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The enhanced role of archaeological and historical research in court proceedings about Saami land rights

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Abstract

Within Swedish law, Saami land rights have been highly controversial since early in the 20th century. In case law, Saami land rights have been placed in the historical context, since it has been established that they are based on long-standing land use. This conclusion puts historical use of land at the very center of any judicial assessment. Herein, two lawsuits about Saami land rights, in which archeology has been used to validate pre-historic and historic land use are compared: the Härjedalen Case, initiated in 1991 and relating to winter grazing rights, and the Girjas Case about hunting and fishing rights. This article describes how archaeological and historical material has been interpreted within the lawsuits and analyzes the impact on the legal assessments. The comparison illustrates how it can be problematic to use archaeological arguments in court proceedings. Nevertheless, it is concluded that archaeology, as part of wider interdisciplinary research, may contribute knowledge about past land use, thus allowing the understanding of Saami land rights to evolve. Furthermore, how researchers within archeology and other disciplines could respond to the fact that the results of their work might be used outside academia and within the very different environment of judicial proceedings is discussed.

Keywords: Archaeology, Saami land rights, indigenous peoples' rights, the Girjas Case, customary rights

11.1 Introduction

The winters are long and the vegetation growing period is short in arctic areas. Under these circumstances, advanced and sophisticated subsistence strategies have developed over thousands of years (Bergman et al. 2008; Bergman et al. 2013; Raitio 2014). Traditional subsistence among the indigenous Saami has been based on fishing, hunting, plant gathering, and – eventually – reindeer herding (Bergman et al. 2013). Historically, Saami society was divided according to a *siida* system, meaning allocation of land, water, and natural resources between different groups, primarily based on kinships (Bergman et al. 2008). From the 16th century and onwards, the Swedish Crown encouraged settler penetration and colonization of the northern parts of the country, and from the 1750s this process completely changed the demographic situation in the area; the Saami is now a minority group within all municipalities (SOU 2006:14: 84–86). Through colonization and demarcation processes carried

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out by the Crown, forest lands became private property (Arell 1979: 16). These historical developments have led to a complex legal situation, and during the last century indigenous Saami in Sweden have claimed that they are holders of private land rights within Sápmi (the Saami homeland area) that should be fully recognized by the Swedish state.

The Swedish state's attitude towards Saami land rights has varied over time. Up until the 1890s, Saami land use was considered to be based on customary rights that would be protected in relation to other land use (Korpijaakko-Labba 1994: 464–468; Päiviö 2011: 250–251). However, at the beginning of the 20th century the state began to express the view that Saami land use was based on what was termed 'the Lapp privilege', meaning that the law was the foundation of the right to use land, and also that the state could regulate land use through new or amended legislation (SOU 2006:14: 387). The Saami opposed the state's position and claimed that they were holders of real property rights. Thus, the status of Saami land rights came to be under dispute for most of the 20th century.

In 1966, Saami representatives initiated court proceedings, known as the Taxed Mountains Case, claiming ownership before the Swedish state to specific high mountain areas in the county of Jämtland. In 1981 the Swedish Supreme Court rejected the claim of Saami ownership (NJA 1981:1). The judgement remains central since the Supreme Court made some important statements to clarify the legal status of Saami land rights. For instance, it was stated that Saami land use is based on the long-standing use of land, justified by 'immemorial prescription' (Sw: *urminnes hävd*), i.e., the continuous use of the land since 'time immemorial'. In 2011 the legal status of Saami land rights as property rights was confirmed in the Nordmaling Case, when the Supreme Court stated that winter grazing in the eastern coastal areas in the county of Västerbotten is based on the long-standing use of land, explained as customary rights (NJA 2011:109). Accordingly, it was clarified within the Swedish legal system that Saami land rights are private property rights based on the long-standing use of land. This conclusion puts the historical use of land at the very center of judicial assessments, which requires informed references to robust archaeological and historical material and a profound understanding of historic Saami land use.

