of life." The Norwegian Court Commission has determined that the courts and their administration must interpret this provision under the guidelines of United Nations Convention for Civil and Political Rights.[53] The establishment of Sis-Finnmárkku diggegoddi (Inner Finnmark district court) is a consequence of this policy and is an acknowledgement that the "Sámi court has special responsibility for safeguarding Sámi culture."[54]

The Sami customs and traditions have received priority when rules of immemorial usage are concerned. This pre-eminence confirms that the Sami connection to land has been recognized by the courts and that their interest in land has received credibility through the creation of the administrative bodies under the various acts. There is still a difference

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[48] Øyvind Ravna, *The Process of Identifying Land Rights in Parts of Northern Norway: Does the Finnmark Act Prescribe an Adequate Procedure within the National Law?*, 3 Yearbook of Polar L., 423, 423–53 (2011).

[49] *Id.*

[50] Section 29 of the Finnmark Act is the direct legal basis for the establishment of the Finnmark Commission, which "shall, on the basis of the applicable national law, investigate use and ownership rights for the land acquired by Finnmark property." Flertallet i justiskomiteen valgte formuleringen «gjeldende nasjonal rett» for bedre å få fram at også samiske sedvaner og rettsoppfatninger skal vektlegges.7 Lovgiver har således tydelig lagt til grunn at samiske sedvaner og rettsoppfatninger skal ha tyngde under rettighetskartleggingen. The majority in the Judiciary Committee chose the wording "current national law" to better emphasize that Sami customs and legal beliefs should also be emphasized. Finnmark Act, *supra* note 31.

[51] *See* The Proposed Nordic Saami Convention, *supra* note 45, at 177–205.

[52] *Id.*

[53] The Court Commission (Domstolkommisjonen) was appointed by Kgl. Res. 8th March 1996 with a mandate to investigate the administrative position of the courts in Norway. It delivered its report in April 1999 as NOU 1999: 19 Domstolene i samfunnet.

[54] *See* Chief Justice of the Supreme Court Tore Schei's speech at the opening of the Court 23rd of June 2004 session where he points out that Inner Finnmark District Court has the important task of letting the insight and knowledge of Sami custom and customary law find expression in its decisions.

between other Indigenous legal regimes such as Australia's, where federal land rights for Aboriginal peoples became known as Native Title in 1993. In Norway, the official recognition process was longer in duration and only officially recognized in 2005 with the Finnmark Act and the subsequent establishment of the Finnmark Estate ("Finnmarkseiendommen"). In both jurisdictions the land made available for indigenous title was common land (or, as in Australia, crown land), that was not subject to private ownership.

The Finnmark Act differs significantly from the Australian Native Title Act because the Finnmark Estate ("FEFO") represented a national legal process, transferring ownership of the Norwegian county to an Estate, and it is of little consequence to Sami people outside its boundaries. Moreover, while the transfer of land from the state to the Finnmark Estate acknowledged an indigenous Sami population who had an interest in land, the Finnmark Estate is not an exclusively Sami Estate and belongs to the entire population of Finnmark, both Sami and non-Sami.[55]

II. Use of Land and Rights Doctrine

It is important to underscore that, until recent decades, the official opinion in Finland, Norway and Sweden about the Sami right to land was the same towards all "Indigenous peoples" in settler states: that their land was *terra nullius*. The government was able to annex these lands as "ownerless lands." The State viewed agriculture, fishing, and hunting as activities of all Norwegian citizens. For this reason, natural resources were deemed to be shared. This scheme subordinated Sami interest in the land to national interests.[56]

A transformation came about through litigation in the Nordic countries that led to recognition of the Sami rights in land, provable in the courts. The initial change was in Sweden, where the Sami group in Jämtland commenced litigation in the land ownership and usage since time immemorial against the Swedish state (so-called "Skattefjällsmålet," or "Taxed Mountain case").[57] This case concerned Sami land and water rights, which the litigants argued had primacy over the government's right to expropriate the land.

In *Skattefjällsmålet*,[58] the Sami applicants claimed restitution of the ownership of certain areas in the northern part of the province of Jämtland (known as "Skattefjäll") and some adjacent properties known as "extended territories." The matter reached the Supreme Court, which

[55] Gro B. Ween & Marianne E. Lien, *Indigenous Land Claims and Multiple Landscapes: Postcolonial Openings in Finnmark, Norway*, *in* Nature, Temporality and Environmental Management: Scandinavian and Australian perspectives on peoples and landscapes 133, 135 (L. Head et al. ed., 2016).

[56] Lennard Sillanpää, Political and Administrative Responses to Sami Self-Determination: A Comparative Study of Public Administrations in Fennoscandia on the Issue of Sami Land Title as an Aboriginal Right43 (1994).

