

ILO Convention No. 169 – A Solution for Land Disputes in the Nordic Countries?

Tanja Joona
PhD Student
University of Lapland, Arctic Centre,
The Northern Institute for Environmental and Minority Law

Introduction – Recent Developments

At the moment political and legal issues concerning indigenous peoples in modern nation states are receiving increasing attention on national and international levels. Like other indigenous peoples, Nordic indigenous groups are fighting for land and self-determination rights. Their aim is to regulate their affairs in their own way in order to survive as culturally different peoples, mostly within nation states. Fundamental questions arise concerning the limits of state sovereignty and the contents of highly and emotionally discussed indigenous right to self-determination.

This paper introduces the ILO-Convention No. 169 which is an international legal instrument safeguarding the rights of indigenous peoples. It has been ratified by 17 countries, including two Nordic countries; Norway and Denmark. Finland and Sweden are aware of the potential impact of the law of the Convention and trying to remove the obstacles before the ratification. The paper analyses the interpretation and implementation of the Convention, which has caused disagreement and conflict between the different stakeholders, and situation where legal concepts have been mixed in different ways and used for political purposes.

It is obvious that the problems which indigenous peoples worldwide are facing today are similar to each other, but it is interesting to see how different approaches have been adopted in these matters.

The ILO-Convention itself has gained very little critics in the Nordic approaches and few have yet demonstrated the actual impact that these international norms can have on domestic politics. Complete opposite approaches from the world are interesting examples. It could be argued that indigenous peoples land rights are

seen as an ongoing process of different political interests, new legislation, interpretation and new information brought to agenda. Therefore combining the methods of international politics and international law is a fruitful approach.

In the new era of globalization the Nordic countries represent welfare states with the strong image and will to protect all the good in life. The Northern geographical position of these countries influences the matters of concern; environmental issues, global warming, human rights etc. all issues that are affecting the lives and livelihoods of the people living in the North. However, one might argue, the new era has brought tremendous challenges for the traditional order of international system. Also the Nordic countries, especially Norway, Sweden and Finland have faced the situation where traditional state sovereignty and indigenous peoples' demands for greater self-determination have made them revalue their positions. It seems that the big question of rights to the Northern lands have also come to an new era. This has put important issues into the two cups of the scale; on the other, there are States' reputations as model countries in protecting human rights, but also States' economical interests in Northern lands. On the other cup, there is the fact that somebody other than the State owns the Northern lands, which is challenging State sovereignty over its territory and resources.

As has become quite obvious during recent years, indigenous ownership rights usually have long historical roots. On the land in question, population is mixed, borders poorly defined and proving ownership rights is intensely problematic and a time-consuming process. Claims from the Sámi people with regard to land may collide with equality rights of other members of the States in question, where however, generous social, cultural and political rights are enjoyed by all citizens regardless of status in comparison to, for example Latin

American countries. In the three Nordic countries the interpretation and implementation of the ILO Convention has caused disagreement and conflict between the different stakeholders. It seems that legal concepts have been mixed and used for political purposes. It is important to emphasise that the conflicts of interest that have arisen between the Sámi and for example those who are not registered into the Sámi Parliament's election registers, or reindeer herders and non-reindeer herders, are the result of a series of circumstances for which neither party can be blamed. Over the years – from the mid 18th century and late into the 20th century – the states have actively encouraged settlers and others to cultivate areas in which the Sámi had previously had exclusive use for reindeer breeding, hunting and fishing. This led to competition for land and subsequently conflicts.

This article introduces some of the recent developments in three Nordic countries in regard to land rights. It also evaluates in a critical manner the International Labour Organization's (ILO) Convention No. 169 concerning indigenous and tribal peoples, which has had a significant role in the political and legal discussions of these countries. While Norway has ratified the treaty, Sweden and Finland have not done so. As will be shown, however, all three countries are acutely aware of the potential impact of the law of the Convention and it even effects the policies and legislation concerning land use and Sámi rights.¹ The potential influence of ILO Convention No. 169 is especially interesting at the moment in Finland, where big mining companies are claiming a mineral deposit (uranium) in the areas of Historical Lapp territories and where State ownership has been challenged. Although States have quite universal rights to the minerals and natural resources of its territory, they still have certain obligations especially towards people who have used the areas since time immemorial for their livelihoods and subsistence. It is here where ILO Convention No. 169 could be used as an important political and moral tool for the mining companies.

The Finnmark Act in Norway

The Sámi rights process in Norway dates from the controversy of the Alta river power plant of the 1070s. A Sámi Rights Commission has been operative since 1980 with the task of clarifying and creating a basis for consolidation of the legal position of the Sámi in Norway. The Commission's report of 1984 included an extensive assessment of relevant international law, and led to the establishment of Sámi Parliament, elected for the first time in 1989, and the inclusion in the Constitution of Article 110a on the rights of the Sámi in 1988.² The Committee submitted a new report in 1997 relating to rights to natural resources and land.³ This report formed

the basis for the government's Bill concerning land rights and management in Finnmark (the Finnmark Act).⁴ Many different stakeholders criticized the bill. For example, the Sámi Parliament rejected it outright, claiming it violated Norwegian legal precedent and national and international law on the rights of indigenous peoples.⁵ In the summer of 2003 the Norwegian Parliament commissioned Professors Hans Petter Graver and Geir Ulfstein of the University of Oslo to prepare a legal opinion on human rights and the proposed Finnmark Act. Their conclusion in the report was that the proposed Finnmark Act does not meet the human rights legislation and commitments, especially in regard to the International Covenant on Civil and Political Rights and ILO Convention No. 169.⁶ The Act, however represents the latest progress in Norway in the field of Sámi land rights and will be partly introduced here in the light of the ILO Convention No. 169.

