

8 **The implementation of Sámi land rights in the Swedish Forestry Act**

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1. Introduction

The protection of the rights of the Sámi people to land in forest areas is elemental for guaranteeing human rights and promoting a sustainable and equitable use of forest areas. As widely recognised in international law, respect for the land rights of Indigenous peoples is both significant for preserving the livelihoods of communities and instrumental to sustainable development and a sound management of forest.¹ When the international community agreed on 17 Sustainable Development Goals (SDGs) in 2015, the preconditions and needs of Indigenous peoples were explicitly acknowledged.² Since access to land and resources is crucial for the survival of Indigenous peoples, securing their title to land should be a central part of the implementation of the SDGs.³ In international law, this is declared in Article 26 of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), where it is stated that Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. It is further stated that Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. Article 26 of the UNDRIP further stipulates that states should give legal recognition and protection to these lands, territories and resources. Article 32 of the UNDRIP also stipulates the obligation to consult Indigenous peoples when development projects affect their land and natural resources. Hence, a crucial aspect of the realisation of sustainable development is the recognition and protection of Indigenous land rights within the various national legal systems.

In Sweden, reindeer herding and the access to reindeer-grazing lands in forest areas is fundamental for the Sámi culture.⁴ In 1977, the Swedish Parliament recognised the Sámi as an Indigenous people,⁵ and since 2011, a specific section in the Swedish Constitution states that the Sámi people's opportunities to maintain and develop their own cultural and community life shall be promoted.⁶ The provision aims to express that the Sámi people is regarded as an Indigenous people, and that reindeer herding is a central part of the Sámi culture.⁷ In addition, the reindeer-herding Sámi have land rights on their traditional territories, and these rights are

recognised as private property rights.⁸ At the same time, the forest areas in which most of the traditional land of the Sámi is situated are owned by private landowners. Hence, parallel property rights exist on the same land, namely, the right of the Sámi to use the land and those of landowners, which include their rights to exploit the forest as regulated through the Forestry Act (1979:429).

However, with an increasing number of conflicts between Sámi communities and landowners over the use of forest areas, it is questioned whether the Swedish legal system is adequately protecting the rights of the Sámi Indigenous people to land and natural sources.⁹ In fact, even if the Indigenous status of the Sámi people is declared in the constitution and even if Sweden is a country with high standards in the fulfilment of human rights, the implementation of Sámi land rights has been highly controversial.¹⁰ Sweden has so far not ratified the ILO Convention No. 169, which is the central treaty in relation to Indigenous peoples.¹¹ And when UNDRIP was adopted in 2007, the Swedish government declared that it must maintain a balance between competing interests of different groups living in the same areas and that ‘Article 28 of the UNDRIP does not give the Sámi people the right to redress for regular forestry by the forest owner’.¹² This statement displays the complex legal and political situation that prevails on a national level when it comes to the implementation of Sámi land rights. The state’s position can be explained by the economic value that natural resources, particularly forest and minerals have for landowners, private companies and the nation as such. It is feared that implementing Sámi land rights would hinder the current extensive use of natural resources.¹³ As a result, the political system has so far failed to strengthen the protection of Sámi land rights, despite the criticism from international human rights institutions.¹⁴

This chapter analyses and discusses the recognition and protection of Sámi land rights in the Swedish Forestry Act. It explores to what extent Sámi land rights have been recognised and implemented in the forestry legislation and to what extent Sámi reindeer herders can influence decisions about how forest areas are utilised, to ensure their ability to use the land for reindeer herding. In summary, the chapter argues that the Forestry Act does not provide an adequate protection of the land rights of the Sámi. On this account, the following chapter is divided as follows. First, the chapter describes the land use conflict between reindeer herding and forestry. Second, an analysis of the development of the rights of the Sámi people to land in Sweden is provided. Third, the chapter focuses on the Forestry Act and the way that the relation between forestry and Sámi reindeer herding is regulated. Specifically, the analysis explains how the Forestry Act fails to protect Sámi land rights. In the conclusion, the chapter also proposes reforms in the legislation to improve the legal situation to provide better protection to the land rights of the Sámi.

2. Reindeer herding, forestry and parallel property rights

Since the inland ice melted about 10,000 years ago, reindeer have migrated between different land areas in what is now the northern parts of Sweden. Eventually, the Sámi started to domesticate the reindeer, and over time, reindeer herding

evolved.¹⁵ Today, reindeer herding constitutes a vital part of the traditional Sámi subsistence system and the Sámi culture.¹⁶ Reindeer herding is also a carrier of traditional knowledge and language. Reindeer owned by Sámi reindeer herders graze in the mountain areas and the boreal forests, migrating between different seasonal grazing areas. Access to pastures, connectivity and diversity of pasture areas, and peaceful grazing without disturbances from human activities and predators are key aspects within reindeer herding.¹⁷ Some 50% of Sweden's land surface is subject to reindeer herding,¹⁸ and a large part of this area consists of forestland. During the snow-free period of the year, reindeer graze on a wide range of plants.¹⁹ During the winter, reindeer survive by feeding primarily on lichens, which they find under the thick snow cover and dig for with their large hooves. Arboreal lichens growing on the tree stems and branches also contribute to their diet during winters, especially when thick or icy snow prevents them from digging.²⁰ Access to winter-grazing grounds is generally the primary limitation on reindeer herding in Sweden since it is decisive for how many reindeers that can be held by the Sámi.²¹ In other words, to continue reindeer herding in the future, access to large forest areas for grazing is a precondition.

