

Conclusion

Reclaiming Land Rights under the Pressure of Nation-States – Insights and Future Directions from Sápmi

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Dispossession and Resistance: The Pathway to Recognition and Reclamation

The Sámi are an Arctic Indigenous Peoples. The Sámi lands, what we call Sápmi, are in the northern part of Scandinavia and across Russia's Kola peninsula. Sápmi and the Sámi people have been divided up over the course of history by the nation-states of Sweden, Norway, Finland, and Russia. Like the experiences of the Indigenous Peoples shared across this book, those of the Sámi indicate that they too have been dispossessed. Likewise, the Sámi have also fought back against this dispossession. It is through ongoing resistance and persistence that positive changes take root.

The Alta conflict, for example, involved a series of protests in Norway during the late 1970s and early 1980s against the construction of a hydroelectric power plant in the Alta-Kautokeino River (in Northern Sámi language, *Álta-Guovdageaineatnu*) in Sámi area, northern Norway. For the first time in history, Sámi organizations and activists, together with environmental activists, rallied against the Norwegian Government. Despite major demonstrations, eventually the hydroelectric power plant was built. But the resistance led to the recognition of Sámi rights on many levels.

For instance, after the conflict the Sámi Rights Commission was established. This Commission wrote a report resulting in the Norwegian Constitution recognizing Sámi culture and society. The Sámi Rights Commission also proposed the establishment of a Sámi Parliament, which had its first elections in 1989 (Somby, n.d.). Later on, through the courts, came a recognition of Sámi customary and collective rights to their lands in Norway, and their constitutional right to fishing in Finland.

We see this pattern above throughout this edited collection – dispossession followed by resistance and then some recognition by the state. It is an unfortunate fact, however, that for many Indigenous Peoples their lands have not been reclaimed. They do not even have access to their lands, let alone any secure land title to them.

This concluding chapter weaves the themes from this book with the Sámi experience, and offers future directions for thinking about land rights in the context of the pressure of nation-states.

Insights from the Sámi and their Resistance

The official colonization of Sápmi commenced in the seventeenth and eighteenth centuries by the Swedish Crown (Kingdom).¹ The official settlement politics by these nation-states have since then gradually displaced the Sámi as a majority in Sápmi. Today, Sámi are a majority in only a few municipalities.

Sámi Governance

The ancient Sámi were governed by the *siida* (Sámi Village) system. In each *siida*, families formed their own economic entities for the annual fishing, hunting, and reindeer cycle, which are important livelihoods for Sámi (Hyvärinen 2010, p. 126). It is possible to demonstrate the existence of legal concepts comparable to land ownership in the *siida* society. There were boundaries to land and water in *siidas* that were exclusive, and smaller inherited tax lands for private families, or the Sámi tax lands (Korpjaakko, 1986). Legal history research shows that members of the *siidas* owned their taxlands, and *siidas* had a collective responsibility to pay taxes to the kingdoms in which the *siidas* were located. The ancient *siidas* disappeared from Finland when it became part of Russia in the nineteenth century, even though *siida* members continued to pay taxes for their lands until the 1920s (Korpjaakko-Labba, 2000). Also, in other parts of Sápmi, the ancient *siidas* disappeared as state borders were fixed, reindeer herding changed, and land-use decisions became centered in the state (Aikio, 1992; Pääviö, 2011).

¹ However, the non-state-based colonization of Sápmi and exploitation of its natural resources began at the dawn of Middle Ages, and expanded during the thirteenth and fourteenth centuries when trade with Sámi flourished, and taxes were levied on them (Baer, 1982).

In Sweden, the *siida*-based reindeer herding, hunting, and fishing rights have survived, albeit with reduced legal protection, as part of reindeer herding communities (*sameby*) (Korpijaakko-Labba, 2000). The reindeer herding *siida* system, still in existence today, is an adaptation of ancient *siida* principles for large-scale nomadic reindeer herding (Sara, 2009).