Norway was the first country to ratify the ILO Convention No. 169, and did so in 1990.⁷ When ratifying the Convention, there was an examination to make sure that there was no contradiction with Norwegian law. At the same time, ILO was informed that matters of the Sámi land rights remained partly disputed and unsettled, and were under consideration by the Commission, with a view to possible changes in the legislation.⁸ At the time of ratification, the Ministry of Justice did not question that there were areas in Norway that were "traditionally occupied" by the Sámi, and where their rights of "ownership and possession" should be recognised. However, contrary to the demands of Article 14(2)⁹ of the Convention, the Ministry did not identify the areas.¹⁰ Moreover, it interpreted the phrase "ownership and possession" narrowly, and concluded that a "protected right to use" was also covered by the phrase. As a result of this, the view in Norway in 1990 was that current regulations on the rights to land and natural resources fulfilled the requirements of the Convention. Norway's understanding of the Convention has not been directly criticized by the ILO, but the ILO Committee of Experts¹¹ has stated that: "*The Committee does not consider that the Convention requires title to be recognized in all cases in which indigenous and tribal peoples have rights to lands traditionally occupied by them, although the recognition of ownership rights by these peoples over the lands they occupy would always be consistent with the Convention.*"¹² This statement has on many occasions been interpreted in such a way, that Norway's understanding of the Convention is in compliance with the requirements. The dialogue between the Norwegian Government and the Committee of Experts after 1995 shows however a different approach, and will be demonstrated briefly below. One has to remember that Norway has still taken an important step forward in the land right issues in the

Norwegian Storting adopting the new Finnmark Act in May 2005.

The Finnmark Act presents a common administrative arrangement for all land in Finnmark that was at the time registered as the property of Statskog SF, i.e. 95 per cent of the county's land area. According to the Ministry of Justice and Ministry of Local Government and Regional Development the purpose of the Finnmark Act is to facilitate the management of land and natural resources in the county of Finnmark in a balanced and economically sustainable manner. This shall be carried out for the benefit of the residents of the county, particularly as a basis for the Sámi culture, reindeer husbandry, use of uncultivated areas, commercial activity and social life. The Act establishes a legal entity, the Finnmark Estate (Finnmarkseiendommen, Finnmarkkuopmodat). Registered title to state land in Finnmark is transferred from Statskog to the new Finnmark agency. The Finnmark Estate is governed by a board which consists of seven persons: three board members appointed by the Sámi Parliament and three by Finnmark County Council. The seventh member and his or her alternate shall be appointed by the King in Council. According to Ulfstein, this unequivocally turns the new agency into a landowning body, and not, in principle, an administrative agency.¹³ However, the Committee of Experts commented on Norway's approach in 2004 in the following manner, when the Finnmark Act was just a proposal:

"17. The proposal would transfer state ownership of 95 per cent of the land in the county to the Estate. It appears that this would include areas that Sámi claim as their land by right of long occupation, and to which the Government acknowledges in principle that the Sámi do have rights, though the extent of these lands and the content of the rights have not yet been identified as required in Article 14 of the Convention. It would give the Sámi a significant role in the management and use of larger area than that to which they now have rights, and the Government indicates that they would have more benefits from the management of the larger area under the present situation. However, the proposal would replace the rights of ownership and possession recognized by the Convention with a right to a large share in administration of the region."¹⁴

It seems that that the new Finnmark Act and the proposed administrative arrangement does not fulfil the requirements of the ILO Conventions article 14 para.1. There are also other numerous unclear issues which include the fact that the Act does not define a boundary between the powers of ownership assigned to the Finnmark Estate and the rights held by the Sámi people on the basis of prescription or immemorial usage¹⁵, the crucial point in relation to the ILO Convention article

14.1. According to the Ministry of Justice, the Finnmark Act provides that the Sámi people, through prolonged use of land and water, have acquired rights to land in Finnmark. Other residents of Finnmark may also have acquired such rights. This is problematic in relation to ILO Convention, because the local population in Finnmark, which of course includes the Sámi population, have the right to exploit certain resources.¹⁶ However, they give no special rights to the Sámi as an indigenous people. According to the Ministry of Justice the Finnmark Act is ethnically neutral in the sense that individual legal status is not dependent on whether one is Sámi, Norwegian or Kven or belongs to another population group.¹⁷ The Committee of Experts has also commented on issues in regard to compliance with the Convention: *"The Committee recognizes the very difficult issues raised by mixed Sámi and non-Sámi occupation of Finnmark County, and the uncertainty over the rights that Sámi and other Norwegians should enjoy there. It has been the subject of long and difficult negotiations until recently."¹⁸*

It seems that the problems in Norway in regard to land rights and ILO Convention No. 169 are very much the same as in many other countries. Even if Norway has ratified the Convention, the implementation of it has been difficult. Some fundamental questions still remain open and unclear. First of all, the subjects of this Convention have not been determined in Norway.¹⁹

