Two Sides of the Coin: Rights and Duties

The Interface between Environmental Law and Saami Law Based on a Comparison with Aoteoaroa/New Zealand and Canada

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Abstract

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The needs of indigenous peoples are related to land, water and other natural resources for sustaining a more or less traditional livelihood. Such needs typically compete with other societal interests. There are, on the one hand, specific interests in exploiting natural resources within traditional indigenous areas, while, on the other hand, concerns regarding conservation and preservation measures of valuable nature areas. This thesis contains two perspectives: an environmental protection perspective and a customary rights perspective. The thesis also contains a comparison of certain aspects of the law in Aotearoa/New Zealand, Canada and Sweden. Although the examination has a comparative approach, Swedish law is in prime focus.

The objective is twofold. On the one hand, it includes an analysis of the interface between Saami customary rights, foremost the reindeer herding right, and environmental protection and natural resources legislation. On the other, it analyses and discusses ways in which the legislation may contribute to a sustainable use of land and natural resources within the reindeer herding area in Sweden. In this way, the second part of the objective is a succession of the former. It includes, above all, discussions de lege ferenda with the focus on Swedish environmental law. Evidently, it is the reindeer herding area per se that is in prime focus.

Inherent in the examination as a whole, there are, hence, sustainability aspects. A correct comprehension of Saami customary rights is also important to the promotion of a sustainable use of the reindeer herding area. The interrelation of the two legal areas, environmental/natural resources law and aspects of the indigenous law, is, however, more evident with respect to the New Zealand and Canadian laws. Nevertheless, the connection also exists in a Swedish legal context, even though not as emphasised. Hence, there may be a call for a greater interrelation of these two legal areas.

While general environmental requirements on the reindeer husbandry are abundant, specific requirements relating to regional or local circumstances are scarce. Such specific provisions may be designed to promote sustainability objectives better and, at the same time, to take into account specific Saami interests. Given the many conflicting land uses in the reindeer herding area, a stricter order of preferences taken on a strategic level generally provides advantages. Now, decisions are commonly left to be solved on a case by case basis with little guidance. Despite many shortcomings in specific legislation, above all, a regional and comprehensive environmental planning would greatly support the goal of sustainable uses of the land and resources in the area.
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Luleå on the 9th of August 2006

Christina Allard
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Part I: Introduction and Background

Part I contains an introduction to the thesis, including an explanation of the objective and methodological issues. I also provide an overview of the relevant legal research with respect to Saami and environmental law. The objective of this thesis has two parts, where the first in brief aims to analyse the interface between aspects of the Saami law and environmental/natural resources legislation. The second part, which is a development of the first, aims to analyse and discuss ways in which the legislation may contribute to a sustainable use of the Swedish reindeer herding area. Hence, although I provide a detailed comparison of the laws of Aotearoa/New Zealand, Canada and Sweden, the focus lies on Swedish law. The analysis of New Zealand and Canadian law is, nevertheless, an aid to both parts of the objective. However, the very beginning of this part commences with concise background information regarding all three countries, providing for a better understanding of the complex issues with respect to the different legal settings. Lastly, Part I contains a chapter that discusses the main characteristics of the three legal systems to provide essential information regarding certain key features, which will enhance the understanding of the analysis of the laws in Part II.
Part I
Chapter 1 Introduction

1 Introduction

This study includes an analysis of various aspects of the law in Aoteroa/New Zealand, Canada and Sweden. It includes a comparison of the laws, although the focus is on Swedish law. The relevant legislation is analysed from two interrelated perspectives: one pertains to environmental protection, while the other pertains to customary rights. These are areas of controversy. However, it is important to bear in mind that issues related to rights of indigenous peoples and environmental protection objectives are not black and white, but are rather shades of grey. Nevertheless, the needs of aboriginal peoples in general relate to land, water and other natural resources for sustaining a more or less traditional livelihood, which needs typically compete with other interests of society. An adequate environmental quality, as well as access to sufficient lands, is vital for securing a long term protection of indigenous cultures.

There is an increasing pressure on lands and scarce natural resources from various sources in all three countries, due chiefly to infrastructural developments, resource exploitation, tourism activities, and various environmental impacts. Only climate change impacts in the Arctic region are assessed to impose large effects on the nature in the near future. Since many of the indigenous peoples still live in the more remote, less densely populated areas with relatively unspoiled nature and a richness of resources, the dependence on natural assets makes the communities more vulnerable to environmental pressure and resource exploitations, such as mining. There are, on the one hand, specific interests in exploiting the natural resources and yet, on the other hand, there is a need to stress conservation and preservation measures in ecologically sensitive and important areas. This picture is relevant as well to the Saami reindeer herding area in Sweden.

Hence, indigenous peoples are particularly close to and dependent upon the nature in which they live. However, in the area of environmental protection and resource management, the acknowledgment of customary rights is only one side of the coin. It is as much a question of responsibilities and duties and of limitation of the freedom of action. This applies not only to indigenous peoples, but also to other individuals and legal persons. Additionally, the states have duties both towards the indigenous peoples and towards protecting the environment in traditional indigenous areas. These two duties too often conflict.

1.1 Setting the Context

1.1.1 Conflicts regarding Land and Natural Resource Uses

Whereas conflicts related to land and natural resource uses and indigenous customary means of using land and natural resources are a shared phenomena among all three countries, the history, culture and colonisation process differs. Under this subsection, issues of resource management and environmental

1 See the Arctic Climate Impact Assessment (ACIA) report, Impacts from a Warming Arctic (2004), which can be viewed at http://www.acia.uaf.edu/ (viewed at 2006-07-07). Reindeer herding is likely to be affected by the climate change, resulting in reduced snow cover, changing snow conditions, and more unpredictable customary harvests of animals. The likely shift in vegetation may also negatively impact reindeer pastures.
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protection are highlighted. Under the next subsection, relevant information is provided regarding the implications of the different colonisation processes and the culture of the indigenous peoples. As a whole, this section forms a basis for the analysis of the laws in Part II and for the final discussion in Part III.

Two distinct issues arise regarding conflicts concerning land and natural resource uses. On the one hand, there are conflicts between customary uses of certain areas and other uses of the same areas, which often leads to competition. This concerns the use by property owners, including the State/Crown, and persons using the areas with the support of usufruct rights and permits, as well as other kinds of approvals. Such uses of areas and natural resources may regard activities that cause environmental impacts or detriments to the enjoyment of indigenous customary rights, or both. On the other hand, there are conflicts between the indigenous customary uses of land and natural resources and conservation interests. The increased need for and emphasis upon environmental protection objectives during the recent decades have meant that traditional indigenous activities have also been scrutinised. There are clashes between indigenous resource management ideas and systems and modern scientific thinking, including the ideas of protecting species or features in nature for their intrinsic value or of sustaining complex ecological processes for their life sustaining services. These latter ideas are inherent in modern environmental law. This thesis concerns primarily the former issue referred to above, but notably in Aoteoaroa/New Zealand and Canada those latter tensions are very much alive, which is apparent in the analysis below.

Nevertheless, in a general context, all humans influence and reshape their environment in one way or another and to a larger or lesser extent. Centuries back, we cultivated land for our livelihood. We built houses and other structures that in turn left traces behind for archaeologists and others to explore. For instance, the settlement of the Maori ancestors nearly one thousand years ago caused the extinction of large birds, such as the giant flightless moa. Some one-third of the forest land was burned and replaced by grassland. Continued hunting and loss of habitat led eventually to the extinction of other bird species. In North America, similar impacts are evident. It is commonly assumed that, when Europeans first arrived in North America, they found a vast wilderness dotted with occasional aboriginal settlements. While many parts of North America were certainly more forested some hundred years ago, numerous generations of aboriginal people have lived on the continent and, over the years, have intensively modified the landscape

2 Regarding nature, particularly protected nature, such as national parks, there are inherent concepts of the relationship between nature and humanity. For national parks, there is a conception of wilderness, of pristine nature beyond human influence. In this context, Saami are seen as a problem, regardless of whether they previously used the present park areas for subsistence purposes during a long period of time. Hence, in conceptualising landscapes, nature and culture are intertwined with modern beliefs. I will not expound upon this theme further, only highlight the problem. Instead, see further in, for example, Mels, Tom (1999) Wild Landscapes. The Cultural Nature of Swedish National Parks (doctoral thesis). See also Dahlström Nilsson, Åsa (2003) Negotiating Wilderness in a Cultural Landscape. Predators and Saami Reindeer Herding in the Laponian World heritage Area (doctoral thesis).


in various ways. One important tool that they used was fire. For example, environmental historians have shown that, in the mixed deciduous forest areas of New England, Nova Scotia, New Brunswick and southern Quebec, aboriginal peoples not only cleared land for their corn fields and gardens, they burned forests at least once a year to keep them open. In Sweden, although the historical landscape of the Saami has not been examined to the same extent, it is safe to say that a large amount of the northerly parts of the country are shaped by pasturage of reindeer due to the Saami reindeer husbandry, particularly evident in the mountainous regions. Wild reindeer, predators and other game have also been extensively hunted and trapped. Nevertheless, even if the conflicts over land and natural resources are shared in Aotearoa/New Zealand, Canada and Sweden, there are specific issues within each country that give a more accurate picture of the specifics of those conflicts. Below follows a short overview of the background and tensions with respect to each country. This should also be read together with the country-specific information in the next subsection. Note that there is somewhat less information with respect to Sweden in both subsections, since I have assumed that most readers, at least to some extent, are familiar with the tensions and historical wrongdoings. I refer to further readings for those readers who are not aware of the tensions and historical events.

i) Aotearoa/New Zealand

Nature in Aotearoa/New Zealand is unique, and a high percentage of the indigenous species are endemic. The country’s plant and animal life has developed in isolation for eighty million years. In fact, the two main islands were among the last places on earth to be settled by humans. The impacts of human contact on the native wildlife were enormous. Many species became extinct and some one thousand species remains threatened. The arrival of the Europeans in the middle of the nineteenth century, along with their animals, likewise had great impact on the country’s natural resources. Another third of the forests was converted to farmland, and wetland areas were drained. Two of the greatest threats introduced were weeds and animal pests. With respect to conserving native species and habitat, the Department of Conservation is increasingly working with local iwi (tribe) and others to protect the country’s biodiversity.

In sum, in the relatively short time period that humans have been in New Zealand,
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the environment has dramatically been changed through activities such as harvesting, deforestation, wetland drainage, introduction of pests and weeds, and pollution.12

To support an understanding, it should be said that the customary uses of the Maori mainly concern harvesting practices and particularly fishing. Nevertheless, there is a great variety among Maori groups. Some tribes, such as the Muriwhenua tribe in the Far North, are very successful in fishing and are depicted as cooperative, productive and capable of outstanding achievements. The Ngai Tahu tribe's fishing resources are known to be rich, and the peoples of the Whanganui River have a complex and fruitful economy of eeling in the river and birding in the adjacent forests.13 Moreover, Maori have traditionally inhabited most of Aoteaorua/New Zealand. In this respect, therefore, there are no “traditional Maori areas”, a concept used in this thesis. Instead, there are specific tribal areas14.

Differing beliefs and values with respect to the environment and resource management have contributed to mistrust and misunderstanding between the Maori and the State.15 Often, cultural values were offended and local wisdom ignored. With such a background, it is not surprising that the first major claims in the 1980s before the Waitangi Tribunal concerned environmental matters.16 Nevertheless, it shall not be presumed that Maori are homogenous, even though they share many physical and cultural characteristics. Some tribes even claim nation status and argue that attempts to describe the Maori as a single group are forced. Another fact should be pointed out. Not all Maori have active links to any tribe. As urbanisation has escalated, issues concerning Maori who are alienated from their tribe have become more important, not the least evident with respect to the allocation of assets due to Maori fishing quota and the Fisheries settlements.17

Maori views of the world are based upon the proposition that the environment is an interactive network of related elements with each having a relationship to the others and to earlier common origins. Humans are a part of nature, rather than superior to it, and exist in a state of balance with other elements. Rivers, lakes, trees, and rocks all have a mauri (life force) of their own, like men and women. In this sense, the features of the environment have equal claims in the order of things.

To understand Maori values, a four-part framework arising from this conceptualisation of the environment has been proposed by Hirini Matunga. He

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12 See further, for instance, in The State of New Zealand’s Environment (1997), Chapter 1 p. 3. As a way of producing high quality data for an effective environmental planning and management certain “State of the Environment” reports are regularly issued, as well as a development of national environmental indicators. See further at http://www.mfe.govt.nz/publications/ser/ (viewed at 2006-07-04). Indicators have been confirmed for transport, biodiversity, marine, air, land, fresh water, ozone, climate change, and waste. Others are or will be developed: Maori, energy, amenity, animal pests, weeds and diseases. See Ministry for the Environment (2000) Making a Difference for the Environment. Recent achievements and plans for 2001, p. 11. Environmental statistics can also be found at http://www.stats.govt.nz/environment/default.htm (viewed at 2006-07-05).


14 See further below in next subsection.

15 The conflict is also evident between the Maori and environmental protection groups. See Gillespie, Alexander (1998) Environmental Politics in New Zealand/Aotearoa: Clashes and Commonality Between Maoridom and Environmentalists in New Zealand Geographer 1998:19.


17 Ibid., p. 5.
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recommends that environmental management decisions should take into account four fundamental Maori values: taonga, tikanga, mauri and kaitiaki. 18

Maori tribes have long felt offended by assumptions of Crown ownership to rivers, minerals, harbours, lakes and forests without clear extinguishments of title. The Maori see the close relationship between tangata whenua (the people of the land) and the environment weakened by legislation, practices of the State, and the conservation lobby. Despite the Resource Management Act (RMA), which provides a legal basis for Maori values to be recognised, some maintain that there is much yet to be done to uphold the principle of partnership. 19 Even if a majority of New Zealanders seem to accept that serious injustices have occurred that need to be addressed, there is still a strong aversion to Maori having specific rights not held by their fellow citizens. When iwi and other groupings claim interests in resources that the Pakeha (non-Maori) thought the Maori had abandoned or bring claims to new resources 20 not existing at the time of the signing of the Treaty, there is a considerable awkwardness. On occasion, public responses to the Waitangi Tribunal and its findings have been quite critical and even hostile. Some commentators suggest that the Tribunal has gained too much influence. It has also frequently been argued that the courts have seized Parliament's law making powers in these respects. 21

As explained above, there are large concerns about New Zealand's indigenous flora and fauna. A number of controversial cases in the late 1980s and early 1990s stressed issues regarding Maori customary use of native plants and wildlife. The customary uses concerned, for instance, use of special timber for canoes and carving material, birds, such as the albatross for ceremonial and food purposes, and poaching of the wood-pigeon. The real problem arose especially when threatened native birds were used for food and cultural purposes, a problem that arose as well with regard to the use of large and rare trees. 22 Evidently, there is, therefore, a clear conflict between a purely conservationist interest that demands full protection and uses of species even if they are threatened due to Maori customs. In the middle of the spectrum there are customary uses of feathers from accidentally killed birds used in weaving, as well as whalebone from stranded whales used for carving. 23

Maori are also concerned about poaching and unlawful harvesting. Not uncommonly, the actions seem to be undertaken by outsiders, people coming from the city with no whakapapa (ancestral) connections with the rohe (geographical territory of iwi/hapu). This was also the case with unlawful taking of traditional

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18 Ibid., pp. 21-23.
19 Ibid., pp. 46-47.
20 There have, for instance, been claims on rights to radio waves.
21 Graham, Sir Douglas (2001) The Legal Reality of Customary Rights for Maori, pp. 1-2. In spite of the Tribunals difficulties, its work has generally been of high standard. Despite its non-legally binding decisions its status within political society is high.
22 Maori Customary Use of Native Birds, Plants and other Traditional Materials, p. 1. When New Zealand Conservation Authority sought submissions of the prospect of customary uses of native species protected in the conservation areas, a majority of Maori respondents approved some form of traditional harvesting, while the majority of non-Maori opposed such actions. See Park, Geoff (1999) Going between Goddesses in Neumann, Thomas & Ericksen (eds.) Foundational histories in Australia and Aotearoa New Zealand, p. 184.
medicinal plants. Damage done by inexperienced harvesters of such plants was a concern in some iwi areas. Nonetheless, it was difficult to make a reliable assessment of the extent of the poaching of native birds. Although there were several stories of poaching actions, there was little evidence. Maori also have strong conservation concerns regarding, for example, the protection of traditional medicinal plants so that local Maori communities have access to such resources. Maori commonly cite the extensive body of traditional Maori knowledge passed down from earlier generations. Much of this knowledge is locally or regionally distinctive, based upon their understanding of seasonal cycles. In some areas, however, traditional knowledge itself is at risk or has already been lost.

Consequently, the European and Maori world-views on the environment are similar in some respects, but inevitably there are tensions. To what extent such cultural differences can be reconciled - if at all - poses a particular challenge for the country. Until recently, New Zealand has been dominated by European values, and the Maori values, economic systems and forms of government, including traditional institutions for resource management, have been marginalized. There were few or no legislative provisions that considered Maori concerns when resource management decisions were taken with respect, for example, to mining, hydro-electricity development, and industrial projects. Only in the past few decades has this situation begun to change.

Whenever they have had a voice, Maori have consistently criticised the wilderness and preservationist ethics that underlie the conservation legislation in New Zealand. They see it as a violation of the philosophy of people being an integral part of nature. The consensus lies instead in the kind of increased community-based conservation that maintains the historical reliance on nature and the intricate linkages between customary resource management and biodiversity. Maori see today's environmental policies as persistent colonialism, as policies of domination and neglect. Despite different conservation views, the Ngai Tahu settlement shows that it is possible for the Crown and iwi to share ownership, management and control of conservation areas.

ii) Canada

Canada is a vast country, in fact the second largest in the world, and it spans over six time zones. With such a large landmass, the geography is very diverse, comprised of mountain regions, fertile plains, huge forests, arctic tundra and permanent ice caps. The population of Canada is just over thirty million people, and consequently Canada has a very low population density, three persons per square kilometre. However, almost eighty per cent of the population is concentrated in urban areas.
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Many aboriginal communities today, particularly in the far north and mid-north, have mixed subsistence-based economies, meaning that they continue to make their living by combining subsistence harvesting with wage labour, government transfer payments and commodity production. In particular, hunting, fishing and trapping continue to be central economic activities. Thus, subsistence is part of the social and cultural system and remains important to the aboriginal communities as a means of securing the future, as well as affirming their connection with their past.31

However, countless aboriginal individuals in all regions of the country, particularly after the First World War, have been arrested and punished for violations of federal, provincial and territorial fish and wildlife legislation. Officials have seized guns, nets, fishing boats and motor vehicles. Prosecutions have led commonly to fines and sometimes even jail.32 Since the Sparrow case in 1990, many charges have tended to fall within areas that enforcement officers consider to be grey areas, such as hunting or fishing in a different treaty area, fishing during spawning periods, or selling some of the catch. These prosecutions seem, however, not to resolve the profound differences regarding the content of aboriginal and treaty rights, or over more general issues related to wildlife management and harvesting between aboriginal peoples, on the one hand, and government and the public, on the other.33

One of the very first targets for preservation measures was commercial fishing in the nineteenth century. There was no question that fisheries needed regulations on the Great Lakes and in north western Ontario, where the situation was becoming a free-for-all. However, the effects of regulations lead to elimination or reduction of existing aboriginal commercial fisheries. A similar situation prevailed on the west coast, where the federal government took over regulation of the fisheries after 1871. However, over the years, not just aboriginal commercial fishing was affected by government regulations and policies. Many traditional techniques, including the use of spears, gill-nets and night fishing by torchlight, were offensive to sport anglers, as were certain hunting activities. In more modern days, legislative debates on the matter resulted in the enactment of new laws in many provinces which restricted hunting and fishing methods. The laws also put a ban on so-called market hunting, that is, the sale of wild meat.34

Nevertheless, the constitutional readjustment in 1982 gave protection to “existing aboriginal and treaty rights”. The courts have provided substantial support for and sometimes priority to aboriginal rights, especially the Supreme Court, which, in a series of decisions from 1985 on, greatly strengthened the legal understanding of those rights.35 In fact, Canada has a distinguished position among countries of the

31 Royal Commission on Aboriginal Peoples (1996) Restructuring the Relationship, pp. 463-464. Note that, under this subsection, I draw extensively from Commission Reports, as they are a highly regarded source. The Royal Commission was established in August, 1991, and was given a comprehensive mandate: investigate the evolution of the relationship among aboriginal peoples, the Canadian Government, and the Canadian society as a whole, as well as recommend specific solutions to the problems rooted in those relationships that confront aboriginal peoples today.
32 Ibid., p. 497.
33 Ibid., pp. 650-651.
34 Ibid., pp. 498-500.
common law world, since it is the only country where in aboriginal people’s rights are unconditionally entrenched in the constitution.\(^{36}\)

The nation-wide concerns for the wildlife must, however, be understood in an historical context, which is particularly reinforced by the rapid disappearance of the buffalo in 1870s. Sports fishing, which is still a growing sector and actively encouraged by many provinces, has, through strong lobbying by sports fishing organisations, been calling for major cutbacks in commercial fishing and aboriginal harvests. Regarding overall fish populations, there is no clear idea of the relative impact of sports angling, including the effects of popular catch and release programs. There is also no accurate knowledge of the actual size or relative impact of aboriginal harvesting.\(^{37}\)

Even if most aboriginal people would stress that they have an obligation to exercise their harvesting rights in a responsible manner, it is not always easily done. One problem is that, while government resource managers have been unaware of or have discounted surviving aboriginal common property institutions on public lands, aboriginal peoples have had no reason to respect the State system. In turn, this has made it difficult for aboriginal governments to maintain or enforce their own rules among their members. In some cases, the result has been the worst of all possible worlds.\(^{38}\)

Among aboriginal peoples there is a sense of an ongoing violation related to environmental pollution and general degradation of the environment, including health related issues. In all aboriginal cosmologies there is a belief in one Creator, a superior force, and all life forms are seen as aspects of that force. All elements of nature, from muskrats to mountains, are a part of the self and, consequently, loss of land and damage to lands and resources are expressed as assaults on one’s own body and on the personal and collective spirit.\(^{39}\)

Environmental degradation has had an especially damaging impact on aboriginal people who live close to the land and its resources. Many who live on reserves or in rural settings depend for daily life upon the resources in their particular area.\(^{40}\) When treaties were first negotiated, a number of First Nations bargained for territories at or near mouths of major rivers in order to be close to traditional food resources. However, pulp mills, mining operations and other industrial complexes were attracted to these same rivers, which meant that those aboriginal communities were placed at greater risk for negative impacts. In short, industrial contamination and disruption of wild life habitat have combined to reduce the supply and purity of traditional foods and herbal medicines.\(^{41}\)

Canada has a large percentage of lands and resources under state control, and some eighty percent remains Crown land. Because of that, Canadians have developed expertise in this kind of property regime, but not without critique. For instance, important resources, such as forests, are effectively controlled by private interests under long-term tenures. Crown lands are managed by provincial and territorial government agencies. These agencies contribute to the development of legislation and regulations, make land use and resource use policies, and issue guidelines. They also grant leases, licenses and other forms of tenure agreements

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\(^{36}\) Woodward, Jack (loose-leaf, continuously updated) Native Law, p. 69.


\(^{38}\) Ibid., p. 526.


\(^{40}\) Ibid., p. 185.

\(^{41}\) Ibid.
that permit private corporations, groups and individuals to use resources. They also monitor these operations. The same agencies control access to and use of parks, forests reserves and other protected areas. The access to Crown land is permitted for many purposes such as hunting, fishing, trapping, boat driving and recreational snow mobile driving. However, government agencies set and enforce policies and regulations for all such activities.42

Parks generally have a very high level of support in urban areas for both conservation and recreational reasons, but they have been deeply unpopular with many residents of rural and remote parts of Canada who, like aboriginal people, have felt that their use of particular areas have been eliminated or diminished.43 Until recently, aboriginal customary uses have been consciously excluded by regulation and policy from parks and other protected areas established on Crown land. As a result, parks have been unpopular among aboriginal peoples. The Yellowstone model for designating and managing parks is a significant part of the corporate memory of land and resource management agencies in Canada. Excluded from this regime is the Nisga’a Memorial Lava Bed Provincial Park, which was established in 1991 in the Nass valley.44

There are also national parks set apart as a result of modern land claims agreements, and aboriginal peoples are commonly sharing the management of these areas, improving the relation between park staff and aboriginal peoples.45 Since there are many parks and protected areas within the traditional territories of aboriginal nations, most aboriginal people want to share the management of existing and future parks and protected areas. Some aboriginal nations have also expressed a wish to establish their own tribal parks, such as the Haida people of British Columbia.46

iii) Sweden

Approximately forty percent of northern Sweden is subject to Saami reindeer husbandry, from the vast mountainous areas in the west and north west, through forest lands, and to the more settled areas close to the shores of the Baltic sea. Apart from the immediate coastal region, the area is sparsely populated. The basic industries have a long standing presence, such as forestry, mining and agriculture. Large areas are also subject to water power generations and subsequent structures. Even if most areas are not intensively used by the husbandry, they are still seasonally or more occasionally used for pasturage. The husbandry is carried out on both state owned and privately owned lands, as a strong usufruct right burdening the real estates47. Consequently, there are commonly overlapping utilizations and, thus, competition over land and natural resources. The ownership of lands is also in dispute, not only regarding Saami, but also other locals, including sometimes Saami descendants. Another strong interest in the region is conservation intended to presume pristine and ecologically important areas. A majority of the county’s protected nature is adequately found within the reindeer

43 Ibid., p. 523.
44 Ibid., p. 522. The Nisga’a Tribal Council approached the provincial government to create the park and to be jointly managed.
47 See also further in subsections 8.1.1 & 8.1.4.
herding area. Tourism and recreational interests are additionally present. There is substantial degree of illegal hunting, and the hidden statistics are sizable.

The reindeer herding area is roughly considered as the traditional Saami area in Sweden and to comprise one part of Sápmi, the imagined homeland area of all Saami in Norway, Sweden, Finland and Russia. The Saami reindeer husbandry is the most obvious customary practice today, even if hunting, fishing and handicraft still are prominent and important means for subsistence. The legislation has amalgamated all customary rights to the Saami involved in reindeer husbandry and who are members of a Saami village. Saami who live outside of villages do not have specific customary rights. Consequently, the vast majority of the Saami population, totalling approximately 20,000, are not involved in reindeer husbandry or in exercising customary hunting or fishing. Due to the legislative reality in Sweden, there is thus a relative emphasis on the reindeer herding right in this study, although comments appear on the basics of codification of Saami customary rights as such.

The reindeer husbandry has since the 1950s undertaken drastic amendments, when more modern equipment and tools came into use. For instance, with the introduction of the present Reindeer Husbandry Act in 1971, the call for a rationalisation, including motorisation, of the business was strong. The husbandry was to be measured against other closely related businesses, prominently forestry and agriculture. Since the revenues from the husbandry business was thought to be too low, the reindeer ownership was concentrated to a few herdsmen. Investments in motor vehicles were encouraged and facilitated by the authorities pursuant to certain programs. This illustrates that legislation and official Swedish policy are part of the problem in that the rationalisation and use of modern technology were seen as preconditions to the survival of the reindeer husbandry. Today, the reindeer husbandry depends heavily upon the use of modern technology. Many reindeer herdsmen have left the business, partly as a result of the rationalisation programs.

However, today environmental authorities seem deeply concerned with the use of modern technology, in combination with allegedly excessive number of reindeer. In 1997, the Reindeer Husbandry Act was supplemented by an environmental objective. It was argued that the rationalisation and motorisation of the husbandry that had occurred over the recent decades caused negative impacts. It was argued that the husbandry should be measured in the same way as other businesses in this respect. At the same time, it was stated that the environmental quality of the mountain regions over the years had declined. There have been several other amendments to enforce environmental protection objectives, the latest of which is the Environmental Code, which has imposed greater environmental requirements for the businesses.

Over the recent decades, the voices for limiting the reindeer husbandry have sometimes been loud, contending that the mountain region is facing desertification as a result of careless reindeer husbandry. The battlefield stands primarily with respect to environmental concerns in the mountainous area. The matter is highly contentious. The reindeer herdsmen do not generally share the

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48 See further on statistics in subsection 9.3.1.
49 On customary uses and traditional knowledge see the various articles in Svanberg, Ingvar & Tunón, Håkan (2000) *Samisk etnobiologi. Människor, djur och växter i norr.*
current diagnosis of the mountain region as being in real environmental danger. In a nutshell, the reindeer husbandry is trapped between external expectations of always remaining the same, thereby preserving a historical reindeer husbandry, and expectations of engaging efficiently in a modern meat production52. The husbandry is thus caught between two extremes, a knot not easily untied53.

Nevertheless, to my knowledge, there is no comprehensive, overarching research on the environmental impacts of reindeer husbandry on the mountainous areas or other areas within the reindeer herding area for that matter. Pasture inventories are also very few, although they in fact must form the very basis of the County Administrative Board’s decisions on the highest number of reindeer allowed for each Saami village. In some debates, reindeer husbandry is singled out as the one and only causes for real and imagined problems. Most probably, the truth lies, as in so many other situations, in between. However, there are numerous records of local damages and detriments over the whole of the mountain area, for instance, due to tramping and over grazing, especially along fences and specific passages.54 Cross country driving has also caused effects locally. Given the multi stakeholder uses of many areas and the complex web of causes and effects, it seems far-flung to lay the whole burden on reindeer husbandry.55. Climate changes and pollution are also probably parts of the problem. Much more research seems, however, to be necessary.

The involvement of Saami in resource management within the reindeer herding area is virtually non-existent. The management of the world heritage site, Laponia, is the closest example of larger co-management initiatives, but so far negotiations have not resulted in any agreements regarding the terms of the co-management. However, in July of this year, some powers have been transferred to the Saami Parliament with respect to the administration of reindeer husbandry under the Reindeer Husbandry Act. As a result, in comparison to Aoteaoroa/New Zealand and Canada, the Saami in Sweden have been even more marginalised in terms of their participation in resource management decisions. Moreover, reindeer husbandry needs huge pasture areas and, during the twentieth century, the areas available to the husbandry have gradually been whittled down and scatted by settlements, road and railway constructions, water power, mining, and so on. Presently, there are no legal means for comprehensive control of the total impacts of different structures or activities carried out for each Saami village or for the whole of the reindeer herding area.

52 This is a conclusion drawn by Nilsson Dahlström with respect to her study on the world heritage site, Laponia, but it is also accurate in a larger context. See Dahlström Nilsson, Åsa (2003) Negotiating Wilderness in a Cultural Landscape: Predators and Saami Reindeer Herding in the Laponian World heritage Area, p. 503.
55 See also Dunell, Oje (1998) Renbete – ekologi och ekonomi in Olsson, Rolén & Torp (red.) Hållbar utveckling och biologisk mångfald i fjällregionen, pp. 199-205.
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1.1.2 The Colonisation Process and the Maori, First Nations, Inuit and Saami

The indigenous peoples included in this thesis, the Maori, Indians, Inuit and Saami, are all acknowledged as indigenous peoples within each country. The Saami were officially recognised as an indigenous people by the Swedish Parliament in 1977. Note that, Indians commonly prefer to be referred to as First Nations, which I also use, although the legislation uses the word “Indian”. Canada also acknowledges a third indigenous people, Métis, who have mixed ancestry (half-breeds) and are in many ways different from the other two indigenous peoples. Specific Métis rights have only recently and only to a limited extent been acknowledged by courts. Hence, Métis and Métis rights are not included in this thesis.

There follows herein a country specific summary and analysis of the colonisation process and the State/Crown-native relationships. From the brief information presented, it is evident that the indigenous peoples have shared experiences and suffered from, for instance, assimilative aims from the states. Nonetheless, the historical events are specific for each country. The historical context is critical for a correct understanding of indigenous customary rights and the complexity of Maori law, aboriginal law and Saami law.

i) Aotearoa/New Zealand

Aotearoa/New Zealand was not settled until about the eleventh century, when the first migration came from eastern Polynesia. The development of the Maori culture was rather isolated from other Polynesian cultures and from European influences. Pre-colonial Maori shared a material culture dependent upon nature for food and shelter. Despite their relatively small numbers and simple technology, they had considerable impact upon the environment. They also introduced the Polynesian rat, which had a devastating impact upon the indigenous invertebrate and bird populations. Nevertheless, over the centuries, the descendants lived, by comparison with later European treatment, in relative harmony with their dynamic physical and cultural environments.

In the eighteenth century, the Maori lived mainly in an agricultural and fishing economy. There were differences between tribal groups, warfare between which was common. These wars escalated with the introduction of guns.

When European discovery and settlement began, the Maori society was relatively homogeneous with a shared belief system, culture and language, although with dialects. The tribal identity was strong and recognised a chiefly leadership. From the beginning, contacts between Maori and the Europeans were mutually beneficial. Maori wanted to trade goods that the Europeans could supply, including weapons and later on blankets, clothing, tools and luxuries. Maori society underwent substantial change in the years before 1840 and the

56 Constitution Act, 1982, s. 35(2).
57 See further in, for example, Borrows, John & Rotman, Leonard (2003) Aboriginal Legal Issues, Chapter 6.
signing of the Treaty of Waitangi. Once cultivators and food-gatherers, Maori adjusted their living habits to accommodate trade needs, such as cultivation of suitable trading crops. Many learned to read and write in the Maori language with help from missionaries. Some adopted Christianity, while others incorporated Christian practices into their traditional custom. This change was most evident among coastal Maori, especially in the North. Some of these had travelled abroad serving on ships and had learned English. Inland tribes were, however, not as affected by European influence until the 1830s.

Treaties with indigenous peoples were not unusual in the history of British imperial expansion, although most of them have been forgotten. The Treaty of Waitangi, signed in 1840 by a Crown representative and over 500 chiefs, is a notable exception. The Treaty was an answer to contemporary humanitarian interests according to the humanitarian movement, which had its peak in the 1830s. The Treaty also laid down provisions to secure Maori co-operation for secure, peaceful European settlement. Otherwise, the aim of the treaty from a British point of view was not to protect the Maori culture, but protect them from the worst effects of uncontrolled European contact, and subsequently to assimilate the Maori with the settler community. When a representative of the British Crown arrived in New Zealand in 1840 to negotiate with the Maori, the British and the Maori were not strangers to each other. After Captain Cook's exploratory voyages, British naval and commercial vessels began to exploit resources, first occasionally, but more regularly after 1800. Already by the mid-1830s, the coast was dotted with semi-permanent trade-settlements and several missionaries with their families.

However, in the 1860s, a war on sovereignty was fought on two fronts: on the battlefield in parts of the North Island and with the colonial parliament. At the end of the 1860s, the government's official understanding of the Treaty was that the Maori had signed away sovereignty and consequently had the general same rights as the Europeans. The structure of the new colonial society emerged rapidly after 1870, and the Treaty was not in the settlers' consciousness. For the Maori, the Treaty became more relevant than ever after 1870, when government jurisdiction and Pakeha (non-Maori) settlement began to touch the most remote areas and villages. Regardless of whether particular tribes had actually signed the Treaty, it became a touchstone for protest, and has been so ever since.

By the 1890s, the population of the Maori had declined to about forty percent of its size before European settlement due to diseases, wars and displacements. The Maori were believed to be on the verge of extinction, but the population started to grow slowly. By the Second World War, the majority of Maori still lived in poor conditions in rural areas, mainly in the North Island. Many Maori began to migrate to urban areas in search of employment and consequently a future outside

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61 See further on the Treaty in subsection 3.1.1.
63 Captain Cook made maps of the country on his first voyage to the Pacific, which included marking stretches of beaches and likely places to land. The beach is also historically significant in encountering and exchanging with the Maori. The first of Cook’s meetings with the natives was in Poverty Bay (Tuarami-nui) in 1769, which ended with a number of local Maori being shot. See Turner, Stephen (1999) *Settlements as forgetting in Foundational histories in Neumann, Thomas & Erickson (eds) Australia and Aotearoa New Zealand*, p. 31.
65 Ibid., pp. 3 & 185. The war lasted for twelve years. The New Zealand government punished the tribes involved by confiscating their lands. Ironically, those tribes who supported British troops nevertheless lost land in the aftermath.
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of traditional iwi areas\textsuperscript{66}. Hence, problems of race relations and social and economic status became more prominent. By the 1990s, more than eighty percent of the Maori lived in urban areas.\textsuperscript{67}

Nevertheless, Maori are still tribal in nature, meaning that Maori identify their tribal ancestries by tracing their family to the voyagers from the Pacific. Oral history handed down from generations identifies the waka (canoes and their commanders) that made their way to the main islands. In this sense, individuals belong first to the whanau (the extended family), then to the hapu (sub-tribe), and lastly to the iwi. In pre-Treaty times, Maori did not see themselves as a nation, but rather as a grouping of tribes living side by side, although not always peacefully. Tribalism is, thus, still an important issue in New Zealand, but with this follows also a lack of a cohesive whole, which is apparent, for example, in modern Treaty settlement processes.\textsuperscript{68} This feature was evident in the Fisheries settlements and the allocation of fish quota. The majority of Maori live in urban areas, and many of them seem to have lost their ancestral links and do not know to which hapu or tribe they belong.

The Maori people constitute some fifteen percent of the total New Zealand population\textsuperscript{69}. In terms of socio-economic status, the Maori still have a low position in the society, and crime rates are high\textsuperscript{70}. However, Maori society is extremely diverse. Some iwi have, through marae processes, elected bodies that have the mandate of the tribes, authorised to speak on behalf of the people. These bodies may be charitable trusts, incorporated societies, trust boards, trusts or bodies set up under other statutes. Trust boards in existence are usually established through legislation, and many are based on traditional tribal territory. One example is the Ngai Tahu Trust Board. In some instances, these trust boards have been established to administer compensation given by the government to redress various wrongs, such as confiscated lands and promises not honoured. Elected representatives administer the boards on behalf of the tribe. The boards distribute funds for initiatives that enhance the well-being of the tribe.\textsuperscript{71} There is a national body, the New Zealand Maori Council, which functions largely as a means of forming and using Maori opinion regionally and nationally in matters of importance to the Maori\textsuperscript{72}.

In a relatively short period of time, there has been a rebirth of Maori culture.\textsuperscript{73} With the beginning of 1970s, a Maori protest movement arose that became more radical, organising a land march in 1975. Such activities created a wider public consciousness of Maori issues and of the fact that the Treaty of Waitangi had failed to protect Maori land, forests and fisheries. In 1975, Parliament passed the Treaty of Waitangi Act, which established the Waitangi Tribunal, called to investigate land claims and related matters. During the 1980s, there was a growing demand for Maori sovereignty and for the government to

\textsuperscript{66} For a Maori vocabulary, see below in subsection 1.2.4.
\textsuperscript{68} See, for example, Graham, Douglas (1997) Trick of Treaty?, pp. 2-3.
\textsuperscript{70} World Directory on Minorities (1997), p. 678.
\textsuperscript{71} Consultation with Tangata Whenua (1991), pp. 13-14.
\textsuperscript{72} Its membership derived from delegates elected by nine district Maori committees. It is established through the Maori Welfare Act 1962. The district councils in turn are made up of representatives from the Maori committees. The Maori Congress consists of a group of united tribes formed to present a national Maori response to issues affecting them.
\textsuperscript{73} Consultation with Tangata Whenua (1991), p. 6.
honour the Treaty. The Crown and Maori tribes have also been engaged in a Treaty settlement process to compensate for past wrongdoings and to honour the partnership inherent in the Treaty. This process is still vital.

Disputes over access to and ownership of natural resources have been a long-standing source of grievance for the Maori. Their concerns have been focused on the government's failure to acknowledge the rights and interests in the Treaty of Waitangi. The allocation and management of fishery resources have been a particular source of conflict, because of the importance of these resources to the Maori. The existence of the Waitangi Tribunal is a major reason why the Maori have been able to function as an effective pressure group, not least during the negotiations over the commercial fishery settlements.

From the very beginning, the traditions of Maori have been intertwined with the sea. A longstanding oral history and recorded stories have reinforced the notion of the Maori as a sea-faring and sea-using nation. Access to fishing grounds was governed by customs and rules, and chieftainship over the sea was described as mana moana, an extension of authority over land, which determined rights to sea resources. At the time of the European settlement, there were in a number of regions several Maori communities whose economic base was fishing. The existence of substantial Maori fishing industry during the pre-colonial period has also been supported by Waitangi Tribunal findings. Maori commonly advocate that they have a special relationship with the environment, particularly the waters.

Since the early 1900s, the legislature has limited and prohibited Maori harvesting rights, for instance through the Wildlife Act. As a contrast, in more modern times, particularly with the Conservation Act 1987 and the Resource Management Act 1991 (RMA), Maori participation in resource management and conservation has become increasingly significant. This is partly a response to the more prominent role of the Treaty. When it became more evident that the Treaty had a role to play and that partnership between the people should be promoted, treaty-derived vocabulary came into excessive use. So also did additional Maori terms that entered the discourse as well. Another reason for more use of Maori words was undoubtedly the decision to raise the Maori language to be official, which was accomplished in 1987 by statute. Hence, certain words entered the public vocabulary, such as kaitiakitanga (guardianship). This concept was made especially important in law because of its recognition in the RMA. Another important concept that arose to the public sphere of knowledge was tikanga, meaning Maori custom or the Maori way of doing something. Tikanga is also protected in the RMA and its content was greatly dwelt and elaborated upon.

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75 See, for example, Memon, P. Ali & Cullen, R. C. Rehabilitation of Indigenous Fisheries in New Zealand, p. 252.
76 Ibid., p. 256.
77 Ibid., p. 253.
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*Kaitiakitanga* is otherwise a concept which has its basis in the complex code of *tikanga*. *Tikanga* embodies the cultural construction of how Maori perceive the natural world and what relation they have with it. It includes also the rules and practices by which Maori manage their world. In order to have some understanding of what the concept means to Maori, one needs first to understand their understanding of who they are and how they came to be. Through oral memory, Maori trace their ancestry by *whakapapa* (genealogy), a series of family trees. The oral tradition varies in detail between tribes, but the source from where humans eventually emerge does not, namely one original, spiritual force.

Nevertheless, Maori are still actively renegotiating their relationship to and roles within the modern New Zealand state. The political dialogue concerns the sharing of the substance of power and resources. In the discussions, the past is in sharp focus, particularly as the Waitangi Tribunal is investigating many Maori land claims. Importantly, Maori use of the past is not just to rekindle a history of grievances and dispossession. Their history is a living presence, with the past still remembered and told at important oral meetings.

**ii) Canada**

The colonisation process in Canada has a longer time-span and is somewhat more complex as compared to Aotearoa/New Zealand. Obviously, with regard to the size of the country and the different indigenous peoples with different cultures and involvements in their contacts with Europeans, this overview will seem to be scanty. Nevertheless, it provides a general basis for the larger understanding.

In the pre-contact era, aboriginal peoples were distributed unevenly across the land, and the population density must have varied according to the ability of the lands to support livelihoods. British Columbia had the greatest ethnic complexity and the largest concentration of population. The size of the aboriginal population before contact can only roughly be estimated. Most figures say between one and two million people across what is now Canada. Scholars also assume that the mortality rate was as much as ninety or ninety-five percent of the aboriginal population between first contact and the twentieth century. Deaths occurred primarily due to introduced diseases, but also to violence and wars. Highly destructive was also the process of settlement and resource exploitation by Euro-Canadians that was well under the way by the nineteenth century. Settlements and mining frontiers everywhere led to dispossession, economic marginalisation, and attempted assimilation of the aboriginal peoples.

Before contact with Europeans, most aboriginal people were hunters, fishers and gatherers. The abundance of natural resources varied greatly from one region to another. A surplus of a particular product provided a basis for trade within and

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82 See further in subsection 4.2.3.2 under ii).
84 Binney, Judith (1999) *Songlines from Aotearoa* in Neumann, Thomas & Ericksen (eds) *Foundational histories in Australia and Aotearoa New Zealand*, p. 218. The Maori perception of time and the past is not the same held by western society, as it cannot impose a chronological order. For Maori the world was and still is ordered and understood by *whakapapa* (genealogy). All things, from emotions to flora and fauna, are part of an organic net and system of relationships. See further in Tau, Te Maire (2001) *Matauranga Maori as an Epistemology* in Sharp & McHugh (eds.) *Histories, Power and Loss. Uses of the Past*, pp. 63 & 65-67.
among aboriginal nations. Aboriginal management systems rested on their communal property arrangements in which the local harvesting group was responsible for management by consensus. Leadership and authority within the group were based on knowledge, experience and effective use. The individuals and families that possessed and demonstrated extensive knowledge and experience regarding traditional medicines, including tending, harvesting, and use and application of plants and animals, became the acknowledged community experts in each such sphere of resource management.

Although Western beliefs tend to dismiss aboriginal economies as “unspecialised, inefficient and unproductive”, aboriginal people live more “lightly on the land” than most of those who came to join them. Many of the resources they used were extraordinarily productive even by modern standards. Fisheries provide a classic example. On the east and west coasts, aboriginal peoples harvested enormous quantities of fish and shellfish both for personal consumption and also for exchange. Similarly, with inland fisheries, the harvests were enormous, according to historical and archaeological evidence, which suggest that such fisheries were managed on a maximum sustained yield basis for centuries.

The pre-contact mobility of the aboriginal peoples was mainly due to different situations, seasonal movements and permanent relocations. Virtually all aboriginal peoples moved, at least partly, in order to find economic opportunities or social interactions. The long-term movements were probably induced by a search for better economic prospects or as a consequence of military setbacks. Even if mobility increased with the coming of the Europeans, relocation of the tribe was not an unfamiliar feature.

The first aboriginal-European contacts were with the Vikings around the year 1000. Some five hundred years later, other Europeans were driven to colonise the continent. First, the rich fish stocks outside of Newfoundland were a yearly magnet to diverse European fleets, and soon the fishing was supported by whaling. The first permanent European settlement started in 1608, when Samuel de Champlain built a fort in what is now the city of Quebec. After the Atlantic fishery, the fur trade became a large commerce in Canadian history. Initially, the principal object for aboriginal peoples was iron. In the seventeenth century, the European market for furs, especially beaver pelts, expanded drastically. Notably, trade purposes were the common denominator for encouraging a continuing relationship between aboriginal peoples and Europeans. However, other motives for contact were Christian evangelization and the forming of military alliances. From the seventeenth century onward, France, England, Spain and Portugal sent missionaries to Canada.

On the whole, the most enduring consequence of the fur trade was the over-exploitation of animals and the abuse of the ecosystem, which made some native
groups dependent upon Euro-Canadians. Moreover, agricultural expansion and resource exploitations affected all aboriginal peoples in every region, although the onset varied from place to place. For instance, farmers began taking over Nova Scotia in the late eighteenth century, Ontario after the War of 1812 against the United States\textsuperscript{92}, parts of British Columbia in the middle of nineteenth century, and the prairies from the 1860s and onwards. The beginning and extent of exploitation of primarily forests and minerals also varied across the country. As a contrast to earlier periods when there was a need to form alliances and lasting relationships, in more modern days the aboriginal peoples began being seen as incidental to Europeans’ objectives or even as obstacles for development aims. Negotiated dispossession through treaties and cultural assimilation became realities.\textsuperscript{93}

Across Canada, a number of different historical treaties were negotiated before and after Confederation\textsuperscript{94}. A difference with the commencement of the settlement of the frontier was that those treaties involved the surrender of land. Seven of the so-called “number treaties” covering most of the plains were negotiated between 1871 and 1877, partly as a response to the concerns of the plains people arising from the rapid decline of the buffalo. As a result of those numbered treaties, reserves were portioned out\textsuperscript{95}. However, most of British Columbia and the three northern territories as well as portions of northern Quebec and Labrador, lack land-surrender treaties, which nowadays also corresponds to the arena for comprehensive claims on aboriginal title and more limited aboriginal rights.\textsuperscript{96}

The Royal Proclamation of 1763 is also important to mention here, as it acknowledged a minimum protection of aboriginal rights. It is a fundamental document that defines the relationship between European colonisers and the native peoples. The Proclamation did not create new rights, but affirmed old rights.\textsuperscript{97} The Proclamation also separated Indian tribal lands from those forming parts of the colonies. These lands were reserved for the exclusive use and possession of the Indian peoples. The Crown hoped in that way to remove the constant colonial pressure for lands which had caused many tribes to move to the interior, which in turn threatened to lead to new wars among the Indian peoples, as well as colonists. By guaranteeing Indian land, the Crown established itself as their protector, which is reflected in the reserve system visible even today.\textsuperscript{98} Moreover, the proclamation initiated an orderly process whereby Indian land could be purchased for settlement or development. Before that, individuals, land

\textsuperscript{92} The War ended by treaty in 1818, which established much of the present day boundary between the two countries. The remainder of the boundary was settled in the 1840s. See O’Callaghan, Shelley & Bursey, David (2002) Canada in Mottershead, Terri (ed.) Environmental Law and Enforcement in the Asia-Pacific Rim, p. 64.


\textsuperscript{94} See further at http://atlas.nrcan.gc.ca/site/english/maps/historical/indiantreaties/historicaltreaties (viewed at 2006-07-06). Regarding the Confederation see further below in subsection 2.2.1

\textsuperscript{95} Most of the reserves were set up in the mid-1880s and carved out from the worst land available, not subject to any future foreseeable resource developments. Today, the reserve land is a rather small portion of the country’s total area and substantially smaller than the reserves set aside in the United States. See World Directory on Minorities (1997), p. 14.


\textsuperscript{97} It has the force of a statute in Canada. See Woodward, Jack Native Law, p. 81.

speculators and colonial officials had often committed frauds on Indian sellers, which had greatly damaged the relations between Indian nations and the Crown. Now lands could only be surrendered on a nation-to-nation basis by the Indian nation to the British Crown in a public process. The Indian nation would be required to consent to the transaction.99

The first state of Canada, established in 1867 by an act of the British Parliament100, consisted of four provinces and a federal government. Over the next thirty-eight years, all of the other provinces joined, except for Newfoundland, which joined in 1949. Canada consists presently of ten provinces. The newest territory in Canada was created in 1999 (Nunavut) and replaces the eastern portion of North West Territory. Canada has three territories which are under the ultimate control of the federal government, namely Nunavut, Yukon and the North West Territories.101

In 2001, the aboriginal peoples comprised some four percent of the total population of the nation.102 About thirty-five percent of the aboriginal population live in the northern parts of Canada. In some regions, aboriginal people are in the majority, and almost everywhere in the north, aboriginal people are numerous. Most northern communities are small, and, as a general rule, the smaller the community, the higher is the proportion of the aboriginal residents.103 Since the Second World War, many aboriginal peoples living in rural or reserve areas have moved to urban areas and particularly to Canada’s largest metropolitan centres. Some half of the aboriginal population lives today in urban areas.104 Nevertheless, in similarity with New Zealand, there is a gap separating aboriginal peoples from other Canadians in terms of the quality of life that remains stubbornly wide.105

iii) Sweden

The Saami people are distinct from all other peoples in Sweden106, and their ancestors have lived in the region for thousands of years. It is widely regarded that the Saami ancestors were the first occupants of the region and that the Saami culture evolved within Sápmi, much through meetings with other cultures. The specific form of culture, with its strong connection to the reindeer, originated probably from the time when the people started to domesticate reindeer for household needs. However, there were no strict borders between Saami and Germanic cultures in the region. Instead, archaeological research has found a mixed culture stretching from south of the present county of Dalarna to north of the counties of Jämtland and Ångermanland during the period from 500 to 1000 AD. Elements of hunting, gathering and agriculture are evident. The burial

99 Ibid.
100 The British North America Act, 1867.
102 See http://www12.statcan.ca/english/census01/Products/Analytic/companion/abor/canada.cfm (viewed at 2006-07-06).
106 The Saami are also genetically unique in a European context.
grounds show evidence of cross marriage and that the cultural identities were unfixed and exchangeable, especially in the upper class society.\footnote{Lundmark, Lennart (1998), Så länge vi har marker – Samerna och staten under sexhundra år, pp. 23-24. Note that this subsection draws mainly from the book of Lundmark since it is a good account of the most important events. See also Hansen, Lars Ivar & Olsen, Bjornar (2004) Samernas historia fram till 1750.}

During the fifteenth century, the Saami organisation was similar to other hunting and gathering cultures in the north. It is possible, and almost certain, that their society was organised in the same way for centuries, but it is only now that we have written sources suggesting what their organisation looked like. The population was divided into communes with some hundred members. Rather large areas were used by the members for hunting and fishing purposes. Within the larger area, each family had smaller areas to benefit from and control. A number of elder Saami administered the supply of family areas. It appears that each family had more than one area. While some areas were suitable for hunting during the winter season, another had good fishing capabilities. It was important that the whole commune gathered certain periods of the year to decide how the land should be re-divided when deaths occurred, family sizes changed, or when new families emerged.\footnote{Lundmark, Lennart (1998), Så länge vi har marker, pp. 33.}

In contrast to both Aotearoa/New Zealand and Canada, the colonisation process in Sweden was peaceful. Another difference is the fact that people already inhabited chiefly southern and coastal areas of the present reindeer herding area. The idea of colonising the north was coupled with the so called parallel-theory, a belief that the agricultural purposes for colonising those areas were so different from the uses that the reindeer herding Saami were making of the land, that the Saami and the non-Saami could coexist without difficulty. This proved to be a very wrong assumption. In the late 1600s, the Crown issued Royal decrees that substantially facilitated peasants who choose to settle in the Lap areas, including an exemption from taxes for a fifteen year period and a complete exemption from military service. However, after all of the many years of warfare, there were too few males, and the colonisation efforts resulted in only a few settlements. Not until the middle of nineteenth century, after the peace in Nystad in 1721 and after the population recovered and increased rapidly, did settlement politics become interesting for more than just a few people.\footnote{Ibid., pp. 60-62.}

In 1749, the Crown issued a new decree to encourage people to move north, which also included elements aimed to protect Saami interests. Those elements included barring the settlers from hunting and fishing beyond five kilometers from their settlement and, if their farm was adjacent to a lake, limiting them to fishing for household needs only. There were also limitations on the number of adults who could live in each settlement, so that they would not be encouraged to hunt and fish. In this period, the Lapland border separated more coastal areas from Saami areas, although the border appears to have been drawn up chiefly due to issues of taxation and military service.\footnote{See further in subsection 8.1.4.} In this period, the financial and social status of the Saami was strong. The average Saami was in fact richer than the average farmer. In the international arena, the Saami were an important brick in a larger political game, since they had contacts with the enemy Denmark-Norway.
and knowledge of the northernmost areas. The domesticated reindeer were used as transportation in a vast area without roads.\textsuperscript{111}

When the settlers grew in larger numbers, the relative proportion of Saami declined. Their earlier prominent national and economical importance also declined when other businesses began developing in the region. The Crown clearly favoured agriculture, and the Saami rights to land and waters started to erode. The Saami became alienated and began being perceived as a social problem. In sum, Crown politics together with external factors lay behind the shift in the Saami position in society. Moreover, the reindeer must have been exposed to an epidemic disease spreading, since they died in large numbers. It may very well have been that the number of reindeer had grown too large for the land to sustain. The old management form of reindeer husbandry, under which the herds were kept together and milked in the same places where diseases easily could spread, may have caused an overexploitation of the pasture. Court cases from this period support this view. Saami brought claims against other Saami regarding the use of so-called taxed Lap\textsuperscript{112} areas (lappskatteland) at the end of eighteenth century.\textsuperscript{113} The crisis resulted in substantial movements to the present day Norway and, hence, fewer Saami involved with reindeer husbandry, although the herds grew larger.\textsuperscript{114}

Note that a growing settler population did not always lead to hostility and conflict. Marriages between Saami and settlers were not uncommon and cooperation occurred at least in the northern Lapland. When clashes in business increased, however, conflicts involving of lands and resources naturally intensified. The parallel theory, that the livelihoods of Saami and settlers were so different in character that no conflicts would arise, proved to be nothing more than wishful thinking. Moreover, many Saami became settlers. Some seemed to break new ground only to protect their taxed Lap areas. They continued with reindeer husbandry, but did not fulfil the requirements of cultivating the land. They were, therefore, forced to leave their settlements in favour of others. Nonetheless, many Saami left the traditional Saami livelihoods to become real farmers with the result that they lost their Saami identity in the population registers.\textsuperscript{115}

Saami had long been paying taxes to the Swedish Crown and sometimes also to the Denmark-Norwegian Crown. At the beginning, the tax burden was not harsh, imposed mainly upon skin, furs and dried fish. However, in the beginning of the seventeenth century, King Karl IX raised the tax burdens drastically, mainly to pay for the war with Polen. Taxes were levied on reindeer and the tax on dried fish was increased dramatically. Since important food supplies vital for immediate survival were now being taxed, Saami families suffered severely. Consequently, the new tax system became a crisis for Saami survival, and poverty spread. In 1620, the tax was reduced by half and further reduced the following decade, when it was confined to dried fish and Lap shoes. Nevertheless, the hard years caused enormous consequences. The most rational solution to the crisis at the time was to increase the herd with tame reindeer in order to rely more on reindeer meat. Hence, reindeer husbandry was initiated and was to be developed over the following years. Consequently, the period around the seventeenth century caused

\textsuperscript{112} Laps was the former name of the Saami.
\textsuperscript{113} See further in Lundmark, Lennart (2006), \textit{Samernas skatteland}.
\textsuperscript{114} Lundmark, Lennart (1998), \textit{Så länge vi har marker}, pp. 67-68.
\textsuperscript{115} Ibid., pp. 69-70.
a revolution in Saami society, with the creation of the husbandry and a nomadic lifestyle.\textsuperscript{116}

There was an early exploitation of natural resources in the north. Silver mining in the Nasa Mountain in the seventeenth century resulted in the Saami and their reindeer being more or less forced to transport the silver rocks to the coast, a distance of some 400 kilometers. In modern times, the large scale development of water power in the 1950s and the early 1960s caused severe problems for reindeer husbandry. The river valleys were important migratory routes and served as good pasture during the migration. The flatter river mouths were usually covered with less snow and the food was more easily accessible there. Consequently, the water power development caused the essential pasture and migration routes to be covered with water. Moreover, insufficient ice cover on the water dams made migration more difficult. The important fishing was also diminished by the development. The next problem was large-scale forestry that began in the 1960s and that resulted in large cleared areas in which the snow was packed harder and the pasture was more difficult to reach for the reindeer. Instead, the Saami had to use expensive artificial feeding. Conditions worsened when the forestry underwent ground preparation (markberedning), which involved the creation of a series of ditches over the area. This completely destroyed the reindeer pasture, thereby making migration more difficult for both the reindeer and the reindeer herdsmen.\textsuperscript{117}

By the time Parliament issued the first legislation regulating reindeer husbandry in 1886, the State policy towards the Saami had drastically changed. In principle, there was a pro-Saami attitude until about the 1880s, when new ideas flowed in mostly from England and Germany with a clearly racist tone. The decline in Saami population led to the belief that the race was doomed eventually to vanish. Another important factor in the change of attitudes toward the Saami were the images drawn up by scholars of the early Sami history. In historical times, the Saami were loosely organised groups moving around the land. As academics, the historians were very influential in society. The well-organised structure in Saami society with regard to their own lands and waters was erased from history.\textsuperscript{118}

The version of racist ideas that probably influenced Saami politics most was the so-called culture Darwinism. According to this theory, all peoples shifted culture, from lower to higher forms, an understanding of history that many believed in. Lowest on the scale were hunters and gatherers, then nomads, and then farmers, with the highest positions on the cultural scale held by European and North American scientists and researchers. The opinions offered as to why the Saami were on the lower scale of cultural development varied. Some argued that external consequences, such a hard climate, were among the reasons, while others maintained that it was caused by their own will and that, if they wished, they could change their situation. Some even contended that the Saami as a people lacked ability and were incapable of changing their situation; it was simply their nature to be nomads.\textsuperscript{119}

\textsuperscript{116} Ibid., pp. 30-32 & 37-41.
\textsuperscript{117} Ibid., pp. 43 & 125-127.
\textsuperscript{118} Ibid., pp. 76-79 & 85-86.
\textsuperscript{119} Ibid., pp. 85-94. See further in Lundmark, Lennart (2002) ”Lappen är ombytlig, ostadig och obekväm...”. Svenska statens samepolitik i rasismens tidevarv.
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After the Second World War, the concept of race changed, and the Saami received the same rights as other Swedish citizens, such as the right to get a loan for housing. The first national Saami gathering occurred in 1918 and concerned, among other things, severe criticism of the mandatory and poor Lap schools. In large, the ethno political mobilisation of the Saami was an opposition against the Swedish Saami policy. In the beginning of the twentieth century, the policy was based upon the so-called “Lap shall remain Lap” ideology, of which, for instance, the Lap schools were a part. The Saami were looked upon chiefly as reindeer herders, which perception, along with the legislation on reindeer herding that laid all customary rights in one hand, caused a splintering of the Saami population between reindeer herding Saami with rights to use land and natural resources and the other Saami. The formation of the National Union of the Swedish Saami (SSR) in the 1950s has been very important for the Saami movement in Sweden, as has been the formation of the Saami Parliament in 1992. Although Parliament has been an arena for all Saami, the division between reindeer herding Saami and other Saami is still very much apparent. Presently, the Saami population is some 20,000 or 0.2 per cent of the total population. There are some 4,700 reindeer owners, and approximately 2,000 Saami earn their main revenue from reindeer husbandry.

1.2 The Thesis

1.2.1 Objective and Delimitation

The objective of this thesis is twofold. On the one hand, I analyse the interface between the Saami customary rights, foremost the reindeer herding right, and environmental protection and natural resource legislation. On the other, I analyse and discuss ways in which the legislation may contribute to a sustainable use of land and natural resources within the Swedish reindeer herding area. The second part of the objective is a succession of the former. The comparison with New Zealand and Canadian law is an aid to understanding and appreciating both parts of the objective, although it is more apparent in relation to the final analysis and discussion in Part III.

Initially, the research project was not focused as much on Saami rights. However, during the process, I developed a strong awareness that the customary

122 See further in Mörkenstam, Ulf (1999) Om “Lapparnas privilegier”. Föreställningar om samiskhet i svensk samepolitik 1883-1997 (akad. avh.).
123 The rights of the Saami are codified in the Reindeer Husbandry Act. See further in subsection 8.1.2.
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rights of the Saami were unclear and often misunderstood, and yet importantly incidental to a sustainable use of the reindeer herding area. Accordingly, inherent in the analysis of the interface between aspects of Saami law and environmental/natural resources law there are sustainability aspects, not the least of which is the fact that the very notion of environmental law includes an overarching goal of sustainable development. The interrelatedness of the two areas is more evident with respect to New Zealand and Canadian laws, but the connection also exists in a Swedish context even if not previously emphasised to this extent\(^\text{125}\). As a result, there has been a shift in focus of the thesis objective. Note that, in relation to the objective, delimitation is also made with respect to sustainable use of the reindeer herding area. As such, the goal of sustainable development includes many other aspects not covered here, such as climate change impacts. Moreover, with respect to Swedish law, I do not cover hunting and fishing legislation separately, only in the context of the Saami customary hunting and fishing rights. Issues on hunting and fishing have recently been subject to several public commissions. Hence, the implications of the present policy on conservation of predators\(^\text{126}\) also lie outside of my analysis, as do issues regarding liability, with a few exceptions.

To analyse the legal crossing points between Saami customary rights and other legislation, an analysis of the nature of those customary rights is essential. Hence, in all three jurisdictions, I begin with an analysis of the rights of the indigenous peoples with respect to their use of land and natural resources.\(^\text{127}\) In Aotearoa/New Zealand, the Maori rights are essentially based upon an old treaty, the Waitangi Treaty of 1841, although it is generally regarded that the Maori customary rights are largely the same as those rights stated with respect to the Treaty. In Canadian law, the rights of the aboriginal peoples may be based upon both various treaties and customary uses. The analysis of the rights is, thus, limited to encompass aboriginal rights only. In Sweden, the Saami customary rights are based upon the doctrine of immemorial prescription (urminnes hävd), which is part of a specific branch of real property law.

It is necessary to distinguish customary rights from treaty rights. The origin of the rights remains the most significant difference. Treaty rights are derived from negotiations between the indigenous people and the Crown (Canada and New Zealand). Treaties were a fundamental part of early European–indigenous diplomacy. Since they resulted from negotiations, treaty rights may comprise any rights agreed upon by the parties, including pre-existing customary rights that have been incorporated into a treaty. An existing hunting right, for instance, may have been explicitly included into a treaty so as to assure that the Crown both new of and respected the continued existence of that right. Treaty rights that did not exist before contact include, for example, the establishment of an Indian reserve, payment of money, grains, horses or rights to schooling.\(^\text{128}\) Notwithstanding the

\(^{125}\) See also below on previous research in subsection 1.2.3.


\(^{127}\) Note also that with respect to the Arctic and the sustainable development within the Arctic region, there seems to be a need of more comprehensive comparative assessments of domestic laws. See here Bankes, Nigel (2004) Legal Systems in the Arctic Human Development Report, p. 116.

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rights created by or acknowledged in the historic treaties, indigenous rights may also be established as a result of the settlement of contemporary land claims, as done in Aotearoa/New Zealand and Canada.

Since I focus on the rights of indigenous peoples to use land and natural resources, I do not analyse their right to the land itself, in particular, ownership rights. Another limitation concerns both the countries chosen for the comparison, as well as the extent of the comparison of the laws in New Zealand and in Canada. I will comment on the latter limitation. Other countries would surely be of interest to compare with Swedish law, but linguistic and other factors make such comparisons practically difficult or impossible. Other English speaking countries, which include indigenous peoples, are, for instance, Australia and the United States of America. However, in Australia, the land was regarded as terra nullius (no man’s land) with respect to the colonisation process\textsuperscript{129}. This is in contrast with the Swedish, New Zealand and Canadian situations, where the rights of the indigenous peoples were respected from the beginning\textsuperscript{130}. Even if this is true for the United States, too, the law there has evolved into a very distinct legal system, which makes a comparison less fruitful. This regards the law concerning First Nations as well.\textsuperscript{131}

Nonetheless, the law in New Zealand and Canada is interesting for independent reasons. New Zealand’s Resource Management Act (RMA) of 1991 provides at least a starting point for a reconciliation of the Maori and Pakhe’a (European) knowledge and understanding related to decision-making of environmental protection and resource management issues. At the same time, the Act is regarded by many as one of the world’s leading environmental law statutes. In some respects, the RMA means an intertwining of Maori customary rights and environmental protection aims. The analysis of the New Zealand law encompasses, hence, an analysis of the RMA, but also an analysis of the modern claims process that partly attempts to reinforce the procedures under the RMA – apart from the initial examination of the Maori customary rights. New Zealand law is of particular interest with respect to procedural rights and obligations between the Maori and the Crown, especially consultation issues and co-management arrangements. The specific legislation on customary rights also includes interestingly certain management rights over the resources used.


\textsuperscript{130} Note, however, that, in relation to the Swedish landmark case, the Taxed Mountains case, the land (Skattefjällen) was considered as terra nullius (herrelös mark) in the late medieval times. This was seen as a precondition for the State to be able to acquire ownership to the disputed areas. See NJA 1981 s. 1, at pp. 227.-228. Regarding the case, see below in section 1.1.

\textsuperscript{131} See further in, for instance, Crane, Mainville & Mason (2006) *First Nations Governance Law*, where chapter 1 provides a short overview of the early developments in the United States. See especially at pp. 16-17. Aboriginal communities in the United States stand somewhat outside of its Constitution and have in fact a residual sovereignty which makes them distinct and somewhat politically segregated. The United States also excessively made use of the settlement system of Indian reservations, which does not correspond with the Swedish colonisation process. Note, however, that Canada also used the reservations system, but not to the same degree. See ibid. pp. 26-31. See further in, for instance, Magoci, Paul Robert (ed.) (2002) *Aboriginal Peoples of Canada. A Short Introduction*, pp. 29-31.
The inclusion of a constitutional protection of aboriginal and treaty rights in the Canadian constitution in 1982 has been integral to the growing understanding of the nature of aboriginal rights. As the result of the constitutional provision, section 35(1), the Supreme Court of Canada has been called to examine the nature of those substantial rights in a number of cases. The constitutional recognition did not create any new rights; the customary rights already existed under the common law’s so-called doctrine of aboriginal rights.

The analysis of Canadian law is limited here primarily to a number of fundamental Supreme Court cases. Importantly, environmental protection objectives are, in one way or another, interrelated in most of these cases. Given the already large scope of the research project, an examination of Canadian environmental laws was not possible. Hence, in the Canadian law the aboriginal rights per se are of particular interest, especially with respect to their interrelatedness to resource management issues and conservation aims. Of importance here is also the doctrine of fiduciary duty and the concept of “the honour of the Crown” since they, for instance, give raise to consultation duties for the Crown vis-à-vis the aboriginal peoples.

On a superficial level, I have found several similarities between the Saami customary rights, established through immemorial prescription, the aboriginal rights, and Maori customary rights based upon historical occupancy and continuous use of a tract and natural resources. For instance, the link between the object, the land being used, and the subject, the group using the land, who is the right holders, must be upheld in order to establish customary rights. As a result, even though this thesis encompasses an analysis of two different legal systems, a common law and a “civil law” system, a comparison is still fruitful. A comparison of environmental law is easier to justify since, in principle, all modern environmental law is statutorily based and aims to promote a sustainable development.

By this short explanation of the content and reasons behind analysing features of the New Zealand and Canadian laws, it should be evident that the comparison as such is used as a source of inspiration when analysing Swedish law. The comparative analysis is not all-embracing in the sense that all legal issues covered in the analysis of valid laws in Sweden are analysed with respect to

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132 The term “aboriginal” is synonymous with “indigenous”, but in the Canadian law, the word aboriginal is used.
133 This doctrine has a basis in colonial customs and basic principles of justice, and has been applied and developed by case law and academic commentary.
134 An analysis of the environmental law is not easily done, since it is regulated both on federal and provincial levels. Moreover, to my understanding, environmental law does not include specific links to the aboriginal peoples on resource management issues. I also got the impression from colleagues in Canada that Canadian environmental law was not of particular interest with respect to the objective of the thesis, especially if compared to New Zealand experiences, or, for that matter, EC environmental law. As a result, for these reasons collectively, I did not analyse the environmental law in Canada, although I am certain that such an analysis would, in one way or another, be interesting. For a reference, see, for instance, Benidickson, Jamie (2002) Environmental Law. Note also that Canada has negotiated modern land claims agreements since 1975. Even if those modern agreements are of great interest for resource management and conservation issues, the task lies outside of the scope of this thesis. See instead Crane, Mainville & Mason (2006) First Nations Governance Law.
135 Note that much of the case law in New Zealand refers to the reasoning by the Supreme Court in terms of the nature of indigenous rights.
136 The “civil law” system is primarily based on Roman-Germanic law.
Aotearoa/New Zealand and Canada. Moreover, and rather obviously, the comparison is made with respect to differences, where the New Zealand or Canadian law has evolved toward an interesting direction. Although the situation generally is similar among the countries with conflicts and competing uses of land and natural resources, the legal situation is diverse.

Lastly, I will say something of the second part of my objective, the analysis and discussion of ways in which legislation may contribute to sustainable uses of land and natural resources within the reindeer herding area. An assumption in this work is that a better understanding of the Saami customary rights enhances the environmental protection of the reindeer herding area; ambiguous understandings and knowledge of Saami customary rights do not generally support a sustainable use of the Saami traditional land-area. Nevertheless, the focus in relation to the second part of the objective lies on a more strategic level, for example, the implications of the planning law with respect to the environmental protection legislation. A detailed analysis of various means for promoting a sustainable use of the reindeer herding area is, thus, not intended. Suggestions de lege ferenda are integrated.

This thesis includes legal material through December, 2005, for New Zealand law, March, 2006, for Canadian law, and, with a few exceptions, through April, 2006 with respect to Swedish law.

### 1.2.2 Methodological Issues

#### 1.2.2.1 Introduction: a Creative Jurisprudence

Regarding the tasks and responsibilities of legal research, I principally concur with the views expressed by the eminent Professor Anders Agell, who uses, in a highly regarded article, the concept of a creative or constructive jurisprudence (rättsvetenskap) for describing the aim of legal research. Agell means that, in contrast to the fact that judges apply the law in a certain area, legal research projects should be designed to promote autonomous analyses of the legal problems (even given the sources limited to the traditional). Hence, he argues that the essential assignment for the jurisprudence should be analysing the relationship between basic provisions and their role in the society, the relationship between sets of provisions internally and the usefulness of the used formation of concepts (begreppsbildningen). Moreover, if profound results are desired, the analysis should be overarching and should leave the door open for review of the appropriateness of the current provisions. At the same time, he acknowledges that studies with guidance of only the legal sources hardly ever may provide for a full analysis of the societal consequences of certain legislation, its appropriateness or whether alternative methods would offer a better solution.

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137 A goal of sustainable use might not explain more than the overarching goal of sustainable development, but it is nevertheless somewhat more limited to various activities performed. And, of course, it is easier to say what is not a sustainable use of natural resources, than the other way around.

138 The reindeer herding area largely corresponds with the traditional Saami area.

139 He seems to use the two concepts as synonyms. See Agell, Anders (1997) *Rättsdogmatik eller konstruktiv rättsvetenskap* in Festskrift till Stig Strömholm, Del I.

140 Ibid., pp. 43-44. Note, also, that Agell is in favour of the use of other disciplines in legal research, as well as cross-disciplinary research projects.
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Agell uses the metaphor of a building when discussing different types of provisions and aspects of the law. Fundamental principles and reasons within the law are found in the basement, where the researcher primarily should reside. In the upper floors, specific provisions and problems of applications are found. The researcher should, of course, visit these floors as well, but for the limited task of checking that the floors are constructed safely and correctly above the basement area. Critique of the law should, hence, foremost be based upon arguments from the “basement”.141 He also lists certain specific tasks for the jurisprudence, grouped into categories (typer). This thesis corresponds with analyses of relationships between provisions within different legal areas. It also corresponds with analyses of consequences, purposes and steering effects of a legal area; the second part of the objective aims to analyse how the larger system of provisions promotes, or does not promote, a sustainable use of the reindeer herding area through legislation. And apparently, my study also includes a comparative analysis, which generally opens the door towards de lege ferenda reasoning.142

Obviously, I bring up this article, because I generally agree in terms of the essential task for the jurisprudence. In fact, it is hard not to, since it allows a multitude of different research tasks – all with the common denominator of an autonomous analysis and review of the law. Additionally, it is useful as a tool for the categorisation of research projects or conducted research, by which the aims and basics of a particular research task are elucidated. With this general introduction, I will now turn to more essential issues related to specific problems inherent in this particular study.

1.2.2.2 Valid Law and Legal Sources

This thesis includes, above all, an analysis of the valid law (gällande rätt) or de lege lata. Under this subsection, I aim to address specific problems related to the analysis of valid law of importance with respect to the chapters on Swedish law, and under the next I discuss certain problems related to the study of foreign law.

However, before going into specific problems in this and the following subsection, I wish to draw attention to a general and deliberate aim when analysing the valid law with respect to all three countries. I have structurally attempted to separate, on the one hand, issues related to substantive rights as such, chiefly concerning the customary rights, and public law regulation and limitation of such rights, on the other. This is particularly obvious in relation to the structure of the Swedish chapters in Part II, where the Saami customary rights are analysed in chapter 7 and public regulation of the rights, particularly the reindeer herding right, are analysed in chapter 8. Another deliberate aim has been, at least mentally, to separate the substantial rights from procedural rights, such as consultation rights/obligations, to redress provisions on environmental impact assessments. I have emphasised structurally issues on consultation in all three countries. However, with respect to the analysis of Canadian law, the question of consultation is partly intermingled with the justification test143. In any case, this

141 Ibid., pp. 45-46.
142 The mentioned tasks of this thesis correspond with points 5, 11 and 10 in Agell’s categorisation. See ibid., pp. 48-50 & 53.
143 This test aims to determine whether legislative infringements on aboriginal rights can be justified. See further in subsection 6.4.5.2.
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way of analysing and structuring the legal material will become more evident with respect to the final analysis in Part III.

After having stated my general starting point, I turn to address specific issues related to the analysis of the Swedish valid law. The analysis of the environmental law and Saami law is problematic for different reasons, but both concern in principle the legal sources. First of all, since this is a normal legal study, a "traditional legal method" is used throughout the thesis. This means in particular an application of the doctrine of legal sources (rättskälleläran). On a superficial level, there is an agreement of what the doctrine of legal sources means, but, of course, the relative weight given different legal sources differs somewhat among lawyers.

In short, with regard to Swedish law, the plain legal text forms the primary understanding of a legal situation. But the weight given the preparatory works is internationally distinct. Thus, the preparatory works (förarbeten, särskilt propositioner) are used primarily as a valuable tool to canvass the reasons behind a specific provision or set of provisions, particularly in situations where the precedent cases (prejudikat) are few. Nevertheless, the relative weight given the legal sources cannot be distinctively stated. It depends largely upon the character and clarity of the legal text and the character of the other legal sources. For instance, whether there are any landmark cases (prejudikat) related to a provision, whether the preparatory works are well drafted or suffer from contradictions, and whether the legislation or a provision are of older date or newly drafted are all important factors in this regard. In this thesis, the relative weight given the sources will for the most part be evident in relation to specific troublesome provisions and adjoining discussions on the valid law in chapters 7-9 in Part II.

Specific problems relate to the analysis of environmental law and Saami law. I will begin with the former. The principal statute, the Environmental Code, was enacted in 1999, which means that the preparatory works are rather new. Unfortunately, the quality could be better. One problem is that, in some situations, the preparatory works refer to old preparatory works, linked to the former statutes which now, having been more or less amended, have been included into the new Code. Since the Code not only is a sum of some previous statutes, it is not always easy to know what role the old preparatory works shall play in the interpretation of the provisions under the Code. Nevertheless, a rather large number of cases have shed light on the application of the Code. There is also imperative legal literature to rely on.

The legal sources of relevance here are primarily legislation, cases (from the highest courts), preparatory works and legal literature (doktrin).

The preparatory works are generally more important for new legislation and where landmark cases are absent. Hence, in principle, the older the legislation, the less important the preparatory works will be. However, where case law has shed light on specific issues, the cases are, of course, of outstanding importance in determining the valid law.

It is nevertheless clear that the old preparatory works of the so-called natural resources management provisions in chapters 3 and 4 of the Code shall support an understanding of the provisions. Those provisions were also, in principle, not amended and more of less "lifted over" to the Code. However, other provisions were redrafted but still refer to older preparatory works.

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Another problem relates to translation of legal texts. The official translation of the Environmental Code\textsuperscript{149}, which is the chief environmental statute, does not always give an accurate picture of the legal text. In addition, many amendments have altered the text. When this has occurred, I explain the situation in my own words. There are also a few other translations related to other statutes, usually unofficial, which I use when I find the translation useful. It has generally been difficult to find the right equivalents to specific words, particularly with respect to the legislation on the Saami reindeer husbandry.

The Environmental Code shall be applied parallel with other statutes, particularly with sector legislation\textsuperscript{150}, as is the case with the New Zealand Resource Management Act. These provisions are referred to in the Code as being subject to other Acts shall be applied where such activities may cause damage or detriment to human health, the environment or other interests protected under the Code\textsuperscript{151}. Generally, in the granting of permits and similar approvals under sector legislation, the Code shall only be applied when so explicitly stated in the relevant Act. Nevertheless, even if not explicitly stated in a sector statute, such as the Reindeer Husbandry Act, the provisions in chapter 2 of the Code are applicable to activities and measures that negatively impact the environment\textsuperscript{152}. Here, the provisions aim directly at “the operator” (verksamhetsutövaren). Those provisions may, moreover, be enforced through supervision. In any case, the main rule is that the substantial requirements expressed in the Environmental Code state the minimum requirements for environmental protection\textsuperscript{153}.

However, the relationship between the Environmental Code and sector legislation is not settled.\textsuperscript{154} The preparatory works are silent on essential questions. Given the broad application of the Code to anything that contradicts the objective of the Code, the range of the provisions in chapter 2 of the Code, and to some extent also chapters 3 and 4, there are diverging interpretations. In essence, the questions are whether sector legislation has become “greener” with the enactment of the Code and whether interpretation of the valid law is limited by explicit references to provisions of the Code. Bertil Bengtsson, the prominent professor and former judge of the Supreme Court, argues for a wider

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\textsuperscript{149} See Ds. 2000:61.

\textsuperscript{150} (sektorslagstiftning). Sector legislation, or sector statutes, is a generic term for legislation which, beside the Code, regulates primarily physical planning, infrastructural constructions (roads, railways, et cetera.), and exploitation of natural resources (minerals, peat, hunting, et cetera.).

\textsuperscript{151} Environmental Code, ch. 1 s. 3. See also further in Michanek, Gabriel & Zetterberg, Charlotta (2004) \textit{Den svenska miljörätten}, pp. 417-419.

\textsuperscript{152} Other provisions may also apply even if not explicitly referenced, such as the provisions related to so-called Natura 2000 areas and the requirement of a permit if an activity has a substantial negative impact on the protected area, as well as the requirement of notice of consultation in ch. 12 s. 6.

\textsuperscript{153} Prop. 1997/98:90, p. 149. This means, in the preparatory works, that all activities with environmental impacts are encompassed by the basic substantial requirements of the Code, regardless of whether the activity is regulated under the Code or under another statute. If there is a conflict, it shall be solved by normal rules of hierarchy and the character of the legislation (allmänna lagvalsprinciper), such as \textit{lex specialis} and \textit{lex posterior}.

\textsuperscript{154} Note that the Law Council acknowledged that the parallel application of the Code and other sector statutes probably would cause practical problems. However, the time given was not sufficient to analyse this problem in more detail. The preparatory works were chiefly engaged in the matter of mapping to the extent the provisions under the sector statutes were contradictory vis-à-vis the provision under the Code. See Prop. 1997/98:90, pp. 500-501.
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interpretation, the application of which would mean that many sector statutes would be balanced against basic provisions in the Code155.

A particular problem is the Code’s relationship to the principle of specialization (den organisatoriska specialitetsprincipen). Note, however, that the principle is somewhat blurred and invisible in Swedish law, but in essence it denotes that each authority shall apply only the legislation attributed and may not apply legislation in relation to the area of competence of another authority. One might say that this principle is dictated by the need for order and organisation among the public authorities, as well as the need for limitation of the discretionary powers vis-à-vis individuals (rättssäkerhetsaspekter).156 Whether the principle applies in relation to the Environmental Code is unclear and the preparatory works are silent157. The principle may limit environmental protection aims. In general, a limitation of this principle should be seen as an advantage from the perspective of environmental protection. On the other hand, the principle restrains large discretionary powers and upholds the rule of law. On the other hand, the principle restrains large discretionary powers and upholds the rule of law (rättssäkerheten). Bengtsson argues that particularly the first section of the Code (chapter 1 section 1) is a diversion from the principle on specialization, and sees this as a natural feature of modern environmental law.158 Hence, he means that the Code should lead to a larger weight of environmental considerations in the decision-making, particularly with respect to provisions including balancing of interests159. Here, the objective of the Code and the general rules of consideration should signify that environmental considerations are given a larger weight.

Nevertheless, the wide interpretation emphasised by Bengtsson has so far not been tried in courts. As a matter of fact, courts have so far only in a few cases referred to the objective of the Code (ch. 1 s. 1), and this in respect to issues under the Code itself. It seems far-flung at the moment that courts, within a reasonable time frame, would refer to the objective and provisions in chapter 2 of the Code in matters outside the Code (in relation to sector statutes) where no explicit references are stated. Moreover, I see as one of my tasks to stress the deficiencies in legislation as such. To highlight those will more clearly signify the need for

155 See Bengtsson, Bertil (2001) Miljöbalkens återverkningar. The book analyses the implications of the Environmental Code on sector legislation. See also below. The rather new constitutional provision may strengthen interpretation of statutes in a more environmental friendly direction, which support the views expressed by Bengtsson. See the Instrument of Government ch. 1 s. 2 para. 3: “The public institutions shall promote sustainable development leading to a good environment for present and future generations”. See also Miljöbalkens återverkningar, pp. 36-37 where he discusses the draft. I should also mention that the legal literature that analyses the relationship between the Environmental Code and sector legislation is extremely limited, which also applies to the legal literature related to substantial analyses of sector legislation generally.

156 See generally in Sundberg-Weitman, Brita (1981) Saklighet och godtycke i rättsskipning och förvaltning, pp. 248-250. Through an analyses of cases, Sundberg-Weitman found strong evidence that the principle also applies in the Swedish law. See the conclusions in ibid., p. 276. For the (six) functions of the principle in relation to the analysed cases, see pp. 286-287. This principle also exists in other Nordic, especially in Denmark, and European countries, including England, France, Italy, and Germany. See ibid., pp. 41-51 & 55.

157 I have found only one statement in this regard in the preparatory works in the form of a paragraph that declares that, if the provisions under the Code shall be used for the exercise of public authority (myndhetsutövning) in relation to sector statutes, the specific provision must be explicitly referred to in the relevant statute. See Prop. 1997/98:90, p. 183.


159 Note that this interpretation has not gained support in other legal literature.
amendments to the benefit of a more direct and distinct steering effect for sustainability objectives. Hence, for these reasons, I refrain from taking into account the wider interpretation, even if such an interpretation might impact the application of some important sector statutes, such as the Mineral Act, and the overall aim of protecting the reindeer herding area. The issues raised under this thesis are complex enough without considering this difficulty.

The analysis of the Saami law is coupled with other problems. Above all, there is a problem with contradictory legal sources, which makes it challenging to analyse the valid law. The chief statute here is the Reindeer Husbandry Act from 1971, which has not changed the foundation of the Saami customary rights since its first enactment in 1886. The legislation and preparatory works predate the essential landmark case from the Supreme Court in 1981, the so-called Taxed Mountains case. This case clarified basically that the Saami customary rights, which are primarily reindeer herding rights, are not dependent upon statute to exist. They are based upon the doctrine of immemorial prescription. Moreover, those civil law based rights are afforded the same constitutional protection as ownership against coercive measures without compensation. In sum, Saami rights are considered to be much stronger than the present legislation would indicate. Another troublesome feature in the legislation is a 1993 amendment that accredited the reindeer herding right to all Saami people, which is in sharp contrast to the basics of the doctrine of immemorial prescription. Hence, the collective feature of the reindeer herding right has become more blurred. Unfortunately, in suggesting amendments or new legislation, recent Commissions have hardly touched upon those elemental issues.

On the whole, the interpretation of the valid law is troublesome. There are very few important cases, the most relevant of which concerns the understanding of the Saami customary rights is still the Taxed Mountains case from 1981. Moreover, the legal literature is also scarce. The conflicting legal sources are particularly evident in relation to the decision on the division of village areas comprised of the pasture areas of the Saami villages. Here, I try to separate what is clearly de lege lata and, given large margin of appreciation in legislation, what could be de lege lata.

1.2.2.3 Using and Analysing Foreign Law

The reasons for using foreign law are rather obvious. Such an analysis usually supports discussions de lege ferenda, reasoning changes or improvements of certain areas of the law or single provisions. Moreover, comparative studies provide for a better understanding of one’s own legal system. This thesis is not an exception in this respect. Even if the objective of this thesis does not explicitly express an aim to compare the laws in Sweden, New Zealand and Canada, naturally such a comparison is inherent in the objective. Moreover, the step between discussions de lege lata and de lege ferenda seems also particularly short when discussing the foundations of the provisions or, to use Agell’s terminology, the construction of “the basement area” of provisions.

161 See Agell, Anders (1997) Rättsdogmatik eller konstruktiv rättsvetenskap, p. 53. See also above in subsection 1.2.2.1.
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As a distinction between the degrees of comparative ambition, Professor Stig Strömholm uses the terms “serving” (tjänande) and “dominant”\(^{162}\) (härskande) in relation to the legal systems studied.\(^{163}\) It is, thus, a difference between studies that have an immediate comparative approach and studies where one’s own legal system is in the forefront, as in this case. Where the foreign material is used to “serve” the examination and analysis of the domestic legal system, several issues arise relating to different purposes gained from using foreign legal material. Those purposes for using foreign law may be to:

a) Achieve information and orientation, which at least helps to place the studied phenomena on the legal atlas. This may be important especially when internal legal material is scanty in certain respects.\(^{164}\)

b) Increase the historical understanding of a legal phenomenon, such as in relation to the development of a doctrine (institut). Here, a detachment from labelling or other outer limitations toward a focus on the functions of the doctrine normally makes the historical understanding of the phenomena more interesting. This broader base more easily serves the larger analysis.\(^{165}\)

c) Use the foreign legal material as examples in the discussion of problems vis-à-vis the domestic legal analysis. On the one hand, case law and legal literature may identify certain facts and conflicts that may arise in the domestic legal system and will demand a solution. On the other, such material may be used to illustrate possible conflicts and solutions in the domestic legal system. The latter purpose is, thus, somewhat more extensive.\(^{166}\)

d) As a further advance, foreign material could be used as arguments for recommendations *de lege lata* or *de lege ferenda*. This approach could well be considered as the most qualified “serving” purpose that foreign legal material could have.\(^{167}\)

This thesis, to a smaller or larger extent, includes several of those above referenced purposes. Nevertheless, at least partly, the purpose is to use the foreign laws as a basis to discuss some problems *de lege lata* in the Swedish law and include recommendations *de lege ferenda* regarding the same. The rather large and partly detailed analysis of New Zealand and Canadian laws is, therefore, justified. The next chapter is also important, because it provides general knowledge of the three legal systems.

As is obvious from the above, in relation to the objective of the thesis, I chose to compare Swedish laws with New Zealand and Canadian laws for particular reasons. They have both adapted legal solutions and approaches out of the ordinary in some respects. As always, however, foreign experiences and legal solutions should not be used uncritically; each country has its own historical,

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\(^{162}\) The comparison itself appears in these instances to be the dominant element.

\(^{163}\) See Strömholm, Stig (1971) *Användning av utländskt material i juridiska monografier. Några anteckningar och förslag* in SvJT 1971, pp. 251-252. See also Strömholm, Stig (1972) *Har den komparativa rätten en metod?* in SvJT 1972 p. 462. There is, of course, no explicit dividing line between these two groupings, but the purpose of the comparison should indicate on which side of the line the comparison falls.

\(^{164}\) Strömholm, Stig (1971) *Användning av utländskt material i juridiska monografier*, pp. 254-255.

\(^{165}\) Ibid., pp 256-257.

\(^{166}\) Ibid., pp. 257-258. Note, statutory law is not predominant here, but rather the practical implications and knowledge that flows from the cases and legal research.

\(^{167}\) Ibid., pp. 258-259.
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economical, social, cultural and geographical background that, to a greater or lesser extent, determines the legal setting. In this sense, a comparison is seldom fruitful unless the compared systems, at least at a minimum, share some similarities with the studied phenomena. The three countries studied here show many similarities, especially regarding the conflicts over land and natural resource uses and the implications from the colonisation process, even if the laws naturally are more diverse. Nevertheless, laws regarding environmental and natural resources are largely codified in all three countries, and the indigenous customary rights are both codified and uncodified. I will say something more concerning the nature of indigenous customary rights below.

I have, in fact, been surprised by finding several similarities among the indigenous customary rights. First of all, in all three countries there have been obvious difficulties reconciling the concepts of customary rights with the rest of the law. The indigenous land and natural resource uses show specific features that are not easily transferred into normal proprietary terms. Hence, the laws in each of the countries, especially the law in Canada, distinguish the aboriginal rights as sui generis rights for those reasons. Secondly, the nature of the rights in all three jurisdictions stems from the unwritten, “customary” law. As such, those rights are not dependent upon legislative enactment, treaty or executive orders for their validity. They are derived from indigenous practises and customs. Consequently, customary rights are based on ongoing traditional activities undertaken by the indigenous peoples, who have not abandoned those activities.

Despite obvious differences in detail, at least on a superficial level, there are several similarities among the laws of these three countries. In particular, the aboriginal rights in Canada are classified as common law rights, founded on the occupation of a specific tract and upheld by a continuous customary use of the area. The rights are based on the old doctrine of aboriginal rights. In Sweden, the Saami customary rights are based on immemorial prescription (urminnes hävd) in the meaning of long-term, undisturbed, and undisputed possession and use and of a specific area. Thus, the customary rights of the Saami, chiefly the reindeer herding right, are also based on unwritten law and have a civil law basis.

The basics of the common law, as well as the doctrine of immemorial prescription, was formed and applied at a time when oral and written cultures were mixed and when the local communities had prominent roles to play in legal

170 Note, however, that in Aotearoa/New Zealand, the Maori rights are foremost advocated through the Waitangi Treaty. The English law, from which the Canadian and New Zealand laws originated, acknowledged common law as “customary law” until the rise of legal positivism in the nineteenth century. The common law was mainly understood as the legal customs of the English peoples. In this sense, the customary law is linked with custom and social practice and is unwritten. The judges discovered, enunciated or clarified such practise, but did not as such create law or rights. See Boast, Richard (2004) Maori Customary Law and Land Tenure in Boast, Erueti, McPhail & Smith (eds.) Maori Land Law, pp. 21 & 30.
172 They exist because they were not extinguished by British or French assertions of sovereignty or their establishment of governmental authority in contemporary states. See Borrows & Rotman (2003) Aboriginal Legal Issues, p. 337.
173 The doctrine itself is a legal relict from the medieval and post-medieval agrarian society.
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Therefore, it seems fruitful to understand early modern law as one phenomenon, as the legal systems incorporated aspects of both community and state law. In my view, it is therefore fruitful to stress the common grounds for understanding indigenous customary rights as based on old doctrines, although the rights of Saami are based on prescription and not custom as such. However, one should not press the distinction between prescriptive rights and rights established by custom too far. Rights by prescription and rights by the assertion of usage are indistinct. Indigenous rights at common law may recognise aboriginal/customary title as well as more limited rights, such as gathering rights. This is also true regarding the doctrine of immemorial prescription. Consequently, there are essential strands of similarity regarding the nature of these rights.

Studying foreign legal systems is always problematic, and to avoid major mistakes, I have benefited from having the texts scrutinized by national experts, as apparent by the Acknowledgements. Of course, remaining errors are my own.

1.2.3 Research in this Legal Cross-Area

This thesis could be regarded as a symbiosis of parts of the environmental law and parts of the Saami law. Even if there more research had been done with respect to the environmental law and less with respect to Saami law, the combination of the two legal areas has only to a very little extent been subject to analysis in Sweden. In principle, Torp has in a few articles touched upon several issues related to both areas. An examination of environmental law and Saami law jointly is also scarce in a Nordic context.

Research in environmental law is, however, close to abundant, at least compared with research in many other legal fields. Since the 1970s, both lecturing and research have been developed fundamentally. Presently several different branches with respect to research tasks and perspectives are evident. Swedish

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175 See at 97 in Ågren, Maria Asserting One’s Rights in http://www.historycooperative.org/journals/lhr/19.2/agren.html.
178 Notable in Torp, Eivind (2005) Rennäringens rättigheter i nationalparker och naturreservat in FT No. 2 2005. See also other references in the Bibliography. He has a strong interest in the links between the law and State policy and politics toward the Saami. A doctoral thesis is forthcoming.
179 The work done by Johansen partly includes such an approach. See Johansen, Ann-Gørril (2004) Retten till å utöve sin kultur och sjelvbestemmelsretten som grunnlag för samiske landrettigheter i Norge – en analyse av rettsprinsippene og deres betydning for den offentligrettlig forvaltning. However, she died sadly before she could finalise her doctoral thesis. Note that there exists a Nordic network with the objective of promoting both Saami law and environmental law, the Nordic Research Network for Saami Law and Environmental Law (NORSEL). See at http://norsel.ies.ltu.se/ (viewed at 2006-06-29).
180 For a short and good record of the development see Michanek, Gabriel (2003) Utvecklingen av miljöraätten i Sverige in Michanek & Björkman (red.) Miljöraätten i förändring – en antologi. During the last decades several doctoral theses have been finalised and post doctoral research have been conducted.
environmental law research can be grouped into at least five main categories.\(^{181}\) Firstly, one category concerns the task of analysing the valid law (gällande rätt), including recommendations on legal applications (rättstillämpning)\(^{182}\). The greater part of environmental research includes, at least to some extent, an analysis of valid law, since this is a fundamental task for jurisprudence as such. Secondly, another category is to analyse a system of provisions within the environmental law, including the identification of gaps, overlaps and contradictions between different sets of provisions\(^{183}\). A particular focus addresses issues on contradictions in the system with respect to different legal requirements for different kinds of environmental impacts, especially where such differences cannot be justified from environmental protection perspectives\(^{184}\).

Thirdly, some researchers have been interested in an analysis of legal instruments (rättslig instrumentell analys), particularly alternative instruments in other legal systems that might be more appropriate from an environmental protection perspective\(^{185}\). Inherent here is, hence, a critical stance toward existing legal instruments or their current application. Fourthly, another category, which is a development and extension of the third category, concerns analyses of the implementation of environmental policy goals (miljöpolitiska mål). The question here is not only whether the environmental law instruments are appropriate, but the extent to which there are obstacles inherent in the legal system as such, which counteract compliance with the goals\(^{186}\). Fifthly, a specific category is the development of an environmental law methodology (miljörättslig metodik)\(^{187}\). Here, the preconditions in the natural environment are specifically obvious, and a focal issue is how the “human laws” could be designed to correspond with the “laws of nature”\(^{188}\). A sixth category could be added that comprise research from the viewpoint of legal sociology. This research is based at the Lund University under the lead of Professor Håkan Hydén.

\(^{181}\) See ibid., pp. 21-25, with references. Note that my references to specific research projects usually span over more than one category. As a result, the references may at times be somewhat misleading.


\(^{183}\) See for instance Michanek, Gabriel (1985) Den svenska miljörättenens upphöjning. This task is important at the very least because of the increased complexity of the environmental law (primarily due to EC environmental law and international environmental law). See also Ebesson, Jonas (1996) Compatibility of international and national environmental law (doctoral dissertation).


\(^{187}\) See also Christensen, Jonas (2000) Rätt och kretslopp. Studier om förutsättningar för rättslig kontroll av naturresursflöden, tillämpade på fosfor (akad. avh.).

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With respect to the analysis of the environmental law, my research is a combination foremost of the first two categories. At least in part, however, the fourth category is also included, since one part of my objective concerns an analysis and discussion of an implementation of a sustainable use of the land and natural resources within the reindeer herding area. The national environmental quality target named “a magnificent mountain landscape” (storslagen fjällmiljö) can also be regarded as an environmental policy goal, along with other interrelated environmental quality targets, such as “health forests”, “a rich plant and animal life”, and “flourishing lakes and streams”. If combined with the Saami law, the analysis of the system of provisions is crucial. Obviously, the aim is to analyse the interface between the two legal areas. It concerns how different sets of provisions correspond or counteract given their objective and given how well each corresponds with promotion of a sustainable use of natural resources. Moreover, the social/cultural dimension is important in this study, a dimension which also is inherent in the concept of “sustainable development”. Thus, this intrinsic perspective makes this thesis different from most other environmental law studies. Consequently, if the environmental law research is rather well developed, the same cannot be said with regard to research on Saami law.

Much has been written on the Saami over the years, but surprisingly little has concerned legal matters. It is noteworthy that the first book on the subject in Sweden was written by Bengtsson in 2004. Bengtsson has written several articles ever since the Taxed Mountains case, in which he was strongly engaged as one of the judges (referent). The subject has particularly concerned compliance with certain constitutional provisions. A few others have also written on the subject, such as Bäärnhielm and Bonde. In a Nordic context, the Saami law has primarily concerned ownership issues and the legal preconditions for Saami reindeer husbandry. Even though there is some Nordic research on legal aspects related to the Saami, there is yet no larger study that examines sustainability objectives in relation to Saami rights. Additionally, few comparisons have previously been made between common law systems regarding the legal situation for other indigenous peoples. Hopefully, this study will give valuable knowledge on similarities and differences and stimulate further analyses.

190 See, for instance, Bengtsson, Bertil Samernas rätt i ny belysning in SvJT No. 2 1990, Samernas rätt och statens rätt in SvJT No. 5-6 1994, Några samerättsliga frågor in SvJT No. 1 2000, Mera om rätten till Lappland in SvJT No. 2 2001, Renskötselrätten in rättssystemet in 21 uppsatser and Om kollektiv renskötselrätt in 21 uppsatser.
192 For research in legal history see foremost Korpijaakko-Labba, Kaisa (1994) Om samernas rättsliga ställning i Sverige-Finland: en rättshistorisk utredning om markanvändningsförhållanden och rättigheter i Västerbottens lappmark före mitten av 1700-talet; Jebens, Otto (1999) Om eiendomsretten til grunnen i Indre Finnmark; Päiviö, Nils-Johan (2000) Lappskattelandens rättsliga utveckling i Sverige: en utredning om lappskattelandens och de samiska rättigheternas utveckling från mitten av 1600-talet till 1886-års renbeteslag; and Strøm Bull, Kirsti (1997) Studier i reindriftsrett og Funderud Skogvang, Susann (2002) Samerett. Om samernes rett til en fortid, nåtid og framtid (this book also includes other aspects of the Saami law, including a chapter on the right to natural resources within reindeer herding areas). See also work done by Somby that includes legal philosophy: see foremost Somby, Ánde (1999) Juss som Retorikk (akad. avh.). Note that several research projects are about to be finalised and a few others have recently been initiated.
1.2.4 Some Terminology and Maori Vocabulary

In the analyses of the New Zealand, Canadian and Swedish laws I have attempted to refer to the legal sources in a manner that is familiar to each country. However, the references in the Swedish chapters demand some explanation for foreign readers. The following list serves as a short explanation of some of the legal sources.

- **Code**: a normal statute, except that it is regarded as having specific importance, and commonly regulates a larger legal area;
- **Ds.** (Departementsserien) Ministry Publication Series. It is a short public report on a limited subject, sometimes forms a part of the preparatory works;
- **FT** (Förvaltningsrättslig tidskrift) Law journal on public law issues;
- **NJA** (Nytt juridiskt arkiv) law report from the Supreme Court;
- **MT** (Miljörättslig Tidskrift) Environmental law journal;
- **Prop.** (Proposition) government bill, often the most important part of the preparatory works;
- **RH** (Rättsfall från hovrätten) law report from the court of appeal;
- **RA** (Regeringsrättens årsbok) law report from the Supreme Administrative Court;
- **SFS** (svensk författningssamling): all legislation enacted is given a specific number (year:number);
- **SOU** (Statens officiella utredningar) a Commission report with a draft proposal on new/amended legislation, formally part of the preparatory works;
- **SvJT** (Svensk juristtidning) a Swedish law journal;
- **JT** (Juridisk tidskrift) a Swedish law journal.

Since the analysis of the New Zealand law, in chapters 3-5, includes references to Maori words and concepts, I also provide a short list of the words used below.

- **Aoteroa**: New Zealand
- **Hapu**: sub-tribe
- **Iwi**: tribe
- **Kaitiaki**: guardian/caretaker (due to traditional responsibilities)
- **Kaitiakitanga**: guardianship, stewardship
- **Kawanatanga**: governorship, government (the right of the Crown to govern and to make laws)
- **Mahinga kai**: traditional places for food-gathering and other resources
- **Mahinga mataitai**: traditional fishing grounds for seafood
- **Mana**: respect, status, the right/authority to an area
- **Maori**: originates from its former meaning of something being normal or ordinary, which in time came to be used to distinguish the original inhabitants from the settlers
- **Marae**: community meeting place: the village court yard and, at the same time, the spiritual and symbolic centre of tribal affairs
- **Mataitai**: seafood fishing area
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Mauri    the life force related to the area
Pakeha    non-Maori, "white" New Zealanders and other Europeans
Pounamu greenstone
Rahui norms for preservation, forbidding access or taking of resources
Rakiura Maori a person who is member of the Ngaitahu Tribe or Ngatimamoe Tribe and is a descendant of the original Maori owners of the Stewart Islands
Rangatiratanga Maori chieftainship, iwi or hapu authority to make decisions and control resources
Rohe geographical territory of an iwi or hapu
Taiapure local fisheries
Tangata whenua the people of the land, Maori people
Taonga valued resources, assets, treasures: include all dimensions of a tribal group’s estate, also non-material resources
Tapu sacredness, spiritual power or force
Tikanga customary values and practices, way of doing something
Tikanga Maori the customs, methods, laws of Maori
Tuaranga ika traditional fishing grounds related to freshwaters
Waahi tapu site with special spiritual significance
Waka canoes and their commanders
Whakapapa descent lines and tables, genealogy (identity with a place and hapu)
Whanau extended family, family groups

1.2.5 Structure of the Thesis

The thesis is structured into three parts. There is an introduction to each part that I recommend be read first, especially before reading Part II, as it provides a good overview of the key features of the laws. The introduction will also serve as a summary of the main contents of the chapters.

Part I includes an introduction to the research project. The objective of the thesis is explained, and issues on method and terminology are raised. Note that a Maori vocabulary is at the reader’s service. Other research done with relevance for this thesis is presented. Part I also includes a chapter on the main characteristics of the three legal systems as a background to the analysis that follows. Those should give essential information on key features of the legal systems.

Part II encompasses the analyses of the New Zealand, Canadian and Swedish laws. This is the most comprehensive part of the thesis. I have analysed the law of each country separately. It should be possible to read the chapters related to one of the countries and to gain a rather good view of the law covered. Nevertheless, there are numerous of references to other parts of the analysis which should support the notion of a comparison.

Part III holds the final chapter, which commences with a section regarding the main themes of the legal comparison with the laws of New Zealand, Canada and Sweden. It includes also an analysis and discussion of essential aspects with respect to shortcomings in Swedish law. Above all, the conclusion encompasses a synthesis of all of the main threads in the thesis and points toward a direction de
Chapter 1 Introduction

lege ferenda on how the law may support a sustainable use of the land and natural resources within the Swedish reindeer herding area.
2 The Three Legal Systems

In this chapter I briefly discuss the three legal systems that are central to this thesis. It is intended to support the understanding of the analysis of the different aspects of the three laws presented in Part II. First, the basic structure and features of each legal system are highlighted. Secondly, a specific part of the national law that has the most relevance for the understanding of the subsequent analysis is emphasised.

2.1 Aotearoa/New Zealand

2.1.1 Basic Structure and Features

Aotearoa/New Zealand is a constitutional monarchy and part of the Commonwealth. The country was established as an agricultural service station. However, since Britain joined what is now the European Union in 1973, the British legal and constitutional structure has become increasingly irrelevant for New Zealand. Instead, the main influences on the New Zealand law arise from international obligations. Aotearoa/New Zealand nevertheless retains strong ties to the United Kingdom. The Queen of Great Britain is sovereign and head of state and the highest court of appeal is the Judicial Committee of the Privy Council, based in London. Some United Kingdom statutes are also still in force.

The Crown is represented by the Governor-General, an appointed prominent New Zealander. The powers of the Governor-General are several, such as to make regulations, but he or she generally does what the Government advises. Even in situations where the Governor-General could be required to exercise independent judgement, this has not happened for a long time. Like its British counterpart, the New Zealand government system and constitution have developed through a series of rules, termed conventions, which has played an important role in the parliamentary system. By following conventions the governmental system becomes more predictable and orderly. Conventions have been established through frequent usage and custom over the years and could be defined as an expectation that a specific person will act in a predetermined manner despite the lack of obvious penalty for not doing so. Thus, conventions are followed because of political expediency and respect for tradition, but are not a product of the common law. Some conventions have later on been incorporated into statutes. Nonetheless, only on very rare occasions courts have used conventions to support a decision.

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193 For concise information, including links to other internet sources, see at http://www.llrx.com/features/newzealand.htm (viewed at 2006-08-03).
195 By the First Schedule in the Imperial Laws Application Act 1988 follows what statutes that still are in force.
196 For example, one set of conventions controls the relations between the legislature and the executive. The creation of the Cabinet and the office of Prime Minister are mainly due to convention. Parliamentary practice is also ruled by convention.
Chapter 2 The Three Legal Systems

Aotearoa/New Zealand, like Sweden, is a unitary state. Even if there is a separation of powers among the legislature, the executive and the judiciary, the concept of separation of powers has never fully operated in the country. The legislature has two parts, the Crown with its representative the Governor-General\[198\], and the House of Representatives, the unicameral Parliament\[199\]. The law-making power of local authorities is, with no exception, delegated from the Parliament and prescribed by statute. Authorities are now given extensive statutory powers, such as through the Resource Management Act 1991 (RMA). A presumption rules that if a local authority is not granted a specific power to carry out a specified function, it has no legal authority to perform it. Should it do so anyway its activity would have no legal effect; the authority is acting *ultra vires*\[200\].

The executive is made up of the Cabinet, the Executive Council and the departments of state. The vital decision-making body is the Cabinet, presided over by the Prime Minister. All important governmental decisions are either ratified by the Cabinet or emanate from it. The Cabinet consists of Ministers who are members of the governing party or parties in Parliament. From a strictly legal point of view, the most important Minister is the Attorney-General, in charge of the Crown Law Office. As the principal legal officer of the government, a lawsuit against the government will be filed against the Attorney-General. The Executive Council is presided over by the Governor-General. As an executive body the Executive Council does not make decisions, merely validates decisions that are made elsewhere. A power frequently delegated to the Executive Council is the powers to make “regulations”, “notices” or “orders” by means of Order in Council\[201\].

The court system in Aotearoa/New Zealand is divided between a civil court system and a criminal court system. There are also special courts, such as the Environment Court. For most cases, the Court of Appeal is the court of final jurisdiction, for both civil and criminal cases. Only rarely is the Privy Council called to make a final statement in a case. The courts and the area of jurisdiction for each court are, in principle, determined by statute. However, courts have also a so-called inherent jurisdiction, which is a kind of residual jurisdiction that enables the courts to maintain their own integrity in respect to the administration of justice, for instance to prevent abuse of the judicial process. In contrast to

\[198\] When the Governor-General shall be appointed it is, for example, convention that preliminary informal consultation takes place between the Commonwealth ministers and the Crown. Another convention is that this person will only be appointed upon advice from the New Zealand ministers. In recent years, it has become a practice to appoint resident New Zealanders, compared to previous years when eminent Britons were appointed Governor-General. Appointment is normally for five years. The Chief Justice of New Zealand performs the duties of the office in the absence or incapacity of the Governor-General. When selecting Prime Minister, the convention is that the Governor-General will accept the electorate’s decision and appoint the leader of the majority party in the Parliament. See Mulholland (1999) *Introduction to the New Zealand Legal System*, p. 45.


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Swedish law, judges in New Zealand develop the law, foremost through interpretation of legislation. The doctrine of precedent applies naturally, which means that previous cases are binding within the hierarchy of courts. Thus, lower courts are bound to follow the decisions from higher courts.202

The law in Aotearoa/New Zealand may also broadly be separated into criminal law and civil law, that is, law in which the action is taken by the Crown on behalf of the community as a whole, or law in which the action is taken by the individual citizen who has suffered loss. A distinction may also be made between public law and private law. The law in Aotearoa/New Zealand consists of two main sources: common law and statute law203. The common law is the law built up by decisions of the courts stretching back over many years. This judge-made law has historically constituted the major source of law and several branches of law still rely upon principles such as contract and torts that have evolved over time. Statutory law derives from the lawmaking powers of the Parliament. In interpreting a statute the courts have wide discretion to determine the meaning of provisions, and a court may extend, modify or restrict the scope of a statute. However, for the most part a literal interpretation is applied.204

Nowadays, statutes have claimed a dominant role as a source of law. Government policies, evoked by social and economic changes, are implemented through new legislation or amendments to existing legislation. In the legislative process, the government normally includes comprehensive consultation with interested groups, not least with Maori groups. The parliament committee system provides for an institutionalised mechanism where pressure groups can give evidence upon legislative proposals. In fact, group activity has become part of the society.205

Unlike most other countries, New Zealand does not have a written constitution. This means that there is no clearly identifiable document. Instead, the constitution is made up of several disparate statutes, court decisions and conventions. The unwritten constitution of New Zealand thus follows the British Westminster system. Among the advantages is that the constitution is flexible and incremental, and can adapt and develop over time to reflect changes in society. The New Zealand constitution has been poetically compared to a breeze; one can feel it, but not see it. On the negative end though, it is questionable if any specific document or aspects or common law is a part of the constitution. It is also difficult to state with certainty if a statute is infringing the constitution.206

The central document of the constitution is the Constitution Act 1986, regarded rather as a constitutional document, not as a written constitution within itself. In sum, the Constitution Act sets out the main powers of state institutions. Two other pieces of legislation are important the New Zealand Bill of Rights 1990,

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203 Note that the legal literature as a legal source has only a very slight role. Hence, legal literature can only be said to have limited persuasiveness in New Zealand law.
205 Ibid., pp. 2-3 & 5-7.
206 Ibid., pp. 26-29 & 36-37. There has been a growing discussion in Aotearoa/New Zealand on why the constitutional provisions are so fragmentary and whether that is a good thing. Comparisons with Australia, Canada and United States are made in that sense. However, in general, there has not been any great tendency to institute a written constitution. See ibid. p. 29. See also, for instance, Palmer, Geoffrey (1992) New Zealand's Constitution in Crisis. - Reforming our Political System.
which provides for the protection of individual civil rights\(^{207}\), and the *Waitangi Treaty Act 1975*, which regulates the rights of Maori in relation to other New Zealanders. It is important to recall here that these statutes are ordinary statutes enacted by the Parliament.\(^{208}\) Over the years, much has been written in Aotearoa/New Zealand about the constitutional significance of the Treaty of Waitangi, the treaty signed between some Maori chiefs and the British Crown in 1840. Nowadays, it is understood as a historical and “informal” constitutional source. Still, it is not part of any statute or formal constitutional document.\(^{209}\) Consequently, apart from the individual rights found in the *New Zealand Bill of Rights Act* the constitution does not encompass any specific Maori rights. This means that the Maori rights inherent in the Treaty of Waitangi are not seen as implicitly constitutional rights. From this it follows that the Maori rights that arise from the Treaty via enacted statutes and from common law rights can, at least theoretically, be altered by a simple parliamentary majority.

The incorporation of the Treaty of Waitangi into New Zealand law has preoccupied the government for some years, a process that has been achieved by means of legislation. Nowadays, the Treaty is seen as “a living document” that has to be adapted and understood in relation to contemporary conditions. The re-examination of the environmental and natural resource law has commenced for Maori influence to a greater extent than ever in the country’s history.\(^{210}\)

### 2.1.2 An Outline of the Environmental Law

Under this subsection I provide a background of the evolution of the environmental law in Aotearoa/New Zealand, as well a brief overview of the contemporary main characteristics of the legal area.

As in many other countries, in early New Zealand, the main State policy was to ensure development of the natural resources, such as timber, minerals and water. At the beginning of the twentieth century, a stronger concern for conservation had grown. The first national park, the Tongariro, was established in 1887. Town-planning legislation, based on the British model, was enacted in the 1920s and soil conservation legislation in the 1940s. However, general control of water pollution and water use did not appear until the 1960s. Natural resource policy took a new turn with the enactment of a development statute in 1979. One aim was to provide a “fast track” for development projects such as oil and gas production, hydro, coal, forestry, and iron and aluminium smelting.\(^{211}\)

The period between 1984 and 1992 included radical economic and governmental reforms devoted to deregulation, privatisation and the clarification of government objectives. The environmental law had also become too complex

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\(^{207}\) Note that section 7 of the Act requires the Attorney-General to report to the Parliament where any Bill includes provisions inconsistent with the rights and freedoms of the Bill of Rights. Note also that the Act includes enactment of the UN Covenant on Civil and Political Rights.

\(^{208}\) Mulholland (1999) *Introduction to the New Zealand Legal System*, pp. 37-44. Other relevant sources of the constitution are Electoral Act 1993, Judicature Act 1908, District Courts Act 1947 and other legislation that, for example, regulates duties arising from international law.


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and too divided, with different statutes regulating water, forest, marine, mining, and so on. The result was no consistency in environmental and management objectives. Environmental decision-making had also become intermingled with social and environmental decision-making, national and regional developments, in ways that usually compromised on environmental objectives. Too many agencies were involved, many of them with mixed mandates. Little attention was also paid to the Maori views on how resources should be managed.212

With the reform of a new integrated resource management legislation, which led to the enactment of the RMA in 1991, another imperative reform relating to the resource agencies was carried through. Its main purpose was to separate commercial from non-commercial activities, to separate policy advice from programme delivery, and to specify and control the enforcement of departmental objectives, mainly through legislation. The targets were agencies performing multiple functions. Additionally, the territorial authorities were rationalised and a new tier of regional councils was created.213

The local government sector is now divided among twelve regional councils214, almost entirely dedicated to environmental regulation and monitoring functions, and seventy-four district and city councils (territorial authorities) with a more local regulatory function. The critical statute for these councils is the RMA, since it sets out the framework for decisions to be made at national, regional and local levels. The division between central and local government has been a part of the planning process for decades, but with the RMA there is even less national direction on matters of detail than used be the case. With support of a vertical environmental planning system, the implementation of the RMA resides with the local government. Aotearoa/New Zealand was one of the first countries to enshrine the concept of sustainability into law when the RMA was enacted in 1991 (one year before the Rio-Conference). In earlier planning legislation the wording “wise use of resources” had commonly been used.215

As in many other countries, legislation is the primary source of today’s New Zealand environmental law216. The tendency has been to define environmental responsibilities in comprehensive statutory provisions. The environmental law in today’s New Zealand can be broken down into four functional groupings: i) environmental planning and natural resource management legislation; ii) conservation of natural and cultural resources; iii) resource allocation and development legislation; and, iv) pollution, waste disposal and hazardous substances control. The environmental planning refers to legislative and common law principles that provide for a structure for integrated planning in matters affecting the environment. This includes land and water use planning, traditional town and country planning and resource allocation legislation. The RMA is the

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212 Ibid., p. 327.
213 Ibid.
214 Most of the boundaries of the regional councils follow watersheds, primarily to facilitate water resource management. See, for instance, Barton, Barry (2002) New Zealand, p. 332.
216 Nevertheless, even today common law principles are important in resolution of conflicts. In early environmental law, private conflicts were resolved through common law principles governing rights and duties and criminal enforcement. See Williams, David (1997) Environmental and Resource Management Law in New Zealand, p. 27. See further in Barton, Barry (2002) New Zealand, p. 343.
prime statute here. One statute that has introduced environmental planning and resource management for a specific resource is the *Fisheries Act 1996.*

Conservation legislation is, by its nature, protective and usually micro-environmental. It deals with conservation of specific living resources or preservation of certain geographic areas in their natural state. The *Wildlife Act 1953,* establishes a protection system for wildlife where some species are absolutely protected and others partially protected. An element of environmental planning is also evident with provisions, for example, regarding wildlife refugees, sanctuaries, the management of reserves and creation of management plans. Another prime statute in this area is the *Conservation Act 1987,* which sets the framework for the functions of the Department of Conservation.

The history of natural resource legislation regarding gold mining dates back to the mid 1850s. By the time that natural resources gained economic and social value, regulation of their exploitation through permit requirements had become a matter of national interest. Environmental consideration has, thus, been integrated into decision-making processes. Nevertheless, such processes have remained largely under control of ministers or agencies with economic approaches. Examples of statutes in this category are the *Forests Act 1949* and the *Crown Minerals Act 1991.* Pollution, waste disposal and hazardous substances are partly controlled under the RMA, but also in statutes such as the *Hazardous Substances and New Organisms Act 1996* and *Biosecurity Act 1993.*

Hence, although the RMA repealed many earlier enactments in the planning area, there are still many separate pieces of legislation dealing with environmental and resource management matters. The legislation may either facilitate protection or exploitation of the environment. Increasingly, many statutes contain both exploitative and protective objectives, as well as micro-environmental and macro-environmental elements. The RMA is one such example.

A trend has also been that provisions in statutes often are goal-based and the refinement and implementation of environmental policy is delegated to expert bodies. The Parliamentary Commissioner for the Environment, established by the *Environmental Act 1986,* provides an independent check on the capability of the environmental protection system and the performance of public authorities in maintaining and improving the quality of the environment. The Ministry for the Environment, also established under the Act, is mainly responsible for the general administration over a number of environmental statutes, including monitoring their effects and the monitoring of other significant environmental matters. The Department of Conservation, established by the *Conservation Act 1987,* is broadly responsible for promoting the conservation of the country’s natural and historic resources. In conjunction with regional councils, it administers the coastal marine area. The Ministry of Commerce, through its Energy and Resource Division, has a significant role in the preparation of Minerals Programmes and minerals permits under the mineral legislation. The Ministry of Fisheries controls the access to the country’s offshore fisheries. It has also extensive functions relating to marine farming and aquaculture.

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220 Ibid., p. 21.
221 Ibid., pp. 20 & 48-52. See also Barton, Barry (2002) *New Zealand,* p. 332.
2.2 Canada

2.2.1 Basic Structure and Features

Canada is a vast and diverse country whose political and legal system reflects those features. It is a federal state in which powers are distributed between the federal government and the governments of the provinces and territories. Two legal systems operate in the country: civil law in the province of Quebec, and common law in the other provinces and territories. Canada, like Aoteoaroa/New Zealand, is a member of the Commonwealth and the Queen of England is head of state. As a constitutional monarch, the Queen is represented by the Governor General for matters concerning Canada as a whole, by the Lieutenant Governors for the provinces, and by the Commissioners for the territories.

The British North America Act, 1867 created the new dominion of Canada by uniting three of the colonies, and the Act reflected the rules of federalism. However, Canada remained a British colony, even if the confederation meant a considerable degree of self-government. The creation of the present, interdependent nation was a gradual process, one that continued well into the twentieth century. The Act did not follow the constitutional model of the United States, which codifies the new nation’s constitutional rules. In fact, the Act did no more than what was necessary to accomplish confederation. Instead, a constitution similar to that of the United Kingdom was, in principle, sought. The Privy Council in London was the highest appellate court until 1949. In 1960 a Canadian Bill of Rights was enacted, but only as a federal statute and applicable only to federal laws. While the British North America Act, 1867 did not include amending clauses, the new constitution was enacted by the imperial Parliament. Nowadays, any changes to the constitution are made by the Canadian government. To the new Constitution was added a bill of rights, the Canadian Charter of Rights and Freedoms, now with constitutional status.

Under the federal system, the executive, legislative and judicial powers are divided between federal and provincial governments. In short, the federal government oversees matters that concern all of Canada, such as national defence, criminal law, fisheries and issues related to the aboriginal peoples. The federal government owns, for example, the land related to national parks, but it is the provinces that own the majority of the public land in Canada. The provincial legislatures have certain exclusive powers, such as property and civil rights in the province, local works and undertakings, and generally, all matters of a local or

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222 There are ten provinces and three territories.
225 See Constitution Act, 1867, s. 91. Part VI of the Act allocates powers between the two levels of government: the exclusive legislative powers of the federal parliament are classified in subjects. Among other things, the power includes the seacoast and inland fisheries and “Indians, and Lands reserved for the Indians”. See also in subsection 6.2.1.
private nature in each province. The federal and provincial governments sometimes have over-lapping jurisdictions, for instance in the field of environmental protection. This feature makes it difficult to get a comprehensive overview of a certain legal area. But, where the provincial and federal legislation directly conflict, the doctrine of paramountcy provides that the federal laws prevail to the extent of inconsistency. The relationship between federal and provincial laws is therefore complex, notably in the areas of environmental and natural resource law, and aboriginal law. Regarding aboriginal peoples, matters affecting “Indianness” forms a part of the primacy federal jurisdiction.

The legislative power, the Parliament, consists of the Senate and the House of Commons. Each province has a parliament with legislative functions, but no senate. Members of the House of Commons are elected by citizens of the provinces. The Prime Minister, as the Head of Government, is the leader of the majority political party. He or she appoints the other members of the Cabinet. The Senate consists of senators appointed by the Governor General on the recommendation of the Prime Minister. Proposals for a new legislation normally originate from the Cabinet and are passed to the House of Commons. The legislation is reviewed in the Senate and given final approval by the Governor General. The legislative process in the ten provinces is analogous to the federal process (except for the Senate). The Lieutenant Governor gives final approval to new provincial legislation.

The new Constitution of Canada plays a vital role in most legal matters. All other legislation must be consistent with the Constitution, otherwise it can be deemed to be of no force or effect by courts. Section 52 of the Constitution Act,
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1982 maintains that the Constitution is the supreme law. This section, together with section 24, often called the enforcement provision, established a regime of constitutional supremacy enforced by judicial review. This regime is somewhat moderated by section 33, which provides that both Parliament and the provincial legislatures may expressly declare that legislation, shall operate notwithstanding the Charter’s constitutional protection, therefore called the notwithstanding clause. This controversial section provides for legislative bodies to override many sections of the Charter by ordinary legislation, and was a product of short-term political trade-offs.

The Constitution also includes the Canadian Charter of Rights and Freedoms. The Charter has a directive to preserve and enhance the multicultural heritage of Canadians. As such, the Charter enshrines the two official languages of Canada, English and French, as well as the rights of aboriginal peoples. Nevertheless, the most essential provision is section 35 that provides for protection for existing aboriginal and treaty rights.

The Supreme Court of Canada is the highest and final court of appeal. On the federal level there are also a Federal Court and a Tax Court. Additionally, each province has a system of courts, and although the names may vary, the structures are roughly similar across the country. Provincial court systems are usually divided into provincial courts, with provincially appointed judges, and superior courts, seated by federally appointed judges. Superior courts are further divided into trial and appeal levels, with the court of appeal being the highest court in the province. Appeals from provincial courts of appeal are filed in the Supreme Court of Canada.

Decisions from the provincial courts are not binding upon other provincial courts, but are seen as persuasive. Rulings of the federal courts are, however, binding on the provincial courts. The legal sources in Canadian law are otherwise the same as in other common law systems (except for the province of Quebec). They include all legislation, enacted by or with delegated power of the federal Parliament and provincial legislatures, case law precedents from domestic and foreign jurisdictions, and legal literature.

2.2.2 The Supreme Court of Canada

The Supreme Court of Canada, with its plenary jurisdiction, is the highest judicial court in Canada. It is the last judicial resort for all litigants, whether individuals or governments. Its jurisdiction embraces both the civil law of the province of Quebec and the common law of the other provinces and territories. Hence, the

233 See further in subsection 6.2.1.
235 The first 34 sections of the Constitution Act, 1982, contain the Charter.
236 See further in section 6.2.
237 When Nunavut became a territory in 1999, a new single-level court system was created. The Nunavut Court of Justice combines the jurisdiction of the territorial and superior courts. This means that its judges can hear all criminal, family and civil matters. See at http://142.206.72.67/04/04b/04b_008_e.htm (viewed at 2006-08-06).
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Supreme Court of Canada has the effect of melding the ten provincial hierarchies and the three territories into a single national system. The decisions of this Court are of utmost importance, since my analysis with respect to Canadian law is predominantly derived from Supreme Court cases. Therefore, I include selected information related to the Court below.

The past 25 years of the Supreme Court’s history have been an extraordinarily challenging period. The Court’s wide jurisdiction also includes the responsibility to measure legislative and executive action against the guarantees of individual and collective rights according to the Charter. The broad public support of the Court and the Charter indicates that the balance achieved by the Court has been successful. In fact, the Court has emerged as one of Canada’s most important national public institutions, one with a strong and growing international reputation. Its opinions have been cited and followed by national courts around the world, not least by New Zealand courts.240

Normally, the judges of the highest courts perform a creative law-making function, as opposed to merely “discovering” the law. This is a clear difference to the function of the court system in Sweden241. Today, the Supreme Court of Canada could, however, be said to have more of a supervisory role. It is required to oversee the development of the law in the courts of Canada, and to give guidance to the provincial courts and the Federal Court on issues of national concern.242 In the Court’s litigation, interveners have come to play an increasingly important role, especially in constitutional cases. This allows third parties such as non-profit organisations, law-related organisations, and industry associations the right to make submissions243. The Court has, thus, significantly redefined its role over the past 25 years, moving more and more towards a supervisory function.244

Moreover, the Supreme Court has shown a concern for civic peace in dealing with aboriginal rights, particularly in its encouragement to the parties to resolve their conflicts and disagreements through political process. This approach complements the search for justification for infringement of rights, and directed towards reconciliation. The most visible encouragement of the negotiation process can be found in the Delgamuukw case245, where Chief Justice Lamer observed that litigation concerning aboriginal rights is expensive both in economic and human terms. He concluded, thus, that he would not encourage the parties to proceed to litigation and to settle their dispute through the courts.246 This statement is significant, since it identified the Court’s uneasiness with having to resolve complex legal issues when the parties have done so little to provide concrete and specific statutory or contractual terms for the Court to interpret.247

Consequently, a core interest for the Supreme Court is to uphold social stability and civic order, and the Court has stated that its administration of the rule

241 See further below in subsection 2.3.1.
243 The Attorney-General remains the most frequent intervener, which is natural given the automatic right to intervene in constitutional cases.
245 See further below in subsection 6.4.6.3.
247 Ibid.
Chapter 2 The Three Legal Systems

of law must always be attentive to any potential for chaos and anarchy that may result from its decisions. The Court has also stated that the law would tolerate neither a legal vacuum, nor any part of Canada being without a valid and effectual legal system. Hence, the Court must ensure that the country does not find itself in a situation in which there is an irreversible threat to the validity, force and effect of rights, obligations and respect for the identity and dignity of others. This self-defined political role of the Supreme Court of Canada is clearly unthinkable for the Swedish Supreme Court or Supreme Administrative Court. The function of the court systems simply differs. In Sweden it is rather the legislature that oversees matters of social and civic order.

2.3 Sweden

2.3.1 Basic Structure and Features

Sweden, like Aotearoa/New Zealand, is a constitutional monarchy with a unitary legal system. The Monarch, King Carl XVI, is head of state, but lacks formal political powers. The King’s functions are strictly ceremonial. Sweden is also regarded as a representative and parliamentary democracy. The form of government rests on the principle of public sovereignty (folksveränitetsprincipen), and not on a division of powers. This means that the public sovereignty is built upon the freedom of opinion and the public and equal right to vote. The public sovereignty is realised through election of members to the Parliament (Riksdagen), which is a unicameral parliament with 349 elected members. In brief, law proposals are formulated at the ministries and passed on to the Parliament. The Parliamentary legislation process is normally superseded by the Law Council, consisting of eminent judges who give advice on proposed legislation. Apart from the law-making function, Parliament also inspects on how the state is governed and managed. The Government is, thus, responsible before the Parliament. The power to govern on the national level lies with the Government. The country is also governed regionally and locally by, foremost, the County Administrative Boards and the Municipalities.

The Swedish legal system has a long and strong continuation over time. The medieval rural and town law was still in force by the time the new legislation of 1734 was enacted. Now, for the first time the same legislation applied to both

248 Ibid., pp. 39-40.
250 At least since the sixteenth century, Sweden has had public representation connected to the King’s government, a pre-Parliament (riksdagen), and in contrast to those in most countries the peasants in Sweden had a rather influential political position over the years.
251 Hence, the legislative power rests in the Parliament, along with the competence of deciding on taxes and how state finances shall be used.
252 Instrument of Government, ch. 8 s. 18. The examination of the Council regards how the proposed legislation relates to the Constitution and the legal system in general, how the single provisions corresponds, how the proposed legislation correspond to the “rule of law” (rättssäkerheten), if the proposed legislation is written in a manner that safeguard the stated objectives, and, lastly, the Council shall put emphasis on problems that may occur in the application of the proposed legislation.
253 Instrument of Government, ch. 1 ss. 4-9.
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countryside and towns. This legislation was built upon old legal traditions with
some influences of German–Roman law. Even if a majority of the legislation has
been amended, some parts of the legislation are still formally in force, but should
for the most part be considered obsolete.254

The Swedish legal system lacks a comprehensive civil code as is common in
Continental European countries. There are instead single statutes in essential
areas. In particular areas within the civil law, where legislation is scarce, legal
interpretation and application through analogies are used in order to determine the
valid law. This method is unknown in countries whose civil code stipulates
fundamental civil law principles. This method of using analogies is, however, not
applied in other legal areas, such as those covered by this thesis. With respect to
certain areas, such as contract law and family law, legislation has been drafted in
cooperation with other Nordic countries, which explains the apparent similarity of
parts of the laws in these countries.255

Today, when large parts of the legislation are to be harmonised as a
consequence of the membership in the European Union, there is again an
influence of Continental European law. This means that each member state must
amend and draft new legislation in order to fulfil its obligations. With the
membership of the European Union it follows that Swedish law, including the
Constitution, can be overruled by the EC law, if proven to contradict Community
law. The European Court of Justice (ECJ) has stated in a number of early cases
that Community law prevails. Along with the membership, the states have limited
their sovereign rights and transferred some of their competence to the European
Community, which means that the national legislator has acted beyond his or her
area of legal competence where national laws are found to contradict Community
law.256 It is the efficiency of the cooperation in the Union and the uniformity in
the application of the Community law throughout the member states that has been,
and still is, the focus of the ECJ.

There are two broad branches of Swedish law: civil law and public law.257
The provisions inherent in the civil law branch regulate relations between single
legal entities, whereas public law concerns the relations between the public and
individuals, as well as between different public authorities. Many legal disciplines
and a large number of single statutes include both types of provisions, such as the
Environmental Code and the Reindeer Husbandry Act, two central statutes in this
thesis. Moreover, constitutional law is regarded as a subclass to public law.
Constitutional law is fundamental, not only because it determines how public
power is exercised, but also since it states how legislation and rules in the
constitution and elsewhere are formed, amended or expired.

254 See, for example, Bernitz, Ulf, among others (2002) Finna rätt, p. 21. For an overview of the
Swedish legal system I refer to Bogdan, Michael (ed.) (2000) Swedish Law in the New Millennium
and Tiberg, Hugo, Sterzel, Fredrik & Cronhult, Pär (eds.) (1994) Swedish Law - a survey. For
additional concise information, see at http://www.llrx.com/features/swedish2.htm (viewed at 2006-
08-07). A short summary of the judicial system is provided at
översikt, pp 77-78.
257 See, for example, Frändberg, Åke (2001) Rättsordningen och rättstillämpningen in Strömholm,
The roots of the constitution in Sweden go as far back as to the medieval rural laws (landskapslagar). The Swedish Constitution includes four different pieces of legislation: the Instrument of Government, the Act of Succession, the Freedom of the Press Act, and the Fundamental Law on Freedom of Expression. The organisation and functions of the Parliament (riksdagen) is, however, regulated in another statute, the Riksdag Act. This statute has a legal position of being in between full constitutional recognition and a normal statute. Its vital provisions must be amended in the same manner as rest of the constitution with two parliamentary decisions.

Nonetheless, the constitutional document of most relevance is the Instrument of Government (RF), hereafter the Constitution. The Constitution encompasses provisions on how state powers are exercised, on elementary State institutions and their functions and powers, as well as basic human rights and freedoms. It includes also a number of fundamental principles and goals. Despite this, it is important to remember that in contrast to many other countries, the Swedish constitution plays a rather quiet legal role. Its provisions aim foremost at the Parliament as legislator or the Government as competent of issuing regulations. This is true also with respect to the fundamental rights and freedoms in chapter 2 of the Constitution. Those rights and freedoms may, nonetheless, be evoked by individuals in courts.

A fundamental principle of the Constitution is the principle that public authority is exercised under the legislation (legalitetsgrundsatsen). This means that all public and Municipal authorities, including the Parliament itself, must follow the applicable legislation. Another important principle is the objectivity principle (likhetsprincipen), aiming foremost at courts and administrative authorities. Those bodies must, in fulfilling their duties, pay regard to impartiality, objectivity and the equal legal status of every person.

Among the goals stated in the Constitution, there are declarations that the public shall promote a sustainable development that leads to a healthy environment for present and future generations, and that the public shall counteract discrimination on different grounds. Moreover, it is declared that the abilities of ethnical, linguistic, and religious minorities to maintain and develop their own culture and associations should be promoted. Those goals are connected to the realisation of public government and power, and not binding per se, and do not create any rights. As noted above, the fundamental rights and freedoms are instead to be found in chapter 2 of the Constitution. The European
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Convention on Human Rights and Fundamental Freedoms, from 1950, is also applicable in Swedish law, but it has only the status of a normal statute. There is another important and rather unusual feature in the Swedish Constitution, namely the principle of public access to official records (offentlighetsprincipen). The principle, codified in the Freedom of the Press Act, means that public records kept by authorities shall be released by request, without the need for the person making the request to reveal identity or purpose. This right may be denied, in principle, only with respect to reasons of secrecy (sekretess), laid down in legislation. This principle is essential from an environmental law perspective. Access to adequate environmental information is crucial for asserting other procedural rights, such as the right to appeal. In the context of European Union, the access to public records is not as readily available.

The court system in Sweden is divided between general courts and general administrative courts, but there are also a number of specialist courts, such as the Environmental Courts and the Environmental Court of Appeal. The Supreme Court is the highest appeal court for civil law matters, including criminal law cases, and sometimes also for environmental law matters. The Supreme Administrative Court sits on top of the hierarchy in public law matters. The role of the courts is also different with respect to New Zealand and Canadian law. Case law is understood as an authoritative interpretation of a statute, and creating new law is not seen as the principal task of the judges. Naturally, however, the less detailed a statute is, the more important precedents become, which is also true for unregulated areas. Hence, precedents are not formally binding, but are seen as persuasive. In practice, however, the cases from the superior courts (prejudikat) are generally followed by lower courts.

The legal sources are otherwise the usual: legislation, case law (praxis) and legal literature (doktrin), but with one addition, the preparatory works (motiven). From an international perspective, the preparatory works to legislation are given a more prominent role as a legal source than in most other countries. The relative weight given to preparatory works depends, among other things, on the character of the legislation and the existence of precedents (prejudikat). However, with entry into the European Union the former position of the preparatory works as an important source of law, as well as a way of develop and amend legislation seems to have weakened somewhat. The legal sources in the EC law differ to some extent, and since EC law has implications on the Swedish national law, I will provide short information below.

271 See SFS 1994:1219. See also, for example, Jermsten, Henrik Konstitutionell rätt, p. 29. Nonetheless, legislation that does not correspond with the obligations of the European Convention must not be enacted. See the Instrument of Government, ch. 2 s. 23.

272 Freedom of the Press Act, ch. 2 s. 2.

273 See also generally, for instance, Conradi, Erland (1993) Skapande dömande in Festskrift till Bertil Bengtsson.


275 Another form of legal source is custom, both in the sense of custom in, for example, business relations, and custom as an older practice. For most of the twentieth century this latter form of custom was regarded by most lawyers as extinct. However, in more recent years rights based on customary law have been claimed by ethnic minorities, primarily by the Saami. See, for example, Frändberg, Åke (2001) Rättsordningen och rättstillämpningen in Strömholm, Stig (ed) Svensk rätt – en översikt, p. 10.

276 See also above in subsection 1.2.2.2.

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2.3.2 Implications of EC Law

Sweden became a member of the European Union in 1995.278 This meant that European Community law (EC law) became part of the national law. Importantly, with Sweden’s accession treaty (anslutningsfördrag) a specific protocol was attached, with the purpose of guaranteeing the continuation of specific Saami rights. Protocol 3 consists only of two short articles, where the first basically secures the reindeer herding monopoly vis-à-vis the EC Treaty. The second article provides for amendments of the protocol for the development of exclusive Saami customary rights.279 This Protocol has, however, not been highlighted, but as the Saami are the only indigenous people within the European Union, it may provide for specific treatments in the future.

EC law is immense, covering many areas, and has of course had a fundamental influence on Swedish law, also in the area of environmental law, but lesser on Saami law. Even if the European Union imposes new legislation in the area of environmental law, it is for the most part in the form of directives. This means that directives must be transferred into national law. The Environmental Code and other pieces of environmental legislation have been amended to incorporate and reflect new EC environmental legislation. Nevertheless, an outline of the main characteristics enhances the understanding of the contemporary Swedish law in general.

EC law is often characterised as a law sui generis since it has features of both international public law and federal law, as well as influences from the domestic laws of the member states280. Its specific features has been endorsed and strengthened by the European Court of Justice (ECJ). Even if the task of the European Community is to establish a common market and an economic and monetary union, environmental protection objectives have a prominent status. For instance, the European Community must promote a harmonious, balanced and sustainable development of economic activities, a sustainable non-inflationary growth, a high level of protection, and improvement of the quality of the environment.281 Furthermore, environmental protection objectives must be integrated into other Community policies and activities282.

The sources of law could roughly be divided into written law, fundamental legal principles, case law from the ECJ and legal literature. The unwritten law becomes acknowledged and clarified through the ongoing activity of the ECJ. The written EC law are generally divided into primary and secondary law. The former consists of the EC Treaty and all treaties amending it, including all protocols and declarations on specific issues. The accession treaties of the member states are also part of the primary law.283 The secondary law is adopted by the Council and

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278 See also Act (1994:1500) on Sweden’s Accession to the European Union.
279 See further in subsection 9.3.2.
280 See, for example, Lysén, Göran (2001) Den Europeiska Unionen, pp. 81-82.
281 EC Treaty articles 2 and 3.
282 EC Treaty article 6.
283 See, for example, Lysén, Göran (2001) Den Europeiska Unionen, p. 54. Note, also that the ECJ has in its case law adopted the opinion that the protection of human rights is a part of fundamental legal principles of the EC law. See ibid., p. 78. There is also a draft Constitution for Europe, but its future existence is in doubt.
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the Commission. It consists of regulations, directives and decisions. Regulations are binding in their entirety and directly applicable in all member states. Directives, which are not binding per se, must be transferred into national law. It is only the result to be achieved that is binding upon each member state. A decision is binding upon those to whom the decision is addressed. International agreements entered into by the EC also belong to secondary law, and member states are explicitly bound by such agreements.

Among the EC institutions the ECJ has played, and still plays, a vital role for reinforcing the EC law and its applicability in the member states. The Court uses a teleological interpretation of the EC law, meaning that the Court interprets a provision according to its objective and purpose. Moreover, the ECJ often bases its interpretation of a provision upon the efficiency of the EC law. Hence, the ECJ seems to emphasise the further integration of the Community, especially where the member states themselves have been unsuccessful.

With respect to the EC Treaty or directives, the Court has established that national authorities, including national courts, must interpret national legislation in light of the text and objective of those sources. This flows from the general obligation of the EC Treaty that member states shall take all appropriate measures to fulfil Treaty obligations. This interpretive principle has been reinforced by subsequent decisions of the Court, imposing rather strict duties on national courts and national authorities. Moreover, the principle of the prevailing Community law prior to national laws means that national courts and authorities must apply a Community provision prior to the contradictory national provision. Such obligation also relates to provisions in the national constitutions to the extent that they contradict Community law. Accordingly, national courts must set aside any provision of national law that may conflict with it, whether prior or subsequent to the Community rule. The accession to the European Union limited the member state’s own sovereignty and competence, and it is, consequently, neither possible nor permitted for a member state to issue national legislation on areas regulated by the Community law or set such law out of play. In sum, the EC law has had important implications on Swedish law.

284 EC Treaty article 249. Recommendations and opinions are also part of the secondary law but not legally binding.
285 EC Treaty article 300(7).
287 EC Treaty article 10.
289 See, for example, Melin, Mats & Schäder, Göran (2004) EU:s konstitution, pp. 47-48 with references to case law.
Part II

Part II: The Law in Aoteoroa/New Zealand, Canada and Sweden

Part II contains an analysis of certain aspects of the law in Aoteoroa/New Zealand, Canada and Sweden. Different aspects of the law in each country are interesting for different reasons, which will shortly be explained below. The analysis of the law in each country can also be read separately by those with particular interests. Whatever the reason, these chapters should be read together with Chapter 2 in Part I which provide more information on special features of the three legal systems.

The New Zealand law is interesting for many reasons. I have found the counterpart to the Swedish Environmental Code, the Resource Management Act 1991 (RMA) particularly fascinating in some respects, as it is considered one of the world’s leading environmental law statutes. The RMA has two essential ingredients of relevance to this thesis. Firstly, as indicated, it is a very far-reaching and comprehensive legislation aimed at promoting sustainable management of natural and physical resources. It includes provisions on physical planning as well as specific permits (resource consents). Much of the decision-making falls back on the planning instruments, chiefly the local plans and their restraints and allowances. The RMA provides a mechanism that leaves large discretion to local authorities and yet allows for general (or specific) resource management issues to be resolved at the central level. The congruent planning system and how it is linked to other resource management decisions related to activities is therefore of great interest.

Secondly, the RMA encompasses Maori concepts, and to a considerable extent, allows for consideration of Maori cultural values, such as “kaitiakitanga”, related to resource management decisions. Those considerations are, however, subordinate to the overall purpose of the RMA. Nevertheless, the RMA is the first attempt to reconcile the two peoples’ knowledge and understanding related to decision-making of environmental protection and resource management issues. As another mean for reconciliation of the countries’ colonial past and to take into account the Treaty of Waitangi, the Crown and Maori tribes have entered into negotiations, which are hoped will lead to settlement packages for particular areas. One important aim of these settlement negotiations is to strengthen the RMA processes, allowing larger Maori input into resource management decisions. As an example, the well-known Ngai Tahu settlement is briefly analysed. The other large settlement included in the analysis of the thesis regards fisheries. Apart from the initial aim of restructuring the commercial fisheries to become sustainable, another aim was to strengthen customary and treaty based fisheries.

On the whole, the New Zealand law is encompassing important legal mechanisms for providing extensive consultation with Maori, particularly in relation to the vital planning instruments provided in the RMA. The legislation also includes mechanisms for co-management of different areas and resources. Maori customary rights have, furthermore, been codified in various pieces of
Part II

legislation in response to court cases and Treaty settlements. This is particularly true regarding vital fishing rights. However, Maori have no constitutionally entrenched rights. On the basis of constitutional protection of aboriginal and treaty rights, the Canadian law provides instead essential knowledge of the nature of the customary rights in common-law countries.

The analysis of the New Zealand law is in some parts more sweeping and in others rather detailed, which is intended. While the more general parts provide valuable knowledge and understanding of the theme, the more detailed sections provide for important exemplifications of how the law, for instance, intermingles sustainability objectives with Maori customary and management rights. In this manner the complexity of this legal field and of the valid law becomes more obvious, as well as providing examples of conflict-solving. Note that the provisions I do not explicitly quote and legislations to which I refer to can be found at http://www.legislation.govt.nz/.

Where the analysis of the New Zealand law is broader, the analysis of the Canadian law encompasses chiefly an examination of the nature of the indigenous people’s aboriginal rights, including aboriginal title. The examination is mainly based on key cases from the Supreme Court of Canada. The treaty rights are not included in my examination, since the relevance for a comparison with Swedish law is less. The basis for the analysis is section 35(1) of the Constitution Act, 1982, which includes a protection of existing aboriginal rights. This brief section has urged the Canadian courts, and above all the Supreme Court of Canada, to define the content and scope of aboriginal rights.

Although an analysis of aboriginal rights as such does not directly influence sustainable use of land and resources, the issue is underlying, since many cases concern conservation aspects vis-à-vis particular resources, notably in relation to fishery. However, many of the cases have been brought to the courts due to breaches of existing legislation, where the accused have asserted the exercise of an existing aboriginal right. In these cases, the Supreme Court was called upon to analyse the limit of aboriginal rights, as well as the limit of infringements on the same rights. As one of the two main objectives of this thesis is to analyse the interface between indigenous customary rights and environmental protection legislation, Canadian jurisprudence is essential. Without a proper understanding of the rights per se, it is difficult to understand how the two areas interact. This issue is underdeveloped in Swedish law. Thus, an analysis of the Canadian aboriginal law in this respect provides valuable material for a critical analysis.

In respect to the nature and scope of aboriginal rights, this single chapter includes an examination of how to identify aboriginal rights and aboriginal title, whether the rights have been extinguished, and whether the rights are infringed. The Supreme Court has also set out a test with criteria to assess whether any infringements can be justified. As an example, conservation means that infringements upon aboriginal rights, such as closed seasons for harvest, will normally be justified.

Canadian law additionally recognises aboriginal peoples as partners to a fiduciary relationship with the Crown, which obliges the federal and provincial governments to acknowledge the position of aboriginal peoples as quite distinct from the position of all other Canadians. This legal distinction is foreign to Swedish law, but is nevertheless very interesting. One facet of this particular relationship is the Crown’s consultation duty, particularly in resource management decisions. This duty arises both in respect to constitutionally
recognised and affirmed aboriginal rights and to claimed aboriginal rights and title not yet recognised. The range of this duty varies with the particular circumstances, but in any event a meaningful consultation, and possibly also accommodation, shall take place in relation to a specific aboriginal community.

In similarity to the New Zealand chapters, some parts of the Canadian chapter are also quite detailed. These concern particularly the examination of the reasoning by the Supreme Court, and provide for a basic understanding of how the law on aboriginal rights has been canvassed and has evolved. It is, therefore, valuable from a Swedish legal perspective to provide for a better understanding of indigenous customary rights as such. There are some basic correspondences regarding the identification and continuance of the rights between the countries, which will be discussed later in Part III. Note that the Constitutional documents and Canadian legislation referred to can be found at http://laws.justice.gc.ca/ and Supreme Court cases and other case law can easily be obtained at http://www.canlii.org.

The analysis of Swedish law consists of three chapters. The first chapter regards the Saami customary rights, the legal nature of the rights as such, as well as the dilemmas and problems related to the contemporary codification of the Saami customary rights in the reindeer husbandry legislation. In Swedish law, only the reindeer herding right is recognised. The reindeer herding right consists of several sub-rights, including customary hunting and fishing rights. However, although the legislation states that the Saami people are the holders of the right, only members of the Saami village are allowed to enjoy the reindeer herding right. The reindeer herding Saami are, in fact, a minority within the Saami population. Other Saami do not have any recognised and codified customary rights.

I maintain that, on the whole, Saami customary rights are poorly understood in contemporary Swedish law. As explained in relation to methodological matters, in Part I subsection 1.2.2.2, the analysis of the Saami customary rights, chiefly the reindeer herding right, is problematic, as the legal sources either do not give guidance on important issues or are contradictory. Saami customary rights are based upon the doctrine of immemorial prescription, and, since the “normal” prerequisites are developed in relation to the context of agriculture and village conditions, they do not correspond to the unique land and natural resource uses carried out by the Saami. Hence, I conclude that there is a need to adapt those prerequisites to correspond to the sui generis nature of Saami customary rights claims.

The second chapter contains valuable information regarding and an analysis of the reindeer husbandry and the content of the codified reindeer herding right, as well as an introduction to the chief statute of Swedish environmental law, the comprehensive Environmental Code. The chapter also contains an analysis of the environmental requirements of the reindeer husbandry, including the reindeer herding right. In sum, these requirements on the husbandry are rather advanced, not at least with respect to the so-called general rules of consideration in the Environmental Code. The supervisory authorities also have authority directly or indirectly to impose environmental requirements on the husbandry, sometimes to the extent that the reindeer herding right, as a civil right, is unduly affected.

The third and last chapter regards environmental protection legislation as a whole. While it is the reindeer husbandry area that is the focus of this thesis, I
analyse how the most relevant statutes take into account environmental protection objectives and the extent to which the enjoyment of the reindeer herding right is protected against environmentally harmful activities. This legislation includes the main statutes with respect to planning law, environmental law, and natural resources law. The Environmental Code is also of essential importance here, not only as it is a comprehensive statute including a wide range of activities, but also because its application is parallel to that of other relevant legislation. Several concerns have become explicit, principally in relation to the inadequate, overarching physical planning given the more pristine character of the reindeer herding area.

Unfortunately a majority of the legal sources can only be obtained in Swedish, although a few statutes are translated. See http://www.sweden.gov.se/sb/d/3288/a/53927;jsessionid=aRa3AbdOEU_. Note, however, that many of them are unofficial translations and often do not include recent amendments. In a few cases, there are English summaries of preparatory works, and those are referred to below.
Chapter 3 Maori Rights Related to Land and Natural Resources in Aotearoa/New Zealand

3 Maori Rights Related to Land and Natural Resources in Aotearoa/New Zealand

Under this chapter, I provide an examination of the Maori rights to land and natural resources. One part of the thesis’s objective is an examination of the nature of particularly customary rights in the three countries. This provides for an analysis of the interface of customary rights and environmental law protection, including conservation aspects. Therefore, the analysis of all three jurisdictions begins with highlighting the current understanding of the indigenous peoples’ customary rights.

Although most of the rights in Aotearoa/New Zealand emanate from treaties, the customary and treaty rights are very often intermingled, which will be evident below when discussing the Treaty of Waitangi and its few, but broad, articles290. This chapter serves, thus, as an examination of the basis, nature and content of Maori rights. Both treaty rights and customary rights are analyzed, but the latter rights are emphasised. Regarding Maori customary rights, a closer study of the content of contemporary customary rights, which also highlights the current discussions of rights to foreshore and seabed, is made in the latter part of this chapter. The customary rights included here should, however, be seen only as examples of the most emphasised. By no means is the presentation below asserted to be complete.

On the whole, some customary rights are of more general nature, whereas other rights might be held by only one iwi or hapu (tribe or sub-tribe). Additionally, apart from Maori treaty and customary rights, there might be either customary rights recognised within a settlement process, or “new” rights negotiated through this process. Such settlement processes, once finished, are enforced by statutory recognition, such as the Ngai Tahu settlement analysed under section 5.3 below. The New Zealand law encompass many Maori words and concepts; for short explanations see above in subsection 1.2.4.

In Aotearoa/New Zealand, the Maori rights to land and natural resources are primarily rooted in the historical Treaty of Waitangi, signed between some Maori chiefs and the British Crown in 1840. The Treaty guaranteed Maori full, exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties. However, the Treaty, as an agreement, has encountered several legal difficulties, including the existence of two official versions that are not translations of each other. Over the years, there have been longstanding grievances and disputes over the ownership and management of land and natural resources resulting from neglect of the Treaty by previous governments291.

To summarise briefly the historical issue of specific Maori rights, during the period from 1840 to the 1980s, the position from Maori point of view was very unsatisfactory292. It was on the Treaty they had relied, but the courts held that it

290 See also subsection 1.1.2.1.
292 However, the first twenty years were not unsatisfactory for Maori, and, in fact, during the early days, there was a lot to be optimistic about. See for instance R. v. Symonds (1847) NZPCC 387 referred to in Joseph, Philip A. (2001) Constitutional and Administrative Law in New Zealand (2nd ed.), p. 55.
was not enforceable in the national law. Maori found very soon after the signing that the agreement, which included respect for Maori rights, was not much of a truth, and that their old customary rights recognised at common law had been largely whittled away. Not until the 1980s did the courts begin to recognise the Treaty rights, mainly due to incorporation of those rights into statutes (by references to the principles of the Treaty of Waitangi). 293

Hence, for years Maori have struggled to gain public recognition of rights based upon their understanding of the important Waitangi Treaty. In particular, they have claimed rights to land, fisheries and other valuable resources, while seeking at the same time to acquire genuine autonomy within the mainstream Aotearoa/New Zealand. 294 The struggle continues through discussions with the government via settlement processes, through new claims brought to the quasi-judicial body, the Waitangi Tribunal, and courts as well as by the establishment of a new political party, the Maori Party 295, and by generally raising Maori issues on the public agenda.

A number of positive attempts have been made during the last two decades to respond to Maori environmental concerns. 296 One important example, the Resource Management Act 1991 (RMA), embraces Maori cultural concepts of environmental protection and management of natural resources. The provisions in this principal environmental statute require environmental managers and planners to take account of Maori cultural values and traditions. In this respect the statute encourages Maori participation in decision-making. Also in relation to other environmental legislation, such as the Conservation Act 1987, there is a requirement that the principles of the Treaty of Waitangi be considered in environmental management. This means that these principles must be evaluated in relation to all aspects of environmental management rather than merely to land or resources particularly related to Maori. Consequently, Maori rights related to land and natural resources are intermingled with the overall planning and resource management in New Zealand.

3.1 The Nature of Maori Rights to Land and Natural Resources

3.1.1 Treaty Rights

3.1.1.1 The Treaty of Waitangi, from Nullity to Vital Importance
The Treaty of Waitangi was signed in 1840 by the British Crown and a majority of Maori chiefs 297. When it was signed, the Treaty was not a particularly special document. Yet, the fact that the Treaty still plays a vital role in the determination

297 The Treaty contains only three articles: the first concerns the transfer of sovereignty to the Queen of England; the second guarantees full, exclusive and undisturbed possession of Maori lands and natural resources; and the third confirms the royal protection of Maori and imparts them with all rights and privileges of British subjects. See further below in subsection 3.1.1.4.
Maori Rights Related to Land and Natural Resources in Aotearoa/New Zealand

of the New Zealand law is rare. In recent years, its importance has increased significantly, mainly due to the Waitangi Tribunal’s work, but also due to recent court cases and a more open political climate for Maori claims of specific rights. The Maori culture has also undertaken a dramatic resurgence over the last forty years or so, which adds to the explanation of the renewed importance of the Treaty.

The place for the Treaty in the history of New Zealand has fluctuated. Since the time it was signed, it has always been surrounded by controversy. Nowadays, it has been said to be the most important document in New Zealand's history. However, it took a long time for the Treaty to gain real status as a legal instrument. The primary reason for this is a long line of judicial decisions stating that it was not part of the national New Zealand law. As New Zealand is a dualistic legal system, a treaty will not directly alter the law unless it is incorporated into national law. No such legislation was generally passed.

The cession of sovereignty or governance by Maori to the Crown in article one was completed by proclamations of sovereignty in London a few months later, leaving the positive protection of Maori rights unlegislated. The only part directly transferred into statute concerned the Crown's right of pre-emption, due to the second article of the Treaty, which was done already a year after the signing of the Treaty. By doing so, the Crown secured the control of the colonization through a monopoly on the purchase of land from Maori. This article, with its pre-emptive right, has since long become obsolete and would today be rejected as discriminatory. The rights of citizenship for Maori in article three were relatively well upheld in the very beginning, compared to other colonies. However, many Maori claims today are based on inequality of treatment vis à vis Pakeha (non-Maori).

The Treaty was, thus, treated as a nullity, both with respect to the lack of national legislation acknowledging the Treaty and with the argument that no political body with power capable of making cession of sovereignty existed at the time. Today this view is generally recognised as based on a wrong approach to international law and British colonial practice. The revival of the Treaty began in the 1960s since the values in New Zealand society undertook significant changes. Discussions on human rights and elimination of discrimination, particularly racial discrimination, turned the attention on Maori situations within the society. Early Maori protest actions owed much to urban Maori with higher education, where the younger Maori were able to articulate their views better. The cry of the protest groups was to receive a greater Pakeha awareness and acceptance for Maori culture and identity, which they claimed that the Treaty in fact

299 Ibid., pp. 72-73.
300 One rare exception regards fishing rights. See below.
guaranteed. New awareness from research, by, for example, historians and lawyers, also gave also new insights to Maori points of views.306

Not until the late 1980s did the Parliament begun to enact legislation that included references to the principles of the Treaty which which the government was obliged to comply.307 It was deliberately left to the courts to determine the content of these principles and the judiciary rapidly responded. Although legislative reference to the principles did not mean that the whole Treaty itself suddenly became part of the law, but it was possible in given circumstances to use the Treaty as a tool in statutory interpretation.

In contemporary New Zealand law, there are numerous references to the Treaty, principally referring to the Treaty principles. These references are predominantly included in environmental and resource management statutes, which explicitly require consideration of, or non-derogation from, the principles of the Treaty308. Hence, the Treaty and the Treaty rights are indeed influential in the area of environmental protection and resource management.

### 3.1.1.2 The Waitangi Tribunal

Most claims on specific Maori rights are today advanced under the Treaty of Waitangi as a more promising alternative than claims for customary rights under common law with all the inherent difficulties of proof.309 Perhaps a trend break can be seen with the current claims on Maori customary rights to foreshore and seabed before the Maori Land Court, even though the new Foreshore and Seabed Act 2004 has halted the process.

With the establishment of a quasi-judicial body, the Waitangi Tribunal310 in 1975, Maori could for the first time turn with some efficiency to a body with their grievances311. Generally, the Waitangi Tribunal has been a success for Maori claims. On the whole, the Tribunal has promoted the understanding of the Waitangi Treaty and developed specific Treaty principles. Its importance cannot be overstated. This is in fact remarkable, since the Tribunal for the most part has no coercive powers; it is in principle only to make recommendations to the Crown about appropriate actions, such as monetary compensation and return of land or resources to correct injustices done in the past312. Importantly, one main

307 See foremost the State-Owned Enterprises Act 1986, s. 9.
310 The Tribunal was established by the Treaty of Waitangi Act 1975. The composition of the Tribunal is one appointed judge (from the High Court or the chief judge from the Maori Land Court) and two to sixteen appointed members (experts from various relevant fields, including lawyers). See Treaty of Waitangi Act s. 4.
311 The specialised jurisdiction of the Maori Land Court did not offer general redress of grievances. It deals with the existence of customary title, who has rights under it, conversation to title as Maori land under legislation, administration of Maori land and alienation of Maori land to the Crown or to others. In large, the legal system gave the executive the power to decide if and when the Treaty should be honoured. See generally Palmer, Geoffrey (1992) New Zealand's Constitution in Crisis. - Reforming our Political System, p. 74.
312 See Treaty of Waitangi Act 1975 ss. 5(1) & 6(3)(4). The Tribunal shall also make recommendations in relation to a number of specified matters. See the Act ss. 8A and forward. Note, however, that the Tribunal has no jurisdiction with regard to commercial fishing, as
Chapter 3 Maori Rights Related to Land and Natural Resources in Aotearoa/New Zealand

difference between general courts and the Waitangi Tribunal is the fact that the
Tribunal can inquire generally into the question whether there has been a breach
of Treaty principles, whereas the courts can inquire only whether there has been a
breach of the law. Thus, the Waitangi Tribunal can inquire whether Parliament’s
own legislation is in breach of the principles.

