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Indigenous Rights: Legal Status of Sami in Scandinavia

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Introduction

The world is made up of different peoples, customs and laws. Among all the populations, the native peoples, first peoples, aboriginal peoples and all the other groups defined as indigenous have suffered a past of colonisation and discriminations. The past discriminatory actions concern the negation of several human rights and lead to the disappearance of a huge number of indigenous individuals. Yet the question is, how are indigenous groups treated today, especially from a legal point of view? This thesis tries to analyse indigenous rights and the recent international achievements on the expansion of human rights, especially focusing on the legal status of Sami people in Scandinavia.

Over the years, indigenous rights have been a quite controversial issue and the states in which indigenous groups live, have hardly granted them special legal measures. However, in a century in which human rights expand to such an extent to develop also indigenous rights, the ideas of protection and reparations for the past wrongs has embraced many international organisations. It is precisely on the international level that indigenous rights are mostly recognised, while the national approaches continue to be still cautious and slow when conceding rights to indigenous minorities. This duality between international and national attitudes can be seen, for example, if we compare the United Nations policies and the Scandinavian legislation.

Despite the fact that the expansion of human rights started internationally in the second half of the twentieth century, the developments of Sami rights in Scandinavia can be concretely detected in the first decade of the twenty-first century, precisely in case law judgments and in the realisation of the Draft of the Nordic Saami Convention of 2005. The supra-national organisations like the United Nations and the European Union, significant promoters of human rights, are fundamental for these evolving processes regarding indigenous peoples and the Sami minority.

My interest in indigenous peoples' rights has aroused thanks to the course of the professor G. Poggeschi on comparative international language law and it has been further increased during my six-month stay in northern Sweden. It is exactly in Sweden where, for the first time, I met and learned more about the transnational Sami people, the indigenous minority living in Sweden, Norway, Finland and the Kola Peninsula of Russia. The unique Sami lifestyle, together with the Sami's belong to the most democratic

countries of the European Union, drew my attention on asking which rights, both in theory and in practice, are officially recognised to this indigenous group.

Even if this thesis is divided only into four chapters, it could have been divided also into two larger parts: indigenous rights in international law on one side and Sami rights in the Scandinavian democracies on the other. However, to highlight the unity and the interconnection of these two conceptual nuclei, it has been preferred not to further gather the sections. Indigenous rights are the starting point for the recognition of Sami rights, as well as Sami rights are the practical and domestic application of some international provisions.

Chapter 1 focuses on the chronological evolution not only of the meaning of the term “indigenous people”, but also of indigenous peoples’ rights, from a total negation of human rights typical of the colonisation period to the current forms of autonomy arising from self-determination. The greatest international achievement for indigenous peoples is surely the elaboration of the UN Declaration on Indigenous Peoples, which expresses explicitly and once for all the rights of indigenous peoples.

Chapter 2 includes a detailed analysis on the several indigenous rights (non-discrimination, prohibition of genocide, cultural integrity, land and resources, social welfare and development, and self-government), all correlated to the more general right to self-determination. Additionally, a brief illustration on how indigenous rights are applied pragmatically, respectively in Latin America, North America and Australia, serves as a basis for further reflections on how indigenous rights have developed nationally over the years.

Chapter 3 relates to Sami people. It briefly illustrates Sami people’s unique identity and livelihoods, which consist primarily in reindeer herding. In addition, more than a description of Sami traditional customary law, this section recollects Sami legal status and Sami relations with the three Scandinavian states. The most important turning points for Sami rights’ recognition are the Lapp Codicil and the Alta conflict, which leads to a greater attention towards the Scandinavian indigenous group.

Lastly, Chapter 4 completes the Sami people’s overview by offering a presentation on the recent achievements. The Sami accomplishments regard above all the concessions obtained through case law, the cultural autonomy established with the Sami parliaments, the joint realisation of the Draft of the Nordic Saami Convention and the

cautious protection granted by the European Union through the European Court of Human Rights.

This dissertation, unfortunately, has also a couple of limitations. The Russian Sami individuals, in fact, are not part of this analysis, because of their completely different history and legal status. Moreover, most of the documents and studies related to Sami are available only in one of the Scandinavian languages and, thus, due to my incompetence in understanding the Scandinavian languages, I could not read directly many official legal sources (e.g. the Draft of the Nordic Saami Convention). Language, thus, is an obstacle to be reckoned while considering the bibliography.

As it is possible to see from the references at the end of the thesis, I have based my work on several bibliographical entries in order to grant a strong basis, as well as multiple perspectives, fundamental for the complexity of the topic. Personally, however, I have found some sources more essential and constructive than others and I would like to highlight them and their major pros: Anaya analyses indigenous rights in a very complete and exhaustive way, offering a solid starting point for more personal opinions; Lenzerini introduces the concept of reparations for indigenous peoples and underlines its benefits for both states and indigenous groups; Ahrén and the book edited by Allard & Funderud Skogvang are extremely important for the parts concerning Sami people, since they bridge the gap of English literature on Sami questions.

The purpose of this composition is the study of indigenous peoples' rights and Sami legal situations. It is the validation of how a state can consist in more than one people and how one people can inhabit more than one state, without affecting the fundamental rights of human beings. It is the illustration of how there are cases in which collective rights are fundamental and intrinsic to the specificity of an indigenous community. Indigenous peoples' dignity, as human beings, consists in their right to have a voice when deciding issues regarding them. The possibility to develop freely and to maintain their distinctive lifestyle is crucial for indigenous and Sami identity and survival.

1. Indigenous Peoples: from Colonisation to Self-determination

The existence of indigenous peoples all over the world raises the question around their legitimacies and the extent of their rights. Indigenous minorities are often threatened separately from other ethnicity issues, due to their unique and distinctive status. More than have a completely different lifestyle, they also possess a specific culture, incomparable with the one of the state in which they live.

Moreover, indigenous peoples are reckoned to be more than 250 million around the world so they differ considerably one from another. They are located in various places around the world, as for example South America, Canada, South-East Asia, Europe and Africa. However, even if there are many differentiations on a national state level, indigenous rights should be considered universally on an international level. To understand the modern legal processes and to create an exhaustive analysis, it is important to examine the developments of indigenous peoples' consideration over time.

1.1 Defining “indigenous peoples”

The controversial status of indigenous peoples is not easy to explain, since the debate over the definition and the classification is still going on. Not even the United Nations gives explicitly a fixed definition in one of the most emblematic documents about indigenous rights, that is, the Declaration on the Rights of Indigenous Peoples¹. Nevertheless, the exhaustive description done by the Special Rapporteur J. Martinez Cobo (1983) is fundamental to explicate the concept of “indigenous peoples”:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their

¹ UN Office of the High Commissioner for Human Rights, *The United Nations Declaration on the Rights of Indigenous Peoples*, August 2013, HR/PUB/13/2. Accessed 10/11/2017. <http://www.refworld.org/docid/5289e4fc4.html>.

continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system².

In addition, more than an explanation of indigenous peoples as a collective and their decisive elements of identification, the author gives a detailed explanation of how the recognition between the single individual and the group works:

An indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members. This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference³.

Indigenous communities are characterised by their historical continuity, particularly with the occupation of hereditary lands, the common ancestry with the original occupants of these territories, the culture (e.g. lifestyle, dress, religion, etc.), the language and other minor factors typical of a specific community.

Differently to other ethnic minorities that depend on past or present migrations, indigenous peoples are often connected, and defined as well, through a past of colonisation. Natives suffered a past of subjection to colonial settlements and some of them affirm that colonialism has not ended yet, due to the way in which they are still treated.

The land is a decisive factor in the explanation of who is “indigenous”. As we said, indigenous peoples are so defined because they are occupying the lands of their ancestors, and therefore living in these areas before settlers came. However, in places with a great past of migrations or with multiple settled minorities, like India or China, it is really complicated to establish who came first. For this reason, the “precolonial existence” determinant cannot elucidate satisfactorily the concept of an indigenous group.

The representation of indigenous peoples is often intertwined with other similar terms that can sometimes create misinterpretation. While “indigenous” concerns a pre-colonial existence, concepts like “aboriginal”, “autochthonous” and “native” refer to people who are clearly the descendants of the original inhabitants of a determined area and they are key-concepts in disciplines like anthropology. Consequently, whereas

² José Martínez Cobo, *Conclusions, Proposals and Recommendations*, UN Doc. E/CN.4/Sub.2/9-83/21/Add.8, para. 379, p. 50. Accessed 21/08/17. http://www.un.org/esa/socdev/unpfi/docum-ents/MCS_xxi_xxii_e.pdf.

³ *Ibid.*, 51.

aboriginal peoples can always be defined indigenous, not all indigenous peoples can be considered aboriginal⁴. With a similar accepted meaning of autochthonous, also appears the term First Nations. However, it is necessary to underline that this expression is used in specific contexts to designate exclusively indigenous peoples of North America, especially those who live in Canada.

During imperialism and domination periods, the presence of colonisers had a negative impact on the lives of native peoples. Non-Europeans⁵ were considered lower races for a long time, because they did not reach the economic, political, social and cultural structures of Europeans. The “other” uncivilised peoples were, thus, considered inferior and often did not deserve the status of full subjects. In their egocentric perspective, Europeans construct the classification of the other according to the knowledge and to the comparison with their own identity, failing to perceive indigenous people as equal human beings.

Wild men, barbarians, primitives and savages were some of the pejorative stereotypes used among colonisers to classify natives. Wildness referred to elements like madness and heresy, deliberately contrasting to civilisation, orthodoxy and Christianity. Barbarity took for granted an implicit natives’ threat to the society and promotes the Aristotelian theory of “natural slavery”, used as an excuse to subjugate non-Europeans peoples. Furthermore, primitive and savage were concepts regularly used in Darwin’s evolution theory to designate a past inferior stage characterised by ignorance. In addition, evolutionism and the connected idea of the savage were used as a basis for a further presupposition that asserted the existence of four stages of development for reaching the upper advanced European level. These stages included in an ascendant order, respectively: hunting, pasturage, agriculture and commerce. First Peoples of North America and aborigines of Australia were, for example, estimated to represent the first stage⁶.

In the eighteenth century, besides all the negative concepts associated with indigenous people, appeared also a positive connotation. Opposed to the underdeveloped

⁴ Paul Keal, *European Conquest and the Rights of Indigenous Peoples. The Moral Backwardness of International Society* (Cambridge: Cambridge University Press, 2003), 10.

⁵ In this thesis, the term “non-Europeans” will refer especially to indigenous peoples that have been colonised by Europeans throughout history.

⁶ *Ibid.*, 74-75.

ignoble native stood the image of the noble savage⁷, who represented a desirable human condition that Europeans lost over the centuries. This point of view, however, has no pivotal role in history or law, since it did not have many supporters and it was usually used in literature.

Nonetheless, the legal attention on indigenous peoples, especially after the two World Wars, is consolidated by the description of social and anthropological studies carried out during the twentieth century. Among the several intellectuals, the anthropologist and ethnologist Claude Lévi-Strauss has played a pivotal role in the development of structuralism, a methodology that implies the uncovering of a system of structures that underlie all human aspects. The anthropologist's most relevant work when discussing indigenous peoples is *Tristes Tropiques* (1955), a travelogue that focuses on native groups from South America, especially Brazil. The book is considered noticeable for the author's perspective and attitude in respect of the indigenous groups. In fact, Lévi-Strauss underlines the similarity of the efficiency of every culture in trying to overcome the problems and does not himself on a superior level.

Going back to the idea of Europeans' superiority, it is important to consider the issue of the occupation of indigenous territories, as a matter connected with and justified by the just-given definitions and considerations of indigenous peoples. Moreover, the Euro-Americans ideas of indigenous Indians fit perfectly the definition of "representation" of K. R. Kemper: "representation is a product of viewing the other culture, often from a perspective of domination and therefore judgement"⁸.

1.2 Early approaches to indigenous peoples

The relation between indigenous peoples and the dominant state has often been controversial. The formation and expansion, not only of a national state, but also of an international global society, frequently resulted in the extinction of indigenous communities, or, at least, in the disappearance of their cultures. Initially, the relation between colonisers and natives was intricate and contradictory. Having been colonised,

⁷ This positive perspective is point out especially in writers that are dissatisfied with the contemporary society. An example is Rousseau.

⁸ Kevin R. Kemper, "Who Speaks for Indigenous Peoples? Tribal Journalists, Rhetorical Sovereignty, and Freedom of Expression", *Journalism & Mass Communication Monographs* 12 (2010): 14.

indigenous populations lost their sovereignty and became subordinated to a state in which they exercised no power. In most cases, colonisers were disrespectful of natives, causing destructions, dispossessions and decimations.

The beginning of the dispute between colonisers and colonised, or we can also say between Europeans and non-Europeans, started with the first most famous contact between these two nations: the discovery of America. Particularly exemplarily is the case originated by the conquest of South America, when Spaniards met indigenous peoples for the first time. The responses to this encounter were concisely assimilation and enslavement, being indigenous peoples considered, as we already said, uncivilised and inferior.

Different perspectives on how indigenous communities should have been approached were given by various critics, among who emerged the opinion of Juan Ginés Sepúlveda and the complaint of the priest Bartolomé de las Casas. These two authors gave nearly opposite points of view, not only on the representation of indigenous peoples' personality, but also on the methods of subjugation used by Spaniards in the conquest of America. The dispute between them took place in the so-called Valladolid Controversy in 1550.

On one hand, Ginés Sepúlveda developed his discourse around four main ideas that comprised the idolatry and the sins performed by indigenous peoples against divine Christian law; the aborigines' barbaric and submissive nature; the mandatory subjugation of natives, even with force if necessary; the exigency to stop indigenous cannibalism, seen as a violation of natural law. His judgements were all in favour of the legitimacy of the conquest of *Las Indias*, as it is expressed in his work *De justis belli causi apud indios* (1550). For him, the Spanish conquest was fundamental and legitimate, because of the cultural and evangelical superiority of Spaniards that, consequently, permitted them to subdue inferior cultures.

On the other hand, the priest Bartolomé de las Casas focused his attention on the arduous defence of indigenous peoples and their rights, in fact, he was appointed as the "protector of the Indians". Among his writings, las Casas' crucial account about natives is the *Brevísima relación de la destrucción de las Indias*, published in 1552 and written ten years before, during his stay in America. In this work, the priest affirmed not only the human nature of natives, but also the necessity of being accepted by the aboriginal

community in order to bring to an end an effective educational and agrarian mission. Moreover, he strongly condemned the perpetuation of the enslavement of aborigines and the aggressive tyranny carried out by Spaniards in American colonies.

However, the Spanish legitimacy of conquering American territories was encouraged also by Pope Alexander VI, who gave his permission to rule over territories that did not have a Christian jurisdiction. This evangelical perspective encompassed a moral obligation of Europeans to rule over the indigenous peoples and it was comparable to the English culture's emblematic formula of "the white man's burden"⁹.

In brief, the debate Sepúlveda-las Casas consisted in whether aboriginal peoples are regarded as human beings and if the methods used to subjugate them were correct or excessive. This discussion focused again on how indigenous people were depicted and which treatment they were entitled to. As las Casas, also Francisco de Vitoria (1486-1547) asserted the essential humanity of Indians and his naturalist theories were the basis for Hugo Grotius's further developments of a secularisation of the law of nature.

1.3 From naturalism to international law

The definition of natural law was progressively changed by European theorists, from "a universal moral code for humankind into a bifurcated regime comprised of natural rights of individuals and the natural rights of states"¹⁰. Hobbes asserted the dichotomy of humanity, which includes both individuals and states or nations. It is precisely referring to nations and states that a new body of law developed: the so-called law of nations.

The theorist E. Vattel (1714-1769) elaborated an analysis of the law of nations, considering especially three key elements: the equality of nations, state sovereignty and state independence. Inside this frame, there was no space for indigenous groups and their autonomy, since they were not considered as individuals nor as nation-states. Nevertheless, reflecting on European expansionism, Vattel considered some rare cases of flourishing indigenous groups as nation-states, like, for example, the indigenous

⁹ The formula was kept from Rudyard Kipling's poem, published in 1899. Even if the poem focuses on the US conquest of Philippines, it exalts imperialism, colonialism and Eurocentrism, as noble enterprises for civilisation. Moreover, the "white man's burden" is conceptually analogous to the American notion of Manifest Destiny.

¹⁰ S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 2004), 20.

communities of Peru and Mexico. For this reason, he criticised some colonialist approaches:

those ambitious European States which attacked American Nations and subjected them to their avaricious rule, in order, as they said, to civilize them, and have them instructed in the true religion – those usurpers, I say, justified themselves by a pretext equally unjust and ridiculous¹¹.

Similarly, many other theorists established a differentiation between indigenous communities, especially between sedentary and hunter-gatherers' societies. This distinction permitted many Europeans to deny to most of the indigenous peoples both land rights and the status of nations.

The substantial non-consideration of indigenous peoples as nation-states was a clear tendency in the United States at the beginning of the nineteenth century. The lack of ancestral lands rights and the lack of autonomy for natives is evident in the *Johnson v. M'Intosh*¹² case. Here, the two parties were claiming for a title to a tract of land. The Court established that the title of the defendant, granted by the state, was superior to the title of the plaintiff, received by a purchased from an Indian tribe. From this, it originated that the United States, considered for its state nature, had an exclusive title to land acquired by conquest or purchase.

The principle of state's exclusivity on the title to land was then defined by J. Marshall as the "discovery doctrine"¹³. Marshall analysed Indians' characterisation and presumed their link with domestic dependent nations, putting their status and rights not necessarily outside the scope of the law of nation¹⁴. Influenced by the cases related to the Cherokee Nation, he considered tribes as nations that cannot lose their rights by the mere discovery. The US protectorate, in fact, was not a unilateral imposition, but a treaty-based bilateral relationship. Representing an early stage of international legal perspective, Marshall's point of view founded on the consideration of indigenous peoples as political communities belonging to the law of nation, which was by then called international law.

¹¹ Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of -natural Law and on Luxury*, edited by Béla Kapossy, and Richard Whitmore (Indianapolis: Liberty Fund, 2008). Accessed 26/10/2017. <http://oll.libertyfund.org/titles/vattel-the-law-of-nations-lf-ed>.

¹² *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

¹³ The discovery theory is described in Marshall's work *Worcester*.

¹⁴ See S. J. Anaya, *Indigenous Peoples in International Law*, 24.

Not too long after Marshall's opinion, the consideration of indigenous peoples as political bodies was soon abandoned by international law and Western colonisers consolidated, instead, their hegemonic political control over indigenous lands. In this context, during the late nineteenth-early twentieth centuries, a new school of thoughts developed: the positivism. The positivist school saw in international law a legitimising force for colonisation. More of being the law of states, that, as we said, comprehended state sovereignty, state equality and state independence, international law was further defined as existing between states and not above them. Shaped by European states, international law became to a large extent independent from the previous naturalistic frame.

It is precisely international law with its duties and rights that excluded indigenous communities outside the restricted hegemonic Western society. The new international society was limited to the civilised colonisers, that is, Europeans. Indigenous peoples did not receive any sort of international consideration and their treatment depended exclusively on domestic policies, without an international scrutiny.

International law was made by states for states and its members were Christian states of Western Europe and their colonies. As we said, since indigenous communities were not regarded as nations, they had legally no state and no lands. For this reason, indigenous territories prior to the colonisation were considered as *terra nullius*, namely vacant lands. After the colonisation of vacant lands, the procedure of statehood was based on the idea of recognition by the international community of nations. For this reason, colonizers realised a reinforcement of territorial and institutional sovereignty in the colonies.

The positivist approach can be better understood through the exemplar case regarding the legal status of Eastern Greenland¹⁵. After the 1931 Norwegian declaration of occupation of Eastern Greenland, Denmark suited Norway before the Permanent Court of International Justice. It was asserted that the declaration constituted a violation of the existing legal situation, which saw Eastern Greenland as belonging to Denmark. However, the dispute, won by Denmark because of a previous sovereignty recognition by other states, did not consider at all the presence of Inuit or Eskimo, an indigenous

¹⁵ *Legal Status of Eastern Greenland (Denmark v. Norway)*, 1933 PCI J (ser. A/B) No. 53.

population living in the same contested area. Sovereignty was affirmed on a colonialist basis, with no consideration of native peoples.

During the positivist era, the doctrine of trusteeship appeared. It was a humanistic thought grounded in the scientific racism's idea of indigenous peoples' inferiority and its aim was to wean natives and civilise them. Examples of states that adopted the trusteeship doctrine were Great Britain, United States, and Canada, although, later, the principle expanded on an international level and broadened its scope at the end of the World War I¹⁶. Indigenous groups had to depend on governmental programs for their survival and, consequently, their autonomous structures of tribal governance were progressively supplanted or eliminated, facilitating the European control over them.

1.4 Contemporary international law and international society

The contemporary international law consists of principles and rules fundamental for the global society. It deals with States' and international organizations' conducts, not only between one another, but also in their relations with private individuals, minorities, non-governmental organizations (NGOs) and transnational corporations (TNCs). For this key-role, international law is bounding between its members, as well as it has no obligations in the relations with non-members. It is exactly this differentiation between members and non-members that is crucial when considering encounters with other civilisations assumed as lacking political society.

In the past decades, there have been several important developments concerning the structure of world organisation. A refined system of international law has permitted a fertile ground for social reforms, especially in the field of indigenous peoples' rights. International law has progressively moved from a Eurocentric positivism to a wider perspective that includes individuals, groups and values like world peace and human rights.

In the legal discourse, international law's principles and procedures have remained basically state-centred and based on the concept of state sovereignty, whereas the European international family has extended globally to all those states that have

¹⁶ In 1919 the Covenant of the League of Nations was adopted.

fulfilled objective criteria of statehood¹⁷. Many new states were born around the mid-twentieth century, especially in Asia, Africa and Latin America and they have undermined the power of Eurocentric precepts in the global system of decision making.

As we have already introduced, the subjects of the contemporary international law include non-state actors. They are private individuals, groups, minorities, international organizations, transnational corporations (TNCs), labour unions, and other non-governmental organizations. All these entities participate in the international personality, placing the role of the state as an instrument of humankind. A peaceful world order and the observance of human rights have become the central aims of international law, expanding its competencies over spheres previously considered as prerogatives of the single states.

After the two world wars, several international organizations have emerged. A modern pivotal international organization is the United Nations, founded by fifty-one states in San Francisco in 1945. At the end of the World War II, the UN Charter¹⁸ symbolised the quest for international peace, human rights, equality, freedom, security, and economic and social progress¹⁹. The UN organization respects the principles of state sovereignty, territorial integrity of member states and the politics of non-intervention into states' domestic affairs. The membership is open to all "peace-loving" states capable of respecting the UN Charter's obligations²⁰, while an additional level of participation includes the presence of non-governmental organizations in forums concerning social and human rights issues.

Human rights become a fundamental matter of customary international law, in particular, the UN international human rights system, typified by the Universal Declaration of Human Rights (1948), has a great impact on the legal status of minorities and indigenous peoples. Specifically, from the end of the twentieth and the beginning of the twenty-first century, the UN promotes considerably indigenous rights. In fact, it has established various organs throughout the years: the subsidiary body of the Working Group on Indigenous Populations in 1982, the Permanent United Nation Forum on

¹⁷ Recognition by other states is not considered anymore as the only formula to affirm statehood.

¹⁸ United Nations, *Charter of the United Nations*, June 26, 1945, 1 UNTS (entered into force October 24, 1945), art. 1.

¹⁹ *Ibid.*

²⁰ *Ibid.*, art. 4.

Indigenous Issues in 2000, the Inter-Agency Support Group on Indigenous Issues in 2002, and the Declaration on the Rights of Indigenous Peoples in 2007.

