

Part Three

Saami Land and Reindeer-grazing Rights in the Three Nordic States

The Draft Nordic Saami Convention and the Assessment of Evidence of Saami Use of Land

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I. INTRODUCTION¹

A. Some Characteristics of Indigenous Cultures Significant for this Analysis

TRADITIONALLY, INDIGENOUS PEOPLE have a close relationship with lands and waters, basing their livelihood on a non-monetary economy and the sustainable use of renewable natural resources. Such use of land and resources does not leave many visible traces in the landscape, unlike activities such as forestry and farming. This makes it particularly challenging to assess evidence for recognising land rights and titles. The situation, common to all indigenous people, is shared by the Saami who live on their traditional territories in Fenno-Scandinavia and North-West Russia.²

In addition, the Saami, like most indigenous peoples, celebrate an oral culture and, until quite recently, have not had a written language. This means that there are few written sources in the archives, but also that what exist have originated with outsiders such as Norwegian, Danish and Swedish officials, traders and missionaries.

Thirdly, until recently, traditional indigenous livelihood activities, such as hunting, fishing and migratory grazing, were not considered to form the

¹ Thanks to my good colleagues, Professor Nigel Banks, Professor Timo Koivurova and Researcher Mattias Åhrén, for thorough reading and useful comments.

² The Saami territories (in Saami language: *Sápmi* or *Samiid eanan*) cover the northern and middle parts of Finland, Sweden and Norway, as well as the Kola Peninsula in Russia. The Saami totally consist of 50,000–80,000 persons, of whom approximately 40,000 live in Norway (Harald Gaski in *Store Norske leksikon*, see <www.snl.no>). Of these 13,890 are registered voters in the Saami parliament in Norway (2009), see <www.sametinget.no>.

basis for the recognition of title and rights of use, since such use of land was not deemed to be sufficiently intensive and continuous to prove land rights or titles. During the twentieth century, this had a significant influence on Norwegian case law.

Lastly, the Saami, at least in Norway, had to confront the self-declared State ownership of land in the Saami territories based on a doctrine of State original title. This approach has made it difficult for the indigenous Saami, and other locals, to obtain legal protection by registering rights to land and natural resources.

In sum, these factors make it challenging both for Saami to prove rights to land use and titles, and for the courts and others to assess evidence of Saami usage.

B. The Problems to Be Addressed

This chapter examines the assessment of evidence, proof and documentation for traditional Saami areas, where the Saami may have acquired titles and rights of use. Other sources have discussed this problem,³ which is also addressed in Article 34(3) of the draft Nordic Saami Convention. Paragraphs (1) and (3) of Article 34, headed ‘Traditional use of land and water’, provide as follows:

Protracted traditional use of land or water areas constitutes the basis for individual or collective ownership right to these areas for the Saami in accordance with national or international norms concerning protracted usage.⁴

Assessment of whether traditional use exists pursuant to this provision shall be made on the basis of what constitutes traditional Saami use of land and water and bear in mind that Saami land and water usage often does not leave permanent traces in the environment.

³ See eg the Saami Right Committee in NOU 1997: 4 Naturgrunnlage for Samisk Kultur 53–64 and Ot prp nr 53 (2004–2005), *Om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (Finnmarksloven)*, 36, which reads: ‘Traditional Saami use in an area over the course of time will leave few tangible traces for posterity. This may mean that information is lost, and that the source situation is so deficient that it may form the basis for wrong conclusions or at least considerable doubt. On the other hand, the government’s actions often leave written clues to which it is easier to relate. In considering the material that exists today, it is important to be aware that the surviving sources taken as a whole may result in an unintended imbalance.’ This and all other translations (except for the draft Nordic Saami Convention (see below n 4) are the author’s. The topic is also discussed in M Ahrén, M Scheinin and JB Henriksen, ‘The Nordic Sami Convention: International Human Rights, Self-Determination and other Central Provisions’ (2007) 3 *Gáldu Čála—Journal of Indigenous Peoples Rights*, see www.galdu.org and in G Eriksen *Alders tids bruk* (Bergen, Fagbokforlaget, 2008) 314–48.

⁴ *Nordisk samekonvensjon: Utkast fra finsk-norsk-svensk-samisk ekspertgruppe* (Oslo, Finnisk-Norwegian-Swedish-Saami Expert Group, 2005), see <www.regjeringen.no>. The English translation of the draft Nordic Saami Convention is taken from the annex to Ahrén *et al*, above n 3.

The problem to be addressed is how to assess evidence and documentation of usage based on traditional Saami use of land and natural resources, when determining whether Saami claims for recognition of land rights and titles may prevail in conflicts with landowners, land developers and other interests outside the Sami reindeer-herding community. The problem is closely connected to the procedure prescribed in the draft Nordic Saami Convention, Article 34.

Beyond the specific significance of this discussion for the draft Nordic Saami Convention, this issue is also important in relation to the international obligation to identify Saami traditional territories and land rights under the ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989), Article 14. This article served as a model for the draft Article 34,⁵ even if it is likely that the draft reaches further than the ILO Convention in protecting the rights of individuals. Article 14 is currently particularly significant for Norway as the only country with an indigenous Saami population that has ratified the ILO Convention. Norway is implementing its commitments through the Finnmark Act clarification process.⁶

In drafting the third paragraph, The Finnish-Norwegian-Swedish-Saami Expert Committee drew attention to the problematic nature of older case law.⁷ Consequently, this chapter begins with a brief historical review of that case law (in section II).

The concept of immemorial usage is central to the acquisition and recognition of rights based on traditional Saami use of land, especially in Norway. It is also significant in relation to the draft Saami Convention, since traditional use is to be assessed in accordance with national norms concerning protracted usage. Therefore, section III discusses this concept, along with other important legislative provisions dealing with the assessment, more particularly the rules on assessment of evidence in the Norwegian Reindeer Husbandry Act.

⁵ *Nordisk samekonvensjon*, above n 4, 250. See also Åhrén *et al*, above n 3, 8, 27.

⁶ The Finnmark Act (Act of 17 June 2005 No 85) (*Lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke*). An English translation of the Act may be found at <www.ub.uio.no>. For more reading, see Ø Ravna, 'The Process of Identifying Land Rights in Parts of Northern Norway: Does the Finnmark Act Prescribe an Adequate Procedure within the National Law?' (2011) 3 *Yearbook of Polar Law* 423; and Ø Ravna, 'The Finnmark Act 2005 Clarification Process and Trial "Within a Reasonable Time"' (2011) 29 *Nordic Journal of Human Rights* 184.

⁷ *Nordisk samekonvensjon*, above n 4, 254. See also Åhrén *et al*, above n 3, 28. They state that '[i]t has proved extremely difficult for the Saami population to succeed in domestic court proceedings against competing non-Saami claims to land'.

Section IV. of the chapter examines the assessment of evidence in the case law from Norway, where most of such case law is to be found,⁸ and section V. reviews Saami customs, traditions and legal opinions relating to the assessment of the examination of evidence for land rights. These traditions and customary laws are elaborated from internal traditions among the reindeer-herding Saami, but they may also be significant in resolving legal disputes with interests outside the Sami reindeer-herding community. In addition to summing up, section VI. offers brief comments in relation to Sweden and Finland. The chapter draws upon legislation, preparatory works, case law and Saami custom emphasising Saami use of land, and legal literature.⁹

II. HISTORICAL REVIEW OF THE ASSESSMENT OF SAAMI USE OF LAND

A. Nomadic Communities Cannot Acquire Property Rights

Protracted, undisputed use of land or water areas will, in the legal systems of many States, form a basis for the acquisition of ownership and rights of use. In parts of the Saami areas, this has not been the case. In what are currently Norwegian parts of Sápmi, a legal doctrine developed during the nineteenth century that differed from that which applied in other parts of the country. That development may be explained by the fact that the Saami did not leave visible traces in the landscape by cultivating it for farming, which, historically, was a prerequisite for claiming title and acquiring rights to land. It may also be explained as a result of the nineteenth-century cultural stage theories that favoured the Norse over the Saami when it came to rights to acquire land. This implied that the King, or the State, could easily take the land into possession based on the doctrine of *State original title*.¹⁰

⁸ The Nordmaling Case (NJA 2011, 109) is a substantial contribution in Swedish case law. There will be some reflections on that case in section VI. of this chapter.

⁹ The rules for the assessment of evidence differ as between common law and civil law systems. See S Geeroms, *Foreign Law in Civil Litigation. A Comparative and Functional Analysis* (Oxford, Oxford University Press, 2004) 14–21, 26–28. In brief, common law countries apply separate processes to determine fact and law, while civil law countries (including the Fennoscandinavian countries) practise a freer assessment of the evidence, using the same process to determine both fact and law.

