ACCESS TO LAND, ACCESS TO JUSTICE THE DIVERGENCE OF LEGAL PROTECTION: CULTURAL PROTECTION FOR SAMI ACCESS TO LAND AND WATERS UNDER SWEDISH LAW IN LIGHT OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

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ABSTRACT

The human rights and fundamental freedoms of the Swedish Indigenous Sami population are secured by both constitutional and international law. This makes both national and international legal norms relevant for Sami legal protection, but it raises the question of whether Swedish legal norms provide the Sami with effective and practical protection for their human rights and fundamental freedoms in line with international human rights law as prescribed in the European Convention for the Protection of Human Rights and Fundamental Freedoms. This thesis aims to provide an answer to this question. It does so by examining the level of protection of Sami human rights and fundamental freedoms at a national level in comparison with the protection the European Convention aims to ensure.

A comparison of the legal protection for cultural aspects of Sami private life under the Swedish legal system and under the European Convention is the ultimate purpose of this thesis. To better understand the contemporary context of Sami interests, a brief overview is provided of international instruments linked to Indigenous peoples. A thorough study is then carried out in two phases. The first phase examines the national protection of Sami interests in light of the historical context that underlies the Sami's natural right to access land and waters to preserve their culture. The second phase examines jurisprudence from the European Court of Human Rights and Fundamental Freedoms with a focus on the right of respect for private life under Article 8 and the right to the peaceful enjoyment of possession under Article 1 of Protocol No. 1. The study reveals that the Swedish Constitution's approach to the protection of cultural aspects of private life means it does not provide sufficient protection for the rights and fundamental freedoms secured by Article 8 of the European Convention.

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ACoA	Administrative Court of Appeal (Sweden)
AHDR	Arctic Human Development Report
CESCR	Committee on Economic, Social and Cultural Rights (United Nations)
COE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights and Fundamental Freedoms
EHRR	European Human Rights Report
ETS	European Treaty Series
FCNM	Framework Convention for the Protection of National Minorities
HRC	Human Rights Committee (United Nations)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILA	International Law Association
ILO	International Labour Organization
IOG	Instrument of Government (Sweden)
MMD	Land and Environment Court (Sweden)
MÖD	Supreme Land and Environment Court (Sweden)
NJA	Decisions of the Supreme Court of Sweden
NOU	Norwegian Official Reports
OUP	Oxford University Press
PROP	Swedish Governmental Bill
SFS	Swedish Code of Statutes
SSC	Supreme Court of Sweden
SSAC	Supreme Administrative Court of Sweden
SSR	Sámiid Riikkasearvi (National Association of Swedish Sami)
RHA	Reindeer Husbandry Act
SOU	Swedish Government Official Reports
STL	Sametingslag (Sami Parliament Act)
UDHR	Universal Declaration of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous peoples
UNGA	UN General Assembly
UNTS	United Nations Treaty Series

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David Mitchell once wrote that 'All boundaries are conventions waiting to be transgressed' (see Chapter 8) In my studies over the years, I have learned that legal boundaries are no exception. They are shaped and reformulated depending on the norms and values that the law accepts in a given era. My journey with this thesis began in one era but ended in another. The legal situation in Sweden today looks somewhat different than when I started my doctoral studies in 2018. This is due to the Swedish Supreme Court's ruling in the *Girjas Sami village* case, which was announced on 23 January 2020 through a unique press conference I had the opportunity to attend.

It is impossible to thank everyone who during my studies on the rights of Indigenous peoples in the Arctic over the years has in one way or another contributed to this research. I thank everyone who in any way contributed to it.

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Chapter 1 Introduction

Sweden is one of the EU's leading iron ore producers and accounts for 90% of production.[1] One of the largest remaining unbroken iron deposits in Europe is also located in the northern parts of Sweden in the Gállok / Kallak area, situated in Europe's largest contiguous natural and cultural landscape, Laponia.[2] Gállok is part of the area traditionally occupied and used by Sweden's Indigenous population, the Sami, for reindeer herding, an activity intimately linked to Sami culture. It follows that Sami interests are a critical factor in the decision to open a mine on their traditional land, as doing so risks a loss of natural values and may indefinitely affect Sami cultural values.[3] If the government approves the Gállok mine, which will be an open pit, it will divide the reindeer pastures of the Sami villages concerned into two parts.[4] In practice, traditional reindeer husbandry would become impossible during the 25 to 60 years the mining is expected to last, not considering the time it would take for the land to become useful for reindeer husbandry once again afterwards.[5]

A prolonged period of time during which the Sami are hindered from using traditional land and waters for reindeer husbandry risks affecting Sami culture, especially at the local level. Reindeer husbandry is traditionally a family activity that is passed on between generations, and since reindeer husbandry requires practical knowledge not only about reindeer but also about nature, the transfer of traditional knowledge between generations is central to maintaining Sami culture. If traditional reindeer husbandry, where the reindeers' natural migration is the basis of the activity, cannot be maintained due to a utilitarian interest in exhaustive resources, forcing the Sami to practice a more stationary reindeer husbandry, not only will part of Sami culture and identity be lost but also a European cultural heritage.

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[1] Anna Orring, 'Sverige toppar EU:s malmliga' (*Ny Teknik*, 2017) <https://www.nyteknik.se/industri/sverige-toppar-eu-s-malmliga-6855373> accessed 6 November 2021; Simon Matthis, 'Malmproduktionen i Sverige slog rekord 2019' (*Conventus Media House AB* 2020) <https://www.metallerochgruvor.se/20200811/7026/malmproduktionen-i-sverige-slog-rekord-2019> accessed 6 November 2021.

[2] CRD, 'Kallakgruvan får stora konsekvenser för samers rättigheter' (*Civil Rights Defender*, 2021) <https://crd.org/sv/2021/09/09/kallakgruvan-far-stora-konsekvenser-for-samers-rattigheter/> accessed 6 November 2021; Redeye, 'Beowulf Mining i 2021 – Hur dom ligger till och vad vi väntar på' (*Redeye*, 2021) <https://www.redeye.se/arena/posts/beowulf-mining-i-2021-hur-dom-ligger-till-och-vad-vi-vaentar-paa> accessed 6 November 2021.

[3] Sametinget, 'Gruvor i Sápmi' (*Sametinget*, 2021) <https://www.sametinget.se/gruvor> accessed 2021-03-22.

[4] Ibid.

[5] Redeye (2021) (n 1).

There is thus a real conflict of interest between Sweden's interest in maximising the economic return of land and waters within its sovereign territory and a greater interest in protecting a cultural heritage. For the Sami, the issue is central to their cultural survival and their ability to decide for themselves about their cultural heritage, which is linked to traditional territories they have occupied and used before the Swedish state conquered these areas. Even if Sweden has no aim to exclude the Sami from the remaining part of their traditional areas, regulation of Sami access to land and waters can have long-term consequences for the Sami's ability to preserve and develop their culture, which can be equated with such exclusion. The Sami have also criticised Sweden's lack of consideration of the relationship between the Sami, traditional land and waters, traditional ways of life, and Sami cultural identity in issues related to mining, a criticism that the UN Committee on the Elimination of Racial Discrimination confirmed in a 2020 report (See Chapter 6).[6]

The above leads to questions about the nature and scope of Sweden's protection of Sami rights linked to traditionally occupied and used land and water, which is fundamentally about the relationship between the Sami and the Swedish state and how this is expressed through regulation of access to land. For example, the question is raised of whether there is adequate protection for the rights of the Sami as Indigenous peoples linked to traditional territories who require due regard for the cultural dimension of this relationship. Another question raised is how the protection of the Sami's human rights and fundamental freedoms is secured as part of their right to a specific cultural identity based on a characteristic way of life requiring access to extensive areas. In essence, it must be questioned whether Swedish legislation is compatible with a modern application of legal principles linked to human rights and freedoms requiring that every individual has the right to human dignity based on their specific situation. These questions are highly relevant today because the current legislation that regulates the Sami's access to land and waters – the Reindeer Husbandry Act (RHA) – is under review. The nature and scope of the RHA is explained in Chapter 5 showing legal protection is categorized, and only offers legal protection to some Sami.

The background to the RHA review is the Swedish Supreme Court's ruling in the *Girjas Sami village* case (Chapter 6 provides an analysis of the case). As a result of the positive outcome for Girjas Sami village concerning control over wildlife resources, the Swedish government

[6] CERD, *Opinion approved by the Committee under article 14 of the Convention concerning communication No. 54/2013* (2020).

appointed the Judicial Inquiry Commission to review the RHA.[7] It follows from the government's directive to the Commission that culture is central to the review. The question of cultural protection for Sami human rights and freedoms as an Indigenous people is thus central to this thesis. While the broader purpose of this thesis is to analyse whether Swedish legal protection ensures cultural protection for Sami rights and freedoms linked to traditional territories in general, the primary focus is on whether Swedish legal protection is on par with that ensured by the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention / ECHR).[8]

1.1 Existing Research on Sami Rights under the European Convention

Existing international research on the legal protection of human rights and freedoms that the European Convention ensures the Sami due to their status as a minority and as Indigenous peoples focus mainly on the framework of international human rights law. This focus is understandable, as the rights of Indigenous peoples and national minorities currently have extensive legal protection at the international level. Examples of international human rights law concerning Indigenous peoples are outlined in Chapter 3.

As shown in Chapter 7, however, the European Court of Human Rights and Fundamental Freedoms (the Strasbourg Court) focuses primarily on the legal conditions that exist at a national level to assess whether a state effectively secures the rights and freedoms of the European Convention. The national focus is because it is the task of the Court to assess the international obligation of states in relation to the European Convention. This thesis, therefore, places more focus on the domestic legal situation. In addition, Sweden has not ratified any international instrument related to Indigenous peoples. Consequently, the relevance of these instruments at the European level for cultural protection remains uncertain. As shown in Chapter 7.4.2, however, international instruments can serve as interpretive aids for the Strasbourg Court. Given the Swedish Supreme Court's application of certain principles of international law found in international instruments linked to Indigenous peoples' cultural rights in relation to traditional territories in the *Girjas Sami village* case (see Chapter 6.1.4), it

[7] Näringsdepartementet, *En ny renskötsellagstiftning – det samiska folkets rätt till renskötsel, jakt och fiske (Dir 2021:35)*, May 2021.
[8] European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, EIF 3 September 1953) ETS 5, 213 UNTS 222 (ECHR).

is likely that similar principles linked to the cultural protection of Indigenous peoples will impact future Sami cases in Strasbourg.

Although at present there is a lack of specific reference to instruments concerning Indigenous peoples and their cultural protection in Strasbourg, Yvonne Donders (2002) argues that the European Convention contains cultural rights in a broad sense.[9] She differentiates this from the more limited cultural rights found in Article 15 (1a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[10] and Article 27 of the International Covenant on Civil and Political Rights (ICCPR)[11] (Chapter 3.4 addresses this principle further). According to Donders, human rights and freedoms ensured by the European Convention that have cultural significance fall within the context of cultural rights.[12] This is because one of the underlying principles of the European Convention is to ensure cultural diversity as part of respect for human dignity.[13] This thesis returns to the protection of cultural diversity and respect for human dignity under the European Convention in Chapter 7.2, explaining how this principle impacts the Court's reasoning on minority protection. How human dignity should be understood in relation to Indigenous peoples is addressed in the next chapter, as respect for human dignity is an inherent part of respect for cultural diversity, and to secure cultural diversity, human dignity must be considered in a cultural context (see Chapter 2).

The focus on cultural protection in light of international human rights law is also present in Timo Koivurova's (2011) analysis of European Convention case law in Sami property rights cases. As Chapter 7.1 shows, there is only one case where the Strasbourg Court examined the merits of a Sami case, this in relation to the right to a fair trial. According to Koivurova, however, the assessments of Sami cases on the admissibility stage shows a development in the understanding of the unique situation of Indigenous peoples in terms of private life (Article 8, ECHR) and property rights (Article 1 of Protocol No. 1) (P1-1).[14] It follows from this, he

[9] Yvonne Donders, 'Do cultural diversity and human rights make a good match?' (2010) 61 International Social Science Journal 15, 19.
[10] International Covenant on Economic, Social and Cultural Rights (16 December 1966, EIF 3 January 1976) 993 UNTS 3 (ICESCR).
[11] International Covenant on Civil and Political Rights (16 December 1966, EIF 23 March 1976) 999 UNTS 171; 1057 UNTS 407 (ICCPR).
[12] Donders (2010) (n 9) 19f.
[13] Ibid 19f, 32.
[14] Timo Koivurova, 'Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects' (2011) 18 Int'l J on Minority & Group Rts 1, 32; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, EIF 18 May 1954) ETS 9 (hereafter "Protocol No. 1").

claims, that Article 8 offers strong protection for Sami culture today. However, Koivurova's discussion is within the context of the practice of cultural activities. Thereby, limiting the scope of Article 8 to include the protection of activities defined as *cultural*, which represents a narrow view of the nature of Article 8. As explained in Chapter 7.2, however, the scope of Article 8 includes a broader protection of cultural dimension of both private life and property.

Against a backdrop of a lack of Sami legal cases of which the Strasbourg Court has examined the merits, most analyses of Sami cultural protection under the European Convention take place in the light of minority rights. It is minority cases that form the basis for the interpretation of the value of Article 8, ECHR, for the protection of Sami rights and freedoms linked to traditionally occupied and used territories on cultural grounds examined under P1-1. The prominent position of minority right for cultural protection is apparent from Gaetano Pentassuglia's (2012) analysis of Article 8.[15] Since protection of cultural diversity is an aim of the European convention, the interpretation of the nature and scope of Article 8 should start, Pentassuglia argues, from European Convention case law, not international law. He explains this by illustrating how the Strasbourg Court seems reluctant to use international sources as aids for interpreting the nature and scope of minority rights under Article 8.[16] According to Pentassuglia, the Court focuses instead on consensus between Member States on the handling of minority issues.[17] At the same time, he explains how the case law shows an opening for using principles expressed in international instruments in specific cases in support of its interpretation of the European Convention.[18] Stefan Kirchner (2016), who has examined case law in relation to the concept of Indigenousness, also highlights how the Strasbourg Court referred to international legal instruments in its reasoning on several occasions.[19]

Other researchers who sees an openness of the Strasbourg Court to consider the special situation of the Sami as an Indigenous people are Ghislain Otis and Aurélie Laurent (2013).[20] This view is based on the rejection of *From v. Sweden* (1998). In this case (explained in Chapter

[15] Gaetano Pentassuglia, 'The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?' (2012) 19 International Journal on Minority and Group Rights 1.
[16] Ibid 13.
[17] The *Member States* are the 47 nations that are members of the Council of Europe. See https://www.coe.int/.
[18] Pentassuglia (2012) (n 15) 114–16.
[19] Stefan Kirchner, 'Conceptions of Indigenousness in the Case Law of the European Court of Human Rights' (2016) 38 Loy LA int´l & Comp L Rev 169.
[20] Ghislain Otis and Aurélie Laurent, 'Indigenous land claims in Europe: The European Court of Human Rights and the decolonization of property' (2013) 4 Arctic Review 156, 174.

7.1) the applicant's complaint of a registration of moose hunting on his land in favour of the Sami was rejected based on the registration being excusable in the interest of the public. Against the background of their analysis of international law and the doctrine of ancestral Indigenous land titles, however, Otis and Laurent argue that the autonomous meaning of possession in P1-1 needs adaptation to comply with the contemporary legal development of Indigenous rights.[21] This adoption is necessary, they argue, to counter neo-colonialism[22] – that is, ongoing inequalities based on a colonialist past.[23] The premise of their argument is thus that property rights must be interpreted in light of the principle of the equality of legal cultures. Consequently, the Strasbourg Court must balance the Western perception of property rights against how the Sami view the concept.[24]

Giovanna Gismondi (2016) takes a similar approach and advocates for an expansive interpretation of P1-1.[25] He claims that one problem with applying P1-1 in a Sami cultural context is the restrictive design of P1-1, which links it to European values of property protection. [26] Consequently, it is a legal challenge for the Strasbourg Court to apply international protection standards for Indigenous peoples' cultural rights to traditional territories when assessing the protection of Sami rights and freedoms to traditional territories under P1-1. [27]

A lack of progress in Strasbourg's taking due account of international norms linked to Indigenous peoples has also been highlighted by other scholars, such as Nigel Bankes (2011)[28] and Péter Kovács (2016).[29] Several of these norms, they argue, are reflected in the case law of the Inter-American Court of Human Rights, such as the need to consider the cultural value of Indigenous peoples' relationships to their homelands.[30]

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[21] Ibid 174–178.
[22] Ibid 179f.
[23] Charina Knutson, 'Conducting Archaeology in Swedish Sápmi – Policies, Implementations and Challenges in a Postcolonial Context' (PhD thesis, Linnaeus University Press 2021) 15.
[24] Otis and Laurent (2013) (n 20) 178.
[25] Giovanna Gismondi, 'Denial of justice: the latest indigenous land disputes before the European Court of Human Rights and the need for an expansive interpretation of Protocol 1' (2016) 18 Yale Human Rights and Development Law Journal 1, 52f.
[26] Ibid 47.
[27] Ibid 47, 52f.
[28] Nigel Bankes, 'The Protection of the Rights of Indigenous Peoples to Territory through the Property Rights Provisions of International Regional Human Rights Instruments' (2011) 3 The Yearbook of Polar Law Online 57, 90.
[29] Peter Kovacs, 'Indigenous issues under the European Convention of Human Rights, reflected in an Inter-American mirror' (2016) 48 The George Washington International Law Review 781, 805f.
[30] Bankes (2011) (n 20) 106; Kovacs (2016) (n 29) 800.

Few would deny that international human rights law is central to protecting the Sami's right of access to ancestral land and waters as part of their cultural protection. Existing research shows, however, difficulties in anchoring Sami legal protection under the European Convention on the basis of international human rights law. To overbridge this problem anchoring the legal protection, this thesis focuses on the protection in a national context and show how the protection of the European Convention operates within this context. Thereby, this thesis contributes to existing knowledge of how Sami legal protection under the European Convention must operate out of a national context, and not how the Strasbourg Court should apply the European Convention to the Sami situation as an international court aiming to secure human rights and fundamental freedoms in the context of present-day conditions.

The thesis' focus on national and European level does not mean that international law is irrelevant. As an international court, the Strasbourg Court is subject to fundamental international principles on human rights and freedoms, including human dignity as part of the right to respect for private life, which this thesis highlights.[31] The analysis of Sami rights in such a context is, however, absent in the above analyses, excepting Yvonne Donders, who has done extensive research on cultural protection in international law.[32] She believes there is a clear link between the right to cultural protection and human dignity:

> While human rights norms have a universal character and apply to everyone on the basis of their human dignity, the implementation of these rights does not have to be uniform. As a result, cultural rights should be universally applicable to all communities and individuals, regardless of their geographical place or specific background, on the ground that culture is an important element of human dignity.[33]

The above suggests that to ensure human dignity even in relation to the Sami, the principle must be considered of the Indigenous cultural context in which it is to be applied. This conclusion is in line with the analysis, provided in Chapter 2, of human dignity in relation to the Sami based on their status as Indigenous peoples.

Notwithstanding the emphasis on international law, which is valuable for Sami legal protection under the European Convention, existing research lacks a comprehensive analysis of the

[31] Janneke Gerards, *General principles of the European Convention on Human Rights* (Cambridge University Press 2019) 61f.
[32] See, e.g., Yvonne Donders and others, *Culture and Human Rights: The Wroclaw Commentaries* (De Gruyter 2016); Y. M. Donders, 'Human rights and cultural diversity: too hot to handle?' (2012) 30 Netherlands quarterly of human rights 377; Donders (2010) (n 9); Yvonne Donders, *Towards a right to cultural identity?* (Intersentia 2002).
[33] Donders (2002) (n 32) 16.

protection of human rights and freedoms under the European Convention in relation to the Sami's national context, a context in which their traditionally occupied and used areas constitute key components of their characteristic culture. These key components require due regard for the rights and freedoms of the Sami to control their own future and respect for their right to private life as part of securing cultural diversity and human dignity. In addition to the above contribution to existing knowledge, this thesis aims to provide such a comprehensive analysis by weaving together analyses of the national and international contexts, with a focus on the European Convention and the protection of the right to peaceful enjoyment of private life and possessions, highlighting the Sami's own perception of their way of life and the key components of it, such as their relationship to traditional territories.

The thesis begins by providing insight into the Sami's own perception of the value their relationship to their traditionally used and occupied areas has for Sami culture and identity (Section 1.2). This section shows that the value of the Sami's relationship to land cannot be reduced to carrying out an activity; it is important for both an overall perspective on Sami culture and the preservation of a collective Sami identity. The subsequent section (1.3) then provides a problematisation of the concept of identity in an Indigenous context. Thereafter, cultural protection is problematised in relation to the RHA, which lacks a clear reference to culture (Section 1.4).[34] This leads to the central question of the thesis, which is whether Swedish law protects the proprietary interest of the Sami in a way that is compatible with the European Convention (Section 1.5). Chapter 1 then concludes with some terminological clarifications (Section 1.6) and an overview of the research plan (Section 1.7).

1.2 The Discourse on Sami Identity: The Importance of the Sami's Relationship with Sápmi for a Sami Identity

As explained in the previous section, the Sami's own perception of what their relationship to their homeland represents as part of their cultural heritage is central to this thesis.[35] This is because the Sami's characteristic way of life and a Sami cultural identity linked to reindeer husbandry has developed over centuries under natural and political conditions that differ from conditions under which non-ethnic Sami have lived (see Chapter 4).[36] Due to this special

[34] Reindeer Husbandry Act (SFS 1971:437) (*Rennäringslag*) (RHA).

[35] Sametinget, 'Samiskt kulturarv' (*Sametinget*, 2019) <https://www.sametinget.se/kulturarv> accessed 6 April 2021; Kjell-Åke Aronsson, *Samiska kulturmiljöer i Sverige: en forskningsöversikt* (Riksantikvarieämbetet 1995) 49–67.

[36] That Swedish society has treated Sami differently because of their ethnicity has been addressed in other contexts and will not be examined in this thesis. See, e.g., Maja Hagerman, 'Svenska kyrkan och rasbiologin' in

situation, it is thus difficult to replace the Sami's own perception of their relationship to their original homeland, even if the importance of the living environment has been highlighted in other contexts.[37] As Israel Roung (1969), former chairmen of the Sámiid Riikkasearvi (National Association of Swedish Sami) and Sámiráđđi (Nordic Sami Council), explains, reindeer herding Sami have a deep historical relationship to the Sami cultural landscape (Sápmi).[38] This relationship is elastic and has created the contextual environment in which Sami culture has been formed, where a relationship to nature, the climate, and animals are constitutive elements.[39] The Sami's relationship to their historically occupied and used land and waters is thus the basis for their material and spiritual culture as well as their social relations.[40]

The value of maintaining a relationship to ancestral land is also stressed by Lars-Andres Baer (1982), former representative of the Swedish Sami as a member of the United Nations Permanent Forum on Indigenous Issues (UNPFII) and chairman of the Barents Indigenous peoples' Office (BIPO). He argues for the necessity of due recognition of the relationship the Sami have to their original land and waters in all matters concerning Sami proprietary interests.[41] Sami cultural survival, he argues, is dependent on upholding continued access to land and waters.[42] The importance and significance of a continued relationship with traditionally occupied and used land and waters is, as can be seen from the following, a recurring theme from the Sami perspective when land and waters are discussed in different contexts.

Conversely, a lack of consideration for the Sami relationship to their original homeland as part of their culture in property right matters does not lead to the disappearance of either the Sami

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Daniel Lindmark and Olle Sundström (eds), *De historiska relationerna mellan svenska kyrkan och samerna – En vetenskaplog antologi*, vol 2 (Artos & Norma bokförlag 2016).

[37] See, e.g., Donders (2002) (n 32) 203f, 304f; Nigel Bankes, 'Legal Systems' in Niels Einarsson, Joan Nymand Larsen and Annika Nilsson (eds), *Arctic Human Development Report*, vol Akureyri (Stefansson Arctic Institute 2004) 107; Natalia Loukacheva, 'Arctic Governance' in Natalia Loukacheva (ed), *Polar Law Textbook* (Nordic Council 2010) 135–139; Peter Schweitzer, Peter Sköld and Olga Ultutgasheva, 'Culture and Identities' in Joan Larsen Nyman and Gail Fondahl (eds), *Arctic Human Development Report (II)*, vol 2 (Nordiska ministerrådet 2014) 139; Federico Lenzerini, *The culturalization of human rights law* (OUP 2014) 124f.

[38] Israel Ruong, *Samerna* (Bokförlaget Aldus / Bonnier 1969) 19. The Sami Parliament defines the Sami cultural landscape as consisting of three cultural heritages, the material, intangible and biological. Sametinget, *Kulturpolitiskt handlingsprogram 2018 – 2021* (2018) 8.

[39] Ruong (1969) 19.

[40] Ibid 19f. See also Aronsson (1995) (n 35) 60–63.

[41] Lars Anders Baer, 'The Sami: An Indigenous People in Their Own Land' in Birgitta Jahreskog (ed), *The Sami national minority* (Almqvist & Wiksell 1982) 11.

[42] Ibid 11.

culture or a Sami cultural identity. Richard Handler (1996), for example, points out that specific cultural identities seldom disappear when exposed to stress; they just change.[43] Handler is not a Sami but points to a key issue in ensuring the protection of practical and effective human rights and fundamental freedoms is that what underlies the cultural stress may lead to unwelcome cultural changes. This issue raises the question of whether these changes are natural or the result of a legal system that is insufficient for ensuring the proactive protection of central parts of the culture in question. Expressed differently, to what extent can a state control the material conditions an ethnic group is dependent on for their cultural survival, and to what extent can a state determine which factors – cultural or economic – are legally relevant for the safeguarding of these conditions before such control violates human rights, fundamental freedoms, and the human dignity of members of the group in question? As Chapter 2 shows, dignity undoubtedly has a collective dimension linked to the cultural identity of Indigenous peoples.[44]

The understanding of which factors are legally relevant to protecting the material basis of Sami culture differs significantly depending on who is asked. As explained in this thesis, Swedish legislation focuses solely on protecting Sami access to traditional land and waters from a resource perspective linked to reindeer herding. The argument brought forward by Lars-Andres Baer (1982) for ensuring protection of Sami interest in maintaining a relationship with traditional territories is based on the relationship constituting the foundation for Sami cultural survival regardless of reindeer herding as part of their right to freely choose a their cultural future.[45] As shown in Chapter 4.5, the first reindeer grazing law from 1886 – subsequently amended in 1898, 1928, and 1971[46] – is based on a similar reasoning: if reindeer husbandry is to cease, this must be due to a decision made by the Sami themselves, not to a lack of legal protection. According to current Swedish legislation, however, this would require that the Sami give up their legal protection for a continued relationship with their traditional territories at the same time. As shown in Chapter 3, whether this kind of legal protection is in line with international legal rules linked to Indigenous peoples' right to traditional territories and resources is doubtful.

[43] Richard Handler, 'Is "Identity" a useful cross–cultural concept?' in R John Giller (ed), *The Politics of National Identity* (Princeton University Press 1996) 27–30.
[44] Rhoda E Howard, 'Dignity, Community, and Human Rights' in Abdullahi Ahmed An-Naim (ed), *Human Rights in Cross–Cultural Perspectives* (University of Pennsylvania Press 1992) 83f.
[45] Baer, (1982) 11.
[46] Tomas Cramér and Gunnar Prawitz, *Studier i renbeteslagstiftningen* (Norstedt 1970).

The question of whether Swedish legal protection is in line with international legal rules is also doubtful in relation to the distinction that Swedish law makes between reindeer herding Sami and Sami in general. Chapter 5 explains what is meant by reindeer herding Sami in more detail, but this group generally includes those involved in a Sami village's reindeer herding work. This problematic feature has been highlighted by Christina Åhrén (2006), for example, in her discussion of Sami identity from a historical and contemporary perspective.[47]

According to Åhrén's analysis, the division of the Swedish legislation between those Sami who are members of a Sami village and engaged in traditional reindeer husbandry and those who lack membership status has played a decisive role in the Sami discourse on Saminess.[48] Chapter 5.1.3 further explains the nature of a Sami village, which is an economic association responsible for reindeer husbandry in a specific geographical area; membership in a Sami village is a prerequisite for being covered by the legal protection the RHA provides to the Sami.[49] Apart from the fact that reindeer herding Sami are a minority among the Sami community,[50] the requirement of a membership in a Sami village creates a legal obstacle to maintaining a relationship with traditional areas because those who are not connected to a Sami village have fewer opportunities to participate in certain cultural processes that are important for the preservation of a Sami identity. This applies not only to reindeer husbandry but also to hunting and fishing, which have become politically controversial issues in the Sami Parliament, as Sami who are not members of a Sami village are not covered by the right to hunt and fish ensured by the RHA.[51] A review of non-Sami village members' rights is currently taking place due to the general review of the RHA (see Chapter 6.1.4).

What is central to Sami identity is contextual, where participation in and access to various cultural and collective activities within a Sami village, often from an early age, are important for determining which aspects linked to land and waters have a more prominent significance for the Sami identity in question.[52] What is central to maintaining a Sami identity may thus

[47] Christina Åhrén, 'Är jag en riktig same? – En etnologisk studie av unga samers identitetsarbete' (PhD thesis, Umeå universitet 2006).
[48] Ibid 37–52.
[49] RHA, s 1.
[50] Sametinget, 'Rennäringen i Sverige' (*Sametinget*, 2020) <https://www.sametinget.se/rennaring_sverige> accessed 21 October 2020.
[51] See, e.g., Jörgen Heikki, 'Jakt– och fiskesamerna vill ha en samebalk' (*Sveriges Radio*, 2020) accessed 6 November 2021 and JFS, 'Lika rättigheter till alla' (*Jakt- och Fiskesamerna*, 2021) accessed 6 November 2021.
[52] Åhrén (2006) (n 47) 67–84. See also Ebba Olofsson, 'In search of a fulfilling identity in a modern world: narratives of indigenous identities in Sweden and Canada' (PhD thesis, Uppsala Universitet 2004), which explains that the Sami identity is becoming stronger among those who live and work among other Sami, 337f.

differ between Sami village members and non-members.[53] This difference is, according to Åhrén, due to the fact that the importance of different aspects of identity is closely related to specific ways of life which each rest on certain conditions of existence that are affected by living conditions both cultural and natural.[54] Members of a Sami village who participate in reindeer husbandry work or gain access to land and waters through the village live in a different contextual and perceptual environment than those who lack access to this cultural and natural environment.[55] This makes the Sami identity contextual and heterogeneous, and it can therefore be assumed that the importance of a relationship with land and waters for the maintenance of Sami identity differs internally within the Sami people.

The maintenance of a close relationship with the traditional territories as part of a Sami identity is of course not dependent on a membership in a Sami village. For example, young Sami who lack membership in a Sami village may still participate in Sami cultural activities where they learn about the Sami cultural landscape and establish a relationship with old settlements through the transfer of traditional knowledge of specific places and respect for nature from one generation to another.[56] The geographical connection to specific areas that results from participating in reindeer husbandry activities within a Sami village is thus not the only way to maintain a close relationship with ancestral land and water. The process of transferring traditional knowledge, norms, and values is equally important.[57] Even if it can be assumed that there are different views among Sami on the importance of reindeer husbandry for Sami culture, reindeer husbandry is a common denominator for the Sami, who see a close relationship with ancestral land and waters as a central part of their identity. This is a natural consequence considering, as noted above, that Sami legal protection of access to land is based on the continued practice of reindeer husbandry, a point this thesis returns to in Chapter 5.

The value of reindeer husbandry for the Sami's relationship to traditional territories as part of their cultural identity has been emphasised by Elina Helander-Renvall (2016) in relation to

[53] Åhrén (2006) (n 47) 47.
[54] Ibid 22–26.
[55] Ibid 67–84. See also Schweitzer, Sköld and Ultutgasheva, (2014) (n 37) 135–137.
[56] Ylva Jannok Nutti and Kajsa Kuoljok, *En eldstad, flera berättelser: unga skapar relationer till tidigare generationers samiska platser* (Ájtte, svenskt fjäll- och samemuseum 2014).
[57] This has been explained also outside the Sami discourse by, e.g., Fjellström Phebe, 'Cultural- and traditional-ecological perspectives in Saami religion' (1987) 12 Scripta Instituti Donneriani Aboensis 34, 36; Per Moritz, 'Fjällfolk – livsformer och kulturprocesser i Tärna socken under 1800– och 1900–talen' (PhD thesis, Umeå University 1990) 257–264.

reindeer herders.[58] She explains that it is difficult to distinguish the herders, the reindeer, and the land used from each other because the interaction between them is fundamental to herding reindeer.[59] The value of reindeer husbandry for protecting the Sami's relationship to ancestral land is further addressed below. In relation to reindeer husbandry, it is above all the interaction with the landscape that creates the close relationship that makes land part of the Sami identity. Consequently, rights linked to land are irreducible to material rights.[60]

The importance of a close relationship with ancestral land for the Sami is not new. Israel Roung (1969/1982) notes that the Sami's relationship to land has long been the constituent element of Sami material and spiritual culture and the historical context in which Sami social norms were created[61] (the historical context in which Sami culture was created is explained in Chapter 4). Lars-Anders Baer (1982/2005) has also highlighted the importance of a close relationship with land and the value of this relationship for Sami cultural society by emphasising the need to view the Sami's relationship with nature as an integrated whole:[62]

> An indispensable condition for the continued existence of reindeer herding as well as of the Sami culture is that the Sami territory be left intact culturally, linguistically, socially and ecologically…The Sami themselves do not consider Lapland a wilderness, but rather a civilized landscape with an ecological balance safeguarded by the relationship of man and nature in the Sami culture.[63]

Baer highlights something central to the discourse on Sami rights linked to access to ancestral land. First, full protection of Sami culture requires due consideration (respect) of the cultural value a close relationship with traditional territories represents for the Sami in general, regardless of the existence of reindeer husbandry. Reindeer husbandry is, however, so

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[58] Elina Helander-Renvall, *Sámi Society Matters* (Lapland University Press 2016).
[59] Ibid 90–95. See also Kajsa Kuoljok, 'Without land we are lost: traditional knowledge, digital technology and power relations' (2019) 15 AlterNative: an international journal of indigenous peoples 349.
[60] Elina Helander-Renvall, 'Animism, personhood and the nature of reality: Sami perspectives' (2010) 46 Polar Record 44, 46–50; Saara Tervaniemi and Päivi Magga, 'Belonging to Sápmi – Sámi conceptions of home and home region' in Thomas Hylland Eriksen, Sanna Valkonen and Jarno Valkonen (eds), *Knowing from the indigenous north – Sámi approaches to history, politics and belonging* (Routhledge 2019) 82f. See also Tim Ingold (1993) who emphasizes the existing interaction between humans and natural landscapes, which gives rise to a special relationship, Tim Ingold, 'The temporality of the landscape' (1993) 25 World archaeology 152; Sametinget (2019) (n 35).
[61] Ruong (1969) (n 38) 19f; Israel Ruong, 'Sami usage and customs' in Birgitta Jahreskog (ed), *The Sami Natinal Minority in Sweden* (Almqvist & Wiksell 1982) 32.
[62] Lars Anders Baer, 'The Rights of Indigenous Peoples – A Brief Introduction in the Context of the Sámi' (2005) 12 International Journal on Minority and Group Rights 245, 247f. See also Asta Balto and Liv Østmo, 'Multicultural studies from a Sámi perspective: Bridging traditions and challenges in an indigenous setting' (2012) 22 Issues in Educational Research 1, 3.
[63] Baer, (1982) (n 41) 19.

intimately associated with Sami culture today that it is difficult to discuss the Sami's right to cultural protection linked to traditional territories without addressing reindeer husbandry and its associated rights (hunting, fishing, and access to forest products). As noted above, however, such a discussion is present within Sami politics regarding hunting and fishing, which are highlighted as Sami cultural activities the legislation should secure for all Sami.

Second, encroachment on traditional Sami territories and restrictions on the Sami's access to traditionally used land and waters affects their relationship to this cultural landscape and risks contributing to a loss of Sami culture and identity for those Sami forced to seek other means of subsistence.[64] Consequently, restrictions on Sami access to land and waters may constitute a direct threat to the Sami's ability to control their own cultural future according to their own choosing. The threat to Sami culture from increased intrusion into their homeland is something the Swedish Sami Parliament has highlighted, as seen below.

The Swedish Sami Parliament was established by the Swedish state in 1993 as a means of strengthening the Sami's self-determination. Chapter 6.1.1.3 further explains the Sami Parliament, which is a hybrid between a Sami popularly elected organisation and a state authority with the main task of promoting Sami culture.[65] As part of their work to protect Sami culture, the Sami Parliament advocates for an increased focus on the cultural protection of the Sami's relationship to traditionally territories.[66] Thus, it emphasises the Sami concern about the threats that large-scale resource extraction pose to reindeer husbandry, which risk undermining the survival of Sami culture due to the cultural significance a connection to nature represents:[67]

> Our deep relationship with nature is difficult to capture in words. Living in nature and providing for ourselves directly on what nature can provide, creates an immediate relationship between us and nature (the animals, each other). We trust a living approach to Sápmi, our home. If we – or someone else – destroy nature, our culture is also damaged.[68]

[64] Ibid 11; Harald Eidheim, *Aspects of the Lappish minority situation* (2 edn, Universitetsforlaget 1974)68–82; Schweitzer, Sköld and Ultutgasheva, (2014) 135–137.
[65] Sami Parliament Act (*Sametingslag*) (STL) (SE), c 1, s 1; c 2, s 2.
[66] Sametinget, *Sametingets syn på Mineral och Gruvor i Sápmi* (Sametinget 2014).
[67] Sametinget, *Sametingets syn på Vindkraft i Sápmi* (2009); Sametinget, *Sametingets syn på gruvor och mineraler i Sápmi* (2014); Sametinget, *Sápmi – en region som berikar Sverige: Rennäringspolitisk strategi* (2021) 12.
[68] Sametinget, *Eallinbiras iellembirás jielemen bijre* (2021) 4; *Sametinget,* (2014) (n 66) 4 [author's translation].

The Sami Parliament emphasises the impossibility of disconnecting the deeper cultural dimension of the Sami's relationship to their ancestral lands and waters from the question of Sami land rights. This is because land is an essential part of where the Sami come from and what has shaped their culture and identity; traditional Sami territories are thus part of Sami cultural heritage, which is both material and immaterial.[69]

The call to recognise that Sami rights and freedoms linked to land and waters extend beyond reindeer husbandry is also emphasised in the Sami Parliament's report, *Preparations before a truth commission on the violations of the Sami people by the Swedish state* (2021).[70] The above noted division of the RHA between those Sami who have legally protected rights and freedoms linked to traditional territories and those who lack these is underlined as a problem in the report.[71] The right to use ancestral houses and huts and take handicraft material from living trees, for example, disappears if a person loses his or her membership in a Sami village.[72] Examples of how county administrative boards have handled situations where a Sami person does not have a statutory right under the RHA are given in the following sections.

The above provides a brief insight into different Sami perceptions about the importance of a continued relationship with traditional territories for Sami culture and the value of this relationship for Sami identity. What it shows is that the value of a continued relationship with traditional territories goes beyond a material value linked to reindeer husbandry; it also includes intangible values.[73] The scope of the relationship encompasses an inherent value for Sami culture in general and the notion of a common Sami identity in particular, especially, as shown above, for those engaged in traditional Sami activities.[74]

Discussing identity in relation to the Sami is not uncontroversial. Although, as shown above, the Sami use the term identity themselves, the following section will problematise the application of the concept to the Sami as an Indigenous people. The reason for this is to recognise that the application of terms linked to human rights and freedoms is often derived from a Western legal discourse that makes them less applicable in the context of Indigenous

[69] *Sametinget, Eallinbiras* (2021) (n 68) 6; *Sametinget,* (2018) (n 38) 7–9, 14f.
[70] Sametinget, *Förberedelser inför en sanningskommission om statens övergrepp mot det samiska folket* (2021) 17–20, 27f.
[71] Ibid 27f.
[72] Ibid 17–20.
[73] The term reindeer husbandry industry covers only the socio–economic side of reindeer herding. Chapter 1.6 provides a terminological explanation of term related to reindeer herding.
[74] Åhrén (2006) (n 47) 14–20, 89–90. See also Moritz (1990) (n 57) 12, 257–269, and Tervaniemi and Magga, (2019) (n 60) 82.

peoples. Identity, which is primarily an individualistic term, falls into this category, as shown in Chapter 3. The term is also problematic in relation to respecting the human dignity of the Sami in light of their collective rights as Indigenous peoples.

1.3 Criticism of the Concept of Identity and its Applicability in the Context of Indigenous peoples

As a concept, identity has been held as individualistic and Western and something that non-Indigenous researchers have imported and applied to situations involving Indigenous peoples without adapting it to the specific cultural context – for example, by taking into account a holistic view of the interconnectedness between humans and nature.[75] Richard Handler (1996), for example, has described identity as a Western ideological concept where even collective identities 'are imagined as though they are human individuals writ large,' and as such it becomes oppressive when applied to those who do not share this perception.[76] Yussef Al Tamimi (2018) further emphasises the need to be aware of the power structures that influence the processes by which an identity is formed, highlighting human rights law as an example of such a process.[77] Without adapting the notion of identity to the cultural context in which it is to be applied, its application risks the rights and freedoms of Indigenous peoples being interpreted based on a Western conceptualisation of the term. In the case of the Sami, this may lead to the collective cultural dimension of their rights and freedoms linked to traditional territories being given less weight in processes aimed at securing historical Sami rights and freedoms.

Others who have objected to the application of the concept of identity in a Sami context are Jarno Valkonen and Petri Ruuska (2019).[78] They highlight the concept's ineffectiveness for analysing key elements of the identity of, for example, reindeer herding, since identity 'is not just a tool with which reality is analysed. It affects the way we obtain different views of reality.'[79] According to Saara Tervaniemi och Päivi Magga (2019), to use the concept of

[75] See, e.g., Thomas Hylland Eriksen, Sanna Valkonen and Jarno Valkonen (eds), *Knowing from the indigenous north: Sámi approaches to history, politics and belonging* (Routledge 2019) 6f. Compare Linda M. Cox and William J. Lyddon, 'Constructivist conceptions of self: A discussion of emerging identity constructs' (1997) 10 Journal of constructivist psychology 201, who argues that identity is a dynamic process which must be viewed in the cultural context of its application, 216f.
[76] Handler, (1996) 33, 38.
[77] Yussef Al Tamimi, 'Human Rights and the Excess of Identity: A Legal and Theoretical Inquiry into the Notion of Identity in Strasbourg Case Law' (2018) 27 Social & legal studies 283, 296.
[78] Jarno Valkonen and Jarno Ruuska, 'Reindeer herding, snowmobile and social change – and a word on identity' in Thomas Hylland Eriksen, Sanna Valkonen and Jarno Valkonen (eds), *Knowing from the indigenous north – Sámi approaches to history, politics and belonging* (Routhledge 2019).
[79] Ibid 92, 105f.

identity in a Sami context requires a more holistic approach to Sami identity.[80] They emphasise the importance of taking into account the complexity of Sami relations with original traditional Sami territories – including political, geographical, historical, and cultural dimensions – in analyses of Sami identity.[81] Elina Helander-Renvall (2016) prescribes such a holistic approach in relation to reindeer herders' identity based on the herders' relationship with nature and reindeer.[82] The same holistic view is found in *Eallinbiras*, the Sami Parliament's habitat program, where emphasis is placed on the interplay between nature, culture, people, and the environment:

> A Sami approach is based on árbediehtu and the holistic approach that man, nature, and the landscape form an indivisible whole. Our pursuit of self-determination must have the Sami Indigenous peoples' own values and cultural expressions at the centre.[83]

Admittedly, from a legal perspective, it is difficult to directly take into account a holistic Sami perspective on the cultural significance of the Sami's relationship to traditional territories in the application of legal principles on property rights, which are based on legal theories grounded in a Western legal view of property. This is one of the problems on which the critique of identity is based, and it is something that this author also acknowledges as important for researchers to be aware of. As this thesis subsequently shows, it is also problematic from a Swedish legal perspective to apply a more cultural approach to the protection of Sami rights and freedoms linked to traditionally occupied areas, regardless of whether the focus lies on the value this relationship has from a Sami private life and identity perspective. The problem is structural and is based on a lack of connection in the RHA between the legal protection of access to Sami traditional areas and the cultural significance this relationship has for Sami culture. The lack of considering a wider cultural context is further explained in the next section in relation to dignity, while Chapter 3 further problematises this in relation to cultural protection of the Swedish Constitution, which ensures protection for the economic side of the reindeer herding industry, while cultural protection remains a goal authorities should strive for.

1.4 The Lack of a Clear Link Between Culture and Legal Protection of the Sami's Right of Access to Land

With the introduction of the first uniform legislation on Sami right of access to land and waters in the 1880s, land rights of the reindeer herding Sami became codified. The underlying process

[80] Tervaniemi and Magga, (2019) (n 60).
[81] Ibid 86.
[82] Helander-Renvall (2016) (n 58) 90–95.
[83] *Sametinget, Eallinbiras* (2021) (n 68) 7 [author's translation].

and subsequent changes that led to the current RHA are addressed in Chapter 4.5. The RHA thus originated directly from the first law and has the same purpose: to secure Sami cultural ways of life by securing their material bases. Despite this fundamental purpose, the RHA contains no specific reference to the protection of the Sami's access to traditional territories as part of their culture and historical rights, nor does it appear directly in the Swedish Constitution of 1974, addressed in Chapter 3.2, although the constitution contains an aim to promote the protection of Sami culture. Through the Swedish case law addressed in Chapter 6, it follows, however, that the constitutional text includes the aim to protect the promotion of reindeer husbandry as part of Sami culture. This protection is part of the reindeer husbandry right, which is the underlying right regulating the Sami's access to traditional territories. The reindeer husbandry right is explained in detail in Chapter 5 and is a generic term for a collective right of access to land and waters.[84] The lack of reference to Sami culture in the right means the socio-economic aspect is at the centre of attention.

The centrality of socio-economic consideration for Sami legal protection is evident from Swedish Supreme court case law analysed in Chapter 6, though the cultural dimension has been given a more prominent role in recent cases, primarily the *Girjas Sami village* case where the court relied on international legal principles related to peoples' right to dispose freely of natural resources. Whether a competing access to land and waters traditionally occupied by the Sami unduly affects their rights and freedoms linked to these areas depends on what impact a measure has on their ability to conduct reindeer herding. This applies regardless of the Sami's above-mentioned emphasis on the cultural significance of their relationship with ancestral land and waters,[85] the significance of this relationship for maintaining a Sami identity,[86] and the right of the Sami to control their homeland and decide their future.[87]

[84] For a definition of *right of access to land and waters* see Chapter 1.6.
[85] See, e.g., Ruong (1969) (n 38) 74–119, Nanna Borchert, *Land is life: traditional Sámi Reindeer grazing threatened in nothern Sweden* (Nussbaum Medien 2001) 5; Sametinget, 'Med renen som leverbröd' (*Sametinget*, 2021) <http://www.samer.se/rennäring> accessed 2021-03-22; Kuoljok (2019) (n 59).
[86] See, e.g., Niclas Kaiser and others, 'Depression and anxiety in the reindeer-herding Sami population of Sweden' (2010) 69 International Journal of Circumpolar Health 383, 390; Lotta M Omma, Lars E Holmgren and Lars H Jacobsson, 'Being a Young Sami in Sweden' (2011) 1 Journal of Northern Studies 9, 19; Niclas Kaiser, Terje Ruong and Ellinor Salander Renberg, 'Experiences of being a young male Sami reindeer herder: a qualitative study in perspective of mental health' (2013) 72 International Journal of Circumpolar Health 1, 7f.
[87] See, e.g., Ulf Mörkenstam, 'Indigenous Peoples and the Right to Self-Determination: The Case of the Swedish Sami People' (2005) 25 Canadian Journal of Native Studies/Le Revue Canadienne Des Etudes Autochtones 433, 441f, 445; Hugh Beach, 'Self-determining the Self: Aspects of Saami Identity Management in Sweden' (2007) 24 Acta Borealia 1, 5f.

A lack of direct cultural protection of the relationship with ancestral land and waters – alongside protection on economic grounds – leads to questions about what would happen if the prospects of reindeer herding disappear due to natural or human influence. Hugh Beach (2007) highlights this issue by pointing to the approach Swedish legislation takes to the issue of Sami legal protection.[88] He argues that the dependence on a specific cultural activity – reindeer husbandry – for the protection of Sami cultural interests creates a built-in vulnerability in the Swedish legal system.[89] Consequently, a loss of land for reindeer herding and associated activities risks having 'profound repercussions for the Saami culture.'[90]

Beach does not explain what these profound consequences might be; they might involve the eradication of Sami culture and identity, with the risk of the Sami being assimilated into Swedish society as another ethnic and linguistic minority, or just a transition and transformation of Sami culture and identity. As explained above, Handler (1996) believes that both cultures and identities change, and the loss of a key element in a culture does not necessarily mean the culture and the identities associated with it cease; they only change. The problem, of course, is that these changes are sometimes undesirable and stem from a lack of legal protection, thereby depriving the subject of the ability to control and determine their future. As Chapter 4.5 shows, it is precisely such considerations that form the basis of the 1886 regulation on reindeer grazing, and the preparatory work states that if Sami nomadic culture and reindeer husbandry is to cease, this should not be the result of inadequate legislation.[91] The concept of nomadic culture in this context is a reference to a group's specific way of life defined by a customary land use that differs from a more settled lifestyle based on land cultivation. This thesis returns to the contemporary understanding of the concept of culture within the framework of Indigenous peoples and human dignity in Chapter 2.

Despite the fact that the protection of nomadic culture by providing adequate legal protection is emphasised in the preparatory work for the Reindeer Grazing Act of 1886, there is, as noted, no clear reference to the cultural dimension of Sami rights and freedoms linked to traditionally occupied and used territories in the RHA, including the area reserved exclusively for Sami use

[88] Beach (2007) (n 87).
[89] Ibid 5.
[90] Ibid 19.
[91] Utskottsutlåtande 1886:1, *Utlåtande, i anledning af Kongl. Maj:ts till Utskottet remitterande nådog proposition med förslag till lag angående de svenska lapparnes rätt till renbete i Sverige, samt till lag angående renmärken*, 18. Preparatory work in the Nordic countries is generally considered to be important sources of law.

(the area is explained in Chapters 4, and 5). Regardless of the legal developments that have increased the focus on the cultural dimension of Sami rights and freedoms linked to traditionally occupied and used territories in disputes of proprietary interest following the *Girjas Sami village* case (see Chapter 6.1.4), rights having an economic value remain the focus of judicial assessment. As explained above, the underlying reason for this is that the Sami's rights to traditional territories are, in Swedish law, exclusively associated with an activity – reindeer husbandry, which is, as shown in Chapter 3, protected as an economic right. The judgement of the Swedish Supreme Court in the *Girjas Sami village* case on the right to control hunting and fishing in parts of the village area within the reserved area largely confirms this emphasis on activity, though it represents a change when it comes to taking due account of the Sami's status as Indigenous peoples in disputes over access to and control over wildlife resources.

This thesis returns to the *Girjas Sami village* case in Chapter 6.1.4, but as is clear from the Swedish Supreme Court's reasoning in the case, one of the underlying problems is a lack of due consideration of the connection between the Sami's property rights and their right to cultural protection. In the *Girjas Sami village* case, the Supreme Court conceded that the Sami's status as Indigenous people requires due regard for their special cultural situation in line with international legal instruments. As an aid for interpreting domestic legal rules and principles, the Supreme Court thus applied international legal principles found in instruments not signed or ratified by Sweden. Although this can be seen as controversial, as Sweden applies a dualistic approach to international law,[92] there may be a responsibility to ensure effective legal protection for the rights and obligations contained in the European Convention in the light of general principles of law found contained in documents Sweden has not signed nor ratified, as explained in Chapter 7.4.

The Swedish Supreme Court does not address the European Convention in the *Girjas Sami village* case; however, as this thesis explains in Chapter 7, Sweden has an obligation to consider the cultural dimension of Sami proprietary interests protected under P1-1. This obligation includes taking due account of the cultural dimension of private life and identity ensured under Article 8 of the ECHR. The above suggests that Swedish law does not ensure the Sami effective

[92] Classically a dualistic approach to international law means that national law and international law operate on different levels and that international law only has legal effect nationally if it has been incorporated. See, e.g., DJ Harris, *Cases and materials on international law* (6 edn, Sweet & Maxwell 2004) 66–69; Rebecca M M Wallace and Olga Martin-Ortega, *International law* (6 edn, Sweet & Maxwell 2009) 37f.

legal protection on par with the cultural protection advocated for at the international level, and the Supreme Court's ruling in the *Girjas Sami village* case clearly shows this shortcoming in relation to international law. There is, as this thesis argues, an additional shortcoming in relation to the European Convention. This shortcoming follows from the lack of legal protection in the Swedish Constitution ensuring effective protection of the Sami's right to respect for personal freedoms linked to private life, including the right to choose a lifestyle and create an identity in relation to others. As Chapter 3 shows, ensuring protection of those parts of Article 8 of the ECHR is at the discretion of the Swedish authorities. This state centred discretion leads to the central question in this research, which is whether Swedish law concerning cultural protection harmonises with cultural protection under the European Convention. As Eyal Benvenisti and Alan Herel (2017) explains, '[t]he protection of rights is a duty of the state—including its *pouvoir constituant*—rather than contingent on its good will or discretion.'[93]

1.5 Central Research Question and Methodological Approach

The aim of this thesis is to provide a comprehensive analysis the protection of Sami proprietary interest falling within the scope of Article 1 of Protocol 1 to the Convention (P1-1). It does so by determining the nature, scope, and content of the right to respect for private live under Article 8 of the European Convention. The thesis analyses the extent to which the Swedish legal system guarantees the Sami effective and practical protection for their proprietary interests as part of their right to respect for the freedom to preserve and develop their culture; it also analyses where this protection stands in relation to protection under the European Convention.

The central question of this thesis is therefore as follows: *does the Swedish legal system recognise and protect the proprietary interests of the Sami in a way that is compatible with the European Convention, and do both recognise and protect Sami proprietary rights in a way that safeguards Sami cultural interests?*

The thesis uses doctrinal analysis of the law and a comparative analysis of the compatibility of Swedish Sami legal protection and legal protection according to Article 8 and P1-1 of the European Convention. The sources of law used in this thesis include statutes, cases, relevant

[93] Eyal Benvenisti and Alon Harel, 'Embracing the tension between national and international human rights law: The case for discordant parity' (2017) 15 International Journal of Constitutional Law 36, 40.

reports, and academic publications. Several official webpages have also been relied upon for facts, reports, and declarations.

1.6 Some Terminological Clarifications

This study has already mentioned several terms in connection with the Sami's right of access to land. In relation to reindeer, this chapter mentions the *reindeer husbandry right.* This is a generic term for a collective Sami right of access to land and waters (including forests). In connection with exercising the *reindeer husbandry right*, the Sami have specific rights that fall under the concept of *reindeer herding rights*. These are personal rights where the holders of the rights are the Sami village association and individual Sami. As explained in Chapter 5, these rights include the right of access to land for hunting and fishing purposes and forest produce and the right of way for migratory purposes. The historical basis for these rights is explained in Chapter 4. A broader concept linked to reindeer herding is *reindeer husbandry*. This broader concept encompasses the socio-cultural and socio-economic significance herding reindeer represents for Sami society. A narrower concept is the *reindeer husbandry industry*, which only covers the socio-economic side.

The term *right of access to land and waters* entails a broader meaning. It covers the actual rights that come with the right of access, including but not limited to the right to hunt, the right to freedom from interference, and the right of self-determination. This thesis uses the term because of its focus on how the Sami's access to land is protected through the regulation of their access to land.

