

INDIGENOUS PEOPLES' CULTURE, CUSTOMS, AND TRADITIONS AND CUSTOMARY LAW – THE SAAMI PEOPLE'S PERSPECTIVE

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I. INTRODUCTION

Indigenous peoples have, for a long time, been among the poorest and most marginalized in the world. During the last two decades, however, the international community has increasingly recognized the particular needs and concerns of indigenous peoples. However, in spite of the increased attention directed toward the particular situation of indigenous peoples, they still face problems and hardships that few other populations have to endure. Several factors contribute to this situation. One of the most significant factors is non-indigenous societies' failure to acknowledge indigenous peoples' legal systems (i.e., their well-established codes of conduct regarding how to operate and co-exist within their societies). Colonizing societies' encounters with indigenous peoples have been marked by a lack of respect for indigenous peoples' customary law. Indeed, indigenous cultures have often been perceived as lacking legally binding norms, or at least norms significant enough for the colonizing power to take into account.

Sometimes, the reason offered for not acknowledging customary law is that customary law should be inferior to – and cannot prevail in conflict with – statutory law. As the latter bears the seal of a formal legislator, it must prevail. However, all cultures, large and small, have legal regimes based on customs.¹ Indigenous peoples are no different in this regard. Moreover, as will be investigated in depth below, these rules and customs form an integral part of indigenous peoples' cultures by being intrinsically connected to the way of life of each particular people.² Customary law is present in all situations of everyday life. Intrinsically connected to the culture of the people whose conduct it is supposed to govern, it is subject to constant change and modification.³ Thus, the term “customary” does not refer to an ancient, static law. Rather, customary law, like the culture from which it springs, adjusts over time, depending on the evolution of the society and changes in the environment around it.

Customary law distinguishes itself from statutory law only by being more closely attached to a people's culture than statutory law. Unlike statutory law, customary law does not gain its authority from formal acts such as a vote of an assembly. Rather, it derives its existence and content from social acceptance.⁴ This difference alone, however, does not justify a lack of

1. See Tom G. Svensson, *On Customary Law and the Saami Rights Process in Norway*, in ON CUSTOMARY LAW AND THE SAAMI RIGHTS PROCESS IN NORWAY 3 (Tom G. Svensson ed., Centre for Sámi Studies Publication Series No. 8, 1999).

2. J. RYAN, *DOING THINGS THE RIGHT WAY: DENE TRADITIONAL JUSTICE IN LAC LA MARTRE* (1995).

3. SALLY F. MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* (1978).

4. See Gordon R. Woodman, *Folk Law*, in *DICTIONNAIRE ENCYCLOPEDIQUE DE*

respect for indigenous legal systems. Both statutory and customary law are created by the purposeful activity of human beings. Further, there is no sharp line between customary and statutory law. The capacity of legislatures to enact statutes depends, in the final analysis, on social acceptance of its power to make law. In other words, the legislator derives its power from customary law. Moreover, bodies of law that are primarily customary frequently contain procedures for law-making that amount to, or come close to, legislation. Sometimes, in certain customary law cultures, influential persons or groups have the power to change norms of customary law at identifiable moments of time.⁵

As a result, there is no significant distinction between indigenous customary law and state statutory law. There is no reason why one should *per se* be subordinate to the other.⁶ So why is it that hardly anywhere in the world does the central power respect and uphold indigenous customary law? Some would answer this question simply by referring to the hierarchy of sources of law, saying that indigenous customary law normally can be applied only if not conflicting with the statutory law of the state. They argue that there simply cannot be two legal systems in one state, an answer that is too simplistic. It is feasible to introduce an order – through legislation or otherwise – that respects two legal systems should there be political will. And when the legal system acknowledged by governmental authorities does not exclude the application of at least aspects of an indigenous people's customary law, courts and administrative authorities should be able to apply such aspects. Still, in most instances, they fail to do so.

So, if indigenous customary law is not inferior to other legal systems, and if it is possible for both legislators and courts to treat indigenous laws as equal in value to other legal systems, what is the reason for the discrimination against indigenous legal systems? This Article suggests that it is not customary law as such that is being viewed as inferior – it is the culture from which it springs. Most indigenous peoples were, for periods of time, viewed as a less worthy race and their cultures as inferior to the cultures of the colonizers. And even though such theories are today generally condemned as scientifically false, substantial parts of the legal order created under that era remain, in law books, as well as – at least subconsciously – in the back of the minds of those who apply the law.

This Article aims to illustrate this problem in the context of the Saami people. It will do so by focusing on the area of customary law most important to the majority of, if not all, indigenous peoples – customary law,

THEORIE ET DE SOCIOLOGIE DU DROIT 262-65 (2d ed. 1993).

5. Neither can customary law effectively be differentiated from statutory law due to the fact that the latter is formalized in writing. It is quite possible to make written records of customary law, and if these written records are given authority, rather than the custom itself, then the customary law has, in effect, been transformed into statutory law.

6. See Gordon R. Woodman, *Customary Law and Customary Legal Rights: A Comparative Consideration of Their Nature and of the Relationships Between Laws*, in ON CUSTOMARY LAW AND THE SAAMI RIGHTS PROCESS IN NORWAY 18-20 (Tom G. Svensson ed., Centre for Sáami Studies Publication Series No. 8, 1999).

traditions, and customs relating to the use of land, waters, and natural resources. Indigenous peoples' lives and cultures are intrinsically and spiritually connected to their traditional land, waters, and natural resources, and indigenous peoples' way of utilizing the land reveals much of their customary law. The Saami people are no exception in this regard. The Saami people's way of life is intrinsically connected to their traditional land, giving rise to customary rules constituting the most important element of the Saami traditional legal system.⁷ One could almost say that Saami land and water use is Saami law.⁸

This Article will initially describe some of the distinct customs, traditions, and customary laws of the Saami people relating to use of land and natural resources. It will outline how the colonizing peoples initially respected the Saami people's legal system and how the laws of the different societies co-existed. This Article will then investigate why the non-Saami society gradually came to disrespect the Saami people's customary land, waters, and natural resource use, as well as the customary law corresponding thereto. The Article will outline what effects this has had, and continues to have, on the Saami people's ability to continue to exist as a distinct people in their traditional territories. The last part summarizes the types of conflicts that can be attributed to the lack of respect for Saami customary law and offers some solutions and suggestions as to how these conflicts can be remedied.

II. ABOUT THE SAAMI⁹ PEOPLE: TRADITIONAL LIVELIHOODS AND SOCIAL STRUCTURE

The indigenous Saami people inhabit an area divided by the borders of four countries: present-day Finland, Norway, Sweden, and the Russian Federation. The Saami people continue to be one people, in spite of having their territory divided by borders drawn up by others. The Saami inhabited their traditional land long before the establishment of the current states. The Nordic countries and Russia began to take their present forms about one thousand years ago. More than one thousand years earlier, the Saami people had established themselves as a distinct ethnic group in mid-Scandinavia (from the north part of Dalarna County in central Sweden and the Hedmark/Sör-Trøndelag County in Norway) and north to the Atlantic Coast, encompassing the northern part of present-day Finland, up to the southwest part of the White Sea, as well as the entire Kola Peninsula. This is *Sápmi* - the land of the Saami people.¹⁰

7. Svensson, *supra* note 1, at 2.

8. See Elina Helander, *Land and Saami Traditional Rights*, in *ON CUSTOMARY LAW AND THE SAAMI RIGHTS PROCESS IN NORWAY* 146 (Tom G. Svensson ed., Centre for Sáami Studies Publication Series No. 8, 1999).

9. The Saami people are sometimes inaccurately referred to as the "Lapp people." "Lapp" is the old name for Saami in the Scandinavian languages, today sometimes perceived to have a derogatory connotation.

10. The Saami people did not settle in the entire *Sápmi* at the same time. Rather,

The Saami people traditionally pursued a nomadic lifestyle, having as their main livelihoods hunting, capturing, fishing, and gathering. With time, the Saami people picked up new forms of livelihood, altering their way of life. Some Saami communities settled in the coastal areas in present-day Norway, and lived predominantly on fish and other resources captured from the marine environment such as seal and whales stranded on the seashore ("Fishing," "Coastal," or "Sea Saami"). Other Saami communities took up reindeer husbandry as their main livelihood and developed a semi-nomadic lifestyle, moving the reindeer between the mountain areas and coastal areas with the various seasons ("Mountain Saami"). Yet others, particularly in certain parts of the Västerbotten and Norbotten Counties in present-day Sweden, in some areas in the southern part of *Sápmi*, and in the northern and middle part of what is today Finland, came to pursue reindeer husbandry in forest areas ("Forest Saami"). The transition from a society based on hunting, fishing and gathering, to a reindeer society did not, however, happen in one big leap. Also, at the time when hunting, fishing, and gathering constituted the main livelihood of the Saami people, it was common for Saami communities to keep a few domesticated reindeer as a complimentary livelihood and means of transport. It appears that the shift towards larger scale reindeer herding in most parts of *Sápmi* occurred in the 1600s.¹¹

The Fishing Saami communities predominantly fished the shores along the big rivers and lakes. Some Saami communities, particularly in the fjord valleys in Norway, adopted agriculture as their main livelihood. It was also not uncommon to combine hunting, fishing, farming, and reindeer husbandry.¹² Saami communities that were predominantly reindeer herders or sea fishermen often complemented their main means of subsistence with other forms of livelihood. For example, for many Sea Saami communities, reindeer husbandry constituted an important complementary livelihood during the 17th

they gradually came to populate the various parts of the region. Archaeologists, historians, and ethnologists are still making progress in mapping when the Saami population reached the various parts of *Sápmi*. This research has been propelled by the fact that only recently have the Saami people themselves become actively involved in the studies of their early history. Until now, the history of the Saami people has predominantly been written by non-Saami peoples, who might not always be inclined to acknowledge an early Saami presence in the countries that today stretch themselves over *Sápmi*. For example, the early mainstream among Swedish scientists had argued that the Saami people came to inhabit Jämtland and Härjedalen counties in the southern part of *Sápmi* in present-day Sweden only in the 17th or 18th centuries. However, when the Saami population inhabiting these areas have themselves been involved in the archaeological research, evidence has been unveiled showing that the Saami people came to these areas at least in the 11th century, and most likely long before that. This Article does not propose to be a study in ethnology, nor in history. For the purpose of discussing Saami customary law and the non-Saami courts' application of the same, more round figures are adequate.

11. See Lennart Lundmark, *Sa Länge Vi Har Marker, in SAMERNA OCH STATEN UNDER SEXHUNDRA AR 36(f)* (1998).

12. See SAMISK ETNOBIOLOGI, MÄNISKOR, DJUR OCH VÄSTER I NORR 14(f) (Ingvar Svanberg & Hakan Tunón eds., 2000).

and 18th centuries, and reindeer herders also fished the sea.¹³

Regardless of livelihood, the natural environment has always formed a vital part of the Saami identity, and the Saami people's way of life has constantly responded to changes in the surrounding environment.¹⁴ In addition, the Saami people have been forced to adjust to the economic, social, and political structures of the states dividing *Sápmi* following colonization.¹⁵

Before the nation states established themselves in *Sápmi*, the Saami people had already established their own societal structures. The most fundamental building block in the Saami society was the *siida*, a village assembly that traditionally¹⁶ played an important role in distribution of land, waters, and natural resources within the Saami society.¹⁷ The *siida* structure varied in different parts of *Sápmi*, often depending on the main livelihoods in the various regions. For example, the reindeer herding *siida* differed from the *siida* structure in the Fishing Saami communities.¹⁸

In the reindeer herding areas, each *siida* normally consisted of a couple of households where husband, wife, children, and some close relatives formed a household. The *siida* did not provide for the households. Each household had to have a full workforce and all the knowledge necessary for the subsistence and survival of its members. If necessary, the household had to complement the family with hired workers. Within the household, each member normally held, and was responsible for, his or her reindeer,¹⁹ even though the household could subsidize individual members. Thus, the *siida* was not responsible for providing for its individual members. Rather, it served to accommodate a rational reindeer herding system²⁰ by orchestrating the work of joint benefit for the members and by constituting a work force resource base for the households.

13. See Allan Kristensen, *Samiske Sedvaner og Rettsoppfatninger – Med Utgangspunkt i Studier av Tingsbøkene fra Finnmark for Perioden 1620-1770*, in SAMISKE SEDVANER OG RETTSOPPFATNINGER – BAKGRUNNSMATERIALE FOR SAMERETTSUTVALGET, NORGES OFFENTLIGE UTREDNINGER 37 (2001).

14. See ETNOBIOLOGI, *supra* note 12, at 14.

15. Again, this section only offers a very broad and simplified description of the main livelihoods in the various parts of *Sápmi*. It does not claim – or aim – fully to map out the different ways of life in different areas in *Sápmi*. First, such a description is not necessary in order to address the questions this section strives to answer. Second, as mentioned above, research regarding the early parts of Saami history is very active at the moment, and one can expect that more facts regarding the early ways of life of the Saami people will be revealed shortly. For example, it might be that forest reindeer herding has been carried out in a much larger area than stated above.

16. In large parts of *Sápmi*, the *siida* continues to play an important role in the Saami society still today, as will be touched upon further below.

17. It is not certain that the entire *Sápmi* was organized in correspondence with the *siida* system. There might have been local variations. This Article will not investigate this issue in depth.

18. See Nils Oskal & Mikkel Nils Sara, *Reindriftssamiske Sedvaner og Rettsoppfatninger om Land*, in SAMISKE SEDVANER OG RETTSOPPFATNINGER – BAKGRUNNSMATERIALE FOR SAMERETTSUTVALGET, NORGES OFFENTLIGE UTREDNINGER 265 (2001).

19. Thus, neither the household nor the *siida* owned any reindeer. *Id.*

20. See *id.* at 278.

It is difficult – if not impossible – to offer a precise total of the number of Saami today. It is estimated that the Saami population in Finland, Norway, the Russian Federation, and Sweden amount to approximately 120,000. Even though the Saami constitute a minority in all four countries, the Saami people still distinguish themselves from the majority groups. To a substantial extent, they have managed to preserve their distinct culture, including language,²¹ livelihoods, ways of life, and spiritual values (particularly the affinity with the surrounding environment).

III. THE SAAMI PEOPLE'S CUSTOMARY LAWS RELATING TO LAND, WATER, AND NATURAL RESOURCES MANAGEMENT

The scope of this Article does not allow for a more detailed presentation of Saami customary law, even if limited to land, water, and natural resources management. Moreover, there is still a great need for further research in order to adequately document the Saami people's customary law.²² In addition, there has never been a unified system of customary laws valid for the entire *Sápmi*.²³ Customs and traditions are, to a substantial extent, local and appear in different forms in different Saami sub-groups in different regions. Customary law varies between regions depending on the different livelihoods, and even communities with the same livelihoods have developed different customs and traditions depending on the environment in the area they inhabit. For example, local variations in the topography have resulted in variations in reindeer husbandry in different parts of *Sápmi*.²⁴ It is not possible to describe in detail such regional variations. Rather, the presentation below focuses on the more general characteristics of the Saami customary law. Necessarily, however, the concrete examples of customary law given come from particular regions.²⁵

Centuries ago, customary law regarding division of land between the *siidas*, as well as between households and individuals within the *siida*, emerged in the Saami society,²⁶ and has evolved and developed ever since. These customary rules, and the way in which they were invoked, reflect that

21. The Saami language can be divided into nine different dialects or language groups.

22. As mentioned above, extensive research is currently carried out regarding the history and early way of life of the Saami people. In comparison, however, very little research has been carried out regarding the Saami people's customary law.

23. See Svensson, *supra* note 1, at 7.

24. *But cf.*, T.H. Aschehoug, NORGES NUVARANDE STATSFORFATNING BIND I 75 (1875).

25. Bear in mind that it is not always certain how widespread a particular aspect of the customary law was. The author has attempted to use examples typical for the traditional Saami customary land and resource management. Thus, the customary law outlined below can be expected to have been valid in substantial parts of *Sápmi*, with small variations.

26. See KRISTI STRÖM BULL, *STUDIERI REINDRIFTSRETT* (1997); see also ÖRNULV VORREN, *FINNMARKSAMENES MOMADISME* (1962); ERIK SOLEM, *LAPPISKE RETTSSTUDIER* 190 (1970).

the Saami are a people of nature. Customary laws have developed in response to the Saami people's surrounding environment, and to correspond to the fundamental requirements and conditions for the Saami traditional livelihoods. Saami customary law reflects a respect for nature and an aspiration to leave no traces upon it.

Each reindeer herding *siida*, and often also households therein, had designated winter and summer reindeer pasture areas, designated migration paths between the pasture areas, and designated places to rest the reindeer when roaming between the different areas.²⁷ These customary laws evolved as a response to how various grazing areas were situated in relation to each other, as well as to what time each *siida* reached each particular grazing area.²⁸ Should a *siida* have to cross another *siida's* designated land, customary laws regulated in what manner it could be done, as well as what happened should the reindeer of the *siidas* mix.²⁹ Over years, the Saami people have developed customary rules for more or less all situations where disputes can arise over the ownership of reindeer.

There were also customary laws regarding how pasture areas, migration paths, and resting places for the reindeer could be inherited, as well as to how to settle disputes as to ownership of reindeer.³⁰ Both men and women could inherit grazing areas.³¹ Grazing areas could also be transferred between different *siidas* due to marriage.³² If such changes in family structure resulted in excessive pressure on certain grazing areas and unutilized pasture in others, there were also customary laws for dealing with such situations.³³ Reindeer husbandry is thus not only about the knowledge of nature and reindeer; insight into social relations and family structures is also an integral part of the customary knowledge and skill of a reindeer herder.