When the Waitangi Tribunal was set up in 1975 through the Treaty of Waitangi Act
1975, the jurisdiction of the Tribunal regarded only future actions by the Crown and
legislation could be tested against the Treaty principles. The first years of the
Tribunal were calm with very few claims. Maori were dissatisfied that they could not
investigate deep-rooted historical injustices. In the 1980s, there were new calls by Maori
organisations to widen the jurisdiction of the tribunal, and many street protests and
occupations led to a belief that “something needs to be done”. After many political turns,
the Waitangi Tribunal received jurisdiction to try claims back to 1840 through an
amendment to the Treaty of Waitangi Act 1975. In 1986 and 1987, when the amendments
came into force, Maori claims began to flow in. The few contemporary reports made in the
latter half of the 1980s were also reassuring, prepared under the new Maori chairperson,
Chief Judge Durie of the Maori Land Court. The government also made some efforts to
meet the recommendations of the Tribunal.313

The Tribunal’s jurisdiction to try claims is wide and includes general and specific
jurisdictions. Its general jurisdiction includes inquiries into claims made by Maori
that they are, or are likely to be, prejudicially affected by legislation or omissions
that are inconsistent with the Treaty principles in relation to the Crown. This
general jurisdiction is only recommendatory.314 Examination of legislation,
policies and practices is, thus, included in its jurisdiction, and the Tribunal shall
consider whether such legislation, policy or practice (or proposals thereof) was or
is consistent with the principles of the Treaty. The Tribunal has also specific
jurisdiction related to certain specified matters where it has power to make
binding decisions315. Additionally, the Tribunal is to examine proposed legislation
and report whether the provisions of the proposed legislation are contrary to the
principles of the Treaty316.

The Tribunal’s general approach with regard to the burden and standard of
proof is the same whether the Tribunal exercises general or specific jurisdiction.
However, no party bears the burden of proof before the Tribunal and the general
standard is that the Tribunal considers the totality of the evidence to find a balance
of probabilities.317 While the Treaty of Waitangi Act primarily deals with Treaty
issues, it may refer certain questions to the Maori Appellate Court or the Maori
Land Court for determination of matters such as Maori custom, rights of
settlements with the Maori have been reached. See the Treaty of Waitangi Act s. 6(7) and further in
section 5.2.

314 See Treaty of Waitangi Act 1975 s. 6(1)-(4). It includes all forms of legislation (ordinances,
regulations, orders, acts, etc.) issued after the signing of the Treaty on the 6th of February 1840, as
well as policies and practices adopted by or on behalf of the Crown. The Tribunal must inquire
into every claim but are only to make a full report if the claim is well-founded.
315 See the Act ss. 8A & 8B. These sections relate, for instance, to making binding
recommendations that lands vested in state-owned enterprises be returned to Maori ownership.
316 See Treaty of Waitangi Act 1975 s. 8. A report shall always be made, for instance, when it
concerns a Bill.
ownership by Maori to particular land or fisheries, and determination of Maori tribal boundaries.\textsuperscript{318}

Importantly, the Crown has commonly implemented partly or fully the recommendations of the Tribunal. The Tribunal has also established some principles of the Treaty, many of which have been transferred into government policy. As the Tribunal is regarded as a specialist tribunal, its interpretations of the Treaty are accorded considerable weight and respect also among the courts.\textsuperscript{319}

The Tribunal prides itself on maintaining its credibility through careful research to support its reports, and it also commissions or organises research work of an historical nature to assist the process of inquiry. Regarding procedure, the Tribunal is importantly accepting Maori custom, often holding hearings on a marae (community meeting place) in the Maori language.

The courts can subsequently use the findings of the Tribunal either by specifically adopting conclusions made by the Tribunal into the reasons of the court or by emphasizing whole or parts of the Tribunal’s reports offered as evidence. In the former case, the factual findings of the Tribunal will lack legal effect unless accepted and acted on by a court; otherwise its findings are only recommendations. Tribunal reports may be received as evidence,\textsuperscript{320} the latter case, if they will diminish the length of a court hearing. Information in Tribunal reports, including evidence from marae and other places, would not normally be practicable for courts to obtain.\textsuperscript{321}

Accordingly, over the years there have been several claims by Maori over Treaty related issues before the Tribunal. Many of the claims have concerned matters of resource management and conservation as a response to degradation and loss of natural resources due to non-Maori practices and priorities.\textsuperscript{322} So, many of the concerns raised by iwi have brought significant conservation benefits for all New Zealanders. For example the Te Atiawa tribe brought a claim against the discharging of sewage and untreated industrial waste from a petro-chemical plant and meat works into the mouth of Motunui River, which would go directly to the sea polluting traditional fishing grounds. The Tainui people brought a claim against the Rotorua City Council and its plan to discharge treated sewage into the Kaituna River. The tribe Ngai Tahu focused its claim on mahinga kai (traditional places for food-gathering and other resources) and the management of natural resources.\textsuperscript{323}

The largest claims heard so far resulted in the Muriwhenua Fishing report\textsuperscript{324} in 1988 and the Ngai Tahu report\textsuperscript{325} in 1991. Presently, due to the numerous claims before the Tribunal, it tends now to work by grouping claims together and dealing with them in large regional enquiries. This approach is also a response to

\textsuperscript{318}See Treaty of Waitangi Act 1975 s. 6A.
\textsuperscript{320}According to Evidence Act 1908 s. 42 (as a published book). See the referred case in the next footnote.
\textsuperscript{323}Maori Customary Use of Native Birds, Plants and other Traditional Materials (1997), p. 55.
\textsuperscript{324}Wai No. 22. The reports can be found on the homepage of the Waitangi Tribunal.
\textsuperscript{325}Wai No. 27.
3.1.1.3 The Treaty and its Implications on Environmental Law

Apart from Treaty claims brought to the Waitangi Tribunal, the law relating to the Treaty has important implications for environmental law. There are references to the Treaty in a number of important environmental statutes. The reference requires generally that the principles of the Treaty be taken into account by persons acting under powers and functions of the statute. The most important provision is section 8 of the Resource Management Act 1991 (RMA), simply because its application affects more areas and taonga (treasured resources) than any other statute. Section 8 requires that:

[i]n achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

Thus, this requirement means that the Treaty principles shall be “taken into account” by central and local governments, including the Crown, in primarily decision-making regarding development of plans and policies, as well as considerations of resource consent applications. Sections 6(e), 6(g) and 7(a) of the RMA is also of most relevance, referring to Maori interests and customary values for the interpretation of the RMA’s purpose. It is noteworthy that the wordings “take into account” in section 8, adhering to the Treaty principles, provide a fairly strict standard for deciding authorities, although section 8 and the other provisions under Part II are still subordinate to the RMA’s purpose in section 5. There are two main decision-making processes under the RMA, decisions pertinent to the planning instruments and decisions related to resource consent applications. The provisions under Part II of the RMA apply to both types of decisions.

Evidently, the Waitangi Treaty has several important implications for the interpretation and application of the RMA, as well as other environmental statutes, such as the Conservation Act 1987. The relevant Treaty principles in each circumstance might differ, however, since each statutory reference to the Treaty principles is focused on a particular legislative purpose, such as management of natural and physical resources (RMA) or minerals (Crown Minerals Act). Moreover, the prominence of the Treaty is still evolving on a case by case basis, regarding both the content of the Treaty principles and its influence on environmental law. The Treaty is indeed “a living document” in this sense: it


should rather be seen as an embryo than a fully developed and integrated set of ideas.329

3.1.1.4 Interpretation and Status Problems, Treaty Rights and Treaty Principles

Many problems attach to the Treaty of Waitangi, not least of which are its legal status and interpretation problems. Both the English and Maori text330 of the Treaty are official, but they are not translations of each other.331 The Maori text seems to be a revised translation of an English language draft that has since been lost332. In fact, the signing the Waitangi Treaty took several months, during which numerous copies of the Treaty text were taken around New Zealand, many of which were not identical. Consequently, this complicated textual history has led to large discrepancies between the two official texts of the Treaty. Some have even argued that the two versions are “two quite different documents: te Tiriti and the Treaty.”333

The legal status of the Treaty is not without complication. It is, however, clear that, while a court cannot directly enforce the Treaty as a treaty, it does not lack legal status entirely, as references to the Treaty in statutes can be enforced.334 So, the Treaty should, in short, be regarded as an historical and “informal” constitutional source that the New Zealand Government draws from in creating legislation. Still, it is not a part of any statute or formal constitutional document.335 Consequently, the Treaty has implications on many levels, and, although it is a part of the context of all legislation, a majority of the legislation will not impact on Treaty relationships. The Courts will, moreover, be reluctant to accept interpretations of a statute which clearly overrides rights stated by the Treaty, even if the Parliament has the authority to do so under the principle of parliamentary sovereignty.336

The Treaty of Waitangi contains only three articles. The first concerns the transfer of sovereignty to the Queen of England. The Second article guarantees full, exclusive and undisturbed possession of Maori land, estates, forests, fisheries, and other properties, which Maori individually or collectively possess

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330 The English text was signed by 39 Maori chiefs, and the Maori version was signed by over 500 chiefs.
331 This might not have been accidentally done by the translators. See Orange, Claudia (1992) The Treaty of Waitangi, p. 39 and onwards.
333 Ibid., p. 511 (footnote 2). He refers to professor Biggs, specialist in Polynesian linguistics.
334 See New Zealand Maori Council v. Attorney-General [1987] 1 NZLR 641, the so called State-Owned Enterprises case. The Court of Appeal (Cooke P.) meant that where there is an explicit reference to the Treaty in a statute, such as with the State-Owned Enterprises Act 1986, the Treaty may be used as an extrinsic aid for interpreting the statute in question. See also New Zealand Maori Council v. Attorney-General [1992] 2 NZLR 576, where this position was refined. The Court of Appeal (McKay J.) stated here that Treaty rights cannot be enforced in the courts except if they have been given statutory recognition.
336 Ibid., pp. 512-513.
The third and last article confirms the royal protection of Maori and imparts to them all rights and privileges of British subjects.

The second article is of special relevance regarding Maori rights to land and natural resources. The Maori version of the Treaty here refers to protection of the Maori chieftainship (rangatiratanga) over their lands, villages and all of their treasures (taonga). Taonga include all dimensions of a tribal group’s estate, including material and non material resources. This is more than the “real estate” rights over land and properties established in the English version. So, one interpretation of the Maori text is that full sovereignty - in a common law understanding - was not ceded to the Crown, but rather a governorship.

An interpretation made by the Government and courts argues that, in spite of the uncertainties regarding the true effect of the Treaty, full sovereignty was acquired by the Crown, meaning that the Government exercises its power on that basis. None of the versions of the Treaty has, however, been adopted literally either by courts or in the political arena. The Treaty has instead been treated in terms of its intent and spirit, and, with this origin, courts and the Waitangi Tribunal have mutually recognised Treaty principles. As a result, most statutes refer to the principles of the Treaty rather than to the Treaty itself. However, it is commonly a lack of definitions of the content of such principles that leaves issues to be solved by the courts. Other statutes define in more detail specific obligations, for instance, of Maori and the Crown with regard to consulting relating to their relationships. As seen above, the RMA is an example of a statute that combines a general reference to Treaty principles as well as including particular provisions relating to specific matters, involving consultation.

Since 1987, with the enactment of the State-Owned Enterprises Act 1986, the New Zealand courts have considered references to the Treaty in statutes. In the famous 1987 Maori Council case, a few Treaty principles were emphasised, which have later been assured and confirmed by subsequent courts. The Waitangi Tribunal has additionally established Treaty principles. However, in Te Ruananga o Muriwhenua Inc v. Attorney General, Cooke P. explained that the findings of the Tribunal will not operate as res judicata as the Tribunal is not a Court and has no jurisdiction to determine issues of law or fact conclusively. He reasoned that, in the end, this requires a court to rule on what is meant by an act in relation to the phrase “the principles of the Treaty of Waitangi”. This must also mean that the resolution of doubts about whether an expressed principle is in fact a Treaty principle lies ultimately in the hands of the courts.

One should additionally bear in mind when referring to Treaty principles that courts, as well as the Waitangi Tribunal, examine such principles relevant to

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337 There is also an exclusive pre-emption right of land to the Crown, meaning that Maori could only sell land to the Crown or by her appointed persons.
338 These include, for example, sacred places and genealogies.
339 See the translation of the text done by Professor Sir Hugh Kawharu in Appendix.
341 See further below.
343 An example is the Local Government Act 2002, which relates to Maori participation in local government processes.
344 See also generally regarding the principles in Harris, Rob (2004) Development v Protection, an introduction to RMA and related laws in Harris, Rob (ed.) Handbook of Environmental Law, p. 61.
the case before them, meaning that they apply a case-by-case approach. Therefore one has to be careful when extracting principles of general application given by decisions with respect to individual situations. These principles will also develop over time. Consequently, it is not possible to ascertain a comprehensive set of Treaty principles as the Treaty itself is a living document to be understood in a contemporary setting. Nonetheless, there are some more general principles that should stand in a longer time perspective. Particularly, in the Maori Council case from 1987, three principles were emphasised by the Court of Appeal.

Among the Treaty principles, there is first of all a principle of partnership-like relationship. The relationship between the parties to the Waitangi Treaty, the Crown and the Maori, creates responsibilities akin to fiduciary duties. Thus, this partnership is generally to be compared with the relationship between trustees and their beneficiaries, solicitors and their clients, guardians and their wards. This fiduciary duty is also generally said to have arisen from the special relationship that exists between the Crown and indigenous peoples, arising from the Crown’s pre-emptive rights to land requiring a reciprocal duty. The same recognition of the Crown’s fiduciary duty is, thus, also evident in Canadian law. See subsections 6.4.2, 6.4.5.3 and 6.4.6.5. This kind of legal recognition of a specific relationship between the government and the Saami is lacking in Swedish law. The colonisation process has not become legally relevant, perhaps because colonisation is also more historically distant and vague in Sweden. But still, it is evident.

So, the main characteristic of such partnership in the New Zealand legal context is acting in outmost “good faith, fairly, reasonably and honourably towards the other.” Note that, although this principle was held unanimously among the five judges in the Maori Council case, each of them gave separate judgements even though the words differed only slightly. This principle is especially relevant for government and government agencies to consider in the exercise of powers and functions related to land use and natural resource management. It seems that the Crown’s duty as a Treaty partner also means that, in order to act in conformity with the Treaty and its principles, the Crown needs to take into account all relevant recommendations by the Waitangi Tribunal. Although the Tribunal is a quasi-judicial body, it has a considerable influence on Crown politics and policy regarding Maori affairs.

The Court of Appeal has continued to use the language of partnership and the fiduciary relationship in its following decisions, such as in Te Ruananga o Muriwhenua Inc v. Attorney General in 1990 (the fisheries case) and Ngai...
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Tahu Maori Trust Board v Director-General of Conservation\textsuperscript{354} in 1995. The 1990 fisheries case (Cooke P.) importantly linked the concept of fiduciary duty to the jurisprudence developed by the Supreme Court of Canada, primarily in the Guerin case\textsuperscript{355}. The Privy Council in England was also confronted with interpretation of the Treaty, in fact for the first time since 1941, when the 1992 Court of Appeal decision was appealed\textsuperscript{356}. The Privy Council did not use the term partnership, but instead emphasised a relationship founded on reasonableness, mutual co-operation and trust\textsuperscript{357, 358}.

Secondly, there is a principle of active protection/protection of taonga. The duty of the Crown means an active protection of Maori people in their use of lands and waters to the fullest extent practicable. The concept of active protection was restyled by Cooke P. in Attorney-General v. New Zealand Maori Council\textsuperscript{359} in 1991, using the concept of “protection of taonga”. However, the changed phrase seems not to have caused a difference in the meaning of this principle\textsuperscript{360}. There seems also to be a third general principle, the principle of redressing grievances. This principle was rationalised with an argument that the obligation of the Treaty parties to comply with its terms was implicit\textsuperscript{361}. For this reason, a breach by one party of his duty towards the other gives rise to a right of redress, that is, a fair and reasonable recognition of the wrong that has occurred. Such a claim, including claims of compensation, can be submitted before the Waitangi Tribunal, but not before normal courts.\textsuperscript{362} As a fourth principle, the Court of Appeal has also established that consultation is to be seen as a principle of the Treaty\textsuperscript{363}.

Additionally, the Waitangi Tribunal, operating under its own statutory mandate, has established treaty principles. More accurately, it has worked out a framework of Treaty duties somewhat different from the principles developed by the courts. The Tribunal’s development of Treaty principles is primarily based upon the Maori text of the Treaty and the relationship between governorship (kawanatanga) and chieftainship (rangatiratanga) in the second article. In the Tribunal’s view the cessation by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori chieftainship. From this it follows that Crown has a duty of active protection and a duty of consultation, and additionally, Maori has a right of tribal self-regulation\textsuperscript{364}.

354 [1995] 3 NZLR 553, p. 561. This refers to the Sealord case.
355 Ibid., p. 655. See also Guerin v. The Queen [1984] 2 S.C.R. 335, which is discussed in relation to the Canadian law under subsection 6.4.2.
361 See Maori Councils case per Somers J., p. 693.
363 See, for instance, New Zealand Maori Council v. Attorney-General [1989] 2 NZLR 42, p. 52. Issues of consultation have been a subject in many court cases and are examined below, but here only in relation to the Resource Management Act. See section 6.4.
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The Waitangi Tribunal equally recognises the principle of partnership, which is derived from case law. Another approach is to take a starting-point in the taonga protected in the second article of the Treaty. Taonga, in the Tribunal’s view, also includes intangible properties, such as the Maori language and Maori customary law related to land occupancy. The Tribunal has also articulated that the Crown should ensure that Maori is left with enough land for future needs so as to provide for an economic base for future development. In similarity with the courts, the Tribunal maintains that consideration of Treaty principles requires a flexible approach to interpretation in contrast to a legalistic view.365 Even if the Treaty principles developed by the Tribunal constitute legal authority, the Crown has drawn its Treaty principles from both case law and Tribunal findings366.

Interestingly, in cases where there is a clear inability to apply Treaty principles, some courts have resorted to the fiduciary duty that is said the Crown owes Maori. This concept of fiduciary duties has potentially far-reaching consequences and has in various jurisdictions been applied to the relationship between the Crown and indigenous peoples.367 Particularly, Canadian courts use the concept vis-à-vis the obligations of the Crown.

3.1.2 Maori Customary Rights

3.1.2.1 The Basis of Maori Customary Rights

In addition to the Treaty rights, Maori have customary rights that are protected at common law. The basis of Maori rights in customary uses corresponds in fact better to the legal situation in Sweden, where the Saami rights are also customary in nature.369. It has been said, in the New Zealand context, that customary rights and the Treaty rights are much the same and that the Treaty simply confirmed pre-existing customary rights.370. This, however, is not quite clear. There are differences between the types of rights. Customary rights arise from long practice of traditional Maori activities whereas the rights arising from the Treaty are due to an (international) agreement.371. Future case law should be able to answer whether there is a closer connection between customary rights and Treaty rights and, if so, what that connection consists of. In comparison to Canadian case law and jurisprudence, the New Zealand law has not evolved around the doctrine of

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365 Ibid.
366 As an example the Department of Conservation has defined eight Treaty principles, which for instance have been reflected in conservation management strategies. The principles are governance, Maori authority, citizenship, partnership, guardianship, active protection, informed decisions and redress. See Llewellyn, Donna (2004) Maori and the environment in Harris, Rob (ed.) Handbook of Environmental Law, pp. 472-473.
368 See further in subsections 6.4.2, 6.4.5.3 and 6.4.5.6.
369 See subsection 7.2.1.
370 In Te Runanga o Te Ika Whenua Inc Society [1994] 2 NZLR 20 the Court of Appeal (Cooke P.) reasoned that the Treaty must have intended to preserve effectively customary title in relation to their rangatiratanga and taonga (see p. 21). In relation to fisheries, the Court of Appeal in Te Runanga o Muriwhenua Inc v. Attorney General [1990] 2 NZLR 641 reasoned that the Treaty might be an assurance of protection of customary title and where, for practical purposes, the present day Treaty rights and customary rights would be the same (see p. 643).
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Instead, claims for Maori rights to land and natural resources have commonly been advocated through the Waitangi Treaty. Since the rights to use land and natural resources of Maori are highly associated with the Treaty of Waitangi, literature on Maori customary rights is scarce. Therefore, this and the next sub-heading draw mainly from a few court cases and from Sir Douglas Graham, a well known and respected New Zealander, who, before his exceptional political career, was a practicing lawyer for two decades. His argumentation is based on case law from primarily Canada and Australia. Consequently, his opinion is well in line with the understanding of the customary rights developed in the Canadian legal context and in other common law jurisdictions.

English common law has long accepted the principle that the right to follow customary activities by prior occupants of a settled colony may survive a transfer of sovereignty. In other words, when New Zealand became a British colony, the English law recognised some rights enjoyed only by Maori. The presumption of colonisation is that the Crown will respect existing rights of property. The principle that the rights of the indigenous peoples in colonised territories are preserved is known as the doctrine of aboriginal rights. The purpose of this principle was to assist the reconciliation of the cultures, which otherwise would be in a state of conflict. There are, thus, customary rights that will be upheld by the courts unless those rights have been abandoned, surrendered or lawfully extinguished. The result is a legal system where certain members have rights not shared by others. Customary rights are normally held communally and are unique in legal character; the rights are sui generis.

Over the past thirty years, there has been significant jurisprudence, particularly in Canada, Australia, and, to a lesser extent, in New Zealand on customary rights of indigenous peoples. Case law has clarified the evidential burden that exists to establish such rights and has defined who carries that burden. Case law has also described the nature of such rights and how and by whom they can be lost, modified or extinguished. Some things seem clear. Those indigenous communities that have remained physically separate from the settler community, such as Aborigines in the outback and Inuit in northern Canada, are much better able to assert customary rights than are Maori. This is due to the fact that Maori in a relatively small island mass quite quickly adapted to the European way of life and became integrated to large extent with the rest of the population. Thus, they ceased to practise many customary activities.

Nonetheless, the main explanation why Maori lost their rights to lands was that large amounts of Maori land were seized by the Crown as a consequence of the New Zealand Wars of the 1860s and subsequent land purchases of the nineteenth century and early twentieth century. Only about six percent of New Zealand land remains presently as Maori land. In the early years after the

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372 See further below in subsection 6.3.1.
373 He entered Parliament in 1984, became Minister for Justice in 1990, was appointed at Minister of Treaty Negotiations the next year and was appointed Attorney-General in 1998.
375 The Crown will however acquire the radical title to land and the right to govern the country. See further in next subsection 2.1.1.
376 See further below in subsection 4.3.1.
378 Ibid., pp. 1-2.
379 See further below in subsection 4.1.1.
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signing of the Waitangi Treaty, customary rights were generally upheld by the law, and colonisers accepted that Maori owned the land. However, tension grew, because it seemed that not enough land was sold by Maori to the Crown for settlement, which generally is believed to be the primary cause for the wars of the 1860s.

Consequently, few Maori customary rights remain. Existing customary rights or customary title do not need to be confirmed by statute so as to be valid. Courts can, however, acknowledge such customary rights at common law, which requires a showing on the balance of probabilities that the activity in question was being conducted prior to first contact with the early settlers and has continued since. For claims of customary rights, the activity does not need to have been exercised to the exclusion of others. The activity needs neither have been exercised without interruptions. Once established, the customary rights are connected to the person or the community and to the activity and the place in question. The right does not extend to other tribes or to other members of the same tribe trying to undertake the activity somewhere else. Maori customary rights at common law can also be recognised (codified) in legislation.

In the codified New Zealand law, the rights consist mainly of food gathering activities. Maori have, for example, fishing rights, both customary freshwater fishing and commercial seawater fishing. Some of the customary rights are exclusive to only some Maori, leaving other Maori in the same position as other New Zealanders. To give one example, Rakiura of Ngai Tahu tribe are allowed to take mutton-birds from the Crown Titi Islands, located in the coast of South Island. The customary rights are held by local hapu or iwi. Therefore, the customary activities are critically dependent on the land and its natural feature, such as Maori customary use of a specific site for habitation, of thermal power for cooking, or of river water for consumption. The activity is distinctly territorial, and the customary usage of natural resources will continue until that usage is no longer followed or where the right has been extinguished by statute.

Customary or native title is part of the common law doctrine of aboriginal rights, as explained in more detail below in relation to Canadian law, in subsection 6.3.1. The nature of the aboriginal rights has particularly been explored by Canadian courts. In order to be distinguished as customary title to land or resources, the demands of evidence are much higher. The claimant must show on the balance of probabilities that the group were in exclusive possession of the land or resources prior to the passing of sovereignty. Moreover, it must also be shown on the balance of probabilities that the customary practices have continued, and that the physical link with the land has been maintained ever since. Thus, Maori

381 This is a contrast to the Swedish law where interruptions in the customary use are an issue. See further in subsection 7.2.1.3.
383 As an example, the key case on the possibility for customary fishing rights was Te Weehi v. Regional Fisheries Officer [1986] 1 NZLR 680, and here statutory law moved in response to give Maori more specific rights in place of the vaguer customary rights.
384 Such rights are governed mainly through regulations.
385 In Te Runanganui o Te Ika Whenua Inc Society [1994] 2 NZLR 20 the Court of Appeal stated that the words “aboriginal title” and “Maori customary title” are interchangeable (see pp 20-21).
customary title has a legal basis independent of the Treaty of Waitangi and upheld in early and recent case law.\footnote{Williams, David A R (ed) (1997) Environmental and Resource Management Law in New Zealand, p. 40-41.}

The connection between customary rights and customary title is close, but different in content. If it can be established that possession was exclusive at the time sovereignty was passed to the Crown and that possession has continued unabated to the present time, the customary right is known as customary title. This is a right to possession that enables the holder of the right to follow and enjoy the traditional and customary practices associated with possession. The holder can use the land for various purposes, which does not necessarily need to be fundamental to the culture of the holder. Yet, customary title does not permit the holder to use the land in any way that is inconsistent with the customary usage\footnote{This seems to be a difference from the understanding of aboriginal title in the Canadian law, where all land and natural resource uses in principle are allowed. Compare with subsection 6.4.6. However, it should be noted that the understanding of Maori customary title is not well established in the New Zealand law.}. Consequently, when the customary usage ceases, usually when the holders of the right depart from the land and resources, the customary title is lost permanently.\footnote{Graham, Sir Douglas (2001) The Legal Reality of Customary Rights for Maori, pp. 6 & 9. A customary title is quite unlike “normal” property rights to land (for instance fee simple title), where the owner may be absent for years.}

It is nowadays clearly accepted that customary rights to land and natural resources exist if not yet extinguished by legislation\footnote{Williams, David A R (ed) (1997) Environmental and Resource Management Law in New Zealand, pp. 40-41.}. Customary and treaty rights to marine fishing have been recognised and protected by delivery of quota rights for commercial activities and through a regulatory regime introduced for customary activities. Customary fishing rights and rights relating to food gathering have a distinctive history in that they early have been given statutory recognition and protection. Claims on further customary rights will most probably focus on food gathering activities\footnote{Graham, Sir Douglas (2001) The Legal Reality of Customary Rights for Maori, p. 19.}, including food gathering activities in relation to the coastal marine area.

It has been argued that the Maori holistic understanding of the marine area might not be compatible with English propriety terms. In a case regarding customary rights to generate electricity, the Court of Appeal (Cooke P.) acknowledged that “[i]t may not be appropriate to render [customary] title conceptually in terms which are appropriate only to systems which have grown up under English law”\footnote{Te Runanganui o Te Ika Whenua Inc Society v. Attorney-General [1994] 2 NZLR 20, p. 26.}. He indicated here that the concept of the river as a taonga meant the whole and indivisible entity, which could not be separated into bed, banks and waters. This shows a general problem between the Maori holistic understanding of land, waters and natural resources with the division and creation of concepts within the New Zealand legal system; they are not fully or even nearly compatible. See also above in section 1.1 for information of the main land and natural resource conflicts with respect to each country.

As stated above, the judicature in Aotearoa/New Zealand has not been engaged with clarifying Maori customary rights to the extent that the Supreme Court of
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The claims have been asserted primarily as rights guaranteed under the Treaty of Waitangi. However, presently customary claims related to foreshore and seabed may be stressed under the Foreshore and Seabed Act 2004, although such claims are restricted. Nonetheless, the case law consist of a few cases regarding claims for customary rights. Two such cases are referenced below.

In *Te Runanganui o Te Ika Whenua Inc Society v. Attorney-General* 393 the Court of Appeal (Cooke P.) found that Maori did not have a right to generate electricity by utilizing water power, either under the common law doctrine of aboriginal rights under the Treaty or under any statute. The Court reasoned that, however liberally Maori customary rights are construed, one cannot think that they were ever conceived as including the right to generating electricity. 394 No authority from other jurisdictions has suggested that aboriginal rights extend to the right to generating electricity 395. Additionally, even if the Treaty of Waitangi is to be construed as a living document, it could not be regarded today as meant to safeguard rights to generate electricity. The appeal was consequently dismissed.

In this case, the Court made some interesting observations regarding the application of customary rights generally. The Court noted that, in recent years, courts in various jurisdictions have increasingly recognised the justifiability of claims made by indigenous people, either by developing the principle of fiduciary duty linked with common law aboriginal rights (Canada, Australia) or as in New Zealand, where the Treaty rights and Maori customary rights tend partly to be the same in content 396. The Court also observed that the nature and occurrence of aboriginal rights are determined by matters of fact dependent on the evidence in any particular case as well as on the approach of the court considering the issue. With the famous Australian *Mabo* case 397 as an example, the aboriginal rights may, at one extreme, be treated as a full rights of proprietorship of an estate in fee recognised at common law, and, on the other extreme, at the best treated a loose and random occupancy giving usufruct rights. 398

In *McRitchie v. The Taranaki Fish and Game Council* 399 in 1998, the Court of Appeal (Thomas J.) could have given reasoning on the nature and content of customary fishing right but chose not to do so 400. Instead, the Court relied on the decision of the High Court (full court). The High Court framed its reasons in relation to the legal regime regulating the trout fishing, which in fact were found to predate the introduction of trout to New Zealand. Trout had always been a part of a separate regime exclusively controlled by legislation. The only opportunity to fish trout was under those provisions. 401

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394 Ibid., pp. 24-25.
395 The Court assessed and referred to cases from Canada (*Guerin, Sparrow, Delgamuukw*), Australia and Nigeria. The Canadian cases referred to here are analysed in relation to the examination of the aboriginal rights.
396 The Treaty of Waitangi has acquired some permeating influence in New Zealand law. See *Te Runanganui o Te Ika Whenua Inc Society v. Attorney-General*, p. 27.
399 CA 184-98.
400 The full High Court and the majority of the Court of Appeal had decided that it is not necessary to address that question. Thomas J. also emphasised that the matter of evidence supporting such claim in the future will hopefully be more extensive than in this case (see ibid., pp. 11-13).
401 Ibid., pp. 10-11. A full court sits where the issue before the court is of special significance. Thus, a full court decision will have special reinforcement from a precedent point of view. See Mulholland, R. D. (1999) *Introduction to the New Zealand Legal System*, p. 81.
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In this case, the appellant was charged with fishing for trout in a river without a licence, even though he had been fishing there for food since he was a child on the authority of his hapu. The appellant claimed that he was exercising a traditional fishing right. The defence of the appellant argued that the customary right was to be understood as focused on the fishing places and purposes, not species. The Fish and Game Council argued, on the other hand, that the right was focused on fish stocks rather than the activity of fishing. As concluded by Thomas J., the question whether the appellant hapu’s right to fish for food in the river includes a right to fish for any species in the river, native and introduced, must await another day.

Altogether, Maori customary rights are generally not at the centre of advancement of Maori rights in Aotearoa/New Zealand. And recently, the new Foreshore and Seabed Act has stifled the possibility of bringing claims on customary rights to the foreshore and seabed, something which has been strongly criticised by Maori and the UN Committee on the Elimination of Racial Discrimination.

3.1.2.2 Abandonment, Cessation and Extinguishment of Customary Rights

Generally, all customary rights are legally recognised if the practises are followed, even if interruptions do not automatically disconnect the link with the land (customary title) or the customary activity (customary right). This is generally true also for Saami customary rights established through immemorial prescription. Also in the New Zealand context, rights to land (customary title) are stronger than customary rights, such as fishing. Maori customary rights can be lost in three principal ways: firstly, by abandonment of the customs, or in the case of customary title, dissolving the physical link with the land concerned; secondly, by surrender to the Crown (cessation of powers, primarily by selling land); or thirdly, if the Crown extinguishes the right pursuant to a lawful act. The third situation is often the essential point, because customary rights are vulnerable to extinguishment by various means. The first and third situations may correspond to the Saami customary rights as well.

The common law protects only the rights that exist at the time they are declared. This means that it is not enough to prove possession at the time of annexation by Britain, regardless of whether the rights were abandoned, cessed or, more likely, extinguished by the Crown. Therefore, when analysing whether or not a customary right exists, which is the first step, it is important to determine if a customary right has been specifically extinguished and, if not, whether the claimed customary right continues to exist (has continuity over time).

Thus, what seems to be critical when determining the existence of customary rights in general is the “second” step, which is to analyse whether the right in fact has been extinguished. It is generally regarded that any
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Extinguishment appearing in legislation must be clearly intented and should come from the Parliament and not as an unintended, accidental side-effect. In the Marlborough Sounds case, it was held that the onus of proving extinguishment lies on the Crown and that, if the Parliament aimed for extinguishment, its intention must be “crystal clear”. In other words, the Parliament’s purpose must be demonstrated by express words, so that Maori property rights cannot be extinguished “by a side wind”. In the McRitchie case, the Court of Appeal made a general comment regarding parliamentary legislation on extinguishment. Employing a useful metaphor, he wrote that “the tail should not be permitted to wag the dog”. In other words, he argued that he would place very light weight on subordinate legislation to determine whether a particular right had been extinguished. Instead, the direction should come directly from Parliament and not by delegated authority, although regulations might occasionally be relevant though.

In sum, customary rights may exist for some groups and not for others, and some groups may never have had a particular right in question. As an example, Maori inland tribes may not have customary fishing rights in the sea, while other groups may have had this right, but abandoned it. So, customary rights are specific to the facts of the particular case and a particular area. In other words, there must be a link between the group exercising the activity, those becoming the holders of the customary right (the subject), and the tract where the activity is carried out (the object). Interestingly, these are the same prerequisites as for establishing Saami customary rights due to immemorial prescription.

In Aotearoa/New Zealand, customary rights to land and natural resources were largely recognised by the law, but lands were seized or sold. Moreover, the Treaty-based rights have commonly over-shadowed the possibility of having customary rights acknowledged, although the Marlborough Sounds case in 2003 reopened the possibility of claiming customary rights. However, recently the new Foreshore and Seabed Act has, with explicit words, extinguished Maori customary rights to those areas and replaced them with a weaker set of statutory entitlements (customary rights orders).

3.2 Contemporary Maori Customary Rights

3.2.1 Introduction

Hereunder follow examples of Maori customary rights to use land and natural resources in certain traditional ways. The origin of the rights and their administration in legislation are diverse and may derive from settlements (as the case with Maori fishing rights), from statutory acknowledgments (the Mutton bird regulation), authorisation and licences (in conservation legislation) and occasionally steam from old legislation. As a supplement to Maori customary

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408 Attorney-General v. Ngati Apa [2003] 3 NZLR 643. For more information on the Marlborough Sounds case see below in subsection 3.2.4.2.

409 Ibid., at 63, 148, 154 & 185. Apart from Canadian and Australian case law, the case also refers to Te Runanga o Muriwhenua v. Attorney-General [1990] 2 NZLR 641 (655) and Te Wehi v. Regional Fisheries Officer [1986] 1 NZLR 680 (691-692).

rights acknowledged in legislation or where Maori may apply for authorisation or licence, there might be specific rights to use land and natural resources established as a result of a settlement process with specific iwi. For instance, the Ngai Tahu iwi has specific rights related to greenstone\textsuperscript{411}. As a difference the the recognised Maori customary rights, identified under this section, are more diverse than the Saami customary rights under Swedish law. It is only the reindeer herding right that is statutorily recognised.\textsuperscript{412}

Regarding Maori customary rights, and particularly customary title, it is important to emphasise that such rights mainly occur on and burden Crown-owned land. The legal position is that Maori appear almost certain to lose legal claims to customary rights on private lands. This is clear from the Marlborough Sounds case\textsuperscript{413} from 2003, which analysed the issue incidentally dealing with foreshore and seabed lands. The Court of Appeal found that there are no customary rights on those private lands, because they have been extinguished by statute. Once a Crown grant has been issued (fee simple title), the customary title has been extinguished, and the same applies to Crown purchases. Land which at one time was alienated from the Crown has the status of private land (General land).\textsuperscript{414} The virtual impossibility for Maori to bring claims on private-owned land is also the result of the operation of the Land Transfer Act 1952, protects registered title against unregistered claims. This Act guarantees the rights of a private registered proprietor in a complete way. In addition, the jurisdiction of the Waitangi Treaty was restricted in 1993 to prevent it from making recommendations with respect to privately-owned land\textsuperscript{415}.

However, there is no modern case law on the matter, as Maori have not directly attempted to pursue such legal action.\textsuperscript{416} Even if claims to customary rights on private lands could be made in courts or in the Waitangi Tribunal, they would be highly controversial. As a fact, Maori may also claim rights on private land in relation to negotiations for Treaty settlements with the Crown, but as a matter of political strategy, Maori groups have not wanted to pursue such claims either in the legal arena or in the political, arguing that one wrong is not remedied by creating another. Nevertheless, Maori have claimed ancestral connections or mana whenua (authority over certain land) without claiming ownership\textsuperscript{417}.

\textsuperscript{411} For more information see section 5.3 below.
\textsuperscript{412} See further in subsections 7.2.2 & 8.1.2. See also my discussion in section 10.3.
\textsuperscript{413} Attorney-General v. Ngati Apa [2003] 3 NZLR 643 (CA 173/01). For more information on the case see below under subsection 3.2.4.2.
\textsuperscript{414} Attorney-General v. Ngati Apa [2003] 3 NZLR 643 (CA 173/01) at, for instance, 99-100, 121-122 & 142. On categories of land, see below in subsection 4.1.1.
\textsuperscript{415} As a response to a recommendation by the Waitangi Tribunal in one of its reports and subsequent public anxiety, the Treaty of Waitangi Act 1975 was amended in order to prevent the Tribunal from making recommendations on return of private lands. The Treaty claims process has generally been launched with the understanding of the claims being against the Crown, leaving private property unaffected.
\textsuperscript{416} Customary rights may apply on private lands according to the Canadian law. See subsection 6.4.1. In the Swedish law the reindeer herding right is burdening both State owned and private lands. See further in chapter 7.
\textsuperscript{417} Mainly through section 6(e) of the RMA In this way respect and protection of certain customary rights may be achieved.
3.2.2 Customary Fishing Rights

3.2.2.1 Background to the Provisions

In contrast to many other established customary rights, Parliament recognised and confirmed customary fishing rights early in the *Fish Protection Act 1877*. This statute contained both a reference to the Waitangi Treaty and to “the rights of the Aboriginal natives to any fisheries”. The effect of this clause was clearly to give parliamentary approval for the courts to uphold Treaty fishing rights as well as customary fishing rights.418 The legislation has, however, been changed over the years, and the reference to the Treaty disappeared419. Also, more recently, Maori fishing rights have been statutorily recognised, partly as a consequence of the recognition of customary fishing rights by courts420. The conservation of such fishing rights was removed as part of the fisheries settlements; Maori were given specific statutory entitlements in place of their now extinguished customary rights.

However, in modern times there have been difficulties in relation to the exercise of customary fishing rights for both Maori and for fisheries authorities. The issues have concerned primarily who had the right to take fish, if permission of any kind was required and, if so, from whom, and, finally, how much fish each person could take. Another issue has concerned what would happen if the fish resource became stressed and the uncertainty of who could place a temporary ban on the harvesting, as well as who would be bound by such a ban.421 The courts had also started to interpret Maori customary fishing rights in accordance with provisions in the *Conservation Act 1987*, including section 4, which states that the Act shall be “interpreted and administered as to give effect to the principles” of the Treaty, as well as a statement that the Maori fishing rights in freshwaters shall not be affected422.

Apart from previous difficulties, after the fisheries settlements423, there was additionally a need to create provisions on non-commercial customary fishing rights424. The drafting of the new provision was guided by three main goals: firstly, an exclusive control of mataitai reserves by adjacent hapu or marae, secondly, the kaitiaki would control the customary take and thirdly, specific officers would be appointed to protect and enforce customary fishing rights. Extensive consultation with iwi assisted the drafting process. Nonetheless, the use of Maori terms in the provisions caused considerable debate; The Crown preferred more specific definitions that the Maori words did appear to offer.425

3.2.2.2 Present Maori Customary Fishing Rights

It is important to understand first of all that Maori fishing rights are essential rights, as they are intermingled with the culture and traditions of all Maori tribes.

419 See the present *Fisheries Act 1996* s. 174, which refer to customary fishing.
422 See, additionally, s. 26ZH of the Act.
423 See below in section 5.2.
424 Section 88(2) in the *Fisheries Act 1983* had been repealed.
If any Maori customary activity is – and has been - general and widespread among the different and distinct iwi, it is fishing with no distinction made between freshwater and seawater fishing. Their association to water and the coastal marine area is particularly strong. The fishing provisions also apply more generally, with separate regulations for the North and South Islands, than, for instance, various gathering rights.

The New Zealand fishing regime is quite complex, and a number of statutes and regulations apply to Maori fishing rights, both customary rights and commercial fishing rights. An initial distinction is made between commercial and non-commercial fishing and sometimes also between freshwater426 and marine fishing. Importantly, the Maori customary fishing rights do not merely include “fishing”, but also include gathering rights of other aquatic life, including seaweed, as well as managing rights of such fisheries resources.

Even if Maori commercial fishing rights, with rights to a fixed percentage of the annual catch quota, are a part of a separate legal system, the basis of this system has been aroused, at least partly, by acknowledged Maori customary rights to commercial fishing. This regime will, however, be presented in subsection 5.2.2.3 since the legal regime draws from the two fisheries settlements.

The settlements of 1989 and 1992 have influenced the rules on customary fishing, establishing quite different provisions applying only to such fishing; some provisions date from the 1992 implementing legislation, while others are older.427 In the 1992 statute, giving effect to the settlement requires the Minister to recommend that the Governor-General make regulations to recognise and provide for customary food gathering as well as protection of places which are of importance for customary food gathering428. Interestingly, under the same statute, the Minister shall, in congruence with the Treaty principles, consult with tangata whenua (people of the land)429 and develop policies that help to recognise Maori practises in the use and management of customary fishing430. This must mean that such policies are beneficial for Maori in relation to their management rights included in the customary fishing rights, but might also have potential to reshape other non-commercial fisheries, such as sports fishing.

The authority for Governor-General to make regulations has been transferred to the Fisheries Act 1996, the primary Act managing fisheries in New Zealand. Such regulations may recognise and provide for customary food gathering and the special relationship between tangata whenua and important places for food gathering. The food gathering places include tauranga ika (traditional fishing grounds in freshwaters) and mahinga mataitai (traditional fishing grounds for seafood). Nevertheless, the regulations may only concern strictly non-commercial fishing.431 Issued regulations prevail over other fishing regulations made under the Fisheries Act 1996, if specifically declared432.

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426 See the Conservation Act 1987 Part 5B, which includes provisions on freshwater fisheries.
428 See the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 s. 10(c).
429 Shall be understood in relation to a particular area and means the iwi or hapu that holds mana whenua (rights/authority) over that area. See RMA s. 2 and glossary in Appendix 2 in Harris, Rob (ed.) Handbook of Environmental Law, p. 579.
430 See the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 s. 10(b).
431 See the Fisheries Act 1996 s. 186(1).
432 See the Fisheries Act 1996 s. 186(2)(a).
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The regulations may also empower Maori Committees, marae committees and kaitiaki to make bylaws restricting or prohibiting the taking of fish, aquatic life, or seaweed, and, if such bylaws are made, the restrictions and prohibitions shall apply generally to all individuals. So, importantly, the iwi may appoint people as kaitiaki (guardians) to manage customary take within the iwi’s territory, including giving permission to people to harvest fisheries resources.

The three fishing regulations that are of most relevance here are all issued under section 186 of the Fisheries Act 1996. They are the regulations on amateur fishing and the two regulations concerning customary fishing. The two customary fishing regulations govern the fisheries in North Island and South Island respectively. These regulations are almost equivalents and differ only slightly from each other. Below is an analysis of the provisions. According to the amateur fishing regulation, Maori has rights to customary fishing, comprising the taking of fish, aquatic life or seaweed, for the purposes of traditional non-commercial fishing use if specifically approved. If properly delegated, a kaitiaki, Maori or Marae Committee can gain power to approve such fishing.

The Government has promulgated other regulations, including provisions recognising Maori customary fishing, such as allowing persons from the Ngai Tahu iwi to have a sole right to take eels from Lake Forsyth or to provide for exclusive fishing rights for members of the Tuwharetoa iwi to fish all indigenous fish species in Lake Taupo for household use.

As a way of protecting Maori customary non-commercial fisheries, the Minister of Fisheries may temporarily close a fishing area or impose restrictions on fishing methods for non-Maori. Before the Minister may impose such a closure, restriction or prohibition, he or she is required to consult relevant persons, including tangata whenua, environmental and recreational organisations, and local community interests. The Minister must also provide for input and participation in the decision-making process for the Maori in the area and have particular regard to kaitiakitanga.

Now I will examine the two customary fishing regulations more closely. Both relates to marine waters. The Fisheries (Kaimoana Customary Fishing) Regulations 1998 apply to seafood, “taking of fisheries resources for customary food gathering purposes from any New Zealand fisheries waters” in North

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433 See the Fisheries Act 1996 s. 186(2)(d) & (3)(a). Note that the bylaws must be approved by the Minister and have been published in the New Zealand Gazette (s. 186(3)(b)) before enter into force.

434 See the Fisheries Act 1996 s. 186(2)(c). See also generally Harris, Rob (2004) The coastal and marine environment in Harris, Rob (ed.) Handbook of Environmental Law, pp. 256-257.


436 Fisheries (South Island Customary Fishing) Regulations 1999 and Fisheries (Kaimoana Customary Fishing) Regulations 1998.

437 See Fisheries (Amateur Fishing) Regulations 1986, reg. 27(1)(a) &(2). These Regulations apply until the Minister has confirmed a kaitiaki for an area. See s 4(2) in both Fisheries (Kaimoana Customary Fishing) Regulations 1998 and Fisheries (South Island Customary Fishing) Regulations 1999.

438 See Fisheries (South-East Area Amateur Fishing) Regulations 1986, reg. 7.

439 See Taupo Fisheries Regulations 2004, reg. 40(2)+(4). However, the authority is subject to “licence” requirements by the Tuwharetoa Maori Trust Board. See also the Maori Land Amendment and Maori Land Claims Adjustment Act 1926, s. 14(2), where the same rights are guaranteed.

440 Fisheries Act 1996 ss. 186A & 186B.
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Island. If the regulations are inconsistent with other regulations made under the other two Fisheries Acts, the Kaimoana Regulations prevail. Under the Regulations, the Maori have rights to take fisheries resources for purposes of “customary food gathering”, meaning taking fish, aquatic life, and seaweed, and managing fisheries resources. The purpose shall be consistent with tikanga Maori (the customs, methods, and laws of Maori).

The tangata whenua within a particular area can, in accordance with the regulations, manage their customary food gathering, primarily through the appointed and confirmed kaitiaki. Certain powers are attached to the kaitiaki, such as powers to authorise taking, contribute to setting sustainability measures, development of management measures, prepare a management plan or strategy for the area that will at least be taken into account by the Minister when developing policies that recognise customary Maori practices, and appoint an honorary fishery officer to control the management. The management is also controlled and enforced by certain provisions.

The Fisheries (South Island Customary Fishing) Regulations 1999, in turn, apply to “the taking of fish, aquatic life, and seaweed for customary food gathering purposes from any South Island fisheries waters”. Likewise, in the event of inconsistencies with other regulations, these regulations prevail. “Customary food gathering” includes the rights to take and to manage fisheries resources (fish, aquatic life and seaweed) for a purpose authorised by the kaitiaki - to the extent consistent with tikanga Maori. The same rules apply concerning the functions and powers of the kaitiaki as in the Kaimoana Regulations and shall not be repeated. This applies also to the control and enforcement of the rules.

3.2.2.3 Mataiatai Reserves and Taiapure Reserves

Both the Kaimoana Regulations and the South Island Regulations include rules on Mataiatai reserves, which are reserves related to marine areas. These are specifically identified traditional fishing grounds established according to special provisions in the Regulations. The fisheries resources can be managed within such reserve by the tangata whenua through the kaitiaki according to Maori traditional

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441 Reg. 3(1)-(2). The Regulations apply to all fisheries resources managed under the two Fisheries Acts other than those fisheries resources taken in fresh water. Kaimoana, referred to in the title, also means seafood.
442 Reg. 4(1). However, emegency matters under s 16 of the Fisheries Act 1996, prevails. See reg. 4(3).
443 Regs. 3(1) & 2(1).
444 Regs. 5(1)-(2), 6 & 9.
445 According to the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 s. 10(b). The plan might also be treated as an iwi planning document within the RMA (reg. 16(2)(a)).
446 Regs. 11,14 & 16-17.
447 See for instance regs. 35-36, 38, 40 and 41-46. Penalties are subject to fines.
448 Reg. 3(1)-(2). No restriction is referred to for freshwater fishing as in the Kaimoana Regulations. See also below in section 5.3 on the Ngai Tahu settlement, which provided for the Regulations as well as larger management role in respect to customary fishing in South Island.
449 Reg. 4(1) & 4(3).
450 Regs. 3(1) & 2(1).
451 Regs. 5, 6, 9, 11, 14 & 16. A rule on appointing honorary fisheries offices is, however, lacking.
452 Regs. 32-33, 35, 37 & 39-44.
453 Mataiatai means seafood fishing area. (Tuaranga ika is traditional fishing grounds related to freshwaters.)
knowledge, customs and laws. Within these reserves, customary fishing rights apply, as well as extended managing rights in relation to the reserves. The bylaws established for managing the reserves’ sustainable apply generally to all individuals fishing within the reserves, not only Maori.\textsuperscript{454} Breach of the bylaws is also subject to sanctions in the form of fees.\textsuperscript{455} Presently, there are two Mataitai reserves established in the South Island and a few applications on the designation of more reserves are pending before the Minister.\textsuperscript{456}

The general rule is that commercial fishing is prohibited within the reserves. However, commercial fishing may be approved through establishment of specific regulations applying to the reserve allowing such fishing.\textsuperscript{457} There is a specific process for creating a reserve, which is initiated by the tangata whenua of the area through an application to the responsible Minister.\textsuperscript{458} The process allows also for joint consultation by Maori and the Minister with the local community. The Minister must establish the reserve if certain criteria are met, such as that the proposed reserve is an identified traditional fishing ground, its size is appropriate to manage effectively, and that the aims of management specified in the application are consistent with a sustainable use of the fishery.\textsuperscript{459}

Under the Regulations, the appointed kaitiaki has powers to manage the Mataitai reserve. He or she can, thus, make bylaws restricting or prohibiting the taking of fisheries resources considered necessary for the sustainable utilisation of the fisheries resources. Still, the Minister must approve the bylaws.\textsuperscript{460} The kaitiaki may in fact close the whole reserve for all fishing. In the event of needs of conservation measures, because of a fall in fisheries resources stock, priority rights can be given to customary fishing and for sustaining the functions of the marae concerned.\textsuperscript{461} Even though the tangata whenua, through the kaitiaki, has extensive rights to manage the taking of fisheries resources within the Mataitai reserve, the Minister has overriding powers allowing him to step in if the reserve is not managed properly from a sustainability perspective.\textsuperscript{462}

Taiapure (local fisheries) are similar to Mataitai reserves in that it is a reserve management system. However, although Taiapure also relates to Maori food gathering rights and managing rights related to important places, the customary rights might not be as obvious as in relation to the Mataitai reserves. Mataitai reserves can only be established through an initiative by the tangata whenua that holds mana over the area, whereas any person may submit a proposal

\textsuperscript{454} Kaimoana Regulations reg. 28(3) & South Island Regulations reg. 25(3). See also generally Harris, Rob (2004) The coastal and marine environment in Harris, Rob (ed.) Handbook of Environmental Law, pp. 257-258.
\textsuperscript{455} Kaimoana Regulations regs. 44 & 46 & South Island Regulations regs. 43-44.
\textsuperscript{456} See Harris, Rob (ed.) Handbook of Environmental Law, p. 258.
\textsuperscript{457} Kaimoana Regulations reg. 27 & South Island Regulations reg. 27. The kaitiaki may request that the Minister make regulations allowing commercial taking of specified species of fisheries resources by quantity or time period within the reserve. The Minister may then recommend that the Governor-General make such regulations under the Fisheries Act 1996 (ss. 186 & 297).
\textsuperscript{458} Kaimoana Regulations regs. 18-22 & South Island Regulations regs. 17-19. Note that the second notification and submissions process is lacking in the South Island Regulations. The process is, thus, somewhat shorter.
\textsuperscript{459} Kaimoana Regulations reg. 23, see also reg. 25 & South Island Regulations reg. 20.
\textsuperscript{460} Kaimoana Regulations regs. 28 & 29 & South Island Regulations regs. 25 & 26.
\textsuperscript{461} See also Fisheries Act 1996 s. 186(2)(e).
\textsuperscript{462} Kaimoana Regulations regs. 34 & South Island Regulations regs. 30. After consultation with the kaitiaki and tangata whenua, the Minister has rather far-reaching authority to take actions to ensure that the reserve and the customary food-gathering are sustainably managed.
for a Taiapure. Nonetheless, the Taiapure are areas that customarily have been of special significance to any iwi or hapu. The provisions aim to protect traditional food gathering or areas for spiritual and cultural reasons, in recognition of rangatiratanga and the right secured in relation to fisheries by the second article of the Treaty of Waitangi. The rights could therefore be classified as both Treaty rights and customary rights.

Taiapure may only be established in estuaries and areas near the shore (littoral coastal waters). Management of the Taiapure is to be handled by an appointed committee, which consists of representatives of the local Maori community. The committee can recommend that the Minister make regulations for the conservation and management of the fisheries resources. In this respect, wide-ranging regulations may be made, but may include allowance for commercial fishing.

The 1986 amendment to the Fisheries Act 1983 included for the first time provisions for the declaration of Taiapure. In 1995, the Minister of Fisheries announced the establishment of New Zealand's first two Taiapure, reserved for hapu and iwi. Four more Taiapure have since been declared, but only one has specific regulations that manage the fisheries resources within the Taiapure. The declaration of a Taiapure is also subject to a specific process, in which the public has important inputs. The Governor-General declares an area to be a Taiapure-local fishery after a public submission process.

For both the Mataitai reserves and Taiapure the processes establishing the reserves are genuine, allowing public inputs from non-Maori as well. Both types of reserves include local managing rights. However, as said above, the customary rights for taking fisheries resources are more accentuated within the Mataitai reserves. There are also mechanisms for enabling sustainable use of the fish resources within the Mataitai reserves as well as conservation measures if needed. Thus, there is a difference, specifically in that the committee managing the Taiapure lacks power to issue by-laws in congruence with tikanga Maori. This is more of a joint management since the committee has to recommend to the Minister regarding the making of regulations. If the committee does not make such recommendations or if the Minister neglects to issue such regulations, then the managing of the local fisheries of the area lacks specific provision designed to meet the needs of the Taiapure and the local Maori community.

This system of management of the reserves is interesting from a Swedish legal perspective. It allows for a kind of self-regulation of certain areas and resources by the indigenous peoples concerned, but still may include an

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463 Fisheries Act 1996 s. 177(1).
465 Customary fisheries regulations (s. 186), generally including commercial fishing (s. 297) and sustainability regulations (s. 298).
466 Fisheries Act 1996 ss. 184-185.
468 Ibid.
470 Fisheries Act 1996 ss. 178(3)-(4) & 180.
471 Fisheries Act 1996 ss. 175 (by an Order in Council) & 176. This involves a review of submissions by the Maori Land Court, which makes a report and recommendation to the Ministry of Fisheries on the basis of the objections and submissions to the proposal. See s. 181.
472 See my discussion below in section 10.3.
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overarching sustainability objective and mechanisms for ensuring that the customary rights are managed within these limits as a kind of safety net. This kind of legal model enhances the connection between the substantive right (the customary right) and the management of the resource, which is linked to a specific site and a specific group of the indigenous peoples. The necessary link between the holder of the right and the land area being customarily used is upheld. At the same time, environmental protection objectives can be linked to a limited area, and the rules can be designed to meet the characteristics of that area and the applicable land use.473

3.2.3 Gathering and Other Miscellaneous Rights

3.2.3.1 Gathering Rights

A variety of enactments have been in place for some time with respect to gathering and fishing rights, particularly in lakes and rivers474. The following analysis of Maori customary rights in such legislation is only a sampling and not a full list of all such rights in relation to Aotearoa/New Zealand lands and waters.

There is a range of different laws relating to Maori customary use of native plans and animal species. The Conservation Act 1987, which serves as an umbrella, is administered by the Department of Conservation (DOC). In the Act’s First Schedule about twenty other acts are listed, which together provide the full range of conservation legislation administered by the DOC. Of particular relevance for Maori customary use is the Wildlife Act 1953, Reserves Act 1977, the Marine Mammals Protection Act 1978 and the National Parks Act 1980. The legislation works in two basic ways: the Wildlife and Marine Mammals Protection Acts establish protection for native plants and animals (native plants are protected only where they grow on conservation lands). The Conservation, National Parks and Reserves Acts set up different provisions governing access to native species on lands of different status (the acts establish different criteria based on the purposes for which access might be sought).475

The principal statute, the Conservation Act, also includes specific provisions for Maori customary use of plants on or from conservation areas. The Director-General may authorise Maori to take plants from a conservation area if the plants are intended to be used for traditional Maori purposes, such a medicine plants476. The Conservation Act provides for preparation of regional conservation management strategies (CMS) and conservation management plans (CMP)477. Each of these regional strategies and plans may make provisions for appropriate Maori access to traditionally important resources in that region. Provisions have been made for Maori customary use of native species in various CMS’s.478

473 See my analysis in the last chapter in section 10.3.
476 Conservation Act 1987 s. 30(2)-(3).
477 Conservation Act 1987 ss. 17D & 17E. CMS are mandatory. Each CMS will be slightly different and will reflect the concerns and priorities of that area. Each is submitted under an extensive public consultation process, including consultation with Maori. CMP are implementing in more detail the CMS.
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Moreover, each regional conservancy office of the DOC has the responsibility to manage Maori customary use of available material in the region. This includes establishing criteria and procedures, considering applications from Maori, and approving or declining those applications. In the absence of national DOC policy, each conservancy has developed its own process for dealing with Maori issues, while some conservancies have established advisory committees with mixed Maori and Pakeha members for administration of applications. A few conservancies even directly refer applications to relevant iwi or hapu for their recommendation and advice. The most common material sought by Maori for customary uses are specific birds and feathers of those birds, timber important for carving, whalebones, medicinal plants, dyes (plants and mud), whales and seals. 479-480

There is an important case regarding whale-watching which, for instance, raised interesting questions on the interpretation of traditional rights and their development that should be mentioned in relation to the Conservation Act and the Act’s reference to the Treaty in section 4.481. The Whale-Watching case482 concerned organised whale-watching by Ngai Tahu, which is a profitable tourist activity. The tribe claimed that they should be consulted before any new permits was issued for whale-watching. Ngai Tahu were pioneers and started the tourist business in 1988. Now other permits were to be granted for whale-watching. The Court argued that however liberal Maori customary title and treaty rights might be construed, tourism and whale-watching were too remote from anything the parties to the Treaty contemplated and the tribe’s claim to veto powers could therefore not be sustained. However, the Court of Appeal held that although commercial whale-watching was not directly compatible with the Treaty text, it nevertheless had a close connection to Treaty matters. Hence, statutory acknowledgement of the Treaty principles in matters of interpretation and administration was not to be narrowly construed here. Therefore, the Treaty principles applied when granting permits under the Marine Mammals Protection Act.483 The First Schedule of the Conservation Act includes a list of other statues, for instance the Marine Mammals Protection Act, which also shall be interpreted and administered to give effect to the Treaty principles.

In relation to national parks, established under the National Parks Act, the protection provides for preservation, conservation and human utility. The taking of indigenous plants and animals is prohibited without valid written consent of the Minister of Conservation. Such approval must be in accordance with the

479 The Marine Mammals Protection Act provides for protection of all marine mammals (whales, dolphins, seals, etc). Taking such specieless dead or alive requires a permit. The Act makes no references to Maori customary uses of such species or parts of them (whalebones, etc.) and nor to the Treaty. However, the Whale-Watching case applies. See below in section 4.4.
480 See Maori Customary Use of Native Birds, Plants and other Traditional Materials (1997), pp. 31-34.
481 Section 4 states that the Act "shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi". Note that this is a stronger reference than in the RMA s. 8, which speaks of taking into account the Treaty principles when achieving the purpose of the RMA:
483 The First Schedule of the Conservation Act includes a list of other statues, for instance the Marine Mammals Protection Act, which also shall be interpreted and administered to give effect to the Treaty principles.
management plan for the particular park, although the Act does not state for what purposes plants and animals might be taken. However, the General Policy for national parks provides specifically for Maori customary use and states that taking for food or cultural purposes will be provided for in management plans, where such plants or animals are not specially protected under other legislation.

The *Wildlife Act* provides for an extensive protection of wildlife, harvested fish species not included. However, the protection is limited by a number of human interests, primarily hunting and farming. The important section for Maori customary use is section 53, which provides that the Director-General can authorise any specified person to catch or kill absolutely or partially protected wildlife or game species that at the time would not otherwise be permitted. Thus, the section acknowledges Maori cultural and traditional uses and is used to authorise the holding of eggs, feathers, bones and other parts of dead wildlife. The Director-General can impose conditions, for example, specifying who may take wildlife, the methods to be used, the period of harvesting, in what area catch or killing can take place, and requirements for reporting the numbers taken. The authorisation can, moreover, be delegated to fish and game councils.

The Minister of Conservation also has the authority to grant rights explicitly to Maori to take or kill birds within scenic reserves, provided that the land was Maori land before the reservation. The taking or killing of the birds must not, however, be in contravention of the *Wildlife Act* or any regulations under it. In contrast to section 53 of the *Wildlife Act* this provision is more restrained, providing only for taking or killing of birds related to scenic reserves. Nonetheless, it may provide for acknowledging customary activities related to gathering birds. There are also specific provisions in regulations that acknowledge customary use of birds.

The Rakiura of the iwi Ngai Tahu in the South Island has statutorily recognised customary rights to take mutton birds (titi) from the Beneficial Titi Islands. The harvest is of significant economic, social and cultural importance to the Rakiura Maori. In a quite detailed regulation, the taking of birds, time-periods for the entering on the islands, and buildings allowed, among other things, are regulated. A Rakiura Maori does not need a permit to enter the islands if he or she has the consent from the majority of the persons in the tribe. All other

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484 National Parks Act 1980 s. 5.
486 Conservation Act 1987 s. 53(5). See also Maori Customary Use of Native Birds, Plants and other Traditional Materials (1997), p. 23. A number of non-Maori and NGO strongly opposed the interpretation of section 53, arguing that the over-riding principle and intent of the Act is complete protection and preservation of wildlife and section 53 was only to be used for provision for scientific research and management purposes. See ibid. p. 24.
487 Reserves Act 1977 s. 46(1)-(2).
488 See Titi (Mutton Bird) Islands Regulations 1978 reg. 2 for a reference of the islands included.
489 Titi is a keystone species since they affect soils and plant generation and are an abundant top predator. They are vulnerable to mammalian predation since they lay only one egg per year. For more information see the on-going bi-cultural research project on the sustainability of the traditional harvest at [http://www.otago.ac.nz/titi/](http://www.otago.ac.nz/titi/) (viewed at 2005-11-28). One goal of the project is to compare Maori traditional ecological knowledge and kaitiakitanga with ecological science for harvest management.
490 Titi (Mutton Bird) Islands Regulations 1978.
491 Defined as a person who is member of the Ngaitahu Tribe or Ngatimamoe Tribe and is a descendant of the original Maori owners of the Stewart Islands. See reg. 2.
persons need a written permit to enter any island and to take mutton birds. The taking of birds is restricted to two the months of April and May, and there are additional detailed restrictions on the birding.

There are specifically appointed supervisors, who are nominated by and from the Rakiura, for particular islands and parts of islands. The supervisors are responsible for a fair and equitable distribution of privileges and rights under the regulation. The supervisors also have authority to convene meetings for the rights holders at times for approving sites for building and generally to supervise the conduct of birding operations in the area. Breach of these regulations is subject to fines. The Ngai Tahu settlement reached in 1997 included a transfer of the title to the iwi as well as agreement that the control and management of the islands be subject to a specific administering body with appointed iwi members.

### 3.2.3.2 Rights to Geothermal Water

Under the Resource Management Act 1991 (RMA), the Maori has an exclusive right to use geothermal water. The right has its basis in a customary use that has retained statutory recognition. Local Maori use of geothermal water for communal benefit is allowed as long it does not have an adverse effect on the environment. The general rule regarding water use is prohibition, unless expressly allowed by a rule in a regional plan or in relation to a resource consent. Apart from local Maori use of geothermal water, there are some other exceptions from this general rule, including, among others, for fire-fighting and in relation to freshwater: an individual's reasonable domestic needs and reasonable needs of an individual's animals for drinking water, provided that the taking or use does not, or is not likely to, have an adverse effect on the environment.

This exclusive right aimed at local use of geothermal waters, enables Maori to continue to follow traditional practises in relation to food preparation, crafts, etc where geothermal energy has long since been used. Consequently, a person is not prohibited by the general rule on prohibition of taking, using, damming, or diverting any water, heat, or energy if

...the water, heat, or energy is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment.

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493 This type of priority scheme shows some resemblance with the Canadian law, where aboriginal rights holders have priority to food gathering where a resource is scarce. Compare with subsection 6.4.5.3.
494 Regs. 3-5. There are also bylaws (the RakiuraTiti Islands Bylaws 2005) that regulate the taking of mutton birds on the RakiuraTiti Islands. See Titi (Muttonbird) Notice 2005, at 5.
495 Reg. 11.
496 Ngai Tahu Claims Settlement Act 1998 ss. 334-337. See also further below in subsection 5.3.2.
497 The issue with geothermal water is that it often contains arsenic, mercury, cobalt and other such contaminants. Discharges of geothermal waters in other surface waters involve risk. See Deans, Neil (2004) Issues relating to water and mechanisms for protecting water-related values in Harris, Rob (ed.) Handbook of Environmental Law, p. 224.
498 RMA s. 14(3)(c).
499 Freshwater and waters near the shores (other rules apply to open coastal waters).
500 RMA s. 14(1) & 14(3)(a).
501 RMA s. 14(3).
502 RMA s 14(3)(c)
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It is evident from the provision that only local use of geothermal water is allowed, and the benefit therefrom must be communal. Furthermore, the use must be consistent with tikanga Maori, the customary values and practices of Maori, which justifies the roots of customary practices and the customary right. The right is also “place specific” in the sense that only the iwi or hapu that have the power over the land where the geothermal water is situated have the right to use it (the tangata whenua of an area).503 The use of geothermal waters is, moreover, restricted if it has adverse effect on the environment. What adverse effect means is not specified and is, thus, left to the courts to decide. The definition of the “environment” is, however, wide-ranging, including ecosystems, all natural and physical resources, and amenity values, as well as social, economic, aesthetic and cultural conditions pertaining thereto.504 This should mean, for example, that even a detriment of purely aesthetic values, if relevant, could be regarded as an adverse effect on the environment.

3.2.4 Rights to Foreshore and Seabed

3.2.4.1 Introduction

To provide a short explanation, the foreshore is the land between high and low tide, and the seabed is the land beyond water and low tide (the wet part of land). New Zealand has a long shoreline, and there are many interests in the marine area, not the least of which, from the Maori perspective,505 includes public recreational purposes and conservation interests.

Furthermore, there is an important legal distinction made relating to the foreshore and seabed. The old English common law regarded ownership of land above high-water mark differently from land below high-water mark.506 For land above high-water mark the presumption was (and is) that the current possessor has lawful title unless the contrary is proved. For the foreshore and seabed, the presumption is that the Crown is the owner unless the contrary is proven.

The issue of who has the rights to foreshore and seabed was abruptly brought to the fore with the decision of the Court of Appeal in the Marlborough Sounds case507 in 2003. To the surprise of the political establishment and the public, the Marlborough Sounds case found that it was theoretically possible that the Crown’s radical title might be burdened by Maori customary title.508 In essence, the Court ruled here that the Maori Land Court had the jurisdiction to investigate Maori customary title and customary rights to the foreshore and the seabed.

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503 RMA s. 2.
504 RMA s. 2.
505 Maori understands the water as possessing its own life force, and the water is perceived as integral to life itself. Areas of waters (shores, rivers, lakes, wetlands, etc.) are still important for food-gathering activities, material, and transportation. See further in Llewell, Donna (2004) Maori and the environment in Harris, Rob (ed.) Handbook of Environmental Law, pp. 480–481.
508 Prior to the case the government understood that the Crown generally owned foreshore and seabed in New Zealand, due to existing legislation and case law. Nonetheless, the possibility for existence of Maori rights to foreshore and seabed has earlier been discussed academically.
seabed. Thus, previous legislative attempts to provide for Crown ownership of the foreshore and seabed did not necessarily extinguish Maori customary rights or customary title, meaning that the Crown’s title might be burdened by Maori customary title. Ultimately, the issue on foreshore and seabed became a much debated and infected subject. Political and legislative attempts to solve the issue have not lead to less controversy. Another aspect of Maori claims on foreshore and seabed is that the claims partly derive from an understanding that the Treaty principle on active protection of Maori interests (taonga) has not been followed in the operation of the Resource Management Act 1991 by consent authorities.

In this context, it is interesting to know how the foreshore and seabed have been used by Maori. For the most part, the customary activities and interests over foreshore and seabed seem to have been rights to gather under specified circumstances, often seasonal and limited in nature. Generally, the customary rights to gather were created through decent or conquest, and this activity usually consisted of exclusively preventing others from harvesting. There were sometimes also sustainability reasons for excluding others from the resources, according to the use of rahui and rights based on family and tribe.

3.2.4.2 The Marlborough Sounds Case and the new Foreshore and Seabed Act

The background to the Marlborough Sounds case was that eight iwi of the northern South Island were concerned about the local government’s marine farming policies (1997). The eight iwi applied to the Maori Land Court for declaratory orders that certain land below the high water mark in the Marlborough Sounds is Maori customary land. The case passed slowly through the court hierarchy (Maori Land Court, Maori Appellate Court, High Court and to the Court of Appeal). The decision by the Court of Appeal has now been appealed to the Privy Council, but the judgement has not been released yet (November 2005).

The Court of Appeal in the Marlborough Sounds case includes four separate judgements, but their reasoning and results are very much the same. In sum, the
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Court ruled on three main issues. Firstly, it overruled its previous decision in the Ninety-Mile Beach. It was generally regarded as a wrong decision (guidance was sought from more recent case law from other countries, including Canadian cases). Secondly, the Court held that the Maori Land Court had jurisdiction to consider investigations of title to the foreshore and seabed. It was thus indicated that this area does not belong to the Crown absolutely. Thirdly, the Court found that the Maori customary title (or customary rights) had not been extinguished by any general enactment. The Court declined to consider whether extinguishments have been made in respect to “area specific” legislation or according to earlier Crown purchases from Maori.

Consequently, in the view of the Court, the current legislation controlling the coastal marine area did not seek to disturb customary property rights. Nevertheless, the Court did not state that such rights/title in fact exist; it was instead open for the Maori Land Court to make such findings. As a consequence of the Marlborough Sounds decision, many Maori groups have applied at the Maori Land Court seeking investigations of title into defined areas of the foreshore and seabed.

In the aftermath of the Marlborough Sounds case, Parliament enacted a new statute related to the foreshore and seabed, the Foreshore and Seabed Act 2004 which entered into force in November, 2004. By this, the Government rapidly wanted to solve the legal uncertainty the Marlborough Sounds case had created. Through the new act, Crown ownership applies to the entire foreshore and seabed, except for those small areas covered by private freehold titles (s. 4(a)). The Act also secures public access (including recreational activities, such as swimming), as well as navigation rights in relation to the foreshore and seabed (ss. 4(d) & 7-9). In fact, the Crown has with the new statute “legislated away” any existing Maori property rights and, in exchange, has offered other legal processes to acknowledge Maori interests in these areas.

The drafting process and the new Act have been severely criticised by Maori. Actually some Maori groups applied for urgency inquiry before the Waitangi Tribunal as well as evoked the “early-warning measures and urgent procedures” before the UN Committee on the Elimination of Racial Discrimination. Despite the time limitations, the Waitangi Tribunal quickly responded and made a report on their findings, concluding that the Crown’s legislative proposals breached the

519 In Re the Ninety-Mile Beach [1963] NZLR 461. See also the High Court case Green v. Ministry of Agriculture and Fisheries [1990] 1 NZLR 411, where the former case was applied (Maori charged for taking shellfish, claimed customary rights and rights to foreshore and seabed).
521 There were also amendments to the RMA through the Resource Management (Foreshore and Seabed) Amendment Act 2004. See further under next subsection.
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Treaty principles in many ways. The Tribunal was also concerned that the path for Maori to obtain property rights to the foreshore and seabed was cut off through the proposal. Furthermore, there were no undertakings proposed that would pay compensation for the loss of rights through the new statute. The findings of the Waitangi Tribunal were dismissed by the Government as being inaccurate, and the plan was to issue the new statute anyway.

On the international level, the proceedings before the Committee on the Elimination of Racial Discrimination lead to a review of the compatibility of the new Act with the provision of the Convention. As a result, from the Maori critique, several provisions in the initial Bill were changed, but nevertheless the Committee recognized that the present Act contains discriminatory aspects against the Maori, particularly in its extinguishment of the possibility of establishing Maori customary titles and its failure to provide a guaranteed right of redress. The apparent haste in which the new legislation was introduced and enacted was also an issue. The Committee recommended that the New Zealand state resume dialogue with the Maori community, closely monitor the implementation of the new Act, and take steps to minimize its negative effects.

Consequently, it is not an understatement to conclude that the Marlborough Sounds case and events following it have been controversial in New Zealand and have raised racial issues (Maori v. Pakhea) once again on the public and political agenda. Maori are still deeply unhappy. Their discontent led to the formation of the Maori Party, which won a couple of seats in Parliament in 2005. The Maori Party seeks to reassert unrestrained rights of Maori to bring matters related to foreshore and seabed to the Maori Land Court. In the legislative process, New Zealand has also been subject to UN criticism.

However, as indicated above, the enactment of the Foreshore and Seabed Act 2004 has extinguished customary rights and replaced them with statutory entitlements. Subject to the provisions of the Act, the Maori Land Court has jurisdiction to investigate claims in relation to the foreshore and seabed, but it can only determine applications for a “customary rights order” that relates to a specified area of the public foreshore and seabed. Thus, the opportunity to receive a freehold title to the foreshore and seabed is no longer possible. Instead, Maori can receive a customary rights order resulting from an investigation by the Maori Land Court, which, once recognised, is statutorily protected by various means. The customary rights order confers a right to carry out a recognised customary activity and enables protection of such activities. The activity may include commercial elements if recognised in the order.

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526 UN Convention on the Elimination of All forms of Racial Discrimination.
528 Ibid.
529 Foreshore and Seabed Act 2004, s. 46(1).
530 Freehold titles or other forms of titles under the Maori Land Act 1993 s. 129 is no longer available in relation to foreshore and seabed.
531 See the Act s. 52.
enactment of the *Foreshore and Seabed Act* amended the RMA by incorporating a few sections and amending others\(^{532}\).

\(^{532}\) For instance RMA ss. 17A-17B.
4 The Resource Management Act and some Environmental Requirements on Maori Customary Uses

The New Zealand Environmental Law comprises several statutes, such as the Resource Management Act 1991 (RMA) and conservation legislation administered under the umbrella statute, the Conservation Act 1987. Most of these require that the principles of the Treaty of Waitangi be taken into consideration in environmental decisions. This is a difficult task, since the “consideration” is based on often complex and poorly understood Maori cultural and spiritual values. These values may also shift or be differently expressed by different iwi (tribes). It is an intricate reality in the application of the law to bring together values from different cultures, which values are sometimes incompatible, in managing the country’s natural resources for the benefit of environmental quality and the needs of future generations.533

The environmental and natural resource law is the clearest example of the connection with Maori rights to land and natural resources, whether of substantial or procedural character, which is especially true in relation to the provisions under the RMA. The provisions give Maori a potentially significant stake as managers of resources, although there is Maori discontent over lack of influence and power. Another important aspect is that enduring grievances over ownership of natural resources are now increasingly being addressed through the process of negotiated settlement of Treaty claims with individual tribes. The implementation of these settlements will have major implications for the future environmental planning and management regime in New Zealand.534 The interconnections of Maori rights, procedural and substantive, within the environmental law do not correspond at all to the contemporary Swedish environmental law, which makes it interesting535.

A basic understanding of the ownership and rights of use over land and natural resources is an important piece of the puzzle to comprehend the environmental law.536 Therefore a short introduction on elementary matters is provided as a beginning to this chapter. After this, there follows an analysis of the most relevant features of the comprehensive RMA as well as an analysis of environmental regulations and restrictions of Maori customary uses. Lastly, the consultation duties and rights under the Act will be discussed.

534 Ibid.
535 See also my discussions in section 10.3, 10.4 & 10.7.
536 A similar overview is provided also with respect to Swedish law. See section 9.1 below.
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4.1 Ownership and other Rights to Land and Natural Resources

4.1.1 The Crown Radical Title and Categories of Land

As in several other legal areas, the Treaty of Waitangi has important effects on the law pertaining to land and property. The Treaty acknowledged a right for the British Crown to claim the sovereignty of Aotearoa/New Zealand. The proclaiming of sovereignty had generally the effect of giving the Crown a radical title (an underlying interest) to the whole country, but the Crown title might still be subject to Maori customary title, particularly where Maori have upheld possession and occupancy of the land. The Crown’s right of pre-emption of Maori lands arises also from the Treaty. Claims to ownership of, for example, the foreshore and seabed are one consequence of the Crown sovereignty and radical title. In relation to the foreshore and seabed the Crown ownership has now been strengthened by the 2004 Act on foreshore and seabed.

In other words, through the colonisation process in acquisition of the territory (settlement, cessation or annexation), the United Kingdom acquired a radical underlying title which goes with sovereignty (the title vests in the Crown). The radical title is, however, subject to existing indigenous rights (customary title or customary rights). When the common law of England came to New Zealand, it was modified so as to recognise and integrate Maori customary property interests. New Zealand lands were never thought to be terra nullius. Thus, the recognised customary title was not a matter of grace and favour, but of common law.

In this way, Maori proprietary interests might burden the Crown radical title if not properly extinguished. Importantly, under the doctrine of tenure, a concept from feudal times, all land is held by the Crown as the ultimate overlord. This is not to say, however, that the Crown is the real owner of the land. So, even though the doctrine states that all land in New Zealand is held by the Crown (the Crown radical title), it has virtually no legal significance for the rights of land owners, private or Maori.

The Crown radical title is, therefore, very different from other titles. Generally speaking, land title is the document that the Crown issues to certify ownership and boundaries. Thus, the title basically states that a certain piece of land is owned by a certain individual, group of individuals, or corporate entity. The title tells, moreover, the rights included, whether they be primarily freehold, leasehold or mineral. The title may

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538 See further below. There are now several specific claims at the Maori Land Court on the issue of rights to the foreshore and seabed.

539 If extinguished, an assumption follows that proper compensation will be paid. There are certain rules regarding the extinguishment of customary rights, such as that the extinguishment must be fair. Otherwise, it is likely to be a breach of the fiduciary duty, widely and increasingly recognised as falling on the colonising power. See *Te Runganamu o Te Ika Whenua Inc Society v. Attorney-General* [1994] 2 NZLR 20, pp. 23-24. See Alexander, David (2004) *Land and property law and the environment* in Harris, Rob (ed.) *Handbook of Environmental Law*, pp. 411-412. See also above subsection 3.1.2.2.

include all rights related to land. It can be of leasehold right or merely include rights to minerals. In this way, there can be more than one title for the same area. Moreover, the title includes information on whether there are any restrictions on the uses of the land.\footnote{As examples, titles to reserves may specify that they are to be held in trust for particular purposes, whereas other titles may specify that the land is subject to protecting the status of existing power lines or fencing requirements. Another important restriction is that Crown land can be subject to s. 27B of the \textit{State Owned Enterprises Act 1986} when sold by the Crown, which will be noted on the title. According to this provision, it is possible, under certain defined circumstances, that the Crown can re-acquire the land by compulsion, paying current market value, and transfer it to Maori owners as a part of a settlement process regarding Treaty claims. See further in Alexander, David (2004) \textit{Land and property law and the environment} in Harris, Rob (ed.) \textit{Handbook of Environmental Law}, pp. 411-412.} Note, however, that the register of titles under the \textit{Land Transfer Act 1952} discloses only some restrictions on the use of land and not those under the \textit{Resource Management Act 1991}. The most frequently used title in New Zealand is a freehold title (or fee simple)\footnote{In early English law it was a title which was free of any obligations of service on the holder of title towards the Crown.}

The land in Aotearoa/New Zealand is commonly divided into three categories: \textit{i}) general land; \textit{ii}) Crown land; and \textit{iii}) Maori land.\footnote{Alexander, David (2004) \textit{Land and property law and the environment} in Harris, Rob (ed.) \textit{Handbook of Environmental Law}, p. 409. See also the \textit{Maori Land Act 1993}, s. 129.} Titles to land are commonly issued under the \textit{Land Transfer Act 1952}, especially concerning general land. Although not compulsory, titles are also issued for some Crown land\footnote{There has never been a complete register on Crown owned lands. However, it possible for Crown owned lands to be included in the land title system, where Her Majesty the Queen is identified as registered owner. Nonetheless, in most cases the Crown lands are held outside this system. Instead, all Crown lands are held under certain statutes and it is the legislation that defines what can be done on those lands, such as the \textit{Land Act 1948}, \textit{Reserves Act 1977}, \textit{National Parks Act 1980} and \textit{Conservation Act 1987}. Each statute is administered by a particular Government department.} and nearly all Maori land.\footnote{Thus, titles are commonly issued under the \textit{Land Transfer Act 1952} even though its records often are incomplete, particularly on Maori land. Since 2000 the land title process is computerised (including a computer register). The title boundaries (pegs and marks) are a prerequisite for the issue of a title. These boundaries can be both horizontal land vertical (for instance individual flats in an apartment block). The title system in New Zealand is modelled on a system developed in South Australia by an administrator (Robert Torrens) and the system is sometimes referred to as the Torrens system. The New Zealand system has a high status among other countries, because of this completeness and certainty with which ownership/interests/protections of land can be determined. See Alexander, David (2004) \textit{Land and property law and the environment} in Harris, Rob (ed.) \textit{Handbook of Environmental Law}, p. 410.} \textit{General land} is basically all privately owned land, and \textit{Crown land} is land acquired from Maori owners or from other owners who had acquired the land from previous Maori owners. Such acquisition could also have been subject to compulsory purchase under the \textit{Public Works Act 1981}.\footnote{Ibid., p. 415 (and following pages for more information).}

The \textit{Maori land} can be divided into three types of land: Maori freehold land, Maori customary land, and general land owned by Maori\footnote{See further in Boast, Erueti, McPhail & Smith (2004) \textit{Maori Land Law} (2\textsuperscript{nd} ed.). Wellington: Lexis Nexis NZ Limited, ISBN 0-408-71691-6.}. The first type is land that has a title issued by the Maori Land Court and which remains under the jurisdiction of that Court. Approximately 4.5 percent of the land area of the country is \textit{Maori freehold land}, only a small proportion compared with the land so
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held in 1840. This explains why Maori today are concerned about the process by which so much land has passed out of their ownership. For clarification, the Maori Land Court acts as the central registry for Maori freehold land (as the Land Registry Office is the registry for general land). The Court acts in relation to Maori lands under the Maori Lands Act 1993.548

Titles issued by the Maori Land Court include ownership and boundaries, but the ownership question is often complicated. Most Maori land is owned by many people, holding shares in the land. Much of the work of the Court is, thus, concerned with keeping track of who are the owners and how an owner’s shares pass by succession from one generation to the next. Multiple ownerships create difficulties also in relation to how decisions can be made about its use and who owns improvements made, among other things. The Crown has over the years developed numerous management mechanisms, where the two most common are incorporations and vesting in trustees. Incorporation turns the ownership into a corporate structure of shareholders with a committee responsible for the daily management and vesting can take place under a professional trustee company or a group of named individuals. In this latter form, the Court defines the terms of the trust, for instance, the Court may determine that the land cannot be sold, but may be leased.549

Maori Customary land is land that has never been before the Maori Land Court for title investigation. It is a residual category of ownership, defined by customs and usages (tikanga Maori) and, as such, not dependent upon title derived from the Crown550. There is hardly any land of this type left, apart from a few islands and rock stacks. General land owned by Maori can have two origins. It could be land acquired by Maori on the open market or it could be land formerly under the jurisdiction of the Maori Land Court, but declared by the Court to be general land.551 Moreover, Maori land that has some specific communal value can be declared to be a Maori Reservation. Such reservation can be of private communal purposes, such as village sites, marae, fishing grounds, timber reserves or burial areas, or of public communal purposes for the benefit of all New Zealanders.552

4.1.1.1 Environmental Covenants, Licences and Profits a Pendre

In relation to titles and lands, there are some mechanisms to provide for environmental protection as well as rights to specific uses, such as Maori

549 Ibid., p. 419.
551 During the period 1968-1972, a large number of Maori land parcels were declared to be general land due to administrative convenience. The effect of such declaration is that the responsibility for recording changes solely will be on the land registry, not the Maori Land Court. See Alexander, David (2004) Land and property law and the environment in Harris, Rob (ed.) Handbook of Environmental Law, p. 418.
552 See Maori Lands Act 1993 ss. 338 & 340. These reserves are administered by Court-appointed trustees and it is up to the trustees to decide what public access will be allowed (if any). As an example, reservations to protect scenic features may not allow public access at all. This is due to the fact that it is still a type of private reserve. See also Alexander, David (2004) Land and property law and the environment in Harris, Rob (ed.) Handbook of Environmental Law, p. 420.
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Gathering rights. The above mentioned forms of arrangement, covenants, licences and profit a pendre, are examples relevant for understanding how such arrangements can be made “outside” of the requirements of the environmental and natural resource legislation. Covenants and profits a pendre may be attached to the title, whereas licenses are not.

A covenant is an obligation that attaches to the land and has to be observed by all owners even after changes of ownership. The covenant may require a duty, a certain performance, or a limitation of a certain kind on the property owner. Environmental covenants can be created under general law, with notation on the register under the Land Transfer Act 1952, or through different statutes, such as under the Reserves Act 1977 (s. 77, conservation covenant) and under the Conservation Act 1987 (s. 27, for conservation purposes). Covenants are a voluntary agreement between the (private) landowner and primarily the Crown or local authority on management practices that are to be applied to certain portions of the property. Covenants can also pertain to protection from development or apply to specified land uses, such as allowing public access. Prior to any expiry date, only the High Court can remove a covenant.

Licences, on the other hand, are not placed on the title and do not bind the land or subsequent owners. Licences are attached to the land user. Licences are common means for permitting certain uses, for instance within a conservation estate, and are usually granted by the Crown. Such a licence may confer gathering rights for Maori. Private landowners may also arrange agreements permitting certain uses that otherwise would lead to trespass or nuisance, which agreements become effectively licences.

Profits a pendre are rights to take something from land, generally associated with harvesting, such as soil, trees, minerals, vegetation and wild animals. The agreement defines the limits of what can be taken. A profit a pendre can be registered against the title of private land and become a concession on Crown land. As an example of a profit a pendre, a state-owned enterprise has the right to harvest exotic timber from land held by Ngai Tahu, which right was transferred as part of their Treaty settlement with the Crown.

4.1.2 Issues on Rights to Natural Resources

Under this subsection, I briefly exemplify legal issues related to ownership of certain natural resources and rights to use certain lands and natural resources within New Zealand law. Generally, the law related to land and the water’s edge is complex in New Zealand, where some aspects have not been codified in statutes and therefore derive from common law, whereas others have been subject to frequent legislative changes (for instance the Queen’s Chain, see below). Below, I discuss the issues on rights to natural resources under headings related to

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553 There are of course other measures that might be attached to a title, such as caveats and easements. See here Alexander, David (2004) Land and property law and the environment in Harris, Rob (ed.) Handbook of Environmental Law, pp. 412-414.
555 Ibid., pp. 414-415.
556 Ibid., p. 415.
557 Ibid., p. 420.
Crown ownership and rights related to fishing and hunting where public access rights are interrelated.

i) Crown ownership

Crown asserts or claims ownership in relation to several specific areas or resources in Aoteoaroa/New Zealand. Hereunder I discuss Crown rights and assumed rights to certain resources as well as specific legal distinctions. As seen above, the property law differs in several aspects from so called civil law legal systems. The distinction on beds and foreshore are, for example, unfamiliar to Swedish law.558

One legal distinction is concerned with land below waters: the beds of the sea, estuaries, rivers and lakes. The Crown claims ownership by virtue of the Royal prerogative; it regards the seabed, beds of estuaries and tidal rivers.559 However, this historical claim has now largely been superseded by the explicit terms of the new Foreshore and Seabed Act 2004. That statute deems the seabed, the land beyond water and low tide up till twelve nautical miles from the shore (the limits of the territorial sea), to be the property of the Crown.560 The beds of estuaries and tidal rivers are also claimed to be in Crown ownership, and the beds of navigable rivers are likewise held to be the property of the Crown, which claims derive from common law. In 1903, Parliament passed, however, legislation that unilaterally declared that the beds of navigable rivers were vested in the Crown.561

The beds of non-navigable rivers are at common law presumed to be owned to the mid point by the adjacent owner.562 However, the contemporary distinction between navigable and non-navigable rivers has become blurred with the use of, for instance, jet-boats and hovercrafts.563 The beds of lakes are presumed to be owned by the adjacent landowner, which primarily applies to the Crown or private landowners. If there is more than one landowner, the ownership of the lakebed is then segmented. This presumption applies, however, only where there are no statutory provisions stating another basis for ownership (for instance Crown or Maori ownership).564 The law here is unclear, however, and there is no guiding case law on the matter.

The legal distinctions of the seabed are connected to the foreshore, which is the land between high and low tide. Also here the Crown claims ownership by

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558 See also subsection 3.2.4 above.
559 Note that a few river and lake beds have been transferred to Maori ownership due to Treaty settlements. See Booth, Kay & Bellingham, Mark (2004) Public access and protection on private land in Harris, Rob (ed.) Handbook of Environmental Law, p. 431.
561 See Alexander, David (2004) Land and property law and the environment in Harris, Rob (ed.) Handbook of Environmental Law, p. 423. This situation is covered today by RMA, s. 354 (Crown’s existing rights continue). See further below.
562 The principle of ad medium filum aequae. Ibid., p. 16.
563 It has not yet been satisfactory determined by courts. See Alexander, David (2004) Land and property law and the environment in Harris, Rob (ed.) Handbook of Environmental Law, p. 423.
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virtue of Royal prerogative. Early statutes acknowledged such Crown ownership and today it is explicitly declared in a new statute that the foreshore vests in the Crown. In certain areas, the Crown title might be burdened with Maori customary title or customary rights, as such rights have not been extinguished by any general enactments. These legal issues are now being tried at the Maori Land Court.

The legal distinction and importance of beds and foreshore is, moreover, evident in the RMA. Certain uses of river and lake beds are restricted and might require a resource consent (s. 13) and, in relation to the coastal marine area, the use of foreshore and seabed is equally restricted (s. 12).

The Crown claims ownership through statutory enactments of many natural resources in New Zealand. Parliament has nationalised several valuable resources: petroleum, gold, silver, uranium, geothermal energy and development rights relating to geothermal waters. Today, the nationalisations are effected or continued by sections in the *Crown Minerals Act 1991* and the *Resource Management Act 1991* (RMA). In relation to the geothermal resources, the Crown declared certain development rights in the 1950s, dictating that the sole right to “tap, take, use and apply” geothermal energy vested in the Crown and introduced licence requirements. In the RMA, there are exceptions from this rule for Maori customary use.

Two important legal issues arise here. One issue regards compensation and the other concerns whether these enactments demonstrate a sufficiently “clear and plain” intention to have extinguished customary title or rights. From New Zealand case law, it is rather clear that there is an assumption that, for any extinguishment of customary title, proper compensation should be paid. Concerning the extinguishment of customary title or rights, New Zealand and other case law insists that, for extinguishments to be valid the “clear and plain” test must be met. In the *Marlborough Sounds* case, the Court of Appeal held that the enactments relating to the foreshore and seabed were not sufficient to extinguish customary title. The Court of Appeal case referred to above, acknowledged the same

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566 See the *Marlborough Sounds* case referred to above in subsection 3.2.4.

567 Since the seventeenth century the common law has recognised gold and silver to be owned by the Crown (the prerogative minerals).

568 *Crown Minerals Act* s. 10 & RMA s. 354.

569 See above in subsection 3.2.3.2 and further below in subsection 4.3. For more information see Boast, Richard (2004) *Maori Land and other Statutes* in Boast, Erueti, McPhail & Smith *Maori Land Law*, pp. 268-269.

570 Te Runganganui o Te Ika Whenua Inc Society v. Attorney-General [1994] 2 NZLR 20 (Court of Appeal). This case regarded customary rights to generate electricity. However, there seems to be no other substantial case law on the matter, and in fact there have been many situations where, for instance, customary title has been extinguished without compensation. See further in Boast, Richard (2004) *Maori Land and other Statutes* in Boast, Erueti, McPhail & Smith *Maori Land Law*, pp. 267-268.


problem, but in relation to river beds of navigable rivers, and considered whether the present statutory provisions were enough to extinguish customary title or rights. Although there is a matter of doubt regarding the Crown ownership to these natural resources, as well as whether compensation should be paid for the nationalisation, there seems realistically to be small chances to challenge Crown ownership where vestings happened a long time ago.

Regarding rights to minerals, at common law the possessor of an estate (in fee simple) is presumed to own the land down to the centre of the earth, which includes all minerals, except for gold and silver and anything excluded from the initial Crown grant of title.\(^{574}\) Since 1913, the Crown has, however, retained the rights to minerals. And from this comes the concept of Crown owned minerals, presently set out in the **Crown Minerals Act 1991**. Maori freehold titles do, however, include mineral rights (except petroleum, gold, silver, uranium) and other freehold titles issued before 1913 can also include rights to minerals.\(^{575}\) Thus, generally the Crown is the owner of minerals beneath or at the surface, including all inorganic substances, as well as all petroleum, gold, silver and uranium. One exception is greenstone (pounamu) to which the provisions in the **Ngai Tahu (Pounamu Vesting) Act 1997**, which apply due to a Treaty settlement between Ngai Tahu and the Crown.\(^{576}\)

\section*{ii) Fishing and hunting rights, including public access rights}

Since New Zealand is surrounded by much water, legal issues on fishing are essential, as evidenced by the introduced quota management system and the Treaty settlements process are proof of.\(^{577}\) Besides fishing, hunting has also been rather important, particularly since European settlement.\(^{578}\) To the early European settlers, hunting and fishing were important, at the very least as a reaction against restrictions on hunting and fishing in Great Britain deriving from class and wealth. These early settlers began the introduction of fish and game species that today are of important recreational and economic value. Because of the importance of fishing and hunting, there was an early effort to maintain easy and inexpensive public access to the fish and game resources.\(^{579}\) In this context, the law has retained public access in certain ways. The Queen’s Chain is the popular

\begin{itemize}
\item \textit{Te Runanganui o Te Ika Whenua Inc Society v. Attorney-General} [1994] \textit{2 NZLR} 20, p. 26. The Court questioned whether the legislation was sufficiently explicit to override the river as taonga, mentioned in the second article in the Treaty.
\item \textit{Alexander, David (2004) Land and property law and the environment in Harris, Rob (ed.) Handbook of Environmental Law}, p. 411 & Boast, Richard (2004) \textit{Maori Land and other Statutes in} Boast, Erueti, McPhail & Smith \textit{Maori Land Law}, pp. 270 & 272. There are no permit requirements for privately-owned minerals under the \textit{Crown Minerals Act}, but there is still a need to comply with the provisions in the RMA, such as apply for a resource consent.
\item \textit{Crown Minerals Act}, but there is still a need to comply with the provisions in the RMA, such as apply for a resource consent.
\item \textit{See further below in the next chapter.}
\item \textit{Perkins, Harvey C. & Watson, Niall R. N. (2000) Fish and Game Councils and Environmental Management in Environmental Planning and Management in New Zealand, pp. 206-207.}
\end{itemize}
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term for strips of public land laid off alongside rivers, on lake shores, and on the sea coast where public access has been secured.

The (usually) twenty metres wide strip on the edge of the coast and rivers is popularly called the Queen’s Chain. One of the British Government’s instructions and expectations when claiming New Zealand for Britain was that the coastline would be protected for public purposes and available to all. This instruction has over the years both been honoured and neglected, resulting in a mix of public strips and private lands extending to the water’s edge along the New Zealand coastline and riverbanks. The public strips can be of various kinds, such as reserves, some ‘roads’ and other classes of lands in Crown or local authority ownership.580

The fish and game management in New Zealand was early transferred from central government to user control by Parliamentary statutes, and the management remains self-funded with respect to angling and hunting licence fees. The management of sports fish and game is centrally and locally controlled by elected councils (the New Zealand Fish and Game Council and several regional Fish and Game Councils) of users within a statutory framework581. These fish and game councils provide a long-term example of co-management of resources. Recent structural reforms have not significantly changed this original institutional arrangement.582

The fish and game resources are commonly owned by public agencies.583 Regarding freshwater fishing rights, sports fishing are prohibited without a valid licence. Nevertheless, land owners and lawful occupiers584 have rights to fish without licence, subject to the normal terms and conditions.585 Recreational fishing is essential and seen as a fundamental right by many New Zealanders. In the coastal and marine area, there is a common law right to fish and gather for recreational purposes.586 Regarding Maori customary and Treaty rights to marine fishing, this has been recognised and protected by delivery of quota rights for commercial activities. See further below under section 5.2.

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580 The Queen’s Chain may for instance be marginal strips under the Conservation Act 1987 or managed under the provisions of RMA (esplanade reserves, esplanade strips and access strips, see RMA ss. 229-237C). See Alexander, David (2004) Land and property law and the environment in Harris, Rob (ed.) Handbook of Environmental Law, pp. 420-422.

581 See Conservation Act 1987 Part 5A. The central council, among other things, develops national policies for sports and fish game and develops effective implementation means for general policies issued under the Wildlife Act 1953 and the Conservation Act. The regional councils are responsible for the management of the resources and issues, for instance, licences.

582 See Perkins & Watson (2000) Fish and Game Councils and Environmental Management in Environmental Planning and Management in New Zealand, p. 207. The provisions in RMA is important to these councils and, for instance the councils monitor resource consent application processes, make submissions and attend hearings and lodge appeals where fish and game interests are affected. See further in ibid., pp. 208-210.


584 Those are persons who have a right to occupy land pursuant to a written agreement for duration of six months or longer.

585 Conservation Act 1987 ss. 26ZI & 26ZO.

Concerning hunting, landowners and certain occupiers, including close family members, have hunting rights on their land and may hunt for game species in the open season subject to the legal terms and restrictions. Otherwise, there is a need to obtain a licence from the regional fish and game councils for the hunting and killing of game, mainly water birds. All wildlife is protected through the Wildlife Act 1953, and the wildlife determined to be game is specified in Schedules 1-3 of the Act, which are mainly water birds.

As implied above, access rights are also essential for a more convenient exercise of the fishing and hunting rights. Rights of public access on public and private lands in New Zealand are also complex, with rights originating from both common law and several statutes. The Queen’s Chain, for instance, allows public access alongside rivers, on lake shores and on the sea coast. And in relation to the foreshore and seabed area the common law has always recognised certain public rights, such as navigation and innocent passage. The right to navigate (for example with kayak) is also related to lakes as well as tidal and navigable rivers. With the new Foreshore and Seabed Act 2004 public access rights have been secured, as well as navigation and fishing rights.

4.2 The Resource Management Act

4.2.1 Introduction

The Resource Management Act 1991 (RMA) is the central environmental statute in Aotearoa/New Zealand, simply because of its implications on almost all activities that have a negative effect on the environment. As said previously, it is also a statute that provides for some integration of Maori rights in a way that is alien to Swedish law. The Swedish counterpart to the RMA, the Environmental Code, or other environmental law legislation does not recognise Saami as distinct from other groups in society. The RMA aims at an integrated management approach and consists of a comprehensive, interrelated system of rules and procedures, all guided by the touchstone of sustainable management of resources.

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587 Wildlife Act 1953 ss. 19(3)-(4) & 15. Certain mammals, such as deer, opossum and pigs, are regarded as pests (noxious) because they cause much harm to the native species, and those noxious species may be hunted without restrictions (except as for land access and firearm safety). See the Act Schedule 6 and s. 7A.


589 See further in Booth, Kay & Bellingham, Mark (2004) Public access and protection on private land in Harris, Rob (ed.) Handbook of Environmental Law, pp. 428-437. In fact, access on private land is often an issue for fishers and hunters and the fish and game councils make efforts to improve the access to rivers, for instance, and to provide information about where there is possible access to such land.


592 See ss. 7-9 of the Act.

593 Compare here subsection 8.2.1 and section 9.2, 9.3 & 9.4. See also my discussion in section 10.2 & 10.7.
in the use of land, water (including the coastal area) and air.594 The scope of the Act is wide, since the RMA encloses an integrated approach towards environmental protection and for this reason it is regarded as one of the world-leading environmental legislations595. Habitat protection and other important matters are, thus, included, since the overriding purpose refers to the life supporting capacity of ecosystems. Protection of significant indigenous habitat is also of national importance596.

The RMA has been described as “a visionary piece of legislation” and a “behaviour forcing legislation” due to the overarching goal of sustainable management and because the Act requires a shift in peoples’ understanding of wide sustainability issues before it will be able to be effective.597 The RMA includes a range of instruments aimed at an integrated approach to environmental protection and resource development: classic command-and-control regulations with detailed legislation as well as national policy statements and environmental standards, economic instruments, information, education, transfer of functions and voluntary agreements.598 As a result, the Act is also a framework statute and a “command and control” legislation. Part II of the Act comprises a rather new form of statutory organisation with a fundamental purpose and a few provisions, which, among other matters, include references to Maori cultural values and the principles of the Treaty of Waitangi. These provisions function as substantive guidance to decision-makers at regional and local levels.

The introduction of the RMA has had three principal effects. Firstly, the management of most natural and physical resources was brought under a single statute. However, the controversial field of mining is still considered separately under the Crown Minerals Act 1991, and the fishery is also regulated under separate statutes. Secondly, a common purpose was created for the management of these resources, namely to promote sustainable management of natural and physical resources. Thirdly, a standard process was introduced to deal with most applicants for resource consent.599 Additionally, to some extent an increased attention has also been given to economic analysis of environmental problems and how to make market forces and economic instruments solve environmental problems.600

Thus, the Act is concerned, as its name suggests, with the management of natural and physical resources and the aim is to promote sustainable management of such resources. The RMA is, thus, the principal statute for the management of

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596 RMA s. 6(c).
land, subdivision, water, soil resources, the coast, air and pollution control, including noise control. It sets out the rights and responsibilities of individuals, territorial and regional councils and central Government.

Moreover, the RMA recognises that the Government has an important role in environmental planning and defines a hierarchical three-tier planning framework, which is based on the notion that decisions should be made as close as possible to the level of the community of interests where the effects and benefits accrue. The principal function of the central Government is to have an overview and a monitoring function. The responsibility for identifying land, air and water resources management issues, to develop policies, and to implement and monitor these, has been delegated to regional and district councils.601

4.2.2 Reforming the Environmental and Natural Resource Law

The 1980s was a decade of reform in New Zealand, where social, economic and legislative reforms took place. The restructuring of the State sector was underpinned by a liberal ideology. Many changes to environmental law, including the creation of the Resource Management Act 1991 (RMA), have been complementary to these reforms.602 In 1988, the government began a review of a number of statutes dealing with planning, protection and conservation of environmental quality and resources. A report was made by the Ministry for the Environment on the implications of the so called Brundtland Report603. Extensive consultation activities followed with public bodies, interest groups and individuals throughout the country, and a number of working papers were issued. In late 1988, the Government made a proposal for a resource management reform, proposing a single integrated resource management statute, which included the notion of sustainable development.604

The concept of sustainable management was chosen before sustainable development, as the Review Group to the Bill argued that the latter concept embraces a much wider scope of matters605 as defined in the Brundtland Report, and the Government adopted the recommendation.606 Social and economic considerations are still relevant, but are somewhat restrained under ecological considerations (see further below). After the usual route in the Parliament, where the Bill was contested through debates and further examination, the RMA came into force the 1st of October 1991.607

605 Foremost including social inequities and global redistribution of wealth.
607 The Act repealed twelve primary enactments and amended over fifty others. See ibid., pp. 67-68.
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Generally speaking, the period of reform was a period of ferment in Maori politics and law, with, for instance, the extension of the jurisdiction of the Waitangi Tribunal and some significant cases. And naturally, the reform of the environmental and natural resource law was of great interest for Maori. The first clear statutory reference to Maori issues in planning legislation was in the *Town and Country Planning Act 1977*, in which the relationship of the Maori with their ancestral lands was a matter of national importance. In the late 1970s and 1980s, Maori issues became increasingly important in resource management law. Therefore it was not surprising that one initial intention of the reform policy was to recognise the Treaty of Waitangi, and an explicit reference to the Treaty principles was, eventually, made. Importantly, when formulating the policy for the RMA, the Government went through a systematic process of consulting Maori in all stages of its development. This was to invest them into the process of the forthcoming statute. Maori values and beliefs were subsequently incorporated into the RMA, as a response to increasing Maori concerns on the state of the environment, which was advocated through Waitangi Tribunal hearings and during the RMA consultation process from 1989 to 1991.

During the process there were criticisms, not the least of which came from the three national Maori organisations, regarding the definitions of Maori terms in the RMA. Some of the concepts introduced were largely unknown to the greater Maori population, and it was argued that the concepts therefore were not adequately debated. This was especially true about the concept of *kaitiakitanga*, construing a form of guardianship and ethic stewardship in relation to natural resources.

Nonetheless, the incorporation of Maori words and phrases supports the contention that a bicultural jurisprudence, however slowly, is emerging from this practice. Maori customs and beliefs are part of several environmental statutes, including the RMA. The RMA places responsibilities on those persons who interpret law to have some understanding of Maori custom. This is a difficult task since few members of the judiciary, including Maori members, are deeply versed in Maori customs and beliefs. While the Maori words are defined in English for the purposes of the Act, the definitions may not be in accordance with a Maori understanding of a particular concept. In fact, each tribe has its own wealth of traditions that gives substance to fundamental concepts, including those used under the RMA.

On the whole, the RMA can be seen as part of a legislative trend to state broad principles of national policy rather than to set out detailed rules of conduct. This means in practice that there is a minimum of central government intervention leaving the implementation of the Act regionally and locally. There is

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612 See below in subsection 4.2.3.2.
a delegation of legislative power to locally elected representatives through regional and district councils. This would not have been possible without the preceding process of statutory rationalisation and the reform of local government, during which many bodies were abolished and the powers were transferred to local authorities615.

4.2.3 An Integrated Resource Management

4.2.3.1 What Comprises the Integrated Approach?

Not only does the RMA combine planning instruments with permitting procedures, it also includes also certain functions or approaches that emphasises an integrated resource management. Below, I aim to discuss certain functions in the Act that promote such an approach.616 Note, however, that most of these functions are both overlapping and interacting. This will be clear when discussing the purpose and effect of the different functions. Although the Swedish Environmental Code is an integrated environmental legislation, the physical planning remains, in principle, outside the statute617.

First of all, the RMA emphasise an effects-based approach, meaning that it is the human activities and their effects on the environment, in a broad sense, that are regulated, not merely the different activities. Secondly, there is an emphasis on an ecosystem approach, since the statute includes activities which have negative effects on land, water (including the coastal marine area), and air, as well as including a broad definition of the “environment”. Thirdly, there is integration with other legislation, or in other words, a parallel application approach. Fourthly, the backbone of the Act is the hierarchal approach towards the planning system, in which lower authorities are bound by decisions taken at higher levels. Fifthly and finally, the RMA provides for an integration of aspects of the Maori value and belief systems, a starting point for a bi-cultural approach towards resource management.

i) The effects-based approach and the ecosystem approach

615 The enactment of statutes, and especially the RMA, where local authorities are given extensive powers, would not have been possible without the reorganisation of territorial local authorities. In the 1980s the establishment of thirteen regional councils, district and city councils, provided for a radical reorganisation of previous smaller authorities and a scattered organisation. See, for example, Mulholland, R. D. (1999) Introduction to the New Zealand Legal System, p 65.

616 See also Tegner Anker, Helle (2002) Integrated Resource Management – Lessons for Europe? in European Environmental Law Review, July 2002. Here she uses three concepts to describe the integrated resource management within the RMA, namely i) cross-media integration (the interconnectedness of environmental elements or media, e.g. air, land, water); ii) cross-agency integration (horizontal and vertical integration of decision-making in relation to foremost authorities); and iii) instrumental integration (clear links between different legal instruments). For short information on the RMA in Swedish see Carlman, Inga (2003) Adaptiv miljöplanering nästa i Michanek, Gabriel & Björkman, Ulla Miljörätten i förändring – en antologi.

617 Compare here subsections 9.2 & 9.6. See also my discussion below in section 10.4 regarding regional environmental planning.
The aim of the RMA was to establish a system of effects-based management, focusing on the effects of different activities than the activities as such. The meaning of the term “effect” is indeed broad, including also cumulative effects among other things. According to the Act, “effect” is defined as including any i) positive or adverse effect; ii) temporary or permanent effect; iii) past, present, or future effect; iv) cumulative effect which arises over time or in combination with other effects; v) potential effect of high probability; and vi) potential effect of low probability which has a high potential impact.

This effects-based approach is evident primarily in the purpose of the RMA (s. 5(2)(c)). The overriding purpose of the RMA “is to promote the sustainable management of natural and physical resources”. In the second sub-section this is further elucidated: In relation to the Act "sustainable management" means:

managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while

a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

c) Avoiding,remedying, or mitigating any adverse effects of activities on the environment.

According to sub-section 5(2)(c), there is an emphasis on avoiding,remedying or mitigating adverse effects on the environment arising from human activities, rather than through a direct focus on the activities per se. The effects-based approach is further evident in relation to the functions of local authorities (regional councils and territorial authorities). For instance, one of the functions of the regional council is to prepare objectives and policies concerning land use; Such preparation shall be carried out “in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance”. The territorial authority, on the other hand, shall in relation to its “establishment, implementation, and review of objectives, policies, and methods” seek to “achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district”. The territorial authority shall also have “control of any actual or potential effects of the use, development, or protection of land”.

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619 RMA s. 3.
620 RMA s. 5(1). The definition of “natural and physical resources” includes land, water air, soil, minerals, energy and all forms of plants and animals and all structures, such as buildings. See the definitions in s. 2.
621 RMA s. 5(2).
622 RMA s. 30(1)(b).
623 RMA s. 31(1)(a).
624 RMA s. 31(1)(b).
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The effects-based approach of the Act is also clear in relation to consideration of applications on resource consents (permit) by consent authorities. The consent authority must have regard to “any actual and potential effects on the environment of allowing the activity” Nonetheless, if the regional or district plan permits the particular activity with the particular effect, the consent authority may disregard the adverse effect of the activity on the environment.

In conjunction to the effects-based approach, the “life-supporting capacity…of ecosystems” is also mentioned as one of the means to promote the sustainable management of natural and physical resources. This ecosystem approach is additionally obvious by the broad definition of “environment”. The term “environment” includes i) ecosystems and their constituent parts, including people and communities; ii) all natural and physical resources; and iii) amenity values, as well as the social, economic, aesthetic, and cultural conditions which affect the matters stated in i)-iii). In section 7(d), “the intrinsic values of ecosystems” are referred to as one of the matters to which deciding authorities are to have “particular regard to”. These intrinsic values are defined as meaning those aspects of ecosystems and their constituent parts which have value in their own right, including – a) Their biological and genetic diversity; and b) The essential characteristics that determine an ecosystem's integrity, form, functioning, and resilience.

Hence, as seen so far, the Act’s purpose addresses and seeks to accommodate several diverging interests: the effect on the environment arising from human activities, the importance of the ecosystem and their life-supporting capacity and intrinsic value as well as the human dimension; and a sustainable management that will enable people and communities to provide for social, economic, and cultural wellbeing, health and safety. The Act affirms, by its definitions, that human social, economic, aesthetic, and cultural conditions affect the environment. Additionally, Part II of the Act includes interpreting provisions (or principles as the Act labels them), which support the purpose in section 5. Sections 6, 7 and 8 guide the decision-maker in determining appropriate promotion of sustainable management in a particular situation. The difficult task and legal question on the interpretation of sustainable management of natural and physical resources will be discussed below under the next subsection.

ii) The parallel application approach

An essential component of the integrated management is integration with other legislation. In section 23(1), the RMA states that compliance with the RMA does not remove the need to comply with other legislation, regulations, bylaws, and common law. In this respect, an approved resource consent does not mean

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625 It may be the Minister of Conservation, a regional council, territorial authority or occasionally a local authority. See RMA s. 2.
626 RMA s. 104(1)(a) (emphasis added).
627 RMA s. 104(2).
628 RMA s. 5(2)(b).
629 RMA s. 2.
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anything else but an approval to carry out an activity that would be a breach of a provision in the RMA.\footnote{630} For example, even though a person has obtained a mining permit subject to the Crown Minerals Act 1991, because the person is also bound by the provisions in the RMA and he or she must, for instance, apply for a resource consent for the use of land and/or water. In other words, other environmental legislation with obligations and requirements to be considered shall be read together (parallel) with the requirements inherent in the RMA in order to elucidate all duties and requirements.

\textit{iii) The hierarchy of the planning system}

The backbone of the RMA is its planning system.\footnote{631} It is comprised of a cord of different planning instruments, which all are interconnected and aimed at ensuring vertical integration of the levels of government (central, regional and territorial). Altogether, the planning system creates a structure that provides incorporation of higher level normative guidelines.

Part V of the Act includes the planning instruments \textit{standards, policy statements} and \textit{plans}. \textit{National environmental standards} are regulations that, for instance, may describe the water, air or soil quality. While the Governor-General, the sovereign’s representative (effectively the Cabinet), has the authority to issue such regulations, he or she may do so only after recommendation by the Minister for the Environment\footnote{632}. The Minister must in beforehand have established a process where the information finally is gathered in a report. In this process the public should be given adequate time and opportunity to comment on the issue and their submissions shall be included in the report, which also shall be published together with the recommendation.\footnote{633} In this process, Maori have an opportunity, mainly through the iwi authorities, to stress their views and interests\footnote{634}.

National environmental standards may, for instance, regard standards in relation to land, water, air and noise, as well as prohibit certain activities and restrict the making of rules in plans or granting of a resource consents for local authorities. Thus, if a national environmental standard requires a resource consent (a permit) to be obtained for an activity, the national environmental standard has the same function as a rule in a plan.\footnote{635} The national environmental standards also directs how the plans (regional and district plans) are designed, foremost in relation to certain activities, and the duty to acquire a resource consent laid down in a national environmental standard\footnote{636}. Moreover, rules and resource consents “may not be more lenient than a national environmental standard”\footnote{637}. Local
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authorities may, however, in their documents (foremost regional policy statements and plans) impose stricter provisions than the national environmental standard638.

Note that national environmental standards are not mandatory. There was a lack of such standards in New Zealand for a long period, which was seriously criticised as hampering the promotion of sustainable management relative to the wide discretion left to local authorities. The first standards were not issued until 2004. Presently, there are national environmental standards for the air (air quality standards)639, but other environmental standards are proposed and now open for public submission640, while still others are planned.641

**National policy statement and coastal policy statements** are approved by the Governor-General on the recommendation of the Minister for the Environment or the Minister of Conservation (for coastal policy statements).642 The primary purpose of such policy statements is to state objectives and policies for matters of national or coastal significance that are relevant in order to achieve the purpose of the Act643. In contrast to the coastal policy statement, the national policy statement is not mandatory. It is up to the Minister for the Environment to consider if it is desirable to propose a national policy statement. By comparison, there shall always exist at least one coastal policy statement.644

The process of establishing any policy statement shall follow certain formal rules, such as an appointed board of inquires to administer the process, which provides for the possibility of submitting proposals and of public hearings. A report must also be prepared on the proposed policy statement. Apart from public notification of the report, a copy of the report shall be sent to local authorities and every person who made a submission.645 The same procedure applies to reviews, changes or revocation of national policy statements646. Also, here the iwi authorities are given an important role to comment on the policy statements’ proposals647.

Regional councils and territorial authorities must amend their documents, including, for instance, actual or proposed regional policy statements or plans, to give effect to a provision in a national policy statement or coastal policy statement. There are certain time limits for meeting this obligation. In order to comply with and implement national policy statements or coastal policy statements, regional councils and territorial authorities have a duty to take any other action that is specified in the policy statements.648 Currently, there are no national policy standards in force, but the Ministry for the Environment is working on standards related to network infrastructures, which will mainly be

638 Compare RMA s. 43B(1)-(2).
640 Standards for drinking-water sources. Consultations though public submissions on the proposed standards were open till the 28 of November 2005.
642 RMA ss. 45-46, 52(2) & 57.
643 RMA ss. 45 & 56.
644 RMA s. 57(1), compare with s. 46.
645 See RMA ss. 46-52 and 39-42A.
646 See RMA ss. 53 and 57(2). See also s. 46A(1)(a)-(b).
647 RMA ss. 46(a) & 57(1).
648 RMA ss. 55(2)-(3) & 57(2).
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applicable for activities such as electricity transmission, storm water run off, telecommunications and energy generation.\textsuperscript{649}

On the regional level, there are regional policy statements with the aim of providing an overview of the resource management issues of the region with policies and methods to achieve an integrated management of resources.\textsuperscript{650} A regional policy statement is mandatory for each region and shall be prepared by the regional council\textsuperscript{651}. The preparation and changes of the policy statement are subject to a specific process where, among other things, consultation with the different Ministers of Crown, as well as iwi authorities, shall be done\textsuperscript{652}. Individuals also have opportunities to give submissions on the proposed policy statement and may thereafter also appeal to the Environment Court on certain matters.\textsuperscript{653} Furthermore, a regional council shall prepare and change a regional policy statement in accordance with its functions stated in section 30, the provisions of Part II, duties under section 32 and any regulations. There is also an obligation to disregard trade competition.\textsuperscript{654} Thus, the regional council shall, for instance, take into account relevant planning documents of iwi authorities, such as iwi management plans\textsuperscript{655}.

Importantly, there is a comprehensive list of what to be included in the regional policy statement. There are additional provisions stating that the statement must not be inconsistent with water conservation orders\textsuperscript{656} and must give effect to national policy statements or coastal policy statements.\textsuperscript{657} Again, the cord of planning instruments is interconnected to higher levels of decisions, as they are also for the regional and territorial plans.

The regional plans assist the regional councils to carry out their functions related to the RMA and to achieve the objective.\textsuperscript{658} The regional plans shall give effect to national and coastal policy statements and regional policy statements. Further, the regional plans may not be inconsistent with water conservation orders or other regional plans for the region\textsuperscript{659}. These plans can apply to the whole region or to a part of it. The regional plans are not as such mandatory, apart from one or more coastal regional plans, which are obligatory.\textsuperscript{660} On the other hand, even if regional councils are not explicitly legally bound to make regional plans, it is still in accordance with the councils’ functions under section 30 and the provisions of Part II. The Minister for the Environment has the authority to direct

\textsuperscript{650} RMA s. 59.
\textsuperscript{651} RMA s. 60(1).
\textsuperscript{652} For a good scheme of the different stages to develop of a plan (or regional policy statement) see Harris, Rob (2004) Policy statements and plans in Harris, Rob (ed.) Handbook of Environmental Law, p. 81.
\textsuperscript{653} See further under Schedule 1 to the RMA. For more information on the Environment Court see below in subsection 4.2.3.3.
\textsuperscript{654} RMA s. 61(1)-(2) & (3).
\textsuperscript{655} RMA s. 61(2A).
\textsuperscript{656} RMA s. 200. Water conservation order imposes restrictions or prohibition on the exercise of the regional councils' powers.
\textsuperscript{657} RMA s. 62(1)-(2)
\textsuperscript{658} RMA s. 63.
\textsuperscript{659} RMA s. 67(3)-(4). See also s. 67(1)-(2) for the content of the plan.
\textsuperscript{660} RMA ss. 64 & 65(1). If appropriate a regional coastal plan may form a part of a regional plan.
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a regional council to prepare a regional plan or to change it, including deciding time limits for the process. 661

The process of preparing and changing regional plans is subject to detailed provisions, in similarity with the process of policy statements. 662 In this process the regional council shall, for instance, take into account any relevant planning document recognised by an iwi authority and lodged with the council, to the extent that its content has a bearing on resource management issues of the region. 663

The regional council may include rules into a regional plan to meet their obligations under the Act and to meet the objectives and policies of the regional plan. Such rules aim at prohibition, regulation or allowances of specified activities. In making rules the regional council shall have regard to actual or potential effect on the environment of activities, particularly adverse effects. The rules in a plan may apply to the whole region or to parts of the region. Furthermore, such rules can apply also for stated periods or seasons. The rules in regional plans have the same force and effect as regulations in force under the RMA. 664

The rules in the regional plans are of crucial importance for the enforcement of the objective set out in the RMA. The manner in which these rules are described and how detailed they are has relevance indeed. If an activity is stated as a “permitted activity” in a particular regional plan, there is no obligation to apply for a resource consent, even if the activity would give rise to a negative effect on the environment, if there is no general rule in the plan that requires a resource consent to be obtained for an activity causing, or likely to cause, adverse effects not covered by the plan. 665 In essence, the force of promoting a sustainable management of natural and physical resources lies primarily at the regional councils, rising partly from the importance of regional councils’ co-ordinating and strategic policy functions. Nevertheless, the territorial authorities also play an influential role at their level of government.

District plans relating to each district are prepared by the territorial authorities with the same purpose as regional plans, that is, to assist territorial authorities to carry out their functions in relation to the purpose of the RMA. District plans are mandatory, and the Minster for the Environment may direct the territorial authority to change its plan, including directions of time limits for the amendment process. 666 The district plan shall give effect to national and coastal policy statements and to regional policy statements. The district plan shall not be inconsistent with water conservation orders or regional plans. 667 The process of preparing and changing a district plan shall likewise be in accordance with certain requirements. 668 In the same way as regional plans, the preparation and change of a district plan shall be in accordance primarily with its functions under section 31, the provisions in Part II, its duties under section 32, and all applicable

661 RMA ss. 66(1), 25A(1) & 65(1A).
662 RMA s. 65(2) and Schedule 1.
663 RMA s. 66(2A).
664 RMA s. 68.
665 RMA s. 77B(1) & 68(5)(e).
666 RMA ss. 73, 73(1), 73(1B) & 25A(2).
667 RMA s. 75(4)-(5). See also s. 75(1)-(2) for the content of such plan.
668 RMA 73(1)-(1A) and Schedule 1.
regulations\textsuperscript{669}. Also here, the authority shall take into account planning documents by iwi authorities\textsuperscript{670}. District rules can be included in the plan and have the same force and effect as regulations under the Act\textsuperscript{671}.

The hierarchical approach of the planning system is a strong method to promote vertical integration of different levels of government. For local authorities, it is also statutorily mandated that they must observe and enforce their own policy statements and plans\textsuperscript{672}. Furthermore, the regional policy statements, regional plans and district plans shall at least every ten years be fully revised by the regional council or the territorial authority, ensuring that statements and plans are up to date\textsuperscript{673}. If there is a dispute whether it is necessary to change regional policy statements or any plan to address an issue or achieve objectives of national or coastal policy statements, the matter can be solved by the Environment Court. The Environment Court has jurisdiction to order the responsible authority to initiate a change, if the inconsistency is of significance\textsuperscript{674}.

iv) The bi-cultural approach towards sustainable management

The RMA provides for an integration of aspects of the Maori value and belief systems, which could be understood as a starting point for a bi-cultural approach toward sustainable resource management\textsuperscript{675}. Above, I have asserted that provisions in relation to policy statements and plans require both that the regional councils and territorial authorities prepare and change these in accordance with the provisions of Part II of the Act and also “take into account” documents recognised by iwi authorities, primarily iwi management plans\textsuperscript{676}. The process of preparing and changing policy statements and plans requires consultation with iwi authorities. Such consultation is additionally required for the preparation of national and New Zealand coastal policy statements and national environmental standards\textsuperscript{677}.

The Act recognises that Maori have a special relationship with the coast that encompasses spiritual as well as physical needs. This is inherent in the provisions regarding the New Zealand coastal policy statement. Such coastal policy statement may declare objectives and policies for “protection of the characteristics of the coastal environment of special value to the tangata whenua”.\textsuperscript{678} However,
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the most important means for cultural integration here are the provisions of Part II. The purpose of the Act in section 5 is supported by sections 6, 7 and 8, referred to as (interpreting) principles. Thus, the purpose is supported by a number of specific supplementary objectives under the headings "matters of national importance" (s. 6), "other matters" (s. 7) and "Treaty of Waitangi" (s. 8). Maori cultural values included into these four provisions are “[t]he relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga” (s. 6(e)), “the protection of recognised customary activities” (s. 6(g)), “[k]aitiakitanga” (s. 7(a)) and “the principles of the Treaty of Waitangi” (s. 8).679

Part II is the most critical part of the Act, which governs both the operation and the interpretation of the statute. Protection and sustainable management of the values and interests inherent in Part II “is meant to underlay and inform regulations, policies and plans under the Act”.680 For example, consideration of applications for resource consent (including submissions on applications) is subject to Part II issues (s. 104). Here, section 104 ensures that a consent authority exercises its power to serve the purpose of the Act, and the authority is then free to consider any of the matters relevant in sections 6, 7 and 8 in relation to a particular consent application.681 Subsequently, the three sections direct decision-makers to consider a variety of matters, including references to Maori cultural values, in achieving the purpose of sustainable management of natural and physical resources.

There are other processes that support the protection of the provisions in Part II of the Act. For instance, iwi and local government may identify significant sites for iwi and agree upon provisions to protect them, according to RMA section 6(e). Protecting significant sites is also consistent with section 8 of the Act and the Treaty principle of active protection. Some local authorities and iwi are already undertaking this work. The use of a written document is another useful tool for iwi and local government to formalise or develop a relationship where a written policy can set the ground rules for interaction between the parties on certain matters. They may also establish formal contracts for projects, such as to provide advice about ways to change internal processes to assist a local authority to carry out its statutory responsibilities towards iwi. However, written documents are only to be seen as tools to assist in developing an ongoing relationship. Other mechanisms used are, for example, informal meetings and gatherings, which are effective means for breaking down barriers.682

where food resources are gathered and plants which produce material highly prized for use in weaving), see RMA s. 2 for some of the definitions.

679 See further under next heading.


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Significantly, the four sections (ss. 5-8) of Part II form a hierarchy of importance\(^{683}\), in that, first and foremost, sections 6, 7 and 8 are subordinate to the single statutory purpose expressed in section 5. Secondly, sections 6, 7 and 8 calls for various degrees of obligations for central and local government: section 6 requires the government to “recognise and provide for”; section 7 requires the government to “have particular regard to”; and section 8 requires the government to “take into account”. This leads to a scale of declining degree of “incorporation and consideration” obligations for central and local government, where section 6 shows the strongest incitement for such obligations and section 8 the least in this respect. This means, for instance, that there is a stronger obligation to protect “recognised customary activities” than to have particular regard to “kaitikitanga”, and the authorities’ regard towards “kaitiakitanga” is ranked higher than the obligation to take into account “the principles of the Treaty of Waitangi”. Nevertheless, each situation and circumstance should determine which Maori cultural values to evaluate in achieving the Act’s purpose.

To summarise the whole of this heading, the objective of sustainable management of natural and physical resources and the hierarchy of the planning system along with the reconciliation of the multitude of interests reflected in Part II of the Act, clearly call for an integrated approach both toward the legislation as such and toward decision-making under the Act. Moreover, the wide discretion left to the local authorities, within certain parameters, to define their own objectives and measures, calls for stringent links between the goals of higher magnitude and lower plans and the case-to-case decision-making in order to achieve the stated purpose. The other values underpinning this comprehensive statute, primarily efficiency and decentralisation, explain the low involvement by central government, making way for a cost efficient road towards environmental protection.

As a concrete example of the efficiency value, before preparing or issuing any of the planning instruments in the Act, an evaluation must be made by the competent authority.\(^{684}\) This evaluation must include whether each objective is the most appropriate way to achieve the purpose and whether the policies, rules or the other methods used are the most appropriate for achieving the objectives in relation to their efficiency and effectiveness\(^{685}\). The evaluation must take into account the benefits and costs of the various methods used, chiefly rules, plans or policies, as well as the risk of acting or not acting where there is uncertain or insufficient information\(^{686}\). Consequently, section 32 requires decision-makers to make conscious and public evaluations of the suitability of rules and other provisions as a method of bringing about the purpose of the Act and the objectives of policies and plans.

\(^{684}\) RMA s. 32. Applies to national environmental standards, national and coastal policy statements, regional policy statements and the plans (regional and district).
\(^{685}\) RMA s. 32(3).
\(^{686}\) RMA s. 32(4).
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4.2.3.2 Interpretation of “Sustainable Management” and the Meaning of
Incorporation of Maori Cultural Values

Although this heading is concerned with the overall judgement and interpretation
of the provisions of Part II of the Act and particularly in relation to the Maori
cultural values incorporated therein, the understanding and interpretation of
section 5, comprising the single purpose, should first be discussed. The
interpretation of the purpose in section 5 will inevitably influence how the
interpreting principles in sections 6, 7 and 8 will be understood.

The general language in section 5 has led to divergent interpretations and
much debate on some fundamental issues, particularly interpretations of sections 2
and 5(2). For instance, the matters debated have concerned whether economical
and social needs or benefits are relevant in resource consent decision making or
whether attention must be focused only upon environmental effects. 687 The
interpretation of section 5 is profoundly important and its meaning has been – and
still will be - contested. The manner by which the interpretation evolves will
without doubt influence the future of New Zealand’s environmental law regime;
The definition of “sustainable management” shifts over time as society’s
conception of certain values changes in relation, for instance, to resources and
technology.688

I aim here first to provide a brief summary of the previous and
contemporary debate concerning the interpretation of the section. The first
discussions will concern mainly the little word “while” in section 5(2), which is
significant, since its interpretation influences how strong the onus is to protect the
environment. The issue is roughly whether “while” should mean “and” or “if”.
The statutory definition is shown directly below.

In this Act, “sustainable management” means managing the use,
development, and protection of natural and physical resources in a
way, or at a rate, which enables people and communities to provide
for their social, economic, and cultural wellbeing and for their health
and safety while

d) Sustaining the potential of natural and physical resources (excluding
minerals) to meet the reasonably foreseeable needs of future generations;
and

e) Safeguarding the life-supporting capacity of air, water, soil, and
ecosystems; and

f) Avoiding,remedying,or mitigating any adverse effects of activities on the
environment.689

This discussion of the meaning of “while” in relation to paragraphs (a) to (c) is
aimed at distinguishing between two different outcomes of the interpretation, the

687 Williams, David (1997) Environmental and Resource Management Law in New Zealand,
Preface, p. 6 and footnote 10.
Resource Management Act in Memon, P. Ali & Perkins, Harvey (eds.) Environmental Planning
and Management in New Zealand, p. 64. See also Harris, Rob (2004) Development v Protection,
an introduction to RMA and related laws in Harris, Rob (ed.) Handbook of Environmental Law, p.
58.
689 RMA s. 5(2) (emphasis added).
“balancing” outcome or the “bottom-line” outcome. It was argued that sustainable management in section 5(2) consists of two parts, the first part which precedes the word “while”, labelled “the management function”, and the second part ((a)-(c)), labelled “the ecological function”. The objective of the first part of section 5(2) is to accommodate social, economic and cultural wellbeing and the health and safety of present-day people and communities. The ecological function ((a)-(c)), on the other hand, outlines a number of considerations that must be observed, including intergenerational, ecological and environmental concerns.

The balancing interpretation understands “while” as a coordinating conjunction (such as “and”), meaning that the Act prescribes a balance to be achieved between the management function and the ecological function. As a contrast, the bottom-line interpretation views “while” as a subordinating conjunction (similar to “if”), which leaves the ecological function a degree of priority over the management function. Here ecological and environmental sustainability becomes a primary role in defining sustainable management within the Act, which has been called the “environmental bottom-line”. Nowadays, most lawyers support the interpretation that understands the ecological function as a set of constraints that must be secured if the management function is to be considered sustainable, that is, supporting the bottom-line interpretation. The case-law, for the most part, seems also to favour this interpretation. The objective set out in paragraphs (a)-(c) cannot, thus, be traded off against benefits in relation to contemporary socio-economic or cultural well-being.

This interpretation is found in the commonly accepted ruling in North Shore City Council & Others v. Auckland Regional Council. Here the Environment Court held that the interpretation of section 5 involved an overall broad judgement of whether a proposal would promote the sustainable management of natural and physical resources, thus recognising that the Act has a single purpose. This kind of judgement allows a comparison of conflicting considerations and the scale and degree of them, including their relative significance or proportion in the final outcome (para. 33).

While there appears to be a general agreement on the broad structure of section 5, the focus has turned to the subparagraphs. So, the debate over what these environmental bottom-lines encompass is far from settled. The debate has been framed within political and ideological themes. It has been argued that the academic debate centres on a struggle between a “narrow” and a “holistic” interpretation of section 5. The former interpretation is founded on the new right political and economic ideology and interprets sustainable management as a consideration of bio-physical environmental effects within the support of a liberalised market allocation system. On the other hand, the holistic approach of interpretation is critical of neo-liberal ideology and insists that decisions on

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691 Ibid., pp. 66-69 & 72. See also the references to commentators in the debate here.
692 A86/1996.
693 Case referred to by Harris, Rob (2004) Development v Protection, an introduction to RMA and related laws in Harris, Rob (ed.) Handbook of Environmental Law, p. 57.
695 Ibid., p. 64.
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resources allocation must be seen together with related social, cultural and economic issues if the use of natural resources is to be sustainable (socially, ecologically and economically) over the long term.\textsuperscript{696}

The narrow interpretation attempts to limit the bottom-line consideration to encompassing only the biophysical environment. This neo-liberal firmness of excluding socio-economic and cultural concerns reveals some contradictions. There is a conflict with international statements on the concept of sustainability and paradoxically, also inconsistency with the Governments’ policy on integration of social, economic and environmental concerns, for example, the Government’s "Environment 2010 Strategy".\textsuperscript{697} On the other hand, the holistic approach views social, economic and cultural concerns as being part of any serious attempt to operationalise the concept of sustainable development. Such concerns, together with ecological concerns, are interdependent and this side argues that it is fundamentally irrational to separate them. In fact, it assumes and argues that the liberalised market is rather a cause of unsustainable resource use and environmental degradation, and thus not the solution.\textsuperscript{698}

On the whole, the holistic (or inclusive) interpretation recognises that intergenerational concerns and ecological integrity require consideration of resource allocation as well as the broader picture of the socio-economic activity, in addition to the consideration of environmental effects. It has been argued that this approach to interpretation of section 5 better addresses the complex requirements defined with regard to interpreting sustainable management.\textsuperscript{699} The obvious and relative ambiguity of the interpretation of what comprises a sustainable management of natural and physical resources might mildly be understood as unsatisfactory. During the first years, there seems to have been reluctance in the courts (notably the Environment Court) to explore and tackle the key questions and definitional problems. A contrasting opinion, however, is that section 5 should not be subject to strict and precise definition, since it is intended to allow application in a broad and general way. Some have even articulated that it is impossible to arrive at a strict and precise interpretation and that Parliament deliberately left the wording indeterminate.\textsuperscript{700}

It is not only the word “while” that has given rise to differing opinions of interpretation, so also has “promote” as it appears in section 5(1) (“the purpose of the Act is to promote the sustainable management or resources”). To some, “promote” implies a positive statement that requires actions to be taken. To others, it signifies that sustainable management is an ideal or goal, which means that the achievement of the ideal or goal is not mandatory at all costs.\textsuperscript{701} Despite diverging understandings, it is only through an ongoing debate and contest in courts of different interpretations of sustainable management that it will be given more explicit meaning. Moreover, the case-by-case interpretation of what is considered sustainable management depends upon the context and the planning instruments: the location, the resources in question, the scale of activity, and,

\begin{itemize}
\item \textsuperscript{696} Ibid.
\item \textsuperscript{697} Ibid., pp. 70-72. The Ministry for the Environment seems to stress such approach to interpretation.
\item \textsuperscript{698} Ibid., p. 71.
\item \textsuperscript{699} See further in ibid., p. 72.
\item \textsuperscript{700} Ibid., pp. 66-67 with references.
\item \textsuperscript{701} Ibid., p. 67.
\end{itemize}
among other factors, the expected environmental effects in relation to general or specific environmental problems in the region, as well as on standards in regulations and the content in national policy statements and plans.\(^{702}\)

Now, I will turn to the other sections in Part II. Whilst the RMA has one overriding objective in section 5, it also has a number of supplementary objectives, as described above. The ‘interpreting’ principles include "matters of national importance" (s 6), "other matters" (s 7) and "Treaty of Waitangi" (s 8). The importance of this part in guiding the sustainable management of resources was emphasised by the High Court in *Falkner v. Gisborne District Council*\(^{703}\) in 1995. It was said that, at a very operational level, policy statements, plans and rules promulgated under the Act are linked back to the core provisions of Part II.

The presumption is that all powers, duties and functions under the Act require an active, rather than a superficial, assessment of the guiding principles in Part II, including those requirements under section 5(2).\(^{704}\) Below, I discuss each section individually that has relevance for the influence of Maori cultural values on resource management issues under the RMA. Lastly, I provide a summary and an exemplification of how the courts have viewed the overall interpretation of the sections.

### i) Sections 6(e) and 6(g)

Section 6 includes "[m]atters of national importance", which persons exercising functions and powers under the Act "shall recognise and provide for". This requirement must be understood foremost in relation to the development of policies and plans, as well as in considering resource consent applications. Importantly, in *New Zealand Rail Limited v. Marlborough District Council*\(^{705}\), the High Court held that matters of national importance are subordinate to the promoting of sustainable management, in other words that the objectives under the section shall not be understood as ends in themselves.\(^{706}\) Moreover, when objectives of national importance compete amongst themselves, the consent authority must in each case do "a balancing exercise by weighing the significance of the conflicting interests in the light of the facts of the particular case".\(^{707}\)

The sub-sections relevant here reads:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources shall recognise and provide for the following matters of national importance:
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

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\(^{704}\) See Harris, Rob (2004) *Development v Protection*, p. 60.

\(^{705}\) AP169/1993.


\(^{707}\) Ibid., where he cites the case *Kemp v. Queenstown Lakes District Council*. C229/1999. See also further references.
(g) The protection of recognised customary activities.708

Section 6(e) affirms the long Maori ancestral relationship with New Zealand’s natural world and declares that it is of national importance709. This was, for instance, acknowledged in the Purnell case710, which concerned a consent application for two new fish farms. See further below for a brief summary of the case.

Section 6(g) is a new amendment to the section and part of the aftermath of the Marlborough Sounds case and the claims on foreshore and seabed.711 Maori customary activities can be recognised through a customary rights order and exercised thereunder. Such customary rights orders can be decided by section 5 of the Foreshore and Seabed Act 2004. Accordingly, where there are such customary rights recognised, the protection of the activities or rights are of national importance. This could, for instance, regard an aim to preserve areas where such activities are carried out and not allow resource consents that would jeopardise the present or future customary activities712.

ii) Section 7(a)

Section 7(a) refers to the Maori concept of “kaitiakitanga”. The section reads:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to

(a) Kaitiakitanga.

The inclusion of “kaitiakitanga” was an attempt to give practical recognition to Maori values under the new management regime introduced with the RMA. The concept is a fundamental Maori ethical principle of resource management, which has always recognised the need for environmental regulation in order to sustain human welfare. Kaitiakitanga is a word built up from smaller words, where “tiaki” is the root of the concept. In its core, it means to guard or to watch over something. With the prefix “kai”, it extends the meaning to include the entity responsible for the guarding. The last part, the suffix “tanga”, extends the meaning of the concept further to include the task or office of the kaitiaki: the earth and its components.713 Kaitiakitanga is, with a more narrow meaning, the role played by the kaitiaki, the guardian.

708 RMA s. 6(e)-(g).
709 The meaning of “ancestral lands” in s. 6(e) has been considered by courts: ancestral lands are not limited to land which remains to be Maori land or land owned by Maori. In each case it is necessary to consider the nature of the relationship between Maori and the lands, water, sites, etc. and the effect of the proposed activity on that relationship. See Williams, David (1997) Environmental and Resource Management Law in New Zealand, p. 87.
710 Purnell v. Waikato Regional Council, A85/96.
711 See further above in subsection 3.2.4.2.
712 See also further below in section 4.3.
In practical terms, the kaitiaki is each whanau or hapu (extended family or sub-tribe) that holds mana (control and power) over their ancestral lands and waters. The kaitiaki must ensure that the mauri (the life force) of their ancestral lands, waters and natural resources, are healthy and strong. If this is not the case, the kaitiaki must do all in their power to restore the mauri to its original status. If the kaitiaki should fail to carry out the duties adequately, the life-sustaining capacities of their land will be deprived and harm will come to the members of the whanau and hapu. Therefore, Maori take their kaitiaki responsibilities seriously and there are also harsh penalties for neglecting kaitiaki duties.\footnote{See Report and Recommendations of the Board of Inquiry into the New Zealand Coastal Policy Statement (1994), p. 17.}

Maori have rules governing the human use of a resource to make sure that it does not affect its mauri. Regulations are provided through “tapu” and “rahui”. Tapu rules may imply an absolute prohibition, and where it is violated, the violation will be punished, in some cases all the way to death. Rahui is a regulation that only temporarily prohibits an action. It is often used to preserve birds, fish or other biological resources, particularly during the reproduction and breeding season. This regulatory system recognises that it is necessary to balance human need with the preservation of the resource and the safeguarding of its mauri. The kaitiaki is therefore at the same time benefactor and beneficiary by protecting the resource from detriment, as well as using the yields of the resource. This concept recognises also that each generation has an inherited duty to protect and care for the natural world. The concept of kaitiakitanga carries, therefore, not only a responsibility to protect the natural world, but also a duty to ensure that a viable livelihood is passed on to the next generation.\footnote{See Tomas, Nin (1994) Implementing Kaitiakitanga under the RMA in New Zealand Environmental Law Reporter, July 1994, p. 39.}

One needs also to remember that Maori concepts arise from different ideology and understanding of the natural world, which not seldomly is conflicting with equivalent European understandings. The attempt to define any Maori concept enables subtle redefinition and the result is often a hybrid in terms of statutory definitions. “Kaitiakitanga” within the RMA is more narrowed and constrained than the original concept. The inclusion of the concept into the RMA has in fact disconnected the concept from its Maori cultural and spiritual context.\footnote{Durie, Mason (1998) The Politics of Maori Self-Determination, p. 29.}

As said before, the implementation of the Maori concept “kaitiakitanga” within the RMA regime is inherently problematic. The translation of any Maori concept is difficult, and it is even more problematic to implement concepts into the legal sphere. Maori have argued that the RMA only recognises a number of chosen elements of kaitiakitanga, which is seen to be a failure of the Act. It has even been argued that any concept, when divorced from its cultural base, is subject to “dysfunction, reinterpretation or hi-jack.”\footnote{The English translation of kaitiaki is normally guardian/caretaker/trustee and kaitiakitanga becomes then guardianship, stewardship or trusteeship, words with the basis in English feudal history. None of these words come even close to explain what is understood of the concept by Maori. See for an example Report and Recommendations of the Board of Inquiry into the New Zealand Coastal Policy Statement (1994), p. 18.}

Thus, there are considerable problems in accurately translating the concept into equivalent English words.\footnote{The Maori understanding of the concept incorporates the spiritual and physical responsibilities of tangata whenua (people
of the land) and relates to mana of the tangata whenua, the gods, the land, the sea and other natural resources. However, there is no commonly understood or accepted perception of the full meaning of kaitiakitanga applicable to all Maori tribes, which adds to the difficulties. Consequently, Maori read far more into the concept than does the definition of the word in the RMA. In the Act kaitiakitanga is defined as meaning:

the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.

This definition was amended in 1997 after criticism from Maori. The former definition did not link the concept directly to the tangata whenua of the area, which meant that even non-Maori could in a given situation interpret the meaning of kaitiakitanga, an understanding supported by previous court cases. From a Maori perspective, it was not possible that a non-Maori could understand the concept of kaitiakitanga. No more could they accept that others than Maori could be regarded as kaitiaki. The present definition of kaitiakitanga, however, refer directly to tangata whenua, the Maori that hold the authority and power in an area, requiring authorities to consult with tangata whenua for an explanation of the meaning of “kaitiakitanga” in a particular matter. Presently, only Maori that can be regarded as kaitiaki.

Since the concept of kaitiakitanga is statutorily defined, it is left to the judicial system to interpret the concept and to make clear what role it has in relation to other matters inbuilt by the Act. Accordingly, the concept of kaitiakitanga will only be one matter that the authority considers in its final decision on, for example, an application for a resource consent. Having “particular regard to” kaitiakitanga is still a high test and requires those administering the Act to give particular weight to and consideration of the concept. Since it is the Maori who hold mana of an area that shall interpret what kaitiakitanga means in any given situation, consultation for this purpose is needed. Whenever any of the

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720 This may be difficult in reality while a compromise of kaitiakitanga, by the balancing of other interests inherent in Part II, is often not an option for the kaitiaki. See further in for example Report and Recommendations of the Board of Inquiry into the New Zealand Coastal Policy Statement (1994), p. 18.
721 RMA s. 2.
722 In the former definition (RMA s. 2) kaitiakitanga meant “the exercise of guardianship: and, in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself”.
723 See for instance Rural Management Ltd v. Banks Peninsula District Council [1994] NZRMA 412. The matter regarded a resource consent application where a company wished to discharge treated effluent through a pipeline into the sea. The local Maori, represented by their kaitiaki did not accept this since it would affect the waters in a spiritual sense: discharge of any contaminant, no matter how well treated, would offend the mana of the water. The kaitiaki emphasised the importance of that the sewage that must pass trough land based sewage disposal systems before reaching the sea. The Planning Tribunal (former name of the Environmental Court) concluded that kaitiakitanga was binding not only on the Maori, but likewise on the consent authorities and applicants. The Court, applying the definition of kaitiakitanga, concluded that the consent authority (the Regional Council) had lived up to the concept, although not responding to a land based disposal system.
matters stated in section 7, including kaitiakitanga, are identified as important to a particular decision, the courts have held that those matters must be considered and carefully weighted when reaching the decision.\footnote{725}.

Observe that the definition of kaitiakitanga refers to the ethic of stewardship. There is also another sub-section of section 7 which explicitly refers to “the ethic of stewardship”.\footnote{726} However, this reference to the ethic of stewardship, which was also inserted with the amendment of the Act in 1997, is not defined. A matter of doubt exists as to its true meaning. Although the enhanced definition of “kaitiakitanga” in the 1997 amendment, is now limited to tangata whenua of an area, the inclusion of “[t]he ethic of stewardship” in section 7(aa) may weaken the Maori role as kaitiaki. This inclusion appears to create an overlap with section 7(a), since the consent authority and the Environment Court could consider whether any person or body was exercising the ethic of stewardship in terms of section 7(aa).\footnote{727}

In sum, the traditional Maori system of resource management is holistic. By daily checks and balances it affirms to prevent intrusions that may cause permanent imbalances, and it guards against detriment to the environment. The interconnectedness in nature, including humans, explains why Maori relate to the environment from a position of parity, rather than superiority. Because everything is inherently sacred and possesses mauri, it ideally creates obligations for Maori and the kaitiaki to respect all things. Thus, preserving the mauri of any element of the natural world is essential for its survival. Kaitiakitanga as a theoretical concept, establishes, thus, duties rather than rights to use particular resources.\footnote{728}

The Maori view of resource ownership and management is often inconsistent with the present legal system and its divisions of the land, the sea and other natural resources. However, it is a difficult equation, by means of a statute that puts together two worldviews with different and often clashing understandings of what wise or sustainable resource use should be in practice.\footnote{729} Nevertheless, with the inclusion of the concept of kaitiakitanga and the Maori need or right to explain the meaning of kaitiakitanga in a particular matter, it is still an important starting point of reconciliation of the two worldviews within the RMA regime.

iii) Section 8

The next section in which Maori matters are included among the interpreting principles of Part II of the Act is section 8.\footnote{730} This section refers to the Treaty of Waitangi, or rather its principles:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development,
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and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

The requirement to include those Treaty principles into decision-making under the RMA is weaker than the above mentioned Maori matters under the provisions in Part II, such as kaitiakitanga. The obligation for those administering the Act is to “take into account” such relevant principles. The principles are not defined in the Act, so the case law from particularly the Court of Appeal and the findings of the Waitangi Tribunal must be analysed to find relevant principles in relation to each set of circumstances. What those principles generally include has been discussed above. Any relevant principle must, however, be applied in the context of the purpose of the Act. The Environment Court has held that, in taking into account the principles of the Treaty the decision-maker must weigh a matter with other matters being considered and, in making a decision, affect a balance of the matters at issue and be able to show that he or she has done so.

In Haddon v. Auckland Regional Council, the issue arose of how the words “take into account” in relation to “have regard to” were to be understood. The matter regarded allowance of extraction of 30 000 m³ sand from the bed of the sea (Auckland City Council was the applicant). The sand was to be used as replenishment of another beach in the region, one of Auckland’s most popular urban beaches. Haddon sought cancellation of the recommendation by the Auckland Regional Council to the Minister of Conservation for allowance of the extraction, and additionally evoked some procedural question pertaining to the Treaty of Waitangi. The question of ownership of the sea bed was (and is) not an issue under the RMA and could, thus, not be solved. Haddon argued that he and his hapu were the traditional kaitiaki over the resource and had been the guardians for six hundred years. Haddon declared that an Ngati Wai tradition holds that disturbing the resources of the sea is a serious breach of tikanga, tapu, mana and mauri. He was additionally concerned that the remains of his people buried in the sand hills were going to be placed on another tribe’s beach, which had previously resulted in tribal wars. He argued that the hapu should be able to exercise kaitiakitanga over the resource and give guidance on how and to what extent it should be developed.

The Court (Judge Kenderdine) stated that the requirement in section 8 of the RMA “to take into account” the principles of the Treaty indicates that a decision-maker must weigh the matter with other matters being considered. When coming to a decision the decision maker must affect a balance between the matters at issue and be able to show that he or she has done so. The Court also referred to R v. CD [1976] 1 NZLR 436, in which the Court of Appeal determined that the duty “to take into account” differs from its duty “to have regard to”. The wordings are not

731 See in subsection 3.1.1.4.
732 Haddon v. Auckland Regional Council [1994] NZRMA 49. For a brief summary of the case see subsection 3.1.1.3.
733 [1994] NZRMA 49 (Environment Court).
734 Ownership claims have to be brought before the Waitangi Tribunal, in civil jurisdictions or by means of negotiations with the Crown. See also Boast, Richard (2004) The Treaty of Waitangi and environmental law in Harris, Rob (ed.) Handbook of Environmental Law, p. 515.
735 A short explanation of the Maori words: customary values and practices, the sacred and spiritual quality, the right/authority to the area and the life force related to the area. See also glossary in Appendix 2 in Harris, Rob (ed.) Handbook of Environmental Law, pp. 579-580 and RMA s. 2.
synonymous and if the appropriate matters had to be taken into account, they must necessarily affect the judgment of the decision maker. In this particular case, only the general social concerns of the community had been taken into account, and the cultural concerns of the hapu and its relationship with traditional resources have not been weighted. As consultation is a principle of the Treaty Haddon should have been properly informed by all parties (Auckland City and Regional Councils) and consulted at the initial stages in the process. Haddon should have been a part of the process which formulated the application.

Furthermore, the Environment Court held in another case that the duty to “take into account” the principles of the Treaty does not require that Maori will decide who is to make up a consent committee, or that resource consent decisions are to be made on a marae by Maori in accordance with their laws and values.736 Moreover, section 8 has to be read and understood in the context of the whole of the RMA, and the principles balanced with other relevant matters.

To summarise the previous passage, section 5 provides the overarching purpose of the Act. In this respect, sections 6, 7 and 8 are only supplementary provisions guiding the interpretation of this purpose. This is particularly evident in relation to the initial wording of the sections; “[i]n achieving the purpose of this Act…”. These provisions are therefore means to accomplish the aim of promoting the sustainable management of resources, according to the legislature. Additionally, sections 6(e), 6(g), 7(a) and 8 are ranked among themselves by the different wordings of the sections, where, on a declining scale, the duties of decision-makers under the Act are stated.

Apart from the Maori matters included into these three sections, there are many other matters as well to bring into the balance in reaching a decision, for instance, in relation to a resource consent application. To use the concept of kaitiakitanga as an example, it is firstly restrained by the statutory definition, and secondly it is subordinate to the overarching purpose. Thirdly, kaitiakitanga is to be weighted together with the other matters stated in sections 6, 7 and 8, before a decision in a particular matter can be made. Indeed, this is not an easy or unproblematic task for a deciding authority.

There are numerous cases which involved the interpretation of the sections in Part II. Here, I will briefly summarise only a few of the cases to illustrate the complexity in reaching decisions under the Act. The hierarchy of matters was evident in the previously cited Haddon case737, which provided in particular acceptance of kaitiakitanga.738 On the whole, it provides a clear example of the provisions in Part II of the Act and how they relate to each other. First of all, the Environment Court739 noted that the geographical identity of the hapu was inextricably bound to the sands, and that the hapu should be able to exercise kaitiakitanga over the sand resource and give guidance on how it should be developed and to what extent. However, since the Court from the technical evidence did not find any long-term or potentially adverse effects on the environment related to the proposed sand extraction, the principles of sustainable

736 Otaraua Hapu v. Taranaki Regional Council, A124/98.
738 Although this case is prior to the amendment of the definition of kaitiakitanga it should still have relevance regarding the hierarchy of goals inherent in Part II of the RMA.
739 Previously the Planning Tribunal.
management pursuant to section 5 in the Act were not breached. In other words, the extraction of sand was well within the over-arching purpose of the RMA. The adverse effects argued by Haddon and his hapu were in the opinion of the Court overstated. Nonetheless, in the end of the judgement the Court noted that its decision might have been different if the resource would had been non-renewable.

Another case, *Purnell*, concerned insufficient consultation as an obstacle for the Environment Court to apply or have regard to in the context of sections 6(e) and 7(a). The hearing before the Court was adjourned to allow further consultation. At the resumed hearing, the Court concluded that the iwi’s opposition to the consent application, which concerned irrigation on farmland and consisted of views based on a strong spiritual affinity with the stream and associated catchments, could be met only on the basis of comprehensive conditions accompanying the consent. In this way, the iwi’s concerns and the promotion of the Act’s purpose could be met.

By this case, it is clear that the matters stated in sections 6 to 8 usually require that sufficient consultation take place with the iwi of hapu of the area. Otherwise, it may be difficult, or sometimes even impossible, for the deciding authority to weigh and balance the different matters properly in reaching a decision. And the decision in *Haddon* (in relation to section 8), referred to above, indicated strongly that the decision-maker must be able to show that he or she has weighed the different matters and achieved a balance of those matters. In this sense, it is an “open” balancing procedure that may be challenged before the courts.

Many cases concern claims of lack of consultation. *Director General of Conservation v. Marlborough District Council* concerned the importance of consulting with the tangata whenua in order for the consent authority to be able to recognise and provide for the matter in section 6(e) and make an informed decision. Without the consultation, the consent authority would not have adequate knowledge of the issues, held the Environment Court. The case regarded consent applications for two additional fish farms, and the iwi was concerned about the cumulative effects of so many farms and that it would interfere with the practical exercise of customary fishing rights. The Court upheld the appeal and cancelled the granting of the consent. The bay included large ecological values of national importance (preservation of the natural character of coastal environment), and the iwi’s culture and traditions were not equally recognised and provided for (national importance) in the Council’s decision.

Nevertheless, even though consultation is indeed important, in *Watercare Services Ltd v. Minhinnick* the Court of Appeal held that, in relation to section 8 and its reference to the Treaty principles, it does not “give any individual the right to veto any proposal”. Such veto-rights were seen as reducing the effectiveness of the Treaty principles, rather than to enhancing them. It has also

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740 Not unimportantly, there was also a potential for payment of royalties to the hapu for further extractions, which could be beneficial to them. However, whether the hapu was entitled to a share of the royalties was up to the Government to decide, not the Court.


742 Issues on consultation will be dealt with below under a separate heading. See under “Consultation Rights”.

743 W89/97.

744 [1998] 1 NZLR 294 (CA221/97). See also *Bleakley v. Environmental Risk Management Authority* [2001] 3 NZLR 213 where the High Court applied the case.
been held, also in relation to consultation, that, where there are overlapping claims of the area, as to whom were entitled to mana (and the role of kaitiaki), the forum for such claims is the Maori Land Court. The deciding authority (Regional Council) acted, thus, correctly when it avoided expressing any preference among the three iwi, and involving them all into the process. So, in relation to the application for a coastal permit to extract sand from a foreshore, the Environment Court found in relation to the requirement in section 6(e) that, as far as possible, it will avoid making any findings of who has particular tribal authority over the area in question.

It should be evident that interpreting the sections in Part II is difficult for the deciding authorities. It must be performed as an overall assessment of all relevant matters in each circumstance, requiring a balancing process to be done, and ensuring transparency regarding the outcome and the reasons for reaching the outcome. There are many different matters to be balanced, not only the Maori related matters, such as the Maori relationship with the ancestral nature, recognised customary activities, kaitiakitanga and the principles of the Treaty, but also environmental effects, the ecosystems and their intrinsic values, amenity values, the social, economic and cultural wellbeing of peoples and communities, maintenance and enhancement of public access to the coastal marine area, and protection of historic heritage, to mention a few. The list is long. The matters relevant for interpreting what a promotion of sustainable management of natural and physical resources means in any given situation are inclusive of all three commonly acknowledged aspects of sustainability: the ecological, economic and social/cultural aspects.

4.2.3.3 Means to Meet the Act’s Purpose

Although much already has been said above in relation to the Act’s integrated resource management, still some key features and mechanisms need to be explained further and concisely. The complexity of the statute and the difference in approach compared with the Swedish environmental law warrants a further explanation with regard to certain elements in order to understand the Act’s components and functions. Otherwise, it would be difficult to analyse and discuss the legislation in conjunction to the Swedish counterpart.

Below, I will address relevant key features and mechanisms through the following sub-headings: resource consents, planning instruments, public participation and control and enforcement mechanisms. In the final part of this subsection, I provide a short summary and comments on the various methods in reaching the purpose of the Act.

