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The balance between the right to  
reindeer herding and other  
interests of land use in Sápmi  
- A labour- and human rights  
perspective on the situation of the  
Swedish Sami

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# Summary

In this thesis, the question of how to balance the right to reindeer herding against competing interests of land use in Sápmi in accordance with the indigenous rights of the Sami, will be examined. In order to answer this question other questions need to be answered – What is the right to reindeer herding? Who is the holder of the right? Where can the right be exercised and finally, how can the right be restricted? The aim of the thesis is to bring clarity to these legal issues from a human rights and labour rights perspective. The method used is a combination of a legal dogmatic method and a comparative legal method. The legal system in Norway is the comparison object as it has common characteristics and similar legal issues are dealt with in Norway.

Reindeer herding is one of the traditional occupations of the Sami people. Traditional occupations are protected by a number of different international instruments as well as by instruments within the European system.

In Sweden, the traditional occupation of the Sami, the reindeer herding, is protected by the Reindeer Husbandry Act. The Act stipulates that only Sami that have a membership in a Sami village can engage in the reindeer husbandry and hence is the holder of the right to reindeer herding. The right to reindeer herding can be exercised in reindeer herding areas which to some degree follows from the Act. In cases of disputes whether or not there is a right to reindeer herding in an area, the situation shall be solved in Court. In cases concerning the use of land and natural resources, the Sami are referred to seek protection for their right to reindeer herding in proceedings on the practical use of land resources. Areas of importance for the reindeer husbandry are protected against intrusions by the Environmental Code as they are of so-called national interest. In cases of competing interests of land use, preference should be given to the action that is most sustainable. However, in these proceedings the special nature of the reindeer husbandry and its extensive use of land are not taken into consideration and the Sami party always ends up on the losing side as intrusions that will not significantly harm the reindeer husbandry are permitted. This leads to violations of the right to reindeer herding as the consequence of these permits is fragmentation of reindeer herding areas.

Sweden has not ratified any Convention explicitly protecting the right to traditional occupations. However, this right consists of other human rights set forth in other instruments that Sweden is obliged to follow. Sweden is therefore obliged to guarantee the right to traditional occupations and reindeer herding for the Sami, as they are an indigenous people and a national minority entitled to special protection.

If applied appropriately, the existing rules in Sweden can provide an adequate protection. In order to promote the Sami rights further Sweden can take inspiration from Norway and ratify the ILO Convention No. 169, establish a concrete protection of the promotion of the Samis' cultural rights and work for a stronger Sami Parliament.

# Sammanfattning

I denna uppsats kommer frågan om hur man balanserar urfolket Samernas renskötselrätt mot konkurrerande markanvändningsintressen i Sápmi att undersökas. För att besvara denna fråga måste andra frågor besvaras – Vad är renskötselrätten? Vem är innehavare av denna rätt? Var kan rätten utövas och slutligen, hur kan renskötselrätten begränsas? Syftet med uppsatsen är att klargöra dessa rättsliga frågor ur ett arbetsrättsligt och människorättsligt perspektiv. Metoden som används är en kombination av en rättslig dogmatisk metod och en jämförande juridisk metod. Det rättsliga systemet i Norge är jämförelseobjektet eftersom det har gemensamma drag och för att liknande juridiska frågor behandlas i Norge.

Renskötseln är ett av Samernas traditionella yrken. Traditionella yrken är skyddade av ett antal olika internationella instrument samt inom det europeiska systemet.

I Sverige skyddas det traditionella yrket renskötseln genom Rennäringslagen. Enligt lagen får endast samer som har ett medlemskap i en sameby bedriva renskötsel och därmed inneha rätten till renskötseln. Renskötselrätten kan utövas på renskötselområden som i viss mån följer av lagen. I händelse av en tvist om huruvida det finns renskötselrätt i ett område eller inte ska situationen lösas i domstol. I fall som rör användningen av mark och naturresurser är samernas hänvisade att söka skydd av sin renskötselrätt i processer om den praktiska användningen av markresurser. Områden av betydelse för renskötseln är skyddade mot intrång eftersom de utgörs av så kallade områden av riksintresse för rennäringen enligt Miljöbalken. I fall av konkurrerande markanvändningsintressen ska företräde ges till den åtgärd som är mest hållbar. I dessa mål beaktas dock inte renskötselns särskilda karaktär och dess omfattande markanvändning och de samiska parterna hamnar alltid på den förlorande sidan eftersom intrång som medför obetydlig skada för renskötseln är tillåten. Detta leder till kränkningar av rätten till renskötseln eftersom följden av dessa tillåtna intrång sönderdelar renskötselområdena.

Sverige har inte ratificerat någon konvention som uttryckligen skyddar rätten till traditionellt yrke. Denna rätt har dock olika beståndsdelar och består av andra mänskliga rättigheter som anges i andra instrument som Sverige är skyldig att följa. Sverige är därför skyldig att garantera rätten till val av traditionellt yrke och renskötseln för samerna eftersom de är ett urfolk och en nationell minoritet med rätt till särskilt skydd.

De befintliga reglerna i Sverige kan ge ett tillräckligt skydd om de tillämpas på ett korrekt sätt. För att främja de samiska rättigheterna ytterligare kan Sverige hämta inspiration från Norge och ratificera ILO-konventionen nr 169, upprätta ett mer konkret skydd för främjandet av samernas kulturella rättigheter än det befintliga samt arbeta för att Sametinget ska få en starkare ställning.

# Preface

To begin with, I want to thank my supervisor Lee Swepston who inspired me to work on these issues. I would also like to thank the employees at Gärde Wesslau Law Firm in Gothenburg for lending me a workplace and for assisting me with their special knowledge in this area of law. Finally, I want to thank my family for their incredible support.

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*Charlotta Cederberg*

# Abbreviations

## English

CERD	United Nations Convention on the Elimination of Racial Discrimination
EC	European Community
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Union
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
FCNM	Framework Convention for the Protection of National Minorities
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
UDHR	Universal Declaration of Human Rights

## Swedish

DO	Diskrimineringsombudsmannen
Ds.	Departementsserien av offentliga utredningar
MÖD	Miljööverdomstolen
NJA	Nytt juridiskt arkiv
Prop.	Proposition
RH	Rättsfall från Hovrätten
SOU	Statens offentliga utredningar

## Norwegian

NOU	Norges offentlige utredninger
NRt	Norsk Retstidende



# 1 Introduction

## 1.1 Background

As a national minority and an indigenous people, the Sami people hold a special position under Swedish national law. They have the exclusive right to carry out reindeer husbandry in Sweden, which is considered an integral part of their culture as well as one of their traditional livelihoods. Since ancient times, the Sami have inhabited the northern parts of Sweden, Norway and Finland and the Kola Peninsula in Russia. This cross-border region is called Sápmi, the land of the Sami.

The Sami lived in what would become Sweden long before the final state boundaries were drawn. Hence, Sweden has had a relationship to the Sami from the beginning of its very existence.<sup>1</sup> Despite this fact, the Sami were not officially recognized as an indigenous people by Sweden until 1977. In 1999 the Sami were acknowledged by the state as one of Sweden's national minorities.<sup>2</sup>

Traditionally, the Sami were a nomad people living on hunting, fishing and collecting. Over time, reindeer herding, which was carried out alongside the other livelihoods, became the main activity of the Sami. The Swedish state is partly responsible for this development. For a long time the Swedish policy towards the Sami was that they should engage only in reindeer husbandry and be kept away from so-called Swedish culture and influences.<sup>3</sup> The way that the Government has conducted itself historically has affected the relationship between the state and the Sami people to this day and the Swedish policy towards its indigenous people still shows deficiencies. There are recent reports on discrimination against the Sami in all areas of society and Sweden has received criticism from international human rights organisations for the way it has handled the Sami situation.<sup>4</sup> Another example is the governmental proposal regarding the rights of the Sami that was to be published during the spring of 2010 but which was stopped in its draft after receiving heavy criticism.<sup>5</sup> Some of the criticism levelled at the proposal was that the ones working with it were not fully representative of the Sami and that contact with Sami representatives in the drafting process had been limited even though representation and

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<sup>1</sup> Sweden became an independent kingdom in the 16<sup>th</sup> century.

<sup>2</sup> See the Government Bill (Prop. 1998/99:143 – *Nationella minoriteter i Sverige*) p. 10. The other national minorities are Jews, Roma, Swedish Finns and Tornedalers.

<sup>3</sup> Mörkenstam, U, *Om "Lapparnes privilegier": Föreställningar om samiskhet i svensk samepolitik 1883-1997*, Stockholms Universitet, Statsvetenskapliga institutionen, 1999, pp. 92– 94.

<sup>4</sup> E.g. The Discrimination Ombudsman Report Series (DO:s rapportserie 2008:1) and The Human Rights Committee, concluding observations on the report of Sweden, 7 May 2009 (CCPR/C/SWE/CO/6).

<sup>5</sup> See the Exposure Draft (Ds. 2009:40) and the article by Christina Allard et al. *Samernas rättigheter försvagas*, Dagens Nyheter, 10.11.2009, where the draft is alleged to constitute further discrimination of the Sami.

consultation were the main points to be emphasised in the proposal itself.<sup>6</sup> The governmental proposal did not appear credible, neither to the Sami nor to others.<sup>7</sup>

Although the Sami culture has many features, most people associate Sami with reindeer husbandry. Also among the Sami, reindeer herding is central as it is an important expression of identity and their only cultural expression specifically protected by law. A crucial prerequisite for the Sami culture to be preserved is that reindeer herding can survive as an industry as, without a viable reindeer industry, other parts of the Sami culture e.g. language and handicraft would most likely vanish.