The distribution of grazing areas within the Saami community has always been determined by an understanding that the reindeer are free, mobile and independent. Reindeer husbandry is not governed by a hierarchical system. Rather, it can be described as a group of individuals adapting to the surrounding environment and the social structures.³⁴ Traditions and customary laws in reindeer herding areas reflect that the reindeer will neither wait for, nor are dependent on, the reindeer herder. The reindeer herder must negotiate and compromise with the animal. This requires a knowledge of

27. See SOLEM, *supra* note 26, at 192.

28. See Kristi Ström Bull, *Reindriftens Retthistorie i Finnmark*, in SAMISKE SEDVANER OG RETTSOPPFATNINGER – BAKGRUNNSMATERIALE FOR SAMERETTSUTVALGET, NORGES OFFENTLIGE UTREDNINGER 209 (2001).

29. See Steinar Pedersen, *Fra Bruk av Naturgodene Etter Samiske Sedvaner Til Forbud MotFjordsalg Til Kke-Norsktalande*, in SAMISKE SEDVANER OG RETTSOPPFATNINGER – BAKGRUNNSMATERIALE FOR SAMERETTSUTVALGET, NORGES OFFENTLIGE UTREDNINGER 294(f) (2001).

30. See SOLEM, *supra* note 26, at 190, 192.

31. See Robert N. Pehrson, *The Bilateral Network of Social Relations*, in KÖNKÄMÄ LAPP DISTRICT 107 (1964). Under Saami customary law, men and women enjoy equal rights to inheritance. See Lundmark, *supra* note 11, at 66.

32. See Oskal & Sara, *supra* note 18, at 269.

33. See *id.* at 275(ff).

34. See *id.* at 276.

nature, the behavior of the reindeer, the topography, weather, climate, and understanding of the interrelation of all these factors.³⁵ The aim is for all reindeer to find pasture and to keep the herd together, separate from other herds. The migration of the reindeer is determined predominantly by climate and ecological factors. The reindeer will roam where access to pasture is the best. The reindeer become accustomed to their regular grazing areas and learn the migration paths between the various grazing lands,³⁶ even though these are commonly situated hundreds of kilometers away from each other. Attempts to move the herd to areas outside the regular grazing areas and migration paths will result in a lack of control over the herd and, correspondingly, in a loss of animals. It is thus not only the Saami people that have an inseparable connection to its traditional land; the reindeer's connection to the land implies that a Saami community would change its grazing areas and migration paths only after serious consideration and for compelling reasons.³⁷ A *siida* could only with great difficulty change to a grazing area traditionally belonging to another *siida*.

Within the reindeer herding *siida*, individual members had decision-making rights over their respective reindeer. Other members could advise the individual, but in the end, the owner decided to what extent to take that advice into account, even though such decisions obviously could affect the other members of the *siida*.³⁸ The *siida* decided land issues within the *siida* (e.g., issues regarding distribution of grazing areas within the *siida*), and acted as one entity if issues arose with regard to grazing areas that also involved neighbouring *siidas*. The *siida* also decided who could become a member of the *siida*.³⁹

In the Saami coastal areas, customary law as to which *siida* was entitled to access to the sea for coastal fishing evolved centuries ago.⁴⁰ Mountain Saami were not entitled to fish in the sea without the permission of the local Sea Saami *siida*. Further, Sea Saami communities developed detailed customary laws regarding which community had the right to whales stranded on the seashore, as well as how a stranded or captured whale should be divided within the community.⁴¹ Sea birds' eggs belonged collectively to the local *siida*,⁴² and detailed customary rules governed which *siida* could hunt seals in a certain area.⁴³

Similarly, in the 16th and 17th centuries, the *siidas* along the shores of the big rivers in the northern part of *Sápmi* had an exclusive right to fish those waters. They could, however, agree to fish the rivers with Saami

35. See *id.* at 265(f).

36. See Mikkel Nils Sara, *Praktisk Reinbeitebruk – Tradisjonelle Kunskaper*, 3 RANGIFER (1999).

37. The reader should bear this in mind when the Article investigates non-Saami authorities' view on interchangability of reindeer pasture areas.

38. See Oskal & Sara, *supra* note 18, at 267(f).

39. See Kristensen, *supra* note 13, at 47.

40. See *id.* at 41(f).

41. See *id.* at 49.

42. See *id.* at 43(ff).

43. See *id.* at 44(f).

communities from other areas.⁴⁴ As with sea and river fishing, lake fishing was primarily the right of the local *siida*.⁴⁵ Over the entire *Sápmi*, well-developed customary rules governed the right to inland hunting and capture.⁴⁶ For example, there are records from the 18th century in *Tana*, on the Norwegian side of *Sápmi*, regarding how beaver should be divided between those participating in the hunt, those paying duty to the community, and those who were old and disabled.⁴⁷

Within the *siida*, each family group had its specific designated grazing, fishing, and hunting areas, which in turn could be divided among the family members.⁴⁸ The borders between these different areas, however, were not always very sharp. A Saami from the *Tana* area explains the system:

When you . . . start to see your place, you feel you have emotions. The emotions say that this is a familiar place. For that reason, you feel yourself safe and secure there You are bound to your own area, therefore, it is of great importance to you. With due time, you take care of your place, it has to survive. Some other people stay there also, the place belongs to the local people. So you do not react if your neighbours show up. The whole area belongs to us.⁴⁹

Thus, Saami customary law recognizes individual usufructory rights, but rests on the perception that land, waters, and natural resources are vested in the collective. The fact that a *siida*, a household, or an individual has recognized exclusive usage rights to certain land or water is not the same thing as saying that the *siida* or individual is regarded as owner of the particular area.⁵⁰ The Saami people have never understood land as constituting a form of bartered goods. The value of land is not based on this concept. Rather, the value of land is based on the fact that the individual and his or her family and descendants could live off the land for generations.⁵¹

It is difficult to describe with any certainty how conflicts were resolved in the Saami society at the time when it was still unaffected by non-Saami cultures. The nature of the Saami culture is oral. There are few documents in which information regarding Saami conflict resolution can be found. Instead of law books, the Saami people relied on "men with good

44. See *id.* at 41.

45. See Kristensen, *supra* note 13, at 42.

46. See *id.* at 45.

47. See ISAK FELLMAN, HANDLINGAR OCH UPPSATSAR ANGAENDE FINSKA LAPPMARKEN OCH LAPPARNA (1910).

48. See Helander, *supra* note 8, at 153(f).

49. *Id.* at 147.

50. See Kaisa Korpjiaakko-Labba, *How and Where to Find Pieces of Its Evidence*, in ON CUSTOMARY LAW AND THE SAAMI RIGHTS PROCESS IN NORWAY 67 (Tom G. Svensson ed., Centre for Saami Studies Publication Series No. 8, 1999).

51. See KAISA KORPIJAAKKO-LABBA, LEGAL RIGHTS OF THE SAAMI IN FINLAND DURING THE PERIOD OF SWEDISH RULE: A SURVEY OF THE PAST, THOUGHTS OF THE FUTURE 15 (Circumpolar and Scientific Affairs Publication Series 93-06, 1993).

memories”⁵² to “store” and convey customary law.⁵³ Moreover, in case of a conflict with regard to certain land areas, the parties would normally try to reach a negotiated solution based on reason before invoking legal norms.⁵⁴ Naturally, however, even if the conflict was settled through a negotiated solution, relevant customary law would be the basis for such negotiations.

If no negotiated solution was possible, disputes appear to have been solved predominantly through discussions in a form of a collegial council, or *norraz*.⁵⁵ Each *siida* seems to have had a *norraz*. Even though the *norraz* was a collegial council, it was probably commonly dominated by one of its members, who could under such circumstances be described as the *siida*’s “wise man.”⁵⁶ In such instances, the wise man would be the person that, in reality, settled disputes within the *siida*.⁵⁷ In case of a conflict between two neighboring *siidas*, the wise men from the two *siidas* would meet in order to try to solve the conflict in line with, or, if necessary, through directly applying the customary law relevant to the area.

As with customary law in general, regional variations existed as to the manner in which disputes were resolved. In parts of the Finnish side of *Sápmi*, there are records of collegial bodies that differed slightly from the *norraz* – *sobbar* (or *norrös*) and *kärreg*.⁵⁸ The *sobbar* and *kärreg*⁵⁹ were made up of the family elders, led by a community elder, and were the highest

52. *Minnesgoda män*.

53. See Heikki Hyvärinen, *Den Samiska Fastigheten Inom Vart Rättsväsen – Några Riktlinjer*, in *DIEDUT* 4(f) (1979).

54. Should, for example, one winter pasture in *Siida A*’s customary land be scarce at the same time that *Siida B* had unutilized pasture areas, *Siida A* would normally be entitled to utilize parts of *Siida B*’s customary pasture areas, without protests or demand for compensation. An alternative solution, however, could be that *Siida B* recruited reindeer herders from *Siida A*, in order to accomplish a balance between the number of reindeer and access to grazing areas. *Siida A* would not be in a position to protest against such an arrangement either. See Oskal & Sara, *supra* note 18, at 285(f).

55. See GÖRAN HALLQVIST, *LAPP-RÄTTEN - ETT ELEMENT I NORDENS FÖRSTA SAMELAGSTIFTNING, UPPSATS I TILLÄMPADE STUDIER* 30 (1982).

56. This seems to have been particularly common in the western and southwestern parts of *Sápmi*. See *id.* at 30.

57. See PER HÖGSTRÖM, *BESKRIFNING ÖFVER DE TIL SWERIGES KRONA LYDANDE LAPMARKER AR 1747 235* (1747). Sometimes, non-Saami persons encountering the Saami society perceived the wise men as “Saami kings.”

58. The *sobbar* and *kärreg* were thus not just versions of the *norraz*. Rather, they constituted other forms of collegial bodies, fulfilling the same functions as the *norraz*, but with a slightly different structure compared to the *norraz*.

59. The history of the term “*kärreg*” is interesting. It can be compared with the term “*käris*,” used in the Swedish King Magnus Eriksson’s *Landslag*, one of the earliest comprehensive statutes enacted by a Swedish king. In Magnus Eriksson’s *Landslag*, the term “*käris*” meant to “be summoned before the court.” It appears quite obvious that the terms “*kärreg*” and “*käris*” are related. This should not be regarded as too surprising. As will be further outlined below, there are examples of the Saami and non-Saami legal systems blending, well into the 1800s. The author is not in a position to tell which term has influenced the other. What is evident, however, is that there was a very early interaction between the Saami and non-Saami legal systems.

decision-making body in the parts of *Sápmi*.⁶⁰ The *sobbar* and *kärreg* had both legal and political functions.⁶¹ It was not possible to appeal their decisions.

The *norraz*, *sobbar*, and *kärreg* did not meet often, and in some parts of *Sápmi*, only once a year.⁶² Their most important task was to settle disputes over distribution of hunting, fishing, and reindeer herding areas within the *siida*.⁶³

The customary law described above was well-established when non-Saami societies started to move into the Saami areas, bringing their legal systems with them. The Saami legal system seems to have worked very well. It provided for efficient utilization of the resources in *Sápmi* and was apt to deal with changes in the Saami people's surrounding environment and social structures. It provided for a well-functioning Saami society, as well as for sustainable use of the natural resources in *Sápmi*. However, the non-Saami societies' colonization of *Sápmi* would eventually result in a gradual destruction of the Saami use of land and the customary laws associated with it.

IV. THE EARLY RELATIONSHIP BETWEEN THE SAAMI PEOPLE AND THE EMERGING NATION STATES

There are records from as early as the 800s of contact between the Saami people and the non-Saami population.⁶⁴ For about one thousand years, however, there was no real competition over the Saami land. The Saami and non-Saami populations enjoyed a predominantly friendly relationship, dominated by barter trade. The Saami people traded furs for salt and iron tools. The non-Saami tradesmen were often supported by their kings, like the King of Norway and the Emperor of Nowogorod.⁶⁵ In the 13th century, the Swedish King joined the competition for trade with the Saami population.⁶⁶

With time, the various kings began to tax the Saami population in the areas around the trade routes. The taxes were predominantly paid in furs and became a substantial income for the kings.⁶⁷ The Crowns of Norway,

60. See U.V. HALONEN, RÄTTSHISTORISK ÅTERBLICK PÅ SAMERNAS STATUS I FINLAND 70 (1969). The *norraz* also had other local names and variations in structure.

61. See GUSTAF VON DÜBEN, OM LAPPLAND OCH LAPPARNE, FÖRETRÄDEVIS DE SVENSKA 346 (1873). Remember that the preference in the Saami society was to settle disputes based on reason before invoking law.

62. See *id.* at 345.

63. See *id.* at 346.

64. For example, in the 800s, a Norwegian tradesman, Ottar, traded extensively with the Saami population inhabiting the coastal shores of present-day Norway, but also with the Saami population further into the country. See KNUT BERGLAND, UTREDNING FOR SKATTEFJÄLLSMALET OM DE SYDLIGE SAMEOMRÅDERS HISTORIE TIL OMKRING 1751 3(ff).

65. Nowogorod was a kingdom in present-day Russia. In 1478, Nowogorod came under the rule of the tsar in Moscow.

66. See JOHAN NORDLANDER, OM BIRKAKARLARNE 215 (1906).

67. For example, in 1563, Sweden exported 1,000 fox furs and 500,000 squirrel

Nowogorod, and Sweden also had other reasons to tax the Saami people. It was a well-established principle in the area at the time that with the right to tax a population followed territorial rights.⁶⁸ Still, initially, the crowns viewed the Saami as a sovereign nation and taxes were paid voluntarily.⁶⁹ In exchange for paying taxes, the Saami people received protection from the kings against thieves, outlaws, and less honest tradesmen. As stated above, the Saami taxes provided the various crowns with substantial income. But the trade was also important to the Saami people, who needed canvas, fishnets, and various iron tools.⁷⁰ Thus, for several hundred years, the interactions between the Saami and non-Saami societies were driven by mutual benefit.

Around the 1400s, the Kings of Norway and Sweden, particularly, started to develop territorial aspirations to the Saami areas. As the crowns' interests in the Saami areas increased during the 1500s, the Saami people were caught in the middle of a series of border wars. The fight over the right to tax the Saami people was often fierce⁷¹ and would continue until the borders cutting across *Sápmi* were finally established.⁷² During these border struggles, the Saami communities and families were still taxed by the various crowns. However, taxation was no longer voluntarily. Rather, the Saami population paid taxes in more or less the same manner as the non-Saami farmer population.

The shift towards a forced tax obligation was of course a burden for the Saami people. Still, being viewed as taxed subjects of the various crowns also carried indirect advantages. Obligation to pay taxes constituted evidence of the tax-collecting king regarding the Saami population as owners of their land. The Saami people would continue to pay taxes as long as they were regarded as owners of their traditional land. Each *siida* paid taxes, but the total was attributed to individual households and members therein, based on the land to which they had individual usufructory rights under Saami customary law.⁷³ Each individual's tax obligation was registered in land books, with a description of the piece of land on which the tax was based, and in the same manner as land tax was imposed on property in general.⁷⁴ Even though the Saami population no longer paid taxes voluntarily, the Saami and non-Saami societies continued to live in relative harmony with each other, where the crowns acknowledged the Saami people's right to land.

furs to Europe. See KNUT BERGLAND, SYDSAMENES PLASS I NORGES ELDER HISTORIE 91 (1969).

68. See Nils Arell, *Rennomadismen i Torne Lappmark*, in SKYTTEANSKA SAMFUNDETS HANDLINGAR 17, 278 (1977).

69. For example, there is evidence that in 1328, the Saami territory was regarded as an independent nation. See BERGLAND, *supra* note 64, at 48.

70. See Lundmark, *supra* note 11, at 19.

71. Sometimes, the Saami people were taxed by more than one crown.

72. As will be outlined further below, in certain parts of *Sápmi*, the final borders would not be decided until the late 19th century.

73. See VEIKKO O. HYVÖNEN & KAISA KORPIJAAKKO-LABBA, THE LEGAL STATUS OF THE LAPPS IN LAND AND WATER LAW 115 (1979).

74. On the Finnish side of *Sápmi*, the land books would continue to be in use until 1924. See *id.* at 115(f).

In 1751, following a series of wars between Denmark-Norway⁷⁵ and Sweden,⁷⁶ the two nations finally agreed to determine the Norway-Sweden border. In doing so, both kingdoms acknowledged that such a border treaty also affected the "Saami Nation" in the area,⁷⁷ and, in particular, the reindeer herders' access to pasture on each side of the border. Consequently, an annex was attached to the border treaty, known as the *Lapp Kodiccill*. The *Lapp Kodiccill* contained thirty paragraphs, outlining the rights and duties of the Saami population residing on each side of the border, particularly with regard to access to pasture on the other side. In addition, the border treaty and the *Lapp Kodiccill* provided the framework for a so-called *Lapp law*.⁷⁸

In 1809, Russia defeated Sweden in a war, and Sweden was forced to give up Finland to Russia.⁷⁹ In 1814, Norway was taken away from Denmark and forced into a union with Sweden under the auspices of the Swedish King. In 1826, Sweden-Norway and Russia-Finland agreed on the border between Norway and Russia. Shortly thereafter, the validity of the *Lapp Kodiccill* came under discussion. These discussions between the Danish-Norwegian and Swedish Kingdoms continued for several years,⁸⁰ but in the mid 1800s, all parties still acknowledged the validity of the *Lapp Kodiccill* and the *Lapp law*.⁸¹ However, as will be outlined in depth below, in the 1800s, theories emerged that would substantially change the non-Saami peoples' view of the Saami people. These theories, together with an increased interest in the Saami people's land and natural resources, would come to have severe effects on the Saami people and Saami society.

75. At that time, Denmark and Norway constituted one kingdom.

76. At that time, Finland had become an integral part of the Kingdom of Sweden.

77. Even though, at the time, the "Saami Nation" was of course known as the "Lapp Nation."

78. See HALLQVIST, *supra* note 55, at IV. For the full text of the *Lapp Kodiccill*, see STUDIER I RENBETSLAGSTIFTNING (1970). The status of the *Lapp Kodiccill* under international law has also been discussed. Saami representatives have repeatedly stated that the *Lapp Kodiccill* has status as a binding treaty under international law, and as such confirms the signatories' duty to respect the Saami nation. See *id.* at 24. These discussions are still ongoing, not least in the context of the new Saami Convention, currently in the process of being drafted. When signed, the Saami Convention will be a legally binding treaty between Finland, Norway and Sweden on the rights of the Saami people, and can thus be viewed as a renewal of the *Lapp Kodiccill*.

