Jindal Global Law Review (2023) 14(2):217–240
https://doi.org/10.1007/s41020-023-00211-1

ARTICLE

Cultural expertise in Sami land rights litigation: Epistemic strategies in the *Girjas* and *Fosen* cases

Peter Johansson[1] · **Johan Karlsson Schaffer**[1] · **Sara Johansson Lopez**[2] · **Sofie Palm**[3] · **Camille Parguel**[1] · **Ina Sandin**[4]

Accepted: 30 November 2023 / Published online: 5 January 2024

Abstract

How do parties mobilise cultural expertise in Indigenous rights litigation in Scandinavia? Recently, Sami groups have litigated to claim Indigenous rights to land and natural resources, winning some remarkable victories in the Supreme Courts of Norway and Sweden. In this paper, we draw on socio-legal mobilisation theory to analyse the epistemic strategies of Sami litigants and their adversaries in two recent landmark Supreme Court cases on Indigenous rights to usage of land: the 2020 *Girjas* case in Sweden and the 2021 *Fosen* case in Norway. Conceptualising cultural expertise as a strategic framing contest, we analyse how the parties struggled over the epistemic basis of the respective case by legitimating their claims to cultural knowledge, drawing on academic research, and discrediting their opponents' epistemic claims. Our findings suggest that in both cases, Sami claimants successfully established an epistemic basis where their traditional, experiential knowledge combined with independent academic expertise effectively challenged the knowledge claims of their adversaries. Yet, both cases also demonstrate how the linkage between Sami Indigeneity and reindeer husbandry in the national law of both countries excludes non-reindeer herding Sami persons from the Indigenous rights affirmed by the courts.

Keywords Cultural expertise · Epistemic strategies · Indigenous rights litigation · Legal mobilisation · Sami land rights

✉ Johan Karlsson Schaffer
j.k.schaffer@gu.se

[1] University of Gothenburg, Gothenburg, Sweden

[2] Linnæus University, Växjö, Sweden

[3] Gothenburg, Sweden

[4] Lund, Sweden

1 Introduction

How do parties mobilise cultural expertise in Indigenous rights litigation in Scandinavia? In recent decades, groups of Sami[1]—an Indigenous people traditionally inhabiting Sápmi, a region across the borders of Norway, Sweden, Finland, and Russia—have litigated repeatedly to claim Indigenous rights to land and natural resources.[2] While this legal mobilisation has led to some notable courtroom victories, it has also demonstrated how legal opportunities set by the state shape what types of claims Sami litigants can successfully pursue in court, and that even successful landmark judgments rarely decisively settle the underlying societal conflicts.

In this paper, we analyse how parties employ cultural expertise in litigation over Sami Indigenous rights. The concept of cultural expertise has helped scholars to analyse the role of social scientists in legal disputes, how academic knowledge contributes to constructing legal truth in judicial and legal processes, and how the 'ways of knowing' of academic research interfaces with the different purposes of establishing facts and knowledge in formal legal processes.[3]

Whereas existing socio-legal research has chiefly studied how academics participate as experts in judicial processes, we seek to shift the focus to how the litigants themselves make knowledge claims, draw on academic research, and challenge the epistemic claims of their opponents. Drawing on socio-legal mobilisation theory, we conceptualise cultural expertise as a strategic framing contest where parties strategise to establish an epistemic foundation favourable to their cause. We analyse two recent landmark Supreme Court cases on Indigenous rights to usage of land; the 2020 *Girjas* judgment[4] in Sweden and the 2021 *Fosen* judgment[5] in Norway. These judgments overturned government decisions and policies and had far-reaching consequences beyond the disputes per se. By analysing how the epistemic contestation in the cases evolved, as documented in court judgments and media reports, we show how parties struggled over the epistemic basis for the respective case and what role cultural expertise and Sami traditional and experienced knowledge had within it.

This paper makes theoretical and empirical contributions. Rather than focusing on the 'epistemological divide' between the Court's truth-finding and academic scholarship, we direct attention to how parties to Indigenous rights litigation strategise to establish a cultural knowledge-base favourable to their cause. In addition, by providing an original analysis of epistemic contestation in recent Indigenous rights

[1] Sami, Sámi, and Saami are all spelling variants to denominate the Indigenous people in focus for this paper. Sami organisations, EU, the Nordic States, and researchers use different variants sometimes interchangeably. We have opted to use the easiest spelling variant for this paper.

[2] Johan Karlsson Schaffer, Peter Johansson, and Hugo Fritjofsson, 'Litigating Land Rights in Sápmi: Indigenous Legal Mobilization in Finland, Norway and Sweden' (*ECPR General Conference, Innsbruck*, 2022); Johan Karlsson Schaffer, Malcolm Langford, and Mikael Rask Madsen, 'An Unlikely Rights Revolution: Courts, Rights and Legal Mobilization in Scandinavia Since the 1970s' (2024) 42 *Nordic Journal of Human Rights* 1.

[3] Livia Holden, 'Cultural Expertise and Socio-Legal Studies: Introduction', in Austin Sarat and Livia Holden (eds), *Cultural Expertise and Socio-Legal Studies:Special Issue* (Emerald Publishing Limited 2019).

[4] *Girjasdomen* NJA 2020 s. 3 (Supreme Court of Sweden 2020).

[5] *Fosen-dommen* HR-2021-1975-S (Supreme Court of Norway 2021).

litigation in Scandinavia, our paper bridges doctrinal scholarship on Sami law with an expanding research agenda on Sami ethnopolitical mobilisation.

The paper is structured as follows: In Section 2, we situate the two cases in the context of increasing litigation on Indigenous rights in Sweden and Norway. In Section 3, we theorise cultural expertise by drawing on legal mobilisation theory to conceptualise litigation as a strategic framing contest, where parties seek to legitimate their own cultural expertise and discredit that of their opponents. We also present our analytical approach and data. In Section 4, we analyse the epistemic contestation on cultural expertise in each case, before we reflect on the findings. Section 5 concludes with issues for further research.

2 Context: Litigation on Indigenous rights in Sápmi

For more than a century, the Sami people have struggled for recognition and self-determination. Initially, Sami ethnopolitical mobilisation in the Nordic countries was mainly reactive to state oppression but became more pro-active and organised in the 1950s.[6] Over time, the Nordic states' policies towards the Sami have shifted from treating the Sami as a minority, with additional rights compared to other minorities, to legally recognising the Sami as a people in the Constitution, although self-determination is still under consideration, and government-appointed truth and reconciliation commissions are ongoing.[7] In all three countries, Sami parliaments offer formal venues for participation and representation, but their degree of self-government and decision-making power varies.[8] To date, Norway has gone furthest in recognising Sami Indigenous rights. In 1990, Norway ratified the Indigenous and Tribal Peoples Convention (ILO 169)[9] and has incorporated a wider range of international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), into national legislation.[10] All three countries support the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[11]

As part of the ethno-political mobilisation for Indigenous rights and recognition, Sami groups pioneered litigation strategies to challenge state policies in Norway and

[6] Patrik Lantto, 'Tiden börjar på nytt: En analys av samernas etnopolitiska mobilisering i Sverige 1900–1950' (Academic Thesis, Umeå universitet 2000); Patrik Lantto, *Att göra sin stämma hörd: Svenska Samernas Riksförbund, samerörelsen och svensk samepolitik 1950–1962* (Kulturgräns norr [Umeå universitet] 2003).

[7] Peter Johansson, 'Indigenous Self-Determination in the Nordic Countries: The Sami, and the Inuit of Greenland' in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples' Rights* (Routledge 2016).

[8] Ulf Mörkenstam, Andreas Gottardis, and Hans Ingvar Roth, *The Swedish Sámi Parliament: A Challenged Recognition?* (EUI Robert Schuman Centre for Advanced Study 2012).

[9] 'Ratifications for Norway' (*International Labour Organization*). https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102785. Accessed 27 October 2023.

[10] 'Lov om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven)' (LOV-1999-05-21-30 § (1999), para. 2. https://lovdata.no/dokument/NL/lov/1999-05-21-30. Accessed 27 November 2023.

[11] United Nations, General Assembly Official Records, 61st Session: 107th Plenary Meeting, United Nations, New York, 13 September 2007, UN Doc A /61/PV.107.

Sweden.[12] A series of cases concerning hydropower dams culminated with the Norwegian Supreme Court's 1982 landmark judgment in the *Alta* case, which the claimants lost, but which triggered a comprehensive overhaul of state policies toward the Sami.[13] Other series of cases involve Sami claims to ownership of land such as the 1981 *Taxed Mountains* judgment in Sweden,[14] and cases concerning usufructuary rights on private land, e.g. the 2011 Swedish Supreme Court judgment in the *Nordmaling* case.[15] More recent cases concern rights claims to fishing, hunting, and natural resources, e.g. the *Nesseby* and *Girjas* trials in Norway and Sweden respectively,[16] as well as legal mobilisation against extractive and energy industries, e.g. the *Fosen* case.[17]

In these lawsuits, reindeer herding—a traditional Sami livelihood—has been a focal point. In both Norway and Sweden, specific legislation[18] regulates reindeer herding rights, which includes rights to hunting, fishing, and use of natural materials such as firewood, and the regulated reindeer grazing area covering 40–50 per cent of the mainland. The respective Reindeer Husbandry Acts stipulate that the right to pursue reindeer husbandry in traditional Sami areas is an exclusive prerogative of the Sami people based on prescription from time immemorial.[19] However, only those Sami persons who are members of a reindeer herding community (RHC; in Sweden *sameby*; in Norway *reinbeitedistrikt*), a form of private economic association, can exercise these rights.[20] Thus, reindeer husbandry has become a linchpin in the legal recognition of Sami Indigeneity, yet in practice, a majority of Sami have no access to these rights.