Before discussing the various means for reaching the purpose of the Act, I should mention a key phrase important for the more general interpretation of the Act. The phrase "use, development and protection" of resources, is used

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745 Tawa PN and Ngati H v. Bay of Plenty Regional Council, A18/95.
747 Compare primarily with subsections 8.2.1, 9.2.3, 9.3.2, 9.4.2 & 9.4.4.
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throughout the Act. The words imply that management includes all three elements, and emphasis on one of them depends upon the particular circumstance. This will, for instance, be relevant in decision-making related to applications on resource consents.

i) Resource consents

The requirements for obtaining a resource consent, a permit, are linked with the provisions set out in Part III of the Act. Part III is essential to the operation of the Act, since it lays down general restrictions relating to uses and activities. There are two presumptions guiding the provisions under Part III. One is where activities are presumed to be permitted unless they are restricted by a rule in a plan or a proposed plan. The other is where activities are presumed to be prohibited unless expressly allowed by a rule in a plan or a resource consent. Hence, in relation to a resource consent, if a specific activity is not labelled as “permitted” in a regional plan, the activities within that region are controlled by the provisions under Part III and consent may be needed from the regional council. The quality and extent of the regional and district plans are, hence, of utmost importance, since the decisions on granting resource consent are made on their basis.

The restrictions and requirements under Part III focus on certain natural elements, such as land use (including subdivision of land), use of coastal marine area (including river and lake beds) and uses related to water. There are also supplementary provisions with general duties laid down that aim at minimising certain unwanted environmental aspects/effects, including discharge of contaminants to air, land and water, noise, and adverse effects on the environment. As a result, on a general level, compliance with the provisions related to land, coastal marine area and waters do not avoid the need to comply with, for instance, the duty to avoid, remedy or mitigate any adverse effects as required by section 17. However, a violation of section 17 does not constitute an offence against the Act, nor does it create a new civil law duty. Other provisions in Part III are enforced in a manner that their breach is considered to be an offence (see below). Nonetheless, they are to be understood as public law

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748 The presumption for activities referable to sections 11-15C (for instance water use and uses within coastal marine areas) is that consent must be applied for. In relation to sections 9-10 (land use) the presumption is reversed; an activity is allowed unless the activity contravenes a rule in a district plan). See also Harris, Rob (2004) Policy statements and plans in Harris, Rob (ed.) Handbook of Environmental Law, p. 78.

749 RMA ss. 9-11.

750 RMA ss. 12-13.

751 RMA s. 14.

752 RMA ss. 15-15C & 16-17. With the new Foreshore and Seabed Act 2004 and the issue of Maori customary rights related to foreshore and seabed, two new sections has been incorporated into the Act (ss. 17A-17B). They will be discussed further below in section 4.3.

753 Compare RMA s. 338 (applies also to s. 16). S. 17(2) states that the duty "is not of itself enforceable against any person, and no person is liable to any other person for a breach of that duty". Note, thus, that s. 17 only occasionally have significance, as a factor to take into account in resource consent decisions.
regulation and are not directly enforceable through a civil action for damages by any private person.\textsuperscript{754}

Generally, the RMA lacks references to the environmental law principles with which the Swedish environmental law and, to some extent, the EC Environmental law are familiar, such as a precautionary principle. However, in a general sense, section 17(1), which aims at avoiding, remedying or mitigating any adverse effects on the environment, includes precautionary aspects.\textsuperscript{755} The RMA also includes a requirement in section 16 on adopting the “best practicable option” in relation to reduction of noise emissions, where land occupiers and persons carrying out activities are to adopt the best practicable option to ensure that the noise emissions from land or water do not exceed reasonable levels.\textsuperscript{756} “Best practicable option” is simply the best method for preventing or minimising the adverse effects on the environment.\textsuperscript{757} For discharge of contaminants into air, land and water the consent authority may require the holder of a resource consent with regard to discharge permits and coastal permits to adopt the “best practicable option” to prevent or minimise any actual or likely adverse effect on the environment of the discharge.\textsuperscript{758} However, it should be noted that the provisions related to “best practicable option” have not been very important.

There are five types of resource consents stated in the RMA: land use consent, subdivision consent, coastal permit, water permit and discharge permit.\textsuperscript{759} Where an activity is not directly permitted it is necessary to obtain a resource consent under Part VI of the Act.\textsuperscript{760} Here, above all, the regional plans are essential. The labelling of activities determines, for instance, whether it is even meaningful to apply for a consent. In the Act, activities are broken down into different categories with different levels of controls attached.\textsuperscript{761} These categories are activities

\textsuperscript{754} This follows from s. 23(2) which states that “the duties and restrictions described in this Part shall only be enforceable against any person through the provisions of this Act; and no person shall be liable to any other person for a breach of any such duty or restriction except in accordance with the provisions of this Act”.


\textsuperscript{756} RMA s. 16(1). Local and consent authorities can still prescribe noise emission standards in plans or resource consents granted. See s. 16(2). The question of what is a reasonable level of noise will, according to court law, depend on fact, degree and on context. See here Williams, David (1997) Environmental and Resource Management Law in New Zealand, p. 98.

\textsuperscript{757} For a full definition see RMA s. 16. In determination of the best method the current state of technical knowledge shall, among other things, be regarded – as well as financial implications.

\textsuperscript{758} RMA s. 108(2)(c). See also RMA s. 108(8). The consent authority must assess certain circumstances before deciding such conditions, including an overall assessment whether the inclusion of the conditions is the most efficient and effective means of preventing or minimising any actual or likely adverse effect on the environment. Note that there are also detailed prerequisites laid down stating when consent authorities must not grant a discharge permit or a coastal permit. See s. 107.


\textsuperscript{760} Applications shall be made in a prescribed manner, set out under regulation. See Harris, Rob (2004) Making applications and submissions in Harris, Rob (ed.) Handbook of Environmental Law, p. 139.

\textsuperscript{761} For instance the categories determine the level of environmental impact assessment to be made. See below.
permitted, controlled, restricted discretionary, discretionary, non-complying and prohibited\textsuperscript{762}.

When a specific activity is prohibited in a plan, one can not apply for a resource consent. Regarding permitted activities there are no requirements for obtaining a consent\textsuperscript{763}. Where activities are categorised as controlled, discretionary or non-complying in a plan, a person must apply for a consent. Moreover, “recognised customary activities”, such as Maori customary uses in foreshore and seabed, are protected from effects arising from activities to a certain degree. There are general restrictions for consent authorities not to grant a consent that “will, or is likely to, have a significant adverse effect on a recognised customary activity”\textsuperscript{764}.

Strict standards apply to what a consent authority must consider in relation to an application, which includes, for instance, actual and potential effects on the environment, provisions in national, NZ coastal and regional policy statements, plans and any other matter relevant and reasonably necessary to determine the application\textsuperscript{765}. The provisions under Part II of the Act shall always be basic provisions, since there is a reference to the matters stated “subject to Part II”. When deciding on whether to grant a consent, the consent authority may set certain conditions accompanying the grant to promote the sustainable management of resources\textsuperscript{766}. The duration of consents differs due to the different categories and whether the grants specify a certain time-period of the consent\textsuperscript{767}. Reviews of consent conditions are made by the consent authority\textsuperscript{768}.

An application for resource consent must always include an environmental impact assessment, or, in the words of the RMA, an “assessment of environmental

\textsuperscript{762} RMA ss. 104(5) & 2. Se also Harris, Rob (2004) Resource consents and monitoring in Harris, Rob (ed.) Handbook of Environmental Law, pp. 88-89.
\textsuperscript{763} Permitted activity rules in plans typically have standards and terms attached that must be met if the activity is to meet the test of being permitted. See Harris, Rob (2004) Development v Protection, p. 88.
\textsuperscript{764} RMA s. 107A(1) (emphasis added). However, the holder of the customary rights order can give written approval for the proposed activity (s. 107 ). Such approval will have the effect of suspending or cancelling, in whole or in part, the customary rights order (s. 107C). The holder must then also apply to cancel the order under the provision in the Foreshore and Seabed Act 2004 (s. 107D), and if such application is declined the resource consent in question has no effect. There are exemptions for the restriction not to grant a consent, such as infrastructure work or maintenance work (s. 107B). In the assessment of “significant” effect the consent authority must consider certain matters, among other things, the effects of the proposed activity on the recognised customary activity and the degree to which the recognised customary activity must be carried out to the exclusion of other activities (s. 107A(2)).
\textsuperscript{765} RMA ss. 104(1)-(3).
\textsuperscript{766} RMA ss. 108 & 2. See also ss. 104A-104D.
\textsuperscript{767} Generally consents can be either unlimited in time (for instance some land use consents and subdivision consents) or allow duration of maximum 35 years (coastal permits, water permits and discharge permits). See RMA s. 123. The consent lapses on the date specified in the consent or 5 years after commencement (if no date is specified), see s. 125. In order to change the duration, a new consent must be applied for, see s. 127(1) e contrario. See also Harris, Rob (2004) Resource consents and monitoring in Harris, Rob (ed.) Handbook of Environmental Law, pp. 90-92.
\textsuperscript{768} RMA s. 128. Reviews can be made subject to conditions attached to the consent or primarily to deal with any adverse effects on the environment that may arise from the activity. See also ss. 129-132.
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effects” (AEE).760 The provisions of an AEE are, however, not straightforward770. There are no mandatory rules on how the process must be carried out771 or what the final report must include772. Schedule 4 of the RMA includes provisions related to AEE; and refers to “[m]atters that should be included” or “[m]atters that should be considered”773. Generally speaking, the application must include an AEE “in such detail as corresponds with the scale and significance of the effects that the activity may have on the environment” 774. The legal requirement of the assessment report is difficult to measure, and, I would say, not very high. Ultimately, it is the consent authority that has the responsibility to assess whether sufficient detail and information has been provided by the applicant. In practice, an unsatisfactory AEE leads to requests from the consent authority for further information. The applicant for a resource consent may refuse to provide more information if requested by the consent authority. The consent authority may then decline the application.775 Even though the applicant may be assisted by the authority, the onus to manage the application remains with the applicant.776

There is one exemption to the moderate requirements on the assessment relating to “recognised customary activities”; an AAE, “where a recognised customary activity is, or is likely to be, adversely affected”, must include “a description of possible alternative locations or methods for the proposed activity”777. Regarding Maori interests, effects on Maori communities and Maori cultural values are clearly within the matters that should be considered in the AEE. Ideally, the assessment should include an analysis of relevant provisions in Part II, which among other things, encompass references to Maori cultural values, how the consent would affect “matters of national importance”, “other matters”, and the treaty principles778. Yet, there are no obligatory requirements on having these matters assessed, except for recognised customary activities. Applications for resource consents are subject to a specific notification process, that is, they are publicly notified or not. The decision by the consent authority on whether to notify the public of an application is complex, although section 93 seems easy enough. Only applications for controlled activities and

770 For more information see Harris, Rob (2004) Assessment of environmental effects in Harris, Rob (ed.) Handbook of Environmental Law, pp. 100-105.
771 Consultation, submissions and hearings are explained below under the sub-heading on public participation.
772 Schedule 4 is seen as providing general guidance. See Harris, Rob (2004) Assessment of environmental effects in Harris, Rob (ed.) Handbook of Environmental Law, p. 100.
773 Compare cls. 1 & 2 of the Schedule.
774 RMA s. 88(2)(b).
775 RMA s. 92A(1)(c) and 92A(3).
776 Without an AEE the application is incomplete. See RMA s. 88(3)-(4). See also Harris, Rob (2004) Assessment of environmental effects in Harris, Rob (ed.) Handbook of Environmental Law, pp. 104-105.
777 Schedule 4, cl. 1A. This applies unless written approval has been given by the holder of the customary rights order.
where the authority is satisfied that the adverse effects of the activity will be minor are exempted from notification, submissions and hearings. Only about five per cent of all consent applications are required to give public notification.

ii) The planning instruments

Previously, I described the Act’s planning system and the different planning instruments in some detail. As seen above, one of the most important features of the RMA is its planning system, how it links between different levels of government and how it links with applications for resource consents. Hereunder, I explore further some relevant provisions for promoting the purpose of the RMA and the integrative approach of resource management.

The role of the national environmental standards and national policy statements should be very important, not least since they are the initial links of the hierarchal planning structure and a part of the backbone of the RMA; The fact that virtually none of them has been made leaves a considerable gap between the levels. A lack of, or insufficient national environmental standards and national policy statements, signifies that it is difficult to ensure a consistent interpretation and implementation of the Act, above all leading to diverging plans and rules at the local levels.

Rules in plans are the predominant method of implementing objectives and policies for local authorities. Anyone who wants to carry out an activity must not only comply with the provision in the present regional/district plan, but also the provision of a proposed plan, if relevant. Nonetheless, there is a range of other possible approaches to achieve the Act’s purpose, such as the use of economic instruments, information, education, transfer of functions and voluntary partnerships, may also be used.

Thus, plans and regional policy statements (including proposals) are the key planning instruments to be used by local authorities when interpreting their resource management functions. The regional policy statements include first and

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779 See also s. 94C(2) where a consent authority can, on the basis of “special circumstances” notify an application. An applicant may also request that the application become notified. See s. 94C(1).


781 See in subsection 4.2.3.1 and iii).


783 When making such rules the regional council and territorial authority shall have regard to actual and potential effects on the environment, particularly adverse effects. See RMA ss. 68(3) & 76(3).

784 In the case of conflict between old and new plans, the stage of the proposed plan is of most relevance; the closer it gets to be operational to more likely is it to render great weight, especially where there is no comparable provision in the old plan this becomes very relevant. See Harris, Rob (2004) Policy statements and plans in Harris, Rob (ed.) Handbook of Environmental Law, p. 83. However, under s. 20A certain existing lawful activities are allowed to continue despite new/amended rules in proposed plans.

785 For instance, covenants and assistance with property management.

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foremost statements of the main environmental issues within the region. Secondly, they include policies regarding how the regional council wishes to solve these identified issues. The regional and district plans, in turn, put more emphasis on the issues identified by the policy statement and describe how the issues should be managed and how to meet applicable standards.\footnote{See Harris, Rob (2004) Policy statements and plans, pp. 77-78.} Particularly, regional plans can be very comprehensive documents, often including several hundred pages.\footnote{The regional plan of Environment Waikato (a regional council) is often referred to as a good example. They are now in a process of reviewing their plan. For more information see \url{http://www.ew.govt.nz/policyandplans/wrpintro/index.htm} (viewed at 2005-11-14).}

Through an amendment in 2003, regional policy statements and plans can be combined. For instance, one document can state the provisions of both the region and the district.\footnote{RMA s. 78A.}

Plans and regional policy statements are in force for a ten year period. However, they are commonly reviewed and changed before the expiry date. These reviews and subsequent changes are the main tool for updating relevant environmental issues, objectives, policies or methods as they may incorporate new information obtained through, for instance, experience, research and monitoring.\footnote{See Harris, Rob (2004) Policy statements and plans, p. 77.} There are possibilities for persons to make a written request for a change in regional and district plans.\footnote{Schedule 1 cl. 21. The local authorities must accept or reject (in part of whole) such a written request within a certain timeframe and may also in the decision process require the person to provide further information to gain better understanding of the basis of the persons' request. The authority can only reject a written request under certain circumstances, such as if the request is not in accordance with a sound resource management or if a plan has been operative less than two years. See Schedule 1 cls. 23-25.}

Through section 32, the RMA imposes a duty on the Ministers for the Environment and of Conservation, local authorities and the Environment Court\footnote{Through an appeal of a plan the Environmenta l Court has the same powers and duties as the local authority in relation to duties imposed by s. 32. See Schedule 1, cls. 14-15.} to consider alternative methods, assess the benefits and costs of methods and ensure that the requirement adopted is needed, appropriate and effective.\footnote{The assessment must also take into account the risk of acting or not acting if there is uncertain or insufficient information. There is a requirement of special attention of far-reaching rules in plans, see s. 32(3A). Case law has also made it clear that the more constrains on the freedom of resource users, the more thoroughly the assessment needs to be. See Harris, Rob (2004) Policy statements and plans, p. 86 where he refers to \textit{Capital Coast Health v. Wellington City Council} W101/98. Although the duty to perform the assessment in section 32 is clear, the process is not. The content of the assessment report is not either clarified in the Act or schedules under the Act, it is merely stated that the report must summarise the evaluation and give reasons for that evaluation. The report shall be publicly available. The local authorities must monitor and report, at least every five years. See also below on environmental information.}

The purpose behind this section was to bring strengthened firmness into policy and plan making as well as to reduce the costs of environmental regulations.\footnote{See Hughes, Phil (2000) The Contribution of the Resource Management Act 1991 to Sustainability- A report card after eight years, p. 146.} This duty is especially evident when preparing or changing plans, policy statements (regional, national and coastal), national environmental standards or regulations. An assessment shall then be made (“a section 32 report”).\footnote{This could in certain respects be understood as a strategic environmental assessment. However, the “section 32-report” includes an assessment of economic efficiency not only environmental}
For preparation and changes of plans, there is a specific provision related to “recognised customary activities” that provides legal protection for the continuance of the customary rights. Local authorities must not include rules in plans that classify a specific activity as a permitted activity if that activity will, or is likely to, have significant adverse effect on such customary activity. Hence, there is a threshold to be met here: the customary activities are only protected from significant adverse effects (or likely significant adverse effects). Any holder of such recognised customary can also challenge rules and ultimately apply to the Environment Court for a change of such rule, including proposed plans. The assessment (by the local authority or the Environment Court) must include certain matters, such as consideration of the effects of the proposed activity on the customary activity; the degree to which the recognised customary activity must be carried out to the exclusion of other activities; and whether the customary activity can be exercised only in a particular area.

iii) Public participation and rights to appeal

Public participation in decision-making is a key component of the Act and was strengthened through the enactment of the RMA. In some ways, the provisions on participation can be regarded as idealistic. For instance, in preparation of district plan, it is assumed that businesses, individuals, and community groups will participate in the development. Provisions for open participation with regard to submissions and hearings in policy and plan development are further examples. Iwi authorities have also been awarded greater input in environmental proceedings through extensive consultation.

As the result of a recent amendment, it is now explicitly stated in the Act that, in relation to a resource consent application, neither the applicant nor the local authority has a duty to consult Maori or iwi authorities about the application. This is also evident in relation to the AEE, in which the applicant should identify the persons affected by the proposed activity, such as iwi or hapu, yet there is no obligation to consult such persons, even though consultation may be done. Instead, submissions on the application can be made and Maori may also put forward their views during a hearing. This must be seen as a departure from normality within New Zealand law, where otherwise Maori commonly are to be consulted on decisions that might affect them (usually in relation to references considerations. See also Fookes, Tom (2000) Environmental assessment under the Resource Management Act 1991 in Memon, P. Ali & Perkins, Harvey (eds.) Environmental Planning and Management in New Zealand.

These rules are a result from the ongoing debate on Maori rights to foreshore and seabed and the new Foreshore and Seabed Act 2004, which amended several provisions in the RMA.

RMA s. 85A.

RMA s. 85B.

RMA s. 85B(2).


For further information on consultation see below under “Consultation under the RMA”.

RMA s. 36A. See further below under “Consultation with Maori under the RMA”.

Schedule 4, cl. 1(b) & 1AA.
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to the Treaty principles in legislation. In Swedish law the applicant shall consult all persons that are particularly concerned (särskilt berörda)804.

Under the Act, there are two main processes where provisions support public participation generally, one is through resource consent applications and the other through policy and plan processes. In both approaches, submissions and hearings are the main tools for participation. The provisions are largely the same for both of these tools, whether concerning consent application or policy and plan preparation805. The design and form of the hearing is subject to other provisions806. During the hearing, the committee shall, where appropriate, recognise tikanga Maori (Maori customs) and receive evidence written or spoken in Maori. The hearing committee shall also avoid all unnecessary formality.807 Apart from the applicant, only those persons who have made written submissions may speak at the hearing and offer evidence808. Moreover, a submission forms the basis for the oral evidence in a hearing809. Thus, making submissions has essential legal implications, including the right to appeal.

Regarding resource consents, only notified applications are open for public participation, a small minority of all resource consent applications. Thus, the notification has important legal implications for the possibility of public participation. This notification decision by the consent authority can not be appealed810. When notification is not required the consent authority must still “serve notice” of the application to all persons that, in the opinion of the consent authority, may be “adversely affected” by the activity.811 Such persons include owners and occupiers of land and additionally any other person likely to be directly affected by the proposed activity, such as neighbours and iwi. The process after a consent application has been lodged at the consent authority includes submissions, perhaps pre-hearings and mediation812, and a hearing before the final decision on the application is made813. Everyone can make submissions on notified applications, and those persons served notice (a non-notified application) can make submissions814.

804 See below in subsection 9.4.2.
805 See for instance on hearings RMA ss. 39–42 and Schedule 1 cl. 8B.
806 RMA s. 41 and the Commissions of Inquiry Act 1908.
807 RMA s. 39(2).
808 RMA s. 40.
810 RMA s. 296. See also Sutherland, Nancy & Chapple, Keith (2004) Judicial review in Harris, Rob (ed.) Handbook of Environmental Law, p. 167. The only way presently to challenge the decision is through judicial review (examination of the correctness of the process) in the High Court. Note that a change is on its way, allowing the Environmental Court power to hear appeals.
811 RMA s. 94. Here the authority is helped by s. 94B which states certain criteria. The holder of a customary rights order must, for instance, be treated as adversely affected if the proposed activity may adversely affect that customary activity. Furthermore Schedule 11 and the list of Treaty settlements (statutory acknowledgements) must be regarded.
812 Mediation can take place between the applicant and person(s) who has left submissions.
813 RMA ss. 96, 99, 99A & 100. The hearing commission makes a recommendation on the decision to the local authority and the authority should issue the decision within 15 workingdays. See futher in Chapple, Keith & Sutherland, Nancy (2004) Participating in public processes in Harris, Rob (ed.) Handbook of Environmental Law, pp. 47-50.
814 RMA s. 96 (adversely affected persons).
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Generally, hearings are held for notified applications and are normally open to the public. Hearings may also be held for applications not notified, but then only adversely affected persons are involved.\(^{815}\) On the whole, public participation is complicated, since more than one resource consent might be needed for the same activity both from territorial authority and the regional council.

The other main process including provisions on public participation is in relation to policy statements and plans. After public notification of the proposal anyone may make written submissions, including iwi authorities and hapu, and any one who made a submission has a right to be heard at the hearing.\(^ {816}\) The different planning instruments have slightly different processes, and the participation process for plans and regional policy statements are the most extensive. The form is set out in Schedule 1 of the Act. This process provides for further submissions in response to submissions made by others. In this sense, a debate may develop which contributes to the oral submissions at the hearing.\(^ {817}\) During the preparation, the local authorities also have a duty to consult with iwi authorities\(^ {818}\).

Regarding the national environmental standards, the public and iwi authorities must be notified of the proposal and be given time and opportunity to comment on the proposed standard\(^ {819}\). Generally, the process for participation in relation to the planning instruments takes considerably longer time than the resource consent process, not at least because of the complexity of the planning documents\(^ {820}\).

One prerequisite for effective participation is access to adequate and relevant environmental information. The local authorities have a general duty to gather environment information and to undertake or commission any research necessary to carry out its functions effectively under the Act\(^ {821}\). The local authorities shall make environmental information available for the public, and the information that must be kept is listed in detail\(^ {822}\). In relation to hearings, a local authority can withhold sensitive information to avoid serious offence to Maori customs and rights, to avoid the disclosure of the location of sacred places, or to avoid disclosure of trade secrets\(^ {823}\). Otherwise, private or commercial details may be withheld from the public based on criteria in the Privacy Act 1993 and Official Information Act 1982.

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\(^{815}\) A hearing must not be held unless the consent authority considers it necessary or if a person who made a submission requested to be heard. See RMA s. 100.

\(^{816}\) RMA ss. 39-42, 48-50, 57, 60, 64, 73 & Schedule 1 (cls. 6-8B). Note that for national policy standards the Minister may chose between two processes, but both include equal focus on the public participation aspect. See s. 46A(1).

\(^{817}\) Schedule 1 cl. 8. See also Chapple, Keith & Sutherland, Nancy (2004) Participating in public processes in Harris, Rob (ed.) Handbook of Environmental Law, p. 48.

\(^{818}\) Schedule 1, cl. 3(1).

\(^{819}\) RMA s 44. A report, which shall be publicly notified, shall be made to the Minister including these comments and general recommendations.


\(^{821}\) RMA s. 35(1).

\(^{822}\) RMA s. 35(3)-(5).

\(^{823}\) RMA s. 42(1).

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There is a right to appeal a decision on resource consent to the Environment Court. The right is linked to any submissions made. The appeal can include the whole decision or only a part of it (this right includes also changes or review of resource consents, if submissions are made). Hence, individuals, iwi authorities, and environmental organisations, among others, may appeal an adverse decision. A principal concern of individuals, community groups, and environmental organisations, among others, is, however, that involvement in resource consent issues may include expenses. There is a potential for having costs awarded against them by the Court. Groups, such as iwi and hapu, can apply for funding from the Environmental Legal Assistance Fund with the aim of helping groups to participate in resource management issues, but it does not cover costs awarded by the court. However, the Fund promotes environmental public interests rather than private interests.

Similarly, the right to appeal decisions to the Environment Court on regional policy statements and plans is linked to earlier submissions. All the appeals are lodged with the Environment Court, an expert court that derives its power from the RMA, like other New Zealand courts. The Environment Court is not bound by the general rules of evidence in judicial proceedings, although it may receive any evidence that it considers appropriate, as well as request evidence that will assist the Court, including written or spoken evidence in the Maori language.

The Environment Court has the power to confirm, amend, or cancel a decision that has been appealed. The Court also has powers to direct a local authority to amend policy statements or plans if necessary. Moreover, if the Court finds that a regional policy statement or plan before them departs from a “higher” planning instrument, the Court may allow the departure to remain only if is of minor significance and does not affect the general intent and purpose of the regional policy statement or plan. This provides for an examination and correction of the planning hierarchy of the Act. Decisions of the Environment Court can be appealed to the High Court by any party to the case.

iv) Control and enforcement mechanisms

824 RMA s. 120. See further in Skelton, Peter (2004) Advocacy and evidence: the appeal process in Harris, Rob (ed.) Handbook of Environmental Law, pp. 153-165.
825 See RMA s. 2 for definition on “person”. The appeal shall be lodged within 15 working days (s. 121).
826 Individuals may apply for civil legal aid. See further in Chapple, Keith & Sutherland, Nancy (2004) Participating in public processes in Harris, Rob (ed.) Handbook of Environmental Law, pp. 53-54.
827 The Fund is administred by the Ministry for the Environment. Fundings covers costs for using lawyers, experts, photocopying, etc. Applications must be made beforehand. See Chapple, Keith & Sutherland, Nancy (2004) Participating in public processes in Harris, Rob (ed.) Handbook of Environmental Law, pp. 52-53.
828 Schedule 1 cl. 14(1)(2).
829 Its name was the Planning Tribunal before it was renamed in 1996.
830 RMA s. 276.
831 RMA s. 290(2).
832 RMA s. 293(1)-(2).
833 RMA s. 293(3)-(5).
834 RMA s. 299.
Altogether, this system with different categories of activities relevant for resource consents and their correlation with the rules in plans, explains why the content of plans is so crucial for the sustainable management of resources. In a sense, the hierarchy of the planning instruments is a form of statutory control of congruence and compliance at lower levels. The functions and powers have through the Act been delegated to the regional councils and territorial authorities, leaving a rather large margin of discretion to the local authorities, although restrained by the various planning instruments and, of course, the provisions in the Act itself. However, there is an important control mechanism for the central government where a local authority is failing to perform its functions, powers or duties under the RMA. The Minister for the Environment can then appoint someone to perform part or all of the authority’s responsibilities\(^{35}\).

The RMA includes powers for local authorities to transfer the control and management of council-owned land to iwi that is of importance to them. To clarify, there may be a transfer of RMA powers, but no transfer of ownership. Where the local authority has made such transfers to an iwi authority through an agreement, the local authority may still change or revoke the transfer at any time, which also must be understood as a means of control.\(^{36}\) Although transfers of powers have been rarely delegated to Maori organisations\(^{37}\), it is interesting to notice that there are few exceptions concerning what functions, powers and duties that a local authority can delegate to an iwi authority.

Since August, 2005, local authorities may also arrange “joint management agreements” with iwi authorities or groups that represent hapu.\(^{38}\) Such agreements include specified natural or physical resources in the whole or parts of a region or a district. The resources shall be jointly managed and the functions, powers or duties laid down under the RMA must, accordingly, also be specified in the agreement. A joint management agreement must, nevertheless, meet the requirement of being an efficient method of performing or exercising functions, powers or duties of the local authorities under the RMA. Importantly, there are very few exceptions for what a joint management agreement may include or encompass.

Otherwise, there are a number of mechanisms in the RMA that aim to enforce the purpose of the Act, such as enforcement orders, abatement notices and penalties.\(^{39}\) An enforcement order is an order made by the Environment Court, for instance to require a person to cease an action or require a person to do something to ensure compliance with chiefly the Act, regulations or plans.\(^{40}\) An enforcement order can also give effect to the general duty in section 17 to avoid, remedy or mitigate any adverse effects on the environment.\(^{41}\) Local authorities,

\(^{35}\) RMA s. 25(1)-(2). Note that this section seems not to have been used so far.
\(^{36}\) RMA s. 33.
\(^{38}\) RMA ss. 36B-36E & 2.
\(^{39}\) See further in Harris, Rob (2004) Reviews, appeals, offences and enforcement procedures in Harris, Rob (ed.) Handbook of Environmental Law, pp. 113-116.
\(^{40}\) RMA ss. 314-320.
\(^{41}\) RMA ss. 314 & 17(3).
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consent authorities or any person may apply to the Environment Court for an enforcement order. In this respect, a fixed duration of a resource consent does not hinder the Environment Court from changing or cancelling a resource consent by an enforcement order. An abatement notice is very similar to an enforcement order, except that it is decided by an enforcement officer of a regional council. The abatement notice can be appealed to the Environment Court, so where a council is concerned about ongoing environmental effects and non compliance it will normally apply for an enforcement order to avoid an appeal.

The Act includes a list of offences, which include a majority of the provisions in Part III of the Act duties and restrictions in relation to land, subdivision, coastal marine area, beds, waters and discharge of contaminants. The penalties are also listed. For instance, any offence against the provisions in Part III may lead to imprisonment for a maximum of two years or fines.

Finally, I will shortly summarise the primary functions of the RMA and give some comments. The strength of the RMA is its provisions on plans and the requirements on resource consent, which direct the environmental restrictions and requirements nationally and in more detail for each region. It is also flexible in the sense that there are many “informal” means to meet the purpose of promoting sustainable management of resources, such as education and voluntary agreements, where suitable. Local authorities may also transfer functions and powers under the RMA to iwi authorities, as well as enter into joint management agreements with iwi and hapu. The focus on effectiveness and efficiency is also evident in the Act, particularly in relation to the section 32-report. The strengthened public participation is also a way to make the functions of local authorities and central government more effective in relation to the Act’s purpose. Given participation through written submissions, the possibility for lodging appeals to challenge parts or the whole of decisions is wide.

Despite lack of substantive guidance on AEE process or forms and conditions for consultation with iwi, there is extensive case law on these matters, which puts some flesh on the bones of the statute. The new rules relating to recognised customary activities provide for recognition and protection of such activities in various situations. They are a both part of Part II (of national importance) as well as subjected to explicit protection if affected, for instance, in relation to resource consent applications. On the whole, Maori issues are promoted throughout the Act, which provides for some substantive rights and recognition of customary activities, but foremost through consultation requirements.

842 RMA s. 316.
843 RMA s. 133.
844 RMA ss. 322-325 & 38.
845 A person affected by an enforcement order may apply for a change or cancel of the order before the Environment Court. See s. 321. See further in Harris, Rob (2004) Reviews, appeals, offences and enforcement procedures, pp. 113-114.
846 RMA s. 338.
847 RMA s. 339. For more information, for instance on the Act’s strict liability, see Harris, Rob (2004) Reviews, appeals, offences and enforcement procedures in Harris, Rob (ed.) Handbook of Environmental Law, p. 115.
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4.3 Environmental Requirements on Maori Land and Natural Resource Uses

Generally, the right to govern Maori traditional uses or land and natural resources is understood to be an exercise of the sovereignty granted by Article 1 of the Waitangi Treaty. The local authorities’ powers, functions and duties with respect to the provisions of the RMA are, thus, imposing controls on Maori lands and customary activities. Minister of Conservation v. Southland District Council\(^{848}\), the SILNA case, addressed the imposition of environmental controls on Maori activities.

The case concerned whether Maori lands, granted under the South Island Landless Natives Act 1906 (SILNA) and exempted from restrictions on sustainable management relating to indigenous forests under the Forests Act 1949, were exempted from the provisions of the RMA. The Environment Court held that such Maori land is not exempted from the provisions in the RMA, for instance, to apply for a resource consent before logging The decision imposed some costs and uncertainty regarding whether a particular application will be granted or refused. Consequently, the Court clarified that the making of a rule in a district plan restricting the use of Maori land is an exercise of the Crown’s Treaty right to govern and, in the RMA, is delegated to local authorities.

Maori land owners are naturally subject to the provisions of the RMA; uses of waters, coastal areas and land need approval by the provisions in Part III under the RMA. Usually, activities require a resource consent. The few general provisions, such as the duty to avoid, remedy or mitigate any adverse effects or the duty to reduce noise emissions, are not really given any weight in practice, although they are generally applicable. It has also been explained above that the RMA contains a provision stating that compliance with the requirements under the Act do not remove the need to comply with other requirements under other statutes and regulations. Thus, we have a parallel application of legislation concerning land and natural resource uses, with the RMA and the Fisheries Acts, as one example.

In more detail, the customary activities related to water are subject to the RMA provisions relating to water use, which are rather strict. Use of water requires primarily compliance with a rule in a regional plan or a resource consent. is the RMA does, however, permit taking or using freshwater for reasonable individual domestic needs and for the reasonable needs of an individual’s animals for drinking, as long as the taking or use does not, or is not likely to, have an adverse effect on the environment\(^{849}\). For geothermal waters, including the water, heat or energy, the same provisions apply. Such use is permitted as long as it does not have an adverse effect on the environment and additionally, if the use is in accordance with tikanga Maori (Maori custom and methods) for the communal benefit of the Maori of the area (tangata whenua).\(^{850}\) Observe here that, in relation to Maori geothermal water uses there is no requirement to take into account likely adverse effects of the environment, only adverse effects.

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\(^{849}\) RMA s. 14(3)(b). Similar exceptions apply to coastal waters if used for individual and reasonable domestic or recreational needs. See s. 14(3)(d).

\(^{850}\) RMA s. 14(3)(c).
Waters and their qualities as chiefly a food source, transportation and intrinsic spirituality have always been, and still are, important to Maori. Many customary activities are therefore associated with water uses of different kinds, such as the use of geothermal water. There are also important Maori customary activities related to the foreshore and seabed area, which, for instance, may relate to gathering of marine resources.

As said before, the new *Foreshore and Seabed Act 2004* has led to amendments of the RMA in relation to Maori customary uses in those areas. Such customary uses are acknowledged in the RMA as a “recognised customary activity” and are recognised through an order. These activities may be carried out despite the restrictions and duties laid down in sections 9 to 17 in the Act. Such activities might also be exempted from rules in plans or proposed plans. These exemptions, however, only apply if the activity is in accordance with any controls imposed by the Minister of Conservation.

The Minister may, under the provisions in Schedule 12, impose term standards and restrictions on a recognised customary activity. Such controls may, nonetheless, be made only if the Minister considers that the activity has, or may have, a significantly adverse effect on the environment and where it is necessary to avoid, remedy or mitigate such significant adverse effect arising from of the activity. Such restrictions may be imposed if the controls will not prevent the activity, are reasonable, and are not unduly restrictive. Furthermore, any controls must not be imposed before an “adverse effects report” by the Minister or the regional council and consultation has been made.

Maori fishing is also important, whether commercial or customary. Fishing is managed under the *Fisheries Acts*, which applies to marine fisheries and customary fishing, and the *Conservation Act 1987*, which applies to freshwater fisheries, in a rather complex way as briefly described previously. I have also referred to the two customary fishing regulations for North and South Islands above. If these specific regulations do not include sufficient means for sustainable management of the fishing or certain fish species, the Governor-General can issue regulations aiming at sustainability measures. Such regulations may also restrict customary fishing methods, for instance, prohibiting netting during certain seasons.

As another example of control of customary fishing, the mataitai reserves (specifically identified traditional fishing grounds), managed under regulations, is controlled by the Minister of Fisheries. The Minister has means to step in if the reserve is not managed properly to restore sustainable management of the fisheries resources. The Minister can cancel the appointment of the kaitiaki as an ultimate mean to restore sustainable management of the fisheries resources. The Minister has also a general obligation to assist the kaitiaki to secure a proper

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851 RMA s. 17A(1).
852 RMA s. 17A(2).
853 Schedule 12 cls. 2-4.
854 The manner in which an assessment and report should be conducted are set out in cls. 6-11 in Schedule 12. See also RMA s. 17B(1).
855 Fisheries Act 1996 s. 298.
856 *Kaimoana Regulations* reg. 34(1)-(6) & *South Island Regulations* reg. 31 (see also reg. 30). For more information see above in subsection 3.2.2.3.
administration of the regulations, including developing a management strategy to apply within the reserve if the customary food gathering is not sustainably managed.857

Regarding customary fishing, there is an additional issue regarding different species of fish. In the McRichie case858, the fishing of trout, an introduced species, was found to be subject to a specific regulatory regime. This meant that, in order to fish for trout, Maori fishermen needed a fishing licence. In practical terms, this means that, if fishing on grounds of a customary right, all catch of trout must be thrown back or the fishermen must have an additional fishing licence for trout (as well as for salmon).

I have above in subsection 3.2.3 given a few examples of customary gathering activities, for instance, the taking of mutton birds.859 Here, the taking is subject to regulations stating the terms and restrictions of the customary activity. Various gathering rights might also be allowed through some kind of authorisation, such as a licence, which may state specific conditions for the taking of plants or eggs, as well as for the taking or killing of wildlife or game species.

On the whole, the conditions and restrictions for customary activities are, thus, determined by provisions under part III of the RMA and the rules in regional and territorial plans, along with specific provisions, primarily through regulations. The general duties laid down under Part III of the RMA, for instance, regarding the duty to avoid, remedy or mitigate any adverse effects on the environment, do not seem to be enforceable to the extent that they may hinder customary uses, if not at the same time contravening any rule in a plan. In the main, to compare with the Swedish legal situation, the environmental requirements on Saami customary rights are more emphasised. In fact, the so-called general rules of consideration in chapter 2 of the Environmental Code provide a rather strict standard to comply with, and the specific requirements inherent in the reindeer husbandry legislation are also accented.860

4.4 Consultation with Maori under the RMA

Generally, consultation can be regarded as an important means to influence resource management decisions generally, including plan and policy statement decisions.861 It is even more crucial to Maori and tangata whenua (the people of the land), since many decisions affect their interests in the lands and natural resources. The consultation provides means for emphasising Maori concerns and traditional ecological knowledge in relation to resource management decisions. It may also provide for acknowledgment or protection of waahi tapu (sacred places) and important food gathering places, especially in relation to consultation related to plan and policy developments under the RMA. In this way, the connection

857 Kaimoana Regulations reg. 33 & South Island Regulations reg. 38. Kaimoana Regulations reg. 34(3)(a) & South Island Regulations reg. 30(3)(a). The bylaws shall not be inconsistent with the management strategy and the kaitiaki shall not issue bylaws inconsistent with the strategy.
858 McRichie v. Taranaki Fish and Game Council, CA 184/98.
859 See subsection 3.2.3.
860 Compare with sections 8.2 & 8.3 below.
between substantial proprietary or usufruct rights on the one hand, and consultation (procedural rights) on the other, becomes rather obvious.

In relation to Maori issues, consultation is a key feature of New Zealand law, not only in relation to the RMA. This is a clear difference to the Saami situation in Swedish law. Consultation is important as it enhances the understanding of customary activities and may provide for better planning that improves considerations of Maori resource uses and accommodation of environmental effects from various activities. This is also interesting from the point of Swedish law, to understand how the RMA includes input from Maori into the resource management decisions. Therefore, this section examines consultation requirements and the content of consultation.

Consultation rights for the Maori primarily originate from references to the Waitangi Treaty, or rather the principles of the Treaty, in statutes. Although the Waitangi Treaty is the basis for the right to consultation, the Treaty per se is generally understood as not directly enforceable as law. Where there is a reference in a statute to the Treaty principles, such as in the RMA (s. 8), the duty to consult will generally be held as one of the principles. Other Treaty principles are also important in the context of consultation, such as the principle of partnership-like relationship and the principle of active protection. A partnership or appropriate protection is hard to reach if the people concerned are not consulted.

Another source for the basis of Maori consultation rights may derive from the doctrine of fiduciary duty. In comparison the doctrine is used more extensively in Canada. There are, however, indicators that the fiduciary doctrine may develop further in New Zealand. The doctrine stresses that there is a special relationship between the Maori and the Crown, and consultation duties then arise against the Crown.

Due to specific provisions in the RMA, one can distinguish two different situations of consultation. One is consultation in relation to the planning instruments, and the other is consultation in relation to resource consent applications. It is important to separate these two situations. While the former means compulsory consultation, the latter is more or less voluntary. The law on consultation related to resource consents is, however, presently somewhat uncertain. In August 2005, a new provision was added (s. 36A), which in fact might mean that the valid law has been substantially changed. The new provision basically states that neither the applicant nor the consent authority has a duty under the RMA to consult any person about the application, which includes iwi,

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862 Compare with section 9.5. See also my discussion in section 10.5.
864 See Consultation with Tangata Whenua (1991), p. 7. Note that the law on consultation relating to resource consent applications might have been substantially changed. See further below.
865 See Consultation with Tangata Whenua (1991), p. 7. Note that the law on consultation relating to resource consent applications might have been substantially changed. See further below.
866 For the Canadian legal context see subsections 4.3.1, 4.4.5.2, and 4.4.5.3.
867 Graham, Sir Douglas (2001) The Legal Reality of Customary Rights for Maori, p. 26. See Smiler v. Port Gisborne Ltd [1998] NZLR. This case was, however, appealed (Port Gisborne Ltd v. Smiler, CA182/98) and the Court of Appeal seems not here to have discussed any fiduciary duties.
hapu and individual Maori. Nevertheless, there is a liberty to consult if they wish, and, additionally, there might be consultation duties under other statutes with which they need to comply, such as under the Local Government Act 2002. I will come back to this new provision when discussing consultation in relation to resource consents. However, before I go into the two different consultation situations, I will bring some more general issues into the forefront.

Under the RMA the duty to consult with Maori arises from two main sources of the Act: firstly, implied obligations by particular provisions, including the provisions in Part II, and, secondly, though the reference to the Treaty principles in section 8. The references to Maori cultural values among the provisions in Part II of the Act are, in the main, acknowledging the relationship of iwi with the environment and recognising the value of Maori knowledge about environmental management. This contributes to the achievement of good environmental outcomes. In order to determine the nature of the relationship specified by section 6(e) and the protection of recognised customary activities by section 6(g), consultation should be a basic feature of interaction with Maori. The same applies to section 7(a). The concept of kaitiakitanga is very broad and iwi may have their own ideas of the extent and meaning, whereas consultation becomes essential. The reference to the principles of the Treaty in section 8 also implies consultation needs.

In some circumstances, for instance, both section 6(e) and 8 will apply, but the former is not restricted to the relationship between Maori and the Crown as Treaty partner. The relationship of Maori with their ancestral lands and waters, among other things, will be matters of national importance regardless of whether issues arise under the Treaty obligations. Moreover, the High Court has confirmed that the duty of consultation with Maori that arises from section 8 is the responsibility of the consent authority and not of the applicant for a resource consent. Also concerning section 8, the Court of Appeal has stated that despite reference to the Treaty principles, consultation does not “give any individual the right to veto any proposal”. Such veto-rights were seen as reducing the effectiveness of the Treaty principles, rather than enhancing them.

It is, however, somewhat problematic that the RMA neither includes a definition of consultation, nor any guidance on how consultation shall be
performed. Nonetheless, clarifications have come from a rather large body of case law on consultation. In a leading case, *Wellington International Airport Ltd v. Air NZ*, the Court of Appeal provided an extensive definition of what consultation is, or rather should be. In sum, the main elements of consulting concern i) the statement of a proposal not finally decided upon; ii) listening to what others have to say and considering responses; iii) allowing sufficient time and making a genuine effort; iv) providing enough information to the party obliged to consult so that the consultee can be adequately informed and so that the obliged party can make intelligent and useful responses; v) that the party obliged to consult must remain open-minded and be ready to change, although the party consulting is entitled to have a working plan already in mind; vi) that consultation involves a meaningful discussion; and, vii) that the party obliged to consult holds the meetings, provides relevant information and further information on request, and waits until those being consulted have had a say before making the decision.

Moreover, a government report in 1998 highlighted the need for guidance to assist the relationship between local government and iwi for RMA purposes and a need for further research in this area. To meet this need, the Ministry developed the “Iwi-Local Government Programme” with the aim to improve environmental outcomes by enhancing iwi participation in environmental management, particularly under the RMA.

As there is no provision concerning when and to what extent consultation is required, the case law provides guidance in this respect. Since there are no rules regarding, for instance, forms of consultation, any manner of oral or written interchange that allows sufficient expression and consideration of views will meet the requirements set forth by case law. In this way, consultation could range from one telephone call to years of formal meetings. The issue or matters at stake and the range of Maori interest involved and affected will, above all, decide the scope of consultation needed.

Now, I will turn to discuss the two situations on consultation. I will begin with consultation in relation to applications for resource consents. As indicated above, the law in this respect is now in doubt since the inclusion of a new provision, section 36A. The provision clarifies that there exists no duty to consult. Before this amendment, there were uncertainty about consultation obligations in relation to resource consent applications and whether the applicants and the local authority were each obliged to consult. There has not been any consistency among the cases on the matter. However, for the most part, it seems sufficiently clear that neither the applicant nor the local authority was positively bound to consult. This has now been clarified by section 36A.

consultation.878 There is no case law yet to shed light on the issue. Since there are doubts as to what the new provision means, I will mainly describe the consultation duties that have evolved up to this time. It should be emphasised, however, that this might be inaccurate in the near future. On the other hand, it might very well be established by future case law that section 36A does not exempt the duties of the local authorities under section 8 or other provisions under Part II of the Act. Where a local authority has chosen not to consult, a court may conclude that this it is not consistent with the spirit of partnership (the principle of partnership-like relationship).

So, even if consultation has not been explicitly mandatory for resource consent applications, consultation seems nevertheless to have occurred voluntarily on many occasions. Moreover, the Maori cultural values included in Part II of the Act implies the existence of a stronger onus on the consent authority to consult Maori. However, the consent authority relies primarily on the applicant to conduct the consultation.879 Note that, where section 8 has been found to include consultation obligations, the duty to consult falls only on the local authority, as stated above.

An application for a resource consent must always be accompanied by an “assessment of environmental effects” (AEE). In relation to the AEE, there are, likewise, no mandatory provisions on consultation, only an indication that the persons affected by the proposal should be identified880. On the other hand, there are no hindrances that prevent the applicant from consulting with tangata whenua, since there is often a need for consultation881. The only compulsory requirement in relation to AEE is where a recognised customary activity is, or is likely to be, adversely affected. The assessment must then include a description of possible alternative locations or methods for the proposed activity.882

Where there is no explicit consultation duty for resource consent applications, consultation in relation to development and changes of the planning instruments are instead compulsory.883 So, in relation to the planning instruments, consultation is required for the preparation of national and New Zealand coastal policy statements and national environmental standards.884 Of more importance are, however, the planning documents on regional and local levels. Here, local authorities, meaning regional councils and territorial authorities, have consultation duties vis-à-vis Maori during preparation and changes on policy statements and plans. The tangata whenua of the area that may be affected shall be consulted through the iwi authorities.885

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880 Schedule 4 cls. 1(h) & 1AA.
882 Schedule 4 cl. 1A (unless written approval for that activity is given by the holder of the customary rights order).
883 Schedule 1 cl. 3(1)(d), which is referred to in RMA ss. 60, 64, 65 & 73.
884 RMA ss. 46(a), 57(1) & 44.
885 Schedule 1 cl. 3(1)(d) & cl 2(2)(b) additionally in relation to a regional coastal plan (consultation with iwi authorities of the region). Consultation obligations apply also to changes of policy statement and plans, see cl. 1(1). Copies of the operative policy statement and plans must be provided without charge to the iwi authorities, see cl 20(4)(f).
Here, there are some main elements that need to be fulfilled to judge whether a local authority has accomplished its consultation obligation, primarily if the local authority has (i) established and maintained processes to provide opportunities for those iwi authorities to consult; (ii) allowed those iwi authorities to identify resource management issues of concern to them; and, (iii) indicated how those raised issues have been or are to be addressed. Hence, there is some guidance on the important elements of consultation regarding plan and policy preparations, which is natural, since it is mandatory. Nevertheless, the case law explains in more detail issues of consultation. For instance, the Environment Court held in a key case that consultation needs to be conducted in mutual good faith and to a degree sufficient so that a council may familiarise itself as to the nature and substance of the interests of the Maori. Consultation does not mean consensus. If the outcome of the council’s decision is a disagreement, the outcome must, nevertheless, be accepted by the Maori affected. Consultation should, moreover, be ongoing, and a council should reopen consultation if other factors and information are brought to its notice. However, consultation should not restrain the council’s decision-making responsibilities.

One important question relevant to effective and correct consultation concerns whom should be consulted. It is not without complexity, as it is not always clear who has the mandate to talk on behalf of tangata whenua. Maori society is very diverse, and who should be consulted may turn out to be an individual, a group of Maori, or a number of corporate bodies representing two or three iwi. Therefore, the question of whom to be consulted is often best left to Maori to advise. In the Environment Court stated that where there are overlapping claims of an area, and questions of who are entitled to mana and the role of kaitiaki, and the forum for such claims are the Maori Land Court. In this case, the regional council had acted correctly when it avoided making any preference among the three iwi, and involving them all into the consultation process.

Another issue of concern to the Maori arises when they require marae process to be followed as a way of consultation. When this occurs, there is an additional question on where consultation should take place. Knowing who to consult should give a definite lead where it should take place, and Maori will give guidance as to which marae is appropriate. The nature of the issue could be of such importance that discussions of the appropriate choice of marae are needed. Conclusively, the primary consequence of an inadequate consultation with Maori...
can be either that the proceedings are adjourned on an interim footing to enable consultation to occur or that the decision is overturned.\textsuperscript{893}

On the whole, consultation under the Act is not easy. Provisions require the councils to consult in plan-making, for instance, but do not further set out any requirements. Maori often feel that they have been reduced to passive respondents. From this point of view, Maori argue that the local authorities have adopted a minimal interpretation of their responsibilities in relation to the Treaty of Waitangi. Maori feel that they are not seen as full and effective participants in a way that reflects the partnership to which they signed in 1840.\textsuperscript{894} On the other hand, other Maori would state that the relationships with local authorities are satisfactory. As a matter of fact, many local authorities have established practical mechanisms to enhance consultation and to make sure that proper consultation does take place.\textsuperscript{895}

Although the law on consultation relating to resource consent applications is in doubt, Maori do have a right to participate in resource management processes as a group with a special status, particularly in plan-making. It has been evident from consultation processes that there often have been different understandings on many resource management issues issues, such as issues regarding “kaitiakitanga”, which has a wider cultural context for most Maori than pure guardianship as defined in the Act\textsuperscript{896}.

There is also a question of finances. Access to adequate financial resources and professional expertise is an issue for iwi. When there is a scarcity of resources, iwi must make decisions on where to focus attention. There are three main areas that are competing within iwi: resource management issues, social and health issues, and Treaty claim progression. Some local authorities and iwi have established a written policy for grants of assistance where authorities pay a fee for certain iwi services. However, although the RMA does not require local authorities to provide such assistance to iwi, doing so might contribute to the development of a good working relationship for RMA purposes.\textsuperscript{897}

To sum up the examination, with the enactment of the RMA, the Maori were given an important consultation role. Before the 1970s, little consultation with Maori took place, and limited legislative attention was paid to Treaty issues. During the 1970s, and especially during the 1980s, Maori issues climbed on the national agenda due to long-lasting dissatisfaction by Maori over many issues and progress in the courts.\textsuperscript{898} In addition to the RMA, today many other statutes acknowledge the Treaty, or rather the Treaty principles, and altogether there has been an increasing body of case law stating that government and government

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\textsuperscript{893} Berkett v. Minister of Local Government, A44/1997. Here the RMA consultants should have consulted on certain tangata whenua interests, even through other interests had been appropriately consulted. Gill v. Rotoroa District Council [1993] 2 NZRMA 604. See Case Law on Tangata Whenua consultation (1999), p. 23.


\textsuperscript{896} It has a deeper meaning, relating to a committed obligation that cannot be relinquished. See Iwi and Local Government Interaction under the resource Management Act 1991: Examples of Good Practice (2000), pp. 3-6.

\textsuperscript{897} Nolan, Derek (2005) Environmental and Resource Management Law, p. 197.

\textsuperscript{898} See for instance Consultation with Tangata Whenua (1991), pp. 6-7.
bodies have an obligation to consult\textsuperscript{899}. In fact, no other group from the population is singled out in this way for specific input into resource management decisions.

Consultation requirements may legally arise from different sources; the Waitangi Treaty and the Treaty principles as in the case in Aotearoa/New Zealand, or the Crown fiduciary duty and the honour of the Crown as in Canadian law.\textsuperscript{900} These procedural rights may, in fact, enhance the enjoyment of the customary rights, as consultation may provide for a better knowledge and understanding of relevant customary activities in certain areas. The Swedish law lacks legal recognition of any kind that would establish a particular relationship between the government and the Saami that would create consultation obligations or rights. A main explanation for this difference is that the colonisation process has simply not become legally relevant. The lack of general consultation requirements in the Swedish law will be discussed further under Part III.

\textsuperscript{899} One important statute, apart from the RMA, is the \textit{Conservation Act 1987}, acknowledging the Treaty in section 4 (the Act "shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi"). This Act includes a list of other statues in the First Schedule. Due to section 4 and a Court of Appeal case (the \textit{Whale-Watching} case), these other statutes shall, in principle, be interpreted and administered to give effect to the Treaty principles, also including consultation duties. See the Court of Appeal case \textit{Ngai Tahu Maori Trust Board v. Director-General of Conservation} [1995] 3 NZLR 553. The Ngai Tahu’s claim to a veto right was, furthermore, rejected by the Court. The case concerned organised whale-watching by Ngai Tahu, a profitable tourist activity, and how to interpret traditional rights in a more commercial world.

\textsuperscript{900} See in subsections 6.4.2, 6.4.5.2, 6.4.6.5 and section 6.5.
5 Treaty Settlements and Maori Rights

Sweden and the other Nordic countries with Saami populations do not have a system of using agreements in solving conflicts and issues related to land and natural resources. The situation is different in Aotearoa/New Zealand. It is, therefore, interesting to examine the treaty settlement system. Many treaties have been negotiated between the Crown and Maori groups not only as a way of accommodating historical grievances, but also to enhance the RMA processes. Once negotiated, such settlements may provide for a larger role in the resource management. In New Zealand law, there is, hence, a strong link between the negotiated settlements and the environmental legislation, particularly the RMA. In this chapter, I will examine the system of treaty settlements by using examples of two well known settlements. The large fishing settlement is intermingled with the fisheries legislation and its sustainability objective and quota management system. The other large settlement, the Ngai Thau settlement, has strong ties to the RMA and enhances some of the Act’s mechanisms.

In the beginning of 1990s, the New Zealand government of the time made a commitment to finalise all settlements of historical Treaty claims within a ten-year period, a goal that quite soon proved to be unreachable. Instead a manageable Treaty claims process has slowly been evolving over the last two decades as a response to recover the country’s colonial history. Although reaching a final completion of all historical claims under the Treaty will nevertheless still take many years, the goal seems possible to finalise. On the other hand, the feature of the Treaty as being a “living document” that constantly needs to be reinterpreted in new circumstances means, in relation to contemporary issues and conflicts, that the Treaty settlement process is never distant from modern claims.

The lodging of claims under the Treaty of Waitangi is not a new phenomenon. From the 1870s and onwards, Maori regularly brought claims before the courts, citing the Treaty in support of their rights to land, waters and other natural resources. As stated above, they had very little success. For over 150 years, Maori have seen the Treaty as the basis of important rights, rights that contemporary law is now recognising. The Crown is also willing to negotiate with iwi and occasionally with hapu to reach final settlements. It has been argued that New Zealand is fortunate to have in the Treaty of Waitangi a founding set of principles by which the relations between Maori and Pakeha can be mediated.

The short and vague document may, in fact, be a strength, as the Treaty constantly needs reinterpretation. In this, many argue that the Treaty has been interpreted reasonably and constructively by the courts and the Waitangi Tribunal. The settlement process, ending in full and final settlements with the Crown, has also been understood as managed with care and moderation. So far, the amount of money spent on the settlements has been manageable. Although criticised by

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901 See my discussion below in section 10.6.
902 Canada also has a well developed system of using negotiations that result in modern treaties between a particular group and the Crown. Those treaties are not, however, analysed in this thesis, as the system is more diversified. Analysing modern treaties and their relation to environmental legislation in Canadian law is a topic all its own.
904 Ibid., pp. 2-3.
905 Some 700 million NZ dollars (some 3350 million Swedish kronor) have been spent so far.
some, there is a growing confidence in the settlement process that historical grievances can be worked through.\(^{906}\)

Some New Zealanders regard the Treaty claims process as a “grievance industry”, arguing that the process is damaging race relations in New Zealand and opening new wounds rather than healing old ones. Nonetheless the Treaty claims process has, for the most part, replaced street protests and land occupations that occurred in the 1970s and 1980s.\(^{907}\) Altogether, through the claims settlement processes, the understanding of Maori society, Maori traditional livelihoods and way of life, and Maori interactions with the Crown and settlers, has grown immensely. The process has, thus, not merely revealed Crown actions and Maori losses.\(^{908}\)

Most of the claims are “historical”, in the sense that they arise from Crown actions before 1975. However, the huge pan-tribal commercial fishery settlement did arise from legislative actions in the 1980s. The fisheries settlement (marine commercial fisheries) has been the most important general settlement between Maori and the Crown\(^{909}\). The privatisation of fisheries resources by introducing a quota management system that neglected Maori interests lead to several Maori claims to the courts and Waitangi Tribunal. The matter is very complex, for instance, regarding how the allocation of assets shall be made. As a result, over the years there have been numerous cases before the courts\(^{910}\). The settlements reached became publicly controversial, and, not surprisingly, the issue created exciting public opinion about the government’s Treaty policy\(^{911}\).

By acknowledging the complexity of the settlement, this chapter includes only an outline of the major events of the commercial fisheries and the most important features of the fisheries management regime.\(^{912}\) The latter part of this chapter includes material on another major settlement, the Ngai Tahu settlement, reached in 1997/1998. In many respects, the Ngai Tahu settlement is seen as a model for reaching a settlement, in particular in its way of including co-management arrangements.\(^{913}\) Importantly, through the negotiation process, some new mechanisms and ideas were developed. The settlement is largely regarded as a success with its well established and functioning governance entity and sophisticated structure to receive and manage the assets\(^{914}\). The Ngai Tahu settlement will here serve as an example of the content of a treaty settlement and how it may intermingle with the general environmental law. Although some more

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907 Ibid., p. 7. The claims and the settlements are also understood as lengthy and expensive.
908 Ibid., pp. 1-4.
910 For an overview of the major events, see the preamble to the Maori Fisheries Act 2004 and Appendix 2 of the Court of Appeal case CA247/03. There is extensive writing on the matter in law articles and literature, which can be consulted for more details.
914 See the web page at http://www.ngaitahu.iwi.nz/Office/Home (viewed at 2005-12-30).
recent settlements also provide mechanisms to enhance Maori input into resource management, the Ngāi Tahu settlement is still prominent in this respect.

### 5.1 The Treaty Claims Process and Treaty Settlements

Claims under the Treaty might be advanced to reach a settlement with the Crown, a way of acknowledging wrongs done in the past and pragmatically securing a future resource and capital base for the tribe.\(^{915}\) Once a settlement is reached, it is full and final. This is an important feature of the settlement process and a driving force for both parties. Another important feature of settlements and of Maori claims generally is that the main goal for those claims has been to defend property rights and the rangatiratanga of chiefs and tribes based on those rights. In this, the Waitangi Tribunal’s Waiheke Report in 1987 broke new ground in that it was the first time the Tribunal recommended the return of land, and the government accepted the recommendation\(^{916}\). Nowadays, a settlement reached commonly includes the return of small portions of lands of particular value to the iwi. In principle, transfer of lands to Maori only involves Crown lands.

As a response to a recommendation by the Waitangi Tribunal in one of its reports and to subsequent public anxiety, the Treaty of Waitangi Act 1975 was amended to prevent the Tribunal from making recommendations on return of private lands. The Treaty claims process has generally been launched with the understanding that the claims would be against the Crown, leaving private property unaffected. Therefore, the 1992 report concerning the claims of the Te Roroa tribe, which recommended that the Crown purchase a piece of farm land to be returned to the tribe, created widespread public apprehension. The land, which included a burial site, was supposed to have been restored to the tribe. The Crown felt obliged to follow the recommendations.\(^{917}\) However, the amendment of the Act means now that the Tribunal can make recommendations only on state owned enterprises (SOE) lands that are privately owned.

Claims advocated as property rights based on the Treaty are not always popular among environmental or recreational organisations. Issues relate commonly to protection of specific habitat and species, such as the protection of endangered species and continued public access. However, contrary to those concerns, conservation estates have neither been raided to provide settlement lands, nor has public access to settlement lands been denied. Co-management arrangements between Maori owners and conservation authorities have been made for some of them, as well as for other lands where the title remains in the Crown. The Waitangi Tribunal has, moreover, recognised that one of the Crown’s principal duties is to provide resource management and protection of values in public lands, which may, in specific circumstances, override particular claims of iwi or hapu.\(^{918}\)

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916 Ibid., pp. 23 & 32. Another important land settlement that arose from Tribunal recommendations was the Orakei Report, also issued in 1987.

917 Ibid., p. 65.

There is a two-option model in order to reach a deed of settlement with the Crown. Iwi may first take their case before the Waitangi Tribunal and/or courts and then negotiate with the Crown. Maori may also directly negotiate with the Crown to reach a final settlement. The Crown has set up an Office of Treaty Settlements (OTS) to handle the claims process.919 The OTS has a larger budget than the Tribunal, as Maori claimants are encouraged to apply to it for direct negotiations.

Nonetheless, many claims start with submitting a claim to the Waitaingi Tribunal. In fact, the claims come often in a very general form and need further investigation. Commonly, the initial general claim might be followed by specific claims920. A feature of the claims process in the Tribunal is that “statements of claim” are regularly revised to keep pace with the research and knowledge accumulation. Thus, the initial claim is supported by research, largely conducted by the claimants themselves, who employ historians and other specialists on contract. Funding comes from the iwi’s own resources, legal aid and specific trusts. However, the Tribunal also conducts research into claims, districts or issues common to many claims, due to its status as a commission of inquiry. When the research is well advanced, the Tribunal begins formal hearings of evidence. The claimants may now also submit their evidence to the OTS and begin negotiating directly.921 The Tribunal issues a report of its findings and makes recommendations to the Crown, which commonly form a basis for negotiations with the Crown for reaching a settlement.

The Treaty negotiations with the OTS consist of four major steps: preparing claims for negotiations, pre-negotiations, negotiations, and, finally, ratification and implementation of the Deed of Settlement.922 Before even pre-negotiations can start, the claimant group needs a mandate from its people, which must be approved by the Crown. The mandate generally includes an acknowledgment primarily of who has authority to represent the claimant group and defines the claimant group and claimant area.923 In the pre-negotiations, mandated claimant groups discuss the terms under which negotiations will take place and a “Terms of Negotiation” is signed by the two parties.924

During the actual negotiations, the iwi and the Crown discuss the basic elements of a settlement, such as the nature of the historical account and cultural and commercial redress. The parties sign a “Heads of Agreement” or an “Agreement in Principle”, which will include a proposed financial quantum of the settlement. Thereafter, more detailed negotiations take place, which are finalised by a draft “Deed of Settlement” that can be presented to the iwi for consideration. If this draft Deed is accepted, a final “Deed of Settlement” will be drawn up and signed by the parties. At that point, the settlement becomes binding on the parties.

920 The fragmentation of claims (additional specific claims by affected hapu or whanau) has slowed direct negotiations as it has hampered Tribunal hearings.
923 See http://www.ots.govt.nz/ (choose “Negotiation Process” and “Mandating for negotiations”). The issue of getting mandated groups to whom negotiations can take place is in fact a big issue and is slowing down the overall settlement process. See Ward, Alan (1999) An Unsettled History, p. 176.
924 For an overview, see http://www.ots.govt.nz/ (choose “Settlement of Progress” and “Progress of Claims”).
This is the ratification of the Deed, but it also needs to be implemented, chiefly done through enacting settlement legislation. The settlement assets are not transferred until the Deed is unconditional. Therefore, further work is still required, primarily by establishing a governance entity\footnote{The governance entity is a legal entity that will hold and manage assets from the settlement. The form and constitution of the entity is free for the iwi to decide, but some prerequisites apply, such as that it must adequately must represent all members of the claimant group and ensures that the assets reaches the beneficiaries. See further in \url{http://www.ots.govt.nz/} (choose “Negotiation Process” and “Governance Entity”).} to receive the assets.\footnote{For an overview see \url{http://www.ots.govt.nz/} (choose “Settlement of Progress” and “Progress of Claims”).}

Settlements are currently occurring at a rate of about one every six months. Since 1989, eighteen settlements have so far been completed, and approximately twenty-five claimant groups are presently being negotiated.\footnote{Before 1992 and the fisheries settlement, there was only one deed, the Waitomo. See \url{http://www.ots.govt.nz/} (choose “Settlement Progress” and “Claims Progress”). The last Deed of Settlement was reached in September 2005: the Te Roroa Deed (in Northland). See also the “Quarterly Report to 30 September 2005” accessible in \url{http://www.ots.govt.nz/} (choose “Documents” and “Latest Quarterly Report”).} Instead of negotiating individual claims, the government prefers that settlements be concluded with large natural groupings of claimants for all their historical claims (e.g. all the claims of a large tribe, or all the claims of a cluster of smaller tribes). Each settlement will usually cover several Tribunal claims as well as claims that have not been specifically registered at the Tribunal. In order to test or challenge the claimant groups’ evidence or interpretation of evidence, the OTS, assisted by the Crown Law Office, may also investigate matters and conduct their own research\footnote{Ward, Alan (1999) \textit{An Unsettled History}, p. 41.}.

There are some settlements of larger significance and scale, often referred to as the “big” settlements, which include the 1992 fisheries settlement, the 1995 Tainui settlement, and the 1997 Ngai Tahu settlement. Each of them included a redress amount of 170 million NZ dollars, the equivalent of 800 million Swedish kronor\footnote{The fact that the same level of redress amount was paid in the Tainui and the Ngai Tahu settlements does not mean that the historical injuries were the same or even easily comparable. Tainui experienced some of the worst cruelty the colonisation led to, with invasion of the British army and loss of many lives in battles and in the social disorder that followed with confiscation of their most fertile and cultivable lands. Ngai Tahu had experienced none of those things. Instead, the Crown acquired land in flawed purchases. A common denominator though is that both had entered into the commercial economy; Tainui were growing large crops of wheat that were exported to Sidney, and Ngai Tahu were growing potatoes sold to Pakeha. See Ward, Alan (1999) \textit{An Unsettled History}, pp. 58-59.}. The total amount spent from 1992 until today is some 700 million NZ dollars.\footnote{Some 3350 million Swedish kronor. See the “Quarterly Report to 30 September 2005”, p. 11, accessible in \url{http://www.ots.govt.nz/} (choose “Documents” and “Latest Quarterly Report”).} The fisheries settlement was the first and is still the only pan-tribal settlement. The Ngai Tahu settlement include, apart from return of land, arrangements for securing a larger role for the Ngai Tahu in resource management within the claimant area in large parts of the South Island. However, recent settlements also generally seem to include arrangements for larger participation of iwi in resource management issues as well as co-management arrangements, apart from the returning of lands\footnote{For instance, the Te Roroa Deed includes the return of some 2000 hectares of land (in fee simple). The transfer is subject to conservation purposes and public access. There are.
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The Treaty claims process has in fact contributed to the re-emergence of the hapu, whose identity was long hidden by the cloak of some forty major iwi recognised by official administration and anthropologists in the nineteenth century. Thus, the traditional Maori society’s focus and dynamics related to hapu have been revived. Claims research, which has revealed a wealth of oral traditions, has been a source of renewed local pride and strength. Research that has not succeeded in proving claims against the Crown has nevertheless been of great value for the iwi or hapu. 932

Because Maori society is competitive, the claims process has sometimes proven difficult in reaching settlements. Leaders of hapu and whanau guard their mana and the mana of the group carefully. Thus, leaders of wider bodies, such as iwi, trust boards or pan-tribal councils, but have difficulties maintaining the support of their component groups, as many hapu leaders do not want their group’s identity to be submerged into a larger structure. This understanding also includes Crown redress assets managed by a pan-tribal corporation. 933 As a result, there is a constant battle for those leaders who see the benefits of large tribal structures to persuade the many hapu and fractions in any claim area to stay under one umbrella, something that was also evident in the Ngai Tahu settlement process.

5.2 Maori Commercial Fishing Rights

5.2.1 Background of the Settlements

The starting point for a long period of extensive negotiations, court proceedings and settlements between the Maori and the Crown was the restructuring of the previous licensing system for commercial fishing. In order to ensure a sustainable fishing industry, the Government promoted a new quota based management system, in which the quota was held as a tradable property right934. The root of the problem was a failure to conserve fish stocks. Serious over-fishing of some species had led to the conclusion that the licensing system was inadequate.

Until the 1970s, the New Zealand fishing industry was rather small compared to its agricultural industry. The fishing industry comprised a large number of small boats that mostly was restricted to inshore fisheries and provided limited employment compared with other economical sectors. The Maori fishing industry was in majority a small-scaled industry with local connection, and the Maori involved almost exclusively worked part-time. Rural Maori tended to be part-time land workers in order to retain their land and part-time fishers to supplement their income. After the mid-1970s, a rapid expansion of the commercial fishing industry occurred. At the time, New Zealand faced a structural crisis due to Britain’s entry into the European Community. In order to increase exports, the Government offered commercial arrangements for co-management of parts of the Waipoua Forest and appointment of the iwi as advisory committee to the Minister of Fisheries as well as a right of first refusal of some quota, if included into the commercial fisheries quota management system. The financial redress is 9.5 million NZ dollars. See further in http://www.ots.govt.nz/ (choose “Documents”, “Deeds of Settlements” and “Te Roroa Deed of Settlement”).

933 Ibid.
934 Through the Fisheries Amendment Act 1986.
fishers and other primary producers generous production incentives. This offer together with the enactment of the *Exclusive Economic Zone Act 1977*, encouraged the New Zealand companies into deep water fisheries through a package of assistance measures and joint ventures with foreign companies. On the whole, the expansion of the commercial fishing industry in New Zealand did not benefit Maori fishing interests.935

The new quota management system introduced in October, 1986, was devised for certain species of fish, and the Ministry of Fisheries would set a total allowable catch for that species in the area. The catch would then be divided into individual transferable quotas. The fishing industry and the government were supporting a system of tradable quotas that created a property right in perpetuity, which in fact was an indigenous concept, and the introduced system attracted much attention abroad.936 The background to these changes undertaken must be understood in a larger context. The changes were commenced during a period of rapid and far-reaching modifications in the institutional framework of environmental management in general. There was much interest in the use of market forces as a policy instrument. Dominant themes in the reforms have, hence, seen the globalisation of the New Zealand economy, reconstruction of the welfare state into corporations, and privatisation of the national estates.937

When introduced, this system granted rights to catch specified quantities of particular species of fish, including the setting of the total allowable catches at sustainable levels. At the same time, the system allows the opportunity to trade the quotas, which makes the system flexible and effective in economic terms. The quotas are to be understood as individual property rights. The ceiling on total allowable annual catches is set after research or by estimations for each species in each zone or both. The process of introduction and gaining acceptance of the new management system, however, was neither easy nor straightforward. A highly controversial assumption was underpinning the system, a principle of Crown ownership of the fishery resources. This contravened Maori interpretation of the Treaty, as well as recent interpretations of the Court of Appeal.938

Tribal claims to the High Court and the Waitangi Tribunal were lodged. In order to complete the restructuring of the commercial fishing industry, the settlement of the Maori claims were crucial in order to bring the reform to an end. The two major settlements reached in 1986 and 1992, as well as political acceptance of bicultural pluralism made the way towards a new management system. A new statute, the *Maori Fisheries Act 2004*, is also a part of the settlement process. Consequently, there is now recognition of commercial Maori fishing resource rights within a co-management framework, and Maori are a major stakeholder in the fishing industry939.


936 Palmer, Geoffrey (1992) *New Zealand's Constitution in Crisis. - Reforming our Political System*, p. 94. Traditionally, there has been a system of definite individual rights to fishing. There were, however, also whanau, hapu and iwi rights. See for instance the Muriwhenua fishing report (Wai 22), pp. 35-36.

937 Memon & Cullen (1996) *Rehabilitation of Indigenous Fisheries in New Zealand*, p. 252. Two distinct forces in society, the so-called New Right and the environmental movement have promoted these institutional changes.

938 Ibid., p. 256.

939 Ibid., pp. 252-253.
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5.2.2 The Fisheries Management System

5.2.2.1 The Preliminary 1986 and the Final 1992 Settlements

As said above, the expansion of the commercial fishing industry did not benefit Maori fishing interests generally. Even if an aspiration of developing a modern business for some Maori individuals and tribes was there, decades of marginalisation presented a structural barrier, as did access to financial resources. The starting point for the dispute over fisheries resources was the Government proposal in 1983, which included proposed compulsory removal from the industry if a fisherman derived less than 80 percent of his income from fishery or less than 10000 NZ dollars as annual earnings from the fishery. This would have had a disproportionate impact on Maori fishermen, since the Maori fishing operations were part-time ventures and commonly restricted to inshore waters.

Through the Fisheries Amendment Act 1986, a new regime of quota management was introduced for commercial fishing. After the amendment, the Fisheries Act 1983 included an authorisation for the Minister to specify total allowable catches for Maori regarding “traditional, recreational and other non-commercial interests in the fishery”, generally leaving Maori outside of the commercial fisheries. Notably, when introducing this new management system the Government had consulted the organisations representing the fish industry, but had chosen to ignore Maori concerns until obliged to do so by the courts. As a response to the new system relating to commercial fishing, Maori lodged several complaints before the High Court, representing tribes of most of the coastal lands of Aotearoa/New Zealand. They sought review of the quota management system introduced, as they argued generally that it was a breach of their fishing rights and was therefore unlawful.

The High Court (interim decisions) found, in short, that Maori had a highly developed and controlled fishery over the whole coast of New Zealand, which was divided into zones under the control of iwi and hapu of the districts. Those fisheries were not purely for sustenance, recreational or ceremonial purposes, but had important commercial elements. There was, moreover, no evidence supporting that those fishing rights were lost. Therefore, the High Court concluded that the Ministry for Fisheries had not made any serious effort to define Maori fishing rights; that the Ministry had long since treated them as recreational, occasional and ceremonial without any commercial or proprietary significance; and that, as a result, the new regime for

940 Ibid., p. 255.
941 Ibid., p. 256.
942 s. 28C(1) in the Act (before it was repealed). See Te Puunanga o Muriwhenua Inc v. Attorney General [1990] 2 NZLR 641, p. 645. Note also that the Fisheries Act 1983 included a provision (s. 88(2)) which stated that “[n]othing in this Act shall affect any Maori fishing rights”.
944 The High Court has a very wide jurisdiction, which includes “all judicial jurisdiction which may be necessary to administer the laws of New Zealand”. See the Judicature Act 1908 s. 16 and its Code of Civil Procedure set out in Schedule 2. See also Mulholland, R. D. (1999) Introduction to the New Zealand Legal System, pp. 86 & 167.
commercial fishing was negatively affecting such Maori fishing rights. These High Court decisions were appealed to the Court of Appeal on mainly procedural issues.\(^{945}\)

When the High Court decisions were appealed to the Court of Appeal, they ended up in a case commonly referred to as the *Fisheries* case.\(^{946}\) In this case, the Court of Appeal was called to consider Maori fishing rights, which it had not done in recent times. In its decision, the Court of Appeal deferred to the High Court ruling on all issues of fact and law, allowing the High Court decision to stand, and instead determined important procedural questions, such as the status of Waitangi Tribunal reports and evidence.\(^{947}\) The Court referred to the findings in several foreign cases, foremost Canadian cases, regarding the nature of customary rights and made some general recommendations on how to analyse and regulate such rights. What Maori obtained from the High Court and the Court of Appeal was a declaration that the Crown ought not to take further steps to bring the fisheries within the quota management system.\(^{948}\)

Two Maori claims before the Waitangi Tribunal have additionally played a vital role in the settlement of the commercial fisheries. The first was the claim by Maori from Muriwhenua, the northernmost region of the North Island, reported in 1988.\(^{949}\) The second claim came from the Ngai Tahu of South Island on sea fisheries, which was reported in 1992.\(^{950}\) These two Tribunal reports supported the negotiation processes.

With the court cases and the Tribunal’s Muriwhenua report as support, the Maori entered into negotiations with the Crown in 1988.\(^{951}\) A first settlement was reached with the enactment of the *Maori Fisheries Act 1989*, although it was understood by both parties to be a preliminary solution.\(^{952}\) The introduction of the initial Bill to this Act, however, again caused proceedings before the High Court brought by virtually all Maori tribes with claims to fishing rights. For instance, there were pleadings of trespass and breach of Crown fiduciary duty. Nevertheless, after comprehensive amendments to the Bill, the 1989 Act could be passed.\(^{953}\)

The *Maori Fisheries Act 1986* guaranteed Maori ten percent of the total deep sea quota and twenty percent of inshore quota issued before 1992. The Act also established a Maori Fisheries Commission, now called the Treaty of Waitangi Fisheries Commission, to hold the transferred quotas. The Government provided

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\(^{945}\) See background and references to the High Court decisions in *Te Ruananga o Muriwhenua Inc v. Attorney General* [1990] 2 NZLR 641.

\(^{946}\) *Te Ruananga o Muriwhenua Inc v. Attorney General* [1990] 2 NZLR 641.

\(^{947}\) See above in subsection 3.1.1.2 for a short explanation of this case.

\(^{948}\) See also the Preamble to the *Maori Fisheries Act 2004*, which has a record on all of the major events.


\(^{952}\) The Act itself does not use the word “interim”, but it is evident, since it leaves s. 88(2) of the *Fisheries Act 1983* and High Court proceedings in existence, as well as leaving open future claims on fishing rights. See *Te Ruananga o Muriwhenua Inc v. Attorney General* [1990] 2 NZLR 641, p. 649.

\(^{953}\) See *Te Ruananga o Muriwhenua Inc v. Attorney General* [1990] 2 NZLR 641, pp. 648-649. The initial Bill created much anger among Maori, since it would repeal section 88(2) to nullify the interim orders of the High Court, which would have meant stopping the proceeding and terminating the possibility for all future claims on Maori fishing rights.
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10 million NZ dollars to help establish Maori fishing operations. The Act also included provisions on non-commercial fisheries (taiapure-local fisheries).954

The Act provoked some anger among Maori since it sidestepped some difficult problems by awarding the quota to a central body rather than directly to iwi, which was seen as a form of state paternalism. There were also difficulties from a lack of consensus among iwi on how to allocate the quota among the different tribes. The iwi also opposed a collective ownership of the quota by a pan-tribal company.955 The issue on allocation has since then caused much debate and proceedings before the courts. See further below.

The second settlement, the so called "Sealord deal", was concluded in 1992 and arose somewhat unexpectedly due to a very good opportunity.956 The shareholding of Sealords Ltd, which held some twenty percent of the total quota, came on the market. It was agreed that the Crown would fund the purchase of parts of the quota in exchange of a final settlement of all fisheries claims.957 At the end of 1992, the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 was enacted and passed to amend the Maori Fisheries Act 1986 and to implement the settlement.

The enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 had three main functions. One was to implement the Sealord deal; a second function was to make better provision for Maori non-commercial and customary fishing rights through regulations; and, thirdly, to make better provision for Maori participation in the management and conservation of the fisheries. The 1992 Act also amended the Conservation Act by providing for the appointment of suitable Maori to be guardians of specific lakes.958 On the whole, the settlement and the 1992 Act created a distinction between Maori commercial and non-commercial fishing rights, even though the Maori had not viewed these rights separately in the past.959

The signing of the deed of the settlement came after the Maori fisheries negotiators told the government that they thought they had enough support from the iwi in light of extensive consultation nationwide. The Sealord proposal, although not perfect, offered means for the Maori to settle commercial fishing claims and to get their people back into the business of fishing. This view was also shared by the Treaty of Waitangi Fisheries Commission, the Waitangi Tribunal, and the Court of Appeal. The negotiators argued that it would take at least ten years for Maori through other means to reach even half the quantity of quota reached by the Sealord deal.960

As a result, the 1992 Act in essence settled the commercial fishing right, valued at 170 million NZ dollars.961 Maori acquired a half-share in Sealord Products, and

955 Ibid., pp. 258-259.
956 This settlement was challenged by Ngai Tahu without luck in Te Ruananga o Wharekauri Rekohu Inc v. Attorney-General [1993] 2 NZLR 301. The tribe was opposed to the deed reached, as the settlement gained Maori generally and was permanent.
958 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 s. 45 & Conservation Act 1986 s. 6X.
960 Ibid., p. 261.
961 Some 900 million Swedish kronor.
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this multinational company now holds about a fourth of all New Zealand fish quota. Maori will receive in addition twenty percent of the quotas determined for all new species as they are introduced to the quota management system. Maori are also guaranteed participation on statutory bodies concerned with fisheries management. All in all, the Sealord deal made Maori joint owners of the largest fishing company in New Zealand. Together with the 1986 preliminary settlement, the Maori control a third of New Zealand's inshore and deepwater fishing industry.962

In the 1992 Act, the Treaty of Waitangi Fisheries Commission (the Commission) was empowered to develop proposals for a new Maori Fisheries Act (reporting to the Minister) under certain criteria set out, including a scheme for identification of the beneficiaries and a procedure for allocation of assets. It has authority to distribute both pre- and post-settlement benefits to Maori. The Commission has examined alternative methods for allocating its assets and, on several rounds, consulted with iwi and Maori on the issue of developing a model with as broad support as possible. The Commission reported to the Minister on the proposal of an allocation model in 2003, which the Minister assessed and subsequently decided to incorporate into legislation. The enactment of the Maori Fisheries Act 2004 meant to complete the implementation of the settlement between the Crown and Maori in relation to commercial fisheries.963 See further below.

5.2.2.2 Legal Implications of the Fisheries Settlement
First of all, Maori commercial fishing rights, whether related to sea, coastal or inland, have through the 1992 Sealord deal been fully and permanently settled. This is evident both by the Deed of Settlement and the 1992 statute964. There is no possibility for Maori to bring claims before the courts or the Waitangi Tribunal based either on common law or on the Treaty965. Claims arising out of non-commercial, customary fishing likewise have no legal effect 966. The Crown is, however, still bound by the Treaty and the Treaty principles, such as the duty to protect Maori fishing grounds and resources actively, but only explicitly regarding Maori non-commercial fishing967. There is, furthermore, a provision that aims at making regulations in order to recognise and provide for Maori non-commercial, customary food gathering, as well as identifying important food gathering places

962 Ibid., p. 260.
963 See Maori Fisheries Act 2004 Preamble for a record of the events.
964 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 ss. 9 & 40. See also the Preamble, which refers to the Deed of Settlement.
965 The Treaty of Waitangi Act 1975 has also been amended. The provision on the jurisdiction of the Tribunal (s. 6(7)) states that the Tribunal no longer has any powers with respect to commercial fishing or fisheries.
966 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 s. 10(d). Such claims, whether based at common law or the Treaty, are not enforceable (before the courts or the Waitangi Tribunal). The removal of section 88(2) of the Fisheries Act 1983, which stated that “[n]othing in this Act shall affect any Maori fishing rights”, means that the right to go to court over commercial fishing claims was taken away. In fact, the removal has created potential uncertainty about the rights to customary fishery resources. See Memon & Cullen (1996) Rehabilitation of Indigenous Fisheries in New Zealand, pp. 260-261.
967 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 s. 10(a).
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for tangata whenua (including tauranga ika and mahinga mataitai)\textsuperscript{968}. This has been accomplished through regulations. See above in subsection 3.2.2.

Moreover, the Minister is obliged to consult with Maori and develop policies that recognise Maori use and management practices in non-commercial fishing.\textsuperscript{969} Altogether, the settlement means that there are no future possibilities to claim commercial or non-commercial fishing rights, whether based at common law or the Treaty. Thus, the settlement is far-reaching. It has also provided for the recognition of customary food gathering of Maori, which includes the taking of other aquatic life and seaweed. Traditional management practices (tikanga Maori) related to food gathering have also been recognised. Perhaps most importantly, all Maori were given a status as beneficiaries to the settlement by the allocation of assets included in the deed. How this allocation should be made has, nonetheless, been a course of considerable debate.

As an aftermath of the Sealord deal, the interpretation of “iwi” has been debated and tried in courts. It was clear that the deed aimed at all Maori, meaning that all Maori should gain something out of the settlement. There has, for instance, been a dispute between urban and rural Maori, the latter of whom commonly have a stronger connection to their iwi, on the forms of allocation. In this respect, urban Maori expressed concern about not being able to benefit from the allocation, since many Maori have lost their connection to their tribe. The Privy Council in London held in Te Waka Hi Ika Arawa v. Treaty of Waitangi Fisheries Commission\textsuperscript{970} that the assets are required to be allocated to iwi, meaning the traditional tribes. Nevertheless, in the new Maori Fisheries Act 2004, there are provisions that allow urban Maori to benefit from the settlement through a trust, the so called Putea trust\textsuperscript{971}. Hence, the 2004 Act finalises the settlement on commercial fisheries reached in 1992.

5.2.2.3 Present Fisheries Management and Quota Allocation

The Fisheries Act 1996 reformed older legislation and is now the primary Act managing fisheries, both commercial and non-commercial. The purpose of this Act is similar to that of the RMA, but the emphasis of use is stronger: it is to “provide for the utilisation of fisheries resources while ensuring sustainability.”\textsuperscript{972} The Act has two principal functions: the first is to determine the allocation of the fishery resource and manage the sustainability of the resource; the second is to manage the effects of fishing\textsuperscript{973}.

\textsuperscript{968} Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 s. 10(c). Tauranga ika means traditional fishing grounds related to freshwaters and mahinga mataitai fishing grounds related to seafood. Note that such food gathering must not be commercial in any way or related to pecuniary gain or trade.

\textsuperscript{969} Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 s. 10(b).

\textsuperscript{970} [2002] 2 NZLR 17. The Privy Council dismissed the appeal and thereby upheld the decision in the Court of Appeal. The allocation of pre-settlement assets (PRESA) are to be allocated though traditional Maori tribes.

\textsuperscript{971} Maori Fisheries Act 2004 s. 82. See also ss. 79-83.

\textsuperscript{972} Fisheries Act 1996 s. 8.

\textsuperscript{973} Harris, Rob (2004) The coastal and marine environment in Harris, Rob (ed.) Handbook of Environmental Law, p. 252.
The quota system is now managed under the *Fisheries Act 1996* and covers presently some sixty species.\(^{974}\) *The Fisheries Act 1983* was the initial statute that created the framework that granted licences to people to fish commercially. Rights of an annual catch, referred to as independently transferable quotas or ITQs, were issued to those who had a catch history. Some fishers were given quota for more than one species, including seaweed and other non fish species. These ITQs may, for instance, be sold or transferred, and the Crown guarantees title to quota shares. The title itself is a hybrid between that of land titles and company shares. There is a publicly available register on quotas for each fish stock, which, among other things, specifies the total allowable catch (TAC), the total allowable commercial catch (TACC), the ITQs allocated to each person, and the registered transfer of quota.\(^{975}\) The eventual surplus after the Minister of Fisheries has set the TACC is held by the Crown due to appeals on quota allocation. Once all appeals are settled the Crown may sell the quota.\(^{976}\)

The setting of the TAC is done after a determination that it can be satisfied in that a stock can produce the maximum sustainable yield. Regard is also taken to the interdependence of stocks.\(^{977}\) Thus, the catches are set at sustainable levels. The TACC can not be set higher than the TAC for any species, in this way upholding the sustainability limit.\(^{978}\) When varying or setting TACC, the Minister must allow for Maori customary fishing non-commercial interests. For instance, the Minister must take into account mataitai reserves within the quota management area. There is a quota management area for every stock included into the quota management system.\(^{979}\)

Apart from setting catch limits, the Act provides for setting a wide range of sustainability measures if necessary to secure the sustainability of the fisheries resources, such as commercial catch limits in relation to a quota management stock, limitations of fishing seasons, and closure of fishing areas. The Minister can also set or vary the catch limit for any stock, whether commercial or not. Before imposing sustainability measures, the Minister shall have regard to planning instruments, such as regional policy statements and regional plans under the *RMA*.\(^{980}\) There are also extensive consultation requirements in the Act, and Maori are mentioned explicitly. There are additional duties to provide for input and participation of tangata whenua (regarding non-commercial or environmental protection interests) and to have particular regard to kaitiakitanga. In relation to TACC, Maori and others having an interest shall be consulted.\(^{981}\)

Largely, the quota management system has been regarded as a great success, keeping the stocks under sustainable use. One reason for this is mainly the adaptivity of the system. While it is inevitable that some fish stocks will decline in certain years due to environmental factors or the effects of fishing, the Ministry is able to respond by cutting quotas at the start of each fishing year in October. The system allows at the same time opportunity to trade the quotas, which makes the

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\(^{974}\) Some 50 speciess are to be added of several thousand speciess caught in the coastal waters. See Harris, Rob (2004) *The coastal and marine environment*, p. 253.

\(^{975}\) Ibid.

\(^{976}\) The ceiling of total allowable annual catches is set after research or by estimations for each species in each zone (quota management area) or both.

\(^{977}\) *Fisheries Act 1996* ss. 13 & 20(5).

\(^{978}\) *Fisheries Act 1996* ss. 20(1), 20(4) & 24.

\(^{980}\) *Fisheries Act 1996* ss. 12(1) & 20(2).
system flexible and effective in economic terms, quotas being individual property rights. This is why New Zealand's fisheries management system is regarded as among the best in the world. Moreover, there are regular reviews of the fish stocks. For most years there has in fact been an increase in the total allowable catch for a few fish stocks in specific areas and decreases for others, while for the majority of stocks there has been no change.\footnote{982 See Ministry of Fisheries at http://www.fish.govt.nz/current/press/pr3604.htm (viewed at 2005-12-21). See also Memon, Ali P. & Bathgate Michael (2000) Towards Co-management of Fisheries in New Zealand in Memon, P. Ali & Perkins, Harvey (eds.) Environmental Planning and Management in New Zealand, pp. 251-259 which apart from the property rights based system discusses the potential for co-management.}

Other statutes of outmost importance for commercial fishing are, of course, the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the Maori Fisheries Act 2004 (which has repealed many provisions of the 1992 Act). The new Maori Fisheries Act 2004 has replaced the interim Act from 1986. The purpose of the new Act is twofold: \(i\) to implement the Sealord deal and \(ii\) to provide for the development of collective and individual interests of iwi in fisheries, fishing, and fisheries-related activities in a manner that benefits all Maori\footnote{983 Maori Fisheries Act 2004 s. 3.}. The Act is comprehensive and rather complex and technical, which is not surprising since it has taken twelve years from the 1992 agreement finally to be able to enact the new statute. It has taken time to find the organisational structure, necessary controls and the model for sharing assets that are now included in the 2004 Act, which must be seen as a major achievement. The resulting model balances a number of factors, including the size of iwi population, with the length of the coastline associated with that iwi.\footnote{984 Maori Fisheries Act 2004 s. 11. Registered coastline entitlements for each iwi are used solely to calculate the amount of the settlement quota to be allocated. See also the web page of Ministry of Fisheries at http://www.fish.govt.nz/current/press/prl7904.htm (viewed at 2005-12-21).}

The Act transfers roughly 750 million NZ dollars in assets, and approximately half of those assets is being allocated directly to some fifty iwi’s, while the other half is managed centrally with the establishment of the company, Aotearoa Fisheries Limited, the country's largest fishing group. This company has an interest in about a third of New Zealand’s commercial fishing industry, and iwi, as shareholders, will receive dividends from the profits of the company. Thus, the finalising of the settlement will provide Maori the means to long-term financial confidence and even empower iwi to develop their own assets.\footnote{985 See Ministry of Fisheries at http://www.fish.govt.nz/current/press/pr17904.htm (viewed at 2005-12-21).}

5.3 The Ngai Tahu Settlement

5.3.1 Background of the Settlement

The settlement of the Ngai Tahu claim was finalised in 1998 with comprehensive settlement legislation, the Ngai Tahu Claims Settlement Act 1998.\footnote{986 The implementation is largely completed and generally regarded as a success. See for instance the "Quarterly Report to 30 September 2005", p. 9, accessible in http://www.ots.govt.nz/ (choose “Documents” and “Latest Quarterly Report”).} The settlement covers about three-quarters of the South Island. In short, the claim...
arose from the Crown’s purchase of Maori land in some ten major transactions between 1844 and 1865. The prices paid were a mockery, and sufficient reserves, as promised in the negotiations, were never set aside. Protection of Ngai Tahu’s rights to greenstone in the West Coast, which had been promised, had not been kept, nor had the hunting and gathering rights been protected. As a result of the purchases, the tribe no longer had any legal interest in the land, apart from their reserves.987

From about 1866 onward, formal complaints began being registered concerning the inadequacy of their reserves. Ngai Tahu leaders tried to launch claims for unfulfilled promises by the Crown and to address their discontent through petitions to the Parliament. The Ngai Tahu grievances, along with other confiscation claims, were investigated by a commission of inquiry as early as 1920. A proposed compensation was rejected by the tribe until 1944, when they unenthusiastically accepted a sum yearly paid over thirty years. The sum was doubled in 1973. This income enabled the Ngai Tahu Trust Board to lodge a claim to the Waitangi Tribunal in 1985.988

The claim before the Waitangi Tribunal addressed a whole range of issues, which were investigated thoroughly. Evidence came from both parties, as well as from specific appointed historical consultants. In 1991, the Waitangi Tribunal published a report of more than a thousand pages on Ngai Tahu grievances between the tribe and the Crown989. The Tribunal found in its 1991 report that, in light of the Treaty principles, the Crown had failed its obligations in many respects: dispossession, dishonesty, broken promises and inflicted poverty. Most evident was the failure to provide for adequate substitutes of good land. The received reserves were not adequate for subsistence. Nevertheless, the negotiation that followed between Ngai Tahu and the Crown aiming at a settlement took many years, and the sea-fisheries negotiation intervened in the Ngai Tahu settlement process.990 In 1997, an 1800 page Deed of Settlement was released with the Crown’s settlement offer. One of the leaders of the tribe, who was a negotiator, described the settlement as acceptable, but not fair991. The package is valued at some 170 million NZ dollars, equal to 5 million Swedish kronor, in cash and lands.

Ngai Tahu had not used their land area very intensively before the Crown purchases; there was little cultivation of crops compared with parts of the North Island. They were basically a sea-fishing people, living in a string of villages along the coast line. The inland was still important for the huge seasonal catches of fish and other game, for bush plants and for the greenstone. The Ngai Tahu population was also rather small.992

The settlement process was anything but smooth. The discussions, which began in 1991, were frequently interrupted. The Crown was investigating ways in which Ngai Tahu could enjoy access to the conservation estate, which in turn made conservation interests anxious. At the same time, there was a belief that large areas of the South Island high country, notably conservation estates, could be

988 Ibid.
transferred to the tribe with possible harmful environmental effects. In addition, groups representing recreational interests were worried about the public access to high country parks, reserves and walkways.  

In many respects, the settlement reached was a result of a struggle between conservation groups and the wish of the tribe to recover its mana and rangatiratanga over traditional lands. In this struggle, the conservation interests scored the most points. As one important example, New Zealand’s highest mountain, Aoraki/Mount Cook, which is part of a national park, was gifted and returned to Ngai Tahu as a significant gesture to confirm the special relationship that Ngai Tahu has with the mountain.  

In their turn, the tribe gifted the mountain directly to the nation as a symbol of the allegiance of the co-management of the area.

The settlement provides nonetheless a significant step towards practical cooperation. A prominent feature of the settlement was that a small number of conservation areas were returned to the tribe, which then leased some areas back to the Crown. A number of lakes, streams and wetlands are also recognised as areas with which Ngai Tahu has special association; there are co-management arrangements for Ngai Tahu for those water areas. There are provisions for Ngai Tahu nominees to be appointed to the Conservation Board, the Geographic Board, the Fish and Game Council, and other bodies responsible for the administration of resources in the settlement area. Thus, in many respects this settlement is a model for achieving the objectives of Maori injured by the Crown’s actions with respect to Treaty principles. The settlement also leads to an increase in the economic and social advancement of the tribe.

It was not obvious that the Ngai Tahu settlement itself would become law. In fact, it nearly did not. There was a strong opposition from several hapu within Ngai Tahu, who objected to being subsumed under a corporate tribal structure. They wished instead to have their specific claims and concerns heard. Some hapu, Waitaha and Tuhuru, even fought the settlement through their representatives in Parliament and the courts. This problem arose from the fact that the primary units of Maori society were then, and still are, the hapu, rather than the overarching iwi structure. However, the iwi structure exists as a body suitable for a struggle against outsiders, for example, in the negotiation process with the Crown. The government’s main position is one of practical common sense. If settlements are to be reached rather quickly and reparation payments are to commence, larger claimant groups are necessary. Both the Tainui and Ngai Tahu settlements had a pre-existing pan-tribal structure dating from the mid nineteenth century, which was crucial for a successful outcome.

996 Ibid., pp. 57-58.
Chapter 5 Treaty Settlements and Maori Rights

5.3.2 The Content of the Settlement and Environmental Law Implications

The final deed and the settlement legislation contain some key elements. First, there is an apology by the Crown for the suffering and hardship caused to Ngai Tahu, something understood as an integral part of the settlement, as a first step of the healing process. Secondly, there is an economic redress through payments to the tribe (170 million) that gives an opportunity for the tribe to re-establish its tribal resource base. Thirdly, the element of cultural redress in the settlement provides for reinstatement of the kaitiaki responsibility of the iwi.

As part of the cultural redress, the tribe was offered ownership and/or control of various areas and resources of special relationship to the iwi. There are four areas of particular relevance in this respect, for instance, concerning the Crown Titi Islands to where the title was transferred in free hold to the governance entity, Te Runanga o Ngai Tahu, protecting the customary rights of RakiuraMaori to harvest mutton birds (titi).

The Ngai Tahu settlement included return of ownership and/or control of some forty land areas of special significance to the iwi, including waahi tapu (sacred sites), waahi taonga (special sites), mahinga kai (food gathering places) and title to three lakebeds. All these areas are managed under a specific trust, which consists of representatives of both Te Runanga o Ngai Tahu and the Waimakariri District Council. Various legal mechanisms have been set in place emphasising the different types of sites and the diverse interests which Ngai Tahu has in them, while also recognising the interests of the wider public. Many areas include a transfer of freehold title, but with continuous protection of public access and conservation values (mainly through covenants). Some other sites vested in Ngai Tahu are controlled and managed as reserves under the Reserves Act 1977. For a few of the land areas, title was transferred to Ngai Tahu, but the principal management role has been retained by the Department of Conservation, a local council or a community board. These arrangements reflect the partnership which Ngai Tahu has sought through the negotiations. In addition, the settlement included a number of instruments that acknowledged the tribes’ mana (authority) in relation to certain sites and areas, such as statutory acknowledgements, deeds of recognition and amendments of

999 The apology is also included in the settlement legislation, see the Ngai Tahu Claims Settlement Act 1998 ss. 4-6.
1001 For a good overview of the four sites and each specific arrangement see http://www.ngaitahu.iwi.nz/Office/The%20Settlement/The%20Crows%20Settlement%20Offer/Cultural%20Redress/Four%20Specific%20Sites (viewed at 2005-12-29).
1002 Those traditional food gathering places are an important part of the settlement. The references to mahinga kai in the settlement, in fact, comprise many different places, however, mainly locations that include access and protection of seasonal occupation sites adjacent to lakes and rivers facilitating customary fishing, et cetera.
1003 For the purpose of setting out the different roles of Ngai Tahu and the Department or local governments, section 38 of the Reserves Act (sites managed as if they were reserves, see ss. 17-23 of the Act) or protected private land agreements (in relation to the Department), have been used.
place names to provide official dual names. The statutory acknowledgment, which was developed in the Treaty settlement, aims to improve the implementation of the Resource Management Act (RMA) processes.

One of the more contentious elements in the settlement negotiation regarded the so-called High Country stations (Elfin Bay, Greenstone, and Routeburn) at the head of Lake Wakatipu in the southern part of South Island. The questions regarded continued public access and the protection of conservation values. Ngai Tahu will gain title to these stations, which has not yet been passed. The tribes’ intention is to gift the mountain tops to the nation in recognition of their conservation values. The remaining area of bush, mountain lands, and the huge Maroroa Valley will be leased back in perpetuity to the Department of Conservation for conservation purposes. Public access will also be continued to allow tramping, fishing, and hunting. However, Ngai Tahu will retain a right to veto in relation to commercial activities on these lands.

Besides the final Ngai Tahu settlement, the ownership of greenstone (pounamu) was returned to Ngai Tahu as a response to a pre-settlement in 1996 through the enactment of the Ngai Tahu (Pounamu Vesting) Act 1997. Pounamu is managed and protected through a management plan that was established in 2002 after five years of preparation, the Pounamu Resource Management Plan. This means that Ngai Tahu is both the owner and the kaitiaki of the greenstone found in the area of the tribe and the adjacent territorial sea in South Island, which also means that they have exclusive mining rights on private land. With respect to minerals, Ngai Tahu has been more successful than other tribes in claiming back such resources. The tribe argued before the Waitangi Tribunal that their ownership of greenstone had never been extinguished, and the Tribunal acknowledged the deep spiritual and cultural significance of the stone for the tribe. Thus, the Tribunal recommended that every effort should be made to secure as much as possible to Ngai Tahu ownership and control, which was done through the pre-settlement.

The Ngai Tahu settlement includes all of the tribes’ historical claims. In this respect, the settlement reached was full and final. As an aspect of this completion, no court or the Waitangi Tribunal has jurisdiction with respect to any Ngai Tahu claim, only regarding claims on the implementation of the settlement legislation. It is common that settlement acts result in an amendment of the provision relating to the Tribunal’s jurisdiction to investigate claims, since one

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1007 See the Ngai Tahu (Pounamu Vesting) Act 1997 s. 3 and the Preamble. Green stone found is, thus, the property of Ngai Tahu and collection of the stone is restricted and subject to permission of the Ngai Tahu and the appropriate kaitiaki (provisions set out by the management plan). Ownership and control apply also on private lands. See further in http://www.ngaitahu.iwi.nz/IM_Custom/ContentStore/Assets/6/67/42cf1d09a708eab61eb403318750f6b/pounamu.pdf.


1009 Ngai Tahu Claims Settlement Act 1998 s. 461.

1010 Ngai Tahu Claims Settlement Act 1998 ss. 461(3)& 462 and the Treaty of Waitangi Act 1975 s. 6(9)(10).
important objective is to end the historical grievances. With respect to the Ngai Tahu settlement, there seem, however, to be different views between the Crown and the tribe on whether the settlement did affect any customary rights or title that existed at the time the settlement was reached. The provisions are, nevertheless, clear that even rights at common law have been settled finally.

As evident from this outline, the settlement is indeed complex and comprehensive, something which is reflected in the settlement legislation. The Ngai Tahu Claims Settlement Act 1998 consists of 17 parts, 479 sections and 117 Schedules. In various ways, it gives effect to the Deed of Settlement. Hereunder I will only briefly point out the most obvious implications for the resource management and the general environmental law regime.

As a central point, the settlement is aimed at collective benefit for the iwi. This is generally provided though return of particular land areas, where the management of the land and the resources will be more direct, as well as provided through arrangements for a larger participation for the iwi in the decision-making relating to specified areas or species. Importantly a main principle appears to be non-derogation from normal environmental and conservation legislation. If certain provisions shall not apply, it is explicitly stated in the Act.

As for the lands returned to Ngai Tahu (in fee simple) the title is usually encumbered by covenants to protect conservation values or to provide that the area is used in a specific manner. A few areas vested in Ngai Tahu are to be managed “as if” they have a particular protection status. For example, the Crown Titi Islands shall be managed as if they were a nature reserve. In this respect, the appointed administering body have all the functions and powers provided by the Reserves Act 1977, including the power to make by-laws. A part of the deal was to give Raiaikuri Maori statutory responsibility for control and management of these islands and the mutton birds. The administrative body, of ten appointed RakiuraMaori, is to control and manage the Islands. Before the administrative body will take over the management from the Department of Conservation, the by-laws must be in place. The administering body has also a duty to prepare a management plan for the islands.

The arrangements for increasing the iwi’s participation and contribution to management decisions include, among other things, the role as statutory adviser to the Minister and fish and game councils, as well as membership on certain statutory boards, such as conservation boards within the claimant area. The package relating to customary fishing in the Crown’s offer provided for greater access and input in the management of customary fishing. In this, regulations on...
customary marine and freshwater fisheries were to be issued, which was done in 1999.

Additionally, there are arrangements to provide for greater consultation than present legislation requires, which is especially provided for if deeds of recognition have been established. On areas subject to statutory acknowledgement, the Minister responsible for the management of the land may enter into a deed with Ngai Tahu. The deeds of recognition are specific agreements between Ngai Tahu and the landholding agency and create an obligation on the agency, commonly the Department of Conservation, to consult with the tribe as well as to have particular regard to its views in relation to the management of each of the areas. In this, the deed is a complement to the statutory acknowledged areas.

Generally, the aim of the statutory acknowledgments is to identify Ngai Tahu's special association with certain significant areas in the South Island and to ensure that Ngai Tahu is informed when a proposal may affect one of the areas. Particularly, the provisions are enhancing the iwi’s input in relation to applications on resource consents within those statutory areas. The acknowledgements require consent authorities to forward summaries of consent applications and to have regard to statutory acknowledgements in decision-making concerning the notification process and considerations of whom may be adversely affected. Another purpose is to empower Ministers to enter into deeds of recognition. The Environment Court must also have regard to statutory acknowledgements as to whether the Ngai Tahu is a person having an interest greater than the general public, and, if so, providing that the Ngai Tahu become a party in the proceedings.

The local authorities must also include the statutory acknowledgements into their planning instruments (policy statements and plans) for the purpose of public information. Persons applying for resource consents will be on notice that these areas are special to Ngai Tahu. However, as long as the information is not explicitly adopted by the regional council or territorial authority, the information is not part of the plan and thus not legally binding. In the Resource Management Act (RMA), Schedule 11 includes all settlement acts, of which there are presently eight, that encompass statutory acknowledgements. As indicated above, the statutory acknowledgement was a new instrument created to improve the effectiveness of Ngai Tahu participation under the RMA. The protection of these identified areas will be enhanced, merely because they are acknowledged and local authorities are already required to recognise and provide for the relationship of Maori with their lands, waters and other taonga as a matter of national importance subject to Part II of the RMA.

Other provisions on consultation requirements relate to the so called Topuni, areas of lands with specific protection status, such as national parks, which

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1021 Ngai Tahu Claims Settlement Act 1998 s. 220.
1022 See also Ngai Tahu Claims Settlement Act 1998 s. 226.
includes specific Ngai Tahu values. Such values include, for instance, specific physical features in the landscape that have significant spiritual meanings. Ngai Tahu and the Minister of Conservation may agree on the application of specific principles to avoid harm or diminution of Ngai Tahu values for each Topuni. Such principles must be publicly notified. The New Zealand Conservation Authority and conservation boards must consult with Ngai Tahu and have particular regard to its views as to the effect on the Topuni of policies, management strategies and management plans approved or considered. The Minister of Conservation also has powers to make regulations to implement objectives through, for instance, conservation management plans, such as to regulate or prohibit activities of the public in a Topuni. Ngai Tahu may additionally recommend that the Minister make by-laws to implement objectives in such areas as management strategies. Even if these Topuni primarily aim to protect sites of spiritual significance to the Ngai Tahu, they are still parts of ecologically valuable or sensitive areas, generally also of large scenic values.

On the whole, the Treaty claims process provides an opportunity to remedy historical injustices, as well as to identify significant areas of Crown land in need of enhanced participation in resource management. The Ngai Tahu settlement provided an opportunity for the iwi to reassert its rangatiratanga over a range of significant sites by regaining a more direct control over the management over those areas.

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1023 See statements of such values in Schedules 80-93.
6 Aboriginal Rights in Canadian Law

Aboriginal legal issues in Canada are similar to those in Aotearoa/New Zealand and Sweden in that they are strongly tied to the relationship with and use of the land and natural resources. There is a link between aboriginal rights and land, as many of the rights stem from aboriginal traditions, customs or practices associated with the land. Many aboriginal communities have lost access to lands and resources in various ways with a diminishing land base as a result. Current conflicts over aboriginal issues are often an enduring reflection of the fundamental and forced separation of aboriginal communities from the land. In recent years, however, there has been a growing judicial recognition that aboriginal rights should be woven into Canadian law. Three distinct aboriginal peoples are constitutionally acknowledged in Canada: First Nations (Indians), Inuit, and Métis.

As a brief historical recapture during the first half of the twentieth century, there was a virtual absence of discussion concerning Indian rights to land and resources in Canada, even in academic literature. In the late 1960s, aboriginal claims were not even recognised as having legal status by the federal government. They were too general and undefined. As an example from this period, the development of hydroelectricity in the James Bay area by Quebec Hydro was originally initiated without any regard to the rights of the Indians living there. It took a number of judicial decisions to bring about a reassessment of the position taken by the government. Notably, the Calder case, decided by the Supreme Court of Canada in 1973, was a landmark case in this respect.

Due to the constitutional statement of protection of existing aboriginal and treaty rights, the courts in Canada have creatively responded by analysing whether any claimed right does in fact exist. Thus, protected rights may exist as aboriginal rights or treaty rights. Treaty rights may, but need not, affirm pre-existing aboriginal rights, such as hunting. However, the focus of this chapter lies entirely on aboriginal rights. Although Canada was subject to extensive treaty making, large areas in Canada are still not subject to historical treaties, notably the larger parts of British Columbia and parts of the Territories.

With or without constitutional protection, the Supreme Court of Canada has over the past thirty years started to re-map the neglected territory of aboriginal and treaty rights. It has done so progressively in a number of important decisions extending from Calder in 1973 to Sparrow in 1990 to the more recent Haida and Taku River cases in 2004 and the Marshall; Bernard case in 2005. At first the

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1026 The term “indigenous” is commonly referred to as “aboriginal” in the Canadian legal context.
1030 For more information see subsection 1.1.2.
1032 These are recent key cases for the situation in British Columbia.
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Court had little to draw its conclusions from, but with a case-by-case approach this legal field has been illuminated.\footnote{Slattery, Brian (2000) Making Sense of Aboriginal and Treaty Rights in Canadian Bar Review Vol. 79 2000, p. 197.}

The Supreme Court of Canada has recognised harvesting rights, such as hunting, fishing and trapping rights. So far, however, no aboriginal title has been explicitly recognised. Nonetheless, land claims have been articulated and advanced through the negotiation process with the federal and provincial Crown, resulting in modern treaties, such as the famous Nunavut Agreement in 1993 and the Nisga’a Agreement in British Columbia in 2000\footnote{See further in Crane, Brian A., Mainville, Robert & Mason, Martin W. (2006) First Nations Governance Law. LexisNexis, chapter 4.}. Nevertheless, in large there are many differences between aboriginal peoples and Crown governments over the definition and scope of various aboriginal rights\footnote{Imai, Shin (1999) Aboriginal Law Handbook, p. 6.}

As a response to the constitutional protection of aboriginal rights, the courts have over the recent years formed an interesting body of case law on the various aspects of aboriginal rights. All of these cases, particularly the important cases from the Supreme Court, have shed light on the nature and extent of aboriginal customary rights related to land and natural resource use. In relation to environmental protection measures, the case law is clear that conservation objectives may permissibly infringe upon aboriginal rights and aboriginal title as long as the justification test illuminated by the Supreme Court in \textit{Sparrow} is otherwise met. However, the Court has also found that aboriginal rights for subsistence and ceremonial purposes have first priority in resource allocation, after conservation measures are met.

Moreover, the principle of the honour of the Crown is invoked in all Crown dealings with aboriginal peoples. This regards particularly unproven, but valid, claims of aboriginal rights or aboriginal title, which give rise to a legal duty to consult and accommodate specific aboriginal interests. Where such interests are established and shielded under section 35 of the \textit{Constitution Act, 1982}, the principle of the honour of the Crown transforms into a fiduciary duty. These and other interesting aspects of the nature of aboriginal rights will be analysed in this chapter.

6.1 Background

The courts have mainly set the stage for an examination of the complex issues involved in aboriginal resource uses and rights to land. Native groups in Canada have turned to the courts in an attempt to defend their interests when politicians seem unable or unwilling to do so. Expert witnesses have been called to provide evidence for both sides, and because the concepts of “established custom” and “prior occupancy” have been central to the cases, historians and historical evidence have been important. Considerable research has been undertaken for these court cases. As one example and indeed a milestone, the Nisga’a First Nation in British Colombia took both the federal and provincial governments to court, because of their failure to recognise aboriginal land rights. This action lead to the 1973 Supreme Court decision in \textit{Calder}\footnote{Calder v. The Attorney General of British Columbia [1973] S.C.R 313.}, and, with it, to a new era of
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federal and provincial land claims policy. The creation of the British Columbia Treaty Commission\textsuperscript{1037} is one example of a recent attempt to deal with unresolved issues dating back to the entry into the Confederation.\textsuperscript{1038}

Recently, the enormous importance of the \textit{Calder} decision has been emphasised in relation to the 30\textsuperscript{th} anniversary of the decision. It was then said that the decision in fact has changed the country and, in particular, the province of British Columbia. Even though there was a legal notion of aboriginal title long before \textit{Calder}, governments and, to a certain extent, the courts were not taking it seriously, which ultimately changed as a result of the \textit{Calder} case.\textsuperscript{1039} Although the decision as such divided all six judges considering the issue, all nevertheless held that Nisga’a once had aboriginal title. The decision was split as to the later issue of whether the title remained. One group found that title was extinguished by colonial land laws, while the other group held that the aboriginal title still existed. On the whole, the appeal was dismissed due to procedural error; the Nisga’a had not sought permission to sue the Crown.

The group upholding the Nisga’a Aboriginal title made some general comments on aboriginal title and rights, supported by previous case law in the Commonwealth, that are worth quoting. They stated that such title did not depend on treaty, executive order or legislative enactment, but was rather a recognition of a pre-existing right of possession. Once the title was established, it was presumed to continue until proven contrary, which requires a “clear and plain” indication in the public records that the sovereign intended to extinguish aboriginal title. In this, the onus of proof lies on the Crown. They saw the nature of aboriginal title as an equitable interest in the land, as a right to occupy the land and enjoy the fruits of the soil in any possible way as long it does not deny the Crown’s paramount title.

They also initially concluded that the right to possession was not prescriptive in origin, as this would presuppose a prior right of some other person or authority. This did not correspond with the fact that the Nisga’a had been in possession since time immemorial, which negates that anyone ever had or claimed prior possession.\textsuperscript{1040} This is, in fact, an important remark to bear in mind in a Swedish legal context, where we since long have chosen the path of prescriptive rights to legally explain Saami customary rights. Immemorial prescription includes an assumption of a previous owner. See further below primarily in subsection 7.2.1.3.

Through the \textit{Calder} case, the Supreme Court of Canada changed the future framework of aboriginal rights in the country. The Supreme Court recognised that aboriginal title was a justifiable right and not solely a moral or political concern. Compare here with the Swedish land mark case, the Taxed Mountain case\textsuperscript{1041}. The \textit{Calder} case raised a possibility that aboriginal peoples had unextinguished legal interests that protected them against the types of abuses to which they had

\textsuperscript{1037} See the web page at \url{http://www.bctreaty.net/index.html} (viewed at 2006-01-31).
\textsuperscript{1038} Royal Commission on Aboriginal Peoples (1996) \textit{Restructuring the Relationship}, p. 478. When British Columbia entered into Confederation, the majority of the population, some seventy percent, was aboriginal, but they were deprived of the rights to vote. Crown land legislation, before and after Confederation, prevented Indian people from pre-empting land without written permission from the Governor, which was hardly ever given. Reserve sizes in the province were limited and comparatively smaller than the national standard. At Confederation, most of the lands used by First Nations in southern and central British Columbia were transferred to non-aboriginal farmers and ranchers. See further in ibid., pp. 476–478.
\textsuperscript{1039} See the expression of Professor Hamar Foster, University of Victoria at \url{http://communications.uvic.ca/releases/release.php?display=release&id=87} (viewed at 2006-01-31).
\textsuperscript{1040} See the reasoning by Judge Hall (Spence and Laskin concurring) in the \textit{Calder} case.
\textsuperscript{1041} See section 7.1 below.
been subjected during the first hundred years of Confederation. Calder also suggested that aboriginal rights originally had their source and authority outside of the common law and the constitutional legal structures, since aboriginal peoples were the original occupants and organised in societies, as had been their ancestors. As such, the Supreme Court proffered the notion that aboriginal title did not depend upon treaty, executive order or legislative enactment, but was a pre-existing right that could be articulated under the common law.  

The effect of the Calder decision was enormous. For the first time in Canadian history, the country began seriously to realize that aboriginal peoples would be a permanent part of the political and legal landscape, and aboriginal peoples began to press harder for a broader recognition of their rights. Not quite ten years later, these forces were united when aboriginal rights gained constitutional protection within the Constitution Act, 1982.

In Canadian law, the approach toward aboriginal rights is that many of them are existing, which has been proven in Canadian courtrooms due to the constitutional recognition of “existing aboriginal and treaty rights”. Indigenous practices and customs that existed before European contact, which still are in use, are in principle protected through the Constitution. The rights, as such, are not created by the court, merely recognised and clarified. Consequently, indigenous practices in relation to land and natural resources use in the Canadian context are founded at common law and protected under it, if not statutorily codified.

The notion of constitutional recognition of existing aboriginal and treaty rights does not mean that the recognition created the legal doctrine of aboriginal rights; they already existed and were recognised under the common law. At common law, the rights did not of course have constitutional status, which meant that the Parliament could, at any time, regulate and extinguish those rights. Presently, aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the tests laid out by the Supreme Court in Sparrow.

Thus, aboriginal and treaty rights must not be understood as privileges extended to individual aboriginal persons, but instead as arrangements needed for the survival of distinct nations: in this they are group or collective rights belonging to a community as a whole. Aboriginal individuals may enjoy the benefits of these rights, such as hunting and fishing, but the rights per se belong to

\[^{1043}\text{Shortly after Calder, the federal government began to rethink its position on Indian rights to ancestral lands. With the issuance of new policy statements, the government declared for the first time its willingness to negotiate claims of aboriginal title without regard to formal supporting documents, foremost treaties. The government was now ready to negotiate with authorised representatives of the aboriginal peoples, specifically in British Columbia, Northern Quebec and the Territories. Where traditional interests in lands could be established, an agreed form of compensation or benefit would be provided to the aboriginal peoples in compensation for their violated interests. Today, various kinds of modern agreements between the federal and provincial governments and groups of aboriginal peoples have been established, and many aboriginal groups are still negotiating or entering into such negotiations. See R. v. Sparrow [1990] 3 C.N.L.R. 160, at pp. 177-178. See also generally in Crane, Brian A., Mainville, Robert & Mason, Martin W. (2006) First Nations Governance Law. LexisNexis Canada Inc., ISBN 0-433-44790-7.}\]
\[^{1044}\text{Borrows, John (2001) Uncertain Citizens: Aboriginal Peoples and the Supreme, p. 18.}\]
\[^{1045}\text{R. v. Van der Peet [1996] 4 C.N.L.R. at 28 (per Lamer C.J). See further in subsections 6.4.4 & 6.4.5.}\]
the community. The rights are personal in the sense that violations of communal rights affect individual members’ enjoyment of those rights.

It is important to emphasize here that, although the landmark case of Calder was initiated through a lawsuit by a First Nation, it represents a rare event. A majority of the cases have found their way to the Supreme Court because of criminal lawsuits. Aboriginal persons have been charged for not complying with environmental protection legislation, for instance, whereas the person or persons charged have claimed the exercise of an existing aboriginal right. For example, the Sparrow and Adam cases had their origin in such charges.

Aboriginal peoples continue to end up in court, because of charges against them for violating federal and provincial legislation. Since Sparrow, many charges have applied to kinds of conduct that enforcement officers consider grey areas, such as hunting or fishing in a different treaty area, fishing during spawning periods, or selling some of the catch. The Royal Commission on Aboriginal Peoples acknowledged that prosecutions of aboriginal harvesters are not only costly to the judicial system, but, above all, socially harmful, while failing to solve the more general issues related to fish and wildlife management. The Commission emphasized that some of the difficulties relate to cultural misunderstandings of, for example, harvesting practices. As an example, aboriginal fishermen used fish traps, weirs, night lights and spears long before the arrival of Europeans. These were all practices with the primary goal of obtaining food with the least amount of effort. Such practices seem to be offensive to sports anglers for whom the thrill of the catch is part of the sport. These cultural differences were seen as interlinked with the long-standing ethos in resource management that makes distinctions between managers and users.1047

6.2 Constitutional Protection of Aboriginal and Treaty Rights

6.2.1 Amending the Constitution

Since the mid of 1960s, the theory and practice of Canadian constitutionalism have been dominated by the idea that only a constitutional reform may resolve conflicts underlying political life.1048 In this respect, the constitution forms an institutional framework of formal rules, including substantive rights, by which social and political conflicts are resolved. The Canadian constitution was amended in 1982. This amendment was part of Canada’s process of evolution as a self-governing nation1049. This process was completed with the enactment of the Canada Act, 1982, a decision by the Parliament of the United Kingdom. The brief statute has Schedules with the Constitution Act, 1982 in English and in French. In a Schedule to the new Constitution Act, new names were also given to a series of old colonial statutes.1050 At the same time, Canada adopted the Canadian Charter of Rights and Freedoms, now including a constitutional guarantee of rights.

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The new Constitution Act, 1982 contains seven parts and the rights of aboriginal peoples are found in Part II. The inclusion of an explicit protection for aboriginal and treaty rights must, however, be seen as a hard-won success. Part II includes only two sections, which will be presented shortly below. Part I of the Act encompasses the Canadian Charter of Rights and Freedoms, which also naturally applies to aboriginal peoples.

The distribution of powers in Canada is rather complex, since the country consists of both a federal and several provincial governments with extensive powers, as well as governments under these. The Parliament has the authority to make laws in relation to “Indians, and Lands reserved for the Indians”. However, the provinces have the possibility to impose their laws on the aboriginal peoples that reside in the province, by virtue of the fact that they own lands and resources and they have the power to make laws in relation to them.

It is clear that the provisions of the Constitution Act, 1982 that its provisions form the overarching law. Section 52(1) states that:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This section, together with section 24, the so-called enforcement provision, which pertains to the Charter of rights and freedoms, establishes a regime of constitutional supremacy enforced by judicial review. Only one provision in the Canadian Charter of Rights and Freedoms explicitly mentions aboriginal peoples, although all the rights and freedoms stated in the Charter naturally apply to aboriginal peoples. Nonetheless, section 25 protects aboriginal and treaty rights from being damaged by inappropriate application of individual rights. One could describe this provision as operating like a shield to protect from intrusion of the Charter, for example, an exclusive treaty right of a particular First Nation to fish. Section 25 of the Charter, with the title “Aboriginal rights and freedoms not affected by Charter”, reads:

The guarantee in this Charter or certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

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1052 Constitution Act, 1867, s. 91(24).
1054 Section 24(1) declares that “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” This regime is, however, somewhat moderated by section 33, which provides that both Parliament and the provincial legislatures may expressly declare that legislation shall operate notwithstanding the Charter’s constitutional protection (the so called notwithstanding clause). This section is controversial in the sense that it allows legislative bodies to override the Charter by ordinary legislation. The provision was largely a product of political short-term trade-offs. See, for instance, Manfredi, Christopher (1996) On the Virtues of a Limited Constitution: Why Canadians were Rights to Reject the Charlottetown Accord, pp. 43-44.
(a) any right or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

All in all, the Constitution Act, 1982 sits at the top of the law hierarchy, and inconsistent laws that are not compatible with the Constitution of Canada are of no force or effect. Note that the Swedish constitution does not play the same strong role of being the supreme law. The most relevant section for Canada’s aboriginal peoples is section 35. The inclusion of section 35(1) represents the culmination of a long and difficult struggle in both political and legal arenas. The strong representation from native associations and other groups concerned with the welfare of the aboriginal peoples of Canada made the adoption of the provision possible. Section 35(1) provides a solid constitutional base upon which subsequent negotiations can take place. The section reads:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

First, it is clear that Canada acknowledges three distinct aboriginal peoples: First Nations (Indian), Inuit and Métis. Second, section 35(3) includes in the constitutional protection not only historical treaty rights, but also modern treaty rights. Third, only existing rights are shielded by the provision. Hence, when rights have been extinguished, they are so to speak non-existent. What is meant by “recognized and affirmed” will be explained below in the next subsection and more thoroughly in relation to the identification of aboriginal rights and aboriginal title.

The general procedure for amendments of the Constitution is strengthened in respect to section 35. The government of Canada and the provincial governments are committed to participate in a constitutional conference, at which representatives of the aboriginal peoples are also invited to participate in the discussions related to a proposed amendment. In this way there is a guarantee that the aboriginal

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1056 Apart from the Constitution Act, 1982, the Constitution also encompasses the Acts and orders referred to in its schedule (those given new names) and any amendments thereto. See the Constitution Act, 1982, s. 52(2).
1057 See my comments in subsection 2.3.1 and section 10.3 (at the very end in a footnote).
1059 Note that s. 35(4) is not cited here. It concerns guaranteed equal treatment of both sexes in respect to the aboriginal and treaty rights.
1060 For more information, see above in subsection 1.1.2.
1061 The general procedure: amendments must be approved by the Senate, the House of Commons, and two thirds of the provinces that contain at least 50 percent of the population. See Constitution Act, 1982, s. 38. See also Manfredi, Christopher (1996) On the Virtues of a Limited Constitution: Why Canadians were Rights to Reject the Charlottetown Accord, pp. 43-44.
1062 Constitution Act, 1982, s. 35.1. Note that this procedure also applies to amendments of section 25.
peoples will be provided participation, at least to express their voice, concerning certain amendments to the Constitution that are of great relevance to them.

In sum, the inclusion of sections 35 and 25 in the Constitution has to be understood in a larger context. During recent decades, Canada had begun to address aboriginal issues in a more serious way than ever before. The country was coming to terms with the reality of history and, through the constitution, attempted to address the reality of the existence of aboriginal peoples. The inclusion of section 35 has indeed been important. On the whole, there has been a shift in attitudes and approaches toward the aboriginal peoples, which intensified with the changes in the Canadian constitution. Saami do not enjoy constitutionally entrenched rights as aboriginal rights do in Canadian law. Even if there are a few constitutional provisions aiming at Saami, they have not the same prominent role as section 35(1) in the Canadian constitution.

### 6.2.2 The Meaning of Section 35(1)

For a long time after the enactment of the constitutional provision in section 35, there was doubt as to what the provision meant in practice. However, in a number of cases beginning in the 1990s with *Sparrow* the Supreme Court has been slowly drawing a picture of the nature and extent of the rights protected. Nonetheless, the full implication of section 35(1) still remains uncertain, and it is important to emphasis that the Court considers aboriginal claims on a case-by-case basis and continually adjusts the tests in response to new situations and issues.

The *Sparrow* case, delivered by a unanimous court, marked the first time that the Supreme Court of Canada explored the scope of section 35(1) of the *Constitution Act, 1982*. This case contains an extensive discussion of how section 35(1) is to be interpreted. In particular, the Court placed emphasis on the word “existing” and the phrase “recognised and affirmed”. In its findings, the Court relied on general principles of constitutional interpretation, academic commentary on the nature of aboriginal rights, frequently quoting legal scholars in the field, notably Professor Brian Slattery, and the purpose behind the constitutional provision itself.

With respect to the interpretation of the meaning of section 35(1), the Court sketched a framework for an interpretation of the words “recognised and affirmed” that, in the opinion of the Court, gives appropriate weight to the constitutional nature of these words. Here, the Court argued that contemporary recognition and affirmation of aboriginal rights were to be defined in light of the historic relationship between the Crown and the aboriginal communities, and legal scholars had also commented that this provision was to be given a meaningful content. Altogether, the court found that the nature of section 35(1) itself suggested that it be interpreted in a purposive way: a “generous, liberal interpretation” of the words was, hence, demanded. This is an important interpretative principle, which has guided the Court in subsequent cases.

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1064 Compare primarily with subsection 7.3.2.3.
1066 *Sparrow*, supra, at p. 162.
1067 *Sparrow*, supra, at pp. 179-180.
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The word “existing” makes it clear that the rights to which section 35(1) applies are those in existence when the Constitution Act, 1982 came into effect. It follows that extinguished rights are not revived by the Act. Moreover, the Court argued that an existing aboriginal right cannot be read so as to incorporate the specific manners in which they were regulated before 1982: such notion of freezing existing rights would be an unfortunate incorporation into the constitution and would mean a patchwork regulation of the rights. The Supreme Court found instead that the phrase “existing aboriginal rights” must be interpreted flexibly so as to permit their evolution over time.1068

Later, the Van der Peet case canvassed more explicitly the underlying purposes of section 35(1). The provision appears to have two underlying purposes which have been affirmed in many cases: i) the recognition of the prior occupation of North America by aboriginal peoples and ii) the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown.1069

The reconciliation aim is generally seen as the more crucial in terms of disputes over rights. This has recently been emphasised in Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)1070. The Supreme Court stated there that "[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions." 1071

At the very least, this section provides “a solid constitutional base upon which subsequent negotiations can take place”.1072 The provision also gives the aboriginal peoples constitutional protection against provincial legislative power, as found in R. v. Côté1073. The Supreme Court acknowledged that section 35(1) lays down only the constitutional minimum that governments must meet in their relations with aboriginal peoples and their aboriginal and treaty rights. Governments may choose to go beyond this standard, subject only to constitutional constraints.1074

Sparrow also found that federal power must be reconciled with federal duty. The Court asserted that the best way to achieve reconciliation is to ensure that any government regulation that infringes upon or denies aboriginal rights is properly justified. Such examination is in line with the principle of liberal interpretation of the section, as well as with the concept of holding the Crown to a high standard of honour and respect when dealing with the aboriginal peoples of Canada (the fiduciary duty). This understanding of the section was derived in spite of the fact that there is no explicit language in the provision that authorises the Supreme Court or any other court to assess the legitimacy of any governmental legislation that restricts aboriginal rights. The Crown’s fiduciary responsibilities, recognised in the Guerin case1075, opened such possibilities. The words “recognition” and “affirmation” incorporate fiduciary relationships and thus import some restraints

1068 Sparrow, supra, at pp. 169-171.
1070 2005 S.C.C. 69.
1071 Mikisew Cree First Nation, supra, at para. 1.
1074 Côté, supra, at para. 83.
on the exercise of sovereign power. The legislative power was now to be read together with section 35(1).\textsuperscript{1076}

Hence, the extent of regulatory impact on an existing right may be examined so as to ensure recognition and affirmation of that right. This means a measure of control over government conduct and a strong check on the legislative power. From this follows that it is governments that are required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected by the constitutional provision.\textsuperscript{1077}

Another consequence of the incorporation of section 35 into the constitutional framework regards the difference in the legal protection achieved. Before 1982 aboriginal and treaty rights could be extinguished and regulated by legislation at the discretion of the federal and provincial Crown, although \textit{Calder} emphasised that a clear and plain intention was needed to extinguish such rights.\textsuperscript{1078} Presently, aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justification test laid out in \textit{Sparrow}. It is this that distinguishes the aboriginal rights protected by the common law from the rights recognised and affirmed by section 35(1). Moreover, section 35 did not create the rights now constitutionally entrenched, nor was the doctrine of aboriginal rights created by section 35(1); aboriginal rights existed and were already recognised under the common law.\textsuperscript{1079}

### 6.3 The Nature of Aboriginal Rights

#### 6.3.1 The Doctrine of Aboriginal Rights

In more recent decisions from the Supreme Court of Canada, the common law foundation of aboriginal rights is apparent. This is evident particularly since the \textit{Guerin case} in 1985. In \textit{Van Deer Peet}, the Court emphasised the pre-existence of aboriginal rights and its relevance to the analysis of section 35(1). It also affirmed – in a much quoted passage- that, as a simple fact, “when Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional status.”\textsuperscript{1081}

Generally, the Supreme Court assumes that the common law governing aboriginal and treaty rights is uniform and does not vary from place to place.\textsuperscript{1082} Matters of legal rights of aboriginal peoples in Canada and the relationship between aboriginal peoples and the Crown, are governed by a distinct branch of

\textsuperscript{1076} \textit{Sparrow}, supra, at p. 181.
\textsuperscript{1077} \textit{Sparrow}, supra, at p. 181.
\textsuperscript{1078} \textit{Sparrow}, supra, at p. 174.
\textsuperscript{1079} \textit{Van der Peet}, supra, at 28.
\textsuperscript{1080} \textit{Guerin v. The Queen} [1984] 2 S.C.R. 335.
\textsuperscript{1081} \textit{Van der Peet}, supra, at para. 30.
\textsuperscript{1082} For many purposes, this uniformity means that there is no need to determine precisely which territories are covered by the Indian provisions of the \textit{Royal Proclamation of 1763}. There is reason to think that the basic provisions apply across Canada, since the common law principles reflected in the Proclamation are in force throughout the country. See Slattery, Brian (2000) \textit{Making Sense of Aboriginal and Treaty Rights}, pp. 198 & 202-203.
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law, the doctrine of aboriginal rights. As said previously, in Sweden, Saami customary rights are established under the doctrine of immemorial prescription, and are as such prescriptive in origin.

In short, the doctrine of aboriginal rights is a body of Canadian common law that defines the constitutional links between aboriginal peoples and the Crown, and it governs the interplay of aboriginal systems of law, rights and standards. The doctrine is a form of “inter-societal” law in the sense that it regulates the relations between aboriginal communities and other communities in Canada. This body of Canadian common law is the unwritten law applied in Canadian courts, whether in common law or civil law jurisdictions (Province of Quebec).

The doctrine also states the original terms upon which the Crown assumed sovereignty over native peoples and their territories. In brief, the Crown’s dealings with the aboriginal peoples were based on legal principles founded on the actual circumstances of life in North America, attitudes and practices of foremost Indian societies, and broad rules of equity and imperial policy. These principles gradually crystallised in “colonial law” or more accurately “imperial constitutional law”, which was a part of a special branch of British law that governed the Crown’s relations with overseas dominions. The legal principles governing the aboriginal peoples developed more fully during the eighteenth century, and these principles were partly reflected in the major Indian document of this era, the Royal Proclamation of 1763.

Over time, distinct rules developed in a body of unwritten law, which now is known as the doctrine of aboriginal rights. The part dealing with aboriginal lands is called the doctrine of aboriginal title. The doctrine is broad and other parts deal with treaties, customary law, powers of self-government and the fiduciary obligations of the Crown toward the aboriginal peoples.

The doctrine of aboriginal rights, similar to other doctrines of colonial law, applied automatically to a new colony when the colony was acquired. In fact, as explained above, the doctrine was part of a body of fundamental constitutional law that logically existed prior to the introduction of English common law. Therefore the doctrine extended to New France at the time of British conquest and before English law was introduced in 1763. The doctrine still limits and moulds the application of English and French law. Altogether, these features of the doctrine provide a theoretical basis for the survival of aboriginal customary law in Canada, a phenomenon long recognised in courts, but not always well understood. Thus, the doctrine of colonial law that supports the survival of aboriginal custom is distinct from the English rules concerning local custom in England and is governed by quite different considerations.

According to some views, when asserting a customary right, a claimant must show that a custom has existed since “time immemorial”, which is associated with the year 1189. This analogy is inappropriate, however, since it draws on English rules.

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1083 The doctrine has its origin in British imperial law, which will be explained below. The doctrine was also inherited by the United States after the American Revolution. Therefore, a series of early American decisions are also highly relevant for Canadian law. See further in Slattery, Brian (1987) Understanding Aboriginal Rights, p. 739.
1084 Compare with subsection 7.2.1.
1087 Ibid., p. 737.
1088 Ibid., pp. 737-738.
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As we have seen, the doctrine of aboriginal rights is not derived from rules applying in England.\textsuperscript{1089} It has become accepted in Canadian law that aboriginal title and aboriginal rights generally derive from historic occupation and use of ancestral lands, and, as such, do not depend on any treaty, executive order or legislative enactment\textsuperscript{1090}. Although the traditional and main component of the doctrine of aboriginal rights relates to aboriginal title (proprietary interests), it acknowledges nowadays a broader notion of aboriginal rights, such as aboriginal rights to hunt, fish, and trap, as well as matters not related to specific lands that form part of a distinctive aboriginal culture\textsuperscript{1091}.

The common law doctrine of aboriginal rights has two major sources. The first is a distinctive body of \textit{inter-societal customs} generated by the intensive relations between aboriginal peoples and the British Crown in the seventeenth and eighteenth centuries in eastern North America. This body of customs was united into a branch of British imperial law as the Crown gradually extended its protective sphere in North America. When Canada became an independent federation, it became part of the fundamental Canadian common law that underpins the constitution. These inter-societal customs assumed more definite forms during the eighteenth century and were reflected in numerous Indian treaties and Crown instruments. By the time the \textit{Royal Proclamation of 1763} was issued, they had merged into a distinct branch of common law known as the doctrine of aboriginal rights. As said previously, this doctrine applied automatically to a new colony. It also restrains the application of English common law in Canada, including legal application related to aboriginal peoples in Quebec.\textsuperscript{1092}

The second source of the doctrine is derived from \textit{basic principles of justice}. These principles have a broad philosophical foundation, which do not depend on historical practice. They provide an inner core of values and mitigate the rigour of a strictly positivistic approach to law. Such basic principles have always, at least to some extent, informed the common law of aboriginal rights. However, their application has been enhanced by the entrenchment of aboriginal and treaty rights in section 35(1) of the \textit{Constitution Act, 1982}. In the \textit{Guerin} case, the Supreme Court first acknowledged the fiduciary duties by which the Crown was bound, because of the special relationship that was found to exist between the aboriginal peoples and the Crown\textsuperscript{1093}. On the whole, the two sources of the doctrine of aboriginal rights, historical and philosophical, operate in tandem to support and nourish the doctrine in Canadian law. They interact in a complex way to correct, complete and reinforce each other.\textsuperscript{1094}

As we have seen, the case law demonstrates that the doctrine of aboriginal rights applies equally throughout in Canada. A couple of important cases have

\begin{itemize}
  \item \textsuperscript{1089} Slattery, Brian (1987) \textit{Understanding Aboriginal Rights}, pp. 746-747.
  \item \textsuperscript{1091} \textit{Van der Peet}, supra, at paras 115-116 (per L’Heureux-Dubé).
  \item \textsuperscript{1092} Slattery, Brian (2000) \textit{Making Sense of Aboriginal and Treaty Rights}, pp. 199 & 201.
  \item \textsuperscript{1093} See further below under subsection 6.4.2.
  \item \textsuperscript{1094} Slattery, Brian (2000) \textit{Making Sense of Aboriginal and Treaty Rights}, p. 199.
\end{itemize}
shed light on this matter. The Supreme Court has in *Côté*\(^{1095}\) analysed whether the legal situation regarding the existence of aboriginal rights was different in the Province of Quebec because of the application of French laws. The Court found that aboriginal rights generally continued to exist in the Province of Quebec in that they were not extinguished. Although the British regime received and continued the former French system of colonial law, the common law recognition of aboriginal title was a necessary incident of British sovereignty which displaced the former colonial law of New France\(^{1096}\). The doctrine of aboriginal rights and other doctrines of colonial law applied automatically to a new colony as soon it was acquired. The colonial law also supplied the presumptive legal structure governing the position of native peoples.\(^{1097}\)

In New France, the aboriginal practices, customs and traditions did not enjoy any explicit legal protection under the colonial regime prior to the transition to British sovereignty in 1763. It was argued by the respondent, the Attorney-General of Quebec, that the assertion of French sovereignty prohibited the recognition of aboriginal title and other ancestral rights and that such rights had not accordingly survived the assertion of sovereignty. However, even though the French Crown assumed full ownership of all discovered lands, in its diplomatic relations, the French Crown maintained that the aboriginal peoples were sovereign nations, rather than mere subjects of the monarch. Hence, French law did not explicitly state that aboriginal interests in land were upheld, or that aboriginal interests in land did not exist.\(^{1098}\)

The issue was solved by referring to the purpose of section 35(1), which is to extend constitutional protection to the practices, customs and traditions central to the distinctive culture of aboriginal societies prior to contact with Europeans. Thus, the absence of legal recognition from French colonial law should not undermine the constitutional protection. Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected the rights of those who were colonised under British colonial power; an awkward patchwork of constitutional protection would then apply across the nation.\(^{1099}\)

The British process of colonisation was different in that the British Crown assumed ownership of newly discovered territories subject to an underlying interest of the indigenous peoples in the occupation and use of such territories, subject in turn to the British law of discovery. Accordingly, it was only through a slow process of negotiation with the aboriginal groups leading to purchase or surrender that the British Crown was able to acquire full ownership of the lands in the New World.\(^{1100}\)

Another matter that was analysed in both *Côté* and *Adams* regarded whether an aboriginal right must be incident to a claim of aboriginal title in land, or whether an aboriginal right may exist independently of a claim of aboriginal title.

\(^{1095}\) *R. v. Côté* [1996] 4 C.N.L.R. 26. See also *R. v. Adams* [1996] 4 C.N.L.R. 1, which should be read together with *Côté*. However, *Adams* refers to *Côté* as for the reasons given in this case. For more information on the cases, see below under section 6.4.

\(^{1096}\) *Côté*, supra, at paras. 49 & 52.


\(^{1098}\) *Côté*, supra, at paras. 42-48.

\(^{1099}\) *Côté*, supra, at paras. 51-53.

\(^{1100}\) *Côté*, supra, at para. 43.
Both these cases concerned an aboriginal right to fish for sustenance. Prior to the cases, claims were commonly advocated through proving existence of aboriginal title when particular rights were questioned. Thus, a fundamental question to be answered was whether the appellants’ claim of an aboriginal right to fish must rest in a claim to aboriginal title to the area in which the fishing took place.

The Court answered in the negative. Aboriginal title was only one manifestation of aboriginal rights. In fact, many aboriginal rights exist on lands where a native group does not hold title. The aboriginal right may nevertheless be site specific. Such a site specific right does not become an abstract right exercisable anywhere, but continues to be a right to, for instance, hunt and fish within the area in question. This is the same logical recognition as for Saami customary rights established under the doctrine of immemorial prescription, where there must be a link between the land (the object) and the group or person holding the right (the subject).

In sum, the common law doctrine of aboriginal rights has a number of distinct branches. The doctrine provides a basic framework for identifying a particular aboriginal and treaty right. From the early colonial days, the doctrine of aboriginal right has formed part of the basic constitutional structure in Canada. It originated in principles of colonial law and defined the relationships between the British Crown and the aboriginal peoples. At Confederation, these principles passed into the federal sphere and formed a body of basic common law principles operating uniformly across the country.

6.3.2 A Categorisation of Different Aboriginal Rights

From the above-discussion on the doctrine of aboriginal rights, it is evident that the doctrine has a number of distinct branches. In other words, aboriginal rights come in a variety of forms with respect to their content and degree of connection to land. It is very useful to emphasise a categorisation of such aboriginal rights in order to enhance their understanding. Professor Slattery’s categorisation of aboriginal rights is very helpful and has a high credibility; it is generally consistent with the evolution of aboriginal rights in the Supreme Court. Interestingly, this categorisation of different types of customary rights corresponds, at least partly, with the way in which rights may be established under the doctrine of immemorial prescription in Swedish law. See my discussion in section 10.3.

Professor Slattery identifies two broad categories of aboriginal rights, specific rights and generic rights. A specific right is a distinct right that is applied only to a certain aboriginal group. The dimensions of this type of right are determined by aboriginal practices and the customs of the group in question. Therefore, specific rights may differ substantially in form and content from group to group. The generic right is a right of standardized character, held by all aboriginal groups that satisfy certain criteria. Such rights are determined by general principles of law rather than aboriginal practices, customs and traditions. Aboriginal title provides a good example of a generic right, as well the right to

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speak an aboriginal language. The aboriginal right to self-government is also likely to be a generic right.1104

Although the distinction between generic and specific rights is clear in theory, it is not as sharp in practice. What the courts initially have regarded as a specific right may later prove to be a concrete instance of a generic right, if rights sharing the same basic structure are found to exist in substantial numbers of aboriginal societies. Consequently, as the jurisprudence of aboriginal rights evolves, specific rights may gradually be subsumed under general headings relating to generic rights.1105

Specific aboriginal rights may be classified into three main groups depending on their degree of connection to land: site-specific rights (for example, hunting), floating rights (for example, gathering wild plants for medicinal proposes) and cultural rights (for example, the performance of certain traditional dances).1106 The Supreme Court of Canada has established specific criteria, an identification test, that must be met. Only then will an aboriginal right, for instance a fishing right, be acknowledged. The claimed aboriginal activity must be a part of a practise, custom or tradition that was integral to the distinctive culture of the specific aboriginal group prior to European contact. If the aboriginal right has not been extinguished, the right is an existing aboriginal right, protected by the shield of section 35(1) of the Constitution Act, 1982. These issues will be discussed further below under subsection 6.4.4.

Note also that the Supreme Court in Delgamuukw v. British Columbia1107 acknowledged the picture that was emerging from Adams that the existing aboriginal rights fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights that are practises, customs and traditions that are integral to the distinctive aboriginal culture of the community claiming the right. At the other end is the right to land itself, aboriginal title. In the middle, there are rights that are not sufficient to support a claim of title, and instead the activity is a site-specific right to engage in a particular activity on that piece of land.1108

Moreover, some aboriginal rights are exclusive in character. They give a particular group the sole right to use and occupy a tract of land, to exploit a particular resource for instance. Aboriginal title is perhaps the clearest example here. There are also non-exclusive aboriginal rights, which do not give the group sole benefit of the right, or the capacity to prevent others from exercising corresponding rights (for example hunting and fishing in certain areas). In practice, exclusive and non-exclusive aboriginal rights co-exist and overlap, since neither operates in complete exclusion of the other. For example, aboriginal groups, as well as the private owner, have the right to pick berries in a particular tract. Two aboriginal groups can also jointly have the right to fish on the same location on a river bank.1109

1105 Ibid., p. 212.
1106 Ibid.
1108 Delgamuukw, supra, at para. 138.
One could, of course, question the legal status of a non-exclusive aboriginal right. The answer lies in the doctrine of fiduciary duty, as interpreted by the Supreme Court of Canada. The Crown has fiduciary duties, obligations to protect the basic rights and interests of aboriginal peoples. Legislation should therefore be interpreted in a manner favourable to aboriginal and treaty rights. In contrast, rights held by the general public do not generally benefit from a similar rule of statutory interpretation. Non-exclusive aboriginal rights may also furnish the policy basis for statutory differentiations between the rights of aboriginal peoples and those of the general public. For example, an aboriginal right to fish may provide the rationale for statutory provisions granting special fishing privileges to aboriginal peoples beyond those held by the public. This kind of differentiation may be shielded by section 25 of the Canadian Charter of Rights and Freedoms. The implications of the Crown’s fiduciary duty will be analysed below under subsections 6.4.2, 6.4.5.3 & 6.4.6.5.

The doctrine of aboriginal rights is, thus, the basic framework in which claims of aboriginal rights (and treaty rights) may be identified. With the support of the tests developed by the Supreme Court, such claimed rights may be characterised either as generic or specific rights, exclusive or non-exclusive.

6.3.3 The Sui Generis Nature of Aboriginal Rights

In general, Canadian courts have had difficulties reconciling the concepts of aboriginal rights with the rest of Canadian law. There were previous attempts to classify aboriginal rights by applying pre-existing legal concepts from English property law. This has been re-evaluated, and these attempts have been abandoned. The law now accepts that aboriginal rights are unique, that they are sui generis. This means that the case law and the definitions evolve slowly on a case by case basis. It is largely understood that this perspective provides opportunities to develop a more sensible understanding of those rights.

The first time this uniqueness of aboriginal rights was emphasised was in the Guerin case. That case concerned aboriginal title and stood for the proposition that title represented a unique interest in land. The Court stated that previously, the courts had almost inevitably applied a somewhat inappropriate terminology drawn from general property law. Instead, the aboriginal interest in lands was sui generis. The sui generis nature of aboriginal rights has since been confirmed in many cases, for instance in Sparrow and Delgamuukw.

In Sparrow, the Court noted that courts must be careful to avoid application of traditional common law concepts of property as they develop an understanding of the sui generis nature of aboriginal rights. Since it is impossible to give an easy definition of aboriginal rights, it is crucial to be sensitive to the aboriginal perspective on the meaning of the rights at stake. As an example, the Court meant that it would be artificial to create a firm distinction between the right to fish and...
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the particular manner by which the right is exercised.\textsuperscript{1116} \textit{Delgamuukw} affirmed the \textit{sui generis} nature of aboriginal title and its specific features, such as its inalienability, by which it meant that it cannot be transferred, sold or surrendered to anyone else but the Crown.\textsuperscript{1117}

What has been important when viewing the aboriginal rights as unique sets of rights, not directly comparable with any other rights, is that the Courts found reasons to adapt legal concepts and principles in order to accommodate the unique historical position of the country’s aboriginal peoples, including their historical occupation and use of land and natural resources. In other words, the law has responded to the specific circumstances relating to the rights. This will be evident below when analysing aboriginal rights.

6.4 Aboriginal Rights

6.4.1 Introduction

Under this important section on aboriginal rights, the Supreme Court of Canada’s analysis of the nature and extent of aboriginal rights will be clarified. It regards, for instance, the criteria under which aboriginal rights are identified. Although this identification process does not directly have implications on the sustainability of land and resources as such, it nevertheless increases the knowledge of the rights \textit{per se}. Without a proper understanding of aboriginal rights, the interface between the rights and environmental protection legislation cannot be comprehended. To recall, the analysis of the interface between indigenous customary rights and environmental protection legislation is one of the two main objectives of this thesis.

Because aboriginal and treaty rights in Canadian law are constitutionally protected, the Supreme Court of Canada has in a number of cases examined and determined the nature and content of these rights, most of which have been so-called site-specific rights. Aboriginal rights derive from the fact of the historical position of aboriginal peoples as self-governing peoples, who occupied and used the land before the arrival of European colonists. Such rights are explained by aboriginal peoples as encompassing everything necessary for their survival as aboriginal peoples, including rights to land, language, economy, culture, law and government.\textsuperscript{1118}

In the \textit{Sparrow} case, a unanimous Supreme Court held that an analysis of a claim under section 35(1) of the \textit{Constitution Act, 1982} has four steps: first, a court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right; second, a court must determine whether that right was extinguished prior to the enactment of section 35(1); third, a court must determine whether that right has been infringed; finally, a court must determine whether that infringement was justified. This analysis provides a rough framework for identifying which aboriginal rights still exist and are shielded by the constitutional provision. Then, in \textit{Van deer Peet}, the Supreme Court

\textsuperscript{1116} \textit{Sparrow}, supra, at p. 182.
elaborated further on the first step of this analysis, developing a specific test for identifying aboriginal rights. This test supports the four-part scheme developed in *Sparrow*. I will follow that scheme in my analysis of the legal issues pertaining to aboriginal rights.

The test supporting the analysis of, for instance, the identification of aboriginal rights has also been adapted to better apply to the specific character of aboriginal title, notably in *Delgamuukw* and *Marshall; Bernard*. Even if the test on a superficial level follows the four-part scheme initially set out in *Sparrow*, there are some important differences. Therefore, aboriginal title will be separately analysed below. A summary of the present legal understanding of the aboriginal rights, along with some comments, are provided under subsection 6.4.7.

It should be noted here that, similar to Maori customary rights, aboriginal rights exist primarily on Crown lands. However, for aboriginal rights short of aboriginal title there is some authority with respect to the right’s continued existence on privately owned lands, although many questions still remain unanswered. Regarding whether private ownership of land precludes a claim for aboriginal title, there is a lack of judicial decisions directly on point.

In *R. v. Alphonse*, Mr. Alphonse was charged under the provincial *Wildlife Act* for hunting out of season on private, uncultivated land. The accused argued that he was exercising an aboriginal hunting right. The British Columbia Court of Appeal considered whether this defence was ineffective, because he was hunting on private land. The Court concluded that, if legislation, such as the *Trespass Act* or the *Wildlife Act*, does not circumscribe the aboriginal right in question, then the right can be exercised. Neither the *Trespass Act* nor any other relevant provincial legislation prohibited hunting on the lands in question. The land was uncultivated bush and not occupied by livestock, nor surrounded by a fence or a natural boundary. Moreover, the consent of the land owner was not required in order to exercise an aboriginal right.

Another recent case, *Hupacasath First Nation v. British Columbia (Minister of Forests)*, decided in December, 2005, concerned chiefly consultation duties of the Crown toward the Hupacasath regarding privately owned lands used for forestry. The Hupacasath assert aboriginal rights and aboriginal title on a large tract in central Vancouver Island, which also includes privately owned lands. The First Nation is negotiating with the Province on the matter. However, in reaching its conclusions regarding any consultation requirements, the British Columbia Supreme Court examined whether private land ownership may co-exist with aboriginal rights and aboriginal title. Regarding aboriginal rights on private lands,

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1120 *Hupacasath First Nation*, supra, at paras. 182-183. See, also, a recent article (2006) by Thomas Isaac on “Aboriginal title”. This monograph is the first in a series of contemporary themes in Aboriginal Law published by the Native Law Centre. A summary can be obtained at [http://www.usask.ca/nativelaw/publications/aboriginaltitle/aboriginaltitle.html](http://www.usask.ca/nativelaw/publications/aboriginaltitle/aboriginaltitle.html) (viewed at 2006-04-18). The two cases referred to here are mentioned by Isaac.
1121 *R. v. Alphonse*, (1993), 80 B.C.L.R. (2d) 17, at paras. 34 & 111 (note that the references are obtained by *Hupacasath First Nation*, supra, at paras. 187-180).
1122 *2005 CanLII 1712 (BC SC).*
1123 Regarding consultation, see further below in section 6.5.
the Court affirmed the *Alphonse* case. In order to solve the issue on consultation, it needed also to examine if the Hupacasath could have aboriginal title with respect to privately owned lands.

Despite the absence of authority, direction was nevertheless found in the principles articulated by the Supreme Court of Canada, affirming for instance *Delgamuukw* and particularly the cases *Haida Nation* and *Taku River*, where the principles for examining the Crown’s consultation duties recently have been canvassed. The Court found first that the First Nation had a strong *prima facie* case for aboriginal rights and aboriginal title on Crown lands. The Court also concluded that the Hupacasath had shown a *prima facie* case for aboriginal rights and aboriginal title, if not extinguished, on the so called Removed Lands (private lands).

In sum, these two cases might indicate that the issue of aboriginal rights on private lands will be accentuated in the near future in British Columbia. It is an important issue for both First Nations and private land owners that needs to be clarified.

### 6.4.2 Aboriginal Rights and the Doctrine of Fiduciary Duty

Before analysing the court cases relevant to understanding the aboriginal rights in Canadian law, I want to address the importance of the doctrine of fiduciary duty. This doctrine acknowledges that the Crown has a fiduciary duty toward aboriginal peoples to protect them in the enjoyment of their aboriginal rights. Particularly, the doctrine has been used by the Supreme Court to analyse justifications of any infringements of aboriginal rights, notably in *Sparrow*. Thus, in relation to the justification test, analysed under subsections 6.4.5.3 and 6.4.6.5, the relevance of the relationship between the Crown and aboriginal peoples will be evident. The importance of the doctrine of fiduciary duty also has connections to the more recent legal development of the Crown’s consultation and accommodation duty, discussed under section 6.5. Below, I will therefore introduce the background and content of the doctrine, since it is of importance for the overall understanding of the aboriginal rights. This doctrine has no equivalent in Swedish law. As a matter of fact, the Swedish law lacks recognition of specific principles related to Saami customary rights.

When the new constitution came into force, aboriginal rights were subject to regulation by legislation and to extinguishment without justification, as found in a number of earlier cases. There was, for example, nothing to prevent the government under the *Fisheries Act* and regulations to impose controls on the aboriginal fishing rights. The new constitutional status of the rights meant that another approach had to be taken. The Crown’s fiduciary duty is one facet of this altered approach.

As said previously, the law of aboriginal rights acknowledges that the Crown has a fiduciary duty toward aboriginal peoples to protect them in the enjoyment of their aboriginal rights, in particular in the possession and use of their lands. This duty has its origins in the Crown’s historical commitment to protect
aboriginal peoples from British settlers. One manifestation of this general duty of protection is the prohibition against private purchase of Indian lands, the inalienable nature of aboriginal title. The case Guerin v. The Queen affirmed the existence of the fiduciary duty. The fiduciary law has since been one of the most significant aspects of Canadian aboriginal rights jurisprudence and is still slowly evolving.

The Sparrow case affirmed the decision in Guerin. Hence, the Crown’s fiduciary duty to the aboriginal peoples applies to virtually every aspect of the relationship between the Crown and the aboriginal peoples. As a result, the courts have been willing to adopt a liberal attitude toward the interpretation of treaties, the admission of evidence, and similar matters, where any ambiguity normally is to be resolved in favour of the indigenous people.

Judicial recognition of the Crown-aboriginal fiduciary relationship came at a point when aboriginal issues and rights were beginning to be taken more seriously. Shortly before, aboriginal and treaty rights were given constitutional protection through section 35 of the Constitution Act, 1982. In the landmark case of Guerin, the Supreme Court in 1984 unanimously declared that the Crown is bound by fiduciary obligations towards the aboriginal peoples. Thus, by determining that the nature of the Crown’s obligation was fiduciary, meaning legal rather than merely political or moral, the Court “blazed a new path in Canadian aboriginal rights jurisprudence”.

The fiduciary relationship between the Crown and the aboriginal peoples is comprised of two distinct types, a general and a specific fiduciary duty. The general duty is an overarching fiduciary responsibility vis-à-vis the aboriginal peoples, which also lies outside the protection of section 35(1) of the Constitution Act, 1982. As indicated above, it is a result of the historical relationship between the parties dating back to the time of contact. The Crown’s general fiduciary duty binds both the federal Crown and the various provincial Crowns within the limits of their respective jurisdictions. Thus, insofar as the provincial governments have the power to affect aboriginal peoples, they also share this duty.

The Crown’s specific fiduciary duty applies toward particular aboriginal communities and stems from the relationship with those communities resulting, for instance, from treaties, agreements or alliances into which the Crown entered. Thus, depending on individual circumstances, it is possible that the Crown owns both general and specific fiduciary duties in relation to a specific aboriginal community or group. This specific fiduciary duty includes legislation that infringes aboriginal rights. Here, the question of conservation objectives and allocation of scarce resources is essential. Those issues are guided by the justification test developed first in Sparrow and modified later in Gladstone.

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Below, I will therefore analyse the implications of fiduciary law on aboriginal rights.

At first glance, however, the marriage of fiduciary law and aboriginal law is unlikely. Traditionally, fiduciary law is a part of private law, whereas aboriginal law is a part of public law, at least regarding the legal relationship between the Crown and the aboriginal peoples. However, the fiduciary relationship between the Crown and the aboriginal peoples is neither private, nor public. It is *sui generis*. Ultimately, all relations between the two parties are rooted in the historical, political, social and legal interaction from the time of contact. This unique background creates the *sui generis* nature of the fiduciary relationship.

The fiduciary doctrine is an elusive concept. It has historical roots dating back to over 250 years in case law. Before that, it was a well established part of Roman law. It has a long history, and for the past half century, it has been applied to a wide variety of relationships in the Canadian legal context, such as between a solicitor and a client, a doctor and a patient, a father and a daughter, and officers/directors and a corporation. There are still many uncertainties surrounding the fiduciary theory. Nonetheless, it has experienced a tremendous growth in use. Fiduciary arguments have become something of a “catch-all”: if all other claims are meritless, breach of fiduciary duties has become a claim of last resort. The concept of fiduciary obligation includes the notion of breach of confidence, and a hallmark of a fiduciary relation is the relative legal positions such that one is at the mercy of the other’s discretion.