79. Finland then became a grand duchy within the Russian Empire.

80. In practice, the discussions were predominantly carried out by relatively low-ranked officers, mainly through written correspondence.

81. Compare Pedersen, *supra* note 29, at 317. Some people regarded the *Lapp Kodiccill* as being in need of revision, especially with regard to the Saami people's fishing rights.

V. NATIONAL PRACTICE, LEGISLATION, POLICY, AND JURISPRUDENCE

A. Non-Saami Institutions Initially Recognize and Apply Saami Customary Law

As mentioned above, when the non-Saami population started to move into *Sápmi*, the Danish-Norwegian and Swedish Kings initially viewed the Saami as a sovereign nation. However, starting in the 1400s, the various crowns gradually began claiming jurisdiction over *Sápmi*, including the application of their own law in these areas.⁸² Still, even after the gradual colonization of *Sápmi*, Saami customary law continued to govern the Saami society.⁸³ Saami collegial bodies such as the *norraz*, *sobbar*, and *kárreg* continued to operate in *Sápmi*. In addition, when Saami matters were brought before non-Saami courts, these institutions respected and applied Saami customary law regarding land and resource management. For example, there are documents from the 18th century, showing that Norwegian courts at the time upheld Saami customary law regarding exclusive rights to certain land areas⁸⁴ (e.g., with regard to what Saami communities were entitled to fish the sea, rivers, and lakes; who had the right to whales stranded on the seashore and to eggs of sea-birds).⁸⁵ Similarly, Swedish regulations enacted in 1734 applying to *Torne Lappmark*, spanning over present-day Finland, Norway, and Sweden, explicitly stated that Saami customary law should be deemed in conformity with Swedish law.⁸⁶ Saami law should prevail in non-Saami courts even in matters otherwise regulated by contradictory statutory law.⁸⁷

Moreover, Saami local officers also exercised substantial influence in non-Saami courts in matters relevant to the Saami society.⁸⁸ Indeed, when the non-Saami population in *Sápmi* was small, all court officials could be of

82. For example, in 1526, the Swedish King ordered local authorities in the southern parts of *Sápmi* to make sure that the Saami population lived by Swedish law and good old practices. See HALLQVIST, *supra* note 55, at 39 (f).

83. There are later examples of the Swedish monarch offering the Saami population in the Finnish and Swedish sides of *Sápmi* so-called “letters of liberty and self-protection” (e.g., in 1551, 1584, 1602, and 1646). See HYVÖNEN & KORPIJAAKKO-LABBA, *supra* note 73, at 115.

84. See Steinar Pedersen, *The State and the Rejection of Saami Customary Law – Superiority and Inferiority in Norwegian-Saami Relations*, in ON CUSTOMARY LAW AND THE SAAMI RIGHTS PROCESS IN NORWAY 47 (Tom G. Svensson ed., Centre for Sáami Studies Publication Series No. 8, 1999).

85. See Kristensen, *supra* note 13, at 40(ff).

86. In other words, the Saami people’s customary law was considered part of the legal system of all three states. See A.L. Keskitalo, *Samiske Rettsoppfatninger Til Samisk Land*, in SAMENE URBEFOLKNING OG MINORITET (Trond Thuen ed., 1980).

87. See Korpijaakko-Labba, *supra* note 50, at 70.

88. See LENNART LUNDMARK, LAPPEN ÄR OMBYTLIG OSTADIG OCH OBEKVÄM, SVENSKA STATENS SAMEPOLITIK I RASISMENS TIDEVARV 45 (2002). See also BERGLAND, *supra* note 64, which shows that already in the early 1600s, Saami individuals were registered as judges in the Swedish tax records.

Saami origin,⁸⁹ but Saami officials continued to play an influential role in the courts into the 19th century, also after the increased non-Saami immigration. Thus, non-Saami courts applied Saami customary law at the same time as the *norraz*, *sobbar*, and other Saami collegial bodies continued to exist. There were also examples of hybrids between Saami and non-Saami judicial bodies.⁹⁰

At this time, the non-Saami societies correspondingly acknowledged the Saami people's right to its traditional land, waters, and natural resources. On the Finnish and Swedish sides of *Sápmi*, the so-called "Taxed Lapp Land" system recognized Saami families and individuals as owners of their traditional reindeer herding, hunting, and fishing lands. The lands to which families and individuals were recognized as owners would normally correspond with the land to which the family had grazing, hunting, or fishing rights under the Saami customary legal system. Thus, Saami individuals and families were registered as owners of particular fishing lakes and hunting areas in the Swedish tax records. These lands could be inherited, given away, or mortgaged. The individual owner could also sublet her or his land, just like any other landowner.⁹¹ Non-Saami courts upheld the rights under the Taxed Lapp Land system. As mentioned above, the fact that the Saami population paid taxes for the land also shows that the crowns regarded them as owners of their lands.⁹² Correspondingly, in 1702, the Danish king⁹³ ruled that the Saami population inhabiting the northern coastal areas in present-day Norway should continue to have exclusive hunting rights in the areas,⁹⁴ and in 1821, Norwegian authorities explicitly confirmed that the Danish-Norwegian Crown had no legal right to land in Finnmark County, in northern present-day Norway.⁹⁵ Further, in 1749, a borderline called *Lappmarksgränsen*, was drawn on the Swedish side of *Sápmi*, aiming to protect the Saami people from intrusion in their most central areas. The non-Saami population could settle above *Lappmarksgränsen* only if causing no impediment to reindeer herding, hunting, or fishing in the area.⁹⁶ In case of a conflict, such non-Saami settlements required a permit from the local court. Of course, at the time, the Saami people exercised substantial influence in such court proceedings, and

89. See Korpjaakko-Labba, *supra* note 50, at 70.

90. See BJÖRN NESHEIM, EASTERN AND WESTERN ELEMENTS IN LAPP-CULTURE (1967). Here, a comparison can be made with what has been outlined above regarding the similarities between the Swedish term "*käris*" and the Saami word "*kärreg*," showing an early interaction between the Saami and the non-Saami legal systems and judicial bodies.

91. See Lundmark, *supra* note 11, at 59.

92. See e.g., KAISA KORPIJAAKKO-LABBA, OM SAMERNAS RÄTTSLIGA STÄLLNING I SVERIGE-FINLAND (1994); see also Lundmark, *supra* note 11, at 25-32.

93. Remember that during this time, Norway was under Danish rule.

94. See Pedersen, *supra* note 84, at 130.

95. See Pedersen, *supra* note 29, at 306. This was a right that Swedish authorities had previously acknowledged in 1751. See *id.* at 317 (Sweden was, at that time, in control of Finnmark County).

96. See Government Bill SOU 2001:101 – *En ny rennäringspolitik – öppna samebyar och samverkan med andra markanvändare*, Betänkande av Rennäringspolitiska kommittén, at 211.

affected reindeer herders were also allowed to present evidence of damages that the settlement would cause, which normally resulted in the settlement not being allowed.⁹⁷

Recall that Saami customary law, although acknowledging exclusive individual usufructory rights, builds on collective custodianship, where the right to use pieces of land could change if practical reasons so required. This aspect of Saami customary law prevailed also following the introduction of elements of non-Saami law, such as the Taxed Lapp Land system. The *norraz*, or other collegial Saami bodies, could still decide on rights to grazing land. The non-Saami court would then “formalize” the decision.⁹⁸ Thus, the *siida* continued to redistribute land within itself, in accordance with its customary traditions.⁹⁹ The process was, of course, simplified by the fact that many of the jurors in the non-Saami court were often of Saami descent.¹⁰⁰

In the *Lapp Kodiccill* of 1751, Denmark-Norway and Sweden-Finland confirmed their view on the Saami people’s customary law.¹⁰¹ In the *Lapp Kodiccill*, the signatory states explicitly expressed their wish to contribute to “the Saami nation’s continued existence” and confirmed the Saami people’s right to their traditional land and waters.¹⁰² The *Lapp Kodiccill* declared the *siidas*’ continued right to their traditional land, including access to their traditional grazing areas, even if those happened to be situated on the other side of the newly drawn border.¹⁰³ In addition, as mentioned above, the *Lapp Kodiccill* introduced provisions referred to as a *Lapp* law as well as an institution that could be described as a *Lapp Court*.¹⁰⁴ Each local *siida* elected three officers to serve as the *Lapp Court*.¹⁰⁵ The *Lapp Court* should settle disputes between Saami parties in matters numbered in section 22 of the *Lapp Kodiccill*, including disputes as to movements of reindeer.¹⁰⁶ In doing so,

97. See Lundmark, *supra* note 11, at 61(ff).

98. See V. Tanner, *Antropogeografiska Studier Inom Petsamo-Omradet*, 49 FENNIA 4 (1929). Thus, the non-Saami authorities did not regard Saami customary law as to land and water distribution as a *sui generis* system. Rather, the non-Saami legal system had expanded to encompass the distinctive land use and customary law of the Saami people associated thereto. See Korpijaakko-Labba, *supra* note 51, at 3.

99. See Lundmark, *supra* note 88, at 45 (ff).

100. See KORPIJAAKKO-LABBA, *supra* note 51, at 9. It is important that Saami customary law and non-Saami law corresponded to the extent that the non-Saami authorities and courts could regard the individual usufructory right under Saami customary law as an ownership right under non-Saami law. Today, Finland, Norway and Sweden regularly deny that they have ever acknowledged that the Saami people had ownership rights to their traditional territories. See LUNDMARK, *supra* note 88, at 7(ff).

101. See the LAPP KODICILL ¶ 10.

102. See MAGNUS MÖRNER, SAMERS OCH INDIANERS RÄTT TILL JORDEN – EN HISTORISK JÄMFÖRELSE INFÖR HÖGSTA DOMSTOLEN 436 (1981). In that the *Lapp Kodiccill* confirms the Saami people’s right to their traditional land, it is similar to the border treaty entered into by Spain and Portugal the year before, confirming the right of indigenous peoples in Latin America to land.

103. See HYVÖNEN & KORPIJAAKKO-LABBA, *supra* note 73, at 115.

104. See Pedersen, *supra* note 84, at 130.

105. The officers were referred to as one *lapplänsman* and two *nämndemän*.

106. See HALLQVIST, *supra* note 55, at 19; see Göran Hallqvist, *Första Bihang*

under the *Lapp* law, the *Lapp* Court was to rule in accordance with Saami customary law.¹⁰⁷ The *Lapp* law can thus be described as a codification of already existing Saami rights.¹⁰⁸ Section 10 of the *Kodicill* stipulated "if the Lapps need land in both kingdoms, they should have it if provided by old customary law . . ."¹⁰⁹

The *Lapp Kodiceill* not only stipulated that the Saami people's collegial bodies should apply Saami customary law. Under the *Kodicill*, non-Saami courts should also uphold the Saami people's customary law. This was underlined further in a decision by a Swedish Court of Appeals the following year.¹¹⁰

Thus, following the establishment of the *Lapp* Courts, these courts, Saami collegial bodies such as the *norraz*, *sobbar*, and *kärreg*, as well as non-Saami courts, applied Saami customary law in parallel. They would continue to do so well into the 1800s. The *norraz* were active during the 1800s and the *sobbar* and *kärreg* in certain parts of the Finnish and Russian sides of *Sápmi* even into the 1900s.¹¹¹ Non-Saami courts on the Swedish and Finnish sides of *Sápmi* continued to abide by the redistribution of Saami taxed land decided by the *siida* based on Saami customary law.¹¹² There is documentation of a non-Saami court in Jokkmokk, a small town on the Swedish side of *Sápmi*, applying Saami customary law in a case regarding land management in 1793. Similarly, a Norwegian royal decree of 1775 stipulated continued respect for

Eller Codecill Till Gränse Tractaten Emellan Konunga Rikena Sverige och Norge, Lappmännen Beträffande, in, STUDIER I RENBETESLAGSTIFTNING 108(ff) (T. Cramér & G. Pravitz eds., 1970). In this context, it can be worth mentioning that a new Court of First Instance has recently been established on the Norwegian side of *Sápmi*, in the city of Tana in Finnmark County, which is sometimes referred to as a "Saami Court." The reference to the *Tana* court as a Saami Court is, however, not accurate. The governmental committee proposing the establishment of the *Tana* court stated explicitly that the court is not intended to be a special Saami Court. The ambition is merely that the *Tana* court shall contribute to an increased knowledge of the Saami people's customs and legal perception. As other courts in Norway, the *Tana* court will apply solely Norwegian (non-Saami) law. The reason behind the *Tana* court is not a wish to acknowledge the Saami people's customary laws to a larger extent than previously. Rather, it is an attempt to strengthen the Saami culture, and in particular, the language by placing a Norwegian court in the traditional Saami area. The Norwegian government has stated that it hopes that the *Tana* court will have a higher degree of Saami speaking judges and other officials than other Norwegian courts. See Government Bill *NOU 1999:22 Domstolene i första instans – Forsteinstansdomstolenes arbeidsoppgaver og struktur*, at 71(f). Commendable as such, it is beyond the scope of this paper to further investigate the implications of the establishment of the *Tana* court.

107. See LUNDMARK, *supra* note 88, at 45.

108. See HALLQVIST, *supra* note 55, at 25.

109. The quote is the author's translation.

110. See Lundmark, *supra* note 11, at 65(f).

111. See *id.* at 39; see also HOLGER ELLIOT, UREEN DOMARES LIV (1958).

112. See LUNDMARK, *supra* note 88, at 45. As outlined above, such redistributions could be a result of changes in family structures or fluctuating numbers of reindeer in the particular area.

Saami customary law,¹¹³ and there is documentation of Norwegian authorities in the 1820s still holding the opinion that the Saami people's right to land and the related customary laws should be respected.¹¹⁴ A piece of Swedish legislation of 1817 stipulated that disputes concerning compensation for damages caused by reindeer should be decided by the *Lapp* Court.¹¹⁵ In Enare, on the Finnish side of *Sápmi*, records from 1827 describe a *kärreg* ruling regarding conflicts between the Saami and non-Saami parties, in accordance with ancient Saami customary law.¹¹⁶ Remember also that in the mid-1800s, all relevant parties explicitly confirmed the validity of the *Lapp Kodicill*.

Thus, well into the 19th century, non-Saami governmental authorities respected, and non-Saami courts applied, Saami customary law as to land, water, and natural resources management.¹¹⁷ Saami households and individuals were correspondingly regarded as legal owners of their traditional land. Saami traditional judicial bodies continued to exist. Things were to change, however.¹¹⁸

113. See *Kongelig Resolution ang. Jorddelingen i Finnmarken, samt Bopladers Udvisning og Skyldlaegning sammenesteds 27.5.1775* (enacted June 3, 1775).

114. See Pedersen, *supra* note 84.

115. See J.H. BACKMAN, *NY LAG-SAMLING* (1831-1860).

116. See GERHARD HAFSTRÖM, *SAMISKA RÄTTSSUTUDIER* (1979). A Swedish judge present at the occasion declared that he was very impressed with the *kärreg's* way of handling the dispute.

117. See Pedersen, *supra* note 84, at 129 (f); see Pedersen, *supra* note 29, at 320. There are, however, some examples of governmental authorities trying to interfere with the Saami people's customary usage of land already at this time. For example, in the part of *Sápmi* that is today Norway, authorities tried to stipulate rules for inland hunting in the 18th century. The authorities were not, however, able to effectively uphold these regulations. See Kristensen, *supra* note 13, at 45; see also HALLQVIST, *supra* note 55, at 35(f).

118. The non-Saami population moving into parts of the traditional Saami territory brought with them a culture of individual ownership, which affected the Saami perception of law, and in particular the notion of collective custodianship. See Kristensen, *supra* note 13, at 49(f). Further, the tax system also infiltrated the Saami customary legal system. Saami persons being taxed for their land gradually came to regard themselves as owners of a particular piece of land, and sometimes even sought the non-Saami authorities' formal acknowledgment of their ownership rights. See LUNDMARK, *supra* note 88, at 47. There were also some examples of individual Saamis selling parts of their land to other Saamis. In other areas of *Sápmi*, however, the influence was less significant. In certain areas of *Sápmi*, the Saami population refused to adjust to non-Saami law well into the 19th century. When, for example, private ownership to land was introduced in Finnmark County in 1775, the reform had little practical impact. Since the Saami people's own system with collective custodianship and individual usufructory rights worked smoothly, the inhabitants saw little reason to register themselves as private owners of particular patches of land. See Kristensen, *supra* note 13, at 52. Ironically, as will be outlined below, when the Saami population in the 20th century wanted to register themselves as owners of their traditional land, as a defense against colonization, they were prevented from doing so. In the areas where there is evidence of Saami individuals selling land, such transactions required the approval of the relevant *siida* and proof that the seller had usufructory right to the piece of land sold under Saami customary law. Thus, even

B. The Cultural Hierarchy Theories Enter Sápmi

The second half of the 19th century saw a sharp shift in the policy towards Saami land use and Saami customary law.¹¹⁹ At that time, the policy towards the Saami people became tainted by theories that have been labelled as “cultural hierarchist,” social-Darwinist, or simply racist.¹²⁰ In the latter parts of the 19th century, non-Saami authorities gradually began to view the Saami culture as inferior and less developed than the Scandinavian cultures,¹²¹ and the Saami people of less value than the Scandinavian peoples, incapable of bringing any contribution to a developed society.¹²² The Scandinavian peoples were the Germanic ruling race.¹²³ The Saami people were believed destined to perish. While in existence, they were deemed incapable of administering their own society, and thus in need of assistance from non-Saami authorities to do so.¹²⁴ At the same time as the cultural hierarchy theories emerged, the competition between the Saami and non-Saami societies over land, waters, and natural resources in Sápmi intensified. The combination of the theories of cultural superiority and the non-Saami society's desire to take control over the Saami people's land and resources

though the introduction of western ownership rights and other aspects of the non-Saami legal systems resulted in the Saami people not being able to apply their traditional legal system to the same extent as before, and had to relate simultaneously to both Saami and non-Saami law, the Saami people in the beginning of the 19th century predominantly relied on their own legal system as to land, water, and resource management. Moreover, and importantly, the non-Saami authorities allowed the Saami people to do so. Indeed, non-Saami authorities themselves applied Saami customary law in decisions or conflict resolutions regarding traditional Saami land, waters, and natural resource management.