During the last decades, intense forest management practices have had predominantly far reaching negative effects on reindeer herding.²² Although Sweden is a country with large forest areas, forestry have increasingly caused loss and fragmentation of grazing areas.²³ Clear-cutting and soil scarification make the ground lichens difficult for the reindeer to access and feed on. Moreover, a decreasing proportion of old forests in the landscape limits the supply of pendant lichens. Fragmentation of the landscape caused by forest roads and clear-cuts makes it also more difficult for the herders to move and keep the reindeer herds together. An additional problem is the choice of replantation method within forestry, where tree species like *Pinus contorta* are causing problems for reindeer grazing.²⁴ In addition to forest activities, Sámi reindeer herding is carried out in parallel with other land uses, such as mining, hydroelectric power, wind energy, outdoor life and tourism. During the last decades, these competing land uses and climate change have limited the grazing areas and the space for adaption.²⁵

In Sweden, a large number of private landowners, both large forest companies and individuals, own the forest areas. Accordingly, land ownership is a parallel property right to land to the Sámi land rights in the northern parts of Sweden. Landownership includes the right to carry out forestry, and forest management is primarily regulated through the Forestry Act.²⁶ In the Forestry Act, there are specific sections stipulating how the landowner should consider the needs of reindeer herding when carrying out forestry.²⁷ Hence, the meaning of the Forestry Act is relevant for Sámi reindeer herding and the implementation of Sámi land rights.

In parallel with the Forestry Act, the voluntary certification systems Forest Stewardship Council (FSC) and Programme for the Endorsement of Forest Certification Schemes (PEFC), regulate how forestry can be conducted by the landowners that have chosen to be affiliated. In both systems, there are rules regarding the considerations that should be taken in relation to Sámi reindeer herding when logging is carried out. According to the Swedish Constitution, the state is responsible

for regulating private law relationships (Instrument of Government [1974:152], Chapter 8, Article 2, Section 1). Since the Swedish state has no influence over the voluntary certification systems, an analysis of the certification schemes falls outside the purpose of the chapter. In the next sections, the chapter therefore examines the content of the Sámi rights to land and to which extent these rights are protected under the Forestry Act, which is the most relevant legal framework for governing relations between Sámi reindeer herders and landowners in the use of forests areas.

3. The historical context and the development of Sámi land rights

The complex legal situation of today, with parallel property rights to the same land, can only be understood in the light of historical events and measures taken by the Swedish Crown, such as the colonisation of the northern areas and the demarcations processes (Swe: *avvittringar*) carried out. Up until the middle of the 18th century, forest areas in the inland of the northern parts of Sweden, were mainly used by nomadic Sámi for, e.g., reindeer herding, fishing, hunting and gathering.²⁸ The present situation with parallel land rights is the result of a colonisation process when the Crown encouraged people to move into these northern areas during the 18th century, for instance, by providing tax reductions.²⁹ Through the colonisation and the demarcation processes, forestlands became private property.³⁰ These processes were carried out to separate private land from the land that was governed by the state and meant that forests were divided between private landowners and considered as private property.³¹

As the importance of forestry increased and the value of forest grew, governmental control over the logging became tighter. During the first half of the 20th century, forestry became more and more industrialised, and the way logging was carried out changed and intensified.³² From the 1950s, clear-cutting became the dominant logging method. This means that all trees in a stand are felled and replaced with new trees plants. Clear-cutting has affected the reindeer-grazing lands negatively.³³

The conflict of interest between forestry and reindeer herding has been known and handled by the state for more than 100 years.³⁴ However, for a long period there was no legislation that regulated the conflict. It was not until 1991 that special provisions about the consideration to reindeer herding were implemented into the Forestry Act, to strengthen the protection of the Sámi reindeer herding.³⁵

Another reason for today's complex legal situation is that the Swedish state's attitude towards Sámi land rights has varied over time. During the end of the 19th century, the Swedish state considered reindeer herding to be based on customary rights.³⁶ However, in the beginning of the 20th century the Swedish state began to express the view that Sámi land use was based on what was termed as the 'the Lapp privilege',³⁷ meaning that the law was the foundation of the right to use land and that the state could regulate Sámi land use through new or amended legislation.³⁸ Sámi representatives opposed the state's position and claimed that they were holders of real property rights and that these rights were older than the Swedish settlers, and that this had to be acknowledged.³⁹ Thus, the status of Sámi land rights came to be under dispute for most of the 20th century. The described unclear judicial

situation has affected the legal situation of today since the applicable legislation is still based on the understanding that Sámi land use is based on ‘the Lapp privilege’.