¹⁰ The doctrine said that land to which individuals could not prove title was considered to be State property. S Brækhus and A Hærem, *Norsk tingsrett* (Oslo, Universitetsforlaget, 1964) 525, write that ‘in older theory, one considered the state to have title to all real property that was not privately owned. This opinion had its origin in Roman law, which in the sixteenth and seventeenth century penetrated in the Nordic countries with its doctrine of state (Emperor) supremacy title.’ H Scheel, *Forelesninger over Norsk tingsret* (Kristiania, TO Brøgger, 1912)

This doctrine afforded the Norwegian State title to so-called 'ownerless' lands, but also underpinned unwritten norms that precluded Saami from acquiring land rights, or set up a standard of proof for the use of land that the Saami were not able to meet. Such norms, opinions or assessments may be traced far back, not only in relation to the Saami but also in relation to indigenous people generally. As early as 1690, the philosopher John Locke argued for such an interpretation when it came to the Europeans' right to acquire land in America without agreements with the indigenous people who owned the lands there.¹¹ He declared that nomadic communities had no title to their lands because such a right was established through bodily cultivation of the land. His arguments were designed to give legitimacy to English efforts to acquire land from the First Nations of America in the years after *The Mayflower* had brought the first colonists across the seas. Similar opinions appeared in a discussion in the Swedish Parliament in 1828, after iron ore was found in Saami areas at Gällivare.¹²

In examining Finnmark, the most central part of the Saami territory, the requirement that land had to be cultivated before ownership could be established appears as the basis for the position put forward in a bill of 1848 to prepare an act for the sale of commons, church property and other State lands. The bill stated that the land of Finnmark was the property of the King or the Government, because 'it originally was settled just by a Nomadic People, the Lapps without permanent dwellings'.¹³

A natural consequence of this was that the Saami were not eligible to own land and that the State could take it in possession. The legal scholar Fr Brandt emphasised the importance of the preparatory works of the 1848 bill when he argued that the State, through the ages, had been the owner

464, writes, with regard to real estate, 'it is ordinarily recognised that it must be considered as the State Property where no other owner can be detected'.

¹¹ J Locke (ed Rod Hay), *Two Treatises of Government* (Hamilton, Ont, McMaster University, 2000). See also N Oskal, 'Det moralske grunnlaget for diskvalifisering av urfolks eiendomsrett til land og politisk suverenitet' in NOU 2001:34 *Samske sedvaner og rettsopfatninger (a Norwegian public investigation / a white paper)* 256. See also J Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights. Defining the Just Society* (Saskatoon, University of Saskatchewan, 2006) 8–9, with further references, who shows how distinctions between 'primitive and civilized' were used to deprive American First Nations from land rights in common law.

¹² See L Lundmark, *Lappen är ombytlig, ostadig och obekväm*, *Svenska statens samepolitik i rasismens tidevarv* (Umeå, Norrlands universitetsforlag, 2002) 29, who also shows that in the debate, it was assumed that the Saami had occupied the whole of Scandinavia in the past, but had been forced north due to immigration of Germanic peoples.

¹³ [Ot Prp] No 21 (1848), *Angående naadigst Proposition til Norges Riges Storting om Udfærdigelse af en Lov om Ophævelse af § 38 i Lov af 20 de. august 1821 om det beneficerede og Statens Gods*, 23. 'Lapp' is an old term for 'Saami'.

of the unsold land in Finnmark. In his property law monograph of 1867 he remarked:

Finnmark has from time immemorial been regarded as the property of the Norwegian State. Only late in the historical time has this district been settled by immigrants, but these are not considered as owners.¹⁴

At this time, the interpretation of law was mixed with biological 'stage theories',¹⁵ dividing nations between 'primitive and civilised',¹⁶ taken to the point where it did not need any further documentation. In 1911, one of Norway's most outstanding legal scholars, Fredrik Stang, explained the rise of such theories of ownership as follows:

As long as people live as nomads, as long as the land is wide enough to give all the space they need, the land is not subject to property. Only when a tribal people settle down and start with agriculture does ownership arise in the land.¹⁷

In Finland, Kaisa Korpjaakko-Labba, has shown that Axel Liljenstrand's nineteenth-century writings explained the assumed lack of Saami title to land in a way similar to that of Stang and others.¹⁸ Liljenstrand wrote that as long as people lived in the first stage of their social development, as hunters and fishermen, they could not acquire title to land. Neither could this take place in the second stage, the nomadic stage. Cultivation of land was the first stage at which property rights could be established.

Liljenstrand explained the cultural differences between Finns and Saami (who Liljenstrand assumed had a common origin), on the basis that Finnish tribes had received fresh inputs from the outside world, including the farming culture. This was not the case for the Saami,

who roamed around in the inner parts of the country's nearly inaccessible wilderness; they lacked in all respects sufficient inspiration for progress and remained

¹⁴ Fr Brand, *Tingsretten fremstillet efter den norske lovgivning* (Kristiania, J Chr Abelsteds forlag, 1867) 194.

¹⁵ C Darwin, *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life* (London, J Murray, 1859); this was further developed the by the philosopher Herbert Spencer and others, who applied Darwin's thesis to humans, society and economy, thereby providing a 'scientific' cover to the theory referred to as 'social Darwinism'. The treatise was first time published in a Nordic language in 1872, see C Darwin, *Om Arternes Oprindelse ved Kvalitetsvalg, eller Ved de heldigst stillede Formers Sejr i Kampen for Tilværelsen* (Kjøbenhavn, Gyldendal, 1872).

¹⁶ See eg Youngblood Henderson, above n 11.

¹⁷ F Stang, *Norsk formueret. Indledning til formueretten* (Kristiania, Aschehoug, 1911) 3.

¹⁸ K Korpjaakko-Labba, *Om samernas rättsliga ställning i Sverige-Finland* (Helsingfors, Juristförbundets förlag, 1994) 21–34. AW Liljenstrand (1821–95) was a Finnish professor of jurisprudence and philosophy, doing research on economics, property law and cultural history. Korpjaakko-Labba uses this example to show the prevailing opinion at that time. She concludes, in contrast to the position taken by Liljenstrand, that the Sami tribute lands (*lappskatte land*) were considered as property.

fishermen and nomads. They were satisfied with feeding themselves ... with wild herbs rather than using the land for agriculture as did their tribal kinsmen.¹⁹

The next section examines case law from the middle of the twentieth century.

B. Twentieth-century Case Law

As pointed out by Mattias Åhrén,²⁰ it has been difficult for the Saami to succeed in domestic court proceedings against competing non-Saami claims to land. Going back to the mid-1900s, there are two notorious cases in which the Norwegian Supreme Court found that Saami reindeer husbandry and other traditional Saami use of land and waters, such as fishing, had to give way to Norwegian agricultural settlement. Evidence of traditional land use was accorded no significance. In the first of these cases, the Dergafjeld Case from 1931,²¹ the Court held that the Saami Jakob Dergafjeld had no rights to set up a Saami tent and storehouse on private property, even the Saami use of land was recognised to be much older than that of the Norwegian farmers who held title to the land. Similarly, in the second case, the Marsfjell Case,²² the Court held that the defendant, the Saami Jonas Marsfjell,²³ had no rights to fish in lakes, even though there was no doubt that Marsfjell and previous generations had been fishing there for centuries. The first voting judge²⁴ stated that it was irrelevant that the Saami had used the area long before the farmers, and thus rejected the claims of Marsfjell based on immemorial usage. The judgment may be explained by the fact that Saami use of land did not establish legal rights, nor prove such rights.

In contrast, the Supreme Court found that reindeer husbandry, exercised by *non-Saami* in the southern mountain areas of Norway in two comparable cases, did count as evidence or proof of existing property rights. In the Vang Case,²⁵ the Supreme Court unanimously found that local farmers and not the State held the title to the disputed mountain area. The first voting judge stated that the way the ‘wild mountain areas has been used—I am referring especially to reindeer husbandry—in my opinion supports the notion that the mountain belongs to the owners of the neighboring pasture

¹⁹ A Liljenstrand, *Finlands jordnaturer och äldre skattväsende, jemte ett blad ur dess kulturhistoria*, (Helsingfors, JC Frenckell & Son, 1879) 42–43.

²⁰ See Åhrén, above n 3.

²¹ The judgment is published in Norwegian court reports *Norsk Retstidende* (NRt 1931) 57.

²² NRt 1955, 361 (Marsfjell).

²³ Marsfjell died during the trial, and in the Supreme Court the case was continued by his widow, Maria Marsfjell.

²⁴ In the Norwegian Supreme Court the first voting judge is the judge who pronounces the first vote/proposal for judgment. In a case where he or she represents the majority, or if the court is unanimous, this is the judgment, which was the situation in the *Marsfjell* Case.

