

# Mineral extraction in Swedish Sápmi: The regulatory gap between Sami rights and Sweden's mining permitting practices

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## ABSTRACT

In Sweden, extractive industries are placing increasing pressure on the traditional indigenous Sami livelihood of reindeer herding. Consequently, the intersection of indigenous rights and mining-related development in Sweden has become an increasingly contested socio-legal space. In this article, we analyse the extent to which there are meaningful opportunities for Sami reindeer herding communities in Sweden to effectively influence the permit procedures concerning proposed mines, in order to protect their rights and interests. We provide a comprehensive socio-legal analysis that highlights the weak level of recognition of Sami rights and related impact assessments within the mining permitting system in Sweden. We demonstrate the weakness is caused by several factors: an *a priori* assumption by Swedish authorities that reindeer herding and mining can generally co-exist; the lack of a codified Swedish State duty to consult the Sami; the narrow scope and the weak status of cumulative impact assessments in Swedish EIA legislation and practice; and the weak recognition of Sami reindeer herding as a "property right" during the permit review process under the balancing of competing land-uses. Our results highlight the urgent need for legislative reform in Sweden, if the State is to fulfil its international obligations and improve its legal consistency concerning the rights of the Sami as an indigenous people.

## 1. Introduction

The intersection of indigenous rights and mining-related development in Sweden has become an increasingly contested socio-legal space. Sweden is generally viewed as an international pioneer of environmental standards and human rights (Brysk, 2009, pp. 42-65), including for the State's support of Indigenous Peoples' rights internationally. Yet, over the last decade, Sweden's domestic mineral policies have resulted in increased conflicts between the State, mining corporations, indigenous Sami reindeer herding communities and non-indigenous local communities (e.g. Labba, 2014; Lawrence and Kløcker Larsen, 2017; Person et al., 2017; Beland Lindahl et al., 2018), with the State receiving sustained critiques from both UN bodies and the Council of Europe therein (e.g. A/HRC/33/42/Add.3, 2016 paras. 49, 45, 83; E/

C.12/SWE/CO/6, 2016 paras. 13, 14 d; CCPR/C/SWE/CO/7, 2016 paras. 38-9; ACFC/OP/IV(2017)004, para. 37; CERD/C/SWE/CO/22-23, 2018).<sup>1</sup>

Twelve of Sweden's fifteen active metal mines (SGU, 2019, 29), and a vast majority of the value of the mineral extraction, are located within Sápmi<sup>2</sup> (Lawrence and Åhrén, 2016), the Sami traditional territories. At the same time, Sweden's national Minerals Strategy seeks to further strengthen Sweden's position as the leading mining state within the EU (Swedish Ministry of Enterprise, Energy and Communications, 2013). The Swedish Government recently took the following actions in favour of mining: launched a policy platform with the specific aim "to facilitate the possibilities to reach out to significant minerals resources"<sup>3</sup>, presented a State strategy for re-industrialization<sup>4</sup>, and initiated a review of the current regulation so as to make the permitting process both

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<sup>1</sup> See also the Resolution of the Council of Europe, Committee of Ministers (CM/ResCMN(2018)9, adopted by the Committee of Ministers on 12 September 2018), urging Sweden to ensure meaningful and effective Sami participation in decision-making processes affecting their traditional lands.

<sup>2</sup> The indefinably traditional Sami lands in Norway, Sweden, Russia, and Finland. Henceforth, when we refer to Sápmi we are referring to the part of the territory that exists within Sweden.

<sup>3</sup> [www.miningforgenerations.com](http://www.miningforgenerations.com)

<sup>4</sup> [https://www.government.se/498615/contentassets/3be3b6421c034b038dae4a7ad75f2f54/nist\\_statsformat\\_160420\\_eng\\_webb.pdf](https://www.government.se/498615/contentassets/3be3b6421c034b038dae4a7ad75f2f54/nist_statsformat_160420_eng_webb.pdf). The quote can be found under the heading "About" (Accessed March 12, 2020)

faster and smoother for the industry (Ds, 2018:38)<sup>5</sup>. The aim of these policy initiatives is to support growth in the mining sector, of which a significant portion is presumed to take place in Sápmi, as much of Sweden's geological ore deposits exist within the traditional Sami territory.

Both the connection to and the ability to live off the land through reindeer herding, fishing and hunting constitutes central features of the culture and rights of the Sami, as with most indigenous peoples (see e.g. Åhrén, 2015, p. 180). Sami reindeer herding in Sweden is currently organized into 51 reindeer herding communities (RHCs, *sameby* in Swedish) in total; these communities are deemed as legal entities. They consist of a defined geographical area, a form of economic association, and a social community of members who practice pastoralism collectively and in family-based groups. Most RHCs extend hundreds of kilometres, from the high mountains in the west to the Baltic Sea in the east, spanning across the northern half of Sweden.<sup>6</sup>

The right to herd reindeer in Sweden is a Sami usufruct right, which means that the reindeer can graze on land irrespective of the title and ownership of the land. Herding depends on having access to large tracts of land. But because this is not an exclusive property right, RHC's are experiencing rapidly-increasing competing land-uses and acute cumulative impacts, such as those from mining, wind energy, forestry and infrastructure development, (Kløcker Larsen et al., 2017). The accumulated area of land designated for mining in Sápmi has already more than doubled between 2010 and 2017, and the number of mineral exploration permits issued per-year has increased from less than ten, between 2002–2004, to 40–60 permits per-year between 2014–2016 (Österlin and Raitio, 2020). Half a dozen large-scale mining concession permit applications concerning land within Sápmi have been pending final decision for several years now, creating significant uncertainty for all of the actors involved.

While the question of indigenous rights and mining has spurred much academic inquiry among other developed countries, such as in Canada and Australia (see e.g. Ali, 2009; Scambary, 2013; O'Faircheallaigh, 2010, 2012, 2017; Leifsen et al., 2017), relatively little research has addressed similar issues within a Swedish or Nordic context (Labba, 2014; Skogvang, 2014; Koivurova et al., 2015). The existing literature in Swedish or Nordic contexts deals primarily with environmental issues, including legal analyses of the Swedish Minerals Act (Liedholm Johnson, 2010; Bäckström, 2015), and often comparatively so (Kokko et al., 2015; Pettersson et al., 2015; Söderholm et al., 2015; Jagers et al., 2018; Tolvanen et al., 2018). Recent social science research does critique Swedish mining policies (Haikola and Anshelm, 2016; Beland Lindahl et al., 2018) and including in relation to Sami rights (Lawrence and Åhrén, 2016; Person et al., 2017), addressing specific aspects such as Sweden's failure to assess cumulative impacts (Kløcker Larsen et al., 2017, 2018) or provide opportunities for the effective participation of Sami in natural-resource-related decisions, as compared to the situation in Canada (Allard, 2018; Kløcker Larsen and Raitio, 2019). However, none of these studies have systematically analysed in detail the mining permitting process in Sweden in its entirety with respect to Sami rights.

Therefore, this article puts forth a timely and much-needed, comprehensive analysis of the current mining permitting process in Sweden in relation to Sami rights. Specifically, it explores the extent to which there are meaningful opportunities for Sami reindeer herding communities to effectively influence mining-related permit procedures regarding new mines, so as to ensure their ability to access and use the

land for reindeer herding in a meaningful way. Through a socio-legal analysis, we offer insights on the most obvious shortcomings of both the corresponding regulatory framework and the permit practices in Sweden, looking specifically at whether or not recent, related amendments and case law are sufficient to address identified gaps.

Any given regulatory regime reflects the current political priorities and relations of power within that jurisdiction. Identifying a regulatory “gap” in terms of a certain policy goal, therefore, simultaneously exposes a “regulatory clash” between those political goals that have been given precedence when drafting the legislation, and those that have not (Vasconcelos, 2005, pp. 86, 96). In the case of mining in Sweden, there are multiple, competing views as to the primary purpose of the mining regulations. As our analysis will show, political priorities in Sweden have privileged the establishment of mines while not engaging with the question of indigenous rights, which explains the weak performance of the corresponding regulations in regards to Sami rights. The argument we put forth is that the outcome should not be a matter of political convenience or expediency; we contend that internal coherence and systematisation of the domestic legal system are core characteristics of good governance and the rule of law. Sweden has recognised the Sami as an indigenous people, and the State has also recognized Sami reindeer herding as a central aspect of Sami culture and as a property right, which is why it is essential, for the legitimacy of the legal system, to ensure the coherence between different aspects of regulations, mining permitting included.

Following this introduction, in Section 2 we outline our data and methods for analysing the multi-level regulatory system. Section 3 provides the context regarding reindeer herding as an inherent part of Sami culture and rights. Section 4 outlines an overview of the key international standards relevant to Swedish law, and it is here that we introduce the international reader to the Swedish legislation on Sami and reindeer herding rights, in general. The primary empirical focus of this paper is on the sectoral regulation of mining and the permit practices therein, which we address in Sections 5 and 6. In Section 7, we discuss the landmark case *Norra Kärr* and its implications for the permitting processes. We summarize our insights of the regulatory system in Section 8, pinpointing key gaps in terms of regulation and implementation failure, conclude with some brief comments on much needed policy reform.

## 2. Socio-legal analysis of the multi-level regulatory system

Indigenous territorial rights, rights to land and natural resources, are not granted by states; rather, they are legal recognitions of rights based on indigenous customary uses of traditional lands, seas and resources that existed prior to the colonisation of indigenous territories and the modern nation-state formation that accompanied it (Allard, 2006, 2011; Åhrén, 2016). Analysing the mining permit system in Sweden from a Sami rights perspective means identifying the extent to which these rights have been recognized and codified – and in some cases omitted or ignored – on various levels of the regulatory system. Environmental and natural resources regulations are generally characterized by a multi-level governance situation (Newig and Fritsch, 2009), which is also the case in regard to Sami indigenous rights in Sweden. We distinguish here between the following levels of regulation and analysis (Fig. 1): (a) international law on indigenous peoples' rights; (b) national law on Sami and the reindeer herding rights; (c) national law on mining and permits related to the environment; and (d) implementation and bureaucratic practices by relevant public authorities related to the granting of mining permits.

Our socio-legal analysis (Cotterrell, 1992; Banakar and Travers, 2005, pp. v-vii) combines a legal analysis of mining regulations regarding the permit process, with an analysis of the planning permitting practices of the public authorities. A socio-legal perspective understands law as interacting in complex ways with the social environment it seeks to regulate (Cotterrell, 1992, pp. 5–6; Hydén, 2018, pp. 209).