Today, one of the most important legislations regulating the right to land of the Sámi people is the Reindeer Herding Act (SFS 1971:437), which regulates how reindeer herding can be carried out. Reindeer herding is practiced in 51 so-called Sámi reindeer-herding communities (RHC; Swe: *sameby*).⁴⁰ Each RHC is a legal entity, constituting a geographical area, a form of economic association and a social community between the RHC members.⁴¹ The Reindeer Herding Act divides reindeer-grazing land into year-round grazing land, where reindeer herding can be carried out the entire year, and winter grazing land, where reindeer herding can be carried out only during the winter period.⁴²

While the Reindeer Herding Act provides the main framework for governing reindeer-herding activities, other legislation, such as the Forestry Act and Mining Act (1991:45), also affects reindeer herding and how Sámi land rights can be carried out. However, even if there is legislation of relevance, it is primarily through case law that the meaning of Sámi land rights have developed during the last decades. Case law has clarified that Sámi land rights are based in the longtime use of land and that they are private property rights.⁴³ This was first elucidated in 1981 by the Swedish Supreme Court in the *Taxed Mountain* case (Swe: *Skattefjällsdomen*). In 1966 several RHCs and individuals in the province of Jämtland sued the Swedish state and claimed full ownership rights to the property in dispute, located in the taxed mountains. They also claimed different limited rights to the same areas. The Swedish state maintained that the state was the owner of the areas in dispute and that the Sámi only held special rights stated in the Reindeer Herding Act. In this regard, the Supreme Court came to the conclusion that the Sámi part had not proven that it was the owner of the area. At the same time, the court also clarified the legal nature of the reindeer-herding right as based on the longtime use of land through the judicial concept of *immemorial prescription* (Swe: *urminnes hävd*) and, therefore, not dependent upon a statute for its existence.⁴⁴ Furthermore, the Supreme Court also concluded that this right was a civil-law-based right, protected by the Constitution as private property against coercive measures without compensation, in the same manner as land ownership.

In 2011 the Supreme Court confirmed in the *Nordmaling* case that the right to graze reindeer in the coastal area was based on the longtime use of land as customary rights.⁴⁵ A large number of landowners had sued three RHCs in the province of Västerbotten and claimed that they had no right to graze their reindeer on the land of the landowners during the winter. Hence, the legal question at stake was whether the RHCs had the right to winter pasture on the properties concerned. The RHC's claim that they had land rights to winter grazing was approved by the Supreme Court. This court case therefore confirmed the legal status of Sámi land rights as private property rights.

More recently, the *Girjas* case in 2020, about the right to small game hunting and fishing in the high mountain areas, has also clarified that Sámi land rights include a right to decide on land use that is not recognised in the Reindeer Herding Act.⁴⁶ In 2009, the Girjas RHC, supported by the reindeer-herding organisation

SSR and all RHCs, sued the Swedish state and claimed exclusive hunting and fishing rights in relation to the state on land governed by the state. Based on the longtime use of land, the Supreme Court found that the Girjas RHC has the right to decide on licenses to hunt and fish in the area, even if this is explicitly prohibited in Section 31 of the Reindeer Herding Act. In the judgment, the Supreme Court also clarified that international Indigenous peoples law is of relevance when courts and public authorities are making decisions that concerns Sámi land use.⁴⁷ From this perspective, the *Girjas* case is a landmark case that has elucidated the need for changes in the legislation to implement and secure Sámi land rights.⁴⁸ As a consequence of the judgment, the Swedish government has appointed a public commission to propose changes in the legislation regulating reindeer herding and other forms of Sámi land use.⁴⁹

To sum up, it is clearly elucidated within the Swedish legal system through case law that Sámi land rights are private property rights, protected by the Constitution through the Instrument of Government, Chapter 2, Article 15. This means that the RHCs and the Sámi reindeer herders have the right to use land for reindeer grazing, the right to make decisions about land use and the right to benefit economically from resources located on those lands. Yet as the next section demonstrates, these rights are not fully protected in the Swedish Forestry Act.

4. The Forestry Act and the protection of reindeer herding: public interest and property rights

4.1 Public interests and private property rights

Sámi reindeer herding is a public interest that shall be regarded when logging is carried out, and at the same time, reindeer herding is based on private property rights. In this section, these two legal elements within Swedish real estate law—public interests and private property rights—are described. When a legal assessment is carried out, it is necessary to distinguish these legal elements from each other since they have different functions within the legal system. Section 4.1 describes the different legal functions of public interests and private property rights. In section 4.2 the dimension of reindeer herding as a public interest in the Forestry Act is analysed, and section 4.3 analyses if Sámi land rights have been recognised and implemented in the Forestry Act in a relevant way in correspondence with their character as property rights.

The Forestry Act is primarily a public law statute, foremost governing the relationship between the Swedish state and the landowner, and the focus is on administrative measures to govern forests and its use. The Swedish Forestry Agency is supervising that the forestry legislation is properly applied by the landowner.⁵⁰ In this regard, the purpose of the Forestry Act is to govern the forest and its competing uses, some of which are designated as public interests such as timber production and reindeer herding.⁵¹

The legal element ‘public interest’ is a method to designate general values and needs that are important from a societal perspective, and that should be evaluated

when land use measures are planned and carried out.⁵² The political system has appointed several public interests in the legislation, such as for example military, environmental and infrastructural needs.⁵³ The system with pointing out public interests also includes the balancing of different, often opposing, public interests concerning the land use in a specific area. A public interest is not connected to a specific rights holder, and it is the Swedish state through the public authorities that supervises that a public interest is taken into account in various situations. As already mentioned, both timber production and reindeer husbandry are designated as public interests in the Forestry Act.