²⁵ NRt 1951, 417 (Vang). The case started in the Mountain Commission, a special tribunal which was awarded investigative power and authority by the Ministry of Justice; see the Mountain Commission Act (adopted 8 August 1908 No 6), s 3.

land'.²⁶ Although reindeer herding had not been continuous everywhere, the judge emphasised that herding was a livelihood, and this supported the conclusion that non-Saami herders had acquired property rights.

In another case from 1954, which also concerned a land claim in the southern mountain areas, the first voting judge, representing the majority, underlined the significance of reindeer herding by local Norwegian farmers:

For those mountain areas considered here, in my opinion the use of areas for reindeer pastures or leasing of land for reindeer husbandry, are factors that must be considered when determining how the boundaries between private property and state common land should be settled.²⁷

The discriminatory application of the law, or the assessment of the evidence, clearly appears less than half a year later when the same judge participated in the above mentioned Marsfjell Case. Here he agreed in the results with the first voting judge, who found that the Saami reindeer herders' use of 'foreign property' was 'a harmless, beneficial use which could not cause the owner any positive detriment'.²⁸ Such a use could certainly not count as evidence or proof of ownership or usufructuary rights, or provide any basis for acquiring such rights in favour of the Saami.

Even as late as 1966, the prevailing judicial opinion excluded Saami reindeer herders from acquiring rights. The Frostating Court of Appeal stated:

The century-old exercise of use, even when it comes to fishing, trapping and hunting, which the Saami undisputedly have exercised, does not go beyond the 'harmless beneficial usage' that the Saami at any time have been allowed to exercise. This kind of use cannot by prescription or immemorial usage create a distinct, separate legal basis that later legislation is not free to regulate.²⁹

Given this line of reasoning, it is clearly difficult not only to succeed in proving a claim based on prescription or immemorial usage, but also even to consider submitting such a claim.

The judgment quoted above was overruled by the Supreme Court in the later Brekken Case, where the Court found that the Saami use 'for a long time seems to have been so attached to the area and so established that it cannot be compared with the exercise of an innocent right of use or a right of public access'.³⁰ This led the Court to confirm Saami rights to hunt and fish in their traditional areas on the private property owned by others. Together with the

²⁶ NRt 1951, 417 (Vang) at 423.

²⁷ NRt 1954, 1055 (Urevassbotn og Lungsdalen) at 1060. This case also started in the Mountain Commission.

²⁸ NRt 1955, 361 at 363.

²⁹ Frostating lagmannsrett (Judgment of 14 November 1966), Appeal 83/1964.

³⁰ NRt 1968, 394 (Brekken) at 401. See also *Nordisk samekonvensjon*, above n 4, 250.

Altevaan Case,³¹ pronounced 14 days later, this was a milestone in the recognition of the Saami rights to use and harvest traditional Saami lands, first and foremost because it set aside the doctrine saying that the Saami use of land only resulted in the acquisition of land rights that the legislature or other State authorities could override without any duty to pay compensation. In the Brekken Case, the first Supreme Court Case that Saami right-holders won since a case settled on 21 June 1862, the Saami made use of written sources to document their long-term use of land.³²

Although Saami won the Brekken and the Altevaan Cases, it was not easy for them to acquire land rights based on prescription and immemorial usage in subsequent cases. For reindeer herders, the main reason for this was simply that the use of land was not considered to be *regular and intensive enough* to acquire rights according to the rules on prescription or immemorial usage. The Trollheim, Korssjøfjell and Aursund Cases all stand as examples of this.³³

In the Trollheim Case, the first voting judge who represented an unanimous stated:

Although in earlier times Saami would have been in Trollheimen to a greater extent than can be documented through historical and archaeological source material, I must presume from the extensive evidences presented in the case, that the Saami have not used this area to such an extent and over such a long period of time that it can provide a basis for historically acquired rights.³⁴

The first voting judge also stated that the fact that, 'the reindeer just occasionally have come into an area' was not an adequate basis for acquiring pastoral rights; there 'must be a more regular use'.³⁵ This legal statement was further elaborated in the Korssjøfjell and Aursund Cases, which also dealt with pastoral rights in the South Saami areas of Norway. Here, the requirements for intensive and regular use by the Saami reindeer herders were assessed against the standard established by the manner in which farmers used the outlying fields. The statement of the first voting judge in the Aursund Case, rejecting the contention of the Saami party, was characteristic. He concluded that:

³¹ NRt 1967, 429 (Altevaan). The case established that interference in traditional Saami lands for the purpose of compulsory purchase implies a right to economic compensation for expropriation.

³² See NRt 1968, 394, where the linguist Knut Bergsland was employed to document the Saami presence in the past and to set aside the still prevailing immigration theory advanced by Y Nielsen, 'Lappernes fremrykning mod syd i Thronhjems stift og Hedemarkens amt', *Det Norske Geografiske Selskabs Aarboeg*, bind 1, Kristiana, 1891, 18–52. The 1862 Case is referred in NOU 1984: 18 *Om samers rettsstilling*, 654 *et seq.*

³³ Published respectively in NRt 1981, 1215 (Trollheim), NRt 1988, 1217 (Korssjøfjell) and NRt 1997, 1608 (Aursund). The plaintiffs in all the three cases were the farming landowners. *Nordisk samekonvensjon*, p 254, also mentioned the Tysfjord Case in NRt 1996, 1232, which I do not find it necessary to go into here.

³⁴ NRt 1981, 1215 (Trollheim) at 1223.

³⁵ *Ibid* at 1225.

[T]he distinctive character of reindeer husbandry, the nature of the reindeer, migration and topography impact requires that it be afforded substantially more lenient requirements for acquisition of right by immemorial usage here than elsewhere in the property law.³⁶

In these cases, though, the Supreme Court did not take into account the special characteristics of reindeer husbandry and the Saami use of the landscape. Instead, the Court applied rules for intensive and continuous use of land, derived from farming and agricultural use of land, to reindeer husbandry. Rules that, in other circumstances, might have allowed the Saami claimant to acquire rights instead became an obstacle to obtaining pastoral rights.

The doctrine was invoked on such a scale that it threatened the entire existence of the South Saami reindeer husbandry and, thus, the Saami culture in the middle part of Norway. Therefore, when a new dispute on the same issue was brought before the Supreme Court in 2001, the Supreme Court decided that the case should be heard by the Court in plenary session.³⁷

III. LEGISLATIVE FRAMEWORK FOR ASSESSING EVIDENCE RELATED TO TRADITIONAL SAAMI USE OF LAND

A. The Draft Nordic Saami Convention and the Selbu Case

Article 34 of the draft Nordic Saami Convention on ‘Traditional use of land and water’ provides the basis for the discussion in this chapter. Article 34(1) says that protracted or long-term traditional use of land or water areas constitutes the basis for individual or collective ownership rights for the Saami in accordance with national or international norms concerning such usage. Pointing to both national and international norms, the provision draws on domestic rules on immemorial usage, but also on the norms of international law, including ILO Convention No 169.

The third paragraph is of particular interest, stating that:

Assessment of whether traditional use exists pursuant to this provision shall be made on the basis of what constitutes *traditional Saami use of land and water* and bear in mind that Saami land and water usage *often does not leave permanent traces in the environment*. (emphasis added)

³⁶ NRt 1997, 1608 at 1617.

³⁷ In the Norwegian Civil Procedure, The Supreme Court might sit as a full plenary court in special circumstances, see Act 25 June 1926 No 2 (*lov om forandring i lovgivningen om Hoiesterett*), s 3, where it is stated that when ‘special circumstances make it desirable ... a doubtful question of law has to be decided ... by a united Supreme Court’. The provision is now repealed and replaced by Act 13 August 1915 on the courts [*Domstolloven*], s 5 (amended by Act No 3/2007). On the particular decision, see NRt 2001, s 769 at 779.

The draft provision thus implies and requires that a Saami title or right of use:

- (a) must be determined on the basis of traditional Saami use of land; and
- (b) that usage rarely leaves permanent traces in the landscape.³⁸

We have already seen that the draft provision, to a large extent, follows Article 14 of the ILO Convention 169, even if the draft provision probably goes further in protecting individual land usage. The idea underlying paragraph 3 also draws on the Selbu Case,³⁹ since the Expert Committee, after referring to the case, noted that, 'it is among others, the points of view in these two [sic] cases that is the basis for the provision in the third paragraph'.⁴⁰

This suggests that an assessment of the evidence based on the principles of the Selbu Case will comply with the proposed standard. Another important reason to rely heavily on the Selbu Case is simply that the judgment is a plenary decision of the Norwegian Supreme Court and, as such, a substantial source of law. Lastly, it should be noted that the Norwegian Parliamentary Standing Committee of Justice, at the time of drafting and adopting the Finnmark Act, stated:

The assessment of evidence in recent case law has been satisfactory. Recent Norwegian case law, particularly the Selbu and Svartskog Cases, has given instruction on how traditional Saami land use shall be considered as a basis for the acquisition of a legal right. These would be important sources of law for the Commission and the Court.⁴¹

The Selbu Case judgment has also had some influence in recent developments in Swedish law, a point to which I return briefly in the last section of this chapter.