Finally, the term *customary law* refers to Swedish legal rules crystallised from Sami customary practices – that is, behavioural patterns that govern Sami land use and are accepted and followed by Sami in general.

1.7 Research Plan

As shown in this chapter, the preservation of Sami cultural identity – from a Sami perspective – is central to the discussion on legal protection of the Sami's right of access to land and water. Despite this, there is a lack reference to cultural protection in the RHA, which aims to be the predominant safeguard of Sami culture by securing the Sami's right of access to ancestral land and waters. This thesis returns to the historical background for this perception in Chapter 4.

Given the right to respect cultural aspects of lifestyle under the European Convention, as explained in Chapter 7.2, it is unclear whether the Sami's right to respect for their cultural characteristics, as part of their right to human dignity, is given adequate legal protection at the national level, meaning a protection that provides the Sami with rights and freedoms that are practical and effective. Since, as Chapter 7 shows, the principle of human dignity is central to such protection under the European Convention, a key question is how the concept is to be applied in relation to the Sami as an Indigenous people with collective interests. Thus, the thesis examines dignity within the framework of Indigenous peoples.

Chapter 2, *Human Dignity from a Sami Indigenous peoples' Perspective*, discusses human dignity in the context of Indigenous peoples. The chapter illustrates how the concept's normative function is culturally contextual in relation to human rights and fundamental freedoms based on the specific context in which they are considered. The chapter introduces a problematic structure of the Swedish Constitution that ensures the right to respect for private life, secured in Article 8 of the European Convention, through the notion of general goals rather than as a constitutional right. This problematic structure leads to a broader question of the nature of the constitutional division of proprietary and social interests considering the legal developments concerning the rights of Indigenous peoples to access and control traditional territory and water. This leads to Chapter 3, which discusses the Swedish Constitution and international law concerning Indigenous peoples from a general perspective.

Chapter 3, *Sami Economic Rights and Cultural Protection Under the Swedish Constitution,* elaborates on several issues relating to the protection of the Sami's right of access to land and waters in the Swedish Constitution. This elaboration takes place within in light of international instruments linked to Indigenous peoples' rights to ancestral land and water. The chapter focuses on the constitutional division of Sami protection into economic rights and cultural protection from a general goal perspective. Though the general goal of ensuring Sami culture is usefulness as an aid to statutory interpretation, the chapter sheds light on the core issues addressed by the thesis and on the heart of the problem of protecting the Sami's right of access to land and waters from a cultural perspective. This problem raises the question of whether this division is in line with the historical background of the reindeer husbandry right and is therefore justifiable. Chapter 4 aims to answer this question through an examination of the historical background of the statutory codification of the Sami's rights of access to land and waters.

Chapter 4, *The Sami's Right of Access to Land from the Late Middle Ages to the Reindeer Grazing Act of 1886,* aims to provide insight into the historical background of the Sami reindeer husbandry right. The chapter sheds light on how Swedish governments have, over the centuries, related to existing ethnic groups during Sweden's colonisation of the northern parts of the Scandinavian Peninsula. The overview provided by the chapter shows how cultural protection underlay the protection of the Sami's access to land and waters when Sweden codified the reindeer husbandry right in 1886. Consequently, special attention is paid to the preparatory work for the first Reindeer Grazing Act. This preparatory work has continued legal relevance for the interpretation of the Sami's right of access to land and waters according to the RHA. Thus, this chapter leads to a discussion of contemporary legislation on the rights of the Sami people linked to traditionally occupied and used areas – the RHA.

Chapter 5*, Contemporary Statutory Protection of the Sami´s Rights of Access to Land ,* describes the major features of the RHA as relevant to this thesis. It explains the reindeer husbandry right and its sub-rights – the reindeer herding rights. Moreover, the geographical administrative boundaries affecting the nature and scope of the Sami's right of access to land and waters and the function of the Sami village are explained. Finally, the chapter provides an overview of the Swedish Government's ability to restrict Sami access to land and waters in accordance with the RHA and the Environmental Code. The chapter thus includes a description of Sami protection under the Environmental Code. Chapter 5 leads to a question of how the Swedish judiciary handles conflicts of interest between Sami interest in the protection of their right of access to land and waters and the Swedish government's interest in limiting this right for the benefit of others and general interest. Consequently, this is examined in Chapter 6.

Chapter 6*, The Protection of Sami Access to Land in Legal Proceedings,* is the last chapter to address Sami rights in a Swedish context. The purpose of the chapter is to analyse how the highest courts within the Swedish judiciary system have dealt with Sami cases concerning disputes over access to land and waters. Its main goal is to shed light on the extent to which Swedish courts takes due account of the cultural aspects of Sami access to land and waters when assessing disputes over access.

The last substantive chapter of this thesis, Chapter 7*, The Right to Respect for Private life and Posession under the European Convention,* focuses exclusively on the analysis of European Convention case law. The focus is on Article 8, which is a cornerstone for the protection of culturally characteristic ways of life, and P1-1, which is the cornerstone for the protection of

proprietary interests. The chapter highlights the interplay between Article 8 and P1-1 and the importance of respect for the cultural dimensions of minority interests in balancing the right to peaceful possession and state interests in restricting this right in the public interest. Furthermore, the chapter shows how states are obliged to take due account of the full context of minority cases, which might require seeking guidance at an international level to ensure the safeguarding of the rights and freedoms of the European Convention, which are practical and effective, not theoretical and illusory.

Chapter 8*, Final Conclusion – All Legal Boundaries are Conventions Waiting to be Transcended*, sets forth the thesis' final conclusions on the shortcoming of the Swedish law on Sami cultural protection.

Chapter 2 Human Dignity from a Sami Indigenous peoples' Perspective

Whereas the first chapter provided an insight into the deeply rooted connection the Sami have to their original territory and the cultural[94] value of this connection, the purpose of this chapter is to examine the idea of human dignity as a normative concept applied in a Swedish constitutional and an Indigenous setting. This chapter aims in particular to analyse and show how the principle of human dignity can and should be seen in relation to Indigenous peoples and to what extent the Swedish Constitution leaves room for consideration of a broader conceptual understanding of the principle. As noted in the previous chapter, even if the principle of human dignity serves as an important norm for cultural protection, securing cultural protection cannot be based on a uniform application of the principle. This chapter shows that the contextuality of human dignity requires due regard not only for cultural activities, such as reindeer husbandry, but also for culturally specific features, such as the collective dimension of Sami rights and freedoms linked to traditional territories. The failure of the Swedish Constitution to take all culturally specific features into account means that there is insufficiently effective and practical protection of human rights and fundamental freedoms for the Sami as an Indigenous people. In particular, it is argued in this chapter that fully complying with the principle of human dignity in relation to the Sami as an Indigenous people requires full acknowledgement of the cultural value of their relationship with original territories as a key aspect of their legal protection. To fully acknowledge the cultural valuse means that Sami access to land must be understood as more than a commodity of economic importance to fully respect the Sami's Indigenous rights and freedoms to live a life of their own choosing. The understanding of human dignity in a Sami context thus provides an important basis for understanding the criticism that this dissertation places on the shortcomings that exist in the Swedish system regarding the cultural protection of the Sami people's continued access to their traditional territories. It also provides a basis for the analyses of Strasbourg case law in Chapter 7.

In order to develop this argument in detail, this chapter begins with an introduction to human dignity in the context of this thesis, where its normative function as an aid for interpreting the nature and scope of human rights and freedoms is explained (Section 2.1). The following

[94] In line with Linda Nicholson's reasoning of the concept, this thesis uses the concept of *culture* in the sense of way of life. Culture should thus be understood as a reference to 'patterns of behaviour and belief, values and life-style, symbols and meanings' of a people. Linda Nicholson, *Identity Before Identity Politics* (Cambridge University Press 2008) 84.

section then provides an explanation of the normative function of human dignity in a Swedish constitutional setting (Section 2.2). The collective dimension of human dignity that follows its application to an Indigenous people context is then conveyed (Section 2.3). As a concluding discussion, the chapter highlights human dignity in the context of the Indigenous discourse on rights and freedoms linked to land and waters. As this section shows, to ensure human dignity for Indigenous peoples, state institutions must give full recognition to the cultural dimension of Indigenous peoples' human rights and fundamental freedoms in their original territories (Section 2.4).

2.1 A General Introduction to Human Dignity

Human dignity emerged as a central principle of contemporary human rights in the wake of World War II and in the drafting of the Universal Declaration of Human Rights (UDHR).[95] Whereas the UDHR recognises the inherent dignity of all human beings, it lacks a definition of the concept. Considering the open-ended meaning codified in the UHDR, it is out of the scope of this thesis to provide an exhaustive analysis of its content. An attempt to analyse the principle would also be a futile task; moreover, as noted by, for example, Getahun A. Mosissa (2020), there is no consensus of the value of human dignity as a legal normative concept and contemporary interpretation, and the implementation of human dignity is debatable and indefinable.[96] However, Doron Shulztiner and Guy Carmi (2014) see the lack of definition as a strength that has led to the concept becoming so widely accepted by various ideological systems.[97] Likewise, A. C. Steinmann (2016) acknowledges the legal dilemmas the lack of definition of human dignity poses when applying the principle to the evaluation of human rights and fundamental freedoms. However, he subscribes to the idea of human dignity as containing basic elements that are generally accepted – for example, that it is an inviolable and inalienable value inherent in the individual by the virtue of being a human.[98] This thesis also subscribes to

[95] Doron Shulztiner and Guy Carmi, 'Human Dignity in National Constitutions: Functions, Promises and Dangers' (2014) 62 The American journal of comparative law 461, 464; UNGA 'Universal Declaration of Human Rights' (10 December 1948) UN Doc A/RES/217 (III) A. See also Charles R Beitz, 'Human Dignity in the Theory of Human Rights: Nothing But a Phrase?' (2013) 41 Philos Public Aff 259, 259f, and Arnd Pollmann, 'Embodied Self–Respect and the Fragility of Human Dignity – A Human Rights Approach' in Paulus Kaufmann and others (eds), *Humiliation, Degradation, Dehumanization – Human Dignity Violated* (Springer Netherlands 2011) 246–248.

[96] Getahun A Mosissa, *Human Dignity* (Intersentia 2020) 87–89. See also Christian Byk, 'Is human dignity a useless concept? – Legal perspectives' in Marcus Düwell and others (eds), *The Cambridge handbook of human dignity* (Cambridge University Press 2014) 363; Shulztiner and Carmi (2014) 462 with further references.

[97] Shulztiner and Carmi (2014) 471f.

[98] Rinie Steinmann, 'The core meaning of human dignity' (2016) 19 Potchefstroom electronic law journal 1, 2–5.

this notion. As Daniel Sulmasy (2007) observes, 'it is not the *expression* of rationality that makes us human, but our belonging to a kind that is capable of rationality that makes us human'.[99] Consequently, according to Mosissa (2020), human dignity has an inherent value 'transcending over cultural, religious, legal, political or other social institutions.'[100] He continues:

> Understood in this sense, it is possible to assert that humanity and its dignity is not and should not be the product of certain form of sociocultural or intellectual conventionalism of some sort. In fact, the argument will be in the reverse order: that is, rather than sociocultural and political systems or conventional values being the determinants of the dignity of humanity, they themselves are required to be subjected to a critical scrutiny against the dignity of humanity. Moreover, this perspective also provides significant coherence to other concrete normative principles for it clearly places humanity and its inherent value at the centre of all normative discourses.[101]

In line with Steinmann's (2016) analysis of human dignity, which shows how the concept has both an objective and a subjective dimension,[102] Mosissa (2020) believes that an analysis of human dignity in the context of human rights and freedoms requires consideration of the reality in which humans live.[103] This is based on the notion that the underlying normative principle of human dignity – the principle of respect – can only be assessed in relation to a specific context:[104]

> [T]he principle of human dignity is characteristically a generic (an abstract) and practical normative principle whose essential meaning is both rooted in and makes sense in the context of concrete and lived experiences of individuals in a political society. This, in turn, establishes it as fundamental evaluative and qualitative normative principle against which the legitimacy (and appropriateness) of the society's socioeconomic, cultural and legal systems vis-à-vis the inherent value of human beings can be assessed and judged.[105]

According to Mosissa, the normative function of human dignity thus lies in serving as a basis for assessing whether a legal structure ensures effective and practical legal protection of human rights and fundamental freedoms in a specific context.[106] A similar view is expressed by

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[99] Daniel P Sulmasy, 'Human Dignity and Human Worth' in Jeff Nalpas and Norelle Lickiss (eds), *Perspective on Human Dignity: A Conversation* (Springer Netherlands 2007) 16, as quoted by Mosissa (2020) 109.
[100] Mosissa (2020) 109.
[101] Ibid 109.
[102] Steinmann (2016) 20.
[103] Mosissa (2020) 110.
[104] Ibid 114–117.
[105] Ibid 121.
[106] Compare Bas de Gaay Fortman, 'Equal dignity in international human rights' in Dietmar Mieth and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 356.

Janneke Gerards (2019) in relation to Article 8 in the European Convention – the right to respect for private and family life – and the ability to maintain a relationship to others as explained in Chapter 7.2.[107] This provides human dignity with a socio-cultural dimension (this is further explained in Chapter 3 in relation to Indigenous peoples' rights and freedoms under international huma rights law). As Steinmann (2016) notes, respect for cultural diversity is also implicit in human dignity.[108] This cultural dimension of human dignity is also something the UN Committee on Economic, Social and Cultural Rights (CESCR) has emphasised:

> [F]ull promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world.[109]

In order to achieve full promotion and respect, due consideration must be given to the cultural dimensions of human rights and fundamental freedoms, and, on this basis, an assessment must be made as to whether the existing legal structure ensures full respect for human dignity in a given context.[110] This points to the fact that the normative function of the principle of human dignity is to serve as an aid to the interpretation of whether a national legal system ensures effective and practical protection of human rights and fundamental freedoms in a given context. Thereby, it is important to consider the principle of human dignity from a Sami cultural perspective giving due regard to their Indigenous peoples status to fully respect their human rights and fundamental freedoms. In particular, given this status, there is a strong international legal cultural protection for Indigenous peoples' freedoms and rights linked to traditional territories, as explained in Chapter 3. Whether the Swedish legal system ensures effective and practical protection of human rights and fundamental freedoms by fully respecting human dignity in a Sami context thus requires both a clarification of the normative function of human dignity in the national legal system and an explanation of how the principle should be understood in relation to Indigenous peoples. Thus, the following two sections address these issues in that order.

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[107] Gerards (2019) 60ff.
[108] Steinmann (2016) 11.
[109] ECOSOC, *General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, [1].
[110] Compare Lenzerini (2014) 209f, who argues that cultural elements function as parameters 'to be used in order to establish whether a human rights breach attained a special qualified degree of gravity, or even – in many instances – whether such a breach did exist or not'.

2.2 The Normative Function of Human Dignity in the Swedish Constitutional Setting

As Bayan Nuwayhid al-Hout (2009) notes, when analysing human rights principles, it must be borne in mind that their application is based on political considerations which, on the surface, may be noble but de facto impose a legal structure that favours only the political structure interpreting them.[111] How the principle of human dignity has been incorporated into the Instrument of Government (IOG) (hereafter referred to as the Swedish Constitution) is no exception. The introduction of the principle in 1974 is based on political considerations that are rooted in traditional conceptions and theories of human rights which separate civil, and political rights from economic, social, and cultural rights.[112] For this reason, the Swedish Constitution distinguishes constitutional rights and freedoms from public goals, where the protection of cultural rights falls within the framework of the latter. Culture is thus deprived of a status as a norm-bearing right which makes the Swedish Constitution narrow in construction, as shown below.

The Swedish Constitution is based on several fundamental principles for human rights. Some of these principles were clarified through the constitutional review of 1974, such as the principle of human dignity together with equality, respect, and the principle of cultural freedom:[113]

> Public power shall be exercised with respect for the equal worth of all and the liberty and dignity of the individual.
>
> The personal, economic and cultural welfare of the individual shall be fundamental aims of public activity.[114]

The purpose of the 1974 constitutional review was to strengthen the legal protection of civil liberties and rights in Sweden.[115] The mentioned fundamental principles – human dignity, equality and respect, however, was placed in a new section on the fundamental objectives of public activities. Following the argument of Mary Ann Glendon (1992), by doing so, principle

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[111] Bayan Wuwayhid Al-Hout, 'Human rights in the historical texts of the modern Arab world' in Salma K Jayyusi (ed), *Human Rights in Arab thought – A Reader* (Tauris 2009) 435.
[112] See, e.g., Javaid Rehman, *International Human Rights Law* (Longman 2009) 77f.
[113] The principle of cultural freedom is expressed through the term *cultural welfare*, which has been defined as 'people's cultural living conditions', Kulturrådet, *Den kulturella välfärden – elitens privilegium eller möjlighet för alla?* (Statens kulturråd 2002) 13.
[114] Instrument of Government (*Kungörelse (1974:152) om beslutad ny regeringsform*) (IOG), c 1, s 2.
Translation by Magnus Isberg, *The constitution of Sweden: the fundamental laws and the Riksdag Act* (Sveriges Riksdag 2016) 65.
[115] Governmental Bill 1976:209, *Om ändring i regeringsformen*, 1, 32.

in the section becomes simply a political goal and as such represents merely *programmatic* principles which 'await implementation through legislative or executive action'.[116] The normative value of these principles thus remains partly unclear, especially if a broader framework is lacking.[117] As shown below, this ambiguity regarding the normative value from a legal perspective leads to complications with regard to Sami cultural protection, which is also regulated in the section of the fundamental objectives of public activities.

One of the reasons for the Swedish Constitution contains makes a separation between certain aspects not being regulate as rights and freedoms as goals to guide public authorities in the exercise of power should strive for, was due to considerations of the drafters that it is inappropriate to ensure economic, social, and cultural rights directly as constitutional rights. This separations rests on concern of increased positive obligations of the state linked to social services.[118] This positive obligation may be contrasted the negative obligation linked to more classical civil and political rights.[119] The drafters argued, for example, that, given Sweden's limited economic resources, it was not practical to secure an individual right to these resources in the Constitution, but the distribution of the state's economic resources would be a balance assessment that the public sector should make.[120] This type of argument is not unique in relation to economic, social, and cultural rights. Furthermore, as noted by Getahun Mosissa (2020), it affects the normative meaning of the right to respect for human dignity and reduces its significance in relation to these rights.[121] Mosissa argues that making economic, social, and cultural rights political goals

> gives the impression that they are not inherent and hence automatically enforceable human rights but rather contingent welfare programs which a given government may at its own discretion choose to provide to certain individuals but depending particularly on the financial affordability and sustainability of such programs. [122]

Securing economic, social, and cultural rights through fundamental principles, such as human dignity, thus says nothing about what legal protection a person can expect as long as there is

[116] Mary Ann Glendon, 'Rights in Twentieth-Century Constitutions' (1992) 59 The University of Chicago law review 519, 527f.
[117] Compare, Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 Ratio juris 131, 131f.
[118] Governmental Bill 1975/76:209, 67–73, 136–138.
[119] This division between civil and political rights and economic, social, and cultural rights is based on the view that there is a hierarchy between different human rights and freedoms. A perspective that today is outdated and inconsistent with ECHR, as explained in Chapter 7.
[120] Governmental Bill 1975/76:209, 67f.
[121] Mosissa (2020) (n 96) 4–8.
[122] Ibid, 8.

no broader framework that in any way describes this right or freedom. As argued by Robert Alexy (2003), for a constitution to be considered to have a *comprehensive and holistic construction*, the structure needs to contain constitutional rights, not just constitutional norms, 'embedded in a broader framework'.[123] As is made clear in the following chapter, Swedish law contains a broader framework with regard to the economic side of reindeer husbandry, which is both a constitutionally protected right and a right protected in law, through the RHA. The same does not apply to cultural rights, these are neither protected as constitutional rights, as explained in Chapter 3, nor are they protected under RHA.

What has been stated above points to there being ambiguities concerning the normative function of human dignity in relation to social, and cultural rights. This is related to the ways in which social, and cultural rights are incorporated into the Swedish Constitution. The failure of the 1974 constitutional review to, for example, codify cultural rights as constitutional rights means that there is no constitutional guarantee that, as indigenous peoples, the cultural rights of Sami should be weighed into the assessment of their rights and freedoms linked to traditionally territories. This is the case, even though, as emphasised in Chapter 4, Sami legal protection is based on cultural grounds. What is missing, to use the words of Doran Shulztiner and Guy Carmi (2014), are 'specific articles that are meant to give expression to this supreme value and goal in the form of explicit instructions and rights provisions'.[124]

The lack of specific articles means that social, and cultural rights are not codified as constitutional rights, and thus their normative function becomes unclear. This in turn leads to an ambiguity regarding how human dignity should be applied in relation to them. This also applies to Article 8 of the ECHR – the right to respect for private and family life – which was codified in the Swedish Constitution at the same time as human dignity (Chapter 7.2 addresses the nature and scope of Article 8 in detail). However, Yvonne Donders (2010) explains that the article serves as the primary article to ensure respect for the human dignity of Indigenous peoples under ECHR.[125]

At the time of the constitutional amendment in the mid-1970s, the rights of Indigenous peoples were not yet secure in international human rights law, and there is understandably a lack of

[123] Alexy (2003) (n 17) 131f.
[124] Shulztiner and Carmi (2014) (n 95) 476.
[125] See Donders (2010) (n 9) 27–29. Compare Gaetano Pentassuglia, 'Protecting Minority Groups through Human Rights Courts – The Interpretive Role of European and Inter-American Jurisprudence' in Ana Filipa Vrdoljak (ed), *The Cultural Dimension of Human Rights* (OUP 2013) 74–79.

discussion on Sami cultural protection in relation to the codification of Article 8.[126] Instead, the discussion concerning the article, focused on explaining why the lack of clarity concerning the nature and scope of the right to respect for private and family life makes these parts of Article 8 unsuitable to be codified as a constitutionally protected right.[127] Consequently, the right to respect for private and family life is, like social, and cultural rights, codified under the fundamental objectives of public activities.[128] Unlike Norway and Finland, which also have Sami populations, Sweden does not provide a constitutionally protected right to respect for private and family life.[129] It, thus, is at the discretion of the authorities to determine, on the basis of a very abstract text, the normative function of human dignity. This involves assessing whether the protection of private and family life is effective and practical in a way that is in accordance with the principle of human dignity:

> The public institutions shall promote the ideas of democracy as guidelines in all sectors of society and protect the private and family lives of the individual.[130]

Promote, *ideals*, and *guidelines* are abstract terms that do not provide clear guidance on how to achieve respect. In the context of the Sami, who have cultural rights as an Indigenous people, where Swedish law lacks a larger framework that protects Sami cultural rights that are linked to traditional territories, the assessment is made according to a legal structure that is not based on the consideration of Sami cultural rights as an Indigenous people. Moreover, Article 8 has gained little attention in constitutional reviews since the 1970s despite the fact that it has, since then, become one of the more important articles for protecting cultural ways of life under the European Convention, as explained in Chapter 7.2.

The lack of a larger framework focusing on cultural rights, or even cultural dimensions of rights and freedoms, is apparent in the 1994 constitutional review, which aimed to further strengthen the legal position of the individual when Sweden transposed the European Convention.[131] In this review, the Sami's constitutional protection for reindeer husbandry as an economic right was strengthened through the clarification that the Sami reindeer husbandry monopoly did not

[126] As shown in Chapter 7, the Strasbourg Court also did not receive the first Sami case until the beginning of the 1980s.
[127] Governmental Bill 1975/76:209, 70.
[128] Ibid 32, 67–73, 136f.
[129] Constitution of the Kingdom of Norway (*Kongeriket Noregs grunnlov*) (LOV–1814–05–17), s 102, available at <www. https://lovdata.no>; Constitution of Finland (*Finlands Grundlag*) (11.6.1999/731), s 17, available at <https://www.finlex.fi>.
[130] Translation by Isberg (2016) (n 114) 65 [transl. altered].
[131] Governmental Bill 1993:117, *Inkorporering av Europakonventionen och andra fri- och rättighetsfrågor*.

violate the principle of equality.[132] This is a measure that can be linked to Sweden's accession to the EU and the fundamental right of the EU to freedom of trade. However, in the 1994 amendment, no special investigation was carried out on the constitutional protection of the Sami's rights and freedoms as an Indigenous people.[133] The underlying reason for this was because of a statement the Swedish government made in a bill in 1993 explaining that the Swedish Constitution ensured the Sami full protection of rights and freedoms, considering Sweden's international obligations.[134] This bill, which is addressed in the next chapter, nevertheless resulted in a special reference to the Sami as a people:

> The opportunities of the Sami people and ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own shall be promoted.[135]

This text, which states that authorities should promote opportunities for the Sami people to preserve their culture and social life, is within the framework of the fundamental objectives of public activities. This means that the promotion of opportunities for the Sami to preserve their culture and social life does not in itself provide the Sami with a constitutional protected right to cultural protection of their rights and freedoms linked to traditional territories. Considering, as explained in more detail in Chapter 7.2, that the cultural dimensions of human rights and freedoms as well as human dignity fall under Article 8 of the ECHR, this raises concerns about whether the Swedish Constitution provides practical and effective protection of the rights and freedoms secured in Article 8 in a way that also complies with their right to respect for human dignity. This is a central issue as Sami cultural protection linked to traditional territories primarily goes through the above regulation in the Swedish Constitution.

That Sami cultural protection linked to traditional territories primarily goes through the Swedish Constitution should mean that constitutional principles of human rights, such as dignity and respect, are considered, in Sami cases, to be linked to traditional territories from a Sami perspective. This should be the case in order to fully respect their human dignity. As Jacob Weinrib (2019) argues, it is important to consider the function of human dignity in the exercise of authority:

> It [human dignity] operates to constrain and direct the exercise of public authority at various levels of abstraction ranging from the overarching constitutional duty to more

[132] Ibid 19–22.
[133] Ibid 22.
[134] Ibid.
[135] Translation by Isberg (2016) (n 114) 65.

> fine-grained issues surrounding the interpretation and operation of rights, limits, and constitutional amendments.[136]

This presupposes, of course, that the norms themselves are so clear that the interpretation does not become arbitrary, which is why, according to Alexy (2003), a constitution has a holistic construction if there are constitutional rights that are part of a broader framework.[137] With regard to the Sami's cultural rights as an Indigenous peoples linked to traditional territories, this broader framework is lacking and have so far mainly been provided through decisions by the Swedish Supreme Court, as explained in Chapter 6. The lack of a broader framework is linked to the fact that cultural protection according to the Constitution is only one goal and that the law that exists to protect the Sami's access to land and water, RNL, lacks a clear reference to the cultural dimension of this access. The recent *Girja Sami village* case that is dealt with in Chapter 6, however, shows that the status of the reference to Sami cultural protection in the Constitution is not as clear cut as it might seem. In this case the Swedish Supreme Court stated that the reference to the Sami cultural protection in the Swedish Constitution may have *material significance*.[138] The full significance of this statement is not clear, but one interpretation is that the rules should be seen as part of substantive law, regulating the relationship between the Swedish state and the Sami as an Indigenous peoples within the sovereign territory of Sweden, not only as a goal.[139]

The above points to whether the legal construction of the Swedish Constitution can be seen as, to use the definition of Robert Alexy (2003),[140] *narrow and strict* or *comprehensive or holistic*. This depends on whether it is analysed it in relation to civil, political, and economic rights or social, and cultural rights. In relation to the Sami's cultural rights, which are linked to traditional territory and to their status as an Indigenous people, the construction is narrow and strict. This, as explained, creates ambiguities around whether the Constitution ensures full respect for human dignity for the Sami in this respect. Therefore, the normative function of human dignity in relation to the cultural rights of the Sami as an Indigenous people is ambigous.

[136] Jacob Weinrib, 'Dignity and Autonomy', *Max Planck Encyclopedia of Comparative Constitutional Law* (2019) 4. Compare Mosissa (2020) (n 96) 139.
[137] Alexy (2003) (n 117) 131–134.
[138] *NJA 2020:3 (Girjas Sami village)* SSC [92].
[139] Compare Eivind Torp, 'Rättsliga följder av HD:s dom i Girjasmålet' (2021) Svensk juristtidning (online), who notes the statement but does not make any analysis of it.
[140] Alexy (2003) (n 117) 132.

2.3 The Sami's Right to Human Dignity from a Collective Perspective

That respect for human dignity can depend on neither state recognition nor interpretation follows from, as Jürgen Habermas (2010) argues, the fact that its inalienable and utilitarian purposes cannot function as an argument for its violation, no matter how noble these purposes.[141] According to Alexy (2003), however, human rights and freedoms may need to be weighed against each other in an objective and justified way.[142] The inherent nature of human dignity should, therefore, instead be considered to give the individual a certain degree of self-determination (autonomy) in life choices. Notably, according to Weinrib (2019), the right to live a characteristic lifestyle.[143] The right of self-determination links human dignity closely to individual human rights and freedoms, and the historical emergence of the principle also coincides with the development of individualism.[144] As this section shows, however, the view of human dignity as primarily an individualistic concept does not mean the human dignity lacks relevance on a collective level. That human dignity has relevance on a collective level is argued by Weinrib's (2019), although he makes a certain distinction between the concepts of dignity and autonomy.[145] Weinrib (2019) believes that even if a certain autonomy enables one to make decisions regarding one's own life, it does not necessarily mean one's human dignity has not been violated.[146] He exemplifies this with a situation where a group has some self-determination (autonomy) but is governed by the unilateral decisions of others outside this group. In a Sami context, consider an example in which a majority of non-reindeer herders decided how the minority of reindeer herders were to organise reindeer herding. In a situation such as this, where members of the minority group cannot influence the decision-making process, it is possible to question whether there is adequate protection for the group members' human rights and fundamental freedoms and thus respect for their human dignity. If such protection is lacking, according to Weinrib, the human dignity of the group may be violated.[147] In this way, the question of human dignity linked to groups can become relevant due to the

[141] Jürgen Habermas, 'The Concept of Human Dignity and the realistic Utopia of Human Rights' (2010) 41 Metaphilosophy 464, 465. Compare Evadné Grant, 'Dignity and Equality' (2007) 7 Human Rights Law Review 299, 305.
[142] Alexy (2003) (n 117).
[143] Weinrib (2019) (n 136) 3.
[144] See, e.g., Grant (2007) (n 141) 304f.
[145] For a review of the concepts of human dignity and autonomy in relation to ECHR see Chapter 7.2.
[146] Weinrib (2019) (n 136) 8f.
[147] Ibid 8f. Compare Byk, (2014) (n 96) 366, who also highlights potential conflicts between the respect for human dignity and personal freedoms (which he equates with the right to autonomy) and states that a situation can be considered compatible with the right to respect for personal freedoms but still violate the respect for human dignity.

normative function of human dignity in ensuring human rights and fundamental freedoms, including the right of groups to self-determination.[148] Consequently, the human dignity of a group may be violated if the human rights and fundamental freedoms of its members are not adequately protected.[149]

Naturally, a violation of the human dignity of the members of a group depends on a causal link between a situation and the level impact it has on the human rights and fundamental freedoms of the members.[150] This line of thought leads to the question of whether the Sami as a group or whether subgroups of the Sami collective, such as reindeer herders, have a collective human dignity that the public authority must consider in their handling of Sami cases linked to regulating the use of traditionally occupied and used land and water. If, however, as explained above, the human dignity of members of a collective can be violated despite the collective having some right to self-determination (autonomy), the question is raised of whether, as Micha Werner (2014) claims, there is a collective human dignity that cannot be reduced to the dignity of the members of the collective.[151] Additionally, it should be asked whether this distinction is at all significant in the context of Indigenous peoples. Some organisations seem to think so, and this relates to the importance of recognising Indigenous peoples' right to respect for human dignity, as collectives, in order to be able to secure and maintain their cultures as distinct peoples. The International Law Association, for example, explains that the legal basis for the right to respect is the Declaration on the Rights of Indigenous Peoples 2007.[152] Chapter 3.4.2 provides further insight into the declaration). However, maintaining a culture in this context is not solely about language and cultural expressions but also a right to traditional territories. Bas de Gaay Fortman (2011) explains as follows:

> [W]hile language and culture remain important elements in the protection of human dignity in its collective aspects, a primary need is the protection against so-called development and its consequences in terms of sustaining daily livelihoods, particularly insofar as these are based on access to land.[153]

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[148] The fact that self-determination is central to Indigenous peoples has been explained by, e.g., Timo Makkonen, *Identity, difference and otherness: the concepts of "people", "indigenous people" and "minority" in international law* (University of Helsinki 2000) 59–80.

[149] An example within the context of the European Convention is provided in Section 7.2

[150] Compare Alexy (2003) (n 117).

[151] Micha Werner, 'Individual and collective dignity' in Marcus Düwell and others (eds), *The Cambridge handbook of Human Dignity* (Cambridge University Press 2014) 343, 351.

[152] Conference International Law Association, 'Report of the Hauge Conference: Rights of Indigenous Peoples' (The Hauge Conference, 2010) 39–43.

[153] Bas De Gaay Fortman, 'Minority Rights: A Major Misconception?' (2011) 33 Human Rights Quarterly 265, 298.

According to Gaay Fortman, focus should lay on the wider perspective of human dignity, which should take due account of other factors of value in the specific context based on the normative foundation provided by international law.[154] One article Fortman highlights is Article 27 of the ICCPR (Section 3.4.3 also addresses the article further). However, as Fortman notes, it has a collective dimension that aims to secure the ability to continue a cultural lifestyle in relation to others. This follows Mosissa's (2020) argument that human dignity must be placed in the reality of human life.[155] In line with the reasoning of Werner (2014), a collective of Indigenous peoples would have a normative status with its own human dignity when the collective is engaged in certain common activities central to their cultural characteristics.[156] This collective human dignity, like individual human dignity, is possible to violate through a lack of respect.[157]

Christian Neuhäuser (2011) is not convinced that a group can have its own human dignity but sees the concept of collective dignity as something consisting of the human dignity of a group's human members only.[158] This does not mean, Neuhäuser adds, that one should ignore the collective when assessing a possible violation of human dignity.[159] The concept of collective dignity may become relevant if the members of a collective share identity-bearing elements fundamental to the common identity of the collective, for example, and especially, when there is 'some strong sense of a common fate'.[160] Accordingly, though Neuhäuser takes a different approach to the concept of collective dignity, human dignity retains its significance as a normative concept in relation to groups.

If there is a sense of common destiny, as required according to Neuhäuser, a violation of an individual member's human dignity can amount to a violation of the human dignity of the collective. Examples of this in relation to the European Convention are provided in Chapter 7. An example highlighted by Neuhäuser is if a symbol with general importance to the collective is violated even if the material object constitutes private property belonging an individual.[161] A Sami example of such a situation, where the actions of authorities may constitute a violation

[154] Ibid 298–303.
[155] Mosissa (2020) (n 96) 110.
[156] Werner, (2014) (n 151) 343f.
[157] Ibid 345–351.
[158] Christian Neuhäuser, 'Humiliation – The Collective Dimension' in Paulus Kaufmann and others (eds), *Humiliation, Degradation, Dehumanization – Human Dignity Violated* (Springer Netherlands 2011) 21.
[159] Ibid.
[160] Ibid 29f.
[161] Ibid 23f.

of a Sami collective dignity, was the decision of the County Administrative Board of Västerbotten to burn down a Sami hut in 2018.

The reason the Sami hut was burned down was that the Sami who built the hut fell outside the group of Sami who are entitled to the rights and freedoms ensured by the RHA. Chapter 6 explains the rights and freedoms further and which building constructions are included in them, such as huts. As she lacked a secured right to build a hut according to the RHA, she needed a building permit, and not having one made the hut illegal in the eyes of the law. The County Administrative Board thus had the right to destroy the hut, and burning it down was a way of doing this. From a Sami perspective, however, even though the decision was directed at an individual Sami, setting the hut alight was considered an assault on the Sami collective.[162]

This perception of a violation of the Sami collective has historical explanations linked to Sami struggle for their rights to traditional territories but also to feelings of a common destiny and a lack of respect as equal members of society. These are factors Neuhäuser (2011) emphasises as contributing to the violation of a collective dignity.[163] A statement in the Sami Parliament's report on the preparations for a truth commission mentioned in Chapter 1.2 emphasises these factors: 'We live constantly in fear of the county administrative board / state, which can take away our hunting and fishing at any time and burn up our huts.'[164]

The statement in the Sami Parliament's report is permeated by the feeling of a lack of respect for the Sami people's position as an Indigenous people and their ability to control and decide their own destiny. According to Mosissas (2020), respect is fundamental to uphold human dignity,[165] and according to Yvonne Donders (2002), it is exactly a lack of respect which might lead to a violation of collectives:

> Respect for human dignity means that individuals are not treated as mere instruments of the will of others, but that the choices of individuals are valued. These choices also include cultural choices. In fact, the suppression or limitation of the development and expression of cultural identity can make people feel alienated, which seriously affects their human dignity.[166]

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[162] See, e.g., Tommy Forsgren, 'Upprörd stämning inför bränning av kåta' (*SVT*, 2018) <https://www.svt.se/nyheter/lokalt/vasterbotten/upprord-stamning-infor-branning-av-kata> accessed 10 May 2021 and Thomas Sarri, 'Amnesty begär utredning av kåtabränningen vid Stenträsket' (*SR*, 2018) <https://sverigesradio.se/artikel/6935608> accessed 10 May 2021.
[163] Neuhäuser, (2011) (n 158) 29.
[164] *Sametinget, Sanningskommission* (2021) (n 70) 19.
[165] Mosissa (2020) (n 96) 114f.
[166] Donders (2002) (n 32) 328.

The construction of the hut can be seen as a cultural expression of not only the identity of the Sami concerned but also an expression of a common Sami identity. Burning the hut was thus perceived as an oppression of the Sami in general.

The discussion above implies that it is necessary to take due account of the collective dimension of human dignity concerning what is central for collective cohesion. This does not necessarily mean there is a requirement to recognise a collective human dignity per se, but it should be recognised that the protection of human dignity exceeds the dignity of an individual member of a group. Whether the Sami collective has dignity thus becomes less relevant; more relevant is the collective dimension of human dignity. Chapter 7.2.4 further explains how the human dignity of group members can be affected by measures that affect the collective on a general level, which can be linked to the right to self-determination (human autonomy) and provides further insight into why the human dignity of group members is important to consider in a Sami context.

For peoples of Indigenous origins, such as the Sami, where cultural cohesion has an overall value for the collective, this means that considering human dignity also requires giving due account to the cultural dimension of the concept. The following section discusses this cultural dimension and explains that the requirement to consider this dimension relates to that it is fundamental incompatible with human rights and freedoms for the majority to oppress the human dignity of the minority by insisting that their own cultural rules and values should constitute the guiding norm. Chapter 7 explains this principle in relation to the European Convention and the overarching principle of pluralism underlying the respect for cultural diversity by arguing that to avoid violation of the Sami reindeer herding minority their rights and freedoms must be secured in relation to a majority of Sami.

2.4 The Cultural Contextuality of the Principle of Human Dignity

A key issue for this chapter is how to understand human dignity in an Indigenous setting. As explained in the previous chapter, Sami rights and freedoms in traditional territories are difficult to reduce to include only material interests. As is clear from this chapter, in line with the principle of human dignity, state institutions must consider the immaterial aspects of Sami rights and freedoms when applying laws and legal principles. Such consideration ensures respect for equality in human dignity, human rights, and fundamental freedoms. As noted by Rhoda E. Howard-Hassmann (2013), acknowledging that the right of property, for example, is

fundamental to an individual's independence.[167] This independence includes the right to social recognition regardless of various collective attributes and the right, as part of being human, to control and make decisions regarding one's property as a constituent part of one's personal identity.[168] For indigenous peoples such as the Sami, property is to be understood as comprising traditional territories (see Chapter 3), and the right to decide means having a certain degree of self-determination over these territories and resources.[169] As part of ensuring their human dignity as a people of indigenous origin, it may be necessary to consider the potential causal connection between the effect a measure potentially has on Sami rights and freedoms as an indigenous people linked to traditional territories, including their ability to choose their way of life and maintain connection with their surroundings.

As indicated in this chapter, human rights dignity requires due consideration to secure respect beyond a material perspective. In a Sami context, human dignity is ensured by securing only their access to the material resources needed to conduct certain cultural activities, without considering the wider cultural context of the Sami's connection to their traditional territories. As explained by Marcus Düwell (2010), human dignity cannot be interpreted too narrowly, as it consists of a multitude of features.[170] The notion of human dignity, for example, includes equality of human dignity regardless of race and culture, with dignity being the inherent worth of the individual.[171] Düwell argues that the notion of individual's inherent value is understandable only in the specific context in which human dignity is to be applied. Human dignity, he argues, does not need to be conceptually understood in accordance with the Western individualistic view of the concept but can, in a specific cultural context based on the culture's social order, take on a wider collective dimension.[172]

Apart from the social order, the normative function of human dignity, according to Düwell, makes sense only in relation to the nature and content of specific human rights and freedoms.[173] Düwell believes that the extent to which human rights and freedoms are considered *positive* or *negative* makes the notion of human dignity inherently contextual; therefore, it can be

[167] Rhoda E Howard-Hassmann, 'Reconsidering the Right to Own Property' (2013) 12 Journal of Human Rights 180, 183.
[168] Ibid 189.
[169] Ibid 189f.
[170] Marcus Düwell, 'Human Dignity and Human Rights' in Paulus Kaufmann and others (eds), *Humiliation, Degradation, Dehumanization – Human Dignity Violated*, vol 24 (Springer Netherlands 2010).
[171] Ibid 218–221.
[172] Ibid 220–221.
[173] Ibid 225.

understood only in relation to the human rights or freedoms in question, evaluated in a specific context.[174] As explained by Jürgen Habermas (2010), this context creates a conceptual connection between human dignity and human rights, and fundamental freedoms where the normative function of human dignity is to uphold the respect and equality of persons, but the content becomes contextual in relation to the specific case and specific human rights and freedoms.[175]

Mark P. Lagon and Anthony Clark Arend (2014) subscribe to the contextuality of the normative content of human dignity by emphasising that, although human dignity underpins human rights, the principle is also a product of human rights.[176] They argue that for human dignity to be maintained in cases in which different rights are inextricably linked, its function is to 'conceptually justify dealing with both types of rights holistically'.[177] One example of a case where different rights are inextricably linked is the Sami's right to the peaceful enjoyment of possession as a people and the right to respect for their cultural way of life (rights which Sweden has an obligation to secure under ECHR, as explained in Chapter 7). Human dignity thus serves as a principle that 'helps transcend the misplaced segregation and prioritisation between political-civil and socioeconomic rights respectively',[178] a division and prioritisation that is found both in the Swedish Constitution and in the RHA, as explained in Chapter 3.

The above suggests that the contextuality of human dignity facilitates the correction of a one-sided focus. In the cultural environment of an indigenous peoples, this contextuality of human dignity, according to Howard-Hassmann (2010), requires scrutiny of how human rights and freedoms apply in relation to Indigenous peoples.[179] Like Düwell, Howard emphasises that human dignity must be seen from an Indigenous peoples' perspective in connection to their cultural context and their collective rights.[180] Consequently, human dignity cannot be limited to the inherent worth of the individual. That focus cannot be limited to individuals is based on

[174] Ibid 225f, Düwell defines positive and negative rights: '[N]egative rights are rights not to be hindered in exercising one's freedom; positive rights are rights to be supported in the exercise or development of one's capacities. While the negative rights protect the negative liberty of human beings, the positive rights support humans in the development of their capacities,' [references omitted].
[175] Habermas (2010) (n 141) 466–470.
[176] Mark P Lagon and Anthony C Arend, 'Constricting a Dialouge on Dignity' in John J DeGioia, Mark P Lagon and Anthony C Arend (eds), *Human dignity and the future of global institutions* (Georgetown University Press 2014) 322.
[177] Ibid 322f.
[178] Ibid 323.
[179] Howard, (1992) (n 41).
[180] Ibid 83f.

the notion that when individual human rights and freedoms are applied in Indigenous contexts, this application I still grounded on European ideologies and, therefore, represents only 'one particular conception of human dignity and social justice,'[181] and thus represents as argued by Al-Hout (2009) a certain political perspective.[182] Consequently, it is impossible to equate respect for human dignity with respect for generally held individual human rights without considering the specific cultural context. For that reason, to fully respect human dignity in an Indigenous setting, one must respect the cultural dimension of Indigenous rights and freedoms.[183]

Cultural contexts has been disregarded in other contexts, which makes it doubtful whether there is full respect for the Sami's cultural heritage, and thus full respect for their human dignity. For example, reindeer herding requires a reindeer mark, registration for which is controlled by the Swedish government but delegated to the Sami Parliament. According to the RHA, the Sami Parliament is, as a Swedish authority, obligated to deregister a reindeer mark if the use of the mark has ceased or if the registered holder no longer has the right to conduct reindeer husbandry.[184] The obligation to deregister applies regardless of how long the symbol has existed within a particular family. There is thus a centralised control over access to a cultural heritage symbol that can have a value alongside its factual function for reindeer herding. This kind of state control over cultural symbols can be problematic from a human dignity perspective, considering Indigenous peoples' right to own and control their cultural heritage.[185]

Though the right to cultural heritage falls outside the scope of this thesis, the emerging right to cultural heritage under international law makes it necessary to take due account of the cultural context of Indigenous peoples, including the right to conserve, control, and protect their cultural heritage, as the Strasbourg Court has noted[186] (Chapter 7 addresses this further). Consequently, the contextuality of human dignity in relation to specific cultures can be

[181] Ibid 84, 99.
[182] Al-Hout, (2009) (n 111) 435f.
[183] Howard, (1992) (n 41) 83f.
[184] RHA, s 79.
[185] For Sami criticism of this centralisation, see, e.g., *Sametinget, Sanningskommission* (2021) 19f, 43.
[186] See, e.g., the Strasbourg Courts statement in *Ahunbay and Others v Turkey (dec)* App no 6080/06 (EctHR, 29 January 2019) [21], where the Court noted the need to protect the cultural heritage of Indigenous peoples including the right to conserve, control, and protect their cultural heritage. This are further explained in Chapter 7.

understood, as argued by Christian Byk (2014), only in relation to the specific case in light of international legal human rights development:[187]

> Admittedly, international law recognizes the absolute character of certain prohibitions (torture, slavery), which find their basis in the concept of dignity, but, for the implementation of other rights (in particular the right to private life or freedom of expression), the influence of dignity must be appreciated in light of factual circumstances.[188]

As with human rights and freedoms, human dignity must be set in the context of present-day conditions if it is to serve its function of ensuring effective enjoyment of human rights and fundamental freedoms in line with the principle of equality in law and rights. In relation to the Sami, this includes considering the legal developments that have occurred at the European level under the European Convention, such as considering the right to respect the cultural characteristic of Sami private life protected under Article 8 of the ECHR. Chapter 7.2 returns to Article 8 and how it ensures cultural protection and how the principle of human dignity relates to this article, but cultural protection under the European Convention is part of the protection of pluralism – cultural diversity.[189]

Nick Stevenson (2014)[190] and Yvonne Donders (2010)[191] emphasise the link between human dignity and cultural protection from a diversity perspective. Stevenson writes, for example, that '[h]uman dignity, it would seem, is not only a matter of rights but depends upon an appreciation of the complexity of others'.[192] Donders affirms this view by adding that the preservation of cultural diversity must happen within the 'moral and legal framework' provided by human rights and freedoms and holds that this requirement of considering the broader framework underpinning human rights and fundamental freedoms 'affirms that culture is an important aspect of the identity, existence and dignity of individuals and communities'.[193] Human dignity, she explains, encompasses cultural diversity into account to secure cultural protection:

> Cultural rights are more than merely those rights that explicitly refer to culture but include all human rights that protect or promote components of the cultural identity of individuals and communities as part of their human dignity. Cultural rights reflect the individual as well as the collective dimension of human rights and they have a

[187] Byk, (2014) (n 96) 364–367.
[188] Ibid 365f.
[189] Gerards (2019) (n 13) 66f.
[190] Nick Stevenson, 'Human(e) Rights and the Cosmopolitan Imagination: Questions of Human Dignity and Cultural Identity' (2014) 8 Cultural sociology 180, 187.
[191] Donders (2010) (n 32) 32.
[192] Stevenson (2014) (n 190) 187.
[193] Donders (2010) (n 32) 31.

> multidimensional character. As such, they embody the indivisibility, interdependence and interrelation of all human rights.[194]

Stevenson's and Donders' views are in line with those of the United Nations Committee on Economic, Social, and Cultural Rights (CESCR), which emphasises that 'full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world'.[195] The Committee continues as follows:

> The protection of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, and requires the full implementation of cultural rights, including the right to take part in cultural life.[196]

This thesis returns to the Committee's view in Chapter 3.4.4 in relation to Indigenous peoples' right to maintain a connection to their original territories. The Committee's statement however, confirms a scholarly perspective of the cultural contextuality of human dignity. However, the fact that human dignity is a central principle of human rights and fundamental freedoms does not necessarily mean it is always relevant to an assessment of a potential violation of a human right, since a restriction of one´s freedoms is not automatically a violation of one´s dignity. Nevertheless, an assessment of whether dignity is relevant in a specific case, according to the above, can be made only in relation to the cultural context against which the principle is to be valued. In a Sami context, this may require consideration of the collective dimension of human dignity.

2.5 Concluding Remarks

The aim of was chapter is to provide a contextual understanding of human dignity in an Indigenous and Swedish constitutional setting without providing a comprehensive analysis of human dignity as a fundamental principle of human rights and fundamental freedoms. As the analysis in this chapter has shown, the conceptualisation of the principle of human dignity in the Swedish Constitution rests, in relation to cultural protection, on a narrow and strict construction and leaves little room for consideration of the broader perspective of Sami cultural interests. It thus seems highly doubtful that the principle in its current application will fully respect the human dignity of the Sami as an Indigenous people. This would require respecting

[194] Ibid 32.
[195] ECOSOC General Comment No 21 [1].
[196] Ibid [40].

the collective and cultural dimensions of the Sami situation, that is, focusing less on activities determined as cultural and more on the Sami rights and freedoms to their original territories as an Indigenous people. Moreover, the obligation of the national authorities to take due account of the wider scope of human dignity in a Sami context means ensuring that they take due account of the Sami's cultural background when considering measures that affect or potentially affect Sami rights and freedoms linked to traditional areas. Understanding the cultural background of Sami rights and freedoms to traditional territories is, therefore, a key aspect for ensuring their rights and freedoms as a people and for fully respecting their human dignity.

The Sami cultural background is linked to the Swedish historical colonisation of Sami traditional territories. To grasp the shortcomings that exist in Swedish legislation regarding protection of Sami rights and freedoms linked to original Sami territories, it is important to understand this colonial background. Chapter 4 thus provides an overview of this background to explain the nature and actual basis of the current law affecting the Sami. Familiarity with this historical background is also important because a lack of knowledge can lead to due consideration not being given to the cultural basis of Sami rights and freedoms (see Chapter 4.5) in decisions affecting the Sami's relationship to traditional territories. This lack of knowledge can result in a violation of the Sami's right to equality in human dignity and human rights and freedoms based on their status as a people, examples of which have been provided in this chapter.

The shortcomings in the Swedish Constitution that are highlighted in this chapter are based on a lack of legal basis for the Sami culture's right to protection, which leads to ambiguities regarding whether there is full respect for human dignity in a Sami Indigenous context. This is because ensuring human dignity requires upholding the right to enjoy human rights and fundamental freedoms through legal safeguards so a person can assert his or her rights and freedoms against an undue intrusion by authorities. Failing to provide clear regulations that a person can rely on for asserting the right to peaceful enjoyment of human rights and fundamental freedoms risks a violation of human dignity, as exemplified above. As noted, neither the RHA nor the Swedish Constitution provide the Sami with sufficient cultural protection as they focus on the economic side of a cultural activity. For the Sami's rights and fundamental freedoms, which as explained in Chapter 4.5 are fundamentally based on ensuring their cultural survival, a central question is then why Swedish law has not ensured this cultural protection on its own merits. The following chapter provides further explanation of why Sami

culture is not protected on its own merits but is instead intrinsically linked to the reindeer herding industry. Chapter 3 shows that, although the underlying reason for ensuring the Sami's access to land and waters has been to protect Sami culture, the focus in Swedish law is on securing the socio-economic part of the reindeer husbandry industry. Thus, contemporary Sami legal protection is directly linked to a specific cultural economic activity that requires access to land and waters.

Chapter 3 Sami Economic Rights and Cultural Protection Under the Swedish Constitution

The analysis in the previous chapter shows that the Swedish Constitution has shortcomings when it comes to ensuring the cultural dimension of Sami rights as an Indigenous people. As noted, the Swedish Constitution does not confirm the Sami's status as an Indigenous people, despite the fact that all branches of government in Sweden – legislative, executive, and judiciary – have confirmed this status. The lack of reference in the Constitution is the result of a perception from the Swedish government that the Sami legal protection in Sweden is current and compatible with other legal systems, including the European Convention. The European Convention is addressed in Chapter 7, but this chapter shows that the Swedish government's misconception that Swedish constitutional protection is in line with international law is an interpretation not fully grounded in contemporary human rights instruments linked to Indigenous peoples. That Swedish law is not in line with international human rights law is also clear from the judgment of the Swedish Supreme Court in the *Girjas Sami village* case (see Chapter 6.1.4). The underlying problem is the division the Swedish Constitution makes between political, civil, economic, and social rights, as explained in the previous chapter.

This chapter problematises the Swedish Constitution's division of human rights and freedoms in a Sami context. It starts by explaining that this division means that only the material basis for the Sami connection to traditional territories is secured as a right (Section 3.1), while the cultural dimension of this connection is only a goal that an authority should strive for in the exercise of authority (Section 3.2). This chapter then exemplifies how the Swedish government's position on the Sami issue is part of this problem (section 3.3), and sheds light on the international context the Swedish government believes its legislation is compatible with (Section 3.4). As this chapter shows, there are general difficulties with the division between economic rights and the cultural protection of Sami rights and freedoms to traditional territories when it is considered in the context of contemporary international developments regarding the rights of Indigenous peoples. This development adds to previous criticism of the lack of full legal protection expressed in the previous chapter.

3.1 Constitutional Protection for Reindeer Husbandry as an Economic Right

The Swedish constitutional division, which the previous chapter explains, that separates economic and social rights into rights and goals that authorities must strive for in their public exercise of power, respectively, means that not all human rights and fundamental freedoms

have the status of a constitutionally protected right. Consequently, the rights and freedoms the Sami have as Indigenous peoples to traditional territories through reindeer husbandry right are consequently ensured in the constitution only as economic rights, primarily because the reindeer husbandry right is a constitutionally protected property right.[197] This legal protection came about after clarification by the Swedish Supreme Court in the *Taxed Mountains* judgment in 1983 (see Chapter 6).[198]

In addition to the above protection, the reindeer herding industry has constitutional protection from competition – that is, competition in nomadic reindeer husbandry, not from other land use. This protection was added in 1995 when Sweden incorporated the European Convention into national law.[199] The background to this is that Sweden joined the EU that same year and needed to comply with the EU's fundamental right to freedom of trade.[200] To safeguard the Sami's historical right to reindeer husbandry, Sweden obtained an exemption regarding the Sami's right to herd reindeer.[201] Consequently, the Swedish Constitution was amended during the process of incorporating the European Convention to clarify that the Sami's exclusive right to conduct nomadic reindeer herding does not conflict with the fundamental right of the EU to freedom of trade.[202] The underlying norm was to protect the Sami's right to conduct business based on the *economic side* of the principle of equality.[203]

When the Swedish government proposed a bill to amend the Swedish Constitution upon the incorporation of the European Convention, however, the responsible committee did not specifically review the Sami's economic or cultural rights and freedoms in relation to the European Convention. The fact that no review was made is linked to a government statement in the aforementioned bill from 1993 that followed an inquiry due to the outcome in the *Taxed Mountains* case (see Chapter 6.1.2). As explained, in this bill, the government stated that the Swedish Constitution, 'in light of Sweden's obligation under international law, gives the Sami as an ethnical minority full constitutional protection.' [204] As is clear from this thesis, this

[197] Governmental Bill 1993/94:117, 19; IOG, c 2, s 15.
[198] *NJA 1981:1 (Taxed Mountains)* SSC, 234.
[199] Governmental Bill 1993/94:117.
[200] Ibid, 19–22; IOG, c 2, s 17(2).
[201] ACT concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Protocol No 3 – on the Sami people, (1194) OJ C241/352 (EIF 29 August 1994).
[202] Governmental Bill 1993/94:117, 22, 52.
[203] Ibid 20f, 50f.
[204] Ibid 22.

statement can today be regarded as an outdated interpretation of the nature and scope of international legal protection of peoples' rights and freedoms, especially those of an Indigenous origin (see Section 3.4).