119. Of course, this process did not start at the same time throughout the entire Sápmi. Generally speaking, the decreased respect for Saami customary law can be said to have started in the southernmost parts of the Saami areas, spreading north. Thus, in some parts of southern Sápmi, the process of non-Saami courts gradually starting to disregard Saami customary law could have started as early as in the late 1700s.

120. See LUNDMARK, *supra* note 88, at 24, 31(ff), 122; see Ström Bull, *supra* note 28, at 110, 204.

121. See Pedersen, *supra* note 84, at 135.

122. See Anton Fjeldstad, *Fedreland og Nasjon*, in NORSK LITTERATURHISTORIE, SAKPROSA FRA 1750 TIL 1995 (E.B. Johnsen & T. Berg Eriksen eds., 1998).

123. See AMUND HELLAND, TOGOGRAFISK-STATISTISK BESKRIVELSE OVER FINNMARKENS AMT (1906). A well-known Norwegian historian claimed that the nomadic Saami people lacked the strength of war, and was on the lowest level of scale of social development. A county governor, explaining why the Saami were underrepresented at municipal boards, concluded that the Saami people had accepted the superiority of the Norwegian race. See DET STATISTISKE CENTRALBUREAU: FINNMARKENS AMT, UNDERDANIGST BERETNING OM FINNMARKENS AMTS ØKONOMISKE TILSTAND M.V. I FEMÅRETT 1886 – 1870, at 58. See also, Pedersen, *supra* note 29, at 341-46 (thoroughly outlining the ideas of the influential Norwegian legal scholar Rudlof Keyser, holding that the Germanic Norwegian race was superior to the nomadic Saami race and that the Norwegians when probing north, came to an inhabited but still unowned land).

124. See PATRIK LANTTO, TIDEN BÖRJAR PÅ NYTT 48 (2000).

would change the Saami society forever.

The fact that the Saami people were deemed to have legal rights to their traditional land obviously constituted a problem when the non-Saami societies developed aspirations to exploit the natural resources in *Sápmi*. Non-Saami authorities thought it unfortunate that the inferior Saami culture should be allowed to stop the evolution of modern society.¹²⁵ Conveniently, the cultural hierarchy theories surfaced, holding that the inferior Saami nomadic way of life did not result in legal rights to land.¹²⁶ The presumption became that only permanent utilization of a specific land area, like agriculture, qualified for title to land, and the Saami people's previously undisputed customary rights became secondary.¹²⁷ Indeed, non-Saami authorities and academics started to question whether the Saami people had any customs or institutions at all for land and resource management and, consequently, came to pay less and less attention to the Saami people's traditions, customs, and customary laws. Being a nomadic, "barbaric"¹²⁸ people, the Saami were now deemed to have no legal rights to lands, waters, and natural resources.¹²⁹

C. John Locke and Sovereignty

There is no evidence suggesting that Fennoscandinavian politicians, legal scholars, or anthropologists were influenced by any particular philosopher or scientist when the cultural hierarchy theories emerged. Still, it is interesting to compare these theories with moral and political philosopher John Locke's¹³⁰ theories on indigenous cultures, sovereignty, and the right to land.¹³¹ Locke argued that sovereignty could not be surrendered or transferred

125. For example, a Norwegian governmental bill from 1848 declared that the Saami people inhabiting Finnmark County utilized the land in a manner not beneficiary to the state. Therefore, it would be better if the land were divided and handed out to individual owners. See GOVERNMENT BILL OT. PRP. NO. 21 1848, at 1. The bill particularly highlighted that if the Saami people should be allowed continuously to exercise control over the northern parts of Norway, that would have detrimental effects on Norway's important logging industry in that area.

126. See, e.g., KORPIAAKKO-LABBA, *supra* note 51, at 21(ff); see Riksdagen 1828/30 Adelsstandet 5, at 138.

127. See Pedersen, *supra* note 29, at 329.

128. Ironically, George Bernard Shaw would claim that this makes the Scandinavian people the barbarians of the time. Shaw has defined a barbarian as someone who mistakes the customs of his tribe for the law of nature.

129. One should also note that it is not correct simply to refer to the Saami people as a nomadic people. As outlined above, many Saami had fishing and agriculture as their main livelihood, and were thus as stationary as the non-Saami population. See also Pedersen, *supra* note 29, at 318.

130. Of course, more philosophers than John Locke shared this view. However, John Locke was the most influential in this group of thinkers.

131. John Locke's (1632–1704) theories were published in 1690 in *Two Treatises of Government* and had as a starting point the relationship between the colonizers and the Native Americans. At the time, indigenous peoples were, in principle, recognized as equal nations in negotiations with European counterparts. Thus, it was generally understood that the only legitimate way for European nations to get access to Native

without the consent of all involved parties, including individuals. Further, according to John Locke, all human beings are born free. Therefore, nothing can bind a citizen except his or her own consent. Thus, the establishment of a justifiable governmental power presupposes a voluntary transfer of power from the individuals, through a "social contract." Governmental power cannot legitimately be founded on anything other than the consent of the people. Further, according to Locke, a man cannot give away a right that he does not have in the state of nature at the entry of the social contract, and nature prohibits a man's trade of a developed condition for a more primitive one.

Locke developed his theories at the time when the European powers were in the process of colonizing North America, and his theories were used as a justification for the colonization. Commenting on the nomadic societies of the Native Americans, Locke described them as being on a lower stage than the civilized, European societies. Locke held that the Native Americans were living in a state of nature lacking political society, legislation, and law enforcement. Because they were living in a state of nature, with no delegation of authority to any institutional legislator or law enforcer, they ruled themselves only as individuals. Consequently, no law or legal system could exist in these societies. Under such conditions, the Native Americans were incapable of transferring the power to a sovereign through a social contract. As a result, because indigenous peoples could not (and thus had not) formed independent sovereign nations, there was no sovereign whose consent was required for sovereignty to be transferred. Moreover, Locke held that the Earth is shared by all people. However, individuals can acquire the right to pieces of land by adding to the value of the land through manual labor (i.e., through agriculture). Because Native Americans had not "improved" their land, they had not acquired any right to it. Locke concluded that the European colonizers taking possession of America occupied territories without a sovereign – and lands without an owner.¹³²

D. The Implementation of the Cultural Hierarchy Theories on the Norwegian Side of Sápmi

In the part of Sápmi that is today Norway, the cultural hierarchy theories predominantly manifested themselves in a harsh assimilation policy. Following the separation from Denmark in 1814, Norway commenced the

American land was through acquiring the consent from these nations. When the Native Americans refused voluntarily to surrender sovereignty or land to the Europeans, it became necessary to provide a justification for why transfer of sovereignty to the European powers did not require voluntary consent from the indigenous peoples. Locke's theories on the social contract should be understood against this background.

132. Regarding the theories of John Locke, see further Nils Oskal, *The Moral Foundation for the Disqualification of Aboriginal Peoples' Proprietary Rights to Land and Political Sovereignty*, in ON CUSTOMARY LAW AND THE SAAMI RIGHTS PROCESS IN NORWAY 99-113 (Tom G. Svensson ed., Centre for Sámi Studies Publication Series No. 8, 1999), from which the section above draws extensively.

construction of a Norwegian identity, resulting in a strong nationalism and ethnocentrism.¹³³ Norway regarded the two northernmost counties – Troms and Finnmark – as ethnically unstable and badly protected against a potential invasion by the Russian Empire.¹³⁴ A Norwegian governmental committee appointed to investigate the use of land in the northern part of the Norwegian side of *Sápmi* stated that “many Saami persons occupied ‘the Crown’s land’ without legal right thereto.” On these lands, “they misused timber and pasture for their own good, with no consideration for the common good.”¹³⁵ The chief of the local authority¹³⁶ in the western part of Finnmark County held that the Saami population were “restless of nature” and “would not travel far for firewood” with detrimental consequences which the Crown should not have to sustain.¹³⁷ Something had to be done.

In a bill to the parliament in 1848, the Norwegian government, for the first time proclaimed the state as owner of the northern part of Norway.¹³⁸ Under the bill, the area belonged to the state because its original inhabitants were a nomadic people without permanent houses.¹³⁹ The Attorney General¹⁴⁰ who argued the Crown’s case stated that “[t]he fully organised [Norwegian] state takes possession of a land without owner through which nomads roam.”¹⁴¹ Local officials acknowledged, however, that the new regulation did not correspond to customary land use in the area and the Saami people were entitled to continue to utilize their land and natural resources in accordance with their customary law, without governmental interference.¹⁴² This included the Sea Saami’s right to fish the sea.¹⁴³

At the same time as proclaiming itself owner of the Saami areas, the government encouraged ethnic Norwegians to move into Finnmark and Troms counties and settle in the traditional Saami territory. From 1835 to 1900, the population of Finnmark County tripled from 11,000 to about 33,000. Of the

133. See Pedersen, *supra* note 84, at 135.

134. See *id.* at 137; see also R. BERG, NORGE PA EGEN HAND 1905-1920 (1996); LANTTO, *supra* note 124, at 320.

135. See Pedersen, *supra* note 29, at 307.

136. The chief was named *Antman* in the Norwegian language.

137. See 35 FAB 311 (1830).

138. See *Angaaende Naadigst Proposition Til Norges Riges Storting om Udfaerdigelse af en Lov om Ophaevelse af § 38 i Lov af 20de August 1821 o Det Beneficerede og Statens Gods*. The proclamation was made even though a government official (*fogde*) a couple of years earlier had stated that the Saami population was the original inhabitant in these regions, and had already been squeezed away by the non-Saami population. See Pedersen, *supra* note 29, at 310.

139. See GOVERNMENT BILL OT. PRP. NO. 21 (1848). In the Norwegian government’s opinion, only agriculture gave rise to the right to land. See Pedersen, *supra* note 84, at 132; see Pedersen, *supra* note 29, at 313. As stated above, not all persons of Saami origin pursued a nomadic lifestyle at this time. This did not matter. Saami persons who actually pursued agriculture in 1848 were also deprived of their traditional land at this time. See *id.* at 336.

140. The equivalent in the Norwegian language is *Regjeringsadvokaten*.

141. This is the author’s translation. See also KNUT SPILLING, AV FINNMARKENS SKOGRET (Bilag til Norsk Retstidende No. 4-6, 1920).

142. See Pedersen, *supra* note 29, at 310-15.

143. See *id.* at 314.

increase, only about 2,000 were of Saami decent.¹⁴⁴ In order to secure the “Norwegianization” of the area, the government further introduced limitations on the Saami population’s ability to acquire title to land, also under Norwegian law.¹⁴⁵ Sparked by nationalism and ethnocentrism, the new settlers in *Sápmi* started complaining about the presence of the Saami “savages” in the area, claiming that the situation in northern Norway was worse than in the colonies overseas. At least the colonists overseas were protected by an army, and were entitled to shoot the savages’ animals on the spot, should they threaten their property.¹⁴⁶

In 1854, Norway introduced its first legislation regulating reindeer husbandry in Finnmark County. The legislation was clearly influenced by the cultural hierarchy theories.¹⁴⁷ The 1854 Reindeer Husbandry Act introduced limitations on the Saami people’s grazing rights on private land.¹⁴⁸ To make matters worse, in 1852 Russia had unilaterally decided to close the Norwegian–Finnish border. The 1854 Act and the closing of the border resulted in seriously decreased winter grazing areas, in turn resulting in a need to redistribute the remaining grazing areas in conflict with traditional Saami customary law. Some reindeer herders had to give up their traditional way of living, because the reduced pasture areas resulted in reduced reindeer herds, in certain areas by as much as fifty percent.¹⁴⁹ Others moved to the Karesuando region on the Swedish side of *Sápmi*, because winter grazing areas on the Finnish side were still open to Saami residing on the Swedish side.¹⁵⁰ This created too much pressure on the grazing areas in the Karesuando region,¹⁵¹ and caused Sweden to relocate by force about 20,000 reindeer further south, in turn increasing the Swedish reindeer herders’ need for winter pasture on the Norwegian side of the southern part of *Sápmi*. This irritated Norwegian authorities that wanted to limit the possibility of reindeer crossing the border to Norway.¹⁵² For the reindeer herders who decided to remain in the Kautokeino area, the closing of the border constituted a major obstacle. They had to decrease the reindeer herds and could no longer migrate with their reindeer in the patterns they had followed since time immemorial.¹⁵³

Norway could have solved all these problems if it had accepted an offer by Russia to re-open the border in 1859, but declined to do so.

144. See HELLAND, *supra* note 123.

145. See Ström Bull, *supra* note 28, at 119(f); LUNDMARK, *supra* note 88, at 122. The local Norwegian authorities in Finnmark County claimed that the distribution of land for free to the new non-Saami settlers would be of great value to Finnmark County. See GOVERNMENT DOCUMENT O. No. 33. (1862/63), at 19.

146. See NELLEJET ZORDRAGER, DE RETTFERDIGES STRID, KAUTOKEINO 1852 (1997).

147. See Ström Bull, *supra* note 28, at 204.

148. See *id.* at 133(f).

149. See *id.* at 96.

150. See *id.* at 113.

151. See LUNDMARK, *supra* note 88, at 127.

152. See *id.* at 128.

153. See *id.* at 102(f). In 1889, Russia also closed the border between Finland and Sweden, and many reindeer herders moved back to the Norwegian side, or to other parts of the Swedish side of *Sápmi*.

Accepting Russia's offer would have been contrary to Norway's general aim for this region: to extinguish the nomadic Saami culture for the benefit of the farmer population in northern Norway.¹⁵⁴ Similarly, in 1870, Norway declined a Swedish compromise offer regarding Saami grazing rights, because it would work against Norway's aim to decrease the nomadic population.¹⁵⁵ A government bill in 1871 stated that "there can be no doubt that the nomadic culture is such a great burden for Norway, and that it has no corresponding advantages, that one must unconditionally desire its cessation."¹⁵⁶

In 1864, Norway also abolished Saami usufructory rights to land in Finnmark County. The attorney for the Crown argued his case as follows:

Finnmark, the old subordinate county without permanent farmers, is hereby known as land taken into unlimited possession and colonized by the Crown itself. The fully organized nation state assumed full property right of the land, as it was regarded as ownerless land crossed by nomads, for use as a private person who is not restrained by the rights of any other.¹⁵⁷

An influential Norwegian legal scholar at the time, explained the Crown's argument by stating that when a people reaches a necessary maturity, it forms its own government, and its customary law is codified in statutes.¹⁵⁸ He shared the opinion that the Norwegian Crown had owned these areas from the earliest days,¹⁵⁹ since before the civilized Norwegian society reached these areas, the land was not occupied by permanent farmers and therefore could be considered unoccupied.¹⁶⁰ He further argued that it was a natural development that customary law materialized itself in statutory law, if customary law were of any validity. Naturally, Norwegian authorities had no intention to materialize Saami customary law.¹⁶¹ Rather, they chose to ignore it. Further,

154. See A.C. MANTHEY, DAGBÖGER FOR 1856-1874 I 112 (1909); Pedersen, *supra* note 29, at 322(f). The colonization of the northern parts, and the extinguishment of the nomadic Saami culture, was so important to Norway that Norway even declined an offer of transfer of territory from Russia to Norway in exchange for Norway opening up its border. See Pedersen, *supra* note 29, at 323.

155. See MANTHEY, *supra* note 154, at 111.

156. See PROPOSITION TO THE ODELSTING No. 2 (1871), at 31(f).

157. See Pedersen, *supra* note 84, at 134. As a background for the new legislation, see GOVERNMENT DOCUMENT O. No. 33 (1862/63), at 17. The local governmental authorities claim that the land in Finnmark County has no added value since no man has increased its value through manual labor. The local authorities further held that recognizing any rights of the Saami people would substantially hinder the colonization of Finnmark County. See *id.* at 18.

158. See Fredrik Brandt, *Om Den Plads, Som Den Saedvansmasessige Ret Hos Os Indtager*, in UGEBLAD FOR LOVKYNDIGHED (Statistik og Statsöcnomi No. 16-17, 1862).

159. See Fredrik Brandt, *Brudstykker af Forelaesninger Over Tingsretten*, in UGEBLAD FOR LOVKYNDIGHED (Statistik og Statsöcnomi No. 22, 1862).

160. See Pedersen, *supra* note 29, at 329.

161. See *id.* at 340(f).

in 1864 the Norwegian Supreme Court passed a judgement holding that local people no longer had the right to utilize renewable resources in their customary way.¹⁶² In order to guarantee completely the non-Saami population's control over the Saami people's traditional lands, a Land Sales Act of 1902 stipulated that Saami speaking persons should no longer be entitled even to buy (their own) land.¹⁶³

The Norway-Sweden union ended in 1905 when Norway gained independence. Already prior to that, Norwegian authorities had started to advocate limited grazing rights in Norway for reindeer herders situated on the Swedish side of *Sápmi*. In 1919, Sweden and Norway agreed on a Reindeer Herding Convention, limiting, or even preventing, the right of reindeer herders residing on the Swedish side of the border to graze their reindeer on the Norwegian side,¹⁶⁴ resulting in a scarcity of reindeer grazing areas on the Swedish side. In 1925, Sweden introduced legislation giving authorities the right to forcefully slaughter reindeer. Under the threat of being deprived of their herds, about four hundred Saami from the *Karesaundo* area were pressured to move further south. More than eighty years after the ancestors of the Saami from Kautokeino left their home, their grandchildren and great-grandchildren were spread around the whole Scandinavian mountain area. No movement had been voluntary.¹⁶⁵ Obviously, new reindeer herders forced to move to other parts of *Sápmi* disrupted the already established customary laws governing grazing rights in those areas.