The Swedish parts of Sápmi constitute as much as 2/5 of the total land area of Sweden. Evidently, within Sápmi there are many and various natural resources. These natural resources have been and are still of great interest for the Swedish state as they create opportunities for e.g. forestry, the mining industry, the establishment of hydroelectric power plants, preservation of predatory animals and tourism. Reindeer herding lays claim to huge land areas as the reindeer continuously move between pastures in the search for graze. Consequently, the reindeer herding collides with different and competing interests of land use and activities in Sápmi. When these different interests are incompatible, one must be restricted.

This thesis will try to answer the questions of how to balance the right to reindeer husbandry against competing interests in Sápmi in order not to violate the indigenous rights of the Sami. In order to answer this question other questions need to be answered first - What right do the Sami have, as a national minority and as an indigenous people, to the reindeer herding? Who is the holder of that right? Where can the right be exercised? Finally, under what circumstances can the right be restricted?

## 1.2 Aim and purpose

The aim of this thesis is to bring clarity to the legal issues described above. By taking the example of the Swedish Sami, this thesis will examine the balance between an indigenous people's right to livelihood, including the right to use land and water, and competing interests of land use. The purpose of this thesis is therefore to examine the substance of the Sami right to reindeer herding and hence, clarify what obligations the Swedish Government has. It is also to examine to what degree the Swedish policy corresponds to international standards and Sweden's international obligations and to present possible solutions to the legal issue. Focus will be on reindeer herding as a traditional livelihood of the Sami, and the thesis will have a human rights and labour perspective from which the inevitable land and water issues will be touched upon. This perspective is chosen because it enables one to deal with the concept of discrimination in employment and occupation, in this context the distinction and

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<sup>6</sup> See the Statement by Jörgen Jonsson from the National Union of the Swedish Sami People (*Svenska Samernas Riksförbund*) on the Exposure Draft (Ds. 2009:40), p. 93.

<sup>7</sup> As expressed by Sara Larsson from the Sami Parliament and Katri Linna, the Discrimination Ombudsman, in the article *Samepolitik utan samisk insyn*, Svenska Dagbladet, 10.01.2010.

exclusiveness of the right to reindeer herding given to the Sami, based on ethnicity, under Swedish legislation. The main interest of this thesis is what effects this distinction has for the traditional livelihood of the Sami, the reindeer herding and how this occupation is specially regulated in a specific Act and is differently treated than other occupations in Swedish law. Situations where individual herders are discriminated against at work e.g. when applying for a job, in education or occupational training, when denied membership in organizations or access to health care etc. falls outside the scope of this thesis. The focus here is not the individual Sami but their traditional livelihood, reindeer herding and the occupation itself. This distinction is however not clear as infringements and violations of the right to work will affect the practitioners, that is to say, the individual herders. However, this thesis will not describe how persons being discriminated against can make individual claims.<sup>8</sup>

### 1.3 Method and material

To fulfil the aim and purpose of this thesis, the method used will be a combination of a legal dogmatic method and a comparative legal method. The legal dogmatic method serves the purpose of this thesis well, as it aims to interpret and present relevant applicable law in order to bring clarity to a specific legal issue.<sup>9</sup> In relation to Swedish law, this means an analysis of the primary legal sources, such as existing legislation, preparatory work and case law.<sup>10</sup> In order to make a comparison of Swedish policy to international standards, relevant international legal sources will be analysed. The relevant material in this part will consist of conventions, international case law, declarations and reports from international organisations.<sup>11</sup> In relation to the European system, the primary legal sources in the European Union are the written law in the form of treaties, the fundamental principles of law e.g. the protection of human rights, decisions by the European Court of Justice and doctrine.<sup>12</sup> The material will also consist of secondary sources, such as legal commentaries on national and international instruments and national legal doctrine.

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<sup>8</sup> The Discrimination Ombudsman (*DO*) is a government agency investigating alleged cases of discrimination under the Swedish Discrimination Act (*Diskrimineringslagen*, 2008:567). The prohibition of discrimination when starting or running a business, in Chapter 2 Section 10 of the Discrimination Act, applies only to the protection of individuals. This means that if a company starts or operates a business, the company is not protected against discrimination under the law. Regarding the Discrimination Act see Gabinus Göransson, H, m.fl. *Diskrimineringslagen*, Norstedts Juridik, 2009.

<sup>9</sup> Described as the mainstream method in e.g. Bernitz, U, *Finna rätt: Juristens källmaterial och arbetsmetoder*, Tionde upplagan, Norstedts juridik, Stockholm, 2008, p. 236 – 237.

<sup>10</sup> *Ibid.*

<sup>11</sup> In Article 38 of the Statute of the International Court of Justice, adopted at San Francisco on 26 June 1945, the legal sources that the Court may use are listed. These sources are international conventions, international custom and the general principles of law recognized by civilized nations. This provision is considered a codification of international customary law of what constitutes the sources of international law.

<sup>12</sup> Bernitz, pp. 61–64.

Foreign law can be a resource for one who seeks arguments and possible solutions to legal problems.<sup>13</sup> Therefore, to bring new aspects to the legal issue and to find alternative ways of looking at the problems connected to the right to reindeer herding, a comparison with the legal situation in Norway will be made. Norway is the chosen comparison object as it shares the same legal tradition as Sweden and has some common characteristics.<sup>14</sup> In addition, similar legal issues are dealt with in Norway in relation to its Sami population. In comparative law, a comparison of function is preferable before a comparison of institution, as experience has shown that the same institutions can have different legal functions in different legal systems.<sup>15</sup> Focus will therefore be on similarities and differences of function between the two systems and not on institutions. In the comparative part, Norwegian legislation, case law, legal commentaries and doctrine will be the material used and examined.

A consequence of the comparative legal method is that the material used will be in different languages, in this case Swedish, Norwegian and English. As a rule, the official translation of the instrument will be used throughout this thesis. When no official translation is available, this will be marked in a footnote saying *Author's translation*. Naturally, author's translation will always be the case with doctrine and preparatory work in Swedish and Norwegian.

## 1.4 Disposition

The disposition will be as follows - the starting point will be the international protection of indigenous peoples' right to traditional occupations, going through international declarations and conventions touching upon this subject. The right to livelihoods will then be described from the point of view of the European legal system; the European Council and the European Union meaning European Community Law. Instruments on the rights of minorities and indigenous peoples in Europe will be in focus here. Thereafter, the right to reindeer herding under Swedish law will be described together with how this right is restricted and balanced against other kinds of land use in Sápmi. The comparison with Norway and Norwegian national legislation will then be presented, going through the legislation in a similar manner as made with the Swedish legislation. Then, an analysis will be made of how Sweden fulfils its international obligations along with what possible changes and improvements that can be made. Finally, the conclusions will be presented together with suggestions of future research.

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<sup>13</sup> Bernitz, p. 26.

<sup>14</sup> In order for a comparison to be meaningful, the latter is a requirement, see e.g. Bogdan, M., *Komparativ rättskunskap*, Norstedts juridik, Stockholm, 2003, p. 57.

<sup>15</sup> Bernitz, p. 237.

## 2 The protection of traditional occupations under the UN system

### 2.1 Declarations

International declarations are not legally binding. There are no concrete instruments to make them effective and failure to comply with their provisions cannot result in any punishment. However, declarations can create and express an international legal consciousness and they can also bring attention to specific legal issues. The preamble of a declaration can serve as an evidence of a legal ideal. Furthermore, a provision in a declaration can be binding for a state, in the same way as with a treaty, if it constitutes codified customary law or expresses a jus cogens rule. Based on this, it is important to begin by describing how the right to traditional occupations for indigenous peoples and minorities are expressed in international human rights declarations.

#### 2.1.1 The Universal Declaration of Human Rights

According to Article 23 of the Universal Declaration of Human Rights (UDHR)<sup>16</sup>, everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. This provision is both a prohibition of forced labour and a guarantee for everyone not to be subjectively deprived of one's freely chosen occupation and to be able to choose employment without interference from state authorities. There are no limitations in this provision and it shall therefore be applied likewise on employment and on traditional informal occupations and livelihoods.

It is said in Article 17 of the UDHR that, everyone has the right to own property alone as well as in association with others and no one shall be arbitrarily deprived of his property. This right is not an absolute right as not all infringements are prohibited, but only arbitrary imposed. Taken together with the provisions in Articles 2 and 7 of the UDHR, the Article further can be understood to provide that neither discrimination nor any distinction shall be made on the basis of property ownership, the lack of such ownership or in the conditions of such ownership. The wording *everyone* and *no one* show that these are universal rights which apply equally to all human beings.

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<sup>16</sup> Adopted and proclaimed by General Assembly resolution 217A (III) of 10 December 1948.

## 2.1.2 Declaration on the Rights of Indigenous Peoples

The Declaration on the Rights of Indigenous Peoples,<sup>17</sup> aims to promote and protect the rights of indigenous peoples. The adoption was motivated as another step forward for the recognition of their rights and freedoms and in the development of actions taken in that field.<sup>18</sup> The Declaration is unique in its nature as it is the only UN declaration drafted with the right-holders themselves involved in the process. Although not legally binding as a treaty, the Declaration has an important position in the UN system. The Economic and Social Council's (ECOSOC) Permanent Forum on Indigenous Issues has the Declaration as its most important point of reference in identifying indigenous issues and is one of the principal mechanisms promoting its implementation.<sup>19</sup>

This Declaration consists of provisions dealing exclusively with the right to traditional occupations for indigenous peoples and other related rights such as cultural rights and these peoples' control over natural resources.

Article 12 declares that indigenous peoples have the right to manifest, practice and develop and teach their spiritual and religious traditions, customs and ceremonies. Furthermore, it says that indigenous peoples have the right to maintain, protect and have access in privacy to their religious and cultural sites.