The Committee notes that there are no plans for further census including specific indigenous criteria. The Committee notes that the Government expresses an interest in achieving a high level of participation in the elections to the Sami Parliament and that the right to vote depends on registration on the electoral lists so that those who are entitled to vote in the elections to the Parliament can be identified. It also notes the programme of Sami policy adopted at the Nordic Sami Conference in 1980, which establishes the basis for identification of "Sami" persons, including self-identification as a fundamental criterion.²⁰

Even though the Convention speaks about "peoples" in plural, the supervisory mechanisms of this Convention shows that it is important to know to which "individuals" this Convention applies. It is also a basic human right. This has been observed for example in the case of Bolivia in 1995:

"...The Committee would be grateful if the Government would indicate the manner in which recognition is given to indigenous communities and individuals so that they can benefit from the legislation which applies to them."²¹

The second important question is the identification of lands. In order to protect indigenous and tribal peoples'

rights to the lands they traditionally occupy, it is necessary to know which these are. This is also an open question in Norway, but will be more closely handled in the case of Sweden below. As a conclusion one might say that Norway's approach has been criticized by several legal scholars and other stakeholders. The Finnmark Act has been seen, however as an important step forward in land rights issues in Norway. But, according to ILO this administrative arrangement still leaves open the question of ownership right to lands and water which the indigenous persons have used with basis in prescription and immemorial usage. If the fundamental questions could be solved, it would be a giant leap in this issue.

“Samernas sedvanemarker” – The Report of the Border Commission for the Reindeer Herding Area in Sweden

In Sweden the ILO Convention has been under consideration in the National Assembly (the Riksdag) for more than ten years. In 1997, the Government decided to appoint a one-man Commission with the task of examining whether Sweden should ratify the ILO Convention No. 169 and the measures necessary for Sweden to be able to live up to its provisions. The Heurgren Report of 1999 – entitled “The Sámi – an indigenous people in Sweden”²² – concluded that Sweden fulfilled the treaty requirements in most respects, but that the land right articles might be problematic. The report also pointed out that, despite the fact that the Convention uses the expression “rights of ownership and possession, this does not necessarily involve a formal title to the land. However, according to Heurgren, the Convention assumes that these land rights satisfy certain minimum requirements. This minimum level would correspond to a right of use and possession of the land with strong protection under the law.²³

The report also states that the rights to land enjoyed by the Sámi today do not meet these minimum requirements, since the Sámi are forced to tolerate serious infringements of their reindeer husbandry rights. For Sweden to fulfil these minimum requirements, the Sámi must enjoy the same protection against such infringements as applies to other land use rights. The report concluded that Sweden may ratify the ILO Convention No. 169, but that this should not occur before a number of measures relating to Sámi land rights were implemented. The first important task was the establishment of a certain boundary delimitation committee to identify the lands and borders where Sámi have rights under the Convention. This committee submitted its findings in 2006.²⁴ Second, a survey should decide the scope of

Sámi hunting and fishing rights on land traditionally occupied by them. A special rapporteur, Sören Ekström, was appointed to clarify this issue and he submitted his findings in 2005 with co-operation of several experts in the field.²⁵ These two recent reports are examined below.

The main task of the Boundary Committee was to delimit, primarily on the basis of archive material, the areas that the Sámi may use under the Reindeer Husbandry Act for reindeer grazing during the period of October–April (winter grazing lands). This part of the remit has been called the search for the *outer boundary*. Another task was to transfer the terms set out in Article 14 of ILO Convention No. 169 into Swedish conditions. This particular article deals with lands that indigenous peoples traditionally occupy and land to which they have traditionally had access for their subsistence and traditional activities. The Committee called the boundary between these two categories of land the *inner boundary*.²⁶

The question of land rights in Sweden can be seen as a question of a reindeer herding right. The whole issue is handled through the legislation on reindeer husbandry which works with a number of concepts that can only be understood when their background is known. The most important of these concepts are the Taxed Lapp Lands (*lapps katteland*), the Lapp Lands boundary (*lappmarksgräns*), the cultivation limit (*odlingsgräns*) and the reindeer grazing mountains (*renbetesfjäll*) in Jämtland County. The Taxed Lapp Lands were areas that individual Sámi families used long ago for the maintenance of their reindeer herds in the spring, summer and autumn. In winter they sought grazing for their herds outside of their own lands. According to the Committee, as far as can be seen from the historical material, in the 17th century case-law, the authorities treated the Taxed Lapp lands in a way that corresponded to the taxed land held by the tax-paying farmers (*skattebönder*). In the late 17th century and the first half of 18th century, however, the Crown questioned the rights of both the tax-paying farmers and the Sámi to their land.²⁷ This question will be more closely examined below in the case of Finland where new information has cast light on this issue.