<sup>5</sup> See also [https://www.riksdagen.se/sv/dokument-lagar/dokument/svar-pa-skriftlig-frag-a/tillstandsprocesserna-for-gruvnaringen\\_H712603](https://www.riksdagen.se/sv/dokument-lagar/dokument/svar-pa-skriftlig-frag-a/tillstandsprocesserna-for-gruvnaringen_H712603) (Accessed March 12, 2020).

<sup>6</sup> Each RHC has a specific name (e.g. Vapsten RHC and Girjas RHC) that we will be referring to in the text. For geographical location of these and other RHCs, see <https://www.sametinget.se/8382> (Accessed March 12, 2020).

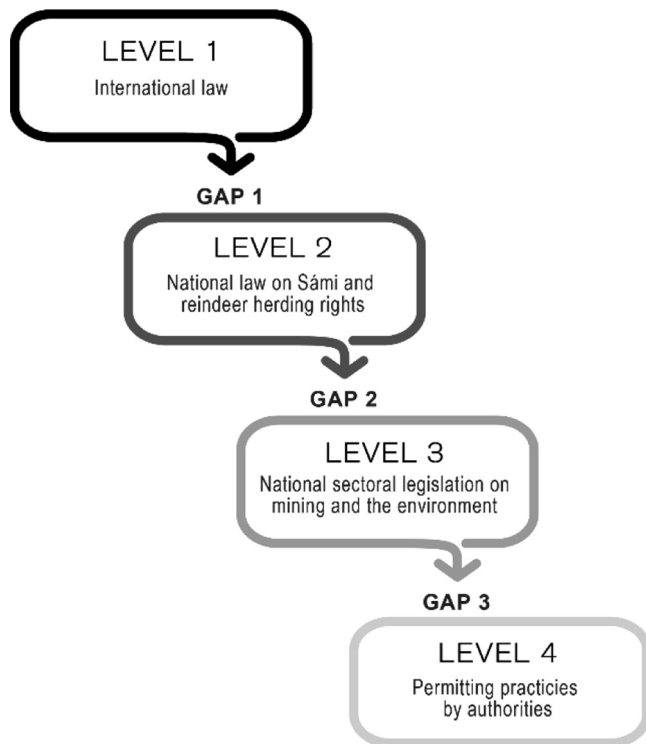


Fig. 1. The multi-level regulatory system concerning Sami rights and mining in Sweden.

The authors of this paper bring a collective, critical interdisciplinary lens to this analysis: the second author Christina Allard with her expertise in legal scholarship on indigenous and environmental law, and the first and third author Kaisa Raitio and Rebecca Lawrence, through the prism of land-use planning, the politics of extractive industries, and the social impacts of mining. By combining a structured analysis of law and practice through this interdisciplinary lens, we provide a thorough analysis of current possibilities available to the Sami reindeer herding communities in Sweden to influence, throughout the permit process in its entirety, matters regarding the establishment of new mines within their traditional territories.

Our legal study of the regulatory framework is based on a qualitative textual analysis of relevant legal sources (legislation, preparatory works,<sup>7</sup> case law and legal literature), with the aim to determine current law (e.g. Kleineman, 2018, pp. 25-26). Our analysis does not include a full case law review; rather, the cases referred to are included as significant examples. EU law, and in particular EU directives, has profound influence on Swedish environmental and natural resources law, however EU law is not fully analysed here, because it has little bearing on our main focus, as the proper transposition of European law basically falls upon state legislation and courts (e.g. Prechal, 2005, pp. 5-6).

Our qualitative analysis of permitting practices includes: a review of written policy guidelines (Swedish Board of Agriculture, 2005; Sámediggi and SSR, 2010; Geological Survey of Sweden, 2016); interviews with the relevant permit authorities (Mining Inspectorate and the County Boards of Jämtland, Västerbotten and Norrbotten); insights from three interactive workshops, in 2015 and 2017, involving permit authorities, Sami reindeer herding communities (RHC), and/or mining

<sup>7</sup> Preparatory works are an important legal source in the Swedish context; the bill is usually abbreviated 'Prop' and includes the year of issue and a serial number. An earlier step, but still a part of the preparatory works, is 'SOU', which is the corresponding appointed commission's report to the Swedish Government. This earlier step could also be made as a smaller report and is then called 'Ds'.

companies (County Administrative Board of Norrbotten, 2016; Kløcker Larsen et al., 2017; Kløcker Larsen and Raitio, 2019); and an in-depth analysis of seven concession application processes from 2010s, during which Sami reindeer herding communities have been making a particular effort to stop the mines, illustrating the space available to RHCs to maximize their influence (so-called critical cases, Flyvbjerg, 2001, pp. 78–79). The data for each of the critical cases includes permit decisions and statements by public agencies, companies, and Sami reindeer herding communities, until March 2020, as well as the interviews and workshop materials of the study (see Table 1). Two of the authors, Raitio and Lawrence, have additionally informed the study through their own action research and on-going engagements with RHCs. Finally, we use a recent systematic analysis of EIAs and Sami rights for all mining concession permits since 1999 (Kløcker Larsen et al., 2018) as secondary, complementary sources for our analysis.

In our analysis, we emphasize the relevant core legal requirements and the application of these legal requirements by authorities. We also examine the corresponding effects on the concerned RHCs' abilities to influence the decision-making processes at hand in regards to their property rights and interests, as well as to shape the decisions concerning whether or not, and based on what terms and conditions, a mining company is granted a mining concession on Sami herding lands. The following questions structure our analysis:

- 1 Where in the process are the most important decisions made?
- 2 When and how can Sami reindeer herding communities influence the process?
- 3 What impact assessments are the decisions based upon?
- 4 How are Sami rights assessed in relation to competing land-uses in the decision-making?

We then relate the answers to these questions to the multi-governance systems regulating Sami rights and mining in Sweden (Fig. 1). We conclude by pointing out the most significant gaps between these factors therein.

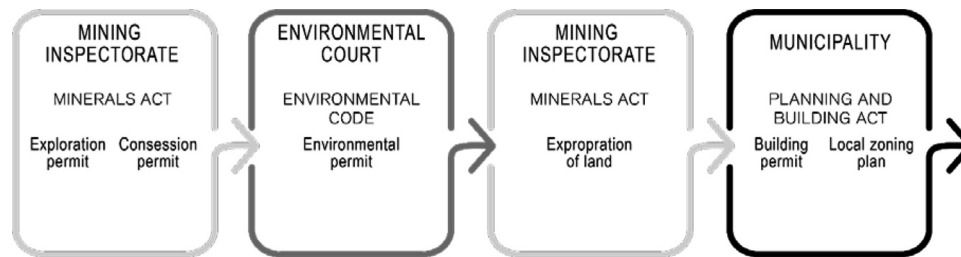
The Swedish permit system relating to minerals in fact consists of several permits; these permits are subject to a number of Acts and are based on a case-to-case assessment. The five basic permit phases are (see Fig. 2): (1) exploration permit with a work plan (granted by the Mining Inspector); (2) mining concession (granted by the Mining Inspector); (3) environmental permits (granted by the Land and Environment Court); (4) the official expropriation of the land (granted by the Mining Inspector); and (5) specific sector permits for associated infrastructure. In this paper we focus on (1), (2) and (3), the phases in which Sami potentially have the best opportunities to influence decisions that affect their use of the land. Phases (4) and (5) include decisions concerning compensation and other matters that may be of importance for the affected RHCs, but by this time in the permitting process key decisions concerning permissibility and prioritisation of different land-uses have already been made, which is why we do not include these latter phases in our analysis.

### 3. Reindeer herding, Sami culture, and competing land-uses

Reindeer and caribou (*Rangifer tarandus*) are keystone species in Sub-Arctic and Arctic landscapes (Vors and Boyce, 2009); the semi-domesticated animal is the reindeer, and the wild deer are known as caribou. Reindeer herding is a traditional, collective, nomadic livelihood and cultural practice of the Sami people. This herding is still a foundation of Sami culture, and the continuing practice of herding the reindeer carries both traditions and language from one Sami generation into the next. Sami reindeer herding in Swedish Sápmi is based on reindeer grazing in natural and open 'pastures' across a variety of ecosystems. From the high mountains to the boreal forests and Baltic Sea coastlands and archipelago, Sami reindeer herding areas cover, in total, 55 % of Sweden's land surface (Sandström, 2015, 15). Currently,

**Table 1**  
Cases studies.

NAME OF THE PROPOSED PROJECT	COMPANY	MUNICIPALITY	REINDEER HERDING COMMUNITIES DIRECTLY AFFECTED
Eva	Copperstone Resources	Arvidsjaur	Mausjaure
Kallak/Gällök	Jokkmokk Iron Mines (JIMAB)	Jokkmokk	Sirges, Jåhkågasska tjiellde
Kyrkberget	Tertiary Gold	Storuman	Ubmeje tjeälddie
Laver	Boliden	Älvsbyn	Semisjaur Njarg
Rönnbäcken	Nickel mountain/ IGE Nordic	Storuman	Vapsten
Stekenjokk	Vilhelmina mineral /Northfield Exploration	Vilhelmina	Vilhelmina Södra, Voernese
Viscaria	Avalon Minerals/Copperstone Resources	Kiruna	Laevas, Gabna



**Fig. 2.** Phases of the permit process for establishing a mine in Sweden.

reindeer herding is organized into 51 reindeer herding communities (RHCs, or *sámeby* in Swedish). The RHCs are autonomous legal entities, each constituting a geographical area, a form of economic association, and a social community between the RHC members who practice pastoralism collectively as well as in different family groups (*siidas*) within the RHC (Labba, 2015).<sup>8</sup>

In Sweden, the right to herd reindeer is a usufruct right and exists regardless of title of the land; this means that reindeer herders can allow the reindeer graze freely on land irrespective of the ownership of the land (Allard, 2011). At the same time, no part of the reindeer herding area is set aside exclusively for reindeer herding; instead pastoralism is always carried out in conjunction with other land-uses (Sandström, 2015, 15).

Foraging by the reindeer consists of consuming numerous species of plant, lichen, and mushrooms, all of which vary between seasons, and Sami transhumance in reindeer herding means moving the herds up to hundreds of kilometres between suitable pasture areas. These migrations are performed in a variety of ways – such as by foot/skis, motorcycles, snowmobiles, small airplanes, and/or trucks – depending on the accessibility of suitable traditional migration routes and any degree of disruption of pasture areas present, such as encroachments by roads, railroads, communities, tourist centres, mines, and wind farms.