Article 15 declares that indigenous peoples have the right to the dignity and diversity of their cultures, traditions and aspirations which shall be appropriately reflected in education and public information. In Subsection 2 of the same Article it says that states shall take effective measures, in consultation and cooperation with the peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Regarding land use, Article 26 declares that indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Furthermore, it says that they have the right to own, use, develop and control these areas and resources by reason of traditional control. In Subsection 3 of the Article it is stated that States shall give legal recognition and protection to these areas and resources with due respect to the customs of the peoples concerned.

Article 29 expresses environmental and health concerns. It says that indigenous peoples have the right to conservation and protection of the environment and the productive capacity of their lands, territories and resources and that states shall, due to this, establish and implement assistance programs without discrimination.

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<sup>17</sup> Adopted by the General Assembly on September 13, 2007.

<sup>18</sup> See the Preamble.

<sup>19</sup> In 2005, the Permanent Forum replaced the so-called Working Group on Indigenous Peoples. See Anaya, S. James, *International Human Rights and Indigenous Peoples*, Aspen Publishers, 2009, p. 105.

According to Article 32, indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources. States shall consult and cooperate in good faith with those concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources. This right is particularly important in connection with the development, utilization or exploitation of minerals, water or other resources. In Subsection 2 of the same Article, it says that states shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

### 2.1.3 The ILO Declaration

Elimination of discrimination in respect of employment and occupation is one of the fundamental principles of the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work.<sup>20</sup> These fundamental principles manifested in the ILO Declaration are so-called core labour rights which shall be respected by all member states even though they may not have signed and ratified specific conventions dealing with the subject.

Although not a legally binding instrument, the world wide adoption and implementation of the ILO Declaration indicates that the formulation of the core labour right within it can reflect a universal consensus and obligations *erga omnes*.<sup>21</sup> This can be demonstrated with the fact that the core labour standards, as defined by the ILO, are explicitly referred to in a number of international instruments and a developed understanding of these issues as labour *rights*.<sup>22</sup>

The prohibition of discrimination obliges states to remove barriers and ensure equal ability to own and use resources, such as land, and to secure conditions for setting up and running enterprises of all types and sizes. For peasants and owners of small or family enterprises, especially ethnic groups, equal access to land, including by heritage, is key.<sup>23</sup> The prohibition of discrimination in respect of employment and occupation is codified in Convention No. 111<sup>24</sup>, which will be further discussed below in Section 2.2.4.2.

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<sup>20</sup> Adopted in 1998. From now on referred to as the ILO Declaration. The other three fundamental principles and rights at work are the freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced and compulsory labour and finally, the effective abolition of child labour.

<sup>21</sup> Kaufmann, C, *Globalisation and Labour Rights*, Studies in International Trade Law Volume 5, Hart Publishing, Portland, 2007, p. 297.

<sup>22</sup> Kaufmann, p. 70.

<sup>23</sup> *The four fundamental principles and rights at work*. Fact sheet from the ILO homepage, <http://www.ilo.org/declaration/principles/eliminationofdiscrimination/lang--en/index.htm> (2010-05-14).

<sup>24</sup> Convention No. 111, concerning Discrimination in Respect of Employment and Occupation, adopted in 1958.

## 2.2 Conventions

### 2.2.1 The International Covenant on Civil and Political Rights

#### 2.2.1.1 Article 1 – Right to self-determination

Article 1 of the International Covenant on Civil and Political Rights (ICCPR)<sup>25</sup> says that, all peoples have the right to self-determination and by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development. This is a collective right as the text refers to *all peoples*. It is however unclear, due to different ways of interpretation, whether indigenous peoples are included or not under this provision. One possible interpretation approach when it comes to the right to self-determination is that an indigenous people with their own state would cease to be indigenous and in that sense a group cannot be indigenous and a people at the same time.<sup>26</sup> The intended purpose with indigenous status is to give the group a chance to survive as an entity with a unique culture, but the effect is that the group is defined and exist as a non-dominant, state-less population.<sup>27</sup> The indigenesness itself excludes these peoples from self-determination in their own state.

On the other hand, the term self-determination does not necessarily include a national state but presumes that peoples shall freely determine and pursue their economic, social and cultural development, following the wording in Article 1. The Human Rights Committee, which is the interpreting organ supervising the Covenant, often invokes Article 1 when addressing indigenous issues.<sup>28</sup> In the eyes of the Committee, Article 1 and Article 27 are closely linked and the right to self-determination is connected to minorities and indigenous peoples' rights to enjoyment of their culture.

States parties often oppose this latter approach and are reluctant to recognize their indigenous population as *peoples* because they are afraid of secession. The concept of self-determination is problematic when it stands against state sovereignty. Nevertheless, indigenous peoples, along with all other peoples have a right to self-determination under this Covenant. The right of indigenous peoples to self-determination involves, besides the right for all peoples to self-determination, other elements of self-determination such as non-discrimination, cultural integrity, lands and natural resources and self-government.<sup>29</sup> This interpretation of the right to self-determination

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<sup>25</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966.

<sup>26</sup> Ekenberg, S, *The power of recognition – The limitation of Indigenous Peoples*, Luleå University of Technology: 2000:14, p. 146.

<sup>27</sup> Ekenberg, p. 146.

<sup>28</sup> Anaya, p. 189.

<sup>29</sup> See e.g. Anaya, S. James, *Indigenous Peoples in International Law*, New York: Oxford University Press, 1996, Chapter 4.



represents the interdependence and indivisibility of various human rights provided in different international human rights instruments.<sup>30</sup>

### **2.2.1.2 Articles 2 and 26 – Non-discrimination**

Article 2 of the ICCPR obligates each State party to respect and ensure, to all persons within its territory and subject to its jurisdiction, the rights recognized in the Covenant without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status. Article 26 of the ICCPR prohibits any discrimination, and provides that all persons are equal before the law and are entitled to equal protection of the law and guaranteed equal and effective protection against discrimination. This prohibition of discrimination mentions the same grounds as those provided in Article 2.

The Human Rights Committee has noted that while Article 2 limits the scope of the rights to be protected against discrimination to those in the Covenant, Article 26 does not give such limitations.<sup>31</sup> Article 26 is therefore, in the view of the Committee, an autonomous right, which prohibits discrimination in law or in any field regulated and protected by public authorities. This means that legislation adopted by a State party must comply with the requirement of Article 26 and that its content is not discriminatory.

### **2.2.1.3 Article 27 – Minorities protection**

This provision is of special importance for minorities and hence, also important for some indigenous groups and peoples which are minorities in their respective countries. According to Article 27 of the ICCPR, persons belonging to a State's ethnic minority shall not be denied the right, in community with the other members of their group, to enjoy their own culture. The Human Rights Committee has stated that, regarding reservations to the Covenant, a state may not deny to minorities the right to enjoy their own culture, profess their own religion or use their own language, as this right represents customary international law.<sup>32</sup> Hence, in the view of the Committee, the cultural minority protection in Article 27 is a rule that a ratifying state cannot exclude through reservation because the state would then violate international legal standards. As States must adhere to these standards without derogations, the rule in Article 27 may also constitute a jus cogens rule.

Furthermore, the Committee has noted that cultures manifest themselves in many and different forms and to enjoy a particular culture may consist in a way of life closely associated with territory and use of its resources.<sup>33</sup> This is particularly true of members of indigenous communities

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<sup>30</sup> Scheinin, M, *The right to enjoy a distinct culture: Indigenous and competing uses of land*, Institute for Human Rights, Åbo Akademi University, 2000, p. 162.

<sup>31</sup> Office of the High Commissioner for Human Rights, CCPR General Comment No. 18: Non-discrimination, 1989-11-10, thirty-seventh session, 1989, § 12.

<sup>32</sup> ICCPR/C/21/Rev.1/Add.6 (1994), General Comment 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, § 8.

<sup>33</sup> CCPR/C/21/Rev.1/Add.5 (1994) General Comment 23: The Rights of Minorities (Art.27), § 3.2.

constituting a minority. According to the Committee, Article 27 protects lifestyles connected to land and the use of natural resources, especially when it comes to indigenous peoples and under Article 27, traditional livelihood is part of the minority culture. The right to enjoy a minority culture may include traditional activities as fishing or hunting or the right to live in reserves protected by law.<sup>34</sup> According to the Committee, the obligation of the State Parties is to ensure the survival and continued development of the cultural identity of the minority concerned and to ensure that the right is fully protected by the State.<sup>35</sup> If the traditional occupation of a national minority is extinguished due to intrusion by the State, there is a clear violation of Article 27. Limitations of the right protected in Article 27 can also amount to a violation, as the following cases will illustrate.

The principles laid down by the Committee in these cases can be summarized in a combined test based on consultation and economic sustainability.<sup>36</sup> These means that the affected party must be consulted concerning the use of land and that the culture of the minority community would not lose its economic capacity.

In *Lubicon Lake Band v. Canada* the Committee established that historical inequities and recent development could threaten the way of life and culture for a minority and hence constitute a violation of Article 27.<sup>37</sup> Hence, when measuring a number of interferences the Committee put emphasis on the cumulative effect for the minority group. The case concerned exploitation of underground oil and gas resources. The Committee found that Canada, by allowing, among other things, private companies to carry out activities in the areas of resident for the Lubicon Lake Band tribe, had violated the minority protection in Article 27. The Committee has also expressed, in another case, that activities on a larger scale and significantly expanded by companies to which exploitation permits have been given may violate Article 27 and State Parties are under a duty to have this in mind when extending existing contracts or granting new ones.<sup>38</sup>

In *Sandra Lovelace v. Canada*, the author of the communication was born and registered indigenous but had lost her status after marrying a non-indigenous person and was prohibited to live on a reserve. The Committee was of the view that the denial of the legal right to reside on a reserve, and the legislation which made her lose her indigenous status, violates Article 27 of the ICCPR and the right for persons belonging to minorities to enjoy their own culture in community with other members of their group.<sup>39</sup>

The situation was similar in *Kitok v. Sweden*. The claimant in that case, a Sami, alleged that he was denied his inherent right to reindeer

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<sup>34</sup>CCPR/C/21/Rev.1/Add.5 (1994) General Comment 23: The Rights of Minorities (Art.27), § 7.