As mentioned above historical background is significant when examining the rights to lands and water. In Sweden these issues relate to reindeer herding, the outer boundary of grazing areas and the prescription from time immemorial. Prescription from time immemorial is a concept that has deep historic roots. Since late 19th century it has been used to legitimise the reindeer herding right. Prescription from time immemorial was discarded from the Land Code in 1972, but is still found in the Reindeer Husbandry Act. The reindeer herding right

is a constitutionally protected right that arises through a long-term use of land and water accepted by others.²⁸ In chapter 11 of the report the Committee takes a position on the outer boundary for reindeer grazing. The Committee considers it important to repeat that their position will not acquire the force of law. A determination with legal force of the question of whether or not a land area is burdened by reindeer herding right can only be obtained through a court ruling.²⁹ The Committee has, however, had the ambition of bringing forward as much material as possible that can serve as relevant information in support of decisions on where rights exist under customary law and they hope that, as a result of the conclusions they have drawn from this, they can help to make future legal proceedings largely unnecessary. The question whether this approach would be in accordance with the provisions of ILO Convention No. 169 is another issue.

The sources the Committee has used are drawn from archives, maps, official publications, scientific works and information we have received from Sámis and landowners. On the basis of this information and guided by the principles that have been expressed earlier in the report they have divided the reindeer herding area into the following categories:

1. proven reindeer grazing right
2. reindeer grazing right not proved according to landowners, but preponderant probability of a reindeer grazing right in Committee's view
3. reindeer grazing right claimed by the Sámi, but not proved or less probable in Committee's assessment
4. no reindeer grazing right

The Committee's conclusions are illustrated on a map that is attached to the report but here it is not possible to demonstrate the specific reindeer herding areas by names.³⁰

The Boundar Delimitation Committee had also the remit of identifying, in accordance with ILO Convention No. 169, the land that the Sámi occupy and use together with others. The main obstacle to Swedish ratification of the Convention has been the question of indigenous peoples' right to land. The Committee's analysis of the requirements set up in article 14 of the ILO Convention results in conclusions that differ in significant respects from those drawn by the previous ILO inquiry.³¹ The Committee does, however *agree with the ILO Inquiry that the Convention does not require a formal ownership right in order for lands that are used by the indigenous people to be assigned to lands that it traditionally occupies*. There is, how-

ever, a minimum level that the rights must reach to be applicable. The Committee considers that this minimum level is not fulfilled by the reindeer herding right that the Sámi have under reindeer husbandry legislation. This means that the Committee does not share the view of the ILO Inquiry that all state-managed year-round land shall be classed as land possessed by the Sámi under the Convention. In the Committee's view, which is based on the current law, there is no large continuous area to which the Sámi have a right that is as strong as the right to which the Convention's requirements concerning rights of ownership and possession refer.³² Some recently published academic research by Bertil Bengtsson³³, Lennart Lundmark³⁴, Lennart Stenman³⁵, Christina Allard³⁶ and Maria Ågren³⁷ are selected here to provide more information on rights to land and water in Sweden in special reference to reindeer herding right and prescription from time immemorial.

Historical Land Rights in Finland – *The Report of the Ministry of Justice*

The question of land rights in Finland as well as in Sweden and Norway dates back a long time. The new era after the Second world war and the activeness of indigenous peoples themselves since the 1960s have raised these questions more openly to public debate as well. In Finland in the late 1980s new information was retrieved affecting the historical land right question. Kaisa Korpijaakko argued in her doctoral thesis that Lapps had ownership of the land and water areas in northern part of Sweden-Finland in the 17th and early part of 18th century.³⁸ The Constitution Committee of the Finnish Parliament has referred to the same possibility in 1990 and several times later. The difficulties related to land rights has also been the main reason for Finland not ratifying the ILO Convention No. 169. There has, thus been a process to clarify the situation, initiated in the late 1990s. The progress has been slow and controversial. The State's intention was to solve the question by political consensus through establishing bureaucratic organs to administrate the northern lands, which would remain in State hands. This model was similar to the model presented above in the case of Norway and Finnmark Act. As consultations got under way, however, very few stakeholders had anything positive to say about it. After several reports and committee deliberations, the Ministry of Justice in 2003 appointed an academic research group to investigate the historical and current legal position of those lands, as requested in many consultations.³⁹

The aim of the research project was to study from a historical and legal perspective the settlement patterns, population history, land use and land ownership in the

area of historical Lapland which at present is part of Finland. The research concentrated on the period 1750-1923 and studied 1) the legal situation of land use rights and land ownership in Finnish Lapland, 2) historical developments after Finnish settlers' arrival to Lapland and 3) historical developments concerning the position of mountain and forest Sámi. Source materials included legislation, court verdicts and tax material, administrative materials (decisions of Governors, tax authorities, etc.); correspondence of authorities and decisions made in connection with the establishment of farms by settlers. The research group consisted of experts from the Universities of Oulu (history) and Lapland (law).

The research group submitted its findings, altogether 1300 pages, in October 2006. A great amount of new information was brought up to clarify the situation of northern lands. The question of ratification of ILO Convention was however postponed after the Finnish Parliamentary Elections in spring 2007. Here it is only possible to go through some of the legal findings and issues related to the ILO Convention, although the three historical researches were mainly of the same opinion.⁴⁰ This means that only the study of Juha Joonas, titled: "Entisiin Tornion ja Kemin Lapinmaihin kuuluneiden alueiden maa- ja vesioikeuksista" will be examined here. The area his study concerns is the area that belonged in the 17th and 18th century to Tornio and Kemi Lapplands and that today belongs to Finland. The line between Lapland and the coastal parish of the Gulf of Bothnia is the so called Lapplands border and it was confirmed in 1751-1754. The Lapplands were divided into Lappvillages. In Enontekiö area in Tornio Lapland there were Lappvillages called Rounala, Suontavaara and Peltojärvi and in Utsjoki area there were Lappvillages called Utsjoki and Teno. The Lappvillages Kittilä, Sodankylä, Sompio, Inarin Keminkylä, Kuolajärvi, Kitka and Maanselkä belonged to Kemi Lapland. The Kemi Lappvillages were situated in the area where at present the municipalities of Kittilä, Inari, Sodankylä, Savukoski, Pelkosenniemi, Salla, Posio and Kuusamo are located.