Sámi Resistance

For as long as we remember and know, we the Sámi have had to fight for our rights. For a long time, this fight was mostly at the local level. For example, in the year 1584, local Sámi complained to the King of Sweden, John III, that farmers from the south had caused them harm by invading their lands. The king drew up a letter of protection for the Sámi, forbidding the farmers from trespassing on Sámi lands. The members of the Sámi village kept this letter carefully and appealed to it to secure their rights in the courts in the year 1727, showing a continuous resistance against dispossession (Fellman, 1912).

In the modern era, the Sámi Elsa Laula-Renberg gathered Sámi for their first joint cross-border meeting in Trondheim, Norway's Sámi region, on February 6, 1917. The goal of the meeting was to strengthen the legal status of the Sámi people and to end discrimination against them (Labba, 2021). Since then, the Sámi's rights as an Indigenous Peoples have been recognized in the constitutions of Finland, Norway,² and Sweden.³ These are individual and collective rights based on international law. Only Norway has ratified the International Labour Organization (ILO) Convention 169 on Indigenous and Tribal Peoples. As part of the ILO 169 implementation process, the so-called state land in Finnmark was transferred to the Sámi inhabitants of Finnmark through an organization called FeFo (Finnmark Commission) in July 2006, enabled by the Finnmark Act of 2005 (Saami Council et al., 2022).⁴ In Russia, Sámi rights

² Amendment (FOR-2023-05-26-739) to the constitution of Norway in 2023 recognized Sámi as an Indigenous Peoples.

³ In the constitution of Sweden, the Sámis are recognized as people. The Instrument of Government (1974, p. 152) Section 2 Subsection 6: "*The opportunities of the Sami people, and ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own shall be promoted.*"

⁴ Many Sámi think argued the Finnmark Act is deficient, and have also criticized FeFo's actions, which are seen as restricting the Sámi right to self-determination. It is also worth mentioning that the area that is defined in the Finnmark Act is only a part of the traditional Sámi lands on the Norwegian side (Saami Council et al., 2022).

activists have been facing increasingly difficult, almost impossible circumstances in recent years (Labba, 2022).

Litigation

There have been a number of significant legal cases on Sámi rights. In the 1981 Tax Mountain case⁵ (Skattefjällsmålet), the Supreme Court of Sweden found that nomadic people, like the Sámi, can acquire ownership rights to land and water through long-term use (claimed from time immemorial) and occupation of derelict land (Samiskt informationscentrum, n.d.). In the January 2020 *Girjás* case, drawing from historical evidence, Sweden's Supreme Court found that the Girjás Sámi had established exclusive rights to small game hunting and fishing on their lands. Thus, the Sámi reindeer herding community had an exclusive legal right to manage hunting and fishing in the Girjás area (Saami Council, 2021).

In the 2001 *Svarskog* case, the Norwegian Supreme Court ruled that the Olmmaivággi Sámi community had acquired collective ownership to a parcel of land through communal utilization since time immemorial. This ruling was found to conform with Article 14 (1) of the ILO Convention No. 169 (Environmental Law Alliance, n.d.). The decision followed a century of resistance by the Sámi (Senter for nordlige folk, n.d.).

Finland's Constitution provides the Sámi with the right to maintain and develop their own language and culture (section 17 (3)). Culture is understood broadly, and extends to protecting traditional Sámi livelihoods, such as reindeer husbandry, fishing, and hunting (Government proposal HE 309/1993 vp). Constitutional fishing rights have prevailed for Sámi fishers where these have come into conflict with state fishing legislation and regulations (Labba, 2023).