Ever since the verdict in the Taxed Mountains Case of 1981, changes within the legislation to implement Saami land rights have been discussed. The Swedish government has set up several public inquiries to look into Saami policy (SOU 1989:41; SOU 1999:25; SOU 2001:101; SOU 2005:116; SOU 2006:14), and all have concluded that the Swedish legislation has deficiencies when it comes to the implementation of Saami land rights. For instance, it is not clear how Saami may use land and how these rights relate to other land rights. However, the proposals submitted to change legislation have not been adopted, mainly because of strong opposing interests. Forestry, mining, and energy production are important and powerful financial interests, and the strengthening of Saami land rights might have adverse effect on these industries. Consequently, politicians have not been willing to reform the legislation since the matter at stake is considered to be of such a delicate nature (Bengtsson & Torp 2012: 145–147).

Because of the political failure to enact amendments in legislation, the content and extent of Saami land rights has primarily been developed through case law. Together, the Taxed Mountains Case and the Nordmaling Case indicate that Saami can turn to the court system to force legal changes to Saami land rights (Brännström 2018b: 34). The Girjas Case, one of the lawsuits which will be described in this article, is the latest major legal action in which the meaning of Saami land rights has been examined at length, and the political failure to adopt legislation that is in accordance with the status of Saami land rights as property rights will probably lead to other court proceedings in the future. This development is also reinforced by changes in the legal culture. Legal positivism has been the most significant idea to have shaped Sweden's legal culture during the 20th century. Within legal positivism, legal arguments based on historical evidence have been considered of relatively minor importance. However, since the 1990s, Swedish legal culture has changed; historical perspectives and debates are increasingly being considered in the legal context (Modéer 2015: 39). Consequently, mature and

dispassionate historical deliberation is required as the courts seek to resolve legal problems in other ways than has previously been the norm.

Since there are few written sources originating from the Saami themselves (the Saami language largely being an oral medium until the late 20th century), Saami history has primarily been written by others. The existing sources are mostly public material and historical records produced by Swedish government representatives of various sorts. The limited knowledge about Saami lifestyle among the majority population and among public administrators has inevitably affected the quality of the written material that is available (SOU 2006:14: 291). In this situation, archaeology, history and other related disciplines can help to fill the gap with important insights into the historical preconditions upon which sits the development of the understanding of Saami land rights.

This article aims to describe how archeology has been used within two lawsuits about Saami land rights to validate historic land use: the Härjedalen Case (Court of Appeal for Southern Norrland 2002), initiated in 1991 in relation to winter grazing rights, and the Girjas Case (Swedish Supreme Court, Case no 853-18) about hunting and fishing rights. This article describes how archaeological material has been interpreted within the lawsuits and analyzes how this has affected the legal assessments. It describes the challenges connected with the use of archaeology within this type of legal proceeding. Nevertheless, the comparison shows how archaeology, as an intrinsic part of interdisciplinary research, may contribute knowledge about Saami land use during historical times, thus becoming a potentially crucial part of any judicial proceedings. To set the context of the lawsuits, the political and judicial backgrounds of the disputes are described. Thereafter, the archeological material that has been referred to by the parties is presented, together with the legal assessments of the courts. The comparison leads to a discussion about the relevance of archaeological and historical material within such court proceedings. Finally, the article discusses how archaeologists and other researchers could respond to the fact that the results of their work might be used within such processes in the future.

11.2 The Härjedalen Case

11.2.1 Background

This section describes the so-called Härjedalen Case, the first judicial proceedings about Saami land rights in which archaeological findings became a central part of the legal assessment. Härjedalen is situated in the southern part of Sapmi. In this area, Saami have lived side by side with others for a very long period of time. In Härjedalen there is a long history of discontent and opposition from land owners, politicians, and other actors against Saami reindeer herding. Towards the end of the 19th century the pressure increased on the Saami, who were seen as intruders on the land of the farmers. This was legitimized by the ‘advancement theory’ that was propagated by researchers at that time (Ojala 2009: 155; Rumar 2014: 25). Within archaeology, South Saami prehistory has been an especially controversial field of study (Ojala 2009: 141). This can partly be explained by the parallel land use of different groups over a long period of time.