The Working Group on Indigenous Populations consists in the protection of human rights of indigenous peoples and the monitoring of international standards. It is composed of five experts, who represent each region of the world, and permits the participation of indigenous groups' representatives and their organisations. For the first time in history, indigenous individuals are allowed to have a direct voice in a UN organ, becoming active subjects instead of passive objects.

The United Nation Permanent Forum on Indigenous Issues (hereafter UNPFII) is an advisory body of the Economic and Social Council (ECOSOC) and it deals with six mandates areas: "economic and social development, culture, the environment, education, health and human rights"²¹. Its yearly sessions focus on a specific issue each time.

The Declaration on the Rights of Indigenous Peoples (hereafter UNDRIP), whose first Draft was initially formulated by the Working Group on Indigenous Populations in 1985, is finally adopted in 2007, after being analysed respectively by the UN Commission for Human Rights, the ECOSOC and the General Assembly. With its 46 articles, the UNDRIP elaborates the minimum universal standards for the survival and dignity of indigenous peoples. The Draft of the UNDRIP was divided into nine parts²², as schematically follow in the table below:

<u>Part</u>	<u>Articles</u>	<u>Contents</u>
I	1-5	Fundamental rights: freedom, non-discrimination, self-determination, etc.
II	6-11	Life, protection, security
III	12-14	Culture, religion, language
IV	15-18	Education, media, employment
V	19-24	Participation, development, health
VI	25-30	Land and resources, cultural and intellectual property

²¹ United Nations, "Permanent Forum", *Un.Org*. Accessed 06/09/2017. <https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2.html>.

²² The 2007 UNDRIP version does not divide the declaration into parts. However, even if the order of the rights is not the same of the draft, it is possible to recognise similar core contents.

VII	31-36	Self-government, cooperation with states
VIII	37-41	Implementation of national and international norms
IX	42-46	Minimum standards for indigenous peoples

The worldwide influence of the UDRIP is very important, even if declarations are in general not binding on states and, consequently, not considered as a primary source of international law.

The UN human rights system provides indigenous peoples with an international position, conferring to them more rights and their greater application in international contexts. At the same time, the international law directly deals with individual and even group rights. International law is still extending its competencies and promoting the realisation of human rights, world order and stability. This contemporary perspective reverses completely the political theory of colonialism, discrediting and denouncing the colonial experiences of subjugation and discrimination.

After the two world wars, the colonies become independent states and the issues regarding indigenous peoples obtain new attention. In the context of indigenous rights, the major development of human rights is the International Labour Organization (hereafter ILO), an agency that now it is affiliated with the UN. Without the participation of indigenous representatives, the ILO developed Convention No. 107 in 1957, which reflects the assimilationist policies realized during the emancipation of colonies. The Convention applies to all “members of tribal or semi-tribal populations”²³ and recognises both collective land rights and indigenous customary law. However, this recognition is still conditioned by a noncoercive assimilation and domestic programs of integration²⁴.

1.5 Indigenous peoples’ rights movements

In the last few decades, the increasing attention to indigenous rights coincides with a greater active participation of indigenous peoples in multilateral dialogues, that includes

²³ Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal or Semi-Tribal Populations in Independent Countries, June 26, 1957, International Labour Conference, 328 UNTS 247 (entered into force June 2, 1959), art. 1, para. 1.

²⁴ *Ibid.*, art. 2, para. 1: “Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries”.

states, NGOs, international institutions and independent experts. This process, promoted by indigenous communities to facilitate their survival as distinct peoples, sees direct appeals to international institutions from sociological, moral and juridical standpoints. In addition, the achievement of conferences, meetings and forums on a supranational level contributes to the establishment of a transnational indigenous identity, which further enforces indigenous peoples to have the right to voice their opinions.

The higher expression of this new approach is typified by the already-cited UNPFII, while the foundational new generation of international law is represented by the ILO Convention No. 169 of 1989. Convention No. 169 is a reassessment of the preceding ILO Convention No. 107 and it distances itself from the outdated integrationist and assimilationist policies. The international society realises that the previous policies were destructive for non-dominant groups, as it is said in the Preamble of the ILO Convention No. 169:

[...] considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live²⁵.

The convention regards key topics, such as self-determination, land rights, non-discrimination and other welfare spheres, supporting national respect for indigenous' aspirations in all fields affecting them.

The convergence towards a reformed normative on indigenous peoples and the incentive to collective rights, instead of the dichotomy individual/state, are constitutive of the emergent customary international law. This improvement, at the same time, challenges the notion of state sovereignty and reopens the discussions about the definitions of self-determination, which will be further discussed below. Convention No. 169 reflects the existence of a common core of values, since it was approved by most of

²⁵ Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, International Labour Conference (entered into force September 5, 1991), fifth and sixth preambular para.

the government delegates²⁶. The ILO Convention accelerated the discussions of indigenous peoples' rights, above all when considering the contemporary revisions of the Draft of the Declaration on the Rights of Indigenous Peoples.

As in the case of Convention No. 107, whose programs for the economic welfare of indigenous communities and their integration were similarly embraced also by the Inter-American Indian Institute, that is, an agency of the Organization of American States (OAS), also today the indigenous rights' era is reflected with specific references in other conventions and treaties. An example appears in the 1989 Convention on the Rights of the Child. Here, there are specifications for indigenous children, whose rights of non-discrimination and freedom of expression are guaranteed²⁷.

To conclude, the relations between states and indigenous groups are central in the contemporary international society. Numerous states have enacted provisions or laws that reflect the developing global consensus on indigenous peoples' rights. However, the possible dangers of abusive and extreme claims, as well as certain states' responses should be kept in mind²⁸. A future solution, to reconcile the international community and indigenous groups, could be to provide and realised further normative developments that consent to establish a satisfactory pacific coexistence.

1.6 Ethno-politics

The mentioned issue of state sovereignty can be deeper analysed by asking whether sovereignty is indivisible or it can be shared without threatening the cohesion and integrity of society²⁹. Ethno-politics represents the introduction of indigenous minorities in the process of policy-making on an equal basis, as well as the possibility to redress past injustices. In addition, the political situation of indigenous peoples, considered in their collective identity, is analogously questionable, in the sense that it goes beyond the previous dichotomy individual/state.

²⁶ Ninety-two states' representatives voted in favour of the convention, while twenty states' delegates recorded abstentions. In most of the abstentions, the reasons depended on the wording and ambiguities of certain provisions, and not on the core precepts of the text.

²⁷ See S. J. Anaya, *Indigenous Peoples in International Law*, 66-67.

²⁸ Benedict Kingsbury, "Claims by Non-State Groups in International Law", *Cornell International Law Journal* 25, no. 3 (1992): 498. Accessed 05/09/2017.
<http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1291&context=cilj>.

²⁹ Augie Fleras, "Politicising Indigeneity. Ethno-politics in White Settler Dominion", in *Indigenous Peoples' Rights* by ed. P. Havemann, 187-191 (Auckland: Oxford University Press, 1999).

1.6.1 Indigeneity

Historically, the concept of state sovereignty was not problematic, due to the indisputable imposition of European settlements and Western political systems. However, in the last two centuries, indigenous peoples have been gradually labelled as subjects and considered approximately as equal citizens, gaining the individualistic human rights. To extricate themselves from disempowering contexts, indigenous peoples appealed to indigeneity to establish a mutually acceptable system of coexistence. What evolved from colonialist structures were proposals “of popular sovereignty as a basis for political legitimacy and self-determination”³⁰.

Demanding reassessment and reconciliation, the principle of indigeneity concerns with restructuring indigenous groups and state relations. Distancing itself from colonisation, it promotes natives’ recognition as distinct societies and fosters ethno-politics for challenging the exclusive hegemony of a state. Contemporary indigenous peoples’ recognitions of “collective and inherent rights to jurisdictional self-determination over land, identity, and political voice [...] serve as a ground for entitlement and engagement with the State”³¹.

The scope of ethno-politics concerns not only with the inclusion of ethnicity in the political domain, but also with the politicisation of ethnicity, which serves as a basis for political struggles. Together with indigeneity, ethno-politics challenges the authority of state sovereignty, as well as includes broader issues, like for example identity and self-determination politics. Ethno-politics supports collective action and internal cohesion of indigenous communities, relying on an international opinion for a substantial reordering.

1.6.2 Collective rights

Indigenous people’s group consciousness is reflected in their claims for collective rights. As we already mentioned, the “traditional” international legal framework focused only on the individual and on the state. Today, even if human rights and the UNDRIP embody individualistic rights and rightsholders, the need for indigenous peoples’ collective rights has become very strong. Indigenous peoples’ identity is so inseparably connected with

³⁰ *Ibid.*, 192.

³¹ *Ibid.*

the group identity they belong to, that the approval and guarantee for special measures are necessary. The debate on collective-individual rights is ambiguous, even if these rights are mutually interactive.

As groups, indigenous peoples ask for protection of their collective rights. The consolidation of this kind of rights is emphasised in the 1978 UNESCO Declaration on Race and Racial Prejudice, which affirms that “all individuals and groups have the right to be different”³², and reaches its highest point in the 2007 UNDRIP³³. However, still today, indigenous peoples are rated to be the most underdeveloped part of societies, especially considering illiteracy and unemployment rates.

The often-conflicting interplay between indigeneity-sovereignty and nationhood-statehood will continue if significant initiatives will not be put into practice rather than be overall theoretical. Group rights are complementary to individual rights and they are fundamental to establish an effective instrument of indigenous peoples’ protection.

1.7 The contentious principle of self-determination

Self-determination is one of the most complex and ambiguous claims when discussing indigenous rights. It is necessary to make clear not only who the protagonists are, but also the vindications, the contexts and the legal frameworks around the self-determination principle, since it is one of the foundational aspect of the contemporary normative regime on indigenous peoples. During the twentieth century, the principle of self-determination was perceived as the most problematic in indigenous rights’ topics, since it was striking the legitimacy of settler regimes.

Initially, the right to self-determination appears explicitly in art. 1 of the International Covenant on Civil and Political Rights (hereafter ICCPR)³⁴, which enunciates that “all peoples have the right of self-determination”. In addition, the article follows explaining more in details the content of self-determination: “by virtue of that right they freely determine their political status and freely pursue their economic, social

³² UN Educational Scientific Cultural Organization, *Declaration on Race and Racial Prejudice*, November 27,1978, art. 1. Accessed 17/11/2017. http://portal.unesco.org/en/ev.php-URL_ID=13161&URL_D-O=DO_TOPIC&URL_SECTION=201.html.

³³ See preamble and art. 1 of the Declaration on the Rights of Indigenous Peoples.

³⁴ International Covenant on Civil and Political Rights, December 16, 1966, G.A. Res. 2200(XXI), 999 U.N.T.S. 171 (entered into force January 3, 1976).

and cultural development”. The category of rightsholders here, that includes “all peoples”, is a narrow one and it has been exploited by a large amount of non-state groups. For this reason, some practices of the Human Rights Committee adhering to the ICCPR differentiate that the right is addressed to “peoples” but not to “minorities”³⁵.

The purpose of the term “peoples” is made clear in the ILO Convention No. 169: “the use of the term *peoples* in this convention shall not be construed as having any implications as regards the rights which may attach to the term under international law”³⁶. The use of the term, therefore, was specified in order to resolve a deeper question. State governments, in facts, have been sometimes reluctant to use the expression “peoples”, due to its association to self-determination, which in turn was connected with the idea of independent statehood.

The resistance towards self-determination principle has found itself in the misconception that self-determination signified independent statehood. This interpretation, that included the possibility of state fragmentation, was mentioned by the Australian government in 1992: “if self-determination in general means that each people has the option of full independence and forming their own state, it will be very difficult for states to accept the application of that right to many groups”³⁷. Furthermore, this idea is reinforced by the process of decolonisation, which transformed colonial territories into independent states on the basis of self-determination.

Decolonisation procedures, however, do not embody the content of self-determination. Following S. J. Anaya’s differentiation, there is a clear distinction between substantive and remedial aspects of the principle³⁸. Decolonisation prescriptions are a remedial effect. Moreover, self-determination remedies can alter applicable legal doctrines, as demonstrated by decolonisation. The doctrine of effectiveness, which confirms *de jure* sovereignty over possessed territories, and the doctrine of intertemporality, which judges events according to the contemporaneous law, are trumped by the modern international legal system based on self-determination. Decolonisation, thus, is judged retroactively in light of contemporary values. Nowadays, the remedies are in accordance with the aspirations of the groups concerned and do not entail secessionist

³⁵ B. Kingsbury, “Claims by Non-State Groups in International Law”, 500.

³⁶ ILO Convention No. 169, art. 1, para. 3.

³⁷ Irene Watson, “Has *Mabo* turned the tide for justice”, *Social Alternatives*, vol.12, no.1, 8, in David Roberts, “Self-determination and the Struggle for Aboriginal Equality”, 260.

³⁸ See S. J. Anaya, *Indigenous Peoples in International Law*, 103-110.

demands³⁹. An example of disambiguation between self-determination and separatist movement is the assertion of the Supreme Court of Canada, which states that:

peoples are expected to achieve self-determination within the framework of their existing states. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states⁴⁰.

Statehood independence, however, can be identified as the appropriate solution in sporadic extreme cases of oppression where protection and human rights are not granted to a specific group.

The substantive aspect of self-determination, instead, derives from the precepts of human rights, regarding especially the standards of freedom and equality. Besides the principle's presence in many international legal instruments, self-determination is enunciated in the purposes of the United Nations Charter: "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"⁴¹. It is important to underline that the presence of this right in the UN Charter was due to the claims brought by indigenous representatives in numerous Working Group sessions. The indigenous spokesmen stressed the significance of self-determination as an inherent and essential right that is the basis for the realisation of further human rights⁴².

The substantive aspect of self-determination can be divided into two strands: the constitutive part and the ongoing one⁴³. On one hand, in its constitutive strand, self-determination requires governmental institutions and the creation of procedures chosen by the will of the peoples governed. This corresponds to minimum standards of internal changes and can be embodied, for example, in the right of political participation. On the other hand, in its ongoing aspect, self-determination necessitates a governmental order, which permits the existence of peoples' status and their freedom. This strand relates to

³⁹ See Charter of the United Nations, art. 2.4.

⁴⁰ *Reference re Secession of Quebec*, (1988) 2 S.C.R. 217.

⁴¹ Charter of the United Nations, art. 1.2.

⁴² See Catherine J. Iorns, "Indigenous Peoples and Self Determination: Challenging State Sovereignty", *Case Western Reserve Journal of International Law* 24 (1992), 224-228. Accessed 20/09/2017. <http://scholarlycommons.law.case.edu/jil/vol24/iss2/3>.

⁴³ See S. J. Anaya, *Indigenous Peoples in International Law*, 103-106.

the possibility for groups to make meaningful choices in all spheres of their lives and to develop freely on a continual basis. Both aspects of substantive self-determination are comprised in the definition contained in the ICCPR provision mentioned before.

The legal importance of self-determination for indigenous communities lies in their past and present difficulties and inequalities to live and develop freely as distinctive peoples. The principle, therefore, means that “indigenous groups and their members are entitled to be full and equal participants in the creation of the institutions of governments under which they live and, further, to live within a governing institutional order in which they are perpetually in control of their own destiny”⁴⁴. The UN recognises the “inherent dignity”⁴⁵ of indigenous peoples, the importance of respecting their rights “for ensuring national stability and development”⁴⁶, and the promotion and protection of self-determination and political participation⁴⁷. It is hoped that international values will be more and more present in national constitutions, to develop an effective recognition of indigenous groups’ identities.

Lastly, the right of self-determination accommodates the concept of multiculturalism within a state. It differs from indigenous sovereignty and it is the basis for other cultural, economic and social norms that concern indigenous peoples. In article 3 of the UNDRIP, self-determination is defined as fundamental for indigenous peoples to “freely determine their political status and freely pursue their economic, social and cultural development”, that means, it is fundamental for their survival. For this reason, norms and laws like non-discrimination, cultural integrity, lands and resources, social welfare, development, and self-governing, are all elaborated on the basis of substantive self-determination’s requirements.

⁴⁴ *Ibid.*, 113.

⁴⁵ UN Sub-Commission on the Promotion and Protection of Human Rights, *Report of the Working Group on Indigenous Populations on its 11th session*, August 23, 1993, UN Doc. E/CN.4/Sub.2/1993/29, para. 22. Accessed 10/11/2017. <http://www.refworld.org/docid/3b00f49e4.html>.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, paras. 79-89.

2. A distinctive legal status

Although the recent progress developed on an international level in the last decades, today indigenous peoples are some of the most vulnerable and precarious groups of international society. Theoretically, international legal instruments and rights are detailed and adequate to indigenous peoples' situations and self-determination, as can be seen in the existing indigenous rights specified and analysed here below. However, in their practical application, national and domestic approaches towards indigenous communities' rights are insufficient and still a work in progress. Where there is a lacking application of international norms, cases of social violence and discrimination can arise. Instead, in many states favourable to indigenous rights as for example Latin America, there are cases of pacific coexistence and constructive multiculturalism.

2.1 International norms for an ongoing self-determination

As we saw in chapter one, self-determination is crucial when talking about recovering rights for indigenous peoples. Even if self-determination could have been included in the list of indigenous rights here analysed, it is presented in the previous chapter since it is significant both as a starting point and as an ending point for a larger number of international norms in favour of indigenous peoples. These international norms concerning indigenous rights are respectively: non-discrimination, prohibition of genocide, cultural integrity, land and natural resources, social welfare and development, and self-government.

2.1.1 Non-discrimination and prohibition of genocide

A minimum condition for applying self-determination is the absence of discrimination against individuals and groups. The principle of non-discrimination is included in the guidelines of the UN Charter, which recommends: "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"⁴⁸. Non-discrimination is particularly relevant when discussing indigenous peoples, who, as a matter of definition, "have been, and still are, the victims of racism and racial

⁴⁸ Charter of the United Nations, art. 1.3.

discrimination”⁴⁹. Discrimination can have a dual nature. On one hand, it can destroy or undermine the material and spiritual conditions of indigenous peoples’ lifestyles. On the other hand, it can provoke behaviours and attitudes that create exclusion when indigenous peoples try to participate in the dominant society⁵⁰.

The norms of non-discrimination against indigenous individuals and groups appear in the principal international instruments, such as the ILO Convention No. 169, the draft of the UNDRIP and the Organization of American States (OAS). In addition, a key institution enhancing non-discrimination is the UN Committee on the Elimination of Racial Discrimination (hereafter CERD) that monitors states’ reports on the implementation of non-discrimination rights. The CERD calls states to preserve the culture and historical identity of indigenous peoples⁵¹, who have the right to freely develop in coexistence with the rest of humanity.

The concept of discrimination is strictly connected to the genocidal practices committed along the centuries. The definition of genocide is given in the 1948 Genocide Convention, which states that “genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”⁵². Here, however, the concept refers exclusively to physical elimination, so cases that concern “cultural genocide”, as well as prejudice or relocation, are excluded from the scope of the convention⁵³.

As a matter of law, genocide requires a specific intent to destroy a particular group. States or governments which take measures that can cause prejudice to a racial, ethnical or religious group do not have the specific intent to physically eliminate the community. For this reason, they are not contravening the prohibition of genocide. The prerequisite of having a specific purpose has been widely discussed and many theorists agree on a broader vision of the meaning of intent, which should include the

⁴⁹ United Nations, *Report of the United Nation Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States*, Ted Moses, special rapporteur, UN Doc. E/CN.4/1989/22, HR/PUB/89/5 (1989), 7.

⁵⁰ *Ibid.* 5.

⁵¹ See UN Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII: Indigenous Peoples*. August 18, 1997. UN Doc. CERD/C/51/misc 13/Rev 4.

⁵² Convention on the Prevention and Punishment of Criminal Genocide, December 9, 1948, 78 UNTS 277 (entered into force January 12, 1951), art.2. The article furthermore presents the five acts that go under the crime of genocide.

⁵³ See Federico Lenzerini (ed.), *Reparations for Indigenous Peoples. International & Comparative Perspectives* (New York: Oxford University Press, 2008), 103-104.

consciousness “that a given conduct is suitable bringing about the factual effect of genocide [...] and the possibility of causing such results is accepted as a collateral effect of another goal which is deliberately pursued through the conduct in point”⁵⁴.

Fortunately, both rights of non-discrimination and prohibition of genocide are internationally protected nowadays, thanks also to the emergence of human rights.

2.1.2 Cultural integrity

The safeguard of cultural identity and integrity of indigenous peoples is inherent to individual human rights, protected by international law. Furthermore, it is linked to collective rights and indigenous peoples’ identity. The relevance of this principle is expressed in the International Covenant on Civil and Political Rights (hereafter ICCPR) which states that minorities have the right, “*in community* with other members of their group, to *enjoy their own culture*, to profess and *practise their own religion*, or to *use their own language*”⁵⁵. Article 27 protects both individual and group interests, even if the group dimension is more meaningful to convey traditional indigenous systems, especially when considering culture as a collectivist outgrowth⁵⁶.

In the UNDRIP, there are several references to the importance of indigenous cultural heritage, which has been also underlined and analysed in a report done by the Office of the High Commissioner for Human Rights in 2000⁵⁷. The latter institution reviewed the report’s draft principles and guidelines for the protection of the heritage of indigenous peoples in 2005⁵⁸. Here, it is specified that the indigenous cultural heritage comprises “both tangible and intangible creations, manifestations and production”⁵⁹ and it manifests itself in various domains:

⁵⁴ *Ibid.*, 108.

⁵⁵ International Covenant on Civil and Political Rights, December 6, 1966, GA Res. 2200 (XXI), 999 UNTS 171 (entered into force March 23, 1976), art. 27. Emphasis added.

⁵⁶ See S. J. Anaya, *Indigenous Peoples in International Law*, 135.

⁵⁷ See UN Sub-Commission on the Promotion and Protection of Human Rights, *Human Rights of Indigenous Peoples: Report of the Seminar on the draft principles and guidelines for the protection of the heritage of indigenous people*, Chairperson-Rapporteur: Mrs. Erica-Irene Daes, June 19, 2000. UN Doc. E/CN.4/Sub.2/2000/26. Accessed 29/11/2017. <http://www.refworld.org/docid/3b00f28018.html>.

⁵⁸ See UN Sub-Commission on the Promotion and Protection of Human Rights, *Review of the draft principles and guidelines on the heritage of indigenous peoples*, June 21, 2005, UN Doc. E/CN.4/Sub.2/AC.4/2005/3. Accessed 29/11/2017. http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/yokota_draft.pdf

⁵⁹ *Ibid.*, art. 1.

- (a) Traditional lands, waters - including historical, sacred and spiritual sites - natural resources, including genetic resources, such as seeds, medicines and plants;
- (b) Traditional knowledge and practices concerning nature and the universe;
- (c) Literary works and oral traditions and expressions, such as tales, poetry and riddles, aspects of language such as words, signs, names, symbols and other indications;
- (d) Musical expressions, such as songs and instrumental music;
- (e) Performances or works such as dances, plays and artistic forms or rituals, whether or not reproduced in material form;
- (f) Art, in particular drawings, designs, paintings, carvings, sculptures, pottery, mosaics, woodwork, metalwork, jewellery, musical instruments, basket weaving, handicrafts, needlework, textiles, carpets, costumes, architectural forms; and
- (g) Social practices, rituals and festive events⁶⁰.

Moreover, the same favourable precepts, representing the equal value and dignity of indigenous cultures, are supported by UNESCO⁶¹, which recommends States to protect and promote all internal cultural expressions⁶².

The protection and preservation of some cultural practices, of inter alia indigenous peoples, is sometimes prescribed as an exception to the principles of a determined convention. For example, the 1973 Agreement on the Conservation of Polar Bears permits the taking of polar bears “by local people using traditional methods in the exercise of their traditional rights”⁶³, as well as the 1957 Convention on North Pacific Fur Seals “shall not apply to Indians, Ainos, Aleuts, or Eskimos”⁶⁴.