The *Girjas* and *Fosen* cases are the most recent major lawsuits in the ongoing legal struggle for Indigenous land rights in Sweden and Norway respectively. In the *Girjas* case, Girjas RHC filed a civil lawsuit against the state in 2009 to have its exclusive right to hunting and fishing in the land it uses for reindeer grazing recognised, as well as the exclusive right to grant such rights in the area. In 2020, the Supreme Court of Sweden ruled in favour of the RHC.[21] In the *Fosen* case, groups within Fosen RHC challenged the concession for Europe's largest onshore wind turbine park on the Fosen peninsula in mid-Norway. In 2021, the Supreme Court of Norway declared the licensing decision invalid for failing to consider the impacts of the wind turbines on reindeer herding, thus violating the right to culture of the Sami

[12] Schaffer, Johansson, and Fritjofsson, 'Litigating Land Rights in Sápmi' (n 2).

[13] *Alta-saken* Rt. 1982 s. 241 (Supreme Court of Norway 1982).

[14] *Skattefjällsdomen* NJA 1981 s. 1 (Supreme Court of Sweden 1981) [1981]

[15] *Nordmalingdomen* NJA 2011 s. 109 (Supreme Court of Sweden).

[16] *Nessebydommen* HR-2018-456-P (Supreme Court of Norway 2018); *Girjasdomen* (n 4).

[17] *Fosen-dommen* (n 5).

[18] Rennäringslag, SFS 1971:437 § (1971). https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/rennaringslag-1971437_sfs-1971-437/. Accessed 26 November 2023; Lov om reindrift 2007 (LOV-2007-06-15-40). https://lovdata.no/dokument/NL/lov/2007-06-15-40. Accessed 26 November 2023.

[19] 'Rennäringslag' (n 18) para. 1; 'Lov om reindrift' (n 18) para. 4.

[20] 'Rennäringslag' (n 18) para. 1; 'Lov om reindrift' (n 18) para. 9.

[21] *Girjasdomen* (n 4).

under Article 27 of the ICCPR.[22] These landmark Supreme Court cases, exposing the gap between Indigenous rights and state practices in Sweden and Norway have prompted legal scholars to analyse their doctrinal significance.[23] However, little research has focused on how the parties have mobilised and contested claims to cultural expertise and knowledge, which is the focus of our analysis.

3 Cultural expertise and strategic legitimation

To theorise the epistemic strategies that parties employ in litigation on Sami Indigenous rights, we draw on legal mobilisation theory and socio-legal approaches to cultural expertise in litigation. Specifically, we focus on how the litigants seek to legitimate their own claims to knowledge and to delegitimate the claims of their opponents. Thus, we assume that (de)legitimation practices—i.e., attempts to establish one's preferred frame as legitimate and discredit the opponent's—are essential to the epistemic strategies groups employ in Indigenous rights litigation.

The concept of cultural expertise seeks to capture the involvement of (social) scientists in legal disputes when providing academic expert opinions about cultural practices. Cultural expertise denotes 'the use of socio-legal and cultural knowledge for assisting the resolution of conflicts and the claim of rights in court and out-of-court'[24] and an emerging line of socio-legal research has analysed how social sciences contribute to constructing 'legal truth' in 'legal process, policymaking and out-of-court settlements'.[25]

Existing literature on cultural expertise has focused on how academics participate as experts in various legal processes, how courts interpret and value such knowledge, and the epistemic and ethical challenges such expert participation entails.[26] A

[22] *Fosen-dommen* (n 5).

[23] Bertil Bengtsson, 'Girjas-Domen' (2021) 1 *Juridisk Tidskrift* 172; Jakob Heidbrink, 'Sedvanans betydelse i modern förmögenhetsrätt' (2020) 105(9) *Svensk Juristtidning* 770; Christina Allard and Malin Brännström, 'Girjas Reindeer Herding Community v. Sweden: Analysing the Merits of the Girjas Case' (2021) 12 *Arctic Review on Law and Politics* 56; Eivind Torp, 'Rättsliga följder av HD:s dom i Girjasmålet' (2021) 106(10) *Svensk Juristtidning* 921; Else Grete Broderstad, 'Om departemental politisk spagat og folkerettens kulturvern' (2022) 1 *Tidsskrift for utmarksforskning* 10; Inge Lorange Backer, 'Fosen-dommen: Prosessuelle og forvaltningsrettslige sider' (2022) 61(5) *Lov og Rett* 281; Berit Svensli Solseth and John Egil Bergem, 'Etterfølgende ugyldighet?' (2022) 61(4) *Lov og Rett* 267; Carola Lingaas, 'Wind Farms in Indigenous Areas: The Fosen (Norway) and the Lake Turkana Wind Project (Kenya) Cases', (*Opinio Juris*, 15 December 2021). http://opiniojuris.org/2021/12/15/wind-farms-in-indigenous-areas-the-fosen-norway-and-the-lake-turkana-wind-project-kenya-cases/. Accessed 26 November 2023; Øyvind Ravna, 'SP artikkel 27 og norsk urfolksrett etter Fosen-dommen' (2022) 61(7) *Lov og Rett* 440.

[24] Livia Holden, 'Cultural Expertise and the Legal Professions' (2021) 11 *Naveiñ Reet: Nordic Journal of Law and Social Research* 7.

[25] Holden, 'Cultural Expertise and Socio-Legal Studies' (n 3).

[26] ibid; Taina Cooke, 'From Invisible to Visible: Locating "Cultural Expertise" in the Law Courts of Two Finnish Cities' in Sarat and Holden (eds), *Cultural Expertise and Socio-Legal Studies* (n 3); Annika Rabo, 'Cultural Expertise in Sweden: A History of Its Use' (2019) 8(3) *Laws* 22; Hermine C Wiersinga, 'The Judge and the Anthropologist' (2022) 11 *Naveiñ Reet: Nordic Journal of Law and Social Research* 151.

key premise is the 'epistemological divide' between the law and the fields of expertise entering legal processes.[27] Scholars have analysed how ways of establishing knowledge in judicial systems interface with the standards of knowledge production and political engagement in academia.[28] A takeaway from this literature is that both law and (social) science have partially overlapping objectives as knowledge-generating institutions, but 'fact-making serves different functions in these two settings' and operate by different validity criteria.[29]

When courts assess Indigenous identities and determine their legal protection, they often rely on cultural expertise provided by anthropologists. Existing literature has explored how anthropological expertise contributes to creating legal categories defining Indigeneity, which set both opportunities and limitations for Indigenous litigants,[30] and provides a 'legal-anthropological knowledge' base on which the court evaluates and adjudicates claims for Indigenous identity and rights.[31] Anthropological expertise may thus contribute to the 'essentialisation' or 'simplification' of Indigeneity in the form of 'strategic essentialism', as essentialist categories may be better apprehended by the law. Such essentialisation to fit legal categories of Indigeneity may enhance chances of a courtroom victory but entails the risks of constraining the agency of the collectives they describe or pressing Indigenous lifestyles into an artificial mould of 'traditional' versus 'modern'.[32] Sometimes, legal experts also act as cultural experts; for example, judges on the Supreme Administrative Court of Finland analysed testimonies to assess who belongs to the Indigenous Sami people.[33]

In this paper, instead of focusing on the epistemological divide between judicial fact-finding and academic expertise, we approach cultural expertise from the perspective of legal mobilisation. Legal mobilisation entails that an agent purposively

[27] Christopher A Loperena, 'Adjudicating Indigeneity: Anthropological Testimony in the Inter-American Court of Human Rights' (2020) 122(3) *American Anthropologist* 595.

[28] Kamari M Clarke, 'Toward Reflexivity in the Anthropology of Expertise and Law' (2020) 122(3) *American Anthropologist* 584; Sheila Jasanoff, 'Law's Knowledge: Science for Justice in Legal Settings' (2005) 95 *American Journal of Public Health* S49.

[29] Jasanoff, 'Law's Knowledge' (n 28).

[30] Maria Sapignoli, 'Indigeneity and the Expert: Negotiating Identity in the Case of the Central Kalahari Game Reserve' in Michael Freeman and David Napier (eds), *Law and Anthropology: Current Legal Issues* (2nd Vol, Oxford University Press 2009); Maria Sapignoli, '"Bushmen" in the Law: Evidence and Identity in Botswana's High Court' (2017) 40(2) *PoLAR: Political and Legal Anthropology Review* 210.