This division between Lapplands and Lappvillages is a first interesting visible sign in regard to the demands of ILO Convention, especially article 14.2 where identification of lands is requested. In Finland, the question of land rights has focused in the area of Sámi Homeland, which is an area in the Northernmost Finland, established in the mid 1990's. In this area the Sámi have a cultural autonomy (right to use their own language, education in Sámi etc.) secured by law and administered by the Sámi Parliament. The discussion of land rights has therefore focused on the area of Sámi Homeland where Sámi Parliament has demanded a collective

ownership or control over the area. The recent research however shows, that the area of historical land rights is much larger than just the area of Sámi Homeland and covers almost 1/3 of the total surface of Finland. The research also confirms the fact that Lapps regarded themselves and were officially acknowledged as landowners in the Kingdom of Sweden-Finland before year 1743. Legislation and courts protected a Lapp's title to land in the same way they protected that of a farmer. Kaisa Korpijaakko also stresses that both farmers and Lapps were considered *individual* landowners. In contrary to a common belief, collective land use was not the dominant, let alone the only pattern of land use among the Lapps.⁴¹ According to Joonas, certain land and water areas inside the Lappvillages were divided among families and individual persons. The areas were hereditary lands and called "Tax land" (skatteländ) since 17th century. Members of the Lappvillage had the right to use lands only in the area of one's own Lappvillage. If this right was offended, the court had the right to resort to punishment.⁴²

Joonas has divided his research in four different time-scales; 1550-1673, 1674-1694, 1695-1748 and 1749-1808. These divisions are based on a new legislation in that time in regard to land and water rights. The research focuses on analysing the legal praxis from the materials mentioned above. In this legal praxis Lapps were considered as land owners and their rights were strong in this respect. In 1737 the situation changes in a special case concerning a farm called Haukiniemi in Kemi Lapplands Lappvillage called Maanselkä. The trial was about whether the claimant had the right to reclaim back the family the farm founded upon a Lapp Tax Land. The central question was whether the Lapp Tax Lands were Tax Lands or Crown Lands. The district court analysed the case according to the old practise and decided that it was a question of Tax Land. The defendant complained to the Piitime chief judge (lagman) which considered the case similarly to the district court. They, however wanted to ask clarification of law from the Court of Appeal of Svea, from Stockholm before final solution. The Court of Appeal asked for a statement from the Chamber Collegium. Contrary to previous sources and research, the Chamber Collegium made a decision in the matter and concluded that all lands were *Crown lands*. According to Joonas, this was however only an interpretation of the Chamber Collegium and no legislation is to be found to support this decision. This means that the decision could be taken to a rehearing and that State ownership today is increasingly at a lower position.⁴³

In regard to the ILO Convention, Joonas points out certain important questions which previously have had little attention or not been discussed at all. It is important

to know the right holders of these land rights. Therefore those, according to the current legislation, who since time immemorial have continuously used the lands (reindeer herding, on a small scale also fishing and hunting) and belong to a Lapp family have obviously stronger rights. The subjects of the rights are important to know also in regard to the ILO Convention.⁴⁴ It is also reasonable to begin to speak of Historical land rights of Lapland instead of highlighting the artificial area of Sámi Homeland which has nothing to do with the land rights. There has also been very little discussion about the provisions, wordings, interpretation and contents of the ILO Convention and what these issues would mean in Finland's situation. There exist also property rights according to the national legislation whose value has not been estimated in regard to ILO Convention.

Comparison and Conclusion

The Governments of Finland, Norway and Sweden have progressed in their investigations of Sámi rights in recent years. While this is perhaps the result of national and international pressure from the indigenous peoples' themselves, it is also a result of improved and wider knowledge of these issues. In this respect it is therefore reasonable to ask whether these solutions, planned or implemented so far in these countries, actually fulfil the requirements set down in the ILO Convention No. 169? Norway has taken the step to establish a new political body with representation from the indigenous communities and other local interest groups, before the basic legal questions (ownership and land identification for example) have been solved and the rights recognized. Norway's approach has been criticized by several experts of international law and the ILO has also commented on the difficult situation. Finland's approach has been similar to that of Norway but has recently adopted new information which likely will change the direction of those plans and will place much more attention on the basic legal questions. The land right question in Sweden revolves around the reindeer herding right which is the crucial element of the whole issue. This differentiates Sweden from Norway and Finland, where issues related to reindeer herding have had very little attention. In spite of the fact that reindeer herders are actually the only ones who still use the land in traditional ways and many of them for their subsistence.