For most RHCs in Sweden, summer pastures are located in the Scandinavian mountain range bordering Norway, whereas winter pastures are primarily located in lowland forests further east towards the Baltic sea.<sup>9</sup> Winter pastures are generally a bottleneck for reindeer herding, and the success of foraging during the winter is a strong determinant of both the number of surviving reindeer at the end of the season and the animals' condition therein. Viable reindeer herding practices are dependent on, among other things: access to pastures (lack of barriers), quality of pastures (abundance of forage), connectivity of pasture areas (lack of fragmentation), diversity of pasture areas (abundance of different types of pasture), and peaceful grazing (lack of

disturbance from human activity and predators) (e.g. Kitti et al., 2006; Lundqvist, 2007; Löf, 2013; Skarin and Åhman, 2014; Kivinen, 2015).

Sami herding flexibility in land-use is repeatedly identified as key to reducing reindeer vulnerability and avoiding reindeer starvation (e.g. Rees et al., 2008; Roturier, 2011; Löf, 2013; Pape and Löffler, 2015). Yet, by reducing pasture quality and connectivity and increasing disturbance, competing land-uses and climate change limit the space for adaptation (Löf, 2013). Mining, for instance, causes loss and fragmentation of reindeer herding and grazing area at the site itself, as well as associated damage through dams, tailings, transport corridors, power lines, disturbance zones, and avoidance due to dust and noise from blasting (Herrmann et al., 2014; Kivinen and Kumpula, 2014; Skarin and Åhman, 2014; Lawrence and Kløcker Larsen, 2019).<sup>10</sup> Mining also contributes to an increased urbanization through the development of a “megasystem” (Avango et al., 2019), spreading its impacts well beyond the originally intended mining activity.

The cumulative impacts of competing land-uses and climatic change, when taken together, are gradually resulting in a loss of key resources and a decline in the quality of the natural landscape mosaic, from the reindeer herding perspective (e.g. Kivinen, 2015; Kløcker Larsen et al., 2017; Lawrence and Kløcker Larsen, 2019; Österlin and Raitio, 2020). The resilience of already-marginalized RHCs is reduced, posing a serious threat to long-term sustainability of the Sami reindeer herding livelihood (Tyler et al., 2007; Löf, 2013; Horstkotte et al., 2014; Kivinen, 2015; Kesitalo et al., 2016). Compensation for loss of grazing areas through feeding reindeer hay and pellets, as a supplementation and solution to the loss, increases both costs and the risk for infectious diseases (Helle and Jaakkola, 2008; Tryland et al., 2019). Moreover, such a feeding method is contrary to the culturally desired practices of free grazing (Lawrence and Kløcker Larsen, 2019). It is, therefore, paramount – for both the viability and future of Sami reindeer herding in Sweden – that every RHC has adequate pasture areas remaining and is able to influence land-use governance practices to that end.

#### 4. International standards, Sami rights and Swedish legislation

As an indigenous people, the Sami have a right to self-determination (e.g. ICCPR<sup>11</sup> Art. 1; UNDRIP<sup>12</sup> Art. 3; Instrument of Government<sup>13</sup> ch.

<sup>8</sup> Each RHC has a name (e.g. Vapsten RHC and Girjas RHC) that we will be referring to in the text. For geographical location of these and other RHCs, see <https://www.sametinget.se/8382>. (Accessed March 12, 2020).

<sup>9</sup> A few Swedish RHCs have customary summer pastures on the Norwegian side of the national border, which is regulated by a bilateral treaty between Sweden and Norway. Cross-border reindeer herding is, however, a contentious and complex issue between the two countries (Broderstad, 2013), and a renewed bilateral treaty seems currently illusive.

<sup>10</sup> See also studies on caribou: Boulanger et al., 2012; Johnson and Russell, 2014; Eftestøl et al., 2019.

<sup>11</sup> International Covenant on Civil and Political Rights, 1966.

1. s. 2) and a right to be consulted by the Swedish State in matters that directly affect them (e.g. ICCPR Art. 27; FCNM<sup>14</sup> Art. 15). The establishment of the Swedish Sami Parliament by an Act in 1992 has been the primary means in which to institutionalize Sami self-determination in Sweden, but the Sami Parliament's functioning and decision-making as a representative body for the Sami is seriously hampered by its regulatory framework and role as a Swedish Government agency and not an independent parliament. The Sami Parliament has no law-making functions and no real ability to realise any meaningful form of Sami self-determination (Lawrence and Mörkenstam, 2016).

Despite the State's general recognition of the above mentioned rights, Sweden – in contrast to Norway and Finland – has no domestic provisions regarding the State duty to consult<sup>15</sup> the Sami (Allard, 2018).<sup>16</sup> A specific act to deal with the State duty to consult with the Sami people was first proposed in the autumn of 2017 (Ds, 2017:43). However, due to criticism (e.g. by Sami representative organisations) the Proposed Act on Consultation in Matters that Concern the Sami People was revised and presented again in the summer of 2019 (Ministry of Culture, 2019). Stakeholders and relevant authorities were invited to submit comments on the amended Proposed Act during the autumn of 2019, and its future is currently highly uncertain. The pending act coincides with the similarly uncertain ratification of the Nordic Sami Convention, and the Convention presupposes a consultation duty with the Sami as a people (Allard, 2018, p. 27). Without such provisions, RHCs are left without meaningful formal processes of consultation with the State. For example, when RHCs have tried to exercise the right to be consulted via face-to-face meetings with responsible ministries regarding appeals over mining concession applications, their requests have been denied.

The principle of the free, prior and informed consent (FPIC) of the indigenous Sami, in relation to land and natural resource developments on their territories, is a central principle supporting indigenous self-determination and enshrined in the UNDRIP<sup>17</sup>, which re-affirms the main thrust of the ILO Convention No. 169<sup>18</sup> (Burger, 2011), and lays out the means for effective indigenous participation and negotiations in decision-making in a broad way, including mineral extraction. Although legally speaking FPIC is a contested and vague concept, and its practical implementation is often far from the ideal (e.g. Tomlinson, 2019; Hanna and Vanclay, 2013), the principle of FPIC should nevertheless be understood as an important expansion of indigenous peoples' participatory rights and, already well-established in human rights law (Heinämäki, 2015). At a minimum and in line with international human rights jurisprudence, states must engage in good faith consultations with affected indigenous communities prior to the exploitation of

resources on their territories, with the ambition of seeking agreement or consent (e.g. Ward, 2011; Heinämäki, 2016).<sup>19</sup> As Sweden does not currently do this, FPIC has thus not been properly addressed in the public legal and political agendas in Sweden.

Overall, international standards for the rights of indigenous peoples and minorities have had relatively little influence on Swedish law regarding Sami rights. The State is not party to the ILO Convention No. 169, nor has it directly incorporated the ICCPR into national law with the Convention's important protection of minority cultures contained within Article 27.<sup>20</sup> Sweden has repeatedly been criticized by UN monitoring bodies for not doing enough with respect to Sami rights and interests (e.g. CERD/C/SWE/CO/22–23, paras. 16–7; A/HRC/33/42/Add.3, 2016 paras. 37–47, 81–4; E/C.12/SWE/CO/6, 2016 paras. 13–6; CCPR/C/SWE/CO/7, 2016 paras. 38–9). The only international convention directly incorporated into Swedish national law is the European Convention on Human Rights,<sup>21</sup> however indigenous peoples have gained little support from this convention thus far (Koivurova, 2011). UNDRIP, whilst important as a benchmark of indigenous rights, is not legally binding, and since it has had little influence on domestic law or Sami policy in Sweden,<sup>22</sup> UNDRIP will not be further addressed in this paper.

In terms of international standards relating to indigenous peoples and minorities, Article 27 of the ICCPR has the most bearing on Swedish law. Article 27's scope requires states to: (i) secure the enjoyment of rights (hereunder reindeer herding rights) by positive legal measures of protection; (ii) ensure effective participation of indigenous communities in decisions which affect them, i.e. consultations; (iii) undertake assessments to determine the impacts of a specific industry on the indigenous group's lands and traditional activities; and, (iv) have regard to cumulative effects of measures sanctioned or supervised by states (e.g. General Comment No. 23, 2020; Länsman III v. Finland, 2005; Poma Poma v. Peru, 2009). States are to ensure that the existence and exercising of indigenous rights are "protected against their denial or violation" (General Comment No. 23, 2020, 6.1), even if it is difficult to determine an exact threshold.

The Swedish Constitution offers the Sami little protection; the actor in the Sami-related constitutional provision that is to promote Sami cultural and social life is the Swedish State, and the text does not designate any Sami rights as enforceable. However, after an amendment in 2010, this Sami-specific provision (Instrument of Government, ch.1 s. 2) now explicitly refers to the Sami as a people, not only as an ethnic minority as was previously the case. Nevertheless, as we show in our analysis, the effects of the deficit in the Swedish Constitution are evident in conflicts concerning proposed mines and the corresponding permitting processes.

<sup>12</sup> United Nations Declaration on the Rights of Indigenous Peoples, 2007.

<sup>13</sup> The most important document of the Swedish Constitution, from 1974.

<sup>14</sup> Framework Convention for the Protection of National Minorities, 1995.

<sup>15</sup> A state's duty to consult indigenous peoples and affected indigenous communities, both internationally and at domestic levels, is a well-established doctrine in Indigenous Law that implies a higher level of influence than what is commonly meant by 'consultation'. In brief, such doctrine puts forward a proactive duty of a state, applying to government actions and decisions that might have an impact on indigenous rights, rewarding, in turn, a special protection for indigenous rights (e.g. Klocker Larsen and Raitio, 2019; Newman, 2014, p. 15). This is a procedural duty aimed at engagement in good faith, building dialogue and reaching consensus.

<sup>16</sup> However, under the Act on National Minorities and Minority Languages (2009:724), ss. 5-5 b, public authorities must have "a structural dialogue" with the Sami (as a national minority) and take into account their views and needs, as far as is feasible, in decisions that concern them. This provision is not sanctioned, and it is poorly applied in practice (see also Klocker Larsen and Raitio, 2019).

<sup>17</sup> Articles 19 and 32.

<sup>18</sup> See Article 6.2 where it is stated that consultations "shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures" (emphasis added).

<sup>19</sup> For a discussion on the different international discourses on FPIC see Section 2 in Lawrence and Moritz, 2019.

<sup>20</sup> Sweden is a dualistic legal system, which is why Article 27 cannot be directly invoked before courts as sole legal source, but when it is referred to the court does have an opportunity to interpret national rules in accordance with the aim of Article 27 (Grahn-Farley, 2018, pp. 453-4). Therefore, unless explicitly incorporated as national law, such conventions are not considered to be part of Swedish law, and the State assumes that domestic law satisfies the duties.

<sup>21</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. As of January 1, 2020, the UN Convention on the Rights of the Child is directly applied as domestic law in Sweden.