The constitutional protection of the reindeer husbandry right as an economic right means that the Sami can invoke protection of their right to reindeer husbandry directly on a constitutional basis. As the next section shows, the same does not apply to Sami cultural protection, where the constitution does not provide a right but rather sees the protection of Sami culture as a goal authorities should strive to promote in their exercise of public power. This view allows for a discretionary interpretation based on Swedish norms and values rather than Sami norms and values.

3.2 Constitutional Protection for Reindeer Husbandry: Cultural Protection

The Swedish constitution lack a right of cultural protection. Like respect for human dignity and the right to respect for private life, the Constitution outlines cultural protection in the fundamental objectives of public activities.[205] This deprives the cultural protection from having the status of a constitutional right:[206]

> The opportunities of the Sami people and ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own shall be promoted.[207]

According to the above, the Sami are thus not the subject of the text but the object. Consequently, the Sami cannot invoke protection of their cultural rights and freedoms as an Indigenous people on a constitutional ground.[208]

That the Sami cannot invoke the above text as a constitutional right to ensure legal protection for the cultural dimension of their land rights does not mean the constitutional reference to Sami culture lacks legal significance. As shown in Chapter 6, it simply means that it is relevant only as an aid for interpretation in the application of other legal rules and principles.[209] This is not consistent with the legal protection of the cultural dimension of human rights and freedoms ensured by Article 8 of the European Convention. As explained in Chapter 7, Article 8 guarantees *a right* to respect for rights and freedoms linked to the personal sphere. A right

[205] Governmental Bill 1992:32, *Om samernas och samisk kultur m.m*, 31.
[206] Governmental Bill 2001:72, *Ändringar i regeringsformen – samarbetet i EU m.m*, 15.
[207] IOG, c 1, s 2(6), translated by Isberg (2016) 65.
[208] Governmental Bill 2001:72, 15.
[209] Ibid 15.

which could be invoked in court. Consequently, Article 8 is not a provision outlining a goal the Member States should strive for.

Even though the Swedish Parliament has recognised the Sami as an Indigenous people, the Swedish Constitution, as noted, does not distinguish Sami cultural protection from that of other minorities.[210] The following section explains the underlying reason for this. Considering, however, that the Swedish Supreme Court took due account of international legal principles linked to peoples' rights to traditional territories in the *Girjas Sami village* case, discussed in Chapter 6.1.4, this deficiency seems to lack legal relevance today, especially considering that the Supreme Court thereby rejected the narrative brought forward by the Swedish government that it had no international obligations towards the Sami based on an alleged Indigenous peoples' status. Chapter 6.1.4 explains this in more detail, but as the following section shows, this approach by the Swedish government is consistent with the view that Swedish law guarantees the Sami adequate legal protection at the same level as that found in other jurisdictions. The following sections show how this misconception today is not in line with the legal protection that international law ensures for Indigenous peoples regarding traditional territories.

3.3 The Preconception of the Swedish Government on the Legal Protection of Sami Rights

During the discussion on the incorporation of the European Convention in the Swedish Constitution, several organisations, including the Sami Parliament, criticised the lack of direct constitutional protection of Sami rights and freedoms to traditional territories based on their Indigenous peoples' status.[211] The Swedish Government dismissed this criticism based on the perception that the constitution is compatible with Sweden's international obligations towards the Sami as an ethnic minority.[212]

When the Swedish Government later presented a bill for amending the Swedish Constitution in 2009 to further strengthen the legal protection of individual civil liberties and rights, the bill suggested a special reference to the Sami alongside the general reference to national minorities in the section outlining the objective of authorities in exercising public power.[213] Several

[210] Governmental Bill 2009:80, *En reformerad grundlag*, 189, 190.
[211] Governmental Bill 1993/94:117, 20–22.
[212] Ibid 22.
[213] Official minorities in Sweden are; Sami, Swedish Finns, Tornedalians, Jews and Roma as national minorities.

consultative bodies were strongly critical of this approach.[214] This criticism rested on the lack of constitutional recognition of the Sami's status as an Indigenous people and, consequently, a lack of clear protection of their Indigenous rights by failing to provide a coherent special regulation of Sami rights and freedoms.[215] The Sami Parliament also considered it objectively misleading to regulate Sami cultural protection in the same context as other minorities in light of the fact that the rights and freedoms of Indigenous peoples are more far-reaching than minority rights.[216] The clearest legal difference generally emphasised is the connection of Indigenous peoples to a geographical area and its environment.[217]

The Swedish government rejected the criticism, amongst other things by referring to the Norwegian and Finnish Constitutions. The government emphasised, for example, that following the amendment, the Swedish Constitution would be in line with how the neighbouring states treat the Sami in their respective constitutions.[218] This statement does not reflect the whole truth. The main difference is the location of the paragraph addressing Sami culture. While the Swedish Constitution, as noted, addresses Sami cultural protection outside the section ensuring human rights and fundamental freedoms, the Norwegian and Finnish Constitutions address Sami cultural protection within their respective sections ensuring human rights and fundamental freedoms.[219]

The strength of Sami cultural protection in the Norwegian and Finnish Constitutions is outside the scope of this thesis. However, as shown, the Swedish government often dismisses criticism of Swedish legal protection of Sami rights by referring to an interpretation that Swedish legislation is in line with other jurisdictions, though this, as shown above, is debatable. As stated below, this is an approach the government has also put forward at the international level, where its perception that the division of the protection of Sami interests into economic rights and cultural aspects in the Swedish Constitution is unproblematic becomes clear. There may be a political aim in emphasising the difference between economic and cultural aspects of Sami interests when voting for or ratifying international instruments that contain both economic and cultural dimensions of peoples' rights and freedoms. The Swedish government emphasised the

[214] Governmental Bill 2009:80, 9.
[215] Ibid 189.
[216] Ibid 189.
[217] See, e.g., Rehman (2009) 480ff.
[218] Governmental Bill 2009:80, 190.
[219] Constitution of Norway (NO), s 108, available at <www. https://lovdata.no>; Constitution of Finland (*Finlands Grundlag*) (11.6.1999/731), s 17, available at <https://www.finlex.fi>.

difference between economic and cultural aspects in its submission to the United Nations under the adoption of the Declaration on the Rights of Indigenous peoples (UNDRIP),[220] which is discussed in Section 3.4.2.

During the UNDRIP adoption procedures, the Swedish government first emphasised the importance of the Sami maintaining a relationship with their traditional territories to preserve a Sami identity, highlighting the link between Sami self-determination (autonomy) and Sami land rights:

> The Sami people are recognized as an Indigenous people by the Swedish Parliament. The Swedish Government bases its relations with the Sami people on dialogue, partnership and self-determination, with respect and responsibility for cultural identity…
>
> The Sami and other Indigenous peoples must have the right to influence the use of land and natural resources that are important for their survival. The political discussion on self-determination cannot be separated from the question of land rights. The Sami's relationship to the land is at the heart of the matter.[221]

The government continues by stressing the importance of placing Sami land rights within the framework of the Swedish historical and demographic context, which, as Chapter 4 explains, is stained by settler colonialism:[222]

> The issue of land rights has different connotations in different States owing to historic and demographic reasons. It is the interpretation of the Swedish Government that the reference to Indigenous peoples' rights in articles 26.1, 27 and 28, plus references to ownership and control in article 26.2, in the Swedish context applies to the traditional rights of the Sami people. In Sweden, those rights are called reindeer herding rights.[223]

The above analyses show that the Swedish government acknowledges that a continued relationship to traditional territories is valuable for Sami culture and identity and that the Sami's right to influence these territories is inseparable from the question of their land rights. Considering the government's division of the protection of Sami interests into cultural and economic spheres, however, it is unclear what legal relevance this statement has.

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[220] United Nations Declaration on the Rights of Indigenous Peoples (2 October 2007) A/RES/61/295 (UNDRIP).
[221] UNGA, *Official records, 61st session: 107th plenary meeting, Thursday, 13 September 2007, New York* (A/61/PV107, 2007) 24.
[222] Within the framework of this thesis, *settler colonialism* is a state-centred project carried out in an area with the aim of securing access to its valuable resources by importing settlers. For a detailed description of the concept see, e.g., Edward Cavanagh, *Settler colonialism and land rights in South Africa –possession and dispossession on the Orange River* (Palgrave Macmillan 2013).
[223] *UNGA,* (2007) 25. Chapter 1.6 provides a terminological explanation of the term.

On the one hand, it is possible to view the Swedish government's position on the cultural value a relationship to traditional territories represents for the Sami and their identity as consistent with international protection, as highlighted in the following section, and for that reason decide the statement has some legal relevance. On the other hand, it is not as obvious that linking the right to influence and access traditional territories only to those who engage in a particular cultural activity, while highlighting general cultural value for the cultural protection of the Sami, is compatible with international law. In this setting, the legal relevance of the government's statement is doubtful, especially considering the growing perception of Indigenous peoples' right to the protection of rights and freedoms in traditional territories on cultural grounds. The next section highlights this by showing how cultural protection of Indigenous peoples has developed from a narrow understanding of a right to perform what the state recognises as culture-specific activities to an understanding of culture being an activity in itself, the protection of which is fundamental to protecting the human dignity of Indigenous peoples.

In light of the legal development that has taken place through the Swedish Supreme Court's judgment in the *Girjas Sami village* case (see Chapter 6.1.4), the relevance of international law linked to peoples and Indigenous peoples for Sami legal protection has been strengthened. The following section thus provides a general overview of the international instruments related to Indigenous peoples' rights that are most relevant to peoples' right to traditional territories on cultural grounds. As the focus of this thesis is on the European Convention, however, a full analysis of international law is outside its scope.

3.4 The International Basis for the Cultural Protection of Indigenous peoples' Relationship with Ancestral Territories

International regulation of Indigenous peoples changed in the late 1980s with the partial revision the Indigenous and Tribal Populations Convention of 1957 (International Labour Organization [ILO] C107).[224] The revision resulted in the adoption of the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO C169) in 1991 and the introduction of *relationship to land* and *identity* as new legal criteria for assessing the rights

[224] ILO 'Indigenous and Tribal Populations Convention 1957' (26 June 1957, EIF 26 June 1957) 328 UNTS 247 (ILO C107).

of Indigenous peoples.[225] Simultaneously, identity appeared as a legal category within the concept of private life in Article 8 of the European Convention,[226] and identity linked to culture appeared in European Convention case law linked to minorities in 1995.[227] This thesis returns to the European Convention in Chapter 7.

The introduction of or reference to new legal categories often involves problems in defining their legal significance. The applicability of the concept of identity, for example, still suffers from a lack of consensus in the social sciences about its legal value.[228] Raw Abdelal *et. al.* (2009) has, for example, labelled the concept as contextual and as such 'elusive, slippery, and amorphous' and thereby useless as a variable for the social sciences.[229] Other, like Marcella Ferri (2018) have highlighted identity as a variable covered by other rights and exemplifies the right not to be discriminated against and the right to respect for private life.[230] If one follows Linda Nicholson's (2008) reasoning about the connection between the term culture and identity, it is precisely the right to distinction from the majority that makes the concept of identity central to the issue of protection of human rights and freedoms.[231] This thesis returns to the right to respect for cultural differences in 7.2.

As the introductory chapter shows, despite the difficulty of clearly defining the concept of identity, this has not prevented the Sami from using the concept within the discourse on their right of access to land and water. International human rights researchers also emphasise the value a relationship to traditional land and territories has for the question of Indigenous culture and identity. Jérémie Gilbert (2013), for example, holds that '[w]hile Indigenous communities are most diverse, most of them share a similar deep-rooted relationship between cultural

[225] ILO 'Convention Concerning Indigenous and Tribal Peoples in Independent Countries' (27 June 1989, EIF 05 September 1991) 28 ILM 1382 (ILO C169), art 2; UNGA 'Convention on the Rights of the Child' (20 November 1989, EIF 2 September 1990) 1577UNTS 3 (CRC), arts 8, 29.
[226] *Rees v the United Kingdom* (1987) 9 EHRR 56.
[227] *June Buckley v the United Kingdom* App no 20348/92 (Commission Decision, 11 January 1995).
[228] Rawi Abdelal and others, 'Identity as a Variable' in Alastair Iain Johnston and others (eds), *Measuring Identity: A Guide for Social Scientists* (Cambridge University Press 2009) 17.
[229] Ibid 18. Compare Rawi Abdelal and others, 'Treating Identity as a Variable: Measuring the Content, Intensity, and Contestation of Identity ' (American Political Science Association conference, San Francisco, 30 August - 2 September 2001) 7f, where the concept of identity is rejected on its vagueness, and Gerry Kearns, 'The Butler Affair and the Geopolitics of Identity' (2013) 31 Environment and planning D, Society & space 191, 201f, who argues that identity has a geopolitical dimension in need of consideration.
[230] Marcella Ferri, 'The Recognition of the Right to Cultural Identity under (and beyond) international Human Rights law. (Cultural Rights and Global Development)' (2018) 22 Law, Social Justice and Global Development Journal 1, 22.
[231] Nicholson (2008) (n 94) 90f.

identity and land.'[232] Similarly, Gaetano Pentassuglia (2015) highlights the 'inextricable link between land-based Indigenous economies and long-embedded patterns of cultural and spiritual identity' and that '[t]here can be no Indigenous identity without land, and no land without a firm legal entrenchment of the latter's role in enabling access to cultural membership.'[233] Indigenous scholars, such as Taiaiake Alfred and Jeff Corntassel (2005), also highlight the unique relationship Indigenous peoples have to their ancestral lands and stress the importance of gaining control of the narrative of this relationship, since it has direct relevance for gaining control of the Indigenous identity narrative historically controlled by the colonial state.[234] Alfred and Corntassel are particularly critical of how colonial states created and shaped what constitutes an *Indigenous identity*, and which formed the basis of state's approach towards Indigenous peoples within their sovereign territory. As explained in Chapter 4, similar considerations on who is a Sami in legal terms is the basis for Sweden's regulation of Sami rights and freedoms linked to ancestral land. For these reasons, Indigenous identity has a colonial-political context that must be kept in mind when dealing with legal concepts in relation to the Sami.[235]

When considering Indigenous peoples' rights to traditional territories, it is important to recognise that the colonisation of the land historically used and occupied by Indigenous peoples differs throughout the world. Therefore, analysing colonisation in the national context is important and, as Chapter 4 shows, in Sweden the colonisation of traditional land and waters occupied and used by the Sami has been a slow process taking place through the gradual establishment of settlements. Although this undoubtedly falls within the notion of colonisation, the aim was never to eliminate the Sami, and, as shown in Chapter 4, the Swedish government has for a long time acknowledged the existence of another ethnic group within the geographical area over which it claimed political sovereignty. It is also a legal reality that non-Sami settlers established communities on land the Sami historically used and occupied exclusively. No matter how painful this is, it is a factor all courts will consider when dealing with disputes over the right of access to land and waters used by the Sami. The establishment of communities on

[232] Jérémi Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land' (2013) 18 SUR 115, 119.
[233] Gaetano Pentassuglia, 'Ethnocultural Diversity and Human Rights: Legal Categories, Claims, and the Hybridity of Group Protection' (2014) 6 The Yearbook of Polar Law Online 250, 263.
[234] Taiaiake Alfred and Jeff Corntassel, 'Being Indigenous: Resurgences against Contemporary Colonialism' (2005) 40 Government and Opposition 597f, 609f. For further references as land as a common denominator among Indigenous peoples see Jonas Perrin, 'Legal Pluralism as a Method of Interpretation: A Methodological Approach to Decolonising Indigenous Peoples' Land Rights under International Law' (2017) 26 Universitas [online] 23, 35.
[235] Alfred and Corntassel (2005) (n 234) 597–601.

original Sami territory – for example, as part of this occupation and for use of this land – could result in the settlers establishing a connection or mutual dependence with the land that is important for a Sami identity as well.[236] Arctic communities, Indigenous or not, are generally considered to have a close connection with their surrounding environment.[237] A relationship to land as an identity-bearing variable is thus not automatically exclusively unique to Indigenous peoples. Chapter 7 explains how the presence of other rights holders influences the Strasbourg Court's approach to cases potentially dealing with conflicts of confirmed rights.

This generalisation of the population of an undefinable geographical area like the Arctic is problematic, as it raises the question of balancing rights. Chapter 7 addresses this problem in relation to the European Convention, but balancing rights can undermine the value of the Sami's relationship with ancestral land and waters, with complications for the protection of Sami rights and freedoms to traditional territories on cultural grounds. In a European Convention case discussed in Chapter 7.1, for example, the Finnish state argued that the Sami's relationship to a certain area and its wildlife resources (fish) was not unique in relation to others. The question of what is special about the Sami's relationship to land is, therefore, important, and international law also distinguishes Indigenous peoples' rights and freedoms to traditional territories on cultural grounds from other groups due to a historical relationship to such areas predating colonisation.[238] It is, therefore, not surprising that the rights of Indigenous peoples to a relationship with traditional territories, as seen in the next section, has a prominent role in international human rights instruments.

3.4.1 Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO C169)

One of the earliest obligations to respect the cultural value a relationship to traditional territories represents for Indigenous peoples is found in Article 13, ILO C169. The following was introduced as part of the partial revision of ILO C107:[239]

> [G]overnments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.[240]

[236] Susan A Crate and others, 'Contact with nature' in Joan Nyman Larsen, Peter Schweitzer and Gail Fondahl (eds), *Arctic Social Indicators* (The Nordic council of Ministers 2010) 109.
[237] Oran R Young, 'A Human Development Agenda for the Arctic – Major Findings and Emergin Issues' in *Arctic Human Development Report*, vol 1 (Stefansson Arctic Institute 2004) 241.
[238] See, e.g., Rehman (2009) (n 112) 480ff.
[239] ILO C169, art 2.
[240] Ibid art 13.

The reason for introducing relationship to land as a legal reference was to clarify the right to special treatment of Indigenous peoples in relation to other groups in society.[241] This treatment is based on the notion that the special relationship between Indigenous peoples' cultures and traditional territories differs from the relationship other groups may have to land and waters. Consequently, the loss of this relationship, or control of it, affects Indigenous peoples differently.[242] The importance of introducing a reference to this relationship as part of the cultural heritage of Indigenous peoples within the section on land rights was thus emphasised during the preparation of ILO C169 as a prerequisite for continued safeguarding of Indigenous peoples' ability to enjoy their cultural heritage.[243] Although Sweden has not ratified ILO C169 because of the Supreme Court's ruling in the *Girjas Sami village* case (see Chapter 6.1.4), it is relevant for the interpretation of Sami legal protection at a national level. In general, however, Swedish legislation lacks a clear obligation to respect the cultural value of the Sami's relationship to their original territory.

3.4.2 United Nations Declaration on the Rights of Indigenous peoples (UNDRIP)

Unlike ILO C169, which focuses on the state's obligation to respect the value a relationship with traditional territories represents for Indigenous peoples, UNDRIP ensures, in Article 25, a right to maintain and strengthen this relationship:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.[244]

The text differs slightly from that in ILO C169 highlighted above, but both texts are based on the premise that the relationship Indigenous peoples have to traditional land and territories has a collective dimension. Moreover, the inherent nature of the common cultural heritage of Indigenous peoples extends beyond a right to a relationship based on specific cultural activities requiring certain material resources. As Mattias Åhren (2009) notes, the reference to a spiritual relationship in UNDRIP is a reference to Indigenous peoples' cultural characteristics with

[241] ILO, *Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Report IV 2A* (ILO 1989) 33.
[242] ILO, *Partial revision of the indigenous and tribal populations convention, 1957 (no. 107), Report VI/PT/1* (ILO 1988) 44f.
[243] ILO, *Record of Proceedings: 75th session, 1 to 22 June 1988, Geneva* (1988) No 32, 1f, 16.
[244] UNDRIP, Art 25.

significance for their cultural identity.[245] Despite the absence of the word culture, according to Åhren, the scope of this legal reference corresponds to that found in ILO C169, as the concept of a spiritual relationship includes all cultural aspects linked to the relationship with traditional territories.[246]

Other authors, such as Jérémie Gilbert (2007), have also emphasised that, for Indigenous peoples, the underlying understanding of the value of maintaining a relationship with ancestral land goes further than for other groups.[247] This is because, for Indigenous peoples, original territories represent more than one commodity. Therefore, legal confirmation of the special relationship of Indigenous peoples to traditional territories was necessary to mark that this relationship differs from a Western conception of land as a commodity.[248] This understanding is in line with the Sami's own perception, highlighted in Chapter 1.3, of the value a relationship to their traditional area represents for their culture and identity.

In addition to the right to a relationship guaranteed by Article 25, Article 26 contains rules on the right of Indigenous peoples to control traditional territories and freely dispose of natural resources. This thesis returns to Article 26 in Chapter 6.1.4 in an analysis of the Supreme Court's judgment in the *Girjas Sami village* case, where the Court attached importance to the right of the Sami, as a people, to control traditional territories and freely dispose of resources. Regardless of the Supreme Court's position in Girjas, however, Sami legal protection in Sweden remains focused on access to land as a commodity.

3.4.3 The Two Covenants of Human Rights – ICCPR and ICESCR

In addition to specific treaties targeting Indigenous peoples, the two covenants of human rights – ICCPR and the ICESCR – are important for Indigenous peoples' right to traditional territories. Amongst other things, these conventions ensure the right of peoples to control traditional territories and to dispose freely of natural resources.[249] This thesis returns to the

[245] Mattias Åhrén, 'The provisions on lands, territories and natural resources in the un declaration on the rights of indigenous peoples – an introduction' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration work – the United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA 2009) 202f.
[246] Ibid 202f.
[247] Jérémie Gilbert, 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 14 International Journal on Minority and Group Rights 207, 223–226.
[248] Ibid 223–226.
[249] Art 1(2) of ICCPR, and of ICESCR are identical and prescribes: 'All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'

right of peoples to control traditional territories and to dispose freely of natural resources in Chapter 6.1.4 in relation to the *Girjas Sami village* case, but the following focuses on Indigenous peoples' right to a relationship to traditional territories from a cultural perspective.

3.4.3.1 International Covenant on Civil and Political Rights

One of the key articles in the ICCPR regarding the cultural protection of Indigenous peoples' ability to maintain a relationship to traditional territories is Article 27, which reads as follows:

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

As Marcella Ferri (2018) emphasises, the article applies an 'identarian' notion of culture, according to which culture provides members of minorities with values and meaning by which they build their identity.'[250] Francesco Capotorti (1979) – Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities – also emphasised that the aim of the article was 'the preservation and natural development of the cultural identity of minorities.'[251] The Human Rights Committee (HRC) has since explained the scope of Article 27.

In its General Comment No. 24 (1994), the HRC clarified how the cultural protection of Indigenous peoples' way of life closely related to traditional territories falls within the scope of the article.[252] The HRC further emphasised the requirement of due consideration of the larger collective context:

> Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.[253]

The obligation of respecting and take measures under Article 27 for protecting the foundation of an Indigenous identity has been emphasised by the HRC in individual cases since 1998,

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[250] Ferri (2018) (n 230) 2.
[251] Francesco Capotorti, *Study on the rights of persons belonging to ethnic, religious, and linguistic minorities* (Discrimination Protection of United Nations. Sub-commission on Prevention of, Minorities United Nations. Centre for Human, Rights ed, United Nations 1979) 599.
[252] UNHRC, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5 [3.2], [6.1], [7].
[253] Ibid [6.2].

including Sami cases.[254] These cases relate to cultural activities where the activity itself constituted a key part of the Indigenous culture in question. As the HRC emphasised in its General Comment No. 23 (1994), however, there is a general obligation under Article 27 to ensure the protection of the cultural and social identity of minorities, not only of specific cultural activities.[255] This is in line with statements made by Capotorti (1979) that full protection of the culture of minorities 'requires that preservation of their custom and legal tradition, which form an integral part of their way of life.'[256]

3.4.3.2 International Covenant on Economic, Social, and Cultural Rights (ICESCR)

Like the HRC, the CESCR has emphasised the importance a relation with land and territories has for Indigenous peoples and their identity in relation to Article 15 (1a) of the ICESCR (1966).[257] Though Article 15, unlike Article 27 of the ICCPR, according to Marcella Ferri (2018),[258] adopts a more materialistic notion of culture, in its 2009 General Comment 21, CESCR held culture to cover 'all manifestation of human existence.'[259] Cultural protection, according to CESCR, includes the right of Indigenous peoples to a relationship with traditional territories as part of their cultural identity:[260]

> Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources.[261]

What CESCR emphasises is the general cultural value traditional territories represent for Indigenous peoples apart from purely materialistic and economic values. Consequently, for

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[254] *Kitok v Sweden* Comm No 197/1985 (27 July 1988), UN Doc CCPR/C/33/D/197/1985 (1988) UNHRC, [9(2)]; *Länsman et al v Finland* Comm No 671/1995 (22 November 1996) UN Doc CCPR/C/58/D/671/1995 (1995) UNHRC, [10(2)]; *Länsman v Finland* Comm No 1023/2001 (17 March 2005) UN Doc CCPR/C/83/D/1023/2001 (2005) UNHRC, [10(1)]; *Howard v Canada* Comm No 978/1999 (26 July 2005) UN DocCCPR/C/84/D/879/1999 (2005) UNHRC, [12(7)]. See also *Hopu and Bessert v France* Comm No 549/1993 (June 30, 1994), UN Doc CCPR/C/60/D/549/1993/Rev1 (1997) UNHRC, where the Committee lacked the competence to examine the matter under Art 27, but stated that there was an obligation to consider the values in specific places for the individual as part of his or her family life and privacy [10.3].

[255] CCPR General Comment No 23, [9].

[256] Capotorti (1979) (n 251) [596].

[257] ICESCR.

[258] Ferri (2018) (n 230) 3.

[259] ECOSOC General Comment No 21 [11].

[260] Ibid [13]–[16].

[261] Ibid [36].

Indigenous peoples' cultural identity to obtain full protection, respecting all the values a connection to traditional territories represents is required, including cultural values.[262]

As noted above, Swedish legal protection largely disregards the value a relationship with original territories represents for the Sami beyond the material context, which could be due to the Sami legal protection not being clearly distinguished from minorities' legal protection. What can be noted in connection with the CESCR's view on Article 15 (1a) is that only in relation to Indigenous peoples is the importance of a relationship to land emphasised. The lack of focus on a relationship with land in non-Indigenous minority cases is in line with the HRC's opinion on the protection of minorities under Article 27 of the ICCPR. In relation to non-Indigenous minorities, the focus is instead the protection of a specific cultural activity important for their cultural identity.[263] The natural explanation for this is the difference in international law between minorities and Indigenous peoples, where Indigenous peoples have a geographical connection to an area established prior to the area being colonised and thus have a different relationship to the area, which has value for their identity.[264] On the other hand, in general, a geographical connection is less relevant in the definition of minorities.[265]

The above analysis points to how, in the field of international human rights, there has been a legal development that clearly distinguishes the cultural protection of Indigenous peoples' rights and freedoms linked to traditional territories from minority rights and freedoms. Cindy Holder (2008) describes the contemporary development of the scope of cultural protection as a transition from a perception of culture as a good limited to 'rights of access and consumption' to an understanding of culture as an activity in itself, the protection of which is fundamental

[262] Ferri (2018) (n 230) 15.
[263] ECOSOC General Comment No 21 [32]–[33].
[264] See, e.g., José R Martínez Cobo, *Study of the problem of discrimination against indigenous populations. Conclusions, proposals and recommendations*, vol 5 (United Nations 1987) [379]. He denies Indigenous peoples as follows; 'Indigenous communities, peoples and nations are those which, having a historical continuity with pre–invasion and pre–colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non–dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.'
[265] See, e.g., Capotorti (1979) (n 251) [568]. He describes minority as; 'A group numerically inferior to the rest of the population of a state, in a non–dominant position, whose members – being nationals of the State – possess ethical, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicit, a sense of solidarity, directed towards preserving their culture, traditions and religion or language.'

for the protection of Indigenous peoples' human dignity.[266] Chapter 2 discusses the concept of dignity in an Indigenous context, and as Holder explains, culture 'is protected directly as a basic component of human dignity.'[267]

This new understanding of cultural protection includes protecting the right to control the material foundations on which the culture is based. According to Holder, this includes the right to have and strengthen relationships with ancestral land and to determine how these territories are to be used in accordance with the cultural value they represent.[268] Cultural protection, Holder explains, includes protecting aspects 'necessary for Indigenous peoples to *be cultural* on terms of their own choosing.'[269] This requires due consideration of all value a continued relationship with traditional territories represents for Indigenous peoples to ensure the protection of their right to cultural identity and to avoid violating their collective dignity. The Swedish Supreme Court's ruling in the *Girjas Sami village* case is a practical example of such an approach (see Chapter 6.1.4).

3.5 Concluding Remarks

The problematic feature of the Swedish Constitution regarding dividing Sami access to land and waters into economically protected rights and the public goal of ensuring Sami cultural protection is similar to an approach applied to minorities, where the cultural activity is in focus. Considering the legal developments at an international level regarding the right of Indigenous peoples to a continued relationship with their traditional territories, this division becomes even more problematic. It is especially so in view of the changing perception of cultural protection as something increasingly important in the interpretation of Indigenous peoples' right to access and control traditional territories and their resources. In this light, the Swedish Government's position that Swedish law regarding the Sami is consistent with its international obligations seems strange. As Chapter 6 shows, this is not a historical position linked to a statement in the 20th century; it is something the Swedish government also argues in court, as in the *Girjas Sami village* case addressed in Chapter 6.1.4.

[266] Cindy Holder, 'Culture as an Activity and Human Right: An Important Advance for Indigenous Peoples and International Law' (2008) 33 Alternatives: global, local, political 7, 8.
[267] Ibid 18.
[268] Ibid 19f.
[269] Ibid 19.

Since the Swedish government constantly refers to historical conditions and their significance for the nature and scope of the Sami's right of access to land and water, the following chapter examines the historical background to the first coherent regulation of Sami access to land in the late 1880s. The chapter also examines the argument underlying the codification, since it continues to be relevant in court processing, as seen in Chapter 6. The chapter shows how the Swedish government secured its sovereignty over territories traditionally used and occupied by the Sami through the adoption of a colonial approach based on establishing settlements. An approach which includes accepting the existence of an Indigenous population but taking control over how to legally define their right over land and waters. It also shows how the protection of Sami access to land and waters is based on protecting the nomadic Sami culture by ensuring its material conditions, not by protecting it as an economic right per se.

Chapter 4 The Sami's Right of Access to Land from the Late Middle Ages to the Reindeer Grazing Act of 1886

> *The future of the Sami as a people and of the Sami way of life and culture is inseparable from the question of our rights to land and water in the land where the Sami live. Our Sami land is literally speaking the foundation for our existence as a people and an absolute requirement for our survival as such. It is the source of natural development of the Sami economy and culture and a guarantee for future generations of the Sami of the freedom to choose a Sami alternative.* (Lars-Anders Baer)[270]

Previous chapters have discussed Sami rights in a modern setting and explained the value of a relationship to traditional areas for the Sami's culture and how the Swedish Constitution, through a fragmented structure, provides legal protection for economic rights arising from this relationship but not for Sami Indigenous rights. This divided protection indicates that there is a difference in views on the value of the relationship, where the Swedish government finds it difficult to look beyond materialistic matrices to provide legal protection securing the Sami's Indigenous rights and freedoms to traditional territories regardless of a specific cultural activity.[271]

That economic rights are upheld as more important than social and cultural rights rests both on a historical view of a hierarchy between human rights and freedoms, where cultural rights have less legal value, and a state-driven narrative of the Sami's right to traditional territories as a limited economic right that is preserved as long as the Sami have this need due to a specific cultural activity. This state driven narrative does not recognise the cultural dimensions of the Sami's Indigenous rights but is based on a continued consolidation of Sweden's claimed right to control the Sami's access to the original Sami homeland and its resources, a common feature among former colonial powers that continues to form the basis of land rights conflicts today.[272] Although the focus on economic rights, as this chapter shows, rests on a historical basis to secure access to material resources, it cannot be ignored that legal protection is based on protecting an Indigenous people who inhabited the northern parts of what today is Sweden by ensuring opportunities for this population to preserve their culture and their characteristic way of life. The legal value of this history has become increasingly central to Sami cultural legal

[270] Baer, (1982) (n 41) 11.
[271] Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22 European Journal of International Law 121, 127f.
[272] Cormier Paul Nicolas, 'British Colonialism and Indigenous Peoples: The Law of Resistance–Response–Change' (2017) 49 Peace research 39, 51.

protection (see, for example the Supreme Court's judgments in Sami cases analysed in Chapter 6). Understanding the historical background is, therefore, central to this thesis.

The main problem with reproducing, as this chapter does, a historical description of Sami access to land in Sweden lies in the fact that several nations have tried to establish legal sovereignty over the Sami homeland. Of these, Sweden and Norway came to have a long-running conflict over the northernmost areas of the Scandinavian peninsula, which are predominantly populated by the Sami. This prolonged conflict affected the Swedish perception of the Sami's right to access land and the emergence of laws and principles to protect this basis for their existence. This chapter demonstrates how the interplay between external and internal politics has contributed to a legal development in Sweden that has created a narrative about the Sami's right of access to land as a limited right. It is shown that the narrative is based on a historical preconception of the Sami's basic need to be able to continue to exist as a culturally distinct people.

4.1 The Protection of Sami Access to Land During the Late Middle Ages (1300–1522)

The Sami's struggle to defend and justify their right to their homeland is as old as their contact with external powers, and the view of the specific content of this right has varied over time according to the development of political and economic life on the Scandinavian peninsula. Through this development, access to land has remained the core of Sami existence as a culturally distinct people. The legal heritage shows that the regulation and organisation of access to land originally used and occupied by the Sami did not occur in a vacuum or due to a sudden conquest of land. The legacy is the result of a long history of the methodical colonisation of an already inhabited area and an attempt to relate to an Indigenous population. While the state has taken measures to secure the existential needs of the Sami, it has created a legal structure that ensures a legally justified colonisation of the Sami homeland based on theories of different resource needs. The legal heritage is thus based on ensuring Sami existence at a level that does not conflict with state interest.

This chapter starts at the end of the 14th century when the provinces of Hälsingland and Ångermanland formed the northern border of the Swedish territory.[273] There were Swedish settlements to the north, in Lapland, but these remained small settlements concentrated in the

[273] Åke Campbell, *Från vildmark till bygd* (Två förläggare Bokförlag 1948) 1f.

coastal areas and waterways.[274] That the Sami populated the area was already known at this time, and their presence was well documented.[275] This presence of an Indigenous population did not hinder Swedish rulers from asserting political sovereignty over large parts of northern Fennoscandia, and they established an administrative area in the north.[276]

Swedish claim to sovereignty over the northern wastelands meant that Sweden could regulate access to land in these areas. Through specific privileges or, more generally, royal ordinances, Sweden granted access to land in the north. This could be access to trade or collect taxes from the Sami or a more general right of access to land for residential purposes.[277] There is no indication that the state regulated Sami access to land during the Late Middle Ages. One of the earlier Swedish documents mentioning the Sami in relation to access to land is a royal decree from 1328, which gave settlers of other ethnic backgrounds than the Sami a general right to access land for residential purposes.[278] In connection to this granted right to settle, the document expressly prohibited those who settled in the northern wasteland from preventing the existing population – the Lapps (Sami) and the forest people – from practicing hunting.[279] This indicates an awareness that the Sami accessed land for hunting purposes and that situations could arise where the Sami's interest in hunting and the interests of the settlers might collide.

Hans Sundström (1984), who has examined historical documents from the 14th and 15th centuries, emphasises the difficulties inherent in interpreting historical documents.[280] These difficulties arise not only because many historical documents are transcripts made much later than the original, and thus may have been influenced by the perception of the time of transcription, but also because there may be underlying motives behind a text that cannot be derived from it.[281] For example, as Kimmo Katajala (2012) explains, there was a general interest during the Middle Ages to gain control of land containing valuable resources from a

[274] Hans Sundström, 'Bönder bryter bygd – studier i övre Norrlands äldre bebyggelsehistoria' (Phd Thesis, Norrbottens museum 1984) 18–25, 33–36, 117f, 145.
[275] Pálsson Hermann, 'The Sami People in Old Norse Literature' (1999) 0 Nordlit 29.
[276] Sundström (1984) (n 274) 33.
[277] Emil Poignant, *Samling af författningar angående de s.k. Lappmarksfriheterna* (Samson & W 1872) 1.
[278] See ibid 3f, for a transcript of the document.
[279] The term *Lapps* is a historical reference for people, of non-Germanic ethnicity manily, who lived a nomadic lifestyle. Officially, the term *Sami* replaced *Lapps* at the end of the 20th century. Even though the document does not describe the forest people it makes a distinction between the Lapps and the forest people. A reasonable interpretation is that the forest people was a referent to other inhabitants than those who lived a nomadic lifestyle. It can be added that Sweden also colonized territories in southern Finland during this period.
[280] Sundström (1984) (n 274) 39–47.
[281] Ibid 43–47.

tax perspective.[282] In Lapland, where the settlements were small and concentrated to the coastal area and waterways, an interest in gaining control over valuable natural resources may explain why the settlers were to refrain from disturbing Sami hunting. The natural products (such as fur) provided by the Sami from the inner parts of Lapland constituted a valuable source of tax revenue, which the state, through its tradesmen, had direct access to.[283] That hunting was a time-consuming occupation that did not guarantee an income can also explain why it was economically advantageous to protect Sami hunting rather than rely on settlers.[284]

The above explains that there may have been reasons why the state wanted to protect Sami hunting that were not based on a perception of Sami rights but rather on the value of Sami hunting for the state. It is thus not possible to assess with any certainty what view there was of Sami access to land other than that the state asserted there was another population in the area who also used the land.

The following section shows that statements on the protection of access to land were not uncommon. In relation to the Sami, statements during the early Vasa age clearly indicate a perception of protecting Sami access to land as part of their lifestyle.

4.2 The Protection of Sami Access to Land During the Early Vasa Era (1523–1611)

A distinctive feature of the early Vasa era was a state interest in securing its tax base.[285] This required a general overview of access to land and whether individuals paid tax or fees for

[282] Kimmo Katajala, 'Drawing Borders or Dividing Lands?: the peace treaty of 1323 between Sweden and Novgorod in a European context' (2012) 37 Scandinavian Journal of History 23.
[283] Michael Roberts, *Gustavus Adolphus: a History of Sweden, 1611–1632*, vol I, 1611–1626 (Logmans, Green & Co 1953) 41, 229; Campbell (1948) 8ff; Roger Kvist, 'Racist legacy in modern Swedish Saami policy' (1994) 14 Canadian Journal of Native Studies 203, 204 – 205; Michael Bravo and Sverker Sörlin (eds), *Narrating the Arctic: a cultural history of Nordic scientific practices* (Science History Publications 2002) 76–77; Harald Gustafsson, 'A State that failed?' (2006) 31 Scandinavian Journal of History 205, 211f, 216; Lars Ivar Hansen and Bjørnar Olsen, *Hunters in Transition: An Outline of Early Sámi History* (BRILL 2013) 232–239, 257f; Bjørn Bandlien, 'Trading with Muslims and the Sámi in Medieval Norway' in Cordelia Heß and Jonathan Adams (eds), *Fear and Loathing in the North: Jews and Muslims in Medieval Scandinavia and the Baltic Region* (De Gruyter 2015); Ingela Bergman and Lars-Erik Edlund, 'Birkarlar and Sámi – inter-cultural contacts beyond state control: reconsidering the standing of external tradesmen (birkarlar) in medieval Sámi societies' (2016) 33 Acta Borealia 52, 54ff; Sirpa Aalto and Veli-Pekka Lehtola, 'The Sami Representations Reflecting the Multi-Ethnic North of the Saga Literature' (2017) 11 Journal of Northern Studies 7. Bergman and Edlund (2016); Bernhard Karl Wiklund, *De svenska nomadlapparnas flyttningar till Norge i äldre och nyare tid* (Almqvist & Amp, Wiksells boktryckeri AB 1908) 9–21; Nils Arell, 'Rennomadismen i Torne lappmark – markanvändning under kolonisationsepoken i fr.a. Enontekis socken' (PhD thesis, Centraltryckeriet 1977) 58.
[284] Ulf Nyrén, 'Rätt till jakt – En studie av den svenska jakträtten ca 1600–1789' (PhD thesis, Göteborgs universitet 2012) 26f.
[285] Vilhelm Irgens Pettersson, 'Ancient and Modern Swedish Land Tenure Policy' (1948) 30 Journal of Farm Economics 322, 322–324.

certain areas and why. For this time period, it is possible to divide land rights into what is comparable with ownership, for which someone paid tax for land, and a right of use, for which someone paid a fee.[286] To secure the tax base, general tax reforms and real estate registers were created in different parts of the realm.[287] The register noted whether tax or fee payments were due to cultivation purposes or access to land to use a certain resource. Through these measures, the state gained control over information regarding the registration of access to land, who had access to which area, if tax payment for a certain area took place, and, if so, for what purpose. For the individual, this meant a registration of the exclusive access to land that came with the tax payment, which is comparable to ownership.[288] Though knowledge of legal relationships in the Sami original homeland has its limitations, as explained in Section 4.3.1, the documentation shows that the Sami paid tax for certain waters valuable from a fishing perspective.[289] The Sami also paid tax for land: *Lappskatteland*. According to Kaisa Korpijaakko-Labba (2005), this can be equated with the same statutory right to land that other taxpayers had – that is, land ownership.[290]

Although the real estate registers provide a statutory right to land, the official view was that the scope of the tax unit should correspond to the proprietor's need to sustain himself, his family, and his animals, which set a limit on how much land a person could master.[291] The connection between need and access to land thus becomes clearer. This connection is central in the subsequent colonisation of Lapland, where the needs of the settlers were in focus, which affected the legal perception of the Sami's need for access to land, as explained in Section 4.3.1.

During the early Vasa era, access to land for the use of resources was not necessarily site-specific, as in the case of the Sami fishing mentioned above. An example of non-site-specific access to land for resource utilisation is the Sami hunting right mentioned in a royal decree of protection from 1543.

[286] Kaisa Korpijaakko–Labba, 'Samernas rätt till mark och vatten – utvecklingen från 1500–talets mitt fram till våra dagar' in *Svenskt i Finland – finskt i Sverige*, vol 1 (Svenska litteratursällskapet i Finland 2005), 327.
[287] SOU 1922:10, *Lappskattelandsinstitutet och dess historiska utveckling*, 7–11.
[288] Pettersson (1948) (n 285) 322–324.
[289] SOU 1922:10 9.
[290] Kaisa Korpijaakko-Labba and Beate-Sofie Nissén-Hyvärinen, *Om samernas rättsliga ställning i Sverige–Finland: en rättshistorisk utredning av markanvändningsförhållanden och –rättigheter i Västerbottens lappmark före mitten av 1700–talet* (Juristförbundets förlag 1994).
[291] Pettersson (1948) (n 285) 322–324.

The royal decree addressed the population along the southern part of a historic Lapland border. This researcher was unable to access to the original document, but according to the title in the transcript, the population along the border were not to interfere with Sami hunting rights – *Lappernes Jagträtt.*[292] Conceptually, the Swedish term *Jakträtt* (hunting right) can have different meaning. As Ulf Nyrén (2012) explains, according to Medieval Scandinavian law, the term *hunting right* only included situations that concerned the hunter's right to acquisition – *jägarens tillägnelserätt*.[293] Here, a distinction was made between the killing and the driving of game.[294] The term 'hunter's right to acquisition' covers both distinctions. From the main text of the decree from 1543, it appears that the ban on interfering with Sami hunting rights was a ban on interfering with the driving and killing of game.[295] A reasonable interpretation is that the intention was to point out, for the settled population, that the Sami had a protected access to land for hunting purposes.

The basis for the ban on settlers disturbing the Sami hunt were twofold. First, the Sami paid taxes for their natural products, furs included. Consequently, they had the same right to the protection of their property, the kill, as the settlers had to theirs. [296] Second, it was necessary to secure Sami livelihood because their way of life made them dependent on what nature provided. They had no other means of subsistence. If the hunt disappeared, the Sami would find it difficult to maintain a sustainable livelihood.[297] The government thus emphasised the Sami way of life as an argument for not disturbing a significant source of Sami livelihood.

The fact that the Government protected Sami hunting, though hunting was part of the settlers' livelihood as well, indicates that there was an intention to distinguish between the importance of hunting for the livelihood of these two groups.[298] One interpretation is that the inhabitants could support themselves in other ways, such as by cultivating the land for which they paid

[292] A transcript of the original document can be found in Gustav Eriksson, *Konung Gustaf den förstes registratur 15, 1543* (Johan Axel Almquist ed, Nordstedt & Söner 1893) 316.
[293] Nyrén (2012) (n 284) 45.
[294] Ibid 47f.
[295] For a transcript of the original document, see Eriksson (1893) (n 292) 316.
[296] Ibid 316.
[297] Ibid 316f.
[298] Dating back to the 13th Century, taxation of bow and arrow use, or winter tax, was imposed on men over the age of 16 and paid mainly in fur and differed from taxation linked to the land which was imposed on all landowners. While taxation of bow and arrow use was based on a flat rate based on the number of taxpayers (men), the land was based on a calculation of how much an adult would pay based on the type of property he or she had, e.g., fields, meadows, fishing waters. See, e.g.. Sundström (1984) (n 274) 56, and Nyrén (2012) (n 284) 27f.

taxes, while the Sami way of life limited this possibility.[299] That the Sami were not considered able to practice cultivation was invoked on the basis of protecting their access to land during the 17th century (see Section 5.3).

While, as Gustav Göthe (1929) notes, the government's concern for protecting residents' access to land in the northern provinces during the Vasa era was in principle based exclusively on protecting its tax base,[300] the decree of 1543 represents a recognition of access to land as part of the Sami's lifestyle. This access includes both a right of access to land for hunting purposes and access to other resources provided by the forest. What resources these are cannot be deduced from the text of the decree.

The above shows that during the early Vasa era, the Sami had protected access to land, and this included access in addition to that required for hunting purposes. In the next section, this thesis will look more closely at how Sweden's focus on the Sami as a tax subject came to contribute to increased conflicts with Denmark-Norway, which ultimately impacted restrictions on transboundary access to land by the Sami residing in Sweden. The subsequent section discusses the internal consequences of this restriction.

4.2.1 The Geopolitical Context of Sami Access to Land and its Consequences

Sweden's perception of citizens' cross-border access to land during the Vasa era was that of a protected right. As Kimmo Katajala (2012) explains, this is a tradition that goes back to the Middle Ages and may be related to poor knowledge of local rights.[301] Early treaties between Sweden and Denmark-Norway also contain protection of transboundary access. One example is the treaty of Stettin (1570), which provided foreign nationals with a general right of access to land if they had previously held such a right.[302] The terms used were av ålder (SV) / *alders tids bruk* (NO). The basis is a customary right and traditionally used.[303] According to Steinar Pedersen (2006), the underlying principle is prescription.[304] These terms reappear in several historical treaties, such as the 1751 Codicil discussed in Section 4.4. Sweden also applies them

[299] Sundström (1984) (n 274) 56.
[300] Gustaf Göthe, 'Om Umeå lappmarks svenska kolonisation – från mitten av 1500–talet till omkring 1750' (PhD thesis, Almqvist & Wiksell 1929) 18.
[301] Katajala (2012) (n 282) 35–39.
[302] Nils Enewald, 'Sverige och Finnmarken: svensk Finnmarkspolitik under äldre tid och den svensk–norska gränsläggningen 1751' (PhD thesis, Gleerup 1920) 57.
[303] See, e.g., Christina Allard, *Renskötselrätt i nordisk belysning* (Makadam 2015), c 5.
[304] Steinar Pedersen, *Lappekodisillen i nord 1751–1859: Fra grenseavtale og sikring av samenes rettigheter til grensesperring og samisk ulykke* (Universitetet i Tromsø 2006) 21.

internally in relation to the contemporary Sami right of access to land for winter grazing, as explained in Chapter 5.1.

The Treaty of Stettin did not regulate the disputed areas of the northern part of the Scandinavian peninsula – Finnmarken. On this issue, the states remained at odds with each other.[305] One of the controversial issues was the right to tax the Sami and what legal significance state taxation of the Sami had for the existence of a legitimate claim to territorial rights.[306] Neither Sweden nor Norway had effective occupation of the area with their own population, but both levied tax from the Sami.[307] Sami taxation, therefore, became a way of arguing for the existence of a legitimate claim to territorial rights based on the principle of occupation. [308] This reinterpretation of legal principles on which a state could assert a sovereign right over territories was not completely rejected until 1751 with the final partition of the remaining part of the Sami homeland (Chapter 4.1).

The Treaty of Stettin did not settle the right of Sami taxation, which remained a source of irritation and was a contributing factor to the Kalmar War (1611–1613).[309] Following its defeat in the Kalmar War, Sweden waived its claim to sovereignty over the northern coastal areas to Norway in the Treaty of Knäred (1613).[310] Swedish claims of territorial rights to the inner part of Finnmark remained, however. Like the Treaty of Stettin, the Treaty of Knäred provided general protection for foreigners' right to access land. Norway, however, made it more difficult for Swedes and Sami to trade along the Norwegian coast, and Sami who lived in Sweden no longer had access to land in Norway to hunt.[311]

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[305] For a reviewed of the disputes between neighbouring countries over the northern parts during the 16th century se, e.g., Enewald (1920) (n 302) 1–55.
[306] See ibid for a review of the conflict over Finnmark during the turn of the fifteenth century.
[307] Gustafsson (2006) (n 283) 211f, 216; Bergman and Edlund (2016) (n 283) 54ff; Kvist (1994) (n 283) 204 – 205; Roberts (1953) (n 283) 41, 229; Bravo and Sörlin (2002) (n 283) 76–77; Hansen and Olsen (2013) (n 283) 257–258; Enewald (1920) (n 302) 48; Roberts (1953) (n 283) 39–42.
[308] Enewald (1920) (n 302) 48; Roberts (1953) (n 283) 49–42; Paul Douglas Lockhart, *Denmark, 1513–1660: The Rise and Decline of a Renaissance Monarchy* (Oxford Scholarship 2007) 151; Hansen and Olsen (2013) (n 283) 259f; John W. Burgess, 'The Recent Constitutional Crisis in Norway' (1886) 1 Political Science Quarterly 259, 260f Gustafsson (2006) 210f; Stefánsson Jón, *Denmark and Sweden: with Iceland and Finland* (James Bryce Bryce ed, Fisher Unwin 1916).
[309] Jón (1916) (n 308) 245; Roberts (1953) (n 283) 38–44; Michael Roberts, *The Swedish imperial experience, 1560–1718* (Cambridge University Press 1979) 8; Otto Jebens, 'Om Lappekodisillen av 1751' (1986) 3 Tidsskrift for rettsvitenskap 215, 240; Robert Frost, *The northern wars: war, state, and society in northeastern Europe, 1558–1721* (Longman 2000) 135–136; Lockhart (2007) (n 308) 116, 151; Hansen and Olsen (2013) (n 283) 259.
[310] Enewald (1920) (n 302) 221f; Jebens (1986) (n 309) 241f.
[311] Göthe (1929) (n 300) 60.

Gustaf Göthe (1929) argues that Norway's restrictions on foreign access to land for the Sami contributed to their living conditions in Sweden deteriorating.[312] In combination with an increased internal encroachment into the Sami homeland and resource competition from Swedish settlers, Sami living conditions became unsustainable.[313] Poverty increased, and the Sami found it difficult to pay the taxes imposed on them.[314]

The unsustainable living situation in Lapland, with increasing poverty, caused many Sami to leave Lapland to seek livelihoods elsewhere. This exodus of Sami caused concern among the Swedish administration from several perspectives. For example, it became clear that the existing organisation in Lapland, with a tax system based on resource utilisation and dependence on cross-border trade, no longer worked.[315] The economic importance of leather, which was a central part of the Sami's contribution to the Swedish economy, also declined sharply during the end of the early Vasa period.[316] A depopulated Lapland also posed a security risk to the Swedish kingdom. Consequently, Sweden needed both a new administration for Lapland and an increased population.

In the following section, this thesis discusses how the realisation of the need for an increased population in Lapland contributed to the establishment of a new legal theory – the parallel land use theory. This theory aimed to guarantee Sami access to land while Sweden implemented a new colonising policy for Lapland.

4.3 The Definition of Restrictions of the Sami's Right of Access to Land During the Swedish Empire (1611–1718)

The central idea of the right of access to land in Lapland was that Sweden could grant it to anyone willing to settle there. The area was sparsely populated, which meant there was plenty of space, but it also meant there were untapped resources. Moreover, the traditional Sami livelihood was based on hunting, fishing, and gathering in combination with a few reindeer.[317] The importance of reindeer as the main base for subsistence did not arise until the 18th century with an emerging large-scale reindeer industry.[318] The combination of a Sami hunting-

[312] Ibid 58–62.
[313] Ibid 59–62; Moritz (1990) (n 57) 37f.
[314] Göthe (1929) (n 300) 58–62.
[315] Ibid 58–62.
[316] In 1590, hides accounted for 17.5% of Swedish exports, in 1613 the proportion was 3.8%, Nyrén (2012) (n 284) 28.
[317] Ruong (1969) (n 38) 10f, 64f; Arell (1977) (n 283) 15f, 22.
[318] Ruong (1969) (n 38) 64f.

gathering society and the potential abundance of resources in the interior of northern Sweden, such as fish, meant there was a view during the 17th century that there was room for increased utilisation of these and other resources.[319] This gave rise to the theory that has since formed the basis for the perception of Sami land rights – the parallel land use theory.