In the Nordic countries governmental and Sámi representatives have firmly supported the ratification of the ILO Convention No. 169, seeing it as an important step towards international standards of indigenous rights, although there is disagreement between them on the interpretation of land rights. There has been little cooperation between the Nordic countries when prepar-

ing ratification of the ILO Convention. The States in question have wanted to find their own ways to solve the issues, although each country has closely followed proceedings of the others. Many questions still remain open and unclear, which generates strong feelings and different political views. ILO Convention No. 169 itself has gained very little criticism in the Nordic countries which is contrary to many other countries where indigenous peoples live. The Convention has been ratified only by 17 countries, most of them in Latin America. Big countries like Australia, New Zealand, Canada, USA, Russia, Asian countries etc. don't even consider the ratification. There are several reasons for that.

The ILO Convention No. 169 has been criticized as being Eurocentric and denying the rights of indigenous peoples. Many of the critics are concerned with how the Convention was drawn up: the tripartite (Governments, employers and employees) system of ILO doesn't recognize indigenous peoples as official partners, therefore they couldn't participate to the drafting process of Convention No. 169. They didn't have the right to speak or vote. The Convention has also been criticized for being written from the non indigenous worldview denying that indigenous peoples have their own governments, legal systems, religions, cultures, economic systems and the right to self-determination. Article 1.3 is worded: "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." It is interesting that an International Organization and the United Nations is telling over 350 million people that they don't exist as peoples. It raises the question of whose rights are protected: those of the indigenous peoples or of the non indigenous peoples? In general, the language of the Convention No. 169 is regarded as negative toward indigenous peoples. For example, Article 7 deals presumptuously with the issue of development, implying that indigenous peoples are backward and underdeveloped. Therefore, development and acceptance of the non indigenous systems are the preferred way of "progress". Many of the wordings of the provisions are considered to be too vague and flexible thus limiting the Conventions purpose. And when it comes to the land rights, the land right articles only recognise rights over land currently occupied by indigenous peoples; they don't recognise rights over land which they used to occupy but were taken from them through colonisation.⁴⁵

The primary argument in favour of the Convention is that, while it may not be the best solution, it is better than anything else available at the moment. This is because it actually identifies indigenous peoples' rights which are not specified anywhere else in international

law, nor indeed in many countries' domestic law, either. Ratification by a country could therefore give the indigenous peoples in that country more rights than they have at present, also in Nordic countries.

References

Allard, Christina (2006). *Two sides of the Coin: Rights and Duties, the Interface between Environmental Law and Saami Law Based on a comparison with Aotearoa/New Zealand and Canada*.

Bengtsson, Bertil (2004). *Samerätt En översikt*. Norstedts Juridik, Stockholm.

CEACR: *Individual Observation concerning Convention No. 169*, Published 2004. www.ilo.org/ilolex

CEACR: *Individual Direct Request concerning Convention No. 169*, Submitted February 1995. www.ilo.org/ilolex

CEACR: *Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia Ratification:1991*. Submitted:1995. www.ilo.org/ilolex

Enbuske, Matti (2006). *Asutus ja maankäyttö keskisessä Lapissa ja Enontekiöllä*.

Hiltunen, Mauno (2006). *Maailma maailmojen välissä. Enontekiön asukkaat, elinkeinot ja maanhallinta 1550-1808*.

Joona, Juha 2006(1)

Joona, Juha 2006(2)

Joona Tanja (2003). "Finland and the Process of Ratifying ILO Convention No. 169" *Indigenous Affairs* 27:40-45. 1808.

Korpijaakko, Kaisa (1989). *Saamelaisten oikeusasemasta Ruotsi-Suomessa*. Lakimiesliiton kustannus, Helsinki.

Lundmark, Lennart (2006). *Samernas skatteland. Institutet för Rättshistorisk Forskning*, Stockholm.

Nahkiaisaja, Tarja (2006). *Asutus ja maankäyttö Inarissa ja Utsjoella 1700-luvun puolivälistä vuoteen 1925*.

NOU 1984:18 *Om samenes rettsstilling*.

NOU 1997:4 *Naturgrunnlaget for samisk kultur*.

Proposition to the Odelsting No. 53 for 2002-2003 concerning an Act relating to legal relations and management of land and natural resources in the county of Finnmark.

Ryel, Anne Lise (2001). *Unpublished seminar paper by State Secretary*. Ministry of Justice, Norway. Rovaniemi, Finland, 5 May 2001.

The Finnmark Act – A Guide⁸/2005, 2. www.jd.dep.no by Ministry of Justice and Ministry of Local Government and Regional Development.

Stenman, Lennart (2001). *Rätten till land och vatten i lappmarkerna i historisk belysning*. Karlstad University Studies, Karlstad.

SOU 1999:25. *Samerna ett ursprungssfolk i Sverige. Frågan om Sveriges anslutning till ILO:s konvention nr 169*, Stockholm, 31 March 1999.

SOU 2006:14. *Samernas Sedvanemarker. Betänkande av Gränsdragningskommissionen för renskötseområdet*, Stockholm.

SOU 2005:116. *Jakt och Fiske i Samverkan. Slutbetaänkande av jakt och fiskerättsutredningen*, Stockholm. Two separate publications were also included in the research: SOU 2005: 17 *Vem får jaga och fiska? Rätt till jakt och fiske i lappmarkerna och på renbetesfjällen*. Delbetänkande av Jakt- och fiskerättsutredningen, Stockholm.