[31] Libardo José Ariza, 'Legal Indigeneity: Knowledge, Legal Discourse and the Construction of Indigenous Identity in Colombia' (2020) 27(4) *Identities* 403; cf. Paul Burke, 'The Anthropology of Indigenous Australia and Native Title Claims' in Marie-Claire Foblets, et al., (eds), *The Oxford Handbook of Law and Anthropology* (Oxford University Press 2021).

[32] Marie-Catherine Petersmann, 'Contested Indigeneity and Traditionality in Environmental Litigation: The Politics of Expertise in Regional Human Rights Courts' (2021) 21(1) *Human Rights Law Review* 132; Olaf Zenker, 'Anthropology on Trial: Exploring the Laws of Anthropological Expertise' (2016) 12(3) *International Journal of Law in Context* 293.

[33] Reetta Toivanen, 'Protecting Indigenous Identities? An Example of Cultural Expertise on Sámi Identity' (2022) 54(2–3) *Legal Pluralism and Critical Social Analysis* 210, 219.

uses the law by invoking a formal institutional mechanism.[34] Approaching cultural expertise as legal mobilisation invites us to theorise how litigants—and their counsels, allies, and adversaries—employ and contest claims to cultural knowledge and expertise in their litigation. In sum, we regard cultural expertise as a discursive struggle in which adversarial litigants (and their supporters and audiences) strategically seek to establish an epistemic basis that will justify their preferred legal outcome.

As an analytical framework, we direct attention to how parties mobilise cultural expertise in terms of *legitimation* and *delegitimation* strategies.[35] Research on legitimacy contestation in global governance has suggested the twin concept of (de)legitimation as practices through which an agent seeks to enhance or challenge relevant audiences' beliefs in the legitimate authority of an institution.[36] Similarly, ideational approaches to policy making suggest the dual strategies of *grafting* and *discrediting* to conceptualise how policy entrepreneurs seeking public policy reform need to *both* justify their own position by strategically and selectively deploying expert knowledge *and* dispute the ideas and expertise underpinning rival positions.[37] Thus, analysing cultural expertise in terms of (de)legitimation, we conceptualise litigation as a *strategic framing contest*, where 'contestants manipulate, strategise, and fight to have their frame accepted as the dominant narrative'[38] and focus on how litigants seek to assert the epistemic validity of their own cause while undermining that of their opponent.

In court litigation, legal and discursive opportunities shape how parties can engage in (de)legitimating framing contests. First, the parties' epistemic contest plays out within a legal opportunity structure[39]—an institutional context that sets boundaries for the epistemic claims and counterclaims they can make. Such institutions consist of both substantive laws (e.g., laws defining Indigenous rights) and procedural rules and regulations, which regulate how parties and the court can and shall call witnesses, appoint experts, rely on various forms of evidence, admit third-party interventions, etc. Second, the strategic framing contest takes place in relation to audiences. In litigation, the primary audience the parties address is the court. However, their claims-making also resonates with external audiences, such

[34] Emilio Lehoucq and Whitney K Taylor, 'Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?' (2020) 45(1) *Law & Social Inquiry* 166.

[35] All italicised words that are not quotes from a source or names/titles in the original language in the text are emphases added by the authors.

[36] Magdalena Bexell, et al., 'The Politics of Legitimation and Delegitimation in Global Governance: A Theoretical Framework' in Magdalena Bexell, Kristina Jönsson, and Anders Uhlin (eds), *Legitimation and Delegitimation in Global Governance* (Oxford University Press 2022).

[37] Gregg Bucken-Knapp, Johan Karlsson Schaffer, and Pia Levin, 'Comrades, Push the Red Button! Banning the Purchase of Sexual Services in Sweden but Not Finland' in Samantha Majic and Carisa Showden (eds), *Power Plays: Rethinking the Politics of Sex Work* (University of Minnesota Press 2014); Gregg Bucken-Knapp and Johan Karlsson, 'Prostitution Policy Reform and the Causal Role of Ideas: A Comparative Study of Policy Making in the Nordic Countries' (2008) 110 *Statsvetenskaplig Tidskrift* 59.

[38] Arjen Boin, Paul 't Hart, and Allan McConnell, 'Crisis Exploitation: Political and Policy Impacts of Framing Contests' (2009) 16(1) *Journal of European Public Policy* 81.

[39] Chris Hilson, 'New Social Movements: The Role of Legal Opportunity' (2002) 9(2) *Journal of European Public Policy* 238.

as policymakers, stakeholders, and the general public. Parties may cater to such external audiences deliberately, believing (correctly or not) the court (deliberately or unconsciously) might consider how other powerful actors will react to its decisions, but audiences also have an agency of their own, so the interaction may be dynamic.[40] Therefore, the epistemic contest over cultural expertise extends outside of the in-court process, and involves contestation in 'the court of public opinion', i.e., debates in the broader public sphere. Like the legal opportunity structure, this wider discursive opportunity structure mediates how agents can reach out with their claims in the public sphere.[41]

3.1 Analytical strategy and data

Our analysis focuses on the *Fosen* and *Girjas* court processes. Both cases involved Sami RHCs challenging laws and government decisions by claiming Indigenous rights to land usage for traditional Sami livelihoods. However, the cases are also dissimilar in many ways, including the matter of the legal dispute, the frameworks set by the national legal systems, and the parties involved. Analysing the two cases, our aim is not causal inference (i.e., we do not compare seeking to isolate causes explaining the outcomes or what determined the parties' strategies), but rather to identify epistemic strategies used by parties in recent Indigenous rights litigation in Scandinavia.

Seeking to capture the struggles over expertise on cultural knowledge as they played out both in the courtroom and in the 'court of public opinion', we use both court judgments and media reports to analyse (de)legitimation strategies in the two cases. Beyond purely legal reasoning, the text of the judgment contains valuable information about epistemic strategies, e.g., the witnesses and experts called by the parties, as well as other sources of expertise, such as academic research, technical reports, and public inquiry commission reports. However, since a court judgment only summarises the claims and testimonies brought by the parties, it cannot inform us about how parties, witnesses and experts phrased their statements, nor about how counsels interviewed them on the stand. It provides only a condensed, mediated summary of the proceedings, styled in the genre of judicial writing. Thus, to supplement our analysis of court judgments, we rely on mass media coverage, public debate, and statements by case parties, third parties, and others engaging with the case. Journalists followed both cases daily, reporting on courtroom deliberations and interviewing participants. Thus, media reports provide a source not only to the broader debate, but also to what happened in court. Moreover, by traversing the boundary between inside and outside court, expert witnesses become commentators on the public debate in the media, a space that leaves more room for politicised

[40] Bexell, et al., 'The Politics of Legitimation and Delegitimation in Global Governance' (n 36).

[41] Bart Cammaerts, 'Protest Logics and the Mediation Opportunity Structure' (2012) 27(2) *European Journal of Communication* 117; Ruud Koopmans, 'Movements and Media: Selection Processes and Evolutionary Dynamics in the Public Sphere' (2004) 33(3/4) *Theory and Society* 367.

claims.[42] Thus, considering the media arena as an extension of the court allows us to identify and analyse the epistemic strategies of the different parties more easily.

4 Tracing epistemic strategies in the *Girjas* and *Fosen* cases

4.1 The *Girjas* process

When the Supreme Court of Sweden delivered its judgment on January 23, 2020, it concluded a long lawsuit on Sami hunting and fishing rights starting in 2009. However, the dispute had old roots. In 1993, parliament abolished the RHCs' exclusive right to hunt and fish on state owned lands above the cultivation limit.[43] RHCs and the newly established Sami Parliament opposed this reform. In 2005, a public inquiry commission proposed a new form of shared administration of hunting and fishing on Sami traditional lands. Dissatisfied with the proposal, *Sámiid Riikkaseatvi* (*Svenska samernas riksförbund*, SSR), a Sami interest organisation for reindeer herding, decided to take legal action against the state since lobbying efforts had proven fruitless. In 2008, SSR strategically selected Girjas RHC as the plaintiff because the historical conditions in the Girjas area made it a strong case.[44]

In May 2009, Girjas RHC filed a civil lawsuit against the state in Gällivare District Court with three primary claims: (1) that Girjas RHC had an exclusive right to hunting and fishing in the area it used for reindeer grazing based on (a) the Reindeer Husbandry Act, (b) the status of the Sami as an Indigenous people, and (c) Sami use of land since time immemorial (*urminnes hävd*) and/or customary law; (2) that the state had no right to grant fishing and hunting rights in the area; and (3) that the RHC had the right to grant such rights in the area without state consent. The State disputed all three claims, maintaining the state, as landowner, had hunting and fishing rights in the area and could therefore also grant those rights.[45] Ruling in favour of Girjas RHC on all three accounts, the District Court found that Girjas RHC had proven an exclusive right to hunting and fishing in the area based on prescription from time immemorial; that the State had failed to prove any such rights in the area; and that therefore, Girjas RHC had an exclusive right to grant hunting and fishing rights in the area.[46] The State appealed the judgement.

In the Court of Appeal for Upper Norrland, both parties presented the same claims and evidence as in the District Court. The Appellate Court found that the

[42] Cynthia Nixon, et al., 'Mediated Visibility and Public Environmental Litigation: The Interplay between inside and Outside Court during Environmental Conflict in Australia' (2021) 10(2) *Laws* 35, 8–9.