<sup>22</sup> On January 23, 2020, after the review of this paper, a landmark case (the *Girjas* case) was decided by the Supreme Court of Sweden, with the Judgment emphasising the importance of international norms, such as those of the ICCPR, UNDRIP and ILO 169. The case determined whether Girjas RHC has exclusive hunting and fishing rights on their lands, including the right to grant hunting and fishing to others. The Court upheld the RHC's rights based on protracted uses and immemorial prescription. The respondent was the Swedish State. The implications of the *Girjas* case on competing land-uses and permit process has yet to be seen. See the case at No. T 853-18.

The Sami have no treaties and no formal Sami reserves; Sami rights to use land and natural resources are customarily based on old Swedish general property law principles (Allard, 2011, 2015a, pp. 31-2). Due to the historical legacy of the Swedish State's Sami policy, two categories of Sami have been codified into Swedish legislation: members of reindeer herding communities (RHC), who enjoy exclusive Sami usufruct rights – which also encompass hunting and fishing rights – to herd reindeer in specific areas, and non-members, who do not retain these rights by default under Swedish law (Allard, 2006, p. 37; Lawrence and Mörkenstam, 2016). We recognize the profound implications and injustice of this colonial legacy for those Sami people who are excluded from enacting these rights; however, the analysis in this paper is limited to RHCs as rights holders recognized by Swedish legislation, due to the fact that the recognition of these rights by the State means that these rights should be respected accordingly in permit-related decisions for new mines.

The content and nature of the Sami right to herd reindeer is codified in the Reindeer Herding Act of 1971. The Act has been heavily criticized for being outdated and has proven to be politically difficult to amend (Bengtsson, 2015). Significant, related legal developments have occurred through two Supreme Court cases, (*Skattefjäll case*, 1981; *Nordmaling case*, 2011), in which the Court held that the Sami reindeer herding right is a strong usufruct right with the same constitutional protection as other property rights, adjusting the proprietary conditions for recognizing the right and mindful of specific Sami land-use for reindeer herding (Allard, 2015b, p. 59). However, neither the Reindeer Herding Act of 1971, nor sectoral legislation such as the Minerals Act of 1991, have been amended to take into account the reindeer herding right as a full property right (Allard, 2016, p. 12; Lawrence and Åhrén, 2016). Mostly, the Sami reindeer herding right is viewed as a weak right with which to pursue an (exclusive) economic “industry”, and so legislation essentially treats mining and Sami reindeer herding as competing economic interests. Reindeer herding continues to be regarded as a public interest in Swedish environmental and natural resources law, while the law is, at the same time, devoid of Sami having status as an indigenous people.

What this all amounts to is a situation in which the territorial rights of the Sami remain unresolved and conflicts around mining are common.<sup>23</sup> In 2012, the National Swedish Sami Association (SSR) released a major policy document in line with international law on indigenous rights, arguing for a complete overhaul of Swedish legislation and calling for a moratorium on resource and infrastructure developments in the most developed Sami areas until such reform took place (SSR, 2012). The Swedish Sami Parliament has also requested a moratorium on the granting of mining concessions in Sweden until adequate legal reforms are made (Såmediggi, 2014).

One of the flaws of the current system regarding mining involves the royalties from mining operations. The land owner and the State are both awarded (small) annual royalties based on the value of the processed ore (Minerals Act, ch. 7 s. 7),<sup>24</sup> while affected Sami RHCs, as property right holders, receive no royalties. However, the bigger problem is that mining is often in direct competition with reindeer herding, and the impacts of mining are so great that no amount of compensation or royalties could make up for the subsequent loss of traditional livelihoods (Lawrence and Kløcker Larsen, 2019).

Having explained the general recognitions, but de facto weak protections, in Sweden of Sami reindeer herding as a property right and the

Sami as an indigenous people, we now turn to analysing in detail the sectoral regulations and practices for mining in Sweden.

## 5. The legal framework of the permitting process

In the context of an increasing pressure in Sweden to open new mines in Sápmi, it is critical that there are meaningful and effective opportunities for affected Sami reindeer herding communities to influence mining permitting processes. This section asks: where in the mining permitting process in Sweden are the most important decisions made? Upon what basis and kinds of assessments are these decisions made? And, crucially, what opportunities do Sami reindeer herding communities have to influence these decisions?

### 5.1. Exploration permit

The first step in the mineral-related permit process in Sweden is the granting of an exploration permit (Minerals Act 1991, ch. 1 s. 4). The exploration permit grants a mining company a period of three years to investigate whether or not the concession minerals included in the permit are economically and technically exploitable within the designated area.<sup>25</sup> Specific terms may apply as a component of the permit, and such terms are aimed to protect public interests and/or private rights, such as Sami reindeer herding (ch. 2 s. 10).<sup>26</sup> A detailed work plan from the applicant is also mandatory prior to the start of the exploration.

RHCs cannot, in practice, prevent an exploration permit from being approved. If an application for exploration fulfils the established legal requirements (which we contend are very low),<sup>27</sup> the Mining Inspector is obliged to grant the permit. Appeals against an exploration permit are handled by a local administrative court (ch. 16 s. 1), and legal standing is bestowed upon those who can prove that the decision concerns them and affects their rights and/or interests (Public Administrative Act 2017, s. 42), which normally is not a difficult requirement to meet for RHCs within the corresponding permit area. Yet, despite attempts by numerous RHCs to utilize the appeal system – e.g. Vapsten RHC systematically appealed a series of exploration permits at the corresponding local administrative court (see *Förvaltningsrätten i Luleå, case No. 940-13*) – we are not, in fact, aware of any exploration permits having been rejected on the basis of such an administrative court appeal by an RHC.

Mineral exploration permits in Sweden are a significantly symbolic part of the mining permitting process for Sami RHCs, due to the fact that the exploration permit may signify the beginning of a longer-term threat to Sami land-use. Yet, the exploration permit only provides a company with an exclusive entitlement to the area for exploration purposes (Bäckström, 2015, p. 152). To undertake actual physical exploration activities, the company must also, after receiving the exploration permit, submit a valid work plan (ch. 3 ss. 1, 5 and 5 c). A valid work plan details how exploration activities are to be carried out and to what extent the proposed activities might affect private rights, notably Sami reindeer herding rights (ch. 3 s. 5). Appeals regarding work plans are handled by the Land and Environmental Court (ch. 16 s. 1). Consequently, appeals against the exploration permit and the work plan are processed by different courts in Sweden, which can result in a

<sup>25</sup> The permit period can be extended by an additional 3 years via application (and after that additional 9 years if the applicant can attest “significant reasons”), see the Act ch. 2 ss. 5-7.

<sup>26</sup> However, conditions should normally be applied sparingly regarding the exploration permit, as conditions to protect public and private interests should instead be addressed within the work plan (Prop., 2004/05:40, p. 44).

<sup>27</sup> Basically, the prospector needs to present material indicating that any concession minerals exist in the area, or, if such materials stating the mineral existence in the area are already in the possession of the Mining Inspectorate, it is sufficient that the prospector refers to that (Prop., 1988/89:92, p. 90).

<sup>23</sup> The same can be said of all resource conflicts, including those of forestry (Brännström, 2017) and wind power (Lawrence, 2014).

<sup>24</sup> The royalty is very low, in total only 0,2% of the value of the annual mineral production within a concession. Since 2005, landowners are entitled to ¼ of the total royalties. In 2017, the total sum of mineral royalties paid out was about 1.2 million euros (12,035,825 SEK). See <https://www.sgu.se/bergsstaten/statistik/mineralersattning/> (Accessed 14 August 2018).

divided trial between the two courts for affected RHCs regarding the exploration phase.

After failing to stop the granting of exploration permit, reindeer herding communities thereafter attempted to set conditions for stricter and more detailed work plans, such as regarding when and how the exploration activities can take place. For example, Gran, Ran and Ubmeje RHCs challenged multiple work plans regarding Canadian Blackstone's activities in Vindelfjällen Nature Reserve, in 2008 and 2009, but without any success (e.g. [Bergsstaten 2010-01-28](#)).

Due to significant protests against mines in Sweden by Sami as well as the environmental movement, new conditions were introduced in 2014 concerning the necessary work plan and requirements therein. An amendment aimed to increase early information and dialogue about the effects of exploration activities on potentially affected Sami RHCs, among other rights holders ([Prop., 2013/14:159](#); [SOU, 2012:73](#)). Hence, where exploration activities affect reindeer herding within a permit area, the corresponding work plan of the company must be sent to the potentially affected RHCs for comments, and the RHCs, in turn, may object in writing to the content of the work plan. If an RHC opposes the work plan, however, it can still be approved by the Mining Inspector, against the will of the objecting RHC (ch. 3 s. 5 d).

After the amendment of 2014, Girjas RHC attempted to curtail drilling activities by the company LKAB in Girjas' winter pasture area in *Ylipääsnjaska* by demanding stricter conditions in the proposed work plan ([Bergsstaten 2014-04-02](#)). Girjas argued for the drilling to take place during the summer, to prevent disturbance of the reindeer when they use the area for grazing during the winter months. The County Administrative Board in Norrbotten – as the regional environmental authority - objected to the alternative put forward by Girjas, on the grounds that the area belonged to the EU Natura 2000 network and that sensitive mires would be damaged by ground transportation and drilling during summertime ([Länsstyrelsen Norrbotten 2013-12-18](#)). LKAB additionally rejected the RHC's proposal to fly in the drilling rigs in summer, calling it unfeasible. The Mining Inspectorate agreed with the County Administrative Board and LKAB, and against the submitted view of Girjas RHC, and allowed for the drilling to occur during the winter, but on the condition that LKAB would inform Girjas in advance of each activity, and that the company would cover any additional costs incurred by Girjas as a result of the exploration.

In sum, a Sami reindeer herding community can attempt to obstruct a mineral exploration work plan and request additional conditions be put on the mining company, however, the work plan itself will, on the basis of legislation, inevitably be approved by the Mining Inspector (ch. 3 s. 5 d).<sup>28</sup> Moreover, exploration activities will most likely be approved without any conditions that are considered too arduous for the mining company. Additionally, there are systematic failures with monitoring and compliance of companies during exploration, as RHCs are, in reality, often the only people on the ground to monitor if companies are actually complying with the approved work plan conditions. For example, in 2011 Jåhkågasska RHC reported to the Mineral Inspectorate illegal exploration activities by Jokkmokk Iron Mines (JIMAB), because the activities were not covered by a valid work plan ([Bergsstaten 2011-03-05](#)).