<sup>35</sup> Ibid, § 9.

<sup>36</sup> Scheinin, p. 168.

<sup>37</sup> Views of the Human Rights Committee, March 26, 1990, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990), § 33.

<sup>38</sup> *I Länsman and others v. Finland*, Communication No. 511/1992, Human Rights Committee Final, CCPR/C/51/1, § 9.

<sup>39</sup> Views of the Human Rights Committee, July 30, 1981, Communication No. 24/1977, U.N. Doc. CCPR/C/OP/1 at 83 (1984), § 19.

breeding because of loss of membership in a Sami village through the operation of Swedish Law.<sup>40</sup> The Committee observed that the regulation of an economic activity is normally a matter for the State alone, however, where the activity is an essential element in the culture of an ethnic community, its application to an individual may fall under Article 27.<sup>41</sup> His claim under Article 27 was admissible since the author had made a reasonable effort to substantiate his allegations that he was a victim of a violation of his right to enjoy the same rights enjoyed by other members of the Sami community. In this case, the Committee established the link between culture and traditional or otherwise typical means of livelihood.<sup>42</sup>

It is not only the notion of culture, as understood by the Committee, which creates this link to a particular way of life and the use of natural resources in specific communities. The right to self-determination, right to participation and the right to protection of property are also relevant and related to the enjoyment of a distinct culture and hence, the right to traditional occupation. This is called the interdependence and indivisibility of human rights.<sup>43</sup>

Article 27 consists of no limitations. Its purpose is to achieve real equality and set down a privileged treatment of minorities, that is to say, provide members of minorities with more rights than the rest of the population.<sup>44</sup> The negative formulation of the right indicates that the enjoyment of the right can require positive legal protection measures and as the provision contains elements of de facto equality and a positive protection against discrimination it can be seen as going further than the prohibition of discrimination in Article 26.<sup>45</sup>

## **2.2.2 The International Covenant on Economic, Social and Cultural Rights**

### **2.2.2.1 Article 6 – Right to work**

Articles 1 and 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>46</sup> have two sister provisions with the ICCPR. Their content is the same. However, the ICESCR has a unique provision regarding the fundamental right to work. The Covenant deals more comprehensively than any other international instrument with this right. The right to work is considered essential for the realization of other human rights and is inherent with a life in dignity. Furthermore, the right to work contributes to the endurance of the individual and his or her family and, to

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<sup>40</sup> Views of the Human Rights Committee, July 27, 1988, Communication No. 197/1985, U.N. Doc. A/43/40, §§ 221-41.

<sup>41</sup> *Kitok v. Sweden*, § 9.2.

<sup>42</sup> Scheinin, p. 165.

<sup>43</sup> *Ibid.*, p. 159.

<sup>44</sup> Nowak, M, U.N. *Covenant on Civil and Political Rights: CCPR Commentary*, 2<sup>nd</sup> revised edition, N.P. Engel, Publisher, 2005, p. 658.

<sup>45</sup> *Ibid.*

<sup>46</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966.

the extent work is freely chosen or accepted, to his or her development, recognition in the community and social and economic inclusion.<sup>47</sup>

The right to work, as expressed in Article 6 of the ICESCR, includes the right for everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts. This right must be recognized and appropriately safeguarded by the States parties to the Covenant. Steps to achieve the full realization of the right include e.g. policies to achieve steady economic, social and cultural development.<sup>48</sup> The right to work obliges states not to deprive individuals of work unfairly and to refrain from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized groups e.g. members of minorities.<sup>49</sup>

## **2.2.3 The Convention on the Elimination of Racial Discrimination**

### **2.2.3.1 Definition of racial discrimination**

Racial discrimination is defined in Article 1.1. of the Convention on the Elimination of all Forms of Racial Discrimination (CERD).<sup>50</sup> It means any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in public life.

The Committee on the Elimination of Racial Discrimination has noted that discrimination against indigenous peoples falls under the scope of the Convention.<sup>51</sup> This follows from the definition in Article 1. Furthermore, the Committee has affirmed that the situation of indigenous peoples is a matter of close attention and concern for its practice, and that all appropriate means must be taken to combat discrimination against indigenous peoples.<sup>52</sup> The Committee has called upon the parties to the Covenant to recognize and protect the right of indigenous peoples to own, develop, control and use their communal lands, territories and resources.<sup>53</sup>

The CERD has, like the ICCPR, a land use dimension. In comparison, the CERD applies to indigenous peoples as well as other minorities. Consequently, the rights of indigenous peoples are expressed to be of

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<sup>47</sup> Committee on Economic, Social and Cultural Rights (Thirty-fifth session) General Comment No. 18, adopted on 24 November 2005, The right to work. Article 6 of the ICESCR, E/C.12/GC/18, 6 February 2006, § 2.

<sup>48</sup> See Article 6.2.

<sup>49</sup> Committee on Economic, Social and Cultural Rights (Thirty-fifth session) General Comment No. 18, adopted on 24 November 2005, The right to work. Article 6 of the ICESCR, E/C.12/GC/18, 6 February 2006, §§ 4 and 23.

<sup>50</sup> Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965.

<sup>51</sup> CERD General Recommendation XXIV (Fifty-fifth session 1999): Concerning Article 1 of the Convention, A/54/18 (1999) 103, § 1.

<sup>52</sup> CERD General Recommendation XXIII (Fifty-first session, 1997): Indigenous Peoples, A/52/18, Annex V, § 1.

<sup>53</sup> *Ibid*, § 5.

special concern to the Committee on the Elimination of Racial Discrimination.<sup>54</sup>

### **2.2.3.2 Full and equal enjoyment of the right to work**

According to Article 2(2), States Parties shall take, whenever necessary, special and concrete measures to ensure the adequate development and protection of certain groups or individuals belonging to them in order to guarantee to them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall never lead to the maintenance or unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 5(e)(i) states that, in compliance with the fundamental obligations laid down in Article 2, States Parties undertake to prohibit and eliminate racial discrimination especially in the enjoyment of economic, social and cultural rights and in particular the right to work.

The right to work is hence, not an absolute right but a guarantee of what kinds of conduct the state can take. The right provides that Member States must not only provide work but cannot arbitrarily deprive someone of one's work. In practice this means that the right to livelihood cannot be taken away without consultation, compensation or retraining.

## **2.2.4 The International Labour Organization Conventions**

The right to work, as follows by the Declarations and Conventions mentioned above, is clearly a human right. Many of these human rights instruments, when defining the right, have taken their starting point from the work of the ILO as employment and decent work is one of the ILO's priorities. The components of the right to work are the subject of a number of ILO Conventions and found in a number of ILO standards. Most international labour standards apply to all workers not just employees working under formal arrangements. In order to reduce poverty, create social justice and bring workers into the formal economy, which are some of the aims of the ILO's work, it has proved to be an effective strategy to extend the term workers to include the workforce active in the informal economy.<sup>55</sup> This means that home workers, migrant- and rural workers and indigenous and tribal peoples are also subjects of different measures required by international labour standards.

### **2.2.4.1 Convention No. 122**

In Article 1 of the Employment Policy Convention, from 1964, Convention No. 122, it says that all member states shall declare and pursue an active employment policy to promote full, productive and freely chosen employment. The aim of the policy should be to ensure that there is work

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<sup>54</sup> See e.g. Report of the Committee on the Elimination of Racial Discrimination, U.N. Doc. A/49/18, at 30 (1994) concerning the hunting rights applicable in Sápmi (Sami land).

<sup>55</sup> *Rules of the Game: A brief introduction to International Labour Standards*, International Labour Office, International Labour Organization, 2005, p. 10.

for all who are available for and seeking work, that such work is as productive as possible. Furthermore, the aim should be that there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in a job for which he is well suited.<sup>56</sup> This shall be irrespective of the worker's race, colour, sex, religion, political opinion, national extraction or social origin.

Furthermore, according to Article 2, each member shall, by such methods and to such extent as may be appropriate under national conditions decide on, and keep under review, within the framework of a co-ordinated economic and social policy, the measures to be adopted for attaining the objectives in Article 1. Members shall also take such steps as may be needed, including when appropriate the establishment of programmes, for the application of these measures.<sup>57</sup>

The Convention consists of a protection of the individual from being denied by a Member state the right to work in an occupation of his or her own choosing. The Committee on Economic, Social and Cultural Rights refers to this Convention in its General Comment No. 18 as an inspiration for the formulation of the right to work as expressed and recognized in Article 6 of the CESCR.<sup>58</sup>

#### **2.2.4.2 Convention No. 111**

Non-discrimination is a fundamental principle within the ILO system and, as mentioned above, a core labour right according to the ILO Declaration. The principle of non-discrimination is manifested by the ILO in two main conventions, No. 100, Equal Remuneration Convention from 1951, and in No. 111, the Employment and Occupation Convention from 1958. In the context of traditional livelihood, Convention No. 111 is of the most importance.

According to Article 1(1) of the Convention, discrimination includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment and occupation. Article 1(3) of the Convention provides that the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment. According to Article 2, each Member undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

#### **2.2.4.3 Conventions No. 107 and No. 169**

The Indigenous and Tribal Populations Convention from 1957, Convention No. 107, aimed at providing a framework for addressing the economic

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<sup>56</sup> Article 1 Section 2.

<sup>57</sup> Article 2(b).