SOU 2005: 79. *Vem får jaga och fiska? Historia, folkrätt och miljö*. Delbetänkande av Jakt- och fiskerättsutredningen, Stockholm.

Ulfstein, Geir (2004). "Indigenous Peoples' Right to Land". Bogdandy and Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Volume 8, 1-49.

Venne, Sharon (). "The New Language of Assimilation: A Brief Analysis of ILO Convention No. 169. Without Prejudice.

Vihervuori, Pekka (1999). *Maahan, veteen ja luonnonvaroihin sekä perinteisiin elinkeinoiniin kohdistuvat oikeudet saamelaisten kotiseutualueella*. Oikeusministeriön yleisen osaston julkaisu, 3. Helsinki.

Ågren, Maria (2001). "Asserting One's Rights: Swedish Property Law in the Transition from Community Law to State Law". *Law and History Review*, Vol. 19, No. 2. Published by the University of Illinois. Also: <http://www.historycooperative.org/journals/lhr/19.2/agren.html>

Endnotes

1 See for example: Vihervuori, Pekka (1999) *Maahan, veteen ja luonnonvaroihin sekä perinteisiin elinkeinoiniin kohdistuvat oikeudet saamelaisten kotiseutualueella*. Oikeusministeriön yleisen osaston julkaisu, 3. Helsinki.

2 NOU 1984:18 *Om samenes rettsstilling*.

3 NOU 1997:4 Naturgrunnlaget for samisk kultur.

4 Proposition to the Odelsting No. 53 for 2002-2003 concerning an Act relating to legal relations and management of land and natural resources in the county of Finnmark (Finnmark Act). See also Ulfstein, Geir 2005, 32.

5 Some of the comments are found in English at <http://www.samediggi.no/default.asp?selNodeID=313&lang=no>. See for example, Councillor Sara's speech to the UN, a statement by the Sámi Council, and a press release about the Finnmark Act (visited 11 November 2003).

6 Folkerettslig vurdering av Forslaget til ny Finnmarkslov.

7 In the end of 1980s the Norwegian Government showed an interest on ratifying the ILO Convention No. 107 concerning ... However, soon it became clear that this Convention was about to be revised and Norway decided to wait that and after that ratified the newer Convention No. 169 as a first country to do so. In political speech this argument has been strongly used to describe the will of the Norwegian State to commit itself to the rights of its indigenous population.

8 Unpublished seminar paper by State Secretary Anne Lise Ryel. Ministry of Justice, Norway. Rovaniemi, Finland, 5 May 2001.

9 Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

10 For example in a CEACR: Individual Observation the Committee of Experts states that: "In Finnmark County, which, as indicated above, is inhabited jointly by Sámi and other Norwegians, the extent of land rights and access to land have been in dispute for many years. The Government acknowledges that "parts or all of Inner Finnmark consist of land which the Sámi people traditionally occupy... However, the Sámi Rights Commission has not provided any basis for the Government to identify precisely which lands the Sámi people traditionally occupy within the county".

11 Missing

12 CEACR: Individual Direct Request concerning Convention No. 169, Submitted February 1995. www.ilo.org/ilolex

13 Ulfstein 2004, 32; The Finnmark Act – A Guide 8/2005, 2. www.jd.dep.no by Ministry of Justice and Ministry of Local Government and Regional Development.

14 CEACR: Individual Observation concerning Convention No. 169, Published 2004.

15 The Finnmark Act involves no changes in rights of use and ownership to the land in Finnmark. If someone has acquired the right of use or ownership through prolonged use of an area (prescription or immemorial usage), the Finnmark Act will not change this. According to Norwegian law, one may on specific conditions acquire both rights of use and right of ownership to an area through using or disposing of it for a long time. "prescription" and "immemorial usage" are terms for means by which one may acquire such rights. The conditions for prescription follow from the Act of 9 December 1966 No. 1 relating to prescription. In order to claim right of ownership one must have disposed of an area for at least 20 years. One must have good reason for believing that one owns the area. In order to claim rights of use one must have exercised a certain use for at least 20 years. The use must have taken place in the belief that one had a right to it. The doctrine of immemorial usage has been developed through legal usage. On the basis of immemorial usage, one may acquire the right of use or ownership to an area even if the conditions for prescription are not met. A total assessment is made, where the most important factors are:

- use of the area over a long period. Since the remaining conditions are not as stringent as for prescription, an extremely long period of use is required, perhaps as long as 100 years and at least 50 years.
- the person who has used or disposed of the area must have done so in good faith. The requirements regarding good faith are not equally stringent if the period of use is extremely long.

16 All residents of Finnmark will be given the right to exploit natural

resources on Finnmarkseien-dommen's land, including hunting, fishing and cloudberry picking. The extent of such rights is dependent on how closely on is associated with the resources. For example, one has a greater right to exploit natural resources in the municipality where one resides. Persons who reside outside the county shall also have access to hunt and trap small game, to fish and to pick cloudberries for their own domestic use. The Finnmark Act – A Guide 8/2005, 2. www.jd.dep.no, by Ministry of Justice and Ministry of Local Government and Regional Development.

17 The Finnmark Act – A Guide 8/2005, 5. www.jd.dep.no by Ministry of Justice and Ministry of Local Government and Regional Development.

18 CEACR: Individual Observation concerning Convention No. 169, Published 2004.

19 Missing

20 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Norway Ratification: 1990, Submitted: 1995, February.