[43] *Girjasdomen* (n 4) 29–30.

[44] Jenny Wik-Karlsson, 'Sammanfattning avseende pågående process om jakt/fiske' (*Svenska Samernas Riksförbund*). https://www.sapmi.se/vart-arbete/juridik/renbetesmal/girjas/sammanfattning-girjas/. Accessed 18 October 2022.

[45] As 'the state' had many roles in this case, for clarity, we will capitalise 'the State' when referring to its role as a party in the litigation and use lower-case when referring to the state and government generally.

[46] *T 323-09* (Gällivare District Court 2016).

State had failed to prove it had hunting and fishing rights in the area and therefore had no right to grant such rights, and that Girjas RHC had hunting and fishing rights in the area based on the Reindeer Husbandry Act. However, contrary to the District Court, the Appellate Court concluded that the RHC had not proven an exclusive right to hunting and fishing in the area based on prescription form time immemorial or customary law, nor that the RHC had an exclusive right to grant hunting and fishing rights. Consequently, the judgement indistinctly ruled that the State had no right to grant hunting and fishing rights in the area, and Girjas RHC did not have the right to grant such rights without state approval.[47] Both parties appealed the judgement to the Supreme Court.

In the Supreme Court, both parties reiterated their claims. Like the lower instances, the Supreme Court concluded that the state had no hunting and fishing rights in the area and hence no right to grant such rights. The Supreme Court also concluded that Girjas RHC held an exclusive right to hunting and fishing in the area as well as the right to grant such rights based on immemorial usage, thereby reaffirming the District Court judgment.[48]

Since 'immemorial usage' was a cornerstone in the RHC's argument for exclusive hunting and fishing rights, both parties presented competing interpretations of evidence on several themes pertaining to this concept, e.g., historical perspectives on the legal order, taxation, and demographics; archaeological, historical, and biological proof of land use; and state supremacy and colonisation. In the trial, the parties cited numerous legal and historical sources (in total 76), many of which both parties used to legitimate their claims and provided written expert opinions by scholars.

Besides written legal and historical documentation, the RHC called four witnesses and four experts. The four witnesses were all members of the RHC giving testimonies based on their knowledge of the land, nature, and circumstances regarding hunting and fishing in the area during the last century.[49] The four experts were academics: a historian, a legal historian, an ecologist, and a legal scholar. Their testimonies covered the history of hunting and fishing, taxation, ownership, land use, and demographics in Sápmi, as well as Sweden's international law obligations.[50] The State called two experts, both historians, who gave testimony on the history of Swedish–Sami relations, law and land, as well as ownership and property rights.[51] Oral testimony was only given in the District Court.

The Courts found it challenging to evaluate the evidentiary sources. The District Court expressed it was 'difficult […] to assess the scientific quality of a work and furthermore whether later research has resulted in the work's content being completely or partially out of date, or even incorrect', and noted the limited research on

[47] *T 214-16* (Court of Appeal for Upper Norrland 2018).

[48] *Girjasdomen* (n 4) 70–71.

[49] *T 323-09* (n 46) 112–127.

[50] ibid 127–167.

[51] ibid 167–193.

historical conditions in northern Sweden.[52] Similarly, the Supreme Court noted that research on the contested area was limited and that the last century's research on the history of northern Sweden showed 'significant differences of opinion on *i.a.* which rights the Sami have acquired throughout history.'[53] The difficulties the Courts faced in evaluating the evidence are illustrated by the Appellate Court's argument when it—unlike the District Court and, later, the Supreme Court—concluded that Girjas RHC did not have an exclusive right to hunting and fishing in the area based on immemorial usage. The Court argued that statements about the Sami having exclusive rights to hunting and fishing are only found in relatively recent academic works and public inquiry commission reports, having 'the character of conclusions on rather uncertain grounds.'[54]

The Courts referred to the statements by witnesses and experts to varying degrees in their judgements. The District Court referred repeatedly to the RHC witnesses' statements on *i.a.* family history as proof of Sami occupation in the area over centuries, the importance of hunting and fishing as a livelihood complementary to reindeer herding, and the oral tradition of the Sami.[55] Regarding the experts, the Court cited the ecologist's statement as proving the need of extensive land use in barren areas and the continued use of land by the Sami over centuries, and mainly referenced the historians when evaluating research and party arguments.[56] The Appellate Court did not explicitly refer to any statement from witnesses or experts, except the legal scholar testifying for the RHC on Sweden's obligations under international law.[57] The Supreme Court referred to the ecologist, whose statements proved Sami land use over the last millennium, and a witness from the RHC testifying on Sami land use over the last century and the importance of hunting and fishing for subsistence.[58]

The two parties pursued (de)legitimation strategies on three overall contentious issues: scholarly objectivity; the terminology to denote the Sami; and Sweden's legal obligations to the Sami as an Indigenous people. First, the District Court's summary indicates the two historians testifying for the RHC were explicitly asked if they had Sami heritage. Concerning the legal historian having a Sami background, he had to discuss 'the ethnic dilemma' and whether there are objectivity issues when researchers with a minority background do research on issues relating to the minority. The expert responded that ethnicity is only considered problematic when Sami study Sami-related issues, not the other way around, and that Sami researchers often meet

[52] ibid 202–203. All quotes from legal and media sources in sections 4.1 and 4.2 are translated to English from Swedish and Norwegian by the authors, with the exception of quotes from the Norwegian Supreme Court judgment in the *Fosen* case which is translated to English for information purposes by the Court.

[53] *Girjasdomen* (n 4) 53–54.

[54] *T 214-16* (n 47) 12.

[55] *T 323-09* (n 46) 193, 212, 252, 254.

[56] ibid 203, 208, 211, 216, 224, 228, 233, 253, 254.

[57] *T 214-16* (n 47) 14.

[58] *Girjasdomen* (n 4) 54, 58, 67.

this attitude.[59] Later, in the Appellate Court, the State's counsel claimed that the legal historian's research distorted historical facts—a claim which the RHC's counsel responded to was defamation.[60] Interviewed by *Sveriges Radio*'s Sami channel, the historian retorted the State sought 'to demonise' Sami researchers.[61] The dispute on objectivity and ethnicity continued outside of the courtroom, as Sami representatives expressed their hurt and frustration at the implication that Sami persons were unreliable experts on their own history.[62]

Moreover, the parties debated scholarly objectivity in relation to the testimonies of the historian experts. An expert called by the State claimed that most contemporary scholarship on the history of Northern Sweden employs colonial narratives and theories based on the colonisation of North America and Australia, and concluded that virtually all current research on Sami issues is biased.[63] In response, a historian called by the RHC argued that contemporary research often aims to capture issues and groups often ignored in earlier, state-centric historical research, and called the State's expert biased in favour of the state.[64] In the Appellate Court, the State disputed the objectivity of recent research, calling the RHC historian expert 'Sami friendly' and accusing another historian, whose research was cited both by the RHC and in the District Court judgment, of lacking objectivity, despite the State citing his research in its own argument.[65] Unsurprisingly, the two parties appropriated research in different ways. Whereas the State mainly relied on research and legal sources produced before the 1980s, the RHC mainly focused on more recent sources. However, since there are no written Sami historical records, both parties relied on historical documents produced by the state. The District Court and the Supreme Court acknowledged that these records often show bias in favour of the state and protect state interests, and both Courts therefore argued that the RHC, to some extent, was to be granted a reduced burden of proof.[66]

A second issue of contention was the State's use of the term *Lapp*—today considered a racial slur for Sami people. The State claimed the term did not refer to the Sami as an ethnic group; rather, it had historically been the official term for nomads, including also non-Sami.[67] The use of the term served to delegitimate the RHC's claim that historical sources referring to 'Lapps' affirmed the Sami's existence as an Indigenous people. The District Court made clear it would use the term Sami,

[59] *T 323-09* (n 46) 127, 141.

[60] David Rydenfalk, 'Staten ifrågasätter samebyns vittnen' (*Sveriges Radio*, 11 December 2017). https://sverigesradio.se/artikel/6839930. Accessed 9 November 2022.

[61] 'Päiviö svarar: Avhandlingen har genomgått sträng prövning' (*Sveriges Radio*, 11 December 2017). https://sverigesradio.se/artikel/6839944. Accessed 9 November 2022.

[62] David Rydenfalk, 'Sameråd ets president: Trist att man måste bemöta sådana saker' (*Sveriges Radio*, 12 December 2017). https://sverigesradio.se/artikel/6841344. Accessed 9 November 2022.

[63] *T 323-09* (n 46) 184–185.

[64] ibid 128, 136, 139, 140.

[65] Rydenfalk, 'Staten ifrågasätter samebyns vittnen' (n 60).

[66] *T 214-16* (n 47) 205–206; *Girjasdomen* (n 4) 51–53.