Cultural integrity’s measures, pursued by international law, try to remedy past injustices and discriminations and demonstrate an affirmative action to assure indigenous cultural survival. Some of the main cultural fields promoted by states are language and religion. In fact, in certain states indigenous languages are progressively revitalised and permitted to use in legal proceedings, whereas in other cases there is an attentive preservation of indigenous sacred sites.

⁶⁰ *Ibid.*, art. 2.

⁶¹ UNESCO, Convention on the Protection and Promotion of Diversity of Cultural Expressions. October 20, 2005. Accessed 30/11/2017. http://portal.unesco.org/en/ev.phpURL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁶² See *Ibid.*, art.2.

⁶³ Agreement on the Conservation of Polar Bears, November 15, 1973, art 3.1. Accessed 28/11/2017. <http://pbsg.npolar.no/en/agreements/agreement1973.html>.

⁶⁴ Convention on Conservation of North Pacific Fur Seals, May 7, 1976, art 8. Accessed 28/11/2017. <http://sedac.ciesin.columbia.edu/entri/texts/acrc/fur.seals.1957.html>.

2.1.3 Land and natural resources

The land is one of the most crucial aspects when talking about law and indigenous lifestyle. The colonisation of European peoples and, consequently, the dispossessions of indigenous lands, seriously undermined natives' culture and survival. For this reason, land and its related rights are fundamental to the recovery of identity, culture and economics of indigenous peoples.

The idea of land as a mean of subsistence is associated to the human right of property. Historically, property right has been often controversial for indigenous peoples, since it was closely related to non-discrimination. For example, in the United States, an indigenous property of lands has been regarded as fungible with a simply transfer of money⁶⁵. Today, international law promotes indigenous land and resources rights, as can be seen in part II of the ILO Convention No. 169:

[...] governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship⁶⁶.

The rights of ownership and possession of the peoples concerned over lands which they traditionally occupy shall be recognized⁶⁷.

The rights of the peoples concerned to the natural resources pertaining to their lands shall be specifically safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of the resources⁶⁸.

The acceptance of indigenous land and resources rights is evident in the preparatory work of OAS' Proposed American Declaration on the Rights of Indigenous Peoples⁶⁹.

Moreover, related to self-determination and culture, the already-cited article 27 of the ICCPR with its right for indigenous peoples "to enjoy their own culture" extends its power to land and resources⁷⁰. The relation between article 27 and the significance of land for indigenous communities has been embodied in the struggles of the Lubicon Lake Band in Canada. In the case *Chief Bernard Ominayak and Lubicon Lake Band v.*

⁶⁵ See S. J. Anaya, *Indigenous Peoples in International Law*, 142.

⁶⁶ ILO Convention No. 169, art. 3.1.

⁶⁷ *Ibid.*, art. 14.1.

⁶⁸ *Ibid.*, art. 15.1.

⁶⁹ See Inter-American Human Commission, Proposed American Declaration on the Rights of Indigenous Peoples, February 26, 1997, OAS Doc. 6 OEA/Ser/L/V/II.95.

⁷⁰ Benedict Kingsbury, "Claims by Non-State Groups in International Law", 490.

*Canada*⁷¹, the claimant states that the incorrect governmental use of the Band's land in Alberta, for benefitting private gas, oil and timber, is destroying indigenous culture. The deprivation of indigenous' exclusive control of land and resources undermines indigenous survival, due to the compromised fundamental economic pursuits like trapping and hunting. The impossibility for indigenous communities to follow pursuing their economic activities is a denial of their traditional culture and a threat to their future survival.

A step further to indigenous land rights is represented by the 1992 *Mabo* case⁷², in which Eddie Mabo and five more Murray Islanders bring a land case against the Queensland government⁷³. In this case, the Australian High Court overturns the previous legal falsehood that at the time of British subjugation Australia was *terra nullius*, that is, free to be occupied. Therefore, native titles could be claimed after demonstrating the connections with a specific territory before the unappropriated Crown's acquisition of sovereignty. Through the *Mabo* case, Meriam people's land rights are recognised in the Murray Islands, challenging the antecedent Australian legal system:

[...] the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live⁷⁴.

On one side, the *Mabo* case increases the opportunities for Aboriginal people to claim their ancestral lands, while, on the other hand, it produces a sense of fears, uncertainties and, in some extreme cases, racism in the more conservatives non-aboriginal Australians. However, even if in 1993 the Native Title Act is enacted by the Australian Parliament, it is substituted just three years later by the Native Title Amendment Act, which further reduces native titles.

⁷¹ *Chief Bernard Ominayak and Lubicon Lake Band v. Canada*, UN Doc CCPR/C/38/D/167/1984, IHRIL 2431, (UNHCR 1990). Accessed 30/11/2017. <http://www.refworld.org/cases,HRC,4721c5b42.html>.

⁷² *Mabo v. Queensland* (No 2), HCE 23, 175 CLR 1 (High Court of Australia 1992). Accessed 15/09/17. <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1992/23.html>.

⁷³ See Richard Broome, *Aboriginal Australians. Black Responses to White Dominance 1788-1994* (St Leonards: Allen & Unwin, 1994), 229-239.

⁷⁴ *Mabo v. Queensland*, para. 28.

During the same years, two similar cases took place in Canada. The case *Sparrow v. the Queen*⁷⁵ affirms aboriginal rights over fishing, instead of being subjected to the Fisheries Act, whereas the case *Delgamuukw v. British Columbia*⁷⁶ explains more in details the definition and the limits of native titles. The aboriginal title is *sui generis*, inalienable, enjoyable by the entire aboriginal community and it “is a right to the land itself” with an exclusive use and a right to the occupation.

More recently, *Awás Tingni v. Nicaragua*⁷⁷ case represents the first time in which the Inter-American Court of Human Rights provides a judgment in favour of indigenous ancestral land rights. In this case, Nicaragua government fails to recognise traditional indigenous lands, since it grants concessions for logging in the questioned indigenous area. The Court concludes that Nicaragua has violated article 21 on property right, protected by the American Convention on Human Rights, and that the state shall delimitate and demarcate indigenous territories. The judgment is in accordance with article 14.2 of the ILO Convention No. 169 and it is a model for the defence of indigenous rights in Latin America.

To understand how much the significance of land right is still present nowadays, it is interesting to know that the special theme of the UNPFII in 2018 will be “Indigenous peoples’ collective rights to land, territories and resources”. The land is not only a source of indigenous communities’ survival, but it also represents a cause and a consequence of an international step towards more general claims to self-determination.

2.1.4 Social welfare and development

In accordance with the core principles of self-determination and non-discrimination, the UN Charter promotes: “higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational cooperation”⁷⁸. These policies of social welfare have been promoted also by several

⁷⁵ *Sparrow v. the Queen*, 1 SCR 1075 (Supreme Court of Canada 1990). Accessed 15/09/17. <https://www.canlii.org/en/ca/scc/doc/1990/1990canlii104/1990canlii104.html>.

⁷⁶ *Delgamuukw v. British Columbia*, 3 SCR 1010 (Supreme Court of Canada 1997). Accessed 15/09/17. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do>.

⁷⁷ *Mayagna (Sumo) Awás Tingni Community v. Nicaragua*, IACHR (Ser. C) No. 79 (Inter-American Court of Human Rights, 2001). Accessed 02/12/2017. http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

⁷⁸ Charter of the United Nations, art. 55.

international organizations, like, for example, UNESCO, World Health Organization (WHO), ILO, etc. In addition, the UNDRIP contains the same key concepts about social conditions in article 21, which refers to the improvement of economic and social aspects, including education, employment, vocational training and retraining, housing, sanitation, health and social security.

In the UNDRIP, the article related to social welfare precedes the right to development⁷⁹ to which it is strictly connected. From the 1986 adoption of the Declaration on the Right to Development⁸⁰ by the UN General Assembly, the right to development is increasingly considered in the international environmental agenda, as demonstrated by the World Summit on Sustainable Development of 2002.

The right to development is established because of two historical phenomena. On one hand, the past plundering of indigenous resources and lands has negatively influenced indigenous activities and economies, leaving indigenous peoples among the poorest. On the other hand, discriminations over time have excluded indigenous peoples from enjoying the benefits of social welfare. As a response to these injustices, ILO Convention No. 169 promotes “the improvements of the conditions of life and work and levels of health and education”⁸¹ of indigenous peoples and recommends special projects for the development of such areas⁸². State obligations to support indigenous development, accordingly to indigenous peoples’ preferences and priorities, are linked with international initiatives for cooperation⁸³.

2.1.5 Self-government: autonomy and consultation

Self-government is the overarching political facet of self-determination. It is a democratic system of governance that functions in accord with the will of people governed. Self-government is related to the governmental legitimacy that, as we saw in the previous chapter, has changed over time. The contemporary expansion of non-authoritarian democracies contributes to the development of the subsidiarity principle, thanks to which the central authority performs only the tasks that cannot be performed at a more local

⁷⁹ UNDRIP, art. 23.

⁸⁰ UN General Assembly, *Declaration on the Right to Development*, December 4, 1986. G.A. Res. 41/128.

⁸¹ ILO Convention No. 169, art. 7.2.

⁸² *Ibid.*

⁸³ See S. J. Anaya, *Indigenous Peoples in International Law*, 150.

level. This policy leads to a heterogeneous view of nation-state that embraces cultural pluralism.

A *sui generis* norm of self-government has been created for indigenous communities and it comprises two guidelines: governmental/administrative autonomy and effective participation/consultation in larger institutions. Many indigenous groups have established *de facto* and, in some cases, *de jure* autonomous institutions of governance. The international law promotes the maintenance of these governmental structures and it urges states to uphold the development of such institutions. Hence, ILO Convention No. 169, as well as the UNDRIP, affirm indigenous rights “to promote, develop and maintain their institutional structures”⁸⁴ and “to autonomy or self-government in matters relating to their internal and local affairs”⁸⁵.

In general, autonomous governance is an instrument for empowering peoples, whose interests are often subjected to a majoritarian dominant elite. It involves for indigenous communities a control of their cultural development, including the management of lands and resources. The draft of the UNDRIP specifies the matters concerning self-government: “culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions”⁸⁶. Similar terms of indigenous autonomy’s recognition are given by the Proposed American Declaration on the Rights of Indigenous Peoples in its article 15.1⁸⁷.

The participation/consultation strand consists in the participatory engagement of indigenous peoples at all levels of decision-making which may affect them⁸⁸. This aspect, of course, cannot be missing in the UNDRIP, which in its article 18 states:

⁸⁴ UNDRIP, art. 34.

⁸⁵ *Ibid.*, art. 4.

⁸⁶ Draft of the UNDRIP, art. 31.

⁸⁷ The article states that: “Indigenous peoples have the right to freely determine their political status and freely pursue their economic, social, spiritual and cultural development, and are therefore, entitled to autonomy or self-government with regard to inter alia culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, the environment and entry by non-members; and to determine ways and means for financing these autonomous functions”.

⁸⁸ The participatory aspect is proposed in ILO Convention No. 169, art. 6.1: “these peoples can freely participate [...] at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them”. Furthermore, the Proposed American Declaration on the Rights of Indigenous Peoples underlines in its preamble that indigenous “participatory systems for decision-making and for authority contribute to improving democracies in the Americas”. In

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

This participatory right in decision-making shall be present both on a national level and on an international one, as can be seen with the participation of indigenous representatives in the meetings of UNPFII. Generally, the consultation is required whenever a state takes decisions that may affect indigenous communities, like, for example, every time that a state retains natural resources from indigenous lands⁸⁹. Moreover, consultations are not simply a matter of informing indigenous peoples, but they “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”⁹⁰.

Indigenous autonomy and participatory engagement are grounded in the general principles of self-determination, non-discrimination and cultural integrity. Even if there is a broad ratification of consultative requirements among states, the right of self-governing has not reached a wide extent of acceptance yet, due to the Western state-centred political order. However, the essential aspect of self-governing is to achieve a meaningful self-determination that confers indigenous peoples the political power to define and affirm their legal status.

2.2 National approaches to indigenous peoples

After having discussed indigenous peoples’ rights on an international level, indigenous peoples’ exemplary situations should be examined through a more detailed analysis. The contemporary multicultural approach promotes a constitutional protection and valorisation of indigenous rights, although there is still a gap between the “law on the paper” and the “law in action”⁹¹. For this reason, it is interesting to verify the effectiveness of constitutional provisions adopted by single states.

article 15.2, it confirms the indigenous participation without discrimination “in decision-making, at all levels, concerning matters which may affect their rights, lives and destiny. They may do so directly or through representatives chosen by them pursuant to their own procedures. They shall also have the right to maintain and develop their own indigenous decision-making institutions, as well as equal opportunities to gain access to, and participate in, all state institutions and fora”.

⁸⁹ See ILO Convention No. 169, art. 15.2.

⁹⁰ *Ibid.*, art. 6.2.

⁹¹ See Giovanni Poggeschi (ed.), *Le iperminoranze* (San Cesario di Lecce: Pensa, 2012), 18-19.

Since the legal histories of indigenous peoples are unique depending on each group and on each dominant state, the analysis will focus only on some noteworthy aspects of specific areas. Nowadays, the main regions in which indigenous peoples are strongly present are North America (First Nations and Indians), South-East Asia, particularly Australia (Aboriginal and Torres Strait Islander peoples) and New Zealand (Maori), and Latin America. In these places, as we said before, the migration of dominant European societies into indigenous peoples' territories provoked terrible cases of genocides and ethnocides towards natives, like those denounced by Bartolomé de las Casas. Specifically, the settler societies tried to replicate the system and the institutions of their mother country, generating an unequal distribution of power between colonisers and colonised as well as a "form of racialized nation-building"⁹².

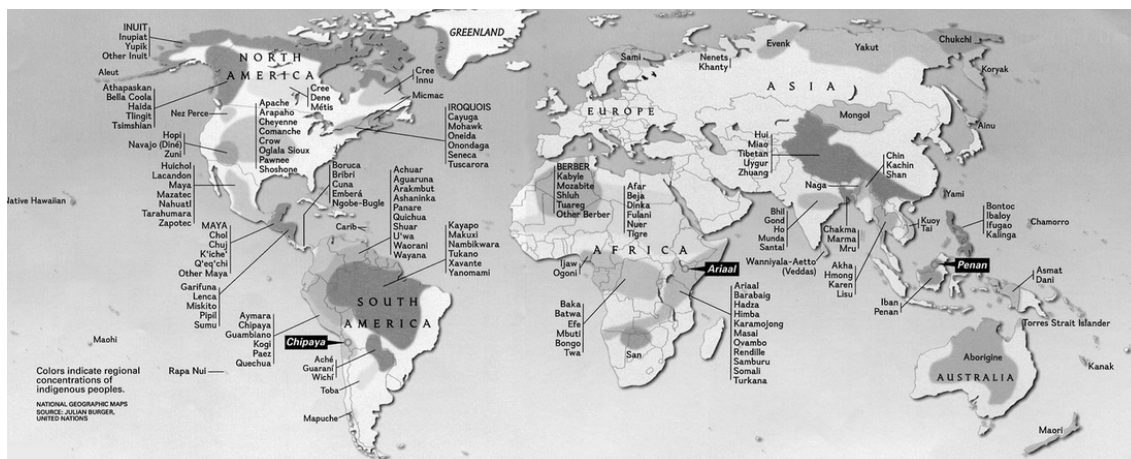


Figure 1. Contemporary World's Indigenous Peoples.

2.2.1 Latin America's multicultural constitutionalism

Since the beginning of the independence from the Spanish Crown, indigenous peoples of Latin America have crossed a series of different stages, from dictatorship to protection. The cases differ depending on the national state, although it is possible to establish an almost common development⁹³ of indigenous rights throughout South America. The main

⁹² Paul Havemann, *Indigenous Peoples' Rights: in Australia, Canada, & New Zealand* (Auckland: Oxford University Press, 1999), 6.

⁹³ Some Latin American constitutions still do not have any kind of indigenous rights' recognition. Specifically, the states without such recognition are: Cuba, Chile, Costa Rica, Dominican Republic, Uruguay, Puerto Rico and El Salvador.

stages are four: colonialism, assimilationist period, “indigenization”, and “multicultural constitutionalism”⁹⁴.

Assimilationist provisions are carried out in the Constitutions of Venezuela and Argentina, respectively in 1811 and 1819, where all forms of indigenous protection are deleted, in favour of a new formal dignity and equality. In this way, *Indios* can better integrate themselves into the dominant society, improving their conditions until reaching the level of other national classes. However, indigenous lands are drastically reduced in many areas, especially in the second half of the nineteenth century.

The twentieth century is characterised by “indigenization”, which basically consists in a milder form of assimilationist practices, even if some constitutions include the possibility to emanate regulations in favour of indigenous peoples’ safeguard. Important is the creation of the Inter-American Indian Institute in 1940. The successive development of dictatorships results in a temporary breaking off of all relations with indigenous peoples. Democratic transitions, on the other side, represent the opportune moment for a constitutional recognition and protection of indigenous communities, who organise themselves in social movements from the 1980s. In 1985, for example, during the civil war, Guatemala recognises in its constitution indigenous peoples, their collective lands, their cultural identity and the bilingual teaching⁹⁵.

Together with democratic transitions, the 1970s represent a broader indigenous political mobilisation, with the emergence of indigenous movements. These movements attempt to regulate the jurisdiction of indigenous demands through legal and constitutional reforms. Although the acquisition of the access to formal education and the enactment of laws, especially regarding the agrarian system and language, there are still persistent inequalities towards indigenous peoples and a strong political exclusion of such minorities.

ILO Convention No. 169 gives an impact to the multicultural model, promoting a reassessment of state-indigenous relations. After the convention’s approval, the OAS Inter-American Commission on Human Rights starts to work on an American Declaration on the Rights of Indigenous Peoples. Nevertheless, such Declaration does not recognise

⁹⁴ See Alexandra Tomaselli, “Tutela dei popoli indigeni in America Latina: equilibri tra costruzioni costituzionali e standard internazionali”, in *Le iperminoranze*, ed. G. Poggeschi (San Cesario di Lecce: Pensa, 2012), 31.

⁹⁵ *Ibid.*, 41.

formally land rights and self-determination, due to the possibility of a full indigenous independence. However, the national reforms are constantly increasing. Van Cott underlines that nine of the new constitutions of Latin America in the 1990s contain at least three of the five elements here presented:

- rhetorical recognition of the multicultural nature of their societies and the existence of indigenous peoples as distinct, substate social collectivities;
- recognition of indigenous peoples' customary law as official, public law;
- collective property rights protected from sale, dismemberment, or confiscation;
- official status or recognition of indigenous languages;
- a guarantee of bilingual education⁹⁶.

The economic growth of the beginning of the twenty-first century is accompanied by an increasing political participation of indigenous peoples. In some countries, there are indigenous political parties, like in Bolivia and Ecuador, and in smaller proportions, in Venezuela, Colombia and Nicaragua. Therefore, the contemporary question is no longer whether indigenous peoples are included in decision-making or not, but how and when their participation can be involved.

The two countries that most support indigenous protection and rights are Ecuador and Bolivia. On one hand, the constitution of Ecuador of 2008 affirms in its article 1 that the state is intercultural and multinational, as well as in article 2 it defines “Spanish, Kichwa [or Quetchua] and Shuar [...] official language for intercultural ties. The other ancestral languages are in official use by indigenous peoples in the areas where they live and in accordance with the terms set forth by law”. Furthermore, indigenous peoples and nations are recognised and guaranteed various collective rights⁹⁷.

On the other hand, the constitution of Bolivia of 2009 is so in favour of indigenous rights that recognises the right to self-determination of indigenous peoples in its article 2⁹⁸. Similar to Ecuador's constitution, the rights of indigenous peoples are further

⁹⁶ Donna Lee Van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America* (Pittsburgh: University of Pittsburgh Press, 2000), 265. See also a more detailed analysis of the elements presented in Latin American Constitutions on pages 266-268.

⁹⁷ See Chapter IV: rights of communities, peoples and nations in the Constitution of the Republic of Ecuador.

⁹⁸ The article 2 of the Constitution of Bolivia states: “given the pre-colonial existence of nations and rural native indigenous peoples and their ancestral control of their territories, their free determination, consisting

explicated in Chapter IV, entitled Rights of the Nations and Rural Native Indigenous Peoples. In addition, Bolivia is the first state that has adopted the UNDRIP as a law in its constitution.

In 2010, it is estimated that around forty-two million of indigenous peoples live in Latin America, which means they represent about 8% of the entire population. At the same time, they represent 17% of the people living in extreme poverty, as can be further demonstrated through the table below, which compares the levels of poverty among indigenous and non-indigenous peoples.

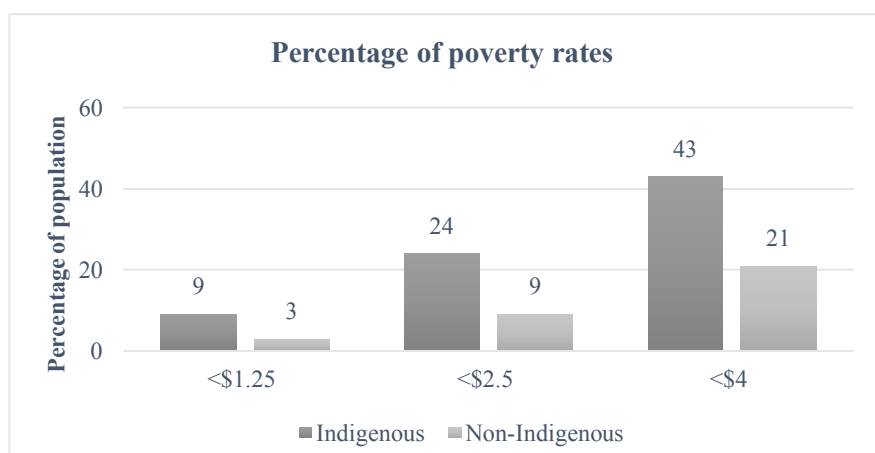


Figure 2. Percentage of People Living on Less than US\$1.25, US\$2.50, and US\$4 per Day Late-2000s weighted average for Bolivia, Brazil, Ecuador, Guatemala, Mexico, and Peru.

However, it is noticeable the recent Latin America's economic progress, with decreasing percentages of poverty. This reduction affects positively indigenous peoples' lifestyles, even if this gain is not equally distributed among the entire region. The main developing countries in this sense are Brazil, Bolivia, Chile, Peru and Ecuador⁹⁹.

In conclusion, the fact that fifteen of the twenty-two states, which have ratified the ILO Convention No. 169, are in Latin America, demonstrates the general positive approach towards indigenous peoples. The majority of Latin American constitutions recognise the existence and the duty of protecting indigenous peoples and many countries

of the right to autonomy, self-government, their culture, recognition of their institutions, and the consolidation of their territorial entities, is guaranteed within the framework of the unity of the State, in accordance with this Constitution and the law".

⁹⁹ See World Bank, *Indigenous Latin America in the Twenty-First Century. The First Decade* (Washington DC: World Bank, 2015), 9. Accessed December 10, 2017. <http://documents.worldbank.org/curated/en/145891467991974540/pdf/98544-REVISED-WP-P148348-Box394854B-PUBLIC-Indigenous-Latin-America.pdf>.

have developed proper national commissions dedicated exclusively to indigenous questions.

2.2.2 Indigenous rights in North America: Canada and United States

Considering indigenous rights in North America, the cases of Canada and United States possess distinctive features, even if there is a common initial situation. The history of these two countries starts with the occupation of North American territories, especially by France and Great Britain. The year 1763 represents the end of the Seven Years War (1754-1763), with the cession of French territories, such as Canada, to Great Britain, and the emanation of the Royal Proclamation. The Proclamation establishes the British Crown's monopoly on the acquisition of indigenous lands and the creation of a first legal recognition of aboriginal rights. The Royal Proclamation, in fact, both affirms and limits the existence of indigenous title to land and sovereignty.