[57] The Sámi National Minority in Sweden 155 (Birgitta Jahreskog ed., 1982).

[58] Trygve John Solbakk, The Sámi People: A Handbook 165 (2006).

decided that the physical boundary was determined for the Sami by the Reindeer Grazing Act of 1886. The ruling stated:

> Here, as when it referred to immemorial prescription, a certain setting of land boundaries must have been significant. In consideration of that said, it is thus impossible to clearly differentiate between the conditions for occupation and for immemorial prescription; that said about the one also applies to a great extent to the other. It should be noted however that the matter at hand is not the typical situation in which the rules on immemorial prescription are actualized, since it is undisputed that the Taxed Mountains were unclaimed lands when the Sami began using them.[59]

In the opinion of the Court, the Sami could not be permitted the ownership rights because of their use since time immemorial and the Swedish State owned the Taxed Mountain because "It [the legislative process] is a matter of nothing other than due and proper protection of a right, which requires protection equal to that accorded ownership rights, and the setting aside of which the 'reasonable interests of the state' in no way permit."[60]

The case established many legal principles in favor of the Sami rights and was advantageous because the Supreme Court held that the 1886 law entailed a codification of their legal position.[61] The impact of the decision is that it is difficult under any pretext to find corroboration for the view that 1886 Act was based on "the understanding that Sami rights in the area of reindeer husbandry, including the right to reindeer pasture, are constituted of a utility right based on immemorial prescription" which was the government's argument.[62] The Taxed Mountains decision has "retroactively ascribed greater significance to immemorial prescription as a basis of the 1886 law than what was actually the case."[63]

This case was followed by a ruling in Norway which concerned the Sami right to land and the economic interests of the state to exploit the natural resources on real estate. On an area of the Finnmark County, the Norwegian government decided in 1978 to build a hydro-electric dam on the Alta-Kautokeino river system. The subsequent project was smaller than the first attempt at the construction of a dam. However, the Sami peoples were concerned that this dam would have an adverse environmental impact on salmon fisheries in the Alta River, as well as on reindeer grazing. The Sami demonstrated against the construction, leading to large-scale civil disobedience in the country.[64]

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[59] *Id.* at 185.
[60] *Id.* at 233.
[61] *Id.* at 238
[62] Eivind Torp, *The Legal Basis of Sami Reindeer Herding Rights in Sweden*, 4, Arctic Rev. on Law & Pol. 43, 58 (2013).
[63] *Id.*
[64] Svein S. Andersen et.al., *Conflict and Local Mobilization: The Alta Hydropower Project*, 28 Acta Sociologica 317–35 (1985).

In Alta/Kautokeino case a district court granted permission for the dam to be built and the Sami objected to the construction of the dam and broadened their attack by expressing land rights in principle, conservation, and sustainability of their culture.[65] They also referred to customary international law to protect their indigenous peoples. The Supreme Court rejected their arguments and held that the Regulation of Rivers Act 1917 does not limit the King's or Parliament's power to permit a regulation of a watercourse. The area was deemed to be under Norwegian jurisdiction and international common law did not apply to the dispute.[66]

The Sami concerns about the dam's likely impact were presented to the court through the evidence of expert anthropological witnesses, *Ivar Bjørklund of the* Department of Cultural Sciences, Tromsø University and Terje Brantenberg, anthropology professor of Lund University.[67] They stated that "reindeer pastoralism in the area" would be adversely affected and, after "the construction of the dam, would no longer be able to function."[68] The Sami litigants served a detailed study by Robert Paine, later published by the *International Work Group for Indigenous Affairs (*"IGWIA") which stated that the "one-population-one culture whose survival depends upon a complimentarity of livelihoods and skills" would be impacted.[69] The Sami legal team also commissioned an amicus curiae from a Canadian anthropological expert on aboriginal rights and international law, Professor Douglas Sanders.[70]

The Court decided that the project could continue but confirmed the district court's findings that the Sami had the right to receive monetary compensation. The Court further agreed there needed to be amendments to the original plan of construction for the dam.[71] The case established new legal grounds on matters of principle. For the first time, Sámi rights to land and water were acknowledged as rights founded on immemorial prescription, "urminneshävd," thereby eliminating the former misconception that Sámi land rights were exclusively based on legislation (the Reindeer Pastoralist Law).[72] The litigation by the Sami was ineffective to stop the construction of the dam, but it resulted in consultations between the Norwegian government and the Sami delegations,

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[65] Robert Paine, Damn a River, Damn a People, IGWIA Doc 45. https://www.iwgia.org/images/publications/0102_45_Dam_a_river.pdf

[66] Eva Solem, *Press Release on the Supreme Court's Verdict*, 30 IWGIA Newsl. 103, 104 (1982).

[67] Ivar Bjorklund & Terje Brantenberg, Samisk reindrift—norske inngrep: Om Altaelva, reindrift og samisk kultur (1981).