4.3.1 State Limitation of Sami Access to Land Through the Parallel Land Use Theory

The combination of the existence of untapped resources and security policy aspects forms an integral part of Sweden's interest in the colonisation of Lapland.[320] From both perspectives, there was interest in keeping the Sami in their traditional areas. Through their knowledge of Lapland, the Sami were a continuing asset for Sweden to gain access to natural resources.[321] Moreover, their traditional knowledge of reindeer made them important from a transport perspective.[322] For a period, they were an asset for the transport of ore and minerals from the growing mining industry, especially during winter.[323] They also transported ammunition and provisions to settlements in Lapland, thus helping to strengthen Sweden's defence against invasions.[324]

On the other hand, there was a perception that the Sami only performed well in their own land and when pursuing their traditional cultural lifestyle.[325] This was a view promoted by Johan Graan, Governor of the province of Västerbotten. He promoted a classical colonial reasoning when he argued that the social, cultural, and historical background that shaped the Sami way of life was an obstacle for them in adapting to a more settled lifestyle based on agriculture.[326] Their traditional lifestyle, he argued, made them unsuitable or unwilling to support themselves through other means of subsistence, such as agriculture.[327] As explained by Arturo Arias (2010), this approach applies a form of colonial rationality in which a state – by attributing ignorance, unproductivity, and inferiority to Indigenous peoples – can demonstrate that the

[319] Erik Nordberg, 'Landshövding Johan Graan – Lappmarksplakatet 1673' in N/A (ed), *Handskrift 25*, vol 25:2:d (Umeå Universitet 2011) 629–632.
[320] Ibid 609–635.
[321] See e.g., Duke Carl's instruction for the bailiffs in Piteä and Luleå Lapland from 1603, Poignant (1872) (n 277) 5.
[322] Erik Nordberg, *Skjutsväsen (malmforor och borgarlass) i lappmarken*, vol 25:40a–b (Umeå Universitet 2011); Göthe (1929) (n 300) 173.
[323] Nordberg, (2011) (n 319) 616.
[324] Johan Nordlander, *Johan Graan: landshövding i Västerbotten 1653–1679* (Thule 1938) 38f
[325] Nordberg, (2011) (n 319) 612.
[326] Ibid 622, 633, 649f.
[327] Nordlander (1938) (n 324) 32–34.

reality of Indigenous peoples is an obstacle to the realities considered relevant.[328] The relevant reality for Graan included a need to increase tax revenues by cultivating Lapland and stronger protection against invasion from surrounding countries.[329] Moreover, to paraphrase Paul Kelly (2008) from his analysis of John Locke's reasoning about native land rights in America, from Graan's letter to the Swedish authorities, it is clear his underlying reasoning behind Sami land rights is based the conception of a property-conferring use only, excluding rights to traditional territories based on cultural use.[330]

Johan Graan is the person who substantiated the preconception that the Sami had a minimal value for Sweden from a socio-economic and security policy perspective due to their cultural history and way of life. Lapland thus needed more suitable people who could use the area's resources more efficiently.[331] This idea was put forward alongside his claim that the Sami lifestyle needed protection because it was the only lifestyle the Sami knew and were comfortable with.[332] Consequently, Sweden needed to protect the cultural way of life of the Sami while solving the economic and security problem that existed because of the lack of settlements by increasing the population. The answer was to create a theory that the Sami had a limited need for resources, leaving room for others to use the surplus of resources that were available and the resources the Sami did not use. The Sami way of life could thus continue to exist while Sweden opened Lapland for further colonisation; this is the assumption on which the parallel land use theory is based.

What lies behind Graan's assumption about the conditions required to support the Sami's cultural way of life is unclear. Graan was of Sami decent, but as Johan Norlander (1938) notes, he never lived a traditional Sami way of life.[333] Graan grew up in a Swedish family and had a solid educational background that included university studies in the Dutch Leiden, the Netherlands. Considering Graan's lifestyle, according to Nils Arell (1977), his theory was at best theoretical in scope, as was is based on a lack of knowledge of the actual requirements of Sami cultural land use or other land use within Lapland.[334] Graan's own documents also show shortcomings in knowledge of the actual conditions in Lapland, for which reason he requested

[328] Arturo Arias, 'The Ghosts of the Past, Human Dignity, and the Collective Need for Reparation' (2010) 5 Latin American and Caribbean ethnic studies 207, 209f.
[329] Nordberg, (2011) (n 319) 622, 633, 649f.
[330] Paul Kelly, *Locke's 'Second Treatise of Government'* (Bloomsbury Publishing Plc 2008) 80.
[331] Nordberg, (2011) (n 324) 629.
[332] Ibid 615.
[333] Nordlander (1938) 13–16.
[334] Arell (1977) (n 283) 74.

funds for carrying out cadastral surveys.[335] These surveys would both document areas the Sami paid tax for and provide an overview of areas suitable from a settlement and extraction perspective. If the surveys showed that the Sami used areas that were valuable from an agricultural or extraction perspective, Graan believed the Sami could move to other areas containing the resources they needed.[336] This is the same approach underpinning the interpretation of the present reindeer herding legislation, that the Sami are mobile due to their nomadic culture and need for specific resources. Chapter 6 explains this further.

The parallel land use theory is a restriction on the Sami's right to access their original homeland. Regardless of whether the Sami and farmers use different resources, their respective use of resources will often occur within the same geographical areas. The Sami's right of access to land is de facto restricted by the presence of others holding a right to access the same area. A current example is the Sami's access to private forest for winter grazing. Chapter 5 discusses this further, but while the Sami have the right to access private forest for winter grazing, a landowner also has access to the land as part of his or her ownership. The question is thus whose right of access to land has priority (Chapter 7 problematizes the balance of rights in relation to the European Convention).

As shown, a perception arose during the period of the Swedish Empire of Sami land access as something restricted. This perspective is based on a misconception that the Sami could only support themselves through traditional industries, such as hunting, fishing, and gathering. Although the parallel theory aims to ensure Sami access to land in accordance with their traditional way of life, the theory assumes that Sami needs are restricted, allowing the state to grant a right to access the Sami original homeland to others for development purposes.

In the following section, this thesis explains how Sweden placed further restrictions on Sami access to land during the Age of Liberty (1718–1772).[337] This was due to an increased interest in the development of agriculture and to ensure this development created a legal system that could reduce conflicts related to access to land in Lapland.

[335] Nordberg, (2011) (n 319) 617.
[336] Ibid 629–635, *et passim*.
[337] Age of Liberty – *Frihetstiden* – is a term Swedish historians use as a term for the period when the Swedish Parliament limited the monarchy until king Gustav III's coup d'état in 1772. See, e.g., Robert de Vries, 'Frihetstidens Sverige 1719–1772' (2010) <https://www.so-rummet.se/kategorier/historia/nya-tiden/frihetstidens-sverige#> accessed 2 November 2021.

4.4 The Demarcation Processes of the Sami Homeland during the Age of Liberty (1718–1772)

The Age of Liberty is marked by the agrarian revolution. New technical developments made it possible to increase agricultural productivity.[338] This led to increased tax revenue and thus an increased interest for Sweden to increase the proportion of cultivated land in Lapland. At the same time, the importance of the reindeer industry for the Sami as a main means of subsistence increased with ever larger reindeer herds.[339] Increasing reindeer herds and increased interest in agriculture contributed to increased competition for pastures. Nils Arnell (1977) has highlighted this in relation to Torneå Lappmark, northern Sweden, which experienced an increase in legal disputes.[340] The promotion of new settlements that followed the agrarian revolution and the protection of Sami land use are thus two parallel tracks that follow each other during this time.

As part of the agrarian revolution, Sweden issued a new settlement decree for Lapland in 1749.[341] In addition, Sweden clarified legal boundaries in the northern areas, such as the Lapland border (Section 4.4.1). Simultaneously, Sweden and Denmark-Norway negotiated their state border (Section 4.4.2). These processes affected Sami access to land by, for example, reversing the burden of proof, as explained below. Instead of an undeniable right of access to land within the Lapland border (see below), the Sami had to prove their right to access land outside the borders. Chapter 7.1.4 exemplifies the legal consequences of this from a contemporary perspective.

4.4.1 The Swedish Lapland Border – *Lapplandsgränsen*

The Lapland border – *Lappmarksgränsen*, concluded in 1750 – was a way of creating order in the legal situation between the population of the coastal landscape and the inner parts of Lapland. Unclear rules regarding the scope of the right to access land for resources had increased antagonisms between coastal farmers and the people of Lapland, including both Sami and farmers.[342] The new border restricted the right of each population to access land. Although the Sami retained their right to access land beyond the border, it became an outer limit for their indisputable right of access to land. The legal basis of this indisputable right is unclear, as this

[338] Janken Myrdal and Carl-Johan Gadd (eds), *Den agrara revolutionen: 1700–1870*, vol 3 (Natur och Kultur 2000) 231f.
[339] See e.g., Arell (1977) (n 283) 248–265, 272–274.
[340] See e.g., ibid 248–265.
[341] Poignant (1872) (n 277) 37–43.
[342] Nordlander (1938) (n 324) 41. For a review of the processes surrounding the determination of the Norwegian–Swedish border see Göthe (1929) (n 300) 453–483.

study lacked access to the original document establishing the border. An interpretation presented in later preparatory works is that official examinations of existing access confirmed the Sami had indisputable rights.[343] This indicates that Sami customary use was the basis for this right rather than a right granted by the state. This right only applied to Lapland; beyond the border, Sami access to land became dependent on the principle of prescription. The dependency on this principle meant that the Lapland border reversed the burden of proof. Outside the border, the Sami bore the burden of proving their right of access, while this right remained indisputable within the border. As Chapter 7.1.4 shows, this had far-reaching consequences for several Sami villages during the 20th Century.

A similar approach to that applied by Sweden when they finally established the administrative boundaries between the coastal area and the inner parts of Lapland during the 1750s is found in relation to Sami transboundary access to land. The following sections show that Sweden and Denmark-Norway applied the same approach when they established the national border in 1751, which, for the Sami residing in Sweden, set a western and northern border for their indisputable right to their original homeland.

4.4.2 The 1751 Regulations on the Sami's Transboundary Right of Access to Land

A significant consequence of the codification of the Swedish-Norwegian border in 1751 is that Sweden and Norway legally recognised that the Sami needed access to land due to having reindeer as part of their livelihood. In the mid-1700s, reindeer herds formed only a part of Sami livelihood, and the Sami needed access to other resources, such as hunting and fishing, to sustain themselves.[344] Regardless, the reindeer's seasonal migration was a central part of the argument during the negotiation of an appendix to the Strömstad Border Treaty of 1751 (hereafter referred to as the Border Treaty).[345] The Border Treaty constituted the legal basis for the Sami transboundary right of access to land, the details of which are described in the appendix: the so-called Lapp Codicil (hereafter referred to as the Codicil).[346]

4.4.2.1 The Regulation of the Sami's Transboundary Right of Access to Land in the Border Treaty of 1751

[343] Governmental Bill 1928:43, *Förslag till lag om de svenska lapparnas rätt till renbete i Sverige m.m*, 47.
[344] Ruong (1969) (n 38) 64f.
[345] Gräntze–TRACTAT Emellan Hans Maj:t Konungen af Swerige, samt Hans Maj:t Konungen af Danmark (adopted 21 September / 2 October, EIF 7 October 1751) (1751 Border Treaty). That the agreements are integrated follows from the Border Treaty, art 8, and the Codicil, s 30.
[346] First Appendix or Codicil to the Border Agreement between the Kingdoms of Sweden and Norway, Concerning the Lapps (adopted 21 September / 2 October, EIF 7 October 1751) (The Codicil).

The general objective of the Border Treaty was to reduce potential grounds for dispute between citizens that could lead to national conflicts. This objective is clear from the preamble. The underlying principle for the treaty is the principle of the sovereignty of states. That is, each state has exclusive sovereignty over its territory, regardless of whether foreign nationals have the right to access land. The regulation in the Border Treaty thus aimed to uphold the principle of sovereignty while allowing exceptions for certain access to land.

To reduce potential grounds for dispute, the general principle in the Border Treaty was that foreigners lose their grounds for claiming a right of access to land across the border. This extinguishment of cross-border rights follows from Article 2 of the Border Treaty:

> As the national border between the kingdoms of Sweden and Norway ... has been united and established, so hereby all the pretensions, of what name they may be, which any Kingdom or its subjects claim to have across this border, completely repealed and extinguished.[347]

By extinguishing all grounds on which foreign nationals could assert a right of access to land, the article contributed to fulfilling the main purpose of the agreements: to minimise conflicts. In general, this main principle also applied to citizens of Sami descent. Article 3 of the Border Treaty, however, provides for exceptions from the main principle that foreign nationals lose their right of access to land across the border:

> None of the Crowns shall now or hereinafter levy tax or other income or acquire rights, whatever the kind, across the border, neither by virtue of the Treaty of Stettin nor other agreements made for these purposes, but [as / if] either sides' Lapps need land of both Kingdoms to sustain their Reindeer; so, in respect of them, such arrangements have been agreed with, which are contained in the Border Treaty's first appendix or Codicil. [author's translation]

The wording of the article reflects the historical disputes that existed regarding the legal significance of Sami taxation for the issue of territorial claims, as explained above. That taxation could form a basis for territorial claims was, however, debunked during the negotiations.[348] It is a reasonable conclusion that the nations wanted to clarify that, regardless of whether foreign nomads had a right of access to land, there was no ground that could be invoked that could restrict the other state's exclusive sovereignty over its territory.

[347] 1751 Border Treaty, art 2 [author's translation].
[348] Enewald (1920) (n 302) 229–232.

Of importance for this thesis is that the exception in Article 3 of the Border Treaty applied to those Sami living a nomadic life who had reindeer as part of their livelihood. It was their cultural lifestyle and identity that was to be protected, not the Sami in general. The first national legislation was based on the same preconditions, and since 1751, the distinction between reindeer herding Sami and other Sami has been the basis for regulating Sami access to land and water. This distinction is discussed in the following in relation to the annex to the border treaty, which specifically regulates the cross-border rights and freedoms of nomadic Sami.

The protection Article 3 of the Border Treaty provided for the cultural lifestyle of nomadic Sami leads to the question of whether it is comparable to a modern provision on human rights. Jan Åke Riseth et al. (2016) claim, for example, that Sweden and Norway, by codifying the Sami's cross-border right to access land, were undertaking the protection of a central part of what maintained the conditions for Sami culture and lifestyle – the material basis.[349] According to Pedersen (2006), for example, the underlying reasons for this protection were that the states were concerned about the negative effect the border could have on the Sami way of life and their survival, which meant they had a moral obligation to ensure continued access to land across the border.[350] This may indicate that there was an intention to protect Sami access to land – not only on the basis of a legal obligation but also a moral one – by acknowledging a restriction on their sovereign right to control foreign citizens' access to land on their territory. Modern human rights regulations work in the same way by ensuring the protection of a fundamental right and regulating the right of states to interfere in those rights. Chapter 7 further explains this in relation to the European Convention.

As Jebens (1986) argues, however, there may have existed other interests in ensuring the Sami could continue to migrate, especially into Norway. Jebens argues that Sweden had an economic interest in arguing for the Sami's continued right to access land in Norway and notes that there was an insight on the Swedish side that this continued access would be advantageous from the perspective of developing Lapland.[351] One such reason may be a reduced competition for land use. Whether Article 3 is based on an intent to protect the Sami for their own sake and whether the article may consequently be equated with modern human rights regulations is thus partly

[349] Jan Åge Riseth, Hans Tømmervik and Jarle W Bjerke, '175 years of adaptation: North Scandinavian Sámi reindeer herding between government policies and winter climate variability (1835–2010)' (2016) 24 Journal of Forest Economics 186.
[350] Pedersen (2006) 23f; NOU 1984:18, *Om Samenes rettsstillning*, 187.
[351] Jebens (1986) (n 304) 278.

unclear. The actual guarantee of foreign Sami right of access to land is nevertheless a unique exception in the context. With few other exceptions, the Border Treaty extinguished foreigners' grounds to claim a right of access to land across the border.

Irrespective of any doubts that exist regarding the states' motives for regulating Sami cross-border rights, the next section shows how the Codicil adjusted the legal basis on which foreign Sami could claim a right of access to land, which resulted in a system of hierarchical rights where national Sami rights took precedence over foreign Sami rights. Consequently, according to the Codicil, the states were responsible for protecting both foreign and national Sami right of access to land.

4.4.2.2 The Lapp Codicil and State Responsibility to Protect Sami Right of Access to Land Nationally

While Article 3 of the 1751 Border Treaty constituted the legal basis for foreign Sami right of access to land and water, one of the appendices to the treaty – the 1751 Codicil – regulated the details of this access. To regulate Sami cross-border migration required detailed regulation of not only rights and freedoms to land and waters but also of citizenship, the state's relationship to foreign Sami, conflict resolution, and fees. Unlike the eight articles of the Border Treaty, the 1751 Codicil contains 30 paragraphs. That Sweden and Norway-Denmark regulated the cross-border rights and freedoms of foreign Sami in an appendix was partly due to this detailed regulation.[352] The reason was also partly that the issue of Sami rights and freedoms could not be settled until the border issue was resolved, as an agreement on this risked affecting the states' negotiating positions regarding specific areas of national interest.[353]

Regardless of whether there was an interest on the part of the states to regulate the cross-border rights of nomadic Sami, the question is why the states did not extinguish Sami cross-border rights as they did other citizens' cross-border rights. An early understanding of this purpose by the Sami in 1968 was that the 1751 Codicil was based on a principle of preserving a Sami nation.[354] Up until this point, there is little to suggest a general understanding that the purpose

[352] Ibid 256.
[353] Norway, for example, wanted to keep Finnmark in Norway as a part and not divide it into more Sweden, as this pure strategy would be better when they created a buffer zone against Russia and Sweden. Sweden, on the other hand, was more interested in areas to the south that it had previously lost to Norway. See, e.g., Enewald (1920) (n 302) 232–237, and Hansen and Olsen (2013) (n 283) 266–269.
[354] 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 right*, vol 48 (Leif Nordberg ed, Societas scientiarum Fennica 1994), at footnote 40.

was to protect a Sami nation.[355] A discussion of the historical meaning of the word nation falls outside the scope of this thesis, but it has been used both as a reference to a certain group of people living in a certain area and to distinguish classes of people from a larger group.[356] The wording of Article 3 of the Border Treaty does not support the interpretation that the Codicil aimed to preserve a Sami nation. Steinar Pedersen is also hesitant about such an interpretation and believes that more research is needed.[357] Other cross-border rights were extinguished, indicating that it was precisely the nomadic cultural lifestyle that was to be protected. That it was the Sami's way of life that distinguished them from the rest of the resident population also appears as a basis for the negotiator to ensure the material basis for this lifestyle.[358]

For the reason that the Codicil secured the material basis for the Sami's specific way of life, as explained further below, several scholars see the 1751 Codicil as an early example of a document of a humanitarian nature.[359] This view is based on an interpretation that Sweden and Denmark-Norway, by securing a certain part of the Sami's material subsistence base, took due account of Sami cultural needs. Consequently, scholars like Tomas Svenson (2005) have compared the Codicil with contemporary documents on Indigenous people's rights.[360] Nevertheless, for Sami living in Sweden, the Codicil constituted an actual limit to their indisputable right of access to land and water. As with the national administrative Lapland

[355] See, e.g., K B Wiklund, 'The Lapps in Sweden' (1923) 13 Geographical Review 223, 228f; T I Itkonen, 'The Lapps of Finland' (1951) 7 Southwestern Journal of Anthropology 32, 41; J G Elbo, 'Lapp reindeer movements across the frontiers of northern Scandinavia' (1952) 6 Polar Record 348, 348; Björn Collinder, *The Lapps* (Greenwood Press 1969), 29f; Ian Whitaker, 'The beginnings of political organization among the Swedish Lapps (Sami)' (1978) 19 Polar Record 39, 39.

[356] See, e.g., Johan Eriksson, *Partition and redemption: a Machiavellian analysis of Sami and Basque patriotism* (Umeå universitet 1997) 85; Emil Hildebrand, *Svenska riksdagsakter jämte andra handlingar som höra till statsförfattningens historia*, vol 3-1: 1593–1594 (1 ed, Norstedt 1894) 376, and SOAB, *Nation* (Svenska Akademins ordbok 1946).

[357] Steinar Pedersen, 'The Lappcodicil of 1751 - Magna Charta of the Sami' (1987) 5 Mennesker og Rettigheter 33.

[358] SOU 1986:36, *Samernas Folkrättsliga Ställning*, 80.

[359] See, e.g., Eriksson (1997) (n 356) 85; Barbara Ann Hocking, 'Evaluating Self-Determination of Indigenous People through Political Processes and Territorial Rights: The Status of the Nordic Saami from an Australian Perspective' (2000) 11 Finnish YB Int'l L 289, 295; Andreas Follesdal, 'On Saami Claims to Land and Water Special Issue on Sami Rights in Finland, Norway, Russia and Sweden' (2001) 8 International Journal on Minority and Group Rights 103, 104; Asbjørn Eide, 'Indigenous Self-Government in the Arctic, and their Right to Land and Natural Resources' (2009) 1 The Yearbook of Polar Law Online 245, 275; Anna Gremsperger, 'On the Sami Minority Colloquium' (2012) 1 JURA 135, 136; Wiklund (1923), 228–230; Ruong (1969) 63f; Riseth, Tømmervik and Bjerke (2016).

[360] Tom G Svensson, *The Sámi and their land: the Sámi vs the Swedish Crown: a study of the legal struggle for improved land rights: the Taxed Mountains Case* (Novus Forlag 1997) 42; Tom G Svensson, 'Interlegality, a Process for Strengthening Indigenous Peoples' Autonomy: The Case of the Sámi in Norway ' (2005) 37 The Journal of Legal Pluralism and Unofficial Law 51, 55.

border, explained in Chapter 4.4.1, the Sami's right to access land and waters across the Norwegian borders depended on prescription.

Like the 1751 Border Treaty, the Codicil was based on creating an order to ensure respect for state sovereignty. The codification of foreign Sami right of access to land was thus based on removing grounds that could create uncertainty about each state's exclusive sovereignty over its territory. For this purpose, the Codicil extinguished the right of foreign Sami to access land based on tax payments:

> No Lapp may henceforth have] Tax- or *Städjandeland* in more than one kingdom, for the reason that commonality of subjects and land may henceforth be avoided.[361]

As shown above, disconnecting foreign Sami's legal basis for access to land from tax payment ensured that similar disputes that had historically arisen due to claims of sovereign right to Sami tax payment could be avoided. Instead of tax, foreign Sami's right of access to their original homeland became dependent on a firmly established practice (Section 10) subject to the payment of fees (Sections 17–18):

> [As / As long as] the Lapps need both Kingdom's land, shall it for them, according to customary law be allowed autumn and spring to migrate with their reindeer herds across the Border in to another Kingdom, and henceforth, as before, equally with the nation's subjects, excepting for such places, as here stated below, have the right make use of the land and shore for upkeep to their animals and themselves, where they are to be kindly received, protected and helped to adapt.

Section 10 of the Codicil is the central article that ensures foreign Sami access to land and water.[362] Codifying prescription as the legal basis for the right of foreign Sami to gain access to land across the border makes the right more general in nature. Due to a prolonged use of land as part of their way of life, the Sami had established a customary right to access the land as part of their way of life, but the Sami lost the protection of access to specific land that came with the payment of tax. The effect is that the Codicil set up distinct levels of security of tenure depending on the legal basis of the right of access in the event of conflicts of rights. This difference follows from, for example, Section 16 of the Codicil:

> [The state should] ensure that relocated Lapps and their animals enjoy sufficient upkeep, only however so that the Lapp himself, whom for the land pay taxes, not by foreign Lapps are displaced or suffer any shortcomings. For that reason, should the Lapp-deputies and

[361] The Codicil, s 2. Unless otherwise stated, the Codicil is translated by the author. A complete translation of Codicil is found in Appendix A.
[362] See, e.g., Arell (1977) (n 283) 302 and Korpijaakko–Labba, (2005) (n 286) 339.

> lay assessors know the nature of the Tax land on their side, and know the number of animals, that the Lapp *äger* [owns], who pay tax for the land, so that the foreign Lapps, if necessary and required, can be allocated to suitable places.

Section 16 of the Codicil made provisions for the exceptions from the general right to access land based on customary law prescribed in Section 10.[363] Although Section 16 confirmed the state's obligation to ensure foreign Sami access to land in line with their resource needs, the regulation empowered the state to intervene in foreign Sami's customary use of a specific area in the event of a conflict of rights. Consequently, national Sami right of possession secured through the payment of tax had priority if foreign Sami use of the same area led to harm. The distinction made regarding the security of land tenure seems natural considering the aim to create clarity in rules concerning access to land so that conflicts could be avoided, especially considering that the same discussions concerning the legal value of tax payment for the right of possession also took place within Sweden.[364]

In conclusion, the Codicil confirmed the obligation of states to protect not only foreign Sami right of access to land but also national Sami right of access to land based on tax payment, with the risk of rendering this right worthless if not doing so. That Sweden has an obligation to ensure that Sami rights do not become illusory appears as an argument when Sweden later regulated the Sami right to access land internally, as shown in the following section.

The above shows how, on the Swedish side, there was an underlying motive to secure the Sami's continued access to Norway, as this would facilitate further colonisation of the inner parts of Lapland, for which a new settlement decree was issued in 1749 (Chapter 4.4). Regardless of these motives, however, the codification of Sami rights in the 1751 Codicil aimed to protect the material basis for their nomadic way of life.

In the last section of this chapter, this thesis highlights the legal developments that preceded and affected the content of Sweden's first Reindeer Grazing Act of 1886. Shortcomings in the 1751 Codicil led to a new regulation of Sami cross-border rights, a convention that in turn functioned as a template for the national legislation on Sami rights. This regulation on cross-border rights and internal land tenure reforms led to measures that affected the legal content of the act that regulates the Sami right of access to land within Sweden. The section shows that

[363] Chapter 1.6 provides a terminological explanation of what customary law means in the context of this thesis.
[364] Arell (1977) (n 283) 155f.

the contemporary legal protection of the Sami right to access land is based on historical notions of the need to protect the foundation that enables the continued existence of nomadic culture so that it does not disappear due to a lack of protection. Securing access to land to safeguard the needs of the reindeer husbandry industry thus aims to protect the material conditions of Sami culture, even though the RHA lacks a direct statement of this goal (see Chapter 5).

4.5 Towards a National Legislation of Sami Right of Access to Land – Legal Developments Influencing the Design of the 1886 Reindeer Grazing Right

At the beginning of the 19th century, with increased colonisation in the northern part of the Scandinavian peninsula, conflicts between the inhabitants and the nomadic population increased. In Sweden, for example, there were increased disputes about the damage reindeer husbandry did to land that settlers had occupied for haymaking. However, there was also an increased insight that the Sami needed stronger protection for their rights.[365] As shown below, this later led to measures to protect Sami interests through a national legislation on Sami access to land and water: a codification of historical Sami rights and freedoms based on the 1751 Codicil regulation modified by a new convention.

One of the reasons why the 1751 Codicil changed was that Norwegian colonisation had reached the northern parts of the country. Consequently, the Norwegian side argued for a need to renew the regulation of foreign Sami access to land.[366] One problem with the Codicil was that it was not sufficiently adaptable to a situation of increased settlement and increased privatisation of land. As shown below, there was a lack of clear regulation of several important aspects for the Sami, such as access to forest products and migration routes. Consequently, it was necessary to regulate rights and obligations more clearly to reduce conflicts. Such regulations came into force through a new convention in 1883. As explained further below, and as Patrik Lantto (2012) notes, the 1883 Convention constitutes the template for Sweden's first national legislation on the Sami's right to pastureland from 1886.[367]

[365] See, e.g., ibid 178–201.
[366] Governmental Bill 1871:8, *Om antagande af en författning rörande Lapparne i de förenade Konungarikena Sverige och Norge*, 16f; Utskottsutlåtande Utskottsutlåtanden 1871, *Utlåtande, i anledning af kongl. Maj:st nådiga Proposition om antagande af en författning rörande Lapparne i de förenade kongarikena Sverige och Norge*, 22f; Patrik Lantto, *Lappväsendet: tillämpningen av svensk samepolitik 1885–1971* (Umeå universitet 2012) 41.
[367] Lantto (2012) (n 366) 41f.

One of the aspects clarified by the 1883 Convention was that the Sami's right of access to land and waters included the right to forest products.[368] This was considered an inherent part of the Sami's right of access to land because they needed access to forest products for reindeer enclosures and fuel, for example.[369] Accordingly, the need for continued access to forest products fell within the Sami's right to access land and water. The 1883 Convention, however, clarified the difference between the Sami's right to forest products on private land and on land under the immediate disposition of the state. This distinction was carried over to the first Reindeer Grazing Act with the change that the Sami would have a more comprehensive right to forest products on private land.[370] This is further explained in relation to the work of the 1882 Special Committee in Section 4.5.1.

Another aspect clarified was the Sami's right to the protection of their migration routes on private land. The disputes that arose regarding migration routes concerned both the damage that farmers had done to historical migration routes and complaints that the Sami did not use them.[371] As a result, the states inserted a ban on restricting the Sami from accessing their old migration routes. Even though this ban constituted a restriction on private landowners' right of use, Sweden included the ban in the first reindeer grazing legislation on the grounds that a lack of protection of Sami migration routes would make the Sami right of access to land for summer grazing illusory, as explained in Section 4.5.1.[372]

A third aspect discussed during the negotiations of a new convention was whether to set a geographical limit for the right of foreign Sami to access land. The proposal was to limit Sami access to land useful from a cultivation perspective. Sweden rejected the proposal, amongst others, on the grounds that a general border excluding the Sami from areas that contained sufficient resources to meet the needs of both the Sami and the resident population was unwarranted.[373] This opposition is understandable considering the negative effect that an ongoing land tenure reform in Sweden - *Avvittringen* – had had on Sami access to land for winter grazing.[374]

[368] Governmental Bill 1871:8, 21–23.
[369] Ibid 21f.
[370] Utskottsutlåtande 1886:1, 31.
[371] Governmental Bill 1871:8, 23–25.
[372] Utskottsutlåtande 1886:1, 28f.
[373] Utskottsutlåtande 1871:20, 24.
[374] Parliamentary Record, Upper House, 1867, 3 vol., no. 29, 494, 508–515; Parliamentary Record, Lower House 1867 (1), 3 vol., no. 29, 1, 54f.

The aim of the land tenure reform was to allocate land and forest under the state's immediate disposition to private ownership.[375] When the reform reached the southern parts of the reindeer grazing district, it had unforeseen consequences for the Sami's ability to access land they needed to sustain their livelihood. Through the reform, the Sami lost access to the pastureland they had used for winter grazing.[376] This was because the reform did not include consideration of the Sami's historical access to land for winter grazing. Lars Rumar (2014) explains that the negative effect on Sami access to land for winter grazing was due to the states' focus on prioritising the farmer's needs and interests.[377] The farmers also represented what was perceived to be a more civilized culture, for which Sami interest in access to land needed to give way.[378]

The negative effects of the land tenure reform in the southern parts of the reindeer herding district meant that when Sweden implemented the reform in the northern parts, political voices argued for better protection of Sami right of access to land.[379] Amongst other things, it was argued that it was no longer legally possible to deprive the Sami of the rights they still had, as this would lead to the Sami being at risk of extinction.[380] This included Sami rights to use land and forest within Lapland. In addition, it was argued, the mountain area they lived in would also be deserted, since cultivation of the mountains was impossible.[381] This shows that there was not only an increased humanitarian interest in protecting the Sami but also a general interest in securing the material basis necessary for the Sami to continue subsisting in areas that otherwise had little utility value at the time.

This resulted in several measures that clarified the Sami's right of access to land in different areas of Lapland. First, the government decided to establish a provisional boundary between the mountain areas and areas suitable for cultivation: *Odlingsgränsen* (hereafter referred to as the Settlement Boundary).[382] Like historical measures, the aim was to clarify legal boundaries between Sami access to land and settlers' access to land to reduce conflicts between them. That

[375] Lars Rumar, *Historien och Härjedalsdomen: en kritisk analys* (Umeå universitet 2014) 145f.
[376] Ibid 145–151.
[377] Ibid.
[378] Ibid 147f.
[379] Sveriges_Riksdag, 'Angående bestämmande af en privisionel gräns emellan Lappmarkernas kulturland och fjällbygd [Kungörelser]' (1867); Governmental Bill 1873:4, *Angående åtgärder för betryggande af skogens framtida bestånd och bevarande af Lapparnes renbetesrätt inom Westerbottens och Norrbottens läns lappmarker*.
[380] Governmental Bill 1873:4,12f.
[381] Ibid 12.
[382] Kungörelse 1867:25 .

the Sami had right of access to land appears as a given, and the aspect clarified was the right of the Sami to access land within the mountain area. When Parliament later confirmed the border in relation to the ongoing land tenure reform, it reaffirmed that the Sami had an ancient right to use the territories and that the purpose of the boundary was to protect the Sami from further encroachment from land development.[383]

Second, when the parliament reaffirmed the Settlement Boundary as part of the ongoing land reform, it clarified that the Sami had a prescriptive easement to forest areas outside the boundary that would become privately owned due to the reform.[384] The arguments for this were, first, the immemorial right of the Sami to access and use land and forest in Lapland, which meant that the state could not give away land and forest with a greater right of disposition than that which the state had over the land.[385] Second, on humanitarian grounds, it was argued that the prohibition of Sami access to land below the border was equivalent to a death penalty or a deportation.[386] The Parliament thus confirmed that the Sami had an indisputable right to access land and forest below the Settlement Boundary. However, this right, which included the right to forest products, became limited to wintertime. [387] When Sweden later regulated Sami right of access to land, it was stressed that the term wintertime had the same connotation as in the international conventions, the Codicil, and the 1883 Convention (see Section 4.5.1.).[388]

The legal development highlighted above influenced the content of the first reindeer grazing law from 1886. It was a legal development where external regulation of the Sami's right to access land coincided with internal legal development. What emerges is an increased insight into the need to protect Sami access to land through legislation to ensure the Sami's livelihood and protect their existence. The internal processes differ from previous ones by showing more clearly that the state had an intention to protect the Sami on both legal and humanitarian grounds before the first RHA.

The next section shows how the realisation of protecting the material basis of Sami culture on legal and humanitarian grounds became increasingly important during the codification of the Sami's right to access land as part of their reindeer husbandry. The contemporary protection of

[383] Governmental Bill 1873:4, 12.
[384] Ibid 21.
[385] Ibid 12f, 21.
[386] Ibid 12f.
[387] Ibid 1f.
[388] Utskottsutlåtande 1886:1, 28f.

Sami access to land thus aims to ensure protection for a specific culture, even if there is no direct statement of this goal in the RHA. This cultursl protection is explained in the following.

4.5.1 The First Reindeer Grazing Act of 1886

The central perception of Sami access to land at the end of the 19th century was that it constituted a customary right based on the Sami's historical occupation and use of Lapland. The prevailing view was that the Sami's characteristic nomadic lifestyle meant they had a limited need for natural resources. Other land use and Sami customary land use could thus be maintained alongside modern land use. The parallel use theory explained in Section 4.3.1, is the basis of this perception. Up to the end of the 19th century, reference to the Sami's right of disposition and security of tenure existed in separate documents, such as the settlement decree mentioned in Section 4.4. The lack of a coherent regulation of Sami access to land meant that, as colonisation took control of more of the Sami original homeland, disputes over each group's access to land increased.[389] The transfer of land to private ownership was a driving factor because with the concept of ownership came a comprehensive right of disposition.

To resolve the conflict between the Sami's customary right of access to land and the landowners' access to land according to the legal concept of ownership, the Swedish Parliament established a special committee in 1882 (hereafter referred to as the 1882 Committee). The 1882 Committee became responsible for producing a legislative proposal for a uniform reindeer husbandry legislation.[390] As shown in Chapter 6, the work of the 1882 Committee remains a central aid for interpretating Sami right of access to land, since it formed the basis for the reindeer grazing act of 1886.

4.5.1.1 The Work of the 1882 Special Committee

The work of the 1882 Committee reflects its time. It is based on arguments that meet the interests of the Sami as far as possible without questioning the supremacy and legitimacy of the state in controlling land and resources in the future.[391] Securing Sami access to land and at

[389] Ibid 1.
[390] Cramér and Prawitz (1970) (n 46) 13.
[391] The French colonial policy, for example, turned during the second half of the 19th Century to the theory of Association, M B Hooker, *Legal pluralism: an introduction to colonial and neo- colonial laws* (Clarendon Press 1975) 196–197. A theory that empowers the colonial state's dual obligation to take care of the well–being of both sides from the respective sides point of view, where nevertheless the Indigenous interests remain subordinate to the interests of the state, Stephen Henry Roberts, *The history of French colonial policy, 1870–1925* (Frank Cass 1963) 71–74.

the same time not questioning the state's authority was possible by focusing on historical perceptions of Sami rights and socio-cultural aspects as a basis for protecting Sami access to land for those limited resources the state considered necessary for Sami cultural survival. At the time, the 1882 Committee's reasoning created no apparent conflict between the state's interest in controlling land and resources in the future and the Sami's interest in access to resources to make their reindeer husbandry viable.[392]

While the 1882 Committee emphasised the importance of recognising the value of nomadic culture and suggested that its value is often underestimated, it clearly stated the differences between the rights the Sami had based on customary law and those that followed from statutes.[393] In particular, it was noted that the rights the Sami had according to customary law did not contain all the rights that came with the concept of ownership in modern society.[394] This limited nature of Sami land rights applied throughout the reindeer grazing district, including the area reserved for the Sami.[395] The area reserved for the Same are located between the Settlement Boundary and the Norwegian border, as illustrated in Chapter 5.1.3.

This indicates that, although the 1882 Committee saw Sami right of access to land as a natural right, this right was at a different level than those established by modern society:

> Although the Sami right to use land and water, in areas where they have a right of access, to support themselves and their reindeer is based on their natural right to the conditions required for their existence, this right cannot be equated with ownership.[396]

The 1882 Committee does not clarify what it means by a natural right, but this classic colonial reasoning suggests that for Indigenous peoples, land has no value beyond what they need to support themselves in a binary relationship, and thus they had no *right of soil* as sovereign.[397] This is in line with a colonialist logic in relation to the land of Indigenous peoples explained by Arturo Arias (2010): 'they [the colonial states] employed a logic that assumed that all []

[392] For further explanations of the theory of association where colonized becomes parties to the state project see Roberts (1963) (n 391) 74f.
[393] Utskottsutlåtande 1886:1, 18. Chapter 1.6 provides a terminological explanation of what customary law means in the context of this thesis.
[394] Ibid 18.
[395] Ibid 31.
[396] Ibid [author's translation].
[397] Joanne Barker, 'For Whom Sovereignty Matters' in Joanne Barker (ed), *Sovereignty Matters* (University of Nebraska Press 2005), 7. See also James Tully, 'Rediscovering America – the Two treatises and aboriginal rights' in Q Skinner (ed), *An Approach to Political Philosophy – Locke in Contexts* (Cambridge University Press 1993) 155–166, and Cole Harris, 'How Did Colonialism Dispossess? Comments from an Edge of Empire' (2004) 94 Annals of the Association of American Geographers 165, 170f.

land was ultimately a state commodity.'[398] The interpretation given by the majority of the Supreme Court in the *Girjas Sami village* case (see Chapter 6) also supports the notion that the Committee's reasoning was based on the idea that a Sami ownership of traditional territories was out of the question. Instead the Sami had only the more limited right of possession – *prescriptive easements* – based on a historical land use for their livelihood.[399]

The limited Sami user rights the legislator recognised for the Sami in the late 1880s included a right to historical migration routes on private land and the right to take forest resources on private land.[400] The Sami's right to access land and waters for different purposes thus fell under the notion of an excising right of possession, which is older than the right of possession the state claimed over the area.[401] Hence, as mentioned, the state could not transfer land to private ownership with greater disposition rights than those it had held itself.[402] Consequently, Sami right of access to land did not cease to exist because the land the Sami had historically occupied and used fell under private ownership.[403] Instead, the allocated land had the burden of a prescriptive easement.[404] This indicates that the natural right mentioned by the Committee is a right created naturally through the Sami's nomadic way of life and not established by positive law. It is a right that has arisen as part of the Sami's life pattern and their historical use of land and waters for survival. This historical use provides the Sami with a natural right to the conditions needed to maintain this way of life. As the Committee also stated, should the nomadic lifestyle cease, it should not be due to a lack of legal protection.[405]

What the necessary conditions for Sami existence were remains undefined; instead, the 1882 Committee explained that the scope is dependent on 'the conditions required for reindeer husbandry.'[406] Consequently, the extent of the right of access to land may vary depending on natural conditions, as Chapter 5.2 illustrates. In this way, the Committee clearly linked the protection of the Sami's characteristic way of life to the conditions for reindeer husbandry. It was thus by securing the material basis of the Sami lifestyle at the time that Sweden could

[398] Arias (2010) (n 328) 209.
[399] Utskottsutlåtande 1886:1 18.
[400] Ibid 29; Governmental Bill 1885 2, *Förslag till lag angående de svenska Lapparnes rätt till renbete i Sverige och till lag angående renmärken*, 6.
[401] Utskottsutlåtande 1886:1, 19.
[402] Ibid 19, 28.
[403] Ibid 28, 34.
[404] Ibid 29; Governmental Bill 1885:2, 6.
[405] Utskottsutlåtande 1886:1, 18.
[406] Ibid 31 [author's translation].

ensure that way of life would not cease to exist due to a lack of legal protection. The parallel land use theory hovers in the background with its prevailing view that the Sami can only come into their own if they continue to live a traditional nomadic life. As the Committee held, the Sami would be worse off if they abandoned their traditional lifestyle. [407]

Although it may be considered prejudiced from a modern point of view that the nomadic Sami lifestyle must be protected because the Sami who lived in this environment would have difficulty adapting to another lifestyle, this argument was based on a perception that the culture required legal protection. [408] In addition to the arguments that the Sami had established rights, as mentioned, the Committee argued that if their nomadic culture were to disappear, this should not be a result of the law but should come naturally.[409] The work of the 1882 Committee was thus based on providing the Sami with cultural protection by securing the necessary material basis.

In conclusion, regardless of the colonial approach, the 1882 Committee's work shows that the historical focus on facilitating the colonisation of Lapland turned in favour of the Sami, as there was a growing realisation amongst Swedish politicians that for the Sami's culture to survive, they needed stronger protection for their remaining right of access to land and water. As Chapter 6 shows, however, there were shortcomings in the codification of Sami access to land that since have led to lengthy legal proceedings. These proceedings raise the question of whether Swedish legal protection at the time truly ensured protection of the Sami's culture in relation to their ancestral land, as by the late 1880s, the first reindeer grazing law regulated Sami access to land throughout the reindeer husbandry district.[410]

4.6 Concluding Remarks

Sweden's colonial heritage described in this chapter has in various ways contributed to the legal regulation of Sami rights and freedoms being based on a historical political-economic view of what the Sami need to preserve a cultural way of life. It is possible to identity several examples where Sweden early on accepted the Sami's right of access to land as a natural right of their cultural way of life. Even though the specific content of this right varied over time

[407] Ibid 33.
[408] Ibid 36.
[409] Ibid 16.
[410] As Patrik Lantto explains, the entry into force took place gradually due to the state having to ensure Sami access to land in the southern part of the reindeer grazing district, Lantto (2012) (n 366) 41.

depending on the development of political and economic life on the Scandinavian peninsula, the protection of Sami cultural lifestyle has always part of Sweden's internal policy. The policy includes protecting the factual foundation for Sami existence – access to their ancestral land and waters for subsistence needs. Focus on the protection of access to land for subsistence needs by securing the material basis for Sami culture has, however, meant that the cultural foundation on which Swedish legislation is based has not been given a prominent position in the legislation. The Reindeer Grazing Act of 1886 was subsequently amended in 1989, 1928, and 1971.[411] At present, the Sami regulate access to land through the 1971 RHA. This legislation is currently under review, and the Swedish government appointed a committee for the purpose in the spring of 2021.[412]

In the next chapter, this thesis provides a brief overview of the statutory protection of Sami right of access to land, focusing on the two most important legislations – the 1971 RHA and the Environmental Code – with the aim of providing insight into the contemporary regulation of the Sami's right to access land and waters and the authorities' ability to control this right. The chapter thus does not provide an exhaustive description of the statutory protection provided by the laws. The focus is on relevant parts of the protection in the context of this thesis. The chapter thus lays a foundation for Chapter 6, which analyses how the higher courts in the Swedish judiciary have handled the issue of Sami access to land and water. As shown, the Swedish government retains its right to regulate access to ancestral Sami land and waters, and the Sami's right of access to their ancestral land and waters continues to be assessed in relation to the utilitarian interest determined by the Swedish Government.

[411] Cramér and Prawitz (1970) (n 46) 13–20.
[412] En ny renskötsellagstiftning (Dir 2021:35) (n 7).

Chapter 5 Contemporary Statutory Protection of the Sami's Right of Access to Land

> *A person of Sami descent (Sami) may according to the provisions of this Act use land and waters for maintenance for himself and his reindeer.*
>
> *The right according to the first paragraph (the reindeer husbandry right) belongs to the Sami population and is based on immemorial prescription.*
>
> *The reindeer husbandry right may be exercised by those who are members of Sami villages.*[413]

The previous chapter has shown how the Swedish state gradually asserted sovereignty over the Sami homeland and how the Nordic countries in 1751 finally divided this homeland among themselves. However, during this process, which lasted several hundred years, Sweden acknowledged the fact that a different ethnic group populated the northern parts of the Scandinavian peninsula. To protect the rights and freedoms of this population, the Swedish state came up with a theory enabling the state to claim sovereignty over land and natural resources while protected rights and freedoms linked to certain areas and resources that the state had deemed necessary for the survival of a way of life that differed from a more settled lifestyle. As explained further below, legal protection came to focus on securing the material basis for the reindeer herding group of the Sami population.[414]

Following the historical background to the legal protection Sweden developed, where Sami access to land and waters is protected while the state retains its sovereign right to further restrict Sami access to land for general interests perused by the state, this thesis sheds light on how the Swedish Court handles Sami protection in a contemporary legal context in Chapter 6. As a background to that chapter, the current chapter provides a brief explanation of the statutory protection provided by the RHA from 1971, which is based on the 1886 law discussed in Section 4.5.1; and the Environmental Act, which regulates the use of resources by balancing various interests. The first section (5.1) provides a general overview of the RHA in the context of this thesis. The following section (5.2) then provides a review of the legal basis for the Swedish government to control the Sami's right to access land and water. That section provides an insight into the rules of the Environmental Code related to the reindeer husbandry industry.

[413] RHA, s 1 [author's translation].
[414] Mauritz Bäärnhielm, 'Sameland och samerätt – ett aktuellt minoritetsproblem i rättshistorisk belysning' in Kjell Å Modéer (ed), *Rättshistoriska studier tillägnade Gösta Hasselberg vid hans avgång från ämbetet den 30 juni 1976*, vol 5 (Institutet för rättshistorisk forskning 1977) 65.

5.1 Central Features of the 1971 Reindeer Husbandry Act

Sami access to land and waters is regulated first and foremost by the RHA of 1971. As shown in the previous chapter, the law is based on the regulation of Sami cross-border rights, which are ultimately based on the 1751 Codicil. The purpose of the RHA is to ensure the Sami's rights and freedoms linked to land and waters so their nomadic cultural lifestyle does not disappear due to a lack of legislation, an objective expressly stated in the drafting of the first national regulation (see Chapter 4.5.1.1). The goal of the RHA is thus to ensure a specific cultural lifestyle linked an ethnic way of life. This goal is outlined in first section of the RHA, which states that the reindeer husbandry right belongs to the Sami population (see introduction to this chapter). Based on this, the reindeer husbandry right has a collective ethnic dimension.

The first section also expresses that the Sami reindeer husbandry right is based on the principle of immemorial prescription.[415] Following the Supreme Court's ruling in the *Taxed Mountains* case (*Skattefjällsmålet*) (Chapter 6.1.1), the principle was inserted into the RHA in 1983 (Chapter 6.1.2) In the subsequent *Nordmaling* Case (*Nordmalingemålet*) (Chapters 6.1.3), it was explained that the statement that reindeer husbandry right rests on the principle of immemorial prescription should be understood as an affirmation of the historical basis for Sami right of access to land and waters and not as the legal basis. That is, as explained in the previous chapter, the rights of the Sami do not rest on statutes or statutory principles. In its subsequent judgment in the *Girjas Sami village* case (Chapter 6.1.4), however, the Supreme Court clarified that the principle of immemorial prescription is the underlying statutory principle against which Sami rights and freedoms should be assessed.

As explained in the next chapter, the ambiguities surrounding the basis, and applicable legal principles, for Sami rights to traditional territories has led to external conflicts over the nature and scope of the Sami's right to winter grazing (Chapters 6.1.3). The Sami collective is also internally divided as to who has rights according to the RHA. Even though the reindeer husbandry right belongs to the Sami population, the collective dimension of the right is complicated because it does not, per se, give individual Sami a right to access the rights and freedoms of the RHA (see section 5.1.1.2). That individual Sami lack a secured access to the rights in the RHA follows from the structure of the first section of RNA which can be explained

[415] RHA, s 1 [author's translation].

by using Boelens and Zwarteveen (2002) distinction between *reference rights*, *activated rights* and *materialised rights*.[416]

According to Boelens and Zwarteveen, a reference right is a formally recognised right which specifies, for example, who the right holder is and what he or she is entitled to. According to the first paragraph of the first section of the RNL, the right holder is a person of Sami descent and he, or she, is intitled to use land and waters for maintenance for himself and his reindeer. However, the third paragraph of the first section contains prescribes the activate right by outlining the underlying process through which the reference right in the first paragraph becomes an activated right. The activation process is the granting process of membership in a Sami village, and it is the result of this process that transforms the reference right into an activated right. The activated right then gives a secured access to the materialised rights secured in the RHA, such as hunting and fishing. This legal division of Sami who are members of a Sami village and those who lack membership has, as emphasised in Chapter 1, led to a division of the Sami population as it controls who have legally protected access to traditional Sami territories. This division, and the rights of non-village members are today up for discussion in the revision of the RHA, which is a consequence of the Supreme Court's decision in *Girjas Sami village* (Chapter 6.1.4).

5.1.1 The Private Law Nature of the Reindeer Husbandry Right

5.1.1.1 The Sami Village and its Control Over Access to its Village Area

A Sami village is an economic association that controls a certain geographical area: a village area for the purpose of reindeer husbandry.[417] The extent of the village areas rest on historical grounds but may be determined by the Sami Parliament as part of its exercise of authority and are thus subject to authoritative changes.[418] As explained in Chapter 6.1.1.3, the Sami Parliament is a hybrid between a governmental body and a Sami collective assembly.

There are currently 51 Sami villages in Sweden.[419] Thirty-three of these are mountain Sami villages, where the performance of reindeer husbandry requires migration over larger areas.

[416] Rutgerd Boelens and Margreet Zwarteveen, 'Gender dimensions of water control in Andean irrigation' in Rutgerd Boelens and Paul Hoogendam (eds), *Water rights and empowerment* (Koninklijke Van Gorcum 2002), 80f.
[417] RHA ss 6, 10.
[418] Ibid s 7.
[419] Anna Skielta, 'Karta över samebyarna i Sverige' (*Sametinget*, 2021) <http://www.samer.se/4331> accessed 9 Augusti 2021.

Ten are so-called forest Sami villages, where the reindeer husbandry is more stationary in nature. In addition, there are eight so-called concession Sami villages, where a non-Sami reindeer owner can conduct reindeer husbandry with a special permit held by a Sami.[420]

The sole task of a Sami village is to administer and organise reindeer husbandry within the village area.[421] For this purpose, it has some control over the right of access to land and waters within the village area. It is, for example, the village that primarily has the right to grant or reject membership applications.[422]As part of its exercise of authority, however, the Sami Parliament may grant an application if there is a special reason for this.[423] In addition, a Sami village may limit the number of reindeer a member can have and close access to certain areas for hunting and fishing purposes if needed to protect these resources.[424]

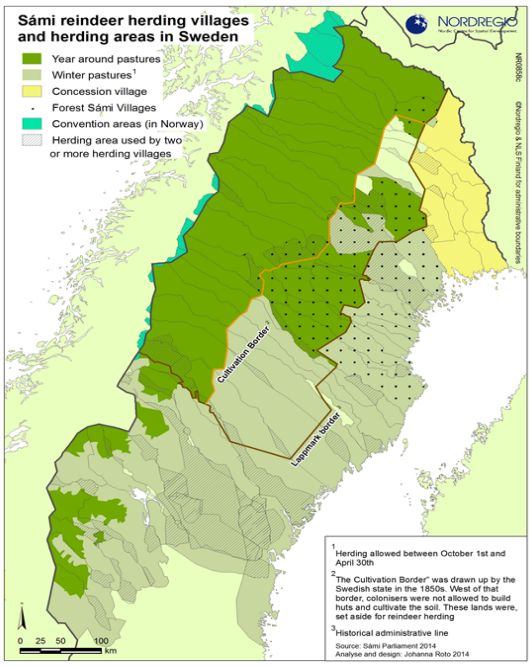

Fig. 1. Sami reindeer herding villages and herding areas in Sweden.

A right whose scope is currently unclear is the Sami villages' right to grant access to the village areas for hunting and fishing.[425] According to the provisions of the RHA, a Sami village may only grant access for these purposes to former members. The mandate of granting hunting and fishing licenses lies with the Swedish government but is delegated to the county administrative boards.[426] Following the Supreme Court's ruling in the *Girjas Sami village* case, which established that the right of disposition for hunting and fishing within the village's year-round land is held by the village, it is unclear how the provisions of the RHA should be interpreted in relation to other Sami villages. How the rules in the RNA should apply to other Sami villages

[420] Sametinget (2020) (n 50).
[421] RHA, s 9.
[422] Ibid s 12.
[423] Ibid.
[424] Ibid s 35.
[425] Ibid s 31.
[426] Ibid s 33.

is one of the things the appointed committee for reviewing the RHA will look at.[427] Chapter 6.1.4 provides a detailed analysis of the *Girjas Sami village* case.

5.1.1.2 Access to Private Law Rights Through Membership

The state regulation of Sami access to traditional territories results, as described above, in that the RHA secures private law rights only for a part of the Sami population, namely those who are members of a Sami village and participate in reindeer husbandry.[428] The maintenance of these rights requires active participation in reindeer husbandry and that the member has no other occupation as their main source of income.[429] As a result of the general revision of the RHA mentioned above and explained in Chapter 6.1.4, these criteria are also up for review.

Granted a membership in a Sami village, and fulfilling the criteria, a member has a secured access to the material rights included in the *reindeer husbandry right*, which is a generic term for several rights: so-called reindeer herding rights. As explained in the previous chapter, the reindeer husbandry right is not a static right but has been (re)defined and explained over time. The majority of the rights included are clearly linked to the practice of reindeer husbandry, such as the right to build structures necessary for the performance of reindeer herding,[430] the right to timber needed for these constructions,[431] and the right of way (migration routes).[432] Practice has shown that the listed rights are not exhaustive. There may be customs that mean that customary law, and consequently legal right, have been established. One example is the right to collect lichen, which is used for feeding reindeer.[433]

Whether certain activities fall within the scope of the reindeer husbandry right depends on if the activity is considered as a natural part of traditional Sami subsistence, primarily linked to herding reindeer and is needed for its continued practice.[434] Under this condition, an unlisted activity may fall within the framework of the Sami's right to access land and waters as part of their reindeer husbandry right. In addition to the rights that are linked directly to the practice of reindeer husbandry, members of Sami villages also have access to land and waters for

[427] En ny renskötsellagstiftning (Dir 2021:35) (n 7).
[428] RHA s 11(1).
[429] Ibid s 11(2).
[430] Ibid s 16.
[431] Ibid s 17.
[432] Ibid s 23.
[433] Eivind Torp, 'Betydelsen av samiska traditioner i svensk rätt' (2011) 2/2011 Arctic Review on Law and Politics 77, 96–98.
[434] Ibid.

hunting and fishing purposes[435] and to collect wood, timber, and other forest products for handicraft.[436]

The access to land a Sami individual obtains through membership in a Sami village for the performance of certain activities has geographical and temporal restrictions. The historical background to these limitations is explained in the previous chapter and can be divided into year-round lands, reserved areas, and winter pasture lands inside and outside Lapland.[437] As the term suggests, year-round land is areas the Sami have continuous access to all year round. The majority of such land lies within the Lapland Border, and for mountain Sami, the concentration of the land lies above the Settlement Boundary. These boundaries are explained in Chapter 4.5. The year-round land of the forest Sami lies between the Lapland Border and the Settlement Boundary. Outside Lapland, in the counties of Jämtland and Dalarna, most year-round land is located in the mountain areas along the Norwegian border, the so-called reindeer herding mountains.