Although a formal recognition of indigenous peoples' lands, the Proclamation is ambiguous, in the sense that it stresses the decision-making power of the Crown, as can be seen in Canada with the incorporation of Indian territories into the colony of Québec (1774). Moreover, the case *St. Catherine's Milling and Lumber Company v. the Queen*¹⁰⁰ demonstrates that, despite treaties, the indigenous title to land remains in the purview of the Crown and its will and pleasure.

The Royal Proclamation ends in the United States with the American Revolutionary War, even if afterwards the country adopts policies very similar to those of the Proclamation. In particular, the already-cited case *Johnson v. M'Intosh*¹⁰¹ sanctions the US' exclusive title to land. Financed by the federal government, the United States actuates a civilisation campaign for the education of aboriginal tribes from the second half of the eighteenth century to the end of the nineteenth century. Despite this, the 1830 Indian Removal Act establishes an exchange of lands among the Mississippi, which consents to move Indian tribes towards the west¹⁰². Nevertheless, the federal government

¹⁰⁰ *St. Catherine's Milling and Lumber Company v. the Queen*, UKPC 70, 14 AC 46 (Supreme Court of Canada, 1888).

¹⁰¹ See note 12, Chapter 1.

¹⁰² See Sara Pennicino, "La rilevanza del diritto autoctono negli ordinamenti di Stati Uniti e Canada", in *Le iperminoranze*, ed. G. Poggeschi (San Cesario di Lecce: Pensa, 2012), 96-97.

maintains political relations with Indian tribes, recognising their inherent self-sovereignty¹⁰³.

Further on, in the US, the Dawes General Allotment Act, enacted in 1887, provides a distribution of Indian lands to individual tribesmen, who, after the land assignment, become US citizens subject to the federal law. The remaining land from the allotment is then made available for public sale. This Act deteriorates indigenous lives and, by 1932, it reduces of two-thirds the Indians' possessions¹⁰⁴.

After about 1920, the population of North American Indians is surprisingly increasing and presses for further rights, due to the bad conditions generated by assimilationist policies. In 1934 the Indian Reorganization Act is adopted by the US Congress, in order to move from a federal administration towards an indigenous self-government. The Act consists in: prohibiting the allotment of tribal lands; the possibility of returning non-sold surplus lands to tribes; the choice for tribes to adopt charters and constitutions to manage their internal affairs; the authorisation of funds for educational and governmental assistance¹⁰⁵.

Similarly, favourable conditions for indigenous peoples appear in Canada only in 1951 with the amendment of the Indian Act. The Indian Act, tinkered and consolidated¹⁰⁶, establishes for the first time a Canadian national policy regarding First Nations, who were previously managed by different treaties. The Act originates from the consolidation of two previous acts: the Gradual Civilisation Act (1857) and the Gradual Enfranchisement Act (1869). The Indian Act provides an exclusive authority of the federal government to "Indians, and Lands reserved for the Indians"¹⁰⁷ and until 1985 it carries out the idea of enfranchisement. Emblematic is the *Calder* case¹⁰⁸ of 1973 in which the Supreme Court

¹⁰³ The legal and political standing of Indian tribes in the US is affirmed in the so-called Marshall Trilogy (1823-1832), which consists in three emblematic cases: *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*.

¹⁰⁴ See "Dawes General Allotment Act", *Encyclopaedia Britannica*. Accessed 14/12/2017. <https://www.britannica.com/topic/Dawes-General-Allotment-Act>.

¹⁰⁵ See "Native American History", *Encyclopaedia Britannica*. Accessed December 14, 2017. <https://www.britannica.com/topic/Native-American/Native-American-history#ref968402>.

¹⁰⁶ The Indian Act is first passed by Parliament in 1876 and, even if today it is still in force, it has been amended many times.

¹⁰⁷ See Canada's Constitution Act (1867), art. 91.

¹⁰⁸ See *Calder v. Attorney General of British Columbia*, SRC 313 (Supreme Court of Canada, 1973). Accessed December 15, 2017. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5113/index.do>.

states that aboriginal title to land exists before colonisation, whether it had been recognised by the government or not¹⁰⁹.

In the current Canada's Constitution Act (1982), the Part II is related to the rights of aboriginal peoples of Canada and affirms the existing aboriginal and treaty rights as part of Canadian law¹¹⁰. Moreover, Canadian indigenous conditions are monitored by the Royal Commission of Aboriginal Peoples, which develops a report (1996) containing implementing changes. In the US, Native Americans have the right to self-determination, that is an inherent right to govern themselves, even if the economic and political rights of Indians are regulated by federal law.

2.2.3 South East Asia: Australia

Australia is a British colony from the late eighteenth century and, in 1901, it becomes a federation of colonies, called Commonwealth of Australia, under the domain of the British Empire. In this period, the number of natives has already decreased, due to the numerous precedent fights with British colonisers. At the beginning of the twentieth century, there is a strong spread of missionary activity among aborigines, the original Australian inhabitants. Nevertheless, not all the missions have a positive development, because of the arduous conditions of the environment. On one side, the land is inhospitable and often to no avail. On the other side, indigenous peoples are so culturally different from missionaries that it is really difficult to establish an approach. Some of the most efficient ways to approach indigenous peoples regard the exchange of food, the application of missionaries' knowledge of medical treatments and the ceremonies and rituals of western society.

As in most cases all over the world, aborigines suffer the racist and ethnocentric attitude of many missionaries that believe indigenous culture to be inferior, pagan and uncivilised. Natives are considered as a depraved race of "children", as wild animals that could not be trusted¹¹¹. Moreover, the presence of missionaries often influences indigenous ways of life, as for example, it entices semi-nomadic tribes into a more sedentary way of life.

¹⁰⁹ See Hamar Foster, "Indian Administration" from the Royal Proclamation of 1763 to the Constitutionally Entrenched Aboriginal Rights, in *Indigenous Peoples' Rights: in Australia, Canada, & New Zealand*, ed. Paul Havemann (Auckland: Oxford University Press, 1999), 351-377.

¹¹⁰ See Canada's Constitution Act (1982), art. 35.

¹¹¹ R. Broome, *Aboriginal Australians*, 101-105.

Missionaries transmit and impose to aborigines, directly or indirectly, also some western values, like for example the Christian tradition of paternalism. In its negative excess, paternalism transmits roles, hierarchies and authoritarian relations that affect indigenous peoples' social lifestyle. The same relation of hierarchy is sometimes used between the missionary and the indigenous community, even if there are exceptional cases of some non-paternalistic missionaries, who consider aborigines as equal human beings. One of these non-paternalistic missionaries is Robert Love, whose words are very impressive: "in this mission, we will never tolerate paternalism. These people are our equals in intelligence, and our superiors in physique. The only differences are in the colours of our skins and the fact that we have had centuries more practice at becoming civilised"¹¹².

The minority of liberal missionaries held a positive view on aboriginal lifestyle and considered it much more worthwhile. For this reason, they tried to act in a way that respects and retains indigenous culture. The philosophy of liberal missionaries was summed up by Love: "I yield to none in recognizing the real intellectual ability of the Australian Aborigines. I honour their real, and indeed intense, religious sense and practices, and do not seek to overthrow these, but rather to use them as a basis for higher principles"¹¹³.

Missionaries, however, help the survival of natives' communities, saving them from being ravaged by rapacious Europeans and from certain diseases. Moreover, the isolation in which the missions generally takes place, has consented aborigines to adapt to western values progressively. There is no doubt that the mission experience has produced a series of disorders in aborigines' personalities. Since the food is provided by the church, natives lose their hunting skills, due to a resulting lack of practice. Indigenous peoples become in the majority more passive, with a child-like dependence on the mission. They assimilate European garments and culture, the mechanism of working in return for food and many other Western Christian values, like patriarchy and monogamy. These changes are forced by missionaries, whose main aim is to defeat aboriginal culture, and, even if some natives resist from the subjugation for a long while, great changes have occurred over years.

¹¹² Maisie McKenzie, *The Road to Mowanjurn* (Sydney: Angus and Robertson, 1969), 88, quoted in R. Broome, *Aboriginal Australians* (St Leonards: Allen & Unwin, 1994), 105.

¹¹³ *Ibid.*, 110.

Indigenous peoples, also known in Australia as Aboriginal peoples and Torres Strait Islanders, are historically subjected to stages of dispossession, assimilation, integration and recognition, like other parts of the world. In Australia, they become politically active in the 1970s and legally equal before the law in 1975, later than other Commonwealth countries like USA and Canada. An example of assimilation policy is given in the 1961 Native Welfare Conference in Australia where “all Aborigines and part-Aborigines are expected eventually to attain the same manner of living of other Australians and to live as members of a single Australian community, enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, hope and loyalties as other Australians”¹¹⁴.

Three judicial cases are foundational for the process of recognition of native title in Australia: *Milirrpum*, *Mabo* and *Wik*. In the *Milirrpum* case¹¹⁵ of 1971, it was confirmed the inexistence of native title to land, in favour of the idea that Australia was *terra nullius* when it was conquered by settlers. Such decision was rejected by the Supreme Court of Canada eighteen months later. While in 1966 the Aboriginal Lands Trust Act guaranteed aboriginal ownership of reserves’ lands in South Australia, only in 1973 an Aboriginal Land Right Commission was established to inquire the Northern Territory which led to the 1976 Aboriginal Land Rights (Northern Territory) Act.

In 1975, on the same line of the CERD, the Racial Discrimination Act affirmed the equality before the law for all races. Specifically, its significance is clarified in *Mabo* case¹¹⁶, which overruled *Milirrpum* decision. Through *Mabo*, the Court rejected the notion of *terra nullius*, enabling indigenous peoples to retain their ancestral lands. In comparison, this native title recognition at common law was taken by USA long time before¹¹⁷. The Australian High Court adopted the Native Title Act in 1993, assuring a framework for the recognition and protection of indigenous peoples’ title and granting a

¹¹⁴ G. F. Gale and A. Brookman (eds.), *Race Relations in Australia – The aborigines* (Sydney: McGraw-Hill Book Company, 1975), 72, quoted in R. Broome, *Aboriginal Australians* (St Leonards: Allen & Unwin, 1994), 173.

¹¹⁵ *Milirrpum v. Nabalco Pty Ltd*, 17 FLR 141 (Supreme Court of Northern Territory, 1971).

¹¹⁶ See *supra* note 25.

¹¹⁷ See Richard H. Bartlett, *Native Title in Australia. Denial, Recognition, and Dispossession*, in *Indigenous Peoples’ Rights: in Australia, Canada, & New Zealand*, ed. Paul Havemann (Auckland: Oxford University Press, 1999), 411-414.

validation of past acts that took place before 1 January 1994 (and after the Racial Discrimination Act of 1975)¹¹⁸.

The question of native title is further improved in the fundamental case *Wik*¹¹⁹, also called *Wik Decision*. Here, the Court ruled that native title can coexist with the rights granted by statutory leases and held by pastoral leaseholders. This provokes a change in the Australian land management and modifies the previous exclusive right of leaseholders of their granted land which used to extinguish native title. The equality of status of native title at common law is affirmed and considered under the supremacy of the Commonwealth.

Nowadays, there is a new sense of respect towards indigenous peoples, a new stage of reconciliation¹²⁰. The Australian federalism, trying to reach the same level of organisation of the US, is actuating and promoting some policies of protection towards aboriginal communities, even if they are not so significant yet.



Figure 3. Pryor imagines Aboriginal scepticism at yet another policy change

¹¹⁸ See Part 2, Division II of the Native Title Act, December 24, 1993. Parliament of Australia, Act No. 110. Accessed 20/12/2017. <https://www.legislation.gov.au/Details/C2017C00178>.

¹¹⁹ See *Wik Peoples v. Queensland*, HCA 40, 187 CLR 1 (High Court of Australia, 1996).

¹²⁰ In 1991, it is established the Council for Aboriginal Reconciliation Act.

3. Sami people in Scandinavia

The Sami people are the only indigenous minority in Europe and they are located in the northern part of Scandinavia. After giving a brief introduction on Sami people and a description of their identity, the chapter will focus on the particular relations developed between Sami and the Scandinavian countries, respectively Norway, Sweden and Finland. The attitude toward Sami people and their rights highly changes among the centuries and here, we will analyse Sami legal conditions until the end of the twentieth century.

3.1 Sami identity

The Sami, Sámi or Saami people¹²¹, previously defined in English as Laplanders because of the denomination of their territory (Lapland), are the only recognised indigenous people in the European Union. They established themselves in mid-northern Scandinavia around two thousand years ago¹²² and their territory, called *Sápmi*¹²³ (Samiland), encompasses parts of Norway, Sweden, Finland and the Russian peninsula of Kola. Today, because of the growth of population and urbanisation, Sami people have been confined and pushed to the northern extremities. Due to a lack of official census among Sami, it is very complicated to give the exact amount of this indigenous people; however, Sami are estimated to be approximately 80 000 – 95 000. According to the Nordic Sami Convention of 2005, Sami individuals are distributed as follows: 50 000 – 65 000 in Norway, 20 000 in Sweden, 8 000 in Finland and 2 000 in Russia.

3.1.1 Traditional livelihoods and customary law of Sami people

Traditionally, the Sami pursued a nomadic lifestyle and their livelihood includes hunting, fishing and gathering. The transition towards a more semi-nomadic lifestyle and a livelihood more associated with reindeer herding has happened progressively, until

¹²¹ “Lapp” and “Finns” are other old terms used especially by Scandinavian languages to define Sami people. Today they are perceived as a derogatory connotation.

¹²² Thanks to archeological researches, evidence of Sami’s presence was certified at least in the eleventh century, even if probably the settlement happened more time before. However, it is assumed that Sami have occupied the Fennoscandia since time immemorial.

¹²³ The Sami term has multiple meanings. It represents not only the Sami territory, but also a Sami individual, the Sami people and the Sami language.

reaching a larger scale of reindeer herding in the fifteenth century. Today, the practice of reindeer herding is considered as the defining feature of Sami culture.

There are distinctions between the livelihoods of Sami people, especially depending on the settlement's environment¹²⁴. Some Sami communities (Fishing, Coastal or Sea Sami) establish themselves in coastal areas, particularly those that nowadays are located in Norway, and rely on fishing and other "marine" resources, like for example seals and stranded whales. Other communities, with a semi-nomadic lifestyle dedicated to reindeer husbandry, move their reindeer between mountain and coastal areas, depending on the season (Mountain Sami). The third group of Sami, particularly in Sweden, take up reindeer husbandry in forest areas as their main livelihood (Forest Sami). Yet, some Sami communities adopted agriculture, while others combine all the livelihood methods above depicted.

Sami individuals are engaged in a mutual relationship with reindeer, indeed, they do not simply follow the animals. Usually they keep some domesticated reindeers as a complementary livelihood and as a mean of transport. Moreover, another Sami business connected to reindeer is the meat production, considered as a traditional activity, important for Sami identity.

Noticeable is the strict connection and relation between Sami people and the natural environment which forced the Sami to adapt their social, economic, cultural and political structures after the colonisation period. The Sami people are socially organised in *siidas*, territorial units and village assemblies that consist of a couple of households. Each household includes "husband, wife, children, and some close relatives"¹²⁵, that is, a full workforce capable of subsistence. Not everywhere the *siida* represents the main social structure, however it is the most common type of association. Moreover, also the customary law is not absolute and identical in all *Sápmi* and could vary among different regions.

The traditional customary law respects Sami relation with nature and has developed over the centuries. It regards the division of lands among *siidas*, with particular attention to reindeer pasture areas. The grazing areas can be transferred between *siidas* through marriage and they can be equally inherited by both men and women. Grazing

¹²⁴ See Mattias Ahrén, "Indigenous Peoples' Culture, Customs, and Traditions and Customary Law – The Saami People's Perspective", *Arizona Journal of International and Comparative Law* 21 (2004), 65-66.

¹²⁵ *Ibid.*, 67.

areas depend on the migration of reindeer during the different season and the aim of the reindeer herder is to keep the reindeer free and his herd together. Since the reindeers get accustomed to their usual grazing areas, it is difficult to change their migration paths and, if this happens, it means a loss of reindeer for the Sami herder. It is for these reasons that a Sami will change pasture territories only for serious reasons.

The *siida* is the entity which decides for land issues internal to *siida*'s territories and it acts like a unity in case of land issues with other *siidas*. In coastal areas, the Sami customary law determines which *siida* is entitled to fish and which community has the right over stranded whales or sea bird's eggs. Like the sea fishing, also in rivers and lakes there are exclusive rights of fishing for the local *siida*, which is free to establish a fishing agreement with other communities.

Sami customary law "recognizes individual usufructuary rights, but rests on the perception that land, waters, and natural resources are vested in the collective"¹²⁶. The borders between different *siidas* are not very sharp and the value of land consists in its generational turnover. Moreover, as Sami culture is intrinsically oral, also Sami customary law is not written and instead relies on wise men with a good memory.

In disputes in which no negotiations between *siidas* seem possible, the discussions can be solved in a *norraz*, the collegial council of the *siida* which has the authority to make binding decisions. Usually led by the *siida*'s wisest man, the *norraz* represents the bearer of past experiences. In this way, the wise men of the *siidas* in conflict meet and try to solve the question applying the relevant customary law. The *norraz* do not exist in all Sami territories. Instead of it, in the Finnish part, for example, there are the *sobbar* and *kärreg*, collegial bodies with political and legal functions which consist in the family elders.

The Sami law described above was well-established when non-Sami people moved into *Sápmi* with their own legal systems. The colonisation results in a gradual dismantlement of Sami customary law and its particular use of land.

3.1.2 Sami language

A short analysis on Sami language is given to have an overall view of Sami identity and origins. Sami language, or Lapp, belongs to the Finno-Ugric family of languages, which

¹²⁶ *Ibid.*, 71.

is part of the greater Uralic group. Sami's grammar is similar to other Baltic-Finnic languages, especially to Finnish¹²⁷, even if its syntax has been influenced by Scandinavian languages. The vocabulary is constituted by a balance between vowels and consonants and it contains many loanwords from Scandinavian and Russian languages. Since Sami culture is mostly oral, especially in the past, the Sami language has different orthographic systems.

There are ten Sami dialects or varieties: North Sami, Lule Sami, South Sami, Ume Sami, Pite Sami, Inari Sami, Skolte Sami, Akkala Sami, Kildin Sami and Ter Sami¹²⁸ (see Fig. 4). Among the varieties, the North Sami is the largest language, spoken by two-thirds of all population. Unless adjacent dialects, which are relatively close in vocabulary, there are many differences between the varieties and it can be difficult to understand each other. Many Sami people, however, are usually bilingual and more than Sami, they speak also the language of the country in which they live.



Figure 4. Sápmi

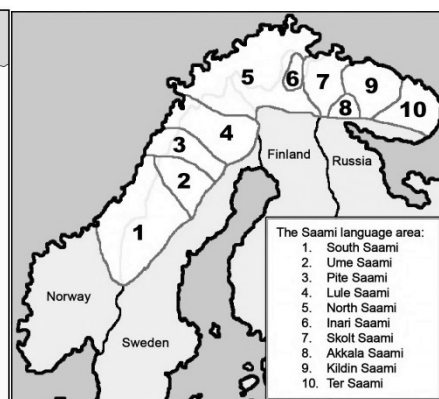


Figure 5. Sami dialects

3.2 Early relationships between Sami and the emerging states: the Lapp Codicil

There are records of the relationship between Sami people and non-Sami individuals dating back to the ninth century, however, for a thousand of years, there are no real competitions for Sami territories. The relationships are friendly and based on a barter trade: Sami's commerce is based on furs, while non-Sami's trade consists of salt and iron

¹²⁷ See Lars Ivar Hansen, Bjørnar Olsen, *Hunters in Transition: An Outline of Early Sámi History* (Leiden: Brill, 2013), 133.

¹²⁸ John B Henriksen, "The continuous process of recognition and implementation of the Sami people's right to self-determination", *Cambridge Review of International Affairs* 21 (2008), 27-28.

tools. Salt and iron tools are useful for Sami, because they are used respectively for the storing of food and for hunting purposes. In doing such barter trade, non-Sami people are supported by their kings, like in the cases of Norway, Nowogorod (Russia) and Sweden (especially during the thirteenth century).

As much as the economic exchange consolidates, the kings start to tax¹²⁹ Sami people. Taxes, however, mean a recognition of Sami sovereignty and the Sami people pay them voluntarily, in return for protection against outlaws, thieves and dishonest tradesmen. For hundred years, these relations provide mutual benefits. An early example of taxation is a decree established by the King of Sweden in 1277 in which the King grants the traders to impose a tax on the Sami with whom they trade¹³⁰.

The interests in Sami lands increase during the fifteenth-sixteenth century, especially for Norway and Sweden which fight for tax rights over Sami¹³¹ and for establishing the borderline cutting across *Sápmi* region. Although taxation is no longer voluntarily, the Sami and non-Sami continue to live in a relative peace “where the crowns acknowledge the Saami people’s right to land”¹³². The taxes, in fact, are paid by each *siida*¹³³ and are based on the land held by each household for usufructuary rights under Sami law.

Sami customary law is respected by non-Sami individuals and even non-Sami courts apply such law, particularly when regarding cases of land and resource management. In the eighteenth century, there are examples of how the courts apply Sami law both in Norway and in Sweden-Finland, considering Sami customary law as part of their legal system. Sami local officers exercise some influence in non-Sami courts in matters concerning Sami society and some Sami individuals and families are registered as owners of particular areas. In 1749, a borderline called *Lappmarksgränsen*¹³⁴ between the Swedish and the Sami areas is drawn in Sweden, to protect the indigenous group from the non-Sami intrusion.

¹²⁹ Taxes are mostly paid in furs.

¹³⁰ Scott Forrest, “Territoriality and State-Sami Relations”, *Arctic Circle* (1997). Accessed 15/01/2018. <http://arcticcircle.uconn.edu/HistoryCulture/Sami/samisf.html>.

¹³¹ Sometimes Sami have to pay double taxes or even triple ones (region around Inari).

¹³² M. Ahrén, “Indigenous Peoples’ Culture, Customs, and Traditions and Customary Law – The Saami People’s Perspective”, 74.

¹³³ The taxation system is reformed and established at the village level.

¹³⁴ *Ibid.*, 71.

A crucial date is 1751, when the two nations, the kingdom of Denmark-Norway and the kingdom of Sweden (and Finland), finally adopt the Stromsåd Treaty, establishing the boundaries in the northernmost part of Scandinavia. The boundaries consolidate the kingdoms' sovereign authority over Sami territories. The treaty contains an annex of great significance, the Lapp Codicil or *Lapp Kodicill*, which seeks to regulate the outcomes of the newly established boundaries for the Sami population. This addendum, established for the preservation of the "Lappish Nation", is often considered the Magna Carta of Sami people, since it recognises pre-existing rights of Sami in Fenno-Scandinavia. Furthermore, it recognises the Lapp law, that is the codification of the existing Sami rights. Section 10 of the Codicil stipulates: "if the Lapps need land in both kingdoms, they should have it if provided by old customary law..."¹³⁵ and "they shall be permitted to migrate, in autumn and spring, with their reindeer across the border into the other Kingdom"¹³⁶. In other words, the Codicil states:

The Sami need the land of both states. Therefore, they shall, in accordance with tradition, be permitted both in autumn and spring to move their reindeer herds across the border into the other state. And hereafter, as before, they shall, like the state's own subjects, be allowed to use land and share for themselves and their animals, except in the places stated below, and they shall be met with friendliness, protected and aided...¹³⁷

However, the pastoral Sami have to choose where to have their citizenship, if Denmark-Norway or Sweden-Finland.