<sup>58</sup> Committee on Economic, Social and Cultural Rights (Thirty-fifth session) General Comment No. 18, adopted on 24 November 2005, The right to work. Article 6 of the ICESCR, E/C.12/GC/18, 6 February 2006, § 4.

problems that indigenous and tribal populations faced in the Member states. A change of attitude towards indigenous peoples started criticisms of the Convention and its weaknesses became apparent. The Convention was e.g. based on the principle of assimilation and integration and this strategy was later claimed to be paternalistic and founded on the idea of cultural inferiority.<sup>59</sup> The assumption that integration into the larger society was the only future for these peoples was challenged during the 60's and 70's.<sup>60</sup> Because of this change of attitude, there was a new revised convention in 1989, The Indigenous and Tribal Peoples Convention No. 169. This Convention was, in contrast to its predecessor, drafted with the participation of the indigenous and tribal groups concerned.<sup>61</sup> It is the only legally binding international instrument on the subject of indigenous peoples. It reflects a totally different approach to indigenous policies from the former Convention, a human rights approach from the standpoint of multiculturalism.<sup>62</sup>

The Convention No. 169 provides guidance on what must be done by states to allow indigenous and tribal peoples, who are either outside or at the outskirts of the national society and economy, to survive in the face of other economic and social models. This is important as in many countries these groups are the very model of the informal economy.<sup>63</sup> The EU has helped to fund an ILO project to promote this Convention, which has carried out both studies and practical assistance to communities and countries.<sup>64</sup>

According to Article 2 of the Convention No. 169, indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. Article 4 provides that, special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned. According to Article 7, the peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use. Furthermore, the peoples shall have the right to exercise control, to the extent possible, over their own economic, social and cultural development. They shall also participate in the formulation,

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<sup>59</sup> Thornberry, P, *Indigenous Peoples and Human Rights*, New York, Manchester University Press, 2002, p. 338.

<sup>60</sup> *Indigenous & Tribal Peoples' Rights in Practice – A Guide to the ILO Convention No. 169*, International Labour Standard Department, 2009, p. 173.

<sup>61</sup> The Convention applies, in accordance with Article 1, to; *both tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws and regulations, and to peoples in independent countries who are regarded as indigenous on account of their descent from the population which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of the present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.*

<sup>62</sup> Rodgers, G, et al. (eds), *The International Labour Organization and the Quest for Social Justice, 1919-2009*. International Labour Organization, 2009, p. 93.

<sup>63</sup> Rodgers, p. 93

<sup>64</sup> *Ibid.* p. 98.

implementation and evaluation of plans and programmes for national and regional development that may affect them directly.<sup>65</sup>

Regarding land, it is stated in Article 14 that the rights to ownership and possession of the peoples concerned over the lands, which they traditionally occupy shall be recognised. The rights of the peoples concerned to the natural resources pertaining on their lands shall be specially safeguarded according to Article 15. The right to the natural resources includes the right to participate in the use, management and conservation of these resources.<sup>66</sup> Furthermore, if a State retains ownership of mineral or subsurface resources or rights, it shall consult these peoples in order to ascertain whether their interests would be prejudiced before permitting exploration or exploitation of such resources.<sup>67</sup> Article 15 also provides that the indigenous and tribal peoples shall participate in the benefits and shall receive compensation for any damages of such activities.

The Convention also regulates labour, vocational training, handicrafts and rural industries. Article 20 provides for the States to adopt special measures to ensure effective and equal protection regarding recruitment and conditions of employment of workers belonging to indigenous and tribal peoples. Article 21 provides that members of these peoples shall enjoy equal opportunity in respect of vocational training measures.

Most indigenous peoples have developed subsistence strategies adapted to the conditions of their traditional territories and they are sometimes identified by their traditional occupations.<sup>68</sup> Traditional occupations are explicitly touched upon in the Convention. Article 23 states that handicrafts, rural and community-based industries, and subsistence economy and traditional activities of these peoples shall be recognized as important factors in the maintenance of their cultures and in their economic self-reliance and development. According to the provision, examples of traditional activities are hunting, fishing, trapping and gathering. Shifting cultivation is also considered an example of such traditional activity.<sup>69</sup> With the participation of these peoples and whenever possible the State shall ensure that these activities are strengthened and promoted.<sup>70</sup> Upon the request of the peoples concerned, according to Article 23(2), appropriate technical and financial assistance shall be provided, wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

Finally, some matters not covered by the Convention No. 169 are touched upon in the Recommendation No. 104, Indigenous and Tribal Populations Recommendation from 1957. It e.g. addressed the actual conditions in which the populations concerned use the land and calls for the

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<sup>65</sup> Article 7(1).

<sup>66</sup> Article 15(1).

<sup>67</sup> Article 15(2).

<sup>68</sup> *Indigenous & Tribal Peoples' Rights in Practice – A Guide to the ILO Convention No. 169*, International Labour Standard Department, 2009, p. 154.

<sup>69</sup> *Ibid*, p. 154.

<sup>70</sup> Article 23(1).



adaptation of modern cooperative methods to the traditional forms of ownership.

# 3 Protection of traditional occupation under the European regional system

## 3.1 The European Council

The European Council is the creator of many legal instruments in the human rights sphere. In this context, two instruments are of most importance. Neither of them expresses specific rights for indigenous peoples but they are both human rights instruments. These are the European Convention on Human Rights (ECHR) and the Framework Convention for the Protection of National Minorities (FCNM).

### 3.1.1 The European Convention on Human Rights

One fundamental feature of a democratic society and of the rule of law is the right to a fair trial. In order to enjoy one's right, one must also be able to protect the right in court or else the right would lack all value. Article 6 of the ECHR provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

For Article 6 to apply there must be a right, secondly this right must exist under national law and thirdly this right must be of a civil nature.<sup>71</sup> Moreover, Article 6 § 1 requires that there must be some sort of a dispute regarding the civil rights or obligations. The right to a fair trial in Article 6.1 has been declared applicable in cases concerning Sami villages claims when these have been raised as an issue of civil rights.<sup>72</sup> In the case *S. v. Sweden* (Application No. 16226/90) it was established by the European Commission of Human Rights that the right to practice reindeer herding was a civil right under Article 6.<sup>73</sup>

Article 8 of the ECHR provides a right for everyone to respect for his private and family life, his home and his correspondence. There is no special protection for minorities in the ECHR but in relation to national minorities, the right to respect for private and family life in Article 8 provides a protection for the individual's traditional lifestyle. The Article has been dealt with in cases concerning the ways of life of indigenous peoples and in

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<sup>71</sup> Jacobs & White: *The European Convention on Human Rights*, Fourth Edition, Oxford University Press, 2006, p. 163.

<sup>72</sup> E.g. see the Commission's statement in No. 27033/95, *Konkama and others v. Sweden*, DR 77/78 and also *Muonio Saami Village v. Sweden*, Application No. 28222/95, European Court of Human Rights 15 February 2000.

<sup>73</sup> 2 September 1992. Unpublished.

*G. and E. v. Norway*<sup>74</sup>, the European Commission of Human Rights expressed the opinion that a minority group is, principally, entitled to claim the right to respect for the particular lifestyle it may lead as being private life, family life or home under Article 8.<sup>75</sup>

Article 8(2) allows for some interference by the public authorities in the Member States. The right to respect for private and family life is hence not an absolute right as it can be limited under certain prescribed conditions. The limitation of the right must be in accordance with the law, be considered as necessary in a democratic society and have a legitimate aim e.g. in the interest of public safety, the economic well being of the country or for the protection of the rights and freedoms of others. *In accordance with the law* means that it must be established that the interference with the right has some basis in national law, that that law is accessible and that, to a reasonable degree due to the circumstances, the effects is foreseeable.<sup>76</sup> The legitimate aims specified in the provision are exhaustive and it is considered relatively easy for a State to bring its action within one of these justifications.<sup>77</sup> The last condition, that the limitation must be *necessary in a democratic society* gives the States a certain margin of appreciation. The size of the margin is however determined by the judgments of the European Court of Human Rights (ECtHR) and depends also on the right in question or on the balancing of competing rights.<sup>78</sup>

Article 14 of the ECHR says that the enjoyment of the rights and freedoms set forth in the ECHR shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Any differentiation in treatment is a violation of Article 14 if the distinction has no reasonable or objective justification in relation to its aim and purpose and with regard to what normally prevails in a democratic society.<sup>79</sup> Furthermore, the objectives must be proportionate to the means employed. There must be a reasonable relationship between the means employed and the aim sought to be realized.<sup>80</sup>

### 3.1.2 Additional protocols

Article 14 is not an autonomous right and can only be used together with another right protected by the ECHR as it constitutes a right not to be discriminated against in the enjoyment of the rights guaranteed under the

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<sup>74</sup> Nos. 9278/81 and 9415/81, D.R. 35 (1983), p. 30-46. See also *Noack and others v Germany* (Application No. 46346/99) where the Court found no violation of Article 8 as the linguistic and religious features of the cultural minority was secured by the State.

<sup>75</sup> To the extent Article 27 of the ICCPR expresses a right that is protected under Article 8 of the ECHR, the right in question is current Swedish law since the ECHR as a whole is incorporated in Sweden.

<sup>76</sup> Jacobs & White, p. 223.

<sup>77</sup> *Ibid*, p. 226.

<sup>78</sup> *Ibid*, p. 233.

<sup>79</sup> See e.g. the *Belgian Linguistic Case*, Judgment of 23 July 1968.

<sup>80</sup> Judgment, Section I B, para. 10.