B. The Concept of Immemorial Usage in Norwegian Law

In Norway, the concept or doctrine of immemorial usage is central in relation to Saami land rights, both in terms of its general legal basis⁴² and when it comes to rules of acquisition of pastoral rights and titles. As such it requires a brief introduction. The concept is grounded in unwritten law or,

³⁸ Åhrén, above n 3, 28, also calls for a wider use of *Saami law*.

³⁹ See NRt 2001, 759 (Selbu). An English translation may be found at <www.elaw.org>.

⁴⁰ *Nordisk samekonvensjon*, above n 4, 250. As far as I can see, the Expert Committee refers only to the Selbu Case. The wording suggests that they also intended to rely on another case, presumably the Svartskog Case in NRt 2001, 1229, which is discussed in section IV.E below.

⁴¹ Inst O nr 80 (2004–2005), *Innstilling fra justiskomiteen om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke*, 36.

⁴² See eg Act of 15 June 2007 No 40 lov om reindrift (on reindeer husbandry), s 4 and the Finnmark Act s 5.

more precisely, customary law developed through centuries in the agrarian societies.⁴³ Immemorial usage is based upon the same concepts as prescriptive titles or rights.⁴⁴ Although the acquisition time is longer, there is also greater flexibility as to the conditions, since a defect in one of the three necessary conditions may be repaired through a stronger claim based on one of the other conditions. The Selbu Case described the three conditions as:

- (a) a certain amount of use;
- (b) over a long period of time; and
- (c) in good faith as to the legitimacy of the use.⁴⁵

Acquisition by immemorial usage may afford rights to natural resources or titles to land.⁴⁶ Legitimate use of land, based on renting, commonage use, permissions or licences, cannot establish the basis of a stronger independent right of title or use as part of immemorial usage. There are some analogies to be drawn between immemorial usage and the rules of *aboriginal title* in common law.⁴⁷ One difference lies in the requirement of good faith as to the legitimacy of the use, which is not required in common law aboriginal title claims.

C. The Rule of Presumption in the Reindeer Husbandry Act

The burden of proof in the ordinary civil procedure in Norwegian law lies with the party claiming to establish a right or a right-altering event.⁴⁸ Most commentators have praised the Norwegian Supreme Court's decision in the Selbu Case for the innovative way in which it assessed the evidence, including the way in which it placed the burden of proof on the landowners. This praise is deserved, but it should also be recalled that the judgment is based on the terms of the Reindeer Husbandry Act, which was amended to create a presumption to the effect that pastoral

⁴³ Brækhus and Hærem, above n 10, 613, express the distinction between immemorial usage and local customary law as being that the former determines the rights to a particular property, while the latter regulates the conditions of property rights for that district.

⁴⁴ See Act 9 of December 1966 No 1 lov om hevd (on prescription), ss 2 and 4; cf ss 8 and 9.

⁴⁵ Ntr 2001, 769 at 788–89.

⁴⁶ For more reading about the concept, see C Allard, 'The Nordic countries' law on Sámi territorial rights' (2011) 2 *Arctic Review on Law and Politics* 159; and in Norwegian, Eriksen, above n 3, 314, and Ø Ravna, 'Alders tids bruk og hevd som ervervsgrunnlag i Samiske områder' (2010) 123 *Tidsskrift for Rettsvitenskap* 464.

⁴⁷ See *Delgamuukw v British Columbia* [1997] 3 SCR 1010 (SCC). See also JJ Borrows and LI Rotman, *Aboriginal Legal Issues* (Canada, LexisNexis, 2007) 258–63; Youngblood Henderson, above n 11, 116–29; and K McNeil, *Common Law Aboriginal Title* (Oxford, Clarendon Press, 1989) 193–306.

⁴⁸ JEA Skoghøy, *Tvistemål*, 2nd edn (Oslo, Universitetsforlaget, 2001) 677.

rights exist in reindeer husbandry, if no other legal situation is proven. The amendment was a result of several Supreme Court judgments which fail to recognise the claims of the reindeer herders, and especially the strict evaluation of the Saami reindeer herders' use of land as a basis for the acquisition of rights in the Korssjøfjell Case.⁴⁹ The amendment is considered to reverse the burden of proof,⁵⁰ although some might question whether a determination of reindeer husbandry rights is a right-altering event. The amendment requires landowners to show that their lands are not burdened by a reindeer husbandry right.⁵¹

The Supreme Court analysed the scope of the rule in the Selbu Case. Given that the Selbu Case represents a paradigm shift,⁵² it is important to examine both the development in legislation and the development in case law. This shows the clear connection between the legislative and judicial branches in developing policy related to Saami in Norway.

In discussing the rules on assessment of the evidence in relation to the draft Nordic Saami Convention, it is relevant to examine the Norwegian legislative process, both because it shows the described development and also because this amendment may influence the development of legislation in other Nordic countries, bearing in mind that the amendment, and not just the case law, calls for a change in assessment of the evidence.

In the Korssjøfjell Case, raised by the landowners, the Supreme Court unanimously found that the boundaries of grazing rights had to be determined by customary use on the basis of civil law rules (ie the rules on immemorial usage) and not on the basis of the boundaries for reindeer husbandry districts as determined by the State Reindeer Administration under the Reindeer Husbandry Act. The first voting judge referred to the recommendation of the so-called 'Lapp Commission' of 1889, and stated that the Commission

did not intend to make such changes in established civil law relations as the reindeer owners' principal argument implies. The Ministry of Agriculture's viewpoint ... that reindeer husbandry legislation up to the present is based on the principle that all uncultivated lands within a reindeer husbandry district are areas where reindeer grazing has been going on since olden times, must have been given on a wrong basis.⁵³

⁴⁹ NRt 1988, 1217. See also section II.B. above.

⁵⁰ Skoghøy, above n 48, 678.

⁵¹ Åhrén, above n 3, 28, states that 'Article 34(3) obliges non-Saami courts to accustom the burden of proof on Saami parties to the Saami traditional land use, in cases concerning whether the Saami have traditionally used a particular land area'. In this context one might say that the provision of the Reindeer Husbandry Act was ahead of its time.

⁵² G Eriksen, 'Samiske sedvaner og bruk av naturressurser før og etter Selbu- og Svartskogdommene' (2004) 30 *Kritisk Juss* 289, 298; repeated in Eriksen, above n 3, 324.

⁵³ NRt 1988, 1217 at 1224.

The Case set aside the established notion, according to the Ministry, that ‘the Saami right to reindeer herding as a general viewpoint applies everywhere in the mountains and the outlying fields within the existing reindeer husbandry areas’.⁵⁴ This was the state of the law that the Ministry of Agriculture supposed had been established through the Reindeer Husbandry Act of 1978, and which was practised in the State Reindeer Administration. The Ministry responded to the Supreme Court’s decision as follows:

The Constitution and international law to which Norway is bound, assume that the Saami reindeer herders in Norway have effective legal protection for the livelihood activity they are currently carrying out. The Supreme Court of Norway has found that the current legislation does not provide such legal protection.⁵⁵

The Ministry further stated that this situation was unacceptable, both on the basis of Norway’s international law obligations, and because of the need to have clear rules governing reindeer husbandry. Hence, ‘as soon as possible clarity must be brought to reindeer husbandry’s legal basis’.⁵⁶ Accordingly, the Ministry of Agriculture proposed an amendment to the law, ‘that directly states that the Saami reindeer herders’ rights and duties, as defined in the Act, apply inside the currently applicable boundaries of the Saami reindeer husbandry areas’.⁵⁷

When the bill was presented in Proposition No 28 (1994–95), the Ministry of Agriculture, which until then had been careful not to recognise that the legal basis of right to reindeer husbandry was immemorial usage, stated that reindeer husbandry had its own legal basis which it was unnecessary to specify in the law:

This is a circumstance that is largely established in case law. The legal basis is also older than the law. It is therefore not the Reindeer Husbandry Act that constitutes the rights of reindeer husbandry. The Reindeer Husbandry Act, does, however, give a more detailed definition of the content of these rights, and provides as well for regulation and control of the exercise of those rights.⁵⁸

Based on this, the Ministry proposed a change in the Reindeer Husbandry Act, stating that ‘the landowner will have the burden of proof that the land is not subject to a reindeer husbandry right’.⁵⁹

The majority of the Standing Parliamentary Committee of Agriculture expressed the same view as the Ministry as the legal basis of the reindeer

⁵⁴ St meld nr 28 (1991–92), *En bærekraftig reindrift*, 84.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, 85.