Norway's Supreme Court has also upheld a right to cross-border reindeer herding, a right confirmed as early as 1751 in the Lappekodisil Protocol. Norway's Supreme Court held that Sámi from the neighboring Saarivuoma reindeer herding community from Sweden "have a right to herd reindeer in the disputed area in Norway, independent of provisions

⁵ The case mostly dealt with the ownership of certain areas known as tax mountains covering an area of about 4,000 square kilometers in the parishes of Frostviken and Hotagen in the northern parts of Jämtland province in Sweden (Bengtsson, 1982a). The main claims of the Sámi parties were dismissed by the Supreme Court, but the Court disclaimed the statement made elsewhere that nomads cannot acquire ownership rights (Bengtsson, 1982b).

found in the *Cross-border Reindeer Herding Act*, including its regulations” (Hofveberg, 2021). However, the court also held that the Norwegian state does not need to financially compensate the Saarivuoma for past infringements of that right, and that the parties must bear their own litigation costs before the court. On the costs issue, the Saarivuoma reindeer herding community is appealing to the European Court of Human Rights (Skoglund, 2022).

Norway’s Supreme Court ruled in 2021 that a license to construct a large wind power plant in the South Sámi reindeer herding area violated the Convention of Civil and Political Rights, Article 27. The implementation of the verdict is still an ongoing process, and the slow progress has caused large protests in Norway by the Sámi and human rights activists (Rasmussen, 2023).

It is also worth mentioning that international treaty bodies such as the Human Rights Committee and the Committee on the Elimination of Racial Discrimination (CERD) have implemented the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in recent decisions on the rights of the Sámi.⁶ This can be seen as a clear signal that UNDRIP is a core instrument of international law for Indigenous Peoples’ rights.

Strategies for Securing Land Rights, and Overcoming the Barriers: Insights from the Collection

The chapters in this book show the diverse strategies used by Indigenous Peoples to have their rights recognized by the state, and to reclaim their lands. These strategies include direct action, where Indigenous Peoples physically resist dispossession, political activism, and litigation like that pursued by the Sámi. The opening chapter by William Nikolakis described the activism and litigation used by Yolŋu people in northern Australia to safeguard their land rights. Litigation has been an important strategy in Australia, Botswana, Brazil, Canada, Chile, and Malaysia. However, Fernanda Frizzo Bragato and Jocelyn Getgen Kestenbaum documented in Brazil that the state applied the “temporal framework doctrine” (*tese do marco temporal*) to contest Indigenous land claims – though with a change in government, there appears to be more political

⁶ CCPR/C/124/D/2668/2015 (*Sanila-Aikio v. Finland*), CCPR/C/124/D/2950/2017 (*Näkkäljärvi et. al v. Finland*), *Ågren et al. v. Sweden* (CERD/C/102/D/54/2013), and *Nuorgam et al. v. Finland* (CERD/C/106/D/59/2016). Three of the cases mostly deal with the political participation rights of the Sámi.

support for Indigenous land rights. In many countries the courts have simply ignored or avoided the land rights and title of Indigenous Peoples. In the chapter on the Democratic Republic of Congo (DRC), Lassana Koné writes that the Baka, Bambuti, and Batwa peoples have pursued community forestry concessions as an intermediary strategy to secure some jurisdiction over their lands, where the courts and state ignore their customary land titles. This approach by the Baka, Bambuti, and Batwa peoples is fraught with administrative hurdles, and they remain vulnerable to encroachment without secure title. The recent Indigenous Peoples' rights legislation in the DRC may be helpful to address this problem.

The chapters show that the process toward recognition and reclamation is non-linear. In Paraguay, Correia, Villagra-Carron, and Glauser documented a pattern of "pendulum policies" starting with the violation and transgression of Indigenous land rights, moving towards justice and then back again to transgression. In Canada, where First Nations peoples have constitutionally backed rights, Diamond and Sanderson illustrated how the Torrens land titling system in Western Canada remains a major barrier to land reclamation, and brings into question the settler land titles. In New Zealand, Jones and Acosta concluded that the statutory approach to land rights has reduced the potential scope for change and treating land as *tāonga tuku iho* (a treasure that connects current generations with their ancestors and future generations). In India, Ambagudia showed that despite the focus on restoring lands to *Adivasi* peoples through statutory measures, there has been an overall decline in formal-titled *Adivasi* land holdings. In India, federalism and power to sub-national governments are frustrating land rights policies. While Indigenous Peoples may have constitutional recognition and land rights frameworks, as exemplified in Malaysia by Subramaniam, without secure and binding commitments that are coupled with social change there will always remain an "implementation gap" in land rights laws. Efforts to address the implementation gap, like the failed constitutional reforms in Chile, analyzed by Tomaselli, and the Peace Accord in Colombia in the chapter by Bolaños and Camilo Niño, illustrate the contested and highly politicized contexts in which Indigenous land rights exists.