Private property rights, on the other hand, have the legal function within real estate law to regulate the rights holders' capability to use, make decisions about and benefit economically from the specific property.⁵⁴ Another function of private property rights is that they offer protection for the rights holders' legal position in relation to others.⁵⁵ A property right belongs to a judicial person and aims to give this subject a legal position in relation to the certain property. Legislation should regulate the relationship between various holders of property rights, especially when there are parallel private property rights to the same land, such as land ownership and Sámi land rights. Private property rights and the protection for these rights have had, for a long period of time, a subordinate role within the Swedish legal system,⁵⁶ and the meaning of the legal implications of property rights within Swedish real estate law has been quite unclear.⁵⁷ However, during the last decade this has started to change, as the meaning of the constitutional protection of private property has developed through court cases.⁵⁸

4.2 Protection of reindeer herding as a public interest

Section 1 in the Forestry Act stipulates that 'the forest is a national asset and a renewable resource that shall be managed so it provides a valuable yield while maintaining biodiversity'. This reflects that timber production and environmental considerations are regarded as equal goals in the Forestry Act.⁵⁹ Timber production is regarded as an important public interest because of the socio-economic values and because it is important for the country's exports.⁶⁰ In Section 1 it is also stated that the landowner, when using the forest shall consider other public interests. According to the preparatory works, cultural heritage, outdoor life and Sámi reindeer husbandry is to be regarded as such a public interest.⁶¹ Arguments for defining reindeer husbandry as a public interest that have been presented in the preparatory works are general values such as the importance of reindeer herding within the Sámi culture and the need for protection for reindeer herding in relation to other types of land use.⁶² The regulation of consideration to reindeer husbandry as a public interest in the Forestry Act is clearly influenced by arguments relating to the protection of other public interests in the Forestry Act, such as environmental considerations and cultural heritage.

From the wording of the relevant sections in the Forestry Act and from the preparatory works that guides the interpretation of the law, it is clear that the legal protection of reindeer herding is primarily based on the view that this type of land

use is a public interest that requires protection in relation to other exploitation of land. This follows a pattern from the 1960s onwards, where focus has been on how to solve the balancing between various interests in relation to land use instead of a discussion about the conflict between holders of land rights.⁶³

Pointing out both timber production and reindeer husbandry as public interests in the Forestry Act opens up for a balancing between these two general values. In addition, following from the wording in the Forestry Act and statements in the preparatory works, timber production is a prioritised value in relation to reindeer husbandry when deciding on how forest areas should be utilised. For example, it is stated in the preparatory works that the protection of reindeer herding should not prevent 'a rational forestry', referring primarily to financial aspects.⁶⁴ Since financial arguments are pronounced, reindeer husbandry is considered as less important economically than timber production.⁶⁵ Consequently, it is primarily the public interest of timber production that motivates the legal permissibility of extensive damages to the reindeer-grazing lands and thus on the property of the RHCs. This way of regulating the relationship between forestry and reindeer herding through the system of public interests clearly circumscribes the consideration that is taken to the later and the level of protection that it is granted.

By privileging timber production and a 'rational forestry', the state likewise favours the private property rights of the landowners. In addition, it also stems from the implementation of the Forestry Act that the rights of the RHC are not adequately protected as private property rights, an argument demonstrated in the next section.

4.3 Protection of Sámi land rights as property rights

This section analyses if Sámi land rights have been recognised and implemented in the Forestry Act in a relevant way in correspondence with their character as property rights. The analysis is based on legal mechanisms that are usually used when the relationship between private property rights is regulated within Swedish real estate law: (1) a requirement of mutual consideration, (2) agreements, (3) the right to appeal to court and (4) economic compensation if damages occur on the property.

A central legal mechanism to regulate property rights relationships is a *requirement of mutual consideration*.⁶⁶ This type of regulation means that the rights holders involved must adjust the measures carried out on the property with respect to the other rights holder's conditions and needs.

In the Forestry Act, there are specific sections that regulate the consideration that the landowner should take in respect of reindeer husbandry when carrying out forestry. Before felling, the landowner shall for instance notify the Forestry Agency about how the planned measures will meet specific values that are specified in Section 14, for instance, measures to meet the interest of reindeer husbandry within the year-round area. According to Section 15, if the forest area is situated within the high mountain area in the west, where it is considered more difficult to establish new forest, the landowner must apply for a permit from the Forestry Agency

in order to log. In this case, the landowner must also provide information about measures to meet the needs of reindeer husbandry.

In addition, Section 31 in the Forestry Act stipulates a general requirement of consideration on all land where reindeer husbandry is carried out, including winter grazing areas. In such areas, the landowner shall take designated consideration to reindeer husbandry when logging is planned and executed. This shall be done by adjusting the size and location of the harvesting site or by leaving groups of trees on harvest sites as well as along migrations routes. The landowner shall also make necessary adjustments when forest roads are constructed. When planning and implementing the forestry measures, it is stipulated that the aim shall be that the RHC concerned should have annual access to grazing areas and to vegetation that is needed in areas for gathering, moving and resting the reindeer.