According to the official web-pages of Norwegian Saami Parliament, in 1989 5497 Saami were registered in the Saami Parliament Election Register in Norway and in 2001, 9923 persons were listed in the register. <http://www.samediggi.noddefault.asp?selNodeID=110&lang=no> (visited 28 November 2003) In 2005 Saami Parliament Elections 12 538 was listed on the register (samemanntallet) <http://www.samediggi.no/Artikkel.asp?Mid1=3&Mid2=300&AId=236&back=1> (Visited 20 November 2006).

Estimation of the total Saami population varies from 50 000 to 75 000. See more T. Joona 2005, 307-309.

The Ministry for Foreign Affairs in Norway gives this explanation for the variation of the amount of Saami population: "The size of the Sami population has been reckoned at 75,000, but estimates vary in accordance with criteria used (genetic heritage, mother tongue, personal wishes, etc.). Official censuses have not given reliable counts. Because of the assimilation process, not all Sami have wished to acknowledge or declare their ethnic identity. For this reason, the Sami parliaments in the Nordic countries have worked out their own criteria for defining Sami from a combination of subjective and objective factors." <http://odin.dep.no/odin/engelsk/norway/history/032005-990463/index-dok000-b-n-a.html> (Visited in 20 November 2006).

21 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia Ratification: 1991, Submitted: 1995.

22 SOU 1999:25, Samerna ett ursprungssfolk i Sverige. Frågan om Sveriges anslutning till ILO:s konvention nr 169, Stocholm, 31 March 1999.

23 SOU 1999:25, 25-26.

24 SOU 2006:14, Samernas Sedvanemarkar. Betänkande av Gränsdragningskommissionen för renskötselområdet, Stocholm.

25 SOU 2005:116, Jakt och Fiske i Samverkan. Slutbetaänkande av jakt och fiskerättsutredningen, Stocholm. Two separate publications were also included in the research: SOU 2005: 17 Vem får jaga och fiska? Rätt till jakt och fiske i lappmarkerna och på renbetesfjällen. Delbetänkande av Jakt- och fiskerättsutredningen, Stocholm. And SOU 2005: 79 Vem får jaga och fiska? Historia, folkrätt och miljö. Delbetänkande av Jakt- och fiskerättsutredningen, Stocholm.

26 SOU 2006:14, 33.

27 SOU 2006:14, 36.

28 The law has nothing to say on question of how long a use must have continued for prescription from time immemorial to exist, except that it must have continued for such a long time that no now living person remembers or has heard from his forefathers when it started.

29 SOU 2006:14, 43-45.

30 SOU 2006:14, 45-46. The grouping can be described very briefly in the following way. According to the current law, the whole province of Lapland is inside the reindeer herding area and is reported on the Committees map as within grazing area 1. Most mountain Sámi villages and all forest Sámi villages have their year-round lands in this province. The Committee also assign the concession area in Norrbotten to category 1 even though all reindeer herding these is not conducted by Sámis. The Committee has taken the view that it is not part of their remit to comment on the disputes on land use that occur between mountain and forest Sámi villages on the one hand, and concession villages, on the other.

31 SOU 1999:25.

32 SOU 2006:14, 48-49.

33 Bengtsson, Bertil (2004) Samerätt En översikt. Norstedts Juridik,

Stockholm.

34 Lundmark, Lennart (2006) Samernas skatteland. Institutet för Rättshistorisk Forskning, Stocholm.

35 Stenman, Lennart (2001) Rätten till land och vatten i lappmarkerna i historisk belysning. Karlstad University Studies, Karlstad.

36 Allard, Christina (2006) Two sides of the Coin: Rights and Duties, the Interface between Environmental Law and Saami Law Based on a comparison with Aotearoa/New Zealand and Canada.

37 Ågren, Maria (2001) Asserting One's Rights: Swedish Property Law in the Transition from Community Law to State Law. Law and History Review, Vol. 19, No. 2. Published by the University of Illinois. Also: <http://www.historycooperative.org/journals/lhr/19.2/agren.html>

38 Korpjääkko, Kaisa (1989) Saamelaiisten oikeusasemasta Ruotsi-Suomessa. Lakimiesliiton kustannus, Helsinki.

39 See also Tanja Joonas (2003) "Finland and the Process of Ratifying ILO

Convention No. 169" Indigenous Affairs 27:40-45.

40 Enbuske, Matti (2006) Asutus ja maankäyttö keskisessä Lapissa ja Enontekiöllä.

Hiltunen, Mauno (2006) Maaailma maailmojen välissä. Enontekiön asukkaat, elinkeinot ja maanhallinta 1550-1808.

Nahkiaisaja, Tarja (2006) Asutus ja maankäyttö Inarissa ja Utsjoella 1700-luvun puolivälistä vuoteen 1925. All published by the Ministry of Justice.

41 Korpjääkko 1989, 584, 432-433.

42 Joonas, Juha 2006(1), 66-67.

43 Joonas, Juha 2006(1), 68-69.

44 Joonas, Juha 2006(1), 71 and Joonas, Juha 2006(2) 381-393.

45 See more: Venne, Sharon member of the Cree nation. "The New Language of Assimilation: A Brief Analysis of ILO Convention No. 169. Without Prejudice, Year ?