Convention. However, by enacting Protocol No. 12<sup>81</sup>, the Council of Europe has taken measures to expand the prohibition of discrimination. It is said in Article 1 of that Protocol that any right set forth by law shall be secured without discrimination and that no one shall be discriminated against by any public authority. The discrimination grounds are the same as in Article 14, but Article 1 of the Protocol has a wider scope as it includes cases where there is discrimination in relation to specific rights under national law, in the exercise of discretion, acts or omissions by and of a public authority.<sup>82</sup>

Article 1 of the First Protocol of the Convention<sup>83</sup> states a basic property right for every natural and legal person to peaceful enjoyment of possessions and no one shall be deprived of possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law. This right is not to weaken the right of a State to implement laws controlling the use of property in accordance with the general interest or to secure the payment of taxes.<sup>84</sup> As already mentioned, absolute rights can never be restricted and hence never be subjected to the State's margin of appreciation. The right to property is however an example of what is considered a national concern and there are therefore few cases where States have violated the right to protection of property. Intrusions are justified as long as a fair balance is struck between the individual right and the national concern. Compensation is an example of what is required in order to limit this right.

The European Commission on Human Rights has taken a broad view of what constitutes possession. In the *Konkama case* the Commission considered that the exclusive hunting and fishing rights claimed by the applicant Sami villages can be regarded as possessions within the meaning of the Protocol.<sup>85</sup> The Commission recognized in its decision that such specific indigenous rights fall within the ambit of the Protocol.<sup>86</sup> Furthermore, the Commission agreed that the applicant Sami villages could claim to be victims of the alleged violations in accordance with the wording of Article 35 of the ECHR on the ground that the rights could be exercised by an individual Sami only as a member of a Sami village. Article 1 of the First Protocol is potentially important for indigenous land claims but the applicable European standard for property rights probably gives less protection than the ones applied in most constitutional systems.<sup>87</sup>

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<sup>81</sup> Opened for signature on 4 November 2000 and entered into force on 1 April 2005. Sweden, among several member states, has not signed the protocol.

<sup>82</sup> Thornberry, P, *Indigenous Peoples and Human Rights*, New York, Manchester University Press, 2002, pp. 295–296.

<sup>83</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (ETS No. 155).

<sup>84</sup> Additional Protocol 1, Article 1, paragraph 2.

<sup>85</sup> *Konkama and others v. Sweden* (No. 27033/95), DR 77/78.

<sup>86</sup> Thornberry, p. 306.

<sup>87</sup> Scheinin, p. 173.

### **3.1.3 The Framework Convention for the Protection of National Minorities**

The Framework Convention for the Protection of National Minorities<sup>88</sup> is a binding treaty for the Member States of the Council of Europe and non-member states which have signed the Convention. The terminology does not prevent it from also including indigenous peoples.<sup>89</sup>

Article 4(2) provides that the Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those who belong to the majority. The Parties shall take due account of the specific conditions of the persons belonging to national minorities. The purpose of this article is to ensure the principles of equality and non-discrimination with adequate measures in conformity with the proportionality principle.<sup>90</sup>

According to Article 5, the Parties to the Convention undertake to promote the conditions necessary for persons belonging to minorities to maintain and develop their culture and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage. Traditional practices remain subject to limitations arising from the requirements of public order.<sup>91</sup>

Article 19 provides that the Parties undertake to respect and implement the principles enshrined in the present framework Convention making, when necessary, only those limitations, restrictions or derogations which are provided for in international legal instruments, in particular the ECHR.

## **3.2 The European Union**

### **3.2.1 Directive 2000/43/EC on Anti-discrimination**

The European Community law, the EC-law, is of great importance when it comes to fighting discrimination in the labour market. It aims to support and complement the Member States' activities in issues regarding non-discrimination. The Treaty of the European Union provides a general prohibition on discrimination on ground of nationality in Article 12. Under Article 13, the EU has the right to take appropriate measures to combat discrimination on ground of sex, race, ethnicity, religion or belief, disability, age or sexual orientation. The Article has resulted in the Council Directive 2000/43/EC on anti-discrimination, which implements the principle of equal treatment between persons irrespective of racial or ethnic origin. Non-

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<sup>88</sup> Opened for signature by the Committee of Ministers of the Council of Europe on 1 February 1995 and entered into force on 1 February 1998.

<sup>89</sup> Thornberry, p. 307.

<sup>90</sup> Explanatory Report, H(1995)010, p. 16.

<sup>91</sup> Explanatory Report, H(1995)010, p. 17.

compliance or lack of implementation of the Directive by the Member State can be invoked in a lawsuit against the state, municipal or county.

### 3.2.2 The EU Charter and the ECJ

The Charter of fundamental rights of the European Union (2000/C 364/01) applies for the EU institutions and for the Members States when they apply EC-law. The Charter Article 15 provides that everyone has the right to engage in work and to pursue a freely chosen or accepted occupation and Article 16 recognizes the freedom to conduct a business in accordance with Community law and national law and practices. Furthermore, Article 17 provides that everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

Article 21 specifies that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

The Charter creates no new rights or obligations for the Member States but reinforces the past. With the Treaty of Lisbon<sup>92</sup> the Charter became legally binding for the member states. Furthermore, the Charter had already been taken into account by the Court of Justice of the European Union (ECJ) in its judicial function.<sup>93</sup> Decisions by the ECJ shall be considered a source of law in the interpretation of national law by the Member States.

Finally, the EC Treaty<sup>94</sup> shall be mentioned in this context as it puts emphasis on the right of individuals and equality of the citizens in the EU.

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<sup>92</sup> Signed by the EU member states on 13 December 2007 and entered into force on 1 December 2009.

<sup>93</sup> See e.g. Case C-540/03 - *European Parliament v. Council of the European Union*.

<sup>94</sup> Commonly known as the Treaty of Amsterdam, amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts. Signed on 2 October 1997 and entered into force on 1 May 1999.

# 4 The right to reindeer herding in Sweden

## 4.1 The definition of the right

The Reindeer Husbandry Act (*Rennäringslagen*, 1971:437)<sup>95</sup> exhaustively regulates the Sami right to reindeer herding.<sup>96</sup> In The Act Section 1, the right to reindeer herding (*renskötselrätten*) is defined as a right for persons of Sami origin to use land and water for one's own maintenance and that of one's reindeer. Beyond the use of land and water, the right also includes the right to construction of facilities and smaller buildings needed for the reindeer husbandry within the village grazing area and the right to hunt and fish. The Act, Sections 15 – 25 gives a detailed description of what is the content of the right to reindeer herding. Although not explicitly mentioned in the Act, the right to reindeer herding also includes the right for the Sami to take wood, timber, hay and gravel for subsistence and use of the pasture areas for grazing other than reindeer grazing.<sup>97</sup>

To the extent the Act regulates what rights and obligations the Sami have against landowners and other individuals the legislation is civil law legislation and the right to reindeer herding is a civil right. The right is not dependent on contract or agreement, but based on prescription for time immemorial.<sup>98</sup> As the right, beyond herding, includes different husbandry connected activities and measures necessary for the subsistence of the Sami, the right is a utility right, a usufruct, and a special right to real estate (*bruksrätt*). The right to reindeer herding differs from other utility rights when it comes to the relationship between the Sami and the landowners. In practice, beyond not being contractual based, reindeer herding use of land is carried out under special conditions and is not very intense. Furthermore, it is carried out on a large area where many areas for a long time are not affected at all by the practice. In comparison to other related rules of the civil law system, this right to real estate is therefore very special.<sup>99</sup>

The right has unlimited duration and carries on as long as there is a right holder claiming and practicing the right.<sup>100</sup> This means that the right is independent of the Act, it was not constructed by the legislation but existed long before it. The right to reindeer herding will therefore continue to exist even if the Act is repealed or replaced in the future.<sup>101</sup> As the right is a permanent use right which cannot be terminated, it is comparable to an

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<sup>95</sup> From now on referred to as the Act. As no official translation of this document exists, all references to it will be the author's translation of the original document.

<sup>96</sup> This was established by the Swedish Supreme Court (*Högsta Domstolen*) in the so-called Taxed Mountain Case (NJA 1981 s. 1- *Skattefjällsmålet*), p. 245. Author's translation.

<sup>97</sup> The Taxed Mountain Case, p. 246-247.

<sup>98</sup> Bengtsson, B, *Samerätt: En översikt*, Norstedts Juridik, Stockholm, 2004, p. 48.

<sup>99</sup> Bengtsson, B, *21 uppsatser*, Juristförlaget, Lund, 2003, p. 234.

<sup>100</sup> The Taxed Mountain Case, p. 177.

<sup>101</sup> Bengtsson, 2004, p. 55.

easement on real estate (*servitut*).<sup>102</sup> This similarity is especially clear when it comes to winter pastures as will be presented later in this thesis.

### 4.1.1 Three features

It follows by the Act Section 1 that, the right to reindeer herding belongs exclusively to the Sami population, is founded on immemorial custom and may only be exercised by the member of a Sami village. Evidently, the provision in Section 1 consists of three conditions. The first condition deals with the exclusiveness of the right; only the Sami people can carry out reindeer husbandry in Sweden. The second condition concerns immemorial custom. In this context, immemorial custom means that the historical use of land in Sápmi has given rise to a special utility right to real estate for the Sami. Immemorial custom will be discussed in detail in Section 4.3.1.1. The third condition, that only a Sami who is a member of a Sami village (*sameby*) can exercise the right to reindeer herding, will be presented in Section 4.2. Below follows a presentation of the exclusiveness of the right to reindeer herding, as attributed solely to the Sami.

### 4.1.2 An exclusive right

In the Instrument of Government (*Regeringsformen*, 1974:152)<sup>103</sup> Chapter 2 Section 20 there is a provision dealing with under what circumstances restrictions may be introduced affecting the right to trade or practice a profession. The Section states that this can only happen in order to protect pressing public interests and never solely in order to further the economic interests of a particular person or enterprise. Reindeer management or husbandry, meaning the practice of reindeer husbandry, is regarded as an industry and hence, falls under the protection in this provision. Section 20 is a prohibition of business and industry monopoly. However, in Subsection 2, there is an exemption of this rule, saying that the Samis' right to reindeer husbandry is regulated in law. That law is the Reindeer Husbandry Act, according to which only the Sami can carry out reindeer husbandry in Sweden. This exemption from the prohibition of monopoly is a reminder of the unique nature of the reindeer herding, as a right exclusively attributed to the indigenous population. But, the right to reindeer herding is still considered a business right.<sup>104</sup> The business monopoly is motivated by the fact that the Sami is an ethnic minority and an indigenous people in their own land and have a special position, both towards the majority population and against other minority groups. The Government have expressed that there are reasons to apply other measures for them than for the other minorities in the country.<sup>105</sup>

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<sup>102</sup> Allard, Christina, *Two sides of the coin: Rights and Duties*, Luleå University of Technology, Doctoral Thesis 2006:32, p. 327.