In 1990, some 500 land owners and three forest companies took legal action against five samebyar (Sw: a *sameby* is a geographic area and a legal person that represents reindeer herding Saami) in Härjedalen (Handölsdalen, Idre, Mittådalen, Idre, and Tännäs samebyar). The question at stake was whether Saami reindeer herders had the right to graze reindeer on private forest land during the winters in the region of Härjedalen. Hence, this lawsuit addresses the question of whether land rights had been established at all. In 1992 the forest companies withdrew their claim after a settlement with the samebyar. Nevertheless, the private landowners continued to claim that the samebyar did not have any legal right to graze reindeer on their real estate.

11.2.2 Archaeology

Because of the legal arguments presented by the land owners and the samebyar, a central issue within the lawsuit was to examine who had used the land during historical times – farmers or nomadic Sami. This put issues about ethnicity on the agenda. A substantial amount of archaeological documentation was presented to the court. Within the lawsuit, two archaeologists acted as expert witnesses to interpret the archeological material. The land owners referred to professor Evert Baudou of Umeå University, and the samebyar referred to associate professor Inger Zachrisson of Uppsala University. Even before the lawsuit, Baudou and Inger Zachrisson had debated the character of the ethnic groups in the southern parts of Sápmi (Baudou 1988; Zachrisson 1988). The debate continued during the court proceedings and the two archaeologists presented divergent interpretations of the archeological material.

Baudou based his statement on a boundary hypothesis that he had developed about the emergence of an early Saami and early Nordic ethnicity in northern Sweden in the first millennium B.C., and the development of a cultural boundary between Upper Norrland and Middle Norrland, which he considered to have had an ethnic significance (Ojala 2009: 131–132). He held that an ethnic categorization had taken place, and that this implied the development of an early Saami ethnicity in the northern parts of Norrland and an early Nordic ethnicity in the more southern parts of Norrland. Consequently, according to Baudou, there were two major cultural areas in the Nordic countries. From around 800 BC, a cultural boundary formed through the northern parts of the provinces of Ångermanland and Jämtland. However, Baudou stressed that the early Saami and Nordic ethnicities in Norrland were not the same as today, but that the two populations had gradually transformed into the groups seen today. Baudou was of the opinion that the archaeological findings referred to in the Härjedalen Case could not be interpreted clearly as Saami or Nordic.

Zachrisson, on the other hand, interpreted the archaeological material in Härjedalen as being Sami. She considered that the ‘boundary hypothesis’ presented by Baudou was not well-founded. Instead, she interpreted the differences in the archaeological material north and south of the described boundary as differences *within* a Saami society (Ojala 2009: 157). Zachrisson argued that there were two different groups in Jämtland and Härjedalen during the Iron Age and early Middle Age: the Saami culture and a Nordic culture.

A central focus of discussion between the two archaeologists during the lawsuit was the site at Vivallen in the northwestern part of Härjedalen, with dated material from about AD 800–1200 (Ojala 2009: 157–158). Both Zachrisson and Baudou considered the site to be Saami because of the burial customs and the finds, which showed great similarities with the material from Saami sites further north in Sápmi. Zachrisson argued that there was Saami continuity at Vivallen since pre-historic times. According to her, one should assume continuity until the opposite could be proven. Baudou, on the other hand, considered Vivallen to be an isolated phenomenon, without predecessors, contemporaries, or followers. According to Baudou, Vivallen represented a Saami group that had moved from northern Norrland during a period of expansion in that area. He considered that it was not possible to prove continuous Saami presence in Härjedalen.

11.2.3 The legal assessments of the courts

In 1996, Sveg District Court delivered its verdict. It was stated that the burden of proof of the fact that reindeer grazing rights had been established fell on the five samebyar. The Court found that the samebyar had not succeeded in presenting sufficient evidence to prove that they had established a right to graze reindeer on the disputed property. It was concluded that the various interpretations of the archaeologists made it impossible for the court to determine who had used the land during historical times.

The samebyar appealed against the judgement, and in 2002 the Court of Appeal for Southern Norrland came to the same conclusions as the court of first instance. In the Court of Appeal, the discussion about Vivallen continued. Zachrisson submitted additional documentation based in new archaeological fieldwork. The Court of Appeal concluded that, based on the material presented, it was not possible to deduce that Saami had been reindeer herding as nomads in Härjedalen at the end of the 16th century and during the first decades of the 17th century. Instead, the court focused on the period from the 17th century onwards as a starting point for the judicial assessment, primarily basing its deliberation on written governmental sources.