There are limits to the Crown’s fiduciary duty, especially regarding the Crown’s general fiduciary duty. In *Wewaykum Indian Band v. Canada* two bands of the same First Nation claimed each other’s reserve lands outside any aboriginal title or treaty rights claims. They argued that the Crown had breached its fiduciary duties and sought declaration against each other and compensation. When the process of creation of the reserves was completed in 1938, each of the bands had formally abandoned the claim they now asserted. The appeals were dismissed. The Supreme Court declared that the fiduciary duty imposed on the Crown did not exist at large, but in relation to specific Indian interests. The Crown’s liability did not cover all aspects of Crown-Indian band relationship. The Court acknowledged the flood of fiduciary duty claims by aboriginal peoples and listed some of them. The Court set out specific criteria for when fiduciary duties may arise in relation to reserve lands, and found that none was applicable in this particular case. Additionally, the *Haida* case from 2004 clarified that, while the general law of fiduciaries may apply to the Crown’s duty to aboriginal peoples generally, all obligations between the parties are not necessarily fiduciary in nature. A fiduciary duty arises on the part of the Crown only where it has assumed discretionary control over specific aboriginal interests. See further on the case under section 6.5.

Now I will briefly turn to the land-mark *Guerin* case. When the Supreme Court held the Crown responsible for fiduciary obligations towards the aboriginal, this notion was already in the air. The English Court of Appeal had ruled in 1981 and

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1137 Ibid., p. 12.
1138 Ibid., p. 149.
1139 *Guerin*, supra, per Dickson J.
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stated that Parliament should not diminish the Crown’s guarantees to Indians. Nonetheless, Guerin was the first Canadian case to sanction the Crown’s fiduciary duty and responsibilities toward the aboriginal peoples. The case did not, however, create a relationship that did not exist previously. It merely gave a label and a method for an analysis of the treatment of the rights, duties and responsibilities existing between the two parties. In this, the use of the fiduciary doctrine is a valuable tool to ensure that the Crown performs the duties it owes to the aboriginal peoples. The demands flowing from the doctrine are nevertheless rigorous. The doctrine ensures protection of the interests of aboriginal peoples and, as part of the common law, is binding upon the Crown and enforceable in the courts.1144

In Guerin, the Musqueam band sued the federal Crown for damages, alleging that the Crown was a trustee of the surrendered lands that were leased to a golf club.1145 They argued that the Crown acted in breach of that trust through its conduct in negotiating and signing the lease; many of the terms and conditions of the finalised lease differed from those that had been disclosed to and approved of prior to the surrender. The band did not receive a copy of the lease agreement between the Crown and the golf club until twelve years later. As a result, this lease had been signed some twenty years before the law suit. The surrendered lands were part of the reserve lands of the band, situated within the city of Vancouver. As such, the lands were valuable, whereas the lease conditions amounted to a poor sum.

The Supreme Court awarded the band ten million dollars in damages, and held unanimously that the Crown’s duty to the Musqueam was equitable, rather than merely political or moral, as the federal Crown had argued. The measure of the damages was the actual loss: the band was to be placed so far as possible in the same position as if there had been no breach. However, there were three separate judgements of which none garnered support of a majority. Despite the difference in how the Crown’s obligations vis-à-vis the Musqueam band was articulated, as fiduciary or trust-like in nature, there was no difference in the scope and extent of the Crown’s obligation.1146 It was also emphasised that aboriginal people have a special relationship with the Crown whereby they cannot dispose of their lands to third parties, but may only cede them to the Crown. In this, the Crown serves as an intermediary between aboriginal peoples and individuals wishing to purchase or lease their lands.1147

The Sparrow case, which will be analysed below, later affirmed the findings in Guerin and the concept of a sui generis fiduciary duty. Guerin established a fiduciary relationship in the exercise of legislative authority. Thus, Sparrow expanded the fiduciary duty to include protection of the existing aboriginal and treaty rights within section 35(1) of the Constitution Act, 1982.1148 The Court

1145 Under the provisions of the Indian Act, Indian bands are prohibited to sell, lease or otherwise alienating title to their lands other than to the federal Government. Then private interests may purchase or lease former Indian reserve lands.
1148 Wewaykum Indian Band, supra, at para. 78.

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declared that the Crown has an obligation to exercise its legislative authority so as to avoid infringing on aboriginal and treaty rights. If an infringement should be justified, it has to be shown that the Crown had “compelling and substantial” reasons to so.

6.4.3 Identifying Aboriginal Rights

6.4.3.1 Illuminating the Van der Peet Test

The Sparrow case, decided by the Supreme Court in 1990, was a landmark case for the legal recognition of aboriginal rights. The fact that the Court upheld the fishing right was seen as a major turning point in the First Nation’s struggle to secure recognition of their gathering rights. However, with respect to the identification and scope of the aboriginal rights, the Sparrow case left some important issues unresolved. These outstanding issues were resolved in 1996 by three decisions referred to as the “Van der Peet trilogy”: R. v. Van der Peet, R. v. N.T.C. Smokehouse Ltd and R. v. Gladstone. A common denominator among all four cases is that they concerned aboriginal fishing rights of First Nations in British Columbia.

The test developed in Van der Peet has been applied in subsequent cases, such as R. v. Adams and R. v. Côté. Interestingly, these two cases also concerned fishing rights, but in the Province of Quebec. The analysis of how aboriginal rights are identified is, thus, primarily exemplified through claims of aboriginal fishing rights. Below, I will outline the test developed by the Supreme Court to support such identification and will illustrate this test through a few other relevant cases. The test is indeed important, as it outlines how customary aboriginal practices may be legally recognised. Regarding the establishment of aboriginal title, the law is somewhat unclear. This will be discussed below under subsection 6.4.6. On the whole, the case law here presents an impressive analytical scheme for identifying aboriginal rights, which is contrasting to the vague prerequisites of immemorial prescription attaching Saami rights claims.

This applies also with respect to the other tests presented below.

In Van der Peet the Court emphasised that the Sparrow case outlined a framework for analysing section 35(1) claims. Because it was never seriously disputed in Sparrow that the person (Musqueam) had an aboriginal right to fish for food, the Court did not explain how the rights protected by section 35(1) are to be defined. In Van der Peet, however, the Supreme Court had to deal with questions arising out of the definition and scope of the rights recognised and affirmed by section 35(1). In order to resolve the case, the Court considered it essential to understand why aboriginal rights exist and are constitutionally protected. Otherwise, it would not be possible to reach a definition of those rights.

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1155 Compare with subsection 7.2.1.3.
1156 See the four-part scheme referred to in the previous subsection.
1157 Van der Peet, supra, at para. 2.
In analysing the purpose underlying section 35(1), the Court reaffirmed the interpretative principle of a “generous and liberal interpretation” of the words in the provision. Hence, the overall outcome of Van der Peet was the development of the identification test. As a result of the test, aboriginal rights claims are to be determined on a case-by-case basis.

The background of the case arose out of a charge of violating federal and provincial legislation. The appellant, Van der Peet, was a member of the Sto:lo and was charged under the federal Fisheries Act, 1970 with the offence of selling fish caught under the authority of an Indian food fish licence, but contrary also to an British Columbia fishing regulation. The appellant had sold ten salmon caught by two other Sto:lo members. The appellant argued that, in selling the fish, she was exercising an existing aboriginal right and that the restrictions imposed by the provincial regulation infringed her right and were invalid on the basis that they violated section 35(1) of the Constitution Act, 1982.

The constitutional question posed in this case was whether the relevant section of the provincial fishing regulation was of no force or effect, because it infringed an aboriginal right constitutionally protected by section 35(1). The question was answered negatively, because Van der Peet had failed to demonstrate that the exchange of fish for money was an integral part of the distinctive Sto:lo society, which existed prior to contact. In reaching this conclusion, the Court developed a test to guide the analysis in determining whether there is an existing aboriginal right.

The Court first analysed the core of aboriginal rights, including the purpose of the protection of the rights in section 35(1) as explained above. The Court stated that its task was to define aboriginal rights “in a manner which recognizes that Aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by Aboriginal people because they are Aboriginal.” In this, aboriginal rights must be viewed differently from the Charter rights that include rights held by all people in society, because each person is entitled to dignity and respect. By contrast, aboriginal rights are held only by aboriginal members of the society. Here, the Court emphasised some academic commentators, primarily Michael Ash, Patrick Macklem and Brian Slattery, and concurred that aboriginal rights inhere the very meaning of aboriginality and are rights held by Indians as Indians.

In order to define aboriginal rights and yet emphasise the dual nature of the rights protected by section 35(1), the Court determined, with support of case law, that courts should take a purposive approach to the Constitution, since constitutions, by their very nature, are aimed at a country’s future, as well as its present. The constitution must be interpreted in a manner that renders it capable of growth and development over time to meet new social, political and historical realities. The interpretive principle, stated first in Sparrow, additionally informed the Court on how to analyse the purpose underlying section 35(1) and that section’s definition and scope. This principle arises from the fact that the Crown has a
fiduciary obligation towards the aboriginal peoples in situations where the honour of
the Crown is at stake.\[^{1164}\]

In determining the nature and basis of aboriginal rights, the Court acknowledged a number of older and newer cases. The Court adopted the same position articulated in the famous Australian Mabo case, that aboriginal title and rights are based on traditional laws and customs and that, as a result, the rights are based in the pre-existing societies of aboriginal peoples. This understanding was also supported by academic commentators. The aboriginal rights protected by section 35(1) must, therefore, be directed towards reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. This approach was supported by Calder and Guerin, as well as legal literature.\[^{1165}\]

In sum, the Court found that Canadian, American and Australian jurisprudence supported that the aboriginal and treaty rights protected under section 35(1) and include (i) the means by which the Constitution recognises the fact that, prior to the arrival of Europeans, the land was already occupied by distinctive aboriginal societies and (ii) the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must therefore be directed at fulfilling both purposes. Therefore, a test for identifying aboriginal rights must be directed at identifying the crucial elements of those pre-existing, distinctive societies. In other words, the test must aim at identifying the practices, traditions and customs central to the aboriginal societies that existed prior to contact with the Europeans. The Court recalled the Sparrow case and reassessed the importance of the rights as integral parts of the distinctive culture of the aboriginal group claiming the right.\[^{1166}\]

These crucial elements integrated into the test are designed in two stages.\[^{1167}\]

1. A correct characterisation of the appellant’s claim is necessary, since the evidence being called upon to support the claim will depend on that description.

2. A court needs to inquire whether the activity claimed to be an aboriginal right is part of a practice, custom or tradition integral to the distinctive culture of the aboriginal group in question prior to contact with Europeans.

The first stage includes the nature of the claim.\[^{1168}\] In the Van der Peet case the most accurate characterisation of the appellant’s position was that she was claiming an aboriginal right to exchange fish for money or for other goods. In

\[^{1164}\] Van der Peet, supra, at paras. 21 & 24.

\[^{1165}\] Van der Peet, supra, at paras. 31-42.

\[^{1166}\] Van der Peet, supra, at paras. 43-46.

\[^{1167}\] Van der Peet, supra, at paras. 45-47. The Court called the test here for the “Integral to a Distinctive Culture Test”.

\[^{1168}\] Three factors should guide a court’s characterisation of a claimed aboriginal rights: (i) the nature of the action which the applicant is claiming was done pursuant to an aboriginal right; (ii) the nature of the governmental legislation or action alleged to infringe the right (the confliction between the claim and the limitation); and (iii) the ancestral traditions and practises relied upon to established the right. See Van der Peet, supra, at para. 53. Moreover, the right claimed must be characterised in context and not distorted to fit with the desired result. It must not be artificially broadened, nor narrowed. A too narrow characterisation risks the dismissal of valid claims, while and an overly broad characterisation risks distorting the right by neglecting the specific culture and history of the claimant’s society. See Mitchell v. M.N.R. [2001] 1 S.C.R. 911, at para. 15. This case is referred to below.
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characterising the claim, the court should consider factors such as the nature of the action, the nature of the governmental regulation, statute, or action being impugned, and the practice, tradition or custom being relied upon to establish the right. The court must also bear in mind that the activities may be exercised in a modern form. Thus, the court should vary its characterisation of the claim accordingly.1169

In the second stage, a court needs to analyse whether a practice, tradition or custom is “integral” to the specific aboriginal group. In making this analysis, courts must take into account the perspectives of the aboriginal people claiming the right, and thus be sensitive to the aboriginal perspective. A court must also, however, be aware that aboriginal rights exist within the general legal system of Canada, taking into account the perspective of the common law. To be “integral”, the practice, tradition or custom must be of central significance to the aboriginal society in question. The claimant must demonstrate that the activity was a central and significant part of the claimant’s distinctive culture, namely one of the factors that made the culture of the society distinctive. That activity must be one of the things that truly made the society what it was.1170

In identifying those practices, traditions and customs that constitute an aboriginal right, a court must ensure that the activity is independently significant to the aboriginal community claiming the right. The activity cannot exist simply as incidental to another practice, tradition or custom, but must in itself be of significance to the aboriginal society. Incidental activities cannot qualify as aboriginal rights. The practice, tradition or custom does not need to be distinct, merely distinctive. A practice, tradition or custom that is distinct is one that is unique, that is different in kind or quality. A claim of distinctness is thus a claim relative to other cultures or traditions. In contrast, a culture that claims that a practice, tradition or custom is distinctive makes a claim that is not relative. Such a claim is rather one about the culture itself apart from other cultures. Therefore, the person or community that claims the existence of an aboriginal right need only to show that the particular activity is distinctive. This arises from the Sparrow case, which acknowledged an aboriginal right to fish, which no aboriginal culture can claim to be unique.1171

Producing evidence of pre-contact activities would, however, be an impossible task for the aboriginal group claiming the right. It would also be entirely contrary to the spirit and intent of section 35(1). The evidence relied upon may instead relate to the post-contact period, as it simply needs to be directed to aspects of the aboriginal community and society that have their origins pre-contact. If these practices, traditions or customs can be rooted in the pre-contact societies of the community in question, they will constitute aboriginal rights.1172

The Court also asserted that, in identifying aboriginal rights, a court cannot look at those aspects of the aboriginal society that are true of every human society. Nor can courts look at those aspects of the aboriginal society that are only incidental or occasional to that society. Instead, courts must look at defining central attributes of the society in question. This is also crucial in reconciling pre-

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1169 Van der Peet, supra, at paras. 51-54 & 76.
1170 Van der Peet, supra, at paras. 48-50 & 55.
1171 Van der Peet, supra, at paras. 70-72.
1172 Van der Peet, supra, at para. 62.
existing aboriginal societies with the assertion of Crown sovereignty, since it is these distinctive features that need to be acknowledged and reconciled.\footnote{Van der Peet, supra, at paras. 56-57.}

Incident to the second stage of the test is the question of \textit{continuity}. Only the practices, traditions and customs which have continuity over time and existed prior to contact can be regarded as aboriginal rights. The time period a court should consider in identifying aboriginal rights is the period prior to contact between aboriginal and European societies. Thus, it is not the time period prior to the assertion of sovereignty by the Crown that is relevant. Accordingly, where an aboriginal community can demonstrate that a particular activity is integral to its distinctive culture today and that this activity has continuity with the practices, traditions and customs of pre-contact times, that community will have demonstrated that the activity is an aboriginal right for the purpose of section 35(1).\footnote{Van der Peet, supra, at paras. 60-61 & 63. Again the Court relied on the Australian \textit{Mabo} case in its argumentation.}

In the analysis of the practices, traditions and customs, influences on them by European culture will only be relevant if it is demonstrated that the activity is integral, because of that influence. The fact that aboriginal activities continued and adapted in response to European arrival is not relevant to the determination of the claim, since European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. In contrast, if the activity in question arose solely as a response to European influences, that activity will not meet the standard for recognition of an aboriginal right.\footnote{Van der Peet, supra, at para 73.}

The concept of continuity is also in line with the findings in the \textit{Sparrow} case that the phrase “existing aboriginal rights” must be interpreted flexibly so as to permit their evolution over time. A “frozen rights” approach will be avoided by the concept of continuity. The evolution of practises, traditions and customs into modern forms will not prevent their protection as aboriginal right, provided that continuity is demonstrated. The concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between current activities and those that existed prior to contact. It may be that, for a period of time, an aboriginal group ceased to engage in a practice, tradition or custom for some reasons, but resumed the activity at a later date. Such an interruption will not preclude the establishment of an aboriginal right.\footnote{Van der Peet, supra, at paras. 64-65.}

The Supreme Court made some important general remarks on evidence and the apparent difficulties inherent in passing judgment regarding aboriginal claims. The Court said that trial judges should be flexible regarding the establishment of continuity, as well as the evidence presented to establish the pre-contact practises, traditions and customs to claims of aboriginal rights. In order to determine whether there is sufficient evidence to support the appellant’s claim, the courts should approach the rules of evidence and interpret the evidence that exists with awareness of the special nature of aboriginal claims. There are difficulties in proving a right originated at a time when no written records of the practises, traditions and customs existed. Thus, a court must not undervalue the evidence

\footnotesize{\textsuperscript{1173} Van der Peet, supra, at paras. 56-57.  
\textsuperscript{1174} Van der Peet, supra, at paras. 60-61 & 63. Again the Court relied on the Australian \textit{Mabo} case in its argumentation.  
\textsuperscript{1175} Van der Peet, supra, at para 73.  
\textsuperscript{1176} Van der Peet, supra, at paras. 64-65.}
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presented by the aboriginal claimants simply because the evidence does not conform precisely with standards that generally apply.\(^{1177}\)

Moreover, claims of aboriginal rights must be adjudicated on a specific rather than a general basis. The existence of an aboriginal right will depend entirely on the practices, traditions and customs of the particular aboriginal community claiming the right. This is the same as the position taken in *Sparrow*, when the court stated that claims regarding aboriginal rights must be solved on a case-by-case basis. The Court affirmed this approach and added that aboriginal rights are not general and universal. Consequently, the existence of a right will be specific to each aboriginal community.\(^{1178}\)

In light of the particular circumstances in *Van der Peet*, the Court characterised the nature of the claim as *an aboriginal right to exchange fish for money or for other goods*, as referred to above\(^{1179}\). There was no evidence that the appellant had sold salmon on other occasions or on a regular basis. Since the sale could not constitute a sale on a “commercial” market, the action was rather an exchange of fish for money. Regarding the second stage of the test, the integral and distinctive culture test, the Court concluded that the appellant had failed to demonstrate that the exchange of fish was an integral part of the Sto:lo society prior to contact. The evidence instead demonstrated that the Sto:lo fished for food and for ceremonial purposes: no regularised market or exchange system was established. Fish were exchanged through individual trade and gifts when there was a fish surplus from time to time.\(^{1180}\)

A market for salmon was created by European traders, primarily the Hudson’s Bay Company. At special forts the Sto:lo were able to deliver fish to the traders where it was salted and exported. However, anthropological and archaeological evidence was in conflict. Evidence led by the Crown was accepted that the Sto:lo had no access to salt for food preservation. The trade that did occur was merely incidental. Trade in dried salmon in aboriginal times was minimal. The findings of facts suggested that the exchange of salmon for money or other goods was certainly taking place in the society prior to contact, but it was not “a significant, integral or defining feature of that society”.\(^{1181}\)

The core of the *Van der Peet* case regarded the question of how aboriginal rights are to be identified in order to be recognised and affirmed by section 35(1). The two other cases of the trilogy, *N.T.C. Smokehouse Ltd.* and *Gladstone*, released on the same day, both applied the *Van der Peet* test. Henceforth, they will be analysed below, along with a few other relevant cases on the identification of aboriginal rights.

### 6.4.3.2 Application of the Van der Peet Test

In *N.T.C. Smokehouse Ltd.*, the appellant was charged under the same federal Fisheries Act as in *Van der Peet* with the offence of selling and purchasing fish not caught under a commercial fishing licence, contrary to a British Columbia

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1177 *Van der Peet*, supra, at paras. 65 and 68.
1178 *Van der Peet*, supra, at para. 69.
1179 The provincial regulation under which the appellant was charged prohibits all sale or trade of fish caught in compliance with an Indian food fish licence.
1180 *Van der Peet*, supra, at paras. 76-80, 84, 89 & 93-94.
1181 *Van der Peet*, supra, at paras. 84-85.
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fishing regulation. The transactions had taken place during a couple of weeks in 1986. The appellant owned and operated a food processing plant, which was an incorporated company. The salmon were caught by members of two Indian bands under Indian food fish licences. Since the fish were not lawfully caught, the appellant based his defence on an attack of the regulation as being in violation of the aboriginal right protected by section 35(1) of Constitution Act, 1982. The matter before the Court was the same as in Van der Peet; whether the regulations were of no force or effect with respect to the appellant.1182

The Supreme Court applied the Van der Peet test. The precise nature of the claim was articulated in the first instance as an aboriginal right to exchange fish for money or other goods. However, the Court had difficulty in rightfully characterising the claim. If the claim was supported by evidence, the Court would continue to analyse whether the evidence also supported a claim of a more commercial nature.1183

In comparison to the Van der Peet case, the claim here was understood as closer to a claim to a right to fish commercially, since it now concerned the sale of 119 000 ponds of salmon by eighty persons, and not ten fishes by one person. The Court argued that the claim for an aboriginal right for commercial exchange placed a more onerous burden on the appellant than a claim to a right to exchange fish for money or other goods. To support the latter claim, the appellant needed to show only that the exchange of fish for money or other goods was integral to the distinctive cultures of the two Indian bands. Whereas, for the former claim, the appellant needs to demonstrate that the barter was commercial in nature, and that it was an integral part of the distinctive cultures of the two bands.1184

The second stage of the test required the Court to determine whether the exchange of fish for money or other goods could be said to be a central, significant or defining feature of the distinctive culture of the two Indian bands, prior to contact. The findings of fact did not support this claim. Sales of fish were few and far between, which did not in itself qualify for a defining status of the band’s culture. The Court concluded from the evidence that the exchange of fish was merely incidental to social and ceremonial activities of the community. Furthermore, without such evidence, there was no support for the claim that the fishing was commercially. As a result the appeal was dismissed.1185

The facts of the case in Gladstone were similar.1186 The two appellants were convicted of attempting to sell herring spawn on kelp caught under an Indian

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1182 R. v. N.T.C. Smokehouse Ltd. [1996] 2 S.C.R. 672 at 1-5. Note, thus, that the appellant himself did not claim to hold an aboriginal right. Nevertheless, the appellant was entitled to raise the existence of an aboriginal right held by the two Indian bands as a defence to the charges. Supra, at 15.
1183 N.T.C. Smokehouse Ltd., supra, at paras. 20-21.
1184 N.T.C. Smokehouse Ltd., supra, at paras. 18-20.
1185 N.T.C. Smokehouse Ltd., supra, at paras. 22-29. The reasons were given by seven of nine judges (the two others dissenting).
1186 Note, however, that the overall situation here is different. The Heilsuk claim recognition of their traditional fishing territory on the coast. After the Gladstones had been charged the Heilsuk Tribal Council initiated an action in Federal Court to oblige the Department of Fisheries and Ocean to issue licences and to recognise their jurisdiction to manage the resource in their traditional territory. See Reid v. Canada [1993] F.C.J. No. 180 (Q.L.) (T.D.). Thus, the nature of the claim by the Heilsuk is territorial, that is to have their geographical boundaries recognised. See further on the issue in Harris, Douglas C. (2000) Territoriality, Aboriginal Rights, and the Heilsuk Spawn-on-Kelp Fishery in the U.B.C. Law Review Vol. 34:1.
food fish licence, which did not permit trade, contrary to the same federal *Fishing Act* and to a specific British Columbia herring fishing regulation. The appellants were members of an Indian band (Heiltsuk). The constitutional question posed in this case also concerned the force and effect of the regulation due to the constitutional protection of aboriginal rights in section 35(1).¹¹⁸⁸

When applying the first step in the *Van der Peet* test, the Supreme Court found the same problem as in *N.T.C. Smokehouse Ltd.* The actions of the appellants were best characterised as the commercial exploitation of herring spawn on kelp. As in *N.T.C. Smokehouse Ltd.*, the Court addressed both possible characterisations of the appellants’ claim. The evidence supported the claim that the appellants had an aboriginal right to exchange herring spawn on kelp for food and other goods. This activity was a central, significant and defining feature of the culture of the Heiltsuk prior to contact. The facts also supported the further claim that the exchange of a commercial nature was an integral part of the distinctive culture of the band.¹¹⁸⁹

The evidence presented at trial was extensive and included the testimony of many experts. To support a claim of an aboriginal right, the Court in *Van der Peet* held, the claimant does not need to provide direct evidence of pre-contact activities, only evidence that demonstrates which aspects of the aboriginal community have their origins pre-contact. This was described as the requirement of continuity, as part of the second step of the test. Thus, there is a requirement only to show that the practice, tradition or custom that is integral to the community now has continuity with the practices, traditions or customs which existed prior to contact. The evidence in *Gladstone* also satisfied this requirement, as the appellants had provided clear evidence from which it was inferred that, prior to contact, Heiltsuk society was, in significant part, based on such trade.¹¹⁹⁰

Thus, the Supreme Court recognised a Heiltsuk right to commercial spawn-on-kelp fishery and determined that this right was still existing. The Court also found that the licensing scheme infringed that right, although the evidence was insufficient to determine whether the infringement was justified.¹¹⁹¹ See further below in subsection 6.4.4.

*R. v. Adams* and *R. v. Côte*, released simultaneously, also concerned fishing rights. The two cases should therefore be read together since they concern closely related issues, not the least of which was that they required an application of the principles articulated in the *Van der Peet* trilogy.¹¹⁹² In *R. v. Adams*,¹¹⁹³ a

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¹¹⁸⁷ Pacific herring congregate in vast schools and spawn during early springtime along the British Columbia’s shoreline. The female herring release their eggs when they brush against marine plants, such as kelp, and the eggs adhere to the plants. First Nations along the coast have long harvested herring spawn by placing for instance kelp, eelgrass or cedar boughs where herring are known to spawn. The herring spawn was consumed locally and traded extensively. This old harvest and trade of herring spawn continues, and the contemporary Heiltsuk fishery is a modern and profitable industry, employing many band members. See Harris, Douglas C. (2000) Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-Kelp Fishery in the U.B.C. Law Review Vol. 34:1, pp. 200-202.


¹¹⁸⁹ *Gladstone*, supra, at paras. 23-26.

¹¹⁹⁰ *Gladstone*, supra, at paras. 27-28.

¹¹⁹¹ On infringements, see below under subsection 6.4.5. Note that there is a case incidental to this, which regards Crown fiduciary obligations: *Gladstone v. Canada* [2005] 1 S.C.R. 325. See above under subsection 6.4.2.

Mohawk Indian was charged with fishing without a licence contrary to the Quebec Fishery Regulations. He caught 300 pounds of perch with a seine net of a length of several hundred feet. He challenged his conviction on the basis that he was exercising an existing aboriginal right to fish protected by section 35(1) of the Constitution Act, 1982. The appellant could have applied for an Indian food fish licence, which he could have obtained under Ministerial discretion. The constitutional question was whether the regulation was of no force or effect due to section 35(1) of the Constitution Act, 1982.1194

The appellant’s claim was best characterised as a right to fish for food in Lake St. Francis. There were no suggestions that the caught perch also would be used for any purposes, ceremonial or commercial, other than to meet the food requirement of the appellant and his band. Applying the second stage of the Van der Peet test, the Court determined whether this activity was part of a practice, custom or tradition, which was, prior to contact with the Europeans, an integral part of the Mohawk society.1195

The evidence supported the finding that the Mohawks have a right to fish for food in Lake St. Francis. The general picture was that, prior to 1603, it was unclear which aboriginal people made use of the St. Lawrence Valley, but from 1603 to the 1650s, the area was the subject of conflict between several aboriginal peoples, including the Mohawks. It was clear that, during this period, the Mohawks fished for sustenance in the area. Thus, fishing for food in Lake St. Francis was a significant part of the life of the Mohawks from a time dating from at least 1603. This date, 1603, marked the arrival of Samuel de Champlain and the effective control by the French over what would become New France. To satisfy the Van der Peet test, the time of “contact” was argued to be the arrival of de Champlain in 1603. Clear evidence that, at contact, the fishing was a significant part of the Mohawk culture should be sufficient to demonstrate that, prior to contact, fishing was also a significant part of their distinctive culture. There was also proof of continuity of the custom to fish for food that existed prior to contact and of the Mohawks present fishing practice, which is hunting and fishing as they had long been practicing.1196

In R. v. Côté1197, members of the Algonquin people (Indians) were convicted of the offence of entering a controlled harvest zone without paying the required fee for motor vehicles. The appellant, Côté, was additionally convicted, under the same fishing regulation as in Adams, of the offence of fishing within the zone without a valid licence. In the summer of 1984, the five appellants and a number of young aboriginal students entered into a large wilderness zone by motor vehicle for the purpose of teaching the students traditional hunting and fishing practices. The appellants refused to pay the required fee for access with motor vehicles into the zone. Upon entry, the appellant, Côté, fished in Desert Lake to demonstrate traditional practices and did so without a licence. In defense

1194 Adams, supra, at paras. 5-7 & 24.
1195 Adams, supra, at paras. 34-37.
1196 Adams, supra, at paras. 38-47. The decision was handed unanimously (nine judges). Note, however, that L’heureux-Dubé wrote some comments regarding the reasons handed down by the others.
of the charges against them, the appellants argued that they were exercising an aboriginal right to fish on their ancestral lands as recognised and protected by the constitutional provision in section 35(1).\(^{1198}\)

The Supreme Court held that the appellant, Côté, had established the existence of an aboriginal right to fish for food within the zone, in accordance with the principles articulated in *Van der Peet*. However, the appellants were also exercising this right for teaching purposes. The nature of the claim was characterised as an aboriginal right to fish for food within the lakes and rivers of the zone. The fishing to illustrate and teach younger Algonquin traditional practices of fishing merely ensures the continuity of customs and traditions. Teaching was, hence, seen as an incidental right to the fishing right, and the substantial claim should therefore be a right to fish for food.\(^{1199}\)

In the second stage of the test, the Court was required to determine whether fishing for food in the zone was a central or significant feature of the distinctive culture of the Algonquin people prior to the time of contact. As in *Adams*, evidence that the custom was significant at contact was argued to be sufficient to demonstrate the significance of that custom prior to contact. The identified relevant time period for contact was also 1603, the arrival of de Champlain. According to the evidence, at the time of contact, the ancestral lands of the Algonquins lay at the heart of the Ottawa River basin, which includes the wilderness zone relevant to this case. The Algonquins were a nomadic people, who moved frequently within these lands. Anthropological evidence supported the conclusion that they predominantly relied on fish to survive during the Fall season prior to winter. Thus, the Court upheld the fishing right, since it was significant to the Algonquins. The continuity of this practice was also upheld by the Court, as it was supported by evidence.\(^{1200}\)

Mitchell v. M.N.R.\(^{1201}\) is another case which concerned a claim for an aboriginal right to trade. In 1988, the respondent, a Mohawk Indian, crossed the international border bringing goods purchased in the United States. He declared the goods to Canadian customs agents, but asserted that an aboriginal right exempted him from having to pay duty. The respondent was later served with a charge for unpaid duty. The nature of the claim was characterised as an aboriginal right to bring goods across the St. Lawrence River for the purposes of trade. Although the Court asserted that a trading right seldom attracts geographical limitations, comparing particularly with *Gladstone*, the matter here concerned an international boundary. In line with the *Van der Peet* test, the characterisation of a claim will generally determine when and to what extent geographical considerations are relevant to the claim. Here, the mentioning of the St. Lawrence River was the legal equivalent of the national border, if framed in modern terms.\(^{1202}\)

The evidence did not, however, support the claim. If the Mohawks did transport trade goods across the St. Lawrence River, such occasions were few and far between and was not something that truly made the society what it was. Although the Mohawks did trade extensively (east-west), participation in a


\[^{1199}\] Côté, supra, at paras. 33 & 55-56.

\[^{1200}\] Côté, supra, at paras. 58-71.


northerly trade was not a practice integral to their culture. Importantly, in *Mitchell*, the Supreme Court discussed rules of evidence in cases involving aboriginal rights claims. The Court emphasised the findings in *Delgamuukw*. Those issues of evidence relevant for the identification of aboriginal rights will be discussed under the next subsection.

### 6.4.3.3 Evidence and Proof of Aboriginal Rights

Aboriginal rights claims give rise to unique and inherent evidentiary difficulties, a fact which was highlighted in *Mitchell*. Claimants are required to demonstrate features of their pre-contact society without the aid of written records. This case required the Court to clarify the general principles laid down in *Van der Peet* and *Delgamuukw* regarding the assessment of evidence in aboriginal rights claims. In this respect, the protection of the aboriginal and treaty rights under section 35(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection. By citing *Van der Peet*, it was said that a court should approach the rules of evidence and interpret evidence with consciousness of the special nature of aboriginal claims. This guideline was stated to apply both to the admissibility of the evidence and to the weight to be given to aboriginal oral history.

In *Delgamuukw v. British Columbia*, the Supreme Court observed that aboriginal oral history might be useful as evidence concerning cases on aboriginal rights (here aboriginal title). The Court held that the laws of evidence must be adapted to accommodate this type of evidence and to place it on equal footing with the types of historical, documentary evidence with which courts are familiar. The Court emphasised that this was a long-standing practice in relation to the interpretation of treaties between the Crown and aboriginal peoples. The Court also noted that, although the doctrine of aboriginal rights is a common law doctrine, those rights are truly *sui generis*, which demands a unique approach to the treatment of evidence that accords due weight to the perspective of aboriginal peoples.

Aboriginal recording of history is very different from the European, as it is neither linear nor steeped in the same notions of social progress and evolution. Another difference is that aboriginal history usually is not so human-centred. The aboriginal historical tradition is oral, involving legends, stories and accounts handed down through the generations. As such it is less focused on establishing objective truth and, in fact, assumes that the story teller is so much a part of the event being described that it would be arrogant to presume to classify or categorise the event exactly or for all time. The purpose of repeating oral accounts is broad, including to educate, to socialise peoples into a cultural tradition, or to validate the claims of a particular family to authority and prestige. In this, oral histories are often rooted in particular locations, making references to particular families and communities, which define their identity and how they express their uniqueness as a people.

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1203 *Mitchell*, supra, at para. 60.
1206 *Delgamuukw*, supra, at paras. 82-87.
Both Van der Peet and Delgamuukw affirmed the continued rules of evidence, but at the same time taught that they must be applied flexibly, not for the purpose of reconciliation embodied in section 35(1). This flexible application of the normal rules of evidence allows, for instance, the admissibility of evidence of post-contact activity to prove continuity with pre-contact practices, customs or traditions. Additionally, the consideration of various forms of oral history is another expression of flexibility. The flexible adaptation of traditional rules acknowledges the underlying purpose of the rules of evidence - namely to promote truth-finding and fairness. However, “[t]he rules of evidence should facilitate justice, not stand in its way.”

Delgamuukw emphasised that the admissibility of oral history must be determined on a case-by-case basis. Thus, oral histories are admissible as evidence when they are both useful and reasonably reliable, but subject always to the exclusionary discretion of the trial judge.

Aboriginal oral histories can be useful, because they may provide evidence on ancestral practises and their significance, as well as to provide the aboriginal perspective on the right claimed. In determining the usefulness and reliability of oral histories, judges must therefore resist superficial assumptions based on Eurocentric traditions and beliefs. Thus, a rejection of oral histories, because they simply do not convey historical truth is not a flexible application of the rules of evidence.

Where a court has found that certain evidence is admissible, then the evidence must be interpreted and valued. Such valuing is often synonymous with the general principles of common sense. Since aboriginal rights are sui generis, courts must interpret the evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims. In the Mitchell case, the Supreme Court found that the trial judge made an overly generous interpretation of the evidence when he supported the claim of the aboriginal right. Sparse, doubtful and ambiguous evidence can naturally not serve as the foundation of a successful claim.

Mitchell affirmed and clarified the general principles established through Van der Peet and Delgamuukw regarding the assessment of evidence, reaffirming the sui generis nature of aboriginal rights claims. On the other hand, the rules of evidence shaped to support truth-finding and fairness shall not be used in a manner that contravenes this purpose.

6.4.4 Extinguishment

Where a court has found that a claim for a particular aboriginal right is supported by evidence, the court needs to determine whether the aboriginal right established prior to European contact still exists. According to section 35(1), only existing aboriginal rights are shielded by the constitutional provision. In R. v. Sparrow, this was interpreted to mean that aboriginal rights that existed when the new Constitution came into force shall be recognised, whereas rights that were...
extinguished before 1982 are not revived by the constitutional provision. The \textit{Sparrow}\ case outlined four stages in the analysis of section 35(1) claims\textsuperscript{1213}. The second stage concerns the question of whether the affirmed aboriginal right has been extinguished.

We shall first recount the facts in this case. The appellant, Sparrow, a member of the Musqueam Indian Band in British Columbia, was charged under the federal \textit{Fisheries Act} with fishing with a drift net longer than that permitted by the terms of the Indian food fish licence. The fishing took place in 1984 and within the licence area. The licence, issued for a one-year-period, sets out a number of restrictions, including the length of the drift net. Although the allowed length was 25 fathoms, Sparrow was caught with a net 45 fathoms in length. Sparrow defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction included in the Band’s licence was inconsistent with section 35(1) of the \textit{Constitution Act, 1982}.\textsuperscript{1214}

The \textit{Sparrow} decision was delivered by a unanimous Supreme Court. It was the first time the Court was called upon to explore the scope of section 35(1) and to indicate its strength.\textsuperscript{1215} It is, however, important to keep in mind that, in this case, the existence of the aboriginal right to fish itself was not subject to serious dispute, as it was in the \textit{Van der Peet} trilogy. Although the evidence was not extensive, it nevertheless supported the determination that Sparrow was fishing in an ancient tribal territory, where his ancestors had long been fishing.\textsuperscript{1216} There was also sufficient evidence to establish the continuity of the fishing right. The Crown, as respondent, insisted that the Band’s aboriginal right to fish had been extinguished by regulations under the federal \textit{Fisheries Act}. Such fishing regulations had been in place since 1878.\textsuperscript{1217}

The Court first remarked that the Crown’s argumentation confused regulation with extinguishment. The fact that a right is controlled in great detail by regulations does not mean that the right is thereby extinguished. Here, the Court relied on the \textit{Calder} case and the judgement of Hall J., emphasising that the Sovereign’s intention to extinguish Indian title must be clear and plain. Thus, the Court held that the \textit{test of extinguishment} that should be adopted was that the Sovereign’s intention must be “clear and plain” if it is to extinguish an aboriginal right.\textsuperscript{1218}

The Court found nothing in the \textit{Fisheries Act} or in its regulations that demonstrated such clear and plain intention to extinguish the aboriginal right to fish. The fact that an express provision stated that permits were discretionary and issued on an individual, rather than communal, basis in no way showed a clear intention to extinguish. Instead, the permit system was a way of controlling the fisheries, not of defining underlying rights. In this respect, the Crown had failed to prove extinguishment of the Musqueam fishing right.\textsuperscript{1219}

This test of extinguishment has been applied in other cases. With respect to the cases analysed above, it is only those cases where the Court has found

\textsuperscript{1213} See above under subsection 6.4.1.
\textsuperscript{1214} \textit{Sparrow}, supra, at p. 164.
\textsuperscript{1215} \textit{Sparrow}, supra, at p. 163.
\textsuperscript{1216} Note that the Court delineated the scope of the appellant’s fishing right to a right to fish for food and social and ceremonial purposes. See supra at pp. 175-176.
\textsuperscript{1217} \textit{Sparrow}, supra, at pp. 172-173.
\textsuperscript{1218} \textit{Sparrow}, supra, at pp. 174-175.
\textsuperscript{1219} \textit{Sparrow}, supra, at p. 175.
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evidence to support the claim for a particular aboriginal right that are relevant for applying the other tests outlined by the *Sparrow* case. Therefore, I will start with *Gladstone* and then analyse *Adams* and *Côté*. I will follow the same approach in the next sub-section, when analysing the important question of whether the infringements can be justified.

In *Gladstone*, the Court affirmed the Heiltsuk’s right to commercial spawn-on-kelp fishery. The legislation here was the federal *Fisheries Act* and regulations thereunder aimed directly at the herring spawn fishery. The Court found that none of these regulations, individually or taken as a whole, could be said to express a clear and plain intention to extinguish the fishing rights of the Heiltsuk. The Court held that, although the Crown perhaps does not have to use language that refers expressly to the extinguishment of aboriginal rights, it must nevertheless demonstrate more than that the exercise of an aboriginal right has been subject to a regulatory scheme. Prior to 1982, the legislation had entirely prohibited aboriginal peoples from harvesting herring spawn on kelp, allowed the fishing for food only, allowed commercial fishing with written permission, and allowed fishing pursuant to a licence. Such a varying regulatory scheme did not express a clear and plain expression to eliminate the aboriginal right of the appellants.1220

The Crown also argued that, if the particular fishing legislation did not extinguish the Heiltsuk right, another regulation enacted in 1917 did.1221 The language of this regulation suggested that the government had two purposes: a conservation goal and a goal that the special protection of the Indian food fishery would continue. Thus, the purpose of the regulation was not to eliminate the aboriginal right to fish commercially. According to the general regulatory scheme for commercial fishery, since the new scheme was introduced in 1908, aboriginal peoples have not been prohibited from obtaining licences to fish commercially. In fact, the government has at various times given preference to aboriginal commercial fishing.1222 In sum, the Heiltsuk commercial fishing right was not extinguished and was thus still existing and affirmed by section 35(1).

In *Adams*, the evidence supported the conclusion that the Mohawks had a right to fish for food in Lake St. Francis. The *Sparrow* test for extinguishment was not met in this case either. Here, the Crown argued that a clear and plain intention could be found regarding two events. First, the submersion of the lands constituting the fishing area in 1845 as part of the construction of a canal, and second, the 1988 surrender agreement between the Crown and the Mohawks, in which the lands around the fishing area were surrendered to the Crown in exchange for monetary compensation. However, even if these events demonstrate a clear and plain intention to extinguish any aboriginal title to the lands in the fishing area, neither is sufficient to demonstrate that the Crown has such intention regarding the appellant’s aboriginal right to fish for food in the area. The aboriginal fishing right is independent of the proprietary interests to the lands surrendered by the Mohawks.1223

The Supreme Court found also in *Côté* that the Algonquins’ right to fish for food within the wilderness zone was still existing. Here, the respondent declined to offer any proof relating to the question of extinguishment.1224 Altogether, these

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1220 *Gladstone*, supra, at paras. 31-34.
1221 Regulation 2539.
1222 *Gladstone*, supra, at paras. 35-37.
1223 *Adams*, supra, at paras. 48-49.
1224 *Côté*, supra, at para. 72.
four cases demonstrate that the onus of proving a clear and plain intention is a high threshold. The Crown must demonstrate a clear and plain intent to extinguish a particular aboriginal right, such as a fishing right. While the language of the legislation does not necessary need to be in express words, the intention must still be obvious.

6.4.5 Infringements

6.4.5.1 The Infringement Test

The Sparrow case\textsuperscript{1225} is the most important decision regarding the analysis of the regulation of aboriginal rights and the extent of conservation restrictions on those rights. The third and fourth stage in the analysis outlined in Sparrow concerns the question of whether the aboriginal right was infringed by the action of the government and whether that infringement was justified.\textsuperscript{1226} The Supreme Court declared that federal legislation may override or infringe aboriginal rights, but such legislation must be justified by valid reasons. The infringement test has been affirmed by the following cases and will be exemplified further below. Again, analytical scheme developed by the Supreme Court of Canada both related to infringements and justifications of infringements (see further below) is notable, and is contrasting to the legal situation related to Saami rights claims and the doctrine of immemorial prescription.

In Sparrow, the Supreme Court first set out the test for a \textit{prima facie} infringement of an existing aboriginal right. As guidance for developing such a test, the Court elaborated on the background and meaning of section 35(1), including the approach to interpreting the words of the provision. The Court sketched a framework for an interpretation of “recognized and affirmed”, which includes a liberal and generous interpretation and an affirmation of the Crown’s fiduciary obligation with respect to the aboriginal peoples.

As explained above under subsection 6.4.1, although section 35(1) does not include explicit language authorising any court to assess the legitimacy of government legislation that restricts aboriginal rights, the Court still found that the words recognition and affirmation incorporate the fiduciary relationship and, as such, import some restraints on the exercise of sovereign power. Thus, implicit in this new constitutional scheme was the obligation of the legislature to satisfy the test of justification; the extent of legislative impact on aboriginal rights may be scrutinised in order to ensure recognition and affirmation.\textsuperscript{1227}

The infringement test sets out a number of questions to be asked. The very first question is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does, it represents a \textit{prima facie} infringement of section 35(1). Here, a number of guiding questions will help to determine whether there is such interference to establish a \textit{prima facie} infringement:

\begin{itemize}
  \item Is the limitation unreasonable?
  \item Does the regulation impose undue hardship?
\end{itemize}

\textsuperscript{1226} See above under subsection 6.4.1.
\textsuperscript{1227} Sparrow, supra, at pp. 176-182.
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- Does the regulation deny the holders of the right their preferred means of exercising the right?\textsuperscript{1228}

This test also involves asking whether either the purpose or the effect of the restriction imposes unnecessary infringements on the interests protected by the aboriginal right. As an example, the Court referred to whether the holder of a fishing right need to spend undue time and money per fish caught or whether restrictions in fishing methods resulted in undue hardship. Nonetheless, the onus of proving a \textit{prima facie} infringement rests on the individual or the group challenging the legislation. The developed tests could not, however, be applied directly in this case. The final outcome was to order a new trial as there was not enough evidence to proceed with the analysis.\textsuperscript{1229}

In \textit{Gladstone}, the Court commented on the test as such. The Court noted that the test at first glance might seem internally contradictory. On the one hand, the test stated that the appellants need only show that there has been a \textit{prima facie} infringement of their rights to demonstrate that those rights have been infringed. This suggested that any reduction of the aboriginal rights would constitute an infringement under the test. On the other hand, the guiding questions incorporated ideas, such as unreasonableness and undue hardship, which suggested that something more is required to demonstrate infringement. However, the Court asserted that this internal contradiction is more apparent than real. The guiding questions only point to factors which will indicate whether an infringement has taken place.\textsuperscript{1230}

\textit{Gladstone} clarified that the infringement test laid out in \textit{Sparrow} to a certain extent was determined by the factual context of that case. The Court asserted that the factual context in \textit{Gladstone} was different in that it did not concern a net length restriction but a challenge of the Crown’s management of the herring spawn on kelp fishery. This was a much broader challenge. The significance of this difference was that the guiding questions to ask according to the test must correspond to aspects of the regulatory scheme and not merely to a single provision.\textsuperscript{1231}

After surveying and analysing the different parts of the government’s regulatory scheme for herring fishery (I will come back to the scheme in relation to the justification test), the Court concluded that the scheme as a whole imposes restrictions on the Heiltsuk commercial spawn on kelp fishery, because the catch is limited. The appellants had discharged their burden of demonstrating a \textit{prima facie} infringement with their aboriginal right. Prior to the arrival of Europeans, the Heiltsuk could harvest herring spawn on kelp at their own discretion.\textsuperscript{1232}

In relation to \textit{Adams}, the Supreme Court found that, under the regulatory scheme the appellant’s exercise of his aboriginal right to fish for subsistence was exercisable only at the discretion of the Minister, a permit requirement. The Court found that this scheme infringed the aboriginal right of the appellant under the \textit{Sparrow} test for infringements. In this instance, the regulatory scheme subjected the exercise of the fishing right to a pure act of ministerial discretion, with no

\textsuperscript{1228} \textit{Sparrow}, supra, at p. 182.
\textsuperscript{1229} \textit{Sparrow}, supra, at pp. 182-183 & 187.
\textsuperscript{1230} \textit{Gladstone}, supra, at para.43.
\textsuperscript{1231} \textit{Gladstone}, supra, at paras. 39-42.
\textsuperscript{1232} \textit{Gladstone}, supra, at paras. 51-52.
criteria regarding how that discretion was to be exercised. Therefore, the scheme imposed undue hardship, as well as interfered with his preferred means of exercising his rights. This infringement was more pronounced due to the testimony offered by the Crown’s own witness that no permits for foods fishing with a seine net, the traditional manner of fishing for the Mohawks, were being issued for Lake St. Francis. The appellant had clearly demonstrated that his aboriginal right to fish for food had been infringed.\footnote{1233}  

The Court asserted that, in light of the Crown’s unique fiduciary obligations toward aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime that risked infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. Thus, the Court held that a statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion and which seek to accommodate the existence of aboriginal rights. Unless such specific guidance exists, the Crown does not fulfil its fiduciary duties and the statute will be found to represent an infringement under the \textit{Sparrow} test.\footnote{1234}

In \textit{Côté}, the Supreme Court examined the effect of two distinct regulatory regimes separately: one federal and one provincial. The Court noted first that the infringement test in \textit{Sparrow} was originally developed in the context of federal legislation which supposedly infringed an aboriginal right. The majority of cases had so far invoked the test against the backdrop of a federal statute or regulation (primarily \textit{Gladstone}). However, the Court stated that it was clear that the \textit{Sparrow} test also applies where a provincial law supposedly infringes an aboriginal right.\footnote{1235}  

With respect to the federal regulatory regime, the Court found that the \textit{Quebec Fishery Regulations} infringed the right of the appellant, Côté, to fish for food within the zone. The federal regulation stipulated that a person must hold a valid licence, which was an infringement for the same reasons expressed in \textit{Adams} (lack of criteria supporting the ministerial discretion). However, with respect to the provincial regulatory regime of regulation respecting controlled zones, the Court found no infringements. Under the terms of the provincial regulation, an Algonquin person was at liberty to enter the zones by foot without restriction and without fee. Similarly, an Algonquin is free to enter the zone without financial costs by a variety of other means, including the traditional canoe and snowshoe, or more modern means such as a bicycle and skidoo. Only in relation to access by motor vehicles is there a requirement of a fee. The appellants’ argument here was that the regulation infringed their ancestral right as it imposed a financial burden on the exercise of their constitutional right.\footnote{1236}  

The Court did not find that the financial burden amounted to an infringement of the Algonquin’s right to fish for food. In this instance, the fee was dedicated to maintenance of the facilities and the roads in the zone and not to generating a tax for the provincial government. Thus, the access fee rather facilitated the appellants’ constitutional right.\footnote{1237} In this case, the appellants failed
to prove that the access fee for motor vehicles infringed their aboriginal right. Now, I will move on to the justification test set out in *Sparrow*.

### 6.4.5.2 The Justification Test

Hereunder, I will analyse the justification test as such, without much emphasis on the implications of the doctrine of fiduciary duties. The justification test encompasses many other aspects of interest, which deserve to be highlighted. In the next subsection, I will instead focus on the allocation of resources, referred to as “the doctrine of priority”, a scheme developed by the Supreme Court with the support of the Crown’s fiduciary obligations. The fact that the relationship between the Crown and the aboriginal peoples has become legally relevant and accountable is unique. It is highly interesting from a Swedish legal context since this acknowledgement is absent, both from accentuated political discussions and from legal principles related to whether the government owes the Saami special treatment. The colonisation process is not legally relevant here. Nevertheless, these two subsections (6.4.5.2 & 6.4.5.3) should be read together in order to appreciate the justification test fully.

The justification test developed in *Sparrow* begins where an infringement has been demonstrated. When a *prima facie* infringement of an aboriginal right is proven, the test progresses to the issue of whether the infringement is justified. This test addresses the issue of what constitutes legitimate regulation of an existing aboriginal right protected under section 35(1). The first question in this assessment is whether the objective of the legislation is valid, that is, whether its objective corresponds to “compelling and substantial” reasons. Conservation measures generally meet this requirement.

In arriving at its findings of the test the Court’s position was clearly stated. The Court referred to Professor Slattery regarding the envisioning of a justification process related to section 35(1). The Court concurred with his viewpoint that the two extreme positions must be rejected in favour of a justificatory scheme compromising between two extreme positions. The first position was the “patchwork” characterisation of aboriginal rights, where past regulations would be read into the very definition of a right. The other position was a characterisation that would guarantee aboriginal rights in their original form, unrestricted by subsequent regulation.

A number of questions guide the justification test:

- Is there a valid legislative objective?
- Is the honour of the Crown at stake?
- Is the infringement proportionate to the desired result?
- If the matter regards expropriation, is fair compensation available?
- Has there been sufficient consultation?
- Other relevant questions.

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1238 See also subsection 6.4.2.
1239 See my discussion below in section 10.2.
1240 *Sparrow*, supra, at p. 183.
1242 For references see further below.
The first question concerns whether there is a valid legislative objective. In the \textit{Sparrow} case, the Court inquired whether the objective of the Parliament in authorising the department to enact regulations regarding fisheries was valid. The objective of the particular regulations regarding the fisheries set out by the department must also be examined. An objective aimed at preserving section 35(1) rights by conserving and managing natural resources, as an example, would be a valid objective. Such aims were also consistent with aboriginal beliefs and practices, and not the least with the enhancement of aboriginal rights in general.\footnote{\textit{Sparrow}, supra, at p. 183.}

Another valid objective would be one aimed at preventing an exercise of section 35(1) rights that would cause harm to the general population or to aboriginal peoples themselves. In general, valid objectives must be found to be “compelling and substantial”. Reference to the public interest was seen as too vague to provide meaningful guidance and too broad to be workable as a justification test for limitations of constitutional rights.\footnote{\textit{Sparrow}, supra, at p. 183.}

If a valid legislative objective is found, the analysis proceeds. Here, the Court emphasised the principle of the honour of the Crown, derived from the \textit{Guerin} case, which generally is at stake in dealings with aboriginal peoples. The fiduciary relationship and the responsibility of the government vis-à-vis aboriginals must be a prime consideration in determining whether the legislation or action in question can be justified.\footnote{\textit{Sparrow}, supra, at pp. 183-184.} This is the second question outlined above. As mentioned, the \textit{Sparrow} case ordered a new trial on the questions of infringement and justification.

As the \textit{Sparrow} case concerned fishing, the Court emphasised the problem of conservation in a modern fishery and stated that conservation inevitably blurs with allocation and management of the fish resource. Although conservation is a valid legislative concern, regulations enforced pursuant to conservation or management objectives may still be scrutinised according to the justification test, as it concerns the question of the honour of the Crown.\footnote{\textit{Sparrow}, supra, at p. 184.} See further below under next subsection.

The two first questions addressed above are the crucial ones, but it might be necessary to address further questions depending on the circumstances of the examination. This includes a proportionality analysis, whether there has been as little infringement as possible in order to effect the desired result. Another question regards whether, in a situation of expropriation, fair compensation is available or has been awarded. Yet, another question concerns consultation, whether the aboriginal group in question has been sufficiently consulted with respect to the conservation measures implemented. The Court asserted that the aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would at least be expected to be informed regarding determination of an appropriate scheme for the regulation of fisheries.\footnote{\textit{Sparrow}, supra, at p. 187.}

The Court stated that there might be other relevant questions to be asked in the justification analysis, but the Court did not attempt to set out an exhaustive list of factors to be considered. It was enough to emphasise that recognition and
affirmation require sensitivity to and respect for the rights of aboriginal peoples from the government, the courts and all Canadians.\footnote{Sparrow, supra, at p. 187.}

It is clear that the justification test developed in Sparrow, similar to the infringement test, was determined to a certain extent by the legal and factual context of that appeal. Nonetheless, the tests are applicable in other circumstances, including infringements of treaty rights. Hereunder, I will give some examples of the application of the justification test by referring to the same cases as above.

In Gladstone, the Court applied the justification test set out in Sparrow, with respect to the two first questions outlined above. The government must first demonstrate that it acted pursuant to a valid legislative objective and, second, that its actions were consistent with its fiduciary duty towards the aboriginal peoples. The Court began by emphasising two relevant differences between this case and Sparrow.

First, the commercial fishing right in this case differed significantly from the right recognised and affirmed in Sparrow, which involved the right to fish for food for social and ceremonial purposes. While the latter right had an inherent internal limitation, the meeting of these needs, the former lacked such internal limitation. Instead, the demand of the market and the availability of the resource were seen as external constraints on the Heiltsuk right. Second, while some aspects of the fishing regulatory scheme related to conservation aims, other aspects of the scheme had little or no relevance to conservation, whereas Sparrow focused on the net-length, a clear conservation measure. Here, there was a lack of evidence regarding other “compelling and substantial” objectives for the allocation of the herring fishery that might justify an infringement in the exercise of the Heiltsuk right.\footnote{Gladstone, supra at paras. 54, 57 & 69-70.}

As the second difference has significance for the first question of the justification test, I will deal with it first. The setting of the total allowable catch at twenty percent of the estimated herring stock was clearly related to conservation, but there was no clear objective for the allocation of the allowable catch, both between different herring fisheries and between user groups (commercial uses and Indian food fishery). Because of the lack of evidence on this allocation, a new trial was ordered. However, the Court found that the setting of the catch at twenty percent of the fishable herring stock was consistent with the first question of the test, a valid objective. This first part of the regulatory scheme aimed at conservation and did not affect the priority of aboriginal versus non-aboriginal users of the fishery.\footnote{Gladstone, supra at paras. 77-80 & 82-85.}

The first difference raised by the Court has significance for the second question of the test, which concerns explicitly the Sparrow doctrine of priority. The Court asserted that, given that a commercial fishing right lacks an internal limitation, the priority standard set out in Sparrow needed to be refined. The Court asserted that the doctrine of priority in these cases did not require that, after conservation goals have been met, the government must allocate the commercial fishery exclusively to the aboriginal peoples. Instead, the Court held that the justification test could not be assessed against a precise standard, but rather on a case-by-case basis. What the doctrine of priority in fact required was that the government demonstrate that, in allocating the resource, it had taken into account the existence of aboriginal rights and allocated the resource in a manner respectful...
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of the fact that those rights have priority over the exploitation of the fishery by other users.1251

The Court affirmed that the aboriginal sustenance rights had top priority after conservation needs, but the ranking of aboriginal commercial rights within the propriety scheme depended upon the overall situation1252. However, clearly the fiduciary duty of the Crown is at stake here, and the government has the burden of proof. To decide whether the second question of the test is met, a court should determine whether the government has taken into account the existence and importance of different aboriginal rights. This refinement of the test was supported by the Van der Peet decision, which emphasised that aboriginal rights are highly fact specific. The rights recognised and affirmed by section 35(1) are not held uniformly by all aboriginal peoples in Canada. The nature and extent of the rights vary in accordance with the variety of aboriginal cultures and traditions. As a result, the government must not only make decisions on allocation between aboriginal rights holders and those that do not hold such rights, but also between different aboriginal groups and between different aboriginal rights.1253 The question of allocation relating to the regulatory scheme of herring was not solved as there was a lack of evidence.

In Adams, the Crown failed to adduce evidence sufficient to demonstrate that the infringement of the appellant’s right to fish for food with a seine net, the traditional manner of fishing for the Mohawks, in Lake St. Francis was justified. The Crown’s evidence did not satisfy either of the two initial questions. Instead, the evidence proved the existence of a policy that essentially favours sports fishing to the detriment of those wanting to fish for food. Thus, the priority scheme here was for sports fishing after conservation. The enhancement of sports fishing as such was not seen as a compelling and substantial objective for the purposes of section 35(1), as it was not of overwhelming importance to the Canadian society as a whole. Therefore, the Court concluded that the appellant’s right to fish for food should be given first priority after conservation concerns were met.1254

The Court also held in Côté that the infringement of the appellant Côté’s right to fish for food was not justified. The regulatory scheme was identical to that in Adams, and the Crown had failed to meet the justification test. The scheme failed to satisfy the Crown’s fiduciary duty towards the Algonquin peoples, because it provided no priority to the aboriginal right to fish.1255

6.4.5.3 The Justification Test and the Doctrine of Priority

The second question in the justification test concerns the fiduciary relationship between the Crown and the aboriginal peoples, particularly whether the honour of the Crown is at stake.1256 In Sparrow, the Court articulated this fiduciary duty in terms of the allocation of the fisheries resource. It was interpreted in a manner that

1251 Gladstone, supra at paras. 62-63.
1252 The Court added to the Sparrow list of additional questions in which to inquire. Those questions were seen as examples and not as an exhaustive list. See Gladstone, supra at para. 64.
1253 Gladstone, supra at paras. 63-65.
1254 Adams, supra, at paras. 56-59.
1255 Côté, supra, at paras. 81-82 & 94-95.
1256 See also subsection 6.4.2.
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gave Indian food fishing top priority after conservation measures had been met. Hereunder, I will analyse this allocation scheme, often called the doctrine of priority, developed by the Supreme Court.

As I noted above, as the Sparrow case concerned fishing, the Court emphasised the problem of conservation in a modern fishery and stated that it inevitably blurs with the efficient allocation and management of a scarce and valued resource. The nature of the constitutional protection afforded by section 35(1), demands that there be a link between the question of justification and the allocation of priorities in the fishery. Thus, the constitutional recognition and affirmation of aboriginal rights may conflict with the interests of others given the scarcity of the resource. The Court stressed that there was a great need for guidelines that would resolve the allocation problems. Here, the Court affirmed findings in case law regarding the allocation of fisheries.

The Court referred to Jack v. The Queen [1979] 2 C.N.L.R. 25, which concerned the regulation of fisheries in British Columbia, including the question of allocation of the salmon fisheries. The Court affirmed an order of priority after reasonable and necessary conservation measures had been met:

i) Indian fishing,
ii) non-Indian commercial fishing and
iii) non-Indian sports fishing. It declared that the burden of conservation measures ought not to fall primarily upon the Indian fishery.

With reference to case law and the constitutional nature of the Musqueam food fishing rights, the Court argued that, after valid conservation measures, Indian food fishing must be given top priority. The detailed allocation of marine resources is a task left to those having expertise in the area. But, when the allocation is established, the Indians’ food requirements must be met first. Even if conservation is a valid legislative concern, legislation may still be scrutinised according to the justification test, as said above. In this instance, the Court acknowledged the fact that the justificatory standard to be met places a heavy burden on the Crown. Nonetheless, the constitutional right embodied in section 35(1) requires the Crown to ensure that its regulations are in keeping with this allocation of priority. To achieve this order of priority, management plans, for example, must ensure that the rights of aboriginal peoples are taken seriously.

Thus, the Sparrow case created a doctrine of priority. The objective of this priority was seen as a guarantee that the legislation and management plans treated aboriginal rights in a manner which assured that those rights were taken seriously. Other cases have affirmed this idea of allocation and developed it due to the specific circumstances in each case.

In Adams, the appellant held an existing aboriginal right to fish for food with a seine net in Lake St. Francis. The Crown failed to provide evidence to meet the standard of the justification test, and the Court concluded that the appellant’s right to fish should be given priority after conservation concerns were met. Of relevance here was the fact that the legislation included a licence requirement for fishing. An aboriginal food fish licence could only be obtained according to ministerial discretion.

1257 Sparrow, supra, at p. 184.
1258 Sparrow, supra, at p. 184.
1259 Sparrow, supra, at p. 184.
1260 Sparrow, supra, at pp. 184-187.
1261 Sparrow, supra, at pp. 186-187.
In light of the Crown’s unique fiduciary obligations towards aboriginal peoples, the Court asserted that Parliament may not simply adopt an unstructured discretionary administrative regime, which risks infringing aboriginal rights in a substantial number of applications, in the absence of explicit guidance. Thus, the Court held that a statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion. Unless such specific guidance exists, the Crown does not fulfil its fiduciary duties, and the statute will be found to represent an infringement under the Sparrow test. The provisions in the regulation were found to infringe the appellant’s aboriginal right to fish for food, and subsequently the subsistence right should be given first priority after necessary conservation measures.

The same legislative regime was also apparent in Côté. Again, the Court recognised that the appellant held an aboriginal right to fish for food. For the same reasons as in Adams, this general administrative regime without guidelines for the issuance of aboriginal licences was found to infringe the right of the appellant. The scheme provided no priority to aboriginal rights to fish and, in this, failed to satisfy the Crown’s fiduciary duty toward the Algonquin people. The Crown failed to provide evidence regarding both initial questions in the test.

The doctrine of priority has not been without controversy. Since 1994, there have been a number of incidents involving angry commercial or recreational fishers against aboriginal harvesters in such areas as the Fraser River of British Columbia. Government regulators are trying to limit all harvesters, since there is a growing public consciousness of fisheries as a declining resource. These disputes concern as much allocation issues as conservation issues. Regarding the salmon fishery in British Columbia the federal department of fisheries is attempting to balance the interests of the commercial salmon industry, tourist outfitters, and sports anglers with the priority of access of aboriginal harvesters in line with the Sparrow decision.

In Gladstone, the aboriginal fishing right acknowledged by the Court was commercial in nature (a right to trade spawn on kelp). The aboriginal right here, unlike the right in Sparrow (subsistence right), was without internal limitation. This fact caused the Court to modify the doctrine of priority developed in Sparrow. The Court argued that the significance of this difference correlating to the test concerned the doctrine of priority. The notion of priority, as articulated in Sparrow, would, in an exceptional year when conservation concerns are severe, allow aboriginal rights holders alone to participate in the fishery. In ordinary years, other users would be allowed to participate in the fishery after aboriginal rights to fish for food for social and ceremonial purposes have been met. If this priority would apply to commercial aboriginal rights as well, it would give exclusivity over any person not having an aboriginal right. The court asserted that such a result was not the intention of Sparrow.

Thus, the Court found that the judgement in Sparrow did not consider how the priority standard should be applied in circumstances where the aboriginal right

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1262 Adams, supra, at para. 54.
1263 Côté, supra, at paras. 76 & 82.
1265 Gladstone, supra, at paras. 57-60.
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has no such internal limitation. Therefore, the test was refined with respect to the doctrine of priorities. Instead, the government’s action should be assessed to determine whether the government has taken into account the existence and importance of commercial aboriginal rights. The Court said here that the content of this priority, something less than exclusivity, but which nonetheless gives priority to the aboriginal right, must remain somewhat vague pending assessments of legislation on a case by case approach. Questions relevant to this assessment are those mentioned in Sparrow relating to consultation and compensation. 1266

The Court also listed some additional questions of relevance:

- Whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (reduced fees, for example).
- Whether the government’s objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders.
- The extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population.
- How the government has accommodated different aboriginal rights in a particular fishery (food versus commercial rights, for example).
- The criteria taken into account by the government when allocating commercial licences among different users. 1267

These questions will give indication and guidance on the factors that may be taken into account when determining whether the government can be said to have given priority to aboriginal rights holders. An argument in favour of such an assessment was the fact that aboriginal rights are not held uniformly by all aboriginal peoples: instead the content and existence of such rights vary. As a result, governments must not only make decisions about how to allocate between aboriginal rights holders and those who do not enjoy such rights, but also about how to allocate fish both between different groups of aboriginal rights holders and between different aboriginal rights. Nonetheless, the Court affirmed that top priority should be given to sustenance for social and ceremonial purposes. In the Glastone case, there was a lack of evidence to determine whether the commercial herring spawn on kelp fishery met the Sparrow test regarding priority. Regarding the Crown’s consultation duty, the evidence was somewhat scanty, but some consultation had been held. The Court could not, however, determine whether it was enough to enforce justification of the herring fishery regime. A new trial was ordered. 1268

In sum, evident from all these cases is the Court’s analysis of the infringements of the aboriginal rights in light of the unique fiduciary relationship that exists between the Crown and the aboriginal peoples. Due to the doctrine of fiduciary duties, a priority scheme has been illuminated that assures substantial protection of existing aboriginal rights, also in relation to necessary conservation measures. This scheme may also be subsumed under a discussion of who shall bear the burden of conservation needs. This kind of discussion, in a legal context, is as relevant from a Canadian as from a Swedish perspective1269. This fiduciary

1266  Gladstone, supra, at paras. 60-64.
1267  Gladstone, supra, at para. 64.
1268  Gladstone, supra, at paras. 64-66, 79-82 & 84.
1269  See further in subsection 9.3.2
relationship is also apparent in relation to aboriginal title, but in a slightly different manner, which will be shown below.

6.4.6 Aboriginal title

6.4.6.1 Introduction
Aboriginal title deals with the right to the land *per se*. Whereas the nature of aboriginal rights, such as fishing and hunting rights, has been fairly analysed and explained by the courts, there remain many unclear legal issues concerning aboriginal title. In fact, aboriginal title shares some features with the Swedish immemorial prescription, which also may establish ownership of land due to possession and continuous use.\(^{1270}\)

Notably, there are similarities regarding the fact that traditional aboriginal and Saami uses of land and natural resources are not readily transferable to the normal concepts of property law within the legal systems. In the Canadian context, issues arise about the exclusivity of the occupation and use, as well as whether nomadic and semi nomadic aboriginal peoples can prove aboriginal title depending upon the criteria established. The burden of proof also lies on the aboriginal peoples. Possession is a central concept for aboriginal title, as it is for immemorial prescription.\(^{1271}\) Even if the court cases do not explicitly discuss the requirement of intensive use of the occupied area, as in the Swedish context, this notion is still causal.

Aboriginal title is at stake in those regions of Canada where traditional aboriginal lands have not been ceded by treaty. These include, not only most of British Columbia, but also parts of Quebec and Atlantic Canada, for example.\(^{1272}\) In the two essential cases, *Delgamuukw* and *Marshall; Bernard*, the Supreme Court analysed the requirements for proving aboriginal title, as well as its sources and content.

As described above under subsection 6.3.1, aboriginal title is one aspect of the doctrine of aboriginal rights. However, certain standards apply to the identification of aboriginal title that, on certain points, differ from the identification test set out by *Van der Peet*. Therefore, under this subsection, I will briefly analyse the criteria corresponding to claims on aboriginal title. This concerns rights which most closely relate to ownership of lands. Similar to the Swedish law on immemorial prescription, where evidence does not support ownership of a certain area, a lesser right is usually affirmed, such as a hunting or a fishing right.

6.4.6.2 The Doctrine of Aboriginal Title

In a much quoted article, Professor Slattery sets out a general theory of aboriginal rights, which was analysed with the aid of both leading cases and the basic common law principles derived from the complex history of relations between aboriginal peoples and the Crown, namely the doctrine of aboriginal rights. This

\(^{1270}\) Compare with subsection 7.2.1.

\(^{1271}\) Compare here with subsections 7.2.1.2 & 7.2.1.3.

\(^{1272}\) See for example at [http://www.parl.gc.ca/information/library/PRBpubs/hp459-e.htm](http://www.parl.gc.ca/information/library/PRBpubs/hp459-e.htm) (viewed at 2006-03-19). This paper (revised in 2000), included into the Parliamentary Research Branch, provides an easy access to the essentials of the *Delgamuukw* case and its aftermath.
doctrine has been explained above under subsection 6.3.1. The doctrine of aboriginal title, which is the topic of this subsection, is part of the larger doctrine of aboriginal rights, but it is nevertheless distinct in that it deals explicitly with the rights attached to the land.

It should, however, be noted that the criteria referred to here might not altogether correspond with the case law developed so far. One example is the time period for establishing aboriginal title, which the case law now seems to have fixed to the time for identification of the assertion of British sovereignty. This reveals the fact that the legal area is still an uncharted territory and that many issues await authoritative judicial treatment. Nevertheless, the theory of Professor Slattery has interest for a comparison with the Swedish equivalent for establishing Saami ownership, or more limited rights.

Before exploring the specific features of aboriginal title, we need to address certain land categories relevant to the acquisition of aboriginal title. Very early, a land system developed in North America where lands were divided into two broad categories: Indian Territories and General Lands. The distinction between these is key to understanding the doctrine of aboriginal title. Thus, lands claimed by the Crown were initially of these two types.

Prior to the arrival of Europeans, most of the land was actually possessed and used by aboriginal peoples, but the possession was not completely static. Aboriginal peoples migrated in response to many factors, such as war, epidemic, famine, diminishing game reserves, altered soil conditions, trade, and population pressure. Boundaries shifted over time; lands that were vacant at one period might later be occupied. The identities of the groups also changed over time. The coming of Europeans usually increased this fluctuation and did not stabilise native boundaries. Thus, the Indian Territories were an area open to movement and change, where the rights of the group rested on possession and were lost by abandonment. The Crown’s claim of sovereignty had one significant legal consequence: the Crown gained ultimate title to the soil. This derived from the feudal character of the British constitution, whereby the Crown is not only the sovereign, it is also the ultimate landlord. Practically, however, the underlying title of the Crown did not affect native property rights that were viewed as burdens on that title. Neither did it affect aboriginal customary systems of land use and tenure, which remained in force within the aboriginal communities. Nevertheless, due to restrictions, aboriginal title became alienable only to the Crown. It applied to dealings between Indians and non-Indians and did not prevent Indians from transferring land among themselves.

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1275 Compare the prerequisites for establishing ownership with respect to immemorial prescription in subsection 7.2.1.
1276 Quite early, these two categories were supplemented by a third, Indian Reserves, which is comprised of land that has become permanently attached to a particular Indian group. These lands are governed by a unique body of rules. See further in Slattery, Brian (1987) Understanding Aboriginal Rights, pp. 743-744 & 769-774.
1277 Ibid., p. 741.
1278 There is, however, substantial critique against the assumption that the Crown acquired sovereignty over tribal territories and that aboriginal title is a burden on the Crown’s underlying title. See, for instance, Borrows, John (1999) Sovereignty’s Alchemy: An Analysis of Delgamuukw v. British Columbia in Osgoode Hall Law Journal Vol. 37 No. 3.
In relation to the Indian Territories, the Crown held the ultimate title and an exclusive right of purchase. Official practice gave rise to a common law rule that aboriginal title could not be transferred to private persons, only to the Crown. On those lands (Indian Territories), aboriginal peoples held possession and the capacity to acquire new lands. The lands that had been withdrawn from the Indian Territories were the General Lands, which were made available for settlement and were governed by European land systems. In principle, where aboriginal title has not been extinguished, the common law remains.\(^{1280}\)

In order to establish an aboriginal title, the lands must form part of the Indian Territories. It is presumed in law that the lands still form part of this category of land, in the absence of proof to the contrary. The onus of proof lies on the one contending that the lands have been converted to General Lands. As said previously, Indian Territories are lands under Crown sovereignty that are open to native use and occupation. Areas that have not been occupied or used by aboriginal groups for a considerable period of time are free of aboriginal title for the time being. However, such lands may remain available for occupation in the future.\(^{1281}\)

The lands belonging to the category of Indian Territories are residual and comprise lands that remain after lands converted to General Lands or Indian Reserves are subtracted. Under the doctrine of aboriginal title, the primary way of converting Indian Territories is by cession. An aboriginal group may cede or sell lands in its possession to the Crown, which means that the rights to the land are extinguished. For a treaty to extinguish aboriginal title, it must be concluded voluntarily by the group holding the title.\(^{1282}\)

It is somewhat doubtful that aboriginal title can burden privately owned lands. There is no clear legal authority on this issue. However, some academic authorities argue that, while aboriginal title may continue to exist on fee simple land, aboriginal title is inoperative as against the rights of the fee simple owner.\(^{1283}\) For the question of whether aboriginal rights may attach to privately owned lands, see the short discussion in the last paragraphs under subsection 6.4.1.

The doctrine of aboriginal title governs three main areas. First, the doctrine defines the legal categories of Indian Territories, General Lands and Indian Reserves and determines how lands may pass from one category to another, as seen above. Second, it defines the concept of aboriginal title and describes its general features, including the manner in which it can be gained and lost. Third, the doctrine determines the fiduciary obligations of the Crown regarding aboriginal lands.\(^{1284}\)

I will now address the features of aboriginal title. The fiduciary implications on aboriginal rights are discussed below under subsection 6.4.6.5. To recall, the doctrine of aboriginal title does not originate in English or French property law, nor from native custom. It stems instead from an autonomous body of law that

\(^{1280}\) Ibid., pp. 743-744 & 763.

\(^{1281}\) Ibid., pp. 756 & 761-62.

\(^{1282}\) Ibid., pp. 762-763.


bridges the native system of tenure and the European property law system. In this, aboriginal land is right are *sui generis*, as acknowledged in the *Guerin* case. Aboriginal title is a collective right vested in a group; this means that it excludes claims advanced by individuals. And the group asserting title must be of aboriginal descent, proving a link with a specific area.

Moreover, the basis for and central feature of aboriginal title is possession. In determining whether a group can be said to possess certain lands, one should take into account, for instance, the size of the group, its way of life and the character of the lands claimed. There might also be joint title where the lands have been shared with other groups. The claimant needs to prove that he or she has an enduring relationship with the lands in question, sufficient to defeat claims of previous possessors and to resist newcomers. The qualified time period might vary depending on the circumstances.

The doctrine of aboriginal title declares that the aboriginal title does not vary from group to group, since it is not governed by traditional practices. Thus, aboriginal title means that an aboriginal group has a sphere of autonomy in which it can decide freely how to use the lands. It may be influenced by traditional practices, but for most native groups, "land use is a matter of survival not nostalgia." Some courts have, however, expressed the view that aboriginal title is limited to the traditional practices which established the title. Professor Slattery argues instead that aboriginal title gives an exclusive use and possession of the lands, which means a use according to the group’s discretion. This view was affirmed by *Guerin*. This means that the right includes, for instance, exploiting non-renewable natural resources. In sum, the general criterion for asserting aboriginal title is current occupation (possession) and actual use.

Regarding possession, a certain time period must pass before an aboriginal group loses title to lands it has abandoned to move elsewhere. Aboriginal title is also naturally maintained through possession. Nonetheless, the group’s title will only lapse after sufficient time has passed to indicate that the group has irretrievably cut its link with the lands. How long this takes depends upon the circumstances. Slattery argued that it was unlikely that a group would lose the rights to its former land more rapidly than it could acquire title to its new land, a period of some twenty to fifty years. When the title ceases to burden the Crown’s underlying title, the lands do not revert back to the General Lands, but remain Indian Territories and are available for aboriginal uses.

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1285 The rights of individuals within the group are determined by internal rules founded on custom, which dictates the extent to which any individual, family, lineage or other sub-groups has rights to possess and use the lands and resources vested in the entire group. See Ibid., p. 745.
1286 Ibid., pp. 744-45 & 756.
1287 Ibid., pp. 764-45 & 756. Slattery argues here that the time period should be some twenty or fifty years to establish aboriginal title. This does not seem to be supported by the case law (see below), although it has not been explicitly tried to my knowledge. This corresponds, to some extent, to the proposed ninety year for establishing immemorial prescription according to Swedish law. See further below in subsection 7.2.3.
1288 Professor McNeil also argues along the same line. He contends that, to classify aboriginal rights as *sui generis* rights does not preclude aboriginal peoples from having rights of exclusive possession and full use of their traditional lands. See McNeil, Kent (1997) *The Meaning of Aboriginal Title* in Borrows & Rotman (1998) *Aboriginal Legal Issues*, p. 64.
1290 Ibid., pp. 765, 775 & 745-748.
aboriginal peoples still have the opportunity to acquire aboriginal title to such lands.

The *Calder* case moved in the direction of recognising aboriginal title as a full legal right. Today, aboriginal title is generally understood as such, and, not surprisingly, it is a property right. The fact that aboriginal rights are inalienable, except by surrender to the Crown, does not mean that they are not truly proprietary in nature, as has been argued sometimes. Aboriginal title is not a concept of English land law, but a *sui generis* right. Since aboriginal title is an interest in land, just compensation must be paid upon compulsory taking according to common law. And like other aboriginal rights, for instance, fishing rights, aboriginal title exists despite any executive or legislative act.\footnote{Ibid., pp. 748-750, 751 & 755.}

Before turning to the current legal position on aboriginal title, it should be noted that, at common law, the physical fact of occupation was proof of possession.\footnote{See, for instance, *R. v. Marshall; R. v. Bernard* 2005 SCC 43 (CanLII) at para 131 (per Lebel J.).} This difference of land acquisition has been criticised by various scholars.\footnote{See, for instance, Donovan, Brian (2001) The Evolution and Present Status of Common Law Aboriginal Title in Canada: The Law’s Crooked Path and the Hollow Promise of *Delgamuukw* in *U.B.C Law Review* 35:1.} For the most part, the critiques point to the higher and more difficult proof required to establish aboriginal title compared to “normal” common law titles. This critique also extends to the burden of proof. Some scholars question why aboriginal groups should bear the burden of proving their title, while it is presumed that the Crown possesses it by bare words, referring to the issue of Crown sovereignty and underlying title to the lands.\footnote{See, for instance, Borrows, John (1999) *Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia* in Osgoode Hall Law Journal Vol. 37 No. 3, p. 572.}

### 6.4.6.3 The Nature of Aboriginal Title

Whereas aboriginal rights have been fairly clarified by courts, many legal uncertainties still attach to aboriginal title and to this doctrine. The jurisprudence on aboriginal title is somewhat underdeveloped.\footnote{Delgamuukw, supra, at para. 119.} Thus, the doctrine of aboriginal title will continue to evolve as principles will be established based on specific claims. Until *Delgamuukw v. British Columbia*\footnote{[1997] 3 S.C.R. 1010.} there was no definitive statement on the source and content of aboriginal title in Canada. As the question of the source and content of aboriginal title is fundamental, the lack of clarity on this issue has been criticised and discussed in legal literature.\footnote{See for instance McNeil, Kent (1997) *The Meaning of Aboriginal Title* in Asch, Michael (ed.) *Aboriginal and Treaty Rights in Canada – Essays on Law, Equality and Respect for Difference*.} Before *Delgamuukw*, the Supreme Court had avoided specifying the precise legal basis of aboriginal title. *Calder* stated in an often-quoted passage that, “when the settlers came, the Indians were there, organized in societies and occupying the land as their fore-fathers had done for centuries. This is what Indian title means.”\footnote{Ibid., pp. 748-750, 751 & 755.} Hence, the Court seemed to vacillate between two sources: aboriginal occupation or aboriginal laws.\footnote{For an analysis up to 1997, see McNeil, Kent (1997) *The Meaning of Aboriginal Title*, pp. 136-137.} *Delgamuukw* joined these two descriptions.
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Delgamuukw was the first decision since Calder to address the existence, nature and quality of the common law aboriginal title to land. 1302 Delgamuukw was also one of the longest and most complicated court proceedings in Canadian legal history. 1303 The Gitskan and Wet’suwet’en First Nations of north-western British Columbia claimed that they retained title to their traditional lands. 1304 These lands encompassed a vast area of 58,000 square kilometres, and the authority on the lands was traditionally divided into clans and houses. The outcome of the case was the order of a new trial due to procedural and evidentiary facts. 1305

Despite the fact that the Supreme Court ordered a new trial, it nevertheless gave guidance on important matters, including the source and content of aboriginal title. 1306 Here, the Court relied on legal literature, particularly on the work of Professor McNeil. It should be noted that, historically, the source of aboriginal title was thought to flow from The Royal Proclamation, 1763, because it was recognised by this legislation. The Court affirmed, however, that aboriginal title arose from prior occupation of aboriginal peoples. The prior occupation was relevant both for the physical fact of occupation, which derived from the common law principle that occupation is proof of possession in law, and the fact that there is a relationship between common law and pre-existing systems of aboriginal law. Thus, the Court maintained that the source of aboriginal title appeared to be twofold: the title is based on the common law and on the aboriginal perspective on the land, including aboriginal systems of law. 1307 In this, both perspectives should therefore be taken into account in establishing proof of occupancy, which will be discussed below in the next subsection.

The source and content of aboriginal title are inherently linked. Hence, the content of aboriginal title is not restricted to pre-contact uses integral to the distinctive culture of the aboriginal group claiming the right, nor does the right amount to a form of inalienable fee simple. Thereby, the Court rejected the two extreme positions of the parties, by stating that the content of the title lies in between them. The content of the title was summarised in two propositions. First, aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to the title for a variety of purposes that do not need to be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures. Second, those protected uses must not conflict with the nature

1304 The previous individual claims by each house were amalgamated into two communal claims at the trial before the Supreme Court, which was advanced on behalf of each nation. See Delgamuukw, supra, at para. 73.
1305 The claims were amended causing the respondent to suffer from some prejudice. Moreover, the Court found that the oral histories of the appellants were not given enough weight by the trial judge and perhaps preventing him from coming to another conclusion. See Delgamuukw, supra, at paras. 76-77 & 107-108. The Court recommended renewed negotiations with the Crown (para. 186). So, although the Gitskan and Wet’suwet’en peoples spent several million dollars preparing and defending this case, it did not resolve their claim. See Coates, Kenneth (2000) The Marshall Decision and Native Rights, p. 92.
1306 The Court was unanimous in its conclusions, but delivered basically two different reasons: a majority judgement by three and minority judgement by two. The sixth judge concurred with the majority, but was still in substantial agreement with the two other judges. 1307 Delgamuukw, supra, at paras. 113-114 & 147.
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of the group’s attachment to the land. These two points will be explained below.

Land uses in relation to aboriginal title are not restricted as such. They can, for example, include mining rights. Nonetheless, the Supreme Court held that there still is an inherent limitation to the title, so that lands cannot be used in a manner that is irreconcilable with the nature of the attachment to those lands. This limit on the content of aboriginal title is a manifestation of its sui generis nature and is distinct from “normal” proprietary interests, notably fee simple. Due to the source of the aboriginal title, there is an implicit protection of historic patterns of occupation. There is a recognition of the importance of the continuity of the relationship of an aboriginal community with its land over time. The relevance of continuity of the relationship of an aboriginal group with its land means that it applies also to the future, not merely to the past. As a result, uses of the lands that would threaten that future relationship are by their very nature excluded from the content of aboriginal title.

In arriving at its findings on the source and content of aboriginal title, the Court emphasised the features of aboriginal title. The starting point was the fact that Canadian jurisprudence has described it as sui generis to distinguish it from “normal” proprietary interests. The sui generis nature of aboriginal title has at least three dimensions. One dimension is its inalienability, another is its twofold source. A third dimension is the fact that it is held communally as a collective right. This affirms also the features referred to above regarding the theory outlined by Professor Slattery.

Now, I will turn to another guideline provided by the Supreme Court in Delgamuukw, concerning the proof of aboriginal title. The test provided was later refined by the Court in R. v. Marshall; R. v. Bernard, which will be addressed subsequently.

6.4.6.4 The Test for Proof of Aboriginal Title

A major uncertainty pertaining to aboriginal title concerned the way in which the legal right was to be identified. The lesser rights, such as hunting, fishing and trapping rights, are identified through the Van der Peet test. It was not until Delgamuukw v. British Columbia that the Supreme Court was called upon to solve this issue. The outcome of this case was the order of a new trial, but the Court nevertheless gave important guidance on the matter. Delgamuukw modified the Van der Peet test in order to set out a test for proof of aboriginal title. Later R. v. Marshall; R. v. Bernard built on that decision, refining parts of the test. Nevertheless, many questions remain to be solved.

In outlining the test applicable to aboriginal title, the Court began by stating that, to date, it had defined aboriginal rights in terms of activities. The Van der Peet test was developed in the context of cases involving claims for aboriginal

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1308 Delgamuukw, supra, at paras. 111 & 117.
1309 This implies an environmental protection approach.
1310 Delgamuukw, supra, at paras. 124-127. The Court gives an example: if occupation is established with reference to the use of land as a hunting ground, then the aboriginal group that has proven aboriginal title may not use it in such a fashion as to destroy its value, such as by strip mining it. See para. 128.
1311 2005 SCC 43 (CanLII).
1313 2005 SCC 43 (CanLII).
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right. Because of the fact that aboriginal title is a right to land itself, there was a need to adapt the Van der Peet test. With reference to section 35(1) of the Constitution Act, 1982, to reconcile the prior presence of aboriginal peoples, both aspects were to be recognised and affirmed: the occupation of land, and the prior social organisation and distinctive cultures of aboriginal peoples. The Court affirmed that the jurisprudence so far had given more emphasis to the second aspect. This was explained to a great extent by the cases that found their way to the Court. Thus, in adapting the Van der Peet test to suit claims of aboriginal title, the test must comprise also the notion of occupation of land.\(^{1314}\)

Nonetheless, the test for the identification of aboriginal rights and the identification of aboriginal title share broad similarities.\(^{1315}\) The major distinction is that under the test for identification of aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy. Another difference is the time for identification. The proper time for identification of aboriginal rights is the time of first contact; whereas, for aboriginal title, it is the time when the Crown asserted sovereignty.\(^{1316}\) The Supreme Court’s test for identifying aboriginal title is threefold.

First, the land claimed must have been occupied prior to sovereignty. The Court asserted here that, from a theoretical standpoint, aboriginal title arises out of prior occupation of the land and out of the relationship between the common law and pre-existing systems of aboriginal law. Aboriginal title is understood as a burden on the Crown’s underlying title. The Crown, however, did not gain this title until it asserted sovereignty over the lands in question. Thus, aboriginal title crystallised at the time sovereignty was asserted, and, before that time, it is not meaningful to discuss a burden that did not exist. Another assertion was that aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practises, customs and traditions, and those influenced or introduced by European contact. Under common law, the act of occupation or possession is sufficient to ground aboriginal title, and it is not necessary to prove that the land was a distinctive or integral part of the aboriginal society prior to contact. For practical reasons, the date of sovereignty is easier and more certain than the date of first contact.\(^{1317}\)

Regarding the proof of historic occupation, in affirming the purpose of section 35(1) and the dual source of aboriginal title, both aspects should be taken into account. This means that aboriginal laws in relation to land as well as physical occupation, must be equally considered. Those relevant aboriginal laws may include land tenure systems or laws governing land use. And physical occupation can be established in many ways, ranging from construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts for hunting, fishing and other means for exploiting natural resources. In assessing whether the land use is sufficient to ground title, one must take into account the group’s size, manner of life, material resources, technological abilities and the character of the lands claimed. Additionally, in order to prove title the land must have been of central significance to the group’s distinctive culture.

\(^{1314}\) Delgamuukw, supra, at paras. 140-142.

\(^{1315}\) Regarding the use of oral histories as evidence see above under subsection 6.4.3.3.

\(^{1316}\) Delgamuukw, supra, at para. 142.

\(^{1317}\) Delgamuukw, supra, at para. 145. The time of assertion of British sovereignty over British Columbia was in 1846.
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However, it would seem clear that any land that was occupied pre-sovereignty, and with which the claimants have maintained a strong connection since then, would be sufficiently important to be of central significance.1318

Second, there must be a continuity between present and pre-sovereignty occupation. However, as with proof of aboriginal rights, conclusive evidence of pre-sovereignty occupation is difficult. Instead, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation. There must, however, be a continuity between present occupation and the pre-contact occupation. Furthermore, there is no need to prove an unbroken chain of continuity between present and prior occupation, as emphasised by *Van der Peet*. The occupation and land use may have been disrupted for a time, perhaps due to the unwillingness of European colonisers to recognise aboriginal title. To impose strict requirements on continuity would undermine the very purpose of section 35(1). The Court also noted that the altered nature of occupation will not ordinarily prelude a claim for aboriginal title, as the link between the people and the land is maintained, and may in principle only be restricted by the internal limits of uses that are inconsistent with continued use of the land by future generations of aboriginals.1319

Third, at sovereignty occupation must have been exclusive. This is, in fact, a very crucial element of aboriginal title. The requirement for exclusivity flows from the very definition of aboriginal title, since it is defined as including a right to exclusive use and occupation of land. The proof of title must mirror the content of the title in this respect. The proof of exclusivity must rely on both the perspectives of common law and the aboriginal perspectives. However, exclusivity is a common law principle derived from the notion of fee simple ownership and should therefore be imported onto the concept of aboriginal title with caution.1320

For example, the Court noted that exclusive occupation can be demonstrated even if other aboriginal groups were present or occasionally used the lands. In such circumstances, exclusivity would instead be modified to be demonstrated by the intention and capacity to retain exclusive control. In fact, the presence of other aboriginal groups might actually reinforce a finding of exclusivity. For instance, the fact that others were allowed access upon request and the permission asked would provide further evidence of the group’s exclusive control. Joint title may also be recognised.1321

The test outlined above applies to aboriginal title. However, where a claimant has failed to prove title, for instance a lack of exclusivity in the occupation and use of the land, the claimant may nevertheless have a site-specific right to engage in a particular activity.1322 This is an important incident of the rights and claims to rights, which corresponds very well with the claims for Saami ownership and more limited Saami customary rights. Here, *Delgamuukw* reaffirmed what *Adams* stated in relation to nomadic aboriginal peoples; nomadic peoples who varied the location of their settlements with the seasons and changing circumstances may be unable to make out a claim for title, but may nevertheless possess aboriginal rights shielded by section 35(1). The notion of nomadic

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1318 *Delgamuukw*, supra, at paras. 146-151.
1319 *Delgamuukw*, supra, at paras. 152-154.
1320 *Delgamuukw*, supra, at paras. 155-156 & 159.
1321 *Delgamuukw*, supra, at paras. 156 & 158.
1322 *Delgamuukw*, supra, at paras. 138-139.
aboriginal peoples and their claims for title is important to raise here. This issue will be further examined below.

As indicated earlier, this test for proof of aboriginal title was developed to some extent in R. v. Marshall; R. v. Bernard. One aspect of the case concerned whether nomadic peoples could claim title to land.1323 This case arose from two different appeals, but both concerned Mi’kmaq Indians who claimed aboriginal title as a response to their convictions. In Marshall, 35 Mi’kmaq were charged with cutting timber on Crown lands in Nova Scotia without authorisation. In Bernard, one Mi’kmaq was charged with unlawful possession of logs, which had been cut on Crown lands in New Brunswick. The respondents argued that they were not required to obtain provincial authorisation to log, because they had a right to log on Crown lands for commercial purposes due to their aboriginal title.1324

These cases, like Delgamuukw, transcended the charges at stake, but the Marshall and Bernard cases found their final solution: no new trial was ordered.1325 The Supreme Court rejected the claims for aboriginal title.1326 In reaching this conclusion, the Court reaffirmed the principles canvassed in Delgamuukw, namely that the common law theory underlying the recognition of aboriginal title holds that an aboriginal group which occupied land at the time of European sovereignty continues to enjoy title, if it has not ceded or otherwise lost the right to the land. The Court also affirmed that occupation must have been exclusive at the time of British sovereignty.1327 Nonetheless, the Court declared that many of the details of this test remain to be developed. In this particular case, issues of the standard of occupation required to prove title, including the issue of exclusivity of the occupation, was raised. Also at issue was the type of evidence required, particularly how aboriginal oral evidence was to be used. The Court affirmed that both aboriginal and European common law perspectives must be considered; only in this way can the honour of the Crown be upheld. The Court argued that, in order to consider both aboriginal and European perspectives, it had to examine the pre-sovereignty aboriginal practice and translate it into a modern legal right, as faithfully and objectively as possible. The question was whether the practice at the time of assertion of sovereignty translates into a modern legal right – and if so, what legal right?1328

Hence, in this exercise, a court must consider the traditional practice from the perspectives of aboriginal peoples. In translating it into a common law right, however, a court must consider the European perspective. Here, the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it. This translation was not to be conducted in a formalistic and narrow way. A court should take a generous view of the aboriginal practice and should not insist on exact conformity to the legal parameters of the common

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1323 2005 SCC 43 (CanLII).
1324 Marshall; Bernard, supra, at paras. 1-4.
1325 Marshall; Bernard, supra, at para. 5.
1326 The respondents advanced three grounds for aboriginal title: common law, the Royal Proclamation (1763), and Governor Belcher’s Proclamation. Note also that the respondents did not claim a lesser aboriginal right to harvest forest resources, only aboriginal title. The Court also rejected the claim for a commercial treaty right to log. The judgement was unanimous, but two of the seven judges concurred with their own short reasons.
1327 Marshall; Bernard, supra, at paras. 39-40.
1328 Marshall; Bernard, supra, at paras. 40 & 45-48.
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In matching common law property rules with aboriginal practices, a court must be sensitive to the context-specific nature of common law title, as well as to aboriginal perspectives. The common law recognises that possession is sufficient to ground title depending upon circumstances, primarily the nature of the land and the manner in which the land is enjoyed. Aboriginal title is established through those aboriginal practices that indicate possession similar to that associated with title at common law. To establish title, a claimant must prove “exclusive” pre-sovereignty “occupation” of the land by the claimant’s ancestors. Notably, this notion of exclusivity corresponds very well with establishing ownership through immemorial prescription in Swedish law.

This was the Court’s recapture of the broad picture. Then in more detail it concentrated on three issues: i) what was meant by exclusive control; ii) whether nomadic and semi-nomadic people can claim title to land; and iii) the requirement of continuity. Regarding the first issue, the Court concluded that all that is required for proving exclusion and exclusive control is effective control of the land by the group, that it could have excluded others had it chosen to do so. This is what is meant by the requirement that the lands have been occupied in an exclusive manner.

The second question, whether nomadic and semi-nomadic people can claim title to land, was answered in the positive. Nevertheless, it all depended on evidence. Possession at common law is a contextual and nuanced concept, and will depend upon the circumstances, chiefly the nature of the land and the way in which it was commonly used. Thus, exploiting the land for hunting, fishing or other resources may translate into aboriginal title if the activity was sufficiently regular and exclusive to comport with title at common law. Seasonal fishing and hunting, on the other hand, will typically translate into aboriginal fishing and hunting rights.

Regarding the third issue of continuity, the Court asserted that it meant that modern-day claimants must establish that they are the descendants from the pre-sovereignty group whose practices are relied upon for the right. They must simply show that they are the right holders. Moreover, the group’s connection with the land must be shown to have been “of central significance to their distinctive culture”. If the group has maintained a substantial connection with the land since sovereignty, this establishes the required “central significance.” The underlying issue on evidence was also discussed in relation to the three issues. Due to the fact that aboriginal peoples did not write down events historically, the Court held that orally transmitted history must be accepted provided that the conditions of usefulness and reasonable reliability are respected, as set out in Mitchell.

The particular evidence in these two cases did not support the claims of aboriginal title. The evidence relating to Marshall was not clear about where the

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1329 Marshall; Bernard, supra, at paras. 48 & 51.
1330 Marshall; Bernard, supra, at paras. 54-58.
1331 Marshall; Bernard, supra, at paras. 63-65.
1332 Marshall; Bernard, supra, at paras. 54, 58 & 66.
1333 Marshall; Bernard, supra, at paras. 67 & 71.
1334 Marshall; Bernard, supra, at paras. 68-69. See further above in subsection 6.4.3.3.
moderately nomadic Mi’kmaq had their more intensively used areas (hunting and fishing grounds) or how wide these areas were. All of the mainland was likely not included in those lands, as the population was too small for that. Regarding Bernard, there was no evidence that exclusive control was retained, due to the vast area and the small population.1335

6.4.6.5 Infringements and Justification of Aboriginal Title
Delgamuukw affirmed earlier statements that aboriginal rights, including aboriginal title, are not absolute, and that they may be infringed, both by the federal (Sparrow) and provincial (Côté) governments. Section 35(1), however, requires that those infringements satisfy a test for justification. This means that, in the context of aboriginal title, issues also arise as to tests on extinguishment, infringement and justification.1336 Regarding extinguishment, the concept of a clear and plain intention of the Crown to extinguish aboriginal title applies. On the whole, it is important to emphasise this correspondence with other aboriginal rights, since they all are shielded under the same constitutional provision (section 35(1)).

The Court explained how the infringement test will apply in the context of aboriginal title in Delgamuukw. Thus, the Court affirmed that aboriginal title can also be subject to infringements, both by federal and provincial governments.1337 The Court also accentuated the difference in approach between Sparrow and Gladstone, particularly in relation to the doctrine of priority regarding the justification of infringements.1338

Regarding the justification of such infringements, the Court referred to Gladstone, where it was explained in more detail what should be meant by a “compelling and substantial” objective. This first part of the justification test outlined by Sparrow, would be directed at either one of the purposes underlying section 35(1): the recognition of the prior occupation of North America by aboriginal peoples or the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown. The latter purpose will often be most relevant at the stage of justification, while aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part, and limits on those rights are equally a necessary part of that reconciliation. Conservation purposes, for instance for fisheries, are accepted as a compelling and substantial objective.1339

Nevertheless, the range of legislative objectives is fairly broad, and most of them can be traced to the reconciliation purpose of section 35(1). Apart from protection of the environment and endangered species, the Court argued that development of agriculture, forestry, mining, hydroelectric power or building of infrastructure might very well justify infringements of aboriginal title. However, it is ultimately a question of fact that will have to be examined on a case by case basis.1340 In this the Crown’s fiduciary obligation and consultation duty are of utmost relevance.

1335 Marshall; Bernard, supra, at paras. 78-83.
1336 Marshall; Bernard, supra, at para. 40.
1337 Delgamuukw, supra, at para. 160.
1338 Delgamuukw, supra, at paras. 162-164.
1339 Delgamuukw, supra, at para. 161.
1340 Delgamuukw, supra, at para. 165.
As no right is absolute, also aboriginal title may be regulated subject to the justification test. The manner in which the fiduciary duty operates with respect to the second question of the test, the honour of the Crown, will be a function of the nature of aboriginal title. Three aspects of the title are relevant here; i) the right to exclusive use and occupation of land; ii) the right to chose how the land and its natural resources should be used; and iii) the fact that the title has an inescapable economic component. The Court found that the altered approach to priority, which was laid down in Gladstone, should apply with respect to aboriginal title. Thus, the government must demonstrate both that the process by which it allocated the resource and the actual allocation which results from that process, reflect the prior interest of the holders of the title. This is a function of the equally substantial and procedural nature of the doctrine of priority, canvassed by Gladstone.1341

More concretely, this might mean that the government must accommodate the participation of aboriginal peoples in the development of resources in British Columbia, that the issuance of leases and licences, for instance, to forestry and mining companies reflect the prior occupation of aboriginal title lands, and that barriers to aboriginal uses of their lands, primarily licences fees, be somewhat reduced. Those examples were only examples designed to illustrate the nature of the Crown’s obligations that might be required to fulfill the justification test and the doctrine of priority. The Court acknowledged that it will be difficult to determine the precise value of the aboriginal interest in the land and any grants, leases or licences given for its exploitation. Those difficult questions could not be resolved in the context of the case.1342

The Court also emphasised that other aspects of aboriginal title suggested that the fiduciary duty may be articulated in a manner different from the idea of priority pertaining aboriginal rights short of title. See above in subsection 6.4.5.3. The right included in the aboriginal title means that the land may be used in a way that does not need to confer with traditional uses of the aboriginal group. This aspect of the title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. Hence, there is always a duty of consultation. Whether the aboriginal group has been consulted is relevant for determining if the infringement of aboriginal title is justified. An analogy was drawn here to reserve lands and the manner in which they are leased (Guerin). However, the nature and scope of the duty of consultation will vary with the circumstances.1343

Where the breach of fiduciary duty is less serious, the duty to consult will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Nonetheless, consultation must be in good faith and with the intention of substantially addressing the concerns of the aboriginal title holders. In most cases, however, the consultation duty will be significantly deeper than mere consultation and some instances may even require the full consent of an aboriginal nation. This will be the case particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.1344

1341 Delgamuukw, supra, at paras. 164 & 166-167.
1342 Delgamuukw, supra, at para. 167.
1343 Delgamuukw, supra, at para. 168.
1344 Delgamuukw, supra, at para. 168.
Moreover, the economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well, which was a possibility suggested by the *Sparrow* decision and repeated in *Gladstone*. As a well-established part of the landscape of aboriginal rights, compensation is awarded for breaches of fiduciary duty.\(^\text{1345}\)

### 6.4.7 A Summation of Existing Aboriginal Rights

After having examined the Supreme Court of Canada’s interpretation of aboriginal rights and aboriginal title to land, it is clear that section 35(1) of the *Constitution Act, 1982*, has played a vital role in clarifying this legal field. Not only has the provision created a new legal framework for addressing aboriginal claims, it has also been used as a blueprint that the various cases have been tried against. The purpose and the underlying intent of the provision have constantly been highlighted, at the least as the source of the various tests developed. In this, the reasons of the Supreme Court have indeed been creative. The Court has elaborated its tests innovatively, but always within the underlying intent of section 35(1), chiefly the reconciliation of the relationship between the aboriginal peoples and the Crown, including the Canadian society, allowing for “normal” principles and concepts of law to adapt to the unique circumstances pertaining to aboriginal rights claims. Here, the acknowledgement of the rights’ *sui generis* nature has reinforced the adaptation.

Nevertheless, to date the number of key cases remains relatively small, although each one of them has substantially redefined the understanding of aboriginal rights in Canada.\(^\text{1346}\) However, the total number of cases concerning aboriginal law issues is relatively voluminous, especially in a Swedish legal context. In fact, in *Delgamuukw*, the Court acknowledged that the legal area was highly complex and rapidly evolving.\(^\text{1347}\) The development of the aboriginal right has created an understanding of the rights as consisting of a spectrum, with more or less connection to the land. The Supreme Court of Canada has found various harvesting rights, primarily fishing, hunting and trapping rights. However, from the hearings of the Royal Commission it has been evident that the continued exercise of these harvesting rights remains deeply controversial in certain sectors in society, such as recreational hunters and anglers as well as commercial fishers.\(^\text{1348}\)

Nonetheless, existing aboriginal rights are constitutionally entrenched. The *Van der Peet* test set out a frame for how the right shall be identified, setting the relevant time period to the pre-contact time for aboriginal activities to be legally recognised. Commercial rights have additionally been recognised, notably regarding fishing. Here the aboriginal activity must have included a commercial ingredient at pre-contact date. The *Van der Peet* test was modified by *Delgamuukw* in order to accommodate the identification of aboriginal title. Here, the relevant time-period is instead the assertion of sovereignty by the British Crown, which created the Crown’s underlying title. The crucial element for

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\(^{1345}\) *Delgamuukw*, supra, at para. 169.


\(^{1347}\) *Delgamuukw*, supra, at para. 159.

establishing aboriginal title is exclusive occupation and use of the area claimed. So far, the Court has not found evidence of aboriginal title, and the law on aboriginal title continues to evolve as many issues remain to be solved.

In fact, some commentators have argued that the standard established in Delgamuukw is a considerable one. Given overlapping territorial and resource claims, as well as disputes between aboriginal groups, it might be difficult to achieve the level of proof required for aboriginal title. The minority judgment in Marshall; Bernard was in fact also concerned with parts of the majority judgement, especially in relation to nomadic or semi-nomadic occupation and uses. It was argued that the test developed might very well amount to a denial that any aboriginal title could have been created by such patterns of occupation and use of land. This concern also attaches to immemorial prescription in the Swedish legal context.

Regarding the claims of aboriginal rights and aboriginal title, the claimant has the onus of proof. Here, the law on evidence has been modified to accommodate better the claims, as there are inherent problems related to these types of claims. Therefore, oral histories in various forms, for instance, are accepted and weighted. Regarding aboriginal rights, evidence of an activity and its distinctive and central character for the community need only be proven at contact, not pre-contact. Similarly, for aboriginal title, the claimant needs only to show evidence at time of sovereignty, not pre-sovereignty. For both types of rights, there must, nevertheless, be shown that continuity exists between the present activity/occupation and the pre-activity/pre-sovereignty occupation. Moreover, disruption of continuity is not seen as a problem as long as the aboriginal activity or occupation is resumed.

Where aboriginal right or aboriginal title is found, issues of extinguishment of the rights arise. It is only existing rights that are shielded by section 35(1). The burden of proof lies here on the Crown to show that a right has been extinguished by a “clear and plain” intention. The Sparrow test also includes an analytic scheme for assessing infringements, and whether such infringements can be justified by a “compelling and substantial” objective. Restriction for conservation purposes is clearly such an objective. The development of those tests has also been conducted with section 35(1) as a reference. Concerning the proof of these issues, aboriginal peoples have the onus to show a prima facie infringement of their right, whereas the Crown has the onus of showing whether an infringement of a right can be justified.

The following scheme emerges as to who has the burden of proof related to the Sparrow tests:
- The identification test: the aboriginal group
- The extinguishment test: the Crown
- The infringement test: the aboriginal group
- The justification test: the Crown

In relation to the justification test, the Supreme Court has also recognised that aboriginal people are entitled to priority of access to fish and wildlife on Crown lands.

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1350 *Marshall; Bernard*, supra, at para. 126.
lands. Such priorities apply to domestic consumption and ceremonial use, as well as in relation to commercial harvesting rights, but they apply here in a slightly different manner due to the ruling in *Gladstone*. This doctrine of priority flows ultimately from the trust-like relationship between the Crown and the aboriginal peoples, the doctrine of fiduciary duties.

Additionally, there is a requirement for consultation intermingled with the substantial rights in the sense that the long historical interdependence with natural resources requires that the aboriginal group holding a right, at the least, be informed of any regulation of the resource. The Crown’s consultation obligation flows from the justification test first enunciated in *Sparrow* and later refined by *Gladstone*. In *Sparrow*, this issue was not addressed further, but *Gladstone* reaffirmed the significance of consultation and raised the issue in relation to the herring fishery regime. Later cases have also dealt with aspects of the consultation requirement that follow from section 35(1). The stronger a right is, the more demanding the consultation duty becomes.

Regarding aboriginal title, the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. Hence, there is always a duty of consultation. Whether the aboriginal group has been consulted is relevant for determining whether the infringement of aboriginal title is justified. More concretely, this might mean that the government must accommodate the participation of aboriginal peoples in the development of resources, that the issuance of leases and licences, for instance, to forestry and mining companies reflects the prior occupation of aboriginal title lands and that barriers to aboriginal uses of their lands, primarily licensing fees, be somewhat reduced. Hence, joint decision-making on exploitation or even joint management might be required. This duty has some similarities with New Zealand law, where the Maori customary rights, statutorily acknowledged, very often seem to be combined with management rights of the resource in question.

On the whole, the fiduciary doctrine has had a major impact on the way in which the courts have handled aboriginal law cases. There has been a flood of claims for breach of fiduciary duties, but nevertheless, the Supreme Court has explained that there are limits to this obligation, and its relevance is primarily linked to specific issues or interests of aboriginal peoples. The doctrine has largely influenced the interpretation of section 35(1), not only in relation to the justification test, but also in relation to the manner in which the provision should be understood and applied.

In *Sparrow*, and later in *Van der Peet*, the Supreme Court found that the interpretive principle of a generous and liberal interpretation ultimately flowed from the fact that the Crown has a fiduciary obligation toward the aboriginal peoples where the honour of the Crown is at stake. This interpretive principle informed the Court’s analysis of the purpose underlying section 35(1) and of that provision’s definition and scope. The fiduciary relationship also means that ambiguity with respect to what falls within the scope and definition of this provision must be resolved in favour of aboriginal peoples, which is a second interpretive principle applicable to section 35(1).1351

To conclude, on a superficial level there are several similarities between the spectrum of aboriginal rights and rights established through immemorial

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1351 *Van der Peet*, supra, at paras. 21 & 24-25.
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prescription, such as the general requirement of a connection between the used land area and the aboriginal group using it, namely the right holders. The lack of written evidence has also in Swedish Courts meant a softening of the requirement of evidence (beviskrav).¹³⁵² There are, of course, many differences, not the least of which is the fact that aboriginal rights are a unique body of law emanating both from common law and aboriginal prior occupation and use of lands and natural resources, whereas Saami rights are prescriptive rights and, as such, part of an old branch of property law. A major difference is the lack of legal acknowledgement of a specific relationship between the government and Saami, as is provided for in Canadian law. A doctrine of priority, or anything similar to it, does not exist in Sweden.

In relation to proof, an apparent difference is the lack of evidence relating to more modern land use and resource conflicts. In proving aboriginal right and aboriginal title, the relevant time is indeed historic, pre-contact and pre-sovereignty. Changes that have occurred in more modern days are simply not of immense relevance here, only in the manner of proving a continuity between then and now. As a contrast, to prove immemorial prescription, there is a requirement to show undisputed and unhindered (okvald och ohindrad) possession and use. Since the suggested time period is some ninety years back, there are naturally many disputes over the lands, as competition of land and natural resources is obvious. Neither is the process of colonisation discussed as a legal feature of relevance in claims of Saami customary rights. This and other issues will, however, be discussed in the next chapter in relation to Swedish law.

6.5 Claims on Aboriginal Rights and the Crown’s Consultation and Accommodation Duty

This section does not correspond directly with the rest of the analysis in this chapter, which is based on examining the nature and extent of aboriginal rights in Canadian jurisprudence. Nevertheless, the Crown’s duty to consult and accommodate has become a critical issue in recent years, particularly in British Columbia. One of the interesting aspects of this jurisprudence is the movement away from finding the source of the duty in the justification analysis (Sparrow and the following cases), and locating it in the honour of the Crown. The principle of the honour of the Crown is the duty of honourable dealings that arises from the assertion of sovereignty. The jurisprudence evolving here is of great relevance, especially in relation to Crown dealings of lands and natural resources, where aboriginal peoples are claiming aboriginal rights or aboriginal title, or already are negotiating on such claims. This section is therefore relevant to the understanding of aboriginal rights in a broad sense. Swedish law lacks guiding principles on the relationship between the government and the Saami, which makes this section interesting ¹³⁵³.

It has long been unclear whether the Crown has any legal duties toward aboriginal peoples when their interests may be at stake, notably regarding decisions affecting areas subject to claims of aboriginal title or aboriginal rights.

¹³⁵² In the Taxed Mountains case, NJA 1981 s. 1. See further regarding the Taxed Mountains case in section 7.1.
¹³⁵³ See my discussion below in section 10.2.
This is prior to any recognition and affirmation of aboriginal title or aboriginal rights under section 35(1) of the Constitution Act, 1982. At least two cases from the Supreme Court are of relevance here.

The first case ever to address the issue at the Supreme Court level was *Haida Nation v. British Columbia (Minister of Forests)*\(^{1354}\) in November, 2004. The Supreme Court held that, due to the principle of the honour of the Crown, sufficient consultation had not taken place. The Province had failed to meet its duty to engage in something significantly deeper than mere consultation, and it had failed to engage in any “meaningful” consultation at all. The Court suggested that this duty also required accommodation to preserve the interests of the Haida.\(^{1355}\)

The Haida have for more than one hundred years claimed title to all of Haida Gwaii (Queen Charlotte Islands), consisting of two main islands and a number of smaller islands situated outside the west coast of British Columbia. They claim title as well as an aboriginal right to harvest red cedar. For a number of years, the Haida have objected to the rate of logging of old-growth forests, the methods of logging, and the environmental effects of logging. The islands are heavily forested, and the cedar has played an essential role in the economy and culture of the Haida. The forests have been logged since before the First World War, and the Province issues licences to cut trees to forest companies. The licences are called Tree Farm Licences (TFL), and the grant includes an exclusive, long-term right to log.\(^{1356}\) The granted TFL disputed in this case covered an area of nearly a quarter of the total lands claimed by the Haida. Large areas had already been logged off, so the potential impact on the asserted rights of the Haida was serious and substantial.\(^{1357}\)

As noted previously, this case was the first of its kind to reach the Supreme Court, and the question arose as to what duty, if any, the government owed the Haida in this situation. The Nation’s claim to title is strong but it is also complex and will take many years to prove. In the meantime, the Haida argue that their heritage will be permanently degraded. In turn, the government argues that it has an obligation to manage the forest resources for the benefit of all British Columbians, and until the Haida formally prove their claim, they have no legal right to be consulted. The Court, however, concluded that the government has a legal duty to consult with the Haida people about the harvest of timber, including decisions to transfer or replace the TFL. Consultation in good faith may in turn lead to an obligation to accommodate the Haida’s concerns in the harvesting of timber. Consultation must also be “meaningful”. Consequently, in this case, the

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\(^{1354}\) 2004 S.C.C. 73.

\(^{1355}\) *Haida Nation*, supra, at paras. 76-77 & 79. The judgement was unanimous.

\(^{1356}\) The TFLs are separated from the granting of cutting permits, which also must be obtained in order to have a right to log. However, the TFLs reflect a strategic planning for utilisation of the resource and the holder submit must every five years a management plan with an inventory of the licence area’s available resources. A “20-year-plan” sets out a hypothetical sequence of cutblocks. The inventories form the basis for determination of the allowable annual cut. Consultation at the operational level thus has little effect. Therefore consultation must take place at the stage of granting or renewing of TFLs. See *Haida Nation*, supra, at para. 76.


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Court set out a general framework for the duty to consult and accommodate before aboriginal title or rights claims have been recognised.\textsuperscript{1358} The government’s duty to consult and accommodate the interests of the Haida was based on the honour of the Crown, which is always at stake in dealings with aboriginal peoples. The historical roots of the principle suggest that it must be understood generously. The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific aboriginal interests, it turns into a fiduciary duty. In this case, aboriginal title and aboriginal rights have been asserted, but not defined or proven. Therefore, the aboriginal interest was too unspecific for the honour to mandate a fiduciary duty. The Court recalled that the aboriginal peoples of Canada were never conquered. Instead, many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. Thus, the potential rights embedded in these claims are protected by section 35(1) of the Constitution Act, 1982. The honour of the Crown requires that these rights should be determined, recognised and respected, as well as a subject of ongoing negotiations. The process continues, and the honour of the Crown may hence require consultation and, perhaps, also accommodation of aboriginal interests.\textsuperscript{1359}

To exploit a claimed resource unilaterally during the process of resolving aboriginal rights claims may be to deprive the community of all or part of the benefit of the resource. That was not to be understood as honourable. The jurisprudence of the Supreme Court suggested that consultation duties were part of a process of fair dealing and reconciliation that began with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation was understood as a process flowing from the rights protected by section 35(1), and, ultimately, its roots lay in the Crown’s assertion of sovereignty. To limit reconciliation to the phase after rights have been recognised would risk treating the reconciliation as a distant legalistic goal. It was, therefore, necessary to recognize the existence of a legal duty to consult prior to proof of claims.\textsuperscript{1360}

The consultation duty arises when the Crown has knowledge of the potential existence of an aboriginal title or right and considers conduct that might adversely affect the right. The mere knowledge of a credible, but unproven, claim triggers the duty to consult and accommodate.\textsuperscript{1361}

The content of the consultation varies with the validity of the claim and the seriousness of the effect on the asserted right. In this, it may be compared with a spectrum. At one end lie cases where the claim is dubious or weak and the potential for infringement minor. At the other end are cases where a strong prima facie case for the claim is established, and the potential infringement is of high significance and/or risk of non-compensable damage is high. In the former case, the consultation duty might require giving notice, disclosing information and discussing issues raised in response to the notice. In the latter case, the duty to consult is more likely to mean formal participation in the decision-making process, opportunities to make submissions, written reasons to show that aboriginal concerns were considered, as well as the impact they had on the

\textsuperscript{1358} Haida Nation, supra, at paras. 6-8, 10-11, 28 & 69.
\textsuperscript{1359} Haida Nation, supra, at paras. 16-18 & 25.
\textsuperscript{1360} Haida Nation, supra, at paras. 27 & 32-34.
\textsuperscript{1361} Haida Nation, supra, at paras. 35 & 37.
decision, dispute resolution procedures, and so on. The list is by no means exhaustive.\textsuperscript{1362}

Between these two extremes of the spectrum lie other situations, and every case will have to be considered individually. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect the reconciliation between the Crown and the aboriginal peoples regarding the interest at stake. Pending any settlement, the Crown is bound to balance societal and aboriginal interests. Therefore, balance and compromise will be necessary.\textsuperscript{1363}

“Meaningful” consultation may oblige the Crown to make changes to proposed actions, based on information obtained through the consultation process. Here, the Court assessed the New Zealand official guide for consultation provided by the Ministry of Justice, where it is stated that consultation is not just a process of exchanging information. When the consultation process suggests amendment of Crown policy, accommodation is inherent. The effect of good consultation may reveal and require a duty to accommodate, especially where a strong \textit{prima facie} case exists. It includes taking steps to avoid irreparable harm or to minimise the effects of infringement. However, accommodation does not give rise to veto powers. The aboriginal consent mentioned in \textit{Delgamuukw} will only be appropriate in cases of established rights. Instead, it is a process of give and take, a balancing of interests.\textsuperscript{1364}

The Court of Appeal found that the forest company, that is, a third party, had a duty to consult and accommodate the Haida. The Supreme Court did not uphold this ruling. The ultimate legal responsibility for consultation and accommodation rests with the Crown and can not be delegated. The Crown alone remains legally responsible for the consequences of its actions as well as interactions with third parties that affect aboriginal interests. The Crown’s duty here includes both federal and provincial governments.\textsuperscript{1365}

The case of \textit{Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)}\textsuperscript{1366} was decided on the same date as \textit{Haida Nation}. It concerned the re-opening of an old mine situated within the claimed area of the Taku River Tlingit First Nation (TRTFN), a remote and pristine area of northwestern British Columbia. The TRTFN had long negotiated a settlement with the Crown, first with the federal Crown and now under the B.C. Treaty Commission. The province clearly had knowledge of the Nation’s claims, which were regarded as a \textit{prima facie} case. The TRTFN participated in a three and a half year environmental assessment (EIA) process in accordance with British Columbia’s \textit{Environmental Assessment Act}, and participated in the Project Committee.\textsuperscript{1367}

Through the EIA, the Nation’s concerns with the road proposal became apparent.\textsuperscript{1368}

\begin{footnotes}
\textsuperscript{1362} \textit{Haida Nation}, supra, at paras. 37 & 43-44.
\textsuperscript{1363} \textit{Haida Nation}, supra, at para. 45.
\textsuperscript{1364} \textit{Haida Nation}, supra, at paras. 46-48.
\textsuperscript{1365} \textit{Haida Nation}, supra, at paras. 52-53 & 57-59.
\textsuperscript{1366} 2004 S.C.C. 74.
\textsuperscript{1367} The Act requires that aboriginal peoples, whose traditional territory includes the site of the proposed project, are invited to participate in a project committee. \textit{Taku River Tlingit First Nation}, supra, at para. 33.
\textsuperscript{1368} \textit{Taku River Tlingit First Nation}, supra, at paras. 1, 3-5, 12, 22 & 30.
\end{footnotes}
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The potentially adverse effect of the Minister’s decision to issue a project approval was understood as relatively serious. The proposed access road was relatively small, but would pass through an area critical to the Taku’s domestic economy. The Nation was concerned that the road could act as a magnet for future development.1369

The Supreme Court concluded that the province was required to consult meaningfully with the TRTFN in the decision-making process surrounding the mining company’s application. The Court affirmed that the honour of the Crown cannot be interpreted narrowly or technically, but must be given full effect in order to facilitate the process of reconciliation mandated by section 35(1). Here, the Nation’s role in the EIA was sufficient to uphold the honour of the province and to meet the requirements of its duty to consult. Compromise is inherent in the reconciliation process. The province accommodated TRTFN’s concerns by adapting the EIA process and the conditions for the mining company to gain approval.1370

Generally, this case affirmed the findings in Haida Nation. The Court acknowledged that determination of the extent of consultation and accommodation before a final settlement of a claim of aboriginal title or rights was challenging. Even so, it was seen as necessary for the process mandated in section 35(1). In relation to the duty to accommodate, the Court noted that this may lead to a duty to change government plans or policy. Responsiveness was a key requirement of both consultation and accommodation.1371

To conclude, the Canadian law on consultation is not as well developed as in New Zealand, where the requirements of consultation have been canvassed by case law in a substantial number of cases. The Resource Management Act 1991 and other statutes require consultation regarding many issues where Maori interests are evident. By comparison, in Swedish law, there exists no legal principles requiring consultation to take place in instances where the rights or

1369 Taku River Tlingit First Nation, supra, at paras. 31 & 38.
1370 Taku River Tlingit First Nation, supra, at paras. 2, 24 & 32. The judgement was unanimous.
1371 Taku River Tlingit First Nation, supra, at para. 25. There is also another interesting Supreme Court case, decided in November 2005, on the Crown’s duty to consult and accommodate. However this case regards constitutionally protected treaty rights. See Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) 2005 S.C.C. 69. The federal government approved a winter road, without consulting the Mikisew Cree. The road would pass through their reserve (subject to Treaty 8). The Court found that, as the project concerned a fairly minor winter road on surrendered lands, the Crown’s duty lied at the lower end of the spectrum. Nevertheless, the Crown had an obligation to engage directly with the Nation and not through a general public consultation process. The Crown was also required to listen carefully to the Mikisew’s concerns and to attempt to minimise adverse impact on their hunting, fishing and trapping rights.
interests of the Saami to land or natural resources are at stake. Instead, such obligation is merely subject to legislative requirements, and very few provisions exist.
7 Saami Customary Rights to Use Land and Natural Resources

To reiterate, the objective of this thesis is twofold. On the one hand, I analyse the interface between Saami customary rights and basically environmental protection and natural resources legislation. On the other, I analyse and discuss ways in which the legislation may contribute to a sustainable use of land and natural resources within the reindeer herding area. The second objective is a succession of the first. The comparison with New Zealand and Canadian law is an aid for both objectives, but will become more apparent in relation to the final analysis and discussion in Part III. In order to analyse the interface between Saami customary rights and other legislation, an analysis of the nature of those rights is essential. I will begin with such an analysis of the legal basis of Saami customary rights to land and natural resources, as done previously vis-à-vis the analysis of the New Zealand and Canadian law. In the latter part of this chapter, I will also analyse dilemmas and problems in relation to the law.

The content and extent of the Saami customary rights are old and controversial questions that are still matters of dispute. The valid law in this area (rättsläget) is far more unclear, compound and complicated than, for instance, the State is willing to admit. While courts primarily make verdicts based upon legislation, the matter will unlikely change drastically due to case law alone. As evident below, unclear legislation and lack of provisions lead to discontented argumentation and confounding conclusions in the courts.

In clarifying the basics of the rights attached to reindeer husbandry, one important milestone is the 1981 Taxed Mountains case, which clarified the legal nature of the Saami reindeer herding as based on immemorial prescription. Due to specific features of the Saami customary use, application of the doctrine of immemorial use as a means for establishing rights is, however, not uncomplicated. This shows that a “normal” application of the perquisites for immemorial prescription is not only difficult, but not even desirable, if reasonable outcomes are sought. Consequently, there are still many legal uncertainties connected to the reindeer herding right, particularly in relation to the present codification of the rights. Note, however, that the purpose of this chapter is not to present a full picture of the doctrine of immemorial prescription, which is clearly outside of the purpose of this thesis.

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1372 See further above in subsection 1.2.1.
1373 This is a part of the real property law (speciell fastighetsrätt).
1374 This is a difference compared to both New Zealand and Canadian law. In Aotearoa/New Zealand the Maori rights are basically articulated in the Treaty of Waitangi, although customary rights also exist. It seems to be a general belief that the treaty rights and the customary rights normally are the same. Canada has both treaty rights and customary rights, called aboriginal rights. However, a difference is that those customary rights, in both countries, are not based on prescription, rather on occupation and continuous use of ancestral lands. See further in subsections 6.3.1 and 7.1.2.
1375 See further in subsection 7.2.1.3. The specific traditional Saami uses of land and natural resources do not correspond with the prerequisites for establishing immemorial prescription. I see a need to adopt and modify those prerequisites, as a way of “decolonise” the law.
Instead, the analysis of the doctrine aims to explain the legal roots of the reindeer herding right, including sub-rights.

In similarity with Canadian and New Zealand experiences, there are also in a Swedish legal context considerable problem in incorporating Saami customary rights and claims thereof into the known legal figures (rättsfigurer). For that reason, it is not surprising that there are problems with the legal understanding of the rights, including their relation to the rest of the legal system. One example of the legal application of the Saami customary rights concerns the decisions by the County Administrative Board determining the borders of village areas. Another example concerns the rights for Saami who are not members of a Saami village. Despite a lack of statutory recognition, one could question whether certain customary rights still exist, such as separate Saami hunting and fishing rights outside of the reindeer herding right\textsuperscript{1376}.

Before digesting this chapter, I recommend that section 8.1 be read first, in which general information regarding husbandry and reindeer herding rights is provided, unless, of course, the reader is already well acquainted with reindeer husbandry. My intention is to concentrate issues concerning the nature of the Saami customary rights in one chapter, without introductory subsections on husbandry as such.

### 7.1 Background

Over the years, there have been numerous commissions that have examined various aspects of the Saami reindeer husbandry and other aspects of the Saami culture. The state’s examinations (utredningar) have largely focussed on issues related to husbandry and the Saami villages and have paid little attention to the Saami rights as such. Ever since the first statute\textsuperscript{1377} in 1886, which in the main codification of existing Saami customary rights, the public focus has been on reindeer husbandry. The basis for those rights was, however, legally unclear for a long period. The state’s main position during the twentieth century was that the legislation as such created the rights, and the rights were referred to as the Lap privilege (lapprivilegiet), since the legislation created a monopoly for the reindeer herding Saami.

However, a 1981 Supreme Court case put an end to this argument. That case, the so-called Taxed Mountains case, is a land mark decision regarding Saami customary rights.\textsuperscript{1378} In fact, it is still the leading case on Saami rights in Sweden. The Supreme Court held there that the reindeer herding right was based on immemorial prescription and, as such, was not dependent upon a statute. The case

\textsuperscript{1376} This would be possible, at least theoretically. The transitional provisions to the present hunting and fishing legislation refer to rights based upon immemorial prescription. Hence, may be possible to establish a Saami customary hunting or fishing right in relation to a specific area through customary use. For instance, a fishing right in particular lakes may have been “inherited” within a specific Saami family. See further below in subsection 7.2.1.2. Note, however, that hunting and fishing rights may be claimed by others than Saami on the same legal basis. See NJA 1984 s. 148.

\textsuperscript{1377} Act on Swedish Lap's rRights to Reindeer Pasture in Sweden and on Reindeer Marks. SFS 1886:28.

\textsuperscript{1378} NJA 1981 s. 1. For a summary of the case in English see Bengtsson, Bertil (1982) \textit{The Decision of the Supreme Court in The Saami National Minority in Sweden}. Note that this author was one of the judges in the case (referent).
concerned the ownership to the so-called Taxed Mountains in the northern part of the county of Jämtland. It is the biggest and most complex case in modern Swedish case history, and also a disappointment for the Saami, as they lost in all courts. Although the judgement was initially heavily criticised by the Saami, as well as by academics, the judgement also included statements favourable to the Saami. Nevertheless, as will be evident by my analysis of the doctrine of immemorial prescription in this chapter, the traditional Saami land uses do not corresponds smoothly with the “normal” preconditions for establishing ownership or other limited rights through the doctrine.

The Tax Mountains case was initiated by the Saami before the district court in 1966 and was finished by the judgement of the Supreme Court in 1981. The civil suit concerned rights to the Tax Mountains and so-called extended homesteads (utvidgningshemman). Various issues were tried: i) the possibility of gaining rights of ownership to areas terra nullius by use of the area for reindeer pasture, hunting and fishing, ii) the legal basis for establishing ownership for the State of the areas in dispute, iii) whether the Saami had rights other than those included in the present legislation on reindeer husbandry, and iv) whether certain rules in the reindeer husbandry legislation were discriminatory. Before all three courts, the claims of the Saami parties were essentially the same. All the claims made by the Saami plaintiffs were to be understood as joint claims, while, at the same time, being advanced as individual and collective claims of rights.

The Saami claimed above, all rights, of ownership to the area in dispute. If their claim failed they claimed more limited rights to the area: i) a restricted ownership; ii) a permanent possession with full elasticity (all rights that belongs to a tenant); and, finally, iii) limited rights as reindeer herding rights, hunting and fishing rights, a right to pasture other than reindeer pasture, hay-making rights, rights to logging, rights to migration routes, rights to minerals, rights to revenue from mining, and rights to hydroelectric power.

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1379 An area of approximately 40,000 square km. Note that the State did not have a land certificate (lagfart) for the Taxed Mountains, but had certificates on the extended homesteads. See NJA 1981 s. 1, at p. 175.
1380 The summary of the case reported in NJA comprises of 253 pages.
1381 See, for instance, different authors in The Saami National Minority in Sweden (1982), published by the Legal Rights Foundation.
1382 Bengtsson, Bertil (1982) Introduction in The Saami National Minority in Sweden, p. 143. In NJA 1981 s. 1 the case is not fully reproduced and is lacking much of the content from the two previous courts’ decisions. The twenty-nine plaintiffs were comprised of Saami villages and members of Saami villages.
1383 The Saami plaintiffs had a priority list of fourteen points comprised of right holders, also including non-parties to the present case. Their claim intended to apply in favour of Saami who were not parties to the case. The Supreme Court found that collective claims or claims by someone who is neither a party, nor a member of any Saami village not party to the case, cannot be regarded as legal entities or parties to the case. These claims were, thus, dismissed (avvisades). See NJA 1981 s. 1, at pp. 20, 167-168 & 249.
1384 By this it was meant a right that did not include a right to sell the property, but rather implied that the areas should be kept intact to serve the purposes of the Saami.
1385 NJA 1981 s. 1, at p. 166. Regarding the claim of logging rights, an alternative claim is made that concerned a right to log for household requirement only.
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As the basis for their claims, the Saami parties referred primarily to occupation and specification (occupation jämte specification), immemorial prescription (urminnes hävd) and acknowledgement by the State (erkännande av staten). The State, in turn, claimed that it was the rightful owner of the areas in question and further that no rights exist other than those stated in the present reindeer husbandry legislation. The parties brought comprehensive evidence, including statements by various experts, to shed light on the events from early times until 1886, when the first legislation came into force. The State used a large amount of material from State administration. Other kinds of material were largely absent, due to the fact that the Saami were very late to develop a written language.

Regarding the onus of proof and issues of evaluation of evidence, the Court found that a cautious evaluation of evidence was to be used due to the uncertainties of the historical events that had been investigated only to a very small extent. Moreover, because of the complexity of the parties’ claims on ownership, the burden of proof could not rest entirely on one side. This question, as is usual, was evaluated due to the strength of the evidence presented by each party. The Supreme Court found, generally, that there was no doubt that Saami lived in large parts of northern Scandinavia long before other peoples made their way here and that the expansion of these societies pushed the Saami out of the areas that they traditionally used. Gradually, the Saami became subjects under the legal system of each country.

The Supreme Court affirmed the judgement of the court of appeal, which meant that the claims by the Saami plaintiffs were not sustained (talan lämnad utan bifall). The Court concluded firstly that the disputed area was owned by the State and not by the Saami. State ownership was fundamentally based on the 1683 Decree that declared Crown ownership to all forest lands not privately owned. Consequently, the Court could not sustain the claims of the Saami as statutory tenants (åbo) or to a “permanent right of possession with full elasticity”, as these rights are closely associated with ownership.

In order to resolve the case, it was of fundamental importance first to clarify the rights that the Saami had to the disputed areas before the enactment of the first legislation on reindeer husbandry in 1886. The evidence did not support the contention that, during the period prior to the Peace of Brömsebro, the Saami had rights corresponding to taxpayers’ rights (skattebön). And after this period, no evidence supported such rights or similar rights to the disputed areas. Instead, the State’s ownership was ultimately based on the King’s forest decree of 1683 and events that followed.
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opinion by the State, in accordance with the decree, was that all forested lands, which could not be proven to be owned by another, belonged to the State. Over time, this opinion became a generally accepted legal principle. Moreover, there has not been any change in ownership in the Taxed Mountains or the extended homesteads since 1886. Thus, the claims of the Saami parties to rightful ownership could not be sustained.

Secondly, the Court held that the reindeer herding right and associated sub-rights, were exhaustively regulated in the first statute from 1886. Moreover, those rights ultimately rested on immemorial prescription (urminnes hävd). In principle, the rights have been transferred on to the present Reindeer Husbandry Act from 1971. The administrative system, in which the County Administrative Board has the authority to grant hunting and fishing rights to others, was not found to be of a discriminatory character. The Court stated that the enjoyment of the reindeer herding right was restricted to, in principle, subsistence purposes, since no other evidence of customary use of natural resources was shown. Nonetheless, the hunting and fishing rights had a commercial character. And importantly, since the rights are based on civil law, they are protected by the constitution in the same way as ownership rights are protected against compulsory disposal without compensation. The reindeer herding right may be abolished through legislation, but, as long as the rights are exercised, they cannot be taken from the rights holders, either by legislation or otherwise, without compensation in accordance with the provision in the constitution.

Consequently, this was a long and complicated case, and the judgement has been subject to more or less misleading interpretations. A few comments on principal matters of the judgement should therefore be made. By this case, the Court has accepted the idea that nomads or semi-nomads may acquire ownership through immemorial prescription, at least during the seventeenth century; regardless of the extent to which they cultivated land or settled permanently. As such, this is an important statement of principle, which might be of great significance for future cases.

The decisive factor in this case was essentially the evaluation of the legal situation during the period around 1645 when the present county of Jämtland was incorporated into Swedish territory. It was at that time that the Saami, according to

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1393 NJA 1981 s. 1, at pp. 227-230. See also pp. 197-209.  
1394 See further below in subsection 8.1.2.  
1395 NJA 1981 s. 1, at pp. 232-248. Besides the codified rights inherent in the reindeer herding right, the Court found that the Saami also might have a few other closely related rights, such as rights to gravel and hay. See further below in subsection 8.1.2.  
1396 NJA 1981 s. 1, at p. 248. In the Instrument of Government ch. 2 s. 18 there is protection for ownership against compulsory disposals without compensation. See further below in subsection 7.3.2.3.  
1398 The Taxed Mountains case concerned parts in the Jämtland, and the Court clearly delimited the statements to the specific precondition in this county, and hence left open the question of ownership of the northern parts. See NJA 1981 s. 1, at pp. 190-191 & 227. Here, the use of the land may have been more undisturbed and more intensive. Note, that there must also be some kind of organisation that could be considered as owners of the land, for instance a siida (an extended Saami family group).
the reasoning of the Court, had the chance to be considered the owners of the Taxed Mountains. The Decree of 1683 eventually caused previously unowned lands to come under State ownership. 1399 Note also that, given the claims by the Saami, the case focused on whether certain rights were in existence and not on issues of compensation for the loss of rights.

No other case has made its way to the Supreme Court on the issue of whether the Saami or the State is the rightful owner of certain areas. 1400 However, the State has long since assumed ownership of the vast mountain region and other parts of the reindeer herding area not owned privately, despite the fact that the State for the most part lacks land certificates (lagfart). On the whole, reindeer herding rights are regarded as a strong right (bruksrätt) that burdens state owned and privately owned lands 1401.

The issue of the need for a land certificate has been tried. 1402 The state-owned enterprise, Vattenfall AB, applied for a land certificate for two estates bought by the State in 1997. The Saami village (Sörkaitum) involved was provided with an opportunity to leave a submission (yttrande) on the application. The village claimed ownership rights on the estates. The Land Register Authority (inskrivningsmyndigheten) decided that the company should file a civil law suit by a certain date or its application would be regarded as invalid (förfallen). Vattenfall AB did not file a civil law suit, but did appeal, and the matter went to the Court of Appeal. The Court of Appeal stated initially that the land certificate in itself was not a strict proof of ownership, since a civil law suit may be filed even against someone who has a land certificate. The Court tried the prerequisites for a land certificate ex officio, finding that, although the Sörkaitum’s claims for ownership could not generally be left without consideration, the circumstances for these two estates were different, since the State had from the early twentieth century physically used the areas in question for water power generation and structures. Consequently, the Court remitted (återförvisade) the case to the Land Register Authority for further handling.

As evident from above, land mark cases (prejudicerande mål) regarding the nature of the Saami customary rights are, mildly speaking, scarce, especially in comparison to Canadian case law. As has occurred many times before, a number of commissions are investigating Saami issues. Nevertheless, there have recently been a few important Commission reports, which in due time may lead to changes in the valid law concerning Saami reindeer husbandry. The Commission for reindeer husbandry policy (Rennäringspolitiska kommittén) has been devoted to an overhaul of contemporary reindeer husbandry legislation1403. The Committee has suggested amendments to the legislation, for instance that two statutes should regulate reindeer herding issues, one regarding civil law matters and the other regarding business

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1400 The majority of the cases have instead concerned whether reindeer herding rights have burdened privately owned lands (winter-pasture-areas). One of them has reached to the Supreme Court, which did not grant an appeal (the so-called Härjedalen case). An appeal has been lodged to the European Court for Human Rights and Freedoms.
1401 Regarding issues of ownership and rights to natural resources, see below in section 9.1.
1402 RH 2001:56.
1403 SOU 2001:101 En ny rennäringspolitik. See also Dir. 1997:102.
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conditions. However, the foundation of the previous legislation has, in principle, been left untouched, particularly regarding customary rights and their protection. Below, I will return to some of the issues covered - and not covered – by this Commission.\textsuperscript{1404}

A recent Bill (proposition), which was presented to the Parliament in February, 2006, has also suggested an increased in Saami influence though the Saami Parliament.\textsuperscript{1405} The aim is to increase self-determination regarding issues of reindeer husbandry, including, for instance, decisions regarding village borders. Hence, the Saami Parliament will, beginning July 1, 2006, be the central authority for reindeer husbandry.\textsuperscript{1406} A number of matters (myndighetsuppgifter) will be transferred from the County Administrative Boards and the Swedish Board of Agriculture (Jordbruksverket) to the Saami Parliament. However, control over land management issues will be retained by the County Administrative Boards.\textsuperscript{1407}

As a follow up from the 1999 investigation by Sven Heurgren regarding a ratification of the ILO Convention No. 169,\textsuperscript{1408} a Commission on Reindeer Pasture Boundaries (Gränsdragningsskommisionen för renskötselområdet) was established in 2002.\textsuperscript{1409} The Commission Report was finalised in February, 2006. One of the main tasks was to analyse the outer limits of the reindeer herding area, the so-called winter-pasture-areas. Those areas are subject to most conflicts, as they commonly regard privately owned lands. In principle, the whole area of the counties of Norrbotten, Västerbotten and Jämtland is regarded as reindeer pasture area, with the exception of a few areas along the coast and the southeast of Jämtland. The northern part of the county of Dalarna is also regarded as burdened by reindeer herding rights, as are also small portions of the county of Västernorrland.\textsuperscript{1410} The Commission also suggested the establishment of a specific body devoted to investigating and mediating conflicts related to Saami land rights. I will also return to this investigation in my analysis below regarding the Commission’s understanding of immemorial prescription.\textsuperscript{1411}

In January, 2006, the Commission on Hunting and Fishing Rights (Jakt- och fiskerättsutredningen) issued its final report.\textsuperscript{1412} This Commission investigated the legal basis and the extent of hunting and fishing rights of Saami village members and suggested cooperative solutions between Saami village members and property owners, including the State. Since this thesis does not explicitly concern hunting and fishing rights, I will not comment upon this Commission further. Nonetheless, I will

\textsuperscript{1404} See further in subsections 7.3.2.2 & 9.4.3.3 and sections 8.4 & 9.6.
\textsuperscript{1405} Prop. 2005/06:86 Ett ökat samiskt inflytande. The investigations behind this are the SOU 2001:101 and SOU 2002:77 Sametingets roll i det svenska folkrätet.
\textsuperscript{1406} The Parliament decided to adopt the Bill on the 11 of Maj 2006. See also 2005/06:KU32.
\textsuperscript{1407} The Bill also includes some other amendments of minor interest. The foundation of the legislation has, however, not been changed. I will, thus, only comment on the Bill in relation to the decision on village borders. See further in subsection 7.3.2.1.
\textsuperscript{1408} SOU 1999:25 Samerna - ett ursprungsfolk i Sverige. Frågan om Sveriges anslutning till ILO:s konvention nr 169. It was suggested here that a specific commission should be established to work with the issue of the boundaries for the vast reindeer herding area.
\textsuperscript{1409} SOU 2006:14 Samernas seidavemarker. See also Dir. 2002:7 and 2004:141.
\textsuperscript{1410} See also the map accompanying the Commission report.
\textsuperscript{1411} See further in subsection 7.2.1.3.
in some instances come back to investigations made by experts retained by this Commission.1413

Moreover, legal experts in Norway, Sweden and Finland have been working on a proposal to a Nordic Saami Convention1414. Their report contains a draft for a convention comprised of fifty-one articles that builds primarily on the ILO Convention No. 169, although transformed to a Nordic context. From the preamble to the draft Convention, it is evident that, for instance, the right to self-determination has been a leading principle in the drafting process. It is also stated that the Saami must have access to land and water as they are preconditions for the Saami culture. On the whole, the Convention is well-balanced and encompasses several legally difficult questions. The draft has made particular progress regarding procedural rights, primarily consultation rights, between the State and the Saami. See further under subsection 9.6 in relation to my concluding remarks. Another suggestion in the draft is that the Convention should be applied directly as a statute, which indeed would be desirable with respect to general implementation and enforcement problems typically encountered by international treaties1415.

In sum, there is generally a shallow understanding of the nature of Saami customary rights, particularly on the part of Government authorities (statsmakterna). Sweden lacks a battery of preceding cases that could shed light on different aspects of Saami customary rights, particularly the reindeer herding right1416. Although a few recent Commissions have worked on different issues concerning Saami rights, few have been focused on the very foundation of the present legislation or the very nature of Saami customary rights. The former part of this chapter includes, thus, an analysis of the doctrine of immemorial prescription as such. It should not be understood as a complete account of the doctrine, rather as a starting point for a discussion on the establishment of Saami rights within the Swedish legal system. Nevertheless, the analysis below serves the purposes of this thesis.

7.2 The Nature of Saami Customary Rights

7.2.1 The Legal Basis of Saami Customary Rights

7.2.1.1 The Doctrine of Immemorial Prescription and its History

Very little is written explaining the basis of the doctrine of immemorial prescription or exploring its application from a legal historical perspective. Osten Undén, Gerhard Hafström and others have covered the doctrine only briefly. To analyse the interface between Saami customary rights and environmental and property law legislation, it is necessary to explore the doctrine so as to understand its historical origin, purpose and

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1413 See further in subsections 7.2.1.3, 7.2.1.4 & 7.2.2.
1415 See article 46 in the draft.
1416 See SOU 2006:14, p. 400 for a short list on cases from lower courts which are decided or are in progress (6). They all regard reindeer herding rights.
application. It is unfortunate, therefore, that there is a lack of analysis of the application of the doctrine in the nineteenth century and thereafter until the enforcement of the new Real Property Code. Accordingly, the numerous references herein to Maria Ågren’s work are explained by the scarcity of literature on the subject1417. Note also that this subsection focuses primarily on the historical prerequisites for acquiring equivalents to ownership rights to land. The difference between ownership and more limited rights seems not to have been distinct, as it is presently.

Immemorial prescription1418 (urminnes hävd) had its glory days in the agrarian society during the shift between community based law and state law.1419 It was mentioned early in some of the medieval codes (landslagarna)1420. There are reasons to believe that its incorporation was influenced by canon and continental law1421. However, the few words in the Codes that referred to immemorial prescription did not say what immemorial prescription was, or how it should be applied.

In contrast, in the seventeenth century, there was a great deal of attention on the doctrine of immemorial prescription, due to academic work, legislative preparations, and several court proceedings in which immemorial prescription was claimed and challenged.1422 During this century, immemorial prescription was seen as a necessary doctrine of great advantage in society. The “ownership” became more stable and unequivocal, and the possessors would feel more secure knowing that the chances of loosing their property were negligible. In this respect, immemorial prescription is an acquisitive prescription based upon use since immemorial times when a possessor was given means to acquire title to property.1423

It is not surprising that, when new winds brought changes in society, the attitudes against the doctrine were gradually altered. There was a move away from

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1417 Hence, this subsection draws information substantially from Maria Ågren’s excellent work *Att hävda sin rätt. Synen på jordägandet i 1600-talets Sverige, speglad i institutet urminnes hävd*. Despite its title, the work also covers some information on the first part of the eighteenth century, as well as the seventeenth century.
1418 “Urminnes hävd” is a translation from the Latin *preascriptio immemorialis*. See Hafström, Gerhard (1969) *Den svenska fastighetsrättens historia*, p. 48. It is not easy to give an exact translation of the concept. The Swedish word “hävd” covers at least five distinct features: possession (innehav, besittning), period of limitation (preskriptionstid), custom/tradition (sedvana), caring/use/labour (omvådnad/gott bruk/nedlagt arbete) and active defence of ones right (hävda sin rätt). The Latin concepts (*preascriptio immemorialis* or *possessio immemorialis*) are not fully inclusive of all of these meanings, just the possession or the period of limitation. The content will nonetheless be understandable in this section. See Ågren, Maria (1997) *Att hävda sin rätt. Synen på jordägandet i 1600-talets Sverige, speglad i institutet urminnes hävd*, p. 204 and Ågren, Maria (2001) *Asserting One’s Rights: Swedish Property Law in the Transition from Community Law to State Law* in *Law and History Review* Vol. 19 Issue 2, at http://www.historycooperative.org/journals/lhr/19.2/agren.html, at 3 (viewed at 2005-05-16). This article also provides a comprehensive extraction of Ågrens’ book referred to in this passage.
1420 In the Codes of Magnus Eriksson and Kristoffer. See ibid., p. 94.
1421 ibid., p. 94 at note 43.
1422 See generally here the work by Maria Ågren (ibid.).
the total agrarian domination toward developments of the agricultural sector with a need for investments and new settlements due to the increasing population, manufacturing developments, and growing small businesses in townships. Lawyers and representatives from the State turned the very favourable view of the doctrine to a far more hostile one. A person claiming prescription in the seventeenth century was at that time considered to be the rightful possessor, whereas the same person in the nineteenth century was instead understood as an intruder. In the preparation of new legislation in the latter half of the nineteenth century, there was strong support for excluding immemorial prescription from the Code. Some even argued that including the immemorial prescription into the Code would incite people to commit criminal acts.\

In the new Real Property Code (JB) from 1971, the legislature was careful not to include immemorial prescription as one of the means of acquiring ownership or more limited rights. By the middle of the last century, immemorial prescription was already understood as an outdated legal figure, a legal relict. Nonetheless, already existing rights originated through immemorial prescription were still valid. Surprisingly enough, this legal relict has in recent years been revived in relation to Saami rights to land and natural resources. Note that both Saami ownership as well as rights to reindeer herding, hunting and fishing can be established through immemorial prescription. However, the prerequisites for acquiring ownership or limited rights differ in some respects. See further below.

By this short consideration of the status of the doctrine, we shall return to the seventeenth century to look closer at how immemorial prescription was applied. Through the flora of court cases, it is noticeable that the majority of the cases regarded unclear and disputed boundaries between certain limited grounds within the villages, including arable and pasture lands. Very often, the disputes regarded grounds (ägor) that were abandoned during times of devastation, and it is clear that immemorial prescription was mainly a rural phenomenon.

Interestingly, both peasants and noblemen were represented at the courts and used the possibility of immemorial prescription to support their claims. In the seventeenth century, the idea that rights become established through long time use constituted a frame for the pre-proprietary thinking, but is was a flexible frame. The doctrine could be used as a means for acquiring individual property from parts of villages’ common resources, which must be regarded as quite an aggressive and individualistic approach to the doctrine, despite its old, medieval roots.

\[1426\] Nonetheless, there is one modern case which regards non-Saami fishing rights. See NJA 1984 s. 148. The Supreme Court held that a village had fishing rights in parts of a lake (Torringen) due to immemorial prescription. The lake is situated between Jämtland and Medelpad.
\[1428\] Ibid., pp. 265-266. Ågren has studied material from the Royal Court of Appeal in Stockholm (Svea Hovrätt) and local hundred courts (häradsrätter).
\[1429\] Ibid., pp. 148 & 154.
During this period, the power of local communities was significant. The courts were largely in the hands of the “local memory” (testimonies) when called upon to determine a case with claims of immemorial prescription, because documents on “proprietary” transactions were either absent or lacked clear references to boundaries. Furthermore, the onus of proof favoured the possessor, who was the person living in the local community. The time-period required for establishing a prescription was not regulated and was left dependent upon local traditions.1430

Since the legal text related to immemorial prescription in the Medieval Code left much to wish for by lawyers and judges, foreign law was applied to make the doctrine understandable and congruent. Here, the concept of possession (besittning) became essential. The idea that the possessor is the rightful holder of a number of rights is a distinctive feature in at least the real property law traditions of Western Europe, which is supported by studies of the early Roman law, as well as medieval English law. This tendency to agglomerate rights on the possessor is rather practical; it becomes easier for a judge if he can presume that the possessor is the rightful “owner”, and the claimant has to prove the opposite.1431

The prerequisites for establishing immemorial prescription are in Latin terms res habilis, possessio and tempus.1432 Regarding res habilis for immemorial prescription, the object for the prescription can only regard delimited areas, which may include the total of the real property (hela fastigheten) or from the village outlying lands (utmark). The object may also involve more limited rights than ownership1433. Possessio means that someone undisputed and unhindered has possessed a piece of land (the object). The time prerequisite is included in tempus. During the sixteenth century, there were attempts to fix a minimum time for the land use by foreign models, but this attempt failed. Tentatively, fifty years was then suggested. However, roughly two generations back, some ninety years, is regarded as a minimum time for establishing immemorial prescription through possession and use of a land 1434. See further below.

The customary law and case law related to immemorial prescription was, in large part, codified in 1734 in the Real Property Code (GJB). Built into the doctrine of immemorial prescription was an aspect of a careful and respectful use of a piece of land, which should not be lost or neglected for the benefit for future generations. There was, thus, an emphasis on the continuation of the use. To use an area only from time to time did not establish a right; the use had to be uninterrupted. To keep cattle on pasturage in the forest did not seemingly establish immemorial prescription. Forests, as such, were not used (brukad) by proper meaning, because the collection of timber was not a sufficient use upon which to base prescription.1435

If the principle of careful and respectful use was important, so was the active defence of one’s rights (aktivt klander). The only essential method for challenging immemorial prescription was through protests (klander), which raised a kind of duty

1430 Ibid., pp. 174-175, 178, 203, 105-106, 162 & 165-166.
1431 Ibid., pp. 105 & 53-54.
1433 See, for example, the Supreme Court in NJA 1941 s. 1 (fishing rights) and NJA 1942 s. 336 (hunting rights).
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to defend one’s rights (klanderplikt). To remain silent was quietly to accept the new possession and prescription (hävden). 1436 The very idea behind immemorial prescription was that, through a long possession, it should be possible to acquire rights to a certain piece of land. The underlying presumption was that someone else owns the property. It was a gradual transformation of the legal protection from the absent owner toward a present and caring possessor 1437. Thus, the investment in labour and care in the piece of land was rewarded by law.

In sum, the doctrine of immemorial prescription nurtures the idea that use of a piece of land or a resource for a long time establishes a right. In this perspective, immemorial prescription and custom have become more of less synonymous 1438. Perhaps this is the feature of the doctrine which most resembles rights established at common law. As a conclusion of her study, Ågren mentions that the “cultural understanding of prescription was also strikingly akin to that of English custom” 1439. Compare here my analysis of the Canadian law on aboriginal rights, particularly in relation to the doctrine of aboriginal rights and its modern application 1440.

Even though the status of immemorial prescription diminished over time in a legal sense, the claims on acquiring ownership or more limited rights did not come to an end. In the first half of twentieth century, there were several cases involving claims of immemorial prescription related to limited pieces of lands. Thus, in the next subsection, I will examine the provisions in the 1734 Real Property Code that are applicable to those cases, as well as to Saami customary uses.

7.2.1.2 Immemorial Prescription in the 1734 Real Property Code

In this subsection, I focus on the “normal” prerequisites for establishing rights through immemorial prescription. Below, I will apply those prerequisites on the specific circumstances connected to traditional land and natural resource uses of the Saami.

With the enactment of the new Real Property Code (JB) in 1972, the former opportunity to acquire rights through immemorial prescription was excluded. Nevertheless, rights based upon immemorial prescription up to the enactment are still acknowledged through the transitional provisions of the Code (JP). 1441 The same applies to Saami hunting and fishing rights. In the transition rules for the present Hunting Act, it is clear that the enactment of the statute does not limit hunting rights based upon immemorial prescription 1442. Similarly, fishing rights based upon

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1437 In this respect, the existence of a legal system that acknowledges prescriptions means in fact that, during the transition period, there are two owners of the object. For one, the right becomes stronger day by day, whereas the opposite applies to the other. This system could thus be categorised as a two-owner-system. See Ågren, Maria (1997) Att hävda sin rätt, p. 50.
1438 Ibid., p. 154.
1439 Ågren, Maria Asserting One’s Rights: Swedish Property Law in the Transition from Community Law to State Law at http://www.historycooperative.org/journals/lhr/19.2/agren.html, at 110. Note, however, that her study concerns mainly the seventeenth century.
1440 See subsections 6.3.1, 6.4.2 & 6.4.3.
1442 The transitional provisions refer here to the old Hunting Act. See the transition rules at 4 in the Hunting Act (1987:259). See also the former Hunting Act (1938:274), s. 8 para. 1.
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immemorial prescription are also still valid; the transitional provisions to the present Fishing Act refer to a previous statute, in which rights based upon immemorial prescription are acknowledged.\textsuperscript{1443}

The provisions regarding immemorial prescription can be found in the old Real Property Code from 1734 (GJB). Through immemorial prescription, ownership of real property and rights similar to an easement (servitut) can be established. The substantial provision reads:

It is immemorial prescription where someone has possessed, used and utilised real property or right in such long time undisputed and unhindered, that no one remembers or on good authority knows how his ancestors or acquirers came to be.\textsuperscript{1444}

Note that immemorial prescription in the old Real Property Code from 1734 was not mentioned as a source of legal acquisition (laga fång), such as inheritance, barter, purchase, gift, legacy, et cetera. However, transferring the provision on immemorial prescription to the Code was not intended to solve the issue on the very content and substance of the establishment of ownership and more limited rights based upon the doctrine. However, with the enactment of the old Real Property Code, the issue of the real character of the doctrine had long since been in doubt. During the sixteenth century, the content and substance of immemorial prescription became disputed for the first time. Two theories were debated, the legal acquisition theory (lagafångstteorin) and the presumption theory (presumptionstteorin).\textsuperscript{1445}

On the one hand, if the possessor could prove that he or his ancestors (fångesmän) possessed the object undisputed during a sufficiently long period of time, ownership of the object accrued to the possessor, even if the original acquisition was proven unlawful through documents, et cetera. On the other hand, according to the second theory, there must be a presumption that the original acquisition was lawful. So, where old documents proved that the original acquisition was lawful, the possessor lost the object (ägan). The seventeenth century was generally favourable for the legal acquisition theory, which is evident from the legislation, case law and legal expertise. In the beginning of the next century, the presumption theory, manifest in the German-Roman law, seems to have prevailed in case law and among legal scholars. The Supreme Court has in one case from 1865 adhered to the presumption theory, but the issue has not been tested in later cases.\textsuperscript{1446} In fact, the two theories are more than theories. The use of either of the two theories has essential practical implications.\textsuperscript{1447}

The main principle is that immemorial prescription cannot be claimed between villages in open forests and fields (öppen skog och mark) without man-made

\textsuperscript{1443} See the transitional provisions at 2 of the Fishing Act (1993:787), which refer to the old Fishing Act (1950:596).

\textsuperscript{1444} See old Real Property Code (GJB) ch. 15 s. 1: “Det är urminnes hävd, där man någon fast egendom eller rättighet i så lång tid okvald och obehindrad besuttit, nyttjat och brukat haver, att ingen minnes eller av sanna sago vet, huru hans förfäder, eller fångesmän först därtill komne äro”.

\textsuperscript{1445} Halström, Gerhard (1969) Den svenska fastighetsrättens historia, pp. 48-49. See also Undén, Östen (1965) Svensk sakrätt II. Fast egendom, pp. 140-141.

\textsuperscript{1446} See NJA 1923 s. 69 and NJA 1933 s. 611.

\textsuperscript{1447} Halström, Gerhard (1969) Den svenska fastighetsrättens historia, pp. 49-50. See also the discussion below in subsection 7.2.1.4.
demarcations (grounds were often used as commons). Hence, immemorial prescription does not apply in villages, on agreed partitions (skiften), or in the villages’ fields, lakes, forests, et cetera. Nonetheless, immemorial prescription may be established on grounds (ägor) outside the immediate village areas (utjord och urfjäll), as well as outside mills and its surroundings (kvarn och kvarnställe), other water plants (annat vattenverk), or islands and islets (öar och holmar). Yet, the ground to which immemorial prescription is claimed must in some manner be enclosed or have marked boundaries.

The Supreme Court has acknowledged rights to other delimited areas not explicitly mentioned in the provision, such as the right to sawmill with waters, ground between properties in a town, meadows and a regimental area. It is, moreover, important to clarify that holding a land certificate (lagfart) is not a prerequisite, which is natural, since claims normally regard a portion of a piece of real property, not the whole estate as such. The actual area of application of the doctrine concerns claims to certain ground (äga), not the whole property as such.