However, even if these sections exist in the Forestry Act, the *requirement of mutual consideration* is not adequately implemented in the legislation to regulate the relation between the forestry measures of the landowner and the reindeer herding of the RHC as a rights holder. On the contrary, it has been explicitly expressed in the preparatory works that the protection of reindeer herding should not prevent 'a rational forestry'.⁶⁷ This means that the legislation allows damages to the reindeer-grazing land. As a consequence, the interest of private landowner pursuing timber production is favoured in principle by the Forestry Act.

Another section in the Forestry Act that stipulates a requirement of consideration is Section 13 b. It is stipulated that if logging leads to such an essential loss of pasture that it affects the admitted number of reindeer that can be held by a RHC, the logging cannot be carried out. This is also the case if the logging means that gathering and migration of reindeer herds would become impossible. However, the fact that Section 13 b has so far never been used by the Forestry Agency to prohibit logging demonstrates that it is generally considered by public authorities that forestry does not violate the interests of reindeer herding as protected under the Forestry Act.⁶⁸ To sum up, the requirement of mutual consideration is not implemented in the Forestry Act.

Another legal mechanism within the Swedish real estate law that regulates private property rights relations is the ability to enter into *agreements* with others.⁶⁹ However, the Forestry Act does not give the RHCs the opportunity to enter into agreements with the landowner about the use of forest areas. Instead, a form of consultation process is prescribed in Section 20 of the Forestry Act.⁷⁰ This type of consultation gives a very weak form of opportunity to influence and protection for the RHCs and their land rights. According to this section, it is enough if the landowner gives the RHC opportunity to consultations before clear felling. However, there is no requirement that the landowner should adjust the forestry measures according to the information from the RHC or inform the Forestry Agency about the opinions that the RHC has presented. Furthermore, the duty to consult is circumscribed in the prescriptions issued by the Forestry Agency.⁷¹ The obligation to consult does not apply for forestry units with less than 500 hectares of productive woodland and if the harvested area is smaller than 20 hectares. This means that the obligation to consult is severely limited.

Additionally, the geographical scope of protection also restricts the duty to consult RHC. Section 20 in the Forestry Act is only valid in areas where reindeer herding can be carried out during the entire year (*åretruntmarkerna*).⁷² Consequently, the requirement to consult does not include the winter grazing areas, which are of crucial importance for reindeer herding. To sum up, the Forestry Act does not give the RHC the opportunity to enter into agreements about the forestry measures on grazing lands.

Other legal mechanisms in real estate law to protect private property rights is *the right to appeal to court* if a decision has negative effects on the property.⁷³ When a notification of clear felling is handed in to the Forestry Agency by the landowner, the RHC is usually not given the opportunity to comment on the planned logging. Neither is a written decision about the planned logging sent out to the RHC by the Forestry Agency. Consequently, the RHC cannot influence the decision-making or appeal against a decision about logging to have the conflict of interest tested in court. This means that the RHC is denied a relevant legal standing in the notification process that corresponds with their property rights. Accordingly, there is no proper access to justice for the RHC in the Forestry Act.

An additional legal mechanism in regulations about property rights relations is *economic compensation* when damages occur on the property.⁷⁴ In the Forestry Act, there are no sections about economic compensation to RHCs when loss of grazing lands occurs. In the preparatory works, it has been concluded that the RHCs could have a right to economic compensation; however, to have this tested, the RHC must turn to the courts in a civil law proceeding.⁷⁵ This type of court proceeding entails many legal challenges for the RHC as a plaintiff. For example, in a situation where the case is lost, the RHC takes the risk to pay the total costs of the trial.⁷⁶ Furthermore, the RHC has the burden of proof in relation to the damages or loss of grazing lands. This means that all the necessary evidence must be provided to convince the court that the losses of forest areas are caused by forestry measures. This can be a difficult assignment since reindeer herding is affected of many other land users as described earlier. And since the Forestry Act stipulates the consideration that the landowner has to take in relation to reindeer herding, there is a risk for the RHC to initiate this type of court proceeding. So far, there are no national precedents where the issue of economic compensation has been tested in court.

In summary, this analysis of the Forestry Act shows that legal mechanisms that are usually implemented in legislation to handle property rights relationships within real estate law are not included in the Forestry Act. Consequently, the forestry legislation does not give the RHCs the opportunities to dispose the grazing land and make decisions about it that correspond with the Sámi land rights' character as property rights. On the contrary, there is an exclusion in the Forestry Act from the decisions about how the forests are managed and utilised. Hence, the legislation does not give the RHC the possibility to influence important decisions about land use and be effectively protected against potential damages and adequately compensated.

5. Conclusions

As described, Sweden recognised the Sámi people as an Indigenous people already in 1977, and reindeer herding has been acknowledged as a central aspect of Sámi culture. In addition, case law has clarified that Sámi land rights are private property rights based on the longtime use of land. Accordingly, there is a general recognition of Indigenous law and Sámi land rights within the Swedish political and judicial systems. However, this chapter reveals a gap between the general recognition of Sámi land rights and the specific legislation that regulates the relationship between Sámi reindeer herding and forestry.