In several of the chapters, Indigenous Peoples are not recognized for their rights. In Botswana, Hitchcock, Sapignoli, and Smith Moeti wrote that the country does not recognize the San as Indigenous Peoples, and High Court judgments supporting land and water rights are simply ignored, leaving San in a precarious tenure position. In Morocco, Bendella and colleagues documented the forces of a Pan-Moroccan

Islamic identity that is subsuming the *Amazigh* (the country's Indigenous Peoples). However, Amazigh's *agdal* land rights system and the *j'maa* (local community assemblies) have survived in the High Atlas, and create a socio-ecological balance in this fragile region. Finally, Baird shows how, in Cambodia and Thailand, Indigenous Peoples are pursuing political strategies, seeking to build support in the electoral system to influence change and land rights.

These strategies used by Indigenous Peoples show their ingenuity and resilience for reclaiming their lands, often in the face of severe discrimination and violence.

Opportunities and Future Directions

Governments have made commitments to addressing land justice for Indigenous Peoples, yet in many instances, there are significant barriers to delivering on these promises. Processes like the Peace Accord in Colombia and new legislation in the DRC herald national commitments to land rights – but the pathways are unclear and there will always be resistance, like that to the recent failed constitutional reforms in Chile that aimed to strengthen Indigenous land rights, and the rejection of the Indigenous Voice to the Australian Parliament in late 2023.

Amongst all of this, there are customary systems and institutions that have been maintained in the face of severe assimilative pressures, like the Moroccan *agdal* system and the reindeer herding *siida* system across Sápmi, which offer critical lessons for creating robust and resilient institutions and land rights. These examples point to the need for Indigenous Peoples to look inwards and build on their own governance moving forward. However, there is a critical need to secure land for the collective survival of Indigenous Peoples all over the world. If this is reached, the benefits to people, the planet, and biodiversity will all be considerable since Indigenous Peoples are also the custodians of much of the world's biodiversity and forests.

Concluding Thoughts

A longtime Sámi rights advocate Lars-Anders Baer summarized the land rights issue well from the Sámi perspective:

The future of the Sámi as a people and of the Sámi Way of life and culture is inseparable from the question of our right to land and water. . . . Our Sámi land is literally speaking the foundation for our existence as a

people and an absolute requirement for our survival as such. It is the source of natural development for the Sámi economy and culture and guarantee for future generations of the Sámi in freedom to choose Sámi alternative (1982, p. 11).

The Sámi fight for the recognition of their land rights is part of the international Indigenous movement. It has led to a development in recognizing the Indigenous rights at the local, state and international levels. The ILO 169 Convention and UNDRIP are the best examples of the legal instruments that have been the outcome of the movement. However, these instruments have neither been fully implemented by nation states, nor have the judgments on Indigenous land rights by the highest courts been followed. Thus, land rights, to a large extent, remain unfulfilled. What is required in general is respecting, recognizing and safeguarding Indigenous Peoples' land rights and rights to use their natural resources. Indigenous Peoples have had, since time immemorial, a strong connection to their own lands and the core of their culture is related to these regions and the natural resources within. A first but major step is for all nation-states with Indigenous Peoples to create appropriate legislation to protect land rights in ways that are designed by Indigenous Peoples themselves and reflect their institutions, values, and goals. A non-negotiable requirement is for any legislation to be dependent on the free, prior, and informed consent of Indigenous Peoples themselves. Drawing from the insights from this book, the next step is for the state to support a comprehensive and good faith implementation of these land rights. Without this commitment, the reclamation of Indigenous Peoples' lands will remain just that – an elusive promise.

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