In the annex, there is no explicit reference to who possesses land sovereignty. Some authors believe that the Lapp Codicil confers ownership on Sami, while others disagree, conferring the ownership on the state¹³⁸. In any case, both points of view are untenable, since the annex defines only the division of jurisdiction between the two countries. The establishment of sovereignty over a territory, in fact, does not mean the state's legal ownership of the land in a private law sense. The state's property can be

¹³⁵ *Ibid.*, 79. Translation by M. Åhrén.

¹³⁶ Kirsti Strøm Bull, "Sami Reindeer Herders' Herding Rights in Norway from the Nineteenth Century to the Present Day", in *Indigenous Rights in Scandinavia. Autonomous Sami Law*, edited by Allard, Christina, and Funderud Skogvang, Susann (Farnham: Ashgate, 2015), 80.

¹³⁷ S. Forrest, "Territoriality and State-Sami Relations".

¹³⁸ See Asbjørn Eide, "Legal and Normative Bases for Saami Claims to Land in the Nordic", *International Journal on Minority and Group Rights* 8 (2001), 138.

affirmed only in cases where there are no previous inhabitants, that means, only in cases of *terra nullius*. Scandinavia, therefore, is not considered as *terra nullius*.

After a war between Sweden and Russia, in 1809, Finland becomes part of the Russian Empire. In 1814, Norway is no longer united with Denmark, but it is forced into a union with Sweden. A few years later, in 1826, Russia-Finland and Sweden-Norway agree on the borderline between Norway and Russia. In the same years, some discussions arise around the legal acceptability of the Lapp Codicil, although in the mid of the nineteenth century the parties still recognise the validity of the Lapp law¹³⁹.

3.3 Cultural hierarchy theories and assimilationist policies

During the nineteenth and early-twentieth century, the situation for Sami people begins to change for the worst. It is possible to see the raise of the Nordic countries' discriminatory attitudes¹⁴⁰ towards Sami, carried out especially for economic and social reasons. The roots of such racial discriminations, comparable to the ideas of race superiority/inferiority typical of the colonisation period, are the cultural hierarchy theories, also labelled as social-Darwinism or simply as racism. These theories affirm the Scandinavian peoples' superiority and believe in the future disappearance of Sami population, whose nomadic livelihood based on reindeer herding is considered undeveloped if compared with the advanced Scandinavian agriculture and industry.

The cultural hierarchy theories, in a legal perspective, believe the nomadic lifestyle of Sami as insufficient for obtaining legal rights to land, which are recognised only in cases of a permanent use of lands. This idea of sovereignty is influenced by John Locke's theories, which are also used as justifications for the colonisation of America. In this political context, the Sami customary law becomes less and less important, the Sami have no longer legal rights to land, natural resources and water and they have to deal with the closing of the borders. In the next paragraphs, there is an analysis on how the cultural hierarchy theories influence the policies in the three Scandinavian countries.

¹³⁹ See M. Ahrén, "Indigenous Peoples' Culture, Customs, and Traditions and Customary Law – The Saami People's Perspective", 75.

¹⁴⁰ The process of the decrease respect for Sami starts in the southernmost part of *Sápmi* and then spreads north.

3.3.1 Norway

Norway is the Scandinavia country with the major presence of Sami. It is possible to outline three different historical stages in the evolution of Sami's legal status¹⁴¹. The first two stages will be analysed here below, while the third one (from the 1970s until today) is presented in the next section of this chapter.

In the first stage, namely before the 1850s, the Norwegian government has a limited interest in Sami, with the exception of taxes and religion. Religion is important, because missionary activities of the Norwegian Luther church seek to convert Sami people, establishing one of the first contacts between Sami and non-Sami¹⁴². However, in this period, the government never tries to acquire ownership of Sami lands.

An interesting topic is the Norwegian attitude toward Sami in 1814, year of Norway's independence from Denmark¹⁴³, when Norway establishes its own Constitution and parliament (*Storting*)¹⁴⁴. The right to vote is assured under certain criteria, which do not allow Sami people to vote. Since only a few men are entitled to vote in the Finnmark county, there is a proposal to amend the constitution to secure voting rights also to Sami. Thus, the *Storting* approves the constitutional amendment for Sami's voting rights in Finnmark in 1821. Together with the Lapp Codicil, the constitutional amendment of 1821 represents an evidence of respect for Sami people.

In the second stage, approximately from to 1850 to the 1970s, there is an active process of nation-building¹⁴⁵, enriched with nationalism, ethnocentrism and an increase of the role of the state in the economic development. Moreover, in the same years, there are developments in international law that lead to a change in the attitude towards Sami. Due to the failure of negotiations between Russia-Finland and Sweden-Norway, Russia closes the borders between Finland and Norway in 1852, restricting the semi-nomadic movements of Sami. Scared of a possible conflict against Russia, Norway adopts a

¹⁴¹ See A. Eide, "Legal and Normative Bases for Saami Claims to Land in the Nordic", 131-137.

¹⁴² Similar is the situation in Sweden.

¹⁴³ Remember that in 1814 Denmark cedes Norway to Sweden under the Treaty of Kiel. Although the union with Sweden, Norway retains its own constitution and parliament. The union between Sweden and Norway lasts until 1905.

¹⁴⁴ See K. Strøm Bull, "Sami Reindeer Herders' Herding Rights in Norway from the Nineteenth Century to the Present Day", 81.

¹⁴⁵ The process of nation-buildings in Europe (1850-1945) consists in an increasingly centralised regulation of security and economics, combined with a homologation of culture. During this process, it is common to have assimilationist policies.

hegemonic approach called “Norwegianization”, applying policies of forced assimilation. The Sami language is repressed in educational contexts and the Christian missionaries are encouraged by the state to convert Sami into the Norwegian religion and lifestyle.

Norway introduces its first legislation on reindeer herding in Finnmark county through the amendment of the 1854 Reindeer Husbandry Act. This Act limits Sami’s grazing rights on private land and further reduces the already limited winter grazing areas. Some reindeer herders have to give up their traditional livelihood, while others move to the Swedish side of *Sápmi*, because some winter grazing areas on the Finnish land are still open for people residing in Sweden. Even if Russia offers to reopen the border in 1859, Norway rejects the proposal, due to its scope of decreasing the nomadic indigenous population.

The Sami suffer discrimination and the Norwegian Parliament officially asserts the state’s ownership of non-registered lands in Finnmark in 1863¹⁴⁶. There is no explanation on how the state obtains the ownership, it is merely taken for granted. There are various grounds used for affirming this issue: the first asserts that the state owns these lands from immemorial time; the second refers to a provision of the Danish-Norwegian King in 1687; the third affirms it has become an established practice; the fourth, close to Locke’s view, asserts that in absence of cultivated lands, the Sami ownership cannot be recognised¹⁴⁷.

In the same years of the proclamation of state’s ownership of Sami lands, the government encourages non-Sami people to move north, particularly in the Finnmark and Troms counties. Here, as a consequence, the population tripled during the nineteenth century¹⁴⁸. In order to assure the “Norwegianization” of the northern territories, the government also introduces limitations to Sami’s possibility of acquiring title to land. In addition, in 1864 Norway passes a law that abolishes Sami user’s rights to land in Finnmark county, while in 1902¹⁴⁹ a Sami individual is not even entitled to buy his land.

¹⁴⁶ In 1821, the Danish-Norwegian King asserts that the state has no legal right to land in Finnmark county. However, already in 1848, the Norwegian government proclaims the state’s ownership of the northern part of Norway in a bill to the parliament.

¹⁴⁷ See A. Eide, “Legal and Normative Bases for Saami Claims to Land in the Nordic”, 133.

¹⁴⁸ See M. Ahrén, “Indigenous Peoples’ Culture, Customs, and Traditions and Customary Law – The Saami People’s Perspective”, 84-85.

¹⁴⁹ Land Sales Act.

In 1905 with the Karlstad Convention, Norway gains independence from Sweden and limits the grazing rights for Sami living in Swedish territories. This limitation leads to the Reindeer Herding Convention agreement with Sweden in 1919. The agreement consists in preventing that Swedish Sami graze their reindeers in Norway. In 1933, a new Reindeer Herding Act affirms the existence of Sami grazing rights on land, but at the same time, it states that, in case of conflict, the interests of non-Sami people will prevail. The 1933 Act also introduces the system of districts for reindeer herding,¹⁵⁰ still in existence today. The no longer recognition of Sami's land rights and the introduction of the district's system provoke the official disappearance of Sami's collegial bodies, with a consequent termination of Sami customary law's applicability.

3.3.2 Sweden

Sweden does not see Russia as a threat to the same extent of Norway. At the same time, Sweden has different developments as a nation and concerning Sami people. As Norway, however, Sweden considers the Sami people as an inferior race, but instead of an approach similar to the "Norwegianization" of Sami lands and culture, it opts for a policy labelled "Lapp should remain Lapp"¹⁵¹. This policy implies an isolation of Sami people, in order to keep them away from the superior Scandinavian non-Sami society. It is believed that if Sami people try the civilised, modern Swedish lifestyle, they will become part of the Swedish society and that is unwelcome. For this reason, Sweden reduces education for Sami children, who cannot be admitted to Swedish schools. Instead, they have to attend special nomadic schools, which intentionally offer a low-level of instruction.

Sami people are not allowed to pursue a livelihood different from reindeer husbandry, since they are held incapable of doing anything else. The Sami are not allowed to build houses in their ancestral lands, whereas non-Sami receive subsidies from the state to move into *Sápmi* and build there their houses¹⁵². Consequently, many Sami individuals, especially the ones that do not dedicate to reindeer herding, are forced to leave their lands

¹⁵⁰ In this way, it is easier for Norway to distribute damages caused by reindeers. In fact, in previous acts, the Norwegian legislation obliges Sami reindeer herders to pay damages caused by reindeers grazing on private lands.

¹⁵¹ M. Ahrén, "Indigenous Peoples' Culture, Customs, and Traditions and Customary Law – The Saami People's Perspective", 88.

¹⁵² Only in 1959 Sweden ends the discrimination between Sami and non-Sami as to the right of housing.

and to integrate themselves into the Swedish society, producing the same effect of assimilation that the state is trying to avoid.

In 1886, the Reindeer Grazing Act officially abolishes the Taxed Lapp Land system, which for centuries recognises the Sami's ownership right to land. Instead, the government declares Sami ancestral lands as property of the Crown. Similar to Norway, no explanation is given to clarify how Sami lost their rights. Since houses are a prerequisite for acquiring land rights, the Sami reindeer herders try to protect their traditional lands taking up farming. However, the Swedish legislation prohibits the Sami to pursue any other form of livelihood different from reindeer herding, creating a vicious circle of disadvantaged situations. Only a Swedish descent can build his house on Sami traditional lands.

The 1886 Act introduces the *Lappfogde* system, which consists in a Swedish administrative officer that represents Sami people at a regional level. The patron should speak for Sami's economic and social issues, replacing indigenous people's ability to represent themselves around land, water and natural resources rights. This transfer of power is mitigated by the 1873 Sami right to winter pasture on private territories, permitted in northernmost part of Sami lands. However, Sami rights are still often overridden by non-Sami interests.

Moreover, the Reindeer Grazing Act inaugurates a new entity, the *lappby*, which later becomes the *sameby*¹⁵³. The *lappby* is a patch of towns, comparable to the modern township, and it serves as an administrative institution for reindeer husbandry. Having its roots in the *siida*, the *lappby* is an organisation of land, that is the most similar system to the previous Sami customary law among the Scandinavian policies. However, its purpose is to provide a legal body for paying compensation to farmers, whose private property has been damaged by reindeer herds. The *lappby* has also a cultural and social role and permits the Sami included in the area to maintain unofficially certain aspects of their legal system, despite a lack of formal recognition.

Considering all the processes, the transfer of authority from non-Sami courts to non-Sami authorities produces a progressive demise of Sami's collegial bodies and law, which is no longer used, not even for matters involving only Sami people. In addition, as in the Norwegian country, the Swedish government encourages and supports the non-

¹⁵³ This second term is introduced by the Reindeer Herding Act of 1971.

Sami colonisation of Sami territories, also in the lands set aside for Sami, that is the area above the *Lappmarksgränsen*. In the nineteenth century, the population in *Sápmi* quadruples and the pasture grazing areas for reindeer herds are strongly diminished.

3.3.3 Finland

Analogous to the 1886 Swedish Reindeer Grazing Act, Finland applies a forest statute¹⁵⁴ that gives the ownership of woodlands, not belonging to individuals or communities, to the state. This is further affirmed in 1932, when, through the first Finnish Reindeer Herding Act, all lands not belonging to farmers become property of the state. Like in Norway and Sweden, Sami lose their rights to lands, previously confirmed in the Taxed Lapp Land System, and their legal and social organisations, namely Sami customary law and *siidas*, disappear.

However, the Finnish case is different from the other Scandinavian countries, since the right of reindeer herding is not legally reserved to Sami people. Under the Russian rule in 1898, the government establishes reindeer herding districts, while reindeer herders, to obtain grazing rights, have to be registered in one of these domains. Also in Finland, the aim of restructuring Sami lands organisation is to provide a system of compensation in case of damages provoked by reindeer herds.

3.4 Modernisation: old borders, new policies

After the World War II, much happens within Sami society. The contacts between non-Sami and Sami increase, while the Sami organisations and movements become more structurally shaped. For example, in 1956 there is the establishment of the Nordic Sami Council, which will turn into the Sami Council in 1992. In this latter year, also the Sami from Russia become part of the organisation. At the same time, the Sami movements start to be affected by the growing influence of international organisations and debates: the concept of indigenous people starts to be used “as a base for Sami demands for stronger land rights”¹⁵⁵.

¹⁵⁴ The Finnish Forest Statute.

¹⁵⁵ Patrick Lantto, “Borders, citizenship and change: the case of the Sami people, 1751-2008”, *Citizenship Studies* 14 (2010), 551.

In this process, the Sami people express the great importance of their identity and nationality:

We are Sami and want to be Sami, without therefore being any more or less than other peoples in the world. We are one people, with a territory, a language, and a cultural and societal structure of our own. Through history we have found our subsistence and lived in Sápmi, and we own a culture that should be developed and continue existing¹⁵⁶.

Sami people insist to be one nation, not regarding the fact that they are divided into four states. Instead, this “divided citizenship” is used as a leverage in national and international negotiations.

The new Reindeer Grazing Convention between Norway and Sweden remains in force from 1972 to 2002, even if the negotiations are extended for some more years until the Swedish government’s abolishment of the agreement in 2005. The disagreements between the two countries are due to the different significance given to customary rights. However, the negotiations towards a new inter-state Convention restart quite soon. An agreement, the Draft of the Nordic Sami Convention, is reached in 2005, although it is not ratified yet by the three Nordic states.

3.4.1 Norway

Following the classification of Norway-Sami relations in historical stages started before, the third stage, from the end of the 1970s until today, sees a progressive decline of the nationalistic approach, due to the developments of international law and international organisations. At the same time, this period coincides in Norway with the discovery and utilisation of natural resources, especially oil and gas. The presence of these natural resources in the Sami area negatively reduces the importance of Sami’s means of subsistence.

Before analysing a fundamental case related to natural resources, it is important to underline that a change in attitude towards Sami and their use of resources already occurs in two judgements of the Supreme Court in 1968. The two cases, the Brekken case and the Altevann case, affirm the possibility for Sami reindeer herders to claim land and resources rights on the ground of usage from time immemorial, a step further respect the harmless right of enjoyment (user’s rights). Although the Norwegian Supreme Court’s

¹⁵⁶ *Ibid.*

recognition of Sami rights based on use from time immemorial, it is difficult for Sami reindeer herders to prove their long-standing and intensive use of lands.

The turning point in the relations with Sami is embodied in the case of Alta Valley (1979-1982)¹⁵⁷, which consists in a Sami's complaint about the construction of a hydroelectric plant and a dam in their areas. The project is criticised by Sami people, not only because of the consequent destruction of reindeer grazing areas, but also because of the existence of previous Sami's rights over the land and water involved. A wave of protests, joined by environmentalists, is triggered by the Alta project which leads the Norwegian government, and also the other Nordic countries, to acknowledge and clarify the legal status of Sami people, by shaping national policies concerning them¹⁵⁸. This case is the first one concerning Sami people that attracts international attention, producing a general groundswell of sympathy in favour of this indigenous population. This positive attitude occurs because of the recent international growing awareness of the discriminations suffered by world-wide indigenous peoples.

Despite the fact that the scope of the Alta project is reduced, Norway persists in its realisation. The European Commission on Human Rights¹⁵⁹, in examining the admissibility of the Alta case, states the basic rules of the European Court of Human Rights relevant to indigenous peoples. Such rights are: articles 1 and 8 of the Convention and article 1 of the First Protocol. Although the traditional lifestyle of indigenous peoples comes under article 8¹⁶⁰, the state can justify such policy as economical benefitting the society as a whole¹⁶¹. For these reasons, the Commission finds the Alta case as inadmissible to the Court.

¹⁵⁷ *G. and E. v. Norway* (1983), Application No. 9278/81 and No. 9415/81, joined. Hereafter cited as the Alta case.

¹⁵⁸ See Stefania Errico, Barbara Ann Hocking, "Reparations for Indigenous Peoples in Europe: The Case of the Sámi People", in *Reparations for Indigenous Peoples. International & Comparative Perspectives*, edited by F. Lenzerini (New York: Oxford University Press, 2008), 373.

¹⁵⁹ The Alta case is the first dispute taken to the European Commission on Human Rights by Sami people.

¹⁶⁰ Article 8 states as follow: "A minority's life style may, in principle, fall under the protection of private life, family life or the home. The submersion of a very small area of land because of the construction of a hydroelectric plant, in a vast region populated by shepherds, hunters and fishermen, does not constitute an interference with the population's private life. Even if it there were an interference, it would be justified as being necessary, particularly for the economic well-being of the country [...]"

¹⁶¹ See Timo Koivurova, "Jurisprudence of the European Court of Human Rights regarding Indigenous Peoples", in *The Interpretation and Application of the European Convention on Human Rights: Legal and Practical Implications*, edited by M. Fitzmaurice, and P. Merkouris (Martinus Nijhoff Publishers, 2013), 243-244.

Due to the effects produced by the Alta case, the Norwegian government establishes a Royal Investigation Commission to investigate a possible change in Sami rights. In 1984 the Commission presents a report whose recommendations are to create political and material conditions for the preservation and development of Sami culture. Here, the effects of article 27 of the ICCPR are clearly visible¹⁶². The state, thus, adopts “the Sami law” of 12 June 1987 (No. 56)¹⁶³, further amended in 2003, which is very significant for the legal status of Sami, since it concerns the establishment of the Sami Parliament and other Sami rights. The Act’s purpose, indeed, is “to enable the Sami people in Norway to safeguard and develop their language, culture and way of life”. The next year, the Act’s purpose appears also in the Norwegian constitution, with the addition of the current article 110a¹⁶⁴ to the constitutional document of 1814. In 1989 the Sami Parliament (*Sameting*) is officially established and in 1997 the Norwegian King Harald V states in the opening speech of the Sami Parliament that “the Norwegian State is founded on the territories of two people – the Norwegians and the Sami”¹⁶⁵, recognising officially the Sami’s status.

3.4.2 Sweden

in Sweden, the Reindeer Herding Acts of 1886, with its amendment of 1889, lasts until 1928. A similar Reindeer Herding Act is in force from 1928 until the present Act of 1971. The 1971 Reindeer Herding Act, always following the narrow system of Sami rights of the previous regulations, is still in force nowadays, although the amendment of 1993. The amendment regulates in a clear way that Sami people’s rights, namely usufruct rights, are based upon immemorial prescriptive rights.

The amendment is a consequence of the famous so-called Taxed Mountain Case of 1981¹⁶⁶, judged by the Supreme Court of Sweden. The Taxed Mountain case (1966-1981) concerns the Sami people’s ownership of a determined mountain area in the county of Jämtland and sees several Sami villages and individuals sue the Swedish state. The

¹⁶² See A. Eide, “Legal and Normative Bases for Saami Claims to Land in the Nordic”, 135.

¹⁶³ Law No. 56/1987. Act of 12 June 1987 Concerning the Sameting (the Sami Parliament) and other Sami legal matters (the Sami Act). Norway: June 12, 1987. Accessed 19/01/2018. <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19870612-056-eng.pdf>.

¹⁶⁴ The article states: “It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life”.

¹⁶⁵ Eva Josefsen, “Norwegian Legislation and Administration – Saami Land Rights”. *Gáldu Čála – Journal of Indigenous Peoples Rights* 1 (2007), 10.

¹⁶⁶ NJA 1981. The case is also known as the Skattefjall case.

Court rules the state's ownership of the disputed area, although affirms the Sami's right to use the land as constitutionally protected. The Sami people have "a firmly protected usufructuary right of a particular kind, based upon use and prescription from time immemorial"¹⁶⁷.

Another interesting case is the report of the Human Rights Committee in *Kitok v. Sweden*¹⁶⁸, where the group interest in the cultural survival has the priority. Ivan Kitok, an ethnical Sami who lost his membership in his Sami village, challenges the Swedish Reindeer Herding Act, since it grants reindeer grazing rights only to members of Sami villages. The UN Human Rights Committee, which monitors the implementation of the ICCPR's provisions, affirms that even if the Act restricts Kitok's participation in Sami cultural life, it does not violate his rights under the article 27 of the ICCPR. The Swedish legislation is thus justified as a mean of ensuring the Sami's welfare as a whole.

The Sami are recognised as an indigenous people in 1977, although this recognition still does not appear formally in the Swedish Constitution. The Sami political struggle in Sweden starts during the 1950s with the establishment of several Sami associations. In 1982, an official investigation, called the Sami Rights Investigation or *Samerättsutredningen*, is set up and completes its work in 1989, suggesting the creation of a Sami popularly-elected body. The Sami Parliament (*Sametinget*) is inaugurated in 1993, a few years later in comparison with Norway and Finland, and it grants Sami cultural autonomy.

3.4.3 Finland

Although the legal cases concerning the Finnish Sami are just a few, the opinion of the UN Human Rights Committee regarding the case *Lansmänn and others v. Finland*¹⁶⁹ is interesting for the relation between the economic aims of Finland and the survival of Sami culture. The Sami people react to the authorisation of the Finnish state for a stone quarrying in the Mount Riutusvaara, an area used by the Sami people for reindeer herding. The Committee analyses the effects of the stone quarrying and asserts that, although

¹⁶⁷ SOU No. 41 1989, 257. Cited in Patrick Lantto, Ulf Mörkenstam, "Sami Rights and Sami Challenges", *Scandinavian Journal of History* 33 (2008): 37.

¹⁶⁸ *Kitok v. Sweden*, Communication No. 197/1985, UN Doc CCPR/C/33/D/197/1985 (Human Rights Committee, 1988).

¹⁶⁹ *Lansmänn and others v. Finland*, Communication No. 671/1995, UN Doc CCPR/C/58/D/671/1995 (Human Rights Committee, 1996).

reindeer herding is part of Sami culture and protected under article 27 of the ICCPR, the circumstances do not violate article 27. Measures that have only a limited impact on the minority, do not necessarily mean a violation of the cultural integrity right. However, the Committee warns that an increase of stone-quarrying activities in the area can in the future constitute a violation of the ICCPR's article.

After the two World Wars, the Sami start to organise themselves also in Finland. Particularly, in 1945, they found the *Sámii Littlo* (Sami Union). The political weight of this union, however, never reaches the level of the Norwegian and Swedish counterparts. More successful is the Sami Delegation, an association established by the Finnish government for advisory purposes. Soon, it becomes an elected body representing the Sami people and it is considered the predecessor of the Sami Parliament. Finland is the first Nordic countries to establish the Sami Delegation/Parliament (*Sámi Párlameanta*), officially convened in 1973. Even if the publicly elected body has no decisional power, it is the first legal instrument that Sami have to express themselves as a national minority. A modern Sami Parliament replaces the older one in 1995 and it is the supreme political body of Sami in Finland which consists of twenty-one representatives elected every four years.