[68] *Id.* at 69.

[69] Robert Paine, *Dam a River, Damn a People? Saami (Lapp) Livelihood and the Alta/Kautokeino Hydro-electric Projectand the Norwegian Parliament*, IWGIA Doc. 45 (June 1982), http://www.iwgia.org/iwgia_files_publications_files/0102_45_Dam_a_river.pdf.

[70] *See* Douglas Sanders, Indigenous Rights and the Alta- Kautokeino Project, *in* Samene, Urbefolkning og Minoritet 176–186 (Trond Thuen ed., 1980).

[71] Sillanpää, *supra* note 56, at 92.

[72] Svensson, *supra* note 14, at 160–4.

with the result that the government appointed two committees, the Sami Rights Commission and the Sami Cultural Commission.[73]

There has been sociolegal commentary on the impact of the case law and its development of consciousness in the rights-based litigation of the Sami people.[74] It changed the legal relationship and led to a new framework that consisted of: establishing the Sámi parliament, Sámediggi, in Karasjok; the recognition of the Sámi as an indigenous people in the Norwegian constitution in 1988 by Article 110; a Sami Assembly in 1989; and the adoption of the Finnmark Act by the Norwegian government in 2005.[75]

In examining the issue of industrial projects on Sami land, it is necessary to evaluate if it is possible for states to improve the legal framework for the protection of the Sami in cases which relate to mining activities. This examination requires a focus on the possibility of increasing the participation of the Sami in the decision-making processes of the indigenous peoples in order to balance the traditional lifestyle of the Sami against the economic interests of the state. This evaluation will need consideration of the Mining licenses issued in the selected Nordic states that must not breach international instruments such as the ILO Convention No. 169. A further concern is the extent to which the Sami are involved in the consultation mechanism of the state which will need their free, prior and informed consent before any decisions are taken in relation to the identification and protection of Sami lands and collective use rights.[76]

III. Land acquisition and claims of restitution

Two issues arise: (1) whether the Sami can restore their lands in the original condition when they are being encroached upon by mineral explorers who have been granted licenses by the Norwegian government, and (2) if there are protective mechanisms available in the Norwegian legal system. Mining on the Finnmark estate in Norway involves the exploration and development of the mining opportunities. The competing claims for land are based on nature conservation, reindeer herding, and forestry, all-important to the Sami people.[77] The Scandinavian countries have planning systems for the mining industry that has an application process which differ according to each country's legal system. In Norway,

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[73] *Id.* at 164.

[74] *See* Andersen et. al., *supra* note 64; *see also* Øystein Dalland, *The Alta Case: Learning from the Errors made in a Human Ecological Conflict in Norway*, 14 Geoforum 193 (1983).

[75] Solbakk, *supra* note 58, at 164–70.

[76] Øyvind Ravna, *Norway and Its Obligations under ILO 169—Some Considerations after the Recent Stjernøy Supreme Court Case*, 7 Arctic Rev. L. and Pols. 201, 201–204 (2016).

[77] In Norway, the mining is regulated by the Norwegian Mineral Act of 2010, together with other laws (the Pollution Control Act of 1981, the Planning and Building Act of 1985 and the Nature Diversity Act of 2009). The authority involved in the management of mining is the Directorate of Mining.

spatial planning is conducted on three levels (state, regional, municipal), in Denmark on two (state and regional) and in Sweden on one (municipal).[78]

The Norwegian Mineral Act of 2010 introduced new obligations regarding the protection of the Sami living in the north of the country.[79] Chapter 1, section 2 stipulates that the fundamentals of Sami rights, their culture, and their lifestyle must be respected in the process of extracting mineral resources.[80] Section 10 establishes that the party involved in the mining of ore deposits must inform the landowners, at the latest, one week before the beginning of the surveying process. However, if the extraction will be in the Finnmark area, the licensed parties must inform the Sami Assembly, the Finnmark Estate and, if possible, also the Sami village (so-called "Siida," the traditional Sami local community and the basic organizational unit for large-scale herding).[81] The Finnmark Estate is an independent legal entity whose task is to administer the lands and natural resources in the designated area.[82]

Chapter 4 section 13 of the Mineral Act, which concerns requests for exploration permits, dictates that "in Finnmark, the Directorate of Mining shall inform the landowner, the Sameting (the Sami Assembly), the relevant area board and district board for reindeer management, and the municipality of the permit." Section 17 of the same chapter establishes that the parties involved in the mining process must take all possible measures to assess whether the exploitation of the resources in the Sami indigenous area can possibly affect Sami interests. The same section emphasizes that such permission may be refused if the exploitation of natural resources will be against the interests of the Sami living in that area who have the right to raise claims if parties impinge upon their lands.[83]

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[78] Horst Wagner et al., *Minerals Planning Policies in Europe*, 52 Materials and Geoenviron. (2004), http://www.rmz-mg.com/letniki/rmz52/rmz52_0607–0620.pdf.