In summary, the 2014 amendments, which emphasize the importance of early dialogue with respect to a valid mineral exploration work plan, have not increased influence in the process for RHCs in any meaningful way. Since the exploration stage is essentially outside of the Sami RHCs control, the second (concession) and third (environmental) permit stages become critical. It is in the second and third stages that the RHCs theoretically have the greatest potential to influence

<sup>28</sup> If certain exploration measures are deemed necessary, that determination, in turn, overrides any potential detriments caused to an RHC. The Mining Inspector may, however, set terms to accommodate Sami reindeer herding interests.

outcomes of the mining proposals and processes, in terms of RHCs' ability to use the land for reindeer herding, and it is to these stages that we now turn.

## 5.2. Mining concession

A mining concession is an exclusive right to access specific concession minerals within a designated concession area ([Bäckström, 2015](#), p. 183). A mining concession does not grant the applicant the rights to actually operate a mine, however an approved mining concession is a pre-requisite for obtaining other permits, such as environmental and building permits ([Prop., 1988/89:92](#), p. 46), which are required under other acts to be able to pursue mining activity.

From a Sami rights perspective, the mining concession is the most important permit of all, whereby the primary assessment of opposing public interests (land-uses) is determined at the specific location of the proposed mine (see Sections 5.4 and 6 below). If the mining concession is not granted, the following permitting processes are thwarted, and a mining development cannot proceed. We are not aware of any resolved cases in which a company has been granted a mining concession and has *not* been granted the subsequent remaining and necessary permits. Thus, the mining concession is the primary permit that indicates permissibility of the project as a whole.

The size of a concession area has traditionally been determined narrowly, taking into account the mineral deposit, the purpose of the concession, and other circumstances (Minerals Act, ch. 4 s. 1), but excluding associated infrastructure such as dams and tailings.<sup>29</sup> A mining concession is typically valid for a period of 25 years, and that validity period may be extended (ch. 4 ss. 7–8). The basic prerequisites for obtaining a concession are rather straightforward; if certain conditions regarding the value of and access to the mineral deposit are met, then the Mining Inspector *must* grant a concession (ch. 4 s. 2; [Bäckström, 2015](#), p. 185).<sup>30</sup>

There is, thus, a presupposed bias in the Swedish Minerals Act that favour the granting of a mining concession. Conditions to protect Sami reindeer herding can be defined in the permit (ch. 4 s. 5; [Prop., 1988/89:92](#), p. 63), but such conditions are rarely applied in practice ([Bäckström, 2015](#), p. 250). The permitting process as a whole is essentially a public law regime, which means that the Sami reindeer herding right as a property right can only be taken into account where explicitly stated in the relevant legislation applied.<sup>31</sup> As mentioned, in mineral and environmental legislation, the protection of reindeer herding is predominantly treated as a public interest (see further Section 6.1); that is, the emphasis is on promoting reindeer herding as a livelihood for all Sami, in a general sense, as opposed to highlighting the *right* of the *specific* RHC to practice reindeer herding. The property rights of RHCs, and the protection of those rights, are poorly incorporated by the Minerals Act, and RHC property rights are mostly regulated by a RHC's capacity to be party to the process and have legal standing. Reindeer herding as a civil right is thus not properly recognised in mineral and environmental legislation, and any accommodations of RHCs' capacities as rights-holders are weak at best.

Since mining is an activity that excludes other land-uses from its immediate operational area, it is necessary to prioritise between competing land-uses and interests, such as nature conservation and/or reindeer herding. This prioritisation is encapsulated by the balancing

<sup>29</sup> The practise is to define the concession area by the size of the mineral deposit, along with an additional zone of 100 metres, which consequently makes the concession areas under review small. See [Bäckström, 2015](#), p.183.

<sup>30</sup> The two basic conditions are that a mineral deposit can most likely be utilized on an economic basis, and that the location and nature of the deposit do not make it inappropriate to grant the applicant the concession applied for.

<sup>31</sup> The Swedish Constitution lacks a provision that explicitly addresses the protection of Sami rights.

between the public interests of mineral exploitation and any opposing interests, as expressed in the Swedish Environmental Code of 1998, Chapters 3–4 (see Section 5.1 below). At this stage, the Mining Inspector determines whether mineral extraction can be permitted at the specific location. The impact this decision has on affected RHCs cannot be emphasized enough. The decision around balancing of public interests made during the concession permit stage is binding in the environmental permit decisions (ch. 4 s. 2 para. 4; [Prop., 1988/89:92](#), pp. 57, 61) and cannot be re-assessed, even if the adverse total impacts are realized to be greater than assumed during the concession phase (e.g., once impacts from infrastructure and operations, such as traffic, noise and dust, are included).

Prior to the permit decision, the Mining Inspector consults the County Administrative Board (ch. 8 s. 1; [Prop., 1988/89:92](#), p. 68). The County Administrative Board has an important function to coordinate and safeguard Swedish State interests regarding the land and resource management interests in the region, including reindeer herding ([Prop., 1997/98:45](#) Part II, p. 29). If the Mining Inspector and the County Administrative Board disagree on the balancing of public interests relevant to the location, the permit decision is, instead, made by the Swedish Government (ch. 8 s. 2).<sup>32</sup>

The Mining Inspector's decision on a mining concession can also be appealed to the Swedish Government (ch. 16 s. 1). Yet, crucially, there is no merits-based appeal process regarding the Government's final decision; Government decisions can only be appealed to the Supreme Administrative Court on technical points of law.<sup>33</sup> The corresponding preparatory works of the Minerals Act express a desire to retain some political control over the permit granting process ([Prop., 1988/89:92](#), pp. 66 and 69). This also means that there is no opportunity for an independent judicial review of the merits of the Government decision, and the resulting gap constitutes a serious flaw in the regulatory framework with respect to Sami rights (cf. [RÅ 2010 not. 31](#) and [HFD 2014 not. 65](#)).

Furthermore, the definition of legitimate appellants is narrow and based on principles of legal standing (Public Administrative Act 2017, s. 42; [Prop., 1988/89:92](#), pp. 69, 129), interpreted to mean that only those immediately affected by the concession area can submit an appeal. Consequently, RHCs negatively affected by associated mining infrastructure (railways, roads), but with pasture areas outside the narrowly-designated concession area, have been denied legal standing in the mining concession permitting process. Although the same RHCs are party to the environmental permitting process that occurs later on, their exclusion from the concession phase has significantly weakened their possibility to influence the most important decision-making stage.

To date, there are only two cases whereby the Country Administrative Board and the Mining Inspector have agreed to reject a concession permit application on the basis of significant impacts on reindeer herding. Both decisions have been appealed. In the *Stekenjokk* case, the proponent appealed the Mineral Inspectorate's decision to reject the mine ([Bergsstaten 2014–02-19](#)) to the Government and presented a revised project plan. The Government considered the changes to the project substantial and resubmitted the case to the Mining Inspector ([Regeringen 2017–11-16](#)), whose decision is still pending. In the *Kyrkberget* case, the Mineral Inspectorate's decision to reject the permit ([Bergsstaten 2019–01-11](#)) was appealed by the proponent and is awaiting the Government's decision. In sum, there are thus far no final cases whereby a mining concession permit has been

<sup>32</sup> The Swedish Government has collective decision-making, but it can also take a decision in one of two ways: by delegation to the Ministry of Enterprise, Energy and Communications (the standard procedure), or via a decision taken by all ministries and in turn signed by the Prime Minister.

<sup>33</sup> The Supreme Administrative Court in Sweden can only try whether the Swedish Government has either overstepped its authority according to legislation or made procedural wrongs in the decision-making, under the Act on Judicial Review of certain Government Decisions, 2006.

denied based on potential impacts on Sami reindeer herding.

### 5.3. Environmental permits

While the Swedish Minerals Act sets the terms for exploration permits and mining concessions, it is the Swedish Environmental Code of 1998 that addresses the environmental protection requirements for the environmental permits needed to *operate* an actual mine. Depending on the character of the mine and processing measures it is necessary to obtain several permits for environmentally hazardous activities (such as for the mining itself and for sintering and other processing facilities and activities)<sup>34</sup> and water permits to regulate the impacts on water systems, e.g. via tailings dams or efferent of ground water (Environmental Code, ch. 11 ss. 3, 9).

The permitting authority for mining operation applications is the Land and Environmental Court (LEC). On the basis of the EIA and substantial environmental protection requirements under Chapter 2 of the Code, the LEC is to evaluate the environmental impacts of the proposed mining operation and associated activities, as well as set necessary conditions to mitigate negative impacts therein (Environmental Code, ch. 16 s. 2 and ch. 22 s. 25; [Prop., 1997/98:90](#), pp. 151-2). Significantly, the Environmental Code is *not* designed to hinder environmentally hazardous activities but, rather, to mitigate and manage potentially significant negative impacts on the environment and human health from such activities ([Michanek and Zetterberg, 2017](#), p. 256). A mining or related activity can only be denied if the site is exceptionally unsuitable (ch. 2 s. 6), if the environmental and/or health impacts would be unacceptably severe (ch. 2 s. 9), or if there would be potentially significant harm to a Natura 2000 area near to the mine.<sup>35</sup> If the permit is granted, then an environmental permit decision can be appealed to the Land and Environmental Court of Appeal by affected RHCs. In contrast to the mining concession decision, legal standing, in this instance, is broad (Environmental Code, ch. 16 s. 12; [Prop., 1997/98:45](#), p. 485). However, in practice, appeals put forward by RHCs have so far not succeeded in the rejection of any environmental permits (e.g. [MÖD 2005:24](#)).

### 5.4. Environmental impact assessments

Both the mining concession and environmental permit stages require the mining company to undertake separate environmental impact assessments (EIAs) (ch. 6 of the Environmental Code and the Minerals Act ch. 4 s. 2 para. 5). The separation of these two critical permit procedures has profound consequences for affected RHCs in the assessment of the impacts of a potential mine on reindeer herding. The legal requirements of the two EIAs differ both in terms of their geographical scope (the mineral deposit and its immediate surroundings vs. a fully-operational mine with adjoining infrastructure), and in their assessment of *which* impacts are to be considered. According to [Bäckström \(2015, p. 249\)](#) such provisions do not function optimally in a split-permit process, because the central principle of environmental law, holistic assessment, is, as a result, not upheld.

Where there is a perceived risk for significant impacts from a proposed mine or related activities on a nearby Natura 2000 area<sup>36</sup>, there is an additional procedural requirement for producing an EIA for the "Natura 2000-permit" application (Environmental Code, ch. 6. s. 20 item 1). This can be done either as a separate EIA or as a part of the EIA for the concession permit (or for the environmental permit).

<sup>34</sup> Environmental Code ch. 9 ss. 1 and 6; Regulation on Environmental Examination (2013:251), ch. 4 ss. 11-15.