Under the 1854 Act, the Saami people still held grazing rights for their reindeer, but an act of 1924 reduced the pasture areas, protecting the non-nomadic population against the lifestyle of the nomads.¹⁶⁶ A new Reindeer Herding Act of 1933, although acknowledging Saami grazing rights on land utilized from time immemorial, rested on the foundation that, in the case of a conflict, such grazing rights must give way for the interest of the non-nomadic population.¹⁶⁷ The nomadic lifestyle of the Saami people was expected to perish and could not be allowed to obstruct the development of the modern, superior society.

The Reindeer Herding Act of 1933 also introduced the system of reindeer herding districts still in force today. The basis for the reindeer herding districts was not Saami customary land distribution. Rather, these

162. See Ström Bull, *supra* note 28, at 98 (f).

163. As part of the "Norwegianization" process, Norway also forbade the use of the Saami language and sought to stigmatize the Saami identity. There were, however, some examples of policies not completely tainted by the paternalist cultural hierarchy theories. Following consultations with the Saami communities, new reindeer husbandry legislation was introduced in 1883 and 1888. These acts, though obliging reindeer herders to pay damages caused by reindeer grazing on "private" land, were generally aimed at codifying the Saami people's customary law regarding grazing areas, as expressed in the *Lapp Kodice*. See SOLEM, *supra* note 26, at 190; GOVERNMENT BILLS NOU 1984:18, at 192 and NOU 2001:34, at 142(f).

164. See LUNDMARK, *supra* note 88, at 111, 123(ff).

165. See *id.* at 130(f). Still today, reindeer herders' access to pasture areas in other countries remains a very heated topic.

166. See Ström Bull, *supra* note 28, at 201-13.

167. See *id.* at 214-18.

districts were drawn up to facilitate an easy distribution of damages caused by the reindeer on what, in the non-Saami society's opinion, constitutes non-Saami property.¹⁶⁸ As a result, the reindeer herding districts prevented the Saami people from distributing reindeer grazing areas between the various *siidas* in accordance with its customary law. The combination of Norway no longer recognizing the Saami people's legal right to their traditional land and the introduction of non-Saami land distribution laws resulted in the disappearance of Saami collegial bodies for conflict resolution and non-Saami courts and administrative authorities ceasing to apply Saami customary law. In less than one hundred years, the implementation of legislation based on the cultural hierarchy theories had resulted in, more or less, the dissolution of the Saami people's customary land management law.

E. The Implementation of the Cultural Hierarchy Theories on the Finnish and Swedish Sides of Sápmi

Sweden did not view Russia as a threat to its security to the same extent as Norway did. Nor was Sweden assertively forming its identity as a nation in the same way as Norway. As a result, the cultural hierarchy theories materialized differently in Sweden as compared to Norway.

On the Swedish side of *Sápmi* a policy emerged that has been labelled "Lapp should remain Lapp." Swedish authorities, too, held that the nomadic Saami people were an inferior race – weak, lazy, cowardly and with a mental capacity of a child – thus incapable of surviving in a civilized society.¹⁶⁹ A Swedish politician with great influence over Saami politics¹⁷⁰ described the Swedish people as a "superior race" and added that "the Lapp, due to both his nature and habits, is an enemy to all forms of order that inflicts in him roaming around the mountains or along the road begging."¹⁷¹

Swedish authorities believed that if the Saami people were exposed to a more luxurious, civilized way of living, they would develop a taste for the "modern" lifestyle and inspire them to become a part of the Swedish society. Such a development was undesirable.¹⁷² Therefore, the Saami people should be kept in the mountain areas, in order not to mix with the superior Scandinavian race.¹⁷³

Sweden barred the reindeer herding Saami population from studying science or receiving a higher education. Saami children were not allowed in Swedish schools. In order to prevent the development of a taste for civilized life, they had to attend special nomadic schools with intentionally miserable

168. *See id.* at 219, 244.

169. *See* LUNDMARK, *supra* note 88, at 63.

170. His name was Mr. John Ericsson. Mr. Ericsson was *landshövding* in Jämtland County in the southern part of *Sápmi* from 1883-95.

171. The statement is an extract from an expert advice to the Swedish government, in the author's translation. *See* Lundmark, *supra* note 11, at 93.

172. *See* NATIONALITETERNA I NORRLAND – LITET HISTORIA OCH NAGRA FRAMTIDSVYER 376-78 (Nordisk Tidsskrift 1895).

173. *See* PROTOCOL FROM THE SWEDISH PARLIAMENT 1913, AK IV, no. 31, at 54(f).

conditions. The teachers in the Saami schools were instructed not to educate the Saami children "too well."¹⁷⁴ Most importantly, however, the Saami people were not allowed to pursue forms of livelihoods other than reindeer husbandry as they were deemed incapable of doing so.¹⁷⁵ Neither were the Saami allowed to build or live in houses in their traditional territories.¹⁷⁶ Not allowed to pursue any livelihood other than reindeer husbandry, the non-reindeer herding Saami population were forced to leave their traditional land and were, to a substantial extent, assimilated into the non-Saami population.¹⁷⁷ Only in 1959 would Sweden put an end to the discrimination between the Saami and the non-Saami population as to the right to housing.¹⁷⁸ The reindeer herding Saami population that remained in the traditional Saami territories could not acquire any legal rights to their traditional land, because they were not allowed to build houses, a prerequisite for acquiring legal right to land under non-Saami law.

Remember that under the Taxed Lapp Land system, Finnish and Swedish authorities had recognized the Saami people's ownership right to their traditional land for centuries. As in Norway, however, the influence of the cultural hierarchy theories suddenly led Finnish and Swedish authorities to conclude that the nomadic Saami lifestyle did not result in legal right to land. The Swedish 1886 Reindeer Grazing Act abolished the Taxed Lapp Land system, and declared the Saami people's traditional land the property of the Crown.¹⁷⁹ No explanation was offered as to how the Saami people had lost their rights, other than that a people belonging to an inferior nomadic culture cannot acquire title to land.¹⁸⁰ The reindeer herding Saami population's response was to attempt to take up farming as a complement to the reindeer herding, in order to try to protect the legal rights to its traditional land. As mentioned above, however, Swedish legislation forbade reindeer herders from

174. See LUNDMARK, *supra* note 88, at 93, 100. The Swedish government's leading "expert" on Saami issues held: "It is dangerous to allow the Lapp children to live in warm and comfortable rooms, to lie in real beds and to eat Swedish food. It is also dangerous to allow them to drink milk[,] . . . eat with knife and fork on real plates and to use linens." See *id.* at 97.

175. See PROTOCOL FROM THE SWEDISH PARLIAMENT 1906, Proposition No. 146, at 7(f).

176. At the same time, the non-Saami population received subsidies from the government if it moved into the traditional Saami areas and built farms or other houses there.

177. In that way, the Swedish policy too, had an unintended assimilatory result, however, affecting "only" a part of the Saami population. The artificial division created between reindeer herding and non-reindeer herding Saami population during this time is the root of many conflicts in the Saami society on the Swedish side of *Sápmi* still today.

178. See LUNDMARK, *supra* note 88, at 120.

179. This process had started a couple of years earlier, when Swedish authorities, in effect, started to issue letters evidencing taxed lands to people of Saami origin. See Lundmark, *supra* note 11, at 74(f).

180. See LUNDMARK, *supra* note 88, at 57(f). Still today, the Swedish government refuses even to attempt to offer an explanation for how the Saami people suddenly came to lose all rights to their traditional land, waters, and natural resources.

pursuing other forms of livelihoods than reindeer herding. Only persons of Swedish descent were allowed to establish farms in the traditional reindeer herding territories.¹⁸¹

The non-Saami control over the Saami people's land and natural resources was eased by the *Lappfogde* system, introduced by the 1886 Act. The *Lappfogde* was a local Swedish administrative officer that was supposed to "represent" the Saami population before administrative authorities, officially seeing to their economical and social interests. Thus, the Saami people were basically placed under custody, and lost the ability to represent themselves in issues relating to their traditional land, waters, and natural resources.¹⁸²

The process of disacknowledging the Saami people's right to land previously recognized had commenced before the enactment of the 1886 Reindeer Grazing Act. Earlier in the 19th century, Swedish regional administrative authorities had already begun gradually squeezing out the courts and held themselves to be the appropriate body to settle disputes over competing interests in *Sápmi* land. As outlined above, until then, the Saami people had experienced substantial influence in Finnish and Swedish courts. The non-Saami courts had, to a large extent, applied Saami customary law in matters involving Saami parties, as did the Saami people's own collegial bodies. The non-Saami administrative authorities had for several years been irritated with the courts for obstructing the development of "civilized" society by continuing to regard the Saami people as owners of their Taxed Lapp Lands thus allowing reindeer herding and other traditional Saami land use to stop non-Saami logging, mining, and other activities. As soon as the administrative authorities assumed power, they started to regard the previous Taxed Lapp Land as property of the Swedish Crown,¹⁸³ and saw no reason to pay attention to Saami customary law or to the opinion of the Saami collegial bodies. They applied only non-Saami law.

The transfer of power from the non-Saami courts to non-Saami authorities signaled the beginning of the end for the Saami collegial bodies for conflict resolution, the *Lapp* law, and the *Lapp* Courts' authority,¹⁸⁴ and thus of conflicts regarding traditional Saami land and waters being settled in accordance with Saami customary law. As a result, Saami interests were constantly overridden by the interests of the non-Saami population. Even in matters solely involving Saami parties, the administrative authorities disregarded Saami customary law. It became increasingly difficult for the Saami people to uphold their traditional principles of exclusive and collective

181. See Lundmark, *supra* note 11, at 70.

182. See *id.* at 94. The *Lappfogde* system was abolished in 1971.

183. See *id.* at 44-61. The problem this shift in power caused for the Saami people was somewhat mitigated by the fact that in 1873 the Saami people had been awarded right to winter pasture on private land. However, this right only applied in the northernmost part of *Sápmi*. Further, in the areas where the right did apply, the Saami people's interest in winter pasture was generally overridden by private, non-Saami interests. See *id.* at 34, 37.

184. As indicated above, these bodies would, however, come to continue to operate in certain parts of *Sápmi* for several years ahead.

use of land and waters.¹⁸⁵

Similarly in 1886, on the Finnish side of *Sápmi*, a new forest statute stipulated that woodlands not belonging to individuals or village communities now belonged to the state, and a governmental committee looking into the legal and economic ramifications of the establishment of nature parks in 1931 concluded that all land in the north not belonging to farmers belonged to the Finnish state.¹⁸⁶ The Saami people lost their legal right to lands acknowledged under the Taxed Lapp Land system,¹⁸⁷ and Saami land use and culture came under increasing pressure from Finnish settlers, bringing with them new and competing forms of land use.¹⁸⁸ At this time, Finland had developed a strong interest in the forest resources in *Sápmi*, and Finland's status as a grand duchy in Russia resulted in a gradual destruction of the records in northern Finland outlining the tax duties of the Saami people. As a result, the Saami people's right to land was not taken into consideration during the general parcelling out of land that took place in the Saami territories in 1925.¹⁸⁹ The titles of new farms established in *Sápmi* by non-Saami settlers were officially recorded, while Saami land was regarded as government land.¹⁹⁰ When regarded as owner of their Taxed Lapp Land, the reindeer herders obviously carried out reindeer husbandry on their own lands. Following the confiscation of the Taxed Lapp Lands, however, Finland enacted its first Reindeer Herding Act in 1932. As on the Norwegian side of *Sápmi*, the 1932 Act disregarded the old *siida* system and otherwise contradicted Saami customary land management law.

In 1886, Sweden enacted its first Reindeer Grazing Act, introducing a new entity, the *lappby*, for the administration of reindeer herding. Since 1886, the right to pursue reindeer husbandry on the Swedish side of *Sápmi* presupposes membership in a *lappby*. The *lappby* has its root in the *siida* system, but does not equate with the *siida*, even though it reflects Saami customary land management law to a larger extent than the Norwegian and Finnish systems. The *lappby* carried out reindeer husbandry within its geographical area for the common good of the members of the *lappby*. As with the *siida*, the *lappby* was not only an entity for carrying out reindeer husbandry, but it also played a social and cultural role.¹⁹¹ However, the *lappby* did not officially acknowledge the individual usufructory rights for each household within the *lappby* in the way the *siida* did.¹⁹² In reality, however, it was not uncommon that the members of the *lappby* unofficially preserved the traditional customary legal system with individual usufructory

185. See Kristensen, *supra* note 13, at 49 (f).

186. See KOMITEANMIETINTÖ 7 (1931) (Comm. Rep.).

187. See HYVÖNEN & KORPIJAAKKO-LABBA, *supra* note 73, at 122.

188. See KORPIJAAKKO-LABBA, *supra* note 51, at 21.

189. See *id.* at 17.

190. However, it has never been formally registered or otherwise acknowledged as such.

191. See GOVERNMENT BILL SOU 2001:101 – *En ny rennäringspolitik – öppna samebyar och samverkan med andra markanvändare*, Betänkande av Rennäringspolitiska kommittén, at 177.

192. See *id.* at 173.

rights despite the lack of formal regulation.¹⁹³ Thus, the *lappby* system, in practice, allowed the Saami people to preserve certain aspects of their customary legal system.

As on the Norwegian side of *Sápmi*, Swedish authorities encouraged and supported the colonization of the Saami territories, granting land titles to non-Saami settlers moving into the areas above *Lappmarksgränsen* that had previously been set aside for the Saami people. During a process referred to as *avvittringen* in the mid-1800s, Sweden gave away substantial parts of the Saami people's traditional land to non-Saami settlers as if no Saami population existed in the areas.¹⁹⁴ Between 1800 and 1890, the non-Saami population in the Saami traditional territories quadrupled.¹⁹⁵ These settlements seriously diminished the pasture areas and thus, the possibility to pursue reindeer husbandry in a customary manner. When Sweden halted this process, a substantial part of the land previously set aside for the sole use of the Saami people had already been transferred to non-Saami settlers.¹⁹⁶ Moreover, even on land that should still have been reserved for reindeer husbandry, several non-Saami farms had already been established. These farms were, to a large extent, allowed to remain.¹⁹⁷

Thus, as on the Norwegian side of *Sápmi*, the implementation of the cultural hierarchy theories resulted in Finland and Sweden no longer recognizing the Saami people's legal rights to their traditional land. The implementation of the cultural hierarchy theories further led to the disappearance of the Saami collegial bodies for conflict resolution and to non-Saami institutions no longer applying or otherwise respecting Saami customary law. Further, both Finland and Sweden introduced administrative reindeer herding systems that resulted in the breakdown of the *siida* system.¹⁹⁸ As on the Norwegian side of *Sápmi*, the implementation of legislation based on the cultural hierarchy theories needed less than one hundred years to dismantle the implementation of Saami customary land management law.

F. The Present Situation

In the second half of the 20th century, the racist cultural hierarchy theories became outdated and regarded as scientifically false. Consequently, the "Norwegianization" and the "Lapp shall remain Lapp" processes were gradually phased out. However, these policies still have an impact on Saami policy today. In fact, the contents of the laws enacted during this era are still substantially in force. Moreover, the attitude that emerged at that time as to what legal rights the Saami people have to their traditional land constitutes the foundation for the Saami policies still today. Even though no one regards the

193. See *id.* at 173(f).

194. See Lundmark, *supra* note 11, at 74(f).

195. See *id.* at 70; GOVERNMENT BILL SOU 2001:101 – *En ny rennäringspolitik – öppna samebyar och samverkan med andra markanvändare, Betänkande av Rennäringspolitiska kommittén*, at 211.

196. See LUNDMARK, *supra* note 88, at 32.

197. See L. STENMAN, *AVVITTRINGEN I VÄSTERBOTTENS LAPPMARKER* (1983).

198. See HYVÖNEN & KORPIJAAKKO-LABBA, *supra* note 73, at 126.

cultural hierarchy theories as valid any longer, Finland, Norway, and Sweden fail to question the policies that emerged from them. They still hold it beyond doubt that the Saami people's nomadic land use has not given rise to legal rights to land and that the Saami traditional lands, waters, and natural resources (such as hunting and fishing rights) belong to the state.¹⁹⁹ These countries have not begun to recognize the validity of Saami customary law in the way they did before the cultural hierarchy theories surfaced. Furthermore, the regulation of the Saami traditional livelihoods is essentially the same as in the reindeer herding acts enacted in the late 1800s and early 1900s.