[79] Rachel Speight & Bushra Shabazz, *Mining Legislation in the Nordic Countries*, Mining J. 1, 1–2 (2013).

[80] Lov om erverv og utvinning av mineralressurser (mineralloven) [Norwegian Mineral Act], LOV-2009–06–19–101, § 2, https://lovdata.no/dokument/NL/lov/2009–06–19–101, *translation of original version of act at* https://www.regjeringen.no/globalassets/upload/nhd/vedlegg/lover/mineralsact_translation_may2010.pdf. ("Within the framework of section 1, the administration and use of mineral resources pursuant to this Act shall ensure that the following interests are safeguarded: a) value creation and industrial and commercial development; b) the foundation of Sami culture, commercial activity and social life; c) the surroundings and nearby areas while operations are being are being carried out; d) the environmental consequences of extraction; and e) long-term planning relating to subsequent use or reclamation of the area.")

[81] Mikkel-Nils Sara, *Siida and traditional Sámi reindeer herding knowledge*, 30 N. Rev. 153, 153 (2009), https://thenorthernreview.ca/nr/index.php/nr/article/view/9.

[82] Finnmark Act, *supra* note 31, at § 6.

[83] Gro B Ween & Marianne Lien, *Decolonisation in the Arctic? Nature Practicing and Land Rights in the Norwegian High North*, 7 J. Rural and Cmty. Dev. 93, (2012), https://journals.brandonu.ca/jrcd/article/view/557.

Finally, Section 18 stipulates that mineral companies involved in the extraction process in the Finnmark area must provide "written notice to the Sami Parliament and the relevant area board and district board for reindeer management." There are several provisions about the protection of Sami rights under the Act and Section 57–58 establishes that regulation fees may be charged for the mining activities in the Finnmark area such as extracting a deposit of minerals owned by the State shall under Section 5–6 pay the landowner fees up to 0.25% in the Finnmark estate. [84]

However, no references are made to the Coastal Sami because the majority of the Coastal Sami live in the inner part of the fjords; their economy is based on fishing, hunting and animal husbandry (so-called "fiskarbonden" – fishermen farmer).[85]

This mining framework is a concern for Sami representatives because of lack of consultation and the limited recognition of the rights of the Sami people. Despite objections from the Sami Parliament, the text of the Minerals Act was adopted. This ignoring of Sami objections was a subject of complaint by the former Special Rapporteur of Indigenous Rights with the Government of Norway.[86] In 2015, the Committee on the Elimination of Racial Discrimination ("ICERD") had concerns over the Act's limited safeguards for the Sami people and made recommendations in its report, CERD/C/NOR/CO/21–22.[87] The Committee suggested that the State party: (a) Take concrete steps to give full effect in practice of the legal recognition of the Sami rights to their lands and resources as provided for in the Finnmark Act to enable Sami to maintain and sustain their livelihoods; (b) Follow up on the proposals of the Sami Rights Committee, including by establishing an appropriate mechanism and legal framework, and identify and recognize Sami land and resource rights outside Finnmark.[88]

The United Nations 2007 Declaration on the Rights of Indigenous Peoples contains several relevant provisions ignored by the Norwegian government. Article 11(2) states that States shall provide redress through effective mechanisms, which may include restitution developed in conjunction with indigenous peoples in respect to their cultural, intellectual,

[84] Forskrift til Mineralloven [Regulations to the Minerals Act], FOR-2009–12–23–1842, § 5–6, https://lovdata.no/dokument/SF/forskrift/2009–12–23–1842 (providing for benefit sharing when the extraction occurs in traditional Sami lands and affects the Sami community in Finnmark).

[85] Anglika Lätsch, *Coastal Sami revitalization and rights claims in Finnmark (North Norway) - Two Aspects of One Issue? Preliminary Observations from the Field*, 18 Samisk Sentrs Skriftserie 60, 63 (2012), https://septentrio.uit.no/index.php/samskrift/article/view/2356/2177.

[86] Anaya, *supra* note 37, at ¶¶ 76, 81.

[87] Comm. on the Elimination of Racial Discrimination, Concluding Observations of the Combined Twenty-First and Twenty-Second Periodic Reports of Norway, U.N. Doc. CERD/C/Nor/CO/21–22 (Sept. 25, 2015), https://undocs.org/en/CERD/C/NOR/CO/21–22.

[88] *Id.* at ¶¶ 30(a)–(b).

religious, and spiritual property taken without their free, prior, and informed consent or in violation of their laws, traditions, and customs.