During the legislative processes that have taken place since the *Taxed Mountain* case in 1981, there has been an obvious lack of analysis of how Sámi land rights as private property rights should be implemented within the Swedish legal system. In the preparatory works, there are only vague references to Sámi land rights as title to land and the legal consequences of this. Instead, the protection of reindeer herding has mainly focused on reindeer herding as a public interest. Hence, the protection of reindeer herding is not primarily based on the fact that there are property rights that should be secured. Instead, the emphasis is on promoting reindeer herding as an industry, as opposed to the right of a specific RHC to practice reindeer herding as a rights holder. This significantly weakens the Sámi reindeer herding in relation to forestry and the landowner's right to land.

As Sámi reindeer herding is primarily regarded as a public interest in the Forestry Act, this opens up for a balancing of opposing land uses, as timber production is also appointed as a public interest to consider when forestry is carried out. This way of dealing with, or failing to deal with, the conflict between land ownership and the Sámi land right constitutes a manifest deficiency in the forestry legislation from a private property rights perspective. This means that the RHCs are given only a limited opportunity through law to influence the outcome of the most critical question of all, the access to enough grazing lands for the reindeer. This manifests a failure to implement Sámi land rights in the Forestry Act, which represents a regulatory framework that neglects rather than enforces the protection of Sámi land rights.

The analysis shows that Sámi land rights to a very limited extent have been recognised and secured in the forestry legislation. Sámi land rights and the duty of the state to provide the Sámi with influence over decision-making have not been properly implemented into the forestry legislation. These shortcomings of the Swedish forestry regulations are not unique. On the contrary, studies of other parts of the legal system, such as the Swedish Mining Act, has visualised a general lack of recognition of Sámi land rights within the Swedish real estate system.⁷⁷

As described in the beginning of this chapter, securing Indigenous land rights and giving Indigenous peoples influence on decision-making is a central part of the implementation of the rights of Indigenous peoples as recognised international law. The various nations where Indigenous people live must find ways to secure Indigenous land rights within their national political and legal systems. Hence, the failure to implement Sámi land rights in the Swedish Forestry Act can also be

described as a deficiency in endeavouring human rights as well as in a sustainable and just use of the land.

To achieve a just and sustainable development in line with the rights of Indigenous peoples, there is an urgent need for a legislative reform. Both adequate procedural regulations and substantive regulations concerning the protection of Sámi land rights are required. There are several legal mechanisms that could be incorporated in the Forestry Act to regulate the relationship between the landowner and the RHC in a more sustainable way, which also would correspond with the existing property rights regime within Swedish real estate law. One legal mechanism that could be implemented is a requirement of negotiations instead of the weak consultation process of today in Section 20 of the Forestry Act. Negotiations would mean that the landowner and the affected RHC would have to collaborate on how forestlands should be utilised. The Consultation Act (2022:66) that has been adopted in 2022 does not strengthen the RHCs' legal position in this respect since consultations is only required by public institutions.

Another legal mechanism that could be included in the Forestry Act is a requirement of agreements, with a consent mechanism that also corresponds with the principle of free prior and informed consent.⁷⁸ A third legal mechanism that could be implemented in the forestry legislation is economic compensation for damages to and loss of grazing land. A fourth legal mechanism that could be implemented is access to judicial review. For instance, a special instance could be adopted that could mediate between the parties and announce a judgment on the matter if an agreement cannot be reached by the parties involved. This type of legal mechanisms would give the Sámi RHCs a stronger position to influence how forests are managed, leading to a more sustainable land use.

The RHCs and their members are not satisfied with the situation of today since they cannot influence decisions on how the forest is used in a proper way. This has led to a situation where the conflicts between the forestry industry and the RHCs have increased during the last years. As the politicians have failed to implement Sámi land rights in the Forestry Act, many RHCs believe that mobilisation and protests are the only alternatives, and the conflict level is getting stronger by the day. If the Swedish politicians choose not to engage in reforms, a continued high level of conflict about forestry in Sápmi is to be expected. To contribute to a sustainable use of the natural resources in the north of Sweden and to realise the rights of Indigenous peoples, there is an urgent need to implement Sámi land rights in a better way in the Swedish forestry legislation.

Notes

- 1 Pierre-Marie Dupuy and Jorge Viñuales, *International Environmental Law* (Cambridge UP 2018) 386–89.
- 2 UNGA, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/RES/70/1, targets 2.3, 4.5.
- 3 UNGA, 'Resolution Adopted by the General Assembly on 6 July 2017. Annex: Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development' (10 July 2017) UN Doc A/RES/71/313, indicators 1.4.2, 5.a.1, 16.b.1.