The samebyar appealed against the verdict to the Swedish Supreme Court, which decided not to permit a review (Supreme Court decision 2004). Thus, the judgement of the Court of Appeal became legally binding and it was thereby concluded that there are no established grazing rights on the affected real estate.

11.3 The Girjas Case

11.3.1 Background

Girjas sameby is situated in the northwestern part of Sweden, where the Saami have lived alone long before the modern nation-state of Sweden was established. There are basically no permanent agrarian settlements (Sw: *nybyggen*) within the disputed area, which is located in the high mountains. During the colonization process in the end of the 19th century, the mountain areas to the west of the so-called 'cultivation border' (Sw: *odlingsgränsen*), which is centre stage in the Girjas Case, were regarded as 'Crown lands' (Sw: *kronomarker*). When the first Reindeer Herding Act was implemented in 1886, it was stated that these Crown lands were for exclusive use of the Saami (Prop. 1886:2). Furthermore, the Saami were described as holders of hunting and fishing rights, including the right to free subsistence and commercial hunting.

Through the first Reindeer Herding Act of 1886, a system to administer licenses to hunt and fish in the high mountain area west of the Cultivation border was established. Because the Crown considered that the Saami were not capable or organized enough to operate the licensing system, it was decided that the County Administrations would run it (Prop. 1883: 105). Nevertheless, the licensing system was clearly designed to take account of Saami land use. The Saami were consulted about licenses, and licenses were not granted if the Saami would suffer harm from them. Furthermore, revenues were forwarded to the affected Saami reindeer herding community and to the Saami Fund, which was a special fund to support Saami needs (Reindeer Herding Act of 1886, Section 22). Licenses to hunt and fish were primarily given to locals and people from within the region. Ever since the establishment of the licensing system, the Swedish government has administered the licenses that deal with fishing and small-game resources. Today the license system is regulated in the Reindeer Herding Act Section 32 (SFS 1971:437, Prop. 1971:51).

The Swedish government did not, before or during the Taxed Mountains Court Case, explicitly claim any hunting and fishing rights, only the authority to administer these rights (Bengtsson 2010: 80). However, a turning point came in a government bill regarding hunting in 1987, wherein the state was described as the land owner with hunting and fishing rights (Prop. 1986/87:58: 45). The interest in hunting and fishing for recreation had increased considerably during the previous few decades, and there were powerful lobbying organizations that had argued for a change to open up further the licensing system that governed these activities (Arnesson-Westerdal 1994: 23–28). A few years later, in 1993, a statement about the state's fishing and hunting rights as the land owner led to

changes within the legal framework to allow everybody to hunt and fish within the high mountain area through the licensing system (Prop. 1992/93:32: 133–152). Consequently, the present institutional arrangements of the licensing system were implemented. In the preparatory works that preceded the changes in the legal framework it was announced that this amendment would better utilize the hunting resources and that it would provide quality recreation experiences to landless hunters at a low price (Prop. 1992/93:32: 133). Today, small-game hunting and fishing provides recreation for local people, other Swedish citizens, and also, since 2007, individuals from countries that are members of the European Union.

Saami representatives protested strongly against the claim to land ownership made by the Swedish state and the changes in the legal framework to open up land for more recreational hunting and fishing, and ever since 1993 the debate about hunting and fishing within the high mountain areas has been intense. In 2003 a commission of inquiry was appointed by the government to propose a new institutional arrangement to administer the licensing system. In 2005 a common pool administration was proposed (SOU 2005:116: 226–247). However, no amendments to the legal framework have been carried out because of strong opposing interests.