Further, Article 19 makes it a moral obligation for governments to obtain the free, prior, informed consent of indigenous peoples before adopting and implementing legislative or administrative measures that may affect their rights. Article 26(3) obligates States to provide legal recognition and protection to those lands, territories, and resources that indigenous communities traditionally owned, occupied, or otherwise used or acquired "with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."[89]

Article 8(1) of the ILO Indigenous and Tribal Peoples Convention of 1989 (No. 169) provides that due regard must be given to the customs and customary law of the indigenous peoples whose rights are implicated in applying national laws and regulations. The existing Special Rapporteur of Indigenous Rights, who has affirmed the findings of previous reports of non-compliance by the Norwegian government, has observed that the starting point for any measures to identify and recognize indigenous peoples' land and resource rights should be their own customary use and tenure systems.[90]

This observation is relevant because the Minerals Act differentiates between the Sami in Finnmark and those outside the estate because there are currently no legal frameworks or specialized mechanisms to identify Sami land and resource rights outside Finnmark and Troms County. The consequence of this is that there is no established method of proving title and this could potentially undermine the future recognition of Sami claims to their traditional lands and resources because of disputes between Sami and non-Sami landowners.

Fixing this problem requires an approach that evaluates the indigenous land rights and land use which focuses on the indigenous right holders. Yet, it is necessary to focus instead on the effect of such processes within the framework of legal rights claims. The multiplicity of claims to title often come up against a bundle of rights that must be separated for indigenous rights claims to be sustained. However, even in the case of Finnmark, Sami have no clear ownership rights over the land for purposes of practicing their traditional livelihoods, especially reindeer herding. An important transformation in the Norwegian legal framework was the adoption of a new Planning and Building Act in 2010. This Act elevates the municipality's role as the planning authority to safeguard the foundations of Sami culture, business and society in terms of land-use arrangements within the municipal territory.[91]

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[89] G.A. Res. 61/295, *United Nations Declaration on The Rights of Indigenous Peoples* (Sep. 13, 2007).

[90] Victoria Tauli-Corpuz (Special Rapporteur on the Rights of Indigenous Peoples), *Rep. on the Human Rights Situation of the Sami people in the Sápmi Region of Norway, Sweden and Finland*, U.N. Doc. A/HRC/33/42/Add.3 (Aug. 9, 2016).

[91] Lov om planlegging og byggesaksbehandling (plan-og bygningsloven) [Planning and Building Act], Art. § 3–1 (Nor.).

The municipality is empowered to terminate a mineral project. The law also allows the Sami Parliament authority to lodge an objection.[92] In Norway, the legal protection of reindeer herding differs between regions. However, Sami can also bring their claims of immemorial use to be studied by the Finnmark Commission.[93] Thus, even if it is debated whether the implementation of ILO 169 is satisfactory, reindeer husbandry in Norway is provided legal protection, "guaranteed not only within the Finnmark area, but also in other relevant territories."[94]

The burden of proof in ordinary civil claims in Norwegian courts lies with the party claiming to establish a right or a right-altering event. This paradigm has a bearing on proving a right to land based on usage, and its recognition through grazing rights on the traditional lands in the court's rulings.[95] There is also a difference between immemorial usage and local customary law, as the former determines the rights to a particular property, while the latter regulates the conditions of property rights for that real estate.[96]

IV. Rights of acquisition by usage

Several Supreme Court cases involving reindeer herders resulted in judgments which accorded recognition to claims of the reindeer herders or evaluated the Sami reindeer herders' use of land as a basis for the acquisition of rights.[97] In the *Aursunden Case*,[98] the Supreme Court assessed the requirements for intensive and regular use by the Saami reindeer herders. The Court rejected the claims of the reindeer herders on the grounds that the use of land was not considered to be regular and intensive enough to acquire rights according to the rules on prescription or immemorial usage.[99] The outcome established by the manner in which farmers used the outlying fields and the interference in traditional Saami lands for the purpose of compulsory purchase now implies a right

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92 *Id.* at Art. § 5–4.

93 *See also* Øyvind Ravna, *The Process of Identifying Land Rights in Parts of Northern Norway: Does the Finnmark Act Prescribe an Adequate Procedure within the National Law?*, 3 Yearbook of Polar Law 423–453 (2011).

94 Anaya, *supra* note 37.

95 Sjur Brækhus & Axel Hærem, Norsk Tingsrett, 610 (1964) (maintaining that the conditions are not independent – "one may for example relax to some extent the requirements relating to time, where the exercise of the use has been more marked and vice versa, and secondly account is also taken of other factors such as the nature and quality of the right, how burdensome it is for the serving property and how necessary it is for the person or persons who claim to have the right).

96 *Id.* at 613.