- 4 Sámi Parliament, Statement on Forestry, 27 November 2020.
- 5 Prop. 1976/77:80, bet. 1976/77: KrU43.
- 6 Instrument of Government (1974:152) ch 1, art 2, s 6.
- 7 Prop. 2009/10:80, 188.
- 8 The function of private property rights within Swedish Real Estate Law is described in Section 4.1.
- 9 The Sámi Parliament in Sweden has expressed that Sámi land rights must be respected and implemented in the national legal system. See Sámi Parliament, Eallinbiras, 23 February 2021.
- 10 Ulf Mörkenstam, 'Organized Hypocrisy? The Implementation of the International Indigenous Rights Regime in Sweden' (2019) 23 *The International Journal of Human Rights* 1718.
- 11 In the *Girjas* case, the Supreme Court concluded that parts of the ILO Convention No. 169 are binding even if the convention has not been ratified. See Supreme Court of Sweden, NJA 2020 s. 3 (Girjas).
- 12 UN General Assembly Official Records, '107th Plenary Meeting' (13 September 2007) UN Doc A/61/PV.107, 25.
- 13 Bertil Bengtsson, 'Reforming Swedish Sámi Legislation: A Survey of the Arguments' in Christina Allard and Susann Funderud Skogvang (eds), *Indigenous Rights in Scandinavia, Autonomous Sámi Law* (Routledge 2015) 66.
- 14 See, e.g., UNGA, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya' (6 June 2011) UN Doc A/HRC/18/35/ass.2; UN Human Rights Committee, 'Concluding Observations on the Seventh Periodic Report of Sweden' (28 April 2016) UN Doc CCPR/C/SWE/CO/7; UNHRC, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Human Rights Situation of the Sami People in the Sápmi Region of Norway, Sweden and Finland' (9 August 2016) UN Doc A/HRC/33/42/Add.3; UN Committee on the Economic, Social and Cultural Rights, 'Concluding Observations on the Sixth Periodic Report of Sweden' (14 July 2016) UN Doc E/C.12/SWE/CO/6; Committee on the Elimination of Discrimination, 'Concluding Observations on the Combined Twenty-Second and Twenty-Third Periodic Reports of Sweden' (6 June 2018) UN Doc CERD/C/SWE/CO/22-23; Committee of Ministers, 'Resolution on the Implementation of the Framework Convention for the Protection of National Minorities' (12 September 2018) Council of Europe CM/ResCMN(2018) 9.
- 15 Ingela Bergman, Olle Zackrisson and Lars Liedgren, 'From Hunting to Herding: Land Use, Ecosystem Processes, and Social Transformation Among Sámi AD 800–1500' (2013) 50 *Arctic Anthropology* 25.
- 16 Sámi Parliament, *Rennäringspolitisk Strategi, Sápmi—en region som berikar Sverige*, 3–5.
- 17 *ibid.*
- 18 Per Sandström, 'A Toolbox for Co-Production of Knowledge and Improved Land Use Dialogues: The Perspective of Reindeer Husbandry' (PhD thesis, Swedish University of Agricultural Sciences 2015) 15.
- 19 Anders Mårell, 'Summer Feeding Behaviour of Reindeer: A Hierarchical Approach' (PhD thesis, Swedish University of Agricultural Science 2006) 31.
- 20 Samuel Roturier and Marie Roué, 'Of Forest, Snow and Lichen: Sámi Reindeer Herders' Knowledge of Winter Pastures in Northern Sweden' (2009) 258(9) *Forest Ecology and Management* 1960.
- 21 Camilla Sandström and others, 'Progressing Toward Co-Management Through Collaborative Learning: Forestry and Reindeer Husbandry in Dialogue' (2006) 2(4) *The International Journal of Biodiversity Science and Management* 326.
- 22 Sonja Kivinen and others, 'Effects of Modern Forest Management on Winter Grazing Resources for Reindeer in Sweden' (2010) 39 *Ambio* 269.
- 23 Per Sandström and others, 'On the Decline of Ground Lichen Forests in the Swedish Boreal Landscape: Implications for Reindeer Husbandry and Sustainable Forest Management' (2016) 45 *Ambio* 415.