[67] *T 323-09* (n 46) 16, 55.

not *Lapp*, emphasising the Sami had preferred this term for almost a century.[68] The Appellate Court established that the distinction the State claimed was irrelevant to the case. Furthermore, the Court President stated that hurtful language had no place in a trial, and demanded that the State justify every use of the word *Lapp*.[69] In the Supreme Court, the State's counsel refrained from using the word, and instead employed the term *nomad*.[70] The RHC's counsel argued the new terminology still failed to appropriately recognise the Sami people and continued to diminish the Sami as a group.[71] Scholars, SSR, and human rights organisations condemned the State's terminology in the media.[72]

The third issue of contention was the status of the Sami as an Indigenous people and Sweden's obligations under international law. From the proceedings in the District Court to the Supreme Court, the State claimed that having not ratified ILO 169, Sweden had no international law obligations regarding special rights for the Sami. Stretching the argument even further, the State claimed in the District Court that Sweden had no international obligations towards the Sami 'whether they are an Indigenous people or not.'[73] In contrast, the RHC argued their exclusive right to hunting and fishing originated in its use of the land as an Indigenous people. Furthermore, the legal scholar testifying for the RHC underlined that Sweden was bound by customary international law regulations embodied in ILO 169 and UNDRIP, and was obliged to interpret national law in accordance with international law.[74]

The Courts dismissed the State's attempt to deny both the Indigenous status of the Sami people and Sweden's international law obligations towards them. The District Court chose not to interpret international law but referred repeatedly to the Sami as an Indigenous people, stating that this status implied a state duty to promote reindeer herding, hunting, and fishing as key elements of Sami culture.[75] The Appellate Court argued that although Sweden abided by the doctrine of dualism, international norms had to be considered when interpreting national law. However, the Court concluded that the RHC failed to prove that there were international obligations of relevance for the case to the extent that Swedish law could be overruled.[76] The Supreme

[68] ibid 194.

[69] *T 214-16* (n 47) 4; Sameradion & SVT Sápmi, 'Staten försökte klarlägga ordet lapp när Girjasrättegången startade' (*Sveriges Radio*, 6 November 2017). https://sverigesradio.se/artikel/6814656. Accessed 8 November 2022.

[70] Jörgen Heikki and Klara Lundmark, 'Lapp blir nomad i statens framställan' (*Sveriges Radio*, 10 September 2019). https://sverigesradio.se/artikel/7296928. Accessed 8 November 2022.

[71] Klara Lundmark, 'Girjas kritiserar statens språkbruk' (*Sveriges Radio*, 23 September 2019). https://sverigesradio.se/artikel/7303522. Accessed 8 November 2022.

[72] Christina Allard, et al., 'Rasbiologiskt språkbruk i statens rättsprocess mot sameby' (*Dagens Nyheter*, 11 June 2015). https://www.dn.se/debatt/rasbiologiskt-sprakbruk-i-statens-rattsprocess-mot-sameby/. Accessed 8 November 2022; Anna Lindenfors, et al., 'Statens argumentation i Girjasmålet chockerande' (*Svenska Dagbladet*, 29 October 2019). https://www.svd.se/a/EWXoAA/statens-argumentation-i-girjasmalet-chockerande. Accessed 8 November 2022.

[73] *T 323-09* (n 46) 16.

[74] ibid 161–167.

[75] ibid 193.

[76] *T 214-16* (n 47) 14.

Court explicitly stated that since 1977, the Parliament had repeatedly declared that the Sami are an Indigenous people. Furthermore, the Supreme Court referred to general principles of international law in ILO 169, ICCPR, and UNDRIP when discussing land use as well as relief of burden of proof for Indigenous peoples.[77] Moreover, human rights groups pointed out that the State's claim subverted the reconciliation policies put forth by the Swedish government in recent years.[78]

Following the Supreme Court judgment, the administration of hunting and fishing permits in the area was transferred from the County Administrative Board to Girjas RHC. However, the judgment ignited a debate on the consequences for Sami who are not members of a RHC.[79] Some Sami politicians feared the judgment would restrict the non-reindeer herding Sami's rights to hunting and fishing in the area even more than before,[80] and claimed the Court had prioritised the reindeer herding industry aspect before international law.[81] Human rights groups welcomed the ruling,[82] but hunting and fishing organisations voiced concerns,[83] as did political parties.[84] In 2021, the government appointed an inquiry commission to investigate how the judgment affected the Reindeer Husbandry Act and to clarify the rights of Sami people outside of the RHC system.[85] In 2022 Talma RHC filed a similar lawsuit against the state regarding hunting and fishing rights.[86]

To conclude, the complex process engaged with an extensive source material to (dis)prove 'immemorial usage'. The State chiefly relied on older legal and historical

[77] *Girjasdomen* (n 4) 42, 52.

[78] Jörgen Heikki, Klara Lundmark, and Karen Eira, 'Skarp kritik mot statens urfolksuttalande' (*Sveriges Radio*, 11 September 2019). https://sverigesradio.se/artikel/7297529. Accessed 8 November 2022.

[79] Jörgen Heikki and Johanna Tjäder, 'Frågan som delar Sametinget' (*Sveriges Radio*, 7 October 2020). https://sverigesradio.se/artikel/7569249. Accessed 9 November 2022.

[80] Soledad Cartagena, 'Vad händer efter domen där Girjas sameby vann över staten?' (*Amnesty Press*, 4 November 2020). https://www.amnestypress.se/artiklar/reportage/26645/vad-hander-efter-domen-dar-girjas-sameby-vann-over/. Accessed 14 October 2023.

[81] 'Flertalet politiker i debatten tyckte att Girjasdomen var bra' (*Sveriges Radio*, 3 February 2017). https://sverigesradio.se/artikel/6622810. Accessed 7 November 2022.

[82] Civil Rights Defenders, 'Civil Rights Defenders välkomnar Högsta domstolens dom i Girjasmålet' (31 January 2020). https://crd.org/sv/2020/01/31/civil-rights-defenders-valkomnar-hogsta-domstolens-dom-i-girjasmalet/. Accessed 7 November 2022; Johanna Westeson, 'Sverige: Amnesty välkomnar Högsta domstolens avgörande i Girjas-målet' (*Amnesty International*, 23 January 2020). https://www.amnesty.se/aktuellt/sverige-amnesty-valkomnar-hogsta-domstolens-avgorande-i-girjas-malet/. Accessed 14 October 2023.

[83] Svenska Jägareförbundet, 'Ett år har gått–fjälljakten efter Girjasdomen' (*Svenska Jägareförbundet*, 22 January 2021). https://jagareforbundet.se/aktuellt/forbundsnyheter/2021/01/ett-ar-har-gatt---fjalljakten-efter-girjasdomen/. Accessed 26 September 2022; Sportfiskarna, 'Bevara fjällfisket för alla' (19 April 2022). https://www.sportfiskarna.se/Om-oss/Aktuellt/ArticleID/12532/Bevara-fjällfisket-för-alla. Accessed 24 May 2022.

[84] Hans Sternlund, 'Åsikterna går i sär om samiska jakt- och fiskerättigheter' (*SVT Nyheter*, 7 September 2022). https://www.svt.se/nyheter/lokalt/norrbotten/partierna-drar-at-olika-hall-om-samiska-jakt-och-fiskerattigheter. Accessed 14 October 2023.

[85] Näringsdepartementet, En ny renskötsellagstiftning– det samiska folkets rätt till renskötsel, jakt och fiske 2021 [Dir. 2021:35].

[86] Andreas Söderlund, 'Talma Sameby Stämmer Staten Om Jakt- Och Fiskerätten' (*SVT Nyheter*, 20 May 2022). https://www.svt.se/nyheter/sapmi/talma-sameby-stammer-staten-om-jaktratten. Accessed 14 October 2023.

documents, often produced by the state, whereas the RHC drew on more recent, but also wider, expertise as well as local Sami knowledge. The *Girjas* process also highlights the state's complex role as a litigant when it engages in strategic framing contests. The use of derogatory terminology, questioning the objectivity of Sami or 'Sami-friendly' researchers, and denying Sweden's international law obligations as (de)legitimation strategies, was a surprising retreat from already established state positions. Furthermore, the case illustrated the dilemma following from the Swedish law linking Indigenous rights to the regulation of reindeer herding, whereby strengthening the Indigenous rights of an RHC may weaken the rights of other Sami.

4.2 The *Fosen* process

The *Fosen* case originated in a 2010 decision by the Norwegian Energy Regulatory Agency to license development of wind power and power lines on the Fosen peninsula, where Fovsen-Njaarke RHC held reindeer grazing rights. When several groups and individuals—including *Sør-Fosen sijte* and *Nord-Fosen siida* (two units within the RHC)—appealed the licence, the Ministry of Petroleum and Energy (MPE) affirmed the licence and expropriation of land and rights, conditioned on adjustments to accommodate for reindeer herding.