<sup>35</sup> See e.g. Land and Environmental Court of Appeal case M 10355-17, August 2018. The Court rejected the application and held that the mining company first needed to obtain a "Natura 2000 permit".

<sup>36</sup> Natura 2000 areas are legally protected nature areas under European law.



Recent legislative changes and case law have influenced the above mentioned EIA requirements. The fundamental decision concerning the mining concession has, until recently, been based solely on the designated concession area, not on the mine as a whole (see Section 6). This interpretation has meant that both the related infrastructure (tailings, dams, transport corridors) and the impacts of a mine in operation (noise, dust, traffic, emissions to water) have been excluded from the EIA at the mining concession phase; such impacts have been accounted for later in the environmental permit process. As a result, the full impacts of a proposed project have not, *at any point*, been considered simultaneously alongside the question of whether or not, upon the balancing of opposing interests, a mine should be permitted. This slicing and dicing of impacts is extraordinary, particularly given the large scale impacts a mine always has on both the environment and on other land-uses and rights holders.

Furthermore, there have not been any legal requirements pertaining to assessing the potential impacts on Sami reindeer herding specifically. However, as a result of increasing resistance from RHCs to new mines, a practice to undertake a “reindeer herding impact assessment” (RHIA, *rennäringssanalys* in Swedish) has emerged among mining companies. These assessments have been carried out, at least to some extent, in cooperation with affected RHCs. Yet, a review of EIAs from 56 mining concession applications (Kløcker Larsen et al., 2018) shows that the performance of these voluntary measures remains poor, even for those companies who are considered relative frontrunners. Community-based impact assessments (CBIA) provide an alternative to applicant-driven impact assessments and their poor outcomes for RHCs. For example, a CBIA was undertaken by Semisjaur Njarg RHC and researchers concerning a proposed copper mine in Laver. The CBIA was submitted to the Mining Inspector and County Administrative Board prior to the determination of the mining concession (Lawrence and Kløcker Larsen, 2017). The arguments within the CBIA regarding the mine’s potential impacts on the RHC were used by the County Administrative Board in their own official submissions to the Minerals Inspectorate, an action that demonstrates the impact of such a report; however, the matter remains under appeal with the Swedish Government.

2018 amendments to the EIA provisions (Prop., 2016/17:200)<sup>37</sup> emphasize an EIA’s role in supporting an overall assessment of environmental effects of an activity, and the requirements of an EIA’s content have been clarified therein accordingly (ibid., pp. 13 3-4). Moreover, amendments to the Minerals Act now require a mining company to undertake corporate consultations with affected stakeholders, such as RHCs, in efforts to reduce appeals (Prop., 2016/17:200, p. 158). Corporate consultations already took place informally in many instances (Tarras-Wahlberg, 2014), and the consultations are a considerable drain on the resources of RHCs in the face of the weak regulations regarding reindeer herding rights. There are also no public funds to cover RHC consultation engagement, nor are there regulations requiring mining companies to provide such funds (Kløcker Larsen and Raitio, 2019); the latter of which, for example, has become best practice in countries such as Canada. Consequently, the ability of RHCs to influence the outcome of the permitting process through corporate consultations remains weak.

Another amendment with respect to the EIA has established that the cumulative impacts of an activity must now be explicitly assessed for an environmental permit (Environmental Code, ch. 6 s. 2)<sup>38</sup>. While this is still not explicitly required in the mining concession EIA, preparatory

<sup>37</sup> These amendments were part of an overhaul of Chapter 6 of the Swedish Environmental Code, based on recent changes (EU Directive 2014/52/EU), amending the EU Directive 2011/92/EU concerning EIA.

<sup>38</sup> This provision, in defining “environmental effects”, includes both direct and indirect cumulative effects, however the bill does not explain what cumulative effects actually means in practice and whether that cover existing operations, which is relevant for a RHCs’ overall land-use.

works (Prop., 2016/17:200, p. 221) lean in this direction. As a result, there is continued uncertainty around a crucial component of impact assessments, from a Sami reindeer herding perspective (Kløcker Larsen et al., 2017; Lawrence and Kløcker Larsen, 2017).

Furthermore, although the amendments to the EIA in Chapter 6 of the Environmental Code clarify certain points and provide improved structure, the system is, nonetheless, restricted to assessment of the environmental impacts of a potential mine<sup>39</sup> and only include corporate consultations, not a State duty to consult Sami (cf. Section 4). Swedish law lacks provisions on social/cultural impact assessments regarding the Sami as an indigenous people, specifically. Furthermore, the amendments to the EIA (Prop., 2016/17:200) do not in any way engage with the specific issue of reindeer herding rights and interests.

In its comment on the bill (i.e. the preparatory works to the amendment of Chapter 6 of the Environmental Code),<sup>40</sup> the National Swedish Sami Association (SSR) argued that relevant provisions should explicitly address the Sami’s right to influence (Prop., 2016/17:200, p. 79), however these arguments were ignored. Hence, under the current EIA legislation, rather than being treated as indigenous rights-holders, the Sami are simply treated as stakeholders like anyone else. Thus, if corporate consultations result in inadequate and incorrect assessments of the possible impacts, affected RHCs cannot refer to a breach of regulations. Instead, a mining company can claim that it has met the minimum legal requirements for the process, and the resulting EIA can be submitted to the permit authorities without the affected RHCs’ consent, which has happened several times.

## 6. The balancing of opposing interests

As noted earlier, a critical and complex consideration during a decision on any mining concession application is the balancing of different, and often opposing, public interests concerning the land-use in a certain area (Minerals Act ch. 4. s. 2). On this matter, the Minerals Act refers to the provisions within Chapters 3-4 of the Environmental Code, as these provisions are to function as broad guidelines for solving various land-use and resource management conflicts wherein the State has significant public interests to guard (Prop., 1997/98:45 Part I, pp. 244-5; Prop., 1985/86:3, p. 46). The provisions were imported directly from the repealed Swedish Nature Resources Act of 1987, and they have always been criticized for being too abstract and imprecise,<sup>41</sup> however, the idea was that such provisions should be applicable to diverse situations. As a result, the competent authorities applying the provisions have a significant amount of discretion in the process.

In the context of mining concession applications, the shortcomings of Chapters 3–4 of the Environmental Code, from a Sami reindeer herding perspective, can be boiled down to three main observations: (1) the inadequacy of a static system in designating certain pasture areas as vital so as to protect the actual needs of each RHC; (2) an a priori assumption of co-existence between mining and Sami reindeer herding; and (3) the privileging of the socio-economic benefits of a mine, that is, an exclusion of concern for major negative impacts resulting from the limited geographical scope (the concession area), while assuming positive socio-economic benefits from a fully-operating mine. We will address each of these matters in the following sections.

### 6.1. Mining and Sami reindeer herding as public interests

The provisions in Chapter 3 of the Swedish Environmental Code that have most bearing on our analysis concern the category of public

<sup>39</sup> Cf. The Canadian Supreme Court case *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, where this limitation of the assessment was deemed insufficient. See also Allard, 2006, p. 432.

<sup>40</sup> Cf. footnote 7.

<sup>41</sup> See the Law Council’s review of the bill (Prop., 1985/86:3, 225).

interests named “areas of national interest” (*riksintresse* in Swedish), which are designated by appointed sectoral authorities.<sup>42</sup> Areas important for Sami reindeer herding, areas with high natural or cultural values (including outdoor recreation), areas suitable for wind power development, and areas containing valuable minerals may, for instance, can all be regarded as “areas of national interest” (ch. 3 ss. 5–7, para. 2). An area designated for a specific purpose, such as an area containing a valuable mineral deposit, *shall be* protected from measures that may be prejudicial against the national interest therein that is to be protected – meaning, the primary interest shall prevail over other public interests that do not have the same status in said area.<sup>43</sup> Commonly, however, the same areas are designated for competing land-uses – for instance, for both valuable minerals and as important reindeer pasture land. In such situations, the vagueness of Chapters 3–4 means that the provisions have little utility as in actually managing different land-uses; decisions tend to become “politicised”, and especially so when the application for a mining concession is being decided by the Swedish Government.

Another specific weakness of the provisions within Chapter 3 relates to the politics of the designation of these areas. Designating selected “areas of national interest” as a static land-use fits poorly with the dynamic nature of reindeer herding as an indigenous Sami land-use. The static approach is not in line with the original aim of the provision to give basic protection for reindeer herding as an essential aspect of Sami culture (Prop., 1985/86:3, pp. 57–8; Torp, 2000). The idea behind the provision was that prime reindeer herding-related areas, such as calving grounds and migratory routes, within each RHC were to be selected (1985/86:3, pp. 160–1). However, today most, if not all, remaining reindeer pasture areas that are used by RHCs are of immense importance. Sami reindeer herding in Sweden, with its cyclical and constantly changing movements between various grazing lands, coupled with the need to navigate increasing encroachments, does not fit into a system of limited and fixed areas for protection. Inevitably, the current system can only be sustained when limited areas are designated as “areas of national interest”, which also explains why there are continuous debates between the Swedish Sami Parliament and other sector-based authorities within the designation processes. Regardless of need, most of the pasture areas of RHCs cannot be fully protected under the current system.

## 6.2. Assumption of co-existence

The Environmental Code – or, rather, the preparatory works therein – postulates that combined land-uses are preferable. Hence, an a priori assumption that mines and reindeer herding should, and can, co-exist is institutionalized. Chapters 3–4 of the Environmental Code emphasize co-existence over analysing whether such co-existence is possible case-by-case. From this general political preference for co-existence, it logically follows that different public interests must necessarily tolerate restrictions on their own activities (Prop., 1985/86:3, p. 154), which, in turn, justifies encroachments on RHC pastures as necessary for the greater good.

Only where interests are considered to be genuinely incompatible is the decision-maker obliged to prioritize one interest over the other (Prop., 1997/98:45 Part II, p. 30; Prop., 1985/86:3, p. 154), which is performed through an assessment of “ecological, social, cultural and

<sup>42</sup> Under the Government Regulation (1998:896) s. 2, these sector authorities are e.g. the Swedish Sami Parliament (reindeer herding), the Geological Survey of Sweden (SGU) (mineral deposits), and the Environmental Protection Agency (conservation interests).