Winter pasturelands are areas the Sami have a general access to between October and April.[438] Within Lapland, above the Lapland Border, there is a general right to winter grazing. Outside Lapland, the right to winter grazing depends on historical use: customary law. As Chapter 4.4 explains, this places the burden of proof on the Sami. Given the Sami's oral tradition and their nomadic way of life that leaves few traces in nature, the Sami have found it difficult to cope with the burden of proof. The problems linked to the burden of proof has resulted in court rulings that have established the lack of a right of access to land for winter grazing purposes for certain southern Sami villages.[439] How the Supreme Court has addressed this issue is illustrated in Chapter 6.

The requirement for connection to a Sami village, as explained above, also means that an individual's right is limited to the area a Sami village has access to for reindeer husbandry and is in accordance with the village's decision concerning access to land.[440] A Sami village's control over its village area thus affects the individual rights of its members.

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[435] RHA, s 25.
[436] Ibid ss 17–18.
[437] Ibid s 3.
[438] Ibid ss 3–4. The county administrative bords may grant access outside this period if weather conditions require.
[439] *District Court of Sveg's ruling, 1996–02–21, T 88–90, T 70–-91, T 85–95 (Härjedalen Sami Village)* Östersund DC; *District Court of Öresund's ruling, 2005-08-08, T 977-04 (Rätan Sami village)* Öresund DC.
[440] RHA, s 35.

5.2 The Government's Ability to Revoke and Control Sami Access to Land

Though Sami legal protection has been strengthened through legal cases like *Taxed Mountains* and *Girjas Sami village,* analysed in Chapter 6, the Swedish government retains an extensive mandate to control Sami access to their traditional territories. The RHA provides the statutory basis for the government's mandate to deprive the Sami of their rights linked to traditional territories if it deems it more socially advantageous to give others access to the area for purposes specified in the Expropriation Act.[441] In addition, the government retains the right to control Sami access to land and waters for resource extraction.[442] The mandate is not unlimited; it is limited by, for example, the nature of the land and its value for reindeer husbandry. That different type of land has different legal relevance does not follow from the RHA but from the 1999 Environmental Code.[443]

The relationship between the RHA and the Environmental Code can generally be explained by the fact that the legal protection the RHA provides has a general nature, while the Environmental Code regulates the protection of Sami rights and freedoms in relation to the use of resources in detail, extraction of resources included.[444] The approach taken by the Environmental Code is that protecting Sami right of access to land and waters is ensured through detailed regulation, where the value of the area for the reindeer industry is determined in advance:

> [It is] of the utmost importance to consider the functional connections that must exist between different sub-areas for reindeer husbandry to be possible and for the continued existence of Sami culture to be guaranteed.[445]

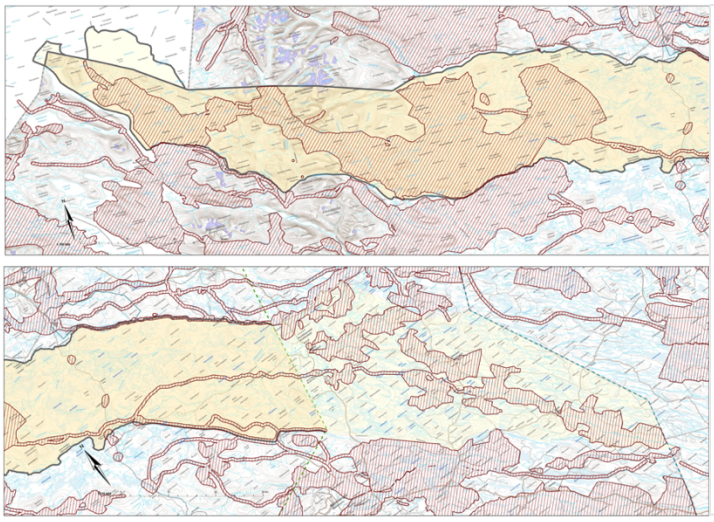
To protect Sami culture by ensuring the protection of the reindeer husbandry industry, areas of exceptional value for reindeer husbandry are labelled as national interests.[446] This is based on information from the Sami Parliament:[447]

> Land and water areas that are important for reindeer husbandry, commercial fishing or aquaculture shall, to the extent possible, be protected against measures that may significantly interfere with the operation of these industries.

[441] Ibid s 26.
[442] Ibid ss 32–33.
[443] For an review of the Environmental Code, see, e.g., Gabriel Michanek and Charlotta Zetterberg, *Den svenska miljörätten* (Iustus 2008).
[444] Governmental Bill 1985:3, *Förslag till lag om hushållning med naturresurser m.m*, 57.
[445] Ibid 57f [author's translation].
[446] The term reindeer husbandry industry covers only the socio–economic side of reindeer herding. Chapter 1.6 provides a terminological explanation of term related to reindeer herding.
[447] Förordning om hushållning med mark- och vattenområden) (SE), s 2.

> Areas that are of national interest for the purposes of reindeer husbandry or commercial fishing shall be protected against measures referred to in the first paragraph.[448]

The legal text points to a division between the protection value of different areas used for reindeer husbandry, which increases the complexity of Sami legal protection for the access to land and waters necessary to ensure the continued practice of reindeer husbandry (see the illustration below for an outline of areas of national interest within the Girjas Sami village area).



The map provides an overview of national interests for reindeer-herding in the Girjas village area. The Girjas village area consists of the yellow area that extends from the patch border in the east (the blue dotted line in the lower image) into Norway in the west. The dark yellow area represents the village year-round land, which extends from the Border for Settlement that cuts through the village area (the green dotted line in the lower image). The red-striped areas are of national interest for reindeer husbandry.

Map 1 Areas of national interest for reindeer-herding in Girjas Sami Village Area

Eivind Torps (2014) argues that it is problematic to provide diverse levels of protection for areas of importance to reindeer husbandry and areas of national interest for the purposes of reindeer husbandry.[449] He argues that areas not considered of national interest for reindeer husbandry bear lower legal weight for Sami protection of access to land and waters, as these areas should only be protected as far as possible. The effect, he argues, is that if there are no reasonable alternatives – either in practical terms or when alternatives become too expensive – access to the same land and waters the Sami have a right of access to can be granted even if this significantly disrupts reindeer husbandry operations in reality.[450] This line of reasoning would mean that the Sami cultural protection could be violated if it is too impractical or too expensive to maintain the protection.

[448] Swedish Environmental Code (SFS 1998:808) (Miljöbalken), c 3, s 5.
[449] Eivind Torp, 'Det rättsliga skydded av Samisk renskötsel' (2014) 2 Svensk juristtidning (Online) 122, 132.
[450] Ibid 131f.

Although the fundamental principle of protecting areas of national interest for reindeer husbandry is based on the notion of ensuring access to land and waters the Sami need to maintain the conditions necessary for reindeer husbandry,[451] the problem, as Trop notes, is that this protection is also weighed against a general interest determined by the state:[452]

> When choosing between conserving natural resources or using them, a socio-economic assessment should in principle be made of which measure is preferable. The socio-economic valuation must be made e.g., based on the objectives of economic policy. This means that the effects on employment and economic growth must be given significant importance. A long-term expansion of production, investments and employment must be secured.[453]

Accordingly, the Sami historical rights to traditional territories continues to be exposed to competition from other land use. As has been the case historically, the current government retains control over ancestral Sami land and waters with the power to give others access to it if it considers this beneficial from a general socio-economic perspective. Consequently, the government retains its right to control or extinguish Sami access to traditional territories for reindeer herding if there are overriding utilitarian interests that are incompatible with reindeer husbandry, such as to protect areas important for resource extraction[454] or energy production.[455] This thesis returns to the Environmental Code in the general discussion in Chapter 6.2 on how Swedish courts view Sami protection under the Environmental Code.

5.3 Concluding Remarks

From the above, it can be concluded that the RHA is a continuation of a historical approach that provides limited protection for Sami interests in accessing traditional territories, and its resources, while the government retains control over access to these territories from a resource point of view. Although the protection of Sami rights linked to traditional territories has been strengthened through other legislation, such as the Environmental Code, Sami interest in access to land and waters continues to be weighed against other interests, both specific stakeholder interests and general ones. There is thus a continued balancing of the historical rights and freedoms of the Sami and the general economic interest pursued by the state (Chapter 7 problematizes this balance of interests in relation to the legal protection of the European

[451] Governmental Bill 1985/86:3, 160f.
[452] Torp (2014) 130–133.
[453] Governmental Bill 1985/86:3, 152 [author's translation].
[454] Swedish Environmental Code (SFS 1998:808) (Miljöbalken), c 3, s 7.
[455] Ibid c 3, s 8.

Convention). A problem with contemporary Swedish legislation that is highlighted in previous chapters is that there is no clear connection between the Sami's rights and freedoms linked to traditional territory and their cultural rights to those territories as an Indigenous people. The legislation that this chapter highlights also shows a lack of an obligation to respect the cultural dimension of the Sami rights and freedoms linked to traditional territory. Thereby, this chapter concludes the framework started by previous chapters on the legal and historical basis for the Sami right to cultural protection.

The framework set together with previous chapters, shows both the basis for the obligation to respect the Sami's Indigenous rights to their traditional territory and how Swedish legislation only partially secure this respect. Partly, because of the focus on the economic side of reindeer husbandry as the basis for the Sami's continued access to their traditional territory, and the failure to secure a constitutional right to cultural protection. This thesis will in the two remaining chapters address the legal significance of this framework in relation to domestic, and European Convention case law. Chapter 6 focuses on how domestic courts have handled disputes concerning Sami land use and highlight the difference that exist between courts' assessment of Sami protection in relation to the RHA and the Environmental Code. This chapter explains, for example, that while Sami protection under the Environmental Code remains technical, a new approach has emerged with regards to Sami protection under RNL based on their Indigenous status. Chapter 7 then follows with an analysis of case law from the Strasbourg Court, explaining how cultural protection fits within the framework of the European Convention.

Chapter 6 The Protection of Sami Access to Land in Legal Proceedings

With an increased interest in natural resources from Sweden, pressure is increasing on the government to provide access to land, water, and resources the Sami have traditionally occupied and used, including the area reserved for Sami exclusive use located on Crown land. This increase interest has led to several legal disputes between the Sami and the authorities, as an increased presence in the areas the Sami use for reindeer husbandry affects their ability to continue to carry out viable reindeer husbandry.

One problem in relation to the Swedish judiciary and the protection of the Sami's right to land and waters is the division of private law and public law rules in the RHA. Christina Allard (2015) argues that this is problematic in connection with the dual structure of the Swedish judiciary, which rests on two pillars.[456] The first pillar is the *ordinary courts*, dealing with criminal cases and private law disputes; this includes special courts, such as land and environmental courts that handle cases related to the Environmental Code. The second pillar is the *administrative courts*, which oversee the government and handle disputes between private individuals and authorities. Even though both systems can apply human rights norm, this division, Allard argues, creates legal obstacles for effective protection of the Sami's right of access to land and waters from a contemporary legal system with overriding human rights norms, [457] since administrative courts lack the mandate to rule on private law issues, and vice versa. For example, in a process concerning an authority's decision to grant a permit for construction in an area the Sami claim ownership of, the case cannot be examined from this perspective, since disputes over who owns the land are matters of private law.[458] Similarly, administrative courts cannot rule in disputes concerning a governmental decision of compensation granted due to a violation of the RHA, as this is considered a private law dispute between the landowner and the reindeer herders, regardless of whether the landowner is the state.[459] The same problem does not arise in Norway, where the judiciary rests on, in principle, one pillar. [460]

The chapter begins by analysing how the Swedish Supreme Court has handled Sami cases and the value attributed to Sami culture and their status as Indigenous peoples (Section 6.1). This

[456] Allard (2015) (n 303) 286f.
[457] Ibid 286.
[458] *RÅ 1999:234* SSAC.
[459] *RÅ 2010:121* SSAC.
[460] Allard (2015) (n 303) 286.

section contains an explanation of the amendment to the RHA that followed the Supreme Court's ruling in the *Taxed Mountains* case. The purpose of dealing with this amendment in this chapter is that understanding this change is essential to understanding the position of the Supreme Court in subsequent cases. The subsequent section then provides a general discussion on how courts have handled Sami cases in relation to the Environmental Code (Section 6.2). While the chapter shows an increased focus on the Sami's status as an Indigenous people in the Supreme Court, this aspect is less relevant in relation to the Environmental Code. As shown, this is linked to the Court's focus on technical matters.

6.1 The Supreme Court's Position on Sami Legal Protection under the Reindeer Husbandry Act

6.1.1 The Taxed Mountains Case and the Principle of Immemorial Prescription (1966–1981)

The *Taxed Mountains* case (TMC) is one of the largest cases ever considered by the Swedish Supreme Court.[461] It began in 1966 through a lawsuit in which several Sami villages in the southern parts of the reindeer grazing district applied for a better right to their year-round land – the reindeer grazing mountains – in northern Jämtland County.[462] The Sami unsuccessfully substantiated their claim of owning their year-round land at the time the first Reindeer Grazing Act came into effect in the late 1880s.[463] The Supreme Court's reasoned and principled statements, however, came to influence legal developments: the confirmation that Sami access to land constituted a special kind of right of use originally based on immemorial prescription, for example.[464] This influenced the government to propose inserting a specific reference to the Sami's right to herd within the property protection provision in the Swedish Constitution when it was amended in 1994 to incorporate the European Convention.[465] The Sami's constitutional protection for their access to land and the division between cultural and property protection is discussed in Chapter 3.

6.1.1.1 Key Arguments

To support their claim to ownership, the Sami argued that they were the original inhabitants of the mountain areas, and based on the principles of occupation and specification, they had

[461] SOU 1989:41, *Samerätt och Sameting*, 251; Bertil Bengtsson, 'Samernas rätt och statens rätt' (1994) 5 Svenska juristtidning (online) 525, 525.
[462] *Taxed Mountains (SSC)* (n 198) 9.
[463] Ibid 227–230, 249.
[464] Ibid 233f.
[465] Governmental Bill 1993/94:117, 19–22.

established a right of ownership before others began accessing the land to use its resources.[466] The later competition over access to land and use of its resources had not resulted in the cessation of their ownership. In addition, the continuous use of land has made it possible to invoke the principle of prescription linked with time immemorial (immemorial prescription).[467] Consequently, they first argued for ownership of an ordinary kind; then, as a second ground, they argued for ownership of a special kind. [468] The special ownership constituted a tenure right in all respects with the absence of the alienation right.[469] If the Court did not confirm a right of ownership, the Sami requested in the third place that the Court declare they had civil-law rights, in addition to the RHA, within their year-round land, including the right to reindeer grazing, hunting and fishing, forest products, minerals, and land ownership in mines.[470]

In support of their claim, the Sami relied on several historical documents, such as the Royal Decree of 1543, dealt with in Chapter 4.2; the 1751 Codicil on Sami transboundary rights, dealt with in Chapter 4.4.2; and the preparatory work for the first Reindeer Grazing Act of 1886, dealt with in Chapter 4.5.[471] One argument put forward based on these historical documents was that the prohibition in the RHA for the Sami to control hunting and fishing within their year-round markets is contrary to the constitutional rules on non-discrimination.[472] This is a legal issue that the Supreme Court would later deal with in the *Girjas Sami village* case (Section 6.1.4).

The government's response to the Sami's claim for ownership of the mountain areas was that they neither met the requirements for occupation nor specification.[473] The area was too undefined for the principle of occupation to apply, and they had not cultivated the area, thereby giving it the added value required for specification.[474] Furthermore, the government emphasised that, regardless of whether the Sami had owned the area in the late 17th century, they had by the end of the 18th Century de jure and de facto waived their ownership by not

[466] *Taxed Mountains (SSC)*, 9f, 143–151, 170.
[467] Ibid 9f, 170.
[468] Ibid 9.
[469] Alienation right is the right to dispose of land.
[470] The resources claimed was: reindeer pasture, hunting, fishing, pasture other than reindeer pasture, mowing, cultivation, gravel, other quarry, forestry (alternative non–exclusive right), migration routes, mineral, land ownership share in mining and hydropower, *Taxed Mountains (SSC)*, 10, 166f.
[471] Ibid 170–172.
[472] Ibid 173.
[473] Ibid.
[474] Ibid 153; 173.

asserting this right of ownership and allowing the state to dispose of the area.[475] In addition, the government claimed that the Supreme Court had no legal basis to be able to affirm a special right of ownership.[476]

The government acknowledges that the Sami's rights are limited to those codified in the 1886 Reindeer Grazing Act, and beyond this the Sami lack rights on other grounds, such as occupation and immemorial prescription.[477] In addition, the government rejected evidence of conditions in other parts of the reindeer grazing district because the conditions in the mountains in Jämtland County differed from those that prevailed further north in Sweden.[478] The Supreme Court would also emphasise this, which turned out to be important for their assessment in the *Girjas Sami village* case (Section 6.1.4).

6.1.1.2 Analysis of the Court's Judgement

Before considering the facts of the case, the Court addressed various aspects of the arguments put forward. First, the Court emphasised the importance of the report of the 1882 Special Committee on which the 1886 Reindeer Grazing Act was based. The report, dealt with in Chapter 4.5, continues to be an important source of law for the assessment of Sami rights and freedoms under the RHA, since it is considered to represent a general view of the legal situation at the time of the first codification of Sami law of access to land.[479]

Second, the Court rejected the government's claim that the Sami, due to passivity, had accepted the state's view of Sami rights or given up any rights.[480] For example, the Court emphasised the historical significance of the Sami constituting a minority with little ability to influence legal developments.

Finally, the Court emphasised the problematic nature of relying on written documents in Sami cases and on the burden of proof.[481] This is partly because the Sami have had an oral tradition, and there are thus few written Sami sources describing the legal relationship between the Sami and their original homeland; it is also partly due to the risk that representatives of the state in

[475] Ibid 174f.
[476] Ibid 173f.
[477] Ibid 22, 153.
[478] Ibid 175.
[479] Ibid 179.
[480] Ibid 182.
[481] Ibid.

unclear legal situations often interpret these in favour of state interests. [482] Despite the difficulties that arose due to the lack of written evidence, the Court chose to apply a standardised burden of proof and assessment of evidence. As shown in subsequent case analyses in the following section, the Court has since adjusted the burden of proof.

Turning to the Sami claim of ownership of the mountain areas, the Court first addressed the issue of specification (*speficiatio*) and whether the Sami had a stronger right to the area due to their historic use. Here, the Court upheld the government's position that Sami land use did not meet the requirement of cultivation required to establish a stronger right.[483] With regard to the acquisition of ownership of land based on occupation (*occupation*), the Court first emphasised the lack of clear rules on the requisites for this principle and that the requirement to be able to assert rights under the principle of immemorial prescription should be guiding.[484] The principle of immemorial prescription is a historical statutory principle previously applied to cultivated areas in southern Sweden that were abandoned by their user and to which a person could claim a right of possession, including ownership, based on prolonged use.[485] To assert an established right based on immemorial prescription, the use must not, for example, have been hindered or questioned.[486] In addition, it should be possible to determine the area by boundaries that are either drawn or defined by natural features, such as mountain areas.[487] The qualification period is two generations: 90 years. [488]

In its assessment of extensive historical material, the Court found that the evidence was not sufficient to establish that the Sami had ownership of the area, either in the ordinary or in the particular sense, but instead found evidence of state ownership of the mountains.[489] One of the aspects highlighted, and which is central to the Court's assessment in *Girjas Sami village*, is that the Sami have been exposed to competitive land use by settlers.[490] In addition, the Court found that the state had made property rights claims in the area. At the time of the codification

[482] Ibid 179–182.
[483] Ibid 185.
[484] Ibid.
[485] Christina Olsen Lundh, 'Tvenne gånger tvenne ruttna gärdesgårdar – Om urminnes hävd och vattenkraft' (2013) 2 Nordic Environmental Law Journal 85, 85–93; Östen Undén, *Svensk sakrätt. II, Fast egendom* (Gleerup 1951) 125f, 141.
[486] Lundh (2013) (n 485) 87.
[487] Undén (1951) (n 485) 143–145.
[488] Ibid 143. See also SOU 2006:14, *Samernas Sedvanemarker*, ch 10.4.
[489] *Taxed Mountains (SSC)* 228–230.
[490] Ibid 229.

of the Sami's rights and freedoms to land and waters in 1886, the evidence showed that the state was the owner of the mountain areas.[491]

Even though the evidence presented by the Sami was found insufficient to prove Sami ownership of the mountain areas, the Court found that the Sami had strong legal protection for their right of access to land and water.[492] This right, the Court added, was a special type of right of use codified by the 1886 Reindeer Grazing Act.[493] This was, as explained in Chapter 4.5, based on the perception of the government and the legislators that there was a need to secure the cultural interests of the Sami by securing the viability of the reindeer husbandry.[494]

Apart from reference to the preparatory work on the importance of reindeer husbandry for Sami culture, the cultural dimension of the Sami's connection to their original homeland had little relevance in the Court's assessment. An effect of the strong link between reindeer husbandry and Sami culture is, however, according to the Court, that it is difficult to compare the Sami situation with other situations. The Court emphasises this in its assessment of the rules laid down by the RHA that prohibit Sami villages and their individual members from granting access to land and waters for hunting and fishing purposes. Chapter 6.1.4 explains these rules in detail in relation to the *Girjas Sami village* case, but during the codification of Sami rights and freedoms in 1886, the legislators had a preconceived notion that the Sami lacked the ability to handle leases to the rights included in the reindeer husbandry right and thus introduced a general ban on such leases in the 1886 Reindeer Grazing Act.

In the *Taxed Mountains* case, the Court held that the special regulation that took place in 1886 put the Sami in such a special situation that it cannot be compared, either directly or indirectly, with other situations.[495] Consequently, it is hard to comparable the situation of the Sami with another. The Court added that in the codification of Sami rights in 1886, the state had struck a balance between different societal interests, where the preservation of Sami culture was one and socio-economic interests were another.[496] This statement of the Court is based on the fact that, regardless of whether there is a comparable situation that could have led to the prohibition rules being discriminatory, balances of different interests had been made, and thus the situation

[491] Ibid 229.
[492] Ibid 197, 205, 227ff.
[493] Ibid 234.
[494] Ibid 238, 247f.
[495] Ibid 247.
[496] Ibid.

was justifiable. It can be noted that the Court's assessment is based on historical circumstances, and there is no contemporary analysis of the prohibition rules in relation to contemporary human rights. As seen in Chapter 6.1.4, the Court changes its approach in the *Girjas Sami village* case, where it relied on contemporary international legal principles related to Indigenous peoples to assess the case.

A more detailed analysis of the prohibition rules is found in the dissenting opinion of Justice Bengtsson, who discussed the prohibition rules neither in light of human rights nor the rights of Indigenous peoples. Instead, he discussed the rules only in connection with the Swedish Constitution, the prohibition of discrimination, and the ability of the Supreme Court to set aside Swedish law. This discussion provides an important insight into the Swedish courts' limitations in dealing with Sweden's historical settler state approach to the Sami that today are questionable based on current norms and principles linked to Indigenous peoples' rights and freedoms relating to the cultural significance of their historical homelands.

Sweden lacks a constitutional court, and the Swedish Supreme Court does not have the same power as one. Consequently, it has limited powers to disregard statutes and can only do so under exceptional circumstances.[497] What Bengtson emphasises is that the Court could not set aside the prohibition rules of the RHA, since they did not fulfil the requirement of being manifestly unconstitutional.[498] Of interest, however, is his reasoning on the rules prohibiting the Sami from controlling access to land and waters for hunting and fishing purposes; he suggests that this prohibition is an unfavourable treatment of the Sami in comparison to other citizens' rights to control hunting and fishing on their land and waters. [499] Consequently, the rules prohibiting the Sami from controlling access to land and waters for hunting and fishing purposes are, according to Bengtson, not sustainable in a contemporary society. [500]

Although Justice Bengtsson came to the same conclusion as the majority regarding the prohibition rules being applicable in the case, it is a reasonable interpretation that his reasoning affected the Court in the assessment it later made in the *Girjas Sami village* case (Section 6.1.4), where the prohibition rules were set aside in favour of the Girjas Sami village. This

[497] Christina Allard has in her analysis of the reindeer husbandry in a Nordic perspective highlighted the differences between Norwegian and Swedish Courts' views on their role as a legislative institution. The progressive position taken by Norwegian courts are similar to the common law system, while Swedish courts takes a more restrictive position to assume a legislative role, Allard (2015) (n 303) 282–315.
[498] *Taxed Mountains (SSC)*, 252f.
[499] Ibid 251.
[500] Ibid 252.

occurred against the Court placing greater focus on international rights concerning Indigenous peoples and on the cultural aspect of reindeer husbandry and its associated rights.

Despite the loss that the Court's decision represented for the Sami involved, the ruling, according to Patrik Lantto and Ulf Mörkenstam (2008), has contributed to strengthening Sami rights in general.[501] One of the most important statements of principle made by the Court was that the reindeer husbandry right are based ultimately on the principle of immemorial prescription and constitutionally have the same protection as other property rights, including ownership. [502] Thomas Cramér (1988) further argues that the Court's position means that even if the RHA is repealed, the right to herd reindeer remains.[503] What this de facto means is that if the right to herd is extinguished, the Sami have the right to compensation for this loss. [504] The legal strength of the reindeer husbandry right influenced the Government to propose inserting a specific reference to the Sami's right to herd within the property protection provision in the Swedish Constitution when it was amended in 1994 to incorporate the European Convention (See Chapter 3.1).[505]

6.1.1.3 The Wider Impact

The statements of the Supreme Court in the *Taxed Mountains* case that gained broader legal significance were, first, that the Sami right to access land as part of their livelihood was ultimately based on immemorial prescription and, second, that reindeer husbandry constitutionally had the same protection as other property protections, including ownership. As mentioned above, this resulted in a reference to the Sami's right to herd reindeer in the property protection provision in the Swedish Constitution.

The Court's assessment of the right to reindeer husbandry also led to the establishment of a judicial inquiry in 1983 with the aim of strengthening Sami rights. This included strengthening the Sami's reindeer husbandry right and examining the possibility of a Sami body that would give the Sami more self-determination.[506] As the judicial inquiry committee (hereafter referred

[501] Patrik Lantto and Ulf Mörkenstam, 'Sami Rights and Sami Challenges – The modernization process and the Swedish Sami movement, 1886–2006' (2008) 33 Scandinavian Journal of History 26, 37.
[502] *Taxed Mountains (SSC)*, 233, 248.
[503] Tomas Cramér, 'Samernas Rätt till Land och Vatten' (1989) 3 Svensk juristtidning (Online) 389, 390.
[504] *Taxed Mountains (SSC)*, 248.
[505] Governmental Bill 1993/94:117, 19–22.
[506] SOU 1989:41, 419f; SOU 1990:91, *Samerätt och Samiskt språk*, 245–255.

to as the 1983 Committee) stated, the Court's assessment of the Sami's right to land and waters was one of the starting points for their assessment of the strengthening of Sami rights.[507]

The work of the 1983 Committee resulted in the establishment of the Sami Parliament, a hybrid organisation between a government body and a Sami elected congregation whose main task is to develop Sami culture.[508] The management of the Sami Parliament consists of members who are appointed by election.[509] Eligible members are Sami who have the right to vote in Sami parliamentary elections.[510] To be eligible to vote in Sami parliamentary elections, a person must be a Swedish citizen, and they must show that the Sami language has been a part of their life, either because the person speaks Sami or because it has been spoken in their home or by grandparents; alternatively, they are eligible if a parent is included in the voting list for the Sami Parliament.[511] Even though the Sami, through this system, have influence in matters concerning their culture, the Sami Parliament has no legislative power but delegated authority tasks. These include partial handling of certain administrative issues related to Sami villages. Regarding the reindeer husbandry right and associated rights, however, the Sami Parliament has a limited mandate, such as regulating borders for Sami villages.[512] The majority of the mandate remains with the government and is currently delegated to the county administrative boards.

Concerning the protection of Sami reindeer husbandry, the reports of the 1983 Committee resulted in an amendment to the RHA clarifying that the reindeer husbandry right is ultimately based on immemorial prescription. However, as shown in the following section on the case of *Nordmaling* (6.1.3), this change had a negative effect on the legal protection of the Sami's right to winter grazing. First, however, the next section addresses the work of the 1983 Committee and their consideration of international law.

6.1.2 The Inquiry on Sami Rights: Aiming to Strengthen Sami Rights (1983–1990)

The work of the 1983 Committee lasted for seven years and resulted in three reports, which formed the basis for their proposed amendments to the law: *the status of the Sami in public*

[507] The 1983 Committee also reviewed the possibility to strengthening Sami self-determination by establishing a separate Sámi body – a Sámi parliament – and better protection for the Sami languages. SOU 1989:41, 260.
[508] STL (SE), c 2, s 1.
[509] Ibid c 2, ss 2, 4.
[510] Ibid c 3, s 18.
[511] Ibid c 1, s 2; c 3, s 3.
[512] RHA, s 7.

international law (1986),[513] *Sami law and the Sami assembly* (1989), [514] and *Sami law and Sami language* (1990). [515] Each report is the result of a specific investigative work where the subsequent report builds on previous reports.[516] The final proposals presented in the last report thus represent the overall assessment of the inquiry. [517] Of interest for this thesis, which moves in the field of international law, is the 1983 Committee's discussion regarding the importance of international law for the nature of the reindeer husbandry right presented in the first report.

The focus of the 1983 Committee on international law follows from an increased focus by the Sami on international law and from the fact that Norway had previously conducted such research.[518] According to the Committee, international law represented a minimum level for positive action.[519] Although there was a lack of international agreements at the time, the Committee stated that Sweden had undertaken international obligations in relation to the Sami in light of the 1751 Codicil.

The 1983 Committee highlighted the 1751 Codicil partly because at the time of the inquiry there was only one international agreement specifically targeting Indigenous peoples: ILO C107. The Convention has been replaced by the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO C169), addressed in Chapter 3.4.1, which has a clearer purpose of protecting Indigenous peoples than its predecessor. Sweden has ratified neither of the conventions. On the other hand, Sweden had, at the time, ratified the ICCPR, and the Committee thus placed great focus on this Convention, primarily Article 27 and the protection of national minorities.[520] Chapter 3.4.3 has treated this article in a contemporary light. Since the legal situation regarding the interpretation of Indigenous peoples' rights under international law in general, and under Article 27 of the ICCPR in particular, has developed during the 35 years since the Commission released its report, the Commission's reasoning has minimal relevance today. However, there is reason to highlight two aspects here: first, the Committee's interpretation of international cultural protection and how the bill for amending the Swedish Constitution in 2009 explained how the property protection provision in the Swedish Constitution fulfils Sweden's international obligations to ensure cultural protection, and

[513] SOU 1986:36.
[514] SOU 1989:41.
[515] SOU 1990:91.
[516] SOU 1986:36; SOU 1989:41, 100.
[517] Ibid.
[518] SOU 1986:36, 4.
[519] Ibid 159–166.
[520] Ibid 122–138.

second, the unconditional acceptance that Sami rights to land and waters are ultimately based on immemorial prescription.

6.1.2.1 Sami Cultural Protection Through Property Rights

In its assessment of how the protection of Sami rights could be strengthened, the 1983 Committee focused on the collective nature of Indigenous peoples' rights under international law. [521] In light of this approach, the Committee found that Sami culture as a whole had international legal protection for the conditions constituting the basis for the survival of the culture.[522] According to the Committee, this meant that Sami access to land needed to maintain reindeer husbandry fell within international protection as a collective right under Article 27 of the ICCPR. Consequently, according to the Committee, it is incompatible with the collective right of the Sami under international law to restrict individual Sami villages' access to land gradually if this leads to the disappearance of their ability to maintain reindeer husbandry.[523] The subsequent bill also emphasised that the concept of culture in Article 27 of the ICCPR should be understood as encompassing protection of the material foundations on which culture is based.[524]

The statement in the bill on the interpretation of the concept of culture was made in relation to the constitutional protection of property given to the Sami, which according to the proposal meant that Sweden should fulfil its international obligations for cultural protection according to Article 27. The constitutional protection of Sami culture is discussed in Chapter 3, but of interest in this part of the thesis is the question of how Sami legal protection according to property rights should be interpreted in light of the statement that it is part of cultural protection. As explained in Chapter 3, the Swedish Constitution does not provide protection for cultural rights, but the statement above is a clarification of the cultural nature of Sami property protection. This clarification means that the constitutional protection of Sami property has the purpose of securing Sweden's international commitment regarding Sami cultural protection. When considering Sami property protection, this entails an obligation to consider the cultural aspects of the Sami's access to land as part of their cultural lifestyle, in the researcher's opinion.

[521] Ibid 71, 98, 109, 125, 128, 145.
[522] SOU 1989:41, 272f.
[523] Ibid.
[524] Governmental Bill 1992:32, 32.

6.1.2.2 The Unconditional Acceptance of Immemorial Prescription as the Legal Basis of the Reindeer Husbandry Right

In retrospect, it can be said that the Supreme Court's statement in the *Taxed Mountains* case that Sami rights are ultimately based on immemorial prescription was misinterpreted by everyone involved. The alternative is, of course, that the Court realised its mistake and thus corrected it in the case of *Nordmaling*, where it explains that the statement was just information of historical nature. Section 6.1.3 explains this further.

In the 1983 Committee's proposal, based on the statements by the Supreme Court in the *Taxed Mountains* case, the parliament amended the RHA with a clarification that the reindeer husbandry right is a collective right based on the principle of immemorial prescription.[525] The background was that the Committee considered it beneficial to codify the legal basis for Sami access to land and waters, as this would contribute to strengthening Sami legal protection by reducing any mistakes regarding the nature of the right.[526] That is, doing so would reduce the misunderstanding that the right was a privilege granted by the state. As explained in Chapter 4.5, the preparatory work for the first reindeer grazing law had already made it clear in the 1880s that this was not the case.

What was missing in both the Committee's reasoning and in the bill was a discussion of what the Supreme Court's statement meant when it said that the Sami right to land and waters was ultimately based on immemorial prescription and how the principle should be applied in relation to the Sami. As explained above, the principle was applied to cultivated land and is thus poorly adapted to the Sami lifestyle, where land use went in cycles due to natural conditions. Regardless, the statement was accepted without considering any legal consequences of introducing it in the law. There is, of course, a problem with criticising an approach when sitting on the facts, as the current author does. However, the lack of a legal discussion in the 1983 Committee regarding the principle is noticeable not only because there is uncertainty about the nature and scope of the principle but also because the principle does not allow consideration of the cultural aspects of the Sami's right of access to land and waters,[527] a connection highlighted during the codification of Sami right to land in the 1880s (see Chapter 4.5).

[525] SOU 1989:41, 262.
[526] Ibid.
[527] See, e.g., Lundh (2013) (n 485) 85–93, and Undén (1951) (n 485) 125–135, 141–145.

6.1.3 The Case of Nordmaling (1998–2011) – The Legal Consequences of Introducing Immemorial Prescription as the Legal Basis of the Reindeer Husbandry Right

The lack of a broader discussion about the principle of immemorial prescription and what its introduction in the RHA entailed led to conflicts regarding which principle the Sami right to winter grazing should be evaluated against: immemorial prescription or customary law.[528] This conflict triggered several legal proceedings in which thousands of landowners in the southern part of the reindeer husbandry region asked for declaratory judgments stating the Sami lacked any right to use their land for winter grazing without a contract.[529] One of these cases was *Härjedalen*, a case not examined by the Supreme Court because leave to appeal was not granted. As this chapter focuses on courts of precedent, it does not deal with the case in detail. However, Chapter 7.1.4. provides an analysis of the case in relation to the Strasbourg Court, as the defendant Sami villages submitted an application to the Court following the failure to receive a leave to appeal from the Swedish Supreme Court.

In these proceedings concerning whether Sami villages in the southern part of the reindeer husbandry region had winter grazing rights on private land, lower courts used the principle of immemorial prescription as a basis to assess the Sami's right to winter grazing. In this process, the qualification period of 90 years for immemorial prescription played a significant role for the lower courts' assessments. Following the introduction of a new land code in the 1970s, however, the possibility of establishing rights according to the principle had become restricted.[530] Consequently, the courts concluded that a right to winter grazing could not, as part of the 90-year qualification period, include land use after 1971. This decision meant the Sami villages could not meet the criteria set and lost their winter grazing areas.[531]

The Supreme Court failed to grant leave to appeal in several cases concerning winter grazing before granting it to several Sami villages in the municipality of Nordmaling. The case differs from the *Taxed Mountains* case because it concerns the right of Sami to use private land and waters for winter grazing. The case began in 1998 when several landowners in the Municipality of Nordmaling, in the south part of Västerbotten County, asked for a declaratory judgement

[528] See, e.g., Eivind Torp, 'The legal basis of Sami reindeer herding rights in Sweden' (2013) 4 Arctic Review on Law and Politics 43.
[529] *Härjedalen Sami Village (DC)* (n 439); *Rätan Sami Village (DC)* (n 439).
[530] *Härjedalen Sami Village (DC)* (n 439) 173.
[531] For a critical review of *Härjedalen* see notably Rumar (2014) (n 375) who argues that the national courts in their assessment failed to take into account historical power–political conditions.

that their land was not burdened with any rights giving the Sami a right of access for winter grazing purposes.[532]

The central questions for the Supreme Court were what necessary conditions should be met to confirm a Sami right of access to private land for winter grazing purposes and which principle the dispute should be assessed by. As described in Chapter 5.1, Sami access to land and waters for winter grazing according to the RHA is dependent on a historical use that establishes the right to winter grazing according to the principle of customary law. After the amendment of the RHA due to the *Taxed Mountains* case, however, it appears in the first section that the reindeer husbandry right originally rests on the principle of immemorial prescription.

In its ruling in *Nordmaling*, where the Court confirmed the Sami had the right to access land for winter grazing throughout the municipality, the Court clarified that the legal regulation that took place after their statement in the *Taxed Mountains* case did not change the basis for assessing the Sami's right to winter grazing, which remained to be customary law.[533] According to Mattias Åhren (2012), the Court's clarification that the Sami's right to access private land for winter grazing rested on customary law had a positive effect on Sami legal protection and led to settlements in similar ongoing cases.[534] As former Justice Bengtsson (2011) notes, however, the rulings resulted in several issues that have been difficult to resolve, including the collective nature of the right to reindeer husbandry.[535] This is dealt with below, but the collective character of reindeer husbandry right may now, in light of the ruling in *Girjas Sami village* addressed in the following section, be considered well established in Swedish law.

6.1.3.1 Key Arguments

In their submission to the Supreme Court, landowners claimed the Sami lacked the right of access to their land to use it for winter grazing. In the case, they argued that having such a right would require the Sami to fulfil the burden of proof according to the requirement of the principle of immemorial prescription.[536] According to the landowners, this meant the Sami had

[532] *NJA 2011:109 (Nordmaling case)* SSC, 113.
[533] Ibid 229, 240.
[534] Jörgen Heikki, 'Nordmalingsdomen banade väg för Rätanförlikningen' (*Sveriges Radio*, 19 April 2012) <https://sverigesradio.se/sida/artikel.aspx?programid=2327&artikel=5071682> accessed 25 September.
[535] Bertil Bengtsson, 'Nordmalingsdomen - en kort kommentar' (2011) 5 Svensk juristtidning (Online) 527 531.
[536] *Nordmaling (SSC)*, 114.

to prove that they had used the land for at least 90 years before the Land Code came into force in 1972, after which rights could not be established according to immemorial prescription.[537]

The Sami, on the other hand, claimed that they had a right to access the land for winter pasture on a collective basis and that the Supreme Court should assess the existence of the right on the basis of customary law, not immemorial prescription. The preparatory work for the 1971 RHA did refer to immemorial prescription, but the Sami argued that it was only made as a guideline for what can be invoked as evidence of a customary law. [538] In addition, the Sami highlighted the problem with the burden of proof: the nature of reindeer herding means it leaves few traces behind, and there is a general lack of historical documentation about Sami lifestyle and land use. [539]

6.1.3.2 Analysis of the Court's Judgement

The Supreme Court begins its reasoning by clarifying that the change that took place in the first section because of their statement in the *Taxed Mountains* case – that the reindeer husbandry right was ultimately based on immemorial prescription – only provides 'information about the origin and legal nature of the reindeer husbandry right. In the text of the law, no legal consequences are attached to the information.' [540] The information thus lacked legal relevance for the assessment of the Sami's right to access the properties in question. Furthermore, the Court found a lack of support in the preparatory works for the application of immemorial prescription in disputes concerning the Sami's right to access land for winter grazing. [541] The Sami's right of access to the landowner's land thus had to be assessed based on the principle of customary law.

That the Supreme Court chose to focus on customary law instead of immemorial prescription, according to Christina Allard (2015), contributed to it being able to consider the nature of reindeer husbandry right in its assessment.[542] The adaptation, she believes, was necessary to avoid discrimination due to the norms of a settled lifestyle being continually applied to the assessment of Sami access to land and waters despite the nomadic nature of their land use,

[537] Ibid 114, 124.
[538] Ibid 116, 119.
[539] Ibid 120f.
[540] Ibid 229.
[541] Ibid 230.
[542] Allard (2015) (n 303) 279f. Chapter 1.6 provides a terminological explanation of what customary law means in the context of this thesis.

which is determined by natural conditions.[543] That the Supreme Court adapted its assessment to the special nature of reindeer husbandry is apparent from, for example, the evaluation of evidence. The Court stated that reindeer husbandry's special characteristics, alongside any other exceptional circumstances the Sami invoke, must be taken due account of when assessing the evidence.[544] That the special characteristics must be considered can naturally be linked to the statement of the 1882 Committee, explained in Chapter 4.5, that the scope is dependent on the conditions required for reindeer husbandry. For the exceptional circumstances, the collective nature of reindeer husbandry right, codified by the 1993 amendment, for example, meant that it was not necessary to be able to specify which Sami used an area to find an established right of access according to customary law.[545] As seen in the following section, the Supreme Court upheld this position in *Girjas Sami village*. That the Sami constituted an Indigenous population, however, played a small role in the Court's assessment, even though this was a special circumstance that the Sami invoked.

The fact that the Sami's status as an Indigenous population did not play a role in the Court's assessment can be linked to the civil nature of the case and the fact that the state was not involved in it. As the Supreme Court explained, it is not possible in a civil case to invoke any shortcomings of the state to ensure rights under international law to deprive private landowners of their civil rights in favour of the Sami.[546] In the context of this work, this statement means that in cases involving conflicts between two private parties, where the central question is whether one party has a right, while the other *de facto* has one, it is ineffective to invoke international law to support an argument that – if successful – would deprive the other party of existing rights established according to the national system. This ineffectiveness to invoke international law on national level does not necessarily mean that it is fruitless to invoke international law in assessing the scope of an existing right against the state. This is since it is states that have obligations to ensure human rights (see Chapter 7.4). The value of international law for Sami rights linked to land is dealt with in the following section.

In summary, the Supreme Court adapted its assessment of evidence in *Nordmaling* to the specific characteristics of Sami livelihood. In the following section, this thesis explains how

[543] Ibid.
[544] *Nordmaling (SSC)*, 232f.
[545] Ibid 230.
[546] Ibid 233.

the Supreme Court further adapts its assessment to specific situations of the Sami by placing greater emphasis on the development of Indigenous peoples' rights at the international level.

6.1.4 The Girjas Sami Village Case– Indigenous peoples' Right to Dispose Freely of Natural Resources (2009-2020)

On 23 January 2020, in the Swedish Supreme Court, the Swedish Sami reindeer husbandry association Girjas successfully defended the Sami's right to dispose freely of their natural resources, such as small game and fish (wildlife resources). Considering the Sami's status as an Indigenous people, the Court ruled that Sami historic and undisturbed nomadic land use, with hunting and fishing as central binaries to reindeer herding, meant Girjas – not the Swedish state – had the right to dispose of wild resources on Crown land[547] located within the association's year-round land (see Section 5.1).

Fig. 2 Girjas Sami Village Area. Source: Swedish Sami Parliament.

As the Supreme Court confirmed that Girjas, not the Swedish state, held the right of disposition of small game and fish on Crown land in the area reserved for Sami exclusive use, the *Girjas Sami village* case has primarily been analysed from a property rights perspective.[548] The focus of such analysis has been on how the Court, through the application of national and international legal principles, has taken a more holistic approach to the importance of the Sami's status as an Indigenous peoples in assessing Sami land rights. Prominent in the Court's reasoning is the Peoples' right to dispose freely of their natural resources as part of their human rights and freedoms, and the judgment is, therefore, analysed in this perspective.[549]

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[547] In the context of this thesis, *Crown land* is land under the direct disposition of the Swedish state but where the ownership may remain unresolved. Therefore, *Crown land* is not a reference to land owned by the state but managed by the state.

[548] See, e.g., Allard Christina and Brännström Malin, 'Girjas Reindeer Herding Community v Sweden: Analysing the Merits of the Girjas Case' (2021) 12 Arctic Review 55; Sakshi, 'The Girijas case and its implications for the Sámi hunting and fishing rights in Sweden' (2021) 23 Environmental Law Review 169; and Torp (2021) (n 139).

[549] For a review of the right to dispose freely of natural resources as a human right, see, e.g., Jérémie Gilbert, 'The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right?' (2013) 31 Netherlands Quarterly of Human Rights 314.

This section aims to provide an analysis of the *Girjas Sami village* case within the context of Indigenous peoples' right to dispose freely of natural resources and to discuss the case's wider impact as it stands at the time of writing. The first part provides a general background on the origin of the case and explains how an increased interest in hunting and fishing in the Swedish mountains led to a dispute over who had the right to dispose of these resources. The following parts present the key arguments of both Girjas and the Swedish government around the question of whose rights are administered by the county administrative board: the Sami's or the state's. The penultimate part, which contains an analysis of the Supreme Court's ruling, shows how international principles related to Indigenous peoples formed the basis for the Court's handling of the case. In doing so, the Court stressed the general principle of the right of Indigenous peoples to dispose freely of their natural resources. The last parts provide a discussion of the wider impact of the *Girjas Sami village* case and shed light on questions that have arisen due to the RHA being under revision as a result of the case.

6.1.4.1 A Sampling of the Historical Background and the Facts of the Dispute

The historical background to the legal protection of the Sami's access to land and waters in their original homeland in northern Sweden for reindeer husbandry is, as explained in previous chapters, based on ethnicity linked to a nomadic lifestyle.[550] As further explained in Chapter 4, Sweden increased its efforts to protect and secure the cultural lifestyle of the Sami's nomadic way of life during the 1800s.[551] This increased effort of protection included establishing a boundary for settlement through which parts of the Sami's original homeland in the Swedish mountains were reserved for their exclusive use (see Chapter 4.5).[552] Moreover, Sweden passed the first reindeer grazing legislation in 1886, aiming to secure the Sami's historical rights and freedoms to use land and waters for the maintenance of themselves and their reindeer.[553] As mentioned in Chapter 4.5, the rights and freedoms codified were considered to belong to the Sami as part of a 'natural right to the conditions necessary for their existence.'[554] Thus, though the regulation came into being to reduce conflict between the Sami and the settled population,[555] another purpose of the codification was to ensure the material basis for the Sami's cultural survival as distinct peoples with a characteristic cultural lifestyle.[556] This

[550] RHA, s 1.
[551] Utskottsutlåtande 1886:1, 18f, 31f, 36.
[552] Governmental Bill 1873:4.
[553] Utskottsutlåtande 1886:1, 19, 28–32.
[554] Ibid 31f.
[555] Ibid 1–14.
[556] Ibid 18, 28, 31, 36.

included the right and freedom to hunt and fish on both Crown and private land historically used by nomadic Sami.[557]

The current regulation of reindeer husbandry – the RHA – derives, as mentioned, from the original 1886 statute. For this reason, underlying discussions of the 1886 law continue to be important in conflicts over Sami proprietary interests linked to land and waters.[558] The RHA's original purpose of protecting the Sami's nomadic way of life and its material basis means that the act only ensures the ability to hunt and fish for Sami who are involved in reindeer herding.[559] This presupposes membership in a Sami reindeer husbandry community – a Sami village.[560]

As described in Chapter 5, a Sami village is organised as an economic association with the aim of promoting the members' interests linked to reindeer husbandry within a specific geographical area – a Sami village area.[561] The Girjas village area, in northern Sweden, is divided into year-round land and summer pastureland. The year-round land located within Crown land reserved for Sami exclusive use (the Area) was the subject of the dispute. In the Ares, Girjas has a limited right of self-determination and can regulate its members' access to land and waters for obtaining wildlife resources.[562] In addition, the association may grant former members access to land and waters to engage in hunting and fishing.[563]

Apart from the right to grant former members access to land and waters for obtaining wildlife resources, the RHA contains an explicit ban against Sami associations disposing of wildlife resources.[564] The underlying misconception behind this prohibition was that the Sami were unable to handle such administration and that it was thus better handled by the authorities (see Chapter 4.5). Consequently, in the first legislation regulating Sami access to land and water, the legislators introduced the legal basis for the Swedish government's current right to control access to wildlife resources on Crown land.[565]

[557] Ibid 31.
[558] *Girjas Sami village (SSC)* (n 138) [98].
[559] Ibid [219]. See RHA s 25.
[560] RHA ss 1, 11.
[561] Ibid ss 9–10.
[562] Ibid s 35.
[563] Ibid s 31.
[564] Ibid s 31.
[565] Governmental Bill 1885:2, 10.

Since 1971, this right has been regulated in Sections 32–34 of the RHA, and the provisions on it, today delegated to county administrative boards, stipulate that access to land and waters for hunting and fishing purposes may be granted by the government.[566] One caveat is that increased presence in the reserved area should not create a significant inconvenience to the reindeer herding industry or affect the Sami village members' own ability to hunt and fish.[567] Practice prescribes that, before access is granted, a dialogue required with the Sami village concerned, giving them the ability to influence the process.

As a result of an increased interest in hunting and fishing on Crown land in the 1980s, Sami influence over wild resources came under pressure.[568] Thus, the Girjas conflict did not result from the RHA alone but was a consequence of an increased interest in access to Crown land and water. The underlying dispute lies in a legal regulation that followed a proposal presented after a review of Swedish hunting and game management that suggested increased hunting on Crown land in the areas reserved for the Sami.[569]

This proposal, which was presented in 1983, led to a decade of discussions and bills regarding access to wildlife resources on Crown land.[570] Despite criticism from the Sami of a lack of consideration of Sami proprietary interests in these resources, the Swedish government presented a bill in 1992[571] that contained proposals for increased access to Crown land for obtaining wildlife resources.[572] The bill passed the Swedish parliament, and the government subsequently amended the Reindeer Husbandry Ordinance, which forms the basis for the exercise of authority linked to the RHA.

In accordance with this amendment, the authorities had to grant access to land and waters on Crown land unless doing so would cause significant inconvenience to reindeer husbandry or interfere with the ability of Sami village members to hunt and fish.[573] This imperative raised questions about the authorities' ability to refuse access to land and waters after a dialogue with the Sami village concerned, because while the RHA enabled authorities to grant access to land,

[566] RHA, s 32.
[567] Ibid.
[568] Sametinget, *Beslutet om småviltjakten: en studie i myndighetsutövning* (Agneta Arnesson–Westerdahl ed, Sametinget 1994) 23–35.
[569] SOU 1983:21, *Vilt och jakt: huvudbetänkande*, 204.
[570] Sametinget (1994) (n 568) 19–21.
[571] Ibid 32–35.
[572] Ibid 20; Governmental Bill 1992:32, 131.
[573] Reindeer Husbandry Regulation (SFS 1993:384) (Rennäringsförordning), s 3.

the regulation imposed a requirement on them to do so. The consequence, according to several Sami associations, was a loss of Sami influence in the granting process.[574]

Another problem with the process of increasing access to Crown land for obtaining wildlife resources was that the Sami saw this as an attempt by the Swedish government to establish private hunting and fishing rights within Crown land.[575] As shown below, state sovereignty over land and waters that are not privately owned does not automatically establish state-held private rights to resources located within such land and waters. According to the Sami, the government's actions were an attempt to consolidate the applicability of the legal theory of dual hunting and fishing rights on Crown land, and thereby establish state private rights to these resources.[576]

The theory of dual hunting and fishing rights suggests that, regardless of whether others may have a right to hunt and fish in a certain area, the starting point is that the landowner holds the hunting and fishing rights.[577] A person, natural or legal, may hold prescriptive rights to hunt and fish, for example.[578] The difference between hunting and fishing rights and rights to hunt and fish is that only the former entails a right of disposition.[579] The Swedish state has had title deeds to the conflict area since 1956; thus, according to the norm, as a result of the registration, the state had hunting and fishing rights and Girjas only had the more limited right to hunt and fish, as expressed in the RHA.[580] As the following sections show, however, it is not sufficient for the state to refer to the registration of a title deed as the basis for asserting private rights on Crown land historically used by the Sami. As seen below, this insufficiency of referring to title deeds applies especially to resources the Sami have traditionally used and to which the state has not asserted its right.

6.1.4.2 The Key Argument of the Girjas Association

[574] See, e.g., *Könkämä and 38 Other Saami Villages v Sweden* App no 27033/95 (Commission Decision, 25 November 1996).
[575] Sametinget (1994) (n 568) 40f; *Gällivare District Court, application for summons in Girjas Sami village case, 2009-05-11, T 323–09 (case file 1)* DC [3.4].
[576] Ibid.
[577] This theory is tracible to changes in the Hunting Act and the Fisheries Act during the 1980s and 1990s. See Bertil Bengtsson, 'Om Jakt och fiske i fjällmarken' (2010) 1 Svenska juristtidning (online) 78, 82. See also SOU 2005:17, *Vem får jaga och fiska? – Rätt till jakt och fiske i lappmarkerna och på renbetesfjällen*; Jaktlag (1987:259) (Hunting Act), s 10; Fiskelag (1993:787) (Fisheries Act), s 9.
[578] *Girjas Sami village (SSC)* (n 138) [29].
[579] Ibid [24].
[580] That the state is a legitimate owner of the area is something that Girjas questions, *District Court of Gällivare's ruling, 2015-02-03, T 323–09 (Girjas Sami village)* DC [6.10]. See also *RH 2001:56 (Sörkaitums Sami village)* Nothern Norrland CoA.

Due to the fundamental principle of the landowner holding the right of disposition of wildlife resources, the issue of state ownership over the area of dispute should have been of importance for the Supreme Court's assessment. Girjas, however, considered the question of whether the Swedish state is the legitimate owner of the Area irrelevant to resolving disputes over the Sami's right to dispose freely of the Area's wildlife resources without government intervention.[581] Girjas claimed that it, not the Swedish state, held the right to wildlife resources in the Area based on historical Sami presence and use of resources in the Area.[582]

Regarding the legal basis for its claim, Girjas first argued that the Sami's right to dispose freely of wildlife resources followed directly from the RHA.[583] This argument is based on the RHA's rule prohibiting Sami from granting access to land and waters for hunting and fishing purposes, which controls the Sami's possessions based on the preconception that they lack sufficient organisation to cope with such administration.[584] The Sami thus had a statutory right to dispose freely of wildlife resources in areas reserved for them, but this ability had been limited on the basis of a derogatory argument that they could not handle such disposition.