Additionally, the question whether immemorial prescription can be claimed against the Crown has historically been subject to different opinions. From the latter part of the seventeenth century until the 1880s, it was generally regarded that immemorial prescription was not valid against the Crown. This understanding was transformed through case law, inspired by new legislation in 1881 regarding time-restricted prescription (20-årig hävd). Additionally, the Saami claimed ownership and other rights to certain areas against the State in the Taxed Mountains case, decided by the Supreme Court in 1981.

There is yet another provision regarding immemorial prescription in the old Real Property Code. Immemorial prescription may also establish ownership or fishing rights to outlying islets, fishing-banks or fishing-grounds (utholmar, fisken eller fiskeskär). There is a rich flora on cases which regard these fishing rights, but a majority seems to regard questions referable to partitions (avvittringar), not primarily claims on immemorial prescription. Moreover, the wording seems to refer principally to situations in the archipelago and larger lakes, not explicitly fishing

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1448 See, for instance, NJA 1932 s. 144 and Undén, Östen (1965) Svensk sakrätt II. Fast egendom, pp. 141-142.
1450 Old Real Property Code (GJB) ch. 15, s. 3.
1451 Old Real Property Code (GJB) ch. 15, s. 3. Ägan bör vara “med rå och rör, eller gård och vård instängd”. Nonetheless, immemorial prescription may be acquired by reference to natural demarcations. See NJA 1932 s. 314 and Undén, Östen (1965) Svensk sakrätt II. Fast egendom, p. 143.
1452 Undén, Östen (1965) Svensk sakrätt II. Fast egendom, p. 141 with references and cases referred to under Old Property Code ch. 15 s. 4 (Sveriges rikes lag).
1453 Ibid., pp. 141-142. Nevertheless, immemorial prescription may be claimed to a whole real property.
1454 See, for instance, NJA 1885 s. 357 and 1932 s. 314. See also Hafström, Gerhard (1969) Den svenska fastighetsrättens historia, p. 51 and Undén, Östen (1965) Svensk sakrätt II. Fast egendom, pp. 141 & 143.
1455 See NJA 1981 s. 1. See further about the case above in section 7.1.
1456 See referred cases under old Real Property Code (GJB) ch. 12 s. 4 (Sveriges rikes lag).
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rights in mountain regions or forest lands. Nonetheless, fishing and hunting rights based on immemorial prescription may be established though the “normal” rules in chapter 15 of the old Code.

Altogether, it is obvious that the legislature had rather limited areas in mind in which immemorial prescription legally may be established, which is also evident from the case law of the seventeenth century. Whether the boundaries of the delimited area were man-made or consisted of natural demarcations, such as islands and forested areas, was not a large issue. Natural demarcation might even prevail over man-made demarcations (rå och rör)\textsuperscript{1457}. A closely linked question concerns who shall be regarded as subject to the right, whether the question concerns ownership or other more limited rights.

In case law from the first half of the twentieth century, both individuals and groups have been adjudged as subjects of rights, including, for instance, companies, the Crown, village communities (byamän), and parishes (socken)\textsuperscript{1458}. This must be seen in light of the statutory recognition and the case law of the seventeenth century, in which immemorial prescription was related to single property (enskild egendom). Historically, claims on immemorial prescription were often fruitful as means to challenge arguments that land still was undivided (odelad), since prescription was, and is, linked to certain limited areas. The main idea seems to have been to gain individual property out of the common grounds of the village. Consequently, at this time, individuals were common subjects of the right or rights to a certain property and gained in this manner a larger right of disposition (förfogandefrihet) over the piece of land. Claims on immemorial prescription could thus, historically, be used as a strategy to separate from the common property regime within a village or between villages.\textsuperscript{1459}

7.2.1.3 The “Normal” Prerequisites of the Doctrine and Saami Customary Use

From the above expose over the doctrine of immemorial prescription and its application, one reflection becomes rather obvious. The provisions and the legal application of immemorial prescription were founded with the agricultural society in mind. The village is a central figure in this context, as well as the idea of investments of labour. The prerequisites developed over time, chiefly by courts and legal scholars, do not correspond very well with the specific character of the Saami customary use of land and natural resources. It does not easily fit into this picture. In the Taxed Mountains case, the Supreme Court highlighted this fact that the provisions took a

\textsuperscript{1457} See NJA 1919 s. 88 & NJA 1932 s. 314 (regarded only natural demarcations). See also Ägren, Maria (1997) \textit{Att hävda sin rätt}, p. 141. Physical boundaries (rå och rör) could easily be manipulated, but demarcations in peoples’ minds could never suffer from external impairments.

\textsuperscript{1458} See, for instance, NJA 1950 s. 450, 1922 s. 185, 1941 s. 542, 1923 s. 69, 1932 s. 314 & 1932 s. 124.

\textsuperscript{1459} Ägren, Maria (1997) \textit{Att hävda sin rätt}, pp. 147-148 & 159.

\textsuperscript{1460} The recent Commission on Reindeer Pasture Boundaries (Gränsdragningskommissionen) has come to the same conclusion. The Commission found the prerequisites so disparate that one could speak of two different doctrines. See SOU 2006:14, pp. 386 & 388. See also Bengtsson, Bertil (2004) \textit{Samerätt}, pp. 82-87.
stance in the circumstances of the agricultural community (bondesamhället) and was not adapted to solve specific conflicts that could arise in uncultivated “wilds” (ödemarker)\(^{1461}\).

Hence, at least six prerequisites that are associated with the doctrine of immemorial prescription could be compared with Saami customary use, particularly the reindeer husbandry.\(^{1462}\) In such a comparison, it is observable that there are severe problems in satisfying most of those prerequisites, if not all. Those seven prerequisites are presented directly below, and the subsection ends with closing remarks. The prerequisites apply equally to claims of ownership as well as claims for limited rights based upon Saami customary use of land and/or natural resources. I will endeavour to keep prerequisites for ownership and other rights apart, since the establishment differs to certain extent. Note also that there are naturally some overlaps between the issues covered by the different prerequisites.

Below, I also take a stance in the reindeer husbandry as an important traditional Saami activity. Ever since the first legislation, the customary Saami hunting and fishing rights have been linked to reindeer husbandry and to the Saami villages (the former Lap villages). Also, in the present legislation, Saami hunting and fishing rights are subsumed under the reindeer herding right. Nevertheless, I still argue that independent Saami hunting and fishing rights may be claimed on the basis of immemorial prescription.

\(i\) The assumption of a previous owner

Inherent in the doctrine of immemorial prescription is an assumption of the existence of a previous owner.\(^{1463}\) The assumption arose out of the use of the doctrine to acquire rights to lands abandoned or otherwise deserted. The possibility of acquiring ownership or other more limited rights through immemorial prescription is based, therefore, upon the idea that the ground already has an owner. This is an important point in the context of Saami customary uses, to which I will return shortly. Hence, it was possible to take possession of someone else’s property, and, by continuous possession and use for a long time period, the rights were gradually passed over to the possessor.

In many areas of the present vast pasture area, particularly in the very north, the Saami, supported mainly by archaeological and historical research, seem to have been the very first inhabitants, living in the area long before the borders of the state were established. The Saami seem, therefore, to have occupied unowned lands, which supports another mode of acquisition of rights to \textit{terra nullius}, namely occupation

\(^{1461}\) NJA 1981 s. 1, at p. 181.
\(^{1462}\) The Commission on Reindeer Pasture Boundaries (Gränsdragningskommissionen) discussed four criteria: a long-term use, an unhindered and undisputed use, a requirement on good faith, and prescription as a solitary basis for claims. The last two criteria are derived from Norwegian law and have no clear correspondence to Swedish law on immemorial prescription. See SOU 2006:14, pp. 382-383.

\(^{1463}\) This shall be compared with the Canadian doctrine of aboriginal rights which emphasises in principle that the aboriginal peoples were the first inhabitants. In short, the basis of the aboriginal rights is thus regarded as a long customary use on a specific area. See subsections 6.4.2 & 6.4.3. Compare also the statement by the Supreme Court of Canada in the landmark case \textit{Calder}. See section 6.1 (the small text).
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with continuous customary use. I will discuss this alternative method of land acquisition in subsection 7.2.1.5. Therefore, the prerequisite of a previous owner inherent in the doctrine does not correspond to traditional Saami land uses, where they were the first settlers. These regard chiefly claims on ownership.

Nonetheless, for acquiring ownership based on immemorial prescription, there is no need to know who were the first occupants of a certain tract, only if the claimed ownership lies within the assumed period for acquiring rights through immemorial prescription (hävdetiden). As said previously, the law does explicitly state a fixed time-frame here. In legal literature two generations back, some ninety years, have been suggested. Even if old sources point in a direction, it will nevertheless be the modern times that will be of decisive importance in determining whether immemorial prescription exists in a certain area. Thus, anyone who claims rights based on immemorial prescription must nowadays be able to prove that immemorial prescription existed at the time the new Real Property Code (JB) came into force, that is, before 1972. This should mean that evidence from the latter half of the nineteenth century is of outmost importance and explains the prerequisite for a normal application of immemorial prescription.

However, the time-period for establishing immemorial prescription is normally much longer than the stipulated ninety years concerning traditional Saami land uses. The crucial issue is, then, whether the customary use has been extinguished, which is similar to the Canadian law on aboriginal rights. This is particularly important with regard to the year-round-areas for reindeer husbandry. As a result, I strongly question the relevance of the assumed ninety year time-period. One possible way to solve this dilemma is through a transfer of the evidential burden. After the Saami party has shown that it is likely that a certain customary use has established rights historically, in the case either of ownership or limited rights, based on immemorial prescription, the onus of proof is transferred to the other party. The property owner has then to prove that the right does not exist due to cessation or very long interruptions in the use.

This system of transferring the evidential burden is used in Canadian courts. Note, however, that these rights are not prescriptive in nature. The aboriginal peoples have the initial onus of proving the existence of an aboriginal right. For claims of title, they have to prove that they had ownership rights at the time of assertion of sovereignty by the British Crown. They must also show a continuity between present occupation and

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1464 Note, however, that the Supreme Court in the Taxed Mountains case analysed the ownership of the disputed areas either by the State or by the Saami. In this, they regarded the Taxed Mountains in fact as terra nullius. See NJA 1981 s. 1, at p. 227.
1465 Undén, Östen (1965) Svensk sakrätt II. Fast egendom, p. 144. Note that the origin of this assumption is unclear.
1467 This is a time-period during which conflicts with settlers and Saami seem to have been common and intense. Due to the other prerequisites for establishing immemorial prescription, evidence of an undisputed and unhindered possession will be difficult to prove as there has long since been a competition for lands, waters and natural resources. A strict use of this prerequisite should, therefore, be avoided.
1468 See the discussion of proof in SOU 2006:14, pp. 397-398, where a reference to the Norwegian Selbu case is made.
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pre-sovereignty occupation. For claims on aboriginal rights, the aboriginal group must show whether a specific custom existed at contact time with Europeans. Also here continuity between the present activity and the pre-activity must be shown. The evidential threshold is not particularly high, especially regarding claims of aboriginal rights. Generally, disruption of continuity is not seen as legally problematic, as long as the activity or the occupation is resumed. If a right has been proven, the onus of proof is transferred to the Crown or perhaps a property owner regarding whether the right has been lawfully extinguished by legislation before 1982.1469

A right may be terminated if the link with the object, the used land, has been permanently abandoned, an example of which would occur if reindeer husbandry were no longer carried out on the lands. Very long interruptions in the use should also cause this link between the object and the subject, the right holder, to be broken. This feature lies within the nature of the doctrine, where possession and prescription (hävd) are essential.1470 See further below.

Nevertheless, the stipulated ninety years might be relevant as a time-frame for establishing rights corresponding to certain winter-pasture areas owned privately, where one may assume that the land use is of a more recent date. The above sketched model of transfers of the onus of proof may also be used here. If the Saami party proved that it is likely that reindeer husbandry has been carried out for long on the disputed areas, the property owner may then be called to prove either that there have been very long disruptions or that the ninety years for establishment have not yet passed. If the property owner fails, the real property is burdened with reindeer herding rights.

Regardless of the relevance of the assumed ninety years for establishment of ownership vis-à-vis traditional Saami land uses, the assumption of a previous owner is still problematic. However, despite issues of ownership, hunting or fishing rights may, for instance, be acquired through prescription. This also concerns the reindeer herding right. Limited rights may be acquired through immemorial prescription. Here, the issue of who owns a piece of land is not as relevant. It is also important to clarify here that, when a Saami party fails to prove ownership, they may still have limited rights to the area, such as reindeer herding rights1471. This is a shared feature with the Canadian jurisprudence on aboriginal title and aboriginal rights1472.

The case NJA 1984 s. 148 has some interest here. As explained earlier it concerned claimed fishing rights (non-Saami) in parts of a lake. Note, however, that this case regards a very limited area, in contrast to the usually large reindeer pasture areas. A case from 1501 was the oldest record of the village’s fishing right based on immemorial prescription. Several disputes, also in courts, were evident from time to

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1469 For a summary, see subsection 6.4.7, otherwise I refer to the relevant subsections.
1470 Compare, however, the specific statement made by Barbro Julstad, Kjell-Åke Modeér and Kjell Westling. They mean that an established right (reindeer herding right) may not be broken through passiveness in the use, only through the establishment of a new right based on immemorial prescription. See SOU 2006:14, p. 525 footnote 1. See also p. 524, where they question the accuracy of parts of the conclusions made in the report on whether reindeer herding rights burdens the estates (the category 2).
1471 Compare with the Taxed Mountains case, NJA 1981 s. 1.
1472 See in subsection 6.4.6.4.
time after that. The Supreme Court found that the evidence from the village during the
more modern time (after partition (avvittring)) was scarce. Nonetheless, the Court held
that, in the examination whether the fishing right still existed, regard was taken to the
fact that the fishing right was strong historically, particularly with support of the 1501
case and its subsequent authority. If this case is transferred to the issue of Saami
customary rights, historical cases or reports may support the evidence in claims on
limited rights.

In sum, due to the fact that a previous owner is assumed, a more limited time-span for
acquiring rights under the doctrine may be assumed. For the most part the stipulated
ninety-year rule is irrelevant as a time-frame for prescription (hävdetid) concerning
traditional Saami uses. The time-frame is essential. Depending on what time-span one
has in mind, the criteria that the use of the ground (ägan) shall be undisputed and
unhindered will most probably have a different outcome. Additionally, in time, the
Crown/State interests and regulation of the northernmost areas increased, leading to
various decisions and legislation that affected all inhabitants or certain groups,
depending upon the issue at stake. The rights of the Crown and its ambitions are
intermingled with the authority (befogenheter) left to the local populations. The
fact that the Saami are an indigenous people and long since in a minority position,
makes the issue of assumed State ownership and authority over the lands all the more
complex.

ii) Possession and continuous use

Another fundamental prerequisite for immemorial prescription is possession. In fact,
ownership based on immemorial prescription is established entirely through a long-
term possession of an area, not through other legal facts. A continuity of
possession or customary activities, if limited rights are concerned, is also a crucial
prerequisite. The link between the object and the subject must be upheld, even if
interruptions are acceptable without loosing the established right. See above.

However, the concept of possession (besittning) is difficult and unclear in Swedish
law. Regarding unsettled areas, where reindeer husbandry mainly is carried out, an
efficient control is more or less impossible. Regarding possession in relation to
immemorial prescription, only a part of an estate is normally subject to possession due
to the prerequisite of limited areas. Instead of efficient control, the degree of the use of
the area should be more relevant. Reasonably, the disputed piece of land shall be used
more intensively by the possessor than by the other party. This regards ownership.

1473 NJA 1984 s. 148, at p. 171.
1474 The rights of the Crown as sovereign (kronans regalrätt) are not straightforward in Sweden
compared to many other countries. In different situations, the Crown has historically claimed rights to
the wilds (obygderna) in the northernmost parts of Sweden. It very doubtful, however, whether the
Crown is regarded as having actual ownership (rights of the Crown as sovereign) or merely the
Crowns’ right of authority (kronans höghetsrätt) to these areas. It seems that the first Royal Decrees
(kungliga påbud) regarded only a Royal right of disposition of the lands for the purpose of
colonisation. See generally and regarding the 1683 Royal Decree on Forests in Hafström, Gerhard
reasons in the Taxed Mountains case NJA 1981 s. 1, at pp. 50-57 & 227-229.
1475 Undén, Östen (1965) Svensk sakrätt II. Fast egendom, p. 140.
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Concerning limited rights as hunting and fishing, it is hardly possible to speak of possession. Nonetheless, possession regarding the reindeer herding right, which is a specific right to real property (särskild rätt till fastighet), should more or less be determined in similarity with ownership, since such possession has similarities with the of possession required for ownership. This implies that the possession should require that the pasture area be used rather intensively in order to be “possessed”. Nevertheless, by outer circumstances, it is difficult to know whether a certain person possesses an area.1476

Apparently, there is a large difference in the modes of land acquisitions between present and early legal societies. In a society where rights to use land can be acquired through active possession and defence and where rights become extinct if not possessed and used, the rights have a close relationship to what people have actually done continuously. To investigate claims on rights in relation to a piece of land therefore, has involved investigating possession; how the ground has been laboured and during what period of time1477. Thus, the people’s memories of the past have been essential. In older times, confirmation of possession and use came mainly through witnesses.1478 Today, written evidence seems far more important than oral in matters of immemorial prescription, not the least because the memory has been lost1479. However, the point here is rather that confirmation of possession and use can never be made beforehand for immemorial prescription1480.

In modern society, in contrast, rights to land can only be established through explicit transactions. The use of a piece of land is not determinative in any way. Now, written documents play an essential role in disputes over rights, which documents can be created at the time of the transaction with an aim to being used in the future.1481 The contrast is complete in that active possession, use and defence cannot be affirmed or certified beforehand. The continuation of Saami customary activities is, therefore, crucial for establishing rights. This is equivalent with the (uncodified) customary rights of the indigenous peoples of Canada and New Zealand.

For safeguarding rights based upon immemorial prescription, the continuance of the possession and use of the lands and natural resources is essential. This is particularly true for limited, rights such as independent Saami fishing and hunting

1477 See here also NJA 1911 s. 257. This case regarded fishing rights of salmon in a river. The nature of the possession (besittningsförhållandet) gives in general a complete understanding (ledning) for determination of the extent of the immemorial prescription (see Sjögren).
1479 Ownership and other rights based on immemorial prescription are proven (styrt) through witness testimony and by old letters and other documents (laggilda brev och skrifter). See old Property Code ch. 15 s. 4. However, this provision concerning different modes of evidence lacks relevance today due to the incorporation of the principle of free assessment of evidence (fri bevisprövning) in the General Court Procedure Code (1942:740) ch. 35 s. 1, which now includes free use of sources for evidence. Nonetheless, the issue of relevant evidence is still troublesome for the Saami.
1481 Ibid. As said previously, since the Saami customary rights (particularly the reindeer herding right) is not established thorough agreement (avtal) – along with the fact that the rights cannot be transferred – written documents are of less importance.
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The normal circumstances for interruptions in the reindeer husbandry due to pasture conditions are not evident here. The link between the land area used or person/persons using it must be maintained (the link between the object and subject)\(^{1483}\).

In conclusion, generally the prerequisite of possession and continuous use of an area is difficult to sustain for traditional Saami land and natural resources use. It is also difficult to know who shall be regarded as the possessor, and, for limited rights, it is difficult even to refer to the concept. Nonetheless, with respect to the large pasture areas for reindeer husbandry and the fact that the reindeer is a half domesticated animal, the continuity of the possession and use concerning the pasturage, along with other elements in the reindeer herding right, becomes naturally weaker. The reindeer, as well as their herders, favour areas with good pasture. For various reasons, certain parts of the pasture areas may not be used as pasturage for several years. Local climate, weather conditions, forestry, presence of predators, over-grazing, and so on explain why certain areas are left for years, sometimes decades. This explains also why reindeer husbandry is in need of large areas.

\(\text{iii) Smaller and delimited areas}\)

In order to acquire immemorial prescription through the “normal” mode of acquisition, the object (the land area) must be delimited, both with respect to size and borders. The object must constitute a smaller ground (äga), usually not the whole of an estate (fastighet), and the borders should be well defined through man-made marks or visual natural demarcations. Reindeer husbandry is carried out on vast areas. To sustain reindeer, large pasture areas are required, and the borders are in many cases vague or in dispute, which is particularly true for winter-pasture-areas.

As a result, with respect to the features and size of the pasture areas, these requirements are impossible to maintain, at least with respect to reindeer husbandry. Fishing rights, for instance, in certain lakes or on river-banks, seem easier to establish due to the requirement of delimited areas (avgränsade områden). Note, however, that, although the Supreme Court in the Taxed Mountains case implied that larger areas could also be subject to immemorial prescription in relation to ownership, as a diversion from normal proprietary provisions, the borders still need to be well defined\(^{1484}\).

\(\text{iv) The intensity of the use and invested labour}\)

The main rule for acquiring ownership has doubtless been use through cultivation (uppodling).\(^{1485}\) Cultivation and permanent settlement were seen as the obvious proofs that labour had been invested in the land and, thus, worthy of legal protection for the possessor. This was regarded as an intense use of estates. Moreover, this form

\(^{1482}\) See NJA 1911 s. 257 and the statement by Sjögren. It is difficult to establish exclusive hunting and fishing rights where the use is not rather intense and continuing in character.

\(^{1483}\) Note, however, that uses by other Saami should be possible to claim as a basis for establishing the rights of a Saami village. This was upheld in the so-called Härjedal case. See further in Bengtsson, Bertil (2004) Samerätt, p. 83.

\(^{1484}\) NJA 1981 s. 1, at p. 190.

\(^{1485}\) See also NJA 1981 s. 1, at pp. 185 &190.
of stationary land use is more visible to the eye, with arable fields and pasture lands, as well as hay-making fields and mires (slåtterängar, slåttermyrar). Hence, with respect to traditional Saami land uses, a direct comparison with agricultural communities is obviously not possible. No improvement of the ground is evident with respect to the reindeer husbandry, hunting, or fishing. Since the reindeer husbandry is carried out in large areas, the intensity of the use of these areas becomes naturally weaker.

Moreover, the Saami have been few in number in comparison with the size of the used area, which means that, compared to cultivation and farming, the intensity of the possession and use is also in this respect weaker. Saami customary uses of the lands nonetheless leave many remains that are hardly visible to the amateur. For example, in the Sarek National Park on an area not larger than 100 square km (en kvadratmil) some 1500 cultural remains have been found. This was regarded as one of the richest areas with respect to cultural remains in Sweden! Still, the “normal” prerequisites for immemorial prescription are invested labour in the form of ploughing the ground and similar visible land uses.

Hence, the prerequisite of an intense possession or land use is difficult to sustain. Neither the traditional Saami land nor natural resource use corresponds to an improvement of the land through investment of labour. When the reindeer are not on pasturage in specific areas, the use is hardly visible apart mainly from scattered buildings and structures necessary for business. The same should apply even more with regard to Saami hunting and fishing. Those rights may be intensively used, but without leaving traces. Here is another link to the problematic concept of possession inherent in the doctrine, at least for claims of ownership or reindeer herding rights; the possession and use may be difficult to recognise.

v) Undisputed and unhindered possession and use

Yet another important prerequisite for establishing immemorial prescription is undisputed and unhindered possession and use of an area. This criterion is in fact stated in the provision. See above under subsection 7.2.1.2 for the legal text. What the words “undisputed and unhindered” (okvald och ohindrad) mean in a given situation is unclear. Nonetheless, a prescriptive use (hävden) of an area may be “broken” through the actions of others, such as a property owner or others that use the area, since the use is not regarded as based upon custom. It should, nevertheless, imply a need for more substantial objections against the possession and use than a few complaints. Law suits are clearly within that frame.

As with the other prerequisites, there are difficulties in establishing an undisputed and unhindered possession and use for the Saami. Because of the colonisation of the northern tracts of the country, although generally at a slow pace, it is difficult to prove that the possession and use was undisputed and unhindered up to the present day. There are early historical records of disputes between Saami and new

1486 The Canadian law on aboriginal title encompass as one criteria the size of the indigenous group using the area. The criteria is related to the concept possession. See subsection 6.4.6.4.
1488 See also the discussion in SOU 2006:14, pp. 394-395.
settlers. The State decisions on the Lapland border and the cultivation boundary are directly a consequence of competing land and natural resource uses.

Another concept is also of importance here, the concept of exclusivity. The possession and use must have been exclusive, that is carried out to the exclusion of others. It may also be seen as the capacity to retain exclusive control. This is the “normal” prerequisite. However, due to the vast area used and the fact that reindeer husbandry does not hinder other land uses, the concept of exclusivity hardly may apply in relation to reindeer husbandry. The business is also carried out under a monopoly, which means that there is no competition with others regarding access to reindeer pasture. The concept of exclusivity is particularly crucial for establishing ownership through immemorial prescription\(^{1489}\). The concept of exclusivity may paradoxically in fact be easier to sustain for limited rights, such as fishing rights in particular lakes.

Thus, it is generally difficult to prove an essentially exclusive possession and use due to Saami customary land uses. Although the possession and use were exclusive in the early days in certain areas, it is hardly the situation in more modern times. The so-called parallel-theory set in motion the notion that areas used for husbandry and agricultural activities co-existed for a long time side by side with clashes in interests as a result. Consequently, due to the competition for land and natural resources, the possession and customary use by the Saami cannot, for the most part, up to the present day be regarded as undisputed or unhindered, let alone exclusive. Regarding Saami hunting and fishing activities, only in remote areas largely absent from early colonisation might it be possible to claim exclusive rights, as hunting and fishing also were used for subsistence by settlers.

\(\text{vi) Evidence and onus of proof}\)

I have already touched upon issues of evidence and burden of proof when discussing the other prerequisites. The general problem with written sources has been briefly highlighted. The evidential situation (bevisläget) is complex and difficult, not the least since much of the historical and legal historical circumstances have not been investigated vis-à-vis the specific Saami situation. With lost memories and a scarcity of written documents, especially those not referable to Crown/State decisions and documentations, submission of evidence must be considered weak. This is a problem, notably since the Saami culture initially did not include a written language. I have also emphasised the present need to prove exclusive possession and use in order to acquire ownership.

Thus, I find it important to stress the fact that, in an historical context, the evidence needed to prove immemorial prescription has varied.\(^{1490}\) Today, it is not inessential whether full evidence is needed in order to establish immemorial prescription. As an historical contrast, the seventeenth century was generally favourable for the possessor, but, when land acquisitions with written documentation became more extensively used, immemorial prescription appeared to be increasingly

\(^{1489}\) This is also the case for aboriginal title under the Canadian jurisprudence. See further in subsection 6.4.6.4.

\(^{1490}\) For instance, it seems as if the cases from the early eighteenth century have not required full evidence (full bevisning) for establishing immemorial prescription.
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legally uncertain. With the presumption theory (presumptionsteorin), the possession could be broken through evidence of an initially unlawful acquisition. See further below, in the next subsection 7.2.1.4.

Issues on evidence lead us also into the question of the onus of proof, which is also a crucial matter in cases involving immemorial prescription. In the preparatory work to the present Reindeer Herding Act, there is a statement, which refers to the preparatory works of the 1928 Act, that acknowledges the assumption that the extent of the Saami customary rights shall be tried in courts on the basis of such evidence needed according to normal law (allmän lag) for evidence of immemorial prescription. According to the provision on evidence in the old Property Code, the onus of proof rests on the one claiming immemorial prescription. In the Taxed Mountains case, the burden of proof was shared, not placed exclusively upon either of the parties, whereas in the so-called Härjedalen, case the burden was laid on the Saami.

Bengtsson asserts that it is clear that the onus of proof lies on the Saami party, both with respect to proof of prescription (hävd) and whether the prescription is immemorial. Nonetheless, I have argued above under (i) on the presumption of a previous owner, for a system of transferring the evidential burden, similar to the Canadian law on aboriginal rights. This suggestion does not move the initial onus of proof ascribed to the Saami party.

As to limited rights, Saami hunting and fishing rights are an element in the reindeer herding right and are accordingly based on immemorial prescription. Two members of an expert sub-commission (Bengtsson and Bäärnhielm) recently analysed Saami rights to hunt and fish in the Lap areas (lappmarkerna) and reindeer pasture mountains (renbestesfjällen) and discussed issues of onus of proof. Bengtsson means that the Saami have the onus of proof concerning the question of whether the Saami have an exclusive right to hunt and fish. According to the statutes on hunting

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1491 As an historic contrast to our times, to bring testimony in the seventeenth century the procedural rules were in favour of the possessor, meaning that the burden of proof rested on the one challenging the possessors’ rights. During the end of this century, there were, however, some discussions on the onus of proof being unfavourable to the possessors, but regarded more complicated situations. Where old documents with evidence against the rights of the possessor were brought forward, the possessor should reasonably then have had to prove his rights. See Ågren, Maria (1997) *Att hävda sin rätt*, pp. 83 & 223-225.


1493 Ch. 15 s. 4.

1494 See the Supreme Court in NJA 1981 s. 1, at p. 182 and Court of Appeal for Lower Norrland in case T 58/96, decided at 2002-02-15, at pp. 18-19.


1496 And similar to the Norwegian Selbu case. This case is regarded as a land mark case. See the Supreme Court case No. 4B/2001, 365/1999 decided on the 21 of June in 2001. The case regarded reindeer herding rights on winter-pasture-areas on privately owned lands. The Supreme Court placed the onus of proof on the property owners, after finding that it was likely that reindeer husbandry had been carried out on the disputed areas. The Saami rights were upheld.

1497 See SOU 2005:17 *Vem får jaga och fiska? Rätt till jakt och fiske i lappmarkerna och på renbestesfjällen*. Note that the directives only included an analysis of the rights for Saami village members (compared to the equivalent rights of the property owners). See p. 7.
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and fishing, the right belongs to the property owner. Bäärnhielm, on the other hand, argues that it is more natural that the State on Crown land above the cultivation boundary and on the reindeer pasture mountains, has the onus of proof to produce evidence that the Saami lack an exclusive right to hunt and fish. Consequently, this normal law of evidence and onus of proof referred to above seems not so uncomplicated.

To end this analysis and discussion of the “normal” prerequisites for establishing immemorial prescription and the uniqueness of Saami customary possession and use, some concluding remarks shall be made. My ambition here has not been – and cannot be - to solve these complicated issues, merely to elevate them. Thus, as with particularly Canadian experiences, there is in a Swedish legal context a considerable problem in trying easily to incorporate Saami customary rights and claims of immemorial prescription into normal proprietary terms. For that reason, it is not surprising that there are problems with the legal understanding of Saami rights, including their relation to the rest of the legal system.

Immemorial prescription seems, nevertheless, to be a suitable doctrine for founding Saami customary rights, if adapted to the specific features of traditional Saami land uses. I will return to this shortly. Its medieval roots where possession is central, as well as the possibility to acquire both ownership and more limited rights, must be regarded as the strong point of the doctrine. Furthermore, no registration of land certificate (lagfart) is required. However, one issue must be noted when dealing with old doctrines. Ownership and other rights were not understood in the same manner as we do presently. Ownership to land in the modern meaning is essentially a product of the nineteenth century, particularly true in the northernmost and rural areas of Sweden. The right to ownership, as we understand it with a conglomerate of rights, was created through statutory activities during the years between 1789 and 1810.

All in all, the distinct characteristics of the Saami customary land use above discussed indicate the necessity to treat claims on customary rights differently. In essence, we have problems with the presumption of a previous owner, the possession and continuous use, the size and delimitation of areas, the intensity of the use and invested labour, the possession and use as undisputed and unhindered, and finally, evidence and onus of proof. My concern is that, with a “normal” application of the prerequisites, it may prove to be impossible to establish any rights based upon immemorial prescription due to reindeer husbandry, as well as hunting and fishing, including rights above the cultivation boundary. Indeed it has already proven to be difficult to assert reindeer herding rights on winter-pasture-areas. In fact, I use this analysis as the main explanation of why reindeer herding rights have not generally been acknowledged.

Even if some scholars, such as Bengtsson and Bäärnhielm, acknowledge the fact that the Saami rights differ from any other proprietary rights, my argument goes

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1499 Bäärnhielm in SOU 2005:17, p. 98.
1500 Another possibility would be occupation with continuous customary use. See further under next subsection 7.2.1.5.
beyond that. The rights must be characterised as *sui generis*, because of which there must be a *legal* recognition of the fact that they are *sui generis*. Again, taking Canadian law on aboriginal rights as a good example, the *sui generis* nature of the aboriginal rights has reinforced the adaptation of the law vis-à-vis the unique circumstances pertaining to aboriginal rights claims. Above all, the Supreme Court of Canada has created a set of specific tests to apply with respect to aboriginal rights claims, acknowledging the specific position of the aboriginal peoples as original inhabitants. An acknowledgment of the *sui generis* nature of Saami customary rights should also be supported by the fact that these rights belong to our indigenous people. In other words, the law should acknowledge the differences and treat the rights as such, for instance, with development of certain guiding principles in the legal application and clear diversion from “normal” prerequisites connected to the doctrine of immemorial prescription. However, the two legal systems differ here. The common manner to impose important amendments to Swedish law is instead brought about through the legislature. There is, nonetheless, a concern here if the legislature fails to impose adequate amendments.

There have so far been very few cases regarding claims of reindeer herding rights in the Swedish courts. Development of certain guiding principles with that background will, thus, take a very long time, perhaps too long. To be blunt, the core of the Saami culture might at the time of reaching enough clarity be extinct or on the ruin. The Swedish courts’ role to develop guiding principles should also be seen in contrast to Canadian legal experiences. The Supreme Court of Canada, which in comparison has a huge number of cases regarding aboriginal rights (approximately some 80 cases between 1985 and 2003), developed the doctrine of aboriginal rights slowly on a case-to-case basis. The Canadian courts also refer to and draw conclusions from scholarly works regarding the nature and extent of these rights. Accordingly, whereas the Swedish courts should liberate from the normal principles on immemorial prescription and apply other more suitable principles, there is also a need for more research on the nature of the Saami rights and the Saami law in general. That task lies clearly outside the purpose of this thesis. It is an open field for anyone with sufficient interest and time.

### 7.2.1.4 The Two Theories Pertaining to Immemorial Prescription

For a full understanding of the doctrine of immemorial prescription, it is necessary to address the two theories connected to the doctrine, which have given rise to two different understandings of the doctrine. The two theories, the legal acquisition theory

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1502 See also Bengtsson, Bertil (2004) *Samerätt*, p. 87. Bengtsson argues here that the courts should in certain respects make deviations from the general principles of immemorial prescription and apply common principles (grundsatser) more suitable in relation to the reindeer husbandry.

1503 See subsection 6.4.7.

1504 The problem with the rights to winter-pasture-areas is serious. Several private property owners have disputed the existence of reindeer herding rights on their property, and, so far, they have won all of the cases. Many cases have been initiated, and others are on-going.

1505 For instance, the contract law principle on doubt (oklarhetsregeln). See Bäärnhielm in SOU 2005:17, pp. 97-98. I also mean that it should be able to apply to legislation, at least in relation to Saami issues.
(lagafångstteorin) and the presumption theory (presumptionsteorin), have briefly been explained above in subsection 7.2.1.2. The theories are evoked with a dispute of a certain possession or use. See the figure below. For the legal acquisition theory, it is irrelevant what form the original possession took or whether it was unlawful. The burden of proof is open here, whether it is placed on the possessor or the person disputing the immemorial prescription.

**The legal acquisition theory:**

 Possession  
  
  | transfer/establishment of rights | Dispute of immemorial prescription |
  
  (time)  

**The presumption theory:**

 Possession  
  
  | transfer/establishment of rights | Dispute of immemorial prescription |
  
  (time)  

 Unlawful acquisition?

The presumption theory accepts unlawful original acquisitions, which means that the immemorial prescription is broken. If the one who disputed that immemorial prescription was established failed to prove a deficiency in the acquisition (to prove that someone else has owned the land was not enough here), the possessor defended his prescription (hävd) after having proven immemorial prescription.1506 Undén reasoned, similarly, that already the possession meant that the other party in the dispute primarily must prove a deficiency in the acquisition or show that a deficiency was likely (göra sannolikt). Thereafter the defendant must demonstrate the claim on immemorial prescription.1507

However, with respect to the specific circumstances related to Saami customary rights claims, I find it doubtful that the theories are applicable. It is also questionable whether it would be desirable to apply the theories. I have in the previous subsection argued that the sui generis nature of Saami customary rights must be adapted to the specific preconditions and circumstances connected to traditional Saami land and natural resource uses. In fact, when analysing the relevance of the two theories, I have not developed a clear mind of the legal consequences of the application of either of the two theories, or, as I noted, whether it is desirable and useful. In any case, the application of the theories must be carefully analysed in relation to the uniqueness of Saami rights claims. This lies outside the purpose of the

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1506 See Hafström, Gerhard (1969) *Den svenska fastighetsrättens historia*, p. 50 who refers to Nehrman on his comment on the application of the 1734 Code (lagkomentar till 1734 års JB).
1507 Undén, Östen (1965) *Svensk sakrätt II. Fast egendom*, pp. 143-144.
thesis. Therefore, the aim of this subsection is rather to elevate the issue, since it has hardly been discussed in relation to claims on Saami customary rights.  

For the “normal” application of immemorial prescription, the two theories are not merely theories, as evident from the description above. They have legal implications on evidence and on the burden of proof for the “normal” application of immemorial prescription. It is noteworthy that the discussion on the character of the doctrine of immemorial prescription has been vital up until the twentieth century. However, the presumption theory was endorsed in the Commission report on the new Real Property Code (JB). This statement must be seen as the latest public declaration in favour of either of the two theories. Hence, if either of the two theories will apply in relation to Saami rights claims, the presumption theory is likely to prevail.

As indicated previously, it is doubtful whether the two theories have relevance for proving Saami customary rights. First of all, the rationale for not applying the two theories is the fact that there is an underlying assumption of a previous owner within the doctrine. As argued above, this prerequisite does not correspond to traditional Saami land uses, since the Saami in most areas, particularly in the mountain regions, seem to have been the very first inhabitants. Thus, their possession is original. There are no previous owners. The next rationale for not applying the theories corresponds with the first. Given the long time period of Saami possession and use of the areas, it will be difficult to prove unlawful acquisition as the presumption theory suggests. Nevertheless, if one disregards the prerequisite of a previous owner, the legal acquisition theory might be applied in relation to claims of Saami ownership. The issue of unlawful acquisition is not relevant here, given the original Saami possession. Moreover, the two theories seem easier to apply in relation to claims of ownership than claims of more limited rights. For instance, with claims of reindeer herding rights, it is more difficult to discern what an unlawful acquisition means. In unsettled, remote areas, the concept of possession is more complex. See subsection 7.2.1.3 under ii). The property owner cannot have the same degree of efficient control as he or she does in areas adjacent to an area inhabited or otherwise commonly used by the owner. Those problems should be relevant even to a larger extent if the area is used seasonally for hunting and fishing. Here, the property owner might not even be aware of the uses.

Despite those problems with the concept of possession, the presumption theory may have relevance to areas where the Saami assumably were not the original inhabitants and in areas where the husbandry started more recently. This should

1508 Bengtsson has touched upon the issue. He seems to contend that, since Saami rights are original, at least in the mountain regions, the original Saami possession must then mean that the two theories do not apply. See Bengtsson, Bertil (2004) Samerätts, p. 82. The Commission on Reindeer Pasture Boundaries (Gränsdragningsskommisionen) has referred to the two theories in a paragraph, but has not discussed their relevance in Saami right’s claims. The Commission concludes only that the case law from the twentieth century on “normal” immemorial prescription is not clear with respect to the application of the theories. See SOU 2006:14, p. 381.


1510 Due to international and State actions historically, some Saami groups seem to have compensated their land loss by starting to use “new” areas. See Bäärnhielm, Mauritz (2004) Samerna som utrikespolitikens schackbőnder in SvJT No. 8, pp.736-738.
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cconcern some parts of the winter-pasture-areas and primarily claims of limited rights, chiefly reindeer herding rights. What does it mean for the onus of proof in Saami rights cases where the presumption theory is applied? It must mean that the property owner must prove a deficiency in the possession. This may, however, be difficult or even impossible due to the unclear nature of the concept of possession, especially in relation to limited rights. To prove a deficiency should be easier for claims of ownership rights, especially where the land use includes permanent settlement. This is not the case with regard to the use of lands and resources for reindeer husbandry. Again, the specific features of the Saami customary land uses become evident, as those features obviously are difficult to fit easily into the prerequisites developed in relation to the doctrine of immemorial prescription.

Ultimately, if a deficiency has not been proven, the Saami have the burden to establish immemorial prescription. They have to show that reindeer herding has previously or historically been carried out on the estates in dispute. Here, the ninety year time period for establishing rights under the doctrine (hävdetiden) may be relevant. Nonetheless, a shorter period might very well apply to accommodate the fact that, in certain areas, reindeer herders have compensated land losses due to various circumstances by using other areas suitable for reindeer pasture. The relevant time period for establishing prescriptive rights (hävdetiden) is open in this sense.

To conclude, I find it doubtful that the legal acquisition theory and the presumption theory should be applied in Saami claims on rights based upon customary land and natural resource uses. However, it needs to be further analysed. In fact, a detachment from the two theories may better facilitate an adaptation of the doctrine of immemorial prescription to the specific features and circumstances affixed to the traditional Saami land uses.

7.2.1.5 Other Modes of Acquisition and Divided Ownership

As seen above, the doctrine of immemorial prescription presents several dilemmas when its “normal” prerequisites are applied to Saami customary uses. This suggests that it is necessary to adopt a cautious and sensible application of the existing prerequisites, for instance regarding the intensity of the use. These dilemmas in the legal application related to Saami customary uses might also call for a re-examination and rethinking of the legal concepts and doctrines that may possibly provide a legal explanation of Saami proprietary and usufruct rights. Apart from immemorial prescription, there might be other ways of describing the legal connection of traditional Saami land and natural resource uses.

Therefore, below I briefly present two arguments in this direction. The first constitutes another ground for acquisition of territorial rights (occupation). The second is directed towards the modern concept of ownership (divided ownership). It

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1511 Claims of ownership would primarily be on the year-round-areas, as the reindeer herding right is strongest there and exclusivity is most applicable.

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should be noted that prior occupation is the legal basis in Canadian law for both aboriginal title and the limited aboriginal rights, which are chiefly fishing and hunting rights. However, the analytical scheme and details for acquiring either title or limited rights differs. The common law foundation of the aboriginal rights, including title, is evident.1513

First, I should mention that the law related to occupation is undeveloped, because it has simply not been used for centuries. Nonetheless, occupation of lands terra nullius must be seen as the very first method of acquiring rights to specific pieces of land. In fact, it is understood as an independent source of legal acquisition (laga fång). Normally, this was done through cultivation, as happened in Sweden.1514 While the Saami were the very first inhabitants in many parts of the vast present reindeer herding area, their possession and use of lands and natural resources must, subsequently, be understood as a peaceful occupation. The possibility of acquiring limited rights through prior occupancy and continuous use of an area is, however, unclear. To my knowledge, it has not been discussed in Swedish literature. Nevertheless, it should be possible.1515

In contrast to the southern parts of Sweden1516 during the medieval times, the northern part of the country (in Norrland), the common lands (allmänningarna), were res nullius and could therefore still be subject to occupation along with invested labour of the land (ockupation och specifikation), primarily through cultivation. It was, thus, possible to acquire “ownership”.1517

For acquiring “ownership”1518 or limited rights associated with certain territories, the possession and use must reasonable, in similarity with the doctrine of immemorial prescription, and be of some intensity and of continuance to more modern times. It is here important to relate to the Taxed Mountains case and the reasoning of the Supreme Court1519. The Court said that Saami customary rights could, in principle, be established through occupation or immemorial prescription. Nevertheless, the prerequisites for establishing rights through either occupation or immemorial prescription were seen as reciprocal.1520 Note that this was in contrast to previous

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1513 See further in subsections 6.3.1, 6.4.3.1 & 6.4.6.3. Compare also the comments on prescriptive rights evident in the Calder case in section 6.1 (small text).
1514 The colonisation of the North was made through free right of occupation. See for instance Hafström, Gerhard (1969) Den svenska fastighetsrättens historia, pp. 216-217.
1515 This seems to be possible in the Norwegian law. See, for instance, Falkanger, Thor (2000) Tingsrett, pp. 59-60.
1516 Settlers and peasants on common lands in the county of Västergötland were the first who could not acquire ownership, merely possession with rights of inheritance (ärftlig besittningsrätt). This was due to a prohibition first included into the Västgöta Code II, a clear influence of canon law and the doctrine of emphyteusis. See ibid., p. 62.
1517 Ibid., p. 62. See also at p. 123.
1518 In these remote times, it is not suitable to label the rights as ownership with a modern understanding of the concept.
1519 For a brief summary of the case, see above in section 7.1.
1520 NJA 1981 s. 1, at pp. 185 & 190. However, altogether it seems as if the Court in its reasoning means that, given the moderate use of the areas with respect to reindeer husbandry (compared to cultivation), occupation of terra nullius is needed as a basis for establishing ownership. With such an understanding, it was possible to establish only limited Saami rights without prior occupancy.
understandings, which meant that a nomadic livelihood could not found ownership rights. On the whole, I find the reasoning somewhat blurred with respect to the two modes of acquisition, which can partly be explained by the claims in the case.

To clarify, the Saami parties based their claims primarily on occupation, invested labour (specifikation) and immemorial prescription. The court concluded first that invested labour (specifikation) could not be used together with occupation as the basis upon which to establish Saami rights, since the value of the area had not substantially been increased by the Saami customary use. Then the Court discussed briefly occupation as a mode of acquisition. For occupation, the main rule was undoubtedly that cultivation of land was required for an acquisition of ownership to the territory. However, the Court reasoned that it must historically have been possible to acquire ownership rights through Saami customary use (reindeer herding, hunting and fishing) without cultivation, which was supported by two cases from the twentieth century.

The Court observed that the prerequisites for establishing Saami rights according to occupation were in doubt, especially since it was here a question of exception from general real property law principles. In similarity with immemorial prescription, the rules were designed to correspond to the agrarian society. Thus, guidance should be sought from the prerequisites of the doctrine of immemorial prescription, since they were more developed. Consequently, the Supreme Court argued here that, in order for the reindeer herding Saami to acquire ownership, occupation and immemorial prescription were to be used in combination, since the Saami uses were not so intensive and were carried out on vast areas.

In my view, the use of the double modes of acquisition might be unfavourable and legally dubious. Occupation and immemorial prescription can each alone establish ownership and limited rights at least in relation to immemorial prescription. An application of the doctrine of immemorial prescription does not involve the question of “who was first” to a tract. So, it all “boils down” to the question of how Saami rights should be understood, rationalised and established in the normal real property law system and in the main stream of Swedish law as such.

My argumentation points toward a necessity to create specific principles applicable to the unique situation of Saami customary possession and use corresponding to either the doctrine of immemorial prescription or occupation with a continuous customary use. Needless to say, such approach must be carefully evaluated in the Saami law context before any application is made, not the least because occupation has long since become even more of a relic than the doctrine of immemorial prescription. Since the Saami were the first inhabitants to many areas comprising the vast reindeer pasture area and still use many of their traditional

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1521 NJA 1981 s. 1, at pp. 168 & 185.
1522 NJA 1981 s. 1, at pp. 185 &190. The cases mentioned were NJA 1932 s. 314 & NJA 1952 s. 199. Both cases regarded immemorial prescription. The former case concerned claims of ownership to a meadow within a Crown owned park (kronopark), and the latter involved claims of ownership to an inlet due to pasturage.
1523 It was not in doubt that the reindeer pasture mountains were terra nullius when the Saami first started to use the area. See NJA 1981, p. 185.
1524 NJA 1981 s. 1, at pp. 190-191 & 185.
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grounds, it would be interesting to follow a legal development in this direction. So, Saami territorial rights might be equally possible to legally rationalise through occupation as through immemorial prescription. Nonetheless, the way paved by the Supreme Court in the Taxed Mountains case might be more secure and reliable. Still, the specific prerequisites for immemorial prescription should be re-evaluated, as argued above.

The second other possible way to describe the link between the law and Saami customary use is not alone a mode of acquisition, but rather a possible explanation of a how to legally describe the relationship to territory, namely the old notion of divided ownership to land (den delade äganderätten). Undén articulated that it is an open question whether the notion of authority/rights between different owners, legally expressed in the divided land ownership, might again be appropriate and shepherd a revival of the old construction. Could the relationship between Saami and the State or private property owners holding a land certificate (lagfart) better be explained and applied through the notion of divided ownership? It is an intriguing question.

The notion of divided ownership cannot be understood as logically more objectionable than joint ownership (samäganderätt). Nehman, an old “proclaimer” for the theory of divided ownership, argued with good reason that the legal construction of two or more owners was in reality was different aspects of the same common ownership (gemensam äganderätt). The authorities or rights inherent in the concept of ownership might be concentrated in one owner’s hand or divided among several owners. The authorities might, thus, be of different origin (dominium). The divided land ownership, with roots in the medieval Italy that evolved in German legal writing, is described as one owner having dominium directum and the other having dominium utile. The latter owner enjoys the benefits and profits for himself and his ancestors, while the former owner receives some acknowledgement and a fee. Nehman gave as an example the relationship between the rights of the taxed peasants (skattebondsens) rights and the rights of the Crown to taxed land (skattejord).

This is not an unimportant example, since legal historians often draw parallels between the legal situation for taxed peasants with the so-called taxed Saami (skatteappar) and their taxed lands (lappskatteland). In the modern understanding, the rights of the taxed peasant lead eventually to ownership of his taxed land. The situation was different for the taxed Saami and their taxed land.

In relation to a Canadian case, R. v. Marshall; R. v. Bernard—the minority judgement raised interestingly the question of divided ownership. Aboriginal title is

1526 It might be possible for the Supreme Court to develop the prerequisites that should apply for Saami rights claims. The prerequisites for establishing rights due to immemorial prescription are already developed, and, as shown above, most of them are difficult to reconcile with traditional Saami land uses.


1528 For a fuller explanation on divided ownership, see ibid., pp. 43-46 & Hafström, Gerhard (1969) Den svenska fastighetsrättens historia, p. 8.


1530 This consequence of the law is currently under academic analysis (legal history).

1531 2005 SCC 43 (CanLII).
understood as a burden on the Crown’s underlying title. In this, one might understand the right of property to be divided between an owner and a usufructuary. If this concept were adopted, dominium directum would be in the Crown, whereas dominium utile would be recognised as belonging to aboriginal peoples. In this case, the judges used the concept of divided ownership for arguing that the test of proof for aboriginal title cannot simply reflect common law concepts of property (primarily proof of physical occupation). Instead, the aboriginal perspectives on occupation of lands would be an important criterion. In this, the group’s relationship with the land would be paramount. Thus, the fact that the group was nomadic, travelled within its territory, and did not cultivate land should not take away the possibility of establishing title to the lands.1532

Hence, the complex relationship between the State and the Saami might logically be described as a divided ownership primarily for areas within the year-round-areas where the rights are strongest. However, this bold redirection of the modern, undividable concept of ownership (odelbara äganderätten)1533 as presented here might well prove not to solve underlying issues and, furthermore, not to be accepted by the concerned parties.

The Saami customary hunting and fishing rights and the assumed corresponding rights for the State as an owner (dubbla jakträtten) might additionally be explained along this manner. The present State administration of grants of the Saami hunting and fishing rights might also be surveyed through the eyes of shared ownership, perhaps leading to a double administration of grants, one directed by the Saami and the other by the State.

7.2.2 Saami Customary Rights as Historic and Cultural Rights

Hereunder, I will summarise my comprehension of the nature of the Saami customary rights. Generally, I have proposed an understanding of the Saami customary rights as rights based on historic facts and events, as well as cultural traditions. Thus, history is important, and Saami cultural activities are equally important. The significance of the historic perspective is vital for establishing customary rights. The doctrine of immemorial prescription demands a look into the rear-view mirror; the possession and use must have been “immemorial” to qualify, and, for most areas there is a prior occupancy by the Saami. Continuous possession and use legitimise establishment of rights to a territory. There are also historical decisions that influence the legal strength of the rights, primarily the establishment of two boundaries in northern Sweden, the Lapland border and the cultivation boundary1534.

Customs are also essential while they are determinative for the content and character of the rights. Traditional activities still in use determine how a territory has been used over time and give content to the right. Customary use of a territory could,

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1532 Marshall; Bernard, supra, at paras. 135-136. See further above in subsection 6.4.6.4.
1533 Bergström refers to the principle of the unity of ownership (principen om äganderätten enhet), that there is only one ownership of each piece of land. However, this principle is not universal, either in time or space. See Bergström, Svante Om begreppet äganderätt i fastighetsrätten in SvJT 1956, pp. 147-148 & 152. Moreover, the divided ownership demands another legal technique and amendments of the legislation. See ibid. p. 162.
1534 See further in subsection 8.1.4.
for instance, concern fishing, hunting, trapping and reindeer husbandry. The use of a lake, for example, could have been exclusive or shared with others. The yield of the use could, furthermore, have been solely for household consumption or the surplus might have been traded.

A conclusion to draw here is that the Saami customary rights and ownership exist within the legal system, since a link still exists between long time possession and use of a territory. Consequently, existing rights established trough immemorial prescription are still recognised by Swedish law. This present understanding of the Saami customary rights coincides well with the foundation of the corresponding indigenous customary rights in Canada and New Zealand. The understanding of the nature of the rights is, furthermore, consistent with the categorisation of rights presented in relation to the analysis of Canadian law: the notion between specific and generic rights. In this context, the referred site-specific and floating rights are of particular interest. See further under Part III in section 10.3 regarding the overall comparison and analysis of the customary rights.

The notion of the Saami customary rights as historic and cultural rights also means that the customary rights have some distinctive features. A comprehensive understanding of the nature of the customary rights is of vital importance for legal codification and application. Four key features will be presented directly below.

i) The collective feature

Saami customary use cannot, particularly in a historical perspective, be viewed as an individual activity. Thus, customary rights cannot, in principle, be individual rights. In fact, Saami ancestry reassures a continuity of the possession and customary use of the land and natural resources related to a specific area. Even if, for instance, a right to fish in a particular lake or river is carried out individually, the prerequisite of the right rests in the fact that the individual Saami belongs to a specific community, the Saami village or a specific family group. Hence, the roots of Saami ancestry are always present. Therefore, it is the group that must be understood as the subject of customary rights (group right), not necessarily the whole of the Saami population. In correspondence with the doctrine of immemorial prescription, the size of the group must reasonably depend both upon which customary activity and which area are in question.

An essential question is, hence, who shall be regarded as the holder of a right. By the case law, from the beginning of the twentieth century regarding immemorial

1535 See further in subsection 4.3.2.
1536 See, also, on the specific features of the reindeer herding right in Bengtsson, Bertil (2002) Renskötselrätten i rättssystemet i Rettsteori og rettsliv - Festskrift til Carsten Smith, pp. 64-70.
1537 This regards both the reindeer herding right subject to the Reindeer Husbandry Act and potential customary rights outside of legislation. Perhaps individual Saami rights may be established through immemorial prescription, such as hunting or taking handicraft material. Then, however, the normal prerequisites to establishing rights should apply, such as everyone else claiming rights due to immemorial prescription. What I try to bring forward here is the very notion of the collective feature of the Saami customary rights. Those rights have been established in very specific circumstances, in which the ancestral roots are a key aspect. This corresponds also very well with the notion of custom. The custom becomes so much stronger when integral to the cultural life of a people. Moreover, there is a difference in the establishment of a Saami customary right and the enjoyment of it.
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prescription, it is clear that individuals, as well as smaller groups, are acknowledged as subjects (holders of the rights). The groups were parishes (socknar) and village communities (byamän). The group that holds the right is the one that has in principle a direct connection to the activity and the piece of land in question. Therefore, concerning the reindeer herding right, the Saami village would be the Saami group that most logically would be the holder of the customary right. Reindeer husbandry is carried out through the village and has a strong connection to a specific land, the pasture areas of the village.

Saami ancestry is also important due to another circumstance. Reindeer husbandry is statutorily reserved for the Saami as a kind of business monopoly. The reindeer herding right is, as previously explained, established through immemorial prescription, but can be carried out only within the Saami village and its members. This leaves a majority of the Saami without any statutorily recognised customary rights, having primarily hunting and fishing rights. As a result, the statement in the present Reindeer Herding Act that the reindeer herding right belongs to all Saami must be taken lightly in this respect. See further below in section 7.3.

ii) The customary law feature

The Supreme Court emphasised in the Taxed Mountains case that, because the reindeer herding right is established through immemorial prescription as a civil law right, the right is independent of statutory recognitions. In this sense, the Saami customary rights exist parallel with the written law. And like the public access to land (allemansrätten), it is a customary law right (sedvanerätt), which means a right to use lands without the prior consent of the landowners. However, other relevant similarities between the two types of rights hardly exist. The right to public access is a much weaker right. This feature also supports the notion that there still might exist Saami customary rights that are not codified in legislation. This concerns both other elements within the reindeer herding right or customary rights where the right-holder might not be members of a Saami village, which is presently a precondition for the possibility to exercise the reindeer herding right.

iii) The elastic feature

Despite the fact that the Saami customary rights are established outside the written law, it may still be subject to regulation. In fact, most rights, whether recognised by

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1538 For a reference to cases see in subsection 7.2.1.2.
1540 See Instrument of Government Act, ch. 2 s. 20 & the Reindeer Husbandry Act, s 1.
1541 NJA 1981 s.1.
1542 On public access to land see in sections 9.1 & 9.5.
1543 In the Taxed Mountains case, the Supreme Court acknowledged some other sub-rights to the reindeer herding right, such as the right to gravel for household uses. See further below in subsection 8.1.3. Note that there is also a suggestion by the Commission for Reindeer Husbandry Policy (Rennäringspolitiska kommittén) to open up the Saami villages. All Saami may then apply to belong to the Saami village most closely connected with their ancestry. See SOU 2001:101, chapter 5.5.
statute or not, may be subject to restrictions. However, as a general rule, if a restriction of any Saami customary right was lifted, the right re-assume its original form. The right has an elastic feature. The elasticity is not only distinctive for ownership, but pertains to other more limited rights (begränsade rättigheter). The difference with regard to ownership is that the elasticity of limited Saami customary rights, such as the reindeer herding right, naturally has a certain limit or border, which is determined by the content of the right.

To give an example, if Saami hunting, based on the reindeer herding right, is restricted in a national park for protection of the game, the hunting right reverts when the restrictions are lifted, or if the legal protection of the area as a national park is revoked. As another example, if the annual quota and fixed hunting period for moose were removed, the Saami could continue to hunt moose, but without limitation. Thus, the content of the reindeer herding right and the border of the elasticity interact.

To be blunt, a lifted restriction does not allow a Saami to begin mining in the area or to start commercial logging activities. The reindeer herding right as a limited right has a certain content that confines the actual right to use land and natural resources. Hence, the content is determined by the customary use as such and positively by legislation.

If the elastic feature of the Saami customary rights is clear, so is not the time-frame for the elasticity. The State has a right to regulate the reindeer herding right and other customary rights, and even to extinguish the rights through legislation, although not without compensation. There is a grey-zone in which exists doubt as to whether a right is temporarily limited or permanently extinguished. This is especially evident in natural conservation issues, for instance regarding limitations of certain activities in national parks or nature reserves. The question in such cases is how much time may pass between the restrictions of the customary right before the right is lost. There must reasonably be an upper limit. Here, it should be of relevance whether, for instance, the reindeer herding right is totally prohibited in a particular area or whether the regulation allows some rights to be exercised, such as hunting and fishing. This will be a matter for the courts to decide, if the issue ever is litigated.

iv) The legal differentiation feature

The strength and content of customary rights differ. Hence, there is a differentiation among Saami customary uses. For instance, the reindeer herding right is not the same over the whole reindeer pasture area. This is partly explained by the characteristics of customary rights as being founded on immemorial prescription, basically long-term customary uses. An exclusive possession and use means a

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1544 The right to ownership is not explicitly codified in any statute, but it is still subject to many restrictions, not the least of which is in relation to the environmental law provisions.


1546 Bergström, Svante Om begreppet äganderätt i fastighetsrätten in SvJT 1956, pp. 148-150.

1547 Ibid.

1548 On the provisions here, see further below in subsection 9.3.2. See also Torp, Eivind (2005) Rennäringens rättigheter i nationalparker och naturreservat in FT No. 2 2005 pp. 155-192.

1549 Compare also with the categorisation of different aboriginal rights examined above in subsection 6.3.2. See also my final analysis and discussion of this categorisation related to Saami rights under Part III in section 10.3.
stronger right. It is also partly explained by historical State decisions, notably the decisions on the Lapland border (lappmarksgränsen) and the cultivation boundary (odlingsgränsen).\footnote{On the boundaries, see below in subsection 8.1.4.}

One fundamental distinction must, however, be made between customary uses that have established ownership\footnote{I assume here that there are still opportunities to prove ownership to certain traditional Saami areas, even if not yet tried by the Supreme Court after the Taxed Mountains case.} on the one hand and limited rights on the other. As long as no ownership has been acknowledged or limited rights clarified or rejected, one must assume that at least the reindeer herding right exists on the majority of the reindeer pasture area\footnote{This is an implication of the Taxed Mountains case. See NJA 1981 s. 1. Compare also the work done by the Commission on Reindeer Pasture Boundaries (Gränsdragningskommissionen) in SOU 2006:14.}. As indicated before, there are reasons to assume that other limited rights which are connected more or less to the husbandry still exist outside of written law, such as hunting, trapping, fishing rights and/or rights to acquire handicraft material or medicine. Such rights must, however, be legally acknowledged in the general courts if disputed.

The legal strength of the reindeer herding right can be grouped, according to the provisions in the present Reindeer Husbandry Act, into six different zones depending upon the content of the right.\footnote{See below in subsection 8.1.4.} In zone 1, the content of the reindeer herding right is the most complete, and the rights here have the strongest legal protection vis-à-vis other land uses. This zone comprises the year-round-areas situated between the Norwegian border and the cultivation boundary, including also year-around areas in the reindeer pasture mountains. The zones, including winter-pasture-areas and the concession pasture area in the Kalix and Torneå river valleys, do not enjoy the same legal protection. Consequently, the reindeer herding right is, in principle, strongest in the north-west of Sweden, while the strength declines in closer proximity to the coastal region.

All in all, the establishment of these zones has been shaped by Crown decisions on geographical demarcations as a response to conflicts between settlers and reindeer herding Saami and, additionally, though later legislative actions. In general, those decisions should, to some extent, be rooted in or adapted to local custom. Hence, historical decisions on demarcations have subsequently been codified into the legislation, giving the right diverse content and protection. The establishment of the Lapland border and the cultivation boundary are, thus, legally important for the reindeer herding right and possibly for acknowledging other limited rights. Saami customary use and historical decisions are now inevitably intermingled.

### 7.2.3 Regulation and Extinguishment of Saami Customary Rights

First of all, it is important to remember that no right connected to real estates is absolute. Rights may be limited through regulation, as long as there is no restriction
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thereof in the constitutional provisions. Also, the right to ownership is subject to many restrictions, not the least of which may be found in environmental protection legislation. There is additionally a special characteristic of the Saami customary rights: if a certain custom is permanently abandoned, the rights are lost. This is why possession and continuance of the use related to a specific area is so vital for sustaining the rights attached to that land.

Since it is natural with interruptions in the reindeer herding in certain areas, questions arise as to how long a period may pass between occasions when an area has been used. The reasons for not using a pasture area for several years may vary, but a common reason is related to modern forestry, where it may take several years before the area is suitable for reindeer herding again. It is legally unclear as to the time period allowed (tillåten avbrottstid) when such long pauses occur. There are no Supreme Court cases to give substantial guidance in this matter. However, a duration of thirty years has been suggested for the pasture right to be ceded, which is about a third of the assumed time of ninety years for establishing immemorial prescription. The Commission on Reindeer Pasture Boundaries (Gränsdragnings-kommissionen) used thirty years as a main rule and ninety years as an upper limit for the reindeer herding right to be regarded as lost.

The time period allowed for interruptions is a difficult question and can hardly be given a general remedy. The hunting and fishing rights included in the reindeer herding right must reasonably be treated differently than the pasture right. The same hindrances for a continuous use do not exist. Nonetheless, it is clear that hunting and fishing activities might decline or detain as a result where areas are not used for reindeer husbandry. Other Saami customary rights, such as hunting, trapping or fishing rights, established through immemorial use must also be considered separately. Thus, this question must be analysed as one of the issues related to Saami customary use and the application of the prerequisites of immemorial prescription. As argued above, the need for treating these rights in an unconventional manner due to the unique character of Saami use is pressing. It might also be proven necessary to solve the issues on the time period allowed for detains, as well as other related issues, on a case-to-case basis.

Even if customary rights are not codified in statutes with assumed existence of other Saami customary rights, they may still be restricted through other legislation, foremost by environmental law provisions. There has recently been a highly interesting case in the Court of Appeal that concerned the relationship between environmental law requirements and the exercise of the reindeer herding right.
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A Saami, a member in a Saami village, was charged for taking lichen (vitlav) within the pasture area of the village without a permit. The area where the lichen was gathered was a nature reserve to which some specific restrictions applied, including a restriction that the gathering of lichen (mossplockning) was not allowed without a permit from the County Administrative Board. The lichen was to be used to feed the reindeer in the gathering and to sort out reindeer (renskiljningen) when the reindeer enclosed did not have any food. As a defence, the Saami claimed that he was exercising a right inherent in the reindeer herding right and, therefore, did not need a permit. In a short opinion, the Court acknowledged the customary right to gather lichen to the extent exercised as a part of the reindeer herding right. The Court held that the decision by the County Administrative Board to impose permit requirements for the gathering of lichen did not constitute a limitation of the reindeer herding right.

I find the decision rather surprising, since this permit requirement would apply also to a property owner. Perhaps the Court meant that, as there had been no compensation, since the right is constitutionally protected by chapter 2 section 18 in the Instrument of Government, the reindeer herding right was unaffected. There is a reference to the constitutional provision. Nonetheless, the Saami still have the opportunity to gather lichen after obtaining a permit. The real problem, as I understand it, is rather that administrative decisions and legislation fail to acknowledge elements in the reindeer herding right or other probable customary rights. This could be solved through a short statement in a decision or piece of legislation stating that a certain customary right is unaffected by all or particular legal requirements or perhaps is only allowed for subsistence. The decision has not been appealed.

There is another case concerning gathering of lichen decided by the Supreme Court. In this case, also a criminal law case (brottsmål), two persons were charged for gathering lichen in a large quantity, causing the top soil to be uncovered. The lichen was to be sold and the profit was regarded as considerable. The persons had no permission from the property owner and gathering to this extent was not regarded as part of the public access to land (allemansrätten). They were charged with stealing (stöld). There is, however, a substantial difference between these two cases. First, the persons charged did not gather the lichen subject to a strong customary right. Secondly, the amount and the manner by which the lichen was gathered differed. In the former case, the lichen was picked here and there, so that the damage would be minimised and would enhance the regrowth. Thirdly, the direct commercial interest in the latter case was lacking in the former.

Accordingly, the State may regulate the reindeer herding right and other customary rights. Among the provisions in the Reindeer Herding Act are several rules

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1563 Some 820 kg lichen was gathered.
1564 It was a former nature protection area (naturvårdsområde), which with the Environmental Code was transferred to a nature reserve.
1565 The County Administrative Board had not, in relation to their decision of designation of the nature reserve, approached the issue of limitations of the reindeer herding right. Hence, the court seems to have argued that the decision cannot have meant a limitation of the right and, thus, that it is not subject to the permit requirement.
1566 NJA 1986 s. 637.
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authorising the County Administrative Board to limit or otherwise regulate the reindeer herding right. This is normal. Nonetheless, there should be a balance between the legal protection of the reindeer herding right and the opportunity afforded the authorities to regulate the business. Presently, the authority given to the County Administrative Board to regulate how businesses are carried out is unique compared to other businesses in Sweden. Through some of its decisions, the County Administrative Board can presently interfere with the civil rights of the Saami in a manner hardly possible for other industries. This will be further analysed and exemplified below.

Other examples of authority given in the Reindeer Herding Act can be exemplified. The County Administrative Board may decide on the highest number of reindeer allowed and on limitations of the rights to pasture. Furthermore, the Board decides on the granting of hunting and fishing rights and other limited rights above the cultivation boundary. The Government may prohibit felling of growing pine, spruce and birch for a certain period of time. There are additional provisions in other legislation, chiefly in the environmental legislation, that limit the exercise of the reindeer herding right. The Environmental Code includes many restrictions and requirements for land and natural resource uses. Of particular interest here are the wide-ranging provisions in chapter 2, entitled the general rules of consideration, which state legal requirements to be met in principle as soon as an activity or measure has negative impacts on the protection of the environment.

Furthermore, the Government has authority to, on certain areas, extinguish or limit the reindeer herding right, similar to expropriation. Such rare decisions are possible only for the same reasons as expropriation in general. Among such reasons are public use and need of communications, infrastructure, electric power generation, sewage system and treatments plants, military defence, recreational purposes, national parks and nature reserves. A limitation of the use in a specific area may concern a certain time period or certain elements in the Reindeer Herding Act, such as limited rights to take timber or extinguished fishing rights. However, in its decision, the Government may assert measures for diminishing damages and detriments for the reindeer husbandry.

Furthermore, damages and detriments to the husbandry or hunting and fishing rights give a right to compensation. The reindeer herding right, like ownership, is

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1567 Compare with the Canadian law regarding the restraint upon public authority that the constitutional provision in section s. 35 has meant. See above in subsection 6.4.2 (last paragraph).
1568 See further below in subsection 7.3.2.1.
1569 See further below in subsection 8.3.3. See also Torp, Eivind (2005) Högsta tillåtna renantal – Ekologiska och rättsliga aspekter på renskötsel in FT No. 3 2005, pp. 341-364.
1570 See further below in section 8.2.
1571 See further below in subsection 8.3.3. See also Prop. 1992/93: 32, pp. 94-96.
1572 See further below in section 8.2.
1573 See further below in subsection 8.3.3. See also Prop. 1992/93: 32, pp. 94-96.
1574 See further below in subsection 8.3.3. See also Prop. 1992/93: 32, pp. 94-96.
1575 See further below in subsection 8.3.3. See also Prop. 1992/93: 32, pp. 94-96.
1576 The Act has its own expropriation rules, which have been argued are more beneficial to the Saami. See Prop. 1992/93, p. 96.
1577 See further below in section 8.2.
1578 If monetary compensation is awarded, s. 28 provides that half of such an award is accrued to the concerned Saami village and the other half to the Saami Fund. This compensation is more generous than in the Expropriation Act, which compensates for damages only, but the compensation right is of a unique collective nature compared to other groups. It is very rare that
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also constitutionally protected against expropriation and other coercive measures without compensation\textsuperscript{1576}. The Taxed Mountains case held that the reindeer herding right enjoys the same protection\textsuperscript{1577}. As a result, the reindeer herding right may be extinguished though legislation, but not without compensation\textsuperscript{1578}.

7.3 Dilemmas and Problems in the Contemporary Codification and Legal Application

7.3.1 The 1993 Amendment

The very first section of the Reindeer Herding Act, which was enacted in 1993, states that the reindeer herding right is held by the Saami people and is founded on immemorial prescription\textsuperscript{1579}. The next paragraph of the same provision states that the right may be exercised by members in the Saami village, which leaves a majority of the Saami without any codified customary rights. I will now look closer at the statement referring to the Saami people as holders of the right. It raises a number of problems.

The statutory recognition of the reindeer herding right as based on immemorial prescription might be understood merely as a right to engage in the industry (näringsrätt), not as a substantive right. Bengtsson argues that such an understanding would diminish the problem\textsuperscript{1580}. Such an interpretation would mean that the Saami, as a collective, have a monopoly\textsuperscript{1581} to engage in reindeer husbandry, although the membership criteria remains with regard to carrying out husbandry. The 1993 amendment is nevertheless a diversion from normal real estate law principles and, in my view, very questionable. Immemorial prescription, \textit{per se}, establishes civil, substantial rights, and the paragraph must be understood in that context.

Firstly, it will be difficult, if not impossible, legally to prove Saami customary use in relation to immemorial prescription for the whole of the Saami population in Sweden.\textsuperscript{1582} None of the general criteria for subject or object can be met. The Saami individual Saami village members are compensated. For references to cases, see Bengtsson, Bertil (2004) \textit{Samerätt}, p. 58. For a discussion on difficulties and methods to determine the amount of compensation, see Prop. 1971:51, p. 169.

\textsuperscript{1576} Instrument of Government, ch. 2 s. 18.
\textsuperscript{1577} See the Taxed Mountains case in NJA 1981 s. 1, at p. 248.
\textsuperscript{1579} The amendment is based on SOU 1989:41 and Prop. 1992/93:32. See also below in next subsection 7.3.2.1.
\textsuperscript{1580} See Bengtsson, Bertil (2002) \textit{Om kollektiv renskötselrätt i 21 uppsatser}, p. 279. Bengtsson is generally critical to the 1993 amendment; \textit{ibid.} pp. 280-283.
\textsuperscript{1581} This is also evident from the Instrument of Government, ch. 2 s. 20.
\textsuperscript{1582} Note that this is not to say that possession and use by other Saami cannot be used to support claims. In order to prove customary rights, the claimants may support their claim by using evidence that other Saami possessed and used the disputed area historically. (Det är alltså möjligt att åberopa andra samers hävd).
ancestry must include reindeer herding forefathers, and the customary use must be of a continuous character. However, it is not difficult to assume that customary hunting and fishing activities have been carried out generally. However, since the pasture right seems to be the main element of the reindeer herding right, reindeer husbandry must be understood as the primary customary activity to establish the reindeer herding right as such. With regard to the requirements for establishing “normal” immemorial prescription, the area used must be well defined and limited. Usually it comprises only a part of a real estate, and, in this case, the object is the entire reindeer pasture area, which obviously is immense, comprising some forty percent of the Swedish territory.

Consequently, since far from all Saami families have been engaged in reindeer husbandry or have maintained the tradition if they at one time were reindeer herders, the whole of the population cannot be holders of the right. Furthermore, there must be a strong link between the subject and the object, between the holder of the right and the area being used. Since the first legislation in 1886, reindeer husbandry has been carried out within the boundaries of the Saami villages, the former Lap villages, and on customarily used areas (sedvanemarker) closer to the coastal region. Before that, the *siida* seems to have been the common unit for Saami customary use and associated to certain areas.

Secondly, the reindeer herding right includes a bundle of different rights, each of which is more or less connected to the reindeer husbandry. Each and all sub rights cannot belong to all Saami. Although Saami customary use has been and continues to be carried out in close relation and connection to nature, the land and natural resources use has historically and locally varied. It is, thus, reasonable to assume that activities, such as hunting and fishing, felling of timber (skogsfång), gravel extraction, and assimilation of handicraft material and medicinal plants, have been common throughout the reindeer herding area. Such Saami customary uses might have established isolated customary rights through immemorial prescription. Also, here the link between subject and object must be strong and rather well defined. Nonetheless, all of these activities are not necessarily exclusive Saami customary activities, and they do not need to be for establishing rights based upon immemorial prescription. Generally, hunting and fishing must have been a common source of subsistence for a majority of the people historically.

Thirdly, if the bundle of rights included in the reindeer herding right is accepted fully, one should directly consider the legal strength of the customary right: the more rights in the hands of a subject, the more alike ownership. This feature has also been acknowledged by the Supreme Court in the Taxed Mountains case. The reindeer herding right enjoys the same constitutional protection against cessation and

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1583 Generally, in the meaning of an extended family group whose customarily used area, for such purposes as hunting and fishing, seems to have been more or less fixed in relation to other groups.


1585 The main issue will be to prove a continuance of a specific activity related to certain lakes, hunting grounds, forests, etc. Saami ancestry and continuous possession should be given more weight in such legal matters.
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limitations as ownership. Another possibility would be to separate hunting and fishing rights from the reindeer herding right. Nonetheless, the reindeer herding right with its bundle of rights has historically been the legal solution in Sweden. So, it can be accepted to conglomerate these rights for those Saami involved in reindeer husbandry, since all sub-rights have a natural relationship with the husbandry and the way of life. However, it should generally not mean that these rights are the only Saami customary activities protected by the law.

This leads us to the last remark, summarising the previous. I have argued here and above for a diversification of Saami customary rights, in contrast to what currently are the case. The delineation of subject and object must be clearer in correlation to immemorial prescription. As seen above, to find a link between all Saami and the total of the reindeer herding area, as found in the current statutory recognition, is not legally possible. Altogether, a lesson to draw is that declared substantial rights should not be taken lightly, especially not in legislative work.

The legislature of 1993 did not analyse the authenticity or potential legal consequences of the amendment with reference to the Saami population as holder of the reindeer herding right. The same could be said about the legislature in 1971 in relation to the present Act, in which the collective features of the reindeer herding right was not analysed. The Commission for Reindeer Husbandry Policy (Rennäringspolitiska kommittén), devoted to overhaul the contemporary reindeer husbandry legislation, did not reflect on the issue either. In its proposal, the Act on Reindeer Herding Right, the reference to immemorial prescription is exactly the same as the 1993 amendment without any assessments of the validity and legal consequences thereof.

7.3.2 Legal Application of the Customary Rights

7.3.2.1 The Example of Divisions of Village Areas

An example of statutory regulation and application which, in my view, is particularly illustrative regards the division of Saami villages. Here, the clashes of different legal sources stand out. Note that the matter is also discussed below in section 8.4.

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1586 NJA 1981 s. 1, at p. 248.
1587 This would make a clearer distinction between different site-specific rights. See the discussion under Part III in section 10.3.
1588 The Taxed Mountains case acknowledges some rights included in the reindeer herding right which is not legally codified. See below in subsection 8.1.3. Note that there also might still be uncodified Saami customary rights apart from the reindeer herding right.
1589 See SOU 2001:101, pp. 71 & 161. In its delimitation of the work, the Commission mentioned as one of the most important tasks were to clarify the meaning and regulations of the reindeer herding right, the civil right. See ibid, p. 102. Note, however, that the Saami commonly seem to favour the reference that the right belongs to the whole of the Saami people. See Prop. 1992/93: 32, p. 89. This should of course be considered. Nonetheless, without a closer analysis of what the statement means, it is difficult for Saami and others to understand the legal consequences of such a statement.
1590 Bengtsson has also acknowledged the problem, but covers it only briefly. The diversion from general real property law principles in the legal application in these matters can be understood as a discriminative feature in the legislation. See Bengtsson, Beritil (2002) Om kollektiv renskötselrätt in 21 uppsatser, p. 282.
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concerning public regulation and control of the reindeer husbandry. These two subsections should therefore be read together. Below, I especially criticise one of the cases (the Sörkaitum case) due to the legal interpretation of the relevant provision in relation to environmental protection matters.

In the Reindeer Herding Act, presently the County Administrative Board has the authority to decide on the borders of Saami villages and their pasture areas. However, beginning on July 1, 2006, this authority was transferred to the Saami Parliament. Nevertheless, I refer below to the County Administrative Board, since the cases regard decisions taken by the Boards. In any case, the division shall be done in a manner so that each area becomes suitable for its purpose.

The division shall be done so that each area becomes suitable for its purpose with regard to pasture availability and other circumstances.

The Board’s decision on a changed division has been tried in a few cases: three cases from the Supreme Administrative Court concerning judicial review (rättsprövning) from 1999, 2000 and 2001, and four cases from the Administrative Court of Appeal from 2001 (see references below). Of importance is that, in a couple of cases, the matter of village borders was initiated by the Saami village, which declared problems or merely articulated a wish to create better working conditions (arbetsro) for the husbandry.

In general, the cases are of rather complex nature. There were many important legal issues emphasised and the open-ended text of the provision in section 7 leaves much room for discretion. Unfortunately though, the cases have not led to clarity. Furthermore, very few issues were seriously analysed and discussed. Only certain relevant themes will be discussed hereunder, which have a close connection to the nature of the Saami customary rights. I will concentrate on two problems:

i. The nature of the reindeer herding right and the codification of the right in the Reindeer Herding Act, section 1.

ii. The administrative borders and potential problems for the reindeer husbandry.

Claims of constitutional protection, primarily compensation, were raised in a majority of the cases and would also be of great relevance to the discussion here. However, the issue of constitutional protection of the reindeer herding right and State/administrative powers will be analysed and discussed in a separate heading last in this chapter. See subsection 7.3.2.3.

Before going into the stated problems addressed above, I will begin by examining the cases and their general features. To begin with, the common denominator in these cases regards above all claimed customary rights to certain areas lost due to the Board’s decisions and contradictions with the constitution. The

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1591 See Prop. 2005:06:86. See further below.
1592 Reindeer Husbandry Act, s. 7 para. 2.
1593 Established borders create a more stable and secure conditions for the labour invested and reduce anxiety. Even if a decision would mean a limitation of the village area, one village argued that the sense of security reached exceeded the loss.
claimants argued that the decisions meant that areas from one private subject (privaträttsligt subjekt) were, through an administrative decision, transferred to another private subject without compensation and inconsistent with the Instrument of Government chapter 2 section 18. One important issue in these cases is, thus, the fact that the County Administrative Board, through its administrative decisions, altered the borders of two or more Saami villages and interfered with clear civil law matters. However, the decisions cannot be challenged as illegal in this respect: authority is given in the Reindeer Herding Act.

Now, I will take a closer look at the cases. There are three cases that concern judicial reviews (rättsprövning) from the Supreme Administrative Court referred to below as the Judicial review case 1999/2000/2001. Note, however, that the precedent value (prejudikatvärdet) is in doubt due to insufficient reasoning, the trials’ limitation, and the fact that all cases are so-called notice cases (notisfall). The Judicial review case 2001 regarded a decision taken by the County Administrative Board that altered the village borders for seven Saami villages, two of which appealed. In the Judicial review cases 1999 and 2000, there were only two Saami villages concerned by the decision of changed borders.

In all three cases, the claimants refer to the decisions’ interference with civil law matters without compensation given for the loss of pasture areas. As a consequence, the important hunting and fishing right might also be affected. Such rights were reduced, particularly in the Judicial review case 2001, since the village area was reduced by some twenty percent. The claimants also questioned the decisions’ consistence with the European Convention and the EC Law, on the basis that one private subject is favoured at the expense of another private subject through an administrative decision and without compensation. In the Judicial review cases 1999 and 2000, the claimants also directly refer to their customary rights to the lost areas.

1594 In the 2001 case (RÅ 2001 not. 183, judicial review), the Saami claimed inconsistency also with the provision in ch. 2 s. 20 concerning the right to carry out an industry (rätten att driva näring).
1595 See Act (1988:205) on Legality Trial of Certain Administrative Decisions. Some decisions, foremost by the Government, may be subject to this kind of limited judicial review. Certain limitations apply. For instance, the decision shall regard the exercise of public authority, and the trial may only regard whether the decision is in conflict with a provision in a manner claimed by the applicant or what otherwise is clear from circumstances in the matter. Mistakes in the decision-making process that may have affected the final decision, are also included. If the applied provisions allow a certain margin of appreciation in the decision-making, the trial includes whether the decision lies within the frames of the provisions. This statute is a result of several convicting judgements by the European Court of Human Rights. This Court acknowledged that there was a lack of the possibility to have judicial trials of certain decisions in the Swedish Law in relation to the obligations stated in the European Convention on Human Rights and Fundamental Freedoms. On judicial review, see also in subsection 9.4.2.
1596 Notice cases are not regarded to be of such principal value so as to be given a full reference in the report of cases (those latter cases are abbreviated as “ref.”).
1597 RÅ 2001 not. 183.
1598 Only one of them appealed the decision by the Government.
1599 RÅ 1999 not. 76.
1600 RÅ 2000 not. 82.
The appeals were not in favour of the Saami parties, either in relation to the authorities or the Courts. The Supreme Administrative Court made only a swift reasoning, a few paragraphs without any substantial analysis. Generally, a sufficient statement of reasons is an obligation in the Administrative Court Procedure Act, and it is also an obligation stemming from the general principle in the Public Administration Law. Again, the legal sources are not straightforward.

The Supreme Administrative Court argued in all three cases that, since the provision in s. 7 is broad (allmänt hållen), it allows a large margin of discretion in the legal application. Consequently, the Government had not superseded that margin. And the decision did not contradict any provision in the manner claimed. There was also no ground for claiming that the legal application had contradicted the European Convention or the EC Law. Regarding the claimed customary rights to the lost areas, the Court did not comment on this matter, perhaps because these issues are clearly a matter for the general courts.

Note that the appeal instances were amended in 1997. Since then, there has only been one other case tried by the Supreme Administrative Court, the Sörkaitum case, which was not granted appeal (meddelades inte prövningstillstånd). The verdict by the Administrative Court of Appeal then abides (står fast). So, although none of the four rulings by the Administrative Court of Appeal is of precedent.

1601 The order of appeal (instansordningen): the decision by the County Administrative Board is appealed to the Swedish Board of Agriculture, which is appealed to the Government, and finally a limited judicial review (rättsprövning) in the Supreme Administrative Court.

1602 See SOU 2001:101, p. 167. A reasonable interpretation of the decision in the Judicial review case 2000, argued here, may be that, since the village was compensated in land (given another pasture area) by the first decision of the County Administrative Board, the Court might have considered this a fair compensation.

1603 Note that the reasonings normally are short in judicial review cases, especially where the matter is not changed. This is probably connected to the fact that it is rather difficult to have a decision by the Government repealed (upphävd), and it is a restricted trial. However, this fact does not seem to explain the difference with the Barsebäck case (see below), which affirmed (fastställede) the Government decision. So, as a contrast, see the Barsebäck case from 1999 (RÅ 1999 ref. 76) of some 50 pages, which also regarded a judicial review (rättsprövning). However, this case is of principal value, a “ref-case”. This case partly concerned an assessment of consistence with the Instrument of Government (ch. 2 s. 18, and others), the European Convention and EC Law. The matter concerned the Government decision to close down the private nuclear power plant, Barsebäck, as a strategy to change the Swedish energy policy towards more “green” energy forms. It is not difficult to see the larger public interest in this matter, and the Courts’ argumentation and statement of reasons are comprehensive. There were many other important issues tried in this case, apart from compatibility with ch. 2 s. 18 (regarding para. 1 of the provision), but it still serves as an example of a closer analysis of claimed contradictions with provisions in the constitution, the European Convention and EC Law. See the reasoning regarding ch. 2 s. 18 in RÅ 1999 ref. 76, under 5.5.1 & 5.5.3, which include an analysis of “pressing public interests” in relation to the proportionality principle. Generally, there are very few cases regarding the application of ch. 2 s. 18. See further below in subsection 7.3.2.3.

1604 “The decision shall state the reasons that determined the outcome”. See the Act (1971:291), s. 30 para. 2. See also the principle codified in the Administrative Procedure Act (1986:223), s. 20.

1605 For For the initial decisions taken before January 1, 1997, the old appeal instances applied. See the Reindeer Husbandry Act, s. 99; and the transitional provisions for the amendment. Present order of appeals: the decision by the County Administrative Board is appealed to the County Administrative Court, which is appealed to the Administrative Court of Appeal and finally to the Supreme Administrative Court.

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character, they illustrate the legal and jurisprudential problems. All of them are from 2001, and three were decided on the same date. I begin with the Sörkaitum case\textsuperscript{1607}. This case is also referred to and discussed below in section 8.3.2 However, only the matters important here are discussed. In this case, seven Saami villages were affected by the County Administrative Board’s decision. The Administrative Court of Appeal ruled, like the County Administrative Court, that that the borders of the pasture areas and situation before the new decision by the Board would apply. On the whole, the need for pasture of the other concerned villages did not motivate that the disputed decision would apply.

Also in this case, the Saami villages (both claimant and defendants) refer to customary rights to certain areas, and their claims were partly overlapping. The Administrative Court of Appeal held that “the provisions in the Reindeer Husbandry Act do not support an understanding that the customary rights attached to certain areas belong to a certain Saami village or certain members thereof”, rather that “such right is founded on immemorial prescription and belongs to the Saami people as a collective”\textsuperscript{1608}. Furthermore, claimed reindeer pasture rights, established between the villages or not, shall only be understood as one of the factors determinative for a consideration of whether a pasture area becomes suitable for its purpose, which is a prerequisite of section 7. Thus, according to the Court, the customary right of a certain village may be significant, but only as one of many other circumstances. Hence, it cannot alone be determinative.

Additionally, a Saami village (defendant) argues that the legal application of the provision in section 7 should not be applied so that one Saami village is allowed to expand at the expense of another. Eventual increases in the production must instead be solved within its own village borders. The village argued that such application of law could not be consistent with the constitution without compensation given, since rights from one private subject (privatarättsligt subjekt) were transferred through an administrative decision to another private subject. The legal application should, furthermore, be understood as in conflict with the European Convention for the same reasons. The application also creates competition advantages which could not be consistent with EC Law. As an answer to these arguments, the Court referred to the Judicial review case 2000, presented above. Since the Supreme Administrative Court did not allow the appeal in the Sörkaitum case, it is not far-fetched to assume that another analysis of the compatibility of the provisions will not take place again. This is not dissimilar to a catch-22 situation!

In as much as the three other cases from the Administrative Court of Appeal\textsuperscript{1609} are closely related to each other, I will refer to them jointly as the Svaipa cases. They all concern the division of the areas of four Saami villages and relate to the borders of the Svaipa Saami village\textsuperscript{1610}. The general outcome of the verdicts was remittal of the

\begin{itemize}
  \item \textsuperscript{1607} See Administrative Court of Appeal case No. 1966-1998 & 2061--62-1998.
  \item \textsuperscript{1608} See the case, p. 10 (emphasis added).
  \item \textsuperscript{1609} See the Administrative Court of Appeal in Sundsvall, cases No. 1191-2000, 2880-2000 & 2881-82 – 2000. The former was decided in 2001-06-19 and the latter two in 2001-07-06.
  \item \textsuperscript{1610} A specific group within Svaipa, a village with a majority of its pasture in the county of Norrbotten, has long since had a winter-pasture-area within the county of Västerbotten. For background information on decades of disputes, see the appeal decision by the County Administrative Court in Västerbotten case No. 1741-98, decided in 2000-03-23.
\end{itemize}
cases (återförvisning) to the County Administrative Court for retrial (fortsatt handläggning). The matter is rather complex. In 1993, one of the Saami villages applied that the County Administrative Board should decide the borders for all of its pasture area, which led to decisions on the matter a few years later. Two of the Board’s decisions were appealed. Another decision on fixing boarders that regarded winter pasture areas in Västerbotten for a Saami village was taken by the Board in Norrbotten, which of course had an effect on the pasture areas of Saami villages in Västerbotten. This decision was also appealed. In sum, the main problems here concerned administrative boarders; former permits granted to a specific group within a Saami village and, in similarity with the other cases, claimed customary pasture rights to certain areas.

Regarding the problem with administrative boarders, one of the villages (Svaipa) has its pasture area in two administrative districts, the County Administrative Board of Norrbotten and the County Administrative Board of Västerbotten. A slight majority of its pasture area (year-round-area) lies in Norrbotten, whereas the County Administrative Board has the authority to decide on division of village area for the Saami village, including the winter pasture in Västerbotten. This in not a unique situation, in fact several Saami villages in Norrbotten have winter-pasture-areas in Västerbotten.

Another closely related issue seemed here also to be the administrative boarders of the Saami villages in relation to historic (and present) use of certain areas, where claims on customary use are overlapping. One of the concerned Saami villages argued that a better division would in fact be to unite two of the Saami villages, since the customary use historically had covered a larger area before the divisions into Lap villages in 1886. Certain cooperation still existed at the time of trial during, primarily, the summer period, while there was and still is a lack of natural borders for the reindeer.

Moreover, a certain group of reindeer herders within the Saami village belonging to the administrative district of Norrbotten had, since the 1940s/1950s, been granted a specific permit by the former administrative authorities in Västerbotten. The permit regarded winter pasture rights to certain areas in the County. This permit had been withdrawal in 1974 with the argument that the pasture was a collective for all the members of the Saami village. The Swedish Board of Agriculture (Lantbruksstyrelsen) recommended the following year that a decision based on the provision in section 7 should be taken to solve the pasture troubles more permanently. This seems to have been done first in 1998 through the appealed Norrbotten County Administrative Board’s decision after more that a decade of negotiations. Altogether, it is clear that the disputes here over certain areas and parts of the boarders have a long history.

To conclude, all of the cases referred to above give a good illustration of the unclear valid law and legal application. These court cases substantiate a delicate legal dilemma. The decisions per se cannot be challenged for being clearly unlawful. They

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1611 This Saami village claimed now that its pasture areas, as a consequence by the Board’s decision, had become reduced by some fifty percent.
1612 See Reindeer Husbandry Act, s. 102 and the Administrative Court of Appeal case No. 1191-2000.
1613 This Saami group is well-known and have had winter pasture in this area for long time.
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are based on a provision in the Reindeer Husbandry Act which authorises the County Administrative Boards to decide village borders without clear restraints. On the one hand, it is possible to restrict the reindeer herding right through legislation, by the Reindeer Husbandry Act or other statutes. On the other hand, the substantial autonomy and discretion left to the County Administrative Boards, whose decisions clearly interfere with customary rights of the Saami reindeer herders, are probably discriminatory, not at least in comparison with other businesses (näringer)\textsuperscript{1614}. The Saami villages are, furthermore, not monetarily compensated, and other pasture areas should not – as a general rule - be understood as compensation. Furthermore, neither the provision (s. 7) nor the legal application allows legal protection between the Saami villages\textsuperscript{1615}. This must be understood as remarkable since each Saami village, which is considered a legal person, is responsible for the husbandry carried out by its members, and there is typically competition among the villages as outlets of reindeer meat on the market with higher or lower profits as a result.

Evidently, those cases raise complex legal issues, two of which I will focus upon below after addressing them initially under this subsection. I will begin with the issue regarding the nature of the reindeer herding right and the codification of the right in the Reindeer Herding Act, section 1. Note also that I will address below in subsection 7.3.2.3 the analysis and discussion of the constitutional protection of Saami customary rights, often referred to in these cases.

\textit{i) The reindeer herding right and its collective feature}

As said above, neither the provisions of section 7 nor the legal application allows legal protection between the Saami villages. The law here does not provide Saami villages with legal protection in relation to other Saami villages despite acknowledged civil rights (bruksrätt). Moreover, the contemporary legal understanding is supported by the 1993 amendment in section 1 of the Reindeer Herding Act, which states that the whole of the Saami people is the holder of the reindeer herding right\textsuperscript{1616}. Consequently, this collective feature of the reindeer herding right has through the 1993 amendment become more promoted and strengthened in the Saami law as such. There are very few cases which relate to the nature of the Saami customary rights, and most of them are offer no precedence. The cases regarding the division of village areas illustrate the clearest example of the current situation in this regard.

In the Sörkaitum case, the Administrative Court of Appeal related to the codification in section 1. The Court referred here to the codification of the nature of the Saami rights and argued that, since the Reindeer Husbandry Act stated that the reindeer pasture right belongs to the Saami people as such, claimed reindeer herding rights by a certain Saami village cannot be the only factor determining the right to a particular area. Reindeer herding rights claimed to certain areas were, thus, only\textit{one}

\textsuperscript{1614} See further below in subsection 7.3.2.3.
\textsuperscript{1615} Historically, the customary rights of individual Saami and Saami villages have been protected against settlers and farmers, but also against each other. See for instance Nils-Johan Päiviö (2001) \textit{Lappskattelandens rättsliga utveckling i Sverige}, Diedut No. 3, pp. 29-30 & 88-94.
\textsuperscript{1616} Bengtsson also acknowledges this consequence of the amendment. See Bengtsson, Bertil (2002) \textit{Om kollektiv renskötselrätt} in 21 uppsatser, pp. 280 & 282.
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circumstance that should be balanced in the assessment of whether the village area becomes suitable for its purpose. It is obvious that the provision in section 1 of the Act has had implications on who to correlate with the Saami claims and the decision on village borders (the suitability requirement). This provision might, additionally, have implications on how other provisions in the Act are interpreted. See also the discussion directly below in subsection 7.3.2.2 concerning normative patterns within the reindeer husbandry legislation.

By the wordings of section 7 and partly by its legal application, it is apparent that the comprehension of the reindeer herding right supports the recognition that it originated solely from the legislation without regard to its unwritten, customary law (sedvanerättliga) roots. This is, in fact, not surprising, since the drafting of the provision in 1971 predated the 1981 decision in the Taxed Mountains case. The amendment of section 1 in the Act in 1993, however, did not.

The legal consequences behind the codification of the nature of the reindeer were not analysed. It was introduced as an important amendment, aimed at promoting the position and security of the reindeer herders in their business. It was also emphasised that previous uncertainties regarding the nature of the Saami rights have had negative influences on reindeer husbandry. Therefore, the legislature argued, the very basis for the reindeer herding rights ought, through the amendment, to be explicitly mentioned in the statute. To escape from this dilemma, I would recommend an adjustment of this provision, since a legal understanding that the reindeer herding right as belonging to the whole of the Saami people runs poorly with the reindeer herding right as based on immemorial prescription. Even more importantly, the amendment has neither led to a clarification of the reindeer herding right, nor to positive influences on the reindeer husbandry, as claimed by the aims behind the codification. Rather, the effect has been the opposite.

With regard to section 7 concerning the division of village borders, I will discuss this issue further below (in subsection 7.3.2.3), but the constitutional protection of property does not correspond well to this provision. The fact that the Saami Parliament will be the competent authority as of July 1, 2006, to decide the matter does not change my analysis and critique here. To my understanding, any attempts to regulate the allocation of pasture due to various policies without respect for the customary rights to certain areas cannot be understood in any other way as remnants from another time-period, of which we cannot be particular proud. The decision on division and allocation of village areas should, in my view, be based first of all on acknowledged customary rights connected to certain areas, not primarily due to facts emancipating from the present business (näringsmässiga grunder).

In one of the Svaipa cases, it was particularly evident that the County Administrative Board was of another view. In short, the Board declared that all claims to

1617 Prop. 1992/93:32, p. 90. See also SOU 1989:41 Samerätt och sameting, 263. The amendment was, moreover, built on this Commission report (Samerättsutredningen).
1619 See Prop. 2005:06:86 Ett ökat samiskt inflytande. Paragraph 2 is not amended, which states the substantial requirements for amendments of borders.
1620 See the County Administrative Board’s view stated in the appealed decision by the County Administrative Court in Västerbotten, case No. 2573-97/2583-97, pp. 9-11.
establishing boundaries on historical facts lack realism. Decisions on the division of village boundaries and the allocation of pasture should instead be based upon the factual situation (näringsmässiga omständigheter), which leads to a suitable division of areas (ändamålsenlighet). The County Administrative Board shall, furthermore, have regard to the common benefit (gemensamt största nyttan) for the reindeer husbandry as a whole. There is usually a need to compromise, since the available pasture is scarce, which sometimes leads to divisions that do not follow natural demarcations. The village decrees (byordningar) from the 1940s are seen as remnants from times long past, and the reindeer husbandry shall follow the social progress (samhällsutvecklingen) in a changing landscape.

While the provision in section 7 gives wide discretion to the County Administrative Board, the vagueness of the provision is even more troublesome, as is shown in the three judicial review cases. Accordingly, I argue on the contrary that, if the fact that the reindeer herding right is based on immemorial prescription shall be taken seriously, the link between the subject and object must be clear. An understanding of the right as belonging to all Saami and attached to the whole of the Swedish reindeer pasture areas cannot be legally sustained. The collective feature of the Saami customary rights should not be misunderstood or misinterpreted.

In a de lege ferenda perspective, why should not the pasture rights of the reindeer herding right be acknowledged as the primary source for the division into village areas? This would correspond well with the understanding of the nature of the reindeer herding right. There would be reason to amend the borders only in cases where the village borders become unsuitable, primary because of environmental reasons, such as where the long term economising of the pasture is in jeopardy. In this context, the statement in the preparatory works on promoting a rational (rationell) use of the pasture areas as a strong method for determining village borders would then become obsolete. The promotion of increased rationality, the main aim of the present statute, is in fact subsumed under environmental considerations. Where the village borders promote a sustainable use of the pasture, they will also become more rational in a long term perspective.

This suggested basis for the division of village areas will moreover create legal protection among the Saami villages, since the reindeer herding right will be connected to a certain village. The link between the subject and object will be upheld, as the doctrine of immemorial prescription requires. The authority responsible for amendments of the village borders cannot, moreover, make an assessment of

\[\text{1621}\] Compare above in subsection 7.2.2. Note also that the Commission for Reindeer Husbandry Policy (Rennäringspolitiska kommittén) has not proposed any amendments, apart from a few words added. Still, the same vagueness and authority adheres to this provision. See SOU 2001:101, p. 75 see also pp. 165-168.

\[\text{1622}\] Another example might be the suitability of migratory routes and breeding lands (kalvningsland), which might also be subject to adjustments while the reindeer have strong habits.

\[\text{1623}\] See also further in Lundmark, Lennart (2006) *Samernas skatteland*, pp. 190-200, which explains historical transitions in the reindeer husbandry and gradual changes in the size of pasture areas.

\[\text{1624}\] As of July 1, 2006, the Saami Parliament became the responsible authority for deciding village borders. Note that there is a kind of consultation requirement (yttrande och sammanträde) connected to
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needs (behovsprövning)\textsuperscript{1625} between different Saami villages, since the basis for the division in my argumentation is the civil rights. And, as said before, an amendment of section 7 of the Act would as well be highly recommendable.

\textit{ii) State administrative borders and Saami village borders}

The issue of administrative borders has legal and practical concerns which coincide. The pasture areas of many Saami villages spread over more than one administrative border in relation to the County Administrative Boards. An unfortunate example of troubles related to administrative borders is evident in the three Svaipa cases presented above. The provision in section 102 of the Reindeer Herding Act does not encourage cooperation among the Boards generally or with regard to decisions concerning village borders in particular.

Obviously a decision on altered borders for a village that has pasture areas in the domain of another County Administrative Board will have larger or smaller effects on adjacent Saami villages in that county.\textsuperscript{1626} When pasture areas are allocated, areas from one or two villages are transferred to the benefit of another. Since there is a scarcity of available pasture areas, there is generally, as said earlier, a competition for land between and among the Saami villages. The Saami villages commonly refer to the customary lands (sedvanemarker) when arguing matters concerning the division of village areas. It seems as if the sense of Saami custom is still acknowledged and articulated before Swedish authorities, including the courts.

Administrative borders of a Saami village may, to a greater or lesser extent, correspond with actual customary pasture rights. From a general perspective, the Saami villages are more or less the same areas formed with the enactment of the first statute regulating reindeer husbandry in 1886. However, older and newer administrative decisions, along with infrastructure developments, exploitation, etc., have altered the former land use in many areas. This complicates the picture considerably. Some areas are also claimed by two or more Saami villages. This is a dilemma difficult to avoid completely; historical, factual and administrative decisions have changed the land use.

However, as a rule of thumb, as far as possible the fixed pasture areas of the Saami village should correspond to the customary use and established pasture rights to the same area. If there is a specific reindeer herding group within a Saami village that has customary rights partly on areas outside of the village’s pasture areas, the matter should be solved with consideration taken to the pasture rights of other villages. Since the Saami village is a legal person, it can only decide on matters related to its members and in relation to its own pasture areas. Claimed customary concerns Saami villages and property owners before a decision is made. See Prop. 2005/06:86. This was suggested by the Commission for Reindeer Husbandry Policy (Rennäringspolitiska kommittén).

\textsuperscript{1625} It is evident from the cases that the authorities in many decisions seem to compare the needs of different villages in relation to the highest number of reindeer allowed and the actual number of reindeer of the recent period of time with available good pasture areas, mainly areas with lichen. Although the provision gives room for discretion, it does not allow the authorities to apply an equity and allocation policy. The needs of the Saami villages fluctuate and change over time.

\textsuperscript{1626} Since the Saami Parliament now is responsible for the village borders, the issue of the county administrative borders will diminish. See Prop. 2005/06:86, pp. 40-44 and SOU 2001:101, pp. 75 & 168.
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rights to areas outside the pasture areas of the village can ultimately be solved by the general courts if an agreement on modification of the borders cannot be reached. Together with the issue of administrative borders of the Saami villages, I should also mention the two cases regarding registration of the Saami village (see further below). In order for a Saami village to acquire rights and assume responsibilities (förvärva rättighet och åta sig skyldigheter), the Saami village and its regulation (stadgar) must be registered by the County Administrative Board. The two cases arose out of the fact that two new Saami villages applied for registration of the Saami village, which was denied. The Administrative Court of Appeal acknowledged that the organisation form was mandatory for the exercise of the business and observed, in addition, that all available pasture area already was allocated among the present Saami villages. In essence, neither the Reindeer Husbandry Act nor the preparatory works supported an understanding that groups of Saami could freely create new Saami villages.

The 2001 case went to the Supreme Administrative Court, which did not grant the appeal (meddelande inte prövningstillstånd), whereas the decision by the Administrative Court of Appeal abides (står fast). The Saami village claimed both ownership and usufruct rights (bruksrätt) to the old taxed land (lappskatteland) with a basis in immemorial prescription. The claim here was rejected (avvisad), since such civil law issues are in the domain of the general courts. Only the issue of registration could be tried. The Administrative Court of Appeal found that neither the Reindeer Husbandry Act nor its preparatory works provided that groups of Saami would be allowed freely to create new Saami villages. Moreover, the present Saami villages were in principal the same as the former Lap villages established by the first statute, and the division of pasture areas comprised the whole of the lands regarded as reindeer pasture areas. The claim was dismissed (avslogs). In the 2002 case, the claims by the new Saami village were principally the same, and so was also the reasoning of the Administrative Court of Appeal.

A conclusion to draw here is that no “free” reindeer pasture areas exist. The organisation into Saami villages is compulsory (organisationstvång), and the exercise of the reindeer herding right is only allowed within the Saami village and its pasture areas (including the membership requirement). Even if reindeer herding rights have been acknowledged for a group of Saami by the general courts due to immemorial prescription, a discussion with each affected present Saami village should take place regarding a possible division of the Saami village and reallocation of pasture areas. However, the Reindeer Husbandry Act lacks explicit provisions regarding the cessation and creation of Saami villages. A situation in which a Saami village would cease to exist was, according to the preparatory works, unthinkable even if its members left the reindeer husbandry, the village should still be in existence for the benefit of other persons with reindeer herding rights (renskötselberättigande) to carry on the business. The Commission for Reindeer Husbandry Policy (Rennäringspolitiska

1628 Reindeer Husbandry Act, ss. 10 & 39.
kommittén) has suggested new rules on creation, fusions and cessation of Saami villages.

7.3.2.2 Normative Patterns and the Size of the Saami Collective

I have above discussed the collective feature of the Saami customary right generally in subsection 7.2.2. There, I argued that customary rights in principle cannot be understood as individual rights as such, since the roots of Saami ancestry are always present. However, the exercise of the rights, such as fishing, can be more individual in character. In correspondence with the doctrine of immemorial prescription and in relation to the categorisation of rights presented in relation to the analysis of aboriginal rights the size of the group must reasonably depend both on what customary activity is carried out, as well as on what land or in what water area the activity is carried out. Most importantly, the size of the reindeer herding group is a crucial issue. To regard the reindeer herding right as a fully collective right where the Saami people are the right-holders might in fact lead to an absurd legal application. This is discussed below with respect to some relevant provisions.

In relation to the provisions in the Reindeer Husbandry Act, the size of the Saami group that should be regarded as holder of the reindeer herding right is blurred. Nonetheless, by the 1993 amendment in section 1 of the Act, it is clear that the Saami people are the right-holder. Whether this is consistent with an understanding of the reindeer herding right as based on immemorial prescription has been discussed above. In the preparatory works to the Reindeer Husbandry Act, it was argued that "the reindeer herding right belongs to the Saami generally as one collective right for the people and not only a particular Saami village or its members". This statement was made in relation to the issue of compensation for infringements on the reindeer herding right. Nevertheless, the statement is important, because it highlights the general understanding of the nature of the right at the time the statute was drafted. Moreover, the Saami reindeer herding right has, in principle, the same content as in previous statutes.

In fact, before the present statute, the Saami village members were in principle free to exercise hunting and fishing rights in the whole of the pasture area, although with some restrictions. This was amended by the present statute subject to critique by the Saami and their sense of Saami customary law.

The statement in the preparatory works and the wordings of certain provisions in the Act, together with the 1993 amendment in section 1, show an underpinning structure and comprehension of the reindeer herding right. It is accurate to label it as a normative pattern pertaining to the legislation. This pattern has been promoted and strengthened in the Act through the 1993 amendment. There seems now to be a


\[1632\] Compare above in subsection 6.3.2. See also below under Part III for a discussion of the relevance of this categorisation for Saami customary rights in section 10.3.

\[1633\] Prop. 1971:51, p. 147.

\[1634\] See the 1928 Act, s. 55.

\[1635\] Prop. 1971:51, p. 166.
normative principle that is guiding the legal application of other vague provisions, examples of which we have seen regarding the division of village borders. This is a paradox, since the amendment was made to emphasise the nature of the reindeer herding right as being founded on immemorial prescription.\footnote{Prop. 1992/93:32, pp. 88-90 & 182. The Law Council did not have any doubts regarding the principal foundation of the nature of the reindeer herding right. See ibid, p. 300. However, see the statement (remissyttrandet) by the Administrative Court of Appeal in Sundsvall who declared that the reference to immemorial prescription and the right belonging to the Saami people as such were in contradiction with regard to the holdings of the Taxed Mountains case. Ibid, p. 89.}

If the reindeer herding right is understood as collective in its widest sense, where the whole Saami population is holder of the right, the legal protection (rättsskyddet) between Saami villages is non-existent. This understanding also explains the basis for the provision in section 7 of the Act regarding divisions into village areas. The normative pattern is, additionally, evident in other provisions, mainly referring to “the reindeer husbandry” (renskötseln) in various contexts.\footnote{See also Bengtsson, Bertil (2002) 
*Om kollektiv renskötselrätt*, pp. 281-282, who also generally discuss the importance of the size of the Saami collective in relation to the provisions referred to below.} It is not inessential whether “the reindeer husbandry” is interpreted as the whole reindeer husbandry or as the reindeer husbandry carried out within a certain Saami village. This is especially so in the balancing of damages and detriments for the reindeer husbandry to tolerate (som får tålas) in relation to other interests in society.

There are a few provisions referring to “the reindeer husbandry” (renskötseln) in the Act, primarily sections 28, 30, 32 and 34 (see further below). The true meaning of the words in these sections is unclear, for instance, whether other elements in the reindeer herding right, such as hunting and fishing rights, are included. The preparatory works are silent on the matter. By the context of the provisions, it can reasonable be assumed that the sections are intended to refer to the reindeer husbandry in a particular Saami village. Since the provisions referred to are vague and unclear, the normative principle in section 1 might in fact mean that the size of “the reindeer husbandry” is extended. It may strengthen an interpretation of the collective as the whole of the Saami population, not only the reindeer husbandry within a Saami village. However, the legal situation is unclear and has not been tried to the merits.

Section 30 regards protection for the reindeer husbandry from activities undertaken by property owners or persons that exploit or use the area. It refers to restrictions in uses equivalent with causing “considerable detriments for the reindeer husbandry” (avsevärd olägenhet för renskötseln). Here, the content and meaning of the phrase “reindeer husbandry” is unclear, and the preparatory works are silent on the matter. Is it a particular Saami village or a group therein that suffers from considerable detriments, or is it the reindeer husbandry in general? The outcome will be quite different depending upon the meaning given to the words of the statute.\footnote{There is one case from the Court of Appeal (not precedent) regarding timbering and ground preparation measures in the forestry. See RH 1990:18. In this case, a Saami village sued a regional manager (regionsschef) responsible for the timbering and following ground preparation activities. Thus, it was here assumed that it was the reindeer husbandry within the particular Saami village that would be assessed relating to “considerable detriments”. This was, however, not proven by the village, according to the Court of Appeal. The timbering and the other measures had caused the village more...}

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Importantly, the assessment of whether “considerable detriments” are caused is primarily done by the owner or user of the land. This assessment can, of course, be challenged in the courts, but it is not a pointless remark.

The same prerequisite is evident in section 32, paragraph 1 of the Act. This provision regards granting of usufruct rights: granting is only allowed if such granting can take place without “considerable detriments for the reindeer husbandry”. If the grant regards the right to hunt or fish, to be allowed, the grant must be compatible with good game or fish preservation and then only if the grant can be undertaken “without disturbing infringements in [the Saami] hunting and fishing rights” (utan besvärande intrång i rätten till jakt eller fiske”). Neither the wording of the legal text nor the preparatory works refers to how to understand “reindeer husbandry” or “Saami hunting and fishing rights”. If interpreted together with section 1, the collective feature might be enforced in a balancing process. This is definitely not encouraging, since more substantive infringements then may be accepted.

Normally, a fee (avgift) is given for granted rights. The provision in section 34, paragraph 2 provides that the State shall compensate for “the damage or detriment for the reindeer husbandry” that the grant causes if it regards acquiring natural assets. The same problem concerning the size of the Saami collective is apparent also here. For the size of the compensation, reference is made to provisions in section 28. In the first paragraph, it is stated that compensation is accrued for “damage and detriment for the reindeer husbandry” caused by cessation. In the second paragraph, there is a rule on a half-half division of compensation if no particular person is affected. The compensation is apportioned with half being distributed to the concerned Saami village and the other half to the Saami Fund.

In addition to the issues arising out of grants and compensation, the issue of standing has importance with regard to who is the subject of the reindeer herding right. There are at least two cases of importance here which will serve as examples. Both are water law cases (vattenmål). One case concerned infringement in the communication to and from certain houses built with support of the reindeer herding right due to the construction of water power plants. The infringement was understood as affecting the reindeer husbandry generally, not the owners of the houses (interpretation of s. 28 of the Act). Thus, the owners had no labour, but did not, for instance, cause reductions in the number of reindeer herding within the Saami village. See also the Administrative Court of Appeal in Sundsvall, case No. 1349-1355-2000, where a Saami village appealed a decision on granted timber permission (avverkning av fjällnära skog). On section 30 and the cases, see further below in subsection 9.4.3.2.

The compensation to the Fund is justified by reference to future detriments for future generations of reindeer herdsman, as well as a possible equalisation of the different economic resources of the Saami villages. It is seen as a protection for the collective reindeer herding right. Compensation to the concerned Saami village or villages is justified as a personal compensation to the reindeer herdsmen presently carrying out reindeer husbandry within a village. Note the slight difference in opinion between the Commission experts (sakkunniga) and the Head of the Ministry (Dep.Ch.). See prop. 1971:51, pp. 146-148. On compensation see NJA 1971 s. 1 (water law case).

Bengtsson refers to NJA 1988 s. 684 and NJA 1981 s. 610, see Bengtsson, Bertil (2002) Om kollektiv renskötselrätt, p. 279. I have not investigated further on other relevant cases, as it lies outside the purpose. These referred cases serve as examples of the unclear legal situation generally.
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standing with regard to the infringement (compensation claims). The Supreme Court referred here to the other case. This other case \(^{1643}\) regarded infringement (intrång) in Saami fishing rights, also because of the construction of water power plants. The Supreme Court found that, in relation to detriments and infringements in the reindeer husbandry, the rights of standing (talerätten) generally belonged to the Saami village and the Saami Fund, only rarely individual Saami (interpretation of s. 28 of the Act).

Consequently, how widely the Saami collective is understood has implication on the legal application. And the 1993 amendment, as a normative principle, with the doubtful potential of guiding legal application of other vague provisions in the Act, supports this normative pattern. However, the pattern underpinning the legislation is not straightforward throughout the legislation in some respects. This concern foremost who is entitled to compensation\(^{1644}\), as well as the distinction between the subject of the right and the Saami allowed to carry out the reindeer herding right with all its elements. The differentiation between the holders of the reindeer herding right (the Saami population) and the Saami allowed to exercise the right (the members of a Saami village) makes the regulation of the rights ambiguous\(^{1645}\).

All in all, this discussion on who should be regarded as the real subject for the reindeer herding right has an embedded dilemma. On the one hand, we have the legislation with the underlying assumption of the legislature and the 1993 amendment that generally promotes the whole Saami as holder of the right. On the other hand, we have the findings of the Supreme Court in the Taxed Mountains case, stating that the reindeer herding right ultimately is based on immemorial prescription, a civil law right. The two different understandings of the nature of the reindeer herding right are clearly incompatible. What then shall be regarded as the valid law when provisions in the Reindeer Herding Act conflict with the ruling of the Taxed Mountains case?

To regard the reindeer herding right as a fully collective right where the Saami people are the right-holders might lead to absurd legal applications. For instance, in relation to section 30 of the Reindeer Husbandry Act, a tourist recreation centre in Jämtland sited on an essential migratory route would not be regarded as causing “considerable detriments for the reindeer husbandry” since the majority of the reindeer herdsmen exist in Norrbotten and Västerbotten. This, if nothing else, should prove that my argumentation is correct. How large the Saami collective is considered to be is definitely a crucial issue.

7.3.2.3 Constitutional Protection and State/Administrative Powers

Under this subsection, I draw attention to constitutional protection in relation to the Saami customary rights. Generally, the cases concerning the village borders of the Saami villages will be used as examples for the discussion, since several of the claims have regarded inconsistency with constitutional provisions mainly concerning non-

\(^{1643}\) NJA 1981 s. 610.

\(^{1644}\) The Commission for Reindeer Husbandry Policy (Rennäringspolitiska kommittén) has suggested that the Saami village concerned shall be paid the whole compensation. See SOU 2001:101, pp. 77-78.

\(^{1645}\) The preparatory works mentions the collective nature of the reindeer herding right also in relation to its exercise, that the right is collective for the reindeer herding members of the village. The hunting and fishing rights were more individual in nature. See Prop. 1971:51, p. 163.
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compensation. The courts have here, to my understanding, too lightly responded to these claims. However, these are difficult and delicate legal issues, where at least the sense of justice is evoked. I will comment on the matter, but I do not assert to be complete. I will discuss the relevant constitutional provisions on minority protection and protection of property (egendomsskydd) under separate sub-headings. Finally, a short summary and comment on the constitutional protection are presented.

i) Minority protection

The Reindeer Herding Act and the legal application allow that decisions changing the division of village borders mean benefits for one village and disadvantages for another. On the whole, the regulation and application of section 7 in the Act is a diversion from common real property law principles. The wide authority given the County Administrative Board to allocate the pasture areas between the Saami villages consequently alters the reindeer herding rights and previous customary divisions. It must be understood as a severe interference in the property (egendom) of the Saami and, as such, a discriminating character in the legislation. The constitutional provision regarding discrimination reads:

No act of law or other provision may imply the unfavorable treatment of a citizen because he belongs to a minority group by reason of race, color, or ethnic origin.

This provision seeks to avoid discriminative law making (normgivning) and negative discrimination. All legislation in all areas is encompassed by the area of application, including for instance civil law legislation. Such discrimination might concern rules that aim at a minority directly, leaving their situation in certain respect of an inferior quality than the situation of the majority, which is arguably the case here with relation to the division of village areas. Another way in which a minority might be discriminated against is where legislation excludes a certain ethnic minority, giving advantage for the majority of the population. This prohibition against discriminative law-making is enhanced by the general provision in chapter 1, section 9 (Instrument of Government), which mandates that courts of law and administrative authorities performing tasks “shall have regard to the equality of all before the law and shall observe objectivity and impartiality”. The preparatory works argue that, through this, it is secured that the authorities in their application of the law do not

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1646 Rights to compensation and pressing public interest are discussed separately.
1647 Or disadvantages for all concerned Saami villages as a result of compromises.
1648 All businesses are generally subject to Regulations, but other businesses are normally not troubled with such serious infringements as the reindeer husbandry. Note however, that subject to parliamentary decisions the Barsebäck company (nuclear power plant) had to close down one reactor subject to a new legislation. This example is, however, an extreme one-time event.
1649 See also Bengtsson, Bertil (2002) Om kollektiv renkötselrätt, p. 282.
1650 Instrument of Government, ch. 2 s. 15. The provision was inserted with an amendment to the Instrument of Government, which came in force in 1977. See Prop. 1975/76:209 Om ändring i regeringsformen.
1651 In contrast to positive discrimination.
take inaccurate regard (ovidkommande hänsyn) in relation to ethnicity. This might be so, but where the legislature already has enacted legislation with a possible or comprehensible discriminatory character, the provision is not straightforward. As evident from the legal text and the preparatory works, the provision aims primarily at law making, that is, avoiding enactments of discriminative legislation.

This constitutional provision has only been tried by the Supreme Court in the Taxed Mountains case in relation to the provisions on granting prohibition of the Saami hunting and fishing rights. The Supreme Court found, however, that those provisions were not regarded as contradictory (inte kunde anses stå i strid) to the constitutional provision.

According to the Supreme Court, a comparison with other groups in society could not be made. Instead, the Court assessed the circumstances and objective behind the present system evident from the preparatory works. The Court reasoned that the system aimed at balancing between different interests and needs in society, and this balancing could not have been supported by a depreciative attitude by the legislature toward the Saami as a people. The conclusion was, as said above, that no inconsistency was proven.

Bengtsson dissented and emphasized that the historical circumstances behind the regulation were essential for understanding Saami rights. Their right to hunt and fish was very old and more original than the reindeer pasture. Until 1886, the Saami fishing rights were exclusive in the taxed mountains and were legally protected at least against other individuals, and, presumably, the hunting rights were also exclusive. He assumed, furthermore, that the Saami could have opposed administrative granting of the Saami rights before that time. Through the 1886 Act, the Saami were deprived from self-determination of the granting. The same system applies, in principle, in the present legislation. Bengtsson argued that it was possible to compare the situation for the Saami in relation to their civil rights, in contrast to their business rights (näringsrätt), with the hunting and fishing rights of other Swedes established through immemorial prescription or otherwise. By such comparison, it was clear that the Saami right of determination (bestämmanderätten) was reduced, and a legitimate legislative aim for the unfavorable treatment (ogynnsam särbehandling) was not found. Nonetheless, the provisions were not considered to be manifestly (uppenbart) inconsistent with the constitution and should therefore still be applied in the case.

1654 NJA 1981 s. 1, at pp. 246-248. Even though the provision in ch. 2 s. 15 is of later date than the provisions in the Reindeer Husbandry Act, the constitutional provision is applicable. See NJA 1981 s. 1, at p. 250. See also Bengtsson, Bertil (1987) Statsmakten och äganderätten, p. 18 regarding the interpretation of this provision in relation to Article 14 in the European Convention on Human Rights and Fundamental Freedoms. If a certain group is treated differently on no acceptable grounds, an unlawful discriminative treatment is at hand.
1655 NJA 1981 s. 1, at pp. 246-248.
1656 Instrument of Government, ch. 11 s. 14: “If a court or other public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision may not be applied. If the provision has been approved by the Riksdag or by the Government, however, it shall be waived only if the error is manifest”.
1657 NJA 1981 s. 1, at pp. 249-253.
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The point stressed by the majority in the Taxed Mountains case, that the present preparatory works lacked expressed negative opinions in relation to the Saami as a people, cannot be relevant for the interpretation of the section. The fact that the legislature had the best of intentions is, in my view, irrelevant if a provision is revealed to have discriminatory effects.1658 Moreover, even if a court finds that there are contradictions, the threshold for not applying the contradictory provision(s) is high. In order to set aside a provision approved by the Parliament or the Government, the error or inconsistency with a constitutional provision must be manifest, which is a very high threshold and practically close to impossible to meet.1659 This illustrates a legal dilemma. Since the assessment of lawfulness (lagprövningen) is restrained1660 and any remedies must come from the legislature by amending or omitting discriminatory provisions or other provisions inconsistent with the constitution, what happens if the legislature declines or fails to take such action? Discriminatory or dubious provisions are then allowed to remain.

The application of the provision (ch 11 s. 14) is not straightforward and most issues must be solved on a case to case basis.1661 The preparatory works do not give much guidance, and the insertion of the assessment of lawfulness (lagprövningen) has been said to be a codification of the case law (praxis).1662 In a few recent cases, the provision has been applied in relation to single decisions by administrative authorities.1663 Thus, it might be possible to evoke the provision in relation to the decision by the County Administrative Board. This is probably not helpful, since section 7 of the Reindeer Herding Act clearly leaves room for wide decision-making. Moreover, if compensation is given to a Saami village for loss of valuable pasture areas (ch. 2 s. 18), it becomes unclear whether this means that the provision on minority protection has lost its edge. The matter is on the whole rather complex.

The provision in chapter 2 section 15 aims, as do most of the other constitutional provisions, primarily at the legislature, and, since the Reindeer Husbandry Act is of older date, the issue was naturally not addressed by the legislature nor the Law Council. All in all, the Law Council had no substantial remarks concerning the new

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1658 See also Bengtsson in NJA 1981 s. 1, at p. 252.
1660 By the second paragraph and the requirement on manifest error (upperbarhetsrevisiet), the marginal of error is larger for legislation (lagar och förordningar) decided by Parliament and Government then for other legislation. The idea behind the restraints here is that Parliament’s function as the chief legislature is upheld and that the legal application must be respected as long as it is within reasonable interpretation. See for instance Petréin, Gustaf & Ragnemalm, Hans (1980) Sveriges grundlagar – och tillhörande författnings med förklaringar, p. 312.
1661 Ibid., p. 311.
1663 In NJA 2000 s. 132 (which concerned taxes) the Supreme Court did not apply a transitional provision with support of ch. 11 s. 14 in the Instrument of Government. See also Nergelius, Joakim (2000) Förvaltningsprocess, Normprövning och Europarätt, p. 127. See also generally at pp. 124-126.
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legislation generally, and no remarks whatsoever concerning the provision in section 7. The Law Council stated initially that the 1928 statute would be replaced by the new and that this legislation aimed at promoting a rationalisation of the husbandry. A reassessment of the legal foundation of the Saami reindeer herding right was therefore not made. The proposal for the new statute was, thus, built on the same prerequisites as the old statute.1664 The legislature’s understanding at the time seemed to presuppose - in relation to the division of village borders - that the right to carry out reindeer husbandry still exists after such decision, just on slightly different pasture areas. This understanding seems, moreover, to endure. See, also, above the discussion of the normative patterns underpinning the present reindeer husbandry legislation in subsection 7.3.2.2.

ii) Rights to compensation

Another unfortunate aspect of the legal application regarding the division of village areas is that pasture areas are allocated to the advantage of some Saami villages at the cost of other villages. This is done without regard to compensation for the Saami villages that loose valuable areas as a result of the new decision. It is clear that the reindeer herding right enjoys the same constitutional protection against coercive measures (tvångsförfoganden) without compensation as ownership (äganderätten)1665. The constitutional provision on protection of property (egendomsskydd) states in the first two paragraphs:1666

The property of every citizen shall be so guaranteed that none may be compelled by expropriation or other such disposition to surrender property to the public institutions or to a private subject, or tolerate restriction by the public institutions of the use of land or buildings, other than where necessary to satisfy pressing public interests.

1665 NJA 1981 s. 1, at p. 248.
1666 Instrument of Government, ch. 2 s. 18. The third paragraph regards public access to land and has no relevance here. This provision has been subject to amendments in 1994, which has been much debated and criticized by legal scholars. In general the amendment established a stronger protection of possession than previous, particularly in relation to paragraph 2. Bengtsson, who has written extensively on the matter, has criticized the amendment for being badly drafted in hasten and without a full analyse of its content and meaning. The legislature claimed that the amendment was in line with the valid law in relation to the legislation (rättsläget), which hardly was accurate. The constitutional provision goes further and is more precise than the equivalent protection in the European Convention on Human Rights and Fundamental Freedom; The first paragraph in the Swedish provision does not allow restrictions for individual interests only. In relation to the second paragraph, stating the right to compensation, the aims behind the provision declared in the preparatory works do not correspond with the literal meaning of the provision. See further in Bengtsson, Bertil (1996) Grundlagen och fastighetsrätten, pp. 14-15. See also Bengtsson in SvJT 1994 pp. 920-933. Despite critique on a number of points related to the application of the paragraphs (in particular the second paragraph), the provision has not been amended yet. An attempt was made with the 1999 Commission on Constitutional Investigation (1999 års Författningssutredning). See SOU 2001:19, pp. 69-111, particularly pp. 106 & 111. The legal text of the second paragraph was in fact the result from editorial mistake.
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A person who is compelled to surrender property by expropriation or other such disposition shall be guaranteed compensation for his loss. Such compensation shall also be guaranteed to a person whose use of land or buildings is restricted by the public institutions in such a manner that ongoing land use in the affected part of the property is substantially impaired, or injury results which is significant in relation to the value of that part of the property. Compensation shall be determined according to principles laid down in law.

The protection of property regards both natural and legal persons, which is inherent in “every citizen”1667. Although not directly evident by the provision, it aims primarily at the legislature, but it may also be evoked directly by individuals1668. There are four different legal effects of this constitutional provision or rather situations where the provision in evoked1669. The first situation regards its steering effect for the legislature. Normal legislation (allmän lag) may generally not be issued if proven contradictory with the provisions in the Instrument of Government. The Law Council has an important role here to analyze whether a legislative proposal is inconsistent (oförenlig) with the Constitution1670. The second situation is where normal legislation conflicts with the provision, and the error is manifest (uppenbart), which means that the legislation can be set aside (not applied). Note, again, that only if the error (contradiction) is manifest, can courts or administrative authorities set aside such legislation or provision1671, a very rare situation.

In the third situation, a specific normal legislation (allmän lag) might be difficult to combine with the constitutional provision, but the error is not manifest. The requirement of manifest error or contradiction (uppenbarhetsrekvisitet) is not fulfilled. The constitutional provision can then influence the interpretation of the other provisions. In the application of a vague and imprecise provision, the constitutional provision gives direction to the interpretation. A forth situation relates to the situation where normal legislation related to the issues covered by the constitutional provision is inexistent. This situation is particularly related to the second paragraph regarding compensation rights1672. The constitutional provision then becomes directly applicable.

1668 See an analysis (with references) regarding the provision’s applicability against the legislature in Bengtsson, Bertil (1986) Ersättning vid offentliga ingrepp, pp. 69-71. Even if the discussion concerns the situation before the amendment it is still relevant.
1669 Bengtsson acknowledges three legal effects of the provision, equivalent with the three last situations/functions referred to here. See Bengtsson, Bertil (1996) Grundlagen och fastighetsrätten, p. 17 & 24.
1670 Instrument of Government, ch. 8 s. 18. However, the Law Council’s statement (yttrande) of new statutes or amendments is never compulsory (the legal text says should). Nonetheless, such statement is commonly obtained. The assessment shall, for instance, regard how a proposal relates to the constitution and the legal system (rätttsordningen) in general. It shall also assess problems in relation to the legal application.
1672 The Law Council has expressed that, in the application of the second paragraph in the constitutional provision, the provisions on compensation in the Environmental Code may be used by analogy, along with a normal assessment of reasonability (allmän skälighetsbedömning). See Prop.
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The first situation will not be applicable here, since the enactment of the Reindeer Husbandry Act in 1971 was made before the amendment took place and also predated in fact the new Instrument of Government (in force in 1975). Nonetheless, the constitutional provision is highly relevant for forthcoming proposals in relation to relevant issues for the Saami. The second and third situation would normally lead to amendments of the contradictory legislation or provision. The courts have, however, not found evidence that provisions in the Reindeer Husbandry Act are inconsistent with a constitutional provision. The three Supreme Administrative Court cases (the Judicial review cases 199/2000/2001), referred to above in subsection 7.3.2.1, gave no merit to the claims of contradictions with section 7. This leads us into the fourth situation, the possibility to directly refer to the constitutional provision.

In many of the cases regarding the County Administrative Boards’ decisions on changed village borders, the claimants and respondents have argued that the decision is inconsistent with the constitutional provision. Here, the decision is challenged, not the provision in section 7 per se, which is an important distinction. It is the legal application of the provision in section 7 that has been the core of the claims. So, one issue regards whether the decision gives a right to be compensated.

To begin, it is clear that both paragraphs in the provision refer implicitly to a physical use of the land or building, not restrictions related to granting or conveyance (överlåtelse). So, land use and use of buildings is the target for the provision in the first two paragraphs in general. The second paragraph states the prerequisites for compensation rights. The legal text is clear here: “[a] person who is compelled to surrender property by expropriation or other such disposition shall be guaranteed compensation for his loss”. Where the County Administrative Board decides on the allocation of pasture areas from one Saami village to the benefit of another village, it is a question of transferring the reindeer herding right to a certain area from one legal person to another, which amounts to expropriate measures. The reindeer herding right is regarded as a specific right to real property (särskild rätt till fastighet), which means that, in principle, the same rules apply as for real property (fast egendom) in general. Thus, the transfer of the rights should be comprised by the meaning of “other such disposition” where compensation is guaranteed. Moreover, the compensation shall be determined according to principles laid down in law.

However, the Reindeer Husbandry Act includes only explicit compensation provisions in relation to extinguishment of the reindeer herding right for purposes stated in chapter 2 of the Expropriation Act. This means also that the second and third situations referred to above will not apply, since there is no contradictory provision refusing compensation among the restrictions in the land use (rådighetsinskränkningar) in the Reindeer Herding Act. The provision in chapter 11

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1673 See the majority in the Taxed Mountains case (NJA 1981 s. 1). Note, however, Bengtsson’s dissenting opinion.
1675 This reason is in line with Bengtsson’s view. See ibid., p. 105.
1676 Reindeer Husbandry Act, ss. 26-29, particularly s. 28.
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section 14 (lagprövningsregeln) will not be evoked here. Instead the constitutional provision will be directly applicable (the fourth situation).

Another issue is how the compensation should be assessed, how the “loss” should be understood. The paragraph states that compensation “shall be determined according to principles laid down in law.” However, there is no such provision even if it might be possible to apply section 28 by analogy1677, but the division of the compensation by half to the Saami village and the other half to the Saami Fund is doubtful, and the facts behind compensation will also be difficult to assess. The size of compensation is generally difficult to measure, and yet more troublesome particularly when provision therefor is lacking. Compensation should therefore be applied through general compensation principles (allmänna ersättningsgrundsätser), which involve many difficulties and shall not further be dealt with here.1678

It is clear that the legislature1679 has not seen the reindeer herding right and the authority given to the County Administrative Boards in this way, nor did the Supreme Administrative Court in the three judicial review cases. However, the Court did not analyse the matter in depth or reason why such compensation was not guaranteed. Overall, it is apparent that the reindeer herding right is poorly understood within the Swedish law.

There is an interesting parallel to the constitutional provision on freedom of business (närings- och yrkesfrihet) in chapter 2 section 20.1680 It is there stated in the preparatory works that all regulation in this area must be of a general nature so as to ensure equal opportunities for competition in relation to a certain business (yrke eller näringsgren). The provision shall prevent a person from obtaining advantages at the expense of another person. No other infringement may be made than those meeting the requirement of “pressing public interests,” which ultimately must be decided

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1677 The "loss" would be "damage and detriment" for the reindeer husbandry in that village. Regarding restrictions in the use of land (rådighetsinskränkning) the Law Council has expressed that in the application of the second paragraph in the constitutional provision, the provisions on compensation in the Environmental Code may be used analogously, along with a normal assessment of reasonability (allmän skälighetsbedömning). See Prop. 1997/98:45, p. 516.

1678 Since the first sentence in the second paragraph substantially is the same as before the amendment, the same considerations still apply. Regarding an analysis of the size of compensation, I refer to Bengtsson, Bertil (1986) Ersättning vid offentliga ingrepp, pp. 83-84, 192-196. For the transfer of property and the specific right to real estate (särskild rätt till fast egendom), an application of fundamental expropriation rules will be foremost applicable. The onus of proof rests upon the individual (the Saami village) and, in principle, the full loss is compensated. However, the compensation may not always include monetary compensation. See ibid. pp. 83 & 150. For a closer analysis see ibid. particularly at pp. 115-117 (ch. 4.10), 147-155 (ch. 5.1), 163-173 (ch. 5.5), 173-177 (ch. 5.6) & 190-191 (ch. 5.11).

1679 In the present overhaul of the reindeer husbandry legislation, the matter of compensation has been raised. The Commission (Rennäringspolitiska kommittén) has considered a provision regarding compensation in relation to a division into village areas, but has chosen not to propose such a provision. The Saami (från samiskt håll) seem not to understand this as problematic and in fact unnecessary. See SOU 2001:101, p. 168.

1680 “Restrictions affecting the right to trade or practice a profession may be introduced only in order to protect pressing public interests and never solely in order to further the economic interests of a particular person or enterprise.” Second paragraph: “The right of the Saami population to practice reindeer husbandry is regulated in law.”
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separately in each case.\textsuperscript{1681} Regarding the reference to the Saami reindeer husbandry in the second paragraph, the preparatory works declare that the business element of the reindeer husbandry (näringsrättsliga sidan) is thereby declared to be congruent (förenlig) with the protection of the freedom of business in the provision\textsuperscript{1682}. It is highly questionable whether section 7 is congruent with this provision and allows equal competition. However, see the discussion below on pressing public interests.

In relation to the second sentence in the second paragraph concerning restrictions in the use of land and buildings, there are other decisions by foremost the County Administrative Board that might guarantee compensation. Also, one has to distinguish here between decisions taken by administrative authorities with basis in the legislation and the legislation as such. The first situation concerns certain decisions that restrict Saami land use so “that ongoing land use in the affected part of the property is substantially impaired, or injury results which is significant in relation to the value of that part of the property”, which, according to the legal text, guarantees compensation. Such decisions are, for instance, restrictions regarding the highest number of reindeer allowed for each Saami village, restrictions aimed at preserving the pasture, and restrictions regarding the grants of elements in the reindeer herding right\textsuperscript{1683}. In such cases, the wordings allow compensation regardless of the purpose behind the restrictions.

However, whether compensation is guaranteed in each situation is far from clear, since the interpretation is uncertain. In many cases, restrictions have environmental protection aims, and these situations are the same as for other activities and measures that are restricted. The other situation evokes the provision in chapter 11, section 14 (lagprövningsreglarna) and an analysis of whether a provision is manifestly (uppenbart) inconsistent with the second paragraph of the constitutional provision. Such provisions regard, for example, granting hunting and fishing rights without fee (compensation)\textsuperscript{1684}, which seems to be manifestly inconsistent with the provision in the second paragraph, second sentence\textsuperscript{1685}. The system for granting might in fact be understood altogether as a measure similar to expropriation, since a right of economic value is transferred to other persons.

iii) Pressing public interests

The constitutional provision on protection of property (egendomsskydd) has another implication for infringements in Saami customary rights. This regards the requirement of satisfying “pressing public interests”. With the 1994 amendment, expropriation and other similar disposition, as well as restrictions in the right to use land and buildings, presuppose a need to “satisfy pressing public interests”. From the legal text, it is obvious that such measures solely for the benefit of individual interests, are not allowed. So, the question is how the pressing public interests should be assessed. Is it an assessment of single decisions or a review of the provision as such? The preparatory works refer to those restrictions through legislation or

\textsuperscript{1681} Prop. 1993/94:117, pp. 50-51.
\textsuperscript{1682} Prop. 1993/94:117, p. 52.
\textsuperscript{1683} Reindeer Husbandry Act, ss. 15 (paras. 2 & 3) & 32.
\textsuperscript{1684} Reindeer Husbandry Act, s. 34 para. 1 & the Reindeer Husbandry Regulations, SFS 1993:384, s. 5.
\textsuperscript{1685} Bengtsson, Bertil (1996) Grundlagen och fastighetsrätten, p. 112. See further in ibid., pp. 66-67. See also Bengtsson Samernas rätt och statens rätt in SvJT No. 5-6 1994 pp. 525-533.
administrative decisions (myndighetsbeslut) in individual property that must fulfil the criteria of pressing public interests. Thus, both situations are covered.

The preparatory work does not define the expression “pressing public interests” and must, hence, be regarded on a case to case basis. This means that whatever is included in pressing public interests is ultimately subject to political valuation, where regard must also be taken to legal security points of view (rättssäkerhetssynpunkter). Primarily, however, pressing public interests at least concern restrictions in the land use that aim generally at safeguarding a good environment, as well as preserving and conserving areas particularly valuable. Military purposes and the public need for land for housing, communications, and recreation are also mentioned. Whether certain businesses, such as reindeer husbandry, commercial fishing, and forestry are of pressing public interest is unclear and the preparatory works are silent.

Again, with the example of the decision on village borders, even if those decisions have not explicitly been claimed to be inconsistent with pressing public interests, the question is embedded in the whole context. Each single decision by the County Administrative Board must be justified as a pressing public interest as well as the rationale for the provision per se. I cannot understand it otherwise than that it will be difficult, for most decisions, to fulfil the requirement of pressing public interests: the reallocation of pasture areas for a few villages does not have a substantial effect on the overall picture in as much as the decision concerns only the affected villages as legal persons and perhaps the land owners. Nonetheless, the decisions may be justified through reference to environmental protection arguments, along with arguments on protection of the reindeer husbandry for future generations.

The justification of the provision as such seems somewhat easier, especially since the assessment ultimately boils down to a political valuation, although regard should be taken to legal security points of view (rättssäkerhetssynpunkter). The provision in section 7 of the Reindeer Husbandry Act refers to the suitability of the village area, and it is valid to argue that such consideration can only be done by an administrative authority. Environmental protection objectives, such as the preservation of good pasture from a long term perspective, are closely related to that suitability consideration (lämplighetbedömningen).

To sum up, the discussion above reveals that there are many questions concerning the consistencies of the two constitutional provisions, here exemplified through the decisions on village borders which rest on section 7 of the Reindeer Husbandry Act. At the end of the day, whether or not there are inconsistencies with constitutional

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1689 Compare with the provisions in ch. 3 in the Environmental Code; areas of “national interest” and businesses of “national importance”.
1690 Another example regards the provisions on the granting of fishing and hunting rights, in which every single grant and/or the system should be stipulated by “pressing public interests”. Full compensation is in principle guaranteed according to the second paragraph, not just fees. See further in Bengtsson, Bertil (1996) Grundlagen och fastighetsrätten, pp. 112 & 66-67. See also Bengtsson Samernas rätt och statens rätt in SvJT No. 5-6 1994, pp. 525-533.
provisions is a task for the courts to assess. If inconsistency is found, the provision in chapter 11, section 14 (lagprövningsregeln) is evoked. Even if the assessment of lawfulness (lagprövningen) is restrained, a future attentive legislature might still find sufficient reasons to amend the legislation. Generally, the provisions in the Reindeer Herding Act have not been tried in relation to the requirement of satisfying “pressing public interests”. And the constitutional provisions on minority protection and protection of possession, particularly compensation claims, should be possible to evoke more often in relation to the same Act. The lingering doubfulness is not beneficial.

7.4 Concluding Remarks

Under this chapter, I have analysed the nature of Saami customary rights, particularly the reindeer herding right, as well as the interpretation and legal application from certain respects. From this, it is clear that there is a poor understanding of the customary rights as such. Through an analysis of the doctrine of immemorial prescription, I argue that the “normal” prerequisites connected to the doctrine need to be adapted to the specific features and circumstances that are evident in Saami claims of customary rights. Those “normal” prerequisites have been developed in relation to agricultural and village settings, which differs substantially from traditional Saami land and natural resource uses. I also emphasise that there might be Saami customary rights outside the reindeer herding right, as well as outside the written law.

However, importantly for the establishment and acknowledgement, all Saami customary rights must prove a clear link between the land area possessed and used (the object) and the Saami group using the area which are the right holders (the subject). With this understanding of the customary rights, all Saami cannot be holders of the reindeer herding right – as presently stated in section 1 of the Reindeer Husbandry Act. The fact that it is only members of a Saami village that may exercise the right does not change this legal incorrectness. I have also shown that section 1 of the Reindeer Husbandry Act may enforce an interpretation of other provisions in the Act, which would lead to unacceptable legal outcomes. In a nutshell, there are severe clashes between the understandings of the nature of chiefly the reindeer herding right and present legislation, which is most troublesome. The example concerning the division into village borders has made this clear.
Chapter 8 Environmental Requirements in Relation to the Reindeer Husbandry
8 Environmental Requirements in Relation to Reindeer Husbandry

The purpose of this chapter is to analyse the environmental requirements that apply in relation to the exercise of the reindeer herding right. Above all, the enactment of the Environmental Code in 1999 meant a strengthening of environmental protection aims vis-à-vis all activities and measures that counteract the purpose of the Code, which is the promotion of a sustainable development. To recall, the first part of the objective of this thesis is to analyse the crossing between chiefly the reindeer herding right, as the only Saami customary right codified, and environmental protection legislation. In this respect, the comprehensive Environmental Code is the core legislation.

This chapter focuses, thus, on environmental regulations of reindeer husbandry as such. The next chapter focuses instead on the environmental legal control of the reindeer herding area against mining, forestry and other activities, which indirectly includes a protection of the enjoyment of the reindeer herding right. The planning law is also analysed hereunder. As certain legal instruments analysed in chapter 9 aim at protection of particular areas, chiefly national parks and nature reserves, activities related to reindeer husbandry are touched upon as well. Moreover, it is inevitable that the texts in chapters 8 and 9, and to some extent chapter 7, to some degree overlap, since the analysed provisions are partly the same.

It is clear that the Environmental Code has changed the valid law related to the enjoyment of the reindeer herding right. The so-called general rules of consideration in chapter 2 of the Act mean a “greening” in terms of how various activities and measures may be carried out related to reindeer husbandry. The Code also means that there is a “double” supervisory function of different authorities responsible under different statutes. Even if the County Administrative Board is responsible for reindeer husbandry under the reindeer husbandry legislation, other supervisory authorities, including the Board, may, for instance, impose injunctions to stress compliance under the provision of the Code. Those and other issues are covered under this chapter. However, I will first provide relevant information important for an understanding of the husbandry and the content of the reindeer herding right. A short introduction to the Environmental Code is also provided below.

1691 Note that the situation is probably more complicated with respect to the County Administrative Boards. The decision-making with respect to reindeer husbandry issues and environmental protection issues are normally separated into different units within the Boards, and it is not certain that the units have the same opinions.
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8.1 Reindeer Husbandry and the Reindeer Herding Right

8.1.1 Introduction with some Facts and Figures

The first legislation regulating reindeer husbandry was enacted in 1886. With this Act, a national legislation was reached, in contrast to the complex legal situation which had operated before with legislation and decisions on different administrative levels. The Act codified the customary law (sedvanerätt) basis for reindeer husbandry, which has been passed on to all other reindeer husbandry statutes, including the present statute. The principal basis for reindeer husbandry, as well as the content of the reindeer herding right, has thus been maintained. A consequence of the first legislation was a splintering of the Saami people into two main categories, reindeer herders and non-reindeer herders, where the former was accrued all customary rights. This feature is also maintained in subsequent legislation. The feature is also maintained in subsequent legislation. The Lap villages were also created with this legislation, which are now renamed as Saami villages.

In similarity with regulation of other businesses, the present reindeer husbandry legislation has been supplemented with environmental protection aims. I examine those provisions below. Noteworthy, the Reindeer Husbandry Act does not include an explicit objective, but from its provisions it is clear that the Act regulates issues related to reindeer husbandry. In short, the Act includes both civil law and public law provisions concerning the content of reindeer herding rights and the correlation between the husbandry and other businesses, as well as management provisions of the Saami village (a legal person) and public law restraints of the husbandry. The Act includes geographical boundaries for the reindeer herding area, and, hence, the Act entails geographical restrictions as the provisions are applicable only to areas where reindeer husbandry is allowed.

The legislation differs between three types of reindeer husbandry: mountain reindeer husbandry, forest reindeer husbandry, and concession reindeer husbandry. This latter form is a type of forest reindeer husbandry, carried out in

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1692 Act on the Swedish Saami Rights to Reindeer Pasture in Sweden and on Reindeer Markings. SFS 1886:38.
1693 SOU 2006:14, pp. 182-183. See also ibid., pp. 175-187 on the background to and drafting process of the Act.
1694 See the Acts: 1886:38 s. 1, 1889:66, s. 1 and 1928:309, ss. 2-3. In the present Act, 1971:437, see s. 3. For a general background of the different statutes, see SOU 2006:14, pp. 182-194.
1695 The Taxed Mountains case found that the present reindeer husbandry statute in principle exhaustedly regulated the content of the reindeer herding right. On the case, see above in section 7.1.
1696 Although traditional Saami use to a large extent has included the keeping of reindeer, but not necessarily a full scale nomadic reindeer husbandry, other activities have been present: hunting and fishing for subsistence and for sale have always been prominent. Saami handicraft and agriculture has also been means for traditional subsistence. A combined use of two or more activities has been common. See further above in subsection 1.1.2.
1697 SFS 1971:437.
1698 Reindeer Husbandry Act, ss. 3 & 85-89. Note that, with this Act, the difference between the mountain reindeer husbandry and the forest reindeer husbandry regarding available pasture areas was
Chapter 8 Environmental Requirements in Relation to the Reindeer Husbandry

the river valleys of the Kalix and Torne rivers, where a special permit is required.\(^{1699}\)

The reindeer herding right is collective and, even if the Act states that the right belongs to all Saami, reindeer husbandry and inherent rights, such as hunting and fishing, can only be exercised within a Saami village.\(^{1700}\) In fact, the Saami entitled to exercise their reindeer herding right are a minority within the Saami population, some ten percent. Hence, membership in a Saami village is a prerequisite for the enjoyment of the reindeer husbandry rights, including sub-rights. Each Saami village has its own reindeer pasture area,\(^{1701}\) which is divided into year-round-areas in which reindeer herding is allowed during all seasons, and winter-pasture-areas, in which the reindeer husbandry area is restricted to the period from October 1 until April 30.\(^{1702}\)

In principle, none other than Saami may carry out reindeer husbandry.\(^{1703}\) They enjoy a business monopoly (näringsmonopol) acknowledged in the constitution.\(^{1704}\) Even if the reindeer herding right is a collective right and a right based on customary law (immemorial prescription), it cannot be compared with public access to land (allemansrätten).\(^{1705}\) The reindeer herding right is legally a much stronger right: it is regarded as a specific right to real property (särskild rätt till fast egendom).\(^{1706}\) Importantly, the reindeer herding right may not be carried out in all areas subject to the vast reindeer herding area in Sweden. Here is a sharp contrast to the public access to land (allemansrätten), which can be carried out in principle by persons in all lands. Instead, the exercise of the reindeer herding right presupposes a defined collective that holds the right (preferably the Saami village) and a certain area where this right may be enjoyed (the village’s pasture area).\(^{1707}\) The organisation form (Saami villages) is, thus, compulsory.\(^{1708}\)


1699 See further below in subsection 8.2.4.

1700 Reindeer Husbandry Act, s. 1. For a discussion on this section, see above in subsection 7.3.1.

1701 Reindeer Husbandry Act, s. 8.

1702 Reindeer Husbandry Act, s. 3. The year-round-areas include the Lap areas (lappmarkerna) in the counties of Norrbotten and Västerbotten above the cultivation boundary and on areas below this boundary where forest reindeer husbandry customarily has been used during spring, summer and autumn and the land either belongs to the State (Crown land) or is reindeer pasture land. Reindeer pasture lands are lands that, after the reallocation of land, have been set aside as reindeer pasture. The year-round-area also includes the reindeer pasture mountains (renbetesfjällen) in the county of Jämtland, as well as state owned areas granted for pasture in the counties of Jämtland and Dalarna. The reindeer pasture mountains are areas set aside for reindeer pasture after the partitioning (avvittringen) in Jämtland and other areas have been added. The winter-pasture-areas include other parts of the Lap areas below the cultivation boundary and areas outside the Lap areas and the reindeer pasture mountains, where reindeer husbandry customarily is carried out during parts of the year.

1703 Compare with concession reindeer husbandry below in subsection 8.2.4.

1704 Reindeer Husbandry Act, s. 1 & Instrument of Government ch. 2 s. 20.

1705 See SOU 2001:101, p. 173, which refers to a Commission in Norway (Reindriftslovutvalget) regarding the meaning of the right as a collective right. It was held here that, even if it were a collective right, it could not be understood as a Saami “public access to land” (samisk allemansrätt).

1706 Note that the reindeer herding right as such does not fit directly into any of the normal proprietary terms. It has, however, features similar to easements (servitut), and could most closely be related to an usufruct right (bruksrätt) not subject to any agreement or time restriction.

1707 See the discussion above in subsection 7.3.1. On public access to land, see sections 9.1 & 9.5.

1708 Reindeer Husbandry Act, ss. 6 & 15 para. 1.
Some of the Swedish Saami have by tradition in summertime moved to Norway to find reindeer pasture, and vice versa. To solve problems caused by national borders, special conventions have been agreed. The first convention between Sweden and Norway occurred in 1919 and was replaced by a new convention in 1972, which has expired. A new convention is currently under negotiation. A similar convention with Finland was agreed to in 1925. It is still in force and regulates basically reindeer in the borderline area, which shall be transferred to the rightful owner. Thus, this convention does not allow customary pasture in Finland or vice versa.

Saami reindeer husbandry is today the most essential customary use of land, water and natural resources, apart from hunting and fishing, although these rights are restricted to sub-rights within the reindeer herding right. In the last decades, the manner and prerequisite by which the husbandry is practised has largely been changed foremost by water power generations and infrastructure developments, along with a modernisation of the husbandry with the increased use of motor vehicles. Nonetheless, it is still nature - the landscape and topography, weather conditions, and the availability of pasture - that determines the conditions for reindeer husbandry in each Saami village.

The husbandry is carried out in large areas, between thirty-four and fifty percent of the total Swedish territory. In principle, the whole of the Counties of Norrbotten and Västerbotten and about eighty percent of the County of Jämtland may be used for reindeer husbandry. Smaller parts of the Counties of Dalarna and Västernorrland are also included into the vast reindeer herding area. Although the area used for pasture is huge, most areas are not used frequently or intensively, depending upon the availability of good pasture and other factors.

Reindeer husbandry is carried out on both State owned and privately owned lands. Particularly the winter-pasture-areas are subject to disputes, due to the fact that the land there - mainly privately owned - is situated in forested areas closer to “civilisation”. Competing land use is more a rule than an exception here. However, competing land uses occur basically in most of the reindeer herding area, of more or less serious character for the reindeer husbandry. Mining, road buildings, logging and other environmental hazardous activities seem to be on the upper end on the scale, but also recreational activities, for example in spring time with snowmobiles, may cause damages and detriment fore those involved in the husbandry (it causes stress for the reindeers on the calving grounds).

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1709 See SFS 1972:114.
1710 See SFS 1926:1.
1711 The statistics differ depending on mainly how generous the estimation on winter pasture areas is. The highest figure is the latest, see Markanvändningen i Sverige (2004), pp. 84-85. The statistics here concern the year 2000. The statistics concerning the winter herding areas are a rough estimation, since the borders are largely undetermined. The lowest estimation regards data from 1997, see Svensk rennäring (1999), p. 135.
1712 For a record of past and present cases, see SOU 2006:14 p. 400.
1713 See further below on the analysis of legislation on exploitation and other activities in section 9.4.
Chapter 8 Environmental Requirements in Relation to the Reindeer Husbandry

There are fifty-one Saami villages in Sweden. Within the Saami village, reindeer husbandry is organised in single enterprises (renskötselföretag). The number of enterprises totalled 932 in 2004, and the number of persons owning reindeer totalled 4,054 that same year. The number of reindeer fluctuates normally in intervals over a period and from year to year. In recent years, the total number of reindeer has been about 230,000, which is below the ceiling set for the highest number of reindeer allowed.

8.1.2 The Content of the Reindeer Herding Right

The content of the reindeer herding right has, in principle, been the same since the first statute regulating the reindeer husbandry was enacted in 1886. What the right encompasses is included in the present Reindeer Husbandry Act and in much detail. However, the basic questions regarding the boundaries of the reindeer herding areas, where the reindeer herding right is exercised, is still unclear and in dispute.

The basic element in the right is formed in a manner that allows Saami to use land and water for subsistence for themselves and for the reindeer. It should also be acknowledged that the right as such is based on immemorial prescription (urminnes hävd) and is, thus, valid regardless of statutory recognition. The nature of the reindeer herding right per se is analysed and discussed above in chapter 7. The reindeer herding right includes different elements comprising a range of husbandry connected activities and measures. In detail, the reindeer herding right includes the following:

1714 The creation of new Saami villages does not seem to be possible, since all pasture area is already possessed and used. See the two cases referred to above in subsection 7.3.2.1. For more information on statistics regarding the husbandry see Svensk rennäring (1999).


1716 See Markanvändningen i Sverige (2004), p. 84. During the twentieth century, the number of reindeer has fluctuated between some 150,000 to almost 300,000.


1718 The total number of allowed reindeer is 284,100. In the county of Norrbotten, which is the county with the highest number of reindeer, the number of reindeer is about 70% of the allowed (180,000). See Minutes 5, 2004 in Appendix 2 from the Reindeer Husbandry Council (rennäringssamfernan) http://www.bd.lst.se/publishedObjects/10001443/041027.pdf (viewed at 2005-01-17).

1719 The Supreme Court in the Taxed Mountains case (NJÄ 1981 s. 1) concluded that the right, with a few exceptions, was exhaustively codified in the present legislation.

1720 Reindeer Husbandry Act, ss. 15-25.

1721 See the work done by the Commission on Reindeer Pasture Boundaries (Gränsdragningskommissionen) in SOU 2006:14.

1722 Reindeer Husbandry Act, s. 1.

1723 Since 1993, this feature of the reindeer herding right has been given statutory recognition. See Reindeer Husbandry Act s. 1 and Prop. 1992/93:32. See my discussion above in subsection 7.3.1.
Basic rights related to reindeer husbandry:

- The whole pasture area of the Saami village may be used collectively as pasture for the reindeer (s. 15).1724
- The Saami village has the right to move their reindeer between different parts of the reindeer pasture area of the Saami village (s. 23).1725
- Within the reindeer pasture area, the Saami village may build fences and other enclosures for the reindeer, slaughterhouse or other structures necessary for reindeer husbandry (s. 16).1726
- Within the reindeer pasture area on outlying land (på utmark) the Saami village may build cottage (renvaktarstuga), cot (kåta), storehouse or other smaller buildings necessary for reindeer husbandry (s. 16).1727

Rights to hunt and fish:

- A member of a Saami village may hunt and fish on outlying land (utmark) within the parts of the pasture area of the Saami village that belongs to the Lap area or the reindeer pasture mountains when reindeer husbandry is allowed there (s. 24 para. 1).1728
- A member of a Saami village that temporarily stays within the reindeer pasture area of another Saami village for purposes related to the management of the reindeer may hunt and fish there, but only for subsistence (s. 24 para. 2).
- On state owned land set aside for pasturage in the counties of Jämtland and Dalarna, a member of a Saami village may fish for subsistence within the reindeer pasture area of the Saami village (s. 25 para. 4).1729

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1724 The pasture includes everything reindeer eat, which is mostly grass, herbs, and lichen on the ground and on trees, funguses, et cetera. See, also, Prop 1971:51, p. 163.
1725 If a question on migratory routes arises or if the Saami village requests, the County Administrative Board determines the route. If there are specific reasons (särskilda skäl) for changing an established or valid migratory route and the amendment does not cause significant detriment (väsentlig olägenhet) for the reindeer husbandry, the County Administrative Board can order an amendment of the route. See s. 24 of the Act.
1726 If a structure is to be used permanently, the structure shall be built on the site assigned by the property owner. If the site is disputed, the County Administrative Board may decide where the structure shall be built. See s. 16 pars. 3-4. The right to use pasture lands for different types of structures has decreased with the new legislation, for instance regarding slaughterhouses. See Prop 1971:51, p. 163.
1727 If a structure is to be used permanently below the cultivation boundary (odlingsgränsen) or outside the reindeer pasture mountains (renbetesfjällen) on privately owned land, the structure shall be built on the site assigned by the property owner. If the site is disputed, the County Administrative Board may decide where the structure shall be built. See s. 16 pars. 3-4.
1728 Hunting of predators (bear, wolf, wolverine and bear cat) is restricted. It is only allowed if the Government (the Environmental Protection Agency) has decided so, usually on a case-to-case basis. If permitted such hunting is allowed on all lands within the Lap area or the reindeer pasture mountains. See s. 25 para. 3.
1729 A Saami member may also hunt for predators in the same area, if approved by the Government or appointed authority (the Environmental Protection Agency) (s. 25 para. 4).
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Rights to timber (skogsfång), et cetera:

- If timber is needed for a structure or building subject to section 16, felling is allowed on forests within the Lap areas (lappmarkerna), reindeer pasture mountains, or state owned land in the counties of Jämtland and Dalarna where set aside for pasturage (s. 17 para. 1).  

- On lands outside the Lap areas (lappmarkerna) and reindeer pasture mountains that are encompassed by the pasture area of the Saami village, members of the Saami village or the Saami village may for the need of timber for a structure or building subject to section 16, take only dry trees, wind fallen trees, leftovers from forestry or, if temporarily needed, deciduous trees growing on outlying land (utmark) (s. 17 para. 4).