<sup>43</sup> A general problem with this rule is that the thresholds of “significant interference” and “significant harm”, concerning the stipulated interests from other land-use activities, is high, thus allowing de facto significant interference/harm, so long as the high threshold is not exceeded.

socio-economic considerations” of different land-use scenarios (Prop., 1997/98:45 Part II, p. 35).<sup>44</sup> This assessment tool provides little, if any, clear direction for decision makers. It is not surprising that conventional socio-economic considerations (i.e. tax revenue and regional employment) commonly prevail, and mining interests are usually prioritized. Indeed, Sami reindeer herding in Sweden has repeatedly and systematically had to concede to other industries, reflecting the general assumption that reindeer herding pastures are so vast and reindeer herding so inherently adaptable (Lundmark, 1998, pp. 60–2; Löf, 2013; Lawrence, 2014) that it can, without any major impacts, be combined with mining (Lawrence and Åhrén, 2016; Lawrence and Klockner Larsen, 2017). Importantly, this assumption *in practice* shifts the burden of proof from the company proposing a mine to the reindeer herding community needing to prove incompatibility.

We are only aware of a few cases where incompatibility of land-use interests has been accepted and an actual prioritizing of land-use took place as a result. In the *Rönnbäcken* case, Vapsten RHC challenged the common presumption of co-existence by submitting an appeal to the Supreme Administrative Court (SAC) of Sweden regarding the Swedish Government’s decision concerning the area in question.<sup>45</sup> The SAC upheld the RHC’s appeal. They found that the Government had simply assumed co-existence, had failed to assess if mining and reindeer herding were actually compatible in the area, and that such an assessment should have taken place (HFD 2012 not. 27). In its ensuing assessment, the Swedish Government found that mining and reindeer herding were, in fact, incompatible within the designated concession area. However, the Government then came to the conclusion that mining should be given priority, based on socio-economic interests (Regeringen, 2013–08-22, p. 10).<sup>46</sup> In a subsequent decision regarding an appeal by the RHC on the same matter, the SAC held that the Swedish Government had not overstepped its margin of appreciation when it decided in favour of the mining interest (HFD 2014 not. 65).

In the *Stekenjokk* case, by contrast, the County Administrative Boards in Västerbotten (Länsstyrelsen Västerbotten 2013-10-02) and Jämtland (Länsstyrelsen Jämtland 2013-10-07) considered, in their overall assessments, Sami reindeer herding as a public interest stronger than the public interest of valuable minerals, and hence the Boards recommended the Mineral Inspector to deny the permit application. The Mining Inspector agreed, however the Government upheld Vilhelmina Mineral’s corresponding appeal (Regeringen, 2017–11-16), due to the fact that the company had revised the project considerably, which therefore led it to be reassessed by the Mineral Inspectorate. At the time of this writing, the decision by the Mining Inspectorate is still pending. In situations of incompatible land-use interests, we are, thus, still yet to see a case in which the Swedish Government prioritises reindeer herding over mining.

## 6.3. Privileging of socio-economic benefits

Our third key observation in our analysis of the legal application of Chapters 3–4 of the Environmental Code is the unequal inclusion of positive and negative impacts of a potential mine during the balancing of interests. The paradox of judging the socio-economic benefits of a mine is that for any benefits to exist, one must already assume a fully operational mine, including its entire land area, related infrastructure, transport corridors and emissions to air and water. But it is precisely the full scope of the operations, which according to the concession

<sup>44</sup> The earlier bill mentioned the quality of the decision’s supporting material and the strength in argumentation of what *in the long run*, from a *public perspective*, could be considered as an appropriate land-use. See Prop., 1985/86:3, p. 169.

<sup>45</sup> This is a limited trial; see Section 4.2 of this paper.

<sup>46</sup> While Vapsten RHC was able to appeal the original procedural error by the Swedish Government to the SAC, the substance of the Government’s decision was not appealable, hence Vapsten RHC’s further complaint to the UN system.

permitting practices thus far, is *not* to be assessed at this stage of the process. In other words, the balancing of interests weighs, on one hand, the *adverse* impacts based on the highly limited assessment of the concession area, and, on the other hand, the *positive* economic and employment impacts based on the assumption of a fully operational mine. This imbalance goes a long way in explaining why, up until recently, mining concessions have, as a rule, been granted. In fact, the preparatory works of the Environmental Code explicitly state that economic considerations and socio-economic values, such as regional politics or employment opportunities, are to be emphasized in the decision-making (Prop., 1997/98:45 Part II, pp. 30, 32–3; Prop., 1985/86:3, p. 155). This is not beneficial for protecting areas such as reindeer pasture, because the economic revenue in Sami reindeer herding is generally assessed to be low, in a strict cost-benefit analysis, even though with a more holistic assessment of the sustainability of different land-uses other results might prevail.

Furthermore, and in the *Rönnbäcken* case, the project consisted of several concession applications that were submitted at different times, making a comprehensive assessment even more difficult. And, as noted earlier, the authorities are only allowed to assess the impacts of a potential mine on Sami reindeer herding as a matter of *public* interest, not as impacts on individual RHCs or herders as rights-holders. This also means that Country Administrative Boards in Sweden are given a high level of discretion in determining the relevant scale of impact in such circumstances, which may bear little to no relevance for how the affected RHC actually use or value the area.

For example, in the *Stekenjokk* case, the County Administrative Board determined that the concession area was relatively undisturbed and part of larger, ecologically valuable mountain landscape, while also being valuable for Sami reindeer husbandry, regionally. Conversely, the County Administrative Board viewed the *Rönnbäcken* area as already under threat of degradation due to other competing land-uses, and therefore less valuable for reindeer herding both regionally and in the long-run. In the *Stekenjokk* case, and for the Vapsten RHC, there was a happy coincidence between the RHC's valuing of the area and the valuing of the same area by the public authority. In the *Rönnbäcken* case, however, existing developments justified the granting of permits for yet more developments, which was in direct contradiction of the view of Vapsten RHC concerning the actual value of the area as pasture for their reindeer. This kind of argument paradoxically reverses the general logic of impact assessment and threshold determination as mechanisms. The general logic would have it that the heavier the pre-existing impacts are on an area or on the affected RHC, the less additional impacts the area or a RHC should be expected to bear.

In conclusion, we question whether Chapters 3–4 of the Environmental Code are suitable for their task of balancing public interests. First, the guidance within the chapters is so broad that it is almost meaningless. Second, in the choice between conserving or exploiting land and natural resources, not all impacts are included in the assessment. Assumed socio-economic considerations are at the forefront, and often preclude more sustainable uses of land and water areas and the rights of Sami RHCs (see also Bäckström, 2015, p. 247).

## 7. Case law as a driver of change: the *Norra Kärr* case

The *Norra Kärr* case from 2016 (HFD 2016 not. 21),<sup>47</sup> reviewed by the Supreme Administrative Court (SAC) and addressing the conditions for a mining concession in the south of Sweden, has influenced on-going mining-related permit processes, including in Swedish Sápmi. *Norra Kärr* was initiated due to conservation interests under EU law, namely the potential negative impacts of a proposed mine on nearby Natura

2000 areas<sup>48</sup>.

The legal issue in *Norra Kärr* was the question as to whether or not it was lawful, under the Swedish Minerals Act (ch. 4 s. 2), to limit the assessment of the mining concession to the designated concession area, thereby excluding all including adjoining activities and infrastructure necessary for operating a mine.<sup>49</sup> The SAC quashed the Swedish Government's decision and held that the geographical limitation of the assessment in question was indeed unlawful.<sup>50</sup> As described above, current application of the law *before* this court case concerned only the operations *within a concession area* (see also Bäckström, 2015, p. 183, 200).

After the *Norra Kärr* case, the Swedish Government remitted all four cases pending decision back to the Mining Inspectorate. This concerned matters both where the Government was first instance (Regeringen, 2016–06-30 *Kallak*; Regeringen, 2016–06-30 *Eva*), and appealed decisions from the Mining Inspector (Regeringen, 2016–06-30 *Viscaria*; Regeringen, 2016–12-01 *Kyrkberget*). The remittance of the cases was enacted on the grounds that the law had been clarified via *Norra Kärr* regarding what land-uses should be assessed, seemingly regardless as to whether Natura 2000 areas were affected or not. In short, the implications from this case have been more far-reaching than adherence to EU environmental law alone in Sweden.

Two of the remitted cases have since been decided by the Mining Inspector. The mining concession application was granted in *Viscaria* (Bergsstaten 2018–03-26), where the area under review was designated in the local plan for industrial and mining operations as having no competing “national interests”; however, adjacent to the area are areas of national interest for Sami reindeer herding. In *Kyrkberget* (Bergsstaten 2019–01-11), the Mining Inspector rejected the application, due to the fact that the localization of the tailings dam would significantly interfere with reindeer herding.<sup>51</sup> Both decisions have been appealed to the Swedish Government; *Kyrkberget* has been appealed by the company Tertiary Gold Ltd, and one of the multiple permitting decisions in *Viscaria* (no 7) has been appealed by Laevas RHC.

Another case of relevance here is *Laver*. In this case, the Mining Inspector rejected an application by Boliden (Bergsstaten, 2016–12-13), because the company had refused to apply for a Natura 2000 permit process. This matter, in fact, results from another consequence of the *Norra Kärr* case, concerning at what point in the entire permitting process a Natura 2000 permit should be obtained. This decision has also been appealed to the Government by the company. Thus, there are a number of important mining permitting cases concerning lands within Sápmi that await the Swedish Government's decision.

Evidently, *Norra Kärr* has clarified that adjoining activities and infrastructure henceforth must be a part of the mining concession assessment and included also in the EIA, however this development has also triggered differing opinions as to when a Natura 2000 permit should be assessed. Furthermore, since the affected area for consideration has now been expanded, the possibility for affected RHCs to

<sup>48</sup> These areas are protected under two EU directives (92/43/ECC and 2009/147/EC) and are “areas of national interest” under the Environmental Code (ch. 4 s. 1, 8).

<sup>49</sup> Such activities and buildings may e.g. be dressing plants, granite heaps, and tailings and dams for purification.

<sup>50</sup> SAC also referred to the preparatory works of the former Swedish Minerals Act from 1974, which declared a larger geographical area. Strangely, there is no equivalent in present preparatory works, nor are there clear cross-references to the former act's preparatory works, but this general reference seems to be the main reason behind the modified policy of both the Swedish Government and the Mining Inspector.

<sup>51</sup> In this part of the site only reindeer herding was designated as an “area of national interest”, and in such a situation, where there is only one “national interest”, reindeer herding *must* be protected against harmful measures, Environmental Code ch. 3 s. 5 para. 2.

<sup>47</sup> This case is a limited trial under the Act on Judicial Review of certain Government Decisions, 2006; the SAC may only accept or set aside the Swedish Government's decision.

appeal decisions on mining concessions has also increased. It is important to note that these changes have come about through case law as a result of Sweden's duty to apply EU environmental law, not through internal Swedish regulatory reforms. The primary problematic aspects of the regulatory framework thus remain institutionalised.