97 The main reason for this was simply that the use of land was not considered to be regular and intensive enough to acquire rights according to the rules on prescription or immemorial usage. Gunnar K. Eriksen, Alders tids bruk 314–48 (2008); Mattias Ahrén et. al., *The Nordic Sami Convention: International Human Rights, Self-Determination and other Central Provisions*, 3 Gáldu Čála J. of Indig. Ppls. Rts. (2007).

98 The Aursunden Case [1997], HR Nr 61 (Nor.).

99 *Id.* at 429.

to economic compensation for expropriation and not a right to title on the lands.

This approach was followed in the *Korssjøfjell Case*,[100] brought by landowners against reindeer herders, where the Court unanimously determined that the boundaries of grazing rights had to be evaluated by customary use based on the rules of time immemorial. It was not to be restricted by the boundaries for reindeer husbandry districts as determined by the State Reindeer Administration ("SRA") under the Reindeer Husbandry Act. The Court held that the SRA did not intend to make such changes to established civil law relations as the reindeer herders' principal argument implies. The Sami won the case and the Court determined that the Ministry of Agriculture was incorrect in stating that reindeer husbandry legislation until now was based on the principle that it was permitted on all uncultivated lands within the district since time immemorial.[101]

The Court held that the reindeer grazing rights were not limited to the state laws or interstate treaties regulating the grazing on lands determined by usage. The Sami who grazed on the Swedish side of the international boundary were awarded compensation and were permitted to graze reindeer because of the custom established since time immemorial. This ruling offered broad rights to graze based on traditional use of the land that was previously preventable by any domestic law of the state.[102]

The holding also had the effect of facilitating the Sami usage of land based on perpetuity in accordance with Article 110a of the Norwegian Constitution. In *Inge Sirum v. Esslan Reindeer Pasturing District*[103] ("Selbu case"), a group of private landowners brought a lawsuit against the reindeer pasturing district to resolve the issue of whether Sami herders had the right to pasture reindeer on unenclosed private land. The Supreme Court ruled in favor of the Sami herders, finding that they had used extensive areas of land from "time immemorial." The Court made a number of important pronouncements in recognizing Sami herding rights and held that "In the assessment of the evidence[,] account must be taken of the fact that the Sami have had a nomadic way of life, and that reindeer husbandry leaves few permanent traces."[104] Further, the "indirect evidence, adduced by the Sami place names and reports, must be ascribed significance as proof of reindeer husbandry in the disputed area."[105]

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[100] The Korssjøfjell Case [1988], Rt.1217 (Nor.).

[101] *Id.* at 1224.

[102] Article 34(3) of the Reindeer Husbandry Act obliges non-Saami courts to accustom the burden of proof on Saami parties to the Saami traditional land use, in cases concerning whether the Saami have traditionally used a particular land area. Reindeer Herding Act, *supra* note 19, at art. 34(3).

[103] Inge Sirum v. Esslan Reindeer Pasturing District [2001], No. 4B/2001 (Nor.).

[104] *Id.* at 17.

[105] *Id.* at 24–5.

The analysis of a right through use from time immemorial rests on three principles: (1) traditional land use/herding rights cannot be evaluated against modern agricultural practices; (2) the Sami are nomadic, and thus would not have left many permanent traces of their land use; (3) oral accounts of land use are important to consider because the Sami traditionally had no great use of written language.[106] The Court relied on established legal precedent based on certain amount of use, which must have taken place for a long time and been exercised in good faith. However, there are no fixed criteria for the determination of whether the individual conditions have been satisfied.[107] The Court accepted that the basis of acquisition in many situations must be determined inter alia on the "nature of the right" and, as the facts concern the pasture for reindeer, consideration must be given to the particular circumstances of reindeer husbandry.[108]

The Selbu ruling overruled the established notion that the Sami right to reindeer herding applied only over the mountain ranges and within the parameters of the grazing areas of the existing reindeer husbandry region. This was the state of the law that the Ministry of Agriculture accepted under the Reindeer Husbandry Act of 1978, and which was practiced in the State Reindeer Administration. The Ministry responded to the Supreme Court's decision as follows:

> The Constitution and international law to which Norway is bound assume that the Saami reindeer herders in Norway have effective legal protection for the livelihood activity they are currently carrying out. The Supreme Court of Norway has found that the current legislation does not provide such legal protection.[109]

The Ministry further stated that this situation was unpalatable because of Norway's international law obligations and the need to have mandatory rules governing reindeer husbandry. Hence, "as soon as possible[,] clarity must be brought to reindeer husbandry's legal basis."[110] The Ministry of Agriculture proposed an amendment to the law which "directly states that the Saami reindeer herders' rights and duties, as defined in the Act, apply inside the currently applicable boundaries of the Saami reindeer husbandry areas."[111] In its Proposition No. 28 (1994–95), the Ministry of Agriculture, which until then had been careful not to recognize the legal basis of right to reindeer husbandry with immemorial usage, stated that reindeer husbandry had its own ambit in law which it was unnecessary to specify in the legislation. The Ministry announced:

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[106] *Id.* at 28–9

[107] *See* The Proposed Nordic Saami Convention, *supra* note 45, at 188.