The judicial process started when the developers—partly state-owned Fosen Vind and state-owned Statnett—brought an appraisal action for measure of damages, where the RHC was among the defendants, while the RHC claimed the appraisal be ruled inadmissible, since the licence decision violated minorities' rights under ICCPR, Article 27, to enjoy their own culture.[87] In 2017, Inntrøndelag District Court found that the windfarm did not infringe on the possibilities for practicing reindeer herding enough to amount to a violation of Article 27, and that the appraisal was thus allowed.[88] Later, the Court made a discretionary assessment of the measure of damages, which granted the RHC compensation for the loss of pastures, feeding, extra work, and other expenses, amounting to NOK (Norwegian Krone) 19.6 million.[89]

Both sides appealed the assessment. The developers claimed the damages were too high. The RHC petitioned for reappraisal, arguing that since the wind power development violated core human rights treaties, the appraisal should be ruled inadmissible; alternatively, that the MPE's decision be ruled invalid for procedural errors, and the measure of damages be reassessed.[90] In June 2020, Frostating Court of Appeal concluded that since the area was practically lost as a winter pasture and since the RHC therefore would have to cull the herd, the windfarm posed an existential threat to reindeer husbandry at Fosen. However, hesitantly, the Court concluded that since winter feeding of the reindeer could mitigate the threat, it did not amount

[87] For the sake of simplicity, we refer to Fosen Vind and Statnett as 'the developers' and Sør-Fosen *sijte* and Nord-Fosen *siida* as 'the RHC', although the parties comprising both sides made distinct claims at key stages of the court process.

[88] TINTR-2014-139974-1 (Inntrøndelag District Court 2017).

[89] TINTR-2014-139974 – TINTR-2014-136323-2 Inntrøndelag District Court 2018.

[90] LF-2018-150314 – LF-2018-150323 – LF-2018-150327 (Frostating Court of Appeal 2020).

to a violation of Article 27.[91] To compensate for winter feeding, the Court raised the damages to circa NOK 90 million.

Again, both sides appealed. The developers challenged the measure of damages, whereas the RHC challenged the interpretation of Article 27, requesting the appraisal be ruled inadmissible. Meanwhile, the MPE intervened as a third party in support of Fosen Vind, declaring a 'strong interest' in overturning the Appellate Court's measurement of damages.[92] In August 2021, the Supreme Court, sitting as a grand chamber, heard the case. On 11 October 2021, the Supreme Court delivered its judgment, unanimously finding that the concession was invalid as the windfarm violated the right of the reindeer herding Sami to practice their culture, according to ICCPR, Article 27.[93] The Supreme Court judgment was immediately hailed as historic.[94] Besides trials in three instances, the case involved other legal processes, including a complaint to the Committee on the Elimination of Racial Discrimination in 2018, which asked Norway to suspend the development,[95] as well as protests and public debate, engaging environmentalists and growing popular resistance to windfarms.

Going to court over whether the windfarm concession licence was valid or constituted a human rights violation, the parties made competing claims on several related issues about how windfarms affect reindeer herding: Do the reindeer avoid or adapt to windfarm areas? Are summer or winter pastures determining the viable size of the herd? How to measure the damages? Did the impact entail a violation of Article 27? Under expropriation law, the appraisal was decided at the district and appellate court levels by judicial panels consisting of both professional judges and lay judges appointed due to their expertise on the matter to ensure 'comprehensive assessment and sufficient knowledge of local circumstances'.[96]

In the District Court, the RHC had little success in challenging the epistemic basis of the licence decision. In its two hearings, the District Court appointed lay judges with expertise on industry, business, agriculture, and forestry, but no expert on reindeer herding.[97] In each hearing, it also inspected the site. The RHC sought to establish that the reindeer tend to avoid windfarm areas and that a winter pasture would therefore be lost. It had commissioned a set of new investigations and several witness statements, including an international law professor, three specialists with

[91] ibid 28–30.

[92] Jakob Ellingsen, 'Staten har valgt side i saken: Går mot samene for å støtte vindkraftutbyggerne' (*Fosna-Folket*, 13 November 2020). https://www.fosna-folket.no/nyheter/i/049jV2/staten-har-valgt-side-i-saken-gar-mot-samene-pa-fosen-for-a-stotte-vindkraftutbyggerne. Accessed 26 November 2023.

[93] *Fosen-dommen* (n 5).

[94] Lingaas, 'Wind Farms in Indigenous Areas' (n 23).

[95] Odin Norum Kvistad, 'Staten trosser FN og Sameråd i vindkraftstrid' (*NRK*, 22 December 2018). https://www.nrk.no/trondelag/staten-stanser-ikke-vindkraftutbygging_-til-tross-for-anmodning-fra-fn-1.14351540. Accessed 20 February 2023.

[96] 'Lov om skjønn og ekspropriasjonssaker [skjønnsprosessloven] 1927' (LOV-1917-06-01-1). https://lovdata.no/dokument/NL/lov/1917-06-01-1. Accessed 26 November 2023.

[97] Linnea Aslaksen, 'Fra en ordinær sak til en nasjonal kontrovers: Konkurrerende verdsettinger av vindkraftverk og reindrift: En praksisorientert analyse av saksdokumentene til Storheia Vindpark' (Masteroppgave Universitetet i Oslo 2021).

expertise on reindeer husbandry and environmental science, as well as the president of a Swedish RHC which had similarly opposed wind power development.[98] Meanwhile, the developers reiterated the conclusions reached by the authorities, downplaying uncertainties in expert reports on avoidance and denying any loss of winter pastures. They also disputed the reimbursement for the RHC's expert witnesses, claiming they had failed 'to distinguish between scholarly objectivity and a strong commitment to the party', and the Court complied.[99] Basing its assessment on the documents produced through the concession procedure, the Court concluded that since the research reports reached diverging conclusions, it was uncertain how powerlines and windfarms affect the reindeer.[100] However, the windfarm would not make the area unusable as a winter pasture, and the RHC would still have access to two other winter pastures.[101] Thus, the RHC failed to insert its preferred expertise into the case.[102]

However, the tables turned when the case reached the Appellate Court. The judicial panel now included a reindeer owner and a senior officer from the Norwegian Nature Inspectorate among the four lay judges.[103] The Court heard ten expert witnesses, inspected the site anew, and assessed numerous research reports. The Court noted that a key issue was whether the reindeer would avoid the windfarm area or adapt.[104] Since research findings on avoidance/adaptation were inconclusive, the Court reasoned it must assess how well these general findings translated to the particular circumstances at Fosen and based its assessment of the reports on a presentation by a professor in reindeer husbandry during the main hearing.[105] 'Taken together', the Court concluded, 'there is solid scientific evidence that the reindeer […] will avoid windfarms where it can move to alternative pastures', a conclusion 'supported by testimony by reindeer owners with experience from wind power areas' elsewhere, as well as GPS studies from the Fosen peninsula. Given the extent of avoidance, the area was a lost pasture.

The Court also established that winter grazing was in fact essential, as the RHC had insisted throughout the concession process.[106] The RHC counsel exposed how the 'minimum factor' had come about: Asked by analysts commissioned by the authorities in 2008 which pastures were most essential, the reindeer herders had answered the summer pastures, which the authorities, the developers, and the District Court later took to mean that winter pastures were not the 'minimum factor'

[98] TINTR-2014-139974-1 (n 88).

[99] ibid 39.

[100] ibid; TINTR-2014-139974 – TINTR-2014-136323-2 (n 89).

[101] TINTR-2014-139974-1 (n 88) 35.

[102] Aslaksen, 'Fra en ordinær sak til en nasjonal kontrovers' (n 97) 78.

[103] According to the Supreme Court judgment, two of the lay judges had reindeer herding expertise. *Fosen-dommen* (n 5) 15.

[104] TINTR-2014-139974 – TINTR-2014-136323-2 (n 89) 10.

[105] ibid 11.

[106] Aslaksen, 'Fra en ordinær sak til en nasjonal kontrovers' (n 97) 78.

determining the viable size of the herd.[107] An expert commissioned by the RHC testified that 'removing half of the accessible winter pasture would have significant consequences', since the herd must alternate between different pastures so as not to wear them down.[108] The developers, by contrast, claimed that since the RHC had not used the area for grazing every year, it could hardly be essential.[109]

Finally, the Appellate Court revised the District Court's measurement of damages. Here, the Court used a different model for damages measurement and based its assessment on a report estimating the costs of winter feeding, commissioned by the RHC. The new measurement model and report led the Appellate Court to quadruple the damages. The developers' counsel said the estimation was 'totally unserious' and that he was 'astonished that lawyers would contribute to such estimations being presented in court'.[110] Thus, the Court reassessed both the scientific expert knowledge and the reindeer herders' experienced knowledge, to the advantage of the RHC, establishing that the wind power development would deprive it of an essential winter pasture. However, since the loss could be offset by compensating the RHC for feeding the reindeer, the Court found 'with some doubt' no violation of Article 27[111]—a discretionary judgment that ignored Sami expertise on what is traditional reindeer herding.[112] Reappreciating expertise also led the Court to grant the RHC reimbursement for the expert reports and witness statements it had commissioned, acknowledging its need to engage its own experts on 'factual and scientific matters' in the case, though the Court denied full reimbursement to a reindeer herder who had testified on the significance of reindeer herding for Sami culture and identity, considering it 'not a type of expert statement'.[113]

When the case reached the Supreme Court, the developers were on the offensive to challenge the knowledge base for the reappraisal. The developers repeatedly claimed they did not deny the windfarm entailed a disadvantage for reindeer herding and said they wished to make up for it, but argued the reappraisal had both exaggerated the impact and measured the damages incorrectly.[114] Societal interests, such as the 'green transition' and the need for renewable energy, outweighed the impact on

[107] Susanne Normann, '«Bit for bit forsvinner landet vårt»' (*Dagsavisen*, 1 June 2018). https://www.dagsavisen.no/debatt/2018/06/01/bit-for-bit-forsvinner-landet-vart/. Accessed 14 October 2023.