<sup>103</sup> The Instrument of Government is part of the Swedish Constitution along with the Act of Succession, the Freedom of Press Act and the Fundamental Law on Freedom of Expression.

<sup>104</sup> Bengtsson, 2004, p. 22.

<sup>105</sup> Governmental Bill (Prop. 1976/77:80 – *Om insatser för samerna*), p. 16.



The Instrument of Government, Chapter 1 Section 2 Subsection 5 says that, opportunities should be promoted for ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own. According to the preparatory work of the Instrument, the word *culture* shall be interpreted broadly and includes the Samis' reindeer herding, which is a central part of the traditional Sami way of life.<sup>106</sup> Accordingly, reindeer herding is a cultural expression protected under the Swedish Constitution. However, Chapter 1 of the Instrument of Government is a charter of goals and does not consist of legally binding rules.<sup>107</sup> Instead, the regulations aim to give directions for the activities of the public authorities.<sup>108</sup>

There is a very modest legal tradition in Sweden to refer to the Instrument of Government in legal argumentation. However, the freedoms and rights expressed in Chapter 2, e.g. the business right in Section 20, are legally binding rules and may be invoked by an individual in court.<sup>109</sup> Normally, the rights protection in Chapter 2 applies against the public, but the prohibition of discrimination in Section 15 and the property right in Section 18 also concerns relationships between individuals and consequently, applies on civil rules.<sup>110</sup>

As mentioned before, the right to reindeer herding is a right of use and a special right to real property. Therefore, it falls under the constitutional property protection in Chapter 2 Section 18 of the Instrument of Government and has the same constitutional protection as e.g. ownership. Chapter 2 Section 18 says that no citizen may be compelled by expropriation or restriction to surrender property to the public institutions or to a private subject. By Subsection 2 it follows that, compensation shall be granted to a person whose use of land or buildings is restricted by the public institutions in such a manner that ongoing land use in the affected part of the property is substantially impaired. This is also the case of injury results, significant in relation to the value of that part of the property. The right to reindeer herding can therefore not be restricted by the public without compensation being made.

Furthermore, Chapter 2 Section 18 provides that restrictions by public institutions on the use of land and buildings are only tolerable when necessary to satisfy pressing public interest. There is no definition within the rule of what constitutes a pressing interest. What it means must be determined on a case-by-case basis. The restriction must further be in accordance with what is acceptable in a democratic society and may never go beyond what is necessary, having regard to the purpose of what has led to the restriction, in accordance with the proportional principle.<sup>111</sup> An interference can be justified e.g. when motivated by the interest of nature and environmental care or of national defence needs. Interference, in the wording of Section 18, does not only cover expropriation measures but also

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<sup>106</sup> Governmental Bill (Prop. 1975/76:209 – *Om ändring i regeringsformen*) p. 138.

<sup>107</sup> Governmental Bill (Prop. 1973:90 – *Grundlagspropositionen*) p. 194.

<sup>108</sup> Holmberg, E, Stjernquist, Nils, *Vår författning*, trettonde upplagan, Norstedts juridik, 2003, p. 58.

<sup>109</sup> *Ibid*, p. 58.

<sup>110</sup> *Ibid*, p. 70.

<sup>111</sup> *Ibid*, p. 67.

limitations on physical control over land and buildings hence the right to compensation in these latter situations of interference also receives constitutional protection.<sup>112</sup> The strength of the public interest is relevant to what can be considered as reasonable compensation for an expropriation procedure.<sup>113</sup>

### 4.1.3 Traditional occupations and Swedish labour law

As a rule, labour law belongs to the state's sovereignty and is designed by a number of national actors.<sup>114</sup> However, for Sweden this rule has countless exceptions as Sweden has entered into a number of international agreements, which oblige the state in various respects. Furthermore, the social organizations, the workers' and employers' organizations, are often included in bigger international organizations imposing obligations on them as well.<sup>115</sup> Examples of Sweden's commitments are the EC labour law, the human rights and fundamental freedoms in the ECHR and the ILO labour standards, which all were presented, in the previous chapter. Workers' rights embedded in both conventions and recommendations inevitably influence Swedish labour law.

Inside the scope of international labour law, the term worker has a broad meaning, as was demonstrated in the chapter 2 and 3. According to the ILO, it includes workers in the informal sector as well as those practising the traditional occupations of indigenous peoples.<sup>116</sup> Sweden is a member state of the ILO and bound by its fundamental principles and the requirements laid down in conventions that it has ratified. Sweden must, as a member state of the ILO and within the meaning of the ILO conventions, recognize the right of workers.<sup>117</sup> Reindeer herders cannot be excluded from the definition of workers as reindeer herding in a recognized occupation. Sweden must as a consequence promote the entitlement to rights for the reindeer herders as for other workers, even though the Sami are not employees, neither in the public nor private sector, but self-employed.

Beyond being workers, the Sami are an indigenous people and a national and ethnic minority in Sweden. The traditional occupation reindeer herding is an indigenous right. Because of this, it differs very much from comparable occupations such as e.g. agriculture. Beyond the Act, the traditional occupation of the Sami is also protected by the Instrument of Government - as a cultural expression in Chapter 2 Section 5, as a business right in Chapter 2 Section 18 and as a property right in Chapter 2 Section 20. It also receives special regulation in Swedish sectoral and environmental

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<sup>112</sup> Bonde, F, "Vad är rättvis ersättning när mark tas i anspråk med tvång?" In: Åhman, K, red., *Åganderätten: Dess omfattning och begränsningar*, Iustus Förlag, Uppsala, 2009, p. 41.

<sup>113</sup> Bonde, p. 42.

<sup>114</sup> Seth, T, *Svensk Internationell Arbetsrätt*, Studentlitteratur, Lund, 2009, p. 17

<sup>115</sup> Ibid.

<sup>116</sup> See e.g. Convention Nos. 111, 122 and 169.

<sup>117</sup> See classification 61 and 66 -

<http://www.ilo.org/public/english/bureau/stat/isco/isco88/61.htm>.

legislation as certain areas in Sweden are considered to be of special importance for the reindeer herding and are of so-called national interest.<sup>118</sup>

## 4.2 The holder of the right

### 4.2.1 The individual Sami and the definition of Sami origin

Neither the Act nor any other legislation defines who is Sami and thus who holds the right to reindeer herding. Still, there is a right in Section 1 of the Act of Sami origin to use land and water and all other rights connected to the reindeer herding.

According to a governmental proposal concerning Sami and Sami culture, if one falls within the definition of Sami under the Sami Parliament Act (*Sametingslagen*, 1992:1433), that person shall be considered Sami for the application of the Reindeer Husbandry Act as well.<sup>119</sup> The Sami Parliament Act regulates who is eligible to vote in elections to the Sami Parliament and includes all those who regard themselves as Sami and use or have used, Sami as a language in the home or have parents, or grandparents, who use or have used the Sami language.<sup>120</sup> Furthermore, those who regard themselves as Sami and have a parent who is or was listed in the electoral rolls for the Sami Parliament is also considered Sami within the meaning of the Sami Parliament Act. Moreover, according to the proposal, what is necessary proof of Sami origin must be determined in court and should only be relevant in relation to the prospect of membership in a Sami village.<sup>121</sup>

In summary, for Sami origin, there is a requirement of self-identification along with a linguistic criterion that goes back two generations; or alternatively, a criterion of a right held by one's parents to vote for the Sami Parliament.

#### 4.2.1.1 Herders and non-herders

With the Reindeer Act of 1886, the Sami population was divided into two categories, herders and non-herders. This division had the effect that the Sami that did not herd lost their right to reindeer herding along with all other indigenous rights, including the immemorial right to hunt and fish.<sup>122</sup> The non-herders, who from now on lacked special indigenous rights, were theoretically equal to other Swedish citizens, meaning that they were to be perceived as Swedes and not as Sami by the authorities. The non-herders were deprived of their Sami identity and were left by the Swedish state as Sami emotionally, but not legally.<sup>123</sup>

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<sup>118</sup> This will be discussed further in Section 4.4, under the restriction of the right and how it is balanced against others' interests of land use by the Swedish courts.

<sup>119</sup> The Governmental Bill (Prop. 1992/93:32 – *Om samerna och samisk kultur*) p. 92.

<sup>120</sup> The Sami Parliament Act, Chapter 1 Section 2. Author's translation.

<sup>121</sup> Ibid.

<sup>122</sup> Ekenberg, pp. 43-44.

<sup>123</sup> Ekenberg, p. 50.

The division of the Sami into herders and non-herders was the beginning of a new approach towards the reindeer industry, with the Sami village as the base for Sami-political organization. The political content focused on the reindeer owners even though most Sami did not, and still do not, own any reindeer.<sup>124</sup>

Since 2008, after a decision by the Sami Parliament, all Sami can apply for membership in a Sami village, including those who are not practicing reindeer herding. Still, to have the right to take part in decision-making one has to own reindeer.

Membership in a Sami village is granted by the County Office (*länsstyrelsen*), due to the number of reindeer that is possible to keep inside the village area.<sup>125</sup> Not all Sami can be guaranteed membership in a Sami village. Even if the applicant is of Sami origin and his or her family has carried out herding for a long time, the prerequisite for membership is that a reasonable number of Sami in the future can get their livelihood out of reindeer herding. It would therefore be more correct to say that all Sami may apply for membership, but the chances for receiving it are limited and depends on the collective view, the number of animals possible to keep in the Sami village and on cultural survival.