From 1999 onwards, the Nordmaling Case, moved slowly through the Swedish court system (NJA 2011:109). As already mentioned, the issue at stake was whether the reindeer herding Saami had the right to graze reindeer during winter on private land in the coastal area. This was the first time that the Saami succeeded in persuading a court that they had established land rights within the Swedish legal system. The result of the Nordmaling Case indicated that the Saami *could* use court proceedings to successfully advance legal positions. With this example in mind, Girjas sameby took legal action against the Swedish state in 2009. The lawsuit was supported by the Swedish National Union of Reindeer Herders (Sw: *Svenska Samernas Riksförbund, SSR*) and all of the samebyar that are members of the Union. Girjas sameby is situated within the county of Norrbotten in the northern parts of Sápmi. Within the sameby, 18 families live and work with reindeer. About 120 individuals are members of the sameby and about 400 have some kind of a social relation to it.

The core of the lawsuit is who is the holder of the hunting and fishing rights in the high mountain area within the territory of Girjas sameby west of the Cultivation border, and as a consequence should decide on licenses allocated for small-game hunting and fishing. The question at stake is thereby not whether land rights have been established as in the Härjedalen Case, rather who has the right to decide issues about the land that follows from the land rights. Girjas sameby argues that the use of land over a long period of time by the Saami has led to them having exclusive hunting and fishing rights. The Swedish state denies that Girjas sameby has exclusive hunting and fishing rights and claims that the state itself, as the land owner, is the superior holder of these rights. The state argues that Saami land use before the middle of the 18th century was fragmented and merely opportunistic in character.

Since both parties have presented very diverse and divergent descriptions of the area's historical development, a key issue of contention is how the Saami utilized the landscape and the resources during pre-historic and historic times. Indeed, assessing evidence about historic land use has become a central part of the court's deliberations, and both parties have referred to an extensive array of documentary material and called expert witnesses from different scholarly disciplines: academics from the fields of history, law, archaeology and forest history. Furthermore, the parties have referred to many written sources, primarily material authored by government representatives such as public investigations, government bills, court protocols, and church records. Since an inspection of the area during the hearing was not allowed, Girjas sameby referred to photographs of the area taken during the late 19th century and thereafter, and also a movie filmed from a helicopter ride over the area with audio commentary from one of the elders of the sameby. Furthermore, members of Girjas sameby have been heard during the proceedings.

11.3.2 Archaeology

When it comes to archaeological material, the Swedish state referred to a written statement from an archaeologist who answered five questions raised by the lawyers representing the state. In the written statement the archaeologist commented on a number of central prerequisites in the lawsuit. However, the archaeologist had not previously undertaken any research either within the northern parts of Sweden or within any Saami context. During the hearing, the Swedish state actually withdrew an oral submission from the archaeologist. The District Court commented on the fact that the archaeologist had not undertaken any research within a Saami context, and concluded that his statement had no value as evidence. Consequently, the court concluded that the archaeologist did not have a profound understanding of historical Saami land use. In the end, the information from the archaeologist was discarded and did not in any way determine the outcome of the case.

In contrast, Girjas sameby referred to a number of archaeological finds that had been recorded within the area: various hearths, storage constructions, cooking pits, pit fall systems, dwelling hut foundations (commonly referred to as Stallo-foundations), and other ancient monuments were all adduced as evidence. However, it should be noted that the archeological finds within the specific area are relatively few and far between since national archaeological surveys have been carried out only to a limited degree (Liedgren and Hedman 2005). In addition, Girjas sameby had no funding to perform archeological field-work of their own. Instead, the sameby referred to archaeological studies performed in other nearby high mountain areas, for example work carried out in Sirkas sameby by Mulk (1994).

Since the Swedish state had disputed the description of Saami land use presented by Girjas sameby, locating more material about historical land use was crucial. Therefore, Girjas sameby referred to results from interdisciplinary research primarily carried out by the Institute for Arctic Landscape Research, INSARC, at the Silvermuseet in Arjeplog. Over the last 20 years or so, this institute has carried out research about the relationship between landscape and humans in the northern parts of Sweden which has led to new knowledge about historic Saami land use. Archaeology has been an important part of this interdisciplinary research together with forest history, ecology, and other related disciplines. The results have been published in international journals and tested and examined through the peer-review process. The research has undoubtedly contributed to the field, yielding new and original knowledge about how humans have used the northern landscapes and resources and how human use has affected these landscapes.