[108] Emilie Sofie Olsen, 'Bekymret for fremtiden: - Jeg ser ikke for meg noe annet liv' (*Fosna-Folket*, 17 December 2019). https://www.fosna-folket.no/nyheter/i/o6kL0R/bekymret-for-fremtiden-jeg-ser-ikke-for-meg-noe-annet-liv. Accessed 14 October 2023.

[109] ibid.

[110] Grete Holstad, 'Sørsamene i rettssak om erstatning for vindkraftutbyggingen' (*Adresseavisen*, 3 May 2018). https://www.adressa.no/nyheter/i/8BM8y2/sorsamene-i-rettssak-om-erstatning-for-vindkraftutbyggingen. Accessed 14 October 2023.

[111] LF-2018-150314–LF-2018-150323-LF-2018-150327 (n 90) 17.

[112] Aslaksen, 'Fra en ordinær sak til en nasjonal kontrovers' (n 97).

[113] LF-2018-150314–LF-2018-150323-LF-2018-150327 (n 90) 26.

[114] Jakob Ellingsen, 'Fosen Vinds advokat: Reindriftens eget syn er også avgjørende' (*Fosna-Folket*, 29 August 2021). https://www.fosna-folket.no/nyheter/i/0GL8xJ/fosen-vinds-advokat-reindriftens-eget-syn-er-ogsa-avgjorende-vi-ser-na-etter-at-rettsakene-startet-at-viljen-til-tilpasning-er-helt-fravaerende. Accessed 14 October 2023.

reindeer herding.[115] In court, their counsels sought to disprove the avoidance claim by showing video recordings from the now completed windfarm supposedly demonstrating that not even reindeer cows with calves avoided the turbines.[116] Insisting the assessment had to be based on the knowledge available at the time of the licence decision, they also revisited the research reports, arguing their inconclusive findings contradicted the Appellate Court's claim that the winter pasture would be lost because of the windfarm;[117] reiterated that the 'minimum factor' was set by the summer pastures, not the winter pasture affected by the windfarm;[118] and dismissed recent research on avoidance as speculative.[119]

Finally, the developers' counsel faulted the reindeer herders for refusing to adapt reasonably, as required by expropriation law, given that various experts had testified that, helped by feeding and active herding, the reindeer can acclimatise to intrusions.[120] The herders' lack of will to adapt, the developers argued, showed that they were not 'denied' practicing their culture, in the sense of Article 27.[121] And since reindeer herding in Fosen was not economically viable anyway but dependent on government subsidies, the protected culture could be practiced just as well with half the current herd. Winter feeding was 'a smaller adjustment [of traditional reindeer herding] than what the herders have introduced themselves by using snowmobiles, GPS collars, and drones,' the counsel argued.[122] Using the state's right to intervene in cases concerning international or constitutional law, the MPE supported the developers and added that since the ICCPR protects only individuals, the RHC had neither rights nor standing.[123]

The RHC could now support its claims on the Appellate Court judgment. Its counsel praised the Appellate Court for acknowledging the traditional experienced 'knowledge of generations' represented by the testimony of reindeer herders, which dovetailed with recent research from both Sweden and Norway, as well as a GPS tracking study demonstrating that the reindeer avoided the windfarm area at

[115] *Fosen-dommen* (n 5) [53].

[116] Ellingsen, 'Fosen Vinds advokat' (n 114).

[117] Jakob Ellingsen, 'Etter vår oppfatning er det ingen tegn til kollaps for reindriften på Fosen' (*Fosna-Folket*, 30 August 2021). https://www.fosna-folket.no/nyheter/i/5GLd4W/etter-var-oppfatning-er-det-ingen-tegn-til-kollaps-for-reindriften-pa-fosen. Accessed 2 March 2023.

[118] Ellingsen, 'Fosen Vinds Advokat' (n 114).

[119] Tor Bjarne Christensen, 'Samisk kamp mot vindindustri i Høyesterett' (*Naturvernforbundet*, 3 September 2021). https://naturvernforbundet.no/vindkraft/samisk-kamp-mot-vindindustri-i-hoyesterett/. Accessed 28 February 2023.

[120] Ellingsen, 'Fosen Vinds Advokat' (n 114).

[121] Ellingsen, 'Etter vår oppfatning er det ingen tegn til kollaps for reindriften på Fosen' (n 117).

[122] Jakob Ellingsen, 'Staten På Parti Mot Samene i Vindkraftutbyggingen' (*Fosna-Folket*, 31 August 2021). https://www.fosna-folket.no/nyheter/i/Rrm702/staten-pa-parti-mot-samene-i-vindkraftutbyggingen-mener-de-fikk-altfor-mye-kompensasjon-pa-feil-grunnlag. Accessed 14 October 2023.

[123] *Fosen-dommen* (n 5) 10.

Fosen.[124] The RHC counsels also highlighted the disparities between the parties: They revealed new information that the developers had accepted more than NOK 400 million in damages to the expropriated landowners, and yet opposed the comparatively smaller damages to the RHC. Furthermore, the MPE's intervention in the case allowed them to highlight the line-up of powerful adversaries: That the state intervened in the case 'not to attend to the state's special responsibility to protect Sami rights, but on the other side is […] a fairly broad assault on Sami rights.'[125]

Stating the Appellate Court had 'had a solid basis for its findings', the Supreme Court confirmed that winter feeding could not be considered traditional Sami reindeer husbandry, and added that damages and compensatory measures would not prevent a violation of Article 27.[126] The Supreme Court also dismissed the developers' claim that the impact on reindeer herding must be weighed against the 'green shift' to renewable energy, since the developers could have selected alternative sites that would have entailed less intrusions.[127]

To sum up, the court process entailed a shift in the legitimation of cultural expertise. The District Court relied almost exclusively on the reports and investigations commissioned by the authorities during the concession process, dismissing the RHC's attempt to establish an alternative epistemic basis drawing on independent research, its commissioned experts, and the testimony of reindeer herders. Yet the Appellate Court, with its differently composed panel of lay judges, largely accepted the RHC's claims. In the Supreme Court, it was instead the developers who struggled to discredit the epistemic basis established by the Court of Appeal. Throughout, the key issue was how windfarms affect reindeer herding, but initially framed as an ordinary matter of measuring damages to a marginal business, it became a national controversy over whether the impact infringed on the Sami reindeer herders' right to enjoy their culture as a minority protected by international human rights law.[128]

Afterwards, government dragged its feet about implementing the judgment. While the RHC and its supporters claimed the windfarm had to be dismantled, the MPE and Fosen Vind were investigating a revised concession based on a reassessment of the impact on reindeer husbandry. On the anniversary of the Supreme Court judgment, the RHC expressed its frustration that the wind turbines were still standing, and that government failed to respect the Indigenous rights of the Sami. The MPE responded that since the Court had found the impact to threaten the Sami livelihood only in the long term, there was plenty of time to find a compensatory scheme that would not require dismantling the turbines.[129] On the 500th dieversary

[124] Jakob Ellingsen, 'GPS-målinger over mange år viser at reinen unngår vindkraftverkene' (*Fosna-Folket*, 31 August 2021). https://www.fosna-folket.no/nyheter/i/KzPg97/gps-malinger-over-mange-ar-viser-at-reinen-unngar-vindkraftverkene-denne-saken-skiller-seg-markant-fra-likende-saker. Accessed 14 October 2023.

[125] ibid.

[126] *Fosen-dommen* (n 5) 16–17.

[127] ibid [143].

[128] Aslaksen, 'Fra en ordinær sak til en nasjonal kontrovers' (n 96).

[129] Ingrid Lindgaard Stranden, 'Ett år siden dommen i Høyesterett – ingenting har skjedd på Fosen' (*NRK*, 11 October 2022). https://www.nrk.no/trondelag/leif-arne-jama-fikk-medhold-i-hoyesterett_-ett-ar-senere-star-turbinene-fortsatt-i-fosen-fjellene-1.16132575. Accessed 2 November 2022.

of the judgment, Sami activists occupied government offices in Oslo. After a week of protests, government expressed its 'regret' at the ongoing human rights violation at Fosen.[130]

4.3 Discussion

Relating the two cases, the struggle over cultural expertise, as provided by government knowledge production, academic research, and Indigenous experienced and traditional knowledge, formed an important subtext to the legal disputes per se. In both cases, the Sami litigants won the case because they managed to establish an epistemic basis where their traditional and/or experienced Indigenous knowledge coupled with independent academic knowledge (researchers from history, law, and ecology in *Girjas*, reindeer husbandry researchers in *Fosen*) could rival the framing of knowledge and expertise provided by their adversary.