Girjas also argued that the Sami's right to dispose freely of wildlife resources followed from the historical Sami use of the Area and its resources.[585] Regarding this argument, Girjas found the label of the underlying principle – customary law or immemorial prescription – unimportant.[586] What was of importance was that the Sami had, uncontested, used the Area and its resources for a prolonged time without any significant competition or objections.[587] Moreover, Girjas highlighted the necessity of considering the status of the Sami as an Indigenous peoples when considering the nature and scope of Sami rights and argued that on this status, the Sami had a right to dispose freely of wildlife resources in the Area.[588]

Fundamentally, Girjas' argument is about asserting the resource rights of the Sami in the constant dispute that exist between the Sami and the Swedish state over the control of resources in Sami original territories and Girjas claimed the grounds listed above confirmed its right to dispose freely of wildlife resources in the Area. Consequently, the association argued that the

[581] *Girjas Sami village (SSC)* (n 138) [38].
[582] *Girjas Sami village (Summons) (DC)* (n 575) [1.1], [2.1.1]; *Girjas Sami village (DC)* (n 580) [2]–[3]; *Girjas Sami village (SSC)* (n 138) [5], [37].
[583] *Girjas Sami village (SSC)* (n 138) [6].
[584] *Girjas Sami village (Summons) (DC)* (n 575) [3.2.3]. See also Utskottsutlåtande 1886:1, 32.
[585] *Girjas Sami village (SSC)* [(n 138) 6].
[586] Ibid [6]; *Girjas Sami village (DC)* (n 580) [3].
[587] *Girjas Sami village (SSC)* (n 138) [5].
[588] Ibid [6]; *Girjas Sami village (DC)* (n 580) [3].

RHA rules preventing it from exercising its right over such resources violated its proprietary interests ensured under the Swedish Constitution and the European Convention.[589]

6.1.4.3 The Response of the Swedish Government

The Swedish government, for its part, declared that there was no support for an interpretation of the RHA that suggested the Sami had a right to dispose freely of wildlife resources in the Area.[590] Rather, they claimed, the Sami had only a limited right to hunt and fish. Just as Girjas argued that, at the time of the codification of Sami rights and freedoms in the late 1800s, it was Sami wildlife resources that became regulated and administered by Swedish authorities, the government argued that the codification was based on an established view among the drafters that the state had ownership claims to the Crown land.[591] Consequently, the rights administered by the state were those of a private landowner.[592] Thus, a Sami association, such as Girjas, would not have a right to dispose freely of all wildlife resources on Crown land, and neither the RHA nor the preparatory work from the 1800s supported such a claim.

Additionally, the Swedish government argued that there was no other legal rule or principle that could support Girjas' claim to a right of disposition of wildlife resources.[593] The underlying perception was that neither customary law nor immemorial prescription were applicable for several reasons. For example, according to the government, a collective could not invoke immemorial prescription, since the principle only applied to individuals,[594] nor could collective use result in rights for a Sami reindeer husbandry association, according to customary law.[595] The government also rejected early on that the Sami's status as an Indigenous peoples was relevant in the case, as Sweden had no obligations under international law to recognise any special rights for the Sami.[596]

Finally, the Swedish government stated that if the Supreme Court concluded the state lacked private rights to wildlife resources in the Area, the provisions in the RHA governing the right of disposition should not apply in relation to the Area. This concession is important because it prevented the Court from examining whether the provisions were, in principle, incompatible

[589] *Girjas Sami village (Summons) (DC)* (n 575) [2.1.2]; *Girjas Sami village (DC)* (n 580) [2]–[3]; *Girjas Sami village (SSC)* (n 138) [8].
[590] *Girjas Sami village (SSC)* (n 138) [9]; *Girjas Sami village (DC)* (n 580) [3], [6.3.2].
[591] *Girjas Sami village (DC)* [6.3.2].
[592] Ibid [6.3.2].
[593] *Girjas Sami village (SSC)* (n 138) [9].
[594] *Girjas Sami village (DC)* [6.3.2].
[595] Ibid [6.3.2].
[596] Ibid [6.3.2].

with the Swedish Constitution. Consequently, because the Court found that Girjas has the right to dispose freely of its wildlife resources in the Area, the rules governing the right of disposition continue to apply in relation to other Sami associations.

6.1.4.4 Analysis of the Supreme Court's Judgement

As this section shows, the Sami's status as Indigenous peoples underlies the Supreme Court's consideration of the case. The Court's reference to international legal principles linked to Indigenous peoples is particularly important, as such principles impose obligations on states to duly consider the historical rights and freedoms of Indigenous peoples linked to traditionally occupied areas and their resources.

Before addressing the merits of the case, the Supreme Court rejected new circumstances relied on by the Swedish government in support of having sovereign rights in the Area. In its submission, the government claimed that the Area had constituted a common land, and in accordance with the principle of eminent domain, the state thus had established rights to resources in the Area.[597] This would mean the Sami would not be able to invoke the right of disposal over the wildlife resources in the Area because a general right to hunt and fish on common land does not include such a right. Though the Court refused to examine the claim that the Area had constituted a common land, it touched on the subject in its analysis of the legal situation at the end of the 1800s, when the first national regulation on Sami access to land and waters was compiled. In its historical overview of preparatory works predating the codification on Sami rights and freedoms linked to land and water, the Court emphasised that nothing in these works indicated that Crown land was considered to constitute common land during the codification process.[598] Following directly from the preparatory work for the first regulation on Sami land rights, which clearly emphasises that the Sami's right to land and waters is older than the Swedish state, there is no basis for an interpretation that this right to wildlife resources has been crystallised from a more general right to hunt and fish on commons.[599]

Turning to the alleged violation of Girjas' proprietary interests, the Supreme Court first considered whether Girjas had the right to dispose freely of wildlife resources under the RHA. As the following section explains, the Court found that the underlying documents for the first

[597] *Girjas Sami village (SSC)* (n 138) [12].
[598] Ibid [60].
[599] Utskottsutlåtande 1886:1, 19.

regulation of Sami rights and freedoms linked to land and waters did not allow for such an interpretation.

6.1.4.4.1 The Sami's Right of Disposition of Wildlife Resources Under the Reindeer Husbandry Act

The general norm, according to the RHA, is that the freedom to hunt and fish that individuals have due to their membership in a Sami community is non-transferable.[600] Individual members and Sami associations thus lack the right to dispose freely of wildlife resources. Consequently, it is the Swedish authorities who administer access to Crown land for hunting and fishing purposes.[601]

The key issue of the case in relation to the RHA was whether the administration of hunting and fishing by the Swedish authorities was of Sami or state resources. Since, under the RHA, the Sami are *de facto* entitled to wildlife resources within Crown land, the key question was whether the Swedish state had similar rights and, if so, when these had arisen. A lack of private rights to wildlife resources for the state could mean that the rules of the RHA regarding the right of disposition *de facto* concerned Sami possessions.

Central to the Supreme Court's analysis of whether that state had private hunting and fishing rights in the Area was the legal situation at the time when Sami rights and freedoms linked to land and waters were codified in 1886. The Court's ruling thus contained a thorough analysis of the historical reforms that preceded the codification.[602] In this way, the Court could determine whether these reforms had resulted in a deprivation or limitation of historical Sami rights and freedoms.[603]

The purpose of several reforms made over the centuries in the northern part of Sweden was to clarify the legal situation regarding access to land. One example of such reforms was the land tenure reforms that distributed Crown lands into private ownership.[604] The settlement boundary established in the 1800s reserving certain mountain areas for the Sami's exclusive use was another reform.[605] The Court explained that none of these reforms aimed to deprive the Sami of existing rights and freedoms but rather to clarify the nature and scope of settlers' rights and freedoms linked to land and waters, a reasoning that shows how sovereign rights to control

[600] RHA, ss 25, 31.
[601] Ibid ss 32–34.
[602] *Girjas Sami village (SSC)* (n 138) [42]–[86].
[603] Compare ibid [48].
[604] Rumar (2014) (n 375) 145–166.
[605] Cramér and Prawitz (1970) (n 46) 21–39.

access to land and waters are separate from the question of whether the state has private rights on Crown land.[606] Thereby, the Court distinguished between sovereign disposition rights and private law disposition rights that come with ownership, suggesting that a sovereign right over an area does not automatically give rise to private law rights.

As mentioned above, the nature and scope of Girjas' lawsuit prevented the Supreme Court from ruling on whether the Swedish state was the rightful owner of the Area, but the Court clarified that 'the established perception towards the end of the 19th century was that undeveloped land in the interior of Norrland was typically owned by the state.'[607] This conclusion arguably followed from the preparatory work underlying the first regulation of Sami rights and freedoms in 1886. One aspect the Court noted was a lack of information in the preparatory works indicating that the legislators perceived the Sami as co-owners in areas of Crown land reserved for Sami exclusive use.[608]

This lack of support for co-ownership indicated, according to the majority of the Court, that the state, in line with the general rule of wildlife resources belonging to the landowner, held the right of disposition of these resources in Crown land.[609] Moreover, the preparatory work expressly limited the Sami's right to dispose freely of their natural resources in the manner prescribed by law.[610] The rules in the RHA prohibiting the Sami from freely disposing of wildlife resources, the Court stated, are also textually clear; therefore, it is not possible to interpret the RHA – either in light of the Swedish Constitution or international law – as suggesting the Sami have a right to dispose freely of wildlife resources.[611] Consequently, Girjas' claim that it has the right to dispose freely of wildlife resources in the Area according to the RHA could not be substantiated.[612]

6.1.4.4.2 The Centrality of International Principles of Law for Sami Constitutional Protection

The Supreme Court first refers to the value of international legal principles relevant to Indigenous peoples in relation to the Swedish Constitution during discussions of whether the RHA rules – which limit the Sami's right to dispose freely of wildlife resources – can be interpreted differently. This discussion is important, as it sets the standard for the Court's

[606] *Girjas Sami village (SSC)* (n 138) [47]–[54].
[607] Ibid [55] [author's translation].
[608] Ibid [105].
[609] Ibid [55], [108], [114], [123].
[610] Ibid [106].
[611] Ibid [90].
[612] Ibid [123]–[124].

subsequent application of international principles when applying the national principle of immemorial prescription to the case. An assessment, as the next section explains, led to the conclusion that Girjas has a right to dispose freely of wildlife resources within the Area.

As explained in Chapter 2, the Swedish Constitution does not ensure protection of a right with respect to culture. Sami cultural protection is instead included as a general goal the authorities must strive for when exercising authority. Thus, authorities should strive to facilitate the Sami's ability to maintain and develop their culture. This lack of a constitutionally protected right of respect for the Sami's cultural way of life as an Indigenous people does not, the Supreme Court explained, mean that the constitutional reference to Sami culture is irrelevant in disputes over resources:

> It may nevertheless have some material significance in such an application of law where it is a question of weighing several factors against each other. The Sami interest in being able to maintain their culture, including reindeer husbandry, must be given special importance in such a balance.[613]

The Court further explained that what the constitution prescribes regarding the safeguarding of the Sami's ability to preserve and develop their culture reflects international principles linked to safeguarding ethnic minorities.[614]

Of particular interest is the Supreme Court's reference to the principle that all peoples have the right to dispose freely of their natural resources, which is expressed in Article 1 of the two International Covenants of Human Rights (see Chapter 3):

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.[615]

This reference is of fundamental importance because it legally confirms the Sami's status as a *Peoples* within the meaning of international law. The Sami thus have the right to a certain degree of autonomy regarding traditionally used land and resources and how the land and its resources are used.[616] That the Court refers to the norm of Peoples' right to self-determination

[613] Ibid [92] [author's translation].
[614] Ibid [93].
[615] Notably, the court refrained from referring to the right to self-determination in the first section of the paragraphs; 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'
[616] Rehman (2009) (n 112) 86f, 472–480.

and their right to have their autonomy respected is also apparent from the reference to Article 26 of the UNDRIP. This provision outlines the right of Indigenous peoples to 'use, develop and control' traditional areas and resources and obligates the state to ensure the protection of these rights while considering 'customs and traditions and tenure systems.'[617]

Sweden has not, as in the case of the above, ratified principles of significance for the rights and freedoms of Indigenous peoples linked to historical land outlined in other documents. As the following section shows, the Court highlights ILO C169 as an example in its analysis of the nature and scope of Girjas rights in relation to the national statutory principle of immemorial prescription.[618] The ability of the Court to take due account of non-ratified documents is based on there being no general obstacles, meaning that principles of international law can provide an aid for the 'interpretation of applicable laws even if transposition has not taken place through legislation.'[619] The Court thus takes a similar position to those applied in other legal systems, which is that international law can give rise to legitimate expectations on the basis of general principles of law and thus needs to be taken into due account at domestic levels, even if the documents expressing those principles have not been transposed into national law.[620]

As the next section shows, the Supreme Court's view on the applicability of international principles of importance to Indigenous peoples underpins its conclusion that Girjas – according to the principle of immemorial prescription – holds the right to dispose freely of its natural resources in the Area. The reference to international principles linked to Peoples also shows that the goal set by the Swedish Constitution aiming to ensure the ability of the Sami to preserve and develop their culture includes taking due account of the rights and freedoms of Peoples and Indigenous peoples prescribed by international principles, as referred to by the Court in its ruling.

6.1.4.4.3 The Sami's Right of Disposition of Wildlife Resources According to Immemorial Prescription

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[617] UNDRIP, art 26, reads as follows:

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned.

[618] ILO C169.

[619] *Girjas Sami village (SSC)* (n 138) [94] [author's translation].

[620] See, e.g., Wallace and Martin-Ortega (2009) (n 92) 47f, and Harris (2004) (n 92) 66–68.

In relation to the assessment of whether Girjas had the right to dispose freely of its natural resources on legal grounds other than the RHA, the Supreme Court stressed the need to consider principles of international law aimed at securing cultural protection for Indigenous peoples.[621] As previously mentioned, the constitutional basis for cultural protection sets a goal for the authorities to take steps to promote conditions for the continued existence and development of Sami culture. The full scope of this obligation remains unclear, but the Court considered it to include placing special weight on Sami customs and customary law in balancing interests in land disputes:[622]

> If it is a precondition for maintaining the culture, it may therefore be necessary to ensure their continued access to land traditionally used. In international practice, principles of customary law have been given special importance in the determination of such land rights.[623]

The Supreme Court's reasoning in the judgment expands the nature and scope of the cultural protection provided by the Swedish Constitution to the Sami. This widening of the nature and the scope follows from the Court's reference to international principles mentioned above but also to Article 8 (1) and 14 (2) of the ILO C169, a convention that Sweden has not ratified.[624] As explained above, international legal principles are valuable as interpretation aids to resolve disputes related to the Sami, regardless of whether Sweden has ratified the document.

Article 8 (1) of the ILO C169 expresses the same principle prescribed in Article 26 of the UNDRIP and prescribes an obligation of states, suggesting that '[i]n applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.'[625] The applicability of this article for the Supreme Court is based on its constituting a general principle of international law, and there is consequently an obligation under international law for Sweden to consider its content.[626] Though not clearly stated, Article 14 (2) of the ILO C169 also, in part, expresses a general principle of international law:

> 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 possessions.[627]

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[621] *Girjas Sami village (SSC)* (n 138) [92], [130]–[131].
[622] Ibid [130]–[132].
[623] Ibid [131] [author's translation].
[624] Ibid [130], [162].
[625] ILO C169, art 8(1).
[626] See, e.g., Wallace and Martin-Ortega (2009) (n 92) 23–25, and Harris (2004) (n 92) 44–47, which describe a general principle of international law as a standard recognised in several legal systems.
[627] ILO C169, art 14(2).

For the legal protection of Sami rights and freedoms linked to traditional areas to be practical and effective rather than theoretical and illusionary, national laws and principles must, thus, consider the wider context to give due regard to the interest of the rightsholder. In the *Girjas Sami village* case, the Supreme Court did this by placing the principle of immemorial prescription in a Sami nomadic reindeer herding context.[628]

The portal section of the RHA prescribes that the Sami's right to land and waters ultimately rests on the principle of immemorial prescription.[629] This is a historic principle that was first introduced in the RHA in 1993 as a result of the Supreme Court's ruling in another Sami case, *Skattefjällsmålet* (*Taxed Mountains*).[630] Originally, the principle was applied in southern Sweden as a ground to assert a protected right of possession to cultivated areas that have been left desolate.[631] It follows that, in its original state, the principle was poorly adapted for the Sami's nomadic use of extensive areas of land. In addition, the Sami have an oral tradition with little self-produced documentation of their customary land use.[632] This, the Court noted, was a practical problem when it was to take due account of Sami customs and customary law, which international legal principles prescribed is required.[633] One reason was that documents created by authorities for other purposes, such as fiscal, cannot with certainty be accepted to reflect Sami customs in a truthful manner.[634]

For the above reason, to ensure practical and effective protection of Sami rights and freedoms as Indigenous peoples, the Court found it necessary to adapt the principle of immemorial prescription to a Sami context.[635] In view of the Sami's characteristic land use over extensive areas, adapting the principle to a Sami context meant an alleviation of evidentiary burden regarding the criteria required by the principle.[636] In other words, the Court was willing to accept that gaps in the evidence be filled with *reasonable assumptions*.[637] In light of Sami land use and legal conditions in other areas the Sami have historically used, it could reasonably be assumed that the same conditions applied in Girjas' geographical area.[638] Consequently, Girjas

[628] Compare, *Airey v Ireland* Series A no 41, (1979) 2 EHRR 305 [24].
[629] RHA, s 1.
[630] Governmental Bill 1992:32, 2, 12, 85; *Taxed Mountains (SSC)*.
[631] *Girjas Sami village (SSC)* (n 138) [137]; Lundh (2013) (n 485) 85–93.
[632] *Girjas Sami village (SSC)* (n 138) [162].
[633] Ibid [162]–[164], with reference to ILO C169, art 14(2).
[634] Ibid [164].
[635] Ibid [147]–[149].
[636] Ibid [162]. The criteria are prolonged and continued use and possession of definable real property, where the use reached a certain intensity and remained unquestioned. See ibid [140].
[637] Ibid [163].
[638] Ibid.

did not have to show exactly which Sami had used the Area, how it had been used, or how individual rights and freedoms had passed from generation to generation.[639]

Based on the substantive evidence, the Supreme Court concluded that from the mid-1700s, in accordance with the principle of immemorial prescription as adapted to the Sami situation, individual Sami had an established right to dispose freely of wildlife resources in the Area.[640] One reasons for this conclusion were that Sami hunting and fishing in the Area had not been subjected to significant competition; rather, it had dominated.[641] The Sami had also granted others access to the Area for hunting and fishing purposes without it having been questioned.[642] Moreover, the Court found a lack of evidence showing that the Swedish state had historically claimed it had hunting and fishing rights in the Area. In conclusion, the Court found that Sami had held the right to dispose freely of wildlife resources in the Area from at least the mid-1700s.[643] In addition, there was no indication that the state had subsequently taken any measures leading to the right being extinguished.[644] The right of disposition that the Sami had held in the Area since the mid-1700s thus remained when the first national regulation of Sami access to land and waters came into effect in 1887.[645]

Through this first regulation of Sami access to land and waters in the late 1880s, the Supreme Court explained, hunting and fishing became intimately linked to rights and freedoms alongside the practice of reindeer herding.[646] The administrative regulation of reindeer herding in Sami communities subsequently linked individual rights to dispose of wildlife resources with local Sami communities.[647] Consequently, the right of Sami individuals to dispose of wildlife resources was transferred through the state administration of reindeer husbandry to Sami villages.[648] It followed that Girjas holds the rights to dispose of wildlife resources in the Area on the basis of the principle of immemorial prescription.

[639] Ibid.
[640] Ibid [205].
[641] Ibid [202], [205].
[642] Ibid [205].
[643] Ibid [206].
[644] Ibid [208]–[217].
[645] Ibid.
[646] Ibid [219].
[647] Ibid [220].
[648] Ibid [220]–[221].

6.1.4.4.4 The Wider Impact of the Girjas Sami Case

The Supreme Court ruling in the *Girjas Sami village* case represents important progress in the protection of the Sami's rights and freedoms linked to their ancestral land. The ruling clarifies that Sweden's obligations to protect Sami cultural heritage and its material foundation extend beyond merely facilitating a nomadic way of life. This obligation includes a duty of care to take due account of legal developments linked to Peoples and Indigenous peoples that aim to establish effective legal protection of Sami rights and freedoms linked to traditional territories and resources. Such protection presupposes a right to dispose freely of natural resources and influence decisions that affect this ability; it aims to ensure safeguards for the Sami's ability to maintain and develop their culture in accordance with their own choices, which is in line with the principles of self-determination and personal autonomy. However, though Indigenous peoples' right to peaceful enjoyment of traditionally used land and resources is a norm that underlies the Supreme Court's reasoning, the wider impact of the ruling is not straightforward.

That Girjas, as an association, has the right to dispose freely of wildlife resources on Crown land due to the Sami's historical residence in the Area not being exposed to significant competition means that the value of the ruling for other Sami associations where colonisation progressed further remains uncertain. The same uncertainty prevails in relation to privately owned land, where landowners hold the right of disposal as a starting point. For a right to dispose freely of wildlife resources on private land to be considered to exist, it must also have been exercised. Thus, it is highly uncertain whether the Sami have an existing right to hunt and fish on private land in areas where such a right has not been exercised but only the more limited right to hunt and fish. To extend this right to include a right of disposition also risks coming into conflict with the property rights of private landowners.

The wider impact of the ruling on existing rights and interests and the relationship between reindeer herders, Sami associations, and the Sami in general is also uncertain. The issue of different stakeholders has come to the fore due to the Swedish government appointing the Judicial Inquiry Commission to review the RHA.[649] This review focuses solely on Sami rights, and one of the tasks is to review whether non-Sami association members have the right to hunt

[649] En ny renskötsellagstiftning (Dir 2021:35) (n 7).

and fish on the basis that these activities form an important part of Sami culture.[650] Thereby, the review risks creating internal conflicts of interests and rights within the Sami community. That a Sami association may hold the right to dispose freely of wildlife resources on traditional Sami land does not exclude individual reindeer herding Sami from having individual protected interests or legitimate expectations of the peaceful enjoyment of hunting and fishing under the ECHR. [651] Moreover, the reindeer herding community is a minority within the Sami community, and the Swedish state has an international obligation under the ECHR to, for example, ensure protection of the cultural dimension of the private and family life of reindeer herders in light of their engagement in a culturally specific activity.[652] Hunting and fishing complement reindeer husbandry and thus form a central part of the reindeer herders' private and family life, making them culturally specific activities.[653]

Questions about internal legal relations within the Sami community will, as mentioned, be examined by the commission appointed by the Swedish government to review the RHA. One of the fears of the Sami associations is that the review will weaken their legal protection in favour of a Sami majority and a more general Sami interest in hunting and fishing.[654] In the end, the issue will be decided politically, as the proposals made by the commission to become law must pass the Swedish Parliament and potentially be discussed in the Sami Parliament. In this context, a relevant question is why the Swedish government appointed a justice from the Supreme Court who has extensive experience of conflict resolution as convener for the commission.

In the *Girjas Sami village* judgment, the Supreme Court shows the importance of considering the rights of the Sami as a people. In the following section, this thesis explains the protection of the Sami's access to land outside the RHA, focusing on the Environmental Code. This expanded focus is required because the Environmental Code is increasingly important in the protection of Sami access to land at a time when interest in, for example, mineral extraction and wind power has increased. The section shows that the protection of Sami access to land

[650] Ibid 6.
[651] See, e.g., *Matos e Silva, lda, and Others v Portugal* (1997) 24 EHRR 573 and *Dogan and others v Turkey* (2005) 41 EHRR 15. Compare *Friend, Countryside Alliance and Others v the United Kingdom* App nos 16072/06 and 27809/08 (ECtHR, 24 November 2009).
[652] See, e.g., *Chapman v the United Kingdom (I)* (2001) 25 EHRR CD64, and *Winterstein and Others v France* App no 27013/07 (ECtHR, 17 October 2013).
[653] See, e.g., *Halvar From v Sweden* App no 34776/96 (Commission Decision, 4 March 1998). Compare *Chassagnou v France* (2000) 29 EHRR 615.
[654] Swedish Sami National Association's Conference of Presidents (21–22 October 2021, Stockholm).

according to the Environmental Code is a narrow interpretation of the cultural purpose of protecting Sami rights explained in Chapter 4.5. This narrow interpretation is because the focus is on ensuring the reindeer industry's access to land rather than considering Sami access in the context of the value of reindeer herding for Sami culture.

6.2 Protection of Sami Access to Land under the Environmental Code

With an increased interest in Swedish minerals, the pressure is increasing on applications for access to land and waters the Sami have traditionally occupied and used.[655] This has led to legal disputes over the authorities' granting access to land and waters for resource extraction, including the harvesting of wind. These extractions expose the Sami's right of access to land and waters according to the RHA to new competition that may affect their ability to conduct viable reindeer husbandry. As explained in Chapter 5.2, the Swedish authorities' assessment of access to land and waters used by the Sami must balance different interests in accordance with the Environmental Code. The code thus plays a crucial role in protecting the Sami's historic right to access land and waters at a time when the Swedish government is advocating a green transition to cleaner energy.

This section contains a general discussion on the protection of Sami rights under the Environmental Code, which is applicable to the exploration and extraction of natural resources and is important in the granting of permission for the construction of wind turbines.[656] The purpose is to provide a general picture of how the Swedish courts have related to Sami protection under the Code by highlighting individual examples showing that the application of the Code primarily focuses on the technical impact of increased presence on land the Sami use for reindeer husbandry. The effect is that even though, according to the Code, legal protection is established specifically for Sami land access based on the RHA, which is based on protecting Sami culture, the cultural dimension becomes less relevant in the assessments.

6.2.1 Reindeer Husbandry and Resource Extraction

The strength of protection for the Sami's access to land and waters according to the rules of the Environmental Code depends on several factors – for example, whether there is a

[655] E.g., Beowuld Mining, 'Discovering and developing Natural Resources in the Nordic Region' (*Beowuld Mining*, 2019) <https://beowulfmining.com> accessed 1 October 2019; Al Jazeera, 'Gallok – The Battle for Sami Rights in Sweden' (2019) <https://www.aljazeera.com/programmes/witness/2019/02/gallok-battle-sami-rights-sweden-190204093418965.html> accessed 28 October 2019.
[656] The Swedish Planning and Building Act (SFS 2010:900) (Plan- och bygglagen), c 2, s 2.

cumulative impact due to previously granted access to land, whether the area is important for the reindeer herding industry from a general perspective or is rather defined as an area of national interest for the reindeer herding industry, and what the terrain in the area is like (narrow moving paths, open planes, etc.). The factors that affect Sami protection under the Code are many, and it is consequently difficult to give an overall picture of which measures affect reindeer husbandry to such an extent that the measure cannot be permitted. Therefore, whether a measure can be permitted or not is a technical assessment performed in relation to the framework of the Code based on the determined value of the area, which is illustrated in Chapter 5.2.

An example of an ongoing case that is still relevant is Bluelakes Mineral AB's application to mine nickel in Rönnbäck in the Storuman municipality in Västerbotten County through its subsidiaries IGE Nordic and Nickel Mountains. The area falls within the village area of Vapsten Sami village and is partly an area of national interest for reindeer husbandry. A national interest under the Environmental Code is a specific area that the legislators have identified as particularly worthy of protection (see Chapter 5.2). When two such interests are set against each other, the government must balance the interest of each. Sami use of land and waters is thus continually subjected to governmental decisions on whether other use of the land serves a utilitarian interest better.

After the government granted mineral processing concessions to IGE Nordic, Vapsten Sami village appealed the decision in the Supreme administrative Court, arguing that the government had failed to take sufficient account of the fact that the reindeer husbandry in the area constituted a national interest within the meaning of the Environmental Code.[657] The Court revoked IGE Nordic's concession decision due to the lack of a clear description of how the government had balanced the national interest related to reindeer husbandry and the national interest in mineral extraction.[658] This decision lacks references to the value reindeer husbandry represents for Sami culture, though it is not clear whether this was something Vapsten Sami village highlighted in its complaint.

When granting the application of concession for exploration to Nickel Mountain, the government had adapted its reasoning based on the Court's assessment in IGE Nordic. The Court thus concluded that the government had fulfilled its obligation when granting the

[657] *HFD 2012:27 (IGE Nordic AB)* SSAC, 1f.
[658] Ibid 4f.

concession, as this was based on an assessment of damage reduction measures required to ensure reindeer husbandry.[659] It is in connection with the assessment of the damage reduction measures that the Court responded to Vapsten Sami village's arguments regarding Sweden's international commitments. Vapsten argued that Sweden's international obligation to ensure the Sami's ability to practice reindeer husbandry required the government and Swedish authorities to base their assessment on evidence and research that shows that a mine does not affect their ability to continue with reindeer husbandry; furthermore, they argued that such a basis for assessment was not presented.[660] The Court noted that the Sami have cultural protection according to the Swedish Constitution, which is explained in Chapter 3. This protection means, according to the Court, that within each Sami village there must be sufficient conditions for the village to be able to continue the practice of reindeer husbandry.[661] However, the Court found that the legal protection provided by Swedish law is stronger than the protection under international law and that the impact a mine can have on the reindeer herding industry cannot be assessed until the exploration phase is completed.[662] Consequently, the Court upheld the government's decision.

It is estimated that Nickel mining in Rönnbäck will last for 27 years, after which the land will be restored, which will take a further number of years; it is only then that the Sami will once again be able to use the area for reindeer husbandry, according to the government's assessment. What is missing in this assessment is how this affects culture for the Sami village concerned and its members. This lack raises the question of how far the Swedish government's mandate can extend to control a population's access to land and waters before the right to peaceful enjoyment of human rights and freedoms held by the Sami belonging to Vapsten Sami village is violated. Chapter 7 discusses this issue in relation to the European Convention, since the government's power to do so is not unlimited. The material question is when the possibility of effectively enjoying key element of human rights and freedoms becomes impossible because legal protection is theoretical and illusory.

The government's reasoning in granting the concession is based on two presumptions. The first is an economic consideration of the importance of nickel extraction. Through the mining, Sweden would become self-sufficient in nickel for 27 years – the same period Sami access to

[659] *HFD 2014:65 (Nickel Mountain AB)* SSAC, 6.
[660] Ibid 2f.
[661] Ibid 5.
[662] Ibid 5f.

the area would be suspended – and it would generate a socio-economic benefit for the state that the reindeer industry could not generate.[663] Consequently, it was determined that there was a general interest in allowing nickel mining. The second presumption is that the land can be restored so that reindeer husbandry can be resumed.[664]

In *Nickel Mountains*, the Court did not make an assessment of whether the prolonged period was an unjustified interference in Sami cultural rather than proprietary interest, since the case only concerned exploration concessions, not mining permits; the Court found that, at that stage, the government's assessment assured sufficient damage-reduction measures for reindeer herding to continue during the mining period.[665] As mentioned, in relation to this, the Court emphasised that the rules according to the Environmental Code fulfilled Sweden's international commitment to the Sami.[666] This included Sweden's responsibility according to Article 27 of the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[667] How the Court came to this conclusion is not clear, and international bodies disagree with this conclusion. In November 2020, for example, the United Nations Committee for the Elimination of Racial Discrimination considered that that the process concerning the granted concessions failed to fulfil Sweden's obligations under CERD.[668] According to the Committee, Sweden had violated the Sami's rights under CERD by granting a concession on Sami land without involving the Sami in the process at an early stage. The decision to grant access to land for exploration purposes thus failed to fulfil the requirement for free, prior, and informed consent.[669]

6.2.2 Reindeer Husbandry and Renewable Energy

Disputes over access to ancestral Sami land and waters range from space research[670] to recreational purposes and economic interests.[671] The major area of dispute is, however, access

[663] Ibid 11f.
[664] Ibid.
[665] Ibid 6.
[666] Ibid 5. See also the *Supreme Land and Environmental Court's ruling, 2018–04–05, M 10984 (Ava wind park)* MÖD, 19.
[667] Governmental Bill 1992:32, 102–105; International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965, EIF 4 January 1969) 660 UNTS 195 (CERD).
[668] *CERD, Communication No 54/2013* (2020) (n 6).
[669] Ibid [1.2], [6.22], [7].
[670] E.g., *RÅ 1999:234 (SSAC)*; *RÅ 2010:121 (SSAC)*.
[671] E.g., Kompass, 'Inmitten der skandinavischen Wildnis – Wandern in Schweden' (*Kompass*, 2019) <https://www.kompass.de/magazin/inspiration/inmitten-der-skandinavischen-wildnis-wandern-in-schweden/> accessed 1 October 2019; Annalisa Barbieri, 'Nights on ice in Sweden's Arctic wonderland' (2017) <https://www.theguardian.com/travel/2017/jan/15/new-ice-hotel-swedish-lapland-arxtic-adventure>

to land for renewable energy, primarily wind power, [672] which the Swedish state advocates as part of a sustainable environmental policy.[673]

Renewable energy extraction requires extensive infrastructure, such as connection to the national grid, roads, necessary buildings, and quarries. All these parts can have a cumulative effect on the ability to conduct reindeer herding. In the Ragunda Borgvatten wind park case, for example, the Sami claimed that quarries built in connection with wind farms were complicating the migration of reindeer, amongst others, because quarries created areas with grazing shortages along the migration routes.[674] This deficiency drove the reindeer from their natural nocturnal resting places, thereby rendering the migration route useless. As mentioned in Chapter 5, migrations routes are a protected right under the RHA. According to the Sami, one of the problems in the aforementioned case was that the decision-making authority failed to consider the effect the quarries would have on reindeer migration when granting permits for the quarries. Moreover, they failed to consider the cumulative effect of granting permits for several quarries. The Sami, therefore, demanded that the permits granted be referred back to the authority for reprocessing. Although the authority did not reason about the effects of the quarries on reindeer husbandry, the Court found that the authorities had considered the cumulative effect.[675] As a result, the Sami's claim was rejected and the quarry allowed.

In other wind park cases, however, courts have engaged in reasoning about the cumulative effect.[676] In the case of a wind park located within the areas of the Sami villages of Vapsten and Vilhelmina northern, for example, the Court notes that consideration of the cumulative effect includes any additional and ongoing land use or exploitation, including activities that

accessed 1 October 2019; Nick Gibbs, 'Sweden's hot spot for winter testing' (2015) <https://www.autonews.com/article/20150601/OEM/306019952/sweden-s-hot-spot-for-winter-testing> accessed 1 October 2019; Luke Harding, 'The node pole – inside Facebook's Swedish hub near the Arctic Circle' (2015) <https://www.theguardian.com/technology/2015/sep/25/facebook-datacentre-lulea-sweden-node-pole> accessed 1 October 2019.

[672] The regulation of watercourses in Sweden took place mainly in the latter part of the last century and the disputes that arose then were mainly related to the issue of compensation paid. *NJA 1961:444* SSC; *NJA 1967:415* SSC; *NJA 1969:105* SSC; *NJA 1979:1* SSC; *NJA 1979 Not A2 (Vapsten Sami village)* SSC; *NJA 1981:610* SSC.

[673] Energimyndigheten, *Nationell strategi för en hållbar vindkraftsutbyggnad (ER 2021:02)* (2021).

[674] *Land and Environment Court in Östersund's ruling, 2011-03-02, M 2637 (Ragunda Borgvatten wind park)* MMD, 2.

[675] Ibid.

[676] *Supreme Land and Environmental Court's ruling, 2018–04–13, M 3648 (Storhöjden wind park)* MÖD; *Supreme Land and Environmental Court's ruling, 2018–05–03, M 1802 (Jovnevaerie Sami village wind park)* MÖD; *Supreme Land and Environmental Court's ruling, 2019–04-01, M 9258 (Hemberget and Sandsjön wind park)* MÖD.

have been discontinued but not subjected to post-treatment measures and approved concessions for activities that have not yet started.[677] Failure to make an overall assessment may result in decisions being overturned by courts.[678]

What the Courts' approaches concerning the cumulative effect have in common is that the focus is on technical issues. This focus on technical issues when interpreting the rules of the Environmental Code, according to the Sami Parliament, leads to a lack of consideration of the Sami perspective.[679] The Sami perspective includes the relationship that the Sami have to ancestral land and waters.[680] From a Sami perspective, land and waters are part of the Sami cultural environment, a constitutive part of the Sami lifestyle, and a prerequisite for the Sami culture to survive and develop.[681] That this is not taken into account in the cumulative effect, according to the Sami Parliament, is due to the fact that there is a limited understanding of the Sami's land use and their cultural landscape.[682] This lack contributes to the difficulty of assessing the cumulative effect on Sami culture of granting access to the same land the Sami have a right of access to.

Even though courts in relation to the Environmental Code highlight 'that reindeer husbandry is a prerequisite for the Sami culture and that the survival of the Sami culture must be guaranteed,' these references are rare.[683] The focus is instead on assessing the degree of the impact on reindeer husbandry and where the measure reaches a level of long-lasting negative impact or a short-term impact that has significant negative consequences for reindeer husbandry.[684] This places a great burden of proof on the Sami to show that the reindeer are actually affected by all the different measures to such an extent that the conduct of the reindeer herding is significantly hindered.[685]

In conclusion, the current assessment of the protection of the Sami's access to land and waters under the Environmental Code focuses on technical matters and thus constitutes a narrow approach to protecting reindeer herding as a cultural activity. As stated in the Ava wind park

[677] *Hemberget and Sandsjön wind park (MÖD)* 10.
[678] E.g., *Supreme Land and Environmental Court's ruling, 2020–05–20, M 2288–19 (NCC mining)* MÖD, 7; *Supreme Land and Environmental Court's ruling, 2020–11–12, P 2707–19* MÖD, 6.
[679] *Sametinget,* (2009) (n 67) 12.
[680] Ibid 9.
[681] Ibid 5, 9.
[682] Sametinget, *Vindkraft i Sápmi* (Sametinget 2018).
[683] *RÅ 2010:6* SSAC.
[684] E.g., *Jovnevaerie Sami village wind park (MÖD)* 3.
[685] E.g., *Ava wind park case 2018 (MÖD)* 5; *Jovnevaerie Sami village wind park (MÖD)* 3.

case (2018), 'It is clear from the preparatory work that the provision is not aimed at the industry itself but at the reindeer industry's need for access to land.'[686] What is missing in this reflection is the connection between the protection of reindeer husbandry according to the Environmental Code and the protection of land and waters set out in the first section of the RHA (see Chapter 5.1). This protection, according to the preparatory work for the first Reindeer Grazing Act of 1886, is based on securing Sami access to land and waters as part of ensuring the survival of Sami culture, as explained in Chapter 4.5.

6.3 Concluding Remarks

The above points to a legal development where the cultural dimension of the Sami rights as Indigenous peoples has become more important for the courts' balancing of conflicting interests. The chapter shows how Swedish courts in this process take due account of the Sami's distinct way of life based on their needs linked to the reindeer herding industry. The focus is primarily on their opportunities to run an economically profitable reindeer husbandry business, which requires secure access to land and water. The Supreme Court's finding in *Girjas Sami village* may be considered to deviate from the economic aspect of access to land, even if hunting and fishing is economic rights. Here, the Court shows an increased understanding of cultural aspects of the rights and freedoms the Sami have to traditional land and waters seen in light of their status as Indigenous people. What sets the ruling in *Girjas Sami village* apart is the Supreme Court's application of international principles linked to Indigenous peoples' rights, an application that makes the same principles applicable in Strasbourg in relation to cases emerging from Sweden, as explained in Chapter 7.4. That these principles now are applicable in Strasbourg follows from the fact that the European Convention cannot provide less legal protection than that existing at a national level.

In the last chapter analysing the legal situation, this thesis focuses on the rules and principles from the historical background that are most relevant for Sami legal protection and for safeguarding the Sami's cultural way of life by ensuring their right of access to land and water. For that reason, the last chapter focuses on the right to respect for private life under Article 8 and the right of property protection under P1-1. The chapter shows the interdependence of conventional rights and how Article 8 may impact the nature and scope of the protection P1-1 aims to ensure.

[686] *Ava wind park case 2018 (MÖD)* 5.

Chapter 7 The Right to Respect for Private life and Possessions under the European Convention

The *raison d'être* for the statutory protection of Sami access to land and waters for reindeer herding is to safeguard a specific cultural lifestyle differing from that of the majority. This lifestyle has a cultural, symbolic significance for the Sami community in part as a common aspect of Sami identity but above all for the Sami's cohesion as an Indigenous people. It is on this cultural basis that the Swedish parliament in the 19th century decided to protect Sami access to land and waters and set an internal limit for future colonisation by reserving certain areas for Sami exclusive use. As shown in Chapter 4.5, at this time, the protection of Sami culture was equated with the protection of herding reindeer, hunting, and fishing. The value of protecting Sami access to land and waters is thus broader than protecting these activities from an economic perspective. The protection has an inherent double value for the Sami's ability to continue to enjoy respect for their right to maintain and develop their cultural way of life and identity according to their own choosing.

Given that herding reindeer, hunting, and fishing constitute *possessions* within the meaning of article 1 of Protocol No. 1 of the European Convention (P1-1), as shown below, and have cultural dimensions, ensuring the right to enjoy these possessions requires due consideration of these cultural dimensions. Considerations of such cultural dimensions within the context of the European Convention falls, as shown below, within the context of Articles 8 to 11, primarily. In light of the discussion in previous chapters on the importance of herding reindeer, hunting, and fishing for the Sami's cultural way of life and identity, this chapter focuses on the right to respect for private life under Article 8.

The chapter begin with an analysis of historical cases concerning Sami property rights and how the Strasbourg Court has dealt with Article 8 in relation to P1-1 in those cases (Section 7.1). Subsequently, Article 8 is analysed in light of the Sami context with a focus on how the Court approaches the concept of the private life of minorities (Section 7.2). The right to protection for the peaceful enjoyment of possession is then analysed (Section 7.3). This section provides an explanation of the extent to which Sami customary rights constitute a valuable factor for a balanced assessment between a Sami interest in peaceful enjoyment of the possession and the government's right to control the extent of this peaceful enjoyment in the public interest. The last section (7.4) contains a discussion on the interplay between different articles in the European Convention and the convention's relationship to international law.

7.1 A Summary of Sami Cases Concerning the Right to Respect for the Freedom of Private Life

As previous chapters have shown, property protection in Sweden has become central to the protection of the Sami's rights and freedoms regarding their original territories. The reindeer husbandry right, which today is the right that ensures the Sami's continued access to traditional territories, has domestically the same legal protection as a right of ownership and thus falls under property protection in the European Convention. As shown below, however, the Sami have not been able to successfully assert this right in Strasbourg. The rights and freedoms Strasbourg institutions primarily insinuate have relevance are instead those that fall under the right to respect for private and family life under Article 8 of the ECHR. As shown below, however, even under this article, the Sami have found it difficult to assert their rights and freedoms linked to original territories.

A fundamental question that arises in the relationship between Indigenous peoples and the European Convention is whether Article 8 serves a purpose for Indigenous peoples in land disputes. The Strasbourg Court has so far not examined the merits of a Sami case in relation to the right to the peaceful enjoyment of posessions (property). In fact, the key Convention cases dealing with groups from different ethnic or cultural backgrounds deal with them as minorities. As shown below, this also applies in relation to the Sami, despite their Indigenous peoples' status. It is, therefore, not possible to know with any degree of certainty that Article 8 has a value in relation to the Sami's right as Indigenous peoples to the peaceful enjoyment of property of original territories under P1-1. Based on the Court's handling of Article 8 in other cases, however, a qualified assessment can be made on its positive value for the Sami, which is something this section does. The scope and nature of the right to the peaceful enjoyment of property (P1-1) and the right to respect for private life (Article 8) are something this chapter returns to in the following sections. In general, both P1-1 and Article 8 shall ensure protection against undue interference by authorities in the peaceful enjoyment of human rights and fundemental freedoms in accordance with one's interests and the right to live a life in accordance with personal choices.

Considering the apparent lack of weight attributed to the right and freedoms of Article 8 in Sami cases discussed below, it might be understandable why the Sami village of Girjas, when submitting its lawsuit claiming exclusive rights to small game hunting and fishing vis-à-vis the Swedish state in relation to the European Convention, only relied on the right to peaceful

enjoyment of property in P1-1.[687] As this section shows, however, it follows from the examination of admissibility in historical Sami cases that the right to respect for the fundamental freedoms covered by Article 8 is a factor that have been taken into consideration in relation to the Sami's right to the peaceful enjoyment of property, although this is not always clear.

7.1.1 The Alta Valley Case (1983)

In October 1983, two Sami residing in Finnmarken in Norway unsuccessfully challenged the loss of access to ancestral land in the Alta Valley in the Norwegian Supreme Court. This loss followed the construction of a hydroelectric power plant, which resulted in part of their traditionally used land becoming submerged by the reservoir. The applicants considered this a violation of their right to peaceful enjoyment of property. Moreover, the loss of access to land was a direct threat to Sami cultural way of life and Sami identity.[688]

In the first Sami case considered by Strasbourg judicial institutions, the late European Commission of Human Rights (ECommHR) found no indication that the construction of the dam unduly interfered with any of the applicants' protected rights and freedoms. In relation to Article 8, ECommHR took notice of the relationship between the applicants' characteristic way of life and the need to access land. In principle, it held, characteristic way of life falls within the scope of private life, family, and home in Article 8.[689] Consequently, disrespect for the interests of minorities to live a way of life of their choosing may conflict with the right to respect in Article 8.[690] The Strasbourg Court later confirmed this in *Buckley v. United Kingdom* (1997).[691]

Even though ECommHR found the construction of the dam justified under the limitation clause in Article 8, it explains the conflicts that might arise between large-scale constructions and the right of respect for private life as follows:

> The Commission is prepared to accept that the consequences, arising for the applicants from the construction of the hydroelectric plants, constitutes an interference with their private life, as members of a minority, who move their herds and deer around over a considerable distance. It is recalled that an area of 2.8 km^2 will be covered by water as a

[687] *Girjas Sami village (Summons) (DC)* (n 575) [2.1]; *Girjas Sami village (SSC)* (n 138) [8].
[688] *G and E v Norway* (1984) 6 EHRR 357 (Commission Decision) 34f.
[689] Ibid 35.
[690] Ibid 38.
[691] *Buckley v UK (CD)* (n 227) [64]; *Buckley v the United Kingdom* (1997) 23 EHRR 101 [51]–[55]. See also *Chapman v the United Kingdom* (2001) 33 EHRR 18 [73].

> result of the plant. In addition, it must be acknowledged that the environment of the said plant will be affected. This could interfere with the applicants' possibility of enjoying the right to respect for private life. [692]

This approach to Article 8 represents an early view of the importance of taking due account of the cultural interests of minorities in pursuing a characteristic lifestyle. As the following sections shows, there have been considerable legal developments since 1983 regarding the right to respect for private life under Article 8. Simultaneously, as Chapter 3.4 shows, there has been significant legal development of the rights of Indigenous peoples at an international level.

It follows from ECommHR's reasoning that, in a balance assessment, the environmental impact resulting from the construction of the dams did not affect the applicants' interests under Article 8 to such an extent that the construction was incompatible with the applicants' right to respect for private life. This misconception is based on the presumption that the applicants, through access to other areas, could continue to practice their nomadic traditions. Consequently no cultural violation arose:

> Nevertheless, in comparison with the vast areas in northern Norway which are used for reindeer breeding and fishing, the Commission considers that it is only a comparatively small area which will be lost for the applicants, for such purposes, as a result of the Alta river project.[693]

The commissions reasoning echoes the approach of the Swedish Governor of Västerbotten in the 17th century, explained in Chapter 4.3.1, which held that their nomadic lifestyle and needs make the Sami's land rights separate from specific places. Fulfilment of Sami interest linked to land is thus possible by protecting Sami access to large areas and the safeguarding of their nomadic lifestyle. From a contemporary perspective, such a position would be incompatible with Indigenous peoples' rights linked to ancestral lands and waters under general principles of international law (as explained in Chapter 3.4.1).

7.1.2 Halvar From v. Sweden (1998)

Halvar From v. Sweden is not a Sami case per se. It concerns a complaint from a private landowner concerning the registration of an elk hunting area on his land for the benefit of a Sami village. [694] The landowner claimed the registration violated his right to peaceful enjoyment of property. As Chapter 6.1 explains, hunting rights in Sweden generally follow

[692] *G and E v Norway* (n 688) 36.
[693] Ibid.
[694] *Halvar From v Sweden* (n 653) (*The Facts*).

landownership, while the Sami's right to hunt is based on customary law codified as part of the reindeer husbandry right.

ECommHR examined the compatibility of the decision to register the elk hunting area under P1-1, since the applicant invoked an infringement of his property rights. According to the limitation clause in P1-1, states have a right to control private property if there is a general interest in doing so. The master of characterisation of a general interest is the state.[695] In the conclusion that the registration was compatible with the limitations clause, ECommHR upheld the value of hunting for the Sami's cultural way of life:

> The Commission finds it to be in the general interest that the special culture and way of life of the Sami be respected, and it is clear that reindeer herding and hunting are important parts of that culture and way of life. The Commission is therefore of the opinion that the challenged decision was taken in the general interest.[696]

Of interest for the following discussion on the value of customary law in Section 7.3, ECommHR highlighted, in relation to this statement, that the Sami's right to hunt 'is considered to be based on custom from time immemorial.'[697] Exactly what this reference means cannot be interpreted from the reasoning because ECommHR at the same time emphasises the Sami's statutory right to hunt. One way of interpreting this is that the Commission found reason to note that the Sami's right to hunt is incredibly old and not just based on statutory provisions, possibly for the purpose of emphasising the general value – from the perspective of the European Convention – of protecting fundamental elements of a lifestyle that deviates from the majority. As shown in the following sections, such an interpretation is not unreasonable against the background that one of the fundamental purposes of the European Convention is to ensure respect for diversity.

It is undoubtedly possible to see ECommHR's approach in the *Halvar From* case in the context of the existence of potentially conflicting rights. As a general principle, the Strasbourg Court cannot adjudicate in private law cases.[698] This does not preclude that cases handled by the Court may have consequences on civil law matters.[699] How the Strasbourg Court handles cases

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[695] *Bélané Nagy v Hungary* App no 53080/13 (ECtHR, 13 December 2016) [113]; *Handyside v the United Kingdom* Series A no 24, (1979-80) 1 EHRR 737 [62].
[696] *Halvar From v Sweden* (n 653) (*The Law*). Compare *OB and Others v Norway* App no 15997/90 (Commission Decision 8 January 1993) (*The Law*), and *Könkämä v Sweden (CD)* (n 574) (*The Law*).
[697] *Halvar From v Sweden* (653) (*The Law*).
[698] ECHR, art 34.
[699] See, *e.g.*, *Gladysheva v Russia* App no 709/11 (ECtHR, 6 December 2011).

involving conflicting private rights has been discussed by Stijn Smet and Eva Brems (2017), for example.[700] This is addressed further below, but the Court tends to avoid situations where a ruling affects, or risks affecting, several private rights, potentially resulting in new private law claims.[701] A ruling finding the decision to register an elk hunting area in favour of a Sami village incompatible with the landowner's right of peaceful enjoyment of property under P1-1 would have had private law consequences. The conflict of rights would arise since the Sami have a protected right to hunt as part of their reindeer husbandry right, as explained in Chapter 5. Additionally, it risked de facto questioning the very foundation of Sami private law rights, ultimately resting customary law in line with the provisions of immemorial prescription. Consequently, it would potentially result in several new claims nationally questioning registrations on hunting areas on private land in favour of the Sami.

Regardless of the presence of conflicting private interests, that ECommHR's statement of the general interest includes respecting the Sami's cultural lifestyle provides an insight into how the respect in Article 8 should be understood in relation to Sami interest in relation to land, despite the lack of a direct reference to Article 8, since it is only Article 8 (with the exception of Article 2 of Protocol No. 1) that contains the word respect.[702] Thus, a holistic approach to the case is shown. The requirement for a holistic view of the European Convention is something that this chapter returns to in the following sections, but the Convention is a whole that may require that several rights and fundamental freedoms must be considered simultaneously.[703] This may be necessary to prevent a situation where a decision in relation to one article risks infringing on the rights and fundamental freedoms under another.[704] Seen in this light, a reasonable interpretation of ECommHR's statement is that the reference to the Sami's cultural way of life is a clarification that within the framework of general interest in P1-1, it may be

[700] Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (OUP 2017).

[701] See, *e.g.*, Ian Leigh, 'Reversibility, Proportionality, and Conflicting Rights – Fernández Martínez v. Spain' in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights* (OUP 2017) 12, 235, and Eva Brems, 'Evans v. UK: Three Grounds for Ruling Differently' in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights* (OUP 2017) 79.

[702] Article 2 of Protocol No. 1 ensures parents the right of respect for their religious and philosophical beliefs in the teaching of their children.

[703] *Klass and Others v Germany* Serie A no 28, (1979-80) 2 EHRR 214, [68].

[704] The Strasbourg Court has on several occasions emphasized the need for a comprehensive and holistic approach to the European Convention, which is based on the view that a narrow and strict approach can lead to results that are inconsistent with the spirit and purpose of individual articles and the Convention as a whole. See, *e.g.*, *Case Relating to certain aspects of the laws on the use of languages in education in Belgium v Belgium (Belgian Linguistic)* Series A no 52, (1968) 1 EHRR 252, 27 [1], 28 [5]; *Handyside v UK* (n 893) [49]; *Stec and Others v the United Kingdom (Dec)* App nos 65731/01 and 65900/01 (ECtHR, 6 July 2005) [48]; *JA Pye (Oxford) Ltd v the United Kingdom* (2008) 46 EHRR 45 [75].

required that due consideration be given to the Sami's interest for respect of their cultural way of life ensured under Article 8.

7.1.3 Johtti Sapmelaccat Ry and Others v. Finland (2005)

Like *Alta Valley*, *Johtti Sapmelaccat Ry and Others v. Finland* revolved around the right to respect for private life and peaceful enjoyment of possession. The national dispute concerned an amendment to the Finnish Fishing Act that came into effect on 1 January 1998, extending public fishing to state-owned waters within the municipalities of Enotekiö, Inari, and Utsjoki – the home districts of the Sami.[705] In Strasbourg, the applicant complained that the opening of water for public fishing violated historical Sami property rights and the respect for the Sami's traditional way of life as an Indigenous people.[706] The applicants could continue fishing in traditionally used waters but argued that in addition to generally weakening the Sami's legal protection of fishing due to being exposed to competition, the legislation violated the applicant's right to respect for private and family life under Article 8 of the European Convention on the basis that fishing is a central part of Sami cultural traditions.[707]

As the applicant was still able to fish, one of the key questions before the Strasbourg Court was whether the amended fishing legislation affected the applicant's existing fishing rights in such a way that a breach of a convention-protected right or freedom arose. For this purpose, the Court applied a consequence-based approach to assess whether the amendment had interfered with the applicant's right to peaceful enjoyment of conventional rights and freedoms. As the Court explained, there could be no violation if there was a lack of proof that the amended legislation *directly and adversely affected* the applicant's 'concrete ability to exercise their traditional fishing rights.'[708] The applicant needed to show that there was a causal link between the measure and the arguably negative effect that arose as a result of it.

In light of the uncertainty as to whether the amended legislation was a substantive change from previous legislation or merely a clarification of an already established legal situation, the Strasbourg Court found that the applicant had failed to *appreciably show* any adverse impact on their concrete ability to exercise their traditional fishing rights.[709] Consequently their

[705] *Johtti Sampelaccat RY and Others v Finland* App no 42969/98 (ECtHR, 18 January 2005), 2f.
[706] Ibid 10f.
[707] Ibid 11, 14f.
[708] Ibid 16f.
[709] Ibid 18.

complaint of a violation of their right to peaceful enjoyment of possession under P1-1 was manifestly ill-founded.[710]

With reference to its reasoning under P1-1, the Strasbourg Court also found that the applicant's complaint under Article 8 of the ECHR was manifestly ill-founded.[711] Although the Court did not develop its reasons in that regard, it did not directly rule out the applicability of Article 8 to the case. The inapplicability of the article was due to the failure of the applicants to prove that the amended legislation affected their ability to enjoy the rights and freedoms protected under the article. It is difficult to interpret the Court's reasoning as anything other than the following: if a measure does not affect the ability of the Sami to carry out traditional activities, the possibility of invoking a violation of the respect for private and family life on a cultural basis decreases. As seen in the following section, such an interpretation finds support in other minority cases the Court has dealt with. What the Court's reasoning in the present case points to is that Article 8 may be relevant in cases that fall under P1-1. Section 7.3 explains this interaction in relation to other European Convention case laws, but if a measure that falls under P1-1 affects the right to respect for the rights and freedoms falling within the scope of Article 8, such as a cultural aspect central to private and family life, this may affect the state's margin of appreciation.