A courtroom is an adversarial forum where verbal arguments and other materials have to be presented so that members of the court can comprehend their significance. In this case, there was the added difficulty of presenting academic, and sometimes highly technical, material. Accordingly, Girjas sameby found that it was not sufficient simply to refer to a large number of peer-reviewed academic articles written in English. Instead, Professor Lars Östlund, Swedish University of Agricultural Science, an expert in forest history with a particular focus on ecosystems and human relations, wrote an expert report that described and summarized the conclusions of the academic research that was considered by the court. In addition, Professor Östlund was heard as an expert witness during the proceedings. During the hearing he described how archeology has been interpreted as an essential part of the interdisciplinary work carried out at INSARC.

11.3.3 The legal assessments of the courts

In February 2016, Gällivare District Court came to the conclusion that Girjas sameby is the holder of exclusive hunting and fishing rights within the area under consideration (Gällivare District Court 2016). As a consequence of this decision, the court stated that the Swedish state is not allowed to issue licenses to hunt and fish and that Girjas sameby can decide on licensing these rights without the consent of the state. The reasoning of the court reveals that the description of the characteristics of the landscape, such as the arctic environment and the historic land use, are fundamental parts of the

judicial assessment. As a starting point of the assessment, Gällivare District Court referred to the archaeological findings within the area and analyzed these in relation to archaeological findings in nearby areas where more detailed excavations have been carried out. The state had argued that the Stållo sites were of Nordic origin. The court discussed the interpretation of these sites and found that they must be regarded as evidence of Saami land use. Furthermore, the court referred to the description of the landscape and findings of pre-historic and historic land use presented by Professor Östlund. The court concluded that the material referred to by Girjas sameby proved that Saami were present in the area since at least the 6th century AD. Furthermore, based on the material presented, it was concluded that there have been Saami settlements and activities within the area from the 16th century onwards. The court concluded that there is good evidence for the fact that Saami have lived in the area in one way or another at least during the last thousand years. This was the starting point of the legal assessment.

It should be noted that the legal assessment of Gällivare District Court differs from previous interpretations of the concept of ‘immemorial prescription’. Previously it has been argued that property rights can be established if the land has been used for approximately 90 years and that this has not been contested by others. With this approach, the relevant period for the judicial assessment starts in the present day and counts 90 years back in time to determine whether land rights have been established (e.g. SOU 2006:14: 389–390; NJA 2011:109 p. 12). However, Gällivare District Court made a completely novel interpretation of the legal concept of ‘immemorial prescription’, since it was concluded that the Saami had lived in the area for at least a thousand years. After this conclusion, the court considered the period in which the Swedish state had started to act in the area and whether the state thereby had established land rights. This type of reasoning, starting within pre-historical land use leading up to the present situation, clearly puts archaeological material at the forefront of the judicial assessment.

The Swedish state appealed against the verdict. In 2018, the Court of Appeal for Northern Sweden pronounced its judgment, concluding that Girjas sameby has exclusive hunting and fishing rights in relation to the state within the relevant area. The Court of Appeal seems to view the archaeological and historical material in the same way as the District Court. The starting point of the legal assessment here was also based on pre-historic land use. Nevertheless, the Court of Appeal also found that the present licensing system, governed by the state, is in compliance with the constitutional protection of property and not discriminatory. Accordingly, the conclusion was that the Swedish state can continue to decide on the granting of licenses to others. The judgment raises several questions about the meaning of property rights within the Swedish property law system (Brännström 2018a: 39–47).

Both Girjas sameby and the Swedish state appealed against the verdict of the Court of Appeal. The Swedish Supreme Court decided to permit a review, and the hearing took place in Stockholm in September and October 2019. The verdict is expected at the end of 2019.