In the *Fosen* case, the developers initially held an advantage, as the District Court accepted that the relevant expertise was to be found in impact assessments and research reviews produced through the concession process. However, in the Appellate Court the RHC managed to graft its expertise and knowledge—expert testimony, a contextual reading of research reports, and testimony of reindeer herders—into the basis for assessing the impact of the windfarm, and its claims that fenced-in winter feeding could not be considered traditional nomadic reindeer herding. Thus, once the RHC had won the epistemic clash in the Court of Appeal, the developers were struggling to revert to the prior epistemic basis.

In the *Girjas* case, the RHC faced the challenge of demonstrating its 'immemorial usage' of the contested lands. Not only had most historical and all legal sources been produced by the state, often as part of its effort to claim sovereignty and ownership of the frontier areas of the north, but traditional Sami livelihoods seek to leave minimal traces in nature, which meant that archeological remains the RHC could point to as evidence were limited. Yet through the expert witnesses the RHC brought, and its own members' testimonies, it managed to challenge the State's state-centric reading of the historical and legal sources of evidence.

A key issue in both cases concerned Sami claims of Indigeneity. In both *Girjas* and *Fosen*, the Sami claimants and their allies demanded that the state recognise their Indigeneity, while their adversaries sought to undermine and qualify such claims. During the *Girjas* trial, the State denied that 'Lapps' in the historical documents referred to the Sami and questioned their status as an Indigenous people, despite parliament's official recognition of the Sami as an Indigenous people in 1977. This served to delegitimate Sami claims of Indigeneity. Furthermore, the State's claim that Sweden lacked international law obligations toward the Sami as an Indigenous group further sought to push Sami Indigeneity to the margins of the case. Sami litigants and allies in public debate countered the State's strategy by accusing it of racism and ignorance towards Indigenous

[130] Olje-og energidepartementet, 'Regjeringen beklager til reindriftssamene på Fosen' (*Regjeringen.no*, 4 March 2023). https://www.regjeringen.no/no/aktuelt/regjeringen-beklager-til-reindriftssamene-pa-fosen/id2965357/. Accessed 29 March 2023.

peoples. This de-legitimation strategy served to assert the Indigenous identity of the Sami and to display the State's inability to acknowledge Sweden's alleged colonial, racist past.

Similarly, in the *Fosen* case, the framing of the Sami litigants shifted. Whereas the District Court chiefly treated the RHC as an economic stakeholder with a claim to compensation, the appellate and, especially, Supreme Court based their judgments on interpreting Norway's international law and constitutional obligations to the claimants as members of an Indigenous minority group with special rights to exercise their culture. Meanwhile, the developers framed the RHC as a marginal primary industry whose adoption of modern technology undermined its claims to be practicing traditional reindeer husbandry, while the MPE's intervention disputed (unsuccessfully) the RHC's standing to claim cultural minority rights under the ICCPR.

By claiming Sami Indigeneity, the litigants open a legal opportunity structure that influences not only those Sami that have standing and can litigate, but the entire Sami community. When the law ties Sami Indigeneity—and the rights it generates—to reindeer husbandry, it excludes Sami persons outside of RHCs. Such exclusion not only compromises the scope of Indigenous rights realisation in Norway and Sweden, but also lays the foundation for lateral conflicts among different Sami groups where the state's law and its history define the legal opportunity for pursuing their claims against it.

Furthermore, in both cases, a key strategy of (de)legitimation concerned the objectivity of research. Some experts called to testify for the respective RHCs had their impartiality questioned by the adversary's counsels. In *Girjas*, the State disputed the objectivity of expert witnesses, implying that the 'Sami-friendly' research of the academic experts distorted historical facts or that some academic experts were biased because of their Sami ethnicity. The RHC's experts retorted that the State misunderstood the scientific standards of contemporary historical scholarship and accused the State's counsel of 'demonising' Sami researchers because of their ethnicity. While questioning objectivity likely comes natural for a party seeking to discredit the adversary's experts, interestingly, neither the parties, the Courts, nor the media debate put focus on whether belonging to the majority population made other experts inherently 'state-friendly'. In *Fosen*, similarly, the developers requested that the District Court lower the reimbursement to the RHC's expert witnesses for failing to uphold standards of objectivity and impartiality. They also disputed the experienced and traditional knowledge of the Sami reindeer herders, maintaining persistently that summer grazing was the 'minimum factor' determining the viable size of the herd. Yet, the RHC clarified already in the Appellate Court how reports produced earlier in the concession process had established this notion by misrepresenting the reindeer herders' statements. Ultimately, the Supreme Court judgment thus also established the Sami reindeer herders' claim to expertise on their own livelihood.

At different times in both cases, courts recognised the cultural expertise of Indigenous participants, or their commissioned experts, as objective, indicating how the Sami could successfully involve cultural experts in their legal battles. Our analysis has brought forward 'the complexity and diversity of legal expertise', to which actors

such as environmental non-governmental organisations, Indigenous communities, and citizen groups have had more and more recourse.[131] Additionally, our findings highlight the importance of 'expert mobilisation in social movements'[132] in Indigenous land rights litigation, but also the role of the court as the establisher of legal truths. The judgments not only provide an authoritative decision on the legal case, but also serve as an arbitrator of epistemic conflict and producer of legal truth. The truth established by the courts may or may not agree with academic knowledge and experienced and traditional Indigenous knowledge. In *Girjas*, the Supreme Court effectively had to write the history of Northern Sweden, rather than just consult a set of neutral, objective historical sources. In *Fosen*, the Supreme Court established that reindeer avoid windfarms, that winter grazing is critical to sustain the herd, and that fenced-in feeding is not traditional Sami reindeer herding. Like the legal precedents, the judgments' establishment of truth has far-reaching effects likely to be revisited in future litigation.

5 Conclusion

In this paper, we have analysed the epistemic strategies parties used in the *Girjas* and *Fosen* cases. Both cases resulted in ground-breaking Supreme Court judgments on Indigenous rights in Sweden and Norway respectively. Drawing on legal mobilisation theory to conceptualise cultural expertise as a strategic framing contest between adversarial litigants, we analysed court judgments and mass media coverage to identify how the parties attempted to (de)legitimate knowledge claims.

A first takeaway of our analysis is that cultural expertise can enter in diverse forms in litigation on Indigenous land rights. No anthropologists were involved in *Girjas* and *Fosen*, yet, expertise provided by historians, animal scientists, ecologists, and jurists played a role like that of anthropologists in other cases of Indigenous rights litigation. Moreover, Sami reindeer herders provided traditional or experienced knowledge which combined with independent academic expertise to establish an epistemic basis central to the outcome of the case. We see interesting opportunities for future research to further theorise how parties incorporate cultural expertise in their epistemic strategies in legal processes.

Secondly, different actors mobilised cultural expertise to construct Sami Indigeneity in legal terms. Both judgments recognised the land rights of the Sami as an Indigenous people whose culture is intimately linked to reindeer herding. Although Sami activists, human rights groups and legal analysts considered both cases a

[131] Carolyn Abbot and Maria Lee, *Environmental Groups and Legal Expertise: Shaping the Brexit Process* (UCL Press 2021) 80; Charles R Hale, 'Using and Refusing the Law: Indigenous Struggles and Legal Strategies after Neoliberal Multiculturalism' (2020) 122(3) *American Anthropologist*, 618–631; Luisa Sotomayor, Sergio Montero, and Natalia Ángel-Cabo, 'Mobilizing Legal Expertise in and Against Cities: Urban Planning amidst Increased Legal Action in Bogotá' (2023) 44(3) *Urban Geography* 447, 463–464.

[132] Scott Frickel, et al., 'Embodied, Embedded or Both? Investigating Experts and Expertise in Two Greater Boston Social Movements' (2022) *Social Movement Studies* 1, 2.

success for Indigenous rights litigation, the judgments only affirmed the rights of reindeer herding communities, which exclude the majority of Sami, and reinforced reindeer herding as the legally recognised basis of Sami Indigeneity. Here we can see the complexities surrounding the granting of collective rights based on legal regulations of minority identities and Indigenous lifestyles.[133] Thus, our findings indicate how legal processes are embedded in deeper societal conflicts and build upon legacies of past oppression, even as the rulings are greeted as progressive landmarks.

In conclusion, our analysis of the two cases suggests that court processes are spaces in which Sami groups can claim Indigenous land rights and contest the status quo, but they face the dilemma that any action within the state's legal system can *both* challenge *and* legitimate the state's claims to sovereign jurisdiction over their traditional lands. While the Sami litigants were able to win epic courtroom victories, the cases also reveal a dissonance between the two governments' concurrent policies of reconciliation and transitional justice for the Sami people and the governments' behaviour during and after the court proceedings.

Acknowledgements This research was funded by the *Riksbankens Jubileumsfond* (the Bank of Sweden Tercentenary Fund), Grant No. P21-0569. Ethics approval was obtained from the Swedish Ethics Review Authority (dnr 2022-05450-01).

Funding Open access funding provided by University of Gothenburg.

Declarations

Conflict of interest The authors declare that they have no conflict of interest.

[133] Miodrag A Jovanović, 'Recognizing Minority Identities through Collective Rights' (2005) 27(2) *Human Rights Quarterly* 625, 651; Petersmann, 'Contested Indigeneity and Traditionality in Environmental Litigation, (n 32).