The Sami rights are covered in two provisions incorporated into the Finnish Constitution. The first one, article 17 of the constitution, expresses the right to one's language and culture: "the Sami, as an indigenous people, [...] have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act. [...]". The second one, article 121, focuses on Sami cultural autonomy and states: "Provisions on self-government in administrative areas larger than a municipality are laid down by an Act. In their native region, the Sami have linguistic and cultural self-government, as provided by an Act".

4. Current situation of Sami people

The expansion of universal human rights since the end of the twentieth century and the gradual realisation that citizens could have different backgrounds result in a positive states' attitude towards minorities and indigenous groups. The historical processes of the evolution of Sami rights in the three Nordic countries have been studied in the previous chapter, while the Scandinavian Law and its mechanism will be analysed here below, in order to offer a more satisfactory view on national approaches to Sami people, particularly regarding the national judicial powers and property law.

The growth of Sami movements and the establishment of Sami parliaments lead to a positive development of Sami right on self-determination, which nowadays includes cultural autonomy. Moreover, Sami rights are further improved in the Draft of the Nordic Sami Convention, which, even if it has not been ratified yet, contains emblematic provisions not only for the transnational Sami specifically, but also for indigenous peoples in general.

Lastly, this chapter will briefly illustrate the role of the European Union, a political and economic entity increasingly important for the Scandinavian policies in the last decades. The EU, especially through the European Court of Human Rights and its case law on Sami issues, is demonstrating advanced human rights and a growing recognition and protection of indigenous rights.

4.1 Scandinavian Law

More than specific analyses of national historical legal traits related to Sami people, it is possible to examine the features of Scandinavian law in general. Traditionally, the Scandinavian constitutions are weak compared to those of common law and, despite some degree of protection for Sami people¹⁷⁰, the provisions concerning the Sami do not confer them a significant role¹⁷¹.

A distinctive element of Scandinavian governments is that they address Sami rights issues through the institution of governments' commissions and bills. Important

¹⁷⁰ Sweden has the weakest Sami's degree of protection.

¹⁷¹ See Christina Allard, "Some Characteristic Features of Scandinavian Law and their Influence on Sami Matters", in *Indigenous Rights in Scandinavia. Autonomous Sami Law*, edited by C. Allard, and S. Funderud Skogvang (Farnham: Ashgate, 2015), 49-50.

reports on Sami matters are produced by the Sami Rights Commission in Norway, as well as by other minor Swedish commissions, although the Swedish researches do not always result in new legislations or significant amendments. However, in the last decades, Sami land and resources rights are increasingly pursued also through national and international case law. The role of Scandinavian courts, in fact, is very important and their powers expand when there is a room for interpretation. Since the legal sources referred to Sami rights are often complex and unclear, the courts have a fundamental role in interpreting them.

4.1.1 Judicial powers

Because of history, there is a distinction between West (Denmark and Norway)¹⁷² and East (Sweden and Finland) Nordic legal traditions. In case law, Norway is stylistically closer to common law traditions. There is a first-voting judge, who argues the case openly, and then the other judges agree or dissent. The judgement is usually long and the Norwegian Supreme Court generally plays an active role in developing the law. The Swedish and Finnish courts, on the other hand, normally make a common verdict, with the possibility for judges to write the dissenting opinions. In this situation, judges have merely the role of applying the law, instead of a law-making function.

The Norwegian Supreme Court's autonomy dates back in the eighteenth century, when the judges are independent and therefore do not have to make the verdict in the name of the Danish-Norwegian king. Furthermore, the Constitution of 1814 underlines this judicial independence, accentuating the distinction between judicial, legislative and executive powers. Since the Norwegian Constitution is the oldest in Europe, there are no significant changes in law among time, not even during the Norwegian union with Sweden, when the country continues to enjoy an internal autonomy.

Differently from the unchanged ongoing Norwegian Constitution, both Sweden and Finland have several governmental documents over the years. Among these norms, there are the constitutional documents called Instrument of government, that form part of the Constitution. The current Instrument of government of Sweden is introduced in 1974, while Finland, after its independence in 1917, revokes the tradition of instruments of government, adopting the Constitution Act in 1919. The present Constitution Act of 1999

¹⁷² *Ibid.*, 50-51. Although it is not relevant when discussing about Sami rights, Island is included in the West Nordic legal tradition.

displays a mix of presidential power and parliamentary system, different from the Norwegian and Swedish monarchies.

4.1.2 Property law

Property law is one of the most relevant fields when discussing Sami rights. Among the Scandinavian states, there are different legislations about property which consequently influence the recognition of Sami's rights to land and natural resources in several ways. The main concept, on which Sami rights are based, is the protracted usage.

Back in history, the administration of lands is very different between the kingdoms of Denmark-Norway and Sweden-Finland. Norway has to deal alone with property law affairs and the administration of land does not establish clear and demarcated boundaries until the end of the nineteenth century. Although a partial land partition, Norway has many large areas, especially in the remote northern lands, which are still not demarcated during the twentieth century. As a result, Norway has to deal with many disputes over real property, regarding not only land boundaries, but also the content of property rights. On the contrary, the Swedish-Finnish kings develop a centralised administration, which is well-organised in land divisions, both on paper and in reality.

Norwegian law has several proprietary concepts to express protracted use of land, among which: immemorial usage, prescription, "established privileges" and local customary law¹⁷³. Most of the concepts are developed by the courts and, thus, they are not always clear and perfectly distinguishable, especially in cases in which they overlap. Despite this, the acquisition through prescription is codified in the Prescription Act of 1996 and it can be obtained with both ownership and user rights.

On the contrary, Swedish and Finnish laws have fundamentally two concepts for protracted uses: immemorial prescription and customary law¹⁷⁴. Immemorial prescription, considered an outdated concept, is annulled both in Sweden and Finland at the end of the twentieth century. The disappearance of the concept immemorial prescription has the effect of complicating any trial regarding such right, due to the fact that this prescription is included in the Land Code of 1734.

Disputes and trials over both protracted usage of land and Sami rights usually arise in contexts of reindeer herding, coastal fishing and ownership. Particularly, reindeer

¹⁷³ *Ibid.*, 56.

¹⁷⁴ *Ibid.*, 57.

herding is the most common element of disputes, even though it is codified in all three Scandinavian states through a proper legislation¹⁷⁵. The disputes follow the normal procedural rules, but often the courts make some cultural adjustments in the assessment of the evidence. The examination and recognition of Sami culture, identity and their use of unwritten language are cultural adjustments increasingly taken into consideration in the case law, especially in Norway¹⁷⁶.

In the Scandinavian case law, the common formula to prove immemorial usage of land consists in three basic conditions: “the use must have been of a particular nature; the use must have taken place over a long period of time; the use must have occurred in good faith”¹⁷⁷. Such proofs are examined with paying attention to cultural adjustments in two exemplar Norwegian landmark cases.

The Svartskog case¹⁷⁸ concerns a dispute regarding whether the state or the local community is the rightful owner of the Svartskogen area. Based on the principle of usage since time immemorial, the Norwegian Supreme Court holds that the local community, which is in the majority composed of Sami people, is the rightful owner. This case is emblematic, since it is the only occasion in which Sami collective ownership is recognised in any of the three Scandinavian countries.

Sami land rights are further improved in the Selbu case¹⁷⁹, which consists in a dispute between Sami reindeer herders and private landowners. The private landowners claim that the Sami people have no rights to herd their reindeers on the landowners’ private areas. The Supreme Court finds that these rights indeed exist. Due to the particular Sami culture, the Court recognises the difficulties in finding evident physical proofs of reindeer herding from past centuries. The cultural adjustments here take into consideration the nomadic lifestyle of reindeer herders:

Since our case regards pasture rights concerning reindeer, the specific conditions within this livelihood must be considered [...]. The conditions must be adjusted to the land uses of the area by the Sami and the reindeer. Regard must also be taken of

¹⁷⁵ Remember that reindeer herding is recognized differently in the three Scandinavian states. In Norway and Sweden only people of Sami heritage can practice reindeer herding, while in Finland also non-Sami citizens can carry out such occupation.

¹⁷⁶ Sweden as well is taking into consideration the status of Sami people in recent case law. Related to Finland, there are no cases regarding Sami people’s rights and property law.

¹⁷⁷ K. Strøm Bull, “Sami Reindeer Herders’ Herding Rights in Norway from the Nineteenth Century to the Present Day”, 93.

¹⁷⁸ NRt 2001.

¹⁷⁹ NRt 2001.

the nomadic lifestyle of the Sami. Circumstances that have been significant for other grazing animals cannot without consideration be transferred to reindeer herding. These circumstances must be a part of the overall assessment¹⁸⁰.

This judgment, together with the Svartskog case, demonstrate a new attitude towards Sami land rights grounded on their historical use.

In Sweden, there is a trial similar to the Selbu case in Norway. The Nordmaling case¹⁸¹, which name relates to the land area concerned, deals with Sami reindeer herding rights on private lands. The Supreme Court concludes that the rights to winter-pasture on private lands exist on the basis of customary law, giving a statutory recognition to Sami customs. The Supreme Court applies a Reindeer Herding Act's provision that affirms the pasture rights on areas used for a long time. The judgement in the Nordmaling case represents a rare case of law-making for the Swedish court and it is the first successful case won by the Swedish Sami.

A recent legal compromise on land management is reached in Finland through the enactment of the Finnmark Act of 2005. The Act, welcomed by the UN Committee on Human Rights and by the CERD, facilitates the management of land, transferring the area from the state ownership to a local government, the *Finnmarkseiendommen*¹⁸². This legal entity, charged with administrating land and natural resources, is made up of six members, three elected by the Sami Parliament and three elected by the Finnmark Country Assembly. Thanks to this Act in Finnmark, the Sami, both as a collective and as individuals, have acquired rights to land and natural resources through the prolonged use of land and water areas.

The flexibility of the Nordic courts in examining the proofs of immemorial usage is paramount, especially considering the fact that otherwise the semi-nomadic usage of lands could be judged to be not sufficiently intensive to establish proper Sami rights. In the twenty-first century, the Scandinavian courts and governments demonstrate a wider acceptance of Sami rights, more in line with the international rights of indigenous people.

¹⁸⁰ NRt 2001, p. 769, 789. Cited in C. Allard, "Some Characteristic Features of Scandinavian Law and their Influence on Sami Matters", 59.

¹⁸¹ NJA 2011.

¹⁸² See S. Errico, B. A. Hocking, "Reparations for Indigenous Peoples in Europe: The Case of the Sámi People", in *Reparations for Indigenous Peoples. International & Comparative Perspectives*, edited by F. Lenzerini (New York: Oxford University Press, 2008), 386.

4.2 Sami cultural self-determination

4.2.1 Sami parliaments

As already anticipated in the previous chapter, the political relations between states and Sami people have changed, especially during the last three decades. The establishment of Sami parliaments in Norway (1989), Sweden (1993) and Finland (1973-1996) means a wider acceptance of the principle of group rights and an empowerment of the representative democracies. The Sami achieve a greater sphere of influence in the dominant society. They can, in fact, participate directly in policy with national elections to the parliaments, as well as indirectly with the work of the Sami parliament, whose members are elected every four years only by Sami individuals.

In Norway, subsequent to the governmental inquiry set up after the Alta conflict, the Sami Parliament is created in 1989 and it works to promote Sami culture, language and social conditions. The parliament is a referral body and it is financed by the Norwegian state, which sets aside for it much more money than the other Scandinavian countries.

In Sweden, the Sami Parliament is a governmental administrative body, whose members are elected among and by the Sami population. The reason for its establishment is the recognition of Sami's indigenous status, although the parliament's function only concerns the monitoring of Sami culture and Sami language.

The Finnish Sami Parliament is initially intended to regulate Sami's rights and their economic, social and cultural conditions. At a later time, the parliament is restructured similar to the Norwegian and Swedish Sami institutions. Section 1 of the 1995 Finnish Act on the Sami Parliament affirms the cultural autonomy of Sami within their homeland: "The Saami as an indigenous people shall, as is further detailed in this act, be ensured cultural autonomy within their homeland in matters concerning their language and culture"¹⁸³. Differently from Norway and Sweden, in Finland the authorities have to negotiate with the Sami Parliament all decisions that can affect, directly or indirectly, Sami's status as an indigenous group¹⁸⁴. The Swedish legislation is silent on the idea of negotiations, while the Norwegian authorities are merely obliged to give the Parliament a chance to express its opinions.

¹⁸³ Finnish Act No. 974 of 17 July 1995.

¹⁸⁴ *Ibid.*, Section 9.

The Sami parliaments, called *Sámediggi* in the Sami language, are one example of the forms of autonomy granted to indigenous peoples in the broader framework of self-determination. Even if the territorial autonomy is not entailed as a function of the parliaments, the objective of cultural autonomy and cultural self-government is presented in all articles 1 of the three Scandinavian Sami parliaments. Since the parliaments have mostly advisory functions, the Sami people do not have such a prominent role in the dominant political structure, not even in Finland where the Sami parliament has a greater power due to the governmental obligation to negotiate.

The Council of Europe Advisory Committee points out the weaknesses of the role played by Sami parliaments. About Finland it argues that “current practices rarely reflect the term negotiation and that the Parliament has often had only limited, if any, influence on the final outcome”¹⁸⁵. The Committee, thus, recommends the authorities to implement the negotiations with the Sami Parliament, going beyond the mere action of consultation¹⁸⁶. In addition, the Council of Europe Advisory Committee, in its First Opinion on Sweden, asserts that the legal obligation to consult the Sami Parliament should extend to include also issues regarding the use of land¹⁸⁷.

In conclusion, Sami parliaments can be seen as a symbol for redressing past wrongs¹⁸⁸. Their foundation is the symbol of the recognition of Sami people’s indigenousness and self-determination in all three Scandinavian states, but at the same time, this acknowledgement is limited to a cultural form of autonomy.

4.2.2 *The Sami Council and the Sami Parliamentary Council*

After the World War II, many national Sami organisations develop. The first forms of association are cultural organisations of Sami, as well as non-Sami associations dealing with Sami culture and language issues. The Nordic Sami Council is established in 1956¹⁸⁹ and it is an umbrella organisation and coalition of Sami organisations of Norway, Sweden

¹⁸⁵ See Advisory Committee on the Framework Convention for the Protection of National Minorities, *Second Opinion on Finland adopted on 2 March 2006*, ACFC/OP/II(2006)003, para. 155.

¹⁸⁶ *Ibid.*, para 156.

¹⁸⁷ Advisory Committee on the Framework Convention for the Protection of National Minorities, *First Opinion on Sweden adopted on 25 August 2003*, ACFC/INF/OP/I(2003)006, para. 63.

¹⁸⁸ A deeper investigation on the reparations for indigenous peoples is carried out in Federico Lenzerini (ed.), *Reparations for Indigenous Peoples. International & Comparative Perspectives*, (New York: Oxford University Press, 2008).

¹⁸⁹ Since its foundation in 1956, the Sami Council is one of the longest existing indigenous peoples’ organisation.

and Finland. At a later time, in 1992, the borders with Russia are reopened, consenting the participation in the Nordic Council also to Russian Sami organisations. With Russian participants, the name of the coalition changes in Sami Council. Today, the Sami Council consists of fifteen members and each component represents a member organisation. The aim of the Council is to promote Sami rights and their interests in all four countries where the Sami reside. Moreover, the Sami Council participates in many international processes on indigenous people, human rights and arctic and environment.

In 2000, the Sami parliaments of the three Scandinavian states establish the Sami Parliamentary Council, a Nordic cooperative body, whose purpose is to safeguard Sami's interests and to strengthen the Sami cooperation across the borders. The Sami Council and the Sami in Russia participate in the Parliamentary Council as observers. Over a four-year period, each Parliament holds the position as president for a mandate of sixteen consecutive months and its secretariat is the Sami parliament from which the president hails.

The Sami Council and the Sami Parliamentary Council found together a committee to govern Sami national symbols, such as the flag, the National Day and the Song of the Sami Family. Both councils operate to maintain a Sami unity beyond the borders and to reach a further level of self-determination.

4.3 The Draft of the Nordic Saami Convention

In November 2005, an Expert Committee consisting in an equal number of appointed members from the Norwegian, Swedish and Finnish governments, with the external participation of representatives from the three Sami parliaments, presents the draft of Nordic Saami Convention in Helsinki. The document consists of nine parts and four annexes, even though the most relevant components are the fifty-one provisions. The aim of the Convention is to stipulate a common position on the minimum rights to allow the Sami people to safeguard and develop their culture, language and livelihoods.

Since the beginning of the work, the Expert Committee aims its Convention to grant concrete rights to Sami people, as well as to establish duties for the states. This kind of Convention with specific objectives is preferred instead of a framework convention,

which is considered far too general for the seriousness of the situation¹⁹⁰. Furthermore, a framework convention already exists and it is the ILO Convention No. 169, ratified only by Norway¹⁹¹ in 1990.

The Draft of the Nordic Sami Convention, as can be understood by the use of the adjective Nordic in the name, does not include Russia. However, the Committee affirms the desirability for the Scandinavian countries of establishing cooperative relations with Russian Sami and tries to extend the Convention's rights as much as possible to Russian Sami, without the involvement of Russia, one of the opponents to the UN Declaration.

Despite some controversies, the Sami people are not part of the Expert Committee¹⁹², since they are not entitled to hold the power of treaty-making. However, the Sami parliaments possess a great influence in the Draft Convention's ratification, amendment, development and supervision¹⁹³. Therefore, as the Preface expresses, there is a relation of cooperation between the three countries and the Sami representatives and the approval of the Convention by the Sami Parliaments is considered of particular importance.

After a Preface, which includes opinions from the three Nordic states and the three Sami Parliaments, the Draft Convention's provisions¹⁹⁴ are divided as follows:

<u>Part/Chapter</u>	<u>Contents</u>
I	The general rights of the Sami people
II	Sami governance
III	Sami language and culture
IV	Sami right to land and water
V	Sami livelihoods
VI	Implementation and development of the Convention
VII	Final provisions

¹⁹⁰ See Timo Koivurova, "The Draft for a Nordic Saami Convention", *European Yearbook of Minority Issues* 6 (2006/2007), 107-108.

¹⁹¹ Nevertheless, Sweden and Finland have openly declared their will to ratify the ILO Convention No. 169 in the next future.

¹⁹² The initial proposal of the Working Group supports the presence of representatives from the three Sami parliaments (one member per parliament) in the Expert Committee.

¹⁹³ *Ibid.*, 110-112.

¹⁹⁴ The unofficial translation in English of the Draft of the Nordic Saami Convention is available at https://www.regjeringen.no/globalassets/upload/aid/temadokumenter/sami/sami_samekonv_engelsk.pdf (accessed 03/02/2018).

Since the work of the Expert Committee is mostly based on the Norwegian and Swedish languages, the examination of the articles presented below will ground on the unofficial translation in English.

Article 1 expresses the objective of the Nordic Saami Convention, that is “to affirm and strengthen such rights of the Saami people that are necessary to secure and develop its language, its culture, its livelihoods and society, with the smallest possible interference of the national borders”. The aim is therefore to propose a renewal and a development of the Sami rights, already codified in the Lapp Codicil of 1751. The acknowledgement of past injustices suffered by the Sami people, certified by the three Nordic states in the Preface, underlines the desire to repair past wrongs by providing some guarantee that such past negative experiences would not occur again¹⁹⁵.

After the recognition of the Sami as an indigenous people (art. 2), the Convention affirms the right to self-determination, in accordance with international law: “[...] the Sami people has the right to determine its own economic, social and cultural development and to dispose, to their own benefit, over its own natural resources” (art. 3). This right, indeed, is already affirmed in the Preface, where both the three Nordic states and the three Sami parliaments allude to it. The right to self-determination is also arelated to article 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights. All three Nordic states are part of these two covenants, but only Norway and Finland incorporate the covenants’ provisions in their legal system. The support of the three Scandinavian states to self-determination rights can be seen also in the process of drafting the UN Declaration. As we analysed in the first chapter, connected to self-determination, there is an extreme possibility to secession rights under certain circumstances in international law. However, taking into account the situation of Sami people, they are not in a position to demand the establishment of their own state. The article on self-determination of the Nordic Saami Convention is hence quite controversial, due to a lack of clear reference to autonomy or local self-government. Sami’s self-determination is even more problematic when considering the constitutional law of the three Scandinavian

¹⁹⁵ See S. Errico, B. A. Hocking, “Reparations for Indigenous Peoples in Europe: The Case of the Sámi People”, 375.

states. Since the three states are unitary, instead of being federal states, it is more complicated to establish different arrangements for various groups¹⁹⁶.

The first section on the general rights of Saami people continues with the corresponding obligations and responsibilities of the Nordic states to establish the appropriate measures and conditions for Sami rights. Particularly relevant is article 9, which deals with Sami legal customs:

The states shall show due respect for the Saami people's conceptions of law, legal traditions and customs.

Pursuant to the provisions in the first paragraph, the states shall, when elaborating legislation in areas where there might exist relevant Saami legal customs, particularly investigate whether such customs exist, and if so, consider whether these customs should be afforded protection or in other manners be reflected in the national legislation. Due consideration shall also be paid to Saami legal customs in the application of law.

This provision on Sami customary law does not consist in an obligation for the Nordic states, but it is an invitation to give more relevance to Sami legal customs, i.e. the *siida* system and inheritance law.

Chapter 2 on Saami self-governance covers especially the rights of Sami parliaments, confirming their status as the highest representative bodies of the Sami people (art. 14). The three main rights concerning the parliaments' role are: they can take independent decisions on matters on which they have a mandate under national or international law (art. 15); they have the right to negotiations in matters of major importance to the Sami (art. 16); they shall be represented on public councils and committees, which deal with Sami interests (art. 17). Furthermore, the Sami parliaments shall represent the Sami people in intergovernmental matters (art. 19) and they might form joint organisations (art. 20). The right to representation in international contexts is not an exclusive right of the Sami parliaments, since other Sami bodies can represent the indigenous group in international forums. One example is the Arctic Council¹⁹⁷, in which the Sami people are represented by the Sami Council.

¹⁹⁶ See T. Koivurova, "The Draft for a Nordic Saami Convention", 117.

¹⁹⁷ The Arctic Council is an intergovernmental forum that promotes the cooperation and coordination among the Arctic states with the involvement of the Arctic indigenous communities. It is made up of eight member states (Iceland, Norway, Sweden, Finland, Denmark, Russia, Canada and USA) and concerns especially sustainable development and environmental protection.

The third section is very focused on the idea of preserving Sami language and culture in the Sami homeland areas. The Sami language rights described in the Convention are aimed to grant a mix of what G. Poggeschi defines as “language rights of first type”¹⁹⁸ and “language rights of second type”¹⁹⁹. The language rights of first type consist in a non-discriminatory attitude towards the native languages of citizens and they constitute part of the fundamental rights. The effect of this type of rights is often the assimilation of minority languages into the dominant language. However, since indigenous peoples are a special type of minority groups, Sami people language rights expressed in the Draft Convention extend also to part of the second type of language rights. Although the equality between the Sami language and the Scandinavian languages is not explicitly affirmed, minority rights are recognised to Sami people, with the consequence of avoiding the process of assimilation.

Language rights include both Sami rights and states’ duties and they encompass the freedom of expression²⁰⁰, the use of Sami language in courts and with public authorities (together with the preservation of the less prevalent Sami dialects)²⁰¹, the conditions for an independent Sami media policy²⁰², the access to education in Sami language²⁰³, as well as education outside Sami society²⁰⁴. In addition, health and social services provided in Sami areas should adapt to Sami linguistic and cultural background (art. 29). Articles from 30 to 33 deal with culture: the respect for Sami traditional knowledge and cultural expressions²⁰⁵, the protection of Sami cultural heritage²⁰⁶ and the responsibilities for the states to provide the material cultural basis²⁰⁷.