⁵⁸ Ot prp nr 28 (1994–95), *Om lov om endringer i reindriftsloven, jordskifteloven og viltloven*, 28.

⁵⁹ *Ibid.*, 31 and 39.

husbandry right. The majority also endorsed the proposed amendments.⁶⁰ The new section provides:

The outlying fields that are included in the reindeer husbandry areas are to be regarded as legitimate herding areas with such rights and obligations as are stated in the first sentence, unless otherwise provided by special legal relations.

This language serves to place the burden of proof on the landowner. This was rather brave, given the risk that the provision might be construed as an interference with the property rights of the landowner in such way that it might violate the European Convention on Human Rights, Protocol 1, Article 1, or the Norwegian Constitution, section 105. The proposal was met with significant opposition. At that time, new laws had to pass both Houses of the legislature. In the *Lagting*,⁶¹ the provision was adopted by 14 votes to 13.

The review above shows that the amendment of the Constitution by the addition of Article 110a in 1988, which protects Saami culture and livelihood, led directly to the *Selbu Case* 13 years later. Although the *Aursunden Case* (in NRt 1997, 1608) was decided against the Saami many years after the constitutional amendment, my claim still stands precisely because the Constitutional amendment contributed to forcing the legislature to change the *Reindeer Husbandry Act* as a result of the *Korssjøfjell Case* (in NRt 1988, 1217)⁶² which in turn led to the *Selbu* decision.

I am unable to examine the parliamentary proceedings here, but it is important to note that, in the *Selbu Case*, the Supreme Court indicated that 'if the wording of the Act is read in isolation, it indicates that there must be proof of a specific legal basis which says that there is no right to reindeer herding in the outlying field within a reindeer husbandry area'.⁶³ However, in light of the parliamentary statements on the interpretation of the section, the Court concluded that the provision must be given a more limited scope. It must be understood to mean

⁶⁰ Although the Saami lost their pasture rights in the *Korssjøfjell Case*, the case showed that the right to reindeer herding was not based on legislation but established through immemorial usage. This must have informed the Ministry of Agriculture's decision to acknowledge that reindeer husbandry was based on immemorial usage.

⁶¹ *Lagtinget* was one of the houses in the Norwegian Parliament; *Odelstinget* was the other. The Norwegian Parliament voted on 20 February 2007 (with effect from 1 October 2009) to abolish the system of *Odelsting* and *Lagting*. A bill must instead be reviewed twice by Parliament in plenary session before a law is adopted, see <www.stortinget.no>.

⁶² The new rule of assessment of evidence was adopted by amendment to the *Reindeer Husbandry Act* of 1978, s 2, 23 February 1996 No 8 (effective July 1 of that year). The amendment came into force July 1 1996, too late to affect the *Aursunden Case* (NRt 1997, 1608) already on its way to the final level of appeal.

⁶³ NRt 2001, 769 at 788.

that it imposes on landowners a burden of proof in the reindeer husbandry areas. The standard of proof is not stricter than that it requires a preponderance of evidence showing that the [reindeer husbandry] use has not had a sufficient extent that the land is lawful reindeer husbandry area.⁶⁴

In practice, this means that the landowner must prove that the reindeer herder's usage has not been as comprehensive as the pastoral rights established on these particular lands.

IV. ASSESSING THE EVIDENCE OF SAAMI USE OF LAND IN CASE LAW

A. Problems in Tracing the Use of Land

In the 'Introduction' to this chapter, I indicated that use of land by indigenous peoples does not leave many visible traces on the landscape, unlike activities such as forestry and farming. As we have seen, this was also emphasised by the Expert Committee when it proposed Article 34(3), stating that 'Saami land and water usage often does not leave permanent traces in the environment'.⁶⁵

In the Norwegian Act on prescription, a permanent, visible arrangement is a condition for the acquisition of rights of use during the ordinary acquisition period of 20 years.⁶⁶ This condition is imposed that the real owner gets some notice of illegitimate use. In the Selbu Case, the first voting judge was concerned that Saami use of land often does not leave such visible traces in the landscape, pointing out that, in matters of this nature, one faces a particular question of method. He continued, referring to the fact that the Saami were nomads and mostly used organic material, that decay and returns to nature make it difficult to find physical evidence of pastoral use of the land. This means that one should be cautious about drawing conclusions about Saami use of a particular territory from that lack of concrete information.⁶⁷

The Supreme Court also emphasised that topography may be used as evidence of use, a topic I return to in section V. below, but the Court did not provide more particular guidance as how to assess that evidence other than what has already been mentioned. However, the Supreme Court did refer to Leif Pareli and Anne Severinsen, who have suggested that it may be possible to rely on certain types of archaeological material and place names as ways to document the presence of the Saami in the past.⁶⁸

⁶⁴ *Ibid.*

⁶⁵ The draft article is referred in section I.B. above.

⁶⁶ Lov [Act] 9 Dec 1966 no 1 om hevd [on prescription], s 8.

⁶⁷ NRt 2001, 769 at 792–93. See also *Nordisk samekonvensjon*, above n 4, 255.

⁶⁸ L Pareli and A Severinsen, 'Noen metodeproblemer i sørsamisk historieforskning' (1979) 116–117 *Ottar* 29, 33 and 35.

B. The Use of Oral Sources as Evidence

The other particular methodological problem referred to by the Supreme Court, also drawing on research by Pareli and Severinsen,⁶⁹ relates to the fact that Saami reindeer herders' economic adaptation and social structure implied that there was no specific need to make use of a written language. The Saami culture has therefore, to a large extent, been based on oral traditions:

On the other hand, the Saami, like the locals, had oral traditions. Such transfer of knowledge handovers have to be considered carefully, but cannot generally be rejected. And if they are supported by other information, they may have increased weight.⁷⁰

Similarly, in the Tydal Case, the Frostating Court of Appeal also relied on Saami testimony on fishing, as the basis for determining whether rights had been acquired.⁷¹ The case law points out that oral evidence, or sources, may have greater significance in cases where the Saami are parties than in cases that do not involve the Saami.

In the Selbu Case, it was further emphasised that language difficulties between Saami and Norwegian authorities may have contributed to misunderstandings. Here, the Court stated:

It must also be taken into account that the communication between the Norwegians and the Saami can cause misunderstandings since the linguistic and cultural differences may mean that they view each other in an improper manner.⁷²

C. Requirements for the Intensity and Continuity of the Use

Although not directly indicated by the Expert Group, perhaps one of the greatest advances of the Selbu Case relates to the manner in which the Court assesses the evidence, or applies the rules of assessing evidence.⁷³ In Selbu, the Supreme Court assessed the evidence of use in a new way in relation to disputes over Saami land use. The Court achieved this by emphasising the significance of Saami cultural features—reindeer husbandry characteristics, migration patterns and land use—and concluded that this could provide solid evidence for acquiring pastoral rights. This way of assessing the evidence placed reindeer herders and landowners on a more equal footing, and implied that the reindeer husbandry districts

⁶⁹ *Ibid*, 30.

⁷⁰ NRt 2001, 769 at 792. See also *Nordisk samekonvensjon*, above n 4, 255.

⁷¹ Judgment 4 Dec 2008 (LF-2008-50209) (Tydal).

⁷² NRt 2001, 769 at 793.

⁷³ Since the concept of immemorial usage is based on customary, and not statutory, law, one might ask whether the adaptation of the concept to Saami customs and traditions is an adaptation of the assessment of the evidence or an adaptation of the (customary) rule of law. Given the problem addressed in this chapter, it is not necessary to go deeper into that discussion.

of Essand and Riast-Hylling obtained recognition for their grazing rights within specified areas of the municipality of Selbu based on the concept of immemorial usage.⁷⁴

In assessing the existence of pastoral rights, the Supreme Court stated that the special conditions, with regard to reindeer husbandry, had to be taken into consideration. Thus, the terms of acquisition may be adapted to Saami use of the area. But what are the implications of the Saami way of using the land for assessing the evidence? An implication that seems obvious today, but remains of great significance, is that terms of acquisition, developed in the context of agrarian domesticated grazing animals, were not necessarily transferable to reindeer husbandry.⁷⁵ The first voting judge highlighted that reindeer husbandry demands huge areas, and that land use varies from year to year depending on weather, wind and quality of the pastures. As a result, he suggested:

It cannot be demanded that the reindeers have to graze in a specific area every year. Both for this reason and because of the Saami nomadic way of life, interruption of use cannot hinder acquisition of rights even though it is of considerable length.⁷⁶

He also indicated:

The consequence of that particular feature of the reindeer husbandry ... is that the way of using pastures must be emphasised. The reindeers use large areas, where the environment, topography, nutrient conditions, weather, wind, etc determine the particular use to which the areas are to be put.⁷⁷

These statements show that the Supreme Court has adapted the rules on immemorial usage, or the assessment of evidence, so that the requirements for intensity and continuity of use in Saami areas must be assessed in light of the characteristics of the particular use.⁷⁸ The Tydal Case,

⁷⁴ The lawsuit was raised by 229 landowners in Midt-Trøndelag District Court in 1995, since Selbu Municipality had given reindeer herders the opportunity to be heard in land matters under the Planning and Building Act. In the writ it was alleged that Essand and Riast-Hylling reindeer husbandry district had no right to reindeer grazing on the plaintiffs' properties. The landowners lost the District Court case. There was a dissent in the Frostating Court of Appeal which concluded that grazing rights were acquired by immemorial use in the disputed area. The Supreme Court in plenary session came to the same conclusion but was not unanimous (9:6). However, the dissent was not concerned with the acquisition of grazing rights but with the question of where the boundaries for the grazing rights should be drawn; the minority would have drawn the boundaries somewhat more narrowly for the Essand reindeer husbandry district.