## 8. Conclusions

In this article we have analysed the extent to which there are meaningful opportunities for Sami reindeer herding communities (RHCs) in Sweden to effectively influence mining permitting processes, in ways that ensure the RHCs' ability to use the land for reindeer herding. In sum, our socio-legal analysis demonstrates that Sami RHCs currently have weak and uncertain possibilities for influence in the relevant laws and processes. More specifically, our answers to our four research questions can be summarized as follows: (1) The most important decisions around permissibility of new mines concern the mining concession phase, because this phase is where the balancing of competing land-uses is assessed and decided, and this cannot be repealed at a later stage. (2) The ability of RHCs to affect the concession permit phase is weakened by several factors. There is neither a Swedish State duty to consult the Sami that is in line with FPIC, nor is there proper access to justice for the Sami (that is, the possibility to appeal a concession permit to a court of law for a full judicial trial, wherein the full merits of the case are heard). The affected Sami RHCs are, instead, left to defend their rights and interests against powerful and well-resourced mining companies, and the RHCs are forced to participate in corporate consultations therein, under legislation designed to "fast-track" mining interests. (3) The divided permit process that separates the mining concession and the environmental permits means that the full impacts of a proposed project are not, at any point, holistically assessed in terms of the balancing of opposing land-uses. Furthermore, the requirements for an impact assessment of a potential mine are unclear concerning cumulative impacts, and requirements are non-existent regarding possible social/cultural impacts on an RHC as an *indigenous* community. (4) When balancing opposing land-uses concerning the mining concession, Sami reindeer herding is treated as an "industry" and as a public interest, but not as a Sami property right; this factor significantly weakens Sami reindeer herding status vis-à-vis mining. Not surprisingly, we are yet to see a case where, at the final instance, the permitting process in Sweden rejects a mine on the grounds of incompatibility with reindeer herding.

The analysis presented in this article points to the urgent need for a thorough, root-and-branch legislative reform in Sweden. We specify at which levels the regulatory gaps exist and how the gaps function and interact. As noted in Section 4, a number of international norms, and hence State practices, vis-à-vis Sami as an indigenous people, remain unratified or unincorporated into national law by Sweden (Fig. 1, gap 1), a deficit which provides a weak starting point for ensuring effective Sami participation in the mining permitting processes. Furthermore, Article 27 of the ICCPR has not been applied in recent legislative amendments in Sweden, which is deeply concerning. This situation in Sweden stands in contrast to that in Norway, whereby international obligations regarding the Sami are routinely and thoroughly analysed in the context of national legal reforms (Allard, 2015b, p. 51). The above mentioned revision of the Swedish Minerals Act, aimed to promote early dialogue and a better balancing between mining interests and potentially-affected rights holders, does not address Sami rights at all, Sami status as an indigenous people, nor the requirement for a State duty to consult in accordance with international law (cf. Prop., 2013/14:159).

While Sweden does have certain statutes that recognize the Sami as an indigenous people (level 2), the status of Sami reindeer herding as a property right, and the duty of the public authorities to provide the Sami influence over decision-making, have not been adequately translated into sectoral legislation, primarily the Minerals Act and the

Environmental Code (gap 2). This gap, between the general stipulations on Sami rights and the specific regulations for mining that fail to mention such rights, is the most significant gap within the Swedish national regulatory system from a systematisation and coherence point of view. Critically, there is little meaningful regard for Sami reindeer herding rights as a property right. This, combined with both a lack of a State duty to consult the Sami and a lack of proper access to justice for the Sami, results in a regulatory framework that neglects, rather than enforces, the protection of Sami rights. Moreover, the recent revisions of the Environmental Impact assessments (EIAs), initiated as a result of EU amendments to corresponding EU directives (Prop., 2016/17:200), have failed to address these shortcomings in relation to Sami rights.

Certainly, the vague and weak regulations on EIAs and the balancing of opposing interests could, in theory, also be interpreted by the permitting authorities and courts more extensively and in favour of RHCs with consideration to reindeer herding and Sami rights. However, as Darpö (2016, p. 71) has observed, the implementation of the already weak *environmental* regulations in Sweden regarding mining is even weaker in cases concerning reindeer herding (see also Kløcker Larsen and Raitio, 2019). In other words, the current sectoral regulations in Sweden could be interpreted more ambitiously, but there is a gap between the regulations and the practices in-action (gap 3). At the same time, the non-regulation of certain practices that are developed by mining companies, such as reindeer herding impact assessments, means such practices lack minimum standards and are therefore difficult for RHCs to challenge.

In sum, our analysis demonstrates that the gaps between international and Swedish national law, along with gaps within the Swedish national legal system, mean that Sami rights are not effectively recognized within the mining permitting system. This void creates a permitting process in favour of the approval of mining activities, and without effective possibilities for Sami RHCs to influence the outcome.

While one of the key implications of our analysis points to the inadequate procedural rights of affected Sami RHCs, it is important to note that they are only one component of the governance gaps in the mining permitting process in Sweden. Even if a state duty to consult were to be introduced into the mining permitting process, the likelihood of Sami RHCs succeeding in defending their rights and interests through such consultations would be slim, unless these actions were coupled with reform to the substantive provisions within the Swedish Minerals Act and Environmental Code, particularly in regards to impact assessment and reindeer herding as a right. This imbalance can only be addressed by a thorough revision of the mining permit regulations in their entirety.

While perhaps surprising, considering the favourable reputation of Sweden in international human rights fora, the shortcomings of the Swedish mining regulations and permit practices are in no way unique. On the contrary, these shortcomings echo the most common governance gaps identified in research literature worldwide concerning mining and indigenous peoples, namely: a general lack of recognition of indigenous rights; inadequate consultation procedures for ensuring community-based FPIC; and the poor quality of proponent-driven impact assessments that seldom cover social, cultural or human rights impacts for the affected communities (e.g. Hanna and Vanclay, 2013; Owen and Kemp, 2014; O'Faircheallaigh, 2017). Our analysis shows that addressing any one of these alone will not solve the problem, instead, they all need to be addressed simultaneously as a part of the puzzle in protecting of indigenous rights vis-à-vis mining. A proper understanding of the potential impacts of proposed projects, for instance, is necessary in order for the affected indigenous communities to be able to give or withhold their *informed* consent (Hanna and Vanclay, 2013), and certainly for the governments to be able to ensure that they do not grant permission to projects that are in violation of indigenous rights. However, unless both adequate procedural regulations concerning FPIC, and substantive regulations concerning the protection of the rights in land-use are in place, impact assessment processes and

negotiations may instead function to co-opt indigenous communities into agreements around projects to which they never would have consented, had a consent mechanism been in place (Hanna and Vanclay, 2013; Howlett and Lawrence, 2019).

The shortcomings we have identified in the Swedish context are similar to those in the international literature also in the sense that they reflect both the states' failure to fulfil their duty to protect indigenous rights (Hanna and Vanclay, 2013), as well as the implementation gap between laws and lived reality (Sawyer and Gomez, 2012; Stavenhagen, 2009: 367, Szablowski, 2011). Returning to the point made earlier by Vasconcelos (2005), the governance gaps that are identified in this paper and international literature are not governance "failures" in the sense that the regulator would have failed to achieve its intended goals. Rather, as O'Faircheallaigh (2017) has pointed out, there is a structural bias around the globe towards ensuring the approval of projects due to government interests to promote "development", and indigenous rights are perceived as standing in the way of this aim. Corporate acceptance and recognition of indigenous peoples' rights to control developments on their own lands is critical for determining the outcomes of mining conflicts (O'Faircheallaigh, 2012) as well for increasing state incentive to regulate mining so as to protect indigenous rights. However, companies operating in Sweden have openly expressed skepticism concerning acceptance and recognition of indigenous rights (Lawrence and Moritz, 2019), which may explain the unwillingness of the Swedish government to move forward in the protection of Sami rights, despite mounting criticism.

Framing indigenous rights as a threat to development is, naturally, a morally unsustainable standpoint, and we also argue that such framing is false. We concur with several international scholars that improving the coherence of the regulatory system from an indigenous (Sami) rights perspective would in fact be in the interest of not only the rights holders, but also of companies, non-indigenous local people, and the state actors, in the forms of increased certainty, predictability, and legitimacy of the regulatory environment and permitting processes (Hanna and Vanclay, 2013; Owen and Kemp, 2014, for similar argument in the context of forest conflicts see Raitio and Saarikoski, 2012). The persistent conflicts around mining in indigenous territories reflect the fact that the permit processes in Sweden and internationally give little room for the affected indigenous communities to influence the outcome of the most critical question for them of all – whether or not a project should go ahead – which leaves political mobilization and protests as the affected communities' only alternatives (O'Faircheallaigh, 2012; 2017). From a corporate perspective, lengthy and unpredictable processes plagued with conflict are an economic liability (de Echave, 2010; Hanna and Vanclay, 2013; Owen and Kemp, 2014). Companies should commit to respecting international human rights, including the indigenous rights, even when these rights are not fully required by national legislation (Hanna and Vanclay, 2013). The role of the state remains, nonetheless, crucial in providing the necessary conditions for a more stable operational environment and risk management (Owen and Kemp, 2014; O'Faircheallaigh, 2017). Without such "conditionalities" in place (Owen and Kemp, 2014), companies are able to neglect indigenous rights without any legal consequences, further escalating ensuing conflicts with indigenous communities.

Unfortunately, we see few signs of this much-needed regulatory reform from the Swedish State thus far. The most promising changes to Swedish mining permit practices have been through case law (*Norra Kärr*) – case law that is not, in fact, directly related to Sami rights, but rather to environmental protections on which Sami have been able to piggyback, along with changes occurring through persistent conflicts between RHCs and mining companies. In other words, change has not come through proactiveness on the part of the State as legislator, nor through public authorities applying law creatively. On the contrary, the Swedish State's continued insistence on corporate-led consultations as a policy solution has, in such situations, only escalated the conflict and led to lengthy appeal processes with uncertain outcomes for all

(Lawrence and Åhrén, 2016; County Administrative Board of Norrbotten, 2016). If the Swedish State chooses to not engage more actively in such reforms, we foresee a continued high level of conflict regarding mining in Sápmi.

#### CRedit authorship contribution statement

**Kaisa Raitio:** Conceptualization, Investigation, Methodology, Resources, Data curation, Writing - original draft, Writing - review & editing, Visualization, Supervision, Funding acquisition. **Christina Allard:** Conceptualization, Investigation, Methodology, Resources, Data curation, Writing - original draft, Writing - review & editing, Funding acquisition. **Rebecca Lawrence:** Conceptualization, Methodology, Investigation, Resources, Writing - review & editing, Funding acquisition.

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