Since land and water rights are related to the issue of self-determination, the Expert Committee analyses them in Chapter IV. Article 34 not only expresses the protracted traditional use of land and water areas as the basis for individual and collective ownership, but also affirms the usufruct rights of the Sami people. It is remarkable to see

¹⁹⁸ See Giovanni Poggeschi, *I diritti linguistici. Un’analisi comparata* (Roma: Carocci editore, 2010), 32-33.

¹⁹⁹ *Ibid.*, 33-38.

²⁰⁰ Draft of the Nordic Saami Convention, art. 23.

²⁰¹ *Ibid.*, art. 24.

²⁰² *Ibid.*, art. 25.

²⁰³ *Ibid.*, art. 26.

²⁰⁴ *Ibid.*, art. 28.

²⁰⁵ *Ibid.*, art. 31.

²⁰⁶ *Ibid.*, art. 32.

²⁰⁷ *Ibid.*, art. 33.

how much the Draft Convention's article is grounded on article 14 of the ILO Convention No. 169²⁰⁸, even if it differs because it accords ownership rights also to Sami individuals. In case of initiating activities (i.e. the extractions of minerals or sub-surface resources and the utilisation of natural resources) in Sami areas, the state shall negotiate with the affected Sami and, if it is a matter of major importance, also with the Sami parliament²⁰⁹. In cases I which such development activities are accorded, the Sami people involved shall receive a compensation for damages²¹⁰. According to articles 39 and 40, the Sami parliaments have extended rights, in co-determination with the state's authority, to land and resource management and environmental protection and management. These extended rights derive from the fact that land and resource rights are intrinsically connected with Sami culture.

Section V aims to protect Sami livelihoods, since they constitute a fundament for Sami culture's survival. The protection of Sami livelihoods covers the activities essential for the maintenance and development of Sami communities²¹¹. Among the Sami livelihoods, reindeer husbandry enjoys a special legal protection. While Norway and Sweden shall maintain and develop the exclusive Sami right to reindeer herding, Finland is required to strengthen the position of Sami reindeer husbandry²¹². In addition, the custom of reindeer husbandry across national borders based is granted in article 43.

The section on the implementation and development of the Convention, Chapter VI, regulates a continuous cooperation between the Norwegian, Swedish and Finnish ministers responsible for Sami affairs and the presidents of the Sami parliaments²¹³. To monitor the implementation of the Convention, article 45 establishes a Convention Committee²¹⁴, which is meant to be a non-judicial body. The Convention's provisions, in fact, shall be applied directly as national law (art. 46).

²⁰⁸ The article is cited in Chapter 2, when discussing about land and natural resources rights.

²⁰⁹ Draft of the Nordic Saami Convention, art. 36.

²¹⁰ *Ibid.*, art. 37.

²¹¹ *Ibid.*, art. 41.

²¹² *Ibid.*, art. 42. As the same article states, Finland should do it in accordance with Protocol No. 3 of its Affiliation Agreement with the European Union. This Protocol, signed by Sweden, Finland, Norway and the EU, confers to Sami people the exclusive rights to exercise reindeer husbandry. Through the Protocol, Finland is permitted (not obliged) to make reindeer husbandry an exclusive right of Sami.

²¹³ *Ibid.*, art. 44.

²¹⁴ The Committee should be made of six members: one from each state and one from each Sami parliament. The members shall be prepared in Sami law, as well as international law.

Lastly, the section on final provisions reiterates the importance of the Sami parliaments' role, since the Convention cannot be ratified until the parliaments' approval. Moreover, the Sami elected bodies' acceptance is required also in case of amendments to the document.

During the drafting process of the Convention, only Finland expresses some doubts about certain issues²¹⁵. Because of this and because of the Sami parliaments' approval step, it is possible that the Convention will be substantially revised during the actual negotiation stage. Nevertheless, the analysis of the articles included in the Draft of the Nordic Saami Convention is essential to understand the contemporary processes affecting the recognition of indigenous rights, not only in Scandinavia but also worldwide. The Draft Convention is indeed emblematic in its formula: it is the first legal instrument that tries to organise the relations between cross-border indigenous people and the states they live in²¹⁶.

4.4 The European Union and indigenous peoples

In the first chapters, we analysed the most important international instruments regarding the protection of indigenous peoples. In particular, the principal elements and norms used in case law are ICCPR, mainly articles 27, 28, and 16, and ILO Convention No. 169, particularly articles 6 and 15. Even if it is not legally binding, and therefore not used explicitly in case law, also the UNDRIP has a relevant influence in the development of indigenous rights, granting indigenous peoples a right of veto in case of activities that affect their lands and resources (article 32.2).

The focus on Sami in Scandinavia, treated in this thesis, brings the attention not only on international law in general, but also on the legislation of the European Union, essential to understanding the main laws concerning minorities and indigenous peoples. In fact, while Sweden and Finland are member states of the European Union, Norway is an associated member of the so-called Schengen area, which is an area without internal borders where citizens can freely circulate. Even if all the twenty-eight European Union

²¹⁵ Some critical issues are: the wording of the article on self-determination; the necessity of a deeper analysis of land and water rights; the insertion of a comparison of interest clause in articles 16 and 36. For a more detailed analysis see T. Koivurova, "The Draft for a Nordic Saami Convention", 131-135.

²¹⁶ The same approach will be used in the UNDRIP, namely in article 36.

member states are also members of the United Nations and, consequently, they pay attention to the UN documents, European countries have their own inter-state norms as well.

According to the Treaty on the European Union, one of the two foundational legal instruments of the EU's primary law:

the Union is founded on the values of respect for human dignity, freedom, democracy, equality, [...] and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail²¹⁷.

Furthermore, article 3 expresses the Union's aim to "promote peace [...] and the well-being of its peoples", to establish an area of freedom "without internal frontiers", to "combat social exclusion and discrimination" and to "respect its rich cultural and linguistic diversity, and [...] ensure that Europe's cultural heritage is safeguarded and enhanced". Member states and the bodies of the EU are bound to these provisions when implementing the national law. They shall ensure the protection of fundamental rights and simultaneously apply their domestic legislation and international obligations.

Human rights are a central aspect of the EU, especially in international relations and multilateral fora, i.e. the United Nations. Particularly, indigenous peoples' issues are an integral part of the more general policy on human rights and are based on the rights proposed by the UN Declaration on the Rights of Indigenous Peoples. Human rights policies greatly develop in the EU after the World War II and culminate in the European Convention on Human Rights²¹⁸ and in the set-up of the European Court of Human Rights (hereafter ECHR) in Strasbourg in 1959²¹⁹.

The most relevant provisions of the European Convention on Human Rights are articles 6 and 8, and article 1 of the First Protocol. This latter regulation states:

Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

²¹⁷ Treaty on the European Union, article 2.

²¹⁸ The European Convention on Human Rights is an international treaty signed in 1950 and it secures fundamental and political rights to everyone within its jurisdiction.

²¹⁹ Since 1998 the ECHR becomes a permanent court.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes and other contributions or penalties.

The Court, therefore, ascertains a fair balance between the protection of the individual fundamental freedoms and the general interests of the community²²⁰. Moreover, the fact that the right to property is not immediately included in the Convention but it is inserted in the First Protocol, adopted only two years later, underlines the contrasting and divergent opinions around this issue during the preparatory work²²¹.

4.4.1 ECHR's decisions on Sami rights

More than its judgment in the Alta case in Norway²²², the European Commission of Human Rights rules several cases concerning Sami rights. In general, it is possible to see an increasing attention to the recognition and protection of indigenous rights²²³. The case *Halvar From v. Sweden*²²⁴, decided by the ECHR in 1998, concerns a dispute between a Swedish landowner, who sues the Swedish authorities over the decision to give a Sami village the right to hunt on Halvar's properties. The Commission affirms the groundlessness of the complaint, since the authorities act on the basis of the law, and that it is:

general interest that the special culture and way of life of the Sami be respected, and it is clear that reindeer herding and hunting are important parts of that culture and way of life. The Commission is therefore of the opinion that the challenged decision was taken in the general interest.

The ECHR's decision is more in line the position of the Human Rights Committee of the UN rather than the Commission's judgment in the Alta case.

²²⁰ See T. Koivurova, "Jurisprudence of the European Court of Human Rights regarding Indigenous Peoples", 223.

²²¹ See Giovanni Poggeschi, "La proprietà come un diritto dell'individuo e/o collettivo delle minoranze indigene nell'ottica del dialogo fra le corti", in *Rischi e potenzialità del dialogo costituzionale globale. Per la costruzione di un "itinerario" geo-giuridico mediante la cooperazione nel diritto pubblico* edited by E. Cukani, M. Dicosola, M. Nicolini, and G. Poggeschi (Napoli: Edizioni Scientifiche Italiane, 2015), 138-139.

²²² See the previous chapter of this thesis.

²²³ See G. Poggeschi, "La proprietà come un diritto dell'individuo e/o collettivo delle minoranze indigene nell'ottica del dialogo fra le corti", 160-166.

²²⁴ *Halvar From v. Sweden* (1998), Application No. 34776/97.

Two similar cases, *Könkämä and 38 other Sami villages v. Sweden*²²⁵ and *Johti Sapmelaccat Ry. and others v. Finland*²²⁶, concerns the respective government's action to extend general public's hunting and fishing rights (in Finland only fishing rights) in a determined area. This action is considered illegal and unacceptable by Sami complainants, who affirm their immemorial usage right. In both cases, the Court rules that the application is ill-founded.

The case *Handölsdalen Sami village and others v. Sweden*²²⁷ is based on a previous national case, where the first claimants, who are private landowners, suite Sami villages in a Swedish court. The claimants affirm the necessity of establishing a valid contract between the two parties in order to allow Sami reindeer to graze on their private land. The Sami villages contest, arguing that their right to pasture is founded on four grounds: the prescription from time immemorial, the Reindeer Husbandry Act, customary law and international law. The Swedish Supreme Court, after over a decade, refuses the Sami appeal. Since the Sami lose the case, they bring the case against the state of Sweden to the ECHR. The Sami people claim the violation of article 1 of the First Protocol, as well as they underline the unclarity of the domestic law, which does not define precisely the limits of grazing areas.

The European Court analyses the way in which the Swedish courts handle the case, highlighting the thoroughness of their work. Although the case is believed to be of a considerable complexity, the Court finds admissible the Sami villages' complaint about the length of the proceedings. The ECHR holds unanimously the violation of article 6.1 of the Convention regarding the length of the domestic proceedings (thirteen years and seven months) and thus orders the state to pay damages to Sami villages.

Another issue considered admissible by the European Court is the applicants' claim for the violation of article 6 in regard to the effective access to court. The Sami villages assert their non-effective access to court and fair hearing, due to the substantial high legal costs of the domestic case. The Sami villages, in fact, have to ask a loan from the Sami Fund to pay the litigation costs incurred in the domestic proceedings. Although the recognition of the limited Sami financial resources, the Court views an overall

²²⁵ *Könkämä and 38 other Sami villages v. Sweden* (1996), Application No. 27033/95.

²²⁶ *Johti Sapmelaccat Ry. and others v. Finland* (2005), Application No. 42969/98.

²²⁷ *Handölsdalen Sami village and others v. Sweden* (2010), Application No. 39013/04. Accessed 26/01/2018. http://www.demaniocivico.it/public/public/article/1216/Cedu1_CASE%20OF%20HAND-OLSDALEN%20SAMI%20VILLAGE%20AND%20OTHERS%20v%20%20SWEDEN.pdf.

equality of arms, declaring a non-violation of the right to effective access to the court²²⁸. Despite this judgment of the Court, the Judge I. Ziemele has a different opinion on the effective access to court:

it could not be effective until and unless the entire approach to land disputes of this kind is revised to take account of the rights and particular circumstances of indigenous peoples. The excessive legal costs and the fact that the applicants had to borrow money from their own Fund are elements of the overall unfairness.

As a basis for her opinion, Judge Ziemele cites the international instruments about indigenous peoples, like the ILO Convention and the UNDRIP, and she affirms that the ECHR should support such international instruments when judging cases regarding indigenous peoples.

These recent legal cases demonstrate an evident attention of the ECHR to indigenous peoples' claims, although the Court is always very cautious in expressing itself. However, in the future, thanks to the greater development of international legal instruments and the ever-growing relevance of international law on indigenous issues, the Court of Strasbourg could extend the protection of indigenous groups and improve the most problematic indigenous rights, among which stands manifestly the property right²²⁹.

²²⁸ See *Ibid.*, para. 51.

²²⁹ See G. Poggeschi, "La proprietà come un diritto dell'individuo e/o collettivo delle minoranze indigene nell'ottica del dialogo fra le corti", 166.

Conclusions

The main purpose of this thesis has been to offer a neutral overview on indigenous and Sami issues, with the use of the correct terminology. The personal opinions have been avoided as much as possible, although some direct thoughts appear now and then. However, the reader is naturally free to infer his/her own judgements. This analysis does not propose itself to be a positive or negative judgement on the development of indigenous rights, but it hopes to be a starting point for acknowledging and improving the indigenous peoples' conditions, especially regarding the legal aspects.

Indigenesness, ancestral lands, cultural integrity and self-determination are the key-words along this thesis and the main concepts when discussing indigenous rights. More practically, property rights and immemorial prescription are the most controversial matters, as can be seen from the case law concerning Sami people.

This examination on indigenous and Sami rights, from colonisation to nowadays, has shown the relations among colonisers and colonised, modern states and indigenous peoples. Thanks to the idea of reparations for past wrongs emerged after the two World Wars, the international organisations are working for transmitting an equal and non-discriminatory attitude among the world in favour of indigenous minorities. Unfortunately, even if noticeable progress has been made, the negative approaches and the discriminatory attitudes toward indigenous peoples are still in existence today. Many indigenous cultures and peoples are still under threat. However, the international and national courts substantially start to consider the special status of indigenous groups and provide some cultural adjustments when there are questions concerning indigenous people. This legal approach is fundamental, because not only it is a symbol of the official recognition of the status of indigenous groups, but also it accepts indigenous cultures to such an extent that the evidence proofs are shaped in conformity with their unique lifestyle (e.g. Svartskog case, Selbu case and Nordmaling case).

A problem that should be taken into consideration while analysing the effective rights of indigenous people, is the duality between theory and practice. The developments and rights written on paper (e.g. the UN Declaration on the Right of Indigenous Peoples and the Draft of the Nordic Saami Convention) do not correspond precisely to the currently applied practices. There is still a gap between law on theory and law in practice

that certainly affects indigenous entitlements. Furthermore, the great development of international procedures remains often tied to state and national consent.

The reparations (moral, economic, social and spiritual) for indigenous peoples, in general, and for the Sami people, specifically, should be seen by the nation states not as a cost, but instead, as an investment for the future of the entire nation. Historical events, multiculturalism, domestic and international laws should be combined to build a stronger argument in favour of indigenous peoples and not be used against them. Therefore, the states should not be scared of recognising equal rights to indigenous peoples. As we said while analysing the right of self-determination and the right of self-government, maybe the most problematic issue connected to these rights is the fear of the states that the indigenous communities can reach the territorial independence. However, it is noticeable how many indigenous minorities do not have the objective of independence from the state in which they live, instead, they just want the instruments to govern their people and to maintain their historical continuity against assimilationist policies. Are not historical continuity and a unique status some of the constitutive elements in the definition of indigenous peoples?

The concept of multiculturalism, fundamental in global sociology and other social disciplines, can be enlarged to other fields, creating a wider acknowledgement of the advantages of multicultural and multilingual states. As my professor G. Poggeschi taught me, do you know that the USA won the World War II also with the essential help of the Navajo code talkers, whose language is completely incomprehensible to the non-members of such indigenous group? This example could be useful to understand the mutual benefits that states and indigenous peoples can reach if they build a cooperative relation. The indigenous rights enumerated in Chapter 2 that are summarily enunciated in the UN Declaration on the Rights of Indigenous Peoples, should be wisely applied and modified to the specific needs of indigenous peoples in order to establish advantageous conditions. Fortunately, in the contemporary era, the human rights and the respect for the “others” are increasingly recognised.

Regarding the Sami people, too often ignored and assimilated into the dominant societies, the ratification of the Draft of the Nordic Saami Convention could be a very important step further for the recognition of their rights. The Nordic countries, which have demonstrated to support indigenous self-determination during the elaboration of the

UNDRIP, reveal evident uncertainties when it is time to adopt binding norms that affect them directly. After more than ten years, the Draft Convention has not been ratified yet. The reasons could vary: the length of bureaucratic procedures, the need to clarify certain provisions of the agreement, the priority of other national issues, etc. However, the Nordic states should once and for all agree on a compromise that finally clarifies the Sami's legal status.

More than the Draft Convention, the Sami situation could be surely improved also with the ratification of international instruments, among which the ILO Convention No. 169 should be a priority for Sweden and Finland. Even if the signing of this specific international convention has been postponed, the adoption of international instruments and the comparison with other national policies regarding indigenous rights should be helpful and favourable for the developments of the Sami's conditions, encouraging effective and special national policies.

Today, remedial measures are called, if not to restore exactly the situation of indigenous peoples before the colonisation, to create a fair balance and a satisfactory compensation for indigenous groups as a remedy for the past violations. Not all the indigenous groups are so well-educated as the Sami people, for this reason, the states they are part of should develop economic and educational possibilities that can help indigenous peoples to preserve and develop their collective entitlements. On one hand, these possibilities should be appropriate not to interfere too much with the life of indigenous communities. In fact, if these measures affect too much indigenous lifestyles, they will create an excessive dependence which can lead to the disappearance of many particular indigenous traits, like what happened in Australia with missionaries. On the other hand, these possibilities should be carried out, since they are a symbol of equality, justice, non-discrimination and, as judge Ziemele said, elements for an overall fairness.

Noticeable is the relevance that indigenous groups have acquired in international fora today. Noticeable is also the recent active and direct participation of worldwide indigenous peoples in international and national organisations, through which they can finally express themselves. The Sami parliaments are, in this sense, emblematic institutions for indigenous self-determination and, even if the cultural autonomy is maybe not enough for the future Sami survival in Scandinavia, nevertheless, it should be recognised as a great starting point.

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Summary in Italian

In questa tesi ci si propone di analizzare i diritti dei popoli indigeni e, in particolare, quelli dei sami. Dopo lo studio dello sviluppo dei diritti internazionali per quanto riguarda le minoranze indigene in generale, si passa successivamente ad approfondire lo status giuridico della popolazione transnazionale indigena sami rispettivamente nei tre paesi scandinavi: Norvegia, Svezia e Finlandia.

I popoli indigeni sono estremamente numerosi nel mondo e possiedono caratteristiche distintive molto particolari. Nonostante ci siano state diverse discussioni, nate dalla difficoltà di dare una fissa e precisa definizione di popolazione indigena, è possibile mettere in luce delle caratteristiche essenziali comuni a tutti i popoli. I popoli indigeni, infatti, si caratterizzano per:

- una continuità storica che precede le invasioni subite con il colonialismo;
- una continuità “territoriale” che prevede la trasmissione delle terre ancestrali di generazione in generazione;
- una connessione evidente con il territorio, fonte essenziale per la sopravvivenza;
- la volontà di preservare, sviluppare e trasmettere la propria cultura e identità etnica alle generazioni successive.

Inoltre, come parte della definizione, un individuo è considerato parte di un popolo indigeno solo se si auto-identifica come tale e se gli altri membri della comunità lo riconoscono e lo accettano come parte integrante del gruppo.

Nel corso dei secoli, specialmente durante l'epoca del colonialismo, il termine indigeno e molti dei suoi sinonimi, come aborigeno, autoctono e nativo, sono spesso associati a caratteristiche negative che includono l'idea di uno stadio di sviluppo anteriore. Tale mancanza di civiltà, incomparabile con il modello sviluppato dei paesi europei, ha reso i popoli indigeni oggetto di varie conquiste, distruzioni e discriminazioni. Nonostante alcuni rari casi letterari in cui l'individuo indigeno rappresenta il nobile selvaggio, uno stadio iniziale desiderabile e innocente, gli indigeni sono generalmente rappresentati come una razza inferiore e selvaggia, incomparabile con l'evoluita civiltà umana moderna. I primi incontri, risalenti al quindicesimo secolo, fra indigeni e colonizzatori furono fatali per molte popolazioni e i risultati più comuni furono l'assimilazione e la schiavitù. Sebbene in Europa si ebbero molte discussioni riguardo al tipo di approccio più

appropriato nei confronti degli indigeni, i più comuni comunque comprendevano missioni culturali ed evangeliche, che avevano lo scopo di sottomettere e assimilare gli indigeni. Legalmente parlando, gli indigeni non erano considerati come aventi dei diritti e non rientravano in nessuna delle due categorie della *law of nations* enunciate da Hobbes²³⁰. In opposizione a tale idea vi è l'analisi portata avanti da Marshall all'inizio del diciannovesimo secolo, la cosiddetta "dottrina della scoperta". Secondo tale dottrina, le popolazioni indigene erano considerate comunità politiche e, pertanto, non potevano perdere automaticamente tutti i loro diritti con la mera scoperta delle loro terre da parte degli stati-nazione europei. La teoria di Marshall venne presto abbandonata e le teorie del diciannovesimo e inizio ventesimo secolo si basarono sul positivismo e sul darwinismo. Inoltre, il diritto internazionale, sviluppatosi dalla *law of nations*, nasce dagli e per gli stati occidentali più avanzati, proteggendo in questo modo soprattutto i loro interessi. Non essendo considerati come entità giuridiche, i popoli indigeni non erano legalmente ritenuti possessori della loro terra, la quale perciò era considerata come *terra nullius*, libera e facilmente conquistabile da parte dei colonizzatori.

Nel corso del ventesimo secolo, il diritto internazionale si sviluppa notevolmente. Nuovi stati vengono formati dopo le due guerre mondiali e nuove organizzazioni internazionali prendono piede. Tra quest'ultime la più notevole è sicuramente l'Organizzazione delle Nazioni Unite (ONU), atta a proteggere e promuovere non solo i diritti umani in generale, ma anche quelli indigeni collettivi. Fra i vari organismi a favore delle minoranze indigene, fondamentale è il Forum Permanente delle Nazioni Unite sui Popoli Indigeni, dove possono partecipare anche rappresentanti delle varie minoranze. La politica dell'ONU riguardo agli indigeni raggiunge il suo culmine nel 2006 con l'elaborazione ufficiale della Dichiarazione sui Diritti dei Popoli Indigeni.

Un'altra importante istituzione è l'Organizzazione Internazionale del Lavoro (ILO), la quale sviluppa due importanti convenzioni riguardo agli individui delle popolazioni indigene. Se da un lato la Convenzione ILO 107 del 1957 riflette ancora politiche di assimilazione e di integrazione che minacciano la scomparsa dei gruppi indigeni all'interno della società dominante, dall'altro la successiva Convenzione ILO 169 del 1989 tende ad affermare i valori legati all'autodeterminazione dei popoli.

²³⁰ Gli indigeni infatti non rientravano né come individui, né come stati o nazioni.

A livello internazionale, la riconciliazione e il riassetto dei rapporti stato-minoranza indigena prevede il riconoscimento dei nativi come popolo distinto e l'inserimento del concetto di etnicità nella politica. Inoltre, data l'importanza della collettività nell'identità indigena, le popolazioni minoritarie richiedono l'inserimento di diritti collettivi, diversi quindi dai diritti umani individuali. Tali diritti indigeni collettivi sono fondamentali per instaurare un'effettiva e prolungata protezione di tali popoli.