- A member of a Saami village may take timber to build or rebuild a family house within the reindeer pasture area of the Saami village subject to Crown lands or lands belonging to public forests (allmänningsskog) after the reallocation of land (avvittring) (s. 18).  

- Members of a Saami village may for subsistence take fuel and material for handicraft (s. 17 para. 2).

- A member of a Saami village that temporarily stays within the reindeer pasture area of another Saami village for purposes related to the management of the reindeer may take fuel for subsistence (s. 19).

- If it is exceedingly (absolutely) necessary to gather pasture for the reindeer the Saami village may within the pasture area of the Saami village, fell trees with lichen, primarily dry and non productive trees (s. 20).

Compensation for timber is under certain criteria compulsory. No compensation applies, however, to timber felled on Crown land or lands belonging to public forests (allmänningsskog) after the reallocation of land (avvittring). The same applies to growing deciduous trees felled within the Lap areas (lappmarkerna), the reindeer pasture mountains, and state owned land in the counties of Jämtland and Dalarna set aside for pasturage. For timber felled on all other lands, compensation shall be paid for growing trees, which mainly concerns privately owned lands. Disagreement over the amount of compensation shall be reconciled upon the request of any of the parties. It is the County Administrative Board that appoints a suitable person to lead the resolution. If the parties fail to agree on a suitable compensation the possibility to bring the matter before the courts is open.  

Apart from those rights presented above, which are regulated in the Reindeer Husbandry Act, there are some other customary activities that additionally might

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1730 Growing pine trees may, however, only be felled after instruction of the property owner, absent agreement on alternative terms. See s. 17 para. 3.

1731 Felling shall be done in accordance with the directions of the property owner (s. 18).

1732 Within the same areas as allowed for felling: within the Lap areas (lappmarkerna), reindeer pasture mountains or state owned land in the counties of Jämtland and Härjedalen where set aside for pasturage.

1733 Such tree felling shall, if possible, be conducted in accordance with the directions of the property owner or users of the land (s. 20).

supplement these rights. Whether the codification of the reindeer herding right was exhausted in the present legislation was one of the questions analysed in the Taxed Mountains case. Hence, due to court findings, a few more elements in the reindeer herding rights might be added. In a recent case from December 2005, the Court of Appeal ruled that gathering of lichen is an element of the reindeer herding right when to be used for feeding reindeer in the sorting out of reindeer (renskiljning)\textsuperscript{1735}. In future court decisions, it might very well be that additional rights will be subsumed under the umbrella, which this case has implied. Consequently, the following rights may under certain conditions supplement the above mentioned sub-rights.

**Other rights discussed in courts:**
- Rights to gravel for household use\textsuperscript{1736}.
- Rights to to pits other than grave, for instance peat harvesting (torvtäkt) and sand pit (sandtäkt) if for household use\textsuperscript{1737}.
- Rights to pasture other than reindeer pasture and rights to hay-making (slåtter)\textsuperscript{1738}.
- Gathering of lichen (mossplockning) for feeding the reindeer during specific periods (renskiljning)\textsuperscript{1739}.

To summarise, the reindeer herding right expressed in the Act includes a number of rather detailed rights on how the land and natural resources may be used. These rights could be characterised as elements or sub-rights to the basic right to use land and water for subsistence for him- or herself and the reindeer, established in the very first section of the Act. The content of the reindeer herding right is of considerable range. The reindeer herding right can be exercised within the reindeer pasture area of the Saami village, which includes the area of the Saami village and other areas used for the reindeer husbandry (winter-pasture-areas)\textsuperscript{1740}. Only exceptionally can the rights in the reindeer herding right be exercised outside of the boundaries of the pasture area of a Saami village, chiefly hunting and fishing when a member temporarily resides on area belonging to another village due to reindeer herding activities, such as gathering or migration of reindeer\textsuperscript{1741}.

\textsuperscript{1735} See below and above in subsection 7.2.3.
\textsuperscript{1736} Household use of gravel was seen as an element of the reindeer herding right in the so-called taxed mountains in the county of Jämtland. See NJA 1981 s. 1, at pp. 235 & 245. The same should apply for other parts of the reindeer pasture area.
\textsuperscript{1737} Such rights shall be determined in the same manner as for the right to gravel pits. See NJA 1981 s. 1, at p. 246. These rights, as well as rights to gravel for household needs, are customary rights inherent in the reindeer herding right.
\textsuperscript{1738} The Supreme Court argued that if necessary for the subsistence for the reindeer herding Saami these rights should also be included in the reindeer herding right. This corresponds to the right the Saami traditionally have had on the Taxed Mountains. See NJA 1981 s. 1, at pp. 235 & 246.
\textsuperscript{1739} I have already indicated the existence of this recent case (criminal law case). See the Court of Appeal for Upper Norrland case No.B 69-04 decided on 2005-12-21, p. 5. For a discussion on this case, see below in subsection 7.2.3.
\textsuperscript{1740} Reindeer Husbandry Act, s. 8. Sometimes parts of the pasture area are shared by two Saami villages.
\textsuperscript{1741} Reindeer Husbandry Act, s. 25 para. 2. Here hunting and fishing are allowed only for subsistence. See also s. 19 regarding rights to fuel.
8.1.3 The Specific Concession Reindeer Husbandry

Since the so-called concession husbandry differs in certain respects from the mountain and forest reindeer husbandry, I will shortly examine the historical background to and prerequisites of this type of reindeer husbandry, geographically limited to the river valleys of the Kalix and Torne rivers. Special regulations apply to this type of reindeer husbandry.

The development of the concession reindeer husbandry is intermingled with the previous use of custody reindeer (skötserenar). The system developed as well due to Saami persistence. With the first reindeer herding legislation in 1886, reindeer husbandry in this region was not allowed in summer-time. Parliament tried to avoid the problem by sanctioning owners of reindeer that were kept below the Lapland border during summer-time. This possibility was not used and the customary rights endured. The legislature chose then to make this reindeer husbandry legal in relation to the enactment of the new reindeer husbandry statute of 1928.1742 See further below.

The use of so-called custody reindeer was previously a part of the customary right (reindeer herding right), and this was particularly accentuated in the northern areas. The reindeer were used as an essential draught animal and for their meat. For instance, merchants in the towns during the seventeenth century owned reindeer that they used as transportation during the winter, since reindeer, with their large hooves and light bodies, were far better than horses. In the summer-time, those reindeer were kept in custody by the Saami. Transportation with reindeer was also a precondition for the old mining activity in these tracts. The peasants were also dependent upon the reindeer for transportation. Reindeer were additionally used in the early forestry. The owners of those custody reindeer could be older Saami, Saami children, Saami peasants, non-Saami peasants, merchants and even the Crown. Reindeer were used in mining for transportation to the coastal region.1743

This system of custody reindeer has in fact been very important for keeping good relations between reindeer herding Saami and settlers. It was of mutual benefit for both. Peasants were often given reindeer as gifts or trade. They had access to reindeer as draught animals and food. The Saami, in their turn, could often live with the peasants when the reindeer were grazing in the winter pasture areas. The families could also exchange services and goods. Whenever necessary, the peasant could also protect the interest of the reindeer herding Saami. Hence, the system of custody reindeer meant that their daily lives were facilitated and the parties had a mutual interest in the reindeer husbandry, where potential conflicts could be avoided.1744

This system of custody reindeer was, however, much criticised. The main argument against the use of custody reindeer was that peasants and tradesmen, by using the

1743 SOU 2006:14, pp. 99-100 with references.
Saami reindeer herding right, gained access to other lands without paying for the benefit, and that the reindeer herdsmen were tempted to accept more reindeer than they could manage. This problem was particularly serious in the counties of Västerbotten and Norrbotten, since some Saami almost lacked their own reindeer and were used as herdsmen for the reindeer owned by settled families. Hence, in the 1898 Act, the keeping of custody reindeer was in principle prohibited. Norrbotten was preliminary exempted from this prohibition since, as a matter of fact, the custody reindeer were essential for the population here.

Finally, a solution was reached in the 1928 Act. The forest reindeer husbandry was allowed to continue where a specific permit, called a concession and limited to a maximum ten year period, had been granted. The concession reindeer husbandry was only to be allowed in the parishes (socknar) of Tornedalen. Through this system with concessions, the customary hunting and fishing were in principle extinguished, since such rights were not encompassed by the permit. To my knowing, no compensation has been paid to the concerned Saami villages. The provisions have been transferred, almost without amendments, to the present Reindeer Husbandry Act.

In general, the other provisions in the Act also apply to the concession reindeer husbandry, with a few specific exceptions. Even if the concession holder must be a Saami (renskötselberättigad), owners of custody reindeer are members of the Saami village and, thus, have decision-making powers. This was seen as relevant since the owners of farms (jurdbruksfastigheter) within the concession area are willing to let the reindeer graze on their lands. They therefore have an interest to influence the manner of which the husbandry is carried out. The owners of custody reindeer have the same legal responsibilities for damages caused by their reindeer as the concession holder.

Concession is granted by the County Administrative Board under certain preconditions. First of all, the reindeer husbandry can only be allowed in an area that has previously been customarily used (av ålder) in all seasons. In the granting process, there is a balancing of the benefits for the locality (orten). Only where the husbandry is of greater benefit (övervägande fördel) may concessions be granted. However, another precondition is that the person will pursue the husbandry in an appropriate manner (ändamålsenligt sätt).

\[\text{1745} \text{ See the 1898 Act s. 27. Custody reindeer belonging to another Saami were still allowed, as well as draught reindeer owned by others than Saami.} \]
\[\text{1746} \text{ SOU 2006:14, pp. 100-101 with references.} \]
\[\text{1747} \text{ See the 1928 Act, ss. 57-58. See also Prop. 1971:51, p. 195 & SOU 2006:14, p. 101. Note however, that, in the present Act, the Saami village may approve the keeping of custody reindeer, after consultation with the County Administrative Board. See Reindeer Husbandry Act, s. 36. See also Prop. 1971:51, p. 172.} \]
\[\text{1748} \text{ Reindeer Husbandry Act, s. 86 para. 2.} \]
\[\text{1749} \text{ Strict liability applies for all forms of reindeer husbandry. See Reindeer Husbandry Act, s. 90.} \]
\[\text{1750} \text{ Prop. 1971:51, pp. 196-197. See also Prop. 1992/93:32, p. 121.} \]
\[\text{1751} \text{ Reindeer Husbandry Act, s. 87.} \]
\[\text{1752} \text{ Reindeer Husbandry Act, s. 85.} \]
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As noted above, a concession may be granted for a maximum of ten years. During this period, the County Administrative Board may change the conditions or revoke the concession, if the preconditions for the concession have been changed. This possibility for the Board is rather open ended, so the concession granted does not give any legal security (rättssäkerhet) for the concession holders. Whether the concession has legal effect (rättskraft) against third persons is doubtful, and it is not regulated whether a granted concession applies before other customary rights to winter pasture for other forest and mountain Saami villages. There exists an overlap of some pasture areas between concession Saami villages and other villages.

The holder of a concession may have custody reindeer in his or her care, primarily by local land owners engaged in farming. The legislation can, however, not be interpreted so that there is a duty for Saami to keep custody reindeer. This has been clarified though a case from the Supreme Administrative Court. The Court held that the County Administrative Board could not, in a condition (villkor), lay a duty to accept custody reindeer. Here, the Board had for several grants, as a general condition, stated that the holders of a concession have a duty to accept a certain fixed number of custody reindeer. A reversed interpretation would in fact have meant that the Saami would have been forced into agreements with land owners and to have accepted inappropriate conditions, since the sanction for a breach of the conditions would have attached to the concession.

The conditions for membership in concession Saami villages differs from membership in other “normal” Saami villages, which in principle can determine who shall be accepted as members. In the concession Saami village, all holders of a concession are automatically members of the village. The County Administrative Board has a wide margin of appreciation to state specific conditions to apply for each concession. A concession shall include: i) the concession area; ii) migration routes; iii) the highest number of reindeer that each concession holder may keep and the highest number of custody reindeer that he or she may have; iv) the extent the concession holder has a right to build fences and buildings and to take timber within the concession area; and, v) other conditions stating the manner under which reindeer husbandry may be carried out. Moreover, each holder of a concession may have a maximum of thirty custody reindeer in care in the winter herd. Regarding provisions on environmental requirements, see the analysis below in subsection 8.2.3.

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1753 Reindeer Husbandry Act, s. 85 para. 3.
1754 Reindeer Husbandry Act, s. 89 para. 4.
1755 Compare RÅ 2003 ref. 69. The County Administrative Board (in Norrbotten) stated that it strived at giving the so-called Lap land reindeer husbandry (lappmarksrens kötseln) precedence if competition to pasture were evident.
1756 Reindeer Husbandry Act, s. 85 para. 1.
1757 RÅ 2003 ref. 69.
1758 Reindeer Husbandry Act, s. 89.
1759 Reindeer Husbandry Act, s. 86 para. 1. See also RÅ 1999 not. 78.
1760 Reindeer Husbandry Act, s. 88.
8.1.4 Old Boundaries and Present Zones

Above, in subsection 7.2.2 under iv) I discuss a specific feature of the Saami customary rights that I name “the legal differentiation feature”. I conclude that the content and strength of the reindeer herding right (or other still existing Saami customary rights) are not the same: they are differentiated. This is partly explained by the fact that historical decisions have influenced the enjoyment of the reindeer herding right. This is chiefly done through the establishment of two boundaries in northern Sweden, the Lapland border (Lapmarksgrens) and the cultivation boundary (odlingsgrens). The decisions connected to the county of Jämtland are of equal importance. Those historical decisions on demarcations have subsequently been codified into the reindeer herding legislation, allowing the right diverse content and protection. Below is a short explanation of the decisions on demarcations, followed by an analysis of the zones that corresponds to how the present Reindeer Husbandry Act treats different areas of the vast reindeer herding area.

The Lapland border was established between 1751 and 1753, which separated the more coastal areas (kustbygden) from the Saami areas (lappmarkerna). Due to conflicts, the border could not be confirmed by the Parliament until 1766. This border is today equivalent to the borders of the province (landskapet) of Lappland. Note that the essential issues concerning the border seem to have been issues of taxation and military service, and thereafter fishing rights. Saami customary rights were in the main respected. The idea of a boundary between more coastal areas and Saami areas was old. Already in the seventeenth century, the thought was evoked. There were many disputes between, on the one hand, Saami and coastal peasants that came to the Saami areas to fish and, on the other, between settlers in the Saami areas (exempted from tax and military service) and the coastal peasants. Conflicts between settlers and the Saami were also common, which proved that the so-called parallel theory was a utopia. The State thought that since the settlers, who were mostly farmers, and the Saami could coexist, since they were engaged in different businesses (näringar).

The next border established, the cultivation boundary (odlingsgrens), was interlinked with the partition (avvittingen) in the north. In the beginning of the nineteenth century, there were suggestions of establishing another border west of the Lapland border and that the land here should be reserved for the traditional Saami businesses (näringar). A motion to the Parliament in 1867 set the idea in movement. The disputes between the Saami and the settlers were intense, also in the mountain areas. Newcomers have settled themselves so high up in the mountain region that cultivation hardly was possible. The pasture (grass) was not sustainable and the qualities of the pasture area were rapidly declining. In 1867 the Parliament decided that a preliminary cultivation boundary would be drawn up in the counties of Norr- and Västerbotten, which was finished four years later in 1871. Even if the biological


1762 SOU 2006:14, pp. 125-130 with references.
preconditions for cultivation were important, there was also a balancing of interest between the reindeer husbandry and the interests of cultivation.\footnote{SOU 2006:14, pp. 130-132 with references.}

The definitive cultivation boundary was handled in close connection to the partition, where the lands of the Crown would be separated from individual lands. The new settlements would also be subject to taxation. Two issues were of importance for the Crown in the partition, the future existence of the forests and the Saami reindeer herding rights. The forest as an economic resource had been elevated, and forest companies logged some areas excessively. The partition proved to be complicated and lengthy. It began in the 1870s and was not finished until the 1920s for some parts. The final cultivation boundary was decided by the Crown in 1890. Even if the granting of settlements above the cultivation boundary was restricted (särskilda skäl), the final result was that those settlements became accepted as specific grants (fjällägenheter) and some of those where held by Saami.\footnote{SOU 2006:14, pp. 133-141 with references.}

The partition in Jämtland and Härjedalen was very different. Here, the interests of the Saami were largely left without any consideration; the needs of the peasants were overarching. The partition here was rapid, beginning in 1821 and largely finished by the end of 1830. There was a strong critique of the manner in which the partition was carried out here. The Saami lost large pasture areas, and their situation became critical.\footnote{SOU 2006:14, pp. 163-173 with references.} There were also disputes over the winter pasture between peasants and the reindeer herdsman after the partition. During the 1890s, the Crown hastily bought back lands (utvidgningshemman) to be used as summer pasture. The last purchase was made in 1944. Then the new reindeer herding legislation of 1886 made it clear that the right to pasture during the winter period was supported by old custom (sedvanerättsmarker). This area set aside for the Saami was named the reindeer pasture mountains (renbetesfjällen).\footnote{SOU 2006:14, p. 143.} Hence, in this region, no cultivation boundary was drawn up.

Note that the cultivation boundary was not mentioned in the legal text of the first statute (1886). The legislature considered it a preliminary boundary.\footnote{SOU 2006:14, pp. 163-173 with references.} However, from the 1898 Act and onwards, the reference to the cultivation boundary is there. As a result, the six different zones of the reindeer herding area presented below are, to a large extent, a result of this boundary, as well of the demarcation of the Lapland border and the reindeer pasture mountains.\footnote{Bäärnhielm refers to four zones in relation to the legislation and he refers also to the Act of 1886 (concern only the counties of Norr- and Västerbotten). See Bäärnhielm, Mauritz in SOU 2005:17 Vem får jaga och fiska? Rätt till jakt och fiske i lappmarkerna och på renbetesfjällen, pp. 83-84.} Some rights or elements of the reindeer herding right, which are connected to certain pasture areas, might not be exercised on another. This creates a zoning of the whole reindeer herding area.

The reindeer herding right is obviously strongest in the year-round-areas above the cultivation boundary or in the reindeer pasture mountains in Jämtland (zone 1).
Chapter 8 Environmental Requirements in Relation to the Reindeer Husbandry

The other zones, including mainly winter-pasture-areas, do not enjoy the same legal protection, which correspond also to the concession areas in the Kalix and Torneå river valleys. By this zoning, it becomes rather obvious that the reindeer herding right has very different character and strength between pasture areas and between the three types of reindeer husbandry, as well as on the whole within the reindeer herding area. In sum, the reindeer herding right has the highest legal strength in the north-west of Sweden and with increased closeness to the coastal region and southwards, the strength of the right declines.1769

Zone 1
Zone 1 is the north-west area of Sweden that is closest to the Norwegian border. This zone comprises both the year-round-areas above (north-west of) the cultivation boundary in the counties of Norrbotten and Västerbotten and the reindeer pasture mountains in the county of Jämtland. In this area the reindeer herding right is the strongest and has statutory protection. The reindeer husbandry on the year-round-areas is protected from land uses that cause “substantial detriment” (avsevärd olägenhet) if not allowed in permits or for expropriation objectives 1770. Above the cultivation boundary, protection is also assured concerning grants of usufruct rights. As a main rule, grants can only be issued if without “substantial detriment” (avsevärd olägenhet) for the reindeer husbandry1771. Hunting and fishing is allowed on areas belonging to the Lap areas (lappmarkerna) and the reindeer pasture mountains when husbandry is allowed1772.

An element of the reindeer herding right is rights to build guarding cottages (renvaktarstugor) cots (kåtor), storehouses and or other smaller buildings necessary for reindeer husbandry. On areas above the cultivation boundary and on the reindeer pasture mountains there, is no need to acquire consent of the owner regarding the localisation of the building1773. Logging necessary for those buildings or for structures, can take place on the Lap areas and reindeer pasture mountains. On the same areas, members may also take fuel and material for handicraft for household use).1774

Zone 2
The areas included in the second zone are the year-round-areas between the cultivation boundary and the Lapland border within the counties of Norrbotten and

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1769 For a map of the reindeer herding area and Saami villages see at http://www.sapmi.se/webb/index.php?option=com_wrapper&Itemid=9 (viewed at 2006-06-06).
1770 Reindeer Husbandry Act, s. 30. See also s. 26.
1771 Reindeer Husbandry Act, s. 32 para. 1.
1772 Reindeer Husbandry Act, s. 25 para. 1. For instance, hunting on winter-pasture-areas is allowed only between 1 of October until the 30 of April. Generally, all Saami hunting and fishing is subject to the restrictions and prohibitions in the hunting and the fishing legislation.
1773 Reindeer Husbandry Act, s. 16 para. 3. Note that the buildings and structures included in the reindeer herding right normally are not subject to a requirement to obtain a building permit (bygglov). See Planning and Building Act ch. 5. ss. 1 para. 2 (in areas not subject to a detailed development plan) & 2. On plans, see further in subsection 9.2.2.
1774 Reindeer Husbandry Act, s. 17 paras. 1 & 3. Note that growing pine trees may only be logged with the consent of the owner.
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Västerbotten. This zone includes chiefly the year-round-areas for the forest reindeer husbandry. The husbandry is also here protected from land uses that cause “substantial detriment” (avsevärd olägenhet)\(^{1775}\). However, the husbandry is not protected by section 32 regarding grants of usufruct rights. Hunting and fishing are allowed the whole year\(^{1776}\). Regarding buildings, there is an obligation to acquire consent of the owner regarding the localisation\(^{1777}\). Logging necessary for those buildings is allowed here, and members may take fuel and material for handicraft provided that it is for household use\(^{1778}\).

Zone 3
Zone 3 includes the winter-pasture-areas in the same area as zone 2, namely between the cultivation boundary and the Lapland border. No specific protection in relation to activities or grants of usufruct rights apply in this zone. Members have a right to hunt and fish during the period from October through April\(^{1779}\). As for zone 2, consent of the owner is needed for building cots, storehouses, etc (for localisation)\(^{1780}\). Rights to logging apply, since the zone is within the Lap area, including the right to take fuel and material for handicraft for household uses\(^{1781}\).

Zone 4
The winter-pasture-areas outside the Lap area are included in zone 4. They consist mainly of pasture areas belonging to the forest reindeer husbandry in the counties of Norrbotten and Västerbotten, as well as those winter-pasture-areas in the counties of Jämtland and Dalarna not set aside for reindeer herding (see zone 5). Here, there are no rights to hunt or fish. As for zones 2 and 3, consent of the owner regarding localisation is needed for building cots, storehouses, etc\(^{1782}\). There are no rights here to fell trees, only to take dry trees, wind fallen trees, leftovers from logging or, if temporarily needed, deciduous trees growing on outlying land (utmark)\(^{1783}\).

Zone 5
This zone includes year-round-areas in the counties of Jämtland and Dalarna specifically granted (särskilt upplåtna) by the State for reindeer pasture\(^{1784}\). Since the areas are year-round-areas they are protected from land uses that cause “substantial detriment” (avsevärd olägenhet)\(^{1785}\). Fishing for subsistence is allowed, but not hunting\(^{1786}\). As for zones 2 to 4, consent of the owner regarding localisation is needed.

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\(^{1775}\) Reindeer Husbandry Act, s. 30.  
\(^{1776}\) Reindeer Husbandry Act, s. 25 para. 1.  
\(^{1777}\) Reindeer Husbandry Act, s. 16 para. 3.  
\(^{1778}\) Reindeer Husbandry Act, s. 17 paras. 1 & 3. Note that growing pine trees may only be logged with the consent of the owner.  
\(^{1779}\) Reindeer Husbandry Act, s. 25 para. 1.  
\(^{1780}\) Reindeer Husbandry Act, s. 16 para. 3.  
\(^{1781}\) Reindeer Husbandry Act, s. 17 paras. 1 & 3. Note that growing pine trees may only be logged with the consent of the owner.  
\(^{1782}\) Reindeer Husbandry Act, s. 16 para. 3.  
\(^{1783}\) Reindeer Husbandry Act, s. 17 para. 4.  
\(^{1784}\) Reindeer Husbandry Act, s. 3 para. 1.  
\(^{1785}\) Reindeer Husbandry Act, s. 30.  
\(^{1786}\) Reindeer Husbandry Act, s. 25 para. 4.
for building cots, storehouses, et cetera\textsuperscript{1787}. Logging for timber to the buildings is allowed here, and there are rights to take fuel and material for handicraft for household uses by members\textsuperscript{1788}.

\textit{Zone 6}

This zone comprises the reindeer pasture areas of the eight concession Saami villages. They are pursuing reindeer husbandry in the areas of the Kalix and Torne river valleys in the north-east of Sweden. The elements in the reindeer herding right are clearly restricted. See also above in subsection 8.1.3. Hunting and fishing rights are excluded and are not part of the concession\textsuperscript{1789}. The right to build necessary buildings and structures is also restricted, being allowed only to the extent given in the concession. This concerns also the right to take timber for those buildings and structures\textsuperscript{1790}. Nevertheless, a concession holder should have the right to take dry trees, wind fallen trees, leftovers from logging or, if temporarily needed, deciduous trees growing on outlying land (utmark)\textsuperscript{1791}.

Section 30 does not apply, since the pasture areas subject to the concession reindeer husbandry has not legally been divided into year-round-areas and winter-pasture-areas\textsuperscript{1792}. The same should apply even if the Board in the concession has designated certain areas to be used the year round, since a property owner or other land users can hardly know of such individual arrangements. The concession areas are not constant, since the County Administrative Board may decide new areas for each application for concession. A concession is also valid for a maximum of ten years. Moreover, the sum of the individual concession areas may not necessarily coincide with the borders of the Saami village\textsuperscript{1793}.

\section*{8.2 Environmental Requirements in the Saami Reindeer Husbandry}

\subsection*{8.2.1 Introduction to the Environmental Code}

Under this subsection, I will shortly introduce the Environmental Code, as it is a comprehensive piece of legislation of great importance for this thesis. Its provisions will also be further analysed below in this chapter, but particularly in chapter 9. This particular section analyses the environmental requirements applicable in the reindeer husbandry. Hence, an introduction of the Code and relevant provisions is necessary. Of most importance are the provisions in the second chapter, the so-called general rules of consideration.

\textsuperscript{1787} Reindeer Husbandry Act, s. 16 para. 3.
\textsuperscript{1788} Reindeer Husbandry Act, s. 17 paras. 1 & 3. Note that growing pine trees may only be logged with the consent of the owner.
\textsuperscript{1789} Prop. 1971:51, p. 195.
\textsuperscript{1790} Reindeer Husbandry Act, s. 88 para. 1 point 4.
\textsuperscript{1791} Reindeer Husbandry Act, s. 17 para. 4.
\textsuperscript{1792} Compare the Reindeer Husbandry Act, ss. 3 & 5.
\textsuperscript{1793} See RÅ 2003 ref. 69.
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The core of the Swedish Environmental Law encompasses the rather new Environmental Code. After years of investigation, the Code came into force the first day of January in 1999. The Code shall be understood as a coherent environmental and natural resources statute with a strong emphasis on the management (hushållning) of resources. Hence, it is a modern environmental statute with guiding environmental legal principles and references to sustainable development. Most of the provisions could, however, be referred to the Administrative Law branch, such as the granting of permits, control and supervision, but the Code also includes procedural, criminal and civil law matters. Since the Environmental Code encompasses a number of previous environmental statutes, it is a comprehensive piece of legislation covering a large number of situations and matters.

Although it is true that the Code partly is a summary of previous statutes, it is also true that the enactment of the Code has meant several changes in the valid law, as well as in the administrative structure of competent authorities. First of all, the scope of the Code is wide-ranging. See further below. Secondly, a set of substantial requirements had been grouped into chapter 2, the general rules of consideration, which are applicable in a large number of situations. Thirdly, the membership of the European Union has meant that several amendments and improvements of the statute have been necessary in order to comply with the EC Environmental Law, both prior to and after the enactment. Fourthly, the former administrative permit body (Koncessionnämnden) was replaced by a new structure with environmental courts and specific units at the County Administrative Boards (miljöprövningsdelegationer). One Environmental Court of Appeal (miljööverdomstol) was also established, with the task of trying appeals.

The Code includes thirty-three chapters, of which the first six have more general applicability, meaning that the provisions shall be applied in many different situations. Then there are chapters applicable to specific types of activities, such as environmentally hazardous activities and water operations, as well as provisions regarding polluted areas, genetic engineering, chemical products, biotechnical organisms, waste, and producer responsibility. There are two chapters covering nature conservation: protection of areas and protection of animal and plant species. In the latter part of the Code, there are a set of chapters dealing with rights to appeal and

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1796 16 former environmental statutes have been included to the Code. See SFS 1998:811, Act on Enactment of the Environmental Code, s. 2.

1797 It should be noted that, although this statute is a Code, it has the same legal status as other statutes.

1798 With the Code came, for example, environmental quality standards, and the so-called Natura 2000 sites and the provisions on environmental impact assessments (ELA) were improved.
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procedural provisions concerning the process of applying for permits, including the legal force of a permit (rättskraft). Here, one can also find procedural provisions guiding the decision-making authorities, the County Administrative Boards, the Government, the environmental courts and the Environmental Court of Appeal.

Provisions regarding the authorities’ supervisory duties, as well as criminal provisions and administrative fees, supplement this part of the Code. The final chapters deal with civil law matters, rights of compensation and rules on liability. Furthermore, in addition to the provisions of the Code, there are a large number of regulations issued by the Government, giving more details to the various provisions in the Code. This means that many of the essential rules are to be found in regulations, including, for example, if a specific measure or activity requires a permit.

The Code’s objective is declared as:

The purpose of this Code is to promote sustainable development which will assure a healthy and sound environment for present and future generations. Such development will be based on recognition of the fact that nature is worthy of protection and that our right to modify and exploit nature carries with it a responsibility for wise management of natural resources.

The Environmental Code shall be applied in such a way as to ensure that:
1. human health and the environment are protected against damage and detriment, whether caused by pollutants or other impacts;
2. valuable natural and cultural environments are protected and preserved;
3. biological diversity is preserved;
4. the use of land, water and the physical environment in general is such as to secure a long term good management in ecological, social, cultural and economic terms; and
5. reuse and recycling, as well as other management of materials, raw materials and energy are encouraged with a view to establishing and maintaining natural cycles.1799

The second paragraph explains in more detail what is meant by a sustainable development. The list is not exhaustive, but gives examples on areas of special importance and attention.1800 The word “environment” in the first point of the second paragraph shall be understood widely. It includes management (hushållning) of natural resources as well as nature conservation values covered in the other points.1801 It is also worth noticing that point four of the second paragraph allows a balancing of social, cultural and economic terms, which the other points do not admit.1802 The determination of what is a good management of land, water and natural resources in

1799 Environmental Code, ch. 1 s. 1.
terms of sustainability and cultural values, such as the Saami reindeer husbandry, may be balanced along with ecological criteria.

Hence, the objective of the Environmental Code encompasses management of natural resources (hushållning av naturresurser). Consequently, such matters come up in various situations, in relation to the Code and other statutes, concerning, for instance, forestry, infrastructural developments, mining, and even in real property subdivisions (fastighetsbildning). And, in principle, all kind of land uses imply a use of natural resources. In many statutes, there is, thus, a reference to the specific provisions in chapters 3 and 4 of the Code.

Importantly, the Environmental Code shall be interpreted parallel with other statutes. The wide scope of the Code, and foremost the general rules of considerations in chapter 2, mean that environmental protection measures might be applicable in situations where such protection incentives were initially not sought. Many statutes are also older, enacted at a time when environmental protection issues were not as relevant. Even if many of them have been amended, the Environmental Code has in fact meant that environmental requirements have been accentuated with the Code. For instance, this situation applies to the 1971 Reindeer Husbandry Act and to the pursuit of reindeer husbandry, as will be evident below. This means also that the valid law at stance is somewhat difficult to grasp directly.

Even if the Environmental Code is a fundamental piece of legislation, there are several other statutes of relevance, for instance the Plan and Building Act, Forestry Act and the Mineral Act. Consequently, there are a number of other statutes, with more or less clear environmental protection objectives, that may be subsumed under the umbrella of environmental law. However, those statutes could more appropriately be referred to as planning and building legislation, real properly legislation or natural resources legislation. For instance, although the Reindeer Husbandry Act includes environmental objectives, it belongs rather to real property legislation (speciell fastighetsrätt). Nevertheless, the Code shall be applied parallel with those sector statutes.

The Code’s area of applicability, which is derived from its very first provision, is not straightforward. However, the scope of the Code is comprehensive: all activities or measures that counteract the purpose of sustainability fall within its domain. It applies to natural and legal persons equally. In fact, this means that not only activities or measures explicitly regulated in the Code, but also all other undertakings that counteract the objective of the Code are encompassed regardless whether the activity is being carried out by a private person, a small-scale business or a large industry. Additionally, the provision on the Code’s purpose of promoting sustainable development establishes a guideline for interpretation of other provisions in the

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1803 See further in subsections 9.2.3.1 & 9.2.3.2.
1804 Those statutes of relevance for this thesis are analysed primarily in chapter 9. The Reindeer Husbandry Act is mainly analysed in this chapter, but also to some extent in chapter 1.
1805 Matters referring to the work environment, health and accidents, are regulated in another statute and thus the Code is not applicable to these matters. See the Environmental Code ch. 1 s. 3. A few other matters are also explicitly excluded, see ch. 1 s. 7.
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This is most apparent when one or more alternatives are possible. Thus, the objective of the Code to promote a sustainable development must be realised through other substantive provisions in the Code. This is probably true also for other sector statutes, that the balancing should be measured against the provision in chapter 1 section 1 of the Code. This has, however, not been tried in courts.

Now, I will examine the provisions in chapter 2 of the Code. Due to the importance and wide applicability of the provisions, this second chapter could be characterised as the core of the Environmental Code. Whereas the principle of sustainable development is expressed in chapter 1 section 1, other principles are found in the second chapter under the heading “General rules of consideration etc.”. Many of those principles can be found in other legal documents on regional and international levels. Hence, chapter 2 encompasses a precautionary principle, a polluter pays principle, and a principle on using the best possible technique, along with other specific provisions for the Swedish Environmental Law. Those specific provisions include a requirement to possess adequate knowledge, provisions on localisation of activities and measures, a requirement to conserve raw material and energy, a requirement to reuse and recycle raw material and energy, and a requirement to avoid using or selling chemical products or biotechnical organisms.

The addresses for the requirements inherent in this second chapter are “persons who (alla som) pursue an activity or take a measure or intend to do so”, which means that the provisions apply chiefly to operators of businesses and industries, consumers, but in principle all persons that “pursue an activity or take a measure or intend to do so” where the applicability of the Code is evoked. These requirements stated in the chapter apply to a large number of activities of different types and significance. However, larger activities are under a permit duty, in contrast to activities and measures that cause smaller detriments to human health and the environment, which are seldom under similar inspection of authorities, especially not regarding private persons.

Although the provisions apply to activities and measures, certain measures are explicitly exempted. Measures that are of negligible significance in individual cases are exempted from the general obligations under this chapter. The meaning of “activity” or “measure” is not defined in the statute. In the preparatory work, activity shall be understood as something that has continuance, such as a classic industry, whereas measure is meant in terms of single actions. Many measures lack significance from a sustainability perspective or are of negligible significance. The

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1806 The official translation of the legal text says that “[t]he purpose of this Code is to promote sustainable development which will assure a healthy and sound environment for present and future generations”. Note that the Swedish text is more straightforward here as the text refers directly to the provisions and not to the Code: “Bestämmelserna i denna balk syftar till att främja en hållbar utveckling som innebär att nuvarande och kommande generationer tillförsäkras en hälsosam och god miljö” (emphasis added).
1807 Environmental Code, ch. 2 ss. 3 & 8.
1808 Environmental Code, ch. 2 ss. 2 & 4-6.
1810 Environmental Code chapter 2 section 1 paragraph 2.
choice of habiting or holiday resorts should not, for example, be applicable to the provisions under chapter 2. Whether a measure is of negligible significance in an individual case must be determined on a case by case approach. Of relevance in this assessment is what effect the measure has on human health and the environment, not who takes the measure.  

The burden of proof is regulated in the first section of chapter 2. Generally, the addresses of the legal requirements have a duty to prove that those are fulfilled. The provision states that, in consideration of matters relating to permissibility, permits, approvals, exemptions and supervision, persons pursuing an activity or taking a measure or intending to do so shall show that the obligations in this chapter have been complied with. For the purpose of this section, analysing the legal requirement on reindeer husbandry, the reference to “supervision” is important, since reindeer husbandry is not under any permit requirement or other approval. Hence, whether questions of compliance under this chapter are evoked in supervision, the Saami, both as reindeer herders and the Saami village, have the onus of proof in this respect.  

The fact that the burden of proof rests on the person pursuing an activity or taking a measure does not tell anything about the magnitude and strength of the proof as such. It varies according to the situation. If the risk of environmental damage is considerable, the demand on the burden of proof must reasonably be higher to justify the action. Nonetheless, there are other provisions supporting the accomplishment of the obligations. Of most importance are the provisions regarding the Government’s permissibility, permit obligations, approvals, exemptions and supervision. They are also supported by criminal provisions in chapter 29 and administrative fees in chapter 30.  

The precautionary requirements arising from the provisions in the chapter are also balanced with respect to a cost-benefit analysis: the benefit of protection measures compared with the costs of such measures. The requirements are applicable to the extent that compliance cannot be deemed unreasonable. Note that, with respect to the requirement for using the “best possible technique” (ch. 2 s. 3), there is also a balancing. The requirement here must be economically possible (ekonomiskt
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möjlig) for a normal business in the sector, such as a Saami village. See further below in subsection 8.2.3. Altogether, the balancing subject to section 7 must not, however, jeopardise an environmental quality standard referred to in chapter 5.\textsuperscript{1818} In other words, the requirement on environmental protection measures shall be environmentally justified (miljömässigt motiverad) without being unreasonable from an economic perspective\textsuperscript{1819}.

The burden of proof in this balancing process lies on the “operator” (verksamhetsutövaren), meaning the person pursuing an activity or taking a measure or intending to do so. He or she must prove that the legal demands for protection of human health and the environment, all together or in relation to a particular provision, are unreasonable and that the legal requirements therefore must be narrowed. The basis of the provisions in chapter 2 is that persons shall bear the burden of costs arising from the substantial requirements. The person has not generally any right to be compensated, for instance, for improvements of air cleaning technology. The rationale behind this stance is an application of the polluter pays principle\textsuperscript{1820}.

In sum, chapter 2 shall be interpreted parallel with other chapters in the Code as well as other statutes, and, since the rules are general, they have to be interpreted in each specific case in the light of particular circumstances. Below in subsection 8.2.3, I analyse the implications of the specific requirements of chapter 2 on reindeer husbandry as a business. The husbandry falls within the scope of the Environmental Code, since it impacts the realisation of a sustainable development. However, first I analyse briefly what specific environmental protection requirement the husbandry is bound by and also whether the husbandry falls within the definition of an “environmentally hazardous activity”\textsuperscript{1821}.

8.2.2 Specific Environmental Requirements under the Environmental Code

Reindeer husbandry as such is not under any general permit (or notification) requirements subject to the Environmental Code or other legislation apart from the specific concession for reindeer husbandry.\textsuperscript{1822} Nevertheless, activities and measures within the reindeer husbandry may in specific circumstances require a permit or other actions by the reindeer herdsmen or the Saami village. For instance, a “notice of consultation” (anmälan för samråd) may be required (see further below). The husbandry is also subject to other various requirements under the Environmental Code. Above all, the general rules of consideration apply in many situations, alone or in combination with other requirements. In next subsection (8.2.3), I analyse the

\textsuperscript{1818} Environmental Code, ch. 2 s. 7 para. 2.  
\textsuperscript{1820} Only under certain specified circumstances, principally decisions on nature conservation, can a person be compensated. See the Environmental Code ch. 31 ss. 4 & 6. Such situations mainly concern ongoing land use that becomes significantly obstructed related to protected areas, such as national parks and nature reserves. The compensation that might be awarded in such situations shall be delimited by a sum relating to what the property owner must abide without compensation.  
\textsuperscript{1821} See further on the specific pereconditions for concession reindeer husbandry below in subsection 8.3.4.1.
environmental requirements that the husbandry is bound by, including the provisions in chapter 2 of the Code. Hereunder, I briefly analyse other specific requirements that are directed towards the reindeer husbandry according to the provisions in the Code.

A so-called “notice of consultation” (anmälan för samråd), subject to chapter 12 section 6 of the Code is required as soon as an activity or measure may cause “a significant impact on the natural environment”. The Saami are called to assess whether an activity or measure will have such an effect on the natural environment. If there are doubts, a notice of consultation should be made as the provision is sanctioned. The notice shall be served upon the supervisory authority, which is usually the County Administrative Board. Then, the authority has six weeks to decide whether specific requirement or prohibitions shall apply for the notified activity or measure subject to the general rules of consideration. Some activities or measures within the husbandry may cause significant impacts on the natural environment, for instance specific buildings or structures when built in ecologically sensitive areas.

The requirement of “notice of consultation” may be important also in relation to protected areas. Although specific regulations are issued to conserve nature within national parks and nature reserves, these requirements may not cover all eventual activities and measures that may cause “a significant impact on the natural environment”. The sensibility of the area and the type and extent (omfattning) of the activity or measure pursued is generally determinative of whether significant impacts arise or not. There are also other provisions in the Code aimed at protecting biodiversity and other aspects of nature conservation. For instance, the Saami may be required to apply for a permit, which must include an environmental impact assessment (an EIA) if planning to pursue an activity or measure that may cause “significant impacts” (betydande påverkan) on the environment within a so-called Natura 2000 area. Furthermore, but not least important, the general rules of consideration aim to protect the environment as such, irrespective of the type of negative impact, whether due to air/water pollution or physical activities such as digging and dewatering.

Other more specified requirements follow from the provisions related to the use of chemical products as well as waste and polluted areas. The definition of “chemical products” is wide and includes biological natural products (naturprodukter). The phrase also encompasses fertilisers, paint, petrol, oils and various solutions and pastes. The area of application of chapter 14 in the Code presupposes a human “handling” (hantering) of chemical products or biotechnical organisms. Handling includes every step from production and manufacturing to the use and destruction of chemical products. Here, the use of chemical products is of particular interest.

\[\text{Environmental Code, ch. 29 s. 4.}\]
\[\text{See further on this provision in subsection 9.4.4.}\]
\[\text{See further on the provisions in subsections 9.3.2 & 9.4.2.}\]
\[\text{Environmental Code, ch. 14 s. 2. The definition includes both chemical substances (also elements) and preparation (beredningar) of chemical substances. See also Prop. 1997/98:45 Del 2, pp. 167-168.}\]
\[\text{Those products include organic living material aimed to be used as a control agent or other technical purposes. See the definition in the Environmental Code ch. 14 s. 3.}\]
\[\text{Environmental Code, ch. 14 s. 4.}\]
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Since the concept of handling chemical products includes many different aspects, other provisions in the Code are often evoked, particularly the general rules of consideration. The use of chemicals in relation to the requirement of using “the best possible technique” (ch. 2 s. 3) may often be one of the preconditions for determining what the requirement means. This requirement may be evoked in relation to supervision. The specific requirement in chapter 2 section 6 means also that the Saami must avoid using a chemical product that may involve risks to human health and the environment, if it is possible to substitute with a less dangerous one. This could, for instance, regard the use of petrols. The Saami may also be required to supply information on specific chemical products subject to issued regulations. This requirement aims at providing authorities with sufficient information necessary to survey and assess possible health and environmental risks with respect to certain chemical products. Handling of particularly dangerous chemicals products may also require a permit.

Waste may also be produced as a consequence of reindeer husbandry, for instance in relation to construction of buildings and other structures, such as enclosures. Additionally, “household waste” (hushållsavfall) and other “comparable waste from other sources”, such as waste generated with respect to specific events (reindeer marking), butchering and latrine, are subject to the provisions in chapter 15. The definition of waste (avfall) here is also wide and includes objects, compounds and substances that the holder disposes of or intends or is required to dispose of (gör sig av med eller avser eller är skyldig att göra sig av med)\(^{1834}\). Similarly, the general rules of consideration are important, particularly chapter 2 section 5, which states a requirement of conserving materials and energy as well as reusing and recycling wherever possible. In relation to the polluter pays principle (ch. 2 s. 8), the operator is responsible for the removal of waste. The operator is also responsible for after-treatment (efterbehandling) where, for instance, waste has caused pollution to land and water areas if it may cause damage or detriment to human health or the environment.

Normally, Saami are required to leave waste where the Municipality or a producer is responsible for removing the waste. Only where the waste can be disposed of without any risk of detriment to human health or the environment may the Saami take care of the waste by themselves, chiefly by composting. A specific

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\(^{1828}\) See further in Michanek & Zetterberg (2004) *Den svenska miljörätten*, pp. 302-305. If specific regulations are issued, the requirements in chapter 14 apply also for goods (varor) treated with chemical products, such as batteries with acids and wood treated with preservation solutions.

\(^{1829}\) See also ibid., p. 306. On the vauge system of pre-examination of chemical procuds see also at p. 308.

\(^{1830}\) See further in subsection 8.3.5.

\(^{1831}\) Environmental Code, ch. 14 s. 9. See also Prop. 1997/98:45 Del 2, pp. 172-173. Note that if information is needed in relation to supervision, the specific provisions related to chapter 26 shall be used instead.

\(^{1832}\) Environmental Code, ch. 14 s. 12. Such requirements are then stated in regulations.

\(^{1833}\) Environmental Code, ch. 15 s. 2. See also Prop. 1997/98:45 Del 2, pp. 184-185.

\(^{1834}\) Environmental Code, ch. 15 s. 1.

\(^{1835}\) See the provisions in chapter 10 in the Code.
permit may be applied for at the Municipality. There is also a specific prohibition against littering (nedskräpning). To leave litter outdoors in places to which the public has access is not allowed. Litter is generally regarded to include plastics, glass, papers, metals, and also hay. In a case from the Supreme Court, hay left on the ground after artificial feeding (stödutfordring) of reindeer was regarded as littering. The chairperson of the Saami village was convicted and given a fine. There is also a prohibition on dumping waste in waters, including solids, liquids, and gases. The prohibition is applicable also to dumping on ice.

With respect to “water operations” (vattenverksamhet), Saami may also require a permit for activities undertaken in water areas, such as drainage (markavvattning), extraction of waters (vattentäkt), or construction in waters. The definition of “water operations” is extensive and includes primarily different constructions and measures undertaken in water areas, including alteration of water depths and so on. In principle, all water operations are subject to a permit requirement.

Altogether, the Saami village and reindeer herdsmen are, as operators (verksamhetsutövare) of an activity that affects the environment, responsible for self-control of the activity (egenkontroll). They must continuously plan and monitor the husbandry and specific activities and measures inherent in the business in order to prevent negative effects. They must also keep themselves informed by carrying out investigations on their own initiative, or by other means, about the impact of an activity on the environment. This provision is proof of the fact that the main responsibility for compliance with the Code lies with the operator. Hence, the Saami village and individual reindeer herdsmen have a responsibility to make certain that the activity is carried out in a manner that is in compliance with the Code’s purpose.

Additionally, an issue of relevance is whether the reindeer husbandry – or rather parts of it – may fall under the definition of an “environmentally hazardous activity.” The definition is wide and is as such not directly linked to permit requirements. As said initially, the reindeer husbandry is not under a permit requirement and is explicitly excluded from other keeping of animals (djurhållning).
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that normally require either permit or notification. Nevertheless, in similarity with many activities, reindeer husbandry is typically an activity that might cause damage and detriments to the environment.

Whether parts of reindeer husbandry are to be regarded as an "environmentally hazardous activity" has some legal implications. It would mean that the Government may issue regulations calling primarily for prohibitions, precautionary measures and limitations. The Government may also impose permit or notification requirements. It would also mean that the Saami autonomously could apply for a permit, which would give certain protection vis-à-vis natural or legal persons affected by the activity on matters covered in the permit and the specified conditions. In relation to supervision, the Municipal division (kommunal nämnd) has the direct supervision over environmentally hazardous activities. Lastly, individuals may bring an action against a Saami or Saami village who pursues or has pursued an environmentally hazardous activity without a permit. The action can result in prohibition of further activity or the ordering of protective measures.

An “environmentally hazardous activity” includes:

a) Discharge of wastewater, solid material and gas from land, buildings or structures onto land or into water areas or ground water;

b) any use of land, buildings or structures that may cause detriment to human health or the environment due to discharges or emissions other than those previously mentioned or due to pollution of land, air, water areas or ground water; and

c) any use of land, buildings or structures in such manner that may cause detriment to the surroundings due to noise, vibration, light, radiation or similar impact.

1846 See the Regulations (1998:899) on Environmentally Hazardous Activities and Health Protection, the Appendix under heading “Agriculture, etc.”, SNI code 01-1 and 01-2.

1847 Environmental Code, ch. 9 ss. 4-5. Such regulations may also be issued to fulfil international obligations (and if necessary exceed the obligations flowing from EC law or international agreements), for instance protection of predators within the reindeer husbandry. Both the Habitat Directive and the Convention of Biological Diversity, as the most important examples, protects such threatened species. Note that other legal implications concern procedural rules, for instance related to costs for trials.

1848 Environmental Code, ch. 9 s. 6. Under certain conditions, such as when there is a risk of significant pollution or other significant detriment to human health and the environment, the Government may order an operator to apply for a permit even if the environmentally hazardous activity as such does not otherwise require a permit.


1850 Environmental Code, ch. 32 s. 12. See also below in subsection 9.4.2. The limitation for evoking this provision regards the prerequisite that the environmentally hazardous activity shall not be subject to a permit, which applies to reindeer husbandry as a whole. Although the concession reindeer husbandry is subject to a permit, it is not a permit obligation under the Code and should not hinder the applicability of this provision. Compare with NJA 2004 s. 88 where a working permit (arbetsstillstånd) issued under the Road Building Act (SFS 1971:948) was not to be understood as a permit within the meaning of ch. 32 s. 12 of the Code. For general information on the provision, see Lindblom, Per Henrik (2001) Miljöprocess. Del 1, foremost pp. 207-222.

1851 See the Environmental Code, ch. 9 s. 1. (Note that this is not a direct citation of the legal text.) The present definition on environmentally hazardous activity is almost identical with the previous
Evident from the definition is that only discharges, emissions, pollutions and detriments arising from immobile sources (fasta källor) are subject to the definition. This means, for instance, that cross-country driving for the purpose of reindeer husbandry is not regarded as an environmentally hazardous activity. Primarily, construction activities could be concerned as environmentally hazardous, in relation to ground preparations before building for example cottages, fences, slaughterhouses or storehouses (situation b). The uses of a guarding cottage (renvaktarstuga) also gives rise to waste (including latrine) and perhaps emissions from a stove (situations a and b). Activities related to the extraction of gravel are also typically environmentally hazardous. Logging activities may also cause leakage of elements and compounds that may "pollute" a nearby stream, for instance (situation b).

The situation in (c) also regards the use of land, buildings and structures that cause detriments, but the additional question here is whether each detriment reaches the surroundings (omgivningen) or not. It is, however, difficult in practice to determine where "the surroundings" begins and ends. The provision might be applicable to the structure’s own land areas, such as an enclosure for the marking of calves, or at least on areas outside the disturbing structure, where there is an effect on nature conservation interests. Note that the words "or similar impact" (eller annat liknande) in (c) encompass detriments similar to those already mentioned. However, the prerequisites in (c) also include detriments of a more temporary kind and the preparatory work states that the courts (rättstillämpningen) will determine what kind of detriment the words "similar impact" include. Nevertheless, mental impacts, such as fears and similar displeasures, are mentioned as an example, which include esthetic detriments, such as negative impacts on the view of the landscape (förfulande landskapsbild).

Detriments caused by reindeer are mainly grounds for damages that might in extension cause erosions locally. Such damages or well-worn paths done by

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1852 To illustrate: it is the road that is the environmentally hazardous activity, not the individual cars driving on the road.

1853 Cross-country driving is regulated in a specific statute, see the Act on Cross-Country Driving, which is analysed below in subsection 8.2.3. Moreover, noise that is mentioned in c), generated from motorcycles, snow mobiles and helicopters, is not either regarded as an environmentally hazardous activity, since it is released from mobile sources.

1854 Bengtsson, Bjällås, Rubensson & Strömberg Miljöbalken. En kommentar, Del 1, p. 9:9.

1855 Prop 1997/98:45 Del 2, p. 108. Note also that Saami hunting and fishing activities that might jeopardise the biological diversity of the game or fish populations are not an environmentally hazardous activity. However, if hunting is done with a rifle, the ammunition might include lead, which, over an extended period of time, might cause pollution to land and water (prerequisite b).

1856 Regarding the use of land, the definition does not limit uses of lands subject to owners of real property or usufruct rights to real property, even where there is no legal basis for carrying out the activities connected to real property. In this respect, reindeer husbandry carried out on winter pasture areas where the legal basis for the husbandry is in dispute does not for this reason exclude the
reindeer (upptrampade renstigar), particularly old migration routes, might be negatively experienced by some, such as hikers (fjällvandrare) as it has impacts on the landscape. The erosion as such might also be regarded as a “similar impact” if soil “pollutes” an adjacent lake, perhaps causing a decline in certain fish populations.

Consequently, even if the legislature has chosen a wide definition of “environmentally hazardous activities”, it is clear that the extensive use of the pasture areas does not as such mean that the husbandry is “environmentally hazardous”. Nevertheless, some elements of the reindeer herding right might in certain circumstances fall within this definition. This concerns primarily activities related to construction works and the use of buildings. Even if this gives rise to certain legal consequences, still the Swedish Agricultural Board has authority under the Reindeer Husbandry Act to issue regulations related to the husbandry. The general rules of consideration apply also with respect to the husbandry, regardless of whether the pollution, emission, damage or detriment originates from mobile or immobile sources.

8.2.3 Environmental Requirements in Reindeer Husbandry

8.2.3.1 Introduction

Under this subsection, I analyse certain issues of relevance for the management of reindeer husbandry. The analysis is related to the enjoyment of the reindeer herding right and environmental requirements that must be met in the business (näringen). As said previously, the enactment of the Environmental Code and the general rules of consideration have changed the legal situation in certain respects. The general rules of consideration in chapter 2 are applicable to everyday events, if such events have importance for the realisation of the Code’s purpose of promoting sustainable development. In this way, the provisions in chapter 2 constitute certain common norms for the way of acting. Only measures of negligible significance in a single case are excluded from the requirements.

As an outline for the analysis below, the relevant provisions aiming at environmental protection in the Reindeer Husbandry Act, together with the requirements in chapter 2 of the Code, are discussed first. Thereafter, the elements included in the reindeer herding right are analysed, with focus on environmental protection. Note here that customary hunting and fishing are analysed together with the requirements of the other sub-rights, even if there are other provisions essential...
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for game and fish conservation\textsuperscript{1860}. Furthermore, the modernisation and rationalisation of the management of reindeer husbandry are analysed, foremost the use of motor vehicles and aircraft, as well as management forms.

8.2.3.2 Environmental Protection Provisions

Like other area demanding businesses (areella näringar), such as forestry and agriculture, environmental requirements in the business have been developed over the recent decades. The Reindeer Herding Act has also been amended to include explicit references to environmental protection in the husbandry\textsuperscript{1861}. This amendment came into force in 1997. Thus, there is presently only one provision in the Act that directly addresses the responsibility of the reindeer herdsman in relation to environmental concerns. Note, however, that there are other provisions relevant to environmental protection, which will be evident by the analysis below. The provision states that:

The reindeer husbandry shall be carried out with conservation of the long time production capacity of the pasture areas so that these areas give a sustainable, good yield at the same time as the biological diversity is retained.\textsuperscript{1862}

Evidently, this provision, stating an environmental goal for the husbandry, does not say much. It is clear that the provision encompasses all parts of the husbandry and all impacts caused on the natural environment, such as impacts from structures and management forms of the husbandry, not just impacts on the pasture as such. Nonetheless, this amendment must be understood in a larger context. The paragraph was added due to an overhaul, with the aim to promote sustainable development in the mountain region\textsuperscript{1863}. It resulted in a few amendments in the present legislation and other measures to promote sustainability in these regions \textsuperscript{1864}.

In any case, the provision does not give any guidance on how the reindeer husbandry should be managed in practise. It leaves room for the reindeer herdsmen to decide what a good management of the pasture areas is. In fact, it is difficult to see situations where a reindeer herdsman does not have this focus in the practical management of the reindeer, since the pasture area as a whole shall be used for several years ahead and most probably also by his or her successors. Still, certain detriments and damages, for instance due to cross-country driving, might occur even if not intended. Nevertheless, the environmental requirements imposed by the Code in chapter 2 apply also to the management of the husbandry generally, regardless of

\textsuperscript{1860} An analysis of hunting and fishing legislation is not included in this thesis. It is currently under consideration and has been subject to investigation. See SOU 2005:116, 2005:79 & 2005:17. See also above in Part I in subsection 1.2.1 for information on delimitations in the thesis.

\textsuperscript{1861} Reindeer Husbandry Act, s. 65 a para. 1.

\textsuperscript{1862} Reindeer Husbandry Act, s. 65 a para. 1.

\textsuperscript{1863} See Prop. 1995/96:226 Hållbar utveckling i landets fjällområden.

\textsuperscript{1864} The preparatory works emphasised that the reindeer husbandry as a business should, to a greater extent, be compared with forestry and agriculture regarding the prerequisites in the management of the business and in the concerns for the environment. See Prop. 1995/96:226, p. 54.
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the existence of this provision in section 65 a. Those provisions specify in more detail the requirements on the enjoyment of the reindeer herding right. See further below.

Section 65 a also includes an authorisation to issue by-laws on issues regarded as necessary for promoting interests of nature conservation and culture environment. However, such regulation must not infringe the enjoyment of the reindeer herding rights to the extent that ongoing land uses are substantially hindered (pågående markanvändning avsevärt försvåras). Hence, the environmental goal in section 65 a may be further specified through by-laws issued by the Swedish Agricultural Board. In six provisions, the by-law states the regard that shall be taken to the interests of nature conservation and the cultural environment in reindeer husbandry. First of all, reindeer husbandry shall be carried out so that remains of structures related to ancient and older reindeer husbandry are not damaged. Secondly, in cases of artificial feeding (stödutfordring) the number of reindeer shall be kept within the carrying capacity of the pasture area.

Thirdly, damage and detriment from work related to reindeer husbandry shall be avoided or limited on flora and fauna that are threatened, rare, vulnerable or otherwise need of special care. Mammals and birds that are threatened, vulnerable or in need of special care must not, during their breeding period, be seriously disturbed. Fourthly, when collecting timber or fuel, certain trees must primarily be left untouched, such as dying, dead or habituated trees. The same applies to trees and stumps with traces of remains from an older culture. Fifthly, when fences, enclosures and other structures are built, damage to the natural and cultural environment shall be avoided or limited. Structures for reindeer husbandry no longer necessary shall be removed, if they are not remains of ancient and older reindeer husbandry.

Sixth and lastly, cross-country driving on bare ground is prohibited in areas of great value for the biological diversity or the cultural environment, if the driving causes damage to the cultural environment or disturbs rare plant and animal species. It is evident from these provisions that they state a kind of normal standard of care in the reindeer husbandry, equivalent to common sense. Nevertheless, if those requirements are not complied with, the County Administrative Board may impose such injunctions and prohibitions (förelägande och förbud) as are necessary, however, only after their advice has not been followed. An injunction and prohibition may be attached with a fee.

There are other provisions in the Reindeer Husbandry act that have a direct relevance to environmental protection interests. Below, I will examine the provisions related to the highest number of reindeer allowed and the possibility for the Saami village to manage the reindeer husbandry within its pasture areas.

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1865 Reindeer Husbandry Act, s. 65 a para. 3 & Regulations (1993:384) on the Reindeer Husbandry, s. 10.
1866 SJVFS 1996:121. (The by-laws are not updated and include references to the old Nature Conservation Act, which is repealed). The by-laws refer to other legislation regarding appointed habitat protection areas (biotopskyddsområden) and ancient monuments and remains (fasta fornlämnningar).
1867 SJVFS 1996:121 ss. 4-9. The Swedish Board of Agriculture any grant exceptions from those requirements, if particular circumstances (särskilda skäl) apply. See s. 10 in the by-laws.
1868 Reindeer Husbandry Act, s. 65 a paras. 4-6.
There is a more general provision than section 65 a, in section 65 of the Act. This provision states in general terms that reindeer husbandry shall be pursued with regard taken to other interests, including, for instance, that the gathering and migration of reindeer shall be pursued in herds and where the least degree of damage is caused\textsuperscript{1869}. Even though it is evident that this section from the beginning is aimed at causing a minimum of damage and detriments to other businesses or property, the general statement on precaution towards other interests should today include public environmental interests (allmänna miljöintressen)\textsuperscript{1870}. When drafting the new provision in section 65 a, it was understood as specifying the general obligation stated in section 65 paragraph 1\textsuperscript{1871}.

An important decision is the limit of the highest number of reindeer that each village is allowed to keep on pasture. This decision, made by the County Administrative Board, shall be based primarily on an inventory of the pasture areas and their carrying capacity\textsuperscript{1872}. This is presently not done, primarily due to the difficulties in finding an adequate method for pasture inventory. See further below in section 8.3. Nevertheless, where the County Administrative Board has decided on a total number of reindeer subject to section 15, a Saami village may - in its turn - decide on a limit of the total number of reindeer allowed for each member and other terms for the ownership\textsuperscript{1873}. The Saami village, which is responsible for the reindeer husbandry within the village’s pasture area, also has, thus, some means to supervise and control the husbandry for the common good of the members. If it is necessary to preserve the pasture and otherwise promote the husbandry, this could be an efficient way of reducing the total number of reindeer\textsuperscript{1874}.

The County Administrative Board’s decision concerning the highest number of reindeer allowed is sanctioned. The Board may impose an injunction, together with a fee, that the Saami village shall reduce the number of reindeer. If the Saami village has decided how many reindeer each members may have, an injunction may be issued against those members that do not comply with the village’s decision\textsuperscript{1875}.

The Saami village, as a legal person and an operator of an activity (reindeer husbandry) is bound by the general rules of considerations\textsuperscript{1876}. The Saami village has

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1869} Reindeer Husbandry Act, s. 65.
\item \textsuperscript{1870} In the original preparatory work (Prop. 1971:51) it was not clarified what other interests the husbandry shall pay regard to. Compare the statements in Prop. 1992/93:32, pp. 123-124, which meant that interest of natural conservation and cultural environment are encompassed by the general obligation in paragraph 1.
\item \textsuperscript{1871} Prop. 1992/93:32, p. 186.
\item \textsuperscript{1872} See Prop 1992/93:32, pp. 110-112 & 184. The highest number of reindeer allowed is today not based on such inventory of the pastures (betesinventering). The basis for the decisions differs instead between all three County Administrative Boards and the figures for many Saami villages are decided in the 1940s.
\item \textsuperscript{1873} Reindeer Husbandry Act, s. 35 para. 1.
\item \textsuperscript{1874} However, in recent years the numbers of reindeers allowed has not been exceeded totally, but some Saami villages have occasionally had more reindeers than the allowed within the village. The number of reindeers of each member also varies, which might make it difficult to reduce the number of reindeer equally among the members. See also Reindeer Husbandry Act s. 35 para. 3, where such a decision by the Saami village must not mean that a member’s reindeer husbandry is jeopardised.
\item \textsuperscript{1875} Reindeer Husbandry Act, ss. 35 para. 4.
\item \textsuperscript{1876} Reindeer Husbandry Act, s 9.
\end{itemize}
\end{footnotesize}
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The overall responsibility for the reindeer husbandry within the village and is, thus, pursuing reindeer husbandry within the meaning of chapter 2 of the Code. Therefore, certain requirements apply in relation to the village’s decision on limiting the number of reindeer for each member or deciding on other requirements of the ownership of reindeer.

Above all, the Saami village must make sure that it possesses adequate knowledge so that the environment may be protected against damage and detriment caused by the husbandry. Moreover, all necessary precautions shall be taken in order to prevent, hinder or combat damages and detriments to the environment. Such precautions must be taken as soon as there is reason to believe that the husbandry causes damage or detriment to the environment. In this case, it regards the future availability of good pasture within the pasture areas of the Saami village. The requirement on using “the best possible technique” applies here as well. All those preventive requirements apply, provided that they are not deemed to be unreasonable for the specific reindeer herdsman or the Saami village.

Where the allowed number of reindeer is exceeded in a village and damage or detriment to the ground is caused or is likely to be caused, the Saami village must implement various protective measures, such as reducing the number of reindeer and considering other terms for the ownership. Altogether, an effort to keep the number of reindeer within the limits of what the pasture areas can sustain should have a preventive effect, which is in line with the requirements of precautionary measures expressed in section 3 of chapter 2.

Another way of managing the reindeer husbandry within the Saami village is through the rules (stadgardar) for the village. Here, it is possible to decide on rules that govern in more detail how the reindeer husbandry shall be pursued. Such rules could regard allocation of the pasture area of the village between different groups of reindeer herding members. Such rules should also encompass rules of importance for maintaining a vital pasture, such as, for example, references to cross-country driving plans or preferred management forms (see below). Here, the traditional knowledge related to reindeer husbandry is essential, including, for instance, the character and behaviour of the reindeer and the natural environment within the village’s pasture areas. The support of such knowledge corresponds very well to the

1877 Reindeer Husbandry Act, s. 35 para. 1.
1878 Environmental Code, ch. 2 ss. 2-3.
1879 Environmental Code, ch. 2 s. 3. This requirement means that a technique must be technically and economically possible. Economically possible means that the requirements related to one Saami village shall be compared with what a “normal” village may be burdened with - or a specific enterprise (renskötselföretag) compared with a “normal” reindeer husbandry enterprise. On the provision see further below in subsection 8.2.3.4.
1880 Environmental Code, ch. 2 s. 7. The onus of proof lies on the operator, see ch. 2. s. 1. See further above in subsection 8.2.1.
1881 What other terms for the ownership (innehavet) that the Saami village is authorised to decide on is not explicitly stated. As a possible restriction the preparatory work mentions a provision on age and sex distribution of the herds which could mean that the need for winter pasture declines. See Prop. 1971:51, p. 171.
1882 Environmental Code, ch. 2 s. 3 para. 2.
1883 Reindeer Husbandry Act, s. 38 point 10.
requirements of possessing adequate knowledge and generally the adoption of precautionary measures.\textsuperscript{1885}

8.2.3.3 Environmental Requirements vis-à-vis the Reindeer Herding Right

Next, I will analyse the environmental requirements in relation to the enjoyment of the reindeer herding right. Here, the focus lies on the individual reindeer herders or a specific reindeer husbandry group, not on the Saami village as such. For a reminder of the content of the reindeer herding rights, see above in subsection 2.1.2. To summarise, the right includes, apart from the basic right to graze the reindeer and move between different pasture areas, rights to build structures and buildings necessary for the management of the reindeer, including a family house, and rights to take timbers for such buildings and structures, as well as rights to take fuel and material for handicraft. The right to hunting and fishing is also important. There might be additional sub-rights not explicitly mentioned in the Act, such as rights to gravel and other pits, as well as rights to gather lichen for feeding the reindeer when enclosed.

These sub-rights may be regarded as either activities or measures depending upon whether the right is carried out regularly. Only measures of negligible significance in a single case are exempt from the substantial requirements set out in chapter 2\textsuperscript{1886}. For example, the right to fell trees with lichen as a measure in aid, is probably to be regarded as a measure, as probably is the right to build fences and enclosures or to build a store house. In contrast, the basic right to pasture and migration between different areas is to be regarded as an activity, as well as seasonal hunting and fishing.

Even if all requirements inherent in chapter 2 of the Code are relevant in one way or another, there are three provisions of more general applicability. They are the requirements of possessing adequate knowledge, taking all precautionary measures necessary, and choosing a location so that the purpose can be reached with a minimum of damages and detriments to the environment\textsuperscript{1887}. The requirement of localisation is important and is in fact an issue for all land uses (markanvändning). I will examine those accumulatively in relation primarily to the elements of the reindeer herding right as they interact.

Note that the words protection of “human health and the environment” from damage or detriment in the legal text of many of the provisions in chapter 2 is wide. The wording has its equivalent in relation to the purpose of the Code, more closely in paragraph 2 point 1. It includes management of natural resources, protection of cultural environments, and protection of biological diversity, among other things. What is

\textsuperscript{1885} Environmental Code, ch. 2 ss. 2-3.
\textsuperscript{1886} Activities are characterized as something that continues over time, whereas a measure refers to single actions. An important factor for deciding if a specific action is part of the reindeer husbandry as an activity should be whether the action is recurrent over a reasonable time period. To determine whether a measure shall be covered by the rules, the effect and significance of the measure on the environment shall be objectively determined, rather than who is taking the measure. See Environmental Code, ch. 2 s. 1 para. 1 & Prop. 1997/98:45 Part 1, p. 205-206.
\textsuperscript{1887} Environmental Code, ch. 2 ss. 2-4.
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stated in points 2-5 of the mentioned provision is to be understood as meaning how to realise the protection of human health and the environment.\textsuperscript{1888} Hence, the protection awarded to “human health and the environment” is comprehensive, which, for instance, means that the cultural environment is included among the protection aims.

To possess right knowledge is a fundamental requirement from an environmental protection perspective\textsuperscript{1889}. Hence, the reindeer herdsmen must possess adequate knowledge when pursuing reindeer husbandry or any of the elements of the reindeer herding right. Here, the traditional ecological knowledge (TEK) of the Saami must be essential, and hopefully such knowledge is still passed on to the next generation. The requirement of knowledge can be seen as one facet of the general provision of precaution, since this provision is almost all-embracing\textsuperscript{1890}. In great, as well as in small, matters the reindeer herdsmen shall take the necessary precautionary measures to prevent, hinder or combat damage or detriments to human health and the environment. Any precaution is relevant, as long as the damage or detriment is minimised or prevented.

This overarching provision on precaution has a very wide area of application. The protective measures, limitations and other precautionary measures can be of variable sort and extent. The protective measures needed vary according to the danger and range of damages and detriment. The particular area where the negative impact occurs is also relevant, whether the natural environment is particularly vulnerable, such as in the high mountain area. Present pressure and other environmental damage and detriment - past and present - are decisive for the effect on a particular area. The choice of preventive and protective measures will sometimes conflict\textsuperscript{1892}. Such matters must be solved on a case to case basis in relation to the effects on human health and environment arising from the activity or measure. On the whole, the idea of an open clause provision is to promote individual cost efficiency. The operator in the individual case has means to choose from a range of precautionary measures that gives adequate protection within a specific frame of cost burdens.\textsuperscript{1893}

Moreover, the buildings and structures necessary for reindeer husbandry shall be located at a site suitable with regard to the general goal of promoting sustainability. The requirement for choosing a suitable site applies for all activities and measures, unless the site shall be used on a purely temporary basis\textsuperscript{1894}. This general requirement applies to the choice of sites for all land and water uses, and a site shall always be chosen in such a way as to make it possible to achieve the purpose of the activity or measure with a minimum of damage or detriment to the environment\textsuperscript{1895}.

\textsuperscript{1888} Prop. 1997/98:45 Del 2, pp. 7-8.
\textsuperscript{1889} Environmental Code, ch. 2 s. 2.
\textsuperscript{1890} Environmental Code, ch. 2 s. 3 para. 1.
\textsuperscript{1891} See also Prop. 1997/98:45 Del 2, p. 15.
\textsuperscript{1892} Prop. 1987/98:45 Part 2, p. 16.
\textsuperscript{1893} Michanek & Zetterberg (2004) 
\textit{Den svenska miljörätten}, p. 118.
\textsuperscript{1894} Environmental Code, ch. 2 s. 4 para. 1. The so-called natural resource management provisions (hushållningsbestämmelserna) in chapters three and four shall not be applied in this situation. Compare ch 1 s. 2.
\textsuperscript{1895} Environmental Code, ch. 2 s. 4 para. 2.
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Taken together, those specific requirements may, for instance, regard the choice of migration route, the size of the herds during different periods of the year, to move or rebuild fences and enclosures necessary to minimise the risk for erosion, taking the slightly longer way to a store house in order to avoid cross-country driving on a marshy tract, avoid felling trees on parts of the forest important for certain sensitive species, and taking care of waste or establishing a forum for distributing TEK on reindeer husbandry and fish preservation. The list could be very long. Here, I aim only to highlight certain elements of reindeer husbandry that have relevance for the requirements in chapter 2.

The general requirement on localisation applies, for instance, to the choice of paths to migration routes; taking timber, fuel and material for handicraft; the choice of appropriate pasture areas for the reindeer related to the season; building temporary structures; and extracting gravel or other similar resources. Regarding permanent buildings and structures, apart from this general requirement on localisation, the localisation shall be suitable with regard to the Code’s purpose of promoting sustainability. When, for instance, slaughterhouses or fences are to be built, the site must be suitable, so that that the environment in general is protected against damage and detrims. Moreover, the material necessary for the building or structure should be reused where possible or regard should otherwise be paid to an economising of material necessary.

To clarify, the provision on a suitable location for an activity or measure applies equally to present and ongoing activities, even if expanded or changed. The question on suitable sites for activities or measures implies an account of possible locations. However, the general obligation in the second paragraph is limited by the fact that the purpose of the activity or measure must be achievable. Grazing of reindeer on locations where the food supply for the reindeer is very scarce jeopardises the husbandry as such. A suitable site for extraction of gravel must in fact include gravel. It should also be noted here that, if specific precautionary measures are undertaken in order to minimise damage and detrments, a site for an activity or measure might become suitable as a result.

Importantly, precautionary measures of different kinds must be taken as soon as there is reason to believe that the activity or measure may cause damage or detriment to human health or the environment. Omission is not acceptable in such circumstances. Even if the knowledge is not complete regarding the damage or detriment occurring or likely to occur, appropriate precautionary measures must be taken.

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1896 Environmental Code, ch. 2 s. 4 para. 1. The so-called natural resource management provisions (hushållnings-bestämmelserna) in chapters three and four shall not be applied in this situation. Compare ch 1 s. 2.
1897 Environmental Code, ch. 2 s. 5.
1899 See Bengtsson, Bjällås, Rubensson & Strömberg Miljöbalven. En kommentar, Del 1, pp. 2:19-20.
1881 Environmental Code, ch. 2 s. 3 para. 2.
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The preparatory work is rather silent regarding the degree of risk that invokes the obligation to take preventive or protective measures. There is an uncertainty related to information on which decisions are based. Scientific information and data are often scarce and disparate. Information deficits could, for instance, concern effects on different pollutions in water, land or on biological life, as well as impacts on wildlife. What could be said is that there is no need for precise evidence of effects from a specific activity or measure. There must, however, be some link between an activity or measure and an environmental effect. The possible risk must be based on some knowledge or data and not merely be based on groundless assertions. Saami TEK should also qualify as asserted knowledge to decide whether precautionary measures shall be taken.

In the reindeer husbandry as a whole, regard must be paid to conservation (hushållning) of raw materials and energy.\(^{1902}\) This requirement has most relevance in relation to the increased use of motor vehicles in the management of the reindeers, but is perhaps also relevant when building houses and other structures. If possible, reuse and recycling of raw materials shall be applied. The general rules of consideration in sections 5 and 6 shall be analysed further below corresponding to the motorisation of the management of the reindeer. There is also a general responsibility concerning the occurrence of damage and detriments. A reindeer herdsman or the Saami village in such cases is responsible until the damage or detriment has ceased or until it is remedied to a reasonable extent\(^{1903}\). The burden of proof here also rests on the person who has pursued the husbandry or the measure that has caused the damage or detriment to the environment\(^{1904}\).

In sum, the individual reindeer herdsman or group of herdsmen is obliged to comply with the requirements stated among the provisions in chapter 2 of the Code. Those requirements can be very shifting and of different degree. However, only supervision can evoke the question of whether there is a compliance with the requirements\(^{1905}\). Then, the burden of proof rests on the operator, that is, the reindeer herdsman or the Saami village\(^{1906}\). The requirements are applicable where not deemed unreasonable\(^{1907}\). The reindeer herdsman or the Saami village must then prove that the requirements for protection of the environment altogether or in relation to a specific provision are unreasonable and that the requirements must be narrowed. The supervisory authority has authority to impose injunctions and prohibitions where they are necessary\(^{1908}\). A matter could, for instance, regard the appropriateness of a specific localisation of a building.

8.2.3.4 The Rationalisation and Motorisation of Reindeer Husbandry

Hereunder, I analyse the environmental requirements in relation to the motorisation and rationalisation of the reindeer husbandry. The use of motor vehicles is not part of

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1902 Environmental Code, ch. 2 s. 5.
1903 Environmental Code, ch. 2 s. 8.
1904 Responsibility for personal damages is not included.
1905 If not, the activities and measures are criminal with respect to chapter 29 of the Code.
1906 Environmental Code, ch. 2 s. 1 para. 1.
1907 The Environmental Code, ch. 2 s. 7.
1908 With support of ch. 29 ss. 9 & 14.
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the reindeer herding right as such, but should be understood as an aspect of the modernisation of the management of the reindeer. Additionally, with the enactment of the present Reindeer Husbandry Act, efforts were made to rationalise the husbandry in order to increase the profitability of the business as a whole.1909

Cross-country driving is subject to restrictions in statute1910. The principal rule (huvudregeln) is that cross-country driving is prohibited on bare ground. However, reindeer herdsmen are exempt from the prohibition, if driving is necessary in the reindeer husbandry. The exemption applies to maintenance of structures, guarding of the reindeer, gathering of the herd just before marking, slaughter or migration, as well as if needed for the livelihood of the reindeer herdsmen in direct connection with the husbandry.1911

The purpose of the legislation on cross-country driving is to prohibit damage and detriments to public interests, such as land, vegetation, fauna and recreational activities. The Act on Cross-Country Driving can therefore be characterised as a prohibition statute (förbudslag).

When driving on bare ground in the high mountain above the tree line (kalfjället), special regard must be taken in order to prevent causing damage to the natural environment and to avoid noise and other detriments of significance1912. There is also a specific provision in the by-laws, as already mentioned, applicable to driving with cross-country vehicles on bare ground for the reindeer husbandry. However, the exemption does not allow driving in areas of great value for biological diversity or the cultural environment, where such driving damages cultural values or imposes detriments for rare flora and fauna1913.

Cross-country driving on snow-covered ground is allowed in principle, apart from driving on snow-covered land with plants or young trees1914 or on snow-covered agricultural land. Driving on such lands is allowed only if it is clear that the driving

1909 See Prop. 1971:51, pp. 29-30 & 73. A different organisation with larger operational units (driftsenheter) was seen as necessary together with an increased use of motor vehicles and other technical aids.

1910 It is applicable to all areas that are not roads and includes all motor vehicles, such as motor cycles, cars, mopeds, tractors, snow scooters and other terrain vehicles. See Regulations (2001:651) on Traffic Definitions, s. 2 and Act (2001:559) on Traffic Definitions, s. 2.


1912 Regulations on Cross-Country Driving, s. 2. See also the General Advise (Allmänna råd) from the Swedish National Protection Agency, Terrängkörning – Handbok med allmänna råd (2005), ISBN 91-620-0136-1, p. 14. As an advice, this section should be understood in a manner that driving on ground that is sensitive shall be avoided. Vehicles used should have a highest pressure on the ground of 15 kPa, and the noise should not be higher than 85 dBA. Damages to the natural environment should mean damage to the ground and vegetation and damage and detriments on wildlife. Other detriments of significance should include pollution to land, water or air that could have negative impacts on the natural environment or recreational activities (friluftsliv). See the document at http://www.naturvardsverket.se/dokument/omverket/remisser/remisdok/terrang/pdf/handbok.pdf.

1913 SJVFS 1996:121 s. 9.

1914 If the plants or young trees are lower then two meters in average above the snow cover the prohibition is valid. See Regulations on Cross-Country Driving s. 4.
can occur without damaging the plants, young trees or the cultivated land.\textsuperscript{1915} Note that, in parts of the mountain areas, the prohibition of cross-country driving is subject to Government regulation. Here, driving might, for certain areas, be totally prohibited or allowed only on public snow mobile tracks (allmän skoterled). Cross-country driving for the purpose of reindeer husbandry is, nevertheless, allowed.\textsuperscript{1916} Cross-country driving, particularly on bare ground, causes damage and detriment to the environment, foremost to the vegetation. It also generates noise and pollution and may disturb wildlife. Hence, the activity is bound by the environmental requirements in chapter 2 of the Code. As noted previously, there are especially three requirements of general applicability: knowledge, precaution and localisation. Adequate knowledge of the natural environment in the area is necessary, so that the reindeer herders may assess alternative routes. Precautionary measures must be taken, which in relation to routings should mean to take the safer way with respect to potential damage that may be caused. It may also include using a vehicle only if absolutely necessary or to develop a specific plan on cross-country driving (terrängkörningsplan) for the Saami village or for a certain group of reindeer herders.\textsuperscript{1917}

Among the provisions in chapter 2, there is a specific provision applicable only to professional activities. It is the requirement for using the “best possible technique”.\textsuperscript{1918} The legal requirement encompasses the entirety of a particular activity, here the reindeer husbandry, such as the technology used, and in what manner a building, structure or plant is designed, constructed, built, pursued, maintained and phased out or wound up. In short, the term encompasses all of the different aspects related to the activity. It regards education, supervision and control of the activity, as well as the use of less dangerous chemicals, materials and energy.\textsuperscript{1919} It is obvious that the provision is formed with a “classical” industry in mind and, even if the husbandry as such is bound by the requirement, it does not directly correspond to all requirements inherent in the concept. Nevertheless, it is applicable to many parts of the husbandry, not the least of which is in relation to the motorisation of the husbandry, including the use of aircrafts (see below).

There is no further statutory definition or explanation of what “best possible technique” means. The concept exists also in relation to two EC directives, but with slightly different wordings.\textsuperscript{1920} According to the preparatory works, the concept of best possible technique shall mean that the technique shall be industrially possible to use in the relevant industry sector, technically and economically (teknisk möjlig/ekonomiskt...
The requirement to use the best possible technique could, for instance, imply an 
obligation to use four-stroke engines, since they are more fuel-efficient and generate 
less noise. The use of a different fuel that is better for the environment lies also 
within the requirements. In conformity with the general obligation on precaution, the 
obligation to use the best possible technique must be weighed with the risk in mind. 
Precautionary measures, which include the technique used, shall be taken as soon as 
there is cause to assume that the reindeer husbandry causes damage or detriments. However, 
the requirement of using the best possible technique is difficult to measure 
in relation to what is “economically possible.” This is weighed with a “normal” 
business within a certain sector, meaning a “normal” Saami village or reindeer 
husbandry enterprise (renskötselföretag). The sector here is small, since the reindeer 
husbandry operates under a business monopoly.

However, in relation to supervision, section 7 is probably evoked, which means 
that a requirement is to be balanced according to a cost-benefit analysis; the benefit of 
protective measures compared with the costs of such measures. In other words, the 
requirement of investing in four-stroke engines found in motor cycles and/or snow 
mobiles, vehicles with low ground pressure or other tiers shall be environmentally 
justified (miljömässigt motiverad) without being unreasonable from an economic 
perspective. The burden of proof lies on the reindeer herdsmen.

There is another requirement relevant, not yet mentioned, that regards the use 
of chemical products. All such products used within the husbandry, such as fuel, 
oils, paint and cleaning agents that involve risks to human health and the 
environment, shall be substituted if another available product is less dangerous. 
Certain prerequisites must be fulfilled if the provision shall apply in a single case. 
Firstly, there must be an alternative product of lesser danger to human health or the 
environment. Even the risk of an adverse impact on human health and the
environment shall lead to an obligation to consider alternatives. The burden of proof in this respect means that the reindeer herdsmen or the Saami village must show either that there is no alternative product or that the alternative product is not less dangerous. Secondly, it must be possible to reach the same purpose with the alternative product. Conversely, the burden of proof in this respect means that the reindeer herdsmen or the Saami village must show either that there is no alternative product or that the alternative product is not less dangerous. Secondly, it must be possible to reach the same purpose with the alternative product.1927 Contrary to the other provisions in chapter 2, violation of the provision on product choice is directly sanctioned1928.

Apart from using snowmobiles, motor cycles, and similar vehicles, the Saami village also occasionally or regularly uses helicopters to gather the herds, for instance, on the eve of migration to another pasture area. For the same purpose, a lorry is in some Saami villages used to move the reindeer between certain pasture areas1929. The same precautionary measures as presented above apply here also; minimising the use and using the best possible technique to reduce noise and pollution. Such legal requirements must be taken if not unreasonable.

Noise, especially in relation to the mountain areas, has come to be regarded as an increased problem and a detriment to wildlife and to people who wish to experience silence. It has recently been estimated that, of the 8.6 million hectare of the mountain area, twenty percent is affected by noise1930. Subject to the national environmental quality target, “a magnificent mountain landscape,” there is a goal to minimise the noise from motor vehicles and noise from aircraft. See below in subsection 9.2.3.5. In the context of reindeer husbandry, this would mean a substitution, for instance, of older snow mobiles to four stroke engines. There has also been a discussion of more restrictions for aircraft in the mountain region, but, so far, no legislative amendments have been made.1931. There are some restrictions in national parks, but the reindeer husbandry is commonly exempted from prohibitions to land or low flying aircraft1932.

The preconditions for reindeer husbandry have been changed drastically in the twentieth century. The increased use of motor vehicles in the husbandry has developed roughly during the last fifty years. The management form of the husbandry, from a so-called intensive husbandry (intensiv renskötsel) to a more extensive use of the pasture areas, took place in the very beginning of the twentieth century. Presently, reindeer husbandry is pursued in a manner that allows the reindeer or smaller herds to move more freely (extensiv renskötsel). Today, the number of

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1927 The assessment here is often complicated in a particular case by the fact that many products are dangerous in different ways. For instance, regarding different fuels, one fuel contains more heavy metals and another fuel adds to the acidification in nature. See also Michanek, Gabriel & Zetterberg, Charlotta (2004) Den svenska miljörätten, p. 130.
1928 Environmental Code, ch. 29 s. 3. The prerequisite for the penalty provision to apply is that the handling must have been deliberate (uppsåtlig) or with gross negligence (grov aktsamhet). The crime is environmentally hazardous handling of chemicals and could at maximum render two years imprisonment.
1929 The normal migration routes might have been lost due to infrastructure developments. The distance between certain pasture areas might also be long and movements by lorry are preferred to sustain a good slather weight of the reindeer.
1931 See for instance a report by the Environmental Protection Agency and the Civil Aviation Agency (Luftfartsverket): NV:s dnr. 104-5268-03 Rv, dated 2003-09-30.
1932 See further in subsection 9.3.2.
reindeer herdsman is relatively small, which means that, in order, to guard and survey the herd, there are long distances to cover by cross-country driving. It means also that it is more difficult to guard the herds in the presence of predators close to or within the pasture area. Altogether, this management form must, however, mean that detriments from tramping and grazing primarily occur along fences and migration routes and sometimes locally on sites due to other factors.

A more intensive use of the pasture areas similar to the older forms of husbandry was due to the reindeer being kept together and guarded more frequently, which also caused other impacts on the vegetation. Records from archaeological findings support this general view. From this perspective – as well as subject to other factors - a return to an older form of management might not be desirable.

Nonetheless, the management of the reindeer in general might be fruitful to discuss for the future of the husbandry. It should, however, be noted that the natural environment and topography varies greatly between each Saami village and within the village. Therefore, an assessment of possible management forms must be conducted with each unique natural setting in mind. Since the requirement in this respect lies on the Saami village, as well as on each reindeer herdsman, the assessment and possible adjustments shall be made there.

8.3 Other Kinds of Environmentally Important Requirements on the Reindeer Husbandry

8.3.1 Introduction

Under this section, I analyse other requirements subject to the reindeer husbandry that are environmentally important, particularly with respect to the reindeer herding right. There are a considerable number of issues relating to the regulation and control of the reindeer husbandry that are of relevance. Therefore, the various provisions have been grouped in specific categories to create an easy outline. See the subsections below. Provisions and instruments directly relevant to environmental protection are in focus, even if a few other relevant provisions are analysed accordingly.

Noticeable from the analysis below, many of the provisions in the Reindeer Husbandry Act are problematic, and the analysis of what is valid law in certain respects is not easily done, especially regarding the provision on amendments to the village borders. Even if the authority in this respect is transferred from the County Administrative Board to the Saami Parliament from the 1st of July of this year, the fundamental paragraph is not amended. Hence, the same problems will endure until the provision is amended. Thus, parts of this heading should be read together with the more general analysis and discussion of the nature of Saami customary rights, particularly the reindeer herding right, in sections 7.2 and 7.3 above, but especially with respect to subsection 7.3.2.1. Some overlapping is, however, unavoidable.
8.3.2 The Saami Village and its Borders

Conducting reindeer husbandry outside of the membership of Saami villages is not allowed – the organisation is compulsory (organisationstvång).1933 The husbandry must be carried out through the Saami village, which is both an economic association and a geographical area1934. The Saami village has as its objective for the common benefit of the members to carry out the reindeer husbandry within the pasture area of the village. The village must particularly organise and manage the husbandry in the best economical manner. The reindeer husbandry is, furthermore, the only economic business that the village is allowed to carry on1935. Other activities, such as tourism, must be organised through other association forms.

The Saami village and its regulations (stadgar) must be registered by the County Administrative Board in order to function as a legal person with subsequent rights and obligations. Amendments of the regulation are also subject to approval by the County Administrative Board.1936 The Board shall not try the appropriateness of the regulations, but merely that the regulations are legally correct and have been established in prescribed manner.1937 Presently, the reindeer herding members have secondary and unlimited obligation to cover for monetary loss (sekundärt och personligt betalningsansvar) within the Saami village1938. Some Saami villages are unfortunately burdened with large debts due to legal expenses and court costs (rättegångskostnader), so the issue of bankruptcy is not too unlikely.

The village must carry out, maintain and run the construction and buildings necessary for the husbandry.1939 In such activities, the Saami village is bound by the general rules of considerations in the Code, as I have previously explained in subsection 8.2.3. The Saami village and its Board represent the members in matters concerning the reindeer herding right or common interests with relevance for the reindeer husbandry generally.1940 Therefore, it is important that the village, and its Board...

1933 Reindeer Husbandry Act, particularly s. 6. See also Prop. 1971:51, pp. 118 and 35-36. None of the reindeer herdsmen are, according to the preparatory works, allowed to herd reindeer outside of the Saami village if it would hinder a rational use of the pasture for the common benefit of the village. The right to reindeer husbandry shall, furthermore, not be understood as an individual right, but rather a collective right for those involved in the husbandry within the same village. The right to perform reindeer husbandry has also long since been adherent with the Saami village (the former Lap village).

1934 Reindeer Husbandry Act, s. 39.

1935 Reindeer Husbandry Act, s. 9 para. 3. This restriction has long since been disputed by the Saami villages. Historically, the recipe for survival has been to conduct a mixed variety of businesses apart from the reindeer husbandry. In other association forms (associationsrättsliga former), however, the Saami could carry out tourism activities, refinements of natural resources, processing industries, etc. There is a proposal to lift this restriction. See SOU 2001:101 En ny rennärinspolitik, pp. 187-190.

1936 Reindeer Husbandry Act, s. 39.


1938 Reindeer Husbandry Act, ss. 40, 44 & 45. There is a suggestion to lift this responsibility for the reindeer herding members. The provisions will then be the same as for economic associations (ekonomiska föreningar) in general. See SOU 2001:101, pp. 178-183 & 191-192.

1939 Reindeer Husbandry Act, ss. 9 & 48.

1940 Reindeer Husbandry Act, ss. 10 & 48.
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particularly, function as intended. Thus, if a Saami village is unable to establish a Board, the County Administrative Board has the authority, if requested, to appoint a trustee (syssloman) to handle the matters of the village – if a member’s right or other person’s rights are dependent upon the existence of a functioning Board\footnote{Reindeer Husbandry Act, s. 50. See also the decision by the Administrative Court of Appeal in Sundsvall: 2106-1999, where a trustee defended a decision by the former Board of the village regarding the highest number of reindeer allowed for the members.}.

Furthermore, the County Administrative Board has the authority to appoint a trustee (syssloman) where the reindeer husbandry is defective (bristfällig)\footnote{Reindeer Husbandry Act, s. 72.}. Such radical compulsory administration is the final means to make a reorganisation of a particular village. However, the County Administrative Board shall primarily seek an agreement on rectification within a certain time frame, but only if the matter is evoked by a member of the village or by other persons who suffer from an infringement of a right\footnote{Property owners, members of other Saami villages, etc.}. If an agreement on the time frame cannot be reached, the County Administrative Board can thereafter appoint a trustee to take care of the husbandry in the Saami village\footnote{See also Prop. 1971:51, pp. 190-193.}.

The above described authority for the County Administrative Board to appoint a trustee is the ultimate means to restore very serious malfunctions of a Saami village and its reindeer husbandry. Nonetheless, it is vital that problems arising from a dysfunctional village be easily resolved for the benefit of the members and additionally to avoid environmental detriments or damages that can be caused by poor management. Since there are competing uses of the areas, the clashes in interests will probably be less accentuated when a Saami village is managed properly.

Areas where the reindeer are allowed to graze the year round have long since been allocated between the Saami villages (the former Lap villages) into specific village areas (byområden). This allocation and division was done with the enactment of the first legislation\footnote{(SFS 1886:38) Act on the Swedish Saami Rights to Reindeer Pasture in Sweden and Regarding Reindeer Markings, s. 5. In relation to preparatory works, it was stated that the Board’s decision on village boarders may be reviewed and the borders should therefore not be understood as fixed for all time. See Prop. 1992/93:32, p. 110.}. From the 1st of July of this year, the Saami Parliament has the authority to divide the areas into village areas\footnote{Reindeer Husbandry Act, s. 7 para. 1 & Prop. 2005/06:86, p. 5. See also SOU 2001:101, pp. 75 & 165-168.}. Note, however, that I refer below to the County Administrative Board as the competent authority. The village areas may also include winter pasture areas, and some parts of the village areas may - by way of exception - overlap two or more Saami villages\footnote{See the Reindeer Husbandry Act, ss. 6-7. It is not uncommon that pasture areas are overlapping, especially the winter pasture areas. These areas are furthermore ordinarily not subject to fixed boarders in the meaning of the Act.}. In general, the division of village areas shall be done so that the areas become suitable for its purpose\footnote{Reindeer Husbandry Act, s. 7 para. 2. See above in subsection 7.3.2.1 for the whole paragraph.}.

Importantly, there is a link between the reindeer herding right and the sustainable use of the pasture areas. Generally, environmental protection (mainly the ground cover) and the husbandry are promoted by borders following natural
demarcations, as well as the customary right attaching to specified areas, which is the link between subject and object. Natural demarcations, such as rivers, streams and mountain ridges, make the reindeer husbandry less difficult\textsuperscript{1949}. Since the reindeer are a semi domesticated animal with strong habits, natural demarcations generally facilitate the husbandry. Without such demarcations or fences, the herds become easily intermingled between Saami villages\textsuperscript{1950}. Fences are otherwise more extensively needed and ground damages due to trampling along the fences will probably become an increasing problem\textsuperscript{1951}. In fact, the “historical” division of land and water areas for the reindeer husbandry (the former Lap village) seems to have normally been drawn according to such nature characteristics\textsuperscript{1952}. There are reasons to assume that the old village ordinances (byordningarna), established by the County Administrative Boards, extensively used natural demarcations to roughly determine the pasture area as well as allowing that the division largely be based on traditional uses\textsuperscript{1953}.

Note here also that the preparatory works state that the County Administrative Board in a particular case should assess whether it is possible to create better conditions for a rational reindeer husbandry with larger or smaller adjustments of the borders\textsuperscript{1954}. This approach seems not to correspond very well with keeping fixed and customary borders based upon natural demarcations. Nevertheless, the objective behind the new statute was the implementation of a more rational structure of the husbandry and its organisation. Nevertheless, it is doubtful whether this approach to rationality is compatible with the present understanding of the nature of the reindeer herding right as being based on immemorial prescription\textsuperscript{1955}.

With respect to the cases referred to previously in subsection 7.3.2.1, both claimants and respondents argued from different points of view that the new borders were not suitable for their purpose. One of the cases, the Sörkaitum case, concerned damaged

\textsuperscript{1949} The same problem is also evident in Norway, where a lack of natural demarcations leads to a mixing of reindeer from different herds and to ground deterioration (slitage). See, for instance, Helander, Elina (2004) \textit{Samiska rättuppfattningar}, Juridica Lapponica 30, p. 48.

\textsuperscript{1950} From a sustainability perspective, it seems generally better to allow only one village to graze in an area. Changes, detriments and damages to the ground and to the environment in large are easier to assess and observe if only one village use an area. However, overlapping customary rights to a certain area may hinder such divisions.

\textsuperscript{1951} There is a short discussion of village areas and the use of natural demarcations instead of fences in the proposal by the Commission for Reindeer Husbandry Policy (Remäringspolitiska kommittén). See SOU 2001:101, p. 165.

\textsuperscript{1952} See, for instance, Prop. 1971:51, p. 36.

\textsuperscript{1953} I would imagine that the disputes over village boarders and the difficulties for the Board to assess the suitability of the village areas would substantially decrease, if natural demarcations where more extensively used (where suitable and possible). The reindeer herding rights to specific areas must then be observed and acknowledged, as I argue below in subsection 7.3.2.1.


\textsuperscript{1955} The ruling of the so-called Taxed Mountains case was released in 1981. The preparatory works acknowledged the on-going case, but could naturally not take a particular stance. See Prop. 1971:51, for instance at pp. 60 & 67.
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The County Administrative Board had decided to change the division of pasture areas for several villages. The facts behind the Board’s decision were claims from one village (Sörkaitum Saami village) sharing a pasture with another that the cooperation was insufficient, which spoiled the pasture. The overlapping pasture area used by the two Saami villages had resulted in less and damaged winter pasture for the claimants. The case was appealed to the Supreme Administrative Court, but the Court did not grant an appeal, which means that the decision by the Administrative Court of Appeal abides (står fast) 1957.

As with other cases previously discussed, this particular case regarded issues on the pasture availability, the need for pasture and customary rights to different areas. The root of the case concerned an administrative decision by the County Administrative Board in 1997, changing the present boundaries and allocation of pasture for a number of villages; one village had complained during some past years that a part of their winter pasture area, an area shared with another village who used it as summer pasture, was damaged and that the cooperation between the two villages had been unsatisfactory. The Administrative Court of Appeal ruled, like the County Administrative Court, that the borders of the pasture areas and situation before the new decision by the Board would apply. The reasons and proof for excluding one village from its summer grazing area was not sufficient. On the whole, the need of pasture of the other concerned villages could not motivate an amendment to the situation applicable before the decision in dispute.

In the discussion of a suitable division and fixing of boundaries, the Administrative Court of Appeal said, firstly, that, since the pasture inventory presented in the case did not cover the whole of the pasture areas for all villages concerned, it could not have significant weight in the allocation of pasture areas. Secondly, while the Reindeer Husbandry Act states that the reindeer pasture right belongs to the Saami people and is based on immemorial prescription, claimed customary rights by a certain Saami village cannot be the only factor determining such rights (bruksrätt) to a particular area. Instead, the claimed reindeer pasture right, established or not, may be one of the factors determinative for a consideration (bedömning) of whether a pasture area becomes appropriate for its purpose according to section 7 in the Act. The customary right of a certain village may, thus, be significant, but not alone determinative. In this particular case, the claims of customary rights (bättre rätt) to certain areas by the different villages overlapped. Therefore, the information presented in the case did not support that any of the villages had stronger customary rights to the areas in question than others.

The issue of spoilt and damaged pasture was, hence, raised in the Sörkaitum case. The reasoning of a suitable division of village areas did not, however, include environmental considerations. Despite asserted pasture damages, due to trampling and overgrazing, as well as unclear customary rights in the disputed area, the Administrative Court of Appeal concluded that the preconditions before the amendments of the pasture boundaries decided by the County Administrative Board

1957 Administrative Court of Appeal in Sundsvall, case No. 1966-1998 & 2061--62-1998 decided in 2001-07-06. See also the Supreme Administrative Court case No. 4931—4933-2001 where the Court did not grant the appeal. The Administrative Court of Appeal decision thus abides (står fast).

1955 See the Supreme Administrative Court case No. 4931—4933-2001.
would apply once again. This meant a return to overlapping pasture areas for the two villages. In sum, the Court found that there was a lack of evidence supporting the assertion by the County Administrative Board and Sörkaitum that the Gällivare Saami village would have spoiled the winter pasture. It might have been possible to challenge this decision on the basis of insufficient investigation, because the nature of the matter required more knowledge.

Nevertheless, the literal meaning of section 7 broadly states that a village area shall be suitable for reindeer husbandry with regard to pasture availability and other circumstances. Thus, availability of good pasture is directly mentioned, but the provision does not say anything explicitly of the relationships between or needs of different Saami villages. Nevertheless, the words imply that, inherent in this suitability assessment, the pasture availability in a larger area should be assessed comprising of two or more Saami villages. On the one hand, this is natural, since each Saami village needs sufficient areas and pasture of different types, such as adequate migration routes, calving grounds and winter pasture. Here, existing pasture inventories could support an assessment of the pasture availability referred to in the provision, assuring that the different village areas comprise the different types of pasture needed to be suitable for reindeer husbandry.

On the other hand, I have above argued (see subsection 7.3.2.1) that the customary rights attached to specific pasture areas, chiefly the Saami village’s pasture areas, should form the basis of the decision for dividing village areas. And as explained above, natural demarcations facilitate environmental concerns as well as the husbandry generally in the decision-making on suitable village boarders. To conclude once again, the interpretation and application of section 7 is far from uncomplicated and an amendment would be highly recommended.

Moreover, the Gällivare village had breeding land (kalvningsland) in the disputed area and, additionally, the need of the other Saami villages did not on the whole motivate a change of the boarders that applied before the Boards’ decision was taken.

Administrative Court Procedure Act (1971:291), s. 8.

In the Sörkaitum case, the Court supported that the decision could be done with pasture inventories as a base. What the Court means by that is not so clear, but it is safe to assume that, with a full inventory as a base for the decision, it becomes easier to assess the needs of pasture by concerned villages. In this case, the inventory covered only small portions of the areas. Thus, the lack of knowledge meant that the inventory could not be of significant weight.

It will of course be more difficult when the rights are unclear. So, where the customary rights are overlapping or otherwise in dispute, an effort should be made to clarify the rights. I do not mean, however, that the matter should be left to the Saami villages entirely to bring a case before the civil court. Another system, where the State takes a more active responsibility would be preferable, for instance the establishment of a specific quasi-judicial tribunal similar to that established under New Zealand law. See above in subsection 3.1.1.2.

See also further in Lundmark, Lennart (2006) Samernas skatteland, pp. 190-200, which explains historical transitions in the reindeer husbandry and gradual changes in the size of pasture areas.

The large discretion left to now the Saami Parliament can be questioned in comparison to other businesses. Other economic associations or businesses are normally opposed to such strong administrative authority. One may also wonder whether the division between the two court instances (general courts and general administrative courts) is appropriate in cases like these. I see this as troublesome, as the matter cannot be completely solved where overlapping claims or unclear reindeer herding rights are advocated. These cases comprise a mix between civil law (claimed reindeer herding

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However, the preparatory works acknowledge that the issue of boarders for the Saami villages should be solved after taking into account the villages’ viewpoint. This is a very important point. Section 7 is also now amended by the insertion of two paragraphs to include formally consultations with the villages before a decision to amend village borders is made. Property owners also have a right to be involved in the consultation.

8.3.3 The Pasture Area and the Highest Number of Reindeer Allowed

According to the Reindeer Husbandry Act, the whole pasture area in Sweden is divided into two categories: the year-round-areas, where husbandry is allowed all year, and winter pasture areas, where husbandry is allowed between the 1st of October until the 30th of April. This system was established in the very first legislation regulating reindeer husbandry. The County Administrative Board has authority to prolong the grazing period on the winter pasture area if needed due to unfavourable weather, pasture conditions, or other particular reason (annat särskilt skäl). This means that a Saami village, if necessary, may request such prolongation of grazing time on the winter pasture area.

Keeping reindeer outside of the reindeer pasture area is sanctioned. If reindeer are found to graze in an area where reindeer husbandry is not allowed either in the area in question or in the particular area at the present time (October-April), the County Administrative Board has the authority to impose an injunction, a fine, or both to urge the Saami village to move the reindeer. However, the County Administrative Board has the authority to take such a decision only if the matter is brought to its knowledge by a person suffering from damages or detriments of some significance and not ex officio. Additionally, a fine can be added to an injunction only if the Saami village fails after an appropriate time to take care of the reindeer.

The provision aims primarily at reindeer roaming more or less outside of the herds (strövrenar), especially in connection with migration. During recent years, reindeer lingering in areas where reindeer husbandry is not allowed has become a growing problem raised by property owners and other businesses, such as forestry industry, especially during the summertime. This section should also, however, be applicable

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1965 See Prop. 2005/06:86, pp. 5 & 76.
1966 Reindeer Husbandry Act, s. 3.
1967 See the 1886 Act on the Swedish Saami Rights to Pasture in Sweden, s. 1.
1968 Reindeer Husbandry Act, s. 4.
1969 Reindeer Husbandry Act, s. 71.
to reindeer husbandry in general, since the words do not leave out such circumstances.\footnote{Section 71 reads: “Reindeer loitering outside the reindeer pasture area or on lands within this area during time where reindeer husbandry is not permitted…” (Uppehåller sig renar utanför rensköttsområdet eller på mark inom detta område under tid då rensköttsel inte får bedrivas där…).}

The pasture area of a Saami village includes the area of the Saami village as such, together with other areas used by the village for the reindeer husbandry.\footnote{Reindeer Husbandry Act, s. 8.} These additional areas normally comprise the winter pasture areas. The definition of the pasture area of Saami villages is of legal importance, since the exercise of the reindeer herding right, including the right to hunt and fish, is allowed only within the pasture area with a few exceptions. In fact, there is a rather obvious link between the size and quality of the pasture area of a Saami village and the maximum number of reindeer that could be sustained in a shorter and longer time period. The availability and quality of the pasture within the pasture area of a particular Saami village should, thus, form the basis of the highest number of reindeer allowed for that Saami village.

That this is not the case presently has been described earlier. Presently, the facts behind the decisions in all three County Administrative Boards differ. In principle, only the decision by the County Administrative Board of Jämtland has been taken with a basis in a pasture inventory and according to s. 15 (inventory by aircraft done in the beginning of the 1970s). In the County of Västerbotten, the decision on a “ceiling” was taken in 2003 according to s. 15, but here negotiations between Saami villages and other stakeholders formed the basis for the decision. In the County of Norrbotten, with the majority of the Saami villages, the figures on the total number of reindeer allowed are mainly from the 1940s. The figures here are included in the village ordinance (byordningar).

In other words, the carrying capacity of the pasture should be determinative for the number of reindeer allowed to graze on the pasture. Nonetheless, it should be mentioned again that the size of the herds varies greatly from year to year, mainly due to the availability of good winter pasture. Still, it is of importance due to pasture resilience and general ecological concerns not allowing the herds grow too large, especially as the use of artificial feeding (stödutfordring) seems to have become more common.

Ever since the first reindeer husbandry statute in 1886, provisions that concern the number of reindeer have been in existence\footnote{The 1886 Act lacked an independent provision, and the matter was instead regulated through provisions in the Regulations. With the 1898 Act, there was a specific provision empowering the State authorities directly to decide on a reduction of the number of reindeer kept to graze within a Saami village (see s. 8 para. 1.). In the 1928 Act, the number of reindeer allowed to graze on certain pasture areas was acknowledged through the village ordinance (byordningen) (see s. 11 para. 2.). Note that the total number of reindeer allowed to graze is commonly included in these village ordinances, but it has never been mandatory. To my knowledge, the “roof” of the number of reindeer allowed in the Saami villages in the County of Norrbotten is still largely based on such decisions made in the 1940s.}. The early regulation was due to
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problems that had occurred. In the present statute (the Reindeer Husbandry Act), the County Administrative Board determines the number of reindeer allowed for each Saami village. Section 15 paragraphs 2 and 3 of the Act states that:

The County Administrative Board decides the highest number of reindeer allowed that may be kept on pasture within the pasture area of the village. Regard shall accordingly be taken to other interests.

If necessary for sustaining the pasture or otherwise promoting the reindeer husbandry, the County Administrative Board may decide on limitation of the pasture right.

The legal text merely states that the County Administrative Board is the competent authority in respect to the decision on the highest number of reindeer allowed. Hence, the Board is not explicitly bound to decide on a “roof” number of reindeer allowed. Subject to the third paragraph, the County Administrative Board has authority to impose limitations on the pasture right (betesrätten), if necessary for conservation of the pasture or if otherwise necessary for promoting the reindeer husbandry. This is an important provision, which gives the County Administrative Board an additional legal instrument if the conditions with respect to certain areas are over-grazed. Together with the possibility of imposing a fine (see below), the provision is effective as long as the authority does not remain passive.

In 1993, the provision on the highest number of reindeer allowed was amended (s. 15). It was added that other interests would be taken into account in the decision-making concern (hänsyn). In the preparatory works, it was explicitly stated that the decision on the highest number of reindeer allowed must be based upon a pasture inventory for each village, and those inventories roughly set the figure on the total number of reindeer that the area can sustain. However, pasture inventories have proven to be difficult to prepare, mainly due to the complexity of the task. Presently, only a few inventories exist. The Commission for Reindeer Husbandry Policy (Rennäringspolitiska kommittén) later suggested that the decision on the highest number of reindeer allowed should be supplemented by other more flexible methods for supporting supervision of the pasture quality, such as regular field problems that had occurred. 1974 In the present statute (the Reindeer Husbandry Act), the County Administrative Board determines the number of reindeer allowed for each Saami village. Section 15 paragraphs 2 and 3 of the Act states that:

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1974 For an analysis of the background to and the rationale for Regulations of the number of reindeer through the present day in more detail, see Torp, Eivind (2005) Högsta tillåtna renantal – Ekologiska och rättsliga aspekter på renkötket in FT No. 3 2005, pp. 341-364.
1975 The legal text does not say “shall”, but merely says that the County Administrative Board “decides” the highest number of reindeer to be kept within a Saami village.
1976 Reindeer Husbandry Act, s. 15 para. 3.
1977 See Prop. 1992/93:32, pp. 111-112 & 184. However, figures on how many reindeer presently and previously usually graze within the pasture area, along with the reindeer’s age and weight, should additionally be regarded in the decision-making process. Regard to other businesses (areella näringar) should also be taken when determining the “roof” of the number of reindeer allowed. Since large areas are used jointly, other businesses should be able to continue with their activities.
1978 See Prop 1995/96:226, pp. 55-57, where the issue on pasture inventories again was drawn to attention. The problem then was that a sufficient system for the inventory was lacking. The climate (warmer or colder years) was mentioned as one of the problems, since the production of the pasture varies greatly. See also the discussion of the problem of designing a valid system for pasture inventory in SOU 2001:101, pp. 312-316.
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studies and the weight of the reindeer. The basis of the decision regarding the highest number of reindeer is problematic.

With the 1993 amendment, a new section was added aiming at disobeying or passive Saami villages. The County Administrative Board now has the authority to issue an injunction with a fine (vid vite) where a Saami village has not followed a decision regarding the highest number of reindeer allowed or a decision on limitations of the pasture right. An injunction with a fine could also be addressed to a member of a Saami village, if the Saami village has decided on a “roof” of how many reindeer each member may graze.

Before the Board can decide the highest number of reindeer it will allow, the Board must know on how many reindeer currently graze in the areas. Therefore, the reindeer in each village must be counted yearly in roughly the same time period. Ultimately, the County Administrative Board can impose an injunction with a fine against the Saami village in order to accomplish this yearly counting of reindeer. It is a Saami tradition to mark the reindeer with a specific owner mark in the ear (with a knife). This marking is a precondition for the counting of the reindeer, and each owner has his/her specific mark, which is approved and registered by the County Administrative Board.

The counting of the number of reindeer is subject to a reindeer record (renlängd), established within each Saami village. The record shall include the owners of the reindeer and the counted or the estimated number of reindeer for each owner. If a decision on the highest number of reindeer allowed for each member has been decided in the village, such information shall also be included in the record. The village assembly (bystämman) confirms the reindeer record. The County Administrative Board has authority to impose an injunction with a fine on a Saami village to establish and confirm such record.

Note also that there is a dilemma here since the optimal number of reindeer that can graze on an area is a number below what the pasture can sustain. The condition of the reindeer is decreased if their numbers are close to the level of what the ground sustainable may feed. See SOU 2001:101, pp. 320-325.

See also Prop. 1992/93:32, pp. 112-113. According to the preparatory works, there was previously a trend that far fewer Saami villages carried out yearly reindeer counting. Some villages have even completely stopped counting reindeer. In other villages, the reindeer counting has never gained strong support due to cultural traditions or even superstition (skrock). Some villages had developed their own system of estimating the number of reindeer. All in all, due to the vital importance of knowing the correct number of reindeer grazing in the reindeer pasture area, there were amendments made in the statute giving the County Administrative Board authority to force the counting of reindeer.
8.3.4 The Regulation of the Reindeer Herding Right

Apart from determining the highest number of reindeer allowed and the possibility to impose limitations in the pasture right, the County Administrative Board has authority to regulate other elements of the reindeer herding right. There are three main forms of reindeer husbandry: mountain and forestry reindeer husbandry and concession reindeer husbandry. The provision concerning the Saami village and its borders, as well as the pasture areas and the number of reindeer discussed above, are the same for all three forms of husbandry, but the concession reindeer husbandry is bound by a set of specific legal requirements. These will be analysed in the next subsection.

To begin with, there is a general prohibition against granting any of the elements in the reindeer herding right, including the important hunting and fishing rights. This prohibition applies to the Saami village as well as to single members. It has instead been the State, through its administrative authorities, that has granted these customary rights. Before the enactment of the first reindeer husbandry statute in 1886, the Saami seem to have granted their rights, for instance to fish, to settlers and others.

Presently, the County Administrative Board grants a majority of such usufruct rights (nyttjanderätter) within the reindeer pasture area. On Crown land (kronomark) above the cultivation border (odlingsgränsen) and on the reindeer pasture mountains (renbetesfjällen), the granting is subject to restrictions and may occur only if it does not cause “considerable detriment” (avsevärd olägenhet) to the reindeer husbandry. Regarding granting of hunting and fishing rights, the grant shall additionally be compatible with good game or fish management and does not cause “problematic infringement” (besvärande intrång) of the Saami hunting or fishing right. The Saami village has a veto right, but only concerning the granting of the whole fishing in a particular water.

The reindeer herding right includes naturally a right to migrate the reindeer between different pasture areas. The migratory route is decided by the County Administrative Board, if the Saami village requests or if the migratory routes are in conflict with the Saami rights.

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1987 Reindeer Husbandry Act, s. 31. As an exception, a Saami village may grant subsistence rights to hunt and fish to a former member.
1988 It is a matter of dispute (due to legal uncertainties) whether the granting of hunting and fishing rights regards the Saami reindeer herding right, the States’ own right as a property owner, or a combination of both. See also the Commission reports on hunting and fishing: SOU 2005:116, 2005:79 & 2005:17.
1989 Regulations (1993:384) on Reindeer Husbandry, ss. 2 & 4. As a general principle, granting shall be subject to a fee (avgift), half of which goes to the Saami village and the other half to the Saami Fund (Samefonden). See Reindeer Husbandry Act, ss. 34 & 28 para. 2. If the granting concerns natural assets (such as minerals) compensation is instead paid due to damage or detriments to the reindeer husbandry.
1990 Reindeer Husbandry Act, s. 32 para. 1.
1991 Reindeer Husbandry Act, s. 32 para. 2. Note, however, that hunting and fishing rights that does not cause “considerable detriment” (avsevärd olägenhet) for the reindeer husbandry must be granted due to an amendment of the Reindeer Husbandry Regulations (s. 3). This policy amendment has been extremely controversial and much debated. See further in, for instance, Prop. 1992/93:32, pp. 131-152, Beslutet om Småviltjakten – En studie i myndighetsutövning (1994) & Bengtsson, Bertil Samernas rätt och statens rätt in SvJT No. 5-6 1994.
1992 Reindeer Husbandry Act, s. 23.
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otherwise are an issue. Moreover, migratory routes are often considered a part of the decisions regarding suitable borders for village areas. Nevertheless, whether included in the decision on village borders, there might be other more sufficient routes of migration with less damage or detriment to the environment. Thus, where there are specific reasons (särskilda skäl) to amend an established route and the alteration can take place without considerable detriments (väsentlig olägenhet) for the reindeer husbandry, the County Administrative Board can decide on an alteration of the route. The preparatory works do not indicate what is meant by “specific reasons”, but environmental considerations should be included.

As an element of the reindeer herding right and a consequence of the pasture right and migration of the reindeer, the Saami village may build cottages and constructions necessary for reindeer husbandry. The Saami village or individual members are exempt from the general requirement of obtaining a building permit (bygglov). Erecting structures, such as fences and other enclosures, is also not subject to building permits. Instead, there is a localisation requirement in the Reindeer Husbandry Act. Structures for permanent uses (foremost fences) shall be built on the site assigned by the property owner, whereas such approval is not necessary for smaller buildings, such as cottages needed for guarding the reindeer, Saami cots (kåta) or storehouses, localised above the cultivation boarder, within the reindeer pasture mountains or on state owned lands set aside for reindeer pasture.

Where there are disputes on the localisation of buildings, the County Administrative Board decides the localisation. This means that the County Administrative Board, as a regional representative of the State as property owner, in principle always decides on the localisation of fences and other enclosures, as well as the localisation of small buildings below the cultivation boarder, outside the reindeer pasture mountains, or on state owned lands not set aside for reindeer pasture.

Saami engaged in Saami handicrafts do not have rights to take necessary material without permission, if they are not members of a Saami village. The County Administrative Board has the authority to issue such licences. Concerning assimilation of timber, fuel and other necessary wood material, the felling shall be conducted in accordance with the direction of the property owner. Felling of trees to build structures for the reindeer husbandry necessary can be prohibited for a certain time period by the Government or authority appointed by the Government. Such prohibition regards growing pine trees, spruces or birch if necessary to conserve the

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1993 Reindeer Husbandry Act, s. 24 para. 1.
1994 Reindeer Husbandry Act, s. 24 para. 2.
1996 Plan and Building Act (1987:10), ch. 8 s. 1 para. 2. Economy buildings for agriculture, forestry and other comparable businesses (such as reindeer husbandry) are subject to building permits only if used for other purposes outside the business. Note that the exemptions from permit only apply on lands not subject to detailed development plans, which are most areas. See further below in subsection 9.2.2.
1997 Compare Planning and Building Act, ch. 8 s. 2.
1998 Reindeer Husbandry Act, s. 16 paras. 2-3.
1999 Reindeer Husbandry Act, s. 16 para. 4.
2000 Reindeer Husbandry Act, s. 17 para. 2.
forests or the regrowth of forest. This possibility to conserve the forest or the regrowth has also previously been possible. See the 1928 Act on the Swedish Saami Rights to Reindeer Pasture in Sweden, s. 51 para. 1. Breach of such prohibition following from this provision is penalized with fines as well as if a Saami breaches against the provisions on felling timber and assimilation of other wood materials in ss. 17-20. See the Act s. 95.  
2002 Reindeer Husbandry Act, s. 65 a para. 3.  
2003 Reindeer Husbandry Act, s. 65 paras. 4-6.  
2006 Reindeer Husbandry Act, s. 87.
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...and the highest numbers of custody reindeer that he or she may have; iv the extent to which the concession holder has the right to build fences and buildings and to take timber within the concession area; and, v) other conditions stating the manner under which reindeer husbandry may be carried out. In relation to environmental requirements, the third and last point is of most interest. Note that compliance of the conditions is sanctioned.

The condition (villkoret) on the highest number of reindeer allowed should be decided based upon a pasture inventory as with the other forms of reindeer husbandry. The preparatory works do not, however, say anything here, but it is reasonable since it applies to mountain and forest reindeer husbandry. The Board may also impose an injunction with a fine to reduce the reindeer if the number exceeds that which is allowed. If an individual member has too many reindeer, the Board may direct an injunction against the concession holder of the owner of custody reindeer (skötesrenägaren).

Regarding other conditions attached to the concession (the last point), the preparatory works do not give any indication as to what such other conditions may be. As a result, the matter is rather open. It may perhaps concern management issues, such as specific routes for cross-country driving or that specific care shall be taken to certain ecologically sensitive areas. The possibility to regulate the husbandry here is wide, and the concession may be designed in respect to a specific area (the concession area) in a manner not possible for the other types of reindeer husbandry. This should generally be an advantage. Where environmental requirements are motivated, they may facilitate the long-term sustainability of the pasture specifically and environmental protection generally. Note that the County Administrative Board may rather freely amend or impose new conditions for the concession where the preconditions for the concession have been changed.

Nevertheless, I am not generally fond of the open-ended possibilities to regulate this type of reindeer husbandry. One should not forget that this form also is based on a customary ground. The Swedish law lacks a set of treaty principles or a notion of fiduciary responsibilities for the State, as in the New Zealand and Canadian laws, to guide and restrain the public power vis-à-vis the Saami. This applies in relation to concession reindeer husbandry, but also to the regulation of the husbandry and the enjoyment of the reindeer herding right in general.

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2007 Reindeer Husbandry Act, s. 88.
2008 Reindeer Husbandry Act, s. 89.
2009 See Prop 1992/93:32, pp. 110-112 & 184. Note, however, that the highest number of reindeer allowed is today not based upon such inventory of the pastures (bêtesinventering) generally. The basis for the decisions differs instead between all three County Administrative Boards.
2010 Reindeer Husbandry Act, s. 89 para. 1, compare with s. 15 para. 3. See also Prop. 1992/93:32, p. 121.
2011 Reindeer Husbandry Act, s. 89 para. 4.
2012 See further below in Part III in section 10.2 & 10.3.
8.3.5 Supervision

From the analysis of the provisions in the Reindeer Husbandry Act above, is it clear that the County Administrative Board, as supervisory authority, is provided with different legal powers to regulate and control the husbandry.\(^\text{2013}\) Those regulatory and supervisory powers regard above all the size and borders of Saami villages, the highest number of reindeer allowed, and also the regulation of the enjoyment of the reindeer herding rights in more detail. In large, those provisions are for the most part rather open-ended. Nevertheless, they provide important means for the County Administrative Board to regulate the reindeer husbandry, directly or indirectly, in a manner that allows environmental protection where needed.

However, with the enactment of the Environmental Code, the different supervisory authorities under the Code have possibilities through supervision – with the support of the provisions in the Code – to make sure compliance with the environmental requirements.\(^\text{2014}\) In an important case the Environmental Court of Appeal has recently (in 2006) analysed overlapping supervision between two different authorities and their respective authority (the Ferry case).\(^\text{2015}\)

The case concerned an injunction to attach catalytic exhaust emission control devices on engines on certain ferries issued by a Municipal division (communal nämnd) according to several provisions in the Code. The Swedish Maritime Administration (Sjöfartsverket), which was the supervisory authority under a specialised statute, opposed the decision and argued that the Municipal division did not have authority to impose an injunction based on the Environmental Code. The Court held, however, that other and stricter requirements may be imposed on such engines, despite the fact that the Swedish Maritime Administration had authority here under other legislation. Nevertheless, a decision on an injunction based on the Code must be justified (befogad). In this case, health issues and the risk of breaching an environmental quality target related to nitrogen dioxide ($\text{N}_2\text{O}$) in air were deemed sufficient.\(^\text{2016}\) This case illustrates and clarifies the “double” supervision responsibilities that apply between sector statutes, such as the Reindeer Husbandry Act and the Environmental Code.

Above, in subsection 8.2.3, I analyse the requirements inherent in the general rules of consideration (chapter 2 of the Code) that shall be complied with vis-à-vis the enjoyment of the reindeer herding right. Those provisions are in principle not directly sanctioned, and issues of compliance are evoked chiefly in relation to supervision. Here, the supervisory authority has the authority to issue an injunction with a fine in order to enforce compliance.\(^\text{2017}\) It may impose an injunction toward the Saami village, a reindeer herding group or an individual reindeer herdsman to cease doing something or positively to take a specific action in order to protect the environment.

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\(^\text{2013}\) The Swedish Board of Agriculture is responsible for the overarching supervision of the husbandry, primarily giving advice and issuing by-laws.
\(^\text{2016}\) The Ferry case, pp. 20-21 (see also pp. 18-19).
\(^\text{2017}\) Environmental Code, ch 26 ss. 9 & 14.
Chapter 8 Environmental Requirements in Relation to the Reindeer Husbandry

With the enactment of the Code, supervision was seen as an important mean to meet the purpose of the Code, the promotion of sustainable development. Hence, there is a strong emphasis on supervision in the Environmental Code. However, note that there is a general lack of enforceable provisions against passive supervisory authorities. This is a weak link, since the emphasis lies on the public law system for the enforcement of the Code, chiefly through supervision and sanctions.

In the realm of the Code, there are a large number of supervisory authorities, and there is no clear division among them regarding the responsibility between authorities. The division of responsibility is stated in the Code, but, more importantly, in the Regulations on Supervision in the Environmental Code. However, the Code requires that supervisory authorities cooperate, if it promotes the supervisory activity. This cooperation can take many forms: it may, for instance, regard issues of environmental importance in larger geographical areas than the Municipality or the County. This is relevant for the supervision on the reindeer husbandry, since the pasture area of Saami villages commonly spans over two or more Municipalities and sometimes over the boundary of two Counties. Moreover, where an authority is responsible for the direct supervision (operativ tillsyn) of specific activities, the authority must ensure that enough resources (monetary, personnel, etc.) are set apart to meet the need of supervision.

I have above in subsection 8.2.2 found that certain parts of the reindeer husbandry can be regarded as “environmentally hazardous activities” particularly in relation construction and use of buildings, which means the Municipality theoretically has the supervisory responsibility for those activities within the Municipality. There is no authority that explicitly has the supervisory authority for reindeer husbandry under the Code, although reindeer husbandry might be subsumed under matters concerning animal production activities (djurhållande verksamhet). This is most doubtful, since animal production regards basically activities that have

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2019 Note, however, that Bengtsson means that it is not impossible that a supervisory authority could be subject to demands of liability based on the Liability Act (1972:207) ch. 3 s. 2. If damage occurs related to a person or the environment in a specific area, it seems now to be easier to establish a casual link with the authority in question - even if the general control of an activity and the obligation not to cause harm lies on the operator. See Bengtsson, Bertil (2001) Miljöbalkens återverkningar, p. 145. NJA 2003 s. 285 regarded the question whether the Government could be accused for faulty or neglect (fel eller försummelse) in relation to a decision on legal standing. The Court found that only obviously incorrect judgements could be regarded as faulty or neglectful within the meaning of ch. 3 s. 2. See also the same meaning in Setterlid, Rikard (2000) Offentlig tillsyn enligt miljöbalken, pp. 161-165.


2021 Regulations (1998:900) on Supervision in the Environmental Code, s. 7 para. 1. See also the Environmental Court of Appeal case M 3304-04, decided in 2005-06-29 which confirmed that authorities, like other operators, cannot disregard the requirements in the Environmental Code with references to a lack of resources (resursbrist).

2022 Compare Environmental Code, ch. 26 s. 3 para. 3 and Regulations on Supervision, s. 4. Note also that the Municipality is responsible for handling of chemical products.

2023 Compare Regulations on Supervision, ss. 5 & 13. In this case, the Swedish Board of Agriculture is responsible for the direct supervision.
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some connections to farming and more stationary animal productions, such as production of chickens, pigs, cattle (including milk producing cows) and sheep. Hence, various authorities have responsibilities for the direct supervision in respect of different matters, which to a lesser or greater extent may be of relevance to the reindeer husbandry or elements of the reindeer herding right.

Note, however, that the Government may decide that the supervision in a single case shall be divided differently than stated in the Regulation on Supervision, if there are specific reasons (särskilda skäl). I am of the opinion that the County Administrative Boards should have the responsibility for the direct supervision vis-à-vis the reindeer husbandry. The reindeer husbandry may cause damages and detriment to the ground and to the environmental protection interests generally in the locality. The husbandry is, moreover, carried out on large areas. Hence, since the Board’s area of responsibility (verksamhetsområde) comprises the whole County and the fact that it already has supervisory responsibilities under the Reindeer Husbandry Act, the Board is suitable as a supervisory authority under the Code. Importantly, the Board should also have more knowledge compared to other authorities with respect to the specific preconditions for the husbandry.

Presently, the supervisory responsibility for different aspects of the husbandry under the Code seems to be as follows. Regarding nature conservation issues, the County Administrative Board is the responsible supervisory authority for national parks, nature reserves, Natura 2000-areas and a few other forms of area protection, including protection of the shores. The Board is also responsible for issues concerning activities and measures that, without being subject to permit or notification requirement, nevertheless might have “a significant impact on the natural environment” subject to the provision on notice of consultation (samrådsregeln). Additionally, the County Administrative Board is responsible for water operations and pits (täkter). The Fishery Agency is the supervisory authority for issues involving fishing. In sum, the question of competent supervisory authority under the Code vis-à-vis the reindeer husbandry is a rather complex matter.

8.4 Concluding Remarks

From the above analysis of the various environmental requirements on reindeer husbandry, it has become evident that those requirements are rather comprehensive. With the enactment of the Environmental Code, the number and strength of those requirements have increased. This is natural, nevertheless, since public environmental interests today are essential. Another purpose of the Code is to emphasise that a

\[2024\] Compare with Regulations (1998:899) on Environmentally Hazardous Activities and Heath Protection Appendix under “Animal Production” (Djurhållning, m m).

\[2025\] Regulations on Supervision, s. 4 para. 4.

\[2026\] Regulations on Supervision, s. 4 para. 2 & the Appendix. Note that where the Municipality has decided to designate an area as a nature reserve, the Municipality is the supervisory authority.

\[2027\] Regulations on Supervision, s. 4 para. 2 & the Appendix and Environmental Code, ch. 12 s. 6. See further on the provision of notice of consultation in subsection 9.5. Note that the Forest Agency is a supervisory authority with respect to the provision in forest land under the Forestry Act.

\[2028\] Regulations on Supervision ss. 5 & 13.
sustainable development is based on a recognition of the fact that nature is worthy of protection, meaning that our right to modify and exploit nature carries with it a responsibility for wise management of natural resources\textsuperscript{2029}.

Those environmental requirements analysed in this chapter have been grouped into two categories, requirements applicable to the Saami village and reindeer herdsmen, on the one hand, and, on the other hand, requirements that the supervisory authorities may use to protect the natural environment directly or indirectly. What has been evident is the fact that these latter requirements are rather open-ended, chiefly in relation to the Reindeer Husbandry Act. They generally leave a large margin of appreciation to the authority, which is, for the most part, the County Administrative Board, sometimes to the extent that the reindeer herding right as a civil right is affected. This concerns above all the decision on divisions into village areas.

In my opinion, this is unfortunate. Swedish law lacks any form of recognition of a specific relationship between the Saami and the State, as in New Zealand and in Canada, that may restrain to excess exercise of authority (myndighetutövning)\textsuperscript{2030}. A possible explanation of this difference is that, in Sweden, the colonisation process has not been regarded as legally relevant. See the discussion below in Part III, section 10.2. In Swedish law, there are only some general public law requirements related to decision-making by authorities, but these do not correspond to the specific situation of the Saami being an indigenous people in a minority position. Apart from the prime statute in the public administrative area, the Administrative Procedure Act\textsuperscript{2031}, there are additionally a set of general principles to be upheld in the public administration, further defined in the constitution and in statutes: the principle of legality, the principle of independence, the objectivity principle, the equality principle, the proportionality principle and the principle of reasonable needs (behovsprincipen)\textsuperscript{2032}.

To conclude, it is evident that the environmental requirements are sufficient. I see no reason to expand further the amount of general environmental requirements. However, this is not to say that there might not be reasons to establish specific environmental requirements for certain areas within the reindeer herding area, preferably in relation to acknowledgment of specific Saami customary rights. See the discussion in Part III, section 10.3. I must also conclude that the protection of the enjoyment of the reindeer herding right is weak, which will be more evident in relation to my analysis in the next chapter. Here, few efforts have been made to regulate and protect the specific circumstances that the reindeer husbandry is carried

\textsuperscript{2029} Environmental Code, ch. 1 s. 1 para. 1.
\textsuperscript{2030} In New Zealand there are a set of Treaty principles and the Canadian law emphasises the fiduciary responsibilities towards the aboriginal peoples. See subsections 3.1.1.4 & 6.4.2.
\textsuperscript{2031} The provisions are applicable for administrative authorities, which in short include local, regional and national public administrative bodies, such as the Municipal Authorities, the County Administrative Board, the Saami Parliament, the Swedish Board of Agriculture, and the National Environmental Protection Agency. Courts, political associations, such as the Parliament and the local Government (kommunfullmäktige), and private organisations are not included, nor is the Government. The Government is not understood as an administrative authority in the Instruction for the Government (Regeringsformen), and, thus, is not bound by the Administrative Procedure Act. See further in Hellners, Trygve & Malmqvist, Bo (2003) Författningslagen - med kommentarer, pp. 46-54.
out under. Above all, the shortage of the planning law means that the strategic issues on adequate levels is not considered with respect to the interests of reindeer husbandry, nor in relation to cumulative environmental effects. See further in the next chapter, particularly in subsection 9.2.2. There seems, hence, to be a need for regional environmental planning within the reindeer herding area.
9 Environmental Protection Legislation and the Reindeer Herding Area

In relation to chapter 8 above, I analyse the environmental requirements applicable to the reindeer husbandry and the enjoyment of the reindeer herding right. Hereunder, I concentrate instead on environmental protection legislation as such, relevant for protecting the reindeer herding area from damages and detriments arising from various activities and measures. Note, however, that there are some overlaps between the two chapters, which are difficult to avoid completely.

In the Swedish legal system, the planning law is partly separate from the environmental protection legislation, and is based on a comprehensive statute. Nevertheless, the physical planning is crucial for the protection of the environment as it establishes a basis where, for instance, particular exploitations of natural resources are measured against. In large, one could, thus, see the planning as a prerequisite for reaching sustainable development and a sustainable use of land and natural resources within the reindeer herding area. In Sweden, the crucial planning decisions are taken on the local level. There are also national planning instruments laid down in legislation that influence the local planning decisions. Hence, the prerequisites for a sustainable development are determined foremost by State and Municipal planning.

The legal links between the planning instruments and the legislation on the management and exploitation of land and natural resources must, furthermore, be manifest. The analysis of the legislation under this chapter is therefore focused on both the planning system and on the interrelation between this system and other legislation aiming at either environmental protection or exploitation of land or natural resources. At the centre of the examination are the possibilities for reaching environmental protection of the reindeer herding area as well as the possibility of enjoying the reindeer herding right, including the procedural aspects of the rights, primarily concerning consultation requirements and rights to appeal. An underlying assumption is that strong environmental protection through legislation generally is positive for the enjoyment of the reindeer herding right. For instance, certain environmentally hazardous activities may be hindered. In other words, the lesser activities that compete over land and resources, are normally the better for the interests of the reindeer husbandry.

After a short description on ownership issues, an analysis of the physical planning and the planning instruments is made. This is followed by an examination of area and habitat protection. The analysis of the pre-examination of activities and measures is made with respect to the Environmental Code and other relevant legislation. The law related to situations without a permit and notification requirement is then examined, which includes issues on public access to land. The consultation requirements generally and vis-à-vis the Saami are analysed, and finally, some concluding remarks on the system are provided.

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2013 See also Prop. 1997/98:45 Del 1, p. 244.
Chapter 9 Environmental Protection Legislation and the Reindeer Herding Area

9.1 Ownership and Rights to Land and Natural Resources

Under this section, there follows a short description on issues of ownership and rights to use natural resources, such as what is encompassed by private land ownership. By this, I provide a basic understanding of features in Swedish law relevant to the analysis of the law in this chapter, particularly regarding the latter part of the chapter comprising an analysis of permit and other requirements in the Environmental Code and other sector statutes.

Above, in chapter 7, section 7.1, I have described the relationship between the State assumptions of ownership to the larger parts of the area above the cultivation boundary and the reindeer husbandry legislation. In the same chapter, I also analyse the legal grounds for establishing Saami customary rights, primarily through immemorial prescription. Both land ownership and more limited rights may theoretically be established according to this doctrine through possession and long term use of a specific area. The reindeer herding right, and possibly solitary hunting and fishing rights, have been legally established in this manner. Reindeer husbandry is carried out on both State owned and privately owned lands, which also applies to the hunting and fishing rights included in the reindeer herding rights. Competition of the land and natural resources is considerable and is a part of the problem. This problem concerns both who has the rights to specific land and resources, as well as the public interest of securing a long term sustainable use of the reindeer herding area.

In the Real Property Code (Jordabalken), chapter 1 section 1 paragraph 1, states that “Real property is earth. It is divided into estates”. The concept “earth” (jord) has a specific meaning and includes not only the surface, but a certain amount of the space vertically. How far above and below the surface the real property stretches is, however, unclear. Chapter 2 of the Real Property Code and preparatory works regulate what shall be regarded as attachments (tillbehör) to and components (beståndsdelar) of the estate (fastigheten). Natural resources that are immobile and attached to the estate belongs therefore to the owner of the estate, such as trees, plants, peat, sand and gravel. Water, since it is seldom immobile, is not as such regarded as a component of the estate. Instead, the concept right of disposition (rådighet) is used. The main rule is that the land owner has the right of disposition over waters within his or her estate. Regarding flowing waters (rinnande vatten), as a

2034 The reindeer herding right is regarded as a specific right to real property (särskild rätt till fastighet).
2035 SFS 1970:994.
2036 Note that these are only the two first sentences of the paragraph. Since 2004, the statute includes provisions on three-dimensional estates. The delimitation of the real property horizontally is determined foremost by the provisions in the Real Property Creation Act (1970:988).
Chapter 9 Environmental Protection Legislation and the Reindeer Herding Area

main rule, the land owners of each side have an equal share or right of disposition over the water.\textsuperscript{2039}

Regarding rights to wild animals, the legal situation is similar to that of flowing waters. Since wild animals are mobile, it is awkward to speak of ownership. The right to fish and hunt has long since been attached to the owner of the estate or water. This right may, however, be limited by, for instance, agreements and immemorial prescription.\textsuperscript{2040} Where Saami have established hunting and/or fishing rights through immemorial prescription, the equivalent rights of the land owner must reasonably be more limited. Since I do not explicitly analyse the hunting and fishing legislation in the thesis I will not discuss the matter further\textsuperscript{2041}.

The situation on ownership of minerals is theoretically complex in Swedish law\textsuperscript{2042}. In principle, minerals are components of the estate, but only as long as they have not been subject to a specific act of possession (särskilt besittningstagande)\textsuperscript{2043}. The issue seems to be whether such possession has been made by the State (Crown) historically or not\textsuperscript{2044}. Sweden as a nation has a long history concerning exploitation of minerals. The first known legislation on the subject goes back to the fourteenth century. A characteristic of the historical development of the mineral legislation is the struggle between three distinct interests: the landowner, the State (Crown) and the exploiter. During the centuries, these interests have been given different weight by the legislator.\textsuperscript{2045}

Nonetheless, presently the vast majority of the minerals belong to the land owner, the so-called real property minerals (markägarmineraler), and exploitations of those minerals are regulated under the Environmental Code. Minerals that are industrially valuable are instead regulated through the Mineral Act (the concession minerals).\textsuperscript{2046} Whether those minerals belong to the land owner or the State seems still an open question. The practical implications are, however, lesser. Even if the land owner is regarded as the owner of the minerals, the Mineral Act substantially limits the opportunity to exploit the concession minerals. The land owner has the right to exploit concession minerals for subsistence without a permit, but only as long


\textsuperscript{2040} Michanek, Gabriel (1990) Energrätt, pp. 478-481. See also the Hunting Act (1987:259), s. 10 and the Fishing Act (1993:787), ss. 3. para. 3 & 9. Swedish citizens may also fish in public waters, see s. 8.

\textsuperscript{2041} See the reasons for this limitation above in subsection 1.2.1.

\textsuperscript{2042} A recent Commission has concluded that the ownership of minerals (concession minerals) are unclear. See Prop. 2004:05:40 Andringer i minerallagen, pp. 61-62 and Ds. 2002:65 Inför en ändrad minerallag – Vissa kompletterande mineralpolitiska frågor, pp. 87-89. An international comparison highlighted that the prevailing system is that the State owns the land and/or the minerals. See Ds. 2002:65, pp. 64-65.

\textsuperscript{2043} Michanek Gabriel (1990) Energrätt, pp. 466-467 and footnote 67. He cites a statement in the preparatory works, Prop. 1966:24, which concerned real property (fast egendom). See also ibid. p. 474.

\textsuperscript{2044} The question seems to be whether the limitation of the possibility to exploit the minerals in the mineral legislation is to be regarded as a limitation of the ownership as such or as public law regulations of the use of the resource. Moreover, the State does not today claim mineral rights on privately owned lands. See Ds 2002:65, p. 88.

\textsuperscript{2045} Prop. 2004:05:40 Andringer i minerallagen, pp. 29-30.

\textsuperscript{2046} Prop. 2004:05:40, p. 29.
Chapter 9 Environmental Protection Legislation and the Reindeer Herding Area

As no one else has been granted concession within the estate. Thereafter, he or she has a right to carry on the mineral exploitation to a reasonable extent (i skälig utsträckning).\textsuperscript{2047} Henceforth, I will simply assume that the ownership of the concession minerals belongs to the property owner\textsuperscript{2048}. The situation concerning ownership is similar concerning peat, where the land owner may exploit the resource for subsistence for energy purposes\textsuperscript{2049}. The land owner may also take, for instance, rock, gravel, sand, and earth for house hold use without permit\textsuperscript{2050}.

So, generally, the ownership of estates may be limited in different ways, primarily through legislation or customary use (sedvänja), and in this the legislature seems to presuppose that the land owner otherwise has the freedom to use the estate for his or her own wishes. The land ownership is, thus, negatively determined\textsuperscript{2051}. However, it should be mentioned that the possibility for the land owner in practice to use the land and natural resources is substantially circumscribed, not at least in relation to environmental law and property law legislation. The public access to land also delimits the land owner’s enjoyment of the property.

The public access to land (allemansrätten) is a publicly cherished and orally defended right. What the right includes is not defined in any legislation, and its content is surprisingly vague\textsuperscript{2052}. The content of the right is instead primarily derived by what is statutorily criminalised and otherwise sanctioned (primarily liability obligations). However, not all that is not criminalised is permitted, which seems particularly true here. The core of the right – or rather the rights - is based on old custom, but the custom has differed and still differs in various regions and parts of the country\textsuperscript{2053}.

The public access to land consists of a bundle of different rights, the content of each of which is more or less vague\textsuperscript{2054}. The basic right is a right of passage on the estates of others, on foot, skiing, riding or bicycling. Despite what many believe, transportation with motor vehicles is not a part of the public access to land, which includes snowmobiles. The basic right of passage is, however, limited. It is forbidden to pass over gardens and grounds (tomt), as well as over other plots that may be damaged\textsuperscript{2055}. Passing over pasture land and forested areas is, nevertheless normally permitted\textsuperscript{2056}.

\textsuperscript{2047} Mineral Act, ch. 1 s. 4 para. 3 & ch. 5 s. 2. Exploration activities to search for minerals may naturally also be undertaken by the land owner. See the Act, ch. 1 s. 4 para. 2.

\textsuperscript{2048} But with the understanding that the issue might be rather complex, as briefly referred to above.

\textsuperscript{2049} Act on Peat Exploitation, s. 3.


\textsuperscript{2051} See further in Michanek, Gabriel (1990) Energirätt, pp. 467, 486-490 with references.

\textsuperscript{2052} The right to public access is mentioned in the Constitution and in the Environmental Code, but there is no definition. See the Instrument of Government, ch. 2 s 18 para. 3 (all shall have access to the nature according to the right of public access) & Environmental Code, ch. 7 s. 1 (in the enjoyment of the right, due care and consideration are required). The right is applicable to all persons that reside in Sweden, even tourists.


\textsuperscript{2054} See further in ibid., particularly chapters IV-VI, VIII & X-XI.

\textsuperscript{2055} Criminal Code, ch. 12 s. 4.

\textsuperscript{2056} The right to public access has been a basic feature for protecting the public access to the shores (strandskydd). Note also that exploration activities to search for minerals have at least partly support of
The public access to land also includes a right to stay (vistas) on the same area that one is allowed to pass over. This may, for instance, regard picnicking, sun bathing or camping out a few nights\textsuperscript{2057}. Public access also applies to water areas, but, unlike the right of passage, no provision applies to criminalise certain activities. In other words, one may swim, sail or use a motorboat immediately adjacent to a house or cottage built near the shore, despite the fact that it may be disturbing to the land owner. The same right to passage applies during the winter time when the water is frozen. The right to take certain natural assets is also included, primarily berries, mushrooms, flowers, smaller stones, a few tufts of lichen, and moss, as well as branches and sprigs fallen on the ground.

In more modern times, two problems are especially related to the public access to land: the invasion problem, that many persons in a small area together cause damages and detriment; and the problem with commercialisation, that a person or company uses the rights included in the public access in business\textsuperscript{2058}. This latter problem regards primarily organised tourism activities, where a guide brings people into nice nature areas. The public access to land is far from always compatible with environmental protection interests. It may also hinder the enjoyment of the reindeer herding right, especially during certain crucial periods. Problems connected to the public access to land are analysed below, in subsection 9.4.4.

9.2 Physical Planning and Planning Instruments

9.2.1 Introduction

The Swedish planning system is mainly concentrated within the comprehensive Planning and Building Act\textsuperscript{2059}. However, some of the important planning provisions lie outside of the Planning and Building Act. This regards chiefly the so-called natural resource management provisions (hushållningsbestämmelserna) in chapters 3 and 4 of the Environmental Code, related to how different areas, resources and interest shall be managed. Those provisions provide guidance for management decisions on the national level regarding the use of different areas, and, in this, they also have importance for single cases on, for instance, permit applications.

\textsuperscript{2057} Certain actions are criminalised in the Criminal Code, ch. 8 s. 11 para. 2 (egenmäktigt förfarande).

\textsuperscript{2058} In general, the right to public access is an individual right. One may thus question whether companies (chiefly tourist enterprises) as a legal person may use the right as a basis for their commercial activity. See further in Westerlund, Staffan (1995) \textit{Nutida allemansrättsliga frågor} in MT 1995:1, pp. 81 & 98-102.

\textsuperscript{2059} SFS 1987:10. There is a rather recent translation of the Act which may be obtained at \url{http://www.boverket.se/upload/publcerat/bifogade%20filer/2005/legislation_the_planning_and_building_act.pdf} (viewed at 2006-05-15). Note that some chapters of the Environmental Code are also translated in this document. See generally on the Planning and Building Act in Michanek & Zetterberg (2004) \textit{Den svenska miljörätten}, pp. 420-436. Note also that the planning law is under investigation. See the final report of the Committee on Planning and Building (PBL-kommittén), SOU 2005:77 \textit{Får jag lov? Om planering och byggnad}. 

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The Planning and Building Act is a comprehensive statute and includes provisions aiming at controlling physical planning, including provisions related to different types of plans and permit requirements for building (bygglov), demolition permits (rivningslov) and site improvement permits (marklov). The requirements for the permits will not be examined here other than briefly regarding the building permit. Building permits are often required for activities that are under permit requirements in other statutes.

There is also a close link between the Planning and Building Act and certain provisions in the Environmental Code, chiefly the natural resource management provisions in chapters 3 and 4 and the provisions regarding strategic environmental assessments in chapter 6. For example, areas and natural resources of national interest (riksintresse) shall explicitly be included in the Municipal’s general plan. The comprehensive plans (översiktsplaner) are an important tool, even if they are not legally binding. The comprehensive plan functions as a guide for the application of the provisions in chapters 3 and 4 in single cases.

The physical planning, governed by the Planning and Building Act, makes the natural resource management provisions in chapters 3 and 4 of the Code more concretised with respect to local situations. Hence, chapters 3 and 4 of the Environmental Code provide for a general basis for planning and resource-management decisions. The provisions are of general application in the Swedish planning system and crucial for determining the legal situation vis-à-vis the environmental protection that promotes reindeer husbandry also in future perspectives. The plans have important implications on the permitting procedures. Detailed development plans (detaljplaner) and area regulations (områdesbestämmelser) are legally binding in the way that no permits and exemptions may conflict with them.

The natural resource management provisions in chapters 3 and 4 of the Code are important here. Given their importance for planning, one could question why they are not included in the Planning and Building Act. The provisions have their origin in the old Natural Resources Act from 1987 and were transferred into the Code in 1999, in principle unmodified. These provisions will, however, be analysed separately below, even if substantial overlapping exists. One reason to examine those natural resource management provisions separately is that many other statutes refer to them in that they are applied in many situations, for instance, in relation to granting permits.

A fundamental idea behind the Planning and Building Act is that, in principle, all land use should be controlled by the public, primarily through the Municipalities, since the Act signifies a decentralisation to the local level. Therefore, it is accurate to speak about a municipal planning monopoly (kommunalt planmonopol), something that often may be problematic from an environmental protection perspective.

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2060 Physical planning is the planning that regulates the use of land and water. Physical planning includes naturally a balancing of conflicting interests. See Prop. 1985/86:1 Ny plan- och bygglag, p. 57.
2062 Environmental Code, ch. 16 s. 4. Minor departures from the plans may, however, be allowed if they do not contradict the purpose of the plan.
Nonetheless, the state has retained some means for controlling the planning mainly through the national interests, which briefly will be examined below in subsections 9.2.3.1 and 9.2.3.2. The physical planning also naturally includes a balancing of conflicting interests. Here, public and long term interests shall weigh more profoundly than private and short term interests\textsuperscript{2063}.

9.2.2 The Plans, the Planning Process and Building Permits

The Planning and Building Act shall be applied parallel with the Code.\textsuperscript{2064} The Act’s area of application is to regulate the Municipal physical planning. In this, the Act applies to all kinds of land and water uses. However, its legally binding instruments regard only buildings and other structures and certain activities related to settlements (benyggelse) or single buildings and structures. This limitation is of great importance for the following discussions on how the physical planning may protect the reindeer herding area from being exploited. Of most importance for this thesis are the provisions related to the different plans. Additionally, public participation was strengthened with the enactment of the Planning and Building Act. I shall also analyse those provisions in relation to the planning process and building permits\textsuperscript{2065}.

The Planning and Building Act has five types of plans. Two of them are not legally binding: the comprehensive plans (översiktsplaner) and the regional plans (regionplaner). The other three are binding to different degrees: detailed developing plans (detaljplaner), property regulation plans\textsuperscript{2066} (fastighetsplaner) and area regulations (områdesbestämmelser). Evidently, from the analysis of the specialised legislation below, other statutes commonly refer to detailed developing plans and area regulations. Many statutes prohibit a land use that contradicts either of those plan types, for instance granting permits in relation to mineral and peat exploitation activities.

The comprehensive plan shall give guidance regarding the use of land and water areas in the Municipality, as well as guidance on how the built environment shall be developed and conserved. The plan includes primarily an account of public interests subject to chapter 2 of the Act and the environmental issues that warrant attention. The national interests within the Municipality shall also be specified.\textsuperscript{2067} Importantly, the comprehensive plan regards the land use within only one Municipality, which makes overarching regional planning matters rather invisible. The interests of the reindeer husbandry are difficult to assess, since it is carried out on large areas, commonly spanning over two or more Municipalities\textsuperscript{2068}.

\textsuperscript{2063} Prop. 1985/86:1 Ny plan- och bygglag, p. 57.
\textsuperscript{2064} Prop. 1997/98:90, pp. 156 & 158. However, the general rules of consideration in chapter 2 of the Code shall not be applied. The preparatory works stated that the Planning and Building Act already had a sufficient system of general provisions aiming at balancing different interests.
\textsuperscript{2065} Prop. 1985/86:1, pp. 77-78.
\textsuperscript{2066} This plan type aims to implement the detailed development plan. It regulates more closely the land division into estates and particular rights burdening estates. See the Act, ch. 6 ss. 3-11. The Property Regulations plan will not be examined further here.
\textsuperscript{2067} Planning and Building Act, ch. 1. s. 3 para. 1 & ch. 4 s. 1.
\textsuperscript{2068} The Municipalities in the County of Norrbotten are, however, in general large in relation to size, but not in relation to population.
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The opportunity to state basic land and water uses, which involve more than one Municipality, exists in relation to regional plans.2069 Those plans are aimed to more formally solve issues where there is a need to assess and coordinate land and water uses that concern several Municipalities.2070 However, regional plans are primarily designed for problems common in metropolitan areas and other more densely populated areas. They may regard the need for coordinating public communication, such as roads and railways, or the need to coordinate drinking water supplies and sewage systems.2071 It is clear, therefore, that regional plans aim to solve issues where coordination on the basis of public interests of mutual benefit for two or more Municipalities exists, not for gaining a better overarching plan to assess and improve environmental protection and/or the interest of the reindeer husbandry. This, together with the fact that the plan is not legally binding and that there is no legal requirement that the plan must exist (plankrav), means that regional plans have little relevance for my further analysis.

In order adequately to assess present and future land uses, it is, in my view, necessary to expand the planning area at least for areas comprising reindeer husbandry. One weakness that this thesis has shown is the lack of legally binding overarching planning reasonably on a regional level. The present planning system does not have the ability to assess and balance environmental protection interests or specific interests, as the reindeer husbandry, more comprehensively. This seems especially essential as other provisions do not take into account cumulative impacts on the environment or on the reindeer husbandry. Those strategic issues must be dealt with on a higher level, as is done in the New Zealand planning system.2072 The vagueness of the provisions under chapter 3, and to some extent chapter 4, of the Code does not have the ability to explicitly secure certain areas.

Only two types of plans are mandatory in the Swedish planning system, the comprehensive plan and, in certain circumstances, detailed development plans. Each Municipality must have an up-to-date comprehensive plan that encompasses the entire Municipality.2073 Detailed development plans are required in three distinct situations:

- for new aggregate settlements (ny sammanhållen bebyggelse),
- for a new single building where the use will have significant impact on the surroundings, or if the building is localised in an area with considerable demand for building sites, and
- for settlements that shall be altered or preserved.2074

2069 Planning and Building Act, ch. 7 ss. 1 & 4. A regional plan may be in force for maximum of only six years. See the Act, ch. 7 s. 8.
2070 A co-operation may be enforced by the Government through the appointment of a regional planning body (regionplanorgan).
2072 See the discussion below under Part III in section 10.4.
2073 Planning and Building Act, ch. 1 s. 3 para. 1. Note that the state has no enforcement mechanisms against a Municipality that does not have an up-to-date comprehensive plan. A planning injunction (planföreläggande) regard only detailed development plans (ch. 12 s. 6).
2074 Planning and Building Act, ch. 5 s. 1. Those plan requirements also regard structures (not only buildings) if a building permit is required. Structures are, for instance, wind mills and pipelines. For a
One exception to the plan requirement applies. Where an area regulation exists that has sufficiently regulated the matter, a detailed development plan is not required. I will come back to the area regulations shortly. First, I will say a few words about the prerequisites for mandatory, detailed development plans. One problem is that the prerequisites expressed in the provision above are vague. However, the requirement of implementing a detailed development plan is directed toward the Municipality, and it is, therefore, the Municipality that decides when such a plan is necessary. The large margin of appreciation left to the Municipalities must be understood in this context, where local situations may be considered and taken into account.

Of particular relevance here is the expression in the second point, “significant impact on the surroundings” (betydande inverkan på omgivningen). Even if the appropriateness of a single building or structure normally can be assessed through the granting process of a building permit, there might be situations where the appropriateness must be assessed through a detailed development plan. From the detailed statements of the preparatory works (specialmotiveringen), it is clear that this requirement aims primarily at buildings and structures in relation to already settled areas, such as a larger building for industry, commerce, or service, and detriments arising from that activity, such as traffic and security issues. The plan requirement may, nevertheless, be evoked in a situation where a building, such as a larger tourist recreation centre, is in an environmentally sensitive area distant from other areas with settlements. It should also mean that wind mills and structures necessary for mining activities require the Municipality to issue a detailed development plan.

In any case, detailed development plans presuppose a connection to settlements (bebyggelse) or single buildings with significant impacts. This feature is true also for area regulations. This is an essential comprehension of the limits of the legally binding plans, which will be discussed further below in relation to the reindeer husbandry interests. Area regulations are used as a tool for making certain issues in the comprehensive plan binding or for securing a national interest subject to the provisions in chapters 3 and 4 of the Code. An area regulation may be issued, in

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short explanation of the concepts, see Michanek & Zetterberg (2004) *Den svenska miljörätten*, p. 424

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2075 | Planning and Building Act, ch. 5 s. 1 para. 2.
2078 | See Prop. 1985/86:1, pp. 552-553. Nevertheless, a building in a rural area can be subject to this provision even if the preparatory works chiefly speak about already settled areas.
2079 | See also Bengtsson, Bertil (2003) *Speciell fastighetsrätt – Miljöbalken*, p. 54.
2080 | A recent licentiate thesis concludes that the installation of wind mills typically requires a detailed development plan as well as a building permit. See Pettersson, Maria (2006) *Legal Preconditions for Wind Power Implementation in Sweden and Denmark*, p. 139.
2081 | The consultation requirements and the possibilities for reindeer herding Saami to appeal against the plan decision will be examined below.
2082 | Compare also with the provisions in chapter 2 of the Act, which state public interests that shall be regarded in the plan process (planläggningen) and in localisation of settlements.
2083 | Planning and Building Act, ch. 5 s. 16.
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similarity with the detailed development plan, for a limited area, but it cannot be used for an area already subject to a detailed development plan.\footnote{Planning and Building Act, ch. 5 s. 16.}

The area regulations may (får) regulate eight explicitly defined situations.\footnote{Planning and Building Act, ch. 5 s. 16 point 1-8.} Despite the fact that the provision as such refers to "may", the preparatory works declare that those eight situations listed are exhaustive.\footnote{Prop. 1985/86:1, p. 602.} Among other things, area regulation can be used for lessening the requirements for building permits or for stating the basic aims for the use of land and water areas for settlements (bebyggelse), recreation structures (fritidsanläggningar), or communication structures. The aim with an area regulation may also be to delimit planned settlements or other structures adjacent to an area of national interest. According to the preparatory works, local interests and other public interests, such as fish reproduction and fresh water supplies, can be guarded through area regulations, even if the comprehensive plan normally should be enough.\footnote{Prop. 1985/86:1, p. 604.} I do not agree, because the comprehensive plan is not legally binding and may therefore not hinder certain exploitations.

Although the two plan types, the detailed development plan and area regulations, may be used alternatively, there are some differences. The detailed development plan includes typically planning of larger areas than the area regulation. It is also more comprehensive and detailed. The detailed development plan also gives rise to a "building right" under the terms of the plan. Area regulations are normally used where less regulation is necessary. For area regulations, moreover, there is no requirement to define the land use in the plan, although the basic aims of land use may be included.\footnote{Prop. 1985/86:1, pp.602 & 604.}

What is obvious with these two types of plans is that they regulate land use situations in close relation to settlements (bebyggelse), single buildings, or structures. They have relevance chiefly for the planning in and adjacent to more populated areas (tätorter). The plan types cover also only small portions of the Municipal comprehensive plan. Importantly, they can never be used solely to safeguard the protection of valuable nature areas or to hinder, for instance, logging in areas without connection to settlements.\footnote{Note, however, that in relation to detailed development plans, the Municipality may decide that site improvement permits (marklov) are needed for felling trees or tree planting (skogsplantering). In area Regulations, the Municipality may decide on site improvement permits for, for instance, tree felling in areas intended for settlement. See the Act, ch. 8 s. 9 paras. 2-3.} In such situations, the provisions under chapter 7 of the Code must be used (nature reserves, et cetera). So, importantly, even if a Municipality would like to protect the reindeer pasture areas within its domain, the Planning and Building Act does not provide the opportunity.

On the whole, this shows a particular problem vis-à-vis the interests of the reindeer husbandry. The business is carried out primarily in areas outside more populated areas. The detailed development plans or area regulations cannot be used to secure a continued enjoyment of the reindeer herding right or to hinder settlements or other structures that may have a large impact on the area and the reindeer husbandry. Environmental protection objectives in rural areas are equally impossible to secure in
Thus, the majority of the reindeer herding areas are not subject to any legally binding plans. That the detailed development plans and the area regulations regard land and water use issues primarily within and adjacent to more populated areas (tätorter) is obvious also in relation to the preparatory works. My understanding is that the planning system does not correspond to the specific preconditions that apply within the vast and densely populated reindeer herding area. There is competition of land and natural resources also in this region, but in a different way. Activities are often carried out on large areas, as in the reindeer husbandry and the forestry. Mining activities also normally demand area, as are water constructions such as dams.