[108] *Inge Sirum*, No. 4B/2001, at 29.

[109] Landbruksdepartementet St.meld. nr. 28, En bærekraftig reindrift, 84 (1991–92), https://www.stortinget.no/no/Saker-og-publikasjoner/Stortingsforhandlinger/Lesevisning/?p=1991–92&paid=3&wid=b&psid=DIVL1324&pgid=b_1027.

[110] *Id.*

[111] *Id.*

> This is a circumstance that is largely established in case law and the legal basis is also older than the law. It is therefore not the Reindeer Husbandry Act that constitutes the rights of reindeer husbandry and gives a more detailed definition of the content of these rights and provides as well for regulation and control of the exercise of those rights.[112]

This was the framework in which the Ministry proposed a change to the Reindeer Husbandry Act, stating that "the landowner will have the burden of proof that the land is not subject to a reindeer husbandry right."[113] The majority of the Standing Parliamentary Committee of Agriculture expressed an identical view to the Ministry's in defining the legal basis of the Act: that it was unnecessary to specify in the law.[114] This type of circumstance is found in the precedents of the courts and is also based on a title on land by prescription, such as an acknowledged claim of right acquired by immemorial usage. It is, therefore, not the Act that defines the rights of reindeer husbandry. The Act does, however, provide a more detailed definition of the content of these rights, as well as the regulation and control of the exercise of those rights.

The Reindeer Husbandry Act is formulated such that "the landowner will have the burden of proof that the land is not subject to a reindeer husbandry right."[115] The exterior fields are included in the reindeer husbandry areas and may be regarded as legitimate herding areas with such rights and obligations as are stated in the first section of the Act unless otherwise provided for by special provisions in lease agreements. There is a hazard that such provisions might be deemed an interference with the property rights of landowners in violation of the European Convention on Human Rights, Protocol 1, Article 1.[116]

While the Selbu ruling was important for the Supreme Court in establishing the right to land based on reindeer husbandry, the *Svarstog* case is significant in developing rights based on immemorial usage. In *Svarstog*, the Court found the local Sami of Manndalen, in the county of Troms, had acquired title to property owned by the Norwegian state.[117]

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[112] *Id.* at 85.

[113] Landbruksdepartementet Ot prp nr 28, Om lov om endringer i reindriftsloven, jordskifteloven og viltloven, 31, 39 (1994–95), https://www.stortinget.no/nn/Saker-og-publikasjonar/Stortingsforhandlingar/Lesevisning/?p=1994–95&paid=4&wid=a&psid=DIVL922&pgid=a_0995.

[114] *Id.*

[115] *Id.* at 31, 39.

[116] "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." The Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, art. 1 (Mar. 20, 1952) 213 U.N.T.S. 221.

[117] Erik Anderson v. Norwegian State [2001], No. 5B ("Svartskogen" case) [hereinafter *Svartskogen*].

The usage of land by its indigenous dwellers was a significant factor because "Knowledge about the landscape and nature changes when technology and economy create new forms of utilization, but interpersonal modes of behaviour, local moral values and fundamental beliefs may still be maintained."[118]

This ruling implies that Sami title to land can be understood from how the local grazing practice is integrated within a social ethos, and how this interplay points towards how this traditional knowledge has developed. The Sami perspective and usage in determining ownership were emphasised in the Court's decision.[119] This ruling is particularly relevant in the Finnmark Commission's mandate, which specifies that legal precedents—for example, as reflected in the decisions of the Supreme Court—should constitute its guidelines. For example, "Sámi customs and conceptions of justice should be taken into account through long-standing legal custom and usage."[120] It can be inferred that the Commission has assessed the *Selbu* case's analysis of norms of particular traditional conduct in assessing nomadic use. The *Svarstog* case reflects this reasoning in its respect for traditional Sami customary law regarding property concepts.[121]

In terms of recognizing title to land arising from customary usage, the Finnish Commission has examined the claims arising in the regions of western Stjernøya/Seiland Finnmark. It has established that utilization has varied from one resource to another as well as in content and scope, and although it originally was crucial for subsistence, it has later changed in character towards being a secondary source of foodstuffs and a place for leisure activities. However, throughout this time, the population has made use of local resources to the extent that doing so has been a natural option in light of the times and conditions.[122]

It is argued that immemorial usage may afford rights to natural resources or titles to land.[123] The legitimate use of land, based on renting, commonage use, permissions, or licences, cannot establish a customary right to land because it is not based on a *sui generis* right that belongs to a tribe that is specific to the territory. There are some parallels between immemorial usage and the rules of aboriginal title in common law.[124] There

[118] *Id* at 274.