Un tema e un diritto basilare per la protezione e per lo sviluppo dei nativi è il concetto di autodeterminazione. Nonostante sia forse uno dei diritti più discussi, il principio all'autodeterminazione compare in molti documenti, tra cui la Convenzione Internazionale sui Diritti Civili e Politici (CIDCP). Tale principio riguarda il diritto di decidere il proprio status politico e di perseguire liberamente il proprio sviluppo economico, politico e culturale²³¹. La definizione è di fondamentale importanza in quanto spesso, erroneamente, il diritto all'autodeterminazione è identificato come il diritto di indipendenza territoriale, come è avvenuto nell'epoca della decolonizzazione. Su questo punto, Anaya differenzia due tipi di autodeterminazione: uno sostanziale e uno rimediale. Mentre il concetto sostanziale riguarda la definizione di autodeterminazione sopra indicata, l'aspetto rimediale riguarda eccezionali prescrizioni avvenute con la decolonizzazione. L'idea di indipendenza territoriale, comunque, viene considerata appropriata solo in estremi casi di oppressione, ovvero nei casi in cui vi è una totale mancanza di protezione dei diritti umani. In conclusione, il diritto all'autodeterminazione è la base per ulteriori norme culturali, economiche e sociali che riguardano i popoli indigeni ed è fondamentale per la futura sopravvivenza di tali comunità.

L'autodeterminazione può essere vista sia come punto di partenza che come punto d'arrivo rispetto a una serie di diritti: non-discriminazione, proibizione del genocidio, integrità culturale, terre e risorse naturali, benessere sociale e sviluppo, e autogoverno. Il diritto di non-discriminazione è la base per un riconoscimento dell'uguaglianza non solo fra persone ma anche fra popoli. Tale diritto è ancora più fondamentale se si considera che i popoli indigeni sono stati, e sono ancora, oggetto di discriminazioni e razzismo. Proprio per questo motivo, il diritto di non-discriminazione è collegato alla proibizione di genocidio. Il genocidio, infatti, è definito come l'intenzione volontaria di eliminare fisicamente un particolare gruppo di individui. Tuttavia, le politiche che portano alla

²³¹ Vedi Convenzione Internazionale sui Diritti Civili e Politici, art. 1.

nascita di pregiudizi razziali non fanno parte della definizione di genocidio, nonostante molti studiosi affermino la necessità di allargare il concetto di intenzione, fino a raggiungere la consapevolezza che una data azione possa avere come effetto collaterale l'eliminazione di un determinato gruppo.

Il diritto all'integrità culturale, già presente come diritto individuale nei diritti umani, viene affermato anche nei confronti delle minoranze nella CIDCP²³², in alcuni articoli della Dichiarazione sui Diritti dei Popoli Indigeni e in alcuni documenti dell'UNESCO. L'integrità culturale si manifesta in svariati ambiti: territorio e risorse naturali, lingua, sapere e pratiche tradizionali, opere letterarie, espressioni musicali, danze e rituali, forme d'arte e costumi sociali. Tale diritto nei confronti dei popoli indigeni si presenta come misura rimediabile alle ingiustizie avvenute in passato e come mezzo per promuovere e assicurare la sopravvivenza culturale indigena.

Il territorio e le risorse naturali sono una delle questioni più controverse quando si parla di diritti indigeni. Non solo le terre sono viste come aspetto fondamentale per rimediare alle conquiste colonialiste, ma esse rappresentano anche il mezzo di sussistenza principale per la sopravvivenza dei nativi. Per queste ragioni, la Convenzione ILO 169 afferma la necessità di riconoscere il diritto di proprietà agli indigeni per quanto concerne le terre ancestrali. Diverse questioni sono scaturite riguardo al diritto di proprietà della terra, fra cui la più decisiva è sicuramente il caso *Mabo v. Queensland* del 1992, in cui viene negato il fatto che l'Australia fosse *terra nullius* ai tempi della colonizzazione. Tale giudizio è inoltre accompagnato dalla possibilità per gli indigeni di acquisire il diritto di proprietà nel caso in cui si dimostri la connessione storica con un determinato territorio. Il diritto di proprietà indigeno è ben descritto in un caso canadese²³³, dove viene definito come un diritto *sui generis*, inalienabile, collettivo e con un esclusivo diritto d'uso e di occupazione.

Molte organizzazioni internazionali sostengono anche il benessere sociale, che include salute e sanità, educazione, occupazione e sicurezza. Tale diritto è strettamente connesso con il diritto di sviluppo, soprattutto tenendo in considerazione che: da un lato le attività e le economie dei popoli indigeni sono state schiacciate da quelle occidentali, mentre

²³² Vedi Convenzione Internazionale sui Diritti Civili e Politici, art. 27.

²³³ Il caso è *Delgamuukw v. British Columbia* del 1997.

dall'altro, le discriminazioni hanno spesso escluso tali popoli dai benefici del benessere sociale, marginalizzandoli fra i livelli più poveri della società.

Infine, non meno importante dei precedenti diritti, appare il diritto all'autogoverno. Tale diritto può comprendere due forme, una di autonomia amministrativa e istituzionale e un'altra di consultazione. La forma di autonomia istituzionale si rispecchia nelle strutture indigene riguardanti gli affari interni e viene protetta dalla Convenzione ILO 169, la quale la giustifica come un modo per dare più potere a popoli spesso assoggettati alle scelte dell'élite dominante. La consultazione dei popoli indigeni, invece, è la forma di autogoverno più comunemente usata e viene richiesta ogni qual volta lo stato prenda decisioni riguardanti le comunità native.

In sintesi, a livello internazionale vengono riconosciuti molti diritti ai popoli nativi, nonostante vi sia ancora una lenta accettazione e applicazione a livello dei singoli stati, troppo basati sull'ordine politico eurocentrico. Tuttavia si può notare come i diritti indigeni si stiano progressivamente sviluppando e diffondendo soprattutto negli ultimi decenni, offrendo una più favorevole base per l'autodeterminazione dei popoli.

Le zone dove si trova la maggior parte di popoli indigeni sono l'America Latina, il Nord America e il sud-est Asiatico. Prendendo in considerazione l'America Latina, si possono evidenziare quattro fasi storiche riguardanti i rapporti tra stati e popoli indigeni: colonizzazione, assimilazione, "indigenizzazione" e costituzionalismo multiculturale. Tali fasi, in modo simile, si sono verificate anche in altri paesi. Mentre la colonizzazione e l'assimilazione hanno drasticamente ridotto il numero di indios e delle terre indigene, l'"indigenizzazione", nonostante sia basicamente una forma più leggera di assimilazione, ha consentito la nascita di alcune norme e organizzazioni (e.g. *Instituto Indigenista Interamericano*) a favore della protezione dei popoli indigeni. Tale apertura, assieme alle transizioni democratiche, ha consentito in alcuni stati il riconoscimento a livello costituzionale dei popoli indigeni, specialmente a partire dagli anni Settanta. I due stati sudamericani che più supportano i diritti delle minoranze indigene sono Ecuador e Bolivia. La costituzione ecuadoriana, nei primi due articoli, afferma il multiculturalismo dello stato e l'ufficialità di alcune lingue indigene. La Bolivia, invece, è il primo stato ad aver adottato la Dichiarazione sui Diritti dei Popoli Indigeni come legge nazionale e lo si può notare con l'enunciazione del diritto all'autodeterminazione dei popoli presente nell'articolo 2 della sua costituzione.

Gli indigeni presenti in America Latina sono molto numerosi e il loro livello di povertà è molto alto se confrontato con il resto della popolazione. Tale dato sulla povertà, nonostante il recente sviluppo economico avvenuto in molti stati, dimostra come gli indigeni rimangano comunque in gran parte esclusi dalla società dominante. Ciononostante, considerando l'aspetto legale, è importante evidenziare che ben quindici dei paesi in America Latina hanno ratificato la Convenzione ILO 169, riconoscendo il diritto e il dovere di proteggere le minoranze indigene.

Anche in America settentrionale sono state attuate diverse politiche sul trattamento degli indigeni. Nonostante un passato abbastanza simile, il Canada e gli USA possiedono caratteristiche distintive. La *Royal Proclamation* del 1763 afferma il monopolio della corona britannica nell'acquisizione delle terre indigene, mentre lo statunitense *Dawes Act* del 1887 distribuisce le terre indigene a singoli individui, i quali, in questo modo, diventano cittadini americani. Nonostante le politiche sfavorevoli, la popolazione indigena inizia ad aumentare a partire dal 1920, facendo pressioni per eliminare le politiche legate al modello dell'assimilazione. Lo statunitense *Indian Reorganization Act* (1934) e il canadese *Indian Act* (modificato varie volte dal 1876) riconoscono vari diritti agli indigeni, soprattutto riguardo alle proprietà terriere e all'autodeterminazione.

Per quanto riguarda la situazione in Australia, gli indigeni sono ancora limitatamente protetti. Come nella maggior parte dei paesi, gli indigeni hanno sofferto fasi di espropriazioni, razzismo e assimilazioni, messi a punto soprattutto attraverso i missionari cristiani. Sebbene non tutti i missionari convertano con la forza le culture indigene, la loro presenza e le loro conoscenze influiscono fortemente sugli stili di vita indigeni, creando una forte dipendenza paternalistica. L'uguaglianza di tutte le razze di fronte alla legge viene affermata con un atto nel 1975 e il diritto di proprietà degli indigeni viene riconosciuto attraverso tre casi giudiziari²³⁴, nei quali non solo si riconosce che l'Australia al tempo della conquista coloniale inglese non era *terra nullius*, ma si afferma la coesistenza del diritto di proprietà indigeno nella gestione e amministrazione delle terre. Dopo aver visto sinteticamente i diritti indigeni a livello internazionale e aver analizzato a grandi linee la situazione in tre diverse parti del mondo, la ricerca si concentra sull'unica minoranza indigena europea: i sami. I sami o lapponi, stabilitisi nel nord della Scandinavia più di due mila anni fa, occupano attualmente un'area chiamata *Sápmi*, che

²³⁴ Essi sono: Millirpum (1971), Mabo (1992) e Wik (1993).

comprende parte della Norvegia, della Svezia, della Finlandia e della penisola russa di Kola. Il numero di sami si attesta attorno ai novanta mila, sebbene non ci sia un censimento ufficiale che certifichi con esattezza il loro numero.

La popolazione sami ha uno stile di vita semi-nomade e basa la sua sussistenza su caccia, pesca, raccolto e, a partire dal quindicesimo secolo, sull'allevamento intensivo di renne. In base al luogo d'insediamento, le forme di sussistenza dei sami si concentrano soprattutto su uno dei mezzi di sussistenza sopra elencati, sebbene vi siano alcuni casi in cui gli stili di vita si basano anche sull'agricoltura o su una combinazione delle varie forme. La lingua Sami, appartenente alla famiglia linguistica ugro-finnica, è una lingua usata per lo più oralmente e, per questo motivo, possiede diversi sistemi di scrittura. Vi sono dieci varietà dialettali sami, fra le quali la più diffusa è il Nord Sami. La popolazione sami, ad ogni modo, è spesso bilingue e capace di parlare anche la lingua dello stato di appartenenza.

Tradizionalmente i sami sono organizzati in *siidas*, unità territoriali che comprendono un paio di nuclei familiari. Nonostante non tutti i sami siano socialmente e territorialmente organizzati sulla base delle *siidas*, esse sono la forma di associazione più comune. La *siida* è un nucleo fondamentale sia per le questioni legate all'eredità delle proprietà, sia per le dispute che possono sorgere in riguardo alle terre adibite al pascolo delle renne. Le unità locali, nonostante non posseggano delimitazioni territoriali ben definite, sono essenziali nel diritto consuetudinario sami e possiedono l'autorità sufficiente per confrontarsi con altre *siidas*. Il diritto consuetudinario sami è un diritto trasmesso oralmente, come lo è la stessa cultura sami, e si fonda principalmente sulla memoria storica degli uomini più saggi del villaggio.

In un primo momento, i rapporti tra i sami e i regni scandinavi (Danimarca-Norvegia e Svezia-Finlandia) sono amichevoli e basati sul baratto. Con il consolidamento del commercio nel tredicesimo secolo, i re scandinavi cominciano a tassare i sami, i quali, comunque, pagano volontariamente le imposte in cambio di una parziale protezione. Nonostante nel quindicesimo e nel sedicesimo secolo gli interessi verso le terre sami aumentino e le imposte non siano più pagate volontariamente, i sami e il loro diritto consuetudinario continuano ad essere rispettati.

Una data fondamentale è il 1751, anno del *Lapp Kodicill*²³⁵, dove si riconoscono i diritti sami in entrambi i due regni scandinavi. Nel 1809 la Finlandia passa alla Russia, mentre nel 1814 la Norvegia passa dalla Danimarca a un'unione con la Svezia. Nonostante tali cambiamenti, il *Lapp Kodicill* è ancora ritenuto valido.

Dalla metà del diciannovesimo all'inizio del ventesimo secolo, la situazione per i sami peggiora. A seguito di ragioni economiche e sociali, gli stati nordici²³⁶ iniziano ad attuare politiche discriminatorie connesse con le teorie razziste di gerarchia culturale, secondo le quali la popolazione sami è una razza inferiore rispetto a quella evoluta scandinava. Non solo la vita semi-nomade dei sami è vista come insufficiente per acquisire diritti di proprietà sulla terra, ma anche il loro diritto consuetudinario diventa sempre meno riconosciuto. Allo stesso tempo, gli stati incentivano la popolazione non-sami ad inserirsi nel territorio sami, facendo diminuire così la popolazione indigena e i suoi territori per il pascolo. Tali politiche di creazione degli stati-nazione, nazionaliste ed etnocentriche, sono diverse nei tre stati scandinavi.

La Norvegia applica un approccio chiamato “norvegianizzazione”, il quale prevede politiche di assimilazione forzata. I diritti dei sami che riguardo il pascolo delle renne vengono notevolmente ridotti e i confini sia con la Russia prima, che con la Svezia poi, vengono temporaneamente chiusi. Lo stato, inoltre, senza dare alcuna spiegazione sui motivi dell'acquisizione, afferma la sua sovranità sulle terre non registrate e istituisce un sistema di distretti per governare al meglio i territori. Con tali politiche, gli organi collegiali dei sami e la loro autorità scompaiono progressivamente.

In Svezia, i sami sono egualmente visti come una razza inferiore, ma la politica che viene applicata in questo caso può essere riassunta con l'espressione “ciò che è sami, rimane sami”. Il popolo indigeno viene perciò isolato dal resto della società e, come nel caso norvegese, la loro terra ancestrale diventa proprietà della corona. Con il *Reindeer Grazing Act* del 1886, ai sami viene ordinato l'obbligo di dedicarsi esclusivamente all'allevamento delle renne, costrizione che, però, causa l'effetto contrario rispetto a ciò che si era sperato. Molti sami che non si dedicavano all'allevamento delle renne furono infatti obbligati a spostarsi e ad integrarsi nella società svedese. Inoltre, sempre attraverso il *Reindeer Act*,

²³⁵ Il *Lapp Kodicill* è un allegato al Trattato di Strömsad, nel quale vengono stabiliti i confini della parte più settentrionale della Scandinavia fra i regni di Danimarca-Norvegia e di Svezia-Finlandia.

²³⁶ Aggettivo che nel corso di questo elaborato sta ad indicare gli stati della Norvegia, Svezia e Finlandia.

viene inserito un ufficiale statale come rappresentante dei sami a livello regionale e viene creata una nuova organizzazione del territorio.

Analogamente, in Finlandia, lo stato si appropria delle terre non registrate e le istituzioni sami scompaiono gradualmente. In aggiunta, anche qui vengono creati distretti territoriali che, come nei casi degli altri due stati, servono soprattutto a regolare i sistemi di compensazione nel caso in cui gli allevatori sami debbano pagare danni causati dal pascolo delle renne sulle terre di proprietà privata. L'unico fattore distintivo riguarda il fatto che in Finlandia il diritto all'allevamento delle renne non è un diritto esclusivo dei sami, come invece lo è in Norvegia e in Svezia.

Dopo le guerre mondiali, le organizzazioni e i movimenti sami iniziano a svilupparsi, portando avanti l'idea di essere una popolazione indigena divisa in quattro stati diversi e favorendo un maggiore riconoscimento dei loro diritti. Il nazionalismo norvegese si riduce e i diritti dei sami sulla terra iniziano a basarsi sul diritto d'uso da tempo immemorabile. Tale diritto, tuttavia, rimane comunque difficile da dimostrare, in quanto una cultura semi-nomade e per lo più non scritta come quella dei sami, non ha molte basi concrete su cui dimostrare il continuo e duraturo uso di determinate terre. Fondamentale è il conflitto di Alta, un caso giudiziario che, non solo ha fatto conoscere i sami internazionalmente, ma ha favorito una politica nazionale tesa a chiarire lo status legale dei sami in Norvegia. Difatti, grazie alle raccomandazioni fatte da una commissione d'investigazione reale, fondata in seguito al caso Alta, lo stato ha provveduto a creare il parlamento sami e a promuovere così ulteriori diritti per il popolo indigeno.

In Svezia, il diritto all'uso delle terre da tempo immemorabile è comparabile con quello norvegese ed è affermato specialmente nel caso *Taxed Mountain* del 1981. Nonostante vi sia il riconoscimento generale sul fatto che i sami siano una popolazione indigena, la Svezia non li include ufficialmente nella sua costituzione, come invece hanno fatto Norvegia e Finlandia. Ad ogni modo nel 1933 viene fondato il parlamento sami svedese. In Finlandia, un'associazione consultiva fondata dal governo, la Delegazione Sami, diventa rappresentativa per il popolo indigeno e viene ufficialmente rinominata come *Sámi Párlameanta* nel 1973. Nel 1996 tale organizzazione viene sostituita con il vero e proprio parlamento sami, basato su caratteristiche simili ai parlamenti sami norvegese e svedese. A livello costituzionale, ben due articoli dell'ordinamento giuridico finlandese riguardano i diritti sami.

In generale, le politiche scandinave possiedono tratti abbastanza comuni che comunque non conferiscono grande spessore ai diritti dei sami. Le politiche statali nei confronti dei sami vengono generalmente messe in atto attraverso report, specifiche commissioni e progetti di legge. Inoltre, soprattutto negli ultimi decenni, i casi giudiziari hanno avuto grande valore per chiarire e definire i complessi strumenti legali riferiti ai sami.

La tradizione legale nordica può essere divisa in due rami: uno occidentale (Norvegia) e uno orientale (Svezia e Finlandia). Mentre nella tradizione occidentale le corti giudiziarie hanno un ruolo attivo nello sviluppo e nella creazione delle leggi, in Svezia e Finlandia i tribunali hanno il compito di applicare “passivamente” le varie disposizioni. In aggiunta, per quanto riguarda il diritto di proprietà, esso è uno dei più fondamentali e controversi diritti quando si parla di sami. Nei tre paesi scandinavi, il diritto di proprietà indigeno si basa sul concetto di prolungato utilizzo delle terre, a sua volta fondato su tre condizioni basiche: dev’esserci un uso di natura particolare, l’uso dev’essere prolungato nel tempo, e l’uso deve verificarsi in buona fede. Le dispute scaturite dal diritto di proprietà, si verificano soprattutto nei casi riguardanti l’allevamento delle renne e la pesca, nonostante questi ambiti vengano trattati da apposite legislazioni statali.

Negli ultimi decenni si è verificata una crescente attenzione delle corti giudiziarie verso ciò che viene definito come un adeguamento culturale. Tale adattamento si riferisce alla presa in considerazione della specificità della cultura sami nell’attuazione delle leggi nazionali. Un esempio è il caso norvegese Selbu del 2001, nel quale la corte riconosce le difficoltà per il popolo sami di trovare prove evidenti del prolungato allevamento di renne in un determinato luogo. Anche in Svezia vi è un caso pertinente, il caso Nordmaling del 2011, dove la corte riconosce i diritti dei sami basandosi sul diritto consuetudinario. Un pratico compromesso sull’amministrazione delle terre è stato raggiunto in Norvegia nel 2005 con l’emanazione del *Finnmark Act*, attraverso cui la sovranità della contea passa dallo stato a un governo locale (formato in egual numero da sami e non-sami).

Il riconoscimento dei diritti sami è stato ulteriormente affermato con la creazione dei parlamenti sami in Norvegia (1989), Svezia (1993) e Finlandia (1973-1996). I tre parlamenti, chiamati *Sámediggi* in sami, possiedono una funzione consultativa e conferiscono ai sami il diritto di autonomia culturale. L’unica differenza fra i tre parlamenti è che in Finlandia vi è il diritto di negoziazione, secondo cui le autorità statali sono obbligate a consultare i sami ogni qualvolta vi siano decisioni che possano

influenzare lo status giuridico degli indigeni. I parlamenti sono un grande passo in avanti per il riconoscimento del popolo indigeno sami e della sua autodeterminazione, nonostante a livello internazionale si spera in un maggior dialogo stato-sami, che estenda le negoziazioni oltre il mero atto di consultazione.

Altre due organizzazioni indigene promuovono l'autodeterminazione culturale dei sami e sono il Consiglio Sami e il Consiglio Parlamentare Sami. Mentre il primo è un'organizzazione ombrello fondata nel 1956 per poi aprirsi anche alle associazioni russe nel 1992, il secondo viene fondato dai tre parlamenti sami scandinavi nel 2000. Entrambi hanno l'obiettivo di mantenere l'unità del popolo sami attraverso una cooperazione transnazionale e lavorano, anche internazionalmente, per incrementare il livello di autodeterminazione.

L'apogeo dei diritti sami è rappresentato dalla stesura della *Nordic Saami Convention*, un documento contenente i diritti basilari per garantire la protezione e lo sviluppo della cultura, della lingua e del sostentamento dei sami. La convenzione, presentata a Helsinki nel 2005, è stata elaborata da una commissione di esperti formata da Norvegia, Svezia e Finlandia. I cinquantuno articoli proposti riguardano: diritti generali, autogoverno, lingua e cultura, terre e acque, stili di vita, applicazione e sviluppo della convenzione e provvedimenti finali. La convenzione, tuttavia, non è ancora stata ratificata e, prima dell'applicazione, richiede l'approvazione anche da parte dei tre parlamenti sami. Simbolicamente, essa rappresenta il primo strumento legale che cerca di regolare le relazioni tra una comunità indigena transnazionale e gli stati di appartenenza.

Oggi, i diritti dei sami vanno analizzati tenendo in conto anche le politiche dell'Unione Europea (UE), considerando che la Svezia e la Finlandia sono stati-membri e che la Norvegia è associata alla UE attraverso il Patto di Schengen. Oltre alla libera circolazione dei suoi cittadini negli stati membri, l'Unione Europea si prefigge i diritti di dignità, libertà, democrazia e uguaglianza, allargando i diritti umani anche nei confronti delle minoranze indigene. Tali politiche sui diritti umani vengono controllate dalla Corte Europea dei Diritti Umani (CEDU), la quale si propone come bilancia fra la protezione degli individui e gli interessi collettivi. Alcuni casi sui sami sono passati alla CEDU, come per esempio il caso Alta, e, nonostante vi sia una costante attenzione per i diritti indigeni, la corte è sempre stata molto cauta nell'esprimere i suoi giudizi. Il caso *Handölsdalen Sami village and others v. Sweden*, risultato da una sentenza avvenuta a

livello nazionale che riguardava il pascolo delle renne su terre private, dimostra come la CEDU, pur riconoscendo a favore dei sami un'eccessiva lunghezza del processo della Corte Suprema svedese, non considera come gli eccessivi costi finanziari, a cui i sami hanno dovuto far fronte durante i processi nazionali, siano una limitazione all'effettivo accesso alla corte. Tuttavia, il giudizio discordante del giudice Ziemele evidenzia come l'effettivo accesso alla corte non può essere ritenuto tale se non si considerano le particolarità della popolazione indigena. In conclusione, nonostante l'Unione Europea sia un'organizzazione sovranazionale che quindi affida agli stati membri le vere e proprie politiche, essa cautamente si concentra sempre di più sul rispetto delle comunità indigene e chissà che in futuro non possa estendere l'armonizzazione delle legislazioni nazionali riguardo ai diritti umani anche nel campo dei diritti indigeni.