7.1.4 Handölsdalen Sami Village (2009)

In the *Handölsdalen Sami village* case*,* four Sami villages complained to Strasbourg that the Swedish judiciary had unduly deprived them of their historic right to winter grazing on private land.[712] The national dispute, as mentioned in Chapter 6.1.3, was a civil case between private persons – landowners and Sami village associations – concerning the right of the members of those four villages to access the landowners' land for winter grazing purposes.[713] The primary complaint in Strasbourg was thus a claim of a violation of the Sami's right to peaceful enjoyment of possession under P1-1, a right the villages claimed national courts had unduly restricted based on provisions in the RHA that were not sufficiently clear.[714] Moreover, the

[710] Ibid.
[711] Ibid 19.
[712] *Handölsdalen Sami Village and Others v Sweden (Admissability)* (2009) 49 EHRR 15 [40]–[44]. The case fails to reach the Swedish Supreme Court as it refused to grant leave to appeal.
[713] For a full review, se notably Rumar (2014) (n 375).
[714] *Handölsdalen v Sweden (Adm)* (n 712) [9].

villages claim a violation of their right to a fair trial under Article 6 of the ECHR included argument of a violation of their right to a fair trial.[715]

The central question for the *Handölsdalen* case was not whether Sweden had failed to fulfil its conventional obligations to ensure the right to a fair trial under Article 6 of the ECHR, but it was only in relation to this article that the application was admissible.[716] In March 2010, the villages successfully challenged the denial of their right to a fair trial before the Strasbourg Court.[717] Sweden had breached its obligation under Article 6 § 1 of the ECHR to ensure that the procedure is completed within a reasonable timeframe.[718] Regardless, the success can at best be seen as a Pyrrhic victory, leaving the villages with a financial burden in excess of 1 million euros. [719]

Before providing a reasonable explanation for why the Strasbourg Court found the application of the case in relation to P1-1 manifestly ill-founded, [720] a summary of the Sami's right to access private land for winter grazing should be provided. As Chapter 5 explains, the RHA's control of the Sami's access to traditional territories is divided between access to year-round land and access to winter grazing land.[721] While the RHA ensures the right of access to private land for winter grazing within Lapland, above the Lapland border (see Chapter 4), Sami right of access to private land below this border depends on established historical use. This geographical difference means that it is the Sami who, in a dispute over whether they have a right of access to private land below the Lapland border, bear the burden of proof for their rights.

It is in the discussion of whether the Sami have a right of access to private land for winter grazing that the Swedish judiciary, as an aid of interpretation of the presence of a historical use amounting to a protected right, relied on the requisite for the historical principle of immemorial prescription. As Chapter 6 explains in relation to the *Taxed Mountains* case, the qualification period to establish a right according to that principle is set to two generations: 90 years of unhindered and undisputed use.[722] In the national handling of the handölsdalen case, the

[715] Ibid 9f.
[716] Ibid 19.
[717] *Handölsdalen Sámi Village v Sweden* App no 39013/04 (ECtHR, 30 March 2010) (Merit).
[718] Ibid [65]–[66].
[719] Ibid [68].
[720] *Handölsdalen v Sweden (Adm)* (n 712) [56].
[721] RHA, s 3.
[722] Undén (1951) (n 485) 143; Lundh (2013) (n 485) 87.

national courts considered that the evidence presented by the Sami was not sufficient to reach the qualifying period, as the Sami could only prove 50 years of uncontested land use.[723] Consequently, the national courts found that the villages lacked an established right of access to the landowners' land for winter grazing purposes.

In Strasbourg, the central question in relation to P1-1 was whether the Sami had a possession within the meaning of the article, which the Court found negative. This chapter describes in detail the requirement for P1-1 in Section 7.3, but since P1-1 does not secure a right to property, one of the preconditions for the applicability of P1-1 is that there is an existing possession.[724]

For a possession to be considered as existing, a sufficiently established basis in national law is required. In the case of the Sami villages, the Strasbourg Court did not consider that the rules of the RHA – which regulate Sami right of access to land outside Lapland and the reindeer grazing mountains for winter grazing purposes – constituted a sufficiently established basis that could give rise to legitimate expectations. The Sami villages could not know for sure if they had a legal right to use the land without the approval of the landowner:

> [T]he right claimed by the applicants did not vest in them without the intervention of the courts. Their property interest was accordingly in the nature of a claim and cannot therefore be characterised as an "existing possession" within the meaning of the Court's case-law.[725]

This is partly true, but as appears from Section 7.3, there were cases at the time of the judgment in the *Handölsdalen* case where the Court, despite the lack of legal grounds at the national level, accepted that there was a property right corresponding to a possession within the meaning of P1-1. According to the reasoning of the Court in these cases, a right that has no formal basis in national law may have legal protection at the convention level. The preconditions for this, however, are that the state has been aware of a situation for a long period of time without acting on it, thus giving rise to a legitimate expectation of a right to peaceful enjoyment of possession (as explained in Section 7.3). Whether private landowners have been aware of a Sami land use is less relevant to the Strasbourg Court's reasoning, as they are not responsible for ensuring international human rights under the European Convention.[726]

[723] *Handölsdalen v Sweden (Adm)* (n 712) [31].
[724] *Marckx v Belgium* Series A no 31, (1979-80) 2 EHRR 330 [63].
[725] *Handölsdalen v Sweden (Adm)* (n 712) [51].
[726] See ECHR, art 1.

If the *Handölsdalen* case was analysed in light of the fact that the underlying dispute was of a private law nature where private interests were set against each other, the Strasbourg Court's approach becomes more comprehensible. In situations of two or more conflicting private interests, the Court tends to limit its investigation to how national courts have dealt with the case.[727] This includes assessing whether the interpretation of national law by national courts is consistent with the underlying principles of the Convention and does not present an interpretation that is unreasonable, arbitrary, or inconsistent with those principles.[728] In the *Handölsdalen* case, the Strasbourg Court, citing its limited power to deal with alleged incorrect facts and laws, found no evidence that the decisions of the national courts were based on arbitrary reasoning.[729]

Notwithstanding the above, from a general European Convention perspective, the Strasbourg Court's lack of attention to the Sami's actual land use for 50 years seems strange. Access to land for winter grazing, for example, is not just an economic asset for the Sami. It is necessary to maintain reindeer husbandry, which is the constitutive cultural activity on which Sami culture is based. As clarified in Chapter 1.2., reindeer husbandry is a cornerstone of Sami culture. According to Swedish contract law rules, the landowners' acceptance of long-term Sami land use could also have amounted to a contractual situation.[730] As Tom Allen (2005) notes, however, 'P1(1) cannot be used as a basis for enhancing contractual or property rights under national law.'[731]

What is missing in the Strasbourg Court's reasoning in the *Handölsdalen* case is a discussion of the Sami's human rights and freedoms based on their status as Indigenous peoples. At the national level, the villages invoked the cultural protection of minorities contained in Article 27 of the ICCPR (see Chapter 3).[732] In its decision on the admissibility, the Court failed to address this. From a contemporary context and considering the development of Indigenous peoples' rights on an international level, the lack of a discussion seems strange. As seen from the dissenting opinion on the ruling of the merits in the *Handölsdalen* case, the Court was fully aware of the principles relating to Indigenous peoples' land rights.[733] This opinion is further

[727] See, *e.g.*, *Pla and Puncernau. v Andorra* (2006) 42 EHRR 25 [46]; *JA Pye v UK* (n 704) [75]; *Vukušić v Croatia* App no 69735/11 (ECtHR, 31 May 2016) [39].
[728] See, *e.g.*, *JA Pye v UK* (n 704) [75].
[729] *Handölsdalen v Sweden (Adm)* (n 712) [54].
[730] Axel Adlercreutz, *Avtalsrätt 1* (12 edn, Juristförlaget 2002) 20–22.
[731] Tom Allen, *Property and The Human Rights Act 1998* (Bloomsbury 2005) 232.
[732] *Härjedalen Sami Village (DC)* (n 439) [2.2].
[733] *Handölsdalen v Sweden (Merits)* (n 717), partly dissenting Opinion of Judge Ziemele, 20–23.

explained in Section 7.4.2. Undoubtedly, the Court avoided a discussion on the cultural aspect of winter grazing by focusing on the right to peaceful enjoyment of possession under P1-1.

The most reasonable explanation for why the Strasbourg Court did not consider the cultural aspect of Sami access to land is the presence of conflicting private rights and interests. The extent to which conflicting interests affect the Court becomes clearer in relation to the question of whether customary law (not to be confused with international customary law), has a value in Strasbourg, which this chapter discusses in Section 7.3. If the Court in the *Handölsdalen* case had highlighted the cultural dimensions of Sami land use – by considering their status as an Indigenous people and using international law as an aid of interpretation – and confirmed a Sami proprietary interest giving rise to a right of peaceful enjoyement within the meaning of P1-1 on private land, the Court would have actively contributed to creating a legal situation with conflicting proprietary interest where before there was only a false conflict between existing private rights (the landowners) and a cultural interest (the Sami) in access to privately owned land to maintain a cultural activity.

As Eva Brems (2007) explains, however, a real conflict may exist between rights and interests if a decision risks affecting core parts of human rights or fundamental freedoms.[734] This includes freedoms falling within the scope of Article 8, such as private life and identity, for example. Section 1.2 explains how interferences in Sami access to land linked to reindeer herding may affect the core part of Sami life and identity. However, a genuine conflict of interest generally arises when a core aspect of human rights or fundamental freedoms is at risk of being affected by a decision in a way that the very notion of the right to peaceful enjoyment of human rights and fundamental freedoms becomes theoretical and illusory.[735] One potential problem regarding conflicting interests in relation to the Strasbourg Court, as Samantha Besson (2017) highlights, is when there is a lack of such a discussion at a national level, since the Court is not an appellant court.[736] She thereby highlights the need for such a discussion to be conducted at a domestic level. Where such discussions took place in the *Handölsdalen* case is

[734] Brems, (2017) (n 701) 80, 92f. See also Leigh, (2017) (n 701) 218f.
[735] Gerhard Van Der Schyff, 'Cutting to the core of conflicting rights – the question of inalienable cores in comparative perspective' in Brems Eva (ed), *Conflicts between fundamental rights* (Intersentia Publishing 2008) 132f. Compare Brems, (2017) (n 701) 80, 92f.
[736] Samantha Besson, 'Human Rights in Relation – A Critical Reading of the ECtHR's Approach to Conflicts of Rights' in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights* (OUP 2017) 27.

not evident from the Strasbourg Court's ruling; instead, focus was on whether the Sami had an existing possession within the meaning of P1-1.

How the Strasbourg Court handles cases of conflicting rights and interests requires a more comprehensive analysis than this section can provide, but it does provide a comprehensible explanation for the Court's approach to certain Sami cases. Moreover (as explained in Section 7.3) the presence of competing interests is relevant for the question of whether customary law may be a relevant factor to consider in property rights cases in Strasbourg. In the *Handölsdalen* case, the question of customary law never became relevant because the Court accepted the Swedish government's argument that the Sami could not know for sure whether they had the right to access private land, as this required the intervention of the courts.[737] Consequently, the Sami could not claim to have a legitimate interest of peaceful enjoyment of possession under P1-1.

Given that at the time of the decision in the *Handölsdalen* case, there was European Convention case law where the Strasbourg Court accepted that land use could create a legitimate expectation of peaceful enjoyment of possession under P1-1, despite a lack of legal basis at the national level (see Section 7.1.4), it is not unlikely that the Court avoided a discussion of competing property rights by dismiss the case on the basis of procedural formalities.[738] This would make Péter Kovács' (2016) conclusion that the Court tends to find formal grounds for rejecting Indigenous peoples' property rights cases less accurate.[739] As Ian Leigh (2017) explains, if a case can be resolved without addressing competing rights, the Court tends to walk down that path.[740] Avoiding cases with potentially conflicting rights and interests is not the same as looking for technical reasons to reject a case that otherwise raises serious issues of facts and law.

As mentioned above, the Strasbourg Court was not unanimous in its decision on the applicability of the *Handölsdalen* case, and it follows from the dissenting opinion on the examination of the merits that the Court was internally divided on the issue of P1-1.[741] The dissenting opinion raises doubts as to whether national courts have duly considered the rights of the Sami by taking into account their special situation in light of their status as Indigenous

[737] *Handölsdalen v Sweden (Adm)* (n 712) [46].
[738] Leigh, (2017) (n 701) 220.
[739] Kovacs (2016) (n 29) 805.
[740] Leigh, (2017) (n 701) 219.
[741] *Handölsdalen v Sweden (Merits)* (n 717), partly dissenting Opinion of Judge Zieleme, 20–23.

peoples. One aspect that was particularly highlighted was that the burden of proof rested exclusively on the Sami, while the landowner's rights were assumed, which was seen as a structural problem built into the Swedish legal system to the detriment of the Sami's legal protection.[742] More generally, the majority was criticised for a lack of consideration as to whether the national courts' handling of the case was more generally compatible with the principles underlying the Convention, such as pluralism and the obligation to protect cultural traditions.[743] Interestingly, it is possible to draw parallels between the criticisms made and how the Swedish Supreme Court handled the *Girjas Sami village* case (see Chapter 6.1.4).

In summary, the Sami cases discussed in this section revolve around issues regarding the right to peaceful enjoyment of possession under P1-1 and the right to respect for a specific lifestyle linked to the concept of private life under Article 8. As shown, ECommHR and the Strasbourg Court have discussed respect for the Sami's characteristic lifestyle linked to the notion of private life within the framework of P1-1. The necessity of doing so seems to have been more prominent for ECommHR, however.

In the following section, this thesis analyses Article 8 from a general perspective with a focus on the right to respect for private life and identity. The section provides an insight into European Convention case law in relation to the right to respect for human rights, and fundamental freedoms and shows how the legal protection of Article 8 in minority cases goes beyond obligations to facilitate minorities' opportunities to live a cultural life of their choice.

7.2 Tolerance and Respect for Cultural Differences, the Freedom of Private Life, and Cultural Identity

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. [744]

A key aspect of Article 8 is that tolerance for cultural diversity (pluralism) requires respect for differences and individual choices to ensure these differences can flourish.[745] Behind this idea lies the realisation that the individual's private sphere needs protection from unwarranted state

[742] Ibid, 21f [7]–[9].
[743] Gerards (2019) (n 13) 66f.
[744] ECHR, art 8.
[745] *S and Marper v the United Kingdom* (2009) 48 EHRR 50 [66].

intrusion, such as that which occurred in the 1930s and 1940s.[746] For minorities, states shall ensure the opportunity to enjoy the freedoms set out in Article 8 by facilitating their ability to make choices in line with their traditions and culture.[747] Facilitating the possibility of a specific cultural way of life, however, involves more than securing a specific cultural activity. It includes securing effective (due) respect of all interests that fall within the scope of Article 8.[748]

This section examines more closely the scope and nature of respect for private life and identity in Article 8. The existence of a close connection is based on the premise (explained in Chapter 1.2) that reindeer husbandry is a fundamental pillar of essential value for the general notion of Sami private life and identity. The section shows how Article 8 provides the Sami with legal protection for their interest of peaceful enjoyment of their freedom of cultural lifestyle linked to private life and identity. The extent of the legal protection of these freedoms, however, depends on how central the interest in question is for personal private life and identity. The consequence is that the applicability of Article 8 may differ between Sami individuals depending on the relationship they have with traditional activities and ancestral Sami land and waters.

7.2.1 The Obligation to Ensure Effective Respect for Minority Interests

The right to respect for the freedom to live a life and form an identity based on personal choices is one of the most intimate freedoms of the European Convention.[749] As a freedom public authorities should refrain from interfering with, it thus establishes a negative obligation.[750] Depending on what is at risk, the authorities may also have a positive obligation to take steps to eradicate structural problems in national law and secure the ability to enjoy the freedoms; in this way, they can ensure that genuine respect does not remain illusionary and theoretical. The positive obligations that exist may differ based on the context in which the concept is applied, although as the Strasbourg Court has noted, there are certain factors that can lead to increased obligations:

> [C]ertain factors have been considered relevant for the assessment of the content of those positive obligations on States. Some of them relate to the applicant. They concern the

[746] Mark W Janis, Richard S Kay and Anthony W Bradley, *European human rights law: text and materials* (3rd ed; with specialist contributions from Aileen McColgan, Jim Murdoch edn, OUP 2007) 373ff.
[747] *Chapman v UK* (n 691) [96]; *Connor v the United Kingdom* (2005) 40 EHRR 9 [84].
[748] *Cossey v the United Kingdom* (1991) 13 EHRR 622, [36].
[749] *Winterstein and Others v France* (n 652) [75].
[750] *Marckx v Belgium* (n 724) [31]; Gerards (2019) (n 13) 132–135.

> importance of the interest at stake and whether "fundamental values" or "essential aspects" of private life are in issue.[751]

What falls within the concept of private life, and thus what constitutes a fundamental value or essential aspect of it, equally depends on the context since the nature and scope of private life being autonomous and inexhaustive.[752] In *Niemietz v. Germany* (1992), for example, the Strasbourg Court explained how the notion of private life encompasses 'to a certain degree the right to establish and develop relationships with other human beings.[753] *Pretty v. United Kingdom* (2002) indicated how the concept of private life covers both 'the physical and psychological integrity of a person,' and exemplifies the freedom of social identity and personal development.[754] Personal identification and ethnic identity were added in *S and Marper v. the United Kingdom* (2008) as another key element.[755] Moreover, in *R.B. v. Hungary* (2016), the Court explained how the failure to take positive actions to secure respect for minorities could affect the collective notion of identity and consequently affect the private life of individual members.[756] The latter, according to Janneke Gerards (2019), gives the respect to personal identification a collective dimension,[757] where the collective's sense of its ethnic identity can adversely affect the individual's private life and thus requires due consideration to ensure effective respect for individual interests falling within the scope of Article 8.[758] Accordingly, there is a similar protection of collective interests under Article 8 as under Article 9 (freedom of thought, conscience, and religion) and Article 11 (freedom of assembly and association).[759] Support for this is found in the freedom to establish relationships with others (as presented below) although this thesis does not provide a clear answer to the question. As argued by Yvonne Donders (2010), however, all human rights and fundamental freedoms may have a collective cultural dimension.[760] This is based on the notion that cultures have both an individual and collective dimension.[761]

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[751] *Hämäläinen v Finland* (2014) 2 WLUK 613 [66], case law references omitted. See also *Abdulaziz, Cabales and Balkandali v the United Kingdom* (1985) 7 EHRR 471 [67].
[752] *Ciubotaru v Moldova* App no 27138/04 (ECtHR, 27 April 2010) [49]; *Nada v Switzerland* (2013) 56 EHRR 18 [151]; *Denisov v Ukraine* App no 76639/11 (ECtHR, 25 September 2018) [95]; *Bărbulescu v Romania* (2017) 9 WLUK 42 [70].
[753] *Niemietz v Germany* (1993) 16 EHRR 97 [29].
[754] *Pretty v the United Kingdom* (2002) 35 EHRR 1 [61].
[755] *Marper v UK* (n 745) [66].
[756] *RB v Hungary* (2017) 46 EHRR 25 [78].
[757] Gerards (2019) (n 13) 63f.
[758] Ibid.
[759] See, *e.g.*, Al Tamimi (2018) 290–292, and Donders (2010) (n 32) 27f, for a discussion of arts 9 and 11, ECHR.
[760] Donders (2010) (n 32) 20, and Donders (2002) (n 32) 340–345.
[761] Donders (2010) (n 32) 15.

A Sami example of the collective dimension of freedoms falling under Article 8 is ECommHR's statement in the case of *Halvar From v. Sweden* (1998). The case (discussed in Section 7.1.2) contains a general statement of the public interest in respecting the Sami's culture and lifestyle, and it indicates a reference to the collective dimension of the Sami's culture and specific way of life. The Strasbourg Court has since highlighted the collective dimension of the value of a unique way of life in several minority cases. One example is *Yordanova and Others v. Bulgaria* (2012), which concerned the removal of a group of Roma people from their homes and whether this violated their right and freedoms under Article 8.[762] In that case, the Court took due account of the collective dimension of the applicants' relations as a separate social group and that this required due consideration in the decision-making process:

> In the context of Article 8, in cases such as the present one, the applicants' specificity as a social group and their needs must be one of the relevant factors in the proportionality assessment that the national authorities are under a duty to undertake.[763]

The necessity to consider the value of social relations within a minority group to ensure effective respect for the enjoyment of freedoms under Article 8 was further highlighted in *Winterstein and Others v. France* (2013)[764] (discussed below). In *Hudorovic and Others v. Slovenia* (2020), the Court also explained the obligation to consider the special needs of a minority's 'lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases.'[765] Moreover, in line with the Court's reasoning in the Roma case *Muñoz Díaz v. Spain* (2010), ensuring respect for cultural diversity in minority cases requires due respect 'to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases.'[766] Thereby, when applying laws and principles, states have an obligation to take due consideration of, and respect, the social, and cultural situation of minorities to avoid the mechanical application of laws and principles to a situation for which they were not intended.[767] This is when laws are applied based on irrebuttable presumption and thus become inflexible in relation to the specific circumstances of a case.[768]

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[762] *Yordanova and Others v Bulgaria* App no 25446/06 (ECtHR, 24 April 2012).
[763] Ibid [129].
[764] *Winterstein and Others v France* (n 652) [76].
[765] *Hudorovic and Others v Slovenia* App nos 24816/14 and 25140/14 (ECtHR, 10 March 2020) [142].
[766] *Muñoz Díaz v Spain* (2010) 50 EHRR 49 [61].
[767] Ibid [63]–[64]; *Emonet and Others c Switzerland* (2009) 49 EHRR 11 [86].
[768] *Katikaridis v Greece* (2001) 32 EHRR 6 [48]; *Tsomtsos and Others v Greece* App no 20680/91 (ECtHR, 15 november 1996) [39]–[40]; *Papachelas v Greece* (2000) 30 EHRR 923 [24], [53]; *Efstathiou v Greece* (2006) 43

As explained by judge Zupančič in the opinion in *Scozzari and Giunta v. Italy* (2000), an irrebuttable presumption is a situation where the application of laws and principle disregard the context and thus hinder the effective protection of human rights and freedoms in a contemporary setting.[769] Consequently, decisions and the application of laws and principles may require adaptation, since a failure to do so risks interfering with fundamental values or essential aspects of the enjoyment of conventional European human rights and freedoms.[770]

The obligation to ensure effective protection for minority interests means that to be able to assess whether effective respect is ensured when decisions are made and laws are applied, an assessment must first be made of what constitutes fundamental values or essential aspects in the individual case. The following section, therefore, takes a closer look at what may constitute fundamental values or essential aspects of the right to private life and identity from a Sami reindeer herding perspective. That the focus is on reindeer herders is based on the importance of reindeer husbandry for the Sami culture.

7.2.2 Reindeer Herding as an Essential Value for Sami Private Life and Identity

The essential value of reindeer husbandry for Sami culture and Sami identity is explained in Chapter 1.2, and as explained in the previous section, the right to respect in Article 8 includes the freedom of both physical and social identity. As shown, this includes a right to respect for establishment and maintaining social relationships, even though social relations above have focused on the private sphere. Considering the dual dimension of the value of reindeer for the Sami – economic and cultural – this section examines more closely the need to consider the obligation of respect for the ability to establish and maintain social relationships within the professional sphere.

That relationships created within the professional sphere fall within the scope of the concept of private life and may have significance for identity is explained below. Minority cases investigated by the Strasbourg Court where social relations are discussed, however, focus on the private sphere. One explanation may be that there is often no common connection to a certain professional activity, such as the practice of herding reindeer. A general overview of European Convention case law shows, however, that activities of a professional nature, such

EHRR 24 [26]–[33]. See also *Lallement v France* App no 46044/99 (ECtHR, 11 April 2002) (French), where the Strasbourg Court stresses the need to consider the applicant's situation in expropriation of land.

[769] *Scozzari and Giunta v Italy* (2002) 35 EHRR 12, concurring opinion of judge Zupančič, 54–58.

[770] *Hämäläinen v Finland* (n 751) [66].

as reindeer husbandry, may fall within the scope of the respect for private life, something the Court highlighted in *Campagnano v. Italy* (2006):

> The Court observes that private life "encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature." It also considers that Article 8 of the Convention "protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world" and that the notion of "private life" does not exclude in principle activities of a professional or business nature. It is, after all, in the course of their working lives that the majority of people have a significant opportunity of developing relationships with the outside world. [771]

The professional nature of reindeer husbandry has been explained in previous chapters and thus undeniably falls within the scope of respect for private life as explained above. Herding reindeer, in addition to being a cultural activity of importance to the Sami people as a whole, is thus also a part of the private life of those who are involved in herding activities within a Sami village. Consequently, as shown below, a decision that affects or risks affecting reindeer herding must also consider how this affects the ability of persons who are directly involved in the activity to enjoy the freedoms under Article 8. Apart from the right to respect for private life, this consideration includes taking into account the right to respect for identity. This requirement is in line with the Strasbourg Court's reasoning in *Fernández Martínez v. Spain* (2015), where the Court explained the link between professional relations and identity:

> Restrictions on an individual's professional life may fall within Article 8 where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others. In addition, professional life is often intricately linked to private life, especially if factors relating to private life, in the strict sense of the term, are regarded as qualifying criteria for a given profession.[772]

That herding reindeer is not part of the private life of every Sami individual is partly related to, as explained in Chapter 1.2, the not all Sami have access to the transfer of knowledge taking place from an early age. As Elina Helander-Renvall (2016) explains, through the practice of herding, synergy arises between the reindeer herder, the reindeer, and the land used for herding, forming the identity of the herder.[773] Consequently, measures that can affect or risk affecting the professional side of reindeer husbandry can have a direct effect on the identity of those who have been involved in reindeer herding since an early age. This causal link to an identity characteristic is further explained below, but measures affecting a professional activity may

[771] *Campagnano v Italy* (2009) 48 EHRR 43 [53]. Case law references omitted.
[772] *Fernández Martínez v Spain* (2015) 60 EHRR 3 [109]. See also *Bărbulescu v Romania* (n 752) [71].
[773] Helander-Renvall (2016) (n 58) 80–95.

have a collective dimension in need of consideration, as a decision interfering with a professional activity shared by many may affect the private life and identity of individual members. Consequently, there may be compelling reasons not only to refrain from making the decisions, which risk leading to a lack of respect for the freedoms in Article 8, but also an obligation to adopt 'measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.'[774] This may entail an obligation on the state to avoid an attempt to regulate membership in Sami villages, for example. As this regulation risk leading to the interest of the minority of reindeer herders to be subjected to the interests of a majority of non-reindeer herding members.

As the Strasbourg Court indicated in *Niemietz v. Germany* (1992), mentioned above, not all relations bearing on identity fall within the scope of Article 8. Whether they do is partly related to whether essential values of importance to private life and identity are affected. As Benedict Douglas (2018) notes, a fundamental aspect of the protection of identity is to ensure the core aspects of a private life and identity remain unviolated, so choices do not become unduly restricted.[775]

An illustrative case of the importance of essential values for the application of Article 8 in matters related to private life and identity linked with collectivism is *Friend, Countryside Alliance and Others v. the United Kingdom* (2009).[776] This case includes concerns whether a ban on hunting foxes and other wild mammals with hounds violated the applicants' right to private life and identity under Article 8.

In the case, the Strasbourg Court accepted in principle that certain collective activities, due to a long history, may constitute elements of essential importance to private life and identity.[777] Consequently, restrictions on these activities may be incompatible with the right to respect linked to the principle of personal autonomy, since a collective activity that has a long history and that has 'developed its own traditions, rituals and culture' could have become intimately associated with a collective notion of lifestyle and identity. It may thus also constitute fundamental values for the private life and identity of individual members.[778] As summarised

[774] *Fernández Martínez v Spain* (n 772) [113].
[775] Benedict Douglas, 'Too attentive to our duty: The fundamental conflict underlying human rights protection in the UK' (2018) 38 Legal Studies 360, 361–363. Essential values and core aspects are interchangeable concepts.
[776] *Friend et al v UK* (n 651).
[777] Ibid [40]–[44].
[778] Ibid [40].

by Lord Rodger of Earlsferry, former justice of the Supreme Court in the United Kingdom, and in principle accepted by the Strasbourg court, 'certain activities could be regarded as integral to a person's identity and so form part of their private life for the purposes of Article 8.'[779]

From the perspective of the importance of hunting for the collective members, the Strasbourg Court accepted hunting as an essential value of their private lives in the case but found no violation of their right to respect under Article 8,[780] because even if Article 8 aims to prevent the state from arbitrarily interfering with private life, not all 'activities a person might seek to engage in with other human beings in order to establish and develop such relationships' fall with its scope. [781]

The fact that not all activities fall within the scope of Article 8 is partly related, as the Strasbourg Court explained in *Friend and Others v. the United Kingdom,* to the dividing line between activities a person engages in for personal fulfilment and activities where personal fulfilment is not the sole objective of the performance.[782] It follows that activities carried out solely for personal fulfilment and the relationships created in this context in general fall outside the scope of protection of Article 8. That certain activities fall outside the scope of Article 8 with regards to identity is especially true for activities that do not have a clear culture-specific connection, such as hunting, which the Court found was an activity of a public nature.[783] Participation in culturally specific activities can, on the other hand, create a link between the activity and the identity requiring consideration in relation to Article 8:

> [T]he Court does not consider that hunting amounts to a particular lifestyle which is so inextricably linked to the identity of those who practise it that to impose a ban on hunting would be to jeopardise the very essence of their identity.[784]

The above suggests that even though specific activities, such as hunting, may constitute central parts of a private life, it does not necessarily mean that there is a sufficiently close connection between the activity and the identity in question.

The same reasoning is applicable to reindeer husbandry: even if a person belongs to the Sami community, it does not necessarily mean the connection between reindeer herding activities

[779] Ibid [28].
[780] Ibid [40].
[781] Ibid [41].
[782] Ibid [42].
[783] Ibid [43].
[784] Ibid [44].

and an individual Sami identity is sufficiently close for all Sami. Consequently, a measure affecting reindeer husbandry does not automatically affect an essential value of the freedoms covered by Article 8 for all Sami, which would make the article relevant in all Sami cases. As shown above, there needs to be a close relationship between the activity in question and the individual Sami for it to constitute an essential element of a private life and identity.

Common to both sections above is the importance of establishing and maintaining external relations, which the Strasbourg Court maintains as a fundamental part of a private life and of importance to an identity. Chapter 1.2 explains the value of relationships in a Sami context, but one aspect to consider when discussing essential aspects of Sami private life and identity is what relationship means in light of the Sami's Indigenous status, especially considering the requirement at international level to take due regards of Indigenous peoples' relationship to traditional territories, as explained in Chapter 3.4. The following thus takes a closer look at how the Court has valued a relationship to specific areas and the importance of this relationship in securing the right to respect under Article 8.

7.2.3 The Strasbourg Court's Perspective on the Value of a Relationship to a Geographical Area

As noted in previous sections, the term relationship mainly refers to those between people. As Chapter 1.2 explains, for the Sami as an Indigenous people, the concept of external relation includes the relation to their homeland. The strength of the relationship may vary from Sami to Sami, but as Chapter 1.2 shows, those who are members of a Sami village and thus involved in reindeer herding activities have a closer connection to the land where herding is practiced than those lacking this connection. The existence of a close connection is especially true for reindeer herders who, as highlighted above, form a special relationship with both the reindeer and the land used for herding. In addition (as Chapter 3 explains), states have an obligation under international law to respect the relationship between Indigenous peoples and their homeland in land rights cases by taking due consideration of the relationship in measures concerning these areas. The concept of relationship thus has a different meaning within a Sami Indigenous context than that normally applied by the Strasbourg Court, where the focus is on relationships between individuals. As shown below, however, there are cases where a relation to a specific place constitutes a relevant factor in assessments of whether a measure is compatible with the respect ensured by Article 8.

Apart from the general difficulties in comparing the protection of the cultural dimension of Indigenous peoples' land rights with the cultural dimension of minority activities, there is no comparable situation in European Convention case law where, as in the Sami case, there is a clear link between a cultural identity and access to land for the subsistence needs required to maintain a specific lifestyle. In addition, most minority cases involving access to land examined in accordance with Article 8 have related to respect for the home.[785] *Winterstein and Others v. France* (2013) is no exception: the case concerned whether an eviction order for travellers (*gens du voyage*), who illegally occupied an area for decades, violated their right to respect for private and family life and home under Article 8.[786] In this case, however, the Strasbourg Court accepted that land use can create an inherent relationship to a specific place with relevance for the maintenance of a relationship with others, even though the occupation in itself was illegal.

The starting point for the conclusion in the *Winterstein* case of the need to consider how decisions concerning land use affect the ability to enjoy freedoms under Article 8 was the existence of a 'sufficient and continuous link with a specific place.'[787] Prolonged occupation of an area not only created the basis for the existence of a home but also, according to the Strasbourg Court, constituted an essential element for the formation and maintenance of private life, identity, and social relations.[788] Decisions affecting the occupation may thus affect the ability to enjoy freedoms under Article 8, such as the maintenance of relationships with others with whom one shares a way of life and identity. Central to the Court's reasoning in the *Winterstein* case is the strength of the actual link with the land in question. If land has been used for a long time, the link may be strong enough to constitute an aspect requiring due consideration in relation to the freedoms in Article 8, even if the actual land use is illegal and thus cannot give rise to a legitimate expectation to remain.[789]

How the Sami's relationship to land will be assessed in the future is unclear. The Strasbourg Court's decision in *Handölsdalen v. Sweden* (2009) (analysed in Section 7.1.4) did not contain an assessment of the social significance of Sami land use or of whether the Sami, through their

[785] *Beard v the United Kingdom* (2001) 33 EHRR 19 [107]; *Coster v the United Kingdom* (2001) 33 EHRR 20 [110]; *Lee v the United Kingdom* (2001) 33 EHRR 29 [98]; *Jane Smith v the United Kingdom* (2001) 33 EHRR 30 [103]; *Connor v UK* (n 747) [84].
[786] *Winterstein and Others v France* (n 652) [3], [7], [78], [103].
[787] Ibid [69].
[788] Ibid [70]–[71].
[789] Ibid [78].

half-century long land use, have developed such a strong connection to the land that this should have been considered in the assessment of the national courts. The Sami undeniably have a strong connection to land used over the centuries, a relationship that, according to the above, needs consideration to ensure effective respect of their ability to enjoy the freedoms under Article 8.

Whether decisions and applications of laws affecting reindeer husbandry constitute a restriction on the Sami's ability to enjoy their rights and freedoms under Article 8 depends, amongst other things, on the intimacy between reindeer herding activities and the freedom in question and on the possibility of enjoying rights and freedoms in line with their own choices. Such restrictions may be incompatible with the rights of the Sami to personal autonomy; however, as shown in the following section, they may also be incompatible with the Sami's right to human dignity.

7.2.4 Respect for the Freedoms of Article 8 in Light of the Principles of Autonomy and Human Dignity

The ability to control one's life has a clear link to the principle of personal autonomy and the right of self-determination.[790] In *Friend and Others v. the United Kingdom* (2009), for example, personal autonomy was the underlying principle of the Strasbourg Court's assessment of whether the decision to ban dog hunting was incompatible with the applicants' freedom under Article 8, since the Court found 'hunting to be too far removed from the personal autonomy of the applicants.'[791] As further explained in *Ciubotaru v. Moldova* (2010):

> The notion of personal autonomy is an important principle underlying the interpretation of the guarantees provided for by Article 8. Under this principle protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.[792]

Through the cases exemplified above, establishing an identity within the individual sphere involves establishing and maintaining an identity through external relations. In *R.B. v. Hungary* (2016), the Court expanded this scope to include the collective relationship to a group.[793] Accordingly, group identification may result in a situation where the private life and identity of individual members of a group can automatically be considered affected if the group is affected at a general level.[794] Janneke Gerards (2019) holds this to be a clarification 'that

[790] Gerards (2019) (n 13) 62–64.
[791] *Friend et al v UK* (n 651).
[792] *Ciubotaru v Moldova* (n 752) [49].
[793] *RB v Hungary* (n 756) [78].
[794] Ibid.

personal autonomy does not necessarily only refer to individual autonomy and freedom of choice.'[795]

Even though the principle of personal autonomy is fundamental to the application of Article 8, cases concerning the right to respect under Article 8 have been analysed in relation to the principle of human dignity. In, for example, *Pretty v. the United Kingdom* (2002), which concerned the prohibition of assisted suicide, the Court emphasised the value of human dignity linked to the notion of quality of life:

> The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance.[796]

The Court continues to explain how a prohibition to allow assisted suicide deprives a person of her or his right of choice, thus raising concerns according to the principle of personal autonomy.[797] This indicates that there is no watertight division separating the notion of human dignity from personal autonomy. In her analysis of *Pretty v. the United Kingdom*, Antje Pedain also argues that there is sometimes a 'fundamental misunderstanding of the conceptual connection between the right to personal autonomy and respect for human dignity.'[798] She argues that 'our liberties are designed to protect our ability to form our own conception of what amounts to a dignified life, and to lead that life as good as we can' and that our dignity is violated when we are treated as objects:[799]

> [We] all agree that our dignity is violated when we are treated as objects even for the benevolent efforts of others, when the running of our lives, against our own will, is taken over by others who decide what is best for us. To deny human beings autonomy over their own lives is what cannot be good in the moral sense. [800]

Pedain's argument is in line with the Strasbourg Court's position in *Pretty v. the United Kingdom,* where it found the denial to raise issues concerning in relation to the applicants' right

[795] Gerards (2019) (n 13) 63f.
[796] *Pretty v UK* (n 754) [65].
[797] Ibid [66]–[67].
[798] Antje Pedain, 'The Human Rights Dimension of the Diane Pretty Case' (2003) 62 The Cambridge Law Journal 181, 190.
[799] Ibid 191.
[800] Ibid.

to human autonomy and human dignity, even though it found the denial justified for moral reasons linked to the sanctity of life.[801]

A complete analysis of the relationship between human dignity and personal autonomy based on European Convention case law is beyond the scope of this thesis. However, the Strasbourg Court's indication in *Pretty v. the United Kingdom* of the close relationship between the principles is consistent with the discussion of the principle of human dignity in relation to Indigenous peoples presented in Chapter 2, where it was explained how restriction of the Sami's right, or groups of Sami, to make decisions according to their own choices may violate their right to personal autonomy and, consequently, human dignity. Moreover, as mentioned in Chapter 2.3, safeguarding human dignity includes considering cultural aspects when assessing specific human rights and fundamental freedoms to avoid violating the Sami's right to dignity based on their cultural context.

In summary, the above point to that the Strasbourg Court's view of Article 8 is that it is designed to underscore that the obligation to respect fundamental freedoms goes beyond the obligation to facilitate a way of life. It follows that the obligation towards the Sami under Article 8 goes beyond the obligation to facilitate their way of life by securing an activity, an approach on which the Swedish Constitution is based (as Chapter 3 explains). Through Article 8, the European Convention ensures the fundamental right to freedom from state interference in what the Strasbourg Court considers to be intimate rights. To assess whether the essence of Article 8 is impaired, however, there must first be an examination of what the essence of an Article 8 freedom is. Only then can a conclusion of non-violation be presented. As explained by Judge Pinto de Albuquerque in his dissenting opinion in *Mohammad and Muhammad v. Romania* (2020), 'it is not reasonable to conclude that the essence of a right is not impaired in a given case without simultaneously identifying what this essence is about'.[802] *Sapmelaccat v. Finland* (see Section 7.1.3) is an example of a Sami case where the court rejects allegations of violation of Article 8 without a thorough assessment of the applicant's right to respect for private and family life.

To determine what the essence of the freedoms in Article 8 is within a Sami context requires a holistic approach to the Convention. As the Strasbourg Court stated in *Klass and Others v.*

[801] *Pretty v UK* (n 754) [69].
[802] *Muhammad and Muhammad v Romania* App no 80982/12 (ECtHR, 15 October 2020), concurring Opinion, 75 [13].

Germany (1978), any interpretation and application of the European Convention must be 'in harmony with the logic of the Convention' to avoid a result where a conclusion under one article is incompatible with the right under another.[803] This is in line with the following dictum: 'The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective,'[804] meaning, as the Court noted in *Airey v. Ireland* (1979), the 'Convention must be interpreted in the light of present-day conditions', according to which there is no clear division between civil and political rights and social and economic rights:[805]

> Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention. [806]

It follows from court's reasoning that the mere fact that the Sami have legal protection for culturally specific activities under the concept of civil rights (see, e.g., Article 27, ICCPR, Chapter 3.4.3) does not mean the more cultural side of Sami social rights can be ignored (see, e.g., Article 15, ICESRC, Chapter 3.4.4). In an impact assessment of a measure that affects or risks affecting reindeer husbandry, which falls under the notion of possession in P1-1, the Sami's more cultural and social interests, which fall within the scope of Article 8, must also be considered. The dual nature of reindeer husbandry, which is of both cultural and economic significance (as explained in Chapter 4.5) means that Article 8 and Article P1-1 need to be considered in the same context to uphold respect for Sami way of life.

In the following section, this thesis, therefore, addresses the protection of proprietary interest under Article P1-1. The subsequent section then illustrates how the Strasbourg Court has approached cases where interests falling within the scope of Article 8 require due consideration for the assessment of the scope of the protection of proprietary interest under Article P1-1.

7.3 The Sami's Right to Peaceful Enjoyment of Possession

The previous two sections have established that Sami customary interest in respect for fundamental freedoms, such as private life and identity, may require due consideration in the

[803] *Klass and Others v Germany* (n 703) [68].
[804] *Airey v Ireland* (n 628) [24].
[805] Ibid [25].
[806] Ibid; confirmed in *Stec v UK (Dec)*, [52].

application of laws and principles. The question thus arises of where customary law stands in all this and whether the Sami's culture and way of life require respect for customary law in addition to Sami custom, as the former, like their cultural way of life, has been shaped for centuries. According to international law, respect for customary law is indeed required, as shown in Chapter 3.4. Nationally, customary law is also a source of law recognised in domestic documents, such as the 1751 Codicil (see Chapter 4.4.2), and it forms the basis for the Sami's right of access to land for winter grazing purposes outside Lapland (see Chapter 5).[807] Despite this, customary law was not a factor for the Strasbourg Court in the *Handölsdalen* case when it was assessing whether the Sami villages had a possession within the meaning of P1-1, nor was it raised in the discussion of whether Swedish courts, in their handling of the case, provided effective procedural protection for Sami interests based on their status as Indigenous peoples.

Through an analysis of European case law linked to the applicability of P1-1, this section provides an explanation as to why the Strasbourg Court did not highlight customary law in the *Handölsdalen* case. As shown below, this relates to the limitations of the Court's mandate and who it can hold accountable at an international level for actions taken at a national level. Thus, the section shows that customary law primarily becomes a factor of importance for the assessment of Sami legal protection under P1-1 in relation to territories under the direct disposition of the State.

7.3.1 The Value of Customary Law for the Right to Peaceful Enjoyment of Possession

> 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.[808]

The rationale behind P1-1 is that it only covers existing entitlements sufficiently established at a national level.[809] Only then can there be a possession within the meaning of the European Convention which entitles to a protection of peaceful enjoyment. Whether an entitlement is sufficiently established is, however, as will be illustrated below, a matter of perspective, and

[807] Allard (2015) (n 303) 161–168.
[808] Protocol No. 1, art 1.
[809] *Marckx v Belgium* (n 724) [50].

the Strasbourg Court applies two perspectives: the national law-based perspective and the recognition-based perspective. Whereas the former requires a base in national law, the latter requires recognition of use.

7.3.1.1 The National Law-Based Perspective of P1-1

From a national law-based perspective, the central prerequisite for P1-1 to become applicable is at least the existence of a legitimate expectation of protection of effective enjoyment of a possession based on at least a claim that would qualify as an asset in national law.[810] As clarified in *Bélané Nagy v. Hungary* (2016),

> Notwithstanding the diversity of the expressions in the case-law referring to the requirement of a domestic legal basis generating a proprietary interest, their general tenor can be summarised as follows: for the recognition of a possession consisting in a legitimate expectation, the applicant must have an assertable right which … may not fall short of a sufficiently established, substantive proprietary interest under the national law.[811]

European Convention case law shows that national law includes all sources of law, such as statutes and judicial decisions.[812] In Sweden, it would include customary law, since it is a valid source of law. The Swedish Supreme Court clarified this in *Girjas Sami village* addressed in Chapter 6.1.4.[813]

From the perspective of the European Convention, there are few cases where the Strasbourg Court moves within the sphere of national customary law. One example is *Dogan and Others v. Turkey* (2004).[814] The case concerned an alleged forced eviction from a village and the refusal of the authorities to allow the applicants to return to their homes and land.[815] According to the applicants, this violated their conventional rights. The violation included a violation of their right to peaceful enjoyment of property, since they had lost their ability to use their property and consequently lost their means of subsistence.[816] One obstacle was that the applicants could not prove they owned any property in the village.[817] Against this, the applicants relied on the patriarchal family system that prevailed in the area and the customary

[810] *Pressos Compania Naviera SA v Belgium* Series A no 332, (1996) 21 EHRR 301 [31]; *Kopecky v Slovakia* (2005) 41 EHRR 43 [35]; *Draon v France* (2006) 42 EHRR 40 [65].
[811] *Bélané Nagy v Hungary* (695) [79].
[812] *Gratzinger and Gratzingerova v the Czech Republic (Adm)* (2002) 35 EHRR 202 [73].
[813] *Girjas Sami village (SSC)* (n 138) [127]–[129].
[814] *Dogan v Turkey* (n 651).
[815] Ibid [3], [89].
[816] Ibid [93], [115].
[817] Ibid [91], [135].

law deriving from this system.[818] This local system gave them not only a right to use the land of their fathers but also a right of access to the common land of the village. These private and collective economic resources, the applicants claimed, fell within the scope of possession in P1-1.[819] Against this background, the Strasbourg court explained that it was irrelevant whether or not the applicants had a property right under domestic law. More relevant was whether the overall economic activity bestowed upon the applicant a possession within the meaning of P1-1.[820] The Court's reasoning shows that the existence of established customary law was important, as it contributed to applicants having financial interests in the village that qualified as possession within the framework of P1-1:

> Although they did not have registered property, they either had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivated the land belonging to the latter. The Court further notes that the applicants had unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling. Accordingly, in the Court's opinion, all these economic resources and the revenue that the applicants derived from them may qualify as "possessions" for the purposes of Article 1.[821]

It follows that the Court's reasoning was based on the conclusion that since it was established that the applicants lived in the area, they must also have lived according to customary law and held rights according to customary law. Consequently, the applicants had far-reaching pecuniary interests within the village, which they could not enjoy through the obstacle set by the authorities to their return. This reasoning touches upon the right to respect for a specific way of life protected under Article 8. In a brief statement at the end of that judgment, the Court also concluded that by refusing to allow the applicants to return to their homes and livelihoods, Turkey had violated the applicants' right to respect for family life and home.[822] How the protection of respect in Article 8 merges with the protection of property is discussed further below, and the existence of a home often plays a central role in the Court's assessment, although this is not always clear.

In *Dogan and Others v. Turkey*, the Strasbourg Court applied a holistic approach to assessing whether the applicant had a property within the meaning of P1-1. This is an approach the Court repeatedly uses in assessing whether applicants have a substantive interest protected by P1-

[818] Ibid [137], [139].
[819] Ibid [137].
[820] Ibid [139].
[821] Ibid.
[822] Ibid [159].

1.[823] As outlined in *Kopecký v. Slovakia* (2004) and clarified in *Centro European 7 S.R.L and Di Stefano v. Italy* (2012), however, this holistic approach cannot give rise to an entitlement that does not exist, nor can it restore an extinguished entitlement or substitute for a failure to comply with legal requirements.[824] Additionally, a legitimate expectation cannot exist if 'there is a dispute as to the correct interpretation and application of national law and the applicant's submissions are subsequently rejected by national courts.'[825]

Disputes and rejections by the Court do not automatically disqualify an existing expectation. For example, a rejection must be based on an examination of the merits of the case.[826] How national courts choose to apply laws can also affect whether an existing expectation remains or not. As the Strasbourg Court explained in *Molla Sali v. Greece* (2019), disputes over the application of laws or the choice of laws against which the case is assessed, where the outcome puts the applicant in a discriminatory position, are incompatible with the state's obligation to secure the peaceful enjoyment of property.[827] Consequently, an applicant can still be considered to have a legitimate expectation even if national courts have rejected the case if this is the result of a discriminatory application of laws. The basic prerequisite stated above must, however, be met, that the applicant has an assertable right sufficiently established in national law.

It follows, from a national law-based perspective, that whether a situation bestows on the applicant a possession within the meaning of P1-1 or not depends on several factors, where the common denominator is a solid foundation at the national level. As shown, this is based mainly on the presence of a sufficient legal basis composed of statutes, regulations, and legal acts. *Dogan and Others v. Turkey* is a rare case where customary law rules influenced the Court's assessment of the existence of substantive interests qualifying as a possession within the meaning of P1-1. It is impossible to ignore that in *Dogan,* the applicants had houses in the village. However, one factor enabling the Court to take due account of customary law, which provided the applicants a right of access to use land for pasture, grazing, and forest produce,

[823] *Beyeler v Italy* (2001) 33 EHRR 52 [100]; *Broniowski v Poland* (2006) 43 EHRR 1 [129]; *Centro Europa 7 SRL and Di Stefano v Italy* App no 38433/09 (ECtHR, 7 June 2012) [171]; *Maharramov v Azerbaijan* App no 5046/07 (ECtHR, 9 May 2019) [47].
[824] *Kopecky v Slovakia* (n 810) [35]; *Centro Europa 7 SRL and Di Stefano v Italy* (n 823) [171].
[825] *Centro Europa 7 SRL and Di Stefano v Italy* (n 823) [172].
[826] Ibid [175].
[827] *Molla Sali v Greece* (2019) 69 EHRR 2 [123]–[132]. See also *Maurice v France* (2006) 42 EHRR 42 [68]–[70].

was that such a consideration would not conflict with the land interests of others, as the access to land for these purposes was a communal right.

7.3.1.2 The Recognitional-Based Perspective of P1-1

This section discusses the second perspective the Strasbourg Court applies in assessing whether a situation bestows on the applicant a possession within the meaning of P1-1 which entitles to a protection of peaceful enjoyment: the recognition-based perspective. This is a perspective where applicants do not have to prove there is a legal basis at the national level on which they have an entitlement to the protection of peaceful enjoyment of possession under P1-1. This perspective is instead based on the autonomous meaning of P1-1.

The concept of autonomous meaning in relation to P1-1 means that what falls within the scope of the article does not depend on any formal classification at the domestic level,[828] nor is the legal protection that P1-1 intends to ensure limited to economic aspects of the notion of possession:[829]

> The Court reiterates that the concept of "possessions" referred to in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to the ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision. In each case the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant [the] title to a substantive interest protected by Article 1 of Protocol No. 1.[830]

The above means it is up to the Strasbourg Court to assess what falls within the scope of the notion of possession in P1-1, in which points of law and of facts become relevant aspects.[831] One of the facts that the Court takes into account is how the state has acted in relation to the applicant. The Court explained this in 1996 in *Matos e Silva, Lda, and Others v. Portugal*.[832]

In *Matos e Silva,* a company complained over expropriation measures of land used by the company, but who owned the land was in dispute. [833] The Court agreed with the Portuguese government that 'it is not for the Court to decide whether or not a right of property exists under

[828] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: the European Convention on Human Rights* (6th edn, OUP 2014) 496.
[829] Ibid 496.
[830] *Brosset-Triboulet and Others v France* App no 34078/02 (ECtHR, 29 March 2010) [65].
[831] *The Former King of Greece & Others v. Greece* (2001) 33 EHRR 21 [60].
[832] *Matos e Silva v Portugal* (n 651).
[833] Ibid [57].

domestic law,' as in the question of the existence of a possession within the meaning of P1-1, it was irrelevant whether the applicants owned the land in question.[834] Of relevance was whether the applicant had a relationship to the land and how the state acted. In the present case, the applicant was able to demonstrate a long-term use of the land, which was the basis for the applicant's subsistence and their claim that the state had accepted this use. According to the Court, this gave rise to a possession within the meaning of P1-1, and thus the applicant had a right to the protection of peaceful enjoyment under P1-1.[835]

In *Matos e Silva*, the applicant was able to show that, in light of the European Convention, it had a proprietary interest in relation to the land used for centuries at a national level, even though this did not constitute a right of ownership, which gave rise to a legitimate expectation of peaceful enjoyment of property under P1-1. A key aspect in this case was that the land use was valuable for the applicant as a means of subsistence; there was thus an economic aspect involved in the case. As the Court explained in *Öneryildz v. Turkey* (2004),[836] however, neither prolonged use nor economic interest is necessary to establish a legitimate proprietary interest that will bestow upon an applicant the right to peaceful enjoyment under P1-1.

Öneryildz is a complex case involving several articles, including P1-1. In relation to P1-1, the question centred on whether Turkey had failed to secure the applicant's right to the peaceful enjoyment of property – a house and movable property – due to a failure to prevent a methane explosion.[837] Given that the applicant had illegally occupied municipal land and built a house in breach of the law, the Strasbourg Court, sitting in the Chamber, considered that the applicant only had a possession in relation to the building itself, not the illegally occupied land:

> [T]he dwelling built by the applicant and his residence there with his close relatives represented a substantial economic interest and that interest, which the authorities had allowed to subsist over a long period of time, amounted to a "possession" within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1.[838]

As in *Dogan and Others v. Turkey,* the case clearly relates to interests ensured under Article 8: respect for private and family life and housing. In *Öneryildz v. Turkey*, however, the Court

[834] Ibid [75]. See also *Gasus Dosier und Fordertechnik GmbH v Nederlands* Series A no 306-B, (1995) 20 EHRR 403 [53].
[835] *Matos e Silva v Portugal* (n 651) [72]–[75]. See also *Gashi v Croatia* App no 32457/05 (ECtHR, 13 December 2007) [22].
[836] *Öneryildiz v Turkey (No 2)* (2005) 41 EHRR 20.
[837] Ibid [18].
[838] Ibid [121].

found it unnecessary to examine the complaints in relation to Article 8 separately in light of the infringements it found in relation to other articles, included P1-1.[839]

The Grand Chamber confirmed the Chamber's position that the applicant had a possession in relation to the dwelling and its belonging within the meaning of P1-1. This conclusion was made against the government's clarification of the lack of legal basis in domestic law upon which the applicant could rely to claim any property right.[840] In addition, the government considered that the conclusion that illegal acts 'could give rise to a substantive interest protected by Article 1 of Protocol No. 1' would create a situation where the obligation to comply with national law would not apply to everyone. [841] Referring to the need for an overall assessment, the Court stated that the authorities had tolerated the applicant's land use by, for example, levying taxes and providing public services and by not acting in time to remedy a situation contrary to policies.[842] Thereby, the authorities had 'acknowledged *de facto* that the applicant and his close relatives had a proprietary interest in their dwelling and movable goods.'[843]

In the *Öneryildz* case, the Strasbourg Court clarifies how the actions or inaction of the authorities may affect the existence of an entitlement within the meaning of P1-1. That authorities can be a factor in the assessment of a possession within the meaning of P1-1 is nothing new.[844] What distinguishes *Öneryildz* from other cases is that the applicants did not have a sufficient basis in national law on which they could rely. Under such conditions, it only remains to be seen whether applicants, through the overall assessment, have developed a proprietary interest due to the authorities acting in certain ways.