⁷⁵ See also Åhrén, above n 3, 28, who states that 'another important factor [that makes it extremely difficult for the Saami to succeed in domestic court proceedings] is that the rules of evidence in the countries within which the Saami population resides are modelled after non-nomadic, non-Saami use of lands'.

⁷⁶ NRt 2001, s 769 at 789. See also *Nordisk samekonvensjon*, above n 4, 255.

⁷⁷ *Ibid.*

⁷⁸ See also Eriksen, above n 3, 331–36, where the question is elaborated.

where Saami reindeer herders established fishing rights in their herding areas based on immemorial usage, illustrates that this has now become the norm.⁷⁹

D. Correction of Evidence From Older Sources

The Selbu Case identified one other important norm in relation to the evaluation of evidence. In its decision, the Supreme Court stated that older Norwegian written sources, such as the report of the 'Lapp Commission' from the 1890s, must be evaluated in light of the culturally specific attitudes prevailing in relation to Saami at the time.⁸⁰ This surely had an influence on the evaluation of the Saami rights to land. For example, the majority of the Court referred to the Commission's infamous statement about Lappish laziness, and dissociated themselves from the statement on the grounds that it represented a cultural view of the Saami that they could not support.⁸¹ However, this assessment was controversial, even in 2001.⁸²

E. The Assessment of a Good Faith Entitlement to Use the Land

It is a condition for acquiring rights according to the rules of prescription and immemorial usage that the claimant is acting in 'good faith'. The concept of good faith implies that the claimant must be acting in good

⁷⁹ In the Tydal Case raised by landowners affiliated with the Tydal landowner association, the Frostating Court of Appeal found that the reindeer-herding Saami in Essand reindeer husbandry district had acquired fishing rights in privately-owned lakes in South-Trøndelag based on immemorial usage. The Court emphasised, inter alia, use in earlier times, the Saami history and special way of life. The Court also stated that when assessing whether the fishing rights were acquired (in association with reindeer herding), regard must also be had to the manner in which reindeer husbandry was traditionally exercised.

⁸⁰ Compare the statement of the Norwegian Government in Ot prp nr 53 (2002–2003), above n 3, where it points out such possible imbalances in older written sources.

⁸¹ See NRt 2001, 769 at 791–92. The statement of the Lapp Commission may be found in *Indberetning fra den ved kongelig Resolution af 12te Juli 1889 til Undersøgelse af Lappforholdene i Hedmarkens, Søndre- og Nordre Trondhjems Amter* (Kristiania, anordnede Kommission, 1892) 33–34: 'One must respect the rights of the Lapps. But when weighing the Lapp and the settled farmers' mutual rights and obligations towards each other, one cannot forget the different conditions of their way of life, and that farmers, undertaking the hard and laborious work of cultivation, often incur heavy burdens. The Lapp, for whom life alternates between hardships and laziness, usually lives free of such impositions. From the state's economic point of view the Lapp livelihood is of little significance. Although he, for his reindeer husbandry, makes free use of significant pastures and much wood, it is nevertheless rare for the Lapp to accumulate wealth for any length of time.'

⁸² The minority, consisting of six of the 15 judges, stated that they could 'not see that there is evidence to suggest that the contemporary view of the Saami reindeer herders has had an impact on the Commission's assessment of the factual evidence'; see NRt 2001, 769 at 820.

faith as to the legitimacy of the use (eg that he or she is entitled to use the land). In other words, if you know that the land is not yours, you cannot acquire ownership according to the rules of immemorial usage. It may be open to question whether the ‘good faith’ condition is truly an assessment of evidence, but the importance of the term, and the absence of a clear distinction between assessment of evidence and the adaptation of legislation, makes it significant to examine the ‘concept of good faith’ in relation to acquiring land rights. In considering this question in relation to Saami land claims, the Svartskog Case is relevant.⁸³ Like the Selbu Case, it involved a dispute concerning land rights. However, in contrast to Selbu, this case involved a dispute regarding ownership rights between the State and a local community in Manndalen in the municipality of Kåfjord in Troms County. The dispute dealt with 116 square kilometers of outlying fields, registered as State property but used as a type of commonage by the local community of which the majority was of Saami origin.

In this case, the Court sustained the claim of ownership by the local community even though the land in question was registered with a title to the State in the land register. Perhaps surprisingly, the Supreme Court suggested that the fact that possession of property by the State was not marked by any visible delineation, since a planned fence was never erected, was a reason why it was not necessary to examine the land register.⁸⁴ Such examination is usually required to disprove or confirm the use of land in ‘good faith’ when claiming rights to a disputed area by prescription or immemorial usage in Norwegian law.⁸⁵ The fact that State authorities raised an out-of-court dispute, and even threatened the inhabitants of Manndalen with legal action, was not enough to rebut the claimants’ good faith of legitimate use of the disputed area.

The decision may not be out of line with other cases on the requirement of good faith in relation to acquiring property rights, even if the reasons for judgment may give the impression that the Supreme Court seems to have gone out of its way to show that good faith was present.⁸⁶ On the other hand, the decision may be understood as an attempt to recognise and honor the oral Saami tradition, and to compensate for lack of fluency in the Norwegian language, legislation and legal culture.⁸⁷

⁸³ See NRt 2001, 1229.

⁸⁴ The verdict is analysed and criticised by B Høgetveit Berg, *Hevd. Lov om hevd 9. Desember 1966 nr 1 med kommentarer* (Oslo, Cappelen Akademisk forlag, 2005) 236–38, 261, 274.

⁸⁵ See Lov om hevd av. 9. Desember 1966 nr 1 (Act on prescription), s 4, para 1; and NRt 2001, 769 at 788–89.

⁸⁶ Berg, above n 84, 274; and Eriksen, above n 3, 345–47.

⁸⁷ I do not here go into the question of the relevance of a requirement of good faith in cases where the entitlement of use is not controlled in a land register. See instead Eriksen, above n 3, 245; and Ravna, above n 46, 464–504.

The manner in which Saami characterise land rights is closely connected to the linguistic and cultural differences between Saami and non-Saami. In Saami tradition, a person is careful to use the term ‘title’ or ‘property rights’, regardless of the extent of use, as in the case of locals living in Manndalen, where the court of first instance concluded that there was no legal basis to award more than logging and grazing rights.⁸⁸ The Supreme Court rejected the conclusion of the first instance court, emphasising that all-inclusive usage of land and natural resources must have more far-reaching legal consequences:

Had similar usage been practised by those of another origin, it would have indicated that they believed they owned the area. The Saami, who constitute the majority of the inhabitants of Manndalen, with their collective and shared use of resources do not have a tradition of thinking about ownership or exclusive rights to property ... Should acquisition of property rights by immemorial usage be stopped because there are many examples where they have spoken about rights to use instead of property rights, their disposal practices, which correspond to the exercise of property rights, would be put to disadvantage compared to the general population.⁸⁹

V. ASSESSING THE EVIDENCE OF SAAMI USE OF LAND ACCORDING TO CUSTOMS AND TRADITIONS

A. Traditional Use as Proof of Land Rights

As we have seen in the Selbu Case, the Norwegian Supreme Court emphasised that Saami usage often does not leave visible traces in the landscape. However, the Court did not provide much specific guidance as how to assess such evidence. At the same time, as a party to the ILO Convention No 169, Norway (or more precisely the Norwegian courts) is (are) committed to considering Saami custom and customary laws when assessing evidence and proof to determine boundaries, titles and rights of use in traditional Saami areas, according to Article 8 (1) of the Convention. That article has also inspired Article 9 of the draft Nordic Saami Convention, which may further draw upon Article 40(2) of the UN Declaration on Indigenous People’s Rights of 2007. That article provides that (court) decisions ‘shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights’.⁹⁰

⁸⁸ The first instance was a special land tribunal called ‘The Uncultivated Land Commission’, established by Lov (Act) 7. Juni 1985 nr 51 om utmarkskommission for Nordland og Troms (repealed).