The lack of correspondence with the regional preconditions in this area is an important reflection. The Environmental Code as well as sector statutes refer to detailed development plans and area regulations. See further below in subsections 9.4.2 and 9.4.3. Land and water uses that are not compatible with the plans are simply not allowed. This is an essential component of the planning law, to prevent certain activities from taking place within particular areas. Such protection is largely absent for the reindeer herding area.

Now, I will focus on the planning process. The process in a compressed version consists of three steps: the drafting of the plan, exhibition of the plan proposal, and the adoption of the plan (normally the Municipal Council). Consultation requirements exist in two situations, in relation to an EIA and in relation to the plan proposal. However, the consultation within the EIA procedure does not include persons or organisations. Instead, there is a separate consultation process for all of the plan types, and consultation is mandatory. Since consultation requirements are analysed separately in section 9.5, I will not examine those provisions here.

An EIA may be required in certain situations for three of the plan types: comprehensive plans, detailed development plans, and property regulation plans. Here, the provisions in the Act refer to chapter 6 of the Code. The provisions for EIA requirements for plans and programmes have recently been extended as a consequence of the EC Environmental law. The Municipality is now required to make an EIA if the implementation of the plan or program is likely to have a significant environmental effect (betydande miljöpåverkan). This regards also

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2090 Planning and Building Act, ch. 4 s. 3, ch. 7 s. 5 and ch. 5 ss. 20 & 33.
2091 Planning and Building Act, ch. 4 s. 2 a, ch. 5 s. 18 and ch. 6 s. 12. As said above, the Property Regulations plans will not be examined further.
2092 The directive (2001/42/EC) on the assessment of the effects of certain plans and programmes on the environment, came in to force the 21st of June in 2004. From the same date, the new Swedish provisions came into force.
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amendments of plans.  The aim of the EIA is to integrate environmental aspects into the plan and program to promote a sustainable development  

The assessment of whether the plan or program is likely to have a significant environmental effect is made with the aid of certain prerequisites. The implementation of a plan or program shall be deemed to have a significant environmental effect if either the plan/program includes an activity or measure for which a permit is required, because it affects a Natura 2000 area (Environmental Code ch. 7 s. 28 a), or the plan/program includes potential activities and measures listed in Appendixes 1 and 3 in the EIA Regulation.  

This means that certain planning requires that an EIA be made. For example an EIA must be made where the plan includes future mining activities, peat exploitation, pipelines for natural gas, deforestation or planting of forest where the aim is to alter the land use, ski slopes, and ski resorts and large hotel complexes outside of aggregated settlements (sammanhållen bebyggelse).  

This EIA process includes no consultation with the public, only with the County Administrative Board and other Municipalities. Individuals and organisations may only leave a written submission on the EIA or the plan proposal in relation to the exhibition. Note that the assessment of whether a plan or program is likely to have a significant environmental effect must be made publicly available and shown in relation to the plan. There is no provision that states that the Municipality’s decision cannot be appealed, as in the case with the County Administrative Board’s decision in EIA for projects. This must mean that its decision of whether an EIA is required or not may be appealed to the County Administrative Board.  

As with the EIA for projects, the overarching aim is naturally to assess impacts on the environment. The EIA shall include a description of the significant environmental effect on, among other things, “other parts of the cultural heritage” than ancient monuments and cultural assets and the relationship between different environmental aspects. Maybe the reindeer husbandry could be subsumed under the words “other parts of the cultural heritage”. Otherwise, the impacts on the reindeer husbandry and the enjoyment of the reindeer herding right are indirect. Where there are significant impacts on the environment, such as pollution to land, air or waters, degradation of the biological diversity or impacts due to infrastructural development or settlements, generally detriments will also arise for the reindeer

2093 Environmental Code, ch. 6 s. 11 para. 1.  
2094 Environmental Code, ch. 6 s. 11 para. 2.  
2095 Regulations (1998:905) on Environmental Impact Assessments, s. 4 and the referred Appendixes. See also the Planning and Building Act, ch. 5. s. 18 paras. 3-4. Note also that exemptions apply for detailed development plans, if they regard small areas and if the criteria in Appendix 4 (in the EIA Regulations) does not support that the plan is likely to have a significant environmental effect. See the Regulations s. 4 para. 2. The same apply to amendments of the comprehensive plan.  
2096 Environmental Code, ch. 6 s. 13.  
2097 Environmental Code, ch. 6 s. 14. See also below on the provisions on submissions in the Planning and Building Act.  
2098 Regulations on Environmental Impact Assessments, s. 6 para. 2.  
2099 Planning and Building Act, ch. 13. s. 2.  
2100 Compare with the discussion below in subsection 9.4.2.  
2101 Environmental Code, ch. 6 s. 12 point 6.
husbandry. The EIA shall also include a record on planned measures to prevent, hinder or counteract significantly negative environmental impacts\textsuperscript{2102}.

Interestingly, in relation to the content of the EIA, there is a reference to national environmental quality targets (miljökvalitetsmål). Relevant targets vis-à-vis the plan must be described, as well as in what manner they are taken into account. This is the only explicit connection with the national environmental quality targets that exists to my knowledge. Otherwise, the preparatory works state that those targets shall be taken into account in decisions related, for instance, to granting permits or to supervision. See further below in subsection 9.2.3.5.

There is also an element of public participation when the plan and the EIA (if required) are exhibited. Individual Saami and Saami organisations may make written submissions on the proposed plan (and the EIA)\textsuperscript{2103}. At this stage, however, the opportunities to influence the plan are limited. The submission has, nevertheless, important legal implications for the possibility to appeal against detailed development plans and area regulations. The decision to adopt, amend or annul those two plans can only be appealed by those who have made a written submission prior to the expiration of the exhibition period\textsuperscript{2104}.

The appeals relative to the different plan types differ. This is because some of the plans are legally binding, while others are not. Comprehensive plans and regional plans may only be appealed through the assessment of legality (laglighetsprövning). Any member of a Municipality has a right to have the legality of the Municipal Assembly assessed via an appeal to the County Administrative Court\textsuperscript{2105}. This means that the appeal basically may not regard the substantial content of the plan or the appropriateness of parts of the plan (lämplighetbedömningar), only whether the process has been followed.

As said above, one requirement for appealing detailed development plans and area regulations is that prior submission (yttrande) during the plan process has been written. Another requirement is that the plan decision must concern (angå) the person, which is the principal public administrative law requirement for appeals (förvaltningsbesvär)\textsuperscript{2106}. In principle, one needs to be regarded as a party to the case (sakägare), and the circle of parties to the case is interpreted to be rather wide.\textsuperscript{2107}.

Holders of reindeer herding rights, which are specific rights to real property, in

\begin{footnotesize}
\begin{enumerate}
\item Environmental Code, ch. 6 s. 12 point 7.
\item Planning and Building Act, ch. 4 s. 7 and ch. 5 ss. 23 & 33. Regarding detailed development plans and area regulations, parties to the case (sakägare) and those Saami that have an essential interest (väsentligt intresse) in the proposal (including Saami organisations) shall be notified of the exhibition and the opportunity to make a submission. See c. 5 s. 25.
\item Planning and Building Act, ch. 13 s. 5.
\item Planning and Building Act, ch. 13 s. 1. and the Local Government Act (1990:900) ch. 10 ss. 1-2. This applies also to the Municipalities decision not to adopt (anta) a detailed development plan. See Planning and Building Act, ch. 13 s. 1 point 3.
\item Planning and Building Act, ch. 13 s. 2 and the Public Administration Act (1986:223) s. 22. See also Prop. 1985/86:1, pp. 809-811.
\item See further in Michanek & Zetterberg (2004) \textit{Den svenska miljöritten}, p. 431 and cases referred to. It is possible to argue for protection of public interest, such as environmental protection, as long as the person has standing.
\end{enumerate}
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principle always have standing, if they are affected by the plan. Such appeals are tried by the County Administrative Board. Its decision may be appealed to the Government.

The Municipality’s decision on granting a building permit may also be appealed through the public administrative law appeal (förvaltningsbesvär). The main principle is that a building permit is required for all new buildings and structures, such as hotels, ski slopes, wind farms, and tunnels. It is common that a building permit is required for buildings or structures necessary in relation to a specific activity that otherwise requires a permit under the Code or another statute. Where the decision concerns the reindeer herdsmen, they have the opportunity to appeal the building permit to the County Administrative Board. However, prior to the decision on whether to grant the building permit, certain persons have the right to leave a submission (yttrande). This regards above all “known parties to the case” (kända sakägare). Saami villages are clearly within that category if the application concerns a property burdened by reindeer herding rights.

9.2.3 National Planning Instruments

9.2.3.1 Basic and Special Provisions Concerning the Management of Land and Water Areas

The planning under the Planning and Building Act is primarily local. The comprehensive plan covers only the domain of the Municipality, and the Municipality has in principle a plan monopoly. This is an aspect of the long tradition of local self-government, and, subject to the new Planning and Building Act, the Municipality has a far reaching planning autonomy. The opportunity for the State to intervene and control this planning is rather restricted. In this respect, the basic and special provisions concerning the management of land and water resources, in chapters 3 and 4 of the Code, are essential. Those so-called natural resource management provisions (hushållningsbestämmelser) must be applied in the planning process and in matters on building permits. In this, they may be regarded as instruments for national

2108 Holders of a specific right to real property (särskild rätt till fastighet) are in principle always regarded as parties to the case (sakägare). See Didón, Magnusson, Millgård & Molander (1987) Plan och bygglagen. En kommentar, pp. 619-620.
2109 The County Administrative Board has the power wholly or partly to nullify (upphäva) a plan decision. See the Planning and Building Act, ch. 13 s. 2 & 4. The Government’s decision may only be subject to a judicial review (rättsprövning).
2110 Planning and Building Act, ch. 13 s. 2. See also Prop. 1985/86:1, p. 812.
2111 Planning and Building Act, ch. 8 ss. 1-2. Larger amendments of already existing buildings and structures normally also require a building permit.
2112 Planning and Building Act, ch. 8 s. 22.
2113 Nevertheless, the legal application here seems to be based on the land registry (fastighetsregistret). The reindeer herding right is not included into this register, unlike all other specific rights to property (särskild rätt till fastighet). Torp has therefore accurately suggested that this right should also be included in the register. See further in Torp, Eivind (2005) Renskötselrätt bör skrivas in i fastighetsregistret i SvJT No. 5 2005.
2114 Planning and Building Act, ch. 2, s. 1 para. 1.
This means, for instance, that the explicitly mentioned geographical areas in chapter 4, including Natura 2000 areas, shall be considered in the planning.

Even if the Municipal plan monopoly means that it is the Municipality that decides the content in the various plans, a few situations apply where the State may repeal (upphäva) some of the plans or impose injunctions (förelägganden). The County Administrative Board has no authority to examine the Municipal comprehensive plans, since it lacks legal effect. Instead, the control mechanism is concentrated to detailed development plans and area regulations. Where the Municipality decides to adopt, amend or abolish any of or those two plan types, the County Administrative Board must, under certain criteria, assess the decisions. It regards primarily if a national interest under chapters 3 and 4 of the Code have not been satisfied or if an environmental quality standard subject to chapter 5 of the Code has not been observed. This assessment shall be made within three weeks from when the Board acknowledged the Municipal decision. The Board can repeal the decision wholly or partly. The Government may additionally impose an injunction upon a Municipality requiring that, within a certain time frame, it adopt, amend or abolish a detailed plan or area regulation where a national interest has not been satisfied. Regarding national interests, the Government may also assess regional plans, with the authority wholly or partly to repeal the decision.

The provisions in chapters 3 and 4 are intended to give substantial guidance on the difficult balancing of various resource management interests which commonly are conflicting, basically between conservation interests and exploitation interests. On the one hand, there is an interest in preserving the environmental quality, natural and cultural values, and outdoor recreation. On the other, there is an interest in exploiting natural resources, such as minerals, including oil and gas, peat, and water, as well as an interest in using the area for energy generation and distribution, industries and infrastructures. In between, we have the interests of certain businesses, namely the reindeer husbandry, professional fishery, forestry and agriculture.

The natural resource management provisions are directed at authorities, who are to apply the provisions in their decision-making concerning plans or granting of permits. The area of application of those provisions is, thus, restricted with regard to certain legislation and concerning authorities. The provisions are not applicable to single operators (verksamhetsutövare). These provisions are problematic for several reasons, but not the least of which is because of the expression of the various provisions. The legal text is vague and gives much room for discretion to the authority called upon to apply them. Unfortunately, the preparatory works are also weak and ambiguous, which on the whole means that the interpretation and

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2116 Planning and Building Act, ch. 12 s. 1-3.
2117 Planning and Building Act, ch. 12 s. 5.
2118 Planning and Building Act, ch. 12 s. 5.
2119 Environmental Code, ch. 1 s. 2. Note that the Commission on the Environmental Code (Miljöbalkskommittén) has suggested an extension of the area of application concerning activities, so that activities that are under notification requirements (anmärkningsplikt) in the Code shall be encompassed. See SOU 2004:37 Miljöbalkens sanktionssystem och hänsynsregler, p. 370.
application of the provisions is unpredictable. This is generally unsatisfactory for promoting a sustainable development or for protecting the interests of the reindeer husbandry. It might also be less desirable to include the specific protection of a certain business within the realm of the Environmental Code, as it chiefly is focusing on the protection of human health and the environment\textsuperscript{2120}.

It is essential to understand that the provisions in chapters 3 and 4 have their origin in the former Natural Resources Act and that those former rules were criticised for being vague and unclear in certain respects. Despite this criticism, the provisions were transferred into the Environmental Code without any significant amendments\textsuperscript{2121}. Due to the fact that those provisions have been “imported” from a former statute, the preparatory works behind that statute are still relevant\textsuperscript{2122}.

Interestingly, the Law Council had remarks on the legislative technique and the large margin of appreciation vis-à-vis the natural resource management provisions at the time. The span between the legal text and the preparatory works was seen as too wide and almost in non-compliance with good legal technique. Even if the Council acknowledged the tradition to further explain the legal text through preparatory works, those concerned by the legislation, argued the Council, should nevertheless be able roughly to interpret its content and legal effects. Moreover, the single provisions were seen as too wide and general.\textsuperscript{2123} In relation to the Environmental Code, the Law Council repeated the vagueness of particularly the expression “to the extent possible” (så långt möjligt) and the fact that its meaning was expressed only in relation to the specific comments for the provisions (specialmotivering)\textsuperscript{2124}. Nevertheless, the natural resource management provisions apply, no matter the critique.

The vagueness and ambiguity of those provisions are unfortunate, since their area of application is rather wide. They shall be applied of course in certain matters under the Environmental Code, but also in matters subject to sector statutes, chiefly concerning decision making for planning and assessment of permits\textsuperscript{2125}. However, their application is restricted to new and changed activities. The provisions are not applicable to situations that are regarded as ongoing land uses (pågående markanvändning)\textsuperscript{2126}.

Normally, forestry and agriculture are regarded as such ongoing land uses, which, for instance, mean that the natural resource management provisions shall not

\textsuperscript{2120} The Law Council (lagrådet) has acknowledged the legislative inappropriateness. Instead they argued that a focus should lie on the natural resources necessary for pursuing a business. See Prop. 1997/98:45 Del 1, p. 243.
\textsuperscript{2121} Prop. 1997/98:45 Del 1, p. 239.
\textsuperscript{2122} Prop. 1985/86:3 Lag om hushållning med naturresurser m.m. The preparatory works of the Code refer also to this legislative basis. See Prop. 1997/98:45 Del 2, p. 29.
\textsuperscript{2124} Prop. 1997/98:45 Del 1, p. 243.
\textsuperscript{2125} Environmental Code, ch. 1 s. 2. Within the Code, the natural resource management provisions shall be applied in matters under chapter 7 (area protection), in the assessment of permit requirements under chapters 9, 11 and 12, and in the permissibility assessment under chapter 17.
be applied, not even in the assessment of logging permits. As a result, where the reindeer husbandry is classified as of national interest in an area, there is normally no protection against forestry. Forestry and agriculture are also typically competing with reindeer husbandry on the availability of land and natural resources. Under the natural resource management provisions, the forestry and agriculture are stated as of “national importance”. In the context of forestry, this means that valuable forest land shall “to the extent possible” (så långt möjligt) be protected against measures that may be prejudicial to a rational forestry.

The provisions in chapters 3 and 4 differ, where the provisions in chapter 3 give general direction, those in chapter 4 state geographical areas that are of national interest. I will begin with analysing the provisions in chapter 4 and then the provisions in chapter 3. The focus lies on the interest of the reindeer husbandry and general environmental protection aims. Note also that I will discuss the national interests separately below, in subsection 9.2.3.2, both regarding their content, legal effect and other implications. This regards, however, primarily the national interests stated under chapter 3 as they are generally expressed and applied on a case by case basis.

Under chapter 4, sections 2 through 8 of the Code, the legislation explicitly points out certain geographical areas to be of national interest (riksintresse). Those areas are, with regard to the natural and cultural assets of national interest in their entirety. The classification as a national interest indicates that the balancing with respect to other interests already has been made and that natural and cultural assets shall be given priority in situations of competition. Exploitation activities and other infringements in the environment may be undertaken only if where it does not meet any hinder due to the specific provisions, or if where it may occur in a manner that does not significantly damage (påtagligt skadar) the natural and cultural assets of these areas.

By the expression “significantly damage” is meant activities or measures that either may cause a permanent, negative impact on the protected interests, or that temporarily cause considerable, negative impact on those interests. Such an assessment should focus on the total natural and cultural assets and the effects on them. This means that considerable, negative impacts can be accepted on part of the area, as long as the area as a whole is not significantly damaged. By this interpretation, it follows that various exploitation activities and other infringements in the environment, for instance, in the unexploited mountain areas (obrutna fjällområdena) of great value for the reindeer husbandry, can be allowed with the support of the provision, as long as the total value of the interests protected is not affected significantly. However, additional exceptions apply, as will be evident shortly.

2127 Environmental Code, ch. 3 s. 4.
2128 Environmental Code, ch. 4 s. 1 para. 1.
2129 Prop. 1997/98:45 Del 1, p. 36.
2130 Environmental Code, ch. 4 s. 1 para. 1.
2132 See for instance RA 1993 not. 550 (“Vedabron”) where the Supreme Administrative Court reasoned along the lines of the (old) preparatory works. The case regarded new roads and a bridge in the coastal area (Höga kusten), now protected in section 2.
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The areas explicitly pointed out consist chiefly of coastal and mountainous areas, certain rivers and watercourses. Of particular relevance here are the protected so-called unexploited (obrutna) mountain areas. In the explicitly mentioned mountain areas, settlements (bebyggelse) and structures may be established only where necessary for the reindeer husbandry, the resident population, scientific research or outdoor recreational exercise (rörliga friluftslivet). Any other measures, such as water power developments, may only be taken if the character of these areas is maintained.

In section 2, a number of areas are listed where tourism and outdoor recreation, in particular the outdoor recreational exercise (det rörliga friluftslivet), especially shall be taken into account in the assessment of permissibility of exploitation activities and other environmental intrusions. This regards the mountain areas not explicitly mentioned in section 5, that is, those areas that are not unexploited (obrutna). However, for the reindeer husbandry, tourism and recreation activities may during periods impose detriments or even damages to the pasture. The implication of the tourism and recreational activities will be analysed partly below in subsection 9.4.4.

In the so-called national rivers (Torneälven, Kalixälven, Piteälven and Vindelälven), hydroelectric power development or other connected water regulations may not be pursued. Those rivers and their water areas, source rivers and tributaries, are strictly protected from electricity generating activities. Additionally, there is a reminder in section 8 that activities and measures that impact a Natura 2000 area might need a specific permit. Through this section, which was enacted by an amendment in 2001, the legal protection afforded in principal to appointed Natura 2000 areas will be protected as well in relation to other sector statutes, where those explicitly refer to the provisions in chapters 3 and 4.

An authority that, under another statute, applies section 8, may only allow activities and measures that may not significantly impact an appointed Natura 2000 area. If a significant environmental impact may occur, the authority must await a specific permit decision before allowing the particular activity or measure. The provision in chapter 4 section 1 was amended at the same time (in 2001). Because of the fact that the EC directives do not limit the protection of Natura 2000 areas to activities and measures undertaken within such areas, it was necessary to amend this provision also. Consequently, all activities or measures, whether carried out inside or outside of such areas, that may significantly impact the environment are shielded by this protection.

2133 A character of those unexploited mountain areas is in principle the lack of roads and railways. For conserving this virginity, new roads may in principle not be allowed, other than for the purposes mentioned in the provision. See Prop. 1997/98:45 Del 2, p. 39.
2134 Environmental Code, ch. 4 s. 5.
2135 Environmental Code, ch. 4 s. 6. Exempted are only water operations that have only minor environmental impacts. This means that various measures related to existing structures should normally be allowed. See also Prop. 1997/98:45 Del 2, p. 41.
2136 Note that also areas that should be included (due to ecological criteria) into the Natura 2000 network have the same legal protection as if they were already appointed. See for instance Prop. 2000/01: 111 Skyddet för vissa djur- och växtarter och deras livsmiljöer, p. 51.
2138 Prop. 2000/01:111, p. 65. See also below on the provisions on Natura 2000 areas in section 9.3.
The specific protection referred to in sections 2, 5 and 6 above, does, however, include some exceptions. The exceptions do not apply to Natura 2000 areas where diversions from the protection shall be assessed under the specific provisions in chapter 7. Those provisions mentioned do not hinder development of existing urban areas, local industry or structures necessary for total defence purposes. Moreover, in particular circumstances (särskilda skäl), the provisions do not hinder structures necessary for mineral exploitation in areas in which minerals regarded as of national interest are mined. What “particular circumstances” include is unclear and not defined in the preparatory works. It means at a minimum that mineral exploitation can be allowed even in unexploited mountain areas, if the minerals in the area are classified as of national interest.

In sum, despite the fact that certain geographic areas are explicitly pointed out in the legal text, rather broad exceptions to the protection offered do operate, particularly in relation to mineral exploitations. This exception shall be understood in the context of the recent exploration activity in the Northern parts of Sweden to find ores economically valuable. See further below in subsection 9.4.3.4. It is only Natura 2000 areas that are exempt from those large opportunities to allow exploitation activities and other infringements in the name of the “local industry”. Both road constructions, if necessary for the local tourism sector, and water power developments may be allowed. Hence, a rather wide discretion is left to the authorities that apply the provisions in chapter 4. This room for discretion is also large with respect of the provisions under chapter 3.

Chapter 3 includes more general provisions regarding the protection of certain areas, but also certain businesses, such as forestry and agriculture, which are of “national importance.” Those provisions apply to the over-all uses of land and natural resources in the country. First of all, there is a central balancing provision, which basically states that land and water areas shall be used for the purpose for which they are most suitable, but also with regard taken to present needs. For competing interests, priority shall be given uses that correspond with good management (hushållning) from the point of view of the public. This latter statement seems to imply that public interests shall take precedence over individual interests. In this, the interests of the reindeer husbandry are both public and individual, such as the interests of forestry. Hence, the balancing becomes complicated. Nevertheless, this balancing shall also be undertaken with support of the objective of the Code (ch. 1 s. 1), where the long-term perspective is further reinforced. The provision in chapter 3 section 1 (balancing provision) has two functions: to support the balancing inherent in sections 2 through 9, and to function as a general provision for situations not covered by the provisions.

The other provisions in the chapter focus on both different types of land and water areas, which typically state conservation values, as well as specific interests that are connected to certain areas, which may be hindered if other uses are allowed.

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2139 Environmental Code, ch. 4 s. 1 para. 2. See further in Prop. 1997/98:45 Del 2, p. 36.
2141 Environmental Code, ch. 3 s. 1.
Despite the heterogeneity among those areas/interests, they shall “to the extent possible” (så långt möjligt) be protected. This is a vague expression. The preparatory works say that the expression contains a balancing between the protected interests and competing interests. The balancing allows socio-economic factors in relation to a single case, for instance, regarding employment policy and regional policy. Consequences for concerned individual interests shall also be balanced. However, economic considerations alone may not jeopardise the values protected, if the overall assessment does not show that it promotes a good economising, subject to the balancing provision in section 1.2143

Areas of importance for reindeer husbandry, commercial fishery2144 or fish farms (vattenbruk), are mentioned among the provisions. Such areas shall be protected to the extent possible against measures that may “significantly interfere” (påtagligt försvåra) with pursuing the businesses.2145 The same applies to areas that contain valuable minerals and other materials, which shall be protected to the extent possible against measures that may “significantly interfere” in their exploitation2146. Areas that are particularly suitable as sites for structures for industrial production, energy production, energy distribution, communications, water supply or waste treatment, shall also, to the extent possible, be protected against measures that may “significantly interfere” the establishment or use of such structures2147. Also, forest lands of importance for the forestry shall, to the extent possible, be protected against measures that may “significantly interfere” with a rational forestry2148.

Additionally, the interests of total defence purposes shall, to the extent possible, be protected against measures that may “significantly hinder” (påtagligt motverkar) those interests2149. Regarding agriculture, areas suitable for cultivation may be used for settlements (bebyggelse) or structures only if necessary for safeguarding significant public interests (väsentliga samhällsintressen), and the need cannot be satisfied by using other land2150.

In addition, there are conservation interests, which concern large areas in principle unexploited, where the area shall, to the extent possible, be protected against “significant impacts” (påtaglig påverkan)2151. Such interests involve areas particularly ecologically vulnerable, which shall, to the extent possible, be protected against “damage” (skada) to the environment2152. Areas comprised of natural or cultural assets, or which include recreation interests, shall, to the extent possible, be protected against “significant damage” (påtaglig skada)2153. The preparatory works elucidate the prerequisites for the conservation interests to some extent.

2144 The concept shall not be interpreted narrowly. Persons of whom the fishery is of significant importance are also included. See Prop. 1997/98:45 Part 2, p. 30.
2145 Environmental Code, ch. 3. s. 5 para. 1.
2146 Environmental Code, ch. 3. s. 7 para. 1.
2147 Environmental Code, ch. 3. s. 8 para. 1.
2148 Environmental Code, ch. 3. s. 4 para. 3.
2149 Environmental Code, ch. 3. s. 9 para. 1.
2150 Environmental Code, ch. 3. s. 4 para. 2.
2151 Environmental Code, ch. 3. s. 2.
2152 Environmental Code, ch. 3. s. 3.
2153 Environmental Code, ch. 3. s. 6 para. 1.
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Nevertheless, taken together with the provisions aimed at protecting areas from measures that may “significantly interfere” or “significantly hinder” certain land uses or exploitation of natural resources, the assessment becomes complicated. To be blunt, the provisions are sufficiently vague to allow the preferred means of land use. Different competent authorities may put weight on different aspects. It seems unlikely that, for instance, the Mining Inspector, when applying the provisions, would possess adequate knowledge of environmental implications or the specific preconditions for reindeer husbandry to be able to assess such aspects correctly.

Consequently, the interpretation of the provisions in chapter 3 leaves a large margin of discretion to competent authorities with regard to both the expression “to the extent possible” and to expressions such as “significant impacts” and “significantly hinder”. The situation is complicated by the fact that both conservation and exploitation interests are protected.

9.2.3.2 National Interests

Achieving a “correct” balancing in each given situation is further complicated by the fact that some of the above stated areas and interests (see subsection 9.2.3.1) might be of national interest (riksintresse). What is remarkable is that there is no definition of the concept “national interest” and that it does not provide an explicit protection, which will be evident from the analysis below. A classified area, such as a national interest, is never legally binding.

Regarding classifications of national interests, the preparatory works state with regard to section 6, for instance, that the areas appointed should have “few equivalents in the nation” (få motsvarigheter i landet). Regarding the other areas of national interest, the uniqueness is evident in the preparatory works. This may be used as a measure, since, by the very words of the instrument, a “national interest” should be a nationally unique area subject to other areas and the various interests that are provided protection.

Areas for the reindeer husbandry and the commercial fishery may be of national interest, as may areas with valuable minerals. Areas suitable for industry, energy generation, energy distribution, among other things, may also be regarded as of national interest, including areas for total defence purposes. Areas that are valuable due to their natural or cultural assets and for recreation purposes (friluftslivet) can also be of national interest.

As indicated above, the classification as a national interest is, however, not an independent legal protection. Authorities responsible for each sector (centrala förvaltningsmyndigheter) may appoint areas that, in their view, are to be regarded as

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2156 The problem today seems to be that too many areas are classified to be of national interest, which in fact should mean that the protection of the various interest – an a given situation – might not be taken seriously. As an example, the Environmental Protection Agency has classified almost a third of Sweden as of national interest subject to section 6 (natural and cultural assets, recreation). See further below.
a national interest, subject to the provisions in chapter 3. For instance, the Swedish Board of Agriculture (Jordbruksverket) has the authority to appoint areas of national interest for reindeer husbandry and the Fishing Agency (Fiskeriverket) for commercial fishing, and the Geological Survey of Sweden (Sveriges geologiska undersökning) suggests areas of national importance for mining\textsuperscript{2157}. The process of classifying areas is rather comprehensive. There is cooperation among the responsible sector authority, the County Administrative Boards, the National Board of Housing, Building and Planning (Boverket), and other concerned sector authorities.\textsuperscript{2158} In practice, the Municipalities are also involved in the process.

The County Administrative Boards keep records on national interests within each region, and the National Board of Housing, Building and Planning (Boverket) has a national coordinating role vis-à-vis the sector authorities. In single cases and in Municipal planning, the County Administrative Board shall also control and promote taking national interests into account.\textsuperscript{2159} It is an interesting statistics that the Environmental Protection Agency has classified almost a third of Sweden as of national interest subject to chapter 3 section 6 (natural and cultural assets, recreation)\textsuperscript{2160}. This should mean that for a majority of matters on granting of permits and in the planning process, there are national interests to take into account and balance against other interests.

An appointed national interest will become legally relevant only in relation to single cases. As said above, a classified area is never legally binding as such. It is instead the authority that on a case to case basis shall decide whether the classified area legally is of national interest. This included, for instance, the Municipality in a planprocess, and the County Administrative Board or environmental court concerning the granting of permits. It is also the permit authority, for instance, that is responsible for the balancing of the provisions in chapters 3 and 4, including situations where an area is classified as a national interest for at least for one purpose\textsuperscript{2161}. The authority called to apply the natural resource management provisions is obliged to state in its decision whether it is possible to combine the structure, activity or measure with good management from the view point of the public, as well as with the comprehensive plan or regional plan if such plan exist\textsuperscript{2162}. Even if the Municipal comprehensive plan is referred to here, there is no explicit prohibition against, for instance, granting permits that do not correspond with the comprehensive plan\textsuperscript{2163}.

Where an area has been appointed and in a single case and regarded as a national interest, the area shall be protected against “significant damage” (s. 6),

\textsuperscript{2157} Regulations (1998:896) on Management of Land and Water Areas, s. 2. See the present areas classified relevant for mining at http://www.sgu.se/sku/sv/naturresurs/riksin_s.htm (viewed 2006-05-20).
\textsuperscript{2158} Regulations on Management of Land and Water Areas, s. 2.
\textsuperscript{2159} Regulations on Management of Land and Water Areas, ss. 1-3.
\textsuperscript{2160} See at http://www.naturvardsverket.se/ under ”Natur och naturvård” and ”områden av riksintresse” (viewed at 2006-05-20).
\textsuperscript{2162} Regulations on Management of Land and Water Areas, s. 5.
\textsuperscript{2163} Compare with the provision in ch. 16 s. 4 regarding detailed development plans and area Regulationss.
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“significant interference” (ss. 5 and 7-8) and “significantly hindrances” (s. 9) subject to the interest protected. The expression “to the extent possible” is excluded here, which means that areas, for instance, with valuable natural assets of national interest shall be protected against “significant damage”. What the expression “significant” (påtaglig) means is, however, unclear. The preparatory works exclude minimal impacts, and, in this, a measure must have a permanently negative impact on the protected interest or, at least temporarily, a very large impact.2164 The room for discretion here is also considerable.2165

From this, it follows that the same area may be subject to classification of two or more national interests. This is generally not a problem until someone applies for a permit. If it regards, for instance, a new mine or railway, it is of great significance for the interests of the reindeer husbandry. If the reindeer husbandry in the areas is regarded as of national interest, it shall be protected from measures that “significantly interfere” with the business (the reindeer husbandry within a Saami village). Where two or more incompatible national interests are present, “priority shall be given to the purpose or purposes that are most likely to promote a long-term economising of land, water and the physical environment in general”2166.

Consequently, national interests classified due to areas including natural assets or for the purposes of the reindeer husbandry should proceed over, for instance, mineral exploiting interests, as a sustainable use of the area is more likely. The objective of the Code, the provision in chapter 1 section 1, shall be used in this balancing. Nevertheless, socio-economic interests are included in the balancing in relation to the economising of land and natural resources. In this, the exploitation of valuable minerals might come out as a winner.2167 The guidance is unfortunately weak, and the room for discretion is large.

9.2.3.3 The Reindeer Husbandry as a National Interest

Reindeer husbandry as a national interest shows some differences in comparison with the other national interests stated in chapter 3 in the Code. I will here discuss those differences and adjacent problems. The reason for classifying reindeer husbandry as a national interest can be found in the development of the national physical planning, which began in the late 1960s. The development in the mountain regions, for instance, with increased tourism, was then seen as a threat against the interest of reindeer husbandry. It was seen as necessary that the development was directed so that Saami interests would not be damaged and preferably also so that the reindeer herding Saami could participate early in the planning process.2168

2165 The room for discretion is likewise large as well for situations where an area does not include a national interest.
2166 Environmental Code, ch. 3 s. 10. See also Prop. 1997/98:45 Del 2, p. 35.
2167 One situation is clear, however, where an area is, or parts on an area are, needed for a structure subject to total defence purposes, this interest precedes all other national interests. See ch. 3 s. 10. For an analysis of conflict situations see Michanek & Zetterberg (2004) Den svenska miljörätten, pp. 153-157 & 162.
2168 Prop. 1972:111 Hushållning med mark och vatten, Bilaga 2, pp. 142-143. The importance of the participation of Saami villages in the Municipal physical planning was repeated in Prop. 1985/86:3, p.
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In the preparatory work for the former Natural Resources Act, where the natural resource management provisions first were passed, it was stated that reindeer husbandry was a prerequisite for the Saami culture. It was additionally recalled that Parliament in different circumstances had expressed that the future existence of the husbandry must be safeguarded.2169 Here, the close relationship between reindeer husbandry and the vitality of the Saami culture was integrated. It is also from this context that one should understand the provision of protecting areas of national interest for reindeer husbandry, which is also supported by international law 2170. The areas of importance for the business are also of public interest, like all other areas of national interest mentioned in chapter 3. In this, reindeer husbandry should not be degraded to merely an individual interest, even if a particular exploiting activity or measure impacts the reindeer pasture areas of one Saami village2171. This might be easily done, as the national interest is linked with the business carried out by the Saami villages. See the discussion further below.

The preparatory works also stated that the protection as a national interest should mean that, in principle for each Saami village, the basic conditions (grundläggande förutsättningar) for reindeer husbandry must be safeguarded. Therefore, sufficient pasture within both year-round-areas and winter-pasture-areas, migration routes, calving grounds and areas with particularly beneficiary pasture, were seen as essential. The most important parts of the reindeer pasture areas should, therefore, be given a strong protection through the new provision against exploitation.2172 Without doubt, this strong protection has failed. The weakness of the provision corresponds, however, with the ambiguity of all of the provisions under chapter 3. Additionally, the analysis of the provisions under chapter 4 has shown that, in many situations, they too provide weak protection against exploitations and other developments. See above in subsection 9.2.3.1.

In addition, the provision aimed at protecting areas of national interest for reindeer husbandry suffers from other problems. To begin with, it refers to “reindeer husbandry” (renskötseln), which textually implies that the whole business is regarded. This expression is in line with how the legislature has expressed other provisions, primarily in the Reindeer Husbandry Act, including the 1993 amendment in section 1, where is says that the reindeer herding right belongs to the whole Saami people. I have discussed the problem above in subsection 7.3.2.2. However, as a contrast, the preparatory works here are explicit that the important areas for each Saami village

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2170 Chiefly article 27 of the UN Covenant on Civil and Political Rights.
2171 Compare here the three matters that Torp refers to, which all regard the reindeer husbandry as a national interest. There seem to be great uncertainty in how the interest shall be assessed in the decision-making of matters - at all levels. See Torp, Eivind (2000) Riksintresset rennäring – vem representerar det och vem företräder intresset?, pp. 171-188.
shall be assessed and classified as of national interest.\textsuperscript{2173} The risk for allowing exploitation activities on the basis that other areas of national interest within the total reindeer pasture area are not “significantly interfered” with, is then minimised. The connection between the subject and object must be upheld, that is between the right holders (the Saami village) and the area (the pasture area of the village). In any case, if this is the intention of the legislature, the provision should be amended to encompass this understanding.

The protection of important areas for reindeer husbandry differs substantially from other areas/interests protected under the provisions in chapter 3. Although the classification as a national interest is connected to an area, there is a specific link to the business (näringen). Naturally, reindeer husbandry must in fact be carried out on those areas that may be regarded as of national interest. The other provisions refer also to areas, for instance, where valuable minerals occur, but the same obvious link to an industry is lacking. Moreover, reindeer husbandry as a business is connected to the reindeer herding right. Reindeer husbandry may not be carried out in areas that are not subject to reindeer herding rights, unless a specific agreement is reached with the property owner.

Hence, one could argue that the basis for a classification is founded on the reindeer herding right. It is, thus, a symbiotic relationship between the national interest and the reindeer herding right. This is relevant to how the Swedish Board of Agriculture shall classify areas of national interest for reindeer husbandry. For instance, certain areas in the southern parts of the reindeer herding area (winter pasture) have been subject to court proceedings in instances when the claims on reindeer herding rights were not sustained. My understanding is that, where a precedent case (prejudicerande dom) has found that the real property is not burdened by reindeer herding rights, no national interests can be classified. This is rather self-evident. But, what about adjacent areas or areas subject to court proceedings not yet finished? As reindeer husbandry should be regarded as a site-specific right\textsuperscript{2174}, one cannot quite simply assume that the right does not exist in nearby areas that have not been subject to judicial trial. The reindeer herding right should be assumed to apply to areas defined as reindeer herding areas in the Reindeer Husbandry Act, until the opposite is proven.

So, at least three different situations may occur: 1) where the presence of the reindeer herding right has been clarified through a precedent case, national interest should commonly exist in that area; 2) where a precedent case has denied the existence of the right, no national interest can be classified; and 3) where the existence of the reindeer herding right has not been sufficiently clarified or where a legal process is ongoing, one should assume that national interests exist as in the first situation. This last situation refers back to the geographical areas stated in the Reindeer Husbandry Act. Generally, it is important to include the whole or parts of the important winter-pasture-areas in the national interest, primarily because they are

\textsuperscript{2173} Compare a contrasting view in the case referred to above in subsection 9.2.3.1 (“Vedabron”), RÅ 1993 no. 550. Here, the Supreme Administrative Court held that considerable negative impacts can be accepted on a part of the area, as long as the area as a whole is not significantly damaged.

\textsuperscript{2174} See further in Part III in section 10.3.
important pasture, and partly because the conflicts of interests and competing land uses are common in those areas.

Where the Swedish Board of Agriculture neglects or refuses to classify areas that reasonably should be classified as of national interest for reindeer husbandry, one cannot force a classification to be made. The County Administrative Board may only notify the Board of Agriculture and the National Board of Housing, Building and Planning if the Board considers that a certain area should be classified as of national interest for reindeer husbandry. This is another shortcoming of the legislation. Even if the protection afforded for reindeer husbandry in section 5 is weak, the protection of the area as a national interest is still worth more, as it has implications for the planning process and for the State control of Municipal planning.

With this background and analysis, I am obliged to conclude that the protection provided by the provision in chapter 3 section 5 paragraph 2 is unsatisfactory. It is the long-term protection of the areas needed for reindeer husbandry that the legislation expresses, although vaguely. The provision refers to a protection from “significant interference”. The vagueness of this expression undermines the protection. As with other national interests, in principle, measures are not allowed where they have a permanently negative impact on reindeer husbandry. The threshold is rather high and gives little guidance. This is a proof of the vagueness and ambiguity of those provisions. Wide discretion is left to the deciding authorities. It simply does not work, especially not for reindeer husbandry, which struggles for cultural survival with a constantly shrinking land and resource base.

9.2.3.4 Environmental Quality Standards

Environmental quality standards, regulated in chapter 5 of the Code, are typically regarded as environmental law instruments. Those standards are based on scientific criteria and are related to what the environment may be exposed to, that is, pollutions and other detriments that lie within nature’s buffering capacity. Nevertheless, those standards might also be regarded as a form of planning instruments, since they must be taken into account in Municipal planning. The

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2175 Regulations on Management of Land and Water Areas, s. 4 point 1.
2176 As an example, in an Environmental Court of Appeal case the Court found no detriments of significance for reindeer husbandry. The area was classified as of national interest for reindeer husbandry. The construction was classified as of national interest for reindeer husbandry. The construction would lead to disruption of the mobility of the reindeer and reduce good pasturage. The area was also a part of a Natura 2000 area, protecting primarily the marine environment. No significant impacts (betydande påverkan) on the environment within the Natura 2000 area were found due to the construction works, and, consequently, no requirement of a specific permit was necessary. See further in subsections 9.3.2 & 9.4.2 regarding Nature 2000 areas. See also another Environmental Court of Appeal case, M 6936-03, decided in 2005-07-06, where Vapsten Saami village emphasised that the area was classified as of national interest for reindeer husbandry. However, the case concerned activities and structures related to mining, where a concession already was obtained. This means that the provisions in chapters 3 to 4 shall not be applied. See further below in subsection 9.4.3.4.
2177 See further in Gipperth, Lena (1999) Miljökvalitetsnorrer (akad. avh.).
Planning and Building Act refers, in chapter 2 section 1 paragraph 2, to those environmental quality standards\textsuperscript{2178}. However, the present legislation, particularly related to the plan types and their legal status, limits the role of environmental quality standards, even if such standards may be used otherwise to a greater extent to safeguard different environmental qualities. See further below. The standards that now exist are national and related to air pollution and water quality, all flowing from the EC environmental law\textsuperscript{2179}.

Nevertheless, the Government has the opportunity to set strict as well as guiding standards for certain geographical areas, which will apply on regional and local levels\textsuperscript{2180}. The standards shall in any case aim to provide a lasting protection for human health and for the environment, and to remedy adverse effects already occurring. The standards can, for instance, regard the level of pollution or detriments to which the environment may be exposed without any risk of substantial detriment, which standards must not be exceeded nor disregarded. Standards that may be expressed in words or numbers, may apply periodically or strictly after a certain date. A standard can also be set to function as a goal, something that should be attained\textsuperscript{2181}. Importantly, environmental quality standards may concern certain types of areas\textsuperscript{2182}, for instance, old forests with tree lichen or other valuable pasture types for reindeer husbandry.

Moreover, these environmental quality standards have a strong correlation to decision-making by authorities. As said above, Municipalities must take into account (iaktta) such standards in their planning process, which regard all of the plan types. However, the prohibition against granting permits or exemptions concerns only detailed development plans and area regulations\textsuperscript{2183}. Those two plan types are legally binding, which means that they have the ability to enforce the environmental quality standards. However, the fact that those plans must have connections to settlements (bebyggelse) or to a single building/structure delimits the importance of such standards. Hence, in practice, primarily health related standards may be used and enforced through binding plans\textsuperscript{2184}.

Authorities and Municipalities must also ensure compliance with the environmental quality standards in decisions that primarily concern granting of permissibility, permits and exemptions. The standards must also be complied with in relation to supervision and issuance of by-laws\textsuperscript{2185}. The main rule is also that permits, approvals and exemptions must not be granted for new activities that are likely to be instrumental in infringing such a standard\textsuperscript{2186}.

\textsuperscript{2178} The standards and how they may be complied with should be stated in comprehensive plans, detailed development plans and area Regulations. See Prop. 1997/98:45 Del 2, p. 46.
\textsuperscript{2179} See further in, for instance, Krämer, Ludwig (2003) EC Environmental Law, chapters 7-8.
\textsuperscript{2180} Environmental Code, ch. 5 s. 1.
\textsuperscript{2181} Environmental Code, ch. 5 s. 2 and Prop. 1997/98:45 Del 2, p. 43-45.
\textsuperscript{2182} Prop. 1997/98:45 Del 2, p. 42.
\textsuperscript{2183} Environmental Code, ch. 16 s. 4.
\textsuperscript{2185} Environmental Code, ch. 5 s. 3.
\textsuperscript{2186} Environmental Code, ch. 16 s. 5.
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Where an environmental quality standard is not complied with, there is an instrument in the Code, an action programme (åtgärdsprogram), that shall ensure compliance in the future. The aim of the programme is to coordinate the enforcement. The programme never legally binds single persons or operators. Instead, the burden of protection measures is spread among a larger collective. It is the Government or appointed authorities that are responsible for adopting an action programme. However, authorities and Municipalities are obliged to take necessary measures stated in an action programme.

9.2.3.5 The National Environmental Quality Target “A Magnificent Mountain Landscape”

Sweden has sixteen so-called national environmental quality targets. In 1998, Parliament adopted fifteen specific targets to apply nationwide and, in 2005, the sixteenth target was adopted. There is in principle no recognition of these targets in the environmental statutes, in the Environmental Code, nor in any other statute. Consequently, they are not legally binding, meaning that no one has to apply them. Nonetheless, in the preparatory work of the Environmental Code, it is said that the environmental quality targets shall be guiding in concrete matters vis-à-vis what a sustainable development means.

Hence, the idea is that the environmental quality targets shall be regarded as a specification of the objective of the Environmental Code in a certain respect. They could therefore guide decision-making authorities on the granting of permits as well as in their supervisory role. Although the environmental quality targets are overlapping and interacting, there is one target of particular relevance for this thesis. That target is called “a magnificent mountain landscape” (storslagen fjällmiljö) and the target is expressed as follows:

The mountain area shall have a high degree of indigenousness regarding biological diversity, as well as recreational, natural and cultural values. Activities in the mountain area shall be carried out with regard to these

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2187 Environmental Code, ch. 5 ss. 4-8. See also Prop. 2003/04:2 Förvaltning av kvaliteten på vattnenmiljön, pp. 21-24 & 32-34. Note also that the implementation of an EC directive has given Sweden new water administration areas. The aim is to ensure an adequate water quality. See the Code ch. 5 ss. 10-11. Regarding action programmes generally, including the issue of water districts, see further in SOU 2005:113 Åtgärdsprogram för miljökvalitetsnormer.


2189 There is only one reference to the targets in the legal text, which appears in the Environmental Code, in ch. 6. s. 12 point 5. This regards requirement regarding the content in EIA for plans. See also above in subsection 9.2.2 (small text).


2191 See also Prop. 2004/05:150, pp. 375-378.

2192 Other targets of relevance are the new “a rich plant and animal life” aiming at securing biological diversity, as well as “healthy forests”, “flourishing lakes and streams” and “reduced climate impact”. Note also, in relation to biological diversity, that the number of threatened species in the mountain region is lower than in other areas. See Prop. 2004/05:150, p. 179.

values so that a sustainable development is promoted. Areas of particular value shall be protected against encroachments and other detriments.

The rationale behind a particular target for the mountain region, from the position of the Government, is that this region is one of the least exploited areas in both a Swedish and an international context. People have also lived in this region for thousands of years, as the result of which the environment encompasses large cultural values. The area is used for reindeer husbandry, as well as recreational activities. In recent years, the detriment of the environment has increased due to, for instance, reindeer husbandry and cross-country driving. The environmental quality has over a long time period declined, and, in certain areas, the environmental problems are substantial. The noise level is also seen as disturbing.\textsuperscript{2194} The Government points out that reindeer husbandry is a prerequisite for a conservation of a magnificent landscape with vast pasture areas, but reindeer husbandry must be carried out to guarantee long term sustainability in the area.\textsuperscript{2195}

Four sub-goals have been expressed to elucidate the target: damages on ground and vegetation, noise, natural and cultural assets, and threatened species.\textsuperscript{2196} As all environmental quality targets have been concretised with more detailed goals, a timeframe for reaching them has also commonly been set. Many of them should be reached by 2010 or at the latest within a generation (2020-2025).\textsuperscript{2197} At the regional level, the County Administrative Boards have developed similar regional environmental quality targets with the national model as a basis. But, it is the same here, they are not legally enforceable.

Therefore the objective of the Code (ch. 1 s. 1), and especially the “list” in paragraph 2, are more helpful when they are employed to determine what a sustainable management means relative to a particular matter. This provision shall be used to guide decision-making, particularly in relation to the second paragraph where it states that “the Code shall be applied so that”, and then the five point list exemplifies aspects of what a sustainable development includes.\textsuperscript{2198} However, it still remains to be seen to what degree courts and authorities will be guided by the environmental quality targets.\textsuperscript{2199} This is the problem with the lack of statutory

\textsuperscript{2196} See also Prop. 2004/05:150, pp. 173-180, where those sub-goals are discussed, and whether they may be reached. For more information on “a magnificent mountain landscape” or other targets see also the official web page at http://miljomal.nu/om_miljomalen/miljomalen/mal14.php (viewed at 2006-05-22).
\textsuperscript{2197} Prop 2000/01:130 Svenska miljömål – delmål och åtgärdsstrategier. There is also an English Summary available at www.regeringen.se/content/1/c4/11/97/2aa078a0d.pdf (viewed at 2006-05-21). See also prop. 2001/02:55 Sveriges klimatstrategi.
\textsuperscript{2198} See Bengtsson, Bjällås, Rubensson & Strömberg Miljöbalken. En kommentar, Del 1, p. 1:3-4. See also Michanek & Zetterberg (2004) Den svenska miljörätten, pp. 105-106. The Environmental Court of Appeal have only in a few cases referred to the provision in chapter 1 section 1, for instance in a recent case on wind mills (Sotenäs-fallet), M 2966-04 decided in 2005-11-01.
\textsuperscript{2199} Note, however, that a Commission (PBL-kommittén) has been working on the matter in relation to the Planning and Building Act. They did not suggest any amendments that would mean that the targets would become legally binding. See SOU 2005:77 Får jag lov? Om planering och byggnande, pp. 211-222.
recognition. This should be compared to New Zealand’s RMA and the binding National Policy Statements.

9.3 Protection of Areas and Habitat

9.3.1 Some Facts and Figures

Although there are a number of different legal forms to protect specific ecological areas and other values subject to the Environmental Code, nature reserves and national parks are the dominating protection forms, as they are within the reindeer herding area. Nature reserves comprise as much as eighty-five percent of all protected natural areas in Sweden. On the whole, the nature protection is most comprehensive in the mountain region, but also forests and wetlands have been increasingly protected. Moreover, the protected nature in the forms of national parks and nature reserves in the mountain region has roughly doubled during the last decade. The extension of protected areas has been especially expansive in the counties of Jämtland and Dalarna. Nearly half of the total of 8.6 million hectares of the mountain region is now legally protected. The Vindelfjällens nature reserve in the county of Västerbotten is one of the largest protected areas in Europe with its 560,000 hectares.

As declared above, the two dominating protection forms subject to the reindeer pasture area are nature reserves and national parks. Totally, Sweden has twenty-eight national parks, at least ten of which are situated within the reindeer herding area.

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2200 See the Resource Management Act 1991, s. 55, where local authorities are bound to implement the national standards and to amend their policy statements and plans if any inconsistencies are found.
2206 Wildlife and plant sanctuaries may also be used to protect areas within the reindeer herding area. However, the majority of the existing sanctuaries (some 1000) are located near the coast, lakes and in the archipelago. They aim above all to protect water fowl and seals. See at http://www.naturvardsverket.se/ under “Natur och naturvård” and “Skyddad natur” and subsection “Andra skyddsformer” (viewed at 2006-05-22).
The vast majority of the area protected as national parks is located within the county of Norrbotten. The number of nature reserves has increased drastically since the late 1970s so that presently there are some 2,700 nature reserves. A majority (some eighty percent) of those reserves lie within the counties in which reindeer husbandry is carried out. This means that a large majority of the area protected as nature reserves is also found here within the reindeer herding area. Regarding Natura 2000 areas, nearly 4,000 areas have been appointed, most of which are already protected as nature reserves or national parks. A substantial majority of those areas are, not surprisingly, situated within the reindeer herding area.

Hence, to compare nationally, the northern region includes the major part of the country’s nature conservation areas. With these statistics as a basis, one can easily conclude that, in one way or another, reindeer husbandry is affected by the nature protection regulations. On the one hand, the accentuated environmental protection may indirectly be beneficiary for reindeer husbandry. However, if national parks are designated with the aim of facilitating tourism and recreation activities in the area, a large number of people, as well as new roads, parking lots, buildings and other structures, may be detrimental for the environment, as well as for the enjoyment of the reindeer herding right. On the other hand, the environmental protection regulations may impose restrictions or even prohibitions vis-à-vis the enjoyment of the reindeer herding right.

9.3.2 National Parks, Nature Reserves and Natura 2000 Areas

The Environmental Code provides for a battery of different forms of protection of nature areas. Those rules are found in chapter 7 of the Code. However, since the predominant form of protection within the reindeer herding area are national parks, nature reserves and Natura 2000 areas, only those protection forms will be analysed herein. I will also briefly examine the particular circumstances related to the Laponia world heritage area. Note, additionally, that I analyse the new protection form culture reserve in relation to reindeer husbandry in next subsection (9.3.2.1).

The analysis in this subsection focuses mainly on two issues: firstly, how “strong” is the protection that the legislation provides; and, secondly, to what extent might the enjoyment of the reindeer herding right be hindered with regard to the

2207 Those are: Vadvetjåkka, Abisko, Stora sjöfallet, Padjelanta, Sarek, Muddus, Pieljekaise, Björnlandet, Töfingsdalen and Fulufjället, in this last of which reindeer husbandry forbidden here. In Sånfjället, reindeer husbandry seems to have been carried out at least in the beginning of twentieth century, but the area is subject to the so-called Härjedalen case, where the reindeer herding right was not established. See at http://www.naturvardsverket.se/ under “Natur och naturvård” and “Nationalparker” (viewed at 2006-05-22).


2209 Note, however, that there is an overlap among many Nature 2000 areas, since they are appointed on the basis of two directives. See at http://www.naturvardsverket.se/ under “Natur och naturvård” and “Natura 2000 – värdefull natur i EU” and under “Natura 2000 – en lathund” (viewed at 2006-05-22).

different protection forms. Additionally, the opportunity to influence the creation of protected areas is briefly examined, as well as resource management inputs of the concerned Saami.

National parks are the oldest form of nature protection. A characteristic feature is that a park may be established only on State owned lands. The history and background of the legislation related to national parks has been described by Torp. Interestingly, his analysis of the legislation also shows that the exclusive position of protection of the reindeer herding right with regard to national parks was removed with the beginning of the 1990s. Prior to 1991 there was a protection of the enjoyment of traditional Saami activities within national parks. Now this position is reversed in that the national parks and nature reserves are on an equal footing regarding the opportunity to issue by-laws that limit the enjoyment of Saami customary rights.

The aim behind a designation of a land or water area into a national park is that “a large contiguous area of a certain landscape type in its natural state or essentially unchanged” shall be preserved. The idea is to preserve areas of particular value, chiefly scientific and scenic, to the benefit of present and future generations. Among the present national parks, approximately ninety percent consist of the mountainous nature type. The purpose of each designated national park is stated with a few words in regulations, for instance “to preserve a Nordic high mountain landscape in its natural state”. A management plan (skötselplan) shall always be adopted for each park. The County Administrative Board is responsible for the management of the national parks within its county. For each national park, particular by-laws are in force, which largely regulates the management of the park, including rights and

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2211 Provisions on compensation (ersättningsregler) are important for the environmental protection. In practice the compensation obligations for “considerable obstruction of ongoing land uses” have imposed a hinderance against area protection. The economic resources of the authorities are often scarce. Relevant provisions are Environmental Code, ch. 31 s. 4. and Instrument of Government, ch. 2. s. 18. Note, however, that examination of compensation provisions is not included in this thesis.

2212 Environmental Code, ch. 7 s. 2.


2214 Ibid., pp. 165-177, particularly at p. 176.

2215 Preparatory works, aimed to establish new objectives and standards for the public environmental policy, amended the old Nature Conservation Act. In section 6 para. 2 to this Act it was stated, in principle, that the Saami rights regulated in the Reindeer Husbandry Act could not be limited in national parks. See Prop. 1990:91:90 En god livsmiljö, p. 408-410

2216 Environmental Code, ch. 7 s. 2. Note that several different landscape types may occur within a national park, especially in larger areas. The Government designates national parks, but only after the consent of the Parliament. See also Prop. 1997/98:45 Del 2, pp. 69-70. Note also that all of the preparatory works to the 1952 Nature Protection Act are relevant for interpreting the provision.


2218 Regulations (1987:938) on National Parks, s. 1.

2219 Regulations on National Parks, s. 4 point 1.

2220 Regulations on National Parks, s. 3.
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obligations for the public. It is the Environmental Protection Agency that, after consultation with the County Administrative Board, issues those by-laws. In relation to by-laws, two kinds of provisions apply, which are aimed, in slightly different ways, to regulate activities and measures that are allowed vis-à-vis each national park. The provision in chapter 7 section 30 has a more general aim. It authorises a regulation of the public’s right to travel and to be in a national park. In this way, the public access to land may be limited or prohibited, but also other activities and measures may be taken if necessary, such as restrictions on fishing and snow mobile driving. The provision in chapter 7 section 3 is more specific. Apart from authorising regulations aimed at the preservation and management of the national park, it also authorises necessary limitations to the reindeer herding right and other individual rights. Where such limitations are suggested, the Environmental Protection Agency shall allow the concerned Saami village or villages to make a submission (yttrande). This might be regarded as a limited form of consultation.

The County Administrative Board may, where specific circumstances apply (särskilda skäl), grant exceptions to the by-laws, which is very rare. There are limited opportunities to appeal a decision regarding by-laws that prohibit elements or the whole of the reindeer herding right. The Environmental Protection Agency’s decision can be appealed to the Government, which decision may be subject only to judicial review (rättsprövning). Since the margin of appreciation is wide, the prospect of having the decision changed is minimal. There are few provisions that restrain the Environmental Protection Agency’s opportunity to limit Saami customary rights in relation to national parks, or other protection forms for that matter. However, a review of interest (intresseprövning) shall be made, which will be briefly discussed below.

To conclude, on the basis of the two provisions in the Code referred to above, the Environmental Protection Agency may impose any restrictions necessary to protect the area as a national park. The tools are there, and, as a matter of fact,
regulation of the public’s entrance and use of the area, together with limitations of specific rights. Including the reindeer herding rights might be rather restrictive.

I will now turn to examine the extent to which the enjoyment of the reindeer herding right has been restricted in the national parks. As said above, in 1991, the former legislation was amended, which in principle allowed limitations on the Saami rights without restriction. There are ten national parks that lie within the reindeer pasture area. Subject to the by-laws, only one prohibits reindeer husbandry totally, Fulufjället’s National Park. This park was established in 2002 as the latest addition to Sweden’s national parks. In all other parks, reindeer husbandry is still carried out. Nevertheless, certain elements of the reindeer herding right are limited or prohibited. Compare here with the analysis of the content of the reindeer herding right above in subsection 8.1.3. The prohibitions regard, above all, the Saami hunting right. In two of the parks, hunting for moose is, however, allowed. Fishing for subsistence and commercial fishing for Fish Saami (fiskesamer) is allowed in seven of the parks.

Additionally, there is a general prohibition to build or to erect other structures, which prohibition does not, however, include the Saami rights to build a cottage for guarding, cot (kåta) and storehouses, as well as fences and other enclosures necessary for the husbandry, all of which are exempt. An element of the reindeer herding right is that timber in certain areas may be logged to build those buildings and structures in certain areas. Within the national parks, there is a general prohibition against damaging living or dead trees, bushes and other smaller plants. This excludes, for the most part, the taking of handicraft material. Commercial activities are, moreover, prohibited in all national parks, but a few Saami villages have the right to sell traditional bread (glödkaka) and fish. In the context of reindeer herding Saami, the revenue comes from the husbandry as well as from selling fish. So, in this sense, the prohibition against commercial activities is strange.

Generally, there is a prohibition against the use of motor vehicles, including motor boats, within the national parks. There is also generally a prohibition on landing with air crafts. Saami villages sometimes use helicopters or small air planes to gather reindeer. Even if driving with, for instance, snow mobiles or cross-country vehicles on bare ground is not a part of the reindeer herding right as such, it is a part of the modernisation of the business. In legislation regulating cross country driving, exceptions are made for Saami in relation to reindeer husbandry. In the by-laws, exceptions are, in principle, made for all parks for driving with snowmobiles, landing

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2229 NFS 2002:21 A point 15. On the process, see further in Torp, Eivind (2005) Rennäringens rättigheter i nationalparker och naturreservat in FT No. 2 2005, pp. 180-181. Note also that some public fishing and hunting are still allowed, but, in this area (winter pasture), Idre Saami village has no fishing and hunting rights subject to the Reindeer Husbandry Act. See also above on the zones (here zone 4) in subsection 8.1.4.

2230 This concern Björnlandet (all that have hunting rights) and Padjelanta (Sirkas, Jäkkpaska and Tuorpon Saami villages). See SNFS 1991:7 and SNFS 1987:10.

2231 All seven parks in the northernmost part of Sweden. See SNFS 1987:6-12.

2232 This concerns four Saami villages (Sörkaitum, Sirkas, Jäkkkaska and Tuorpon) in the national parks in Stora sjöfallet, Sarek and Padjelanta. See SNFS 1987:8-10.

2233 See above in subsection 8.2.3.
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with aircraft, and sometimes for flying low with regard to reindeer husbandry. Where Saami fishing rights are allowed, the use of motor boats is also allowed.

A reflection of those by-laws is the fact that husbandry, as well as hunting and fishing, has been carried out in those areas for a very long period of time, prior to their establishment as parks. The landscape in many of the areas should also be a direct result of the grazing of reindeer and the reindeer husbandry (bêtespräglat landskap). Even if the modernisation of the business to some extent has the potential to damage parts of the sensitive environment, primarily due to cross country driving on bare ground, the limitations of the other elements in the reindeer herding rights seems not to correspond to the need for protection. Fishing and hunting, at least for subsistence, should commonly not put the protection of a park in jeopardy. On the whole, there are rather few persons that may enjoy the elements in the reindeer herding right.

Among the provisions in chapter 7 of the Code there is an important provision stating preconditions for a review of interests (intresseprövning). This provision shall be applied, for instance, in matters concerning issuance of by-laws restricting the reindeer herding right. It states:

In connection with the consideration of matters relating to protected areas referred to in this chapter, private interests shall also be taken into account. Restrictions on the rights of private individuals to use land or water under safeguard clauses provided in this chapter must therefore not be more stringent that is necessary in order to achieve the purpose of the protection.

This provision expresses a form of proportionality principle. Note, however, that the legal text of this provision does not support the previous case law of the Supreme Administrative Court. Instead, the legislature seems to have intended to emphasize that only particularly weighty private interests (enskilda intressen) may hinder the enforcement of the Code’s objective. In this assessment, the importance and strength of the environmental interests should be weighed with economic and other interests of the holders of specific rights (the Saami village). Of importance in this balancing is also whether the right holders are entitled to compensation. In sum, this should mean that the review of interests in any given case will be applied narrowly. The interpretation of the provision is, however, in doubt since there are no preceding cases yet.

Applied in the context of the reindeer herding right, this review of interests seems not to correspond very well to the situation of the Saami. The provision refers here to the rights of private individuals (enskilda rätt), even if the proportionality principle should be applicable as well to associations, such as a Saami village. Nonetheless, given that the Saami are an indigenous people and a minority, the

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2234 Those exceptions do not, however, apply to the newest national park, Björnlandet. See SNFS 1991:7.
2235 Environmental Code, ch. 7 s. 25.
2236 Bengtsson, Bjällås, Rubensson & Strömberg Miljöbalken. En kommentar, Del 1, pp. 7: 62-65, particularly at p. 7: 64
reindeer herding right should primarily be regarded as a public interest, not a private interest. There is also an element of public interest involved regarding the protection of a vital part of the Saami culture. Conclusively, the interest of reindeer husbandry can hardly be compared to other private interests, such as the forestry. Additionally, the provision leaves a rather large room for discretion for the deciding authority. In this, Swedish law lacks an overarching principle, as has the doctrine of fiduciary duty in Canadian that restrains Government actions, including public authorities, when Saami issues are at stake.

Hence, there seems to be a need to a specified proportionality principle, with a safety net so that unnecessary infringements in the reindeer herding right may be avoided. As an example, hunting, particularly moose and small game, and fishing, at least for subsistence, cannot be regarded as a substantial threat to the environment within a protected area, if carried out on a sustainable basis. Here, I also want to recall the priority doctrine in Canadian law, where, in cases of conservation needs, the customary rights of aboriginal peoples (subsistence rights) are given top priority. See above in subsection 6.4.5.3. Moreover, reindeer grazing may also prove necessary in order to sustain the character of the area (betespräglat landskap). In this, the reindeer husbandry has over centuries created a culturally affected landscape, which, in fact, might be legally protected as a cultural reserve. See further below in subsection 9.3.2.1.

Another reflection is that the impression given in the stated objective behind the designation of a park, along with the description of them, is that they are close to untouched nature. Very little is mentioned in relation to the ongoing and traditional Saami culture. One may quietly wonder where the pride over the Saami heritage and history is. At least tourists seem to be attracted by the combination of a living Saami culture, outstanding natural beauty, and environmental tranquility.

In comparison with the New Zealand and the Canadian situations concerning protected nature, Maori and First Nations often initiate the discussion of legally protecting certain traditionally used areas. This has been made in relation to settlement processes with the Crown related to historical grievances, as well as outside. Models of different forms of co-management, or at least a larger say in the management of the particular area, are commonly established. My impression is that the same strong reluctance or opposition against designation of new protected areas is not as present in New Zealand and Canada as in Sweden. In Sweden, there is a strong local opposition to designating more protected areas, also among Saami.

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2237 Compare with subsection 6.4.2. See also my discussion in section 10.2 below.
2238 Although the comparison with Canadian law does not include an analysis of protected areas, I can safely say with support in the literature that aboriginal peoples, and particularly First Nations, have played an active role in creating new national parks and other protected areas. This has been incident to land-claim settlements. See for instance Peepre, Juri & Dearden, Philip (2002) The role of Aboriginal Peoples in Dearden, Philip & Rollins, Rick (eds.) Parks and Protected Areas in Canada. Planning and Management, p. 324. See also generally Notzke, Claudia (1994) Aboriginal Peoples and Natural Resources in Canada. However, compare also with the information in subsection 1.1.1 above, where especially national parks have been unpopular among aboriginal peoples and other locals.
2239 Compare above with New Zealand law, in section 5.2.
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One explanation is if of course that reindeer husbandry is restricted, as well as hunting and fishing rights. Another corresponding explanation is that a large proportion of the environment, especially in the north, already is legally protected. Compare with the statistics provided initially.

As a long standing principle, the state and appointed state authorities are responsible for the management of protected areas in Sweden. As a central authority, the Environmental Protection Agency has the over all responsibility for all of the country’s protected areas. The County Administrative Board is responsible for the protection on the regional level2241, and the Municipality has authority regarding the areas it has designated, such as nature reserves.2242 Regarding nature reserves, the County Administrative Board may delegate the management to another authority, such as the Saami parliament, a legal person (Saami village), or a property owner, if it is ascertained that the ability for such a responsibility exists2243. However, this power of delegation does not include national parks. To my knowledge, it is only in the context of the world heritage area, Laponia, that there have been sincere discussions about including Saami in the management of protected areas. Regarding Laponia, see further below.

Regarding nature reserves, the designation is decided by the County Administrative Board or a Municipality.2244 The preparatory works state that there must be a strong public interest behind the intent to designate a nature reserve2245. In similarity with the establishments of national parks, the same proportionality assessment shall be made in relation to a decision to designate a nature reserve2246. However, here the area may concern privately owned lands as well as state owned. The aim is either one of the following or combined: “preserving biological diversity, protecting and preserving valuable natural environments, or satisfying the need of areas for outdoor recreation”.2247 The reasons for designating an area a nature reserve shall be stated in the decision as such. This decision shall also state limitations on the rights to use the area that are necessary in order to comply with the aim of the designation. In the legal text, this is exemplified with a prohibition against settlements (bebyggelse), construction of fences, pits, cultivation, logging, hunting, fishing, and the use of pesticides. Access to the area may also be prohibited during.....
the entire year or in periods. If additional restrictions are necessary, a new decision with limitations may be made.\(^{2248}\)

In conclusion, the County Administrative Board or the Municipality have far-reaching means here to regulate or restrict the access or land use within a nature reserve. This means also that holders of reindeer herding rights and property owners have to accept certain intrusions in the area, especially those that are likely to facilitate access to the area for tourism and recreation needs.\(^{2249}\) The County Administrative Board or the Municipality may grant exceptions from the by-laws in the decision if special circumstances apply (särskilda skäl). Such an exception may only be granted if it is compatible with the purpose of the specific provision and if the intrusion is reasonably compensated within the reserve or in another area.\(^{2250}\) Hence, the opportunity to grant exceptions is rather restricted\(^{2251}\).

Moreover, designation of an area as nature reserve or changes to the reserve must not counteract a detailed development plan or area regulations.\(^{2252}\) For each nature reserve, a management plan (skötselplan) shall secure a long-term conservation of the area.\(^{2253}\) It is possible to appeal a decision to designate an area to nature reserve or any amendments in relation to the reserve. The County Administrative Board’s decision may be appealed to the environment court and the Municipality’s decision to the County Administrative Board.\(^{2254}\) The public law principle applies here, that one has to be affected by the decision. If the decision concerns an area subject to reindeer herding rights, an individual Saami or the Saami village may be a party to the case, which means that they have standing\(^{2255}\).

With the EC environmental law, a new form of area protection became applicable, the so-called Natura 2000 areas. They consist, strictly speaking, of two different types of areas: the special protection areas (SPA’s) under the birds directive\(^{2256}\), and sites of community importance (SCI) under the habitat directive\(^{2257}\). The aim of those designated areas is to create a coherent European ecological network, Natura 2000. The attempt to create this ecological network is serious and in fact goes far beyond what individual member states have achieved at national levels\(^{2258}\). However, as such, the Natura 2000 areas do not create an independent

\(^{2248}\) Environmental Code, ch. 7 s. 5.
\(^{2249}\) Environmental Code, ch. 7 s. 6.
\(^{2250}\) Environmental Code, ch. 7 s. 7 paras. 2 & 4. Monetary compensation is not accepted. If the intrusion is minor, compensation is generally required. See further in Prop. 1997/98:45 Del 2, p. 77.
\(^{2251}\) There have been at least two cases concerning exemptions from by-laws, where exemptions were granted. However, they regarded reserves in the southern part of Sweden that were already rather exploited. See Environmental Court of Appeals decisions 2001-05-20 in case M 3102-00 and 2001-05-08 in case M 4027-00.
\(^{2252}\) Environmental Code, ch. 7 s. 8. However, a minor modification is accepted if it does not conflict with the purposes of the plans.
\(^{2253}\) Regulations on Protection of Areas Subject to the Environmental Code, s. 3. This decision may be appealed to either the County Administrative Board (if the Municipality is the decision authority) or the Government. See the Regulations, s. 41.
\(^{2254}\) Environmental Code, ch. 19 s. 1 & ch. 20 s. 2 para. 2.
\(^{2255}\) See further in subsection 9.4.2 (in the end).
\(^{2256}\) 79/409/EC.
\(^{2257}\) 92/43/EC.
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protection. Instead, it is necessary to protect them in the various forms under the national law. In Sweden, most of them are protected as national parks and nature reserves. This means rather that the protection is enforced.

One important facet of this extra protection is that, where an activity or measure “in a significant way (betydande sätt) may impact (påverka) the environment” in a designated area, a specific permit is needed. This permit may be granted only under certain conditions.2259 The room for exception vis-à-vis this permit requirement is very restricted: it applies only in the absence of alternative solutions and where the activity or measure must be carried out for imperative reasons that override the public interest. If those circumstances apply, compensatory measures must be made in order to ensure that the overall coherence of Natura 2000 is protected.2260

Another facet of the extra protection is that authorities are required to ensure actively that “a favourable conservation status” is upheld within designated areas. This concept is well defined and ensures that mechanisms to conserve a habitat or species enduringly are in place.2261 This duty relative to “a favourable conservation status” is accentuated where an authority has granted a decision that may impact the environment within an area, for instance the granting of a permit.2262

The appointment of a Natura 2000 area in an already designated national park or nature reserve means, thus, an extra layer of environmental protection. Foremost, the detailed provisions on permit requirements and exceptions from them, give a rather stringent protection where the authority’s room for discretion is substantially narrowed. Compare with the opportunity to grant exceptions to the by-laws for “specific reasons” (särskilda skäl) related to national parks and nature reserves. However, an appointment as a Nature 2000 area should also mean that the reindeer husbandry may, in certain situations, impose such a detriment on the environment as to evoke the permit requirement. Note that the application for such a permit shall be joined by an EIA.2263 The County Administrative Board is the permit authority for situations where no other permit requirements apply.2264

Since the Saami is regarded as the only indigenous people within the European Union, this may provide for specific treatment. In the treaty on European Union (anslutningsfördrag), Sweden and Finland attached a specific protocol, Protocol No. 3, concerning the Saami people. The protocol consists of only two articles, of which the first basically secures the reindeer herding monopoly vis-à-vis the EC Treaty.

2259 Environmental Code, ch. 7 ss. 28 a & 28 b. Note also that a permit is not required for an activity that has started before the 1 of July in 2002 (the date when the amendments came into force). See transitional rules to SFS 2001:437 at point 2. See further in Michanek & Zetterberg (2004) Den svenska miljörätten, p. 218.
2260 Environmental Code, ch. 7 s. 29. This decision must be made by the Government. Where an area includes priority species and/or a priority natural habitat type, the granting assessment is further restrained and may require an opinion from the Commission. See Regulations on Protection of Areas Subject to the Environmental Code, s. 20. The building of the Botnia railway (Botniabanan) required an opinion by the Commission, as well as compensatory measures in relation to the Ume river delta. See further in Michanek & Zetterberg (2004) Den svenska miljörätten, pp. 221-223.
2261 Regulations on Protection of Areas Subject to the Environmental Code, s. 16. Each area shall also have a detailed conservation plan.
2262 Regulations on Protection of Areas Subject to the Environmental Code, s. 19.
2263 Environmental Code, ch. 6 s. 1 para. 1.
2264 Environmental Code, ch. 7 s. 29 b.
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while the second concerns proceedings for extensions of the protocol for the development of exclusive Saami rights linked to their traditional means of livelihood. Hence, if the reindeer herding rights are considerably infringed upon due to the specific provisions that relate to Nature 2000 areas, amendments may be made to this protocol to allow traditional Saami activities.

Finally, I will briefly examine the provisions related to the UNESCO world heritage site, Laponia. This area is comprised of four national parks and two nature reserves including a total area of 9400 square kilometers. It is designated for both natural and cultural values, a so-called mixed site. Each world heritage site must have a conservation plan. There is no such plan in force yet for Laponia, but over the years there have been efforts to draw up such a plan. Since there are many stakeholders, including Saami, it has been difficult to find a solution acceptable to all. Six Saami villages are using the area for reindeer pasture: Baste, Sörkaitum, Sirkas, Jäkkåkaska, Tuorpon and Gällivare forest Saami village. The Saami culture is important, since it is a mixed site, and the relative influence of the concerned Saami villages will be interesting to see once the conservation plan is established. It is the first serious attempt nationally to allow the Saami and other local interests to take part in the management of such an important protected area.

As a summary of the most relevant provisions, the State and appointed authorities have large opportunities to preserve areas under the provisions on national parks and nature reserves. The provisions leave wide discretion to impose restrictions to apply within a designated area, including limitations on the reindeer herding right. For national parks, restrictions are made by the Environmental Protection Agency, and for nature reserves, it is the County Administrative Board or the Municipality that impose restrictions. Regarding the nature reserves, I see this wide margin of discretion somewhat problematic, especially since a nature reserve may be designated only for outdoor recreational purposes. Such activities may be detrimental to the enjoyment of the reindeer herding right, especially during certain periods of the year.

Nevertheless, infringements may also be made in relation to the reindeer herding rights, as no single provision or general principle counteracts the authority of the Parliament in this respect. The provision on review of interests (ch. 7 s. 25) does not seem to correspond well to the Saami situation, as discussed above. On the whole, this should be compared with the situation in Canada, where the constitutional protection of aboriginal and treaty rights has caused the Supreme Court of Canada to deduce a specific set of tests to analyse issues on infringements of customary rights and justifications for such matters as conservation measures. A matter that also should be brought into light is the fact that the State (Crown), through its decisions on the Lapland border (lappmarksgränsen), the cultivation boundary (odlingsgränsen),

2265 For information, see at www.laponia.nu (viewed at 2006-05-23).
2266 Padjelanta, Stora sjöfallet, Sarek and Muddus.
2267 Sjuanja and Stubba.
2268 Convention Concerning the Protection of the World Cultural and Natural Heritage, article 5.
2270 Compare above in subsection 6.4.5.
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and the reindeer pasture mountains (renbetesfjällen), set aside land for the interests of reindeer husbandry. One should also recall that the basis for the rights is immemorial prescription.

The provisions on national parks, nature reserves, and Natura 2000 areas provide means for safeguarding sustainability, which is indirectly beneficial for the enjoyment of the reindeer herding right. As concluded above, the provisions concerning national parks and nature reserves allow the competent authority to design the environmental protection according to the specific needs, which include a rather wide opportunity to impose regulation and restrictions to apply within the protected area. This means that the authorities have opportunities where deemed as necessary to limit Saami rights, which is commonly made, at least in relation to the national parks.

Thus, I see that there might be a problem vis-à-vis the relative burden for the Saami villages carrying out traditional activities within protected areas, especially where the limitation of elements of the reindeer herding right could not be justified in relation to the purpose of the designation. The problem might be particularly accentuated for appointed Natura 2000 areas. However, Protocol No. 3 might be proven to have been an anticipated step taken by Norway, which initiated the drafting of the protocol. The fact that the vast majority of the protected areas are situated within the reindeer pasture area should serve as a basis of contemplation. A relevant question is the extent to which the reindeer herding Saami shall bear the costs of protecting natural areas through the loss of access for hunting and fishing or other activities. Even if compensation is given, it does not outweigh the loss in the larger perspective as the customary rights are the very foundation of the Saami culture.

9.3.2.1 Culture Reserves as Means for Protecting Reindeer Husbandry

Even if the main focus of this chapter is environmental protection with regard to the reindeer herding area, I will briefly examine the opportunity to use culture reserves as a mean for protecting areas subject to reindeer husbandry. This examination fits well with the analysis and discussion above on the other forms of area protection. The particular provision in chapter 7 of the Code states that the protection as culture reserve shall preserve “valuable cultural landscapes” (värdefulla kulturpräglade landskap), which should apply to reindeer husbandry.

The opportunity to designate an area as a culture reserve was introduced with the Environmental Code, as a new form of area protection. Better provisions designed to conserve cultural-historical (kulturhistoriskt) valuable landscapes were seen as necessary. One ambition was to guard the historical dimension of the landscape side by side with conservation of, for instance, biological diversity. The historical landscape was characterised by elements that reflect significant features from older land uses. The reindeer husbandry should be encompassed by this definition, since much of the landscape is shaped by reindeer grazing as such, but the landscape also includes older cots, fences, trapping pits (fångstgrop), religious sites, and other remnants of an older form of land use.

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2271 Environmental Code, ch. 7 s. 9.
The preparatory works also exemplify that the cultural environment should be shaped by older prescription (hävd) and forms of land uses (brukningsformer). Thus, culture reserves should be used in situations where the main reason for protection is the cultural environment.\(^{2273}\) Also, those preconditions should apply well to the reindeer husbandry. Importantly, the provision does not in express words delimit the size of the area that may be designated as a culture reserve. The provision refers also to the specific provisions for nature reserve to be applied also for culture reserves (ss. 4-6). This means that rather large areas should be able to pass as culture reserves, although not the entire reindeer herding area, but compare with the vast nature reserve in Västerbotten referred to in subsection 9.3.1.

Likewise, it is the County Administrative Board or the Municipalities that designate culture reserves. The decision shall also here include limitations to use the area necessary to conserve the reserve. Importantly, a designation can be subject to privately owned areas, such as areas subject to winter-pasture-areas, imposing restrictions, for instance, in relation to logging. In sum, I find it likely that areas particularly rich in historically remnants from earlier reindeer husbandry activities and where reindeer are presently situated could be protected as a culture reserve. This should mean that the enjoyment of the reindeer herding right can be protected from other activities and exploitations, as long as the modern husbandry itself does not threaten the historical landscape. A designation would in fact also mean an upgrading of the status of the Saami culture, at least regionally.

Recently, the very first Saami culture reserve has been designated by the County Administrative Board of Västerbotten. It was opened with a ceremony in July this year.\(^{2274}\) The reserve is dominated by the Saami holy mountain, Atoklimpen (Aatoklimpoe), and the area is dotted with historical and cultural remains. However, even if this culture reserve does not explicitly link the historical land uses with the contemporary reindeer husbandry, it is still possible.

### 9.4 Environmental Legal Control of Activities and Measures

#### 9.4.1 Introduction

In this section, I focus primarily on different instruments of pre-examination (förprövning) of activities and measures, even if other provisions to some extent are also examined. In this context, permit requirement of chiefly “environmentally hazardous activities” and “water operations” is an important and well-established mean to control what kind of exploitation or land use should be allowed and under what preconditions.\(^{2275}\) However, at least in relation to the Environmental Code, a trend seems to be a move away from comprehensive pre-examinations for a large number of activities and measures, toward alternative forms of environmental control.

\(^{2273}\) Prop. 1997/98:45 Del 2, p. 78.

\(^{2274}\) See [http://www.ac.lst.se/](http://www.ac.lst.se/) (viewed at 2006-07-27).

This means, for example, that an activity that previously required a permit might require only notification (anmälan) to the Municipality or might not even require pre-examination at all. Hence, supervision, as well as other means for control, becomes a vital instrument as a mean for securing compliance.

To recall the legal distinction between an activity and a measure in the Environmental Code lies in the following reiteration: a one-time event, a single action will fall into a measure, whereas continuous operations, repeated actions will become an activity. This distinction is relevant primarily in relation to the requirements in chapter 2 of the Environmental Code, for activities that are not under a permit requirement. A majority of the activities or measures that, in one way or another, impact the environment are subject to the provisions in the Environmental Code. However, there are also activities that are subject to legal control under more sectorised statutes, such as mineral exploitation. As regards such activities, the Code and the sector legislation normally have a parallel application.

There are additional important legal instruments and matters linked to the pre-examination, such as the requirement for environmental impact assessments, permissibility for certain larger activities, provisions on rights to redress, and the opportunity to revise permits (omprövning). Those closely linked issues will also be analysed hereunder. An alternative and important form of pre-examination is lastly analysed in subsection 9.4.4, which concerns primarily the provision in chapter 12 section 6 (samrådsregeln) in the Code.

9.4.2 Pre-Examination under the Environmental Code

The Environmental Code encompasses provisions, of particular relevance here, related to “environmentally hazardous activities” and “water operations”. Many different activities are submerged under these two broad categories. Below, I will analyse the two types of activities and the respective legal requirements pertaining thereto. Like the other headings above, the focus lies on provisions that promote a protection of a sustainable use of land and natural resources within the reindeer herding area, as well as a protection of the enjoyment of Saami customary activities in an environmental context.

2276 The move away from pre-examination has recently been disuceeded in relation to the Environmental Code and specific Regulations. See the report Pröva eller inte pröva? Förslag till förändringar i förordningen (1998:899) om miljöfarlig verksamhet och hälsoskydd (2004). See particularly pp. 8 & 18-30. Regarding pre-examination of water operations, smaller water operations that previously required permits may after recent amendments to the Code be referred to notification requirement only (if specifically regulated by the Government). See Environmental Code, ch. 11 s. 9 a och Prop. 2004:05:129, pp. 68-73.

2277 See further above in subsection 8.2.1.

2278 A translation of the Environmental Code can be seen at http://www.sweden.gov.se/sb/d/2023/a/22847/jsessionid=aIDN_2BND875 (viewed at 2006-04-04). Note, however, that, since the translation, many provisions have been substantially amended. A summary of the provisions of the Environmental Code can be obtained at http://www.sweden.gov.se/sb/d/2023/a/20549/jsessionid=a5OZV1M7xoi7 (viewed at 2006-05-01).

2279 Environmental requirements on the reindeer husbandry is analysed above in sections 8.2 & 8.3.
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For an easy outline, this heading is largely structured after the procedure related to the pre-examination as such, which means that I begin with the definitions of the two types of activities followed by the permit requirements, environmental assessment requirements, the opportunity to leave submissions on the application, and the examination of the application as such. The permissibility of certain activities and notification requirements are analysed accordingly, as well as the right to appeal decisions. Other specialised provisions are included that may require permits for specific situations, such as in relation to activities that impact Natura 2000 areas.

The definition of “environmentally hazardous activities” is broad and includes:

1. the discharge of wastewater, solid matter or gas from land, buildings and structures onto land or into water areas or ground water;
2. any use of land, buildings or structures that entails a risk of detriment to human health or the environment due to discharges or emissions other than those referred to in point 1 or to pollution of land, air, water areas or ground water; or
3. any use of land, buildings or structures that may cause a detriment to the surroundings due to noise, vibration, light, ionizing or non-ionizing radiation or similar impact. [2280]

Only discharges, emissions, pollutions and detriments arising from immobile sources (fasta källor) are defined as environmentally hazardous. [2281] Points 1 and 2 presuppose discharge from or use of land or structures that includes pollution to the environment in one way or another. [2282] The prerequisite in point 3 also regards the use of land, buildings and structures that causes detriments, but the question here is whether each detriment reaches the surrounding. However, usually one does not have to consider in any depth this definition if the Government has issued a regulation in the Regulations on Environmentally Hazardous Activities and Health Protection [2283], and explicitly declared in detail which types of activities that are either under a permit requirement or notification requirement.

In principle, if an activity is not explicitly mentioned under this regulation and is not subject to any permit requirement under another statute, it is regarded as a “free” environmentally hazardous activity, that is, it is by definition environmentally hazardous, but may be carried on without permit or prior notification to the Municipality. Note, however, that activities that normally are not under a permit

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[2281] To illustrate: it is the road that is the environmentally hazardous activity, not the individual cars driving on the road.
[2282] Note that regarding point 1, only the discharge of pollutants of a measure is sufficient for it to fall within the definition.
requirement do require a permit when the activity will significantly impact the environment within a so-called Natura 2000 area. These rules will be analysed further below.

Examples of environmentally hazardous activities that are regulated under the Code are different pits (täkter), for instance, for the extraction of gravel, sand or peat; mining of uranium, ore-mining or structures necessary in the process; extraction of crude oil or natural gas in certain areas; wind mills and activities connected to agriculture, such as animal farms. Water operations are often also environmentally hazardous, but are regulated under chapter 11. In principle, all water operations are under a permit requirement. If specifically regulated, certain smaller water operations may require only a notification process.

Water operations are activities which include primarily: i) building of structures in water, such as dams, bridges, wind mills, and piers; ii) other measures in water, such as filling or piling, extraction of water, ditching, excavation or blasting; iii) activities that alter the depth or current site of waters, such as regulation of a lake; iv) extraction of ground water; v) adding of water to increase the groundwater level; and, vi) dewatering of land areas (markavvattning). In the context of this, thesis the legal control of water operations is of importance mainly for the conservation of wetlands. Water regulations and development of water power plants have been made earlier since at least the beginning of twentieth century, and the four large untamed rivers (nationalälvar) are under legal protection. Therefore, it seems unlikely for the present that there will be a large scale development of new water power plants in the foreseeable future.

The permit procedure for environmentally hazardous activities or water operations includes an environmental impact assessment (EIA). The EIA is mandatory for all activities regulated under the Code as soon as a permit is required. Note that the permit application does not explicitly direct the extent of the EIA. In this, the EIA is autonomous vis-à-vis the specific activity that shall be assessed. The EIA shall be a basis for a decision and shall therefore also identify and describe indirect effects that a planned activity may cause. The

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2285 They often cause water pollutions.
2286 Environmental Code, ch. 11 s. 9. A few exceptions are stated in ch. 11 ss. 11-12. The permit authority is the Environmental Court for a majority of the operations. See ch. 11 s. 9 b.
2287 Environmental Code, ch. 11 s. 9 a. See also Prop. 2004/05:129.
2289 Environmental Code, ch. 4 s. 6. Exceptions are made for water operations that cause only minor environmental impact. See also above in subsection 9.2.3.1.
2290 Another matter is that measures to increase the effectiveness of older plants, including regulation of water levels, probably will increase in the future. Those measures may give rise to environmental problems locally, for instance, on the fish resources within the reindeer herding area.
2291 See what shall be included into an application: the Environmental Code ch. 22 s. 1 and ch. 19 s. 5. See further on EIA as an environmental, legal instrument in Hörnberg Lindgren, Christina (2005) Miljökonsekvensbedömningar som rättssligt verktyg för hållbar utveckling (akad. avh.).
2292 Environmental Code, ch. 6 s. 1.
2293 Environmental Code, ch. 6 s. 3 para. 1.
analysis of the provisions on the EIA below shows that Saami perspectives only indirectly become highlighted, basically via an assessment of the economising of land and natural resources.\textsuperscript{2294} See further below. The EIA must be conducted or paid by the applicant and include an important procedural element of consultation.\textsuperscript{2295}

The extent of consultation required in relation to the EIA is determined by the likely environmental impact of the proposed activity. Where an activity is likely to have a “significant environmental impact” (betydande miljöpåverkan), the extent of the consultation is greater. Activities that are always likely to have a “significant environmental impact” are included in a regulation, Regulations on Environmental Impact Assessments.\textsuperscript{2296}

The applicant must always consult with the County Administrative Board, the supervisory authority and individuals that are likely to be adversely affected (särskilt berörda) by the proposed activity. If an activity is likely to have a “significant environmental impact,” the applicant shall additionally consult with other relevant State authorities, Municipalities, as well as the general public and organisations that are likely to be affected (berörda).\textsuperscript{2297} Thus, the Code sets out a requirement that the applicant shall hold at least one consultation with the above mentioned authorities, persons and organisations. The consultation shall be made in good time and to an appropriate extent before submitting the application. Furthermore, the consultation shall concern localisation, extent, nature of the planned activity and its anticipated environmental impact, as well as the content and scope of the EIA.\textsuperscript{2298}

The content of the EIA report is regulated more strictly for activities that are likely to have a “significant environmental impact,” where the five-point list in paragraph two of section 7 is mandatory. However, importantly, the content of the report shall always include the information needed to meet the aim of the EIA.\textsuperscript{2299} In section 3, the aim is above all to identify and describe the direct and indirect impact that the proposed activity may cause to “people, animals, plants, land, water, air, the climate, the landscape and the cultural environment, on the economising (hushållning) of land, water, the physical environment in general, and on the other economising of materials, raw materials and energy.”\textsuperscript{2300} An additional aim is to enable an overall assessment of this impact on human health and the environment. The aim of an EIA is broad, but this is not directly reflected in the five-point list in paragraph two of section 7, even if it does speak of impacts on the management of land, water and other resources. I will come back to this shortly below.

\textsuperscript{2294} See also a student work (examensarbete i biologi, D-nivå) on EIA where the reindeer husbandry interests are affected, which also includes guidelines for permit applicants: Mörner, Elisabeth (2004) Rennäring i Miljökonsekvensbeskrivningar – Hur rennäringen kan behandlas i MKB:er för nya verksamheter och exploateringar. The report can be viewed at http://www-mkb.slu.se/mkb/Morner_E/e_morner.pdf.

\textsuperscript{2295} Environmental Code, ch. 6 s. 10.

\textsuperscript{2296} SFS 1998:905. Appendix 1 lists all such activities.

\textsuperscript{2297} Environmental Code, ch. 6 s. 4 para. 1. Relevant information shall be distributed before the actual consultation, but only to the County Administrative Board, the supervisory authority and individuals likely to be adversely affected. See para. 3.

\textsuperscript{2298} Environmental Code, ch. 6 s. 7 para. 1.

\textsuperscript{2299} Environmental Code, ch. 6 s. 3.
Along with the application, the EIA must be notified of an environmentally hazardous activity or water operation, and the notice shall be published in a local newspaper without delay. 2301 The permit authority shall approve the EIA, either by separate decision or in connection with the decision of the application for a permit. The authority shall then assess whether the EIA, including the consultation, satisfies the requirements laid down in chapter 6 of the Code. This approval cannot be appealed separately. When examining an application, the permit authority shall have regard to the content of the EIA and the result of consultations and any submissions in relation to the notification. 2302 There is no requirement to include the result of the consultation or to meet any comments or remarks within the EIA itself. Information regarding the result of the consultation shall, nevertheless, be included in the application.

Saami have, like everyone else, opportunities to take part in consultation (samråd), where they are likely to be adversely affected (särskilt berörda), which mean that one has to be a party to the case (sakägare). If an application is proposed to be carried out within the borders of a Saami village, the Saami village as a legal person is usually to be regarded as adversely affected. Where an activity is likely to have a “significant environmental impact” (betydande miljöpåverkan), the Saami village may also take part in the consultation as affected (berörda), even if not adversely affected. In conclusion, where an activity, which is likely to have a significant environmental impact, is planned to be carried out within the reindeer herding area of a particular Saami village, the Saami village, and perhaps adjoining Saami villages, are at least to be considered as affected. Commonly, the individual members of a Saami village are also adversely affected; perhaps where a specific reindeer herding group exists that has pasture at or near the site of a planned activity. Importantly, not only the reindeer husbandry may be obstructed by a planned activity, but also the customary fishing and hunting rights may be damaged or diminished. When reindeer husbandry is carried out in large areas, at least the Saami villages are often to be considered as affected or adversely affected.

In the preparatory works, adversely affected persons include primarily persons who live or reside (närboende) close to the planned activity. In many instances these persons will also become a party to the case (sakägare). 2303 The concept of being a party to a case (sakägarebegreppet) is far from clear in the Environmental Code. However, the preparatory works state as a principle that the wide concept formerly applicable in the old Environmental Protection Act from 1969 shall be used as a basis. 2304 This means that persons that may suffer from damages or other detriments from the activity, including, for instance, visual intrusions, will be regarded as a party to the case. Such persons will have a more qualified interest in the matter. In many situations, at least the Saami village will, according to these criteria, become a party to the case. Note, however, that the case law so far has not meant a large difference from what was applicable before the Code. It is in principle the character of the single case

2301 Environmental Code, ch. 6 s. 8 & ch. 22 s. 3. If the application concerns a water operation the notice shall also be sent to each party to the case (sakägare).
2302 Environmental Code, ch. 6 s. 9.
2303 Prop 1997/97:45 Del 2, p. 57.
2304 See Prop. 1997/97:45 Del 1, pp. 483-484.
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that determines of how wide or narrow the right to standing is regarded, which corresponds with being a party to a case. 2305

Even if the Saami, mainly through the Saami village, very often are regarded as adversely affected or simply affected by planned activities, the opportunity to influence decisions is small. 2306 Depending on the applicant, the number of consultations held could increase the dialogue, but only one is compulsory. So, the opportunity to inform or discuss impacts on reindeer husbandry in certain areas due to environmental impacts or localisation issues important for the Saami culture, is rather minor. It could regard, for instance, holy sites (seitar), prominent fishing lakes, or migratory routs for the reindeer.

Despite the broad aim of the EIA stated in section 3, the assessment per se is oriented towards the environmental implications of a specific activity. The room for an assessment of the activity’s impact on Saami customary rights is, therefore, negligible. In this context, the localisation of a specific activity or the extent of an activity may have significant impact on how Saami customary rights can be carried out, such as tourist recreation centres (turistanläggningar), roads and railroads. It is clear that the EIA process, as the legislation is framed, has little opportunity to include and highlight direct impacts on Saami customary rights, only indirectly through the management of land and natural resources, including the adverse environmental effects of a planned activity. Furthermore, the room for accommodating adverse effects on the husbandry or fishing and hunting rights in this context is non-existent. The law is silent here. Only the general provision in section 30 of the Reindeer Herding Act applies with its inherent restrictions 2307.

Nonetheless, I do not assert that the scope of the EIA should be widened to encompass specific interests of reindeer husbandry where not clearly environmental matters rise. This lies also outside the scope of the Environmental Code. I merely highlight the shortcomings with respect to the specific circumstances for the husbandry and for the enjoyment of the reindeer herding right. The focus on the environmental issues within the EIA as an instrument should be preserved. However, instead one could consider introducing a specific “Saami cultural assessment” or a “reindeer husbandry assessment”, perhaps within the reindeer husbandry legislation. A specific provision could state that for activities requiring a permit, where it is likely that the activity will have considerable impact on the reindeer husbandry, or customary hunting and fishing rights, an assessment must be made by the operator. Consultation should be made mandatory. Preferably, mandatory consultation should be required also between the competent permit authority and the affected Saami. In this way, the specific circumstances for the reindeer husbandry may be highlighted and perhaps lead to some adaptation of the planned activity.


2306 See also Mörner, Elisabeth (2004) Rennäring i Miljökonsekvensbeskrivningar. –Hur renäringen kan behandlas i MKB:er för nya verksamheter och exploateringar.

2307 See further below in subsection 9.4.3.3.
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Consultation with Saami, affected or adversely affected, in relation to the EIA instrument, seems in the context of consultation to be a real minimum requirement. One should not forget, however, that this kind of consultation is linked to applications, not planning or managing of resources. In New Zealand, the consultation relating to resource consents is presently in doubt, so a comparison cannot be made. The analysis of Canadian law concerns other issues. Nonetheless, what is clear is where consultation is required, it is mandatory with separate consultations with the indigenous peoples likely to be affected or adversely affected. Moreover, it is the Government or the administrative authority responsible that has the duty to consult, not the applicant.

Apart from the potential to engage in consultation, Saami may, like everyone else, comment on the notification of an application or the EIA through written submissions (yttrande). However, generally late in the application procedure there should be few opportunities to change the course of a proposed activity. Clearly, the law is designed to be uniform, allowing everyone the same opportunities, but for the Saami with a reindeer husbandry carried out on some 40% of the Swedish territory, the uniformity does not meet the needs of the Saami as an indigenous people. Within the reindeer herding area, environmental and cultural assessments are equally important and interlinked. Note, however, that the EC directive on EIA enables member states to adopt more stringent national provisions. Hence, Sweden may, for instance, with regard to the specific situation of the Saami, adopt a set of rules that goes beyond the requirements of the directive. The Protocol No. 3 to the treaty on European Union (anslutningsfördrag), referred to above in subsection 9.3.2, may also mean that the specific regulation might be designed due to the fact that the Saami are the only indigenous people within the EU.

The examination of whether to grant a permit or under what conditions (villkor) the activity, both environmentally hazardous activities and water operations, may be carried out, is subject to the provisions foremost under chapters 2 through 4 of the Code. Chapter 2 includes fundamental provisions and principles to be met, which are called general rules of consideration (allmänna hänsynsregler). For an analysis of the provisions, see also further above in subsections 8.2.1 and 8.2.3. All provisions in chapter 2 aim at minimising the environmental impact of an activity, such as possessing adequate knowledge, precaution, using the best possible technology, economising with material and energy, and substituting for environmentally harmful chemical products. For all of these provisions, including the provision on localisation, the requirements cumulatively apply, as long as they cannot be deemed to be unreasonable.\(^{2308}\)

For the localisation of an activity or measure, “a site shall always be chosen in such a way as to make it possible to achieve [its] purpose with a minimum of damage and detriment to human health and the environment”.\(^{2309}\) For activities or measures that use land and water areas on a more permanent basis, a site shall be chosen that is

\(^{2308}\) Environmental Code, ch. 2 s. 7. The onus of proof here lies on the applicant to demonstrate that the requirements all together are unreasonable and, therefore, should be reduced.

\(^{2309}\) Environmental Code, ch. 2, s. 4, para. 2.
suitable with regard to chapter 1 section 1, and chapters 3 and 4.\textsuperscript{2310} The reference here is to the objective of the Code, which is the promotion of a sustainable development, as well as to the basic and specific provisions concerning the management of land and water areas. Those provisions are applicable primarily in relation to examination of permit applications and the Government’s permissibility assessment (see below), which means new activities.\textsuperscript{2311} For the sake of clarity, the localisation requirement in chapter 2 is applicable for new as well as existing activities and measures.

The localisation must be examined against two different requirements, both the “suitability requirement” with respect to the Act’s objective and the provisions in chapters 3 and 4, as well as the “minimum requirement.” This may mean that, although a particular site is suitable, the localisation is flawed where there is a better site from environmental protection perspectives. On the other hand, a site might be unsuitable, but at the same time the only site where a particular activity can take place, such as mineral exploitation within a protected area or a wind farm in the mountain region within an area declared to be of national interest for tourism and recreation.\textsuperscript{2312}

Apart from the localisation of an activity or measure, the requirements on implementing protective measures are also of great relevance. Such measures may, in principle, regard everything that prevents or hinders damage or detriment to the environment, but typically it concerns a reduction of pollution or forms of waste treatements arising from the activity or measure.\textsuperscript{2313} The requirement of using the “best possible technique” (bästa möjliga teknik) is also essential in this respect.\textsuperscript{2314} This requirement includes, in short, all different aspects related to the activity, such as the used technology, in what manner a building, structure or plant is constructed, built, maintained and phased out, or issues of education for the personell and the use of less dangerous chemicals, materials and energy.\textsuperscript{2315} According to the preparatory works, best possible technique shall mean that the technique shall be industrially possible to use in the relevant industry sector technically and economically (teknisk möjlig/ekonomiskt möjlig).\textsuperscript{2316}

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\textsuperscript{2310} Environmental Code, ch. 2 s. 4 para. 1. On localisation, see further in Michanek, Gabriel & Zetterberg, Charlotta (2004) Den svenska miljörätten, pp. 124-126.

\textsuperscript{2311} Environmental Code, ch. 1 s. 2. According to older legislation and case law, the provisions are not applicable on “ongoing land uses” (“pågående markanvändning”), only new activities, which includes “altered land uses” (“ändrad markanvändning”). See Prop. 1985/86:3 Lag om hushållning med naturresurser m.m., pp. 14-15. See also Michanek & Zetterberg (2004) Den svenska miljörätten, p. 146.


\textsuperscript{2313} Environmental Code, ch. 2. s. 3 para. 1. See also Prop 1997/98:45 Del 2, pp. 15-16.

\textsuperscript{2314} Environmental Code, ch. 2. s. 3 para. 1. See also above in subsection 8.2.3.


\textsuperscript{2316} Possible from a technical viewpoint means that the technique as such must be available at the world market, meaning that technique only at an experiment or research phase does not qualify. Possible from the economic point of view means that a typical business in the sector forms a norm by which other activities are weighed against. Whether a particular business or industry can afford a new technique or technology is balanced against an objective criterion, and not regarding the economy of
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The legal requirements arising from the provisions in chapter 2 are also balanced with respect to a cost-benefit analysis: the benefit of protection measures compared with the costs of such measures. The demands shall only “be applicable where compliance cannot be deemed unreasonable”.\(^\text{2317}\) This balancing must not, however, jeopardise an environmental quality standard referred to in chapter 5.\(^\text{2318}\) In other words, the requirement of environmental protection measures shall be environmentally justified (miljömässigt motiverad) without being unreasonable from an economic perspective\(^\text{2319}\). The burden of proof in this balancing process lies on the “operator” (verksamhetsutövaren), meaning the person pursuing an activity, taking a measure, or intending to do so.

The provisions in chapters 3 and 4 can be rather problematic, particularly the basic provisions in chapter 3 which refer to a protection “to the extent possible” (så långt möjligt) in situations where no national interests are concerned. It is also problematic if the area includes several national interests (riksintressen) or where such national interests for reindeer husbandry has not been declared. However, since I have analysed these provisions above, they will not be further analysed in this context. See instead the analysis in subsections 9.2.3.1, 9.2.3.2 and 9.2.3.3. I can only conclude that, in certain situations on localisation of an activity (or measure), the provisions, particularly in chapter 3, such as where national interests are not subject to the area, are rather vague.

Regarding water operations, there are some additional specific provisions that apply to those types of activities. Most important of those is the basic requirement that water operations may only be undertaken “if the benefits from the point of view of public and private interests are greater than the costs and damage associated with them”\(^\text{2320}\). Additionally, persons that intend to carry on water operations that may be detrimental to fisheries, are obliged to set out and maintain any necessary arrangements for the passage of fish or the sustainability of fishing as well as other conditions for protecting the fishery in the water areas subject to the operation\(^\text{2321}\).

Apart from the provisions under chapters 2 through 4, there are other provisions that may limit or even hinder the granting of a particular permit. Chapter 5 of the Code includes provisions on environmental quality standards. Where such standards are set, the permit authority must apply the standards issued, for instance, when granting permits\(^\text{2322}\). In principle, the permit authority must not grant a permit for a new activity if the activity contributes to the infringement of an environmental quality standard\(^\text{2323}\). Furthermore, granting of permits must not conflict with detailed

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2317 The Environmental Code, ch. 2 s. 7 para. 1.
2318 The Environmental Code, ch. 2 s. 7 para. 2.
2321 Environmental Code, ch. 11 s. 8.
2322 Environmental Code, ch.5 s. 3. For an explanation of the standards, see further above in subsection 9.2.3.4.
2323 Environmental Code, ch.16 s. 5.
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development plans or area regulations. The provisions in chapter 7 regarding protection of valuable areas or habitats may also limit or hinder a planned activity, particularly the provisions on Natura 2000 areas. See further below.

Apart from permit requirements for specific activities, under the Environmental Code there are also provisions on notification requirements (anmälningsplikt) for certain activities that do not require a permit. These are typically smaller activities with lesser environmental impacts. Those activities are also listed in the appendix to the Regulations on Environmentally Hazardous Activities and Health Protection. For those planned activities, there must be a written prior notification to the Municipality. The notification must include the information necessary to assess the character, extent and environmental impacts of the activity or the measure. A notification may occasionally need an EIA subject to the provisions under chapter 6.

State authorities and Municipalities that may have a specific interest (särskilt intresse) in the matter shall be given an opportunity to comment (yttra sig) on the notification. The same applies to organisations and individuals that may have a specific interest in the matter. These shall, in an appropriate manner and to a reasonable extent (på lämpligt sätt och i skälig omfattning), be given this opportunity to comment. When the notification is sufficiently examined, the Municipality shall issue any injunctions and prohibitions for the activity, if necessary. If such measures are not determined, the Municipality shall inform the “applicant”. The activity cannot start before six weeks have past since notice was issued, unless the Municipality decides otherwise.

Those activities that are under a prior notification requirement may impact not only the quality of the environment, but also Saami customary rights, such as fish farms (fiskodlingar), agriculture and animal farms. Within the reindeer herding area, the Saami village should at least be deemed to have a specific interest (särskilt intresse) in the matter and be given an opportunity to comment on the notification. There is additionally a specific procedure for a few activities that involve a decision on prior permissibility (tillåtlighet) by the Government. For certain larger activities, such as environmentally hazardous activities and water operations, the Government must determine whether those activities in the first place may be established. This permissibility procedure includes i) structures for nuclear power activities, including structures for exploitation of uranium and other substances to be used as nuclear fuel; ii) motorways and other roads with a minimum four lanes and a length of at least ten kilometres; iii) railroads for long-distance traffic and building of new tracks of a minimum length of five kilometres; and, iv) public fairways (allmänna farleder). Of relevance here is mainly uranium exploitation or...

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2324 Environmental Code, ch.16 s. 4.
2325 Activities stated as category C.
2326 Regulations on Environmentally Hazardous Activities and Health Protection, ss. 21-22 & 25.
2327 Regulations on Environmentally Hazardous Activities and Health Protection, s. 26.
2328 Regulations on Environmentally Hazardous Activities and Health Protection, s. 27. Some restrictions to this obligation apply.
2329 Environmental Code, ch. 9 s. 6 para. 4. Note that eight weeks apply for water operations. See ch. 11 s. 9 b para. 3.
2330 Environmental Code, ch. 17 s. 1.
exploitation of other substances and railroads. However, in individual cases, the
Government may also reserve the right to consider the permissibility of other
activities than previously mentioned.

This situation is restricted to three distinct situations. Firstly, it concerns an
activity that is likely to cause substantial or intrusive impacts on interests protected
by the Code. Secondly, the situation arises if an activity outside a Natura 2000 area is
likely to cause damage to the area’s natural assets that are not inconsiderable.
Thirdly, if an activity is encompassed by the provision in chapter 4 section 6
paragraph 3, that is, water operations that only will cause minor environmental
impacts. On the request by Municipal councils (kommunfullmäktige), the
Government shall also determine the permissibility for a number of other larger and
new activities, such as certain wind farms, water regulations, water power plants,
structures for storage of natural gas, and activities carried out within the protected
mountain areas mentioned in chapter 4 section 5.

If an activity must be examined by the Government, the permit authority sets
after permissibility examination the conditions (villkor) to apply to the activity where
the Government’s decision is affirmative. The provisions under which the
Government is examining the permissibility of a specific activity are also here the
requirements in chapters 2 through 4, where the provisions under the two latter
chapters become crucial. The EIA report will also naturally be important as well as
other factors, such as whether the activity impacts a certain protected area. Again, the
vagueness of the basic and special provisions on land and water management
becomes obvious.

Even if a permit is not normally required for a specific activity, the activity may
nevertheless under certain circumstances require a permit. Such a permit is always
required for activities or measures that “in a substantial manner may impact the
environment” (på ett betydande sätt kan påverka miljön) in a Natura 2000 area. For
those areas, specific criteria apply for the granting of permits. Permits may only
be granted if the planned activity or measure, alone or together with other ongoing or
planned activities or measures: i) does not damage the habitat or habitats in the area
that are under protection; and, ii) does not cause the species protected to become
exposed to a detriment that in a significant manner may hinder the conservation of the
area related to the species.

Despite those criteria mentioned above, some exceptions apply nevertheless. Permits
may be granted if: i) alternative solutions are absent; ii) the activity or the measure
nevertheless must be carried out for imperative reasons of overriding public interest
(väsentligt allmänintresse); and, iii) necessary measures are taken to compensate for

2331 Environmental Code, ch. 17 s. 3. Note that only activities that are under a permit requirement may
be subject to permissibility assessment here.
2332 In a very recent case concerning the so-called Botniabanen (construction of a new coastal railway
track), the Environmental Court of Appeal held that the Court was bound by the previous assessment
of the stretching of the tracks decided by the Government. Therefore the Court could not assess
alternative routings. See the Environmental Court of Appeal case M 5040-05, decided in 2006-06-15.
2333 Environmental Code, ch. 7 s. 28 a. Activities and measures that are directly linked to the
management of the area is excluded from the permit requirement.
2334 Environmental Code, ch. 7 s. 28 b.
the loss of environmental assets to ensure that the objective with the protection of the specific area still can be satisfied. Any compensation measures shall be at the applicant’s expense, unless deemed to be unreasonable. A granting of a permit on the basis of those criteria alone may only be decided after permissibility has been assessed by the Government. On some occasions, the European Commission shall be given an opportunity to comment on the Government’s permissibility assessment. Where the Natura 2000 site hosts a priority natural habitat type and/or priority species in the permissibility assessment, the only considerations that may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment, or to other imperative reasons for overriding public interest. This very last consideration of whether an activity or measure is supported by imperative reasons for overriding public interest, presupposes that the opinion of the Commission is obtained.  

It is clear that the opportunity to obtain a permit for an activity that substantially may impact the environment within a Natura 2000 site is rather restricted, and the circumstances are regulated in detail. The influence of EC law is obvious. The provisions on Natura 2000 area ensure a strong protection of the environment within these areas, which generally must be seen as satisfactory for the enjoyment of Saami customary rights. On the other hand, Saami customary activities, particularly the reindeer herding right, may in some circumstances cause such substantial impact that the permit requirement is invoked, which then hinders the continuance of traditional activities. See further above, in subsection 9.3.2, where the provisions of Natura 2000 areas are analysed.

There is, additionally, another instrument in the Code relevant to environmental protection within the reindeer herding area. It concerns polluted areas and the requirements to clean up an area (efterbehandling). Those requirements are, for instance, normally evoked in relation to old mines. The main rule is that the operator is liable for the after-treatment of areas, buildings and structures. Even if those provisions are relevant, I will not analyse them further.

I will instead turn to issues on rights to appeal. First of all, the Government’s permissibility decisions cannot normally be appealed. They may be tried under the Act on Legal Review on Certain Public Decisions (Rättsprövningslagen). The trial is in principle limited to whether the Government’s decision is incompatible with any provision, including procedural provisions. The Supreme Administrative Court assesses whether the decision lies within the discretion of the specific provisions (interpretation of provisions), and not whether the appealed decision is appropriate.

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2335 Environmental Code, ch. 7 s. 29.
2336 Environmental Code, ch. 7 s. 29 a. The assessment on reasonableness shall particularly have regard to the public interest referred to in s. 29 para. 1 point 2.
2337 Environmental Code, ch. 7 s. 29 para. 2.
2338 Regulations (1998:1252) on Area Protection under the Environmental Code, s. 20.
2339 Environmental Code, ch. 2 s. 8 and ch. 10.
2340 See instead further in Darpö, Jan (2001) Eftertan ke och förutseende. En rättsvetenskaplig studie om ansvar och skyldigheter kring förorenande områden (akad. avh.).
2341 SFS 1988:205.
The Court cannot replace a repealed decision with a new decision; it can only confirm (bifalla) or repeal (upphäva) the earlier decision.\textsuperscript{2342} This means that, where the provisions are open-ended, the possibility to have the decision repealed is reduced. Nonetheless, the assessment often includes a normative assessment of certain broad concepts in the legal text, such as damages or detriments to the environment\textsuperscript{2343}. Generally, in cases concerning environmental or Saami issues, the opportunity to challenge a decision is difficult. The discretion and balancing of interests left to the Government and other deciding authorities are wide. One good example is the natural resource management provisions in chapters 3 and 4 of the Code. Another example is the provisions under the Reindeer Husbandry Act, which also regard the exercise of public authority (myndighetsutövning)\textsuperscript{2344}.

For individuals, the right to appeal is connected to the public law principle of being affected by a decision.\textsuperscript{2345} Decisions and judgements may be appealed by “any person who is the subject of a judgement of decision against him or her”\textsuperscript{2346}. This means that parties to the case (sakägare) have the right to appeal a decision, but the issue of who is regarded as a party to the case is not straightforward and has largely been left to the courts to determine. Although the preparatory works to the Environmental Code stated that the concept of who is a party to a case should be uniform under the Code (enhetligt sakägarbegrepp) and that a wide application (generös tillämpning) of the concept shall be made, the matter is rather complex\textsuperscript{2347}. In any case, the basis for assessing whether a person is sufficiently affected by a decision or judgment is the concept canvassed in the old Environmental Protection Act. What is relevant here is whether a person may be affected by damage or other detriment due to a planned activity or measure.\textsuperscript{2348} As said above, the case law so far indicates that, in principle, the character of the single case determines the prerequisite for standing. In this, the right to appeal differs between, for instance, shore protection areas (strandskydd) and environmentally hazardous activities.

The question whether individual Saami or a Saami village are affected by a decision, primarily on granting a permit, should not normally be an issue regarding planned environmentally hazardous activities or water operations. Even the risk of being affected by detriments fulfils the requirement. Where the individuals or the Saami village might be subject to damages and detriment, such as increased competition for the resource base, scattering of the pasture area, and loss of migration


\textsuperscript{2343} See for instance RÅ 1997 ref. 18. The case concerned encroachments in a national urban park (nationalstadspark) due to road construction.

\textsuperscript{2344} Compare with the Administrative Procedure Act (1986:223) (Förvaltningslagen), s. 22.

\textsuperscript{2345} See further above, particularly in subsection 8.3.2.

\textsuperscript{2346} Environmental Code, ch. 16 s. 1 point 1: “den som domen eller beslutet angår, och avgörandet har gått honom eller henne emot”. See further in Bengtsson, Bjällås, Rubensson & Strömberg Miljörätten. En kommentar, Del 1, pp. 16:23-16:25. Note that also so-called non-decisions (noll-beslut) by a supervisory authority can be appealed. See, for instance, the Environmental Court of Appeal case M 2047-04, decided in 2004-06-15.


\textsuperscript{2348} Prop. 1997/98:45 Del 1, p. 484.
routes and noise, they should normally be deemed as parties to the case. The reindeer herding right is a strong civil law right, regarded as a specific right to real property (särskild rätt till fastighet).

There is also an opportunity for an individual to bring an action against a person who pursues or has pursued an “environmentally hazardous activity” without permit, through a civil litigation (civiltal) \(^2\) 2349. Individual Saami must, however, be affected (berörd) by the activity in question. The action may be aimed at a prohibition of the environmentally hazardous activity or at taking protective measures or other precautions to minimise negative effects. There is an important limitation on the opportunity to bring an action against a person or company: the activity must have been carried out without a permit. This means either that a permit is not necessary for the type of activity (environmentally hazardous), or that a permit has not been obtained. The legal requirements applied in such an action are the general rules of consideration in chapter 2 of the Code. 2350

The aim of this specific provision (ch. 32 s. 12) is to hinder or limit pollution or other detriments. It is foremost the general rules of considerations in chapter 2 that are evoked when an action is brought to the Environmental Court. 2351 This provision applies to individuals, and, in case law, a foundation (stiftelse) has been held to have legal standing 2352. It is, however, unclear whether the individual must be concerned, that is, to be affected in one way or another by the environmentally hazardous activity. The words of the provision do not say anything about the need to be affected to evoke legal standing. 2353

The legal application of this provision is unfortunately unclear in several instances, for instance who has the onus of proof in these cases. 2354 One important clarification has been made, which regard the opportunity to bring actions against the building of roads (the construction plan) and railways (the railway plan) 2355. See further below in subsections 9.4.3 and 9.4.3.5. If many individuals are affected by an environmentally hazardous activity that does not have a permit, the Saami may nowadays bring the matter to the court as a class action (grupptal) 2356. The same preconditions apply as in chapter 32 section 12 2357. Organisations of reindeer herders or Saami fishermen

\[^2349\] Note that there is also an opportunity to bring a similar action with regard to water operations without permits (stämningsmål). See Environmental Code, ch. 21 s. 2 and Act (1998:812) on Certain Provisions on Water Operations, ch. 7 s. 2.
\[^2351\] See also The Supreme Court in NJA 2004 s. 88.
\[^2352\] In NJA 1994 s. 751, the Supreme Court used the word “affected” (berörd). For a deeper discussion on the matter see Lindblom, Per Henrik (2001) *Miljöprocess. Del 1*, foremost pp. 242-249.
\[^2353\] The provision has not been discussed in any depth in the preparatory works. See Michanek & Zetterberg (2004) *Den svenska miljörätten*, pp. 412-413 with references.
\[^2354\] See the Supreme Court case in NJA 2004 s. 88.
\[^2355\] Environmental Code, ch. 32 s. 13 paras. 2-3. See also Act (2002:599) on Class Actions.
\[^2356\] See also below in subsection 9.4.3.5.
also have the opportunity to bring an action against a person or company that pursues an environmentally hazardous activity without permits.\textsuperscript{2358}

Finally, permits may be reviewed and revoked under certain circumstances.\textsuperscript{2359} However, as the localisation generally is made and the activity already is there, emissions may only be reduced and other detriments may be prevented or hindered. Only in exceptional cases, where the localisation obviously is inappropriate, there can be a question of moving the activity.

### 9.4.3 Pre-Examination under other Legislation

#### 9.4.3.1 Introduction

Apart from the Environmental Code, a number of sector statutes exist that regulate specific land or natural resource uses. Nevertheless, certain provisions under the Code shall be applied, at least where explicitly stated. The Code and other legislation have a parallel application\textsuperscript{2360}. One example concerns the permits issued according to sector statutes, which will be evident from the analysis below. However, these permits do not provide the same legal effect (rättskraft) as permits granted under the Environmental Code.\textsuperscript{2361}

The parallel application also means that, where negative effects on the environment indirectly affect reindeer husbandry, the supervisory authority under the Code may, according to chapter 26 and with the support of the general rules of consideration in chapter 2 of the Code, decide upon injunctions in a particular case. A supervisory authority may require the operator to take additional, although not unreasonable, precautionary measures, including limiting the activity or even, occasionally, stopping the activity entirely.

Sometimes, the permit authority and the supervisory authority under sector statutes are one and the same. However, the National Environmental Protection Agency has the central supervisory responsibility regarding the application of the Environmental Code. Regarding environmentally hazardous activities or specifically protected areas, such as nature reserves or wildlife and plant sanctuaries, the County Administrative Board or the Municipality is the supervisory authority.\textsuperscript{2362} Altogether, the use of the provision in chapter 26 section 9 presupposes that the supervisory authority is active in its role, if detriments to the environment and indirectly for the reindeer husbandry shall be possible to accommodate.

Moreover, the provisions related to civil litigation (civilrättslig talan) aimed at minimising or hindering the negative effects of “environmentally hazardous activities”, might possibly have far-reaching applications, at least in relation to the decisions on construction plans and railway plans under the Road Act and Railway Act. The provisions should also be applicable to environmentally hazardous activities

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\textsuperscript{2358} Environmental Code, ch. 32 s. 14 para. 2.


\textsuperscript{2360} Environmental Code, ch. 1 s. 3 para. 1.

\textsuperscript{2361} Prop. 1997/98:90, pp. 151-152. See also chapter 24 of the Code.

\textsuperscript{2362} Regulations (1998:900) on Supervision under the Environmental Code, ss. 4-5 & 13.
regulated under other statutes. Here, Saami organisations for professionals (yrkesverksamma) have the opportunity to bring class action suits against persons and organisations. These provisions on civil litigation (civilrättslig talan) examined here may in fact be an important and helpful mean to minimise negative effects to roads and railways, at the least. The provisions may also be used to mitigate effects from other environmentally hazardous activities where the Environmental Code is applicable, for example permits under the Forest Act and concessions decided under the Mineral Act and the Peat Exploitation Act. See the discussion below in subsection 9.4.3.5.

In order to examine the relevant specialised legislation, I have structured this subsection in four additional subsections. First, I analyse the provisions in the forestry legislation; secondly, environmental and other requirements in relation to the management of the forest; thirdly, the concession legislation; and lastly, I analyse the requirements for structures related to public communication (the construction of public roads and railways). The purpose of this subsection is primarily to analyse permit and other environmental requirements in relation to each sector legislation, which may counteract a sustainable use of the land and natural resources within the reindeer herding area. In this, an environmental protection will promote the enjoyment of the reindeer herding right. The possibilities for accommodating detriments for the reindeer husbandry are specifically examined, together with opportunities for Saami to be involved into the decision-making processes.

9.4.3.2 Permit Requirements in the Forestry

The modern forestry is causing many disturbances and hinderances to reindeer husbandry, as well as to biological diversity. Most Saami villages see the forestry as a large threat to their traditional livelihood. At the same time, the forestry is a vital national industry (basläns regerings). A specific Forestry Act regulates management
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issues, nature conservation issues, as well as protection of sensitive forest categories. Forestry is legally regarded as an ongoing activity (pågående markanvändning), which means that the provisions in chapters 3 and 4 of the Environmental Code are not evoked. Normally logging does not require a permit, only notification to the Forest Agency (Skogsstyrelsen)\[^{2369}\]. However, for certain forest categories permit requirements apply, which will be analysed shortly below.

The notification is important for environmental protection reasons. Notification must be made at least six weeks before the logging takes place\[^{2370}\]. The Forest Agency has then opportunities to examine any potentially negative environmental effects caused by the logging with respect also to the logging site. With the support of chapter 12 section 6 of the Environmental Code, the Forest Agency may decide on specific injunctions to meet environmental protection measures (försiktighetmått). See further below under subsection 9.4.4. In certain circumstances, the Forest Agency must consult with the County Administrative Board, and as a response the Board may decide on a temporary prohibition of the logging (interimistiskt förbud)\[^{2371}\].

The purpose of the Act is twofold: one long-term production goal and one nature conservation goal. The Act states that “[t]he forest is a national resource. It shall be managed in such a way as to provide a valuable yield and at the same time preserve biodiversity”.\[^{2372}\] However, the environmental goal, included in the Act after an amendment in 1993, is not enforced in the Act, which means that the Act in practice has a low ambition in relation to nature conservation issues\[^{2373}\]. This must be understood as a general problem, as well as a specific problem for the reindeer husbandry, since no logging at all normally will be better from the view point of the Saami villages.

Another consequence of the 1993 amendments and the new forest politics is the occurrence of earlier felling operations (lägre slutavverkningsålder), which mean that the share of forests with tree lichen is decreasing.\[^{2374}\] Old growth forests with a high biodiversity and important tree lichen must, under certain conditions, also be replaced concerned an enforcement of environmental requirements and other implications of the Code on other sector legislation. My analysis here takes a stance in the valid law.

\[^{2369}\] Forestry Act, s. 14. The owner of forest land (skogsmark) is then required, among other things, to notify planned measures to satisfy the interests of nature conservation and cultural heritage preservation in connection with felling operations to be carried out on his land. Such measures may indirectly be beneficial to the reindeer husbandry. See also Regulations (1993:1096) on Forestry, s. 15. Note that, since January 2006, the former National Board of Forestry and the ten Regional Forestry Boards (Skogsvårdsstyrelser) are now reorganised and renamed (the Swedish Forest Agency).

\[^{2370}\] By-laws SKPS 1992:3 under section 14.


\[^{2372}\] Forest Act, s. 1 para. 1. For an unofficial translation, see at [http://www.svo.se/eng/act.htm](http://www.svo.se/eng/act.htm) (viewed at 2006-04-09).


\[^{2374}\] Tree lichen is important both from nature conservation aspects as well as from reindeer husbandry aspects. A recent doctoral thesis on the relation between tree lichen and forestry recommends, for instance, that the period between loggings (rotationstiden) be prolonged to more than 110 years. For a summary, see Hemberg, Leif (2001) *Skogsbruk och rennäring*, pp. 15-16.
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Logging may take place in two instances as part of forest management, cleaning or thinning (röjning/gallring) and final logging (slutavverkning). Permits for logging are required only in relation to certain categories of forests, which are specifically protected in the Act. The Act regards forest land with adverse regeneration conditions (svårföryngrad skog) or protected forest land (skyddsskog). The latter category is forest land that is needed to protect against sand and soil erosion or that is required to prevent a lowering of the tree line. Additionally, mountainous forest land (fjällnära skog) is a subcategory of forest lands with adverse regeneration. For these three forest categories, a permit is required from the Forest Agency. In relation to the application, the applicant must describe the planned measures to satisfy reindeer husbandry interests.

The Forest Agency has general authority to specify conditions and measures for logging in relation to granting permits, which is intended to enable the Agency to limit or counteract detriments and to ensure re-growth of new stands. Certain, stricter conditions apply for mountainous forest land. Above all, the granting of permits must not be allowed where the logging is “inconsistent with essential nature conservation and cultural heritage preservation interests” (oförenlig med intressen som är av väsentlig betydelse för naturvården eller kulturmiljövården). Additionally, certain conditions relate to the counties of Norrbotten, Västerbotten, Jämtland and Dalarna in relation to granting of logging permits. Reindeer husbandry is carried out within those four counties. These conditions concern only forest land with adverse regeneration conditions (svårföryngrad skog), which includes mountainous forest lands. Here, the Forest Agency must not grant permits for logging old forests or for logging to build a road (skogsbilväg), where the benefit for the forestry does not correspond to the cost of the road.

The legislative control of the three forest land categories is more detailed, not at least since they are under a permit requirement. These forests categories have typically larger natural values and are also more ecologically sensitive. Therefore, indirectly, those provisions may promote the enjoyment of the reindeer herding right as the forestry is measured vis-à-vis the need for environmental protection.

There is a provision, section 21, aimed expressly at protecting the interest of reindeer husbandry in relation to granting permits. Section 21 paragraph 2, states that...
“[i]n year-round-areas, logging is not permitted, if it: 1. causes such a significant loss of reindeer pasture land that the possibility to maintain the permitted number of reindeer is limited; or 2. precludes the customary grouping and migration of reindeer herds.”

It is clear by its wording that this paragraph does not provide any considerable protection for the reindeer husbandry. Note that the former Forestry Boards (Skogsvårdsstyrelser) have not in any single case prohibited logging due to this provision (2001).

The first precondition in section 21 paragraph 2, regards the opportunity for a Saami village to keep the permitted number of reindeer. This is a very blunt measure of the impact of a planned logging. The factual number of reindeer within a Saami village is often, but not always, lower than the permitted number to which the provision refers. This does not mean that reindeer husbandry is not substantially impaired. Likewise, the second precondition will seldom apply, since migration of reindeer is hardly ever made impossible (omöjliggjord). For many Saami villages, much of the migration is already done through lorry. Moreover, out of necessity, the reindeer herdsmen often find some solutions to the problems caused by loggings. Nevertheless, their businesses suffer primarily from the need of increased guarding, collecting and artificial feeding. Those costs are difficult to measure against “impossible measures” (omöjliggörande) regarding customary grouping and migration of herds. The protection afforded in paragraph 2 is also limited to the year-round-areas. Logging in winter pasture areas is not subject to any permit restrictions. In conclusion, the thresholds are high.

Note that there is a difference between section 21 in the Forestry Act and section 30 in the Reindeer Husbandry Act, where the former provision states preconditions in which the Forest Agency must not grant a logging permit. Section 21 includes an explicit reference to the permitted number of reindeer, whereas the words in provision 30 do not at all mention the number of reindeer. Instead, the latter provision is invoked when measures are taken that alter the prerequisites for a continuing reindeer husbandry, which may imply a reduction in the present number of reindeer held within a Saami village. Otherwise, both provisions apply only to the year-round-areas.

Section 21 also states that the applicant for a logging permit shall describe in the application planned measures to satisfy reindeer husbandry interests. These planned measures might be important, particularly if consultation with the concerned Saami village has taken place and the measures accommodate the reindeer husbandry. Failure to comply with the requirement of consultation is sanctioned by fine or imprisonment. Note, however, that consultation is mandatory only in relation to

2384 Forestry Act, s. 21 para. 2: “Iom renbete på områden där skogsavverkning sker får tillstånd inte meddelas om avverkningen 1. medför sådant väsentligt bortfall av renbete att möjligheterna att hålla tillåtet renantal påverkas, eller 2. omöjliggör sedvanlig samling och flytning av renbjord.”

2385 Hemberg, Leif (2001) Skogsbruk och rennäring, p. 20. There are approximately sixty applications each year.

2386 Compare with Reindeer Husbandry Act, s. 15 para. 2. The Country Administrative Board decides the highest number of reindeer allowed for each Saami village. See further in subsection 8.3.3.

2387 For an analysis of the provision, see below in 9.4.3.3.


2389 Forestry Act, s. 21 para. 1.
loggings in the year-round-areas. Consultation with regard to winter-pasture-areas occurs, but on a voluntary basis. Generally, voluntary action is problematic in contrast to explicit legal requirements. On consultation requirements, see further below in subsection 9.5. Furthermore, when granting the logging permit, the Forest Agency shall decide what consideration is to be given to reindeer husbandry interests, such as the size and location of the logging site and permissible logging methods. Note also that no EIA is required for applications for logging permits.

A permit might also be required under the provisions relating to Natura 2000 areas under chapter 7 of the Environmental Code, even if not required under the Forestry Act. Such a permit for logging is required as soon as the logging activity “in a substantially manner may impact the environment” ("på ett betydande sätt kan påverka miljön"), including construction of necessary roads. For the specific preconditions for a permit, see above under subsection 9.4.2. Note that the logging activity does not need to be carried out within such a protected area. It is enough that the logging activity or the road construction has a negative impact on the environment of the area.

The permitting procedure is governed by the provisions in chapter 7 of the Code, not under the Forestry Act. Decision-making related to the granting of logging permits is subject to the public law principle of administrative autonomy (officialprincipen), in similarity with decision-making under other environmental and natural resources legislation. This principle means basically that the deciding authority shall autonomously assess the matter before, for example, granting a logging permit. This requirement means that information and submissions from sources other than the parties must be considered in the decision-making. Hence, a Saami village may give the Forest Agency written or oral information regarding detriments for the husbandry and the environment, as well as their general view of the planned logging. It may give the authority valuable information where the consultation with the forest owner has been scarce. Nevertheless, the Forest Agency bases its decision on the provisions under the Forestry Act and the preconditions for granting permits for the three protected forest categories. Decisions by the Forest Agency can be appealed to Public Administrative Courts (allmän förvaltningsdomstol). This means that permit decisions can be appealed, but not issues concerning notification (anmälan) of logging, which do not require a decision as such by the Forest Agency.

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2390 Forestry Act, s. ss. 20. & 38 point 1.
2391 Forestry Act, s. 21 paras. 3-4.
2392 In some instances an environmental assessment (miljöanalys) must be done, but only in relation to new forest management methods and the use of new forest reproductive material. See Forestry Act, s. 32 & Regulations on Forestry, ss. 31-34.
2393 Environmental Code, ch. 7 s. 28 a. Activities and measures that are directly linked to the management of the area are excluded from the permit requirement.
2394 Environmental Code, ch. 8 ss. 8 & 1.
2396 Forestry Act, s. 40. This means that an appeal shall be made to the Administrative Court.
In a case from the Administrative Court of Appeal\footnote{2397} in 2002 a Saami village (Semisjaur-Njarg) appealed decisions on granted logging permits. The forest areas were owned by a State company (Statens Fastighetsverk) and the loggings regarded mountainous forest land (fjällnära skog). The planned loggings regarded chiefly winter-pasture-areas for the Saami village. The village argued that the pasture on both sides of the lake were significant and the re-growth of other areas subject to previous loggings had been bad, so the planned logging areas would substantially hinder their husbandry to the degree that the number of reindeer must be decreased. Semisjaur-Njarg also argued that an overall view of previous and future loggings must be considered concurrently, as the cumulative consequences of the logging cause substantial detriment for the husbandry.

The Court concluded that the Forest Agency had contended that the planned loggings in the applications were compatible with section 21 of the Act. The logging was only a small part of the total pasture area available for the Saami village. There was not enough proof to support the assertion that these loggings would impact the village’s opportunity to keep the permitted number of reindeer, and the same applied to the requirement to carry out customary gathering and migration of the herds. The Court implicitly concluded that there was nothing else in the legislation that obliged other considerations to be taken regarding the interests of the reindeer husbandry than the requirements in section 21 (for instance consideration of cumulative effects).

This above referenced court case illustrates the high threshold for finding hindering logging under the Forestry Act. And as said previously, section 21 has never caused the Forest Agency not to grant a permit, at least not up to 2001.\footnote{2398} Additionally, the case demonstrates the problem with cumulative effects of different logging operations. Even if they alone are small in size, the result of several logging areas might be troublesome from the perspective of reindeer husbandry. The legislation does not cover this problem of cumulative effects.

\section*{9.4.3.3 Requirements Related to the Management of the Forest}

Although the issue of management of the forest does not require a permit, it is nevertheless important with regard to the protection of the enjoyment of the reindeer herding right. I want to raise the issue in the context of permit requirements for forestry.

Regarding the management of the forest (skötsel av skog), certain provisions apply aiming at protecting reindeer husbandry interests. In the management of the forest, accommodation shall take place that are obviously needed with respect to the reindeer husbandry ("anpassning [skall] ske som uppenbart påkallas med hänsyn till rennäringen").\footnote{2399} Again, the threshold is rather high, namely what is “obviously needed” (uppenbart påkallat). However, observe that the accommodation duty regards all forest areas whether on year-round-areas or winter-pasture-areas. This accommodation requirement concerns the form and size of logging areas, the

\footnote{2397} (Sundsvall) case No. 1349/-1355-2000.
\footnote{2398} Note that, the Commission for Reindeer Husbandry Policy (Rennäringspolitiska kommittén) has suggested an amendment of section 21 in the Forestry Act. The reference to the permitted number of reindeers is removed. Nevertheless, the threshold is still rather high. See SOU 2001:101 Del 1, p. 96.
\footnote{2399} Forestry Act, s. 31.
establishment of new stands (beståndsanläggning), the retention of tree groups, and the routing of forest roads. Accommodation implies also that consultation with the concerned Saami village actually takes place. However, the Act does not mention a need to consult with the Saami regarding the management; the consultation requirement is a duty prior to logging, due to section 20. This is a want in the legislation.

In relation to the concerned Saami village, section 31 also states that the planning and implementation of forest management measures shall strive to ensure (eftersträvas) that the Saami village has annual access to interconnected pasture areas and to necessary vegetation in those areas used for gathering reindeer, as well as migration and resting areas for the reindeer. Accommodation seems to take place primarily in relation to the form and size of logging areas, establishment of new stands, retention of tree groups and routing of forest roads, and less in relation to ensure existence of interconnected pasture areas. It seems apparent that, in relation to the management measures, the protection of the reindeer herding right in relation to the forestry is weak. This is nevertheless important, because management measures also may cause detriments and hinder the reindeer husbandry.

Section 30 of the Reindeer Husbandry Act also does not incorporate a strong protection for the customary rights. It is restricted to year-round-areas. This section states that “owners or those who use land where reindeer husbandry is carried out must not in their land use take measures that cause substantial detriment (avsevärd olägenhet) to the husbandry”. Certain activities and measures are exempt from application of the provision. They regard land uses in correspondence with detailed development plans (detaljplan) and such activities and measures whose permissibility is separately assessed under specific legislation. This means that activities and measures that are under a permit obligation are exempted.

The requirement in section 30 applies to the forestry, as well as to all other activities or measures that cause such detriments. The threshold in this provision is likewise high, requiring a substantial detriment. The provision is only meant to be

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2400 Forestry Act, s. 31.
2401 Non mandatory by-laws (Allmänna råd) issued by the Forest Agency recommend that consultation with the Saami villages also is held outside the year-round-areas on an annual basis regarding management measures. The consultation should be carried out in the same manner as recommended in relation to section 20. See SKSFS 1993:2 related to section 31.
2402 Forestry Act, s. 31.
2404 The legal application of the provision has not led to the desired protection of the pasture areas that was sought by the legislature. See SOU 2001:101, p. 219. It was criticised already in 1989 in relation to SOU 1989:41 Samerätt och sameting, pp. 278-279. The provision is problematic for other reasons. The Committee (Rennäringspolitiska kommittén) has suggested a new general provision (generell hänsynsregel) applicable between land owners and reindeer herding Saami within the whole of the pasture area. See SOU 2001:101, pp. 76 & 218-224. I do not see that this new general provision will solve the underlying issue of adequate protection of the reindeer herding right, particularly in relation to the Forestry Act. See also Bengtson’s comments in Bengtsson, Bertil (2004) Samerätt, p. 62.
2405 See generally under subsections 8.1.1 & 8.1.4.
2406 Reindeer Husbandry Act, s. 30 para. 1. "Den som inom året-runt-markernas äger eller brukar mark där renkötsel bedrivs får inte vid användningen av marken vidta åtgärder som medför avsevärd olägenhet för renkötseln...". Note that the provision was slightly amended in 1993.
applicable to more serious encroachments, which jeopardise the prerequisites for a continued reindeer husbandry (rubbar förutsättningarna för fortsatt renskötsel)\textsuperscript{2408}. This should mean that measures related to the management of the forest never cause such severe detriments that those measures would be prohibited according to section 30. Only larger logging activities (slutavverkning) may be hindered due to the provision\textsuperscript{2409}. But even in those cases the threshold is high. See the case referred to below.

Moreover, section 30 is a prohibition clause (förbudsregel), and it is the land owner who is required to assess whether the land use will cause substantial detriment for the reindeer husbandry\textsuperscript{2410}. An affected Saami village must turn to the public court (allmän domstol) to have a dispute settled. Note also that the provision seems to include detriments only for the reindeer husbandry per se, and not substantial detriments related to other elements in the reindeer herding right, such as hunting and fishing rights. The section refers to reindeer husbandry, and not to the reindeer herding right\textsuperscript{2411}.

There is one case from the Court of Appeal that regards interpretation of section 30.\textsuperscript{2412} In 1984, a State owned forest company (Domänverket) logged (slutavverkade) a forest area with following ground preparation measures (markberedningsåtgärder) where Sirkas (Sirges) Saami village had reindeer herding rights. The village argued that reduction, damage and detriments on the winter and spring pasture had occurred, as well as the total loss of the vital tree lichen in the logged areas. The area was particularly important for the husbandry due to the rich occurrence of tree lichen. The logged area was categorised as mountainous forest land (fjällnära skog), and a permit was obtained for the logging, including following measures to secure re-growth (plöjning och harvning). Adjacent to the logged area was a migration route. Due to the logging, the Saami village argued that it had caused difficulties in their reindeer husbandry, particularly for a specific group that used this area. It had caused increased labour (arbetsinsatser) and expenditure for the reindeer herders, primarily due to artificial feeding and the increased difficulty of the migration. The reindeer avoided the clear-cut areas and wished to move over to other pasture areas

\begin{footnotesize}
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\item \textsuperscript{2408} Prop. 1992/93:32, p. 102.
\item \textsuperscript{2409} Compare also s. 21 in the Forestry Act. See above in subsection 9.4.3.2.
\item \textsuperscript{2410} The head of the Ministry (DepCh.) did not find this solution entirely satisfactory, that the land owner is called upon to make the assessment. However, he approved the provision on the ground that most of the land area in the year-round-areas is owned by the Crown (krönjord). See Prop. 1971:51, p. 130. But, this is not a guarantee that a correct assessment will always be made. See also the discussion in Bengtsson, Bertil (1987) \textit{Statsmakten och äganderätten}, pp. 30-35. Note that the Commission for Reindeer Husbandry Policy (Rennäringspolitiska kommittén) has proposed a new mutual provision for consideration to be taken with respect to land uses. The Commission observed that the provision did not protect the reindeer pasture area in the manner assumed when it was drafted. See SOU 2001:101, p. 76 & 218-224. See also Bengtsson, Bertil (2004) \textit{Samerätt}, p. 62. Although Bengtsson is in favour of the new provision (hänsynsregeln), he is critical to the liability provision, that only personal or (sak) material damage is compensated, as it is only the land owner that are helped by this rule. Compare with SOU 2001:101, p. 76 & 224-227.
\item \textsuperscript{2411} The proposed amendment refers to the holders of reindeer herding rights and their rights to use land, which include all sub-rights. See SOU 2001:101, pp. 76 & 218.
\item \textsuperscript{2412} RH 1990:18. Note that the legal value (prejudikatvärdet) of this case is in doubt, also apart from the fact that it is a case from the Court of Appeal. Note also that court cases in relation to section 30 is very scarce.
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belonging to another village, which required increased guarding of the herds. The forest company had long since consulted regarding their plans of logging in the area, which the Saami village opposed. During the time period after the logging, the number of reindeer held within the Saami village had in fact increased. Although the Court of Appeal found it was clear that the labour for the herders had increased, the Court did not find that the logging had caused such a "substantial detriment" for the reindeer husbandry. In other words, the threshold of section 30 was not met in this case.2413 By this case, it it seems as if the section prohibits measures that, in principle, would cause a sizeable reduction of the number of reindeer. Other measures, not causing such "substantial detriment" are therefore allowed according to section 30.

Neither section 30 of the Reindeer Husbandry Act nor section 31 in the Forestry Act takes into account cumulative effects or consequences of activities.2414 The aggregate impact of the many activities that cause disturbances for the reindeer husbandry is nowhere assessed. The pasture areas are already scattered, which causes problems for carrying out the business. In this sense, reindeer husbandry is land demanding. A shrinking land base is problematic for the future of this customary activity. Some overview of the situation for certain Saami villages may, nevertheless, be assessed in relation to the physical planning and the local comprehensive plan, which is not legally binding. Swedish law is generally lacking appropriate instruments that are legally enforceable and that would ensure sufficient protection concerning certain activities with substantial detriments for the enjoyment of the reindeer herding rights or concerning accumulated effects of different activities or measures vis-à-vis the reindeer herding right. See the discussion related to strategic planning in Part III, section 10.4.

9.4.3.4 Permit Requirements under Concession Legislation

The so called concession legislation (koncessionslagstiftning) regards primarily extraction of natural resources, but also other land uses. This is a group of statutes regulating “environmentally hazardous activities” that requires concessions (permits). The activities are typically very environmentally harmful, but are nevertheless often allowed, after balancing of interests, due to their public benefits. Hereunder, I analyse the legislation related to mineral and peat exploitation, as well as legislation regulating to building pipelines for natural gas transportation. Concession legislation regulates typically to situations that may impact also the enjoyment of the reindeer herding right. In relation to these sector statutes (speciallagstiftning), the

2414 Note however, that with the introduction of the natural resource management provisions (hushållningsbestämmelserna) and particularly the provision that now is included in the Environmental Code, ch. 3 s. 5, the legislature seemed to mean that the reindeer husbandry with the new provision would be strongly protected against different land uses (particularly for areas of national interest). This implies a protection of cumulative encroachments. The preparatory works ascertained that the areas subject to reindeer husbandry interests (rennäringens markanspråk) often have been withdrawn due to other important land use interests (primarily mining, water power developments and road constructions). See Prop. 1985/86:3, pp. 57 & 160-161 said that.
Environmental Code shall only to some extent be applied in matters (ärenden) under the Acts, as will be examined and discussed below.

The number of applications for exploitation of minerals has increased drastically during the last few years. It is the high world market price of minerals that increases the interest of extracting such resources. Sweden as a country has many different mineral deposits, not the least of which is within the reindeer pasture areas. In fact, Sweden is presently one of the world’s “hottest” mineral countries and the largest mining country within the EU.

Mineral exploitations are a large and a potentially increasing threat to the environment and to reindeer husbandry. The waste from mining activities is considerable and therefore the activity as such demands large areas for deposit of the waste. The localisation of the mining activity is naturally rather fixed, attached to the existence of the mineral ore. Mining activities not only may increase the splintering and scattering of the villages’ pasture area, the localisation of mines may also have substantial detriments for a Saami village if located near strategic areas for reindeer husbandry, such as old migration routes, calving grounds and areas with very good pasture. However, at the same time, it is an industry that may generate large profits and employment in more rural areas. Interestingly, however, a recent Commission recognised an international trend that seems to allow indigenous people and other interests a larger role in decision-making concerning mining projects.

The Mineral Act from 1991 regulates two types of permits: the exploration permit (undersökningstillstånd) and the exploitation concession (bearbetningskoncession). The Act regulates the exploitation of a number of minerals called concession minerals, including elements such as lead, gold, iron, copper, chromium, silver, titan, uranium and zinc; rocks (bergarter) and other compounds, such as alum shale (alunskiffer), graphite (grafit), refractory clay or clinkering clay and coal; and oil, gaseous hydrocarbons (natural gas) and diamonds.

Regarding the legislation on minerals, it is especially important to separate the issue of who has the right to the land and the minerals, on the one hand, and the restrictions imposed upon the enjoyment of those rights, on the other. Since the minerals legally belong to the property, the landowner seems to have the ownership.

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2415 Note that Bengtsson means that the concession legislation has become “greener” with the enactment of the Environmental Code. He concludes that environmental concerns do apply, but differently for each statute. He concludes, hence, that the introduction of the Code has not meant a simplification of the legislative system here. See Bengtsson, Bertil (2001) Miljöbalkens återverkningar, pp. 109-116 (particularly at the last page). However, so far there have been no cases that explicitly have concerned an enforcement of environmental requirements and other implications of the Code on other sector legislation. My analysis here takes a stance in the valid law.


2417 Prop. 2004/05:40, p. 33. See also Ds 2002:65, pp. 76 & 81.

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of all minerals. However, the right to use the minerals is strictly regulated, where anyone other than the land owner may be granted rights to examine the occurrence of and exploit minerals. The land owner has then a right to be compensated for encroachments on (intrång) and damage to the property, as well as compensation for the minerals as such (mineralersättning). Holders of the reindeer herding rights are parties to the case (sakägare) are likewise entitled to compensation for damages or encroachments, but not to the new mineral compensation.

In principle, a permit is always needed for exploration of concession minerals and for the exploitation of minerals. The main rule is that the Mining Inspector (bergmästaren) considers and grants exploration permits and exploitation concessions.

Exceptions from the main rule apply concerning granting of some exploitation concessions and prolonging exploration permits. In relation to exploitation concessions, it concerns situations where the Mining Inspector finds:

i) the matter of concession to be of special importance from the point of view of the public interest; or,

ii) there are reasons to reject what the County Administrative Board has proposed in applying chapters 3 or 4 of the Environmental Code. If either of these two situations applies, the Mining Inspector shall refer the matter (ärendet) to the Government for consideration. Matters concerning consideration of prolonging exploration permits shall also be referred to the Government, where the Mining Inspector finds that there are reasons to reject what the County Administrative Board has proposed in applying chapters 3 or 4 of the Code. Matters referred to the Government shall nevertheless first be investigated by the Mining Inspector, and a statement of his or her view shall be attached. If the Government has decided on granting a concession, the rights to appeal are restrained. Appeals can only be made under the Act on Legal Review on Certain Public Decisions (rättsprövningslagen). See further in subsection 9.4.2.

Generally, the Act promotes exploration and exploitation of minerals under controlled forms. For most cases, the Mining Inspector is both permitting authority

2419 The issue on ownership is, however, not totally clear. See further above in section 9.1. Nevertheless, whether the ownership belongs to the property owner or the State is of less practical relevance since the enjoyment of the rights to minerals is substantially restricted.

2420 Mineral Act, ch. 7 ss. 1-5 & 7. Note that the mineral compensation recently was introduced through Prop. 2004/05:40 Ändringar i minerallagen. The aim behind this amendment was to strengthen the land owner’s position vis-à-vis the exploiter. See ibid., pp. 61-67. Seventy-five percent of the compensation goes to the land owner and the rest to the State. This latter compensation shall be used for research on sustainable development of mineral resources. See ibid. pp. 63-64. Similar compensation was previously in force until 1974.

2421 Mineral Act, ch. 7 ss. 1-5. The subheading before these sections is “Compensation to parties to the case (sakägare).” See also Prop. 2004/05:40, p. 63.

2422 Mineral Act, ch. 1 s. 4. An exploration permit (undersökningstillstånd) or exploitation concession (bearbetningskoncession) is applicable to the mineral or minerals which are referred to in the permit or in the concession. See Mineral Act ch. 1 s. 5 para. 2.

2423 Mineral Act, ch. 8 s. 1 para. 1. The Mining Inspectorate of Sweden (Bergsstaten) is the official authority (förvaltningsmyndighet) and the Mining Inspector is the head of this authority. See further at http://www.bergsstaten.se/index_e.htm (viewed at 2006-04-27).

2424 Mineral Act, ch. 8 s. 2.

2425 Mineral Act, ch. 8 s. 3 para. 3.

2426 Mineral Act, ch. 8 s. 4.
and, at the same time, supervisory authority, which is rather unusual in the Swedish system of public supervision. This is not a benefit in the context of promoting environmental protection, particularly since the Act gives the Mining Inspector extensive discretionary powers and authority. This is especially evident in relation to the assessment of the environmentally hazardous activity and its necessary structures under the Code, which often follows a granted concession. Here, the Environmental Court is bound by the environmental and natural resource management assessments done by the Mining Inspector. See further below.

The Act’s focus on facilitating exploration and exploitation of valuable minerals is also evident concerning consideration of exploration permits and exploitation concessions. The Mining Inspector may grant an exploration permit without consulting any party to the case (sakägare) but the applicant. This means that not even the property owner or an affected Saami village is entitled to prior notice of the Mining Inspector’s decision. For granting exploitation concessions, the rules in the Environmental Code are restrained. Most mineral exploitations are subject to permit requirements under both the Mineral Act and the Environmental Code. The provisions in chapters 3 and 4 of the Code shall only be applied in the assessment related to the granting of exploration concessions under the Mineral Act. Hence, the natural resource management provisions are not applied in a subsequent permitting procedure under the Code or any other legislation. Therefore, the Mining Inspector may, for example, consider an area within the mountain region not to be of “national interest” for reindeer husbandry (ch. 3 s. 5) or of “national interest” for natural conservation purposes (ch. 3 s. 6), even if there is a previous decision declaring that this area possesses such values. The Inspector may also find that the exploitation does not “significantly interfere” (påtagligt försvårar) with the reindeer husbandry (the business) in an area of national interest for husbandry.

The hands of an environmental court are also tied with respect to the permitting process under the Code, even if the court finds the judgement by the Mining Inspector to be erroneous. In conclusion, the authority and power given the Mining Inspector in legislation is unique in the area of Swedish environmental law. For other situations of overlapping permitting procedures, the natural resource management provisions in chapters 3 and 4 are applied separately in each trial. One may very well question whether the Mining Inspector possesses extraordinary competence to assess reindeer herding issues and ecological consequences.

2427 Mineral Act, ch. 8 s. 1 & ch. 15 s. 1.
2428 Mineral Act, ch. 8 s. 1 para. 2. However, regarding exploitation concessions the Mining Inspector shall consult the County Administrative Board, but only concerning the application of chapters 3-4 and 6 of the Code. See para. 3. A statement (yttrande) shall also be obtained from the Municipality if the matter concerns an area subject to a detailed development plan or area regulation. See Mineral Regulations (1992:285) s. 28 para. 2.
2429 Mineral Act, ch. 4 s. 2 paras. 3-4. This is partly explained by the fact that mineral exploitation is done in stages: first comes the obtaining of an exploration permit, then exploitation concession and finally as assessment of the activity under the provisions in the Environmental Code. The general rules of consideration in chapter 2 of the Code shall not be applied in relation to the exploitation concession, as the legislature has seen potential risks of dissimilar assessments if the provisions should be applied in the granting process (exploitation concession) and in the later assessment under the Code. Moreover, the environmental quality standards are not either applicable, since the mining activity in this stage was regarded as too vague. See Prop. 1997/98:90, pp. 218-219.
As one illustration, the Environmental Court of Appeal was in a recent case called to consider an appeal regarding permit requirements under the Environmental Code. The permit regarded structures necessary to run a gold and silver mine in the area Svartliden. The issues regarded particularly the construction of a dam for dressing sand. The company had previously been granted an exploitation concession under the Mining Act. The Mining Inspector found that the classification of the area as of national interest for reindeer husbandry, or the other provisions in chapters 3 to 4, did not constitute hinders against the granting of the concession. There were environmental issues in the case, particularly contamination of two streams that formed part of two Natura 2000 areas.

Even if chapters 3 to 4 does not apply in the case, Vapsten Saami village maintained the same arguments here as in the Environmental Court. There was a lack of comprehensive assessment of the negative effects and side effects of the mining activities on the Saami society and reindeer husbandry. The total effect of the mine for the Saami village would be substantial and the husbandry would suffer from long term damages and detriments. The village argued also that the mine affects several migratory routs, of which two is classified as of national interest. They should therefore be protected. The area was already a difficult passage with large areas logged. The mining activities would lead to an increasing demand on labour and large costs, as well as psychological distress for the reindeer herdmen. On the whole, the Court decided new conditions with respect to the dam, but held that it was not necessary to impose other conditions regarding reindeer husbandry. The conditions set by the Environmental Court included certain rules for accommodating reindeer husbandry.

Moreover, the promotion of minerals exploitation in the Mineral Act is also evident with respect to the fact that applications of exploration permits or exploitation concessions must be granted if certain conditions are fulfilled as stated in the provisions. This is important, as an exploration permit is issued normally for three years and an exploitation concession for twenty-five years. Moreover, the exploration permit will, under normal circumstances, be prolonged after application for another three year period. If regular exploitation activity is carried out after the twenty-five years have passed, the concession is automatically extended for ten year periods without formal application. This means that the provisions in chapters 3 and 4 of the Environmental Code are not applied.

An EIA shall always be made in relation to an application for an exploitation concession. Only certain provisions in chapter 6 of the Environmental Code shall be
applied here. In other words, the consultation process with those adversely affected by the planned exploitation activity is exempted. The preparatory works argued that, since structures necessary for mining shall be tried against the provisions in the Environmental Code, there was no need for the same procedural rules in the Mining Act. Even if mineral ores are limited to certain sites, consultation early in the process is generally to the benefit of those that might be affected. Alternative locations, where possible, shall also be assessed and discussed within the EIAs. Moreover, the application shall include, among other things, an assessment of impacts on public and individual interests, such as environmental effects and effects on the reindeer husbandry, along with an explanation of measures that the applicant finds necessary to protect those interests. Without prior and mandatory consultation with the affected Saami village, the effects on the husbandry and accommodation measures are difficult to assess. Knowledge of the preconditions for the reindeer husbandry is generally scarce.

Affected Saami villages must be notified of an application and the EIA. Parties to the case may make written submissions on the application within certain time-frames, although the Mining Inspector is not obliged to take into account such submissions, in similarity with other granting processes under other legislation. Nonetheless, the Mining Inspector must include conditions in the concession that protect public interests and individual rights. Conditions may be set for complying with aims inherent in the provisions in chapters 3 and 4 of the Code. Those conditions may be amended by the Mining Inspector if the activity causes "substantial detriments" that were not foreseen when the concession was granted. In those cases, a renewed assessment of the provisions in chapters 3 and 4 of the Code shall be made. It may, for instance, concern substantial detriments for the reindeer husbandry that were not previously foreseen. More guidance regarding the application of the provisions is not given. The large discretion left to the Mining Inspector in the Act is again evident. However, one restriction that is explicit exists: the granting of concession must not counteract an

2435 It regards section 3 (purpose of EIA), section 7 (the content of the report), section 8 paragraph 1 (notification of the EIA), section 9 (the Mining Inspector shall approve the EIA), section 10 (the applicant is responsible for the cost vis-à-vis the EIA) and sections 19-29 (access to relevant material). See Mineral Act, ch. 4 s. 2 para. 5.
2437 See also a recent report aimed to improve the EIA in relation to mining at http://www.sjv.se/webdav/files/SJV/trycksaker/Pdf/ovrjft/ovr123.pdf (viewed at 2006-05-20).
2438 Environmental Code, ch. 6 s. 7 point 4. This might be relevant where the proposed mining shall be carried out under ground.
2440 Mineral Regulations, s. 21. Note that the provision does not refer to specific rights to real property, but it should nevertheless be encompassed by the provision as it also refers to other, lesser rights. See also Mineral Act, ch. 17 s. 1.
2441 Mineral Act, ch. 4 s. 5. See also Prop. 1988/89:92 Ny minerallagsstiftning m.m., p. 100.
2442 See Mineral Act, ch. 6 s. 4. See also Prop. 1988/89:92, pp. 107-108. This detriment shall be weighted against the damage that the holder of the concession suffers through due to an amendment of the conditions, according to the preparatory works.
existing detailed development plan (detaljplan) or area regulations (områdesbestämmelser)\textsuperscript{2443}.

After an exploitation concession is granted, a specific process of land designation (markanvisningsförrättning) is normally held. The aim of this process is to decide the area that may be used for mineral exploitation and adjoining activities\textsuperscript{2444}. The land designation process is held by the Mineral Inspector, who is obliged to notify all parties to the case (sakägare) regarding the meeting\textsuperscript{2445}. However, the land designation meeting is more of a formality, since no consultation is included, only a mutual exchange of views. The matter of land designation is decided by the authority for land designation (förrättningsmyndigheten), comprising the Mineral Inspector and sometimes two appointed executive officials (gode män)\textsuperscript{2446}.

In conclusion, environmental considerations in relation to exploitation concessions are minimal, that is, limited primarily by the provisions in chapters 3 and 4 of the Code.\textsuperscript{2447} The large room for discretion for deciding authorities means in practice that the outcome in different situations becomes unclear.\textsuperscript{2448} For instance, the Mining Inspector may in granting a concession find that a specific appointed area of national interest for reindeer husbandry is in fact not of national interest, as the assessment of national interest shall be made on a case by case basis. The environmental assessment is also restrained in relation to following granting procedures under the Environmental Code. Moreover, the opportunity for affected Saami villages, or land owners for that matter, to hinder exploration and exploitation of minerals is small, if not non-existent.\textsuperscript{2449} Although most of the decisions taken by the Mining Inspector may be appealed, the opportunity to influence decisions is rather small and appeals are tried against the substantial provisions under the Mining Act. The opportunity to state conditions into the exploitation concession that accommodates the reindeer husbandry is also unclear.

The Act on Peat Exploitation\textsuperscript{2450} has largely the same character as the Mining Act. One difference is, however, that the relevant provisions in the Environmental

\textsuperscript{2443} Mineral Act, ch. 4 s. 2 para. 6. However, smaller diversions are allowed as long as the objective of the plan/area Regulations is not counteracted.