[119] *Id* at 1229.

[120] Recommendation No. 80 from the Justice Committee on the Act on Legal Relations and Management of Land and Natural Resources in Finnmark County (Finnmark Act), 18–19 (2004–2005).

[121] *Svartskogen*, *supra* note 117, at ¶ 84.

[122] Finnmarkskommisjonen, Rapport felt 1 Stjernøya/Seiland, (Mar. 20 2012), 60–68.

[123] For more reading about the concept, *see* Chrstina Allard, *The Nordic Countries' Law on Sámi Territorial Rights* 2(2) Arctic Rev. on L. and Pols. 159 (2011); *see also* Øyvind Ravna, *Alders tids bruk og hevd som ervervsgrunnlag i Samiske områder*, 123 Tidsskrift for Rettsvitenskap 464 (2010).

[124] *See* Delgamuukw v British Columbia [1997], 3 S.C.R. 1010 (Can.). *See also* John J. Borrows and Leonard I. Rotman, Aboriginal Legal Issues: Cases, Materials & Commentary, 258–68 (2d ed. 2003); Kent McNeil, Common Law Aboriginal Title,

is a specific difference that exists in the requirement of good faith as to the legitimacy of the use, which is not required in common law aboriginal title claims. This enables a process of accepting the Indigenous peoples' land rights, from the historic "state-centric position of denial and non-recognition, to one of gradual acceptance, catalysed by progressions in international and human rights law."[125]

The acceptance of indigenous rights as *sui generis* does not owe itself to any jurisprudential regime, such as a treaty as is the case in Canada, but is recognition that "culture is an important factor in customary rights."[126] This is a more flexible doctrine that enables itself to be part of a dynamic process based upon "points of mutually shared agreement that can be highlighted" and it "reformulates similarity and difference and thereby captures the complex, overlapping, and exclusive identities and relationships of the parties."[127] Adopting this framework means that there are two systems of law running concurrently in relation to land. The indigenous law is not thereby extinguished because it survives as a right and it can be affirmed that it is not extinguished where the common law is unable to recognize that law because it is a pre-existing right.

Conclusion

The Sami people in Norway are an indigenous group that has lived in the region of Scandinavia, the Nordic and Russian hinterland since time immemorial. They have a common denominator with the native peoples of North America in that they were hunter-gatherers and lived a nomadic lifestyle. The lands upon which they had practiced their customs, which were bound by their customary laws, was deemed terra nullius by the Norwegians who encountered them. The Norwegian Government had initially denied that the Sami use of land and resources established any formal rights.

This scheme underwent a transformation which included the adoption of the ILO Convention 169, which Norway is only Nordic country to ratify. This adoption fostered changes that created the Sami Parliament, the codification of Article 110a which granted recognition of the cultural and linguistic rights of the Sami, and the passage of the ground-breaking Finnmark Act of 2005. This framework forms the legal and organisational structure for managing natural resources in Finnmark and Trom, taking into consideration the particular rights acquired by the Sami as an indigenous people in this area. The legal framework is devolutionary and integrated with the Sami Parliament, playing a significant role

193–306 (1989).

[125] Aoife Duffy, *Indigenous Peoples' Land Rights: Developing a Sui Generis Approach to Ownership and Restitution*, 15 Int'L.J. on Minority & Grp. Rts. 505–538 (2008).

[126] Øyvind Ravna & Nigel Bankes, *supra* note 16, at 70–117.

[127] J Borrows & Leonard L Rotman, *The Sui Generis nature of Aboriginal Rights: Does it make a difference?*, 136 Alberta L. Rev. 9 (1997).

in the Finnmark Estate, which owns approximately 95% of the former Finnmark county.

The process of recognising the title to land for the Sami must be compatible with the Minerals Act of 2010, the Planning and Building Act of 1985, the Pollution Control Act of 1981, and the Nature Diversity Act of 2009. The basis of the Sami claims to restitution in land have revolved around the Reindeer Husbandry Act and the Finnmark Act. Their interests can be brought forward in the different planning stages of new mineral projects and can influence the process. However, whether these theories work in practice is dependant on the case law. It is the courts that decide the scope of Sami rights based on reindeer husbandry and the duration of its grazing rights, and whether those factors give them a right to land. Good-faith arguments of the immemorial use of land also contribute towards proving a genuine right to land.

The Norwegian State can still decide that the interests of the mining industry are more important than the interests of traditional Sami livelihoods. It can do so because the Sami Parliament only has jurisdiction in the Finnmark area and relevant territories. There needs to be more concrete measures that may increase the state commitment to rights enshrined in international agreements. The State also needs to establish a legal framework that provides a basis for litigation in cases involving breaches of customary law.