⁸⁹ NRt 2001, s 1229 at 1252. The interpretation of both the Selbu and Svartskog Cases is developed by Eriksen, above n 3, 314–48; and Eriksen, above n 52.

⁹⁰ While this is a declaration and not a treaty, it still carries some normative weight, especially in Norway since the Cabinet Minister in charge has stated that the ‘UN Declaration on

In this context, the work of Mikkel Nils Sara for the Reindeer Pasture Committee for East-Finnmark is of great significance. Sara pulls together the internal Saami traditions and legal opinions obtained from reindeer herding. Even though this work is entirely based upon internal Saami customs and opinions, those internal rules and traditions may contribute in resolving legal claims and disputes with interests outside the Saami reindeer-herding society. Sara's work describes and evaluates traditional rules of grazing use in relation to reindeer husbandry.⁹¹ These rules aim to determine reindeer herders' access and rights based on traditional knowledge, including how to assess evidence of traditional Saami usage.

Sara's work distinguishes between different forms of entitlements. First he deals with the evidence or proof of establishing rights to pasture inside the Saami reindeer husbandry areas, where there is competition between reindeer-herding *siidas* in relation to winter pastures. The situation is legally complicated as the legal position is unclear, and there might be several parties and conflicts.

As we have already seen from the Selbu Case, the reindeer herder's use of land demands flexibility because of variations in weather and, thus, the condition of the pastures, eg warm weather in winter followed by ice may lock the pastures and make them unavailable, requiring the herders to search for other areas. This also means that the same areas are not necessarily used annually. Flexibility with respect to variations in weather has been taken care of by varying the timing of in-and-out migration to and from the different seasonal pastures. However, Sara emphasises that this need for flexibility cannot be a reason for one *siida* 'to exceed its own pasture borders without an agreement with the affected *siida*, except in unusually extreme and rare cases. The *siida* must be presumed to know its own ordinary room for flexibility.'⁹²

Sara distinguishes between normal pasturage, which the Saami call *guodoheapmi*, and other reindeer grazing activities.⁹³ The grazing that occurs when the reindeer have just arrived in the autumn or winter pastures and are roaming extensively for mushrooms, for example, is called *Vistin* or *visttiheapmi*. This is a form of stray or roaming grazing, where the reindeer are difficult to control. In the Selbu Case, which also involved peripheral areas of the reindeer husbandry district, the Supreme Court assumed that 'roaming or stray grazing' may establish rights. Although the Supreme

the Rights of Indigenous Peoples is in line with government policy towards the Sámi people'; see <www.regjeringen.no>.

⁹¹ Reinbeiterettsutvalget for Øst-Finnmark, *Utredning om reinbeiterrettigheter på vinterbeitene i Karasjok* (Alta, Reindriftsforvaltningen, 2008) 15–22. See also MN Sara, 'Land Usage and Siida Autonomy' (2011) 2 *Arctic Review on Law and Politics* 138.

⁹² Reinbeiterettsutvalget for Øst-Finnmark, above n 91, 16.

⁹³ *Ibid.*

Court did not make a final decision on the point, it did suggest that this form of use could provide a basis for pastoral rights in these areas.⁹⁴

In relation to other reindeer-herding *siidas*, Sara assumes that ‘*vistin* grazing’, where reindeer use will probably exceed the long-term capacity limits, cannot provide a basis to claim grazing rights but may perhaps support a ‘*vistin* right’ (roaming pastoral right).⁹⁵

B. Evidence for *siida* Boundaries

Winter grazing areas may be divided according to their seasonal suitability: *skábmaguoh tun* (dark-time pastures) and *giđđadálveguoh tun* (late winter pastures). They may also be divided into *guovddáš dálveorohat* (core area) and *orohatruvda* (peripheral area).⁹⁶

Sara points out that the core area, in this context, is an area in which the herd of a *siida* will not come in to contact with those of other *siidas*. In peripheral or border areas, herders must expect contact with neighbouring herds in their operations, and there will, therefore, be a need to communicate with neighbouring *siida* on the use of the site to maintain *siidagaska*, ie the distance between the herds to prevent mixing of reindeer.⁹⁷

In the Selbu decision, we saw that the Supreme Court emphasised that pasture boundaries had to follow natural borders or separations in the terrain, such as the Selbu Lake.⁹⁸ This is consistent with Sara’s analysis, but it is more difficult to apply in relation to winter pastures, when rivers and lakes are frozen.

Sara particularly acknowledges that the ability to comply with the *siida* boundaries must be supported by the landscape conditions. Boundaries can naturally have significance where movements across the boundary will be readily visible. A boundary should be confirmed by a visible formation in the terrain: ‘A boundary through dense forests is not possible to observe in practice and thus unlikely as a traditionally established border.’⁹⁹ Sara points out that natural boundaries, in Saami named *oazit*, will be found in winter pastures, although they will not be marked as definitively as the summer pastures.¹⁰⁰

In sum, the ‘natural boundaries’ of the landscape may be used as evidence of the existence of boundaries between the pastoral lands of different *siidas*.

⁹⁴ Ntr 2001, 769 at 816.

⁹⁵ Reinbeiterettsutvalget for Øst-Finnmark, above n 91, 16. See also Sara, above n 91, 151.

⁹⁶ Reinbeiterettsutvalget for Øst-Finnmark, above n 91, 16.

⁹⁷ *Ibid*, 17.

⁹⁸ NRt 2001, 769 at 816.

⁹⁹ Reinbeiterettsutvalget for Øst-Finnmark, above n 91, 17.

¹⁰⁰ *Ibid*, 18.

This means that terrain and topography become a kind of evidence for usage, and thus may contribute towards recognising of the rights.

C. Traditional Rules Support Evidence of Use

Traditional rules within the *siida* system may also support evidence of *siida* boundaries and create an understanding of what is meant by such boundaries, or *siidarådji* or *siidagaska*. Sara offers several examples.¹⁰¹ Unacceptable or illegitimate behaviour naturally cannot serve as evidence. Such behaviour may be interpreted in light of the landscape, snow situation and weather conditions. For example, if the terrain conditions, such as elevations or hollows, create an enhanced or stronger movement of a herd in a particular direction, which may be further enhanced by the wind (reindeer generally run towards both hills and the wind), a neighbouring *siida* is not allowed to move into the area to which the herd is heading. Sara also points out that there ‘may exist customs that are very locally designed and reasoned’.¹⁰²

Sara concludes that the mixing of animals can be avoided if *siida* boundaries are completed by applying customary rules toward the relationship between *siidas* for peripheral areas, supplemented by locally-crafted rules and agreements between the *siidas* involved. It may ‘still be relevant to enter into agreements on setting up artificial barriers, *áideoazit*, where this is justified by changes in the husbandry conditions, eg due to external interferences, interventions or climate changes’.¹⁰³

D. Opinions among Reindeer Herders on What Counts as Evidence

This section draws on the results of an interview survey of Saami customary law, focusing on rules and opinions on land use, conducted by the author and Jan Josef Olli.¹⁰⁴ In the survey, reindeer owners were asked what

¹⁰¹ *Ibid.*, 18, where he points out: i) Reindeers that go into a neighbouring *siida*’s area must be retrieved immediately. In such a case, the crossing is not considered a violation of the boundary. ii) Reindeers that go into a neighbouring *siida*’s area should not be retrieved if it means that reindeer from the first *siida* (which are on their ‘home’ area) will follow. iii) One cannot drive or otherwise move a neighbouring *siida*’s ‘edge reindeer’ if those reindeer are in the neighbour’s own area. iv) In cases where herds have been in contact with each other in the border areas, each *siida* has a right immediately, or as soon as possible, to access the other *siida* herd to search for animals that may have been included in the neighboring herd. The rule of access is now enshrined in s 29 of the Reindeer Husbandry Act.

¹⁰² Reinbeiterettsutvalget for Øst-Finnmark, above n 91, 18.

¹⁰³ *Ibid.*, 19.

¹⁰⁴ See Ø Ravna and JJ Olli, *Sedvanerettslige oppfatninger om arealbruk blant reindriftsutøvere* (Kautokeino, Diedut 2, 2011).

principles or evidence should be used to determine boundaries between *siidas*. Even though these responses are primarily based on legal opinions within the reindeer herding societies, they may, at least to a certain extent, also have value in assessing evidence to settle disputes in relation to outsiders.

A large number of respondents answered that such determinations of boundaries for winter grazing land should be based on customary rights acquired from long-term usage: see Table 1¹⁰⁵ below.