A similar case, where the Court found the applicants to have a proprietary interest without a sufficient basis in national law, is *Brosset-Triboulet and Others v. France* (2010).[845] The case concerned whether the authorities' refusal to allow the continued use of a plot of land located in marine public property, on which the applicants' family had a secondary house since 1945, and the decision for its demolition conflicted with the right to peaceful enjoyment.[846] Even

[839] Ibid [160].
[840] Ibid [122].
[841] Ibid.
[842] Ibid [105], [127]– [128].
[843] Ibid [127]. See also *Saghinadze v Georgia* (2014) 59 EHRR 24 [106].
[844] *Iatridis v Greece* (2000) 30 EHRR 97 [54]. See also *Beyeler v Italy* (n 823) [104].
[845] *Brosset-Triboulet v France* (n 830). See also *DePalle v France* (2012) 54 EHRR 17.
[846] *Brosset-Triboulet v France* (n 830) [3].

though a house was involved in the *Brosset-Triboulet* case, the situation differs from *Öneryildz v. Turkey* in that the house was the applicant's secondary home. The national definition of the house as a secondary home did not influence the Court's assessment of the existence of a proprietary interest.[847]

According to the French government's argument in *Brosset-Triboulet and Others v. France*, the applicants could not establish a right *in rem* over marine public property,[848] nor was there any ground upon which they could acquire property by adverse possession.[849] Since the applicants could not be considered to have a right *in rem*, they could not, according to the Strasbourg Court, 'reasonably have expected to continue having peaceful enjoyment of the property solely on the basis of the decision authorising occupancy.'[850] The fact that the applicants could not have such an expectation did not, however, preclude them from having possession within the meaning of P1-1 based on a proprietary interest. As the Court explained, the existence of a proprietary interest is unrelated to any recognition in national law, as a situation of long-term land use in itself 'had the effect of vesting in the applicants a proprietary interest in peaceful enjoyment of the house that was sufficiently established and weighty to amount to a "possession".'[851]

The recognition-based perspective is a clear example of the autonomous nature of the concept of possession and its independence from national definition.[852] From this perspective, it follows that a possession within the meaning of P1-1 can arise through a de facto recognition of a proprietary interest by the authorities based on how they have acted or refrained from acting and thereby contributed to a situation. Some common denominators in the cases above are that the land in question is under the direct disposal of the state or is public land, or the dispute of ownership is between a private person and the state. Thus, through the Strasbourg

[847] See, *e.g.*, *Demades v Turkey* App no 16219/90 (ECtHR, 31 July 2003) [32].
[848] *Brosset-Triboulet v France* (n 830) [61]. For a definition of right *in rem* see footnote 852.
[849] Ibid [64].
[850] Ibid [70].
[851] Ibid [71].
[852] See, *e.g.*, *Fordertechnik v Nederlands* [53] where the Strasbourg Court linked the concept of autonomous meaning of P1-1 to the term *right in rem*. Compare *Iatridis v Greece* (n 844) [53]–[54], and *Hingitaq 53 and others v Denmark* ECHR 2006-1 C 345 [A] (*The Law*). Within the framework of the European Convention, a right *in rem* may follow from the fact that a person may, under a rule of law, expect to have a right of obtaining effective protection of a possession, which imposes obligations on others, or that the state has acted in such a way that the same expectation can be considered to arise. See, *e.g.,* Albert Kocourek, 'Rights in Rem' (1920) 68 University of Pennsylvania law review and American law register 322, 322f, and Emily MacKenzie and Simon Gardner, *An introduction to land law* (Hart Publishing 2012), 3f. See, e.g., *Fabris v France* (2013) 57 EHRR 19 [50].

Court's reasoning, a state has an obligation to act in time to prevent a proprietary interest from arising. A reasonable interpretation is that this relates to the principle that a state cannot renounce its international responsibilities with reference to national legal situations.[853] Even though state actions can lead to a proprietary interest, European Convention case law only provides support for the following conclusion: proprietary interest giving a right of peaceful enjoyment only in relation to the applicant's entitlements – material or immaterial goods – not a property right to land. This conclusion follows from, as the Court explained in *Iatridis v. Greece* (1999), that it falls outside the competence of the Court to deal with land ownership issues.[854]

7.3.1.3 Geographical Differences in the Value of Customary Law for the Existence of a Possession

This section thus returns to the initial question of where customary law stands in all this. As a Swedish legal source, customary law should bear weight in Strasbourg. As Christina Allard (2015) explains, however, it was not until 2011, through the *Nordmaling* case, discussed in Chapter 6.1.3, that the Swedish Supreme Court chose to apply customary law in a Sami case.[855] This occurred two years after the Strasbourg Court delivered its verdict in *Handölsdalen v. Sweden* (2009). However, from Judge Ziemele's dissenting opinion in the *Handölsdalen* case, it is clear the Court was fully aware of the international rules governing the rights of Indigenous peoples, including the respect for custom and customary law.[856] As explained below, however, the existence of conflicting interests provides the most plausible explanation as to why the Court did not choose to refer to international principles concerning the rights of Indigenous peoples in the *Handölsdalen* case.

As Section 7.1.4 explains, in the *Handölsdalen* case, the Strasbourg Court found that the Sami villages could not know for sure if they had a right of access to the landowners' land for winter grazing purposes. This conclusion was based on the conception that the village's half-century of land use did not have sufficient support in national law. To use the Court's own reasoning from *Brosset-Triboulet and Others v. France* (2010), the villages could not 'reasonably have expected to continue having peaceful enjoyment of the property' solely on the basis of their prolonged land use.[857]

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[853] Harris (2004) 67f.
[854] *Iatridis v Greece*(n 844) [54]. See also *Matos e Silva v Portugal* (n 651) [75].
[855] Allard (2015) (n 303) 161.
[856] *Handölsdalen v Sweden (Merits)* (n 717) [20]–[23].
[857] *Brosset-Triboulet v France* (n 830) [70].

One explanation for why the Court did not take the prolonged land use into account in its assessment of whether this in itself had given rise to a proprietary interest may be due to the fact that the recognition came from private landowners and not the state. It was the landowners themselves who, through their failure to protest against the Sami using the land for winter grazing purposes, contributed to the situation.

As explained in Section 7.1.4, the underlying national dispute in *Handölsdalen* was between the landowners' interest in the peaceful enjoyment of their legally acquired property and Sami interest in the peaceful enjoyment of their customary right of access to land for winter grazing purposes, which is recognised as a prerequisite to maintain the Sami's cultural lifestyle (as explained in Chapter 4.5).

Considering that the Strasbourg Court lacks the mandate to settle disputes of right over land, it is difficult to find that the Court, in cases concerning the Sami's right to private land, could refer to international law concerning Indigenous peoples' rights to conclude that the Sami have proprietary interests related to resources on private land. Moreover, a conclusion that the Sami have a proprietary interest in access to resources on private land could have far-reaching consequences for land rights at a national level – an area that, as mentioned, is outside the Court's competence.

This does not mean that customary law is irrelevant in Strasbourg. It follows from *Dogan and Others v. Turkey* (2004) that the Strasbourg Court considers custom and customary law as a factor in its assessment of the existence of a proprietary interest linked to land use. However, the situation in *Dogan* differs from the situation in *Handölsdalen* in that the Court's consideration of customary law did not affect the rights of use of others. There is thus not the same situation with competing interests in *Dogan* as in *Handölsdalen*. For the Sami, this means that whether customary law becomes a relevant factor in the Court depends partly on whether there are conflicting private land interests and whether the land is under private ownership or under the direct disposition of the state. Given the geographical division of the Sami's right of access to land (as explained in Chapter 5), and that the right covers both private land and land under the direct disposition of the state, the value of customary law for the presence of a proprietary interest depends on both the land's geographical location and who holds the right of disposition.

It follows from the above that, without a doubt, most of the rights codified in the RHA and included in the reindeer husbandry right fall within the concept of possession in P1-1. As explained in Chapter 5, nationally, the Sami have a recognised right of access to land for reindeer grazing in large parts of the reindeer grazing district. As part of the reindeer husbandry right, the Sami have the right to wildlife resources. In addition, European Convention case law confirms that reindeer husbandry and hunting,[858] fishing,[859] and land use[860] may constitute possessions within the meaning of P1-1. The above exceptions apply to rights that are geographically unconfirmed and depend on customary use, such as the right to winter grazing outside Lapland and the reindeer grazing mountains.

In relation to the rights guaranteed by national law, the Sami have legitimate expectations of the peaceful enjoyment of possession. Accordingly, Sweden's obligation under the European Convention is to ensure that the right to peaceful enjoyment is practical and effective and not theoretical or illusory. To ensure such legal protection, it is required, according to what is emphasised in Section 7.2, that an assessment be made of what the essential interest of property protection means for the Sami and their private life and identity. In a Sami context, where property protection has a close connection to Sami culture and identity, this requires a holistic view of the Convention, considering the interrelation P1-1 has with Article 8. This requirement is to avoid a result where a legal protection under one article in practice leads to the interests protected by other articles becoming theoretical or illusory. As the Strasbourg Court stated in, for example, *Airey v. Ireland* (1979), it is not possible in a holistic interpretation of the Convention to clearly divide social and economic rights.[861] To paraphrase Yussef Al Tamimi's (2018) reasoning, it becomes paradoxical if the focus is only on ensuring external expressions of Sami identity – reindeer husbandry – without at the same time considering the Sami's (inter) identity.[862] Similarly, Siegfreid Wiessner (2011) explains that it is not possible to have a too

[858] *OB v Norway* (n 696) [2] (*The Law*); *Könkämä v Sweden (CD)* (n 574) [1] (*The Law*).
[859] *Posti and Rahko v Finland* (2003) 37 EHRR 6 [76]; *Alatulkkila v Finland* (2006) 43 EHRR 34 [66].
[860] *Sargsyan v Azerbaijan* (2017) 67 EHRR 4 [202]–[203].
[861] *Airey v Ireland* (628) [25].
[862] Al Tamimi argues that, although the Strasbourg Court clearly takes the position that minorities have the rights to challenge national identity, the Court has, through its case law, created 'a pre-political construction of identity that abides by a state's accepted norms and assesses the applicant's claim, the excess of identity, through that construction.' This means, he argues, that the Court's view of minority identities takes place within a national framework and that '[w]hile the minority's rights are protected under the ECHR, the inability of the Court to conceive of minority, the 'others', outside the national frame is patently clear.' He continues, '[T]he Court's approach to identity in such cases reflects a paradox that is inherent to identity; identity is

narrow view of the protection of Indigenous peoples' right to access land; due consideration must be given to the cultural side of their right of property to uphold respect for this way of life.[863] This is especially true in the case of the Swedish Sami, where their right of access to land has a cultural foundation (as explained in Chapter 4.5).

In the following section, this thesis discusses how the Strasbourg Court has recognised the existing interplay between European Convention articles. It shows that factors falling under one article can become relevant in the balance assessment of whether the state has breached its obligation to ensure practical and effective protection of the applicant's right under another article. Next, the interplay between the Europe Convention and other treaties is discussed in light of the Sami's status as Indigenous people.

7.4 The Interplay Between Articles of the European Convention and its External Relations

7.4.1 The Interplay Between the Right of Property Protection Under P1-1 and the Right to Respect for Fundamental Freedoms

In cases where the interest of protection of property is close to the interests protected in other articles, the Strasbourg Court has on several occasions discussed these interests in one context, as explained below. The previous section has given examples of when the existence of a house has been discussed in connection with the legal protection of property. Although the Court has not always explicitly stated that it took due account of the applicant's right to respect for and private and family life, and home in these cases, it is implicit and is apparent from the reasoning.

The need to take due account of the interests covered by various articles of the European Convention is apparent from several cases. In *Marckx v. Belgium* (1979), for example, the Court's argument rests on a combination of consideration of the right of property protection under P1-1 and the right to respect for private and family life under Article 8.[864] In this case, which concerned a dispute over inheritance rights, the Court emphasised that Article 8 also covers 'interest of a material kind.' [865] The central question in these cases is which material

personal while simultaneously constituted and shaped by overarching power mechanisms.' Al Tamimi (2018) (n 77) 285, 295f.

[863] Wiessner (2011) (n 271) 139.

[864] *Marckx v Belgium* (n 724).

[865] Ibid [52].

interests are so intimately linked to, and indispensable for, private and family life that they fall within the scope of these concepts.

Zehentner v. Australia (2009) is another case where consideration of both P1-1 and Article 8 becomes relevant.[866] In this case concerning a judicial sale of an apartment in accordance with national law resulting in an eviction, the Strasbourg Court found it relevant, in addition to assessing if the sale was compatible with P1-1, to examine whether the applicant's interest under Article 8 had been considered adequately,[867] as the measure under P1-1 affected the applicant's interest under Article 8.[868] Here, the Court emphasised the need to strike a balance between the applicant's interest in protecting the intimate right and freedoms protected by Article 8 and the general interest against which it is weighed.[869] For example, it is important that there are procedural safeguards providing the applicant with the ability to have this balance questioned and tested.[870] In a similar case, *Gladysheva v. Russia* (2011), it appears that in the case of measures that fall under Article P1-1 but affect the applicant's interests under Article 8, the applicant's attachment to the object in question is a factor to be taken due account of. Likewise, due account should also be taken of the right to respect for identity, which includes the 'maintenance of relationship with others and a settled and secure place in the community.'[871]

Chassagnou and Others v. France (1999) is a good example of the interplay between articles of the European Convention for the balancing assessment of whether a state has fulfilled its obligation to ensure practical and effective protection of fundamental rights and freedoms in the light of the Convention as a whole. In this case, the applicants relied on their ethical conviction that hunting was wrong to protect their land from state regulated access for hunting purposes.

The *Chassagnou* case dealt with the landowners' right to exclude others from their land for the purpose of preventing hunting, which was contrary to their ethical beliefs.[872] The case concerned the French law on hunting associations and the requirement for small landowners to

[866] *Zehentner v Austria* (2011) 52 EHRR 22.
[867] Ibid [35].
[868] Ibid [54].
[869] Ibid [55]–[64].
[870] Ibid [65].
[871] *Gladysheva v Russia* (n 699) [93]–[95].
[872] *Chassagnou v France* (n 653) [72].

become members of the local hunting association and transfer their hunting rights to it.[873] Through the transferred hunting rights, another member of the association could then hunt on a small landowner's land, just as the small landowner could hunt on other land.

At first sight, the central issue is whether French law infringes on the applicants' right to the peaceful enjoyment of property under P1-1, since they lost control of their land due to the transfer of hunting rights. In particular, they lost the right to exclude others from using their land for purposes contrary to their ethical belief that hunting was wrong. Fundamentally, however, the case is about the balance between the power of states to control private property for a utilitarian reason and the individual's right to protection from state encroachment on fundamental freedoms and rights. In the case, the fundamental freedoms involved were specifically freedom of thought, conscience, and religion (Article 9) and freedom of assembly and association (Article 11).[874] Structurally, Articles 9 and 11 are similar to Article 8, in part because the limitation clause of these articles require that all limitations 'are necessary in a democratic society.' Consequently, the landowners' interest in the peaceful enjoyment of property was not based on economic consideration. By finding a violation of the applicants' right to the peaceful enjoyment of property, the Strasbourg Court, in *Chassagnou*, accepted the value of non-pecuniary interest in balancing individual right of respect for freedoms with state interest in regulating access to valuable resources for the benefit of others:

> [A]lthough the applicants have not been deprived of their right to use their property, to lease it or to sell it, the compulsory transfer of the hunting rights over their land … prevents them from making use of the right to hunt, which is directly linked to the right of property, as they see fit. In the present case the applicants do not wish to hunt on their land and object to the fact that others may come onto their land to hunt. However, although opposed to hunting on ethical grounds, they are obliged to tolerate the presence of armed men and gun dogs on their land every year. This restriction on the free exercise of the right of use undoubtedly constitutes an interference with the applicants' enjoyment of their rights as the owners of property.[875]

Undoubtedly, the Strasburg Court considered how the applicants wanted to use their property based on their own interests, their beliefs, which fall under Article 9 and are protected interests within the meaning of the European Convention. Accordingly, this became a factor in the balance assessment under P1-1, where the Court found it incompatible with the applicants'

[873] Ibid [10]–[13].
[874] Ibid [66].
[875] Ibid [74]. The principle was confirmed in *Herrmann v Germany* (2013) 56 EHRR 7 [80].

right to peaceful enjoyment that their property was open for use contrary to their belief.[876] Thus, a central part of the landowners' identity was at risk of being affected by the upholding of a legislation compelling a use of their property in a way that was not compatible with their lifestyle. It follows that the applicants' protection of the peaceful enjoyment of property described in the first sentence of P1-1 (Section 7.3.1) was defined through the balancing assessment carried out under the restriction clause in the third sentence, in which the applicants' interest under Article 9 was given significant weight.

Another aspect of *Chassagnou* is the respect for the minority to live a life according to their own choices. As noted in Chapter 7.2, there is an underlying notion that respect for diversity is required for the benefit of the European community as a whole.[877] The underlying principle behind the respect for diversity was explained in *Chassagnou* in relation to Article 11:

> Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.[878]

That the interest of the majority must not lead to dominance over the minority is something the Court constantly highlights.[879] In *Chassagnou,* the fact that the majority, in relation to the minority of landowners who did not want the hunt, had an interest in hunting does not mean that the minority's interest must take second place, especially not if the majority only has an interest in access to resources while the minority has a right to the resources. In such a situation, there is also no real conflict of rights, and due consideration is required to the interest of the rightsholders, something the Court provided in relation to P1-1, where emphasis was placed on the applicants' interest under Article 9 to assess the scope of their right to peaceful enjoyment of property.

The interplay between the articles suggests that it is mainly in the balancing process under one article that another article may be a relevant factor to consider. In *Chassagnou*, for example, the Court did not define the nature and scope of the right to peaceful enjoyment of possession. It was defined during the balancing assessment, where the applicants' belief was given due

[876] See, *e.g.*, *Kokkinakis v Greece* Series A no 1260-A, (1994) 17 EHRR 397 [31], where the Strourg Court have listed belief as a central part of identity.
[877] *Chapman v UK* (n 691) [93]; *Muñoz Díaz v Spain* (n 766) [60].
[878] *Chassagnou v France* (n 653) [112].
[879] *Young, James and Webster v the United Kingdom* Serie A no 4, (1982) 4 EHRR 38 [63]; *Gorzelik and Others v Poland* (2005) 40 EHRR 4 [90]; *Navalnyy v Russia* (2019) 68 EHRR 25 [175].

weight. By doing so, the nature and scope of their right to peaceful enjoyment became defined against the weight given to their right to respect for beliefs, which ultimately limited the state's margin of appreciation in controlling the landowners' land. The next section connects this to the Sami's status as Indigenous peoples in light of a broader international context.

7.4.2 The Interplay Between the European Convention and Other International Agreements

The balancing assessment in the Strasbourg Court, where factors of importance to the applicant should be given due regard, gives rise to a dilemma concerning the legal status of the Sami as a People. On the one hand, the Sami are an Indigenous people given special attention in the Swedish Constitution (as explained in Chapter 3). On the other hand, the Sami are a national minority.[880] While the first is based on facts that go back centuries, the second is based on a political agreement under the auspice of the Council of Europe that resulted in the Framework Convention for the Protection of National Minorities (1995) (FCNM), resulting in a national definition of the Sami as a minority.[881] This makes the status of a minority legally determined, while the domestic status has a factual basis. Argumentatively, this raises questions of points of law and facts concerning which status the Strasbourg Court should apply in relation to the Sami in future Sami cases. The choice of status is a relevant question because (as shown in Chapter 3.4) international law contains specific legal principles linked to Indigenous peoples that are not applicable in relation to minorities. Of course, as Timo Makkonen (2000) explains, the statuses are not mutually exclusive.[882] The relevance of one does not prevent the other from being relevant as well. Nevertheless, not taking due account of the Sami's status as a People could raise an issue in relation to Article 14, the prohibition of discrimination, which protects those belonging to a *minority* and *other statuses* from discrimination. Undoubtedly, the Sami's status as a People, including being Indigenous, falls within the scope of the latter, since this is a recognised status in international law.[883]

European Convention case law provides no clear answer as to how relevant Indigenous peoples status is in a balancing interest, since the majority of case law concerns minority status. An exception is *Ahunbay and Others v. Turkey* (2019), which involved a decision made by the

[880] Lag (2009:729) om nationella minoriteter och minoritetsspråk, s 2. Sweden has five officially recognised minorities; Jews, Roma, Sami, Swedish Finns and Tornedalians.
[881] Council of Europe, Framework Convention for the Protection of National Minorities (1 February 1995, EIF, 1 February 1998) ETS 157, 2151 UNTS 243 (FCNM).
[882] Makkonen (2000) (n 148) 133f.
[883] "Peoples" and "Indigenous peoples" position as legal concepts is expressed in the first articles in, *e.g.*, ICCPR; ICESCR; UNDRIP; and ILO C169.

Strasbourg court in connection with an application for a complaint concerning the Ilisu Dam construction project in Turkey.[884] In this case, the applicants claimed that Turkey had violated their conventional rights and freedoms (included those protected under Article 8) because part of their traditionally used land containing an archaeological site of cultural heritage value, which would be submerged by the reservoir.[885] To support their claims, they referred to international conventions aiming to protect cultural heritage.[886] The Turkish Government, for its part, argued that the Strasbourg Court did not have jurisdiction to consider the issue of cultural heritage and that Article 8 did not guarantee a right to protection in that regard.[887] Although the Court rejected the case due to a lack of consensus among Member States, which necessitated a reconsideration of the nature and scope of Article 8 in relation to cultural heritage, it did not reject the idea that cultural heritage might fall within the scope of the cultural protection ensured by Article 8. What is interesting in the context of this thesis is that the Court indicated for the first time that the Indigenous status of a group may constitute a relevant factor to consider when interpreting the right to peaceful enjoyment under Article 8.[888]

The case law cited by the Strasbourg Court in *Ahunbay* to strengthen its argument was minority cases in which the Court considered the cultural and ethnic aspects of the right to peaceful enjoyment under Article 8. From these cases, inter alia, *Buckley v. the United Kingdom* (1996),[889] *Chapman v. the United Kingdom* (2001)[890] and *Muñoz Díaz v. Spain* (2009),[891] it follows that taking due account of minority status included taking due consideration of the social and cultural context (something addressed above in Section 7.2). The minority status in these cases was a matter of a material nature for the assessment of whether the person in question was entitled to the peaceful enjoyment of the rights and freedoms of Article 8.[892]

The same line of reasoning is applicable to P1-1 (as seen from *Chassagnou v. France*). In relation to the majority interested in hunting, the applicants held a specific status due to belonging to a minority of conscience. This reasoning, as noted above, is based on the principle of respect for diversity. As explained by ECommHR in *Handyside v. UK* (1975), the principle

[884] *Ahunbay and Others v Turkey (dec)* (n 186).
[885] Ibid [16]–[18].
[886] Ibid [20].
[887] Ibid [19].
[888] Ibid [23]–[24].
[889] *Buckley v UK* (n 691) [80].
[890] *Chapman v UK* (n 691) [96]. See also *Connor v UK* (n 747) [84].
[891] *Muñoz Díaz v Spain* (n 766) [64].
[892] See, *e.g.*, *Rechul v Poland* App no 69143/12 (ECtHR, 9 July 2020) [28]–[33].

of respect for diversity rests on the fundamental principle of a democratic society. Under this principle, there may be a requirement to balance the interest of 'the individual and the utilitarian "greater good of the majority."'[893] As the Strasbourg Court later clarified, as noted above, and outlined in *Chassagnou v. France,* that this does mean that 'the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.'[894]

Against the historical existence of the Sami in the northern parts of the Scandinavian peninsula and the realisation of the Swedish parliament in the 19th century that the state could not give away land with rights more than they themselves had when dividing land (as explained in Chapter 4.4), it is then reasonable to see beyond the Sami's more limited legally bestowed status as a minority. In her partly dissenting opinion in *Handölsdalen* (2010), Judge Ziemel argued so.[895] She argued for due consideration of the Sami's status as an Indigenous people to achieve equal rights.[896] This requires taking due account of regulations of Indigenous peoples' rights at the international level by highlighting, alongside ILO C169 in the UNDRIP, general comments from United Nations human rights treaty bodies, including the HRC and the Committee on the Elimination of Racial Discrimination. [897] These documents are discussed in Chapter 3.4 and in relation to the Swedish Supreme Court's ruling in *Girjas Sami village* in Chapter 6.1.4.

In relation to other treaties, the Strasbourg Court has a limited jurisdiction. It cannot apply other treaties or assess whether a state complies with them. This restricted mandate follows from statements in, for example, *Gratzinger and Gratzinger v. the Czech Republic* (2002).[898] In this case, however, the Court clarified that they could take due consideration of international legal instruments for interpreting provisions in the European Convention:

> The Court notes at the outset that its jurisdiction extends only to applying the European Convention on Human Rights and not to applying other international treaties. However, in interpreting the provisions of the Convention, it may find it helpful to be guided by provisions of other international legal instruments.[899]

[893] *Handyside v the United Kingdom* App no 5493/72 (Commission Report, 30 September 1975) [146]–[148].
[894] *Chassagnou v France* (n 653) [112].
[895] *Handölsdalen v Sweden (Merits)* (n 717), partly Dissenting Opinion of Judge Ziemeke, 20–23.
[896] Ibid 20 [2].
[897] Ibid 20-22 [2], [7].
[898] *Gratzinger v Czech Republic (Adm)* (n 812).
[899] Ibid [50]. Compare *Zehnalová and Zehnal v the Czech Republic* App no 38621/97 (ECtHR, 14 May 2020) [B].

The Court has applied this possibility in several cases. In *Carson and Others v. the United Kingdom* (2010), for example, the Court took due consideration of the ILO's Social Security (Minimum Standards) Convention (No. 102) and Maintenance of Social Security Rights Convention (No. 157).[900] In *Stummer v. Austria* (2011), it used the definition of forced or compulsory labour in the ILO Convention of Forced Labour (No. 29) as a starting point for interpreting the term forced or compulsory labour in Article 4.[901] Likewise, the ILO conventions were a source of guidance in Béláné Nagy v. Hungary (2016).[902] The list is not exhaustive.

Reference to the ICCPR and General Comments from the UN HRC is found in, for example, *Hirst v. the United Kingdom* (2005).[903] The case concerned prisoners' right to vote. In this case, the Strasbourg Court cited a ruling from Canada's Supreme Court as support for its reasoning that a general removal of voting rights was incompatible with the European Convention.[904] In *Timishev v. Russia,* the Court referred to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child to emphasis children's right to education.[905] Moreover, together with reference to legal instruments under the auspices of the Council of Europe, the Court highlighted the ICESCR in *Demir and Baykara v. Turkey* (2008) as support for a consensus on civil servants' right to engage in collective bargaining.[906] This list too is not exhaustive.

The above, which in no way provides a substantive analysis of European Convention case law linked to international law, shows how the Strasbourg Court takes due account of international instruments as aids to interpret the nature and scope of rights and freedoms in the European Convention. *Loizidou v. Turkey* (1996) is an example of the necessity to do so:

> In the Court's view, the principles underlying the Convention cannot be interpreted and applied in a vacuum. Mindful of the Convention's special character as a human rights treaty, it must also take into account any relevant rules of international law when deciding on disputes concerning its jurisdiction.[907]

[900] *Carson v the United Kingdom* (1019) 51EHRR 13 [49]–[50], [85].
[901] *Stummer v Austria* (2012) 54 EHRR 11 [125]
[902] *Bélané Nagy v Hungary* (n 695) [40]–[41].
[903] *Hirst v the United Kingdom* (2006) 42 EHRR 41 [22].
[904] Ibid [25], [46]–[52].
[905] *Timishev v Russia* (2007) 44 EHRR 37 [64].
[906] *Demir and Baykara v Turkey* (2009) 48 EHRR 54 [41], [74].
[907] *Loizidous v Turkey* 23 EHRR 513 [43].

The Court confirmed this in *Demir and Baykara*, which according to Ineta Ziemele (2013) is a clear example of the Court's willingness to take due account of contemporary international legal norms:[908]

> [I]t is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights. [909]

Both *Loizidou* and *Demir and Baykara* are based on the European Convention being an international treaty and on the fact that interpretation on that account can take into consideration international law rules applicable to the Contracting Party.[910] It follows that, when ensuring the protection of human rights and freedoms in the European Convention, international human rights instruments may need to be taken due account of so the rights' protection becomes practical and effective set in the context of present-day condition. A limited interpretation of a Convention article may thus be 'inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective.' [911] International legal instruments may thus be used as interpretative rules regardless of whether the contracting state has signed or ratified the document:

> The Court observes in this connection that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State. [912]

This is a position adopted by the Swedish Supreme Court in *Girjas Sami village*.[913] Regardless of whether legal principles are part of Swedish legislation though incorporating the underlying legal document, a contextual examination of the situation from a contemporary context may require due consideration of them. As a result of the due consideration the Supreme Court took in *Girjas Sami village*, principles contained in ILO C169 have now become part of Swedish

[908] Ziemele Ineta, 'Customary International Law in the Case Law of the European Court of Human Rights – The Method' (2013) 12 The Law & Practice of International Courts and Tribunals 243, 244–246.
[909] *Demir v Turkey* (n 906) [146].
[910] *Loizidous v Turkey*, [43]; *Demir v Turkey* (n 906) [65]; *Vienna Convnetion on the Law of Treaties* (adopted 23 May 1969, EIF 27 January 1980) 1155 UNTS 331, arts 31–32.
[911] *Demir v Turkey* (n 906) [70].
[912] Ibid [78].
[913] *Girjas Sami village (SSC)* (n 138) [94].

law though transformation.[914] The consequence of this decision is that these principles are now amongst legal sources applicable in future Swedish Sami cases in Strasbourg. How the Strasbourg Court chooses to apply these and other principles linked to the Sami's status as Indigenous peoples, however, remains to be seen.

Considering the lack of Sami legal cases, of course, it cannot be said with certainty how the Strasbourg Court will approach international principles of Indigenous people and which weight it will give to those principles. The above shows, however, that the Court takes due account of international legal principles to ensure that the protection of the European Convention remains practical and effective in a contemporary society.

7.4.3 Concluding Remark

The above has shown that there have been significant legal developments in Strasbourg since the Strasbourg Court rejected the first Sami case in 1983. This development includes the nature and scope of both the right to private life under Article 8 and the right of property under P1-1. While the right to peaceful enjoyment of the right and freedom to private life encompasses a cultural way of life that forms a central part of an identity, the right to peaceful enjoyment of possession includes interests of a more immaterial nature that do not have the status of a property right at the national level but rather intrinsic value for the individual in question.

While the right to respect for rights and fundamental freedoms under Article 8 is contextual and focuses on the individual, the freedom to maintain a lifestyle and a specific identity with relationships to others gives the protection Article 8 ensures a collective dimension in addition to a cultural dimension. In relation to the Sami's rights and freedoms linked to their original territories, this cultural and collective dimension becomes legally complex. This complexity is partly due to the Swedish state limiting the legal protection of the Sami's rights and freedoms to these territories to a specific activity that the government, several hundred years ago, decided was the means required to protect the nomadic Sami – reindeer herding. –

Regardless of what one thinks about a historical system being upheld in a time where the Sami's rights as an Indigenous people to their original territories must be recognised beyond reindeer herding, the historical foundation of Sami rights and freedoms in Sweden creates an inherent relationship between the right to peaceful enjoyment under Article 8 and P1-1. This

[914] Compare Julian Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations' (2013) 38 Yale J Int'l L 289, 304–307.

relationship must be given due recognition, and a balancing assessment must be weighed between the interest of the Sami and the general interest pursued by the state. The significance of Article 8 in such a balance may, however, depend on how central the connection to original Sami territory is to the individual in question. Article 8 is thus undoubtedly central to Sami who live in close relation to these areas and engage in reindeer herding and related activities, such as hunting and fishing.

Chapter 8 Final Conclusion – All Legal Boundaries are Conventions Waiting to be Transcended*

This thesis sought to answer the question of whether the Swedish legal system recognises and protects the proprietary interests of the Sami in a way that is compatible with the European Convention on Human Rights and whether both recognise and protect the Sami's proprietary rights in a way that safeguards their cultural interest. This question is central not only for the Sami in general but also specifically for those who are involved in reindeer husbandry. Reindeer husbandry includes activities that are today not in themselves necessary for the practice of reindeer herding, such as hunting and fishing. More specifically, the thesis intended to make a legal comparison between the protection of cultural aspects of Sami private life in relation to property protection under the Swedish legal system and the European Convention. In this way, this thesis contributes to existing knowledge of how Sami legal protection under the European Convention by showing how this protection must operate out of a national context, unlike analyses of how the Strasbourg Court should apply the European Convention to the Sami situation from an international human rights perspective.

This thesis claims that there is a discrepancy between the legal protection the European Convention aims to ensure and that ensured by Swedish legislation. Above all, the Swedish Constitution does not ensure a right to protection of human rights and fundamental freedoms linked to private life at the same level as the European Convention, which does so through the right to respect in Article 8 of the ECHR. The safeguarding of these human rights and freedoms will thus, in accordance with its placement in the fundamental objectives of public activities under the Swedish Constitution, depend on the authorities' goodwill to consider whether the Sami's *ability to maintain and develop their own cultural and community life* has been sufficiently promoted.

Promoting an opportunity is not the same as securing a right, and a human right can never be dependent on the goodwill of a state, nor is it in line with the basic principles of human rights and fundamental freedoms that their safeguarding is up to states' goodwill. The obligation to secure a right undeniably places demands on the obligation of consideration of relevant aspects for the benefit of the individual in the assessment of whether legal protection based on the

* This heading is a paraphrase of David Mitchell's quote 'I understand now that boundaries between noise and sound are conventions. All boundaries are conventions, waiting to be transcended. One may transcend any convention if only one can first conceive of doing so.' David Mitchell, *Cloud Atlas* (Hodder Stoughton Ltd 2004) 460.

purpose of the human rights and freedoms is effective and practical. That is, efficiently and practically from the individual's perspective, not from a state perspective where the possibility to promote is an assessment made in relation to a general interest pursued by the state for economic, and political purposes.

Regarding Sami interest linked to human rights and fundamental freedoms, such as the right to form a private life according to personal choices or the interest in peaceful enjoyment of their historic land and waters without undue external influence, both of these interests must be taken due account of in matters related to the natural right of the Sami to their traditional territories. This natural right has been developed through historical occupation and land use of an area that the Swedish government has long had a weak interest in; thus, the government has had poor insight into the Sami's internal legal conditions. There has been equally poor insight into what the Sami need to ensure the survival of *Sami culture*; the irrebuttable perception here has long been that if the material basis alone is ensured, the survival of Sami culture is ensured.

When it comes to the political will to protect the interests of the Sami, the approach is reactionary. There is a conservatism based on a perception that it is the task of the courts to ensure Sami protection in accordance with legal developments, a momentous task that the Swedish courts reluctantly undertake, as their task is not to ensure human rights and fundamental freedoms but to ensure that the existing legal protection is complied with so that an effective and practical protection is set up that enables the peaceful enjoyment of human rights and fundamental freedoms at a level that is compatible with the contemporary rule of law.

The means by which national courts secure human rights and freedoms of the Sami today include international legal principles linked to Indigenous peoples. That Sami legal protection requires consideration of international human rights principles follows from the judgment of the Swedish Supreme Court in *Girjas Sami village*. Thus, more specific legal principles are applicable to Swedish Sami cases than those offered under the European Convention, which lacks regulation concerning Indigenous peoples. The Supreme Court reference to international legal principles in *Girjas Sami village* means that the assessment of protection to secure respect for fundamental principles, such as human dignity and personal autonomy, requires consideration of the Sami's status as an Indigenous people. This requirement has been shown to be supported by European Convention case law, which shows that the specific situation of

minorities must be repsected to achieve legal protection that ensures a quality of life based on the specific context.

Even though an Indigenous peoples' context is a factor that is both necessary and feasible to consider, it is possible that it does not have the same weight in all cases concerning Sami legal protection of access to traditional Sami territory and its resources. The importance attached to this factor must be judged based on how central access to land and waters is from a reasonably objective perspective that is consistent with the fundamental principles of the European Convention and international human rights law. Consideration of an Indigenous peoples' context on purely ethical grounds is not compatible with the European Convention; however, this status is a relevant dimension to consider in relation to regulating human rights and fundamental freedoms. As stated at the beginning of the thesis and in the examination Swedish and European Convention case law, the cultural dimension is important. As for the Sami's own perception, the cultural dimension is a central part of their private life and essential to their common sense of identity, as the case law highlighted in this thesis shows. However, there uncertainty as to what extent such a broad view of the importance of cultural dimensions can be given weight in the assessment of individual cases. In any case, there needs to be a causal link between the effect of a measure and the consequence on an individual level. The evaluate whether there is a causal link requires an assessment of the individual situation, where there is an obligation to take due account of the cultural context if this is central to the ability to peacefully enjoy human rights and fundamental freedoms. This obligation is in line with the fundamental principle of the European Convention on respect for cultural pluralism, which is part of our common cultural heritage.

The contextual assessment has proved to be of fundamental importance for the Strasbourg Court's assessment of how the substantive provisions of the European Convention are to be applied in relation to minority groups. The contextual assessment is to avoid legal norms being applied in a way that leads to the interests of minority groups being subjected to the interests of the majority in a way that makes the minority's right to the protection of human rights and fundamental freedoms illusory and theoretical. The obligation to avoid such a situation applies not only to the Sami's relationship to Swedish majority society but also in relation to minority groups within the Sami population. A criticism of such an approach is, as emphasised at the beginning of this thesis, that it would further contribute to the division of the Sami people into separate groups. The fact remains, however, that it is not compatible with human rights and

fundamental freedoms that the interests of a minority shall give way to the interests of the majority, regardless of who that majority consists of. A balancing assessment is always required where factors central to the private life of persons belonging to the minority must be given due account when their right to peaceful enjoyment of human rights and fundamental freedoms must in some way be restricted in favour of the majority.

In the end, it is an increased focus on cultural aspects in the balance assessment of the Sami's protection of access to traditional territories that this study hopes to encourage. An increased focus on cultural aspects is something that can objectively be achieved based on a de facto way of life. To live in a certain cultural way differs markedly from a desire to do so. Just as the European Convention does not contain a right to property, the Convention does not contain a right to a specific lifestyle. What the Convention ensures is protection against the interests of the majority overriding the interests of the minority in a way that is contrary to Europe's cultural heritage. Failure to ensure a right to respect for human rights and fundamental freedoms can, therefore, not be considered compatible with the European Convention.

Appendix A

First Appendix or CODICIL to the Border Treaty between the Kingdoms of Sweden and Norway, Concerning the Lapps*

On the Lapp's regular migration, and for this the paid fee and jurisdiction over foreign Lapps during the mentioned migration time, henceforth nothing may give grounds to disagreement or misunderstanding, and that one should thereby be able to clearly know, which are henceforth considered Swedish or Norwegian Lapps, as well as how to interact with them reciprocal on all occasions, it has in the forthcoming Border Treaty been mentioned and here signed commissioners of certain interrelated points has agreed, as follows:

§ 1

Since the year 1742, and during this Border Commission's private Swedish Lapps, in certain places in Norrland county, have been imposed a Norwegian Lapp tax, and thereby established tenancy [*städjande*] of summer land, and its disposition to the aforementioned Swedish Lapps against annual tax payment, shall now be suspended and discontinued, as in violation of certain of the following conditioned articles, and as contributing to new disorder in the lapp-administration, for which a regime, as prescribed below in certain places, shall be put into operation.

§ 2

No Lapp may henceforth have *Tax*- or *Städjandeland*[1] in more than one kingdom, for the reason that commonality of subjects and land may henceforth be avoided.

§ 3

For announcement at present time it is agreed that, as far as between the Börje mountains to the Bonnäs mountains, that is, at the beginning of Norrland County and for Helgeland bailiwick on the Norwegian side, but Ångermansland and Umeå *Lappmarker* on the Swedish side, the mountain ridge to the Border is defined, and as a result both sides lose the old Tax land and subjects, which have hitherto been had in places beyond the mountain ridge; so should the Lapps with their families, that nowadays have tax land at that place on the Swedish side of the Border, be considered as Swedish subjects and belong to that side, regardless of which side they before had *boxlat landet* and to which side therefore tax was paid, as well as those Lapps with their Families, that at present have old *boxel land* on the Norwegian side of the Border in the same way, should belong to Norway.

§ 4

If any Lapp currently is found to have on both sides of the border old Swedish or Norwegian Summer Tax land, that is such land, which for the year 1742 to Sweden or Norway tax have been paid, then he has the freedom to choose which side's subject he henceforth will be, inasmuch he no Winter Tax land on either side owns. If he has Winter Tax land on either side, the Swedish or Norwegian, belonging to that side, on which territory he such Winter Tax land owns.

§ 5

If any Lapp on the distance between Bonnes mountain and Halde, after which Kautokeino Border begins, that is on the Norwegian side for the whole of Saltens, Senjens and a part of Tromsöns bailiwick in Norlands County, but on the Swedish side for the whole of Piteå and Luleå and a part of Torneå *Lappmarker*, is found to have such Summer Tax land on the Norwegian side of the Border, for which for the year 1742 tax to Norway has been paid, but owns Winter Tax land on the Swedish side of the Border, then has he the freedom to choose whether he henceforth want to be a Swedish or Norwegian subject, then he henceforward keeps that tax land he has on the same side of the Border, but loses the tax land he has had on the other side of the Border.

§ 6

To be able to know, who are Swedish or Norwegian subjects, it shall as provided in the 4th and 5th §§ concerning the Lapp's free choice take place in the Commissioners presence at the demarcation, as soon as possible, without hindrance, temptation or persuasion, bribes and gifts, neither by promise of a lower tax, or by any other means or through attempts by private landowners or others on either side, but they will have a completely free and unconstrained choice.

§ 7

Those Lapps, that thus henceforth, once this Convention has come into force, is found to have both Summer and Winter Tax land, or only one of them, namely, either Summer or Winter Tax land on the Swedish side of the Border, should with their families, that is children or those who is in the children's place, such as foster children or relatives in one and the same household, likewise servants and lodger, be considered as Swedish subjects. The same is to be understand about those Lapps with their families, that have an old *boxel* land on the Norwegian side of the Border, so that one henceforth can separate, which side's subject he is, since no Lapp may have Tax or *boxel* land on both sides, nothing else can be added thereto than what in this Convention prescribed is.

§ 8

If any Swedish Lapp marries with a Norwegian Lapp-wife, which in Norway has her own Tax land or more reindeers than he, he has the choice, without any hindrance or fee of their property, to become a Norwegian Lapp, then he turns in this matter to the Swedish bailiff, and prove that this has taken place, upon which they provide him their written permission of relocation and record this in [tax-register], and him from Swedish tax is excluded.

The same it is to be applied vice-versa with a Norwegian Lapp in a similar situation.

In other circumstances follow the wife the man.

§ 9

If a Lapp want to abandon his land or become another kingdom's subject, is it with him, as with other Swedish or Norwegian subjects in similar circumstances, namely, he pays tithe and sixth coins of what he owns, to the side, from which he wants to move, and brings proof to the side he wants to move to, that the fee properly is paid and has received a permission to move.

§ 10

Althenstund [As / As long as] the Lapps need both Kingdom's land, shall it for them, after *gammal sedewana* [customary law], be allowed autumn and spring to migrate with their reindeer herds across the Border into another Kingdom, and henceforth, as as before, equally with the nation's subjects, excepting for such places, as here stated below, have the right make use of the land and shore [water] for upkeep to their animals and themselves, where they are to be kindly received, protected and helped to adapt, even in Wartime, during which in the Lapp-administration exactly no changes should be made, and least of all should the foreign Lapps be exposed to plunder or any kind of compulsion or harsh violence, that wartimes brings, but always be regarded

* The translation, made by Jan Mikael Lundmark, is a literal translation of the original text.

1 Landholdings for which tax was paid.

and handled as its own subjects, on which side they then may as foreigner be residing.

§ 11

No Lapp, that needs to migrate with his animals across the Border, may in wartimes commit any hostile act. If he is caught doing so, relates not to him the customs of war, but he is punished in the same way, as if his misdoings were in peacetime committed.

§ 12

Where on the Norwegian side there are protected seal hunting and down gathering, that on Norwegian is called *Kobbeweide*, *Fugle* and *Dunnwär*, for which some subjects pay annual tax, shall it under such punishment, that the Norwegian law for Norwegian subject prescribe, Swedish Lapps be prohibited, at the place to hunt, or otherwise do damage. In all other places for them such and all other hunting and fishing in equality with Norwegian subjects is allowed. The Norwegian Lapps also enjoy such freedoms in Lappmarken on the Swedish side.

§ 13

The Swedish Lapps, who do migrate across the Border with their animals into Norwegian soil, but do not reach the sea or the fjords and there practice any fishing or seal hunting, pays in fee for every twentieth animal, that in their entourage is, big or small, of both sexes, exempt those calves, that was born in the same spring, which do not count, one shilling Danish or one Swedish penny [*styfwer*]in copper coins, no more. But if they practice fishing or seal hunting in the sea or the fjords on the Norwegian side, they pay for each twentieth animal twice as much, as stated above, namely two shillings Danish or two Swedish penny in copper coins, the same years spring calves unaccounted. More may not from the Swedish Lapps be taken, regardless of whatever name or form it is, nor may they be assigned any personal labour or service.

§ 14

The Norwegian Lapps, that in the autumn migrates with their animals across the Border into the Swedish side, pays for every twentieth animal, that they bring with them, big or small, of both sexes, the same years spring calves included, two shillings Danish, or two Swedish penny in copper coins, if the mentioned Lapps at that place remains for the longest time of the year, and the spring calves during that time the same upkeep, as the other animal, need. Want they in addition practice fishing and shooting in *Lappmarken*, pay then twice as much, namely four *Styfwer* in copper coins, or four Danish shillings. More may from the Norwegian Lapps not be taken, regardless of whatever name or form it is, nor may they be assigned any personal labour or service.

§ 15

In every district, wherever relocated Lapps are, shall be appointed one Lapp-deputy and two lay assessors, for whose migration nothing should be pay.

§ 16

The Lapp-deputy and the lay assessors should mutually ensure that relocated Lapps and their animals enjoy sufficient upkeep, only however so that the Lapp himself, whom for the land pay taxes, not by foreign Lapps are displaced or suffer any shortcomings. For that reason should the Lapp-deputies and lay assessors know the nature of the Tax land on their side, and know the number of animals, that the Lapp owns, who pay tax for the land, so that the foreign Lapps, if necessary and required, can be allocated to suitable places. On both sides should the foreign Lapps take care during their migrations so to not harm the nation's own inhabitants, neither in winter nor summer on forest, fields or meadows, mulberry- or cloudberry-morass or any others, at legal duty, and should the damage reimburse after the evaluator's opinion.

§ 17

Before any Lapp, Swedish or Norwegian, with his animals migrates across the Border, he shall report to his own Lapp-deputy and lay assessors the number of animals, he has in his entourage, including his own, his children's, servant's and lodger's, and the fee to the mentioned Lapp-deputy deliver, against proof of both the statement, and the fee. He shall also announce as soon as possible, if he wants to practice fishing and shooting, after which the fee will be adjusted and paid, and on the statement and proof to be noted. With the mentioned proof he then passes, without hindrance and further address, back and forth.

§ 18

Before the Lapp-deputies with their Lapps move across the Border, they should provide the other side's Lapp-deputy with one of them and the lay assessors signed and specified list of the Tax Lapps and animals from their district, that the same year want to migrate across the Border, then they as well as the fee to the mentioned Lapp-deputy deliver against proof of the mentioned list and payment. In the absence of Lapp-deputies who may receive the aforesaid list and payment from the foreign side, shall the person or persons, that the fee belongs to, send a plenipotentiary, as in such a convenient place, as possible is, shall stay, namely at the nearest to the Border situated Lapp-Parish on the Swedish side, and on the Norwegian side in one of the nearest inner fjords and on the mainland.

§ 19

The Lapps should, if requested, once a year for all and not more often on that side's territory, that the fee belongs, for the mentioned side's Lapp-deputy, or whom the owner of fee thereto in writing has appointed, be obligated to show all the animals, that in their entourage is, and to allow them to be counted as proof of the accuracy of their statement. If they deny this, or they the mentioned persons with words of deed is badly treated, a Swede if fined just for his recalcitrance, twelve *Daler* silver coins, and a Norwegian Lapp four Danish *Riksdaler*, half to the mentioned offended person and the other half to the King. For each time such offense occurs, double the penalty.

If the Lapp assaults the mentioned person further, that what can as a simple insubordination by regarded, he is punished in addition according to the law.

§ 20

If any Lapp, Swedish or Norwegian, is found to have falsely stated the number of animals, so that he has twenty animals more or there above than what he had reported, he pays for each twentieth animal in the herd, twice as much, as stated above. If he is caught a second time with such inaccuracy, pays double as much, as the first time. The third time double as much as the second time, and so forth, so that the punishment for each time doubles, whereof the informant receives half and the other half goes to the one, that the fee belongs. When no other informant exists, keeps the owner of the fee everything.

§ 21

If the Lapp-deputy or the lay assessors is found to have colluded with the Lapps in their incorrect statement, or their own register is falsified and fees have been withheld, which they have received, duty the first occurrence three times as much, as the concerned thereby could have been defrauded, half to the informant, and the other half to the person or persons, that the fee belongs to.

The second time they are remove from office and punished as thieves.

§ 22

If any dispute arises between Lapps from one and the same side, either regarding their relocations and the place, where they during their relocation time have the intention to stay, or about lost reindeers, fights, small depts claims, that do not exceed twelve *Daler* silver coins or four Danish *Riksdaler*, all distribution of

estate, or other small things, the Lapp-administration in particular and concerning Lapp customs, should such things, when conciliation fails, by the same side's Lapp-deputy and his two lay assessors soon be decided, and so forth the concerned to the Hundred Court do not want to appeal, it shall be enforced in the same place, without regards to the territory the deed took place or was reported. But are such things between parties of separate nations, or between a Swedish or Norwegian Lapp, then in addition, without regard to territorial integrity the plaintiff's deputy and lay assessors may immediately deliver a verdict, and the verdict, if not appealed, enforce; However only in so far, that the Court consisted of two lay assessors from the defendant's side, and that the deputy from the same side, as their defence and representative, shall be entitled to be there, if so desires, all without payment for the mentioned service in both cases. When one of the parties with this Lapp Court's proceeding are dissatisfied and with the case wants to go further, shall the appeal be made to the Swedish and Norwegian Hundred Courts, where the deed has been committed, or in the case of distribution of estate, the side to which the deceased during his life belonged.

§ 23

All other matters between Lapps, either by one and the same nation or by different Nations, belongs to the ordinary Hundred Court, and be brought before the court, adjudicated and, in the case it is not appealed to a higher court, it should at the same place to be enforced, all on the territory, where the deed is committed, only with the difference, that in the next § is stated, namely, that when one of the parties is a foreign subject, or the deed against a foreign subject or his property has been committed, shall before the Court two lay assessors from the foreign side participate, who at all time should have the same respect, rights and authority, as the other lay assessors, also shall the foreign Lapp-deputy have the right to be present, as defence and council of the party, which is from the same side. When it is proven, that the two concerned foreign lay assessors have been legally appointed as assistants in such a Court, and they do not appear, may in their places two other reasonable and honest Lapps from the same side be appointed. If none is found, it remains with the ordinary board, and shall the verdict be given at the same place, and the ruling in addition is given to the concerned, who is present from the foreign side, either the Lapp-deputy, or the lay assessors, in witnesses presence or with their proof, without payment, so that one from the same side may know, how the court's proceeding has been conducted.

If any judge deviates from any of this Convention's prescribed statutes, he has violated his office.

§ 24

The concerned from the foreign side, both parties as witnesses, should, when legally summoned and subpoenaed, shall be required to appear before this combined Court and respond to matter, or give their testimony. If the defendant does not appear, and not his unavailability and hindrance to the Court, at the time he is subpoenaed, report and proves, and evidence exist, he is legally subpoenaed, the case nonetheless proceeds, as if he were present, then after the complaint or the indictment and the presentation of evidence the verdict is delivered and executed. If the defendant at the next assembly proves a lawful excuse, both that he could not participate in person, and neither hade the possibility to inform this to the Court the day he should have appeared in Court, then the case should be retaken and decided. But in the absence of witnesses from the first assembly, and the case without them cannot be decided, the case is postponed to the next assembly, and duty the witness, that without reason had been absent, three *Daler* silver coins or one Danish *Riksdaler* for the failure to appear, to the Crown, which subjects they are.

§ 25

No enforcement or expropriation, except in accordance with the verdict, that the Lapp Court according to 22 § have the right to judicate and execute, may be done in any foreign Lapps household, unless a written ruling is presented, and proof of the foreclosure to the Lapp, in whose household the enforcement or expropriation is to be undertaken, immediately at the place is delivered. Anyone who does wrong against this, punished is as for an act of violence.

§ 26

Escapes any Lapp from any committed serious crime across the kingdom's Border, where the deed is committed, it is for him, as for other Swedes of Norwegian subjects in similar situations.

§ 27

All Lapp cases should on simple and unmarked paper be dealt with and described, when a foreign Lapp is involved in the case.

§ 28

The settled population in Utsjocki, that now through the Border unification becomes private Swedish subjects, should in all matters concerning trade, both the nation's products, and the merchandise, that is brought to the nation, to be treated equally with royal Norwegian subjects in that land, and equal with them enjoy as well the present, and future granted, privileges and other commercial institutions, so that, what the Norwegian merchants delivers, shall to them after the duty have been paid, and likewise after the commodity price has been decided, cater what they want; however shall the *Compagniet* [a historical trade company] not be obligated to give these Swedish subjects the credit, which in some cases, as a result of the privilege, should be given to Norwegians.

§ 29

All Royal officers on both sides, especially county governors, should diligently examine, whether the foreign Lapps are well treated and cared for, so that they know what is right and what they according to this Convection should enjoy. Moreover should they, when travelling through the nation and, on the behalf of the office, visit, early on let the Lapps know, the time and place they arrive to their neighbourhood, so that those, who may have something to complain about, could personally attend and discuss their affairs.

§ 30

Spiritually it is necessary to declare, that the stated relocation, and the associated institutions, by no means should be understood, as if the Kingdoms of Sweden and Norway thereby any jurisdiction or other rights, by whatever the name may be, recognise in the other kingdom, but only as a tolerance and reciprocal docility, which cannot be done without, to the extent that Lapps on both side should through power and politics be kept in appropriate peace and order. Consequently is the in the established Border Treaty agreed Borderline, both with regard to the Lapps and their districts, as in case of other Swedish and Norwegian subjects and their districts, in its full power, so that neither the pass of time, respective officer's and subject's neglect, collusions or interventions or other prescriptions and use across the same Border, it becomes so old, and of what nature or character it may be, herein any changes shall or may be done, but each nation shall henceforth on its side of the above mentioned Border alone and without trespass be entitled to exercise and keep all Regalia and Jura Majestatis as well as in spiritually as in earthly things.

This appendix to the Border Treaty shall in all its paragraphs have the same status, as the aforesaid Border Treaty, as if words for words were inserted in it.

In addition to what has already been mentioned there are two written examples, signed by both majesties' plenipotentiary Border Commissioners and with their ordinary signature stamp confirmed, that took place in Strömstad in the year after the birth of Christ of one thousand seven hundred fifty-one the 21 September / 2 October.

J. Mauritz Klinckowström. J. Mangelsen.

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