11.4 Discussion and conclusions

As described above, the understanding of Saami land rights is still incomplete and the legal situation is complex. Consequently, there is a need to develop further our understanding of these rights. Since it has been determined through case law that Saami land rights are based on the long-standing use of land, the historic land use of areas will certainly be relevant in any future court proceedings. An aspect that makes archaeology even more interesting for the implementation of Saami land rights is the recent reinterpretation of the legal concept of ‘immemorial prescription’ in the Girjas Case. As

described above, the relevant period of time to establish this type of land rights has previously been defined as approximately 90 years, starting in the present day and counting back in time. However, in a radical departure from precedent, the first and second instances of court analysis in the Girjas Case have considered pre-colonial land use as the starting point of the judicial assessment. If the Swedish Supreme Court upholds this way of evaluating Saami land rights, the relevance of archaeology and history will increase in the future. Against this background it is relevant to reflect upon the use of archaeology and history within the Härjedalen Case and the Girjas Case.

Initially, it can be concluded that the Härjedalen Case illustrates that there was no common understanding of the historical prerequisites for the assessment of Saami land rights at that time (Ojala 2009: 156). The various arguments and historical developments presented by the parties in the Girjas Case reveals that this is still the case. Thus, one task of the courts is to determine the historical prerequisites that will be the starting point of the judicial assessment. However, judges have little knowledge about Saami history, and the courts have no independent archaeologists or historians upon whom they can call as a matter of routine to settle disputed points, as is the case for example with technical issues. Consequently, the courts are dependent on the evidence referred to by the parties and on interpretations of the material referred to from specialists drawn from within archaeology, history and other disciplines.

However, the Härjedalen Case clearly illustrates the challenges that can occur when archaeological material is referred to within judicial proceedings (Ojala 2009: 156). It reveals how an ongoing archaeological discussion about South Saami prehistory was brought into court proceedings. As described above, the two archaeologists that were called as experts had very divergent understandings of important ethnic and cultural factors, which clearly affected their interpretations. The various interpretations indicate that the scientific debate about South Saami land use was starting to develop at the time of the proceedings. The debate has subsequently progressed on to a more nuanced approach to Saami cultural expressions and ethnic signals within the South Saami area (Hansen and Olsen 2006: 107). Accordingly, it would have been better if the academic debate about the interpretations of the archaeological material had taken place within academia. Instead, the discussion took place within a lawsuit, and a court room is not an arena for constructive academic discussion and nuanced debate about interpretations. Within civil lawsuits another type of debate takes place, in which one of the parties has the burden of proof and must provide evidence enough to support the claims raised. Consequently, clear positions from the experts are expected. It is also a part of the civil law process to point out weaknesses in the evidence presented by the opposing party. Therefore the attorneys ask questions to highlight shortcomings presented by the opposing council. In the Härjedalen Case this seems to have led to fixed positions between the archaeologists that did not facilitate constructive academic debate.

The Härjedalen Case also illustrates that there is a risk that the researchers and the court may contribute to maintaining historical perceptions and ideas that are far from fixed, and in fact are under debate and ripe for re-evaluation in the future. This seems to have been the case with the impact of the 'advancement theory' (No: *fremrykningsteorien*) in the Härjedalen Case. The 'advancement theory' was the most significant theme within South Saami historical studies from the beginning of the 20th century (Ojala 2009: 143). This theory presumed that Saami had advanced from the north into more southerly areas where farmers were already living from the 17th century onwards. The theory was first presented by the Norwegian historian Yngvar Nielsen in 1891, and it was supported by archaeological and historical researchers in Sweden right up until the 1990s. However, the theory has been increasingly disputed (Rumar 2014: 25). Baudou had, earlier in his career, supported this theory (Baudou 1974), and some of his statements in the Härjedalen Case seems to have traces of these thoughts. Rumar has concluded that the assessment of the Court of Appeal was made based on this theory, and has criticized this as a misinterpretation of the historical situation during the Härjedalen Case (Rumar 2014: 39).

The comparison between the Härjedalen Case and the Girjas Case also illustrates that the various historical developments in different areas within Sapmi will lead to diverse foundations for legal proceedings. It can be concluded that the historical situation in Härjedalen is complicated, since farmers and nomadic Saami have lived in the same areas for a long time. This clearly affected the interpretations of the archaeological material within the Härjedalen Case. In this respect, the Girjas Case concerns an area where the Saami context is clearer, which makes the interpretations of the archaeological and historical material easier when it comes to the question of who used the land.