As outlined above, the Norwegian 1933 Reindeer Herding Act introduced a system under which the reindeer herders were administratively divided into reindeer herding districts, with grazing areas that run contrary to Saami customary land distribution law. This system is essentially still in force, but the present Reindeer Herding Act of 1978 moved even further away from Saami customary reindeer herding practices. The 1978 Act stipulates that reindeer husbandry shall be carried out through a reindeer herding unit with one registered leader. The reindeer herding unit system conflicts with the customary land distribution within the *siida* as it fails to correspond with the usufructory rights to particular land areas within the *siida* for households and individuals within the *siida*. Further the system does not comply with the customary notion that the land within the *siida* belongs collectively to the members.²⁰⁰ Reindeer herders have compared the reindeer herding units with

199. As has been thoroughly outlined above, this perception contradicts history, which contains little evidence suggesting that the states should have ownership rights to the Saami people's traditional lands and resources. Moreover, governmental authorities, national courts and U.N. institutions, such as the Committee on the Elimination of Racial Discrimination, have repeatedly pointed out that the Saami people most certainly have legal rights to their traditional land and resources. For example, the Finnish Forest Statute of 1886 did not intend to amend legal relationship to private land, wherefore, in principle, Saami individuals should still be regarded as owners of their traditional land. See *id.* at 122. In the early 1980s, the Finnish Standing Committee on the Constitution pointed out that Saami rights to land and water since time immemorial continue to exist but remained unrealized in both law and practice. See *Eduskunnan perustuslakivaliokunnan lausunnot* (1981) (Reports of the Standing Committee on the Constitution No. 5) and (1982) (No. 11). Similarly, on the Swedish side of *Sápmi*, the Swedish Supreme Court in the *Taxed Lapp Mountain* case made it absolutely clear that the Saami people most likely are the owner of at least a substantial part of their traditional land. *Skattefällsmålet* [1981] NJA 1. Moreover, the Supreme Court further held that it is indeed possible to acquire title to land and pursuing a nomadic way of life on it. In the time since the ruling in the *Taxed Lapp Mountain* case, further evidence of Saami presence in its traditional areas has been presented, which has led the reporting judge in the *Taxed Lapp Mountain* case, former Supreme Court Judge and Professor of Law Bertil Bengtsson, to state that what appeared likely at the time of the *Taxed Lapp Mountain* case today seems to be a fact. See GOVERNMENT BILL SOU 2001:101 – *En ny rennäringspolitik – öppna samebyar och samverkan med andra markanvändare, Betänkande av Rennäringspolitiska kommittén*, at 107-18 (Swed.). See also Lundmark, *supra* note 11, at 128(f).

200. The reindeer herding unit system has also had adverse effects on women within the Saami society. Under Saami customary law, both the men and women in a household owned reindeer. Today, however, when one reindeer herding unit can have

a privatization of the reindeer herding rights.²⁰¹

The reindeer herding administrative system on the Finnish side of *Sápmi* was laid down in the 1990 Finnish Reindeer Herding Act. The 1990 Act builds on the 1932 Act and thus, contradicts the old *siida* system and Saami customary land management law. As in Norway, reindeer husbandry is supposed to be carried out through reindeer herding units. The reindeer herding unit's borders are predominantly artificially decided by government authorities, rather than within a *siida* as Saami customary law provides.²⁰² Further, the 1990 Act does not recognize any aboriginal rights to the Saami people's traditional land in Finland, even though non-Saami authorities can issue permits to pursue reindeer husbandry on privately held land if it is considered traditional reindeer herding land.²⁰³ The right to pursue reindeer husbandry in Finland requires only residing in a municipality in the so-called "Saami homeland" area. Thus, unlike in Norway and Sweden, anyone, not just Saami individuals, can pursue reindeer husbandry in Finland, as long as they reside within the Saami homeland area.²⁰⁴ Obviously, having non-Saami persons competing for grazing land adds to the difficulties with upholding Saami customary land distribution law.²⁰⁵ Thus, even more than on the Norwegian side, the Finnish 1990 Act treats reindeer husbandry as an industry and, worse, accessible to all persons – Saami and non-Saami alike.²⁰⁶

Also on the Swedish side of *Sápmi*, the reindeer herding regulation is in force – essentially the same as the one introduced during the cultural hierarchy theories era. Under the Reindeer Herding Act of 1971, the right to pursue reindeer husbandry still presupposes membership in a *sameby*.²⁰⁷ introduced by the 1886 Act.²⁰⁸ The 1971 Act builds on the presumption that

only one appointed leader, most reindeer herding unit leaders are men. The reindeer herding units have thus resulted in many Saami women having to transfer the ownership of their reindeer to their husbands.

201. See GOVERNMENT BILL SOU 2001:101 – *En ny rennäringspolitik – öppna samebyar och samverkan med andra markanvändare, Betänkande av Rennäringspolitiska kommittén* (Swed.), at 175 (f).

202. See HYVÖNEN & KORPIJAAKKO-LABBA, *supra* note 73, at 127. In addition, Finnish law requires that reindeer herders slaughter a certain part of their herd each year. Finnish authorities appear to view reindeer husbandry as a business like any other business, rather than as a fundamental building block in the Saami culture.

203. See *id.* at 122.

204. See *id.* at 123. Finland has so far failed to render reindeer husbandry a sole right of the Saami people, even though E.U. legislation explicitly exempts reindeer herding from the European Union's competition law.

205. See KORPIJAAKKO-LABBA, *supra* note 51, at 24.

206. The Finnish Standing Committee on the Constitution agreed to the 1990 Reindeer Herding Act only after explicitly stipulating that the 1990 Act should be revised in order to comply with a Saami Act being drafted at that time by the Advisory Committee on Saami Affairs. However, the Finnish government failed to materialize the Saami Act.

207. The 1971 Act introduced the term "sameby," substituting for the term "lappby," which at that time, had a derogatory undertone. However, the *sameby* system basically equals the *lappby* system.

208. One should note, however, that the right to pursue reindeer husbandry is not dependent on legislation, as underlined in the *Taxed Lapp Mountain* case, in which the

nomadic land use does not give rise to legal rights to land.²⁰⁹ Reindeer herders do, however, at least formally, still have grazing rights on land that they have traditionally occupied, but that today, in the government's opinion, constitute property of the state or of private title holders. As outlined above, the *sameby* system, even though contrary to customary land management law, builds on certain aspects of the *siida* system.²¹⁰

The Saami population on the Swedish side of *Sápmi* were allowed to retain the right to fish and hunt in the mountain areas throughout the cultural hierarchy theories era.²¹¹ The 1971 Reindeer Herding Act did not change this order. Thus, the reindeer herding Saami population could continue to hunt and fish in these areas substantially in accordance with Saami customary law, and could, at that time, also sublet parts of the hunting and fishing rights. Finnish and Norwegian legislation still uphold the position taken during the cultural hierarchy theories era – that the Saami people have no particular hunting and fishing rights in their traditional territory²¹² – in violation of Saami customary law. Since the introduction of the Norwegian legislation, there are several examples of Norwegian authorities simply refusing members of the Saami population the right to fish in rivers their ancestors have fished for generations.²¹³ On the Finnish side of *Sápmi*, in 1978, the Finnish Parliamentary Standing Committee on the Constitution commented on a government bill concerning fishing rights and the parcelling out of waters in northern Finland.²¹⁴ The Committee concluded that the Saami people indeed had fishing rights to the northern waters based on undisturbed possession since time immemorial. The Committee held that the government bill violated these rights. The Finnish government, however, did not want to acknowledge Saami fishing rights and therefore preferred to withdraw the bill. Instead, the government associated the parcelling out of waters in northern Finland with the parcelling out of land in 1902, which allowed the government to ignore the Saami fishing rights in essentially the same way it

Swedish Supreme Court stated that by utilizing their land since time immemorial, the *samebys* in question had acquired a reindeer herding usufructory right to their traditional grazing areas that is not dependent on Swedish legislation. *See supra* note 199.

209. *See* Lundmark, *supra* note 11, at 128.

210. The *sameby* is also sometimes viewed as a continuation of the *siida* by the reindeer herders. *See* GOVERNMENT BILL SOU 2001:101 – *En ny rennäringspolitik – öppna samebyar och samverkan med andra markanvändare, Betänkande av Rennäringspolitiska kommittén*, *supra* note 199, at 177.

211. However, the right to fish and hunt as a part of the reindeer herding right presupposes membership in a *sameby*.

212. There are a few exceptions to this general rule. The Saami people retain certain fishing rights in the big rivers in northern *Sápmi*.

213. *See* Ingar Nikolaisen Kuoljok et. al., *Samiske Sedvaner og Rettsoppfatninger – En Gjennomgang av Arkivmateriale Til Rettshjelpskontoret Indre Finnmark for Tidsrommet 1987-1997*, in SAMISKE SEDVANER OG RETTSOPPFATNINGER – BAKGRUNNSMATERIALE FOR SAMERETTSUTVALGET, NORGES OFFENTLIGE UTREDNINGER 74 (2001).

214. *See* EDUSKUNNAN PERUSTUSLAKIVALIOKIVLIOKUNNAN LAUSUNTO NO. 7 (1978) (Report of the Parliamentary Standing Committee on the Constitution).

had during the parcelling out of land almost eighty years earlier. A new Fishing Act of 1982 explicitly excludes the northernmost areas from its application, purposely leaving the old legislation – enacted during the cultural hierarchy theories era – in force.²¹⁵ In other words, Finland used legislation enacted during a racist era to, in modern times, retain control over Saami hunting and fishing rights. In 1992, Sweden, in a similar manner, utilized legislation enacted during the racist cultural hierarchy theories era as a tool to take away the Saami people's right to sublet their hunting and fishing rights.²¹⁶

Clearly, even though constantly reminded of the Saami people's rights,²¹⁷ Finland, Norway, and Sweden have all essentially failed to rid themselves of the cultural hierarchy theories legacy. Although provided with several opportunities to introduce legislation that recognizes the Saami people's right to land and Saami customary land management law, they have constantly refused to do so. This pattern is very visible in Finland and Sweden's hesitation before a ratification of ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries. A Finnish Government Bill of 1990 concluded that:

If Finland were to ratify the [ILO] Convention [No. 169], it

215. See KORPIJAAKKO-LABBA, *supra* note 51, at 23.

216. This confiscation constitutes another excellent example of how the cultural hierarchy theories continue to influence non-Saami policy towards traditional Saami land and natural resources. Remember that the right to administer the hunting and fishing in the traditional Saami areas was taken away from the Saami people in the 1886 Reindeer Grazing Act. The motivation was that the nomadic Saami people were deemed incapable of administering their own hunting and fishing rights. The 1886 Act was very clear, however, that it was still the Saami people's hunting and fishing rights that the non-Saami administrative authorities were administering. Even though the government retained the right to administer these rights throughout the 1900s, there was no doubt that the rights still belonged to the Saami people. For example, the Swedish Attorney General (*Justitiekanslern*) confirmed that the hunting and fishing rights still belong to the Saami people in a Supreme Court case in 1949. The government further confirmed the Saami people's ownership right to the fishing as late as 1981, in the *Taxed Lapp Mountain* case. Then, in 1992, Sweden suddenly started to treat the hunting and fishing rights as a property of the state. No explanation was ever offered as to how the Saami people had transferred these rights to the government. In other words, even though claiming no longer to adhere to the cultural hierarchy theories, Sweden in 1992 utilized the Reindeer Grazing Act of 1886, which was clearly tainted by these theories, to confiscate the Saami people's hunting and fishing rights. Of course, administrative authorities allowing foreign persons to hunt and fish in the Saami areas, without consulting the relevant *sameby*, disrupts Saami customary fishing and hunting law. To make matters worse, uncontrolled hunters in the grazing areas also disturb the reindeer herding, and thus the customary law associated with it. See Lundmark, *supra* note 11, at 131.

217. As outlined above, these violations have sometimes been pointed out by national courts and governmental investigations. Even more frequently, however, U.N. bodies such as the Human Rights Committee and the Committee on the Elimination of All Forms of Racial Discrimination have pointed out the human rights violations the Saami people are subjected to.

would have to guarantee the rights of the Sami associated with lands traditionally inhabited and owned by them and their rights associated with the use of natural resources in these lands to a greater extent than is provided by legislation currently in force.²¹⁸

Having to acknowledge Saami rights led the Finnish government to conclude that it is not feasible for Finland to adopt the ILO Convention No. 169.²¹⁹ Sweden has reasoned in a similar manner,²²⁰ and Norway, even though it has ratified ILO Convention No. 169, has essentially failed to implement provisions in the Convention relating to rights to land, waters, and natural resources.

The most recent example of the Fennoscandinavian countries taking for granted that the Saami people have no legal rights to their traditional land is the recently proposed Land Managing Act concerning Finnmark County, on the Norwegian side of *Sápmi* (the *Finnmark Act*).²²¹ The proposed *Finnmark Act* would transfer ownership of land and natural resources in Finnmark County to a body established for that particular purpose, called *Finnmarkseiendomen*. Under the proposal, the non-Saami population would exercise control over *Finnmarkseiendomen*, and consequently over the land and resources in *Finnmark* County. The proposed *Finnmark Act* also fails to address Saami customary law. The proposed *Finnmark Act* violates many aspects of international law, most notably by completely disregarding that the Saami, as indigenous peoples, have particular rights to their traditional land, waters, and natural resources.²²² The Saami people had eagerly anticipated the *Finnmark Act*, expecting it to be the first legislation that would address *Sápmi*'s colonial past in good faith. It turned out to be just another failure to abolish the policies adopted during the cultural hierarchy theories era.²²³

However, there have also been some recent positive developments.

218. See GOVERNMENT BILL NO. 306 (1990).

219. See KORPIJAAKKO-LABBA, *supra* note 51, at 26.

220. Regarding the Swedish side of *Sápmi*, see GOVERNMENT BILL SOU 1999:125 - Samerna- ett ursprungsfolk i Sverige, Fragan om Sveriges anslutning till ILO's konvention nr 169 (Swed.), which recommended that the Swedish government ratify the ILO Convention No. 169.

221. See GOVERNMENT BILL OT. PRP. NO. 53 (2002-03) - *Om lov om rettsforhold og forvaltning av grunn og naturresurser i Finnmark fylke (Finnmarksloven)*.

222. The proposed *Finnmark Act* has been heavily criticized by Norwegian and international media, by the U.N. Committee on the Elimination of Racial Discrimination, by the ILO, as well as by the government's own international legal experts appointed particularly to review the proposed *Finnmark Act*. See *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, Republic of Korea, U.N. CERD 63rd Sess., U.N. Doc. CERD/C/63/CO/9 (2003); see HANS PETTER & GEIR ULFSTEIN, *FOLKRETTLIG VURDERING AV FORSLAGET TIL NY FINNMARKSLOV*.

223. Despite the criticism, the Norwegian government has presented the *Finnmark Act* to the Norwegian parliament. The Norwegian parliament will, however, negotiate with the Norwegian Saami Parliament before finalizing and passing the Act. It is very difficult to predict what the outcome of these negotiations will be.

On the Norwegian side of *Sápmi*, a recently presented government bill identifies that the contradiction between statutory law and the Saami people's own legal perception that renders the legislation ineffective, because the situation creates uncertainty as to the rights of each reindeer herder.²²⁴ The bill therefore, suggests the reintroduction of certain aspects of Saami customary law in Norway's reindeer herding legislation. The bill gets rid of the reindeer herding units and reintroduces the *siida* as the fundamental building block in the reindeer herding communities. If enacted, the Act would recognize that the *siida* is not only a working unit, but also an institution for the traditional use of the reindeer herding areas, and it would award the *siida* increased influence over who can pursue reindeer husbandry within the *siida*. Under this bill, the number of reindeer allowed in each area would also be increasingly governed by the *siida* structure. The reindeer herding district system remains but the reindeer herders' influence over the decisions of the district increases. Finally, the new bill underlines the importance of responsible administrative authorities having knowledge of the particular requirements and conditions for reindeer herding and awards the Saami people increased input in decision-making regarding activities competing with reindeer husbandry.²²⁵ An increased knowledge among non-Saami courts and administrative authorities of the particularities of the Saami people's traditional livelihoods is essential (as will be evident from some recent positive developments in Norwegian jurisprudence, outlined below).

G. Jurisprudence: Competing Legal Systems and the Rule of Evidence

Although in principle entitled to pursue reindeer husbandry on its traditional land, even when privately owned, in practice it has often been difficult for the Saami people to realize this right. The abolishment of the Saami legal institutions and the failure to acknowledge Saami customary law has allowed Finland, Norway, and Sweden to take full control over the Saami people's traditional land, waters, and natural resources. When disputes have arisen regarding whether a particular land area constitutes traditional Saami land, the Saami parties have, with few exceptions, lost. The reason for the Saami people's poor track record in court proceedings can be explained to a substantial extent by non-Saami courts' and administrative authorities' failure to recognize the requirements for the Saami traditional livelihoods and Saami customary land management law.

Even though the Saami people are entitled to pursue reindeer husbandry on their traditional land, what constitutes traditional Saami land has never been identified. On the Norwegian side of *Sápmi*, in the *Korssjoffell* (1998) and *Aursunden* cases (1997), local title holders to land

224. See 35 NORGES OFFENTLIGE UTREDNINGER (2001).

225. Finland has also contemplated new reindeer herding legislation. In 1990, the Advisory Committee on Saami Affairs presented a proposal for a new Reindeer Herding Act that would bring Finnish legislation fairly close to the Swedish Reindeer Herding Act (i.e., closer to, but not in line with, the old *siida* system). The Finnish government has so far failed to act in accordance with the recommendations of the Committee. See KORPIAANKO-LABBA, *supra* note 51, at 27-31.

contested that the land areas in question constituted traditional Saami reindeer herding land. In the *Aursunden* case, the Norwegian Supreme Court attached substantial importance to a previous Supreme Court judgment from 1897. The Supreme Court stated that “the courts were considerably closer to the evidence a century ago” and that “one must be wary of disregarding the Supreme Court’s 1897 assessment of the evidence.”²²⁶ In the 1897 case, the Supreme Court stated that “the farmer, during his hard and difficult cultivating work, often carries hard burdens, while the *Lapp*, whose lifestyle changes from hardship to laziness, usually escape those.”²²⁷ Further it stated, “the [Lapp people’s] rights cannot be recognised to be of such nature that they might exclude or prevent a rational development of agriculture and progress.”²²⁸ With reference to the findings of the Court during the cultural hierarchy theories era, the Norwegian Supreme Court found in favor of the title holders in the *Aursunden* case,²²⁹ as did the Norwegian Supreme Court in the parallel *Korssjofjell* case. Holding that the Saami parties had to prove that they had utilized the area in dispute from time immemorial, the Supreme Court found that they had failed to do so. Further, in its finding, the Norwegian Supreme Court paid no attention to the specific features of reindeer husbandry, the particular Saami way of life or Saami customary land management law.²³⁰

Courts on the Swedish side of *Sápmi* have disregarded Saami customary land management law in a similar manner. The uncertainty as to what, in the Swedish government’s opinion, constitutes traditional Saami land, has resulted in a number of conflicts, particularly over the winter pasture areas. Following the politics pursued during the cultural hierarchy theories era, the Saami people to a large extent today share their winter pasture areas with the non-Saami population.