## 4.2.2 The Sami village

Section 6 of the Act provides that for reindeer herding there are Sami villages. By this provision, it follows that the individual Sami can only exercise his or her right to reindeer herding, and all other rights attributed to this right, if he or she is a member of a Sami village. Of Sweden's approximately 20,000 Sami, 2,500 are actively involved in reindeer herding.<sup>126</sup> The majority of the Swedish Sami population have no other indigenous rights except the right to vote in the election to the Sami Parliament.<sup>127</sup> The right to reindeer herding must therefore be understood as a right given to all Sami but conditioned with a requirement of membership in a Sami village.

Within the Sami villages, there are a number of so-called reindeer herding corporations. It is only within these corporations that the right to reindeer herding can be realised and carried out. Thus, the Sami can only exercise the right to reindeer herding collectively, in herding groups.

According to Section 11 of the Act, a member of a Sami village is a Sami who participates in the reindeer husbandry inside the geographical area of the village, or alternatively, a Sami who used to participate and had reindeer herding as permanent occupation. It can also be the husband, wife or child of such a member.<sup>128</sup> A participant in husbandry is a member who

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<sup>124</sup> Elenius, L, *Nationalstat och minoritetspolitik: Samer och finskspråkiga minoriteter i ett jämförande nordiskt perspektiv*, Studentlitteratur, Luleå, 2006, p. 315.

<sup>125</sup> The Act, Section 15 Subsection 2.

<sup>126</sup> Estimations taken from the Sami Parliament home page <http://www.sametinget.se/1126> (2010-04-27).

<sup>127</sup> Under the condition that they fulfill the criteria in the Sami Parliament Act as mentioned above.

<sup>128</sup> Author's translation.

himself or through members of his family carries out husbandry with his own reindeer within the pasture area of the village.<sup>129</sup> All members of the Sami village are the owners of their own and/or their families' animals. The Sami village is consequently not a unit for collective ownership although the right itself is exercised collectively.

Historically, an individual Sami, had legal protection not only against outsiders but also against other Sami as the right to use the land for one's husbandry was divided among the Sami.<sup>130</sup> In 1886, with the Reindeer Act and the division between herders and non-herders, there was a collectivisation of the right and today, the usufruct is a collective right. Problems have emerged how to transform this to the civil law system.

The collective feature of the right to reindeer herding indicates that an individual Sami cannot be treated in law as a direct holder of the right. The declaration, that the right to reindeer herding belongs to all Sami lacks any civil law significance.<sup>131</sup> If the whole Sami population was considered to be the holder of the civil right this would not only be impractical in civil cases but would create a peculiar legal situation without any equivalent in Swedish civil law.

Since July 2006, the Sami Parliament (*Sametinget*) is the central authority and representative body for the Sami. Hence, the Sami Parliament may also be perceived as the representative of the Sami population, the collective.<sup>132</sup> From a business perspective, there are no barriers to considering the business part of the right as a collective right, belonging to the Sami population as a whole and managed by the Sami Parliament. In this latter case, that it is a business right belonging to the whole population, nothing speaks against a strict interpretation of Section 1 of the Act.

#### 4.2.2.1 Legal person

The legal status of the Sami village is according to the Act that it is a self-administrative economic association, a legal person, maintaining the husbandry for the economic benefits of its members. The Sami village has the main responsibility for the reindeer husbandry and should hold and promote the rights and interests of its members.<sup>133</sup> To become a legal person the Sami village needs a registration at the Sami Parliament.<sup>134</sup> Once it is a legal person, it may acquire rights, accept duties and represent its members in matters concerning the husbandry and other common interests of the members regarding reindeer herding.

The Sami village may not carry out other economic activities than reindeer husbandry. This does not however prevent reindeer owners and herders within the village to engage in such activities, although it must be in

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<sup>129</sup> The Act, Section 13.

<sup>130</sup> Korpijaakko-Labba, K, *Om samernas rättsliga ställning i Sverige-Finland*, Juristförbundets Förlag, Helsingfors, 1994, p. 264.

<sup>131</sup> See e.g. the State Official Inquiry, (SOU 2001:101 – *En ny rennäringspolitik*) pp. 111 and 173, where the collective is considered to consist of the members of the Sami village and not by the whole Sami population. Author's translation..

<sup>132</sup> Regarding the role of the Sami Parliament see the State Official Inquiry (SOU 2002:70 - *Sametingets roll i det svenska folkstyret*).

<sup>133</sup> The Act, Sections 9-10.

<sup>134</sup> The Act, Section 38-39.

private or in the form of a company.<sup>135</sup> Many Sami practice other professions on the side of herding, as it has proved hard to support oneself only on reindeer husbandry.

#### 4.2.2.2 Village area

All Sami villages have a certain geographical area in which the members can carry out reindeer husbandry. The main area, the reindeer husbandry area, is separated into year-round areas and winter pasture areas.<sup>136</sup> These areas in turn are divided between the villages in specific village areas. If there are special reasons they can be partly shared by different Sami villages. The division is decided by the County Office, which, as already mentioned also decides the highest number of reindeer which may be held for grazing inside the village area.<sup>137</sup>

### 4.3 The geographical scope of the right

#### 4.3.1 Difficulties in identifying the scope

The aim of the Reindeer Husbandry Act was to enact and concretize the Sami rights through systematic regulation of the right to reindeer herding. In this regard, the content of the right to reindeer herding is rather clear. However, interpretation problems have arisen, leading to an unclear legal situation for the Sami. These problems are especially linked to the unclear geographical scope of the right.

The Act does not directly specify the boundaries of the areas where the Sami can exercise their right, the so-called reindeer herding areas (*renskötselområdena*). This has caused uncertainty of the width of the Sami rights. A number of commissions have been appointed to bring some clarity to this situation, most recently the Commission on Reindeer Pasture Boundaries (*Gränsdragningskommissionen*) which gave its report in 2006.<sup>138</sup> Still, there is a poor understanding of the geographical scope of the right. This has been argued to depend on the fact that the right is based on immemorial prescription and that no commission has been able to pin down the essence of the Sami customary right.<sup>139</sup> Another problem is how to prove a customary right when you carry the burden of proof in cases concerning the geographical scope of the right. The following is a presentation of this scope, in as much as such can be determined, together with a presentation of the main problems connected to the identification of these geographical areas.

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<sup>135</sup> Bengtsson, 2004, p. 67.

<sup>136</sup> The Act, Section 3.

<sup>137</sup> The Act, Section 15 Subsection 2.

<sup>138</sup> For the report see the State Official Inquiry (SOU 2006:14 – *Samernas sedvanemarker*). The Commission did not have mandate to investigate areas where disputes occurred. Its conclusions are not legally binding but only recommendations.

<sup>139</sup> Allard, pp. 257-323.

### 4.3.2 Reindeer herding areas

The reindeer herding areas, where the reindeer herding may be conducted by the Sami, are defined in Section 3 of the Act. According to this provision there are year-round pastures and winter pasture areas. The year-round areas are, above the cultivation line in Norrbotten and Västerbotten County and below the cultivation line where forest reindeer husbandry of age (*av ålder*) has been conducted in the spring, summer and autumn. This is when the land either belongs to the state or at the end of June 1992 belonged to the state, so-called crown land, or constitutes reindeer grazing land. According to the Act Section 3 Subsection 2, reindeer grazing land means land which at the state disposal (*avyttringen*)<sup>140</sup> was declared as reindeer grazing land or which has traditionally been used as such. The year-round areas also consist of the reindeer grazing fjell in Jämtland County. There are also year-round areas within the areas in Jämtland and Dalarna County, which at the end of June 1992 belonged to the state and were granted particularly to reindeer grazing. Reindeer grazing fjell (*renbetesfjällen*) means the mountains assigned for the Sami at the state disposal, and the areas that were subsequently assign to the expansion of these mountains.

In the winter pastures, the customary right to reindeer herding is combined with a time frame for herding, from 1 October – 30 April, together with a requirement of the land being used for reindeer herding traditionally.<sup>141</sup> There is no real difference between the terms traditionally and of age. The legislator acknowledged that there is a customary right to use land areas in other places than the year-round areas, but did never define them. Generally, the winter pastures are located below the cultivation line. The customary property rights connected to the winter pasture are like an easement as it gives a right, in some respect, to use another person's property.<sup>142</sup>

The right to practice in the reindeer herding areas applies regardless of who owns the land that is to say, whether the land is state property, municipal or private.<sup>143</sup> The Sami have the same indigenous rights in connection to the reindeer herding right in both year-round and winter pasture areas. However, protection against restrictions on the right is poorer in the winter pastures because the regulations in Section 30 and 32 of the Act, that limit the ability to make restrictions in the right to reindeer herding, does not apply on winter pasture areas.<sup>144</sup>

The right to winter pastures is unclear, especially when it comes to privately owned land and neither the Act nor other material give any answer to the question which land the Sami have an immemorial right to use.<sup>145</sup> Because of this, the immemorial right to winter pastures will vary in strength from area to area inside Sápmi and the question whether there is a

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<sup>140</sup> With *state disposal* the Act refers to when the State owned land was privatized.

<sup>141</sup> The Act, Section 3 Subsection 1 § 2.

<sup>142</sup> See for easement (*servitut*) in national legislation *Jordabalken*, 1970:994, Chapter 14 Section 1 compared to the Act Section 3 Subsection 1.

<sup>143</sup> State Official Inquiry (SOU 1999:25, *Samerna – ett ursprungsfolk i Sverige*), p. 134.

<sup>144</sup> Restrictions of the right are further discussed in Section 4.4.

<sup>