Table 1: Principles for determining boundaries for winter pastures

No	Determining the boundaries for winter grazing land should be based on	Numbers	%
1	Customary acquired rights based on long-term use (the one that came first in time is best in law)	43	53.8
2	Prescription	17	21.3
3	Operational and natural conditions, ie natural boundaries (<i>oazit</i>).	9	11.2
4	Appropriateness based on an overall rational use of pastures for the <i>siidas</i> /summer pasture districts that have pastoral rights in the winter pasture area.	10	12.5
5	Other	1	1.2
		80	100

Source: Ravna and Olli, *Sedvanerettslige oppfatninger om arealbruk blant reindriftsutøvere*, at 36, Table 24.

The interviewees were also asked what factors should be applied to prove or document the acquisition of customary rights based on long-term use. The responses in Table 2 below show that oral traditions, written sources and pastoral uses documented in other ways should be accorded significantly more weight than other possible sources as evidence or as a source of determining boundaries.

Other questions in the survey may also be relevant for assessing evidence concerning customary rules of land use. For example, a large majority

¹⁰⁵ The table is based on the number and percentage of respondents who marked the particular category as priority 1.

Table 2: Distribution with respect to factors that should be emphasised in order to document rights based on customary use and prescription

No	The determination of boundaries of winter pastures based on	Numbers of all answers	% of all answers	Numbers of priority 1 and non-priority answers	% of priority 1 and non-priority answers
1	Oral traditions (eg stories of older, trustworthy people)	42	20.7	25	21.8
2	Written sources (eg documentary literature, reports or records of the reindeer administration, etc)	40	19.6	26	22.6
3	Use of pastures that is documented in other ways	38	18.6	28	24.3
4	Traces in the landscape (eg turf huts, cottages, fences, etc)	31	15.2	16	13.9
5	Operational and natural conditions, ie natural boundaries (<i>oazit</i>)	28	13.7	11	9.6
6	Traditional size of the heard (historical figures for the herd)	16	7.8	4	3.5
7	That one has prevented others from using an area and where they have respected this	6	2.9	2	1.7
8	Other things, please explain	3	1.5	3	2.6
		204	100	115	100

Source: Ravna and Olli, *Sedvanerettislige oppfatninger om arealbruk blant rein driftsutøvere*, at 38 and 39, Tables 26 and 27.

(95%) of respondents were of the opinion that a reindeer herder family or a *siida* has a particular right to use a specific area in preference to other herders (eg that there are specific, subjective pastoral rights for certain group of people). The survey also shows that the reindeer herders consider knowledge about reindeer husbandry, Saami society, traditions and legal culture to be very important for judges and others who will clarify the legal issues, including assessing evidence from the Saami reindeer herders.¹⁰⁶ Available space does not permit a more comprehensive review of this.

VI. SOME CONCLUSIONS

The Norwegian Selbu Case is a landmark decision in redefining the rules on assessing evidence in cases where traditional Saami use of land conflicts with the claims of farmers or other landowners, including defining what is 'traditional Saami land'. In that case the Supreme Court emphasised that while the Saami use of land does not leave as many traces on the landscape as does traditional agricultural use, this fact cannot be used to deny the existence of a Saami presence. Certain types of archaeological material and place names may be relevant sources to help establish such a presence.

The Selbu Case also establishes norms to the effect that the cultural characteristics of Saami reindeer husbandry and particular use of such pastures are significant when the use of land is assessed as evidence of immemorial usage (eg Saami reindeer husbandry use of land cannot be assessed according to the way farmers with domestic animals use the pastures). It also shows that older written sources must be corrected for the negative view of the Saami culture that prevailed in the nineteenth and twentieth centuries, and that oral evidence is to be accorded greater weight in cases involving Saami parties than in non-Saami cases.

Although the Supreme Court generally receives credit for achieving progress in these evidentiary areas, this chapter shows that these advances should also be attributed to developments in the State's Saami policy, as reflected in the amendments to the legislation. I have primarily referred to the changes to the Reindeer Husbandry Act in 1996, where the burden of proof was reversed and placed on landowners. It is also relevant to refer to the preparatory work of the Finnmark Act, where the Standing Parliamentary Committee of Justice expressed its satisfaction with the assessment of the evidence in recent case law, which gives 'instructions on how traditional Saami land use shall be considered as a basis for the right acquisition'.¹⁰⁷

¹⁰⁶ Ravna and Olli, above n 104, 49–50.

¹⁰⁷ Inst O nr 80 (2004–2005), *Innstilling fra justiskomiteen om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke*, 36.

Since the Selbu Case is used as a ‘model’ by the Expert Group in formulating Article 34(3) of the draft Nordic Saami Convention, it is not much use to ask if the Selbu Case complies with that text. It makes more sense to evaluate whether Norwegian (and other Nordic States’) laws and evidentiary rules, more specifically in Saami cases, comply with the draft Article 34. At this stage we can say that the Tydal Case, heard by Frostating Court of Appeal, seems to confirm the standards that were established in the Selbu Case, but it is hard to go beyond this at this stage of the development of the law. Further clarification will likely come as a result of the implementation of the Finnmark Act.¹⁰⁸

In this review, I have not specifically examined the state of the law in other Nordic countries. However, in Sweden, the recent Nordmaling Case of the Swedish Supreme Court¹⁰⁹ to some extent shows the influence of the Norwegian case law. For example, in the Court’s examination of principles for assessment of the evidence, it states that

[t]he principle of free assessment of proofs, which is to be applied, means that particular characteristics of the reindeer husbandry and other factors which the Saami villages have relied on should be considered when the evidence is evaluated.¹¹⁰

The influence or similarity is even clearer in the reasons of the Supreme Court which draw on the principles derived from the Selbu Case (and here compare the quotations in section IV.C. above):

When the reindeer herding areas should be determined ... it must be noted that reindeer husbandry has particular characteristics that define the areas which need to be used. The investigation in this part shows that winter pasture requires large areas ... in that the pasture availability varies from year to year. Changing weather conditions imply that areas used during one winter, may not be available for grazing the next winter. When an area is grazed down, it will take a long time before the lichen has grown up again, and in the meantime the reindeer have to move to other areas. The reindeer herding area must therefore be broad and not limited to the areas where reindeer have been observed in a particular year.¹¹¹

In my view, this suggests that the Swedish case law is developing along the lines of Norwegian case law, taking into account Saami traditional use of

¹⁰⁸ Another question is whether one can say that a general open-ended provision of an international convention is so precise as to enable one to verify whether the internal legislation in this respect fully complies with the convention.

¹⁰⁹ See Case no T 4028-07 (Nordmaling) (Judgment 27 April 2011). See also C Allard, ‘The Swedish Nordmaling case’ (2011) 2 *Arctic Review on Law and Politics* 225.

¹¹⁰ See Nordmaling, above n 109, para 19.

¹¹¹ *Ibid*, para 56.

land in assessing evidence of acquired land use rights.¹¹² In contrast, this development has yet to be picked up by the Finnish courts.¹¹³

The internal legal conflicts within the Saami communities may, in some places, be more demanding than conflicts relating to State infringements or other impacts of the majority society. Examples include conflicts within the winter pastures in Finnmark and cross-border pasture conflict between Saami reindeer herders in Norway and Sweden. Although Article 43 of the draft Nordic Saami Convention has rules on how disputes between the Saami villages, *siidas* or reindeer husbandry units are to be resolved in case of border crossing conflicts, the draft Convention does not provide advice on how other such disputes within the Saami community are to be resolved. This may be regarded as a shortfall in the draft, but on the other hand, it is presumably not the aim of an international convention to go this far. Even if Article 43 deals with such issues, the long-term, ongoing, cross-border pasture conflict, which has generally been devastating for the Saami community, offers a good argument for thinking that this issue needs to be addressed to a greater extent. In this area Mikkel Nils Sara's work might be helpful in showing how traditional use may assist in establishing evidence for land rights. In particular, he shows how the different use of pastures, by the reindeer, may be used to determine boundaries for pastoral rights between the Saami *siidas*. Natural terrain boundaries and topographic features, like rivers, lakes and watersheds, may also help determine the boundaries between *siidas*, where traditional rules support evidence of use.

The direct opinions of reindeer herders through interviews also suggest that customary acquired rights, based on long-term use, are of the greatest importance in determining grazing boundaries, especially on winter pastures in Finnmark. The crucial evidence or sources for determining boundaries are oral traditions, written sources and actual pastoral use.

Taking this knowledge into consideration, and applying the law and assessment of evidence as adapted to Saami customs and use of natural resources, including the rules on immemorial usage, means that the Saami do not need to be on 'foreign fields' when facing the Norwegian courts and land claims from other interests. When this can be achieved throughout the Nordic countries, one of the purposes of the Nordic Saami Convention, which, it is hoped, will soon be adopted, is on its way to being fulfilled.

¹¹² One should however be careful not to place too much emphasis on the importance of Norwegian law for the outcome, since the general trend in international law points in the same direction.

¹¹³ *Nordisk samekonvensjon*, above n 4, 252. For a short general description of the situation in Finland, see Allard, above n 46, 178–80.