- 24 Sofia Bäcklund and others, 'Tree and Stand Structure of the Non-Native *Pinus Contorta* in Relation to Native *Pinus Sulvetris* and *Picea Abies* in Young Managed Forests in Boreal Sweden' (2018) 33(3) *Scandinavian Journal of Forest Research* 245.
- 25 Rasmus Kløcker Larsen and others, 'Sámi-State Collaboration in the Governance of Cumulative Effects Assessment: A Critical Action Research Approach' (2017) 64 *Environmental Impact Assessment Review* 67.
- 26 In addition, the Environmental Code (1998:808) is of relevance for forest management measures.
- 27 The relevant sections are described in Forestry Act, ch 4.
- 28 SOU 2006:14, 85.
- 29 Nils-Johan Päiviö, 'Från skattemannarätt till nyttjanderätt, En rättshistorisk studie av utvecklingen av samernas rättigheter från slutet 1500-talet till 1886 års renbeteslag' (PhD thesis, Uppsala University 2011) 110–18.
- 30 Nils Arell, *Kolonisationen av lappmarken* (Esselte studium 1979) 16; Johan Strömgren, 'The Swedish State's Legacy of Sámi Rights Codified in 1886' in Allard and Skogvang (n 13) 97.
- 31 SOU 2006:14, 130–42.
- 32 Anna Berg and others, 'A Century of Logging and Forestry in a Reindeer Herding Area in Northern Sweden' (2008) 256 *Forest Ecology and Management* 1009.
- 33 Sandström and others (n 23).
- 34 Isabelle Brännlund and Per Axelsson, 'Reindeer Management During the Colonization of Sámi Lands: A Long-Term Perspective of Vulnerability and Adaption Strategies' (2011) *Global Environmental Change* 1095, with reference to administrative reports 1890 and 1895.
- 35 SFS 1990:1379 and prop. 1990/91:3.
- 36 Kaisa Korpiaakko-Labba, *Om samernas rättsliga ställning i Sverige-Finland: En rättshistorisk utredning av markanvändningsförhållanden och -rättigheter i Västerbottens lappmark före mitten av 1700-talet* (Juristförbundets förlag 1994) 464–68; Päiviö (n 29) 250–51.
- 37 SOU 1923:51 p. 101, 123, prop. 1928:43, 54.
- 38 SOU 2006:14, 387.
- 39 See, e.g., Elsa Laula, *Inför lif eller död? Västerbottens-Kuriren* (Gaaltije 1 September 1904).
- 40 Reindeer Herding Act, s 6.
- 41 Each RHC has a name, such as Luokta Mavas RHC (Swe: *Luokta Mavas sameby*). For geographical location of the RHCs, see Sámediggi <<https://www.sametinget.se/8382>> accessed 1 September 2023. Note that Sámi who own no reindeer constitute the vast majority of Sámi in Sweden. Non-reindeer-herding Sámi have no state-recognised land rights. This is the result of state policy and legislation, separating nomadic Sámi, especially in the mountainous areas, from other Sámi who became permanent residents in houses.
- 42 Reindeer Herding Act, s 3.
- 43 Supreme Court of Sweden, NJA 1981 s 1.
- 44 *ibid*.
- 45 Supreme Court of Sweden, NJA 2011 s 109.
- 46 Supreme Court of Sweden, NJA 2020 s 3.
- 47 *ibid* 91–94.
- 48 Christina Allard and Malin Brännström, 'Girjas Reindeer Herding Community v Sweden: Analysing the Merits of the Girjas Case' (2021) 12 *Arctic Review on Law and Politics* 56.
- 49 Dir. 2021:35 En ny renskötsellagstiftning—det Sámska folkets rätt till renskötsel, jakt och fiske.
- 50 Forestry Act, s 35.

- 51 See, e.g., the Environmental Code (1998:808), ch 3; the Expropriation Act (1972:719), ch 2, and the Forestry Act, s 1.
- 52 Aleksander Pezenik, *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation* (Fritzes 1995) 174.
- 53 See, e.g., the Environmental Code (1998:808), ch 3; the Expropriation Act (1972:719), ch 2; Forestry Act, s 1.
- 54 Malin Brännström, 'Skogsbruk och renskötsel på samma mark, En rättsvetenskaplig studie av äganderätten och renskötselrätten' (PhD thesis, Umeå University 2017) 56–69.
- 55 *ibid.*
- 56 Inguun Ikdahl, 'Concepts of Property and Property Rights' (2011) 34 *Retfaerd* 49; Ulf Bernitz, 'Rättighetsskyddets genomslag i svensk rätt—konventionsrättsligt och unionsrättsligt' (2010–2011) 4 *Juridisk Tidskrift* 821.
- 57 Brännström (n 54) 53–56.
- 58 See, e.g., Supreme Court of Sweden, NJA 2014 s 332; NJA 2018 s 753.
- 59 Prop. 1992/93:226, 47.
- 60 *ibid* 47–48.
- 61 Prop. 1990/91:3, 52.
- 62 *ibid* 52–53 with reference to the protection in the environmental laws.
- 63 Gabriel Michanek and Carlotta Zetterberg, *Den svenska miljörätten* (5th edn, Iustus 2021) 65–68.
- 64 Prop. 1990/91:3, 19, 53.
- 65 *ibid.*
- 66 See, e.g., the Land Code, ch 3, s 3.
- 67 Prop. 1990/91:3, 19, 53.
- 68 Information by email from the Forestry Agency, 22 October 2021.
- 69 Torgny Håstad and others, *Civilrättens grunder* (Iustus 2016) 18.
- 70 The consultation process in FSC does not either require agreements.
- 71 SKSFS 2011:7, para 4:3.
- 72 Reindeer Herding Act, s 3.
- 73 See, e.g., the Administrative Procedure Act (2017:900) s 33.
- 74 See, e.g., the Tort Liability Act (1972:207) ch 2, s 1.
- 75 Prop. 1971:51, 136; Prop. 1992/93:32, 98, 107–9.
- 76 The Code of Judicial Procedure, ch 18, s 1.
- 77 Kaisa Raitio, Christina Allard and Rebecca Lawrence, 'Mineral Extraction in Swedish Sápmi: The Regulatory Gap Between Sámi Rights and Sweden's Mining Permitting Practices' (2020) 99 *Land Use Policy*, ch 3.
- 78 See, e.g., United Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA A/RES/61/295 (UNDRIP).