\textsuperscript{2444} Mineral Act, ch. 9 s. 1. The designation process is held at the request of the concession-holder. Se also ss 11-12 in the same chapter.

\textsuperscript{2445} Mineral Act, ch. 9 ss. 4, 13-14 & 16. If there is no conflict of interest, a meeting is not required. Note also that more than one meeting may be held only under certain conditions, where a specific matter cannot be decided without further investigation, or if necessary for some other reason.

\textsuperscript{2446} Mineral Act, ch. 9 ss. 4 para. 2 & 19. Note that executive officials shall only be appointed if the Mining Inspector considers this necessary, or on the request of one of the parties to the case (sakägare) and where the appointment will not cause undue delay.

\textsuperscript{2447} The exploration of concession minerals is typically not environmentally harmful and is partly done with the support of the right of public access to land (allemansrätten). Exploration activities in national parks are, however, not permitted. A permit might also be needed if affecting a Natura 2000 area. See Mineral Act, ch. 3 s. 6.


\textsuperscript{2449} Section 30 of the Reindeer Husbandry Act is of course generally applicable in relation to mining activities, but where a valid permit or concession has been obtained, those activities are exempted from the requirements in this section.

\textsuperscript{2450} SFS 1985:620. (Energitorvlagen).
Chapter 9 Environmental Protection Legislation and the Reindeer Herding Area

Code apply fully. The statute regulates exploitation of peat pits for energy consumption. Exploitation of peat is typically environmentally harmful, since it may cause disturbances in the hydrological preconditions and pollution to groundwater, and it also alters the habitat for plants and animal life. Additionally, the esthetical character of the site (landskapsbild) is commonly altered. The impacts on the reindeer husbandry may, apart from disturbance of the activity as such, include loss of valuable pasture (grass and herbaceous plants) and loss of pasture areas for the reindeer, due to the exploitation as such, structures and new roads.

The Act states a general permit requirement for “energy” peat, either an exploration concession (undersökningskoncession) or an exploitation concession (bearbetsningskoncession). Also in this Act, the reindeer herding right is explicitly regarded as a specific right to real property (särskild rätt till fastighet). The County Administrative Board is the permit authority as well as a supervisory authority. Normally, concession concerning pits for energy peat will not be assessed under the Environmental Code, even if some of its provisions are applicable. Instead, the environmental effect of the peat pit activity shall be assessed in one occasion. However, where there are impacts on a Natura 2000 area, there is a need for obtaining a specific permit according to the provisions in chapter 7 of the Code. The opportunities are rather restrained.

The granting of concessions shall always be based upon the provisions in chapters 2 through 4 of the Environmental Code, as well as the provision in chapter 5, section 3, which regards the fulfilment of existing environmental quality targets. In relation to exploitation concessions, some additional provisions in the Environmental Act are applicable, which, for instance, means that an EIA must be

2451 See also Prop. 1997/98:90, pp. 222-229.
2453 Act on Peat Exploitation, ss. 1-2. Note that s. 3 allows the land owner to undertake or exploit peat for household use.
2454 Act on Peat Exploitation, s. 42.
2455 Act on Peat Exploitation, ss. 5 & 36.
2456 See also Prop. 1997/98:90, pp. 223-224.
2457 See above in subsection 9.3.2.
2458 Act on Peat Exploitation, s. 7 para. 3. Existing environmental quality targets concern the air and fishing waters. There are also specific Regulations regarding the management of waters (surface and ground waters) related to chapter 5 of the Code. See Regulations (2004:660) on the Management of the Water Environmental Quality.
2459 Act on Peat Exploitation, s. 7 para. 4. Provisions in the Environmental Code: ch. 6, ch. 9 s. 6a paras. 1-2, ch. 16 s. 5, ch. 16 s. 12 point 1, ch. 16 s. 13. Provisions in the Act (1998:812) with Specific Provisions on Water Activities: chs. 1-3, ch. 7 ss. 21-27 and ch. 7 s. 29. This latter Act states preconditions for dewatering (markavvattning), which is an important part of peat exploitation, and those provisions shall be applied. A permit for dewatering under the Code is not necessary if the concession has been grated under the Act on Peat Exploitation. See Environmental Code, ch. 11 s. 11 para. 4.
made, and there is no restriction here with respect to consultation2460. The Code’s rules on the right to appeal shall also be applied2461.

Moreover, the environmentally important provision (balancing provision) related to other kinds of pits (for instance gravel pits) shall be applied, where the need is balanced against environmental damages. This provision states that, in granting an exploitation concession, the need for the peat pit shall be measured against the damages that the pit might cause on the plant and animal life and on the environment. Concession must not be granted either for a peat pit that is likely to be detrimental to the habitat of any endangered, rare or care-demanding animal or plant specie.2462 However, note that the authority for the Government to prohibit land drainage (markavvattning) that would require a permit in areas where conservation of wetlands is particularly important, does not apply for drainage subject to the Act on Peat Exploitation. Such prohibitions apply in a few wetland areas within the reindeer herding area, but, as I just said, the prohibition does not apply to water drainage with respect to exploitation of peat used for energy purposes.2463

Another restriction applies under the Act on Peat Exploitation: an application for an exploitation concession must not be granted if the peat cannot be economically profitable.2464 Additionally, the granting of concession includes a suitability assessment (lämplighetsbedömning) to determine if it will be suitable from the view of the public that the activity take place and if the applicant will be suitable to carry on the activity. If these two requirements are not fulfilled, the concession must not be granted.2465 As with the Mineral Act, a concession must not be granted where a planned peat pit counteracts an existing detailed development plan (detaljplan) or area regulations (områdesbestämmelser)2466. An exploration concession is normally issued for two years, but there seem to be no time restrictions for exploitation concessions2467.

To a concession, conditions must be attached. Those conditions aim at protecting public interests and individual rights, such as protecting human health and the environment against damages and detriments, as well as promoting a long term energising (hushållning) of natural resources.2468 This specification in the latter part

2460 Compare above with respect to the Mineral Act. See also on the requirement on the EIA above in subsection 9.4.2. See also Regulations (1985:626) on Peat Exploitation, s. 4 point 2, which states that an EIA shall accompany the application together with information on the consultation undertaken.
2461 See further above on the interpretation of the rules in subsection 9.4.2. Note also that the decisions by the County Administrative Board under the Regulations on Peat Exploitation may only be appealed to the Government. See the Regulations s. 18.
2462 Environmental Code ch. 9 s. 6a: “Vid prövningen av en ansökan om tillstånd till täkt skall behovet av det material som kan utvinnas vägas mot de skador på djur- och växtlivet och på miljön i övrigt som täkten kan befaras orsaka. Tillstånd får inte lämnas till en täkt som kan befaras försämra livsbedingelserna för någon djur- eller växtart som är hotad, sällsynt eller i övrigt hänsynskrävande.”
2464 Act on Peat Exploitation, s. 7 para 5.
2465 Act on Peat Exploitation, s. 7 para 1.
2466 Act on Peat Exploitation, s. 7 para 2.
2467 Act on Peat Exploitation, s. 11 para. 2.
2468 Act on Peat Exploitation, s. 12 para. 1. See also s. 36, wherein the Board also may decide conditions for the activity to ensure that it is carried out in accordance with the provisions of the Act.
of the sentence is a difference compared to the equivalent provision in the Mining Act, where examples of valid conditions are not mentioned at all.\textsuperscript{2469} Although those examples mentioned explicitly in the provision are not exhaustive, they are nevertheless the most important reasons for designing conditions and give some guidance. The County Administrative Board may also, rather freely, add or amend conditions in situations where the activity has caused a detriment of some significance (olägenhet av någon betydelse) that was not foreseen when the concession was granted.\textsuperscript{2470}

This means that, where a detriment of some significance has occurred in relation to the enjoyment of the reindeer herding right in the area that was not foreseen, the County Administrative Board may add or amend the conditions for the concession to accommodate this detriment. The Board may also withdraw a concession if the conditions have not been complied with.\textsuperscript{2471} In relation to exploitation concessions, the County Administrative Board shall decide on the land necessary (anvisning av mark) for the activity, but only where the land owner has not approved of the commencement of the peat exploitation or adjoining activities.\textsuperscript{2472} As with the Mineral Act, the land owner and holders of reindeer herding rights have a right to be compensated for encroachments (intrång) and damages.\textsuperscript{2473}

In conclusion, the balancing provision, including a strict protection of the habitat of endangered, rare or care-demanding animals and plants, means that the opportunity to obtain an exploration concession is restrained. The requirement of the peat pit to be economically profitable, along with the suitability assessment, may also hinder the granting of an exploration concession. Environmental protection mechanisms are, thus, in force to a greater extent in this legislation than with relation to mineral exploitation permits. This is indirectly beneficial for the interests of the reindeer husbandry.

Additionally, the consultation requirement in the EIA procedure is relevant. The applications for concessions shall also here include an assessment of the impacts of the planned activity on public and individual interests along with – in the view of the applicant – necessary measures for protecting public interests, such as the environment, and individual rights, such as the reindeer herding right.\textsuperscript{2474} Although not enough, in my view, the element of consultation in the EIA may promote a better understanding of the Saami land use in the area and may increase accommodation of the enjoyment of the reindeer herding right. The application shall also include, among other things, the information necessary to assess how the general rules of consideration in chapter 2 of the Environmental Code are accommodated, which should mean that the less environmental damage, the less detriment for reindeer

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{2469} Compare with the Mining Act, ch. 2 s. 10 & ch. 4 s. 5.
\item \textsuperscript{2470} Act on Peat Exploitation, s. 14. Such conditions may, however, not be so intrusive that the activity no longer can be carried out or is considerable hindered (avsevärt försvåras). See para. 2.
\item \textsuperscript{2471} Act on Peat Exploitation, s. 17. Withdrawal is also possible if exceptional circumstances (synerliga skäl) apply.
\item \textsuperscript{2472} Act on Peat Exploitation, s. 26 para. 1.
\item \textsuperscript{2473} Act on Peat Exploitation, s. 27 para. 1. Compensation for damages and encroachments in relation to exploration activities are also compensated. See the Act, s. 22.
\item \textsuperscript{2474} Regulations (1985:626) on Peat Exploitation, ss. 2-3 point 6.
\end{enumerate}
\end{footnotesize}
husbandry. Moreover, the applications shall be published (kungöras), and parties to the case shall be informed. The Saami village and individual Saami may then make submissions (yttranden) on the application or the EIA.

A new Natural Gas Act has recently come into force (1st of July, 2005). It was a response to fulfill the obligations in an EC directive with the aim of creating an internal European market for natural gas. Although the use of natural gas in Sweden presently is small (less than two percent of the energy consumption), it may nevertheless be used to a higher degree in the near future. Present and future natural gas exploitation in Northern Norway and Russia may mean an establishment of a pipeline through parts of the Swedish reindeer pasture area. Generally, the potential for finding new gas deposits is regarded as large in the Barents region.

There is no exploitation of natural gas in Sweden, and if gas deposits were found, the Mineral Act would apply. The natural gas used presently is imported through pipelines in the Southeast of Sweden. Therefore, the matter analysed here is somewhat hypothetical and regards the possible impacts of the building of pipelines across the reindeer pasture area. Apart from splintering pasture areas, there might be leakages from the transport of gas through the pipelines. Measures might also be needed for allowing space for the pipeline, such as explosions, excavations, logging and other ground preparations.

The area of application of the Natural Gas Act relevant here is therefore related to building of pipelines for the gas. There is a requirement for obtaining concession for the building or use of pipelines for natural gas. The Government is the permit authority. An EIA shall be made in accordance with the provisions in

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2475 Regulations (1985:626) on Peat Exploitation, ss. 2-3 point 5.
2476 Regulations (1985:626) on Peat Exploitation, s. 8.
2477 SFS 2005:403.
2478 See Prop. 2004/05:62 Genomförande av EG:s direktiv om gemensamma regler för de inre marknaderna för el och naturgas, m.m.
2480 The large Snohvit project in Northern Norway is planned to be opened in the latter part of 2006. It is planned to be productive till 2035. Even if the natural gas will be transformed into liquefied natural gas and shipped to primarily USA and southern Europe, there have previously been discussions on a pipeline through Sweden. See at the official web page http://www.statsoil.com/statsoilcom/snohvit/svg02699.nsf?OpenDatabase&lang=en (viewed at 2006-05-02).
2481 See generally on environmental impacts at the web page of the Swedish Energy Agency http://www.stem.se/WEB/STEMEx01Swe.nsf/ReadForm&MenuSelect=FCB5CAEE6C754116C125703B0025DC0D&WT.Ti=Energimarknader Naturgas Naturgas%20och%20miljön (viewed at 2006-05-03).
2482 See the Natural Gas Act, ch. 1 s. 1 for the area of application. See also ch. 1 ss. 3-5 for definitions. Note that liquid natural gas is included. See the Act, ch. 1 s. 2 para. 2.
2483 The Swedish Energy Agency (Statens energimyndighet) prepare (bereder) the matter and then passes it to the Government for decision. See Regulations (2000:673) on Natural Gas, ss. 2 & 8.
chapter 6 of the Environmental Code, which means that consultation with affected Saami shall take place. Other provisions in the Code shall be applied in the granting procedure: chapters 2 through 4, chapter 5 section 3 and chapter 16 section 5.

There is, however, an important restriction on the application of the Environmental Code. An approved concession means that a prohibition of building or using the pipeline due to the provisions under the Code cannot be made. This is similar to the permissibility procedure under the Environmental Code. The granting of a concession is restricted, moreover, if it counteracts a detailed development plan (detaljplan) or area regulations (områdesbestämmelser). The requirement that the pipeline must be deemed to be appropriate (lämplig) from the public point of view must be fulfilled before the Government may grant a concession. A concession shall state the principal stretch of the pipeline and is granted for forty years.

The Government’s decision may be appealed, but only through a more limited legal review. Hence, only the legality of the Government decision can be tried by the Supreme Administrative Court and only if the decisions concern the exercise of public authority. Affected Saami have the opportunity to request a legal review of the Government decision. The limitation means, however, that the Court considers only whether the Government decision lies within the boundaries of its discretion accredited by the legislation on which the decision is based on. The Court cannot assess whether the decision as such is appropriate, since this would infringe the political autonomy. See further on the Swedish legal review system in subsection 9.4.2. Other decisions under the Natural Gas Act, apart from the Government decision on granting concessions, are taken by the Energy Agency. Those decisions normally cannot be appealed.

In conclusion, the pipelines impose environmental detriments determined by the stretch of the pipeline and the possible need for clearing and preparing the ground for building the structure. Detriments related to altered esthetical character of the land (förändrad landskapsbild) may also occur. For the interests of the reindeer husbandry, the potential scattering of the pasture lands is a problem. Although the Act includes consultation requirements for the exploiter through the EIA, the opportunity to hinder or amend concessions is limited. The issue of stretching of the pipeline is crucial for protecting the enjoyment of the reindeer herding right. Again, the provisions in chapters 3 and 4 of the Code do not include sufficient guarantees for the protection of those rights.

To sum up this analysis of the so-called concession legislation, all three statutes refer to both detailed development plans and area regulations and to natural resource

\[\text{2484 Natural Gas Act, ch. 2 s. 7.}\]
\[\text{2485 NatureGas Act, ch. 2 s. 4.}\]
\[\text{2486 See further under subsection 9.4.2.}\]
\[\text{2487 Natural Gas Act, ch. 2 s. 6.}\]
\[\text{2488 Natural Gas Act, ch. 2 s. 5.}\]
\[\text{2489 Natural Gas Act, ch. 2 ss. 9 & 11.}\]
\[\text{2491 Regulations on Natural Gas, s. 20. Only their decisions on permitting a transfer (överlåtelse) of a concession can be appealed to the Government. Note that the Regulations refer to provisions in the former Natural Gas Act of year 2000.}\]
management provisions in chapters 3 and 4 of the Code. If unsupported by other environmental protection provisions, as in the Act on Peat Exploitation, the environmental guarantees are vague in relation to the reindeer herding area. In this vast area, few detailed development plans and area regulations exist. This means that there are no plans in force to hinder certain activities. The problem with the provisions under chapters 3 and 4 has briefly been discussed here and in more detail above in subsection 9.2.3.2. I will not discuss them further here, but in relation to the analysis in Part III, in section 10.4. However, as the acts refer to chapters 3 and 4, the existence of a Natura 2000 area might hinder exploitation and other activities or measures. Chapter 4, section 8 is a reminder that a specific permit might be needed in relation to Natura 2000 areas, where the activity or measure may cause a significantly impact (betydande påverkan) on the environment within such an area. In other words, those provisions break through other legislation.

9.4.3.5 Permit Requirements for Structures Aimed at Public Communication

Here, I aim to analyse briefly the permit requirement for building public roads and railways. As evident from the previous analysis of the concession legislation and the legislation on forestry, roads may be built as a consequence of the activity, where a new road is necessary for access to the area where the activity is carried out. The area of application of the Road Act is instead roads needed for public use, such as roads for improving transportation to a new tourist recreation centre in the mountain region. The Railway Act regulates the building of tracks for railway traffic. Both Acts regulate situations where new roads or tracks, as well as reconstructing of an existing route, may seriously impact the enjoyment of the reindeer herding right, as the building may scatter the pasture areas. As indirect effects, other activities may be established or carried out as a consequence of better access to a certain area, for instance tourist activities.

The term “construction” (byggande) in both Acts is broad. In the context of roads, it includes construction of new roads, as well as reconstructing and improving existing roads. Construction of railway tracks likewise includes new tracks, as well as reconstructing and improving existing tracks. The two Acts have large similarities regarding the process of construction of roads and tracks. This process is divided into three distinct parts: a pre-assessment (förstudie), a specific assessment on alternative routing of the road or track (vägutredning eller järnvägsutredning), and a construction plan or railway plan (arbetsplan eller järnvägsplan). I shall begin with analysing the provisions in the Road Act, followed by the Railway Act.

2492 See above in subsection 3.3.2.
2493 Bengtsson has found that the amendments to the Road Act and the Railway Act have triggered the application of stronger environmental requirements. See Bengtsson, Bertil (2001) Miljöbalkens återverkningar, pp. 107-108. See generally at pp. 105-108. This is later supported by Michanek & Zetterberg. See Michanek & Zetterberg (2004) Den svenska miljörätten, p. 475.
2494 SFS 1971:948.
2496 Road Act, s. 10 para. 1.
2497 Railway Act, ch. 1 s. 2.
In the Road Act, the third step, the decision to approve a construction plan, must be regarded as the granting of a permit under the Environmental Code.2498 The construction plan shall be decided (fastställas) by the Road Agency (Vägverket) in consultation with the County Administrative Board. The matter shall be decided by the Government in cases where the two authorities are not in agreement. In this decision, the environmental impact assessment (EIA) and the result from consultations and submissions must be regarded (beaktas).2499

An EIA shall be made in relation to the road assessment and the construction plan. Note, however, that the road assessment shall only be made where it is necessary to assess alternative localisations of the stretch of the road2500. The EIA for the road assessment is guided through the provisions in the Code and includes an application of consultations with adversely affected (särskilt berörda) and affected (berörda) road building, depending upon whether the building is regarded as likely to have a significant environmental impact (betydande miljöpåverkan)2501. An EIA shall also accompany a construction plan. Here, the consultation requirement is not mandatory if a road assessment has been made. Consultation in relation to the EIA shall be made only where the County Administrative Board has decided that it is likely that the road building will have significant environmental impacts and a road assessment has not been made.2502 The EIA shall always be approved by the County Administrative Board before it is attached to the road assessment or the construction plan. Also, the cooperation between the Road Agency and the County Administrative Board is evident2503.

In any case, consultation regarding the routing and design of the road shall be held with affected property owners, authorities and others who may have a significant interest (väsentligt intresse) in the matter.2504 The Regulation specifies that those who must be included in the consultation shall comprise local interest groups and associations (lokala organ och sammanslutningar)2505. Saami villages, where affected, should be deemed to have a significant interest in the road building and should be provided the opportunity to participate in the consultation. To clarify, this consultation requirement regards only the process of preparing the construction plan, and, where the road has a greater environmental impact (significant environmental impact) the consultation takes place in conjunction with the EIA and under the

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2498 Road Act, s. 3 a. See however further below in relation to Supreme Court case in NJA 2004 s. 88.
2499 Road Act, s. 18. See also s 19.
2500 Road Act, s. 14 b.
2501 The sections in chapter 6 of the Code that shall be applied are ss. 3-4 (paras. 1-3), 6-8 (para. 1), 10 & 19-20. The Country Administrative Board shall decide whether the road building is likely to have a significant environmental impact, with the aid of the preconditions stated in the Regulations to the 6th chapter. See Regulations (1998:905) on Environmental Impact Assessments, s. 3 & Appendix 2. See also above in subsection 9.4.2.
2502 Road Act, ss. 15 paras. 2-3 & s. 16 para. 1.
2503 For more information on the cooperation see the Road Regulations.
2504 Road Act, s. 16 para. 1. Exceptions apply, see paras. 2-3.
2505 Road Regulations (1971:954) (Vägtrafikkungörelsen), s. 27. Note also that the building plan shall include a list of all known property owners and holders of particular rights (särskild rätt) and usufruct rights (nyttjanderätter). See s. 25.
consultation requirements set out in chapter 6 section 4 of the Code. In this latter situation, Saami villages clearly must be involved in the consultation process.

The preconditions for constructing roads are partly rather vague. For new roads, construction (anläggning) may be allowed where the road is needed for public transportation or is otherwise likely to have substantial importance (synerlig betydelse) to the public. Reconstruction and improvements of existing roads may take place where necessary from the viewpoint of the public (påkallat från allmän synpunkt). When constructing roads, it shall be secured that the road is given such stretching and design so that the objective of the road is meet with a minimum of encroachment and detriment and without undue cost. Regard shall also be taken to the surrounding city and country environment (stads- och landskapsbild) and to nature and cultural values.

The only provision that may hinder constructing roads is the reference to detailed development plans, area regulations, and provisions regarding area protection. Where the building of a road counteracts any of those plans, building is not allowed. Likewise, if specific provisions exist that protect specific nature areas, for example a nature reserve or a national park, a road must be built so that the objective of such provisions is not impaired. This means, for instance, that, even if a routing is planned outside of a projected area, another routing may be required if the objective of the specific protection would be jeopardised. Construction of roads may, thus, be hindered by this provision, although the road’s stretching lies outside the protected area or outside of specific by-laws. However, exemptions from the provision may be granted by the Government where particular reasons (särskilda skäl) apply. In relation to valuable nature areas, the regulations also state that, when a construction plan is prepared, particular regard shall be taken so that nature areas of particular interests are protected as much far as possible from negative impacts of road construction.

Chapters 2 through 4 of the Environmental Code shall be applied in matters (ärenden) under this Act. Of particular relevance is the location of the road, which must be chosen so that it is possible to achieve its aim with a minimum of damage and detriment to human health and the environment. The location of the road must also be suitable (lämplig) with regard taken to the objective of the Code and the provisions under chapters 3 and 4. As said many times before, the so-called natural resource management provisions may be supportive of both conservation interests as well as exploitation interests, such as concerning a “national interest” (riksintresse) for transportation. Moreover, conservation aspects or reindeer husbandry in the planned routing may or may not be regarded as a national interest. Problems arise because the provisions may act in both directions and are vague. This is also
discussed in Part III, in section 10.4. Otherwise, the provisions under the chapter 2 of the Code are aimed at minimising damages and detriments, not primarily to hinder the building of a road or other activities and measures\(^\text{2513}\).

Issues on construction of roads are handled by the Road Agency after consultation with the County Administrative Board. As said above, the construction plan is to be regarded as a permit.\(^\text{2514}\) The Road Agency may, after examination, decide on an amendment or the preparation of a new construction plan\(^\text{2515}\). Decisions by the Road Agency can be appealed only to the Government, which means that the Government decision is subject to only a limited judicial review (rättsprövning). The decisions by the County Administrative Board regarding the EIA (the decision on significant environmental impact and approval) cannot be appealed separately, as is the case also under the Environmental Code.\(^\text{2516}\)

However, there are chiefly two other opportunities to influence in what manner a road is built or to minimise effects from existing roads. The first possibility is through supervision. Individuals may complain to the competent supervisory authority concerning the need for environmentally protective measures\(^\text{2517}\). A second possibility concerns civil law actions. With the support of the Environmental Code (ch. 32 s. 12), an individual Saami may bring an action against a road project\(^\text{2518}\). Where a construction plan has been confirmed (fastställd), an individual Saami affected by the road may bring an action to the civil court, either for a prohibition of the road building or to require protective measures or other precautions to be taken to minimise negative effects. Here, the legal requirements in chapter 2 of the Code are evoked.\(^\text{2519}\)

The Supreme Court has, in a recent case, clarified whether the building permit hinders an action brought with the support of chapter 32 section 12\(^\text{2520}\). The provision is not applicable when an environmentally hazardous activity has been granted a permit. The Court stated that although, section 3 a of the Road Act says that the construction plan shall be compared to a permit granted under the provisions in the

\(^{2513}\) See further in subsection 8.2.1 & 8.2.3. See particularly the localisation provision. Note, however, that the so-called stop clause (stoppregeln) in chapter 2 section 9 may directly hinder certain environmentally harmful activities, which is likely to cause “significant damage or detriment” (olägenhet av väsentlig betydelse) to human health or the environment. This provision is evoked as a last step to hinder activities or measures that, despite all precautionary measures taken aimed at minimising the negative effects, cause prevailing damages or damages of more momentary effects. Environmental effects include here resource management aspects and protection of biological diversity. See Prop. 1997/98:45 Del 1, pp. 237-238. The threshold is rather high so it is not likely that a road normally will be deemed to cause such negative impact within the reindeer herding area.


\(^{2515}\) Road Regulations, s. 28. Concerned authorities shall then be notified.

\(^{2516}\) Note that these cases (dispositiva mål) bind only the parties.

\(^{2517}\) See also above at the end of subsection 9.4.2.

\(^{2518}\) Note that these cases (dispositiva mål) bind only the parties.

\(^{2519}\) See also above at the end of subsection 9.4.2.

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The Court emphasised that the preparatory works to the Code established an understanding that the legislature meant that the area of application for the environmental legislation (Environmental Code) would encompass road structures (trafikanläggningar) to a larger extent than before. Any limitation hereof has not been expressed in the preparatory works, that enforcements, for instance, only would be effected through supervision or reviews of permits and not in matters of civil litigation (civilrättslig talan). In the preparatory works, which focused on the relationship between the Code and other more specialised legislation, it was explicitly said that permit decisions or other similar decisions taken under other legislation do not have the legal protection (rättskraft) accredited for permits under the Environmental Code. This means that the provisions in the Code may be applied despite the fact that an activity has been tried according to other legislation. The Court acknowledged that this order may give rise to parallel procedures, which nevertheless must have been intended by the legislature. In other words, a confirmed construction plan could not be regarded as a permit in the meaning of chapter 32 section 12. This was also the interpretation that best corresponded to the legal text. An opposite interpretation could not be supported by any provision in the Code.

Saami organisations aimed at promoting reindeer husbandry or fishing interests for professionals (yrkesverksamma) also have the opportunity to bring a civil action to stop road projects, as well as railways, new and existing. The provisions on civil litigation (civilrättslig talan) examined here may in fact be an important and helpful means at least to minimise the negative effects of roads and railways. The provisions may possibly also be used to minimise effects from other activities where the Environmental Code applies, such as permits under the Forest Act and concessions decided under the Mineral Act and the Peat Exploitation Act.

This interpretation is supported by the implication from the Supreme Court case referred to above and from the preparatory works. For instance, in relation to supervision, the preparatory works state that the provision in chapter 26 section 9 means that the supervisory authority may issue injunctions and prohibitions (förelägganden och förbud), notwithstanding that an activity has been permitted in a granting process pursuant to another statute. This example was given in relation to the Mineral Act. This should mean that the civil litigation may further restrict the activity on the basis of pollution and other detriments affecting Saami who are pursuing traditional activities.

2521 NJA 2004 s. 88, at p. 92.
2522 This was said in relation to the so-called stop clause (stoppregeln) in ch. 2 s. 9. See Prop. 1997/98:45 Del 1, p. 238.
2524 NJA 2004 s. 88, at pp. 92-93.
2525 Environmental Code, ch. 32 s. 14. See also above at the end of subsection 9.4.2.
2527 See also above in subsection 9.4.3.4.
The Railway Act is structured in a way similar to the Road Act, with many common provisions. The third step in the process is here called the “railway plan”, which will likewise be regarded as the granting of a permit under the Environmental Code.\textsuperscript{2528} The railway plan must be decided (fastställas) by the Railway Agency (Banverket) in consultation with the County Administrative Board, or by the Government alone where the matter is in dispute. In this decision, the environmental impact assessment (EIA) and the result from consultations and submissions must be regarded (beaktas).\textsuperscript{2529} The requirements in relation to the EIA are the same, and an EIA shall, hence, be made both in conjunction with the railway assessment and the railway plan.\textsuperscript{2530} Regarding the preparation of the railway plan, consultation shall be held with affected property owners, authorities and others that may have a significant interest (väsentligt intresse) in the matter. This seems to be a consultation outside of the EIA.\textsuperscript{2531}

In all phases of constructing and maintaining railways, regard must be taken to individual and public interests, and environmental protection is mentioned explicitly.\textsuperscript{2532} The same general requirement applies as in the Road Act: when building tracks, the track shall be given a stretching and design to meet the objective of the track with minimum encroachment and detriment and without undue cost. Regard shall also be taken to the surrounding city and country environment and to nature and cultural values.\textsuperscript{2533}

There is also the same reference to detailed development plans and area regulations. A railway must not either counteract provisions that protect the use of areas, such as nature reserves. However, if there are particular reasons (särskilda skäl), the County Administrative Board and the Government may grant exemptions.\textsuperscript{2534} The appeal situation is the same as under the provisions in the Road Act.\textsuperscript{2535} Generally, the application of the provisions of the Environmental Code will have the same effects as for the Road Act.\textsuperscript{2536} Note, however, that in practice the authority may feel bound by previous decisions, particularly with respect to decisions on state funding of certain roads or railway tracks. This may have implications for the actual environmental assessment under the legislation.\textsuperscript{2537}

\textsuperscript{2528} Railway Act, ch. 1 s. 3 para. 1.
\textsuperscript{2529} Railway Act, ch. 1 ss. 8. The Government shall also decide where the building regard new tracks for long distance traffic and the length of the tracks are at least five kilometres. See Environmental Code, ch. 17 s. 1 point 3.
\textsuperscript{2530} Railway Act, ch. 2 ss. 1 a, 2 & 8 para. 3.
\textsuperscript{2531} Railway Act, ch. 2 s. 5.
\textsuperscript{2532} Railway Act, ch. 1 s. 3 para. 2.
\textsuperscript{2533} Railway Act, ch. 1 s. 4.
\textsuperscript{2534} Railway Act, ch. 1 s. 5 & Railway Regulations (1995:1652), s. 9. Those decisions taken by the County Administrative Board may be appealed only to the Government. See the Regulations, s. 12.
\textsuperscript{2535} Railway Act, ch. 5 ss. 1-2.
\textsuperscript{2536} Also here the provisions in chapters 2-4 and ch. 5 s. 3 & ch. 16 s. 5 apply. See Railway Act, ch. 1 s. 3.
9.4.4 Other Requirements to Prevent Significant Damage to the Natural Environment

Under this subsection, I aim to analyse an important situation where explicit requirements on permit and notification are lacking. This and other closely related issues have only partly been examined above. The situation is typical of all situations where no permit or notification requirements apply for certain activities and measures. It concerns risks for damages and detriment arising from the enjoyment of the right to public access. There is a specific provision in the Environmental Code to regulate situations where “normal” provisions on pre-examination (förprövning) are absent. Hence, I will focus on this provision (ch. 12 s. 6) below. In fact, this provision may be regarded as a specific form of pre-examination.

Generally, in situations without permit or notification requirements, the battery of provisions related to supervision (tillsyn) is evoked. Importantly, the supervisory authority may, at any time, impose restrictions on an activity or measure with support of the provisions in chapter 2 of the Code. Additionally, individuals and certain groups, such as Saami villages and organisations, also have the opportunity to bring a case against “environmentally hazardous activities” without permits, through civil litigation (civilrättslig talan). Those issues have partly been analysed above. Nevertheless, the general rules of consideration in chapter 2 of the Code are important, both for the “operator” and the supervisory authority.

Crucially, where no specific requirements operate, the general rules of consideration commonly apply to all activities and measures. This concerns, for instance “environmentally hazardous activities” that are not under explicit permit or notification requirements, so-called “free” environmentally hazardous activities. As explained above, the definition of “environmentally hazardous activities” is broad. See above in subsections 8.2.2 and 9.4.2. The provisions in chapter 2 are applicable to all activities and measures that counteract the objective of the Environmental Code, which is the promotion of sustainable development. Hence, for instance, in relation to the enjoyment of the rights inherent in the public access to land, the person must take protective measures when passing over wetlands, picking plants or camping. This concerns also other activities and measures, such as larger excavations, preparations for main systems (ledningsgator), ditching, roads and organised tourism activities. The general rules of consideration also apply in conjunction with supervision and the specific provision analysed directly below.

There is a central provision in the Environmental Code (ch. 12 s. 6) which aims to regulate those situations where other forms of pre-examination under the Code do not exist. This provision has an important function as a complement to the provisions pertaining to permit requirements. It is labelled “notice of consultation” (anmälan...
The supervisory authority may also here impose injunctions and prohibitions on some activities and measures. Regarding the consultation requirement, if an activity or measure may have “a significant impact” on the natural environment (väsentligt ändra naturmiljön), a notice of consultation shall be given to the supervisory authority.\textsuperscript{2544} Note that even a risk of causing a significant impact evokes the consultation requirement.\textsuperscript{2545} The idea behind this provision is that it shall function as a preventive and handy a means for controlling, directing and perhaps preventing activities or measures that negatively impact or that might negatively impact the local environment primarily.\textsuperscript{2546} The section reads:

If an activity or measure for which a permit or notification is not required pursuant to other provisions of this Code may have a significant impact on the natural environment, notice of consultation shall be made to the supervisory authority in accordance with the provisions of chapter 26 or with rules issued in pursuance thereof.

The Government or the authority appointed by the Government may issue rules to the effect that notice of consultation shall always be given, at national or local level, in the case of activities or measures that may damage the natural environment. The Government or the authority appointed by the Government may also issue rules specifying the information to be supplied in such a notice.

Activities or measures which must be notified for consultation may not commence earlier than six weeks after submission of the notice unless the supervisory authority decides otherwise.

The authority referred to in the first paragraph may order persons who are required to submit notice of consultation to take any measure that are necessary to limit or combat damage to the natural environment. If such measures are not sufficient, the authority may, where necessary in order to protect the natural environment, prohibit the activity. Provisions concerning the right to compensation in the case of such an injunction or prohibition are contained in chapter 31.\textsuperscript{2547}

In this provision (para. 1), the consultation requirement concerns consultation between the person, company or organisation, on the one hand, and an authority on the other. It is the County Administrative Board or the Forest Agency for activities

\textsuperscript{2543} This requirement is in fact somewhat more thorough than a notification requirement (anmälan). Consultation \textit{per se} requires a larger degree of cooperation from the “operator”, to discuss protective measures and how to mitigate adverse effects.

\textsuperscript{2544} Environmental Code ch. 12. s. 6 para. 1.

\textsuperscript{2545} The provision says “may” (kan). See also Michanek & Zetterberg (2004) \textit{Den svenska miljörätten}, p. 234.

\textsuperscript{2546} Prop. 1997/98:45 Del 2, p. 151. See also Bengtsson, Bjällås, Rubensson & Strömberg \textit{Miljöbalken. En kommentar}, Del 1, p. 12:15.

\textsuperscript{2547} Environmental Code, ch. 12 s. 6.
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and measures regulated under the Forestry Act that are the competent authorities. Consultation under this provisions differs, thus, from other forms of consultation where both authorities and those concerned by a planned activity are consulted, for instance with respect to an EIA. See further below, in section 3.5 on consultation requirements vis-à-vis the Saami.

A prerequisite to evoking the consultation requirement is that the planned activity or measure may have “a significant impact on the natural environment”. It is here important to regard how sensitive the natural environment on the site is, whether, for instance, it concerns a nature reserve or may impact a wetland area or important pasture or tree lichen for the reindeer (“natural environment”). If there are doubts, consultation is recommended as the consultation requirement is sanctioned. Subject to the second paragraph in the provision, the Government or the appointed authority may, through regulations, generally require notice of consultation for certain types of activities and measures that may damage the natural environment. Such regulations may concern the whole country or parts of the country, such as within the reindeer herding area. Note here that the words in paragraph 2 are slightly different (“damage [to] the natural environment”) and that the precondition “significant” is removed. However, the criterion here is linked to the authority given to the Government to issue regulations.

The relevant provisions on national requirements for notice of consultation encompasses snowmobile tracks and other structures for snowmobile traffic outside of planned areas (planlagt område), exploration activities under the Mineral Act carried out in the so-called unexploited mountain region (obrutna fjällområdet), as well as to the building of reindeer fences (renstångsel) and other permanent structures necessary for reindeer husbandry. The Regulations also include measures relative to forestry and the Forestry Act. Notice of consultation shall be made to the Forest Agency concerning, for instance, logging, building of forest roads, measures on clearings (hyggesbehandling), establishment of new stands (beståndsanläggning), or fertilising or liming of forest land. The old legislation, from which this provision originated, included also pits for household use by the property owner (where no permits are required), power-lines and some settlements (bebyggelse).

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2548 Regulations (1998:900) on Supervision under the Environmental Code, s. 4 & the Appendix (A15 and A16).
2549 Environmental Code, ch. 29 s. 4 (utillåten miljöverksamhet). See further in Bengtsson, Bjällås, Rubensson & Strömberg Miljöbalken. En kommentar, Del 1, pp. 12:15-16. Note also that the Law Council was critical of the sanction, since the provision was seen as too vague and broad to serve as a base for such legal consequences. See Prop. 1997/98:45 Del 2, p. 306.
2550 The County Administrative Board and the Forest Agency are authorised to issue by-laws on requirements for notice of consultation. See Regulations (1998:904) on Pits and Notice of Consultation, s. 7. On national requirements for notice of consultation, see below.
2551 The difference implies that the risk for the natural environment does not have to be as negative in order give rise to the authority to issue provisions in the form of Regulations. See Bengtsson, Bjällås, Rubensson & Strömberg Miljöbalken. En kommentar, Del 1, p. 12:17.
2552 Regulations (1998:904) on Pits and Notice of Consultation, ss. 7 a- 7 c.
2553 Regulations on Pits and Notice of Consultation, s. 7 para. 2.
2554 Bengtsson, Bjällås, Rubensson & Strömberg Miljöbalken. En kommentar, Del 1, p. 12:16.
For all those situations, the notice of consultation must be in written form, attached with a map and a description of the planned activity or measure. It may also require an EIA, chiefly where there are negative impacts on a Natura 2000 area.2555 Where a notice of consultation has been made, the activity or measure must not be started before six weeks have passed. During this time period, the supervisory authority has the opportunity to impose the necessary injunctions to limit or combat damage to the natural environment.

The issuance of injunctions (förelägganden) is based upon the provision in chapter 26 section 9. This is done, however, if the consultation has not lead to a mutually acceptable agreement on how the activity or measure shall correspond to the requirements stated in the Environmental Code.2557 Where those protective measures are not sufficient, the supervisory authority may prohibit the activity/measure. However, according to case law, prohibitions may only be used in exceptional cases; normally information and injunctions should be enough.

A case from the Supreme Administrative Court concerned experimental cultivation with exotic plants on a small part of an inland with verified natural environment beyond the normal. A classification as a nature reserve was considered. The Court held that, although the Court found that the planned cultivation might have a “significant impact on the natural environment”, the possibility to prohibit an activity should only be used in exceptional cases. The Court argued that the circumstances in this particular case did not support the prohibition of the planned cultivation. In this, the reasoning encompassed a proportionality thinking, between the needs of protecting the natural environment and imposing restrictions on the company.

As said, the Government, the County Administrative Board and the Forest Agency is authorised to issue provisions that generally require an operator to consult when certain types of activities or measures, specified in regulations or by-laws, are conducted.2559 In the preparatory works, organised recreational activities (organiserat friluftsliv) are particularly mentioned.2560 The idea is that, with requirements locally, it is possible to hinder detriments with respect to the enjoyment of the public access. Recreational activities in particular that are organised and commercial may lead to

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2555 The requirements on the EIA are then linked directly to the provisions on Natura 2000 areas. See Environmental Code, ch. 6 s. 7 para. 4.
2556 See also Regulations on Pits and Notice of Consultation, s. 6 where for instance notice concerning logging and cultivated lands turned into non-productive shall be regarded as a notice of consultation under ch. 12 s. 6.
2557 See also Bengtsson, Bjällås, Rubensson & Strömberg Miljöbalken. En kommentar, Del 1, p. 12:19.
2558 RÅ 1996 ref. 22. Note that the Court referred to preparatory works, which stated a restrictive application of the possibility to impose prohibitions. See also RÅ 1996 ref. 56, which concerned planting of birches on formerly arable land. Here, the same Court explicitly used a proportionality principle and also repealed (upphävde) the prohibition with reference to its use in exceptional cases. See also Michanek & Zetterberg (2004) Den svenska miljörätten, pp. 234-235.
2559 Under paragraph 2 of the Code or under the Regulations, s. 7. Note that the Forest Agency is authorised to issue requirements on notice of consultation in relation to forest lands.
2560 Prop. 1997/98:45 Del 1, pp. 305-306. Notice of consultation may also be required for organised tourism activities on the property owner’s own estate.
damages or detriments. Reindeer husbandry may also be disturbed or disrupted where many persons enjoy their rights to public access.

Apart from requirements related to organised recreational activities, notice of consultation may also respond and be designed to accommodate particularly sensitive environments locally or regionally. Subject to the legislation, such requirements may be designed to apply in areas used for reindeer husbandry that are especially ecologically sensitive, such as parts of the bare mountains and mountainous forests. Note, however, that the authority to impose provisions only concerns the public interest in the care of the natural environment, not reindeer herdsmen or property owners. Nevertheless, through specially designed requirements of notices of notification the authorities may receive a better overview of the situation and may steer some activities to other areas, or, if necessary, impose injunctions on protective measures for protecting the natural environment. This will, at least indirectly, benefit also the interests of the reindeer husbandry, as long as requirements are not directed toward the husbandry itself.

Where a property owner is exposed to damages and detriment from organised recreational activities, he or she may also initiate a case on liability against the organiser. In the so-called white-water racing case the Supreme Court found that even if the public access to land may be enjoyed commercially, there are limits. The case concerned organised white-water racing on a property without the property owner’s permission. Due to the intensity of the use, the damages and detriments on the property were beyond what the owner must accept with regard to public access to lands (allemansrätten). A continued activity was also inappropriate with regard to plant and animal life.

Injunctions and prohibitions issued in relation to notices of consultation may be attached with a fine. The decision by the supervisory authority may be appealed to the Environmental Court. However, as the provision (ch 12 s. 6) regards a public interest, namely the protection of the natural environment, the likelihood of having standing in such cases appears to be limited. The case law shows that the right to appeal in those cases arises only where a decision negatively impacts the property owners’ enjoyment of the property or where a specific right to the property (särskild rätt till fastigheten) is impaired.

In a recent case from the Environmental Court of Appeal, a property owner who opposed the building of a radio pylon (radiomast) did not have standing. As a support of her case, she claimed public interests, that the pylon was to be erected in
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an area of national interest due to the area’s natural assets and that the pylon would significantly damage the view of the landscape. She also claimed that the electromagnetic fields were detrimental to health, particularly for her, since she was hypersensitive to those fields (elöverkänslig). The Court found that she was not concerned (berörd) by the decision which regarded an initial prohibition to erect the pylon by the County Administrative Court, subject to chapter 12 section 6 of the Code.

As explained above, in subsection 9.4.2, the concept concerning parties to the case (sakägare) is regarded differently for different situations under the Code. The categorisation as party to a case is important, since it is linked with the right to appeal. In many cases, the right to appeal decisions is narrowly interpreted, despite general comments on a generous application of the concept in the preparatory works\(^{2569}\). Even if individual Saami or the Saami village will have difficulties gaining standing with respect to the provision on consultation (ch. 12 s. 6), the provision nevertheless has an important function. It may bring together activities and measures that may significantly impact the natural environment and indirectly the interests of the reindeer husbandry. For instance, the negative impacts of organised recreational activities may be steered to areas less ecologically sensitive. The use of local/regional provisions on notice of consultation could also be used more extensively. Importantly, the supervisory authority may also at any time impose restrictions on an activity with the support of the provisions in chapter 2 of the Code. In this, the decision does not give rise to the legal effect that the person or company pursuing the activity may carry on the activity without further restrictions\(^{2570}\).

9.5 Consultation Requirements

In order to clarify the requirements on consultation in relation to Saami customary rights, I have chosen to analyse those provisions separately. Even if consultation as such does not directly contribute to environmental protection, which is the main theme of this chapter, consultation with Saami has important aspects for linking Saami customary rights and practices with, for instance, planning processes or decision-making with respect to granting permits. In this sense, the acknowledgement of customary practices and Saami interests, particularly reindeer husbandry interests, may strengthen the resource management and promote a sustainable use of the reindeer herding area.

Note, however, that, in a Swedish legal context, consultation means foremost consultation between an operator (verksamhetutövare) and the Saami village, as well as between an operator and authorities, but not particularly between the Government and the Saami.\(^{2571}\) The Government, including the County Administrative Board and Municipalities, is under no specific obligation to consult with the Saami in Swedish law, except with respect to other provisions such as the consultation process with


\(^{2570}\) See also ibid., p. 235.

\(^{2571}\) Compare with the legal situation in Aotearoa/New Zealand and Canada covered here. See sections and subsections 4.4, 6.4.5.2, 6.4.5.3 & 6.5.
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respect to EIA. I see this as a weakness in the law 2572. Nevertheless, the public law principle on communication (kommunikationsprincipen) may be seen as including consultation obligations for the deciding authority. See further below.

Above, I have analysed the consultation requirement in relation to environmental impact assessments (EIA), as this instrument has a strong connection to permit requirements or certain plans where the implementation of the plan is likely to have a significant environmental effect. 2573 Other provisions concerning consultation are on the whole scarce, both general consultation requirements and those specifically aiming directly at the reindeer husbandry 2574. Consultation duties arise either subject to the plans under the Planning and Building Act or subject to particular activities under legislation with respect to real property law or natural resources law, such as forestry legislation. Regarding the plans, the Municipalities are called to consult in certain occasions, and concerning different activities, it is the exploiter who shall conduct the consultation. I will begin with the plans.

For all five plan types under the Planning and Building Act there is a separate consultation process, which is mandatory. 2575 The objective of the consultation is to improve the material on which decisions are based, and at the same time provide transparency and influence to the decision-making 2576.

The consultation in relation to comprehensive plans and regional plans includes the County Administrative Board and other Municipalities that are affected (berörd) by the proposal. The Municipality shall also consult other authorities, associations and persons that have an essential interest (väsentligt intresse), or rather those shall be provided the opportunity to enter into consultation. 2577 Regarding associations and persons that have an essential interest in the plan, the preparatory works mention interest organisations, for instance regional and local recreation and environmental organisations, property owners, parties to the case (sakägare) and those who live in the area. 2578 The section does not state how this circle should be delimited. Instead, this is done on a case by case basis, depending upon the extent of the current amendments 2579.

Who shall be regarded as having an essential interest (väsentligt intresse) is not stated in the provision or the preparatory works. However, reindeer organisations, such as the Swedish Saami National Association (Svenska samernas riksförbund) and other regional and local Saami organisations (sameföreningar), should be provided the opportunity to consult if the reindeer husbandry is affected by the plan proposal.

2572 See further in Part III, section 10.5.
2573 On consultation with regard to EIA, see above in subsections 9.2.2, 9.4.2, 9.4.3.4 & 9.4.3.5.
2574 The so-called consultation provision (samrådsregeln) is analysed above in subsection 3.4.4. This provision regards much more than consultation, in the meaning under this section. Above all it evokes a requirement for an individual or company to consult with the supervisory authority, but not with someone else.
2575 Planning and Building Act, ch. 4 s. 3, ch. 7 s. 5 and ch. 5 ss. 20 & 33. See also above in subsection 9.2.2.
2576 Planning and Building Act, ch. 4 s. 4, ch. 7 s. 5 and ch. 5 ss. 21 & 33. Consultation reports must be made afterwards.
2577 Planning and Building Act, ch. 4 s. 3. The same apply for regional plans (ch. 7 s. 5).
2578 Note that the circle has been extended by an amendment. See Prop. 1985/86:1, pp. 536-537 & Prop. 1994/95:230 Kommunal översiktplanering enligt plan- och bygglagen, m.m, p. 114.
They should in those instances be deemed to have an essential interest. This should apply also to single reindeer herders or reindeer companies (renskötselföretag). The Municipality does not need to consult actively with any of the parties directly, only provide for consultation to take place. This is also a clear difference from the law in New Zealand and Canada where active consultation must take place; it is a part of the consultation duty. Moreover, the form for the consultation is not stated in the Planning and Building legislation.

The County Administrative Board has a particular role to play in the consultation process. It has a duty primarily to stress and coordinate the interests of the state, particularly concerning public interests, such as environmental issues and risk factors that warrant attention, promote compliance of the “national interests” subject to chapters 3 and 4 in the Environmental Code, and make sure that environmental quality standards are observed. Areas where reindeer husbandry is regarded as of national interest may be highlighted, subject to the consultation. A problem is that the County Administrative Board shall have regard to may different interests, which means that it is likely that the interests of the reindeer husbandry is often submerged by others, as are environmental protection interests.

There are also consultation requirements for detailed development plans and area regulations. The consultation here concerns in principle the same circle. What is important in relation to detailed development plans, in contrast to area regulations, is that consultation is required also for the program, and, here, the same circle shall be consulted. Unless unnecessary, a program must be made, which specifies the starting point for the objectives with the plan. So, for detailed development plans, at least two consultations may be required.

Where someone claims that insufficient consultation has taken place, it is possible to appeal once the plan decision has been made. However, procedural mistakes may not be appealed separately, only in relation to the adoption of the plan. On the whole, concerning the different plan types, the Municipalities must consult with a wide circle of authorities, organisations and individuals. However, the duty of consultation means only that such consultation shall be made possible. Consultation directly with specific groups, such as the Saami, is not explicitly required. This contrasts greatly with New Zealand law, where the Maori are singled out among other citizens.

In relation to forestry activities, there is an important consultation provision aimed directly at the Saami villages. In the Forest Act, consultation with the Saami villages is mandatory, but only concerning planned loggings on the year-round...

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2580 See also Prop. 1985/86:1, p. 537.
2581 Planning and Building Act, ch. 4 s. 5. During the exhibition the County Administrative Board must also give a specific statement over the plan proposal. See ch. 4 s. 9.
2582 Planning and Building Act, ch. 5 ss. 20 & 33. Those who shall be consulted: the County Administrative Board, the National Land Survey (Lantmäteriverket), other Municipalities, parties to the case (sakägare) and those who live in the area that are affected (berörda) by the proposal, as well as other authorities, associations and persons that have an essential interest (väsentligt intresse).
2583 Planning and Building Act, ch. 5 s. 18 para. 1.
2584 This concern the comprehensive plan, the detailed development plan and area Regulations. See Planning and Building Act, ch. 13 ss. 1 & 5.
The concerned Saami village shall in such instances be given the opportunity to participate in consultation. In by-laws, the Forest Agency states that, before clear-cutting (föryngringsavverkning) and logging for building of necessary roads (skogsbilväg), the land owner must consult with the concerned Saami village.

The concerned Saami village is the village that has pasture areas within the logging area. The consultation shall include the logging and following forest management measures. However, regarding smaller logging areas, the Saami village does not need to be consulted, according to the by-laws. Consultation shall, nevertheless, always take place where the logging concerns, for instance, particularly important forests with tree lichen or migration routes, or where the new logging area lies adjacent to other clear cut areas. In relation to the notification (anmälan) or the permit application, a written document shall be attached with a statement that the concerned Saami village was given the opportunity to participate in consultation.

For the Saami village, it might be important to know about logging plans beforehand, so that they may use the pasture on the planned logging site more intensively.

Every year, some five hundred mandatory consultations take place, as well as a large number of voluntarily consultations regarding loggings on the winter-pasture-areas. A majority, some four hundred, of the obligatory consultations are taking place in the county of Norrbotten. Voluntarily consultations also occur regarding the forest management. Large forest companies seem to be more willing to accommodate the interest of the reindeer husbandry, compared to private forest owners. Thanks to consultation, regard and accommodation toward the interests of the reindeer husbandry have taken place.

The provision in section 20 is rather narrowly defined. It concerns only logging, not measures related to the management of the forest, and consultation is mandatory only on year-round-areas. Nevertheless, the provision is sanctioned. The Commission for Reindeer Husbandry Policy (Rennäringspolitiska kommittén) has suggested that consultation prior to logging be held in relation to the whole reindeer pasture area. It is suggested that the concerned Saami village be provided with the opportunity to consult where the logging regards important pasture areas or other essential areas. A strict obligatory consultation on those large areas was seen as time-consuming and

2585 Forestry Act, s. 20. Compare with subsection 9.4.3.2 on permits requirements for logging activities.

2586 Where the forest area (brukningsenhet) is less than 500 hectare productive forest land and where the logging area is less than 20 hectare (10 hectares for mountainous forest land (fjällnära skog)). See SKSFS 1993:2 under section 20.

2587 By-laws to section 20. See SKSFS 1993:2 under section 20. The Forest Agency recommends that consultation takes place at least annually for larger forest owners. Minutes from the meetings are also recommended. Consultation should also include planned measures for a 3 to 5 year period. Personnel from the Forest Agency may also be invited to the consultation. See general recommendations (Allmänna råd) SKSFS 1993:2 under section 20.


2589 Fines or imprisonment. See the Forestry Act, s. 38 para. 1 point 1.
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impractical for both Saami villages and forest owners. Still, the suggestion regards only logging and not other measures relative to the management of the forest.

Consultation is always required in relation to construction of public roads and railways. This is conducted in relation to an EIA that shall accompany a road assessment (vägutredning) and sometimes a construction plan (arbetsplan), but also individually. See further above in subsection 9.4.3.5. In relation to the pre-assessment (förstudie), consultation shall be made with concerned County Administrative Boards, Municipalities and environmental organisations, as well as with others that are regarded as particularly concerned (särskilt berörda).

If an EIA is not attached to a construction plan (arbetsplan), consultation regarding the routing and design of the road shall be held. This circle shall comprise affected property owners, authorities and others that may have a significant interest (väsentligt intresse) in the matter. The Regulations specify this latter circle as comprising local interest groups and associations (lokala organ och sammanslutningar). Saami villages, where affected, should be deemed to have a significant interest in the road building and should be provided the opportunity to participate in the consultation.

With respect to the construction of railways, consultation shall likewise be held outside the EIA procedure in the pre-assessment (förstudie) and in the preparation of the railway plan (järnvägsplan). The circle of those who shall be consulted is the same as in the Road Act for both the pre-assessment and the railway plan. Hence, here also affected Saami villages should be deemed to have a significant interest in the building of railway and provided opportunity to consult. In relation to the provision on notice of consultation in chapter 12 section 6 of the Code, analysed above, consultation is required for activities and measures that may have a “significant impact on the natural environment”. However, here the consultation duty rests on the Saami party.

Note, however, that the public law principle on communication (kommunikationsprincipen) applies in relation to decision-making by public authorities (offentlig förvaltning) and, as such, also for matters which affect the reindeer husbandry. The principle encompasses the notion that an authority in its decision-making powers (maktutövning) must not decide a matter before a party has

2590 SOU 2001:101 Del 1, pp. 243-244. They also suggest that minutes from the consultation shall be obligatory. See ibid, pp. 244-245.
2591 Road Act s. 14 a, which refer to the Environmental Code ch. 6. s. 4 paras. 3-4.
2592 Road Act s. 16 para. 1. Exceptions apply, see paras. 2-3.
2593 Road Regulations (1971:954) (Vägtrafikkungörelsen) s. 27.
2594 Railway Act ch. 2. ss. 1 & 5. Pre-assessment: concerned County Administrative Boards, Municipalities and environmental organisations as well as with the public that is regarded as particularly concerned (särskild berörda). Railway plan: affected property owners, authorities and others that may have a significant interest (väsentligt intresse) in the matter.
2595 See Prop 1971:51 p. 198 where the Dep.C. declared that the principle applies also with respect to the reindeer husbandry. No specific provision in the Act was seen as necessary. Whether the principle should be codified in the reindeer husbandry legislation was also discussed before that and in relation to the 1971 Administrative Procedure Act. See a resumé in the JO-decision referred to below (JO 1979/80 s. 514.) at pp. 522-523. See futher on the principle in for instance Hellners, Trygve & Malmqvist, Bo (2003) Förvaltningslagen – med kommentarer, pp. 173-193.
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been given opportunity to make a submission (yttrande). In this, the principle expresses a kind of consultation obligation for authorities, which seems to be the only generally applicable principle related to such obligations for authorities’ vis-à-vis affected Saami. The principle has been applied in the Swedish law for some three hundred years, but if was codified first in the 1971 Administrative Procedure Act. The provision has been transferred, in principle without amendment, to section 17 in the present Administrative Procedure Act (1986:223). The provision in section 17 is applicable only on “exercise of public authority” (myndighetsutövning), and in this the principle is not fully codified in the legislation. The area of application is also directed at communication (kommunicering) before the final decision is taken in a specific matter.

Communication subject to the provision includes two elements: (i) information to the parties in the case; and, (ii) to provide an opportunity for each party to make a submission (yttrande). Both are equally important, but in a given situation, stronger emphasis may be on either of the elements. Few formal requirements on the communication apply. For instance, communication need not necessarily be in writing. Importantly, the fact that communication is not mandatory shall not be understood as permitting the authority to omit such communication. The Administrative Procedure Act is a widely applicable statute which states a minimum standard for public decision-making. There is here also a close relationship with the public law principle of administrative autonomy (officialprincipen), which states that it is the authorities’ obligation to make sure that the matter is sufficiently examined.

Compliance with the principle has been tried in relation to granting usufruct rights (nyttjanderättsupplåtelser) in year-round-areas for the reindeer husbandry below the cultivation boundary, chiefly with respect to forest Saami villages. Here, the Parliamentary Ombudsman (JO) argued that, even if the matter brought before him was not to be regarded as an exercise of public authority, since it concerned real property management (egendomsförvaltning), the principle would

\[\text{2596 See, for instance, Bergström, Hästad, Lidholm & Rylander (1992) Juridikens termer, p. 90.}\]
\[\text{2598 In general, the concept includes an exercise of authority to decide benefits, rights, obligations, sanctions, et cetera. The exercise of public authority aims at individuals (enskilda), which include individual reindeer herdsmen and private legal persons, such as Saami villages and other businesses. The prerequisite for the exercise of public authority is the fact that it comprises decisions and other measures as means to express the public authority in relation to its citizens. A characteristic feature is that the individual being in a state of dependence. If it is a question of prohibition, injunction or a similar decision, the individual has to follow the decisions or otherwise different forms of sanctions might be used. In order for a decision to qualify as an exercise of public authority, the matter in question must solely be decided by the authority. Thus, agreements and similar actions falls outside the definition. See, for instance, Hellners, Trygve & Malmqvist, Bo (2003) Förvaltningslagen - med kommentarer, pp. 23-31 & 72-73.}\]
\[\text{2599 Parties to a case are in principle those who have standing (saklegiterade). See further in Hellners, Trygve & Malmqvist, Bo (2003) Förvaltningslagen - med kommentarer, pp. 31-34.}\]
\[\text{2601 JO 1979/80 s. 514.}\]
nevertheless be applicable as a fundamental law principle (allmän rättsgrundsats). This was supported by the preparatory works of the 1971 Administrative Procedure Act, where the statute was seen as setting out a minimum standard. The content of the consultation obligation was dependent upon the legal strength of the reindeer herding right, which differs within the reindeer herding area. He concluded, somewhat surprised, that there were no explicit provisions that obliged deciding authorities to consult with the Saami in the present Reindeer Husbandry Act in matters that affect them, and he concluded also that, with respect to the matter before him, the principle on communication was not formally applicable. Therefore, he suggested an amendment to the legislation. This has not yet happened. The legal situation is still that no explicitly stated consultation or communication requirements apply.

As initially stated, the provisions concerning explicit and independent consultation outside the EIA are rather few. Consultation requirements explicitly directed toward Saami villages or other Saami organisations are even fewer. They exist only in relation to loggings under the Forest Act. Consultation then must take place between the operator and the concerned Saami village. Generally, there is a striking difference comparing with the legal situation in both Aotearoa/New Zealand and Canada, where consultation that affects the indigenous peoples is held directly between the State (Crown) and the concerned peoples. This seems to be a consequence of the fact that the colonisation process in itself is legally relevant, despite other legal sources for consultation requirements, including the Waitangi Treaty and constitutional protection. As described above, the common law doctrine of aboriginal rights, includes clearly the notion of colonisation. This will be discussed further below under the analysis: see section 10.2.

The Commission that has drafted a proposal to a new Nordic Saami Convention has suggested a few articles on consultation requirements. Those articles concern consultation between the State and its authorities, on the one hand, and the Saami Parliaments, Saami villages, other Saami organisations and local Saami representatives, on the other hand. It is suggested, moreover, that this Convention shall apply directly as a statute. Hence, through those suggested articles on consultation (förhandling), the specific relationship between the Saami and the state is accentuated. The colonisation process becomes somewhat more legally relevant.

2602 Compare also the six zones above in subsection 8.1.4.
2603 JO 1979/80 s. 514, at pp. 522-527.
2604 See further in subsection 6.4.2.
2606 Ibid., see article 46.
2607 Even if the word consultation (samråd) only is used in relation to article 21, this shall not be misinterpreted. With regard to the law on consultation in Aotearoa/New Zealand and Canada, consultation has a large span. It may include everything from information meetings to something little less than veto rights for the indigenous peoples. The word “förhandlingar” (negotiations) used in other articles is thus included in how I use the concept of consultation throughout this thesis.
9.6 Concluding Remarks

From the above analysis of the legislation regarding planning, environmental protection and property law legislation on exploitation of land and resources for various means, at least two overarching concerns have become obvious to me. The first concern regards the planning and the planning instruments. The planning under the Planning and Building Act is primarily a local responsibility. Since reindeer husbandry typically is carried out in two or more Municipalities, there are very few incitements for a planning that takes into account cumulative effects of planned land uses for each Saami village. The comprehensive plan regards only one Municipality. Even more important is the fact that the legally binding plan types, the detailed development plans and area regulations, regard small areas within the Municipality, and a connection to settlement (bebyggelse) is presupposed.

There is also a problem with respect to the Municipal planning monopoly and the limited opportunities for state authorities to enforce national goals. However, with respect to reindeer husbandry, there is no clear or explicit goal to promote the husbandry as such. With respect to the Instrument of Government, it is stated only that the opportunities of the ethnical minorities to preserve and develop the cultural and community livelihood should be promoted. Additionally, the reindeer husbandry is subject to a business monopoly. In 1977, Parliament declared that the Saami comprise an ethnical minority and that, as the indigenous people in Sweden, they have a specific position. Hence, a national goal to promote reindeer husbandry, which is a vital part of the Saami culture, could be said to exist even if it is blurred. The Swedish State is also under international obligation to preserve the Saami culture and traditional means of livelihood.

Thus, given that promotion of the reindeer husbandry is a national goal, the enforcement of the goal is vague. In respect to the general and open ended provisions stating requirements (kravregler), Municipalities have wide discretion and freedom on how to take into account national goals. Municipalities may also choose to be passive. The State has, in sum, limited means to control the enforcement of national goals. Those problems are unfortunate, since there is a link between other natural resources legislation and legally binding plans. Permits must not be issued where they counteract such a plan. This means in most cases that, for areas covered by reindeer husbandry, outside settlements (bebyggelse) lack detailed development plans and area regulations. A comprehensive plan can never guarantee a protection, even if it is of good quality and includes statements that certain reindeer pasture area shall be protected against exploitation activities. The plan is simply not legally binding. Hence, the important opportunity to hinder certain activities within the reindeer herding area due to incompatibility of legally binding plans is almost non existent. As said above, the State has limited power to control and steer the Municipal planning.

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2608 Ch. 1 s. 2 para. 5. In the same section it is also stated that the public shall promote a sustainable development. See para. 3.
2609 Instrument of Government, ch. 2 s. 20 para. 2.
2611 Compare with the implementation of wind mills. See Pettersson, Maria (2006) Legal Preconditions for Wind Power Implementation in Sweden and Denmark (Licenciate Thesis), pp. 142-145.
Another problem relates to the so-called natural resource management provisions in chapters 3 and 4 in the Environmental Code. Those provisions are a part of the national planning instruments and include, among other things, provisions on areas of national interest for different purposes. The provisions are applied by many different authorities in planning matters, as well as in matters regarding granting permits. As with the binding plans, there is, thus, a strong linkage between the natural resource management provisions and both planning legislation and property law legislation. Areas explicitly stated in chapter 4 as being of national interest, which are primarily the unexploited mountain regions and which shall be specifically protected, are, nevertheless, subject to rather broad exemptions.

Certain areas may also be appointed to be of “national interest” subject to chapter 3, for instance, concerning the interests of reindeer husbandry. The national interest of reindeer husbandry shows some specific features not shared by the other national interests, chiefly because of its strong connection to the reindeer herding right. Note that, where an area of national interest for reindeer husbandry is the sole national interest involved in a matter, the protection is rather strong. However, the balancing of interests becomes more complicated when more than one national interest applies, or where there are none. The vagueness of the provisions in chapter 3 in those situations complicates the picture, and the outcome becomes difficult to predict. There is a large margin of appreciation for the deciding authority. Recall here that the classification of areas to be of national interest does not have a legal effect (rötsverkan). Rather, this is decided on a case by case basis. Moreover, the provisions in chapters 3 and 4 are applicable only to new and changed activities and not ongoing activities, which means, for instance, that forestry is excluded. It is noteworthy that these provisions have been criticised by the Law Council since the provisions were initially drafted.

As a conclusion, with respect to the lack of legally binding plans subject to the majority of the reindeer herding areas, it is normally difficult to hinder environmentally harmful activities in outside protected areas, such as nature reserves and national parks. Environmental protection is less stringent, and the protection of the reindeer business as such is almost non-existent. The environmental effects of different activities and measures may, for the most part, be limited only through the general rules of consideration and other similar provisions subject to other legislation.

One particular problem is the mining activities under the Mining Act, especially with regard to the subsequent restrained environmental assessment under the Code and the fact Sweden is a “hot” mining nation. Another problem is that logging under the Forestry Act normally is not under any permit requirements.

Another problem regards the provisions on area protection: national parks, nature reserves, and Natura 2000 areas. Even if those provisions aim at protecting the environment in various aspects within a designated area, which indirectly may be beneficial for the interests of the reindeer husbandry, problems may arise when the elements in the reindeer herding rights are prohibited within those areas. Where there is a clear conservation need, the prohibition should not be seen as problematic. Parts of the motorisation of the husbandry, such as prohibitions on bare ground cross-country driving, should be justifiable in many cases.
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However, it should be legitimate to question whether all limitations in the reindeer herding right are necessary in order to meet the objective of the area protection. The proportionality principle applies in those balancing situations. With respect to the statistics concerning the amount of protected areas in the reindeer herding area, this is not a theoretical concern. For example, during the last decade, the protected nature in the mountain region doubled. A matter to include is the extent to which the reindeer herding Saami shall bear the costs of protecting natural areas through the loss of access for chiefly hunting and fishing. The above analysis of the provisions shows that the competent authorities, comprised of the Environmental Protection Agency, the County Administrative Board, and the Municipalities, have wide discretion to infringe the reindeer herding right. Only the generally applicable proportionality principle applies to restrain the public power. This should be compared with the specific justification test developed by the Supreme Court of Canada, applicable only on the relationship between aboriginal peoples and the Crown.

The fact that reindeer husbandry is an essential component of the Saami culture, protected by international law, should also be balanced in a proportionality assessment. Otherwise, the provisions allow the competent authority to design the different environmental protection quite freely. Nevertheless, as such, a stronger environmental protection should be seen as an advantage for the interests of reindeer husbandry, since it normally promotes a better environmental quality, and it also generally hinders environmentally harmful activities that may scatter the pasture areas. On the other hand, nature reserves designated for promoting tourism and recreational activities may impose damages and detriments for the environment as well for the husbandry.

On the whole, the analysis has shown that, as an effect of the malfunctioning planning system, at least in the more sparsely populated areas of northern Sweden, there is little opportunity to survey cumulative effects. Reindeer husbandry is area-demanding, and several small and large activities/measure affect the opportunity to carry out reindeer husbandry through a scattering of the pasture land. The permit authority has to apply the applicable provisions in single cases. There are normally no requirements to consider the effects of other activities within the pasture area of a specific Saami village. Such considerations must be decided on a higher lever, preferably in relation to regional planning of binding character. This should then apply to forestry and mining activities, as well as other environmentally harmful activities and measures.

This suggestion may be compared to the regional planning under the Resource Management Act in Aotearoa/New Zealand. The wide-ranging regional plan decides in some detail which activities may be granted a permit (consent) and which activities/measure a permit may not even be sought. They are hindered already in the plan. This system relates also to certain areas. Those plans are preceded by extensive consultation with Maori and Maori organisations specifically. I will discuss the Swedish planning system in comparison with the New Zealand planning law under the RMA in the next part. See section 10.4.

2612 See for instance Environmental Code, ch. 7 s. 25.
2613 See subsection 6.4.5.2.
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Part III: Analysis

Part III encompasses the final chapter, in which the main threads come together. It commences with a summation of the three laws to refresh the memory and to provide a platform for the sections that follow. Although the focus henceforth lies on aspects of Swedish law, the comparison with New Zealand and Canadian laws is always present. The analysis and discussion of the relevant parts of Swedish law also include recommendations de lege ferenda.
Now, I have come to the concluding part of this thesis, where I will bring all of the threads together. Even though the analysis, chiefly with respect to Swedish law, has revealed several problematic features, far from all of them are highlighted here. Instead, the focus lies on crucial issues illuminated by the comparison of the laws of the three countries as such. Regarding the other legal issues, I hope to be able to bring them up later on after the completion of this thesis. Note also that, even though my discussions and suggestions de lege ferenda are without regard to political problems that most certainly arise, I am not unaware of the difficulties involved in putting them into practice. My analysis, however, focuses on legal issues.

My conclusions from the comparison follow below, structured under specific headings, including the main threads of particular relevance for Swedish law with respect to the stated objective of the thesis. As a reminder, the objective was partly to analyse the interface between certain aspects of the environmental law and the Saami law. This was essentially made in Part II, but naturally elucidated in this Part III. A second part of the objective was to analyse and discuss ways in which Swedish legislation may contribute to a sustainable use of the reindeer herding area. This appears mainly in this chapter, with support from the analysis of Swedish law and of the comparison with New Zealand and Canadian laws.

Of course, I am aware of the law being only one of the instruments that determine whether the area may be used sustainably. Nevertheless, since the law sets the frame and basic structure under which resource management decisions are made, the environmental law is essential. In this sense, the Environmental Code and other natural resource legislation comprise one way of implementing the State policy on environmental protection, notably an ecologically sustainable development.

Worth mentioning again is the fact that, in the course of the research process, I have become increasingly aware that the legal issues of the enjoyment of customary rights, environmental protection objectives, and conservation interests interact. With respect to the three countries, this is not obvious in my introductory section, section 1.1. Here, however, I paint a broad picture of nationally relevant conflicts relating to land and natural resource uses and environmental protection aims. Nonetheless, the relevant law in Sweden does not traditionally unite these resource management issues. The legislature has mainly seen them as separate matters.

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2614 Given the scope of this thesis and the fact that this is the first time these legal issues have been analysed in concert and in depth, reliable recommendations de lege ferenda can only be broad. In fact, the result of this thesis has revealed many more legal questions to be resolved.
2615 It is, thus, the area per se that is in focus.
2617 Almost needless to say, customary land and resource uses of indigenous peoples may also cause damages and detriment to environmental protection interests.
Chapter 10 Toward a Reconciliation of Saami Customary Rights and a Sustainable Use of the Reindeer Herding Area

As an additional remark regarding the interrelatedness of the Saami customary rights and environmental protection aspects, I have asserted that, as long as the Saami customary rights are unclear and poorly understood within Swedish law, they do not support a sustainable use of the reindeer herding area per se. There is competition among different land uses and interests in the area: primarily interests of reindeer herding Saami, other Saami, conservation interests, and interests of various other forms of resource exploitation, including tourism and recreational activities. Hence, given the overlapping and conflicting land uses and interests, a protection of the enjoyment of Saami customary rights should also mean a better situation for the environmental quality in the area – as long as the husbandry itself does not negatively impact the environment. In recent decades, the reindeer husbandry has been exposed to critique as causing major threats to the environment, especially in the mountainous areas. This should not, of course, be neglected, but I see as a potentially more severe threat the cumulative effects of many small and larger activities carried out within the area, without sufficient control of concurrent impacts on the environment. Reindeer husbandry is naturally one part of this narrative, but it does not alone comprise the whole story.

The chapter is structured as follows: First, I highlight some of the main themes and features of the three legal systems in a concise manner that will refresh the memory and provide a platform for the following discussion. Secondly, I emphasise the different approaches toward colonisation with respect to the New Zealand and Canadian legal systems on the one hand, and the Swedish legal system on the other. This difference has implications in other areas of law discussed in other following sections. Thirdly, the nature of the Saami customary rights is discussed. Fourthly, I summarise the shortcoming of the contemporary planning legislation and discuss ways to improve the situation within the vast reindeer herding area. Fifthly, I discuss issues related to consultation and modern agreements. Lastly, the “Closing Discussion” includes some final comments and remarks.

10.1 A Summation of Main Themes of the Laws in the Three Countries

As explained initially, there are several conflicts related to the use of land and natural resources in all three countries. On the one hand, the conflicts are related to competition over the use of the land base and scarce natural resources between indigenous customary uses and other interests in society, such as forestry, mining, settlements, tourism, recreation, infrastructure and energy generation. On the other hand, the conflicts concern different views between the indigenous peoples and the State, including conservation interests in the society regarding how the traditional indigenous area should be used. This is especially obvious with respect to protected areas, such as national parks. Those latter tensions seem stronger in Aotearoa/New Zealand and Canada, even though they are visible to some extent in Sweden as well. This thesis, as said previously, has chiefly focused on the former tensions.

Consequently, with respect to the above mentioned clashes, there are large similarities among the countries, which include, at least superficially, some parts of the colonisation process and especially the implications of settlement policies.
and assimilation policies. Nevertheless, the history and encounters with indigenous peoples are distinct in each country. In contrast though, the active colonisation of northern Sweden was essentially peaceful. The peninsula of Scandinavia had long been inhabited by other peoples when the colonisation begun. The different historical events and distinct cultures of the indigenous peoples have led to different legal realities in the three countries.

As a rough comparison, New Zealand law emphasises procedural rights, consultation rights and managing rights with respect to the Maori. The rights of Maori are integrated with planning and environmental protection legislation and the chief statute, the Resource Management Act (RMA). The RMA is impressive and provides for an integrated resource management, especially true for the comprehensive planning system. Settlement legislation, issued for implementing treaty settlements with Maori tribes, normally includes a package of land rights, which includes recognition of customary rights, conservation of areas, co-management arrangements and enforcement of RMA procedures.

In Canadian law, aboriginal rights are constitutionally protected. Hence, there is a focus on substantive rights, but the recognition of aboriginal rights is intermingled with procedural rights, primarily consultation. In Swedish law, the Saami rights are on many points unclear and codified only with respect to reindeer husbandry, even if customary hunting and fishing rights also are subsumed under the reindeer herding right. Furthermore, there is in Swedish law, a comparatively large focus on environmental requirements for the enjoyment of the reindeer herding right. There are, however, virtually no links between Saami customary rights and environmental and natural resources law. Although the central Environmental Code is a comprehensive and integrative statute, planning and natural resource legislation lie outside. The reindeer herding area is, moreover, regulated as any other area in the country.

Below, I provide a summation of the main elements within each country. However, I will separate the text into two topics. First, I emphasise the law related to the customary rights in each country. Secondly, I analyse the environmental law in Aotearoa/New Zealand and Sweden. The text is structured after countries in the same manner used throughout the thesis: Aotearoa/New Zealand first, then Canada, and lastly Sweden.

i) Maori, Aboriginal and Saami rights

Maori rights in Aotearoa/New Zealand are based mainly upon the Treaty of Waitangi, and hence the rights are characterised as treaty rights. However, the treaty rights and customary rights of the Maori are often seen as intermingled, that the Treaty confirmed pre-existing customary rights. The Treaty contains three articles, only the second of which is of importance here. It guarantees full, exclusive and undisturbed possession of Maori lands, estates, forests, fisheries, and other properties. Thus, it can be seen as guaranteeing protection of traditional land and resource uses of the Maori. Recently, Maori have also claimed customary rights to the foreshore and seabed outside of the Waitangi Treaty, but

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2618 My comparative analysis of Canadian law does not include analyses of the environmental law. See above in subsection 1.2.1.  
2619 Note, however, that New Zealand law has not evolved around the doctrine of aboriginal rights, as in Canadian law.
new legislation has closed the claims process. On the whole, customary practices have normally been advocated through the Treaty. Therefore, the Waitangi Treaty is essential with respect to Maori rights claims and Crown-Maori relationship.

Maori customary rights have been codified in legislation, chiefly as a response to court cases and treaty settlements. The recognised rights consist mainly of food gathering rights, especially all fishing rights. The fishing rights include both customary freshwater fishing and commercial seawater fishing. Maori commercial fishing rights are fixed to a percentage of the annual catch quota under a specific regime. As a result of the commercial fishing settlements, legislation on non-commercial customary fishing was created. There are two regulations governing the customary rights, one applying to North Island and the other to South Island. Fishing rights normally also include the taking of other aquatic life, such as seaweed. The regulations also include managing rights of fisheries resources, for instance allowing the kaitiaki or Maori committees to make by-laws restricting or prohibiting the taking of fish. Other legislation regarding gathering rights also normally includes managing rights.

Additionally, other iwi or hapu have codified rights to take fish species from certain lakes or rivers. In relation to specific areas within the public foreshore and seabed, Maori are entitled to gathering rights established through a specific court procedure, creating “a customary rights order”. This order includes a right to carry out a recognised customary activity and afford statutory protection. Other examples are customary rights to harvest native birds and eggs and rights to use geothermal waters. Maori may also apply for specific approval from regional conservation offices to collect material in the region, such as birds, timber, whalebones, medicinal plants, dyes, whales, and seals. In contrast to Swedish law, Maori customary rights occur, in principle, only on Crown lands.

The establishment of the quasi-judicial Waitangi Tribunal has been vital for the resurgence of Maori rights. As a matter of fact, most of the Treaty claims have involved important resource management and conservation issues. The Tribunal has, on the whole, promoted the understanding of the Waitangi Treaty and developed specific Treaty principles. The Tribunal may also inquire whether the Parliament’s own legislation is in breach of these Treaty principles. Another task is to examine proposed legislation and to report whether any provision is contrary to the principles of the Treaty. The Tribunal’s status is remarkable, since in principle, it may only make recommendations to the Crown. Normal courts may, nevertheless, adopt conclusions or emphasise the whole or parts of the Tribunal reports as evidence. Environmental and resource management legislation encompasses references to those above mentioned Treaty principles, securing adherence to them. Therefore, Maori rights related to the use of land and natural resources are intermingled with the planning and recourse management law in Aotearoa/New Zealand. I will return to the New Zealand environmental law below.

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2620 See further in subsections 3.2.2.
2621 See further in subsection 3.2.2.3.
2622 See further in subsection 3.2.3.
2623 See further in subsection 3.2.3.1.
2624 See further in subsection 3.2.4.
2625 See further in subsections 3.1.1.
In Canada, the enjoyment of traditional rights has also been battled in courts. Many aboriginal individuals have been charged with violating federal and provisional legislation. The constitutional protection of “existing” aboriginal rights has caused the Supreme Court of Canada to illuminate the legal area. In *Sparrow*, the Court held that the constitutional protection should be interpreted in a generous and liberal manner. This interpretative principle is imperative and has guided the Court in subsequent cases. Over the years, the Court has produced an interesting body of case law on the nature and extent of aboriginal rights. The Court has, above all, recognised harvesting rights, such as hunting, trapping and fishing rights. Still, no aboriginal title has been recognised.

Aboriginal rights are established under the doctrine of aboriginal rights, which is part of the common law. The doctrine is a form of “inter-societal” law as it regulates the relations between aboriginal communities and other communities in Canada. It is the result of the Crown’s dealings with aboriginal peoples in the colonisation process, based upon legal principles founded on actual circumstances of life in North America. It includes, additionally, attitudes and practices of foremost First Nation societies and broad rules of equity and imperial policy. Those practices gradually emerged into a sort of “colonial law”, and, by the time of the *Royal Proclamation of 1763*, into the specific doctrine of aboriginal rights, a body of unwritten law. As the doctrine is founded on basic principles of justice, it provides an inner core of values that may mitigate the rigour of strict positivistic approaches to law. Those set of principles have been enhanced by the constitutional protection of aboriginal rights. Importantly, the doctrine of aboriginal rights limits and shapes the application of English and French law.

Aboriginal title and aboriginal rights derive from historic occupation and use of ancestral lands. Therefore, the rights are not dependent upon legislative enforcement or treaties. The doctrine of aboriginal rights and the case law support the existence of a variety of aboriginal rights, dependent basically upon their content and degree of connection to land. There are specific rights, held by only certain aboriginal communities, and generic rights, held by all aboriginal groups, such as the right to speak a native language. The content of specific rights is determined by the customary uses of land and natural recourses by the group in question.

Aboriginal rights are distinct and are held as *sui generis* rights. This unique character means, above all, that normal proprietary concepts cannot be used without modification. Courts have, hence, found reasons for adapting legal concepts and principles in order to accommodate the unique historical position of the country’s aboriginal peoples and their prior occupancy. In similarity with the legal situation in New Zealand, aboriginal rights exist mainly on Crown lands. Nevertheless, there is some authority stating that aboriginal rights continue to exist on private lands, although many questions remain open due to a lack of decisions directly on point.

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2627 The Supreme Court has held that the underlying intent of the constitutional provision primarily is a reconciliation of the relationship between the aboriginal peoples and the Crown, including the rest of Canadian society.

2628 See further in subsection 6.2.2.

2629 See further in subsection 6.3.1.

2630 See further in subsection 6.3.3.

2631 See further in subsection 6.4.1.
The analysis of claimed aboriginal rights involves four steps. It includes, firstly, a determination of whether an applicant has demonstrated that he/she was acting pursuant to an aboriginal right; secondly, whether that right was extinguished before the constitutional enactment in 1982; thirdly, whether the right in question has been infringed; and, fourthly, whether the infringement was justified. Hence, the analysis of the existence of aboriginal rights is carried out in a number of tests. In large, the same tests apply to the identification of aboriginal title, although somewhat modified. A common denominator for all tests is the fact that the *sui generis* nature of the rights demands a unique approach, for instance, to the treatment of evidence. Here, due weight is given to the perspective of aboriginal people, such as oral history. With respect to the different tests, the onus of proof shifts also between the aboriginal group and the Crown.

The existence of a specific aboriginal right will depend solely on the distinct traditions and customs of the particular aboriginal community claiming the right. In this, aboriginal rights must be recognised on a case by case basis. In contrast to Swedish law, interruptions in the use are not seen as a problem, at least not as long as the customary activity is resumed. Claims on commercial aboriginal rights place an additional and more onerous burden on the aboriginal group than claimed subsistence rights (harvesting for food). For claims on commercial rights there is a need to prove that the barter was an integral part of the distinctive culture of the aboriginal community.

Interestingly, the constitutional protection of aboriginal rights has meant that any infringement on a right, for instance, because of conservation legislation, is subject to analysis under the justification test. In this, the legislation must not impose undue hardship on the aboriginal right, which includes a sort of proportionality thinking. In other words, the infringement must be proven to be justified, corresponding to a “compelling and substantial reason”. Another inherent issue is whether the honour of the Crown is at stake. Although conservation aims usually is understood as a valid legislative objective, there may be issues of aboriginal harvesting due to competition of resources. Therefore, the Supreme Court has established an allocation scheme, the doctrine of priority, which gives aboriginal food harvesting top priority after conservation needs are met. This priority scheme has, for instance, been enforced in various management plans. This means also that Parliament may not adopt an open and broad administrative regime that risks infringing aboriginal rights in a number of ways, such as in fisheries legislation. Explicit guidance is required.

Canadian law acknowledges, hence, that the Crown has unique fiduciary obligations toward the aboriginal people to protect the enjoyment of their aboriginal rights. Consequently, this doctrine of fiduciary duty is interrelated with the doctrine of aboriginal rights, particularly in relation to the justification test. The Crown’s fiduciary duty is comprised of a general duty and a specific duty. The former is an overarching fiduciary responsibility toward the aboriginal people.

2632 A central feature of aboriginal title is possession (occupation). Here, regard is taken to the size of the group, its way of life and the character of the claimed lands. There is also a requirement of exclusive occupation to be met in order to qualify as an aboriginal title. Nevertheless, claims short of title will usually be characterised as a site-specific right.

2633 See further in subsection 6.4.3.3.

2634 See further in subsection 6.4.7.

2635 See further in subsection 6.4.2.
peoples that also lies outside of the constitutional protection. This general duty binds both federal and provisional governments. The specific fiduciary duty relates to certain aboriginal communities, due, for instance, to treaty making or alliances. It also includes legislation that infringes aboriginal rights. In sum, since the Guerin case in 1984, the fiduciary law has been one of the most significant aspects of Canadian aboriginal rights jurisprudence.

In Swedish law, Saami customary rights are not primarily based on occupation and continuous use, but generally regarded to be based on prescription.\(^{2636}\) The doctrine of immemorial prescription is, likewise, an old doctrine, but has evolved as a response to conflicts in agrarian societies. Only more recently has the doctrine been applied in relation to Saami rights claims.\(^{2637}\) The so-called Taxed Mountains case, decided in 1981, is still the leading case concerning the examination of Saami customary rights, as well as for claims of ownership rights.\(^{2638}\) As with the Canadian doctrine of aboriginal rights, immemorial prescription may establish ownership or more limited rights, such as reindeer herding rights and hunting and fishing rights. Saami ownership has not been recognised. The only recognised Saami customary right is the reindeer herding right, which is carried out on both state owned and privately owned lands.\(^{2639}\) The reindeer herding right includes many sub-rights, including hunting and fishing rights.\(^{2640}\) The enjoyment of the reindeer herding right is attached to specific pasture areas with respect to mandatory Saami villages, which are also responsible for the overall management of the husbandry.

With respect to the doctrine of immemorial prescription, certain prerequisites have been developed over the years, which determine the relevant conditions that support the analysis of whether a customary right has been established. At least six requirements are linked to the establishment of rights under the doctrine, all of which, more or less, are in conflict with the distinct traditional Saami land and natural resource uses.\(^{2641}\) First, immemorial prescription is interlinked with a presumption of a previous owner. The doctrine was historically used to acquire rights to lands abandoned or deserted or as a way of separating parts of village lands into individual land. Secondly, there is a requirement of possession and continuous use of the specific area. This is vital for sustaining the link between the lands and the persons using it. There is an issue of disruptions of continuity in the use, and the time-period allowed for interruptions has not yet been resolved by the courts. Thirdly, the areas to which rights may be acquired should be smaller and delimited. Fourthly, the use of the land should be intense and involve an investment of labour, primarily agriculture and farming. Fifthly, the possession and use should be undisputed and unhindered. And, lastly, the evidential burden and onus of proof rests entirely upon the one claiming immemorial rights. It is also unclear whether the two theories linked the doctrine...

\(^{2636}\) The Reindeer Husbandry Act states that the reindeer herding right is established by immemorial prescription. See, however, my discussion regarding occupation as a basis for Saami customary rights in subsection 7.2.1.5.

\(^{2637}\) See further in subsection 7.2.1.

\(^{2638}\) See further in section 7.1.

\(^{2639}\) Note, however, that I argue that there may still exist other customary right outside the reindeer husbandry, on the basis of immemorial prescription. Customary rights are not dependent on statutory recognition in order to exist.

\(^{2640}\) See further in section 8.1.

\(^{2641}\) See further in subsection 7.2.1.3.
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of immemorial prescription, the legal acquisition theory and the presumption theory, apply to Saami rights claims\textsuperscript{2642}.

A main problem, at least theoretically, is the assumption of prior ownership coupled with the doctrine. The Saami were the first occupants of large areas. With respect to Canadian jurisprudence, chiefly the prominent Calder case\textsuperscript{2643}, it was early asserted that aboriginal rights of possession were not prescriptive in origin, as this would presuppose a prior right of some other person or authority. This was not consistent with the recognition of pre-existing rights of possession. In relation to the doctrine of immemorial prescription, the assumption of a previous owner is a problem, but, at the same time, it provides an opportunity. The prior occupancy by Saami may reinforce Saami traditional land uses and call for adaptation of the other prerequisites inherent in the doctrine. It calls, however, for an active, authoritative statement in this direction. The Taxed Mountains case is vague on the point\textsuperscript{2644}.

Consequently, the specific requirements attached to the doctrine have evolved as a response to land use problems in a village context rather than the wide and extensive use by the Saami. Most of these six prerequisites, if not all, are difficult to reconcile with the unique character of Saami rights claims. However, Swedish law lacks general guiding principles on how to adopt those prerequisites. In fact, few principles are linked to the specific character of the Saami customary uses of land and natural resources. This means that there is nothing to guide legal interpretation or application involving claims of limited rights or ownership. In contrast to New Zealand and Canadian laws, there is an absence of any legal recognition of the existence of a relationship between the Saami and the State.

Given the unclear nature of Saami customary rights, I have argued that the rights must be understood as historic and cultural rights, collective and unique in character. The Saami rights claims do not fit easily into known proprietary concepts and should therefore be treated as \textit{sui generis} rights, endorsing adaptation of the real property law, in similarity with the development of aboriginal rights in Canadian law.\textsuperscript{2645} Furthermore, there is a problem with the present codification of the basis of the reindeer herding right in section 1 of the Reindeer Husbandry Act. It is there stated that the reindeer herding right is held by the whole Saami people. As a matter of fact, this provision does not correspond with the establishment of rights under the doctrine of immemorial prescription.\textsuperscript{2646} Unfortunately, this codification seems to strengthen the otherwise blurred legal application of the provisions of the Reindeer Husbandry Act\textsuperscript{2647}. The legal situation is complicated, since the legal sources either are silent in important matters or are contradictory. Consequently, with respect to the Swedish law on Saami customary rights, there are more questions than answers. In comparison with especially the Canadian jurisprudence, the scanty nature of the jurisprudence is rather evident. This is troublesome since the law includes many ambiguities and deficiencies.

\textsuperscript{2642} See further in subsection 7.2.1.4.
\textsuperscript{2643} See above in subsection 6.1.
\textsuperscript{2644} See my discussion with respect to occupation and the case in subsection 7.2.1.5.
\textsuperscript{2645} See further in subsection 7.2.2.
\textsuperscript{2646} See further in subsection 7.3.1.
\textsuperscript{2647} See further in subsection 7.3.2.
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ii) Environmental law

A characteristic of the environmental law in New Zealand is that it is intermingled with recognition of Maori cultural values related to resource management.2648 Maori have been given a role to play, even if Maori generally complain that it is too weak. The Resource Management Act (RMA) is the central environmental statute, a highly regarded piece of legislation, although it has weaknesses. The Act incorporates an integrated management approach, including the management of land, waters and air2649. The comprehensive planning system is a key feature of the Act, and there are linkages with the planning instruments and other important resource management decisions. The RMA includes a range of instruments: classic command-and-control regulations with detailed legislation, as well as national policy statements and environmental standards, economic instruments, information, education, transfer of functions, and voluntary agreements. As with the Swedish Environmental Code, the RMA must be applied parallel with other statutes.

The overriding purpose of the Act is to “promote the sustainable management of natural and physical resources”, which is supported by a number of guiding principles, such as explicitly stated matters of national importance. On the whole, the Act addresses and seeks to accommodate several diverging interests, including Maori cultural values. The matter of interpretation and application becomes, thus, rather complicated.2650 Nevertheless, there is always an “environmental bottom-line” interpretation, meaning that certain matters cannot be traded off against benefits with respect to contemporary socio-economic or cultural wellbeing.

The planning system under the RMA could most accurately be labelled as environmental planning.2651 This is in sharp contrast to the physical planning structure in the Plan and Building Act in Sweden. The RMA includes several planning instruments, both binding and non-binding, which are interlinked to the permit (consent) provisions.2652 The structure secures a vertical integration, that higher instruments are enforced on lower levels, all the way to the regional and local plans. Those plans must, in principle, not be more lenient than superior planning instruments and give effect to them. The system is also based upon the idea that decisions should be made as close as possible to the level of the community of interests where the effects and benefits accrue. Government has the responsibility basically for overviewing and monitoring, whereas the responsibility for identifying resource management issues and developing, implementing and monitoring policies is delegated to local authorities, meaning regional councils and territorial authorities. The implementation of the RMA is in this way left to regional and local governments.

The planning instruments are various standards, policy statements and plans.2653 National environmental standards state standards in relation to land, water, air and noise, may prohibit certain activities, and restrict the making of rules in plans. Such standards are not, however, mandatory, which generally is

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2648 See further in subsection 4.2.3.2.
2649 See further in subsection 4.2.3.1.
2650 See further in subsection 4.2.3.2.
2651 See further in subsection 4.2.3.1 under iii).
2652 See further in subsection 4.2.3.3 under i).
2653 See further in subsections 4.2.3.1 under ii) and 4.2.3.3 under i).
seen as a problem. The purpose of national policy statements and coastal policy statements is to state objectives and policies on matters of national or coastal significance. Coastal policy statements are mandatory, although national policy statements are not (the first are now being drafted). On the regional level, there are obligatory regional policy statements with the aim of providing an overview of the resource management issues in the region. Those include policies and methods for achieving an integrated management of resources. There is a comprehensive list of what to be included in the regional policy statement.

The regional plans assist the regional councils in carrying out their functions related to the RMA and may apply to the whole region or to a part of it. Although regional plans are not explicitly mandatory, they are implicitly required, as preparation of such plans is seen as being one of the councils’ functions with respect to other provisions of the Act. The Minister for the Environment also has the power to direct a regional council to prepare a regional plan or to amend it. District plans have the same purpose as regional plans, but are explicitly mandatory. The Minister can also here direct territorial authorities to amend the plan. Binding rules are attached to both plans, which are of crucial importance for the enforcement of the objective of the Act. As an example, a rule can prohibit certain activities in parts of the region, meaning that it is not even possible to apply for a consent.

The process of preparing and changing any of the plan instruments is comprehensive, including an extensive public participation process, especially with respect to regional policy statements and plans. Importantly, iwi authorities are given the opportunity to stress their views and interests, including giving comments on proposals. In this respect, the Maori have an exceptional influence as a group. No other group from the population is singled out in this way for specific input into resource management decisions.

Even if there obviously are problems and diverging views about resource management issues between Maori and non-Maori, the RMA regime allows in comparison considerable input from Maori. With respect to the environmental law outside of the RMA, there are different means to regulate and limit negative effects of Maori customary activities. Regulation and control seems mainly to be secured through regulations under the different environmental protection statutes, such as the Fisheries Acts and the Conservation Act. A specific feature is that the recognition of Maori customary rights normally includes the right to manage the resource, although with overarching powers retained by government agencies.

In Sweden, the environmental law consists chiefly of the Environmental Code, but also includes the Plan and Building Act and a wide range of other statutes, with more or less environmental protection objectives. In similarity with the RMA, the Code shall be applied parallel with other legislation, and the interplay with other legislation differs. The Code is a comprehensive statute aimed at an integrated protection of land, water, and air, with a strong emphasis on the management of resources (hushållning). The purpose of the Code is in the main to “promote a sustainable development”. Examples of the most relevant features of what a sustainable development is include, for instance, that human

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2654 See further in subsection 4.2.3.3 under iii).
2655 See further in section 4.3.
2656 See further in subsection 8.2.1.
health and the environment are to be protected against damage and detriment, that valuable natural and cultural environments are to be protected, and that biological diversity is to be preserved. The scope of the Code is comprehensive: all activities or measures that counteract the purpose of sustainability fall within its domain.

The provisions in chapter 2 of the Code could be regarded as its core with respect to their character of guiding principles and wide applicability. The provisions reflect a precautionary principle, a polluter pays principle, and a principle on using the best possible technique, along with other provisions of general character. Those specific provisions include a requirement to possess adequate knowledge, provisions on localisation of activities and measures, a requirement to conserve raw material and energy, a requirement to reuse and recycle raw material and energy, and a requirement to avoid using or selling chemical products or biotechnical organisms. The provisions in chapter 2 apply, in principle, to each natural and legal person “who pursues an activity or takes a measure or intends to do so,” where the applicability of the Code is evoked. Hence, those provisions have a very wide range and are not only determinative for granting of permits. They also impose, for instance, restrictions on the Saami reindeer husbandry.

Although physical planning is decided under the Planning and Building Act, the Environmental Code also includes a set of planning provisions in chapters 3 and 4, called natural resource management provisions. Those provisions form a sort of national planning instruments, since they are to be applied in Municipal planning and on a case by case basis with respect to granting permits also under statutes other than the Code. The provisions are aimed to give substantial guidance on the difficult balancing of conflicting resource management interests, basically between conservation interests and exploitation interests. In chapter 4, specific geographical areas are explicitly mentioned, and in chapter 3, the provisions mention specific types of areas comprising certain valuable interests, including areas of “national importance”. Hence, areas important for conservation, reindeer husbandry, and mineral and energy exploitation, among other things, are encompassed.

Nevertheless, Swedish physical planning essentially takes place at the local level. The Municipality has wide powers, usually referred to as the Municipal planning monopoly. It decides, in principle, the content of the different plans as well as when there is a need for planning or revising existing plans. The Planning and Building Act encompasses five types of plans, but only three of them are of relevance for this thesis. The comprehensive plan, which covers the municipality and is mandatory, is not legally binding. The other two, detailed developing plans and area regulations, are binding to different degrees. Both of them cover only small parts of a Municipality and are as such interrelated with settlement, single buildings, or other structures.

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2657 See further in subsection 8.2.1.
2658 See further in subsections 8.2.3.3 & 8.2.3.4.
2659 See further in subsection 9.2.3.
2660 See further in subsection 9.2.2.
2661 Swedish planning and building legislation make a distinction between buildings (byggnad) and structures (anläggningar). See further in 9.2.2. Where I henceforth refer to “buildings” I normally also include structures.
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With respect to the reindeer herding area, which comprises more than a third
of the Swedish territory, I have argued that the connection to buildings in the two
binding plan types is unfortunate.\footnote{2662}{See further in subsection 9.2.2.}
Major parts of the area lack settled areas and larger buildings. Hence, there is a scarcity of binding plans to hinder certain environmentally harmful activities, and the ambiguity of the provisions in
chapters 3 and 4 of the Code means that there is no strategic and substantial
environmental planning, including a balancing of conflicting interests. This
feature of the planning law is additionally unfortunate with respect to the Saami
reindeer husbandry, since virtually no assessments are possible regarding
cumulative environmental effects or other effects arising from various sources
within a larger region. Even if the reindeer husbandry is carried out in vast areas,
the suitable and available pasture areas are shrinking, and the cumulative impacts
from various smaller activities may be as devastating as impacts from a few larger
environmentally harmful activities. As a result, given the comparatively large
pristine character of the northern part of the country, the planning system includes
an inherent weakness. It is especially troublesome, as the link between the binding
plans and the granting of permits is detached.

The Environmental Code also includes different provisions related to pre-
examination of different activities, such as environmentally hazardous activities,
water operations, and other activities that may have a “significant impact on the
natural environment”. The definitions of the two former types of activities are
wide and include many forms of activities.\footnote{2663}{See further in subsection 9.4.2.}
The third type of activity includes a specific form of pre-examination of activities that does not fall under other permit
or notification requirements, but still causes significant impacts.\footnote{2664}{See further in subsection 9.4.4.}
There is a procedure for the application and granting of activities, as well as a less time-
consuming system of notification of a planned activity to the Municipality. The
permit requirement for an activity is linked to a requirement for the preparation an
environmental impact assessment (EIA), which includes consultation duties for
the operator with affected parties and other authorities.

Other legislation beside the Environmental Code requires permits or
notification in relation to activities that have a greater environmental impact. I
have analysed the law relating to forestry, mining, energy peat exploitation,
construction of pipelines for the transport of natural gas, road construction, and
railway construction. Here also, the lack of binding plans presents a problem for
the protection of valuable nature areas and/or protection of vital pasture areas for
reindeer husbandry. Again, there are no means for assessing or controlling
cumulative effects from several sources, and, with the virtual lack of binding
plans, authorities are not hindered by plans from granting permits.

Provisions on nature conservation, primarily protection of areas are also
included into the Code. There are many different types of protection, but of
relevance here are chiefly national parks, nature reserves and Natura 2000
areas.\footnote{2665}{See further in section 9.3.} They form the vast majority of the protected areas within the reindeer
herding area. With respect to national parks, the elements of the reindeer herding
right are substantially limited in all parks. Here, there is a clear clash between the
interests of modern reindeer husbandry and Saami views, on the one hand, and

\footnote{2662}{See further in subsection 9.2.2.}
\footnote{2663}{See further in subsection 9.4.2.}
\footnote{2664}{See further in subsection 9.4.4.}
\footnote{2665}{See further in section 9.3.}
conservation interests on the other. The Saami, like other groups, is also largely left out of the management of protected areas. Sweden has long since applied a model where the state and appointed state authorities have sole responsibility for protected areas. Nevertheless, it might be possible to designate cultural reserves to protect the enjoyment of the reindeer herding right in certain crucial areas. This is a new protection form introduced with the Code in 1999.

10.2 Implications of Colonisation

It has been obvious from the comparison of the three jurisdictions that Canadian and New Zealand laws include recognition of the colonisation process. In this, colonisation is legally relevant with respect to the acknowledged specific relationship that is alleged between the peoples, represented by the Crown and the different indigenous groups. In Canadian law, this is recognised within the doctrine of aboriginal rights, where it is recalled that the honour of the Crown is always at stake when dealing with First Nations and the Inuit. This doctrine defines in fact the linkage between aboriginal peoples and the Crown.

Additionally, the Crown’s fiduciary duty, the origin of which is in the Crown’s historical commitment to protect aboriginal peoples from the settlement process, supports the conception of a specific relationship. Presently, the Crown’s duty is foremost understood as a protection of the enjoyment of aboriginal rights. For instance, one aspect of this fiduciary relationship is that ambiguities in legislation and treaties should be resolved in favour of the indigenous people. The Guerin case in 1984 was an imperative step, as the Supreme Court determined that the nature of Crown’s obligation was fiduciary and, therefore, legal, rather than only political or moral. Hence, the fiduciary law has been highly influential on the aboriginal rights jurisprudence. Interestingly, the Crown’s fiduciary duty stems from private law. Consequently, the marriage with aboriginal law, which is generally regarded as part of public law, was almost unthinkable. Since Guerin, however, the nature of the fiduciary relationship has been seen as neither private, nor public, but sui generis.

Where aboriginal interests are less specific, not giving rise to a fiduciary duty on behalf of the Crown, the principle of the honour of the Crown has recently been asserted by the Supreme Court. With respect to potential rights embedded in aboriginal rights claims, the honour of the Crown may require that consultation and accommodation of aboriginal interests take place in order to fulfil the Crown’s obligations toward the aboriginal peoples. Again, the colonisation process has been inherent in legal interpretation and application. Consequently, in the two relevant cases, Haida Nation and Taku River, the Supreme Court stated that the historical roots of the principle call for a generous

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2666 See further in subsection 9.3.2.1.
2667 The thesis does not include an analysis of Métis rights. However, they are also recognised as an indigenous people in Canada. See further in subsection 1.1.2.
2668 See further in subsection 6.4.2.
2669 Nonetheless, at the time, fiduciary arguments were being used increasingly in Canadian jurisprudence. The concept of fiduciary obligations includes the notion of breach of confidence, and an important feature of a fiduciary relationship is that one party is at the mercy of the other’s discretion. (För svenskt vidkommande kan det väl närmast översättas i ett sorts förmynderskap).
2670 See further in section 6.5.
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understanding of the principle, giving rise to consultation and perhaps accommodation duties vis-à-vis a particular aboriginal group.

In New Zealand, where the law has generally evolved around the Waitangi Treaty, one of the Treaty principles acknowledges a partnership-like relation between the Maori and the Crown.2671 The relationship between the parties to the treaty creates responsibilities akin to fiduciary duties, which was first held in the Maori Council case in 1987. Generally, this fiduciary duty arises from the special relationship that exists between the Crown and Maori, due to the Crown’s pre-emptive rights to land, requiring a reciprocal duty. So, too, in this respect, the colonisation process and the Crown’s actions leading to the acquisition of land and sovereignty have become legally evident. The key features of this partnership are acting in “good faith, fairly, reasonably and honourably” toward each other. This principle is to be considered by government and government agencies in their exercise of powers and functions, for instance, with respect to resource management legislation. Since 1987, the Court of Appeal has continued to use the language of partnership and the fiduciary relationship in its subsequent decisions, emphasising as well the jurisprudence in Canadian law, primarily in the Guerin case.

Even though the legal rationale for emphasising a specific relationship between the indigenous people and the Crown to a large extent differs between Canadian and New Zealand law, it is, nonetheless, an important aspect within both national legal systems. The situation is distinctly different in Sweden, as Swedish law does not recognise the existence of any specific relationship between the State and the Saami. This may partly be explained by the fact that, when colonisation of the north commenced, Sweden was already inhabited by other peoples. It may also be explained in part by the legal system itself. The British colonisation process seems special in that the British Crown, in principle, always assumed ownership of newly discovered territories subject to an underlying interest of the indigenous peoples in their occupation and use of the lands. This seems to be incidental to the British law on discovery.2672 The presumption of colonisation was, thus, that the Crown would respect existing rights of property. The purpose was clearly to smooth colonisation and reconcile the different cultures, which otherwise would have been in a state of conflict.

In the Canadian case, Côté, the Supreme Court analysed whether the existence of aboriginal rights was different in Quebec with respect to the early application of French colonial law in the province.2673 In New France, aboriginal customary activities did not enjoy any explicit legal protection under the colonial regime. The Attorney-General of Quebec argued in the case that the assertion of French sovereignty prohibited recognition of aboriginal title and other ancestral rights. The French law was simply silent on the matter of legal recognition of aboriginal interests in land, much like Swedish law. In fact, in this respect, the French legal system shows more similarities with Swedish law than do the common law systems.

Nonetheless, even if the Swedish legal system does not recognise the existence of a specific relationship between the State and the Saami, an equivalent political and moral recognition stemming from the colonisation should, at least, be

2671 See further in subsection 3.1.1.4.
2672 See further in subsection 6.3.1.
2673 On the case see further in subsection 6.3.1.
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existent. This political and moral recognition should stem from the fact that the Saami people are an indigenous people, who, at the time of colonisation, occupied and used specific lands. The traditional land uses of the Saami were also historically upheld by courts, as well, for instance, as through the decisions on the Lapland border and the cultivation boundary. Facts that support such a notion are the establishment of the Saami Parliament and the recognition of the Saami as the only indigenous people of the five so-called ethnical minorities (nationella minoriteter). However, nowhere in law are the Saami portrayed as having a particular status among other groups in society, apart from the business monopoly and the right to use the Saami language with respect to administrative authorities in a few Municipalities.

The fact that the colonisation process is not legally relevant in Sweden has implications. The lack of such overarching principles means, for instance, that it is difficult to mould interpretation and application of Saami customary rights with respect to the prerequisites of the doctrine of immemorial prescription. Furthermore, it is difficult to rationalise consideration of Saami values and interests in resource management decisions, for instance, through consultation. Moreover, the State would, in one way or another, be responsible for its actions and decisions affecting Saami, since it is required to uphold the “honour of the State”, a concept foreign to the Swedish legal discussion. One example where such a concept should be helpful is the Parliamentary decision in 1992 on a changed policy for small game hunting in the mountainous region. The Parliament’s decision adopting the proposal, along with the process that led to the government bill, have been severely criticised from various points of views. The question remains whether this was an honourable process and decision.

Hence, whether the colonisation process is legally relevant has consequences that bear upon whether the legal system acknowledges that the indigenous people have specific status. The recognition of customary rights as sui generis would also be enhanced by such a recognition. In sum, those implications should be a matter for the legislature to consider strongly with respect to new or amended legislation affecting the Saami. On the whole, I argue that this lack of general principles within the Swedish legal system calls for a re-examination of the relationship between the Swedish state, the other Nordic states, and the Saami as a people. The situation vis-à-vis the Swedish state and the colonisation process are not that distinct from New Zealand and Canadian experiences. Nevertheless, the laws have evolved differently.

2674 Parliament publicly recognised the Saami as being an indigenous people within Sweden in 1977. See further in section 9.6.
2675 The others are Swedish Finns, Torne peoples, who reside in the north-eastern corner of the country, Gypsies, and Jewish people (sverigefinnar, tornedalningar, romer och judar). See Prop. 1998/99:143 Nationella minoriteter i Sverige. As a response to this status, specific language legislation has been issued that gives rights to the concerned peoples to speak their native language in relation to public administration in certain regions. With respect to the Saami see the Act (1999:1175) on the Right to Speak Saami at Public Bodies and Courts.
10.3 Understanding Saami Customary Rights

Another result from the analysis in this thesis has shown that the understanding of the Saami customary rights is rather poor, especially in comparison with Canadian law. The analysis of Saami rights has chiefly regarded the reindeer herding right, since it is the only statutorily acknowledged right.²⁶⁷⁸ In contrast with Canadian law, the reindeer herding right is generally regarded as being based upon prescription, not occupation.²⁶⁷⁹ Despite this difference, there are similarities between the customary rights. For instance, they are not dependent upon statutory enactments to exist and, hence, the basis of the rights is unwritten and customary in nature. It is quite another matter that legislation may acknowledge, promote and regulate such rights. Customary uses may, furthermore, have founded ownership rights, or more likely, limited rights, such as various harvesting rights. So far, none of the court systems in any of the three countries has maintained claims on ownership rights²⁶⁸⁰.

Moreover, a continuous use of the specific area, with more or less customary roots, is vital for sustaining a customary right. If the link between the people and their land area is lost, the rights erode. Where the link is maintained, however, the more exclusive and intense the land use has been, the more exclusive and intense will be the ownership. A difference with respect to the doctrine of immemorial prescription is, however, that breaks in the use are not allowed for longer time-periods, which break the prescription (håvd). Another shared basic feature for the laws is that the customary rights have been difficult to translate into known proprietary terms. I have previously explained the tensions with the “normal” prerequisites interrelated to the doctrine of immemorial prescription²⁶⁸¹. All in all, as the customary rights in each respective country all show distinct characters, so also do the Saami customary rights. The reindeer herding right, being the only recognised Saami customary right, enjoys distinct features.

Apart from emphasising that Saami customary rights should be understood as historical and cultural rights, distinct in nature, I have emphasised four features with respect to the rights, particularly the reindeer herding right.²⁶⁸² Firstly, the

²⁶⁷⁷ Nonetheless, Saami groups other than the reindeer herding Saami may, on the basis of the doctrine of immemorial prescription, prove the existence of rights, such as hunting and fishing rights. However, there are difficult evidential thresholds, not the least of which is because the prerequisites of the doctrine of immemorial prescription do not correspond very well with traditional Saami land uses.

²⁶⁷⁸ As noted above, the Reindeer Husbandry Act states that the reindeer herding right is based on immemorial prescription. Above, I have briefly examined whether Saami rights instead might be based upon occupation, as a response to the fact that the prescriptive right presupposes a previous ownership of the land. See above in subsection 7.2.1.5. However, the law on occupation is even more undeveloped than the doctrine of immemorial prescription, and it is not certain that limited rights can be established through occupation. Hence, the way paved by the Supreme Court in the Taxed Mountains case might be more secure and reliable. Regarding Canadian law, see further below for references.

²⁶⁷⁹ Nevertheless, in the settlement processes, title and other rights have been acknowledged. In Sweden, however, such agreements are alien.

²⁶⁸⁰ See the discussion above in subsection 7.2.1.3. This thesis does not attempt to and cannot resolve the problems with the prerequisites, since a closer examination is required. I aim here merely to elevate the problems and to give some guidance on the basis of comparison.

²⁶⁸¹ See above in subsection 7.2.2. As a reminder, the reindeer herding right includes several sub-rights, such as hunting and fishing. See above in subsection 8.1.2.
rights are to be understood as collective in nature, since the very roots of Saami ancestry always is present. The rights exist solely because individuals belong to a specific cultural context, and the ancestry reassures that the link between a group of people and the land being used is maintained. Secondly, the rights have their basis in unwritten, customary law. Thirdly, the rights are elastic in basically the same manner as ownership. In principle, where a restriction of the right is lifted, the former right is resumed in the particular area. Fourthly, given the character of the customary uses, the rights have different legal strength. Legislation and historical Crown decisions have also shaped the manner in which the rights may be enjoyed.

Altogether, the features emphasised should assist in explaining and understanding the nature of the reindeer herding right. As a matter of fact, the right is not equivalent to other rights known in the contemporary Swedish law. In short, Saami customary rights are not determined upon agreement, are valid without time restrictions, are subject to both private and public properties, and are collective in nature. Most closely the reindeer herding right is to be understood as a kind of usufruct right (bruksrätt), encumbering real properties. Commonly, the right is also referred to as a specific right to real property (särskild rätt till fastighet). The right enjoys the same constitutional protection against coercive measures without compensation as does ownership, which proves the strength of the right. In fact, the reindeer herding right seems far stronger than the contemporary law recognises, which calls for a stronger protection of the enjoyment of the right in legislation.

From an environmental protection perspective, a more adequate protection of the reindeer herding right should also assist a promotion of a sustainable use of the area. While there is competition over the same land areas, the resources are normally not enough for all different and diverging interests. There should, hence, be a balancing of interests with an order of priority for certain interests, decided at a strategic level. Here, activities that, in a long-term perspective, promote sustainable uses of the reindeer herding area should be given precedence. For the most part, the reindeer husbandry, Saami hunting and fishing, and other customary activities should be characterised as preference activities essentially on State owned lands, given that environmentally harmful elements are mitigated. This notion of differentiation would, however, be reinforced by recognition of a specific relationship between the Saami and the State, with regard to which the concept of colonisation would be legally relevant. The specific status of Saami land uses to reflect the fact that they were the first occupants in the majority of the area would support the notion of differentiation of diverging interests. This compares with Canadian law and the so called doctrine of priority.

Canadian jurisprudence may, additionally, enhance the understanding of the nature of Saami customary rights in another way. This should be relevant when

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2682 Nevertheless, the enjoyment of the rights may be more individual in nature, such as hunting or fishing activities.
2683 See further in subsection 8.1.1.
2684 See further in subsection 7.3.2.3 under iij.
2685 Note also the difficulties with respect to the constitutional protection of the reindeer herding right. See further in subsection 7.3.2.3.
2686 See in subsection 6.4.5.3. Compare also what is said with respect to non-exclusive rights in subsection 6.3.2.
discussing the content of Saami rights de lege ferenda. In his categorisation, Slattery presents the spectrum of aboriginal rights that may exist. While the link between the group of people (subject) and the land area used (object) must be upheld in both laws, which also applies to New Zealand law, the categorisation is relevant to Saami customary rights as well. For this thesis, the specific rights are the most relevant. In contrast to generic rights, specific rights apply only to a certain indigenous group. The dimensions of these types of rights are determined by indigenous practices and customs of the group in question. Therefore, specific rights may differ substantially in form and content from group to group.

Depending upon their degree of connection to land, specific rights can be subdivided into three groups: site-specific rights, floating rights, and cultural rights. Examples of site specific rights are hunting, trapping and fishing rights. The reindeer herding right should also be regarded as a site specific right, since the husbandry is connected to the present Saami village (and formerly to the siida). Floating rights include, for instance, gathering wild plants for medicinal proposes. Picking wild plants is included in public access to land (allemansrätten), where not specifically decided to be preserved (fridlyst). Otherwise, the Saami may claim such customary rights on the basis of immemorial prescription. The third group, cultural rights, are in the Canadian context linked to ceremonial activities, such as performance of certain traditional dances. Such activities seem not presently to be relevant to the same degree to Saami culture. Nonetheless, collecting handicraft materials for Saami duodji could be considered a cultural right.

Moreover, Slattery acknowledges that specific rights may be exclusive or non-exclusive. However, this distinction is not clear with respect to the reindeer herding right and its inherent sub-rights. Generally, the reindeer herding right should be considered a non-exclusive right, since it does not mean a sole right to use and occupy the area, nor does it include the capacity to prevent others from using the area. The hunting and fishing right should be comprehended in the same manner, as the present understanding of the law does not permit an exclusive right to hunt and fish in the area for Saami. Primarily, land owners have the same corresponding rights. However, the basic right to pasturage (betesrätten) could be considered exclusive, since the reindeer husbandry is carried out under a business monopoly.

2687 See further in subsection 6.3.2. Among the Saami there are also differences in custom and language between regions, but there has rather been an effort by the State to make the rights for the reindeer herding Saami more consistent.

2688 By the doctrine of immemorial prescription it is obvious that there must be a close link between the Saami group and the lands being used by this group. The “normal” prerequisites include the notion of well defined and limited areas, usually only a part of a piece of real estate, in order to establish rights. Another prerequisite of importance is the requirement of a continuous use of the specific area.

2689 See further in subsection 6.3.2.

2690 The extended family group.

2691 The relevant subject, the right holders, should be the Saami village or other Saami groups. One drawback is, however, that the contemporary Saami culture is not to the same extent tribal compared to Aoteoaroa/New Zealand and Canada.

2692 Note that, under the Reindeer Husbandry Act, the right to handicraft is subject to a permit requirement for a Saami that is not a member of a Saami village. Nonetheless, the customary right is implicitly recognised. See the Act, s. 17 para. 2. Alternatively, this right could be characterised as a floating right.
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Additionally, Saami without a membership in a particular Saami village may not exercise the reindeer herding right in that Saami village. So basically, the only clear examples of exclusive rights are ownership and, for example, the sole right to fish in a particular lake\textsuperscript{2693}. Conclusively, the distinction between exclusive and non-exclusive customary rights is not that helpful for explaining the nature of the reindeer herding right, although it may help to explain Saami customary rights generally.

Consequently, this presented categorisation provides a theoretical framework for understanding the variety of customary rights. It could perhaps also be used as a basic frame for analysing and identifying Saami rights claims. The categorisation acknowledges that the traditions and customs of different indigenous (Saami) groups are different and that the use commonly is associated with specific areas (site-specific rights). Consequently, with respect to the nature of Saami customary rights, determined chiefly by support of the doctrine of immemorial prescription and the categorisation of customary rights alleged here, I argue that there is a need for a diversification of Saami customary rights compared to the contemporary codification. Above all, the whole of the Saami population cannot be holders of the reindeer herding right. This is stated in section 1 of the Reindeer Husbandry Act, as amended in 1993. It cannot be maintained legally. I have instead argued that the Saami group to be regarded as subject to the reindeer herding right is the Saami village\textsuperscript{2694}.

I would also recommend a larger diversification of the rights among the Saami villages, where supported by recognised custom. To some extent, their land uses have differed and still differ. As explained above, all rights are not held by all Saami, which should also be true with respect to some sub-rights inherent in the reindeer herding right. The legislature has, in principle, chosen to regulate the reindeer husbandry in a standardised manner\textsuperscript{2695}. However, a detailed analysis reveals large differences in the content of the reindeer herding right between different areas. I have above categorised the areas subject to reindeer herding rights into six zones\textsuperscript{2696}. Consequently, there are already differences more or less regarding the content of the right between Saami villages. The concession husbandry is also regulated quite differently\textsuperscript{2697}. Additionally, the Taxed Mountains case and the recent so-called lichen case have proven that there may be other sub-rights not codified in the present Reindeer Husbandry Act\textsuperscript{2698}.

\textsuperscript{2693} Such a fishing right probably lies outside of the reindeer herding right, at least with respect to the present codification. Such a fishing right may, nevertheless, be claimed as an autonomous Saami customary right.

\textsuperscript{2694} See above in subsection 7.3.1. The 1993 amendment is unfortunate, as it seems to strengthen the normative pattern inherent in the reindeer husbandry legislation, which very well might lead to an absurd legal application. Hence, I see a need to amend the Reindeer Husbandry legislation, which should also be amended with respect to the many references to the vague expression “the reindeer husbandry”. See further in subsection 7.3.2.2.

\textsuperscript{2695} Initially, however, the mountain reindeer husbandry was favoured. Nevertheless, an inherent assumption in the legislation is, however wrongly, an understanding that the Saami community is homogenous.

\textsuperscript{2696} See further in subsection 8.1.4.

\textsuperscript{2697} See further in subsection 8.1.3.

\textsuperscript{2698} See further in subsection 8.1.2.
Another closely related problem is the model chosen by the legislature, which has brought together different rights, with connections to the reindeer husbandry, more or less, under the umbrella of the reindeer herding right. It is a problem, especially since Saami outside the reindeer husbandry and the former Lap villages were left without statutorily recognised customary rights, primarily hunting and fishing rights. Thus, there seems to be an issue whether such rights were extinguished by statute in 1886, which may mean compensation rights. Hence, this “bundle of rights approach” by the legislature can be criticised, since customary hunting and fishing may be exercised only in relation to membership of a particular Saami village. The present organisation of Saami village memberships does not promote enlarging the number of members. Instead, the organisation shall, in principle, facilitate the husbandry.

Even though I have asserted a diversification of the present codification of the reindeer herding right, the basic elements of the reindeer herding right should, nevertheless, be the same. In general terms, one possible solution to the legal problem of the codification that I see would be to maintain an overarching reindeer husbandry statute similar to the present. This frame work legislation should state the basic content of the reindeer herding right applicable for all Saami villages, including other necessary provisions as well. It would then be possible to issue specific regulations (förordningar) under the main statute, including codification of other (site-specific or floating) sub-rights and for one village or a group of Saami villages.

Although the following issues, discussed below, do not directly correspond with the heading of this section, I wish nonetheless to discuss them jointly. For promoting a sustainable use with respect to a Saami village or another specific area, more detailed environmental requirements could be attached in those specific regulations. For example, local or regional environmental quality standards can be designed. The present by-laws issued by the Board of Agriculture with environmental requirements are rather general. The environmental requirements in chapter 2 of the Environmental Code are also of general character.

Comparatively, the reindeer husbandry, including the enjoyment of the reindeer herding right, is subject to many environmental requirements. The emphasis upon environmental requirements in Swedish law is advanced. Therefore, I do not see a need for more general requirements. Nevertheless, additional specific environmental considerations particularly designed for the need and character of the specific area may better promote a sustainable use of the specific areas. Those requirements should be discussed in close relationship with the Saami and others especially concerned. Nonetheless, my recommendation here is contrary to the interest of gathering all environmental requirements under the Environmental Code. However, as explained, the benefits are essential, given

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2699 Here, I disregard the possibility that the State may argue that the right to compensation is barred by the limitation of actions (preskriberat).
2700 Note, however, that the Constitution (the Instrument of Government) requires regulation by statute with respect to the Saami’s relationship to single land owners. See ch. 8 s. 3. However, an exception is possible through authorisation by statute. See ch. 8 s. 7, point 4. See also ch. 8 s. 11, which provides that the Parliament may authorise another administrative authority (förvaltningsmyndighet) to decide, for instance the Saami Parliament.
2701 The same constitutional requirements apply here. See previous footnote.
2702 See further in section 8.2.
the fact that the resource use issues are subject to regional conditions with strong ties to customary rights.

Other issues that could be combined under those regulations regard managing rights of particular areas or resources, primarily on State owned lands, similar to the codification of contemporary Maori customary rights. But again, the notion of a specific relationship between the Saami and the State seems to be incidental to such recognition of managing rights for Saami groups, and not for other members of the society.

A benefit with such a legislative scheme suggested here is that site-specific Saami rights become emphasised and legally recognised, which is a precondition for the opportunity to protect and accommodate the enjoyment of these rights. Moreover, with a more detailed regulation of the customary rights linked to specific areas, certain environmental requirements may be designed to apply, if necessary.

As a conclusion, with respect to the analysis of Saami customary rights, I have asserted that the Saami customary rights are a unique set of rights. This is a shared feature in all three laws: even if the roots of the customary rights are based upon property law and old proprietary terms (common law as custom and custom based upon immemorial prescription), it seems to be equally difficult in a Swedish, Canadian and New Zealand context to apply these rules and principles without taking into account the specific features of the customary rights. An emphasis on the customary rights as being sui generis may, hence, promote an adaptation in legal interpretation, application and drafting of legislation, as done particularly with respect to Canadian law, but also in New Zealand law.

As there are no explicit overarching principles in this area of Swedish law, it is worrying that the Swedish legal system lacks the legal recognition of the consultation process. Given the character of the Swedish Constitution, I see a lesser need for a corresponding constitutional protection of the Saami customary rights as in Canada. It would not be given the same meaning with respect to

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2703 Codification of rights normally includes managing rights. Moreover, it seems as if Maori customary rights commonly are codified through regulations, with a local or regional scope, but subsumed under other overarching provisions in statues, such as the Conservation Act, Wildlife Act and Fisheries Act. See further in section 3.2.

2704 Maori rights are primarily based and advocated through the Waitangi Treaty. However, claims of customary rights are now advocated before the courts concerning mainly gathering rights and customary title in relation to the foreshore and seabed.

2705 With respect to legal interpretation, Bäärnhielm has argued for an application of the contract law principle on doubt (oklarhetsregeln). I agree that it should be possible to use the principle with respect to legislation, at least with regard to Saami rights issues. This means that ambiguous provisions in the Reindeer Husbandry Act should be interpreted in favour of the Saami. See above in subsection 7.2.1.3 (in the very end). This has similarities to the application of the principle of a generous interpretation of the constitutional provision applied by the Supreme Court. This principle has been applied at least since the middle of the 1900s with respect to treaties, and its area of application was extended later to constitutional interpretation. See Borrows & Rotman (2003) Aboriginal Legal Issues, p. 158.

2706 The Constitution, the Instrument of Government (RF), does not have the same function in Swedish law, and on the whole the protection of rights in the Constitution is rather “weak”. Moreover, the courts do not create law to the same extent as the Supreme Court of Canada and lower courts. Consequently, a similar provision would not give the same far-reaching protection as in Canadian law.
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the more limited role of courts in the Swedish legal system. Nevertheless, constitutional recognition of a specific relationship between the Saami and the State, emphasised as an interpretive principle, may enhance the *sui generis* nature of the rights and mould legal interpretation. I would rather see that Sweden join the path taken by the two other jurisdictions, actively seeking a reconciliation of the main stream law and Saami customary rights. More research, and perhaps also precedent case law, should be able to determine how this may be achieved.

The proportionality principle may, however, to some extent, accommodate protection of Saami customary rights. The principle stresses a balance between the objective of a measure and the infringements imposed on Saami rights. In other words, what the public achieves and the individual/group looses must be in reasonable proportionality. Such issues have not been raised in courts so far regarding Saami rights, but the proportionality principle was elevated in the Supreme Administrative Court a decade ago as a response to the alleged new closeness with European law⁷⁰⁷. Yet, a few later cases have defused the prominence of the principle⁷⁰⁸. I find it doubtful that the principle could play the role of moulding the application of state authority on Saami rights. For this, I have asserted that there is a need to recognise the interplay between the Saami and the State.

10.4 A Need for Environmental Planning

To be explicit, in this thesis it is the reindeer husbandry *area* that is in prime focus, not the Saami customary rights isolated *per se*.⁷⁰⁹ Hence, under this section I will focus more on the area as such, discussing ways in which the legislation may contribute to a sustainable use of the area. The analysis and discussion will raise more detailed issues than in other sections in this chapter, as it is essential in relation to the Swedish legislation and the understanding of how different sets of rules interact. A comparative perspective is still imperative, since the analysis of the New Zealand environmental planning system has widened the perception of the Swedish system with regard to physical planning and more strongly emphasised its shortcomings. I will highlight the essentials of the environmental planning system under the RMA below. First, however, there is a need to recall the problems and tensions revealed by my analysis of Swedish law, predominantly in chapter 9.

With respect to the analysis of Swedish law, I found several weaknesses regarding the implementation of environmental protection objectives. This must,

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²⁷⁰⁷ See RÅ 1996 ref. 40 (no extension of a natural reserve), RÅ 1996 ref. 44 (exemption from a shore protection area) and RÅ 1996 ref. 56 (cultivation of forests on previous farm land). The cases have been much criticised. See, for instance, Westerlund, Staffan (1996) *Proportionalitetsprincipen – verklighet, missförstånd eller nydaning?* in MT 1996:2.

²⁷⁰⁸ RÅ 1997 ref. 59 (no granted exception from provision of protection of a biotope of old stone walls) and RÅ 1999 ref. 76 (Barsebäck, closing of a nuclear power plant). On the latter case see also above in subsection 7.3.2.1. See further in for instance Michanek, Gabriel & Zetterberg, Charlotta (2004) *Den svenska miljörätten*, pp. 45-46 with references.

²⁷⁰⁹ Compare with the stated objective in subsection 1.2.1. Given the right’s many unclear aspects, achieving a better comprehension of the nature of the customary rights was incidental also for analysing and discussing ways in which the legislation may enhance a sustainable use of the area. At the same time, this should directly and indirectly promote an enjoyment of the reindeer herding right. I have explained this in the previous section.
however, be understood in relation to the uniqueness of this geographical area. Large parts are of more or less pristine character, with areas that lack roads, railways settlements and larger buildings. Above all, I see a lack of sufficient national or regional planning instruments adapted to the traditional Saami area. There are two legally binding plans, detailed development plans and area regulations, but they are rather few within this area, as their function is linked with settlement, single buildings, or structures of large impact. Those planning instruments function rather well in more populated areas, but, given the unique character of the reindeer herding area, such binding plans are absent on the whole.

As a consequence, the specific provisions do not apply that may hinder granting of permits or exemptions in the Environmental Code and natural resources legislation. If a planned activity counteracts a detailed development plan or area regulation, a permit must not be granted to the planned activity. Building permits subject to the Planning and Building Act may, likewise, not be hindered with respect to non-compliance with plans. Normally, given the purpose of the plans, there are a wide range of activities that may be hindered if found to counteract any of the two binding plans. This is, as said, not normally possible within the reindeer herding area.

Physical planning in Sweden takes place on the local level, where the Municipality, given its planning monopoly, in principle, decides the content of the different plans and largely when there is a need for planning and revision of existing plans. The state control of the planning process and the content of plans are weak, mainly related to areas of “national interest” and environmental quality standards. Moreover, even if the physical planning under the Planning and Building Act includes a balancing of conflicting interests, the fact that the comprehensive plan is not legally binding is a problem. As said above, with respect to the reindeer herding area, there are few planning instruments that actually safeguard a sustainable use of land and resources.

The comprehensive plan is not binding and covers only the municipal area. The plan is important, of course, for resource management decisions, but it cannot alone hinder any land uses from commencing. Nevertheless, with respect to at least new wind mill installations, the presence or absence of an up to date comprehensive plan has proven significant in courts relating to decisions concern where to locate wind mills. In terms of the large authority left for the Municipalities, it is, however, essential to point out that the legislation as such does not guarantee that the comprehensive planning is adequate and of good quality. No sanctions are attached either. Even if there is a requirement that each Municipality must have an up to date comprehensive plan, there are no additional requirements ensuring that relevant resource management, conservation and settlement issues within the Municipality are adequately addressed and cared for, which includes the interests of reindeer husbandry. Without sufficient superior

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2710 See further in subsection 9.2.2.
2711 See further above in subsections 9.2.1, 9.4.3.4 and 9.4.3.5.
2712 See further in subsection 9.2.2.
2713 See further in subsections 9.2.3.1 & 9.2.3.4.
control of the comprehensive plans, it is an ambiguous and uncertain planning instrument\textsuperscript{2715}.

In any event, in the absence of detailed development plans and area regulations that may hinder certain land uses, it is instead the substantial provisions in relevant statutes that will determine whether the activity may be permitted and the environmental requirements imposed upon the activity. This is, of course, a general planning problem, but I argue that it is particularly unfortunate with respect to the reindeer herding area for several reasons.

The lack of sufficient overarching planning instruments, foremost being binding plans, means that it is difficult to assess cumulative environmental effects of various types of activities within a region. As noted, the resource management decisions become scattered and rest mainly on substantial law, allowing strategic decisions to be taken on an inappropriate level. With respect to decision-making in single matters, the permit authority has few opportunities to take into account the effects of other activities within the area. As a rule, more than an exception, where no significant environmentally harmful effects arise from a planned activity (new and enlarged), activities are normally allowed, provided that they do not impact specifically protected nature areas, such as Nature 2000 areas.

Another problem relates to the reindeer husbandry. As the pasture areas of Saami villages are immense and normally cover two or more municipalities\textsuperscript{2716}, cumulative effects with respect to the enjoyment of the reindeer herding rights cannot be surveyed. Especially from the beginning of the twentieth century, other forms of land uses have increased, such as water power constructions, other infrastructural developments, settlements, mining and other environmentally hazardous activities. Those land uses have not only diminished the areas suitable as pasture, but additionally caused a scattering of the pasture areas. Moreover, the national planning provisions in chapters 3 through 4 of the Environmental Code do not fulfil the required needs with respect to the raised problems. These provisions will be closely discussed below.

The so-called natural resource management provisions in the Code can be seen as instruments for national planning, as the provisions are applicable to the planning process under the Planning and Building Act and to granting building permits, as well as to granting permits under the Code and natural resources legislation. Note that the provisions are not applicable to granting logging permits, as logging is regarded as an on-going land use (pågående markanvändning)\textsuperscript{2717}. There are also inherent problems in those provisions in chapters 3 and 4, but of a different character\textsuperscript{2718}. The provisions in chapters 3 and 4 differ, in so far as chapter 3 states certain general interests that shall be considered, while chapter 4 explicitly points out certain geographical areas\textsuperscript{2719}.

Certain areas comprising specific interests mentioned in chapter 3 may be regarded as of "national interest" (riksintresse). This means that the deciding authority or a court will, on a case by case basis, decide if a specific area is of national interest on

\textsuperscript{2715} See also in subsection 9.2.3.1.

\textsuperscript{2716} Note that the northern Municipalities usually are big, and sometimes comprise the same size as counties in the southern parts of the country.

\textsuperscript{2717} Specific problems relates to the Forestry Act that will not be raised here. See further in subsections 9.4.3.2 & 9.4.3.3.

\textsuperscript{2718} See below and subsections 9.2.3.1 & 9.2.3.2.

\textsuperscript{2719} See further in subsection 9.2.3.
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the basis of the classification previously done by sector authorities. As examples, areas essential for the reindeer husbandry may be of national interest\(^\text{2720}\), as well as areas important for mining or energy generation purposes. Additionally, areas may also, for instance, be regarded as of national interest due to their importance for nature conservation purposes or for the purpose of recreational activities. Consequently, with respect to areas, there are many interests covered by the provisions. Where only one “national interest” exists within a specific area, the protection of this area is comparatively strong: the area must be protected against significant damages or significant interferences of the interest. Normally, however, there are competing interests, some of national interest and some not. Where there are several interests competing and conflicting, the legal situation becomes more complex, and the legal situation becomes vaguer with respect to the anticipated outcome of a given balancing of diverging interests, even with the support of the balancing provisions (ch.3 ss. 1 & 10).

Interpretation of the provisions in chapter 4 is not easier.\(^\text{2721}\) The status as “national interest” with respect to areas directly mentioned means that the balancing vis-à-vis other interests has already been made and that the natural and cultural assets within these areas must be given priority in situations of competition. Unexploited (obrutna) mountainous areas are, for instance, explicitly protected. Those pristine parts of the mountain area, without major roads, railways or larger settlements, are rather strongly protected, since specific requirements apply. Settlements and structures are allowed, for instance, only where needed for the reindeer husbandry or for outdoor recreational activities. Other measures are prohibited if the natural character of the area would be affected. Protections of other mountain areas, which are not unexploited (obrutna), are weaker. As there is no specific protection, as compared with the provision related to unexploited mountain areas, the general requirement (in ch. 4 s. 1 para. 1) is more relevant to those situations. Legal interpretation allows that considerable negative impacts may be accepted within a part of an area, as long as the totality of the area is not “significantly damaged”\(^\text{2722}\). As with the corresponding expression in chapter 3, the words are unclear, although the aim is clearly not to hinder all environmentally harmful activities.

Nonetheless, despite additional requirements in single provisions in chapter 4, such as in the provision related to unexploited mountainous areas, exceptions do apply. In practice, this creates a large hole in the safety net. Exceptions from the protection apply with respect to the development of existing urban areas, local industry or structures necessary for total defence purposes, which cover rather wide situations. Moreover, exploitation in areas of national interest containing valuable minerals is not hindered by the sections in chapter 4, if “particular circumstances” (särskilda skäl) apply. This is another vague and unclear expression. In sum, only the provision related to the protection of the Nature 2000 area enjoys, in principle, a strict protection. Here, a specific permit is required for all measures that may cause “significant impacts” upon the environment within a specific Nature 2000 area, subject to the provisions in chapter 7 of the Code\(^\text{2723}\).

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\(^\text{2720}\) I have above argued that the reindeer husbandry as a national interest shows distinct features in contrast to the other protected interests in chapter 3. The right to carry out reindeer husbandry has its basis in a recognised customary reindeer herding right to the area in question. Hence, due to commenced or finalised litigations, the classification of areas important for the reindeer husbandry may be more complex than for other national interests. Again, this uniqueness reinforces the notion of the *sui generis* nature of the reindeer herding right. See further in 9.2.3.3.

\(^\text{2721}\) See further in subsection 9.2.3.1.

\(^\text{2722}\) See here the case Vedabron, referred to above in subsection 9.2.3.1.

\(^\text{2723}\) See further in subsection 9.3.2.
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As a summation of the legal implication of the resource management provisions, in most situations the provisions allow a large margin of appreciation for decision-makers. This was partly intentional as the provisions were to be applied for diverging situations: Nonetheless, the legal text has been criticised for being too wide and general. This regards particularly the expressions “to the extent possible”, “significant damage” and “significant interference”. Since the legal text is vague and broad, the meaning of the provisions is rather to be found in the preparatory works. In fact, this legislative technique, to legislate through preparatory works, is not without critique.

Generally, it may even be so that the legal text becomes directly misleading where the statements of the meaning behind a certain provision in the preparatory works are stretched beyond the textual comprehension, but this is not the normal situation. A common problem is rather that the legal text and preparatory works largely are compatible, but the full interpretation of a provision cannot be obtained without the preparatory works. For ordinary people a provision may, hence, be comprehended as mysterious, since preparatory works often are difficult to get hold of, if not trained as a lawyer. Many persons that apply the natural resource management provisions are not lawyers by profession, which means that given the unclear legal text, the interpretation and legal application becomes even more unpredictable. Of course, decisions may be appealed, but not all are.

Regardless of the imperfective character of the legislation, the provisions must nevertheless be applied. The diverging interests within the reindeer herding area, however, make balancing such interests difficult and unclear. Hence, the provisions do not adequately ensure a sustainable use of the reindeer herding area. The large span of the undetermined outcome must be seen as a considerable deficit. Even if the natural resource management provisions are applied with respect to, for instance, comprehensive plans, the crucial outcome of the provisions lies on a case by case basis with respect to granting permits. Such important decisions should instead be taken on a different, more strategic level, preferably in an environmental planning process. Furthermore, the non-legally binding classification of national interests by sector authorities looses its purpose and edge as a national planning instrument when the classification becomes inflationary. For instance, the Environmental Protection Agency has classified a third of the country as of national interest with respect to nature conservation interests and protection of cultural assets or recreation (ch. 3 s. 6)2725. Thus, it is not unlikely that courts in the near future will reject a classification in single cases.

With a lack of legally binding Municipal or regional plan instruments, at a minimum, the natural resource management provisions in chapters 3 and 4 should be strengthened. They are essential with respect to the creation and amendment of plans, including the non-binding comprehensive plan, as well as the granting of permits. One possible solution would be to include a new provision in chapter 4 that explicitly protects certain areas of essential importance for reindeer husbandry, such as calving grounds, migration routes, and some parts of the

2725 See further in subsection 9.2.3.2.
winter pasture areas. An additional requirement could state that activities and measures that infringe upon the enjoyment of the reindeer herding right are allowed only where certain permission has been granted by the Saami Parliament, including preconditions to be satisfied before permission may be allowed\textsuperscript{2726}. Such a suggested provision should also encompass the obligation to consult with the affected Saami village.

Nevertheless, even if this suggestion is theoretically possible, it would not fit well in the present system in chapter 4, with its emphasis on nature and cultural interests alone. Moreover, if the general exception in chapter 4 section 1 were to apply, exploitation could still be allowed, for instance, in the name of “local industry”, diminishing the protection. New employment opportunities are important in many densely populated Municipalities. Additionally, it would be difficult to delimit the relevant pasture areas for each Saami village and, at the same time, easily explain the demarcations in a legal text\textsuperscript{2727}. Another possible solution would be to strengthen reindeer husbandry as a national interest, much like the present situation for total defence interests in the balancing provision (ch. 3 s. 10).

A third solution would be to lift the balancing of national interest in chapter 3 to a more strategic level.\textsuperscript{2728} To avoid the inflation of national interests pointed out by various sector authorities, the Government could be authorised in the Code to balance the diverging interests in regulations. This balancing should be based upon the classification by sector authorities, but the Government should be required to prioritise between competing national interests within the same geographical area. However, given the many conflicting interests in the reindeer herding area, there is a risk that the reindeer herding right will not be sufficiently protected, at least without explicit guidance from general principles stating the specific status of the reindeer herding Saami. Nevertheless, those suggestions would be better than the contemporary, unclear situation regarding the balancing provision in chapter 3 section 10.

However, a far better solution in the long run would be the establishment of a new regional system of environmental planning, with binding planning instruments, applicable to the reindeer herding area. The specific characters of the area have been emphasised above. Such legislation is justified by environmental protection reasons, the interests of the Saami, and the protection of the enjoyment of the reindeer herding right. Hence, I see a need for strategic and comprehensive regional planning, similar to the New Zealand environmental planning system, that includes a balancing of interests in more detail and that takes into account cumulative environmental effects\textsuperscript{2729}. In such a planning structure, reindeer husbandry interests may also be better considered and accommodated where needed. In this way, both environmental objectives and accommodation or

\textsuperscript{2726} This suggestion is generally in line with some suggested articles in the draft version of the Nordic Saami Convention. See Nordisk samekonvensjon. Utkast fra finsk-norsk-svensk-samisk ekspertgruppe. Avgitt 26. oktober 2005. See particularly articles 16 & 35-36. My suggestion should also be in line with the transfer of certain authority and power to the Saami Parliament by the County Administrative Boards and the Swedish Board of Agriculture. See Prop. 2005/06:86.

\textsuperscript{2727} It might be solved by references to maps held available at the Saami Parliament and County Administrative Boards.


\textsuperscript{2729} I will return to the environmental planning system under the RMA below.
protection of the enjoyment of the reindeer herding right may be promoted. Drafting of such legislation naturally requires much consideration and rethinking. Nevertheless, the benefits should outweigh the problems.

For an example in a Nordic context, Norway has recently issued a much debated regional legislation, the new Finnmark Act, although it is not as such an environmental planning legislation. The Act combines issues of land and natural resource management with recognition of Saami customary rights and other aspects of the Saami culture. The Act became effective in July, 2006. With its enactment, all public land in Finnmark County (fylke) was transferred to a specific body (Finnmarkseidendommen) with local representatives, which will manage the assets. Although it is not as such a Saami legislation, the Finnmark Act provides a greater opportunity for local residents to determine land and natural resource use issues. For instance, priority is given to local harvesting, such as hunting and fishing. Land and resource management are, however, subject to other relevant legislation. Reindeer husbandry is still regulated under the specific reindeer herding legislation. Importantly, the Act recognises that there may be specific Saami customary rights in certain areas, either as limited rights or as ownership of land, which the legal system previously has not acknowledged. Linked to the legislation, there is a Finnmark Commission, with the purpose of analysing whether such rights exist subject to national law, and a special appeal court (Utmarksdomstolen) devoted to solving legal disputes regarding the existence of customary rights. The decision from this court can be appealed to the Norwegian Supreme Court.

It is now time to recall briefly the environmental planning that exists under the New Zealand RMA. It has two main features of relevance here. First, the planning is intermingled with recognition of Maori cultural values with respect to resource management, allowing a comprehensive consultation process where the Maori are singled out as a group from the rest of the population. However, this is mainly a result to the partnership-like relationship inherent in the Waitangi Treaty. I have explained above how the notion of colonisation has influenced the law in both New Zealand and Canada. Secondly, the planning system is built upon a three-tier framework, where the government has an overarching responsibility. The provisions and the different planning instruments secure a vertical integration of the three levels. Nevertheless, substantial freedom is left to the regional and local governments, although they are required to comply with higher planning instruments. They are also required to implement and enforce the RMA, the promotion of a sustainable management of natural and physical resources.

Of essential importance are the regional policy statement and the regional plan. Even if the regional plans are not explicitly mandatory (but implicitly) and may apply to parts of the region, they are of profound importance for resource

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2730 See further at http://www.finnmarksloven.no (viewed at 2006-07-27), which also provides information in English. Note, however, that this type of legislation is almost unthinkable in Sweden, as the Saami are not a majority in any of the Municipalities.

2731 See further at ibid.

2732 See further in subsections 4.2.3.1 & 4.2.3.3.

2733 See section 10.2.

2734 Note, also, that a similar system with vertical integration exists in Denmark. See Pettersson, Maria (2006) Legal Preconditions for Wind Power Implementation in Sweden and Denmark, chapter 5 with references.

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management decisions under the RMA. The Minister for the Environment also has the authority to direct a regional council to prepare a regional plan if necessary. It is a comprehensive plan with more or less detailed rules supporting the compliance with the Act generally and superior planning instruments in particular. It normally includes hundreds of pages. In making rules, the regional council must have regard to actual and potential effects on the environment, including cumulative effects. The RMA is in the main focused on an effects-based approach. A sub-objective of the Act is to avoid, remedy or mitigate any adverse effects of activities on the environment.

Drafting and amending regional policy statements and plans are subject to wide-ranging public hearings and consultation with iwi authorities. Importantly, the regional plan and the inherent rules are linked to the permitting procedure. Certain activities in specific areas may already be prohibited in the plan, meaning that it is not even possible to apply for a consent (permit). The balancing of issues and interests, on a strategic level, has already been made. Additionally, there is a link to certain Maori customary activities. So-called “recognised customary activities”, related mainly to customary harvesting with connection to waters, are protected both in relation to the creation of rules when drafting and amending plans. Those activities are also protected in relation to granting of consents, if an activity is likely to have a significantly adverse effect upon the customary activity. As a result, there is also an interconnection of planning and resource management issues and Maori customary rights. On the whole, given the compulsory requirement of implementing all superior planning instruments, this system calls for a genuine environmental planning, since it is also linked to preconditions for the application of permits.

The system inherent in the RMA may, hence, then be a source of inspiration for specific Swedish legislation connected to the reindeer herding area. Regional environmental quality standards may, for instance, be implemented through binding regional plans and interrelated to the balancing of interests in the plan process. Ideally, the recommended new structure of the reindeer husbandry legislation, discussed in section 10.3, should be linked with the suggested regional planning statute, allowing for some integration of the legal issues. However, to what extent and in what manner must be further considered.

Another way of protecting the environment is, of course, through the provisions of area protection in chapter 7 of the Environmental Code. However, it is important to remember here that the function of these instruments is, in principle, aimed at preservation, not allowing sustainable uses of a particular area for reindeer husbandry, as one example. Chapter 7 includes a range of protection forms, but the most commonly used for this region are national parks, nature reserves and Natura 2000 areas. Generally, they may give a strong protection of sustainability objectives, depending upon the regulations attached to the designation of an area. Particularly, the Nature 2000 areas provide a rather stringent protection. However, a general problem vis-à-vis preservation of areas seems to be that the enjoyment of the reindeer herding right is strongly limited, at least with respect to national parks. It may be questioned whether limitations on, for instance, customary hunting and fishing rights for subsistence

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2735 See further in subsection 4.2.3.1.
2736 See further in subsection 4.2.3.3.
2737 See further in subsection 9.3.1.
are required for complying with the aim of preserving the area. There are few guarantees to secure continued enjoyment of customary rights, apart from a general balancing provision not well adapted to the unique situation of the Saami.2738 In contrast, the legislation related to national parks in New Zealand law explicitly allows Maori customary uses for food and cultural purposes, which are provided for mainly in the management plans. The continuance of the customary rights applies as long as plants and animals are not specially protected under other legislation.2739 The same seems to apply to existing aboriginal rights in Canadian law with respect to the doctrine of priority.2740

Another option in the Swedish context aimed at protecting the enjoyment of the reindeer herding right, but also indirectly the environment, would be through the new instrument “culture reserves”.2741 The culture reserve is aimed to preserve “valuable cultural landscapes” and permits the preservation of large areas, even not the whole reindeer herding area. Specific regulations may be designed to apply to the culture reserve, as with nature reserves. For instance, regulations may prohibit certain environmentally harmful activities, infrastructural developments and settlements. The regulation may also be designed to include a priority scheme for harvesting resources similar to the one established by the Supreme Court of Canada, where, for instance, Saami customary hunting and fishing for subsistence purposes have priority over harvesting by tourists.2742 In fact, the very first culture reserve in a Saami context has been designated in 2006 by the County Administrative Board of Västerbotten. It was opened with a ceremony in July.2743 The reserve is dominated by the Saami holy mountain, Atoklimpen (Aatoklimpoe), and the area is dotted with historical and cultural remains.

10.5 Consultation Obligations

Another implication from the comparison of the three laws regards the differences in legislation relating to consultation. Swedish law includes very few provisions on consultation requirements directly with the Saami.2744 A major difference is also the fact that Swedish law comprehends consultation as taking place with, for instance, a Municipality in the planning process or between an operator and an affected party in an EIA procedure, and not specifically between the State, including state authorities, and the Saami. In contrast, New Zealand and Canadian laws recognise that the Crown has consultation obligations toward Maori, First Nations, and Inuit. As said, Swedish law lacks this distinction. The explanation for this difference should chiefly relate to the implications of the recognised special relationship between the Maori/aboriginal people and the Crown. I have discussed this above in section 10.2.

2738 See further in subsection 9.3.2.
2739 See further in subsection 3.2.3.1.
2740 See further in subsection 6.4.5.3.
2741 See further in subsection 9.3.2.1.
2742 See further in subsection 6.4.5.3.
2743 See http://www.ac.lst.se/ (viewed at 2006-07-27).
2744 See further in subsection 9.5.
However, in the draft Nordic Saami Convention, there are a few articles that suggest direct consultation with Saami by State or State authorities. 2745 Hence, the basis of the articles seems, at least, to rest on an idea that States have a particular responsibility toward the Saami. If the Convention is eventually ratified, those provisions will become directly applicable, since it has been suggested that the entire Convention be applicable directly as national law. I generally support the draft Saami Convention, and particularly in relation to those consultation obligations. In both New Zealand and Canadian laws, consultation is seen as a key feature. In Aotearoa/New Zealand consultation is emphasised in the RMA, and in Canadian law the doctrine of fiduciary duties and the principle of the honour of the Crown give rise to consultation obligations for the Crown, and sometimes also a duty to accommodate detriments on aboriginal rights.2746 Consultation provides means for stressing indigenous concerns and knowledge with respect to environmental protection and resource management decisions. Consultation also enhances the understanding of customary activities and rights, which also makes it possible to accommodate detriments or infringements on the customary rights. Thus, it can be said that procedural rights, especially consultation obligations, support the protection of substantial, customary rights. In the context of international law, consultation, which is the right to participate in decision-making, and other procedural rights are commonly regarded as environmental rights2747. The so-called Aarhus Convention 2748 is an important convention in this respect, which, among other things, includes provisions for enhancing public participation. The preamble also emphasises, for instance that, in the field of the environment, improved access to information and participation in decision-making enhance the quality and the implementation of decisions.

In sum, I recommend that the Swedish legislature facilitate mandatory consultation related to resource management decisions between the State and the Saami on various levels, since it will indirectly promote both protection of Saami customary rights and environmental objectives. Additionally, given the many overlapping land uses within the reindeer herding area, a strengthening of “normal” consultation should also indirectly promote the sustainable use of the area. Mutual consultation obligations, where relevant, should apply between the husbandry and other businesses, foremost forestry2749, agriculture, and mining. This should minimise conflicts between different businesses, supporting a better understanding of the characteristics of the different businesses.

2746 See further in sections and subsections 4.4, 6.4.5.2, 6.4.5.3 & 6.5.
2749 There is a compulsory obligation to consult the Saami in the Forestry Act. See above in subsection 9.4.3.3.
10.6 Modern Agreements

In this thesis, I have included an analysis of modern agreements in relation to New Zealand law. Canadian jurisprudence also encompasses such agreements between aboriginal groups and the Crown, but it has not been examined here. Although the negotiations between the Crown and Maori tribes are made with regard to breaches of the Treaty of Waitangi, the settlements reached provide interesting links to the RMA and conservation legislation. The negotiation process takes several years and includes distinct stages. Once the main issues have finally been resolved, a deed is signed between the parties. This normally consists of a settlement with cash and small tracts of land. Comprehensive settlement legislation incorporates and enforces such agreements. In this way, settlement legislation is normally a part of the resource management legislation in Aotearoa/New Zealand. Once a settlement is final, no court or the Waitangi Tribunal has jurisdiction to try the matters settled. In this way, modern agreements, or Treaty settlements as comprehended in Aotearoa/New Zealand, not only remedy the country’s colonial past, but also provide for a larger participation in resource management decisions for specific Maori groups.

More recent settlements have provided for a larger role in resource management, such as improving iwi participation under the RMA and co-management arrangements, often of protected areas. Recognition of customary rights with respect to certain areas is also normally included in the package. With respect to the prominent Ngai Tahu settlement, the parties creatively designed new legal instruments, which improved the iwi’s role in resource management decisions affecting traditional iwi areas.2752

Hence, as an alternative to the normal limited results of litigation, modern agreements may be used as a means for remedying historical wrongdoings and enhancing procedural provisions with respect to Saami input in resource management, such as the management of protected areas within the reindeer herding area. However, it should be remembered that Treaty settlements in Aotearoa/New Zealand have been backed up by a comprehensive Tribunal report, a court case, or both. Sweden lacks such a specific Tribunal, leaving the Saami to resort exclusively to the normal court system. Note that the new Norwegian Finnmark Act established a specific Commission and an appeal court. Perhaps a similar system should be considered in Sweden as well to clarify the content of the different site specific rights. The Commission on Reindeer Pasture Boundaries (Gränsdragningskommisjonen) has instead suggested a body for examination and mediation of conflicts that should result in a formal agreement2754. However, given the complex historical issues, I see that a tribunal or specific court would better solve Saami rights claims and related issues. There is a need for a specific body or court that may thoroughly investigate Saami issues, at least for a fixed period of time, apart from normal courts.

Nevertheless, negotiation is theoretically possible, even if not yet used in Sweden or the other Nordic countries. A settlement may concern small or large

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2750 See further in chapter 5.
2751 See further in section 5.1.
2752 See further in subsection 5.3.2.
2753 See above section 10.4.
areas and does not need to include return of lands, even though this is commonly one part of a settlement. Where lands cannot be returned, specific arrangements may be designed, as was done, for instance, in the Ngai Tahu settlement. Moreover, negotiations take place with small or large groups of indigenous people, which, in a Swedish context, should mean Saami villages or other specific Saami groups with connections to land. The Saami group need not necessarily be in the majority in the area, even though this generally should strengthen the Saami position in the negotiation process.

All the same, the larger Saami population may also enter into negotiations. Compare here the large fisheries settlement reached in Aoteoroa/New Zealand that concerned the allocation of fisheries resources\textsuperscript{2755}. For example, the hunting and fishing issues for Saami outside of the Saami village may be a matter that can be negotiated. The first legislation in 1886 linked all of the customary rights to the enjoyment of reindeer husbandry, leaving other Saami without recognised customary hunting and fishing rights. Another issue that concerns the majority of the Saami villages regards the state administrative system linked to the hunting and fishing rights inherent in the reindeer herding right.

10.7 Closing Discussion

The comparison included in this thesis has confirmed both similarities and differences with respect to Swedish law. I have been surprised to see so many similarities regarding the nature of the customary rights, but perhaps this is not that strange, as their roots lie outside of written law, now linked to old proprietary doctrines. One large difference concerns the lack of legal recognition of the colonisation process in the Swedish legal system. This seems to have implications on other areas of the law, such as consultation and managing rights for the indigenous people. In short, it has implications regarding the extent to which the legal issues on customary rights and indigenous management of resources are interrelated with the environmental law in general. Hence, even if issues related to

\textsuperscript{2755} See further in section 5.2.

\textsuperscript{2756} A few examples of agreements between authorities and private companies exist. There exist so-called conservation agreements (naturvårdsavtal) in the context of forestry, and in relation to nature reserves, there are opportunities for the authorities to make formal arrangements with private land owners on, for instance, the management of certain areas.
customary rights and sustainability coexist in all three countries, the laws are different.

An essential question is, thus, how the diverse and conflicting land uses, which also comprise traditional land uses by indigenous peoples, should be regulated legally. As should be evident from my discussions _de lege ferenda_ above, I prefer a larger integration of the recognition of Saami customary rights and environmental law in the region. I also prefer what could be called a regionalisation of the legislation, at least with respect to planning law. In fact, the present Reindeer Husbandry Act is already a regional statute. The reason for the emphasised integration is quite simple, the issues coexist and I argue that it promotes a sustainable use of the reindeer herding area. But, of course, it is necessary to link the various natural resources legislation and the Environmental Code to the regional planning system in order to secure sustainability objectives, allowing land use conflicts to be resolved on a higher level\(^\text{2757}\).

In relation to the aboriginal law and the underlying intent of the constitutional protection of existing aboriginal rights, there is a notion of reconciliation of both the relationship between the aboriginal peoples and the Crown, including the rest of the society, and a reconciliation of prior aboriginal occupancy with the Crown assertion of sovereignty. I find the concept of reconciliation appealing. To reconcile something, normally a dispute of some kind, is to find a way to make two or more ideas or situations agree with each other, when they actually seem to be in opposition\(^\text{2758}\). I have used the concept in the heading of this last chapter to emphasise my conclusions with respect to the analysis of Swedish law, to unite the two perspectives in this thesis, the environmental protection perspective and the rights perspective\(^\text{2759}\). Nevertheless, the integration must include both rights and obligations, since they are intermingled. They are two sides of the same coin. With respect to environmental protection, the right to use a resource includes a reciprocal duty, for instance, to secure future needs of the resource, a comprehension that is imbedded in the concept of sustainable development. The notion of rights and duties corresponds also to the relationship between the Saami, as an indigenous people, and the State. As the State has authority to regulate and decide issues which impact the Saami way of living, it should also mean a corresponding duty to act honourably in all situations involving Saami issues.

As a whole, this thesis has raised more questions than it has answered. My analysis has raised and clarified future research needs, for instance, in relation to the prerequisites attached to the doctrine of immemorial prescription and other ways of legally explaining the traditional Saami land uses. A more comprehensive analysis of modern agreements, including other countries, would also be interesting. Profound analyses of more limited parts of Swedish legislation are also called for, perhaps linked to my suggestions for regional environmental planning. Yet another research task would be different forms of co-management arrangements for promoting sustainability within the reindeer herding area. Evidently, in relation to sustainability issues, there is a need for a manageable

\(^{2757}\) There is also a need to amend certain aspects of the natural resources legislation to secure sustainability objectives better, which I have not developed here. The problems are raised with respect to the analysis of the legislation. See above in subsection 9.4.3.

\(^{2758}\) See, for instance, the Oxford Advanced Learners Dictionary.

\(^{2759}\) See further above in the preamble to chapter 1.
As a few closing words, I generally nourish a pragmatic comprehension of the law. In essence, I believe that, where there is a will, there is a way. With respect to the fact that the Saami are in a minority position, however, the political climate is difficult. Despite the complicated political context, the task of upholding Saami customary rights falls primarily on the Government and the courts. Nevertheless, past and new issues should be laid to rest once there is resolution.

system for pasture inventories, as well as further research on the environmental impact of the husbandry and other land uses within the reindeer husbandry area, also linked to the problems of air bound pollution and climate change. The lack of comprehensive knowledge is a disadvantage.

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