There are several cases pending before Swedish courts where non-Saami parties are claiming compensation from different *samebys* because of reindeer grazing on land to which the non-Saami holds title, and which the title holders claim does not constitute traditional Saami winter pasture areas (the *Reindeer Grazing* cases). In February 2002, a Swedish Court of Appeal ruled that the land areas in question do not constitute traditional pasture areas, and that the reindeer herders shall pay compensation to the title holders for the

226. Norwegian Supreme Court judgment, Oct. 24, 1997.

227. Norwegian Supreme Court judgment, July 6, 1897.

228. Then professor of law, now Supreme Court Judge, Jens Edvin A. Skoghoy has said: “One cannot rule out that the evaluation of evidence made by the Supreme Court in 1897 was influenced by the attitude of the public authorities at that time.” See JENS SKOGHOY, *TVISTERMAAL* 757 (1998).

229. Thus, the *Aursunden* case constitutes yet another example of the Nordic countries utilizing the sentiments that evolved during the cultural hierarchy era in order to retain control over the Saami people’s traditional land and natural resources in modern time, even though claiming no longer to adhere to those theories.

230. The Saami parties appealed the *Korssjofjell* and *Aursunden* cases to the U.N. Human Rights Committee. The Committee found the case inadmissible, due to procedural reasons. See U.N. COMM. ON HUM. RTS. DECISION CCPR/C/76/D/942/2000 (Nov. 12, 2002).

reindeer grazing on the land.²³¹ When hearing the case, the Court of Appeal failed to acknowledge Saami customary usage of land, as well as the particular circumstances of, and prerequisites for, reindeer husbandry.²³² The Court placed all the burden of proof on the Saami parties. It requested evidence for the Saami presence in the area, which was virtually impossible to provide. The Saami culture is oral in nature. Any agreements or similar evidence regarding use of land would thus be oral. The Saami parties tried to explain that they have never felt any need to document the movements of the reindeer. The knowledge is traditional, passed on from one generation to the next. The reindeer herder knows the reindeer, how they roam and where they pasture. It is clear from historic sites that there has been a Saami – and reindeer – presence in the region for hundreds, if not thousands, of years, which the Court of Appeal acknowledged. Naturally, reindeer herders seek the best grazing areas available for their reindeer. The grazing areas in dispute are among the best in the region. It should be obvious that the reindeer had grazed in the areas in dispute. The Court, however, demanded specific written evidence that the reindeer had grazed each square kilometer in the area in question on a regular basis without interruption by the non-Saami society. Obviously, it is not possible for a culture aiming to live in harmony with the land and to leave no traces thereupon to prove its presence in a particular land area in such a manner. In reaching its conclusion that no evidence had been presented that supported the claim that the areas in question were traditional reindeer herding areas, the Court of Appeal to some extent relied on the content of the Reindeer Grazing Act of 1886. As stated above, the 1886 Act rested on the cultural hierarchy theories.

The *Korssjoffell*, *Aursunden* and *Reindeer Herding* cases constitute examples of a clash between two societies with two different ways of life. The two societies have developed two legal systems, adapted to and designed to address the particular characteristics of each society. The problem is that conflicts between the two societies are always settled in a conflict resolution body that is the product of only one of the societies – applying the legal system of that society. Since the cultural hierarchy theories emerged in the mid-1800s, non-Saami courts have paid no attention to Saami customary land use or legal precepts. If non-Saami courts base their decisions solely on non-Saami law and fail to acknowledge the distinct prerequisites for the Saami

231. The Swedish Supreme Court has not yet decided whether it will hear the case or not. If not overruled, the ruling will have detrimental effects on reindeer husbandry in the region. Several reindeer herders will not be able to pursue their traditional way of living if they are obliged to pay a fee for using their traditional winter pasture areas. In December 2001, after several years of discussion on the matter, the Swedish government appointed a Boundary Commission with the task to investigate what areas constitute traditional Saami reindeer herding land. The aim is to avoid further court proceedings. The Commission should finalize its work by Dec. 31, 2004, but is expected to need extended time to finish its work. The establishment of the Boundary Commission constitutes a commendable step by Sweden toward adequately addressing the Saami land issues. Saami parties are concerned, however, with the fact that the Commission is seriously under-financed.

232. The Court of Appeal did refer to the particular prerequisites for reindeer husbandry in its findings, but still failed to give them any weight in its ruling.

traditional livelihoods, Saami parties will never fare well in such proceedings.

Saami customary land management law reflects the prerequisites for the Saami traditional livelihoods. Indeed, it is not possible to distinguish the practice from the law associated with it. Consequently, non-Saami courts' failure to acknowledge the prerequisites for the Saami livelihoods also implies a complete disregard of Saami customary law. In fact, if the colonizing societies continue to take such a position, the Saami legal system is destined to perish totally, as indeed the cultural hierarchy theories predicted. In order not to lose its traditional land entirely, the Saami people will have to adapt their way of life to the non-Saami societies, resulting in the final end of Saami customary law. Should this occur, the cultural hierarchy theorists will have managed to fulfill their own prophecy.

As will be discussed in more depth below, there is a need to acknowledge the Saami legal system as equal to the non-Saami systems. However, Saami customary law can also, to some extent, be preserved through a more sensitive application of the non-Saami legal system, as two recent court cases suggest. Like the *Korssjøfjell* and *Aursunden* cases, the parallel *Selbu* case²³³ concerned whether reindeer herders have grazing rights on private title holders' land in Sør-Trøndelag County, in the southern part of the Norwegian side of *Sápmi*. In the *Selbu* case, however, the Norwegian Supreme Court found in favor of the Saami parties.

Having concluded that the land areas in question had a clear Saami presence, the Court held that the landowners had to prove that the land areas in dispute *do not* constitute traditional reindeer husbandry territory. Moreover, the Supreme Court stated that the test must be adapted to the Saami people's – and the reindeer's – ways of using the land, as well as to other conditions necessary for reindeer husbandry. The Court acknowledged that the Saami people have traditionally pursued a nomadic lifestyle and that the test applied when deciding whether a party has acquired legal right to land through agriculture – or other forms of more permanent land use – cannot be automatically transferred to the traditional Saami livelihoods, such as reindeer husbandry. Rather, one must recognize that reindeer husbandry requires large land areas, and that the areas utilized may vary from year to year, depending on wind, weather and supply of pasture. Reindeer do not necessarily graze in the same area year after year. The Court stated that even though the reindeer herders might utilize the outer areas of their herding territories only to a limited extent, one must recognize that these areas might still be necessary for continued reindeer husbandry. This characteristic of reindeer herding, taken together with the Saami people's nomadic lifestyle, the Norwegian Supreme Court concluded that it cannot be a prerequisite for acquiring legal rights to land that the reindeer have grazed there every year. The Supreme Court considered the topography and concluded that it would have been unnatural if reindeer had not traditionally roamed the whole land area in dispute and not only parts of it, as the title holders argued. The Supreme Court further acknowledged that the Saami culture is oral, therefore, one cannot disregard oral statements as evidence of presence in the land areas in dispute.

233. Supreme Court Case Rt-2001-769 (150-2001).

Moreover, according to the Norwegian Supreme Court, when giving weight to the evidence presented (or, perhaps rather, not presented), one must recognize that the Saami people traditionally used organic material that decomposes with time. Therefore, the Norwegian Supreme Court held that it cannot be decisive that the Saami parties have not managed to produce concrete evidence of earlier settlements.²³⁴

The second case, the so-called *Svartskog* case, also from the Norwegian side of *Sápmi*,²³⁵ concerned who is the owner of the Manndalen valley in Nord-Troms County – the local Saami community or the state. Again, the Norwegian Supreme Court found in favor of the Saami parties, holding that the Saami community had acquired a *collective* ownership to the land through communal utilization since time immemorial. The recognition of collective ownership is very important, since it reflects an understanding of, and respect for, Saami customary land management law.²³⁶ The *Svartskog* case is the first example of a Fennoscandinavian court finding that the Saami people have acquired ownership to a land area through traditional use.

In the *Selbu* and *Svartskog* cases, a non-Saami court finally deviated from the cultural hierarchy theories and interpreted non-Saami law in a more modern manner. The Norwegian Supreme Court acknowledged the requirements for the Saami traditional livelihoods and recognized that Saami customary land use can indeed give rise to rights to land. Doing so, the Norwegian Supreme Court renders it possible for the Saami people to continue to apply their customary law internally, if not in non-Saami courts. Even though not applying Saami customary law directly, through upholding the boundaries for the intrusion of the non-Saami societies into the Saami society, the Supreme Court, to a certain extent, protects the Saami traditional livelihoods, exercised in accordance with Saami customary law.

234. The different ruling in the *Selbu* case compared to the *Reindeer Grazing* cases cannot be explained by the fact that Norway, but not Sweden, has ratified ILO Convention No. 169. The Norwegian Supreme Court stated explicitly that it was not necessary to apply the ILO Convention No. 169 to hold in favor of the Saami parties. Some of the pasture areas in dispute in the *Reindeer Grazing* cases border to the areas in dispute in the *Selbu* case, with only the Swedish/Norwegian border “in between.” As outlined above, under the *Lapp Kodiccill*, reindeer in the area were allowed to cross the border freely. There has traditionally been an interchange of pasture areas in the region, even though today the pasture areas happen to be divided by a border. Even today, reindeer from the respective districts naturally roam across the border (which obviously is not visible to the reindeer). The fact that, today, a border crosses the areas does not affect to what extent the Saami people have traditionally utilized the areas in question. The Saami presence has presumably been the same on both sides of the border. Given this background, the different approaches taken by the Norwegian and Swedish courts become apparent. Rather than concurring with the Norwegian Supreme Court in the *Selbu* case, the Swedish Court of Appeal chose to stay true to the legacy of the cultural hierarchy theories, and disregard Saami customary land management law.

235. Supreme Court judgment 5B/2001, no. 240/1999, Oct. 5, 2001.

236. A body through which the inhabitants of the Manndalen valley will manage its collective land, presumably in accordance with Saami customary individual usufructory law, is about to be established.

H. Development Projects in Traditional Saami Territories

The Saami people's ability to continue to apply their customary law is not only threatened by legal proceedings concerning the legal right to land. Investments and extractive activities on traditional Saami land and waters have escalated since World War II. Today, such activities constitute perhaps the greatest threat to the Saami people's traditional livelihoods – and consequently to the customary law associated with it. In these cases, the Saami right to a presence in the area is not in dispute. Rather, the issue at hand is to what extent the Saami people should have to endure competing non-Saami activities on their traditional territories.

The Norwegian 1978 Reindeer Herding Act stipulates that Norwegian courts shall weigh Saami and non-Saami interests in case of a conflict as to the use of land that the Saami people have traditionally utilized. Similarly, the Swedish 1971 Reindeer Herding Act stipulates that owners of traditional reindeer herding land must not engage in activities which seriously hamper the possibility of pursuing reindeer husbandry in the area, and the Finnish 1990 Reindeer Herding Act stipulates that title holders to designated reindeer herding areas must not utilize the land in a manner that substantially prevents the possibility of pursuing reindeer husbandry. This is the law in principle. The problems arise when non-Saami courts and administrative authorities put the law into practice. When applying this legislation, non-Saami courts and administrative authorities generally fail to acknowledge the Saami people's customary way of using land, waters, and natural resources.

In the so called *Ailegas* case (1986),²³⁷ the Norwegian Supreme Court held that the interests of the Saami parties had to give way for the interests of the Norwegian national telecommunication operator, because “merely” one percent of the reindeer herding district's summer grazing areas were affected by the project. As illustrated above, however, a very small piece of land can be of vital importance to continued reindeer husbandry in an area. It may be particularly rich in pasture, rendering it impossible to simply switch to another area. Further, when migrating between the winter and summer pasture areas, the reindeer depend on the pasture in a particular resting area, if only for a few days, and even if the area in question make up merely a fraction of the reindeer herding community's total pasture areas. The Norwegian Supreme Court disregarded these fundamental requirements for reindeer husbandry in the *Ailegas* case. In addition, the outcome of the case can be further explained by the fact that when supposed to balance the interests of the Saami and non-Saami society, the Supreme Court looked at potential harm to the artificial reindeer herding district constructed by the non-Saami society, rather than the effects on the Saami society as it is structured in reality. Had Norwegian legislation reflected Saami customary land management law, the Supreme Court might have been able to see that the development project will have detrimental effects on the particular reindeer herders in the area (even though it perhaps has no impact on other parts of the

237. Supreme Court Case Rt. 1986, at 364; see also Rt. 2000 at 1578, where the Supreme Court reached another conclusion.

artificial reindeer herding district).

On the Swedish side of *Sápmi*, administrative authorities have not refused on one single occasion forestry companies the right to deforest Saami traditional pasture areas. That is so even though the authorities are supposed to strike a balance between the Saami and non-Saami interests, and stop logging activities that seriously hamper the ability to pursue reindeer husbandry in the area.²³⁸ Further, forestry companies are supposed to consult with affected Saami communities before entering into major deforesting projects. However, these consultations have had no significant effect on the impact of forestry activities on the reindeer husbandry. For example, in 2002, an administrative Court of Appeal allowed logging in a vital part of the local reindeer herders' pasture areas.²³⁹ Although recognizing that the surrounding areas were already significantly marked by deforestation, the Court held that further logging would not significantly negatively affect the reindeer herding. According to the Swedish administrative Court, the area was not that important to reindeer herding, since the reindeer herders could move their reindeer to other pasture areas. The area in dispute is used for pre-Christmas pasture (i.e., during early winter before the reindeer are moved to the permanent winter pasture areas further east). The area is at a lower altitude than the surrounding areas, offering the lower snow-depth that is essential to allow the reindeer to find pasture. As can be seen from cases mentioned above, continued reindeer husbandry depends on all pasture areas used during the yearly cycle. It is not possible simply to move the reindeer hundreds of kilometers to another area. The forest area in dispute constituted less than one percent of the company's forest holdings. Still, the Court held that the interests of the company overrode the interests of the reindeer herders.²⁴⁰

Similarly, on the Finnish side of *Sápmi*, even though the 1990

238. Which a Swedish government investigation has also acknowledged. See *En ny rennärringspolitik – öppna samebyar och samverkan med andra markanvändare*, BETÄNKANDE AV RENÄRRINGSPOLITISKA KOMMITTÉN SOU 2001:101, at 235, 239.

239. See Administrative Court of Appeal (*Kammarrätten i Sundsvalls*) ruling no. *Mål nr 2000 s. 1349-1355*.

240. This is only one of several examples of excessive logging in the traditional Saami territories, seriously hampering the ability to maintain and develop the traditional Saami livelihoods. Excessive logging has resulted in diminishing winter pasture areas for the reindeer husbandry. Winter pasture areas are particularly essential to continued reindeer husbandry. The access to winter pasture is for most Saami communities more scarce than summer pasture (i.e., winter pasture is normally the bottleneck for reindeer herders). Decreased winter pasture areas imply decreased reindeer herds, and consequently that persons of Saami origin have to give up their traditional way of life. During the last couple of years, the interests of the reindeer herders have over and over been forced to give way to the interests of the forestry industry, as also acknowledged by the government's own investigation. See *En ny rennärringspolitik – öppna samebyar och samverkan med andra markanvändare*, BETÄNKANDE AV RENÄRRINGSPOLITISKA KOMMITTÉN SOU 2001:101, at 230. Like their Norwegian counterparts, Swedish non-Saami courts, when entrusted with the task to balance the interests of two societies, look at the Saami society as described, or even "reconstructed" by non-Saami legislation, rather than at how the Saami society is structured in reality and operates in accordance with its own customary norms.

Reindeer Herding Act should protect reindeer husbandry from competing activities that prevent the continuation of reindeer husbandry, in practice, reindeer herding and other traditional Saami livelihoods regularly have to give way to competing interests.

Activities such as drilling for oil and gas, mining, tourism, and military activities also often infringe on the Saami people's traditional land and waters, and the customary use thereof. Norway is preparing the drilling of gas in the counties Nord-Troms and Finnmark, in the heart of the Saami traditional territory. The area is of significant importance to the livelihood and culture of the Saami population inhabiting the area, and the project will have a major impact on the environment and thus on the Saami culture and society. Mining has also seriously hampered the possibility of pursuing the traditional Saami livelihoods – particularly reindeer husbandry – in various parts of *Sápmi*.

Regardless of all these hardships, the Saami people have managed to preserve and continue to practice substantial parts of their customary legal system relating to land, waters, and natural resources management. Should the Saami culture manage to survive over a longer perspective, however, there is a need to analyze the conflicts at hand and to come up with solutions to mitigate those conflicts.

VI. CONFLICTS: A SUMMARY

The conflict that has been outlined above is basically a conflict between two societies with two different views on land, water, and resources management and two separate legal systems responding to the different views and needs of the separate societies. As has been described above, the conflict manifests itself in various forms.

First, when the non-Saami societies began regulating the traditional Saami livelihoods in the late 1800s, they chose a legal structure that did not correspond with the structure of the Saami society, but that rather required that the Saami livelihoods adapt to the structure of the non-Saami society. The conflict between non-Saami legislation and the Saami people's organization of their traditional livelihoods renders it difficult, or even impossible, for the Saami people to apply their own customary land management law. The closing of national borders, and the following forced relocation of the Saami population, have added to the problem. When the *siidas* lost their own traditional grazing areas, or when other Saami communities moved into the areas, the Saami population were forced to utilize land areas that under Saami customary laws "belonged" to another *siida*.²⁴¹ Sometimes, these conflicts are unnecessary, and could have been avoided with little or no cost for the non-Saami society, as exemplified by the newly proposed Norwegian Reindeer Herding Act.