Another difference is that the archaeological material used in the Härjedalen Case was not interpreted within a broader interdisciplinary framework. In the Girjas Case, on the other hand, the interpretation of the archaeological material was a part of interdisciplinary research, in this case primarily allied with ecology and forest history. This approach allows broader conclusions to be drawn that are relevant for the legal assessment, for instance regarding the character of Saami land use. Accordingly, the Girjas Case exemplifies how archaeology and its various related disciplines can augment our knowledge about Saami land use, which will ultimately assist in the developing understanding and implementation of Saami land rights.

In addition, the Girjas Case highlights how the interpretation of archaeological and historical material requires a developed contextual understanding, with consideration of basic factors such as topography, seasonal changes, and weather conditions. Large areas of land are needed for subsistence in this climatic environment and resources must be collected at many diverse sites. Furthermore, social, cultural, economic, and religious aspects should be considered (Bergman et al. 2008). In this respect, the Girjas Case exemplifies how archaeological findings have to be analyzed in relation to settlement patterns and characteristics of mobility.

How can archaeologists and other researchers relate to the ongoing judicial proceedings concerning the implementation of Saami land rights? The legal analyses of the Härjedalen Case and the Girjas Case do raise questions to reflect on in relation to the unsolved issues regarding Saami land rights. Some general thoughts will, therefore, be shared below, in the hope that this encourages further discussions.

Reflections on this topic must be seen in light of the inherently complex relationship between research and indigenous peoples. There has been strong criticism about the way research has been used in relation to indigenous peoples since such research has sometimes been a part of the colonization process itself (Smith 2012); indigenous peoples themselves have seldom decided the questions to ask and what material to use. Often, indigenous peoples have been regarded as little more than the exotic objects of research, and the unique world views and knowledge cultures *within* these groups have not been considered at all. In addition, some academic research has maintained methodological and theoretical approaches that have been grounded in paradigms that are simply not accepted anymore. This has also been the case with archaeology (Ojala 2019). These are contentious aspects of academic work that researchers studying within a Saami context should be aware of. Basically, it is necessary to reflect on one's position and consider the performance of the study. Who am I who formulates the questions? What must I be aware of and take into account to perform the study and to analyze the material? How can I relate to the colonial context? It has been suggested that researchers working in this type of contested field familiarize themselves with the Saami context and Saami perspectives, and that they are aware of the wider discussions about appropriate methodologies in this sensitive area (Smith 2012). Of course, this must not violate the scientific integrity of the researcher.

It is also suggested that researchers carrying out studies that relates to Saami contexts are aware of the fact that their results may be used as an integral part of the sort of legal proceedings that have been described herein. Considering the legal issues that still remain unresolved, it is likely that questions about who used the land and how intensively will be asked. For example: Who lived in the area? What was the character of the land use? How have various groups related to each other? Is a find of Sámi

origin? These are all complex questions, especially when they touch upon the issue of ethnicity (Jones 1997). Even if this type of question cannot always be answered with certainty, it is suggested that the researcher reflect on them, and, if possible, describe, explain, and interpret the archaeological and historical material with these potential types of question in mind. In addition, if the scientific debate is still developing, it is suggested that the researcher understands the importance of explaining this ongoing process to the court. It is also suggested that the researcher consider whether there are specific issues that need to be analyzed on the basis that they can contribute to legal development. Hopefully, the type of self-reflection suggested above will make researchers better prepared in the future to enter the potentially testing arena of a highly charged courtroom.¹

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1. "After this chapter was completed and had passed through the peer review process, the Swedish Supreme Court released its verdict concerning the Girjas Case on January 23, 2020: Case No. T 853–18. The Supreme Court based their reasoning on the long-term use of the Sámi that have lived in the relevant area and concluded that they had exclusive hunting and fishing rights by 1750 and that the Swedish state thereafter had not acted in any way to revoke these rights. Hence, the Supreme Court concluded that Girjas sameby has the right to decide on the granting of licenses to others. The Supreme Court also stated that ILO Convention no. 169 is legally binding in Sweden when it comes to Sámi customary rights, although the convention has not been formally ratified. The verdict of the Supreme Court must be regarded as a milestone within the Swedish legal system when it comes to Sámi land rights."

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