241. To make matters worse, conflicts arising out of such shrinkage of land sometimes cause the non-Saami society to draw the conclusion that the Saami people lack a functioning system for division of rights and conflict resolution. See Ström Bull, *supra* note 28, at 242.

Second, the lack of respect for, and understanding of, Saami customary land use and land management law often results in the Saami people being denied recognition of the right to their traditional lands in court proceedings. The *Korssjoffell*, *Aursunden*, and *Reindeer Grazing* cases reflect a still prevailing sentiment among the Fennoscandinavian courts that the Saami nomadic lifestyle does not give rise to a legal right to land.²⁴² Moreover, or maybe as a result of this, non-Saami courts have failed to take the particularities of the Saami society into account in their rulings. As a consequence, it has been virtually impossible for Saami parties to succeed in conflicts with the non-Saami society over what constitutes traditional Saami land. Because Saami customary land management law is indistinguishable from the use of land, non-Saami courts' failure to acknowledge the requirements for the Saami traditional livelihoods results in the destruction of Saami customary law. Hopefully, the *Selbu* and *Svartskog* cases signal a shift toward increased recognition of the particularities of the Saami society and customary law.

Third, even when a certain land area is recognized as traditional Saami land, competing non-Saami activities often prevent Saami customary land management in the area. Non-Saami courts' and administrative authorities' failure to acknowledge the requirements for the traditional Saami livelihoods results in infringements on the Saami lands and prevents the Saami people from managing its traditional land, waters, and natural resources in accordance with its customary law. As shown by, for example, the *Ailegas* case, these infringements are sometimes exacerbated by the artificial structuring of Saami traditional livelihoods in order to fit better with the non-Saami society. When required to weigh the interests of the Saami and non-Saami society, non-Saami courts measure the harm to the Saami society as "reconstructed" by non-Saami legislation, rather than trying to understand how the Saami society operates in reality under its own customary laws.

The non-Saami societies' destruction of Saami customary law is, to a substantial extent, made possible by the fact that Finland, Norway, and Sweden continuously disregard the possibility that the Saami people have indeed acquired legal title to their traditional land. This perception emerged with the cultural hierarchy theories. Today, these theories are regarded as scientifically false. Still, the idea they brought with them – that the Saami

242. Adding to the problem, legislators and national courts qualify customary law as a norm that must have been observed for a specific period of time or since a specific date. The courts in the *Korssjoffell*, *Aursunden*, and *Reindeer Grazing* cases held that a particular grazing area must have been utilized for as much as one hundred years for the Saami people to acquire legal right thereto, even though it is widely acknowledged that a rational reindeer husbandry demands a change of grazing areas once in a while. The test of whether a rule of conduct qualifies as a customary law cannot be subject to such a technical rule. Moreover, as outlined above, customary laws may be in a state of change, responding to modernization in the societies in which they are observed or changes in the surrounding environment, with new norms emerging and other disappearing, as states, too, amend statutory law in response to development in the society. The requirement should rather be that a norm is observed at the particular time when its existence is in dispute. See C.K. ALLEN, *LAW IN THE MAKING* 133-35 (7th ed. 1964).

people have no legal right to their traditional land – remains an undisputed fact among the non-Saami authorities. The same is true for the right to the traditional Saami livelihoods of hunting and fishing.

Regardless of all the obstacles raised by the non-Saami societies, the Saami people continue to aspire to live in accordance with their own customary laws, to the greatest extent possible. However, in addition to all the impediments outlined above, it is onerous for the Saami people to live in legal pluralism, torn between obeying non-Saami laws and their own perception of right and wrong. The present order puts the existence of the Saami people's culture – including their customary law – in danger. There is an urgent need for remedies.

VII. RECOMMENDATIONS

The problems outlined above can be remedied to a substantial extent if the non-Saami societies erase the remnants of the cultural hierarchy theories and stop treating the Saami people as individuals belonging to an ethnic minority. In order to adequately address the conflict between the Saami and non-Saami legal systems, the non-Saami societies must: (1) recognize the Saami people as a people, equal in dignity and rights to their neighboring peoples, which in turn implies that the Saami legal system is equal in value to the non-Saami legal systems; (2) fully acknowledge that the Saami people's way of life might indeed give rise to legal rights to their traditional land, waters, and natural resources; (3) recognize the particularities of the Saami traditional livelihoods in conflicts between the Saami and non-Saami societies as to use of land; and (4) harmonize their legislation with the corresponding Saami customary laws in instances when there is no real need for conflict.

For many years, the question of what is meant by the term "peoples" – in the context of rights of peoples – was one of the most debated issues in the United Nations and elsewhere in the international community.²⁴³ In the 1960s and 1970s, most international actors appear to have been of the opinion that the term "peoples" simply meant the total of the inhabitants of a state.²⁴⁴ With time, however, it has become increasingly evident that this is not a valid interpretation of the term "peoples" under international law. Today, it is sufficiently clear that a state can consist of more than one people, and that one people can inhabit more than one state.²⁴⁵ It is equally clear that an

243. It lies outside the scope of this Article fully to outline the right of peoples under international law. To understand the recommendations below, however, a brief recapture of this debate is necessary.

244. The reader should be aware of, however, that also during this period, a number of countries (e.g., Germany (then West Germany), France, and the Netherlands) seem to have held a different opinion on this issue. It lies beyond the scope of this Article, however, to outline this debate in detail.

245. *See, e.g.*, G. A. Res. 1541, U.N. GAOR, 15th Session, Supp. No. 16 at 29, U.N. Doc. A/4561 (1960), at note 15; U.N. Hum. Rts. Comm., General Comment 12 (21), at ¶ 3, 21st Sess. (1984). For an extensive elaboration on who constitutes a people under international law, see also Supreme Court of Canada decision re

indigenous people can constitute a “people” under international law (e.g., under Article 1 of the Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic Social and Cultural Rights (CESCR)) and can also otherwise enjoy rights as a people.²⁴⁶ For example, the Human Rights Committee has confirmed that the Saami people are such a “people.”²⁴⁷

As a “people,” the Saami people are equal in dignity and rights to the neighboring non-Saami peoples. To treat the Saami people any differently would violate the fundamental principle of non-discrimination. Finland, Norway, Russia, and Sweden must acknowledge the practical consequences of the fact that they are each a state based on the territory of two “peoples.”²⁴⁸ Even though, in principle, recognizing the Saami people as a people, they have all failed to put this recognition into action. Indeed, the fact that these countries fail to treat the Saami people as a “people” is the major reason for the problems outlined above.

Equal in rights, the Saami people have the same right to self-determination as the non-Saami peoples, with whom they today, to a substantial extent, share their traditional territories.²⁴⁹ An integral part of the right to self-determination is the right to have their own legal system recognized and applied, because legal norms constitute a central part of the system through which a people govern its society. Consequently, the Saami people have the right to have their customary legal system recognized as equal to the non-Saami legal systems. Any other policy is discriminatory. As described above, the fact that the norms in the Saami legal system might be less concrete, built on a consensus decision-making system, and leave more room for negotiations between the parties in dispute than the non-Saami statutory law, does not mean that the non-Saami legal system *per se* shall have priority over the Saami legal system. Nor does the nomadic, or semi-nomadic, lifestyle of the Saami people give the non-Saami societies the right to disregard Saami customary land management law.

Non-Saami authorities’ refusal to acknowledge the Saami people as a people results in the Saami society losing virtually every conflict with the non-Saami societies as to the right to land, waters, and natural resources. By viewing the Saami population solely as a group of individuals, the non-Saami governments put the Saami parties in the position of having to fight every conflict under a law that is not theirs, in a court constituting a part of the legal

secession of Quebec [1998] 2 S.C.R.

246. *See, e.g.*, U.N. Human Rights Committee’s Concluding Observation regarding Canada (U.N. Document CCPR/C/79/Add. 105/1999) and Australia (UN Document CCPR/CO/69/AUS, para. 506-509).

247. *See, e.g.* the U.N. Human Rights Committee’s Concluding Observations regarding Norway (U.N. Document CCPR/C/79/Add.112/1999) and Sweden (U.N. Document CCPR/CO/74/SWE).

248. In fact, several indigenous peoples reside within the borders of present-day Russia. The Russian Federation is consequently a country established on the territory not of two, but several, peoples.

249. Finland, Norway, and Sweden have all also confirmed that the Saami people are entitled to the right to self-determination. The Russian Federation has not objected to the existence of a right to self-determination for indigenous peoples in the negotiations on the U.N. Declaration on the Rights of Indigenous Peoples.

system of the counter-party, and which is staffed with judges that rarely demonstrate any desire to understand the prerequisites for the Saami way of life or legal thinking. Not recognizing the Saami people as a people with their own customary land management law effectively guarantees the non-Saami societies' continuous control over the Saami people's land and natural resources. Only if the Saami people's customary legal system is viewed as equal to the non-Saami legal system – in theory as well as in practice – can the Saami people and individuals be equal with the non-Saami peoples and individuals in matters concerning the right to land, water, and natural resources.

Those who regard two parallel legal systems as somewhat futuristic and radical should recall that as late as 1817 Swedish law stipulated that cases where title holders claim compensation for alleged damages caused by reindeer grazing on their land should be settled by Saami courts. Moreover, and more importantly, the Saami legal system was at one time regarded as distinct and applied in parallel to the non-Saami legal systems. This system with dual legal systems appears to have operated smoothly. In any event, such a position can hardly be viewed as any more radical than the position taken by Finland, Norway, and Sweden, refusing to amend the policies adopted during the racist cultural hierarchy theories era.²⁵⁰ Acceptance of the Saami people's customary legal system is an essential element in finally adequately addressing *Sápmi's* colonial past, and putting an end to cultural hierarchy policies.²⁵¹

250. The recent exceptions are the newly proposed Norwegian Reindeer Herding Act and the *Selbu* and *Svartskog* cases. However, the proposed Finnmark Act signals a return to the old position.

251. The discussion above could be seen in light of the intensive discussions during the last couple of years over whether indigenous peoples are entitled to collective human rights (i.e., whether indigenous peoples, as such, can be subjects under international law). U.N. bodies such as the Human Rights Committee, an overwhelming majority of international legal experts, as well as the vast majority of states, now acknowledge that international law recognizes indigenous peoples' collective human rights. One can note, however, that Sweden is still an exception. In that sense, indigenous rights distinguish themselves from the rights of minorities, which are individual in nature. The problems outlined in this section can be viewed as good examples of why international law relating to indigenous peoples focuses so strongly on the collective aspect of their human rights. Many of the problems that indigenous peoples wrestle with are a result of the group (i.e., the people) being under attack, rather than the individuals belonging to the group. The injustices indigenous peoples are subjected to can be attributed to discrimination of the people as such. Therefore, the remedies applied to correct such injustices have to be directed towards the people as such, rather than towards individual members of the people. The just stated is very true also for the situation of the Saami people. It is the institutionalized form of discrimination that the Saami people are subject to that causes the most severe and fundamental problems for the Saami population. This form of discrimination occurs because Finland, Norway, and Sweden, even though formally having recognized the Saami people as a people, in practice continue to have difficulties with implementing measures that put this formal recognition into effect. Recognizing indigenous peoples' collective rights is a prerequisite for ending the discrimination they are subjected to, and, in the case of the Saami people, to extinguish the remnants

Applying the non-Saami legal systems in a more equitable manner can never result in equal treatment between the Saami and non-Saami interests as to the right to land. It can, however, remedy some of the problems discussed above. The Saami people are the indigenous people of *Sápmi* – the Saami population were the first settlers in their traditional territories.²⁵² Non-Saami law recognizes occupation as a means to acquire legal title to land. As the first settlers, the Saami population must reasonably have had every chance to acquire legal rights to their traditional land, also under non-Saami law. Still, in court proceedings, non-Saami courts constantly find in favor of the non-Saami parties. How is it possible that the Saami population, at one point the sole inhabitants of *Sápmi*, have not managed to acquire legal rights to any part of the Saami traditional land? True, in the late 1800s and early 1900s, non-Saami courts were heavily influenced by cultural hierarchy theories, holding that nomadic land use does not give rise to legal rights to land. But today, these theories have been discarded as scientifically false, and it has been confirmed that Saami traditional land use can indeed give rise to legal rights to land. Why is it then that the Saami parties still constantly lose in disputes over the right to land, even though as confirmed first inhabitants of the territories in dispute, they should reasonably have an advantage over their counter-parties?

Of course, the fact that the law applied is non-Saami law puts the Saami parties at a disadvantage. Still, this cannot be the only reason for the Saami parties' poor record, because the non-Saami legal systems do acknowledge occupation as a means to acquire right to land. The author suggests that the reason for the Saami parties' failure in proceedings in non-Saami courts is that even though no authority today would claim that the Saami culture is inferior to the non-Saami cultures, the policy towards the Saami people continues to be based on the assumption that the Saami people have no legal right to their traditional land.²⁵³ This position is taken even though the relevant countries (1) agree that the Saami population were the first to inhabit *Sápmi*; (2) admit in principle that nomadic land use can indeed give rise to legal rights to land; and (3) have previously recognized that the Saami people own their traditional lands. The courts have apparently shared their governments' presumption, at least until the very recent exceptions on the Norwegian side of *Sápmi*.

When Finland, Norway, and Sweden developed an increased interest in the Saami people's land, waters, and natural resources during the 1800s, the cultural hierarchy theories assisted them to "morally" justify the confiscation of the Saami people's land. *Sápmi* is still extremely rich in natural resources, such as oil, gas, water, iron, and gold, and also in traditional Saami natural resources such as timber, hunting, and fishing. These resources continue to be of great importance to the economies of Finland, Norway, and Sweden, in addition to these areas being of great recreational value. Non-Saami

of the cultural hierarchy theories.

252. As mentioned above, even though some – commonly for political reasons – have previously argued against the statement that the Saami population were the first settlers in the whole of *Sápmi*, it is now increasingly becoming an undisputed fact.

253. See Korpijaakko-Labba, *supra* note 50, at 73(f).

politicians, particularly those living in *Sápmi*, often claim that it would not be “fair” if the Saami people had particular rights to these resources. Thus, in addition to the cultural hierarchy theories, non-Saami interests in the Saami people’s land and the surface and sub-surface natural resources continue to be a driving force in the policies aimed at the Saami people. This deprives the Saami people of the foundation for their culture and destroys the Saami people’s ability to apply and develop its own customary land and resource management law.

Hopefully, the *Selbu* and *Svartskog* cases signal a shift in attitude in non-Saami courts, when ruling on whether a particular land area constitutes traditional Saami land. In particular, it is important that other courts allow themselves to be guided by the burden of proof applied by the Norwegian Supreme Court in the *Selbu* case, and acknowledge (even though perhaps not always directly applying) Saami customary land management law. Such receptiveness is also important in conflicts when it is not disputed that the land area in question constitutes traditional Saami land, but when extractive industries and development projects compete with traditional Saami livelihoods. In these cases, non-Saami courts and administrative authorities must take the basic requirements for traditional Saami livelihoods into account in all their rulings and decisions. They must detach themselves from the perception that non-Saami activities always have precedence over the interests of the Saami society. Further, when balancing the conflicting interests, courts and administrative authorities must recognize that the prerequisites for Saami traditional livelihoods, and thus Saami customary land management law, differ from the norms in the non-Saami society.

We have further seen that non-Saami regulations sometimes unnecessarily conflict with Saami customary land management law, which also contributes to the weakening of the Saami people’s own legal system. Non-Saami societies should review all their legislation and eliminate unnecessary clashes with Saami customary law. The proposed revision of the Norwegian Reindeer Herding Act, recognizing that the reindeer herding district and unit system conflicts with the Saami customary *siida* system, can be viewed as a positive example in this regard. Similarly, present national borders disrupt Saami customary land distribution law. The relevant countries should be able to open up their borders because it should be irrelevant to the non-Saami peoples which reindeer graze certain part of *Sápmi*.

How then, should the recommendations above, be implemented in practice? As evident from the problems discussed, to a certain extent it is merely a matter of a change of mind. Non-Saami governments, law-makers, courts, and administrative authorities must recognize that their entire policy concerning, as well as their own perceptions of, the Saami people and their rights were shaped during an era dominated by theories that none of them would subscribe to today. Still, sometimes consciously – but surely equally often subconsciously – the laws and policies directed at, and the perception of, the Saami culture, spring from this time. It is time to formulate Saami policies and politics that are not based on the perception of the Saami culture as inferior to the non-Saami cultures.

Other problems, however, are not that easily remedied.

Acknowledging the Saami people as a “people” will require recognition that the Saami people’s right to self-determination implies some degree of independence within national borders. An implementation of the Saami people’s right to self-determination demands that the states define fields of activities over which they will not seek to exercise jurisdiction. They must leave the control in these areas to the Saami people’s institutions to make decisions – in accordance with the Saami people’s own customary legal system. This reasonably includes a re-introduction of Saami conflict resolution bodies.²⁵⁴ A re-introduction of Saami conflict resolution bodies would come close to what is sometimes referred to as “institutional” recognition. Recognition occurs if state legislation includes provisions requiring its own judicial and administrative bodies to give effect to the norms of the non-state customary legal system (normative recognition), or incorporates the institutions of the people in minority within its own institutional structure (institutional recognition). Both normative and institutional recognition could complement the implementation of the right to self-determination in remedying the problems outlined above.

Regardless of what method is used to remedy the problems, any solution must be based on the recognition that the Saami culture and the Saami legal system, is equal in value to the non-Saami cultures and legal systems. Further, the fact that the application of customary Saami land management law might result in a land and resource distribution that has financial implications for, and may be burdensome to, the non-Saami society, is not a reason to side-step the rule of law.



254. It would thus be very interesting to see an experiment where the Tana court, described above, is more than a Norwegian court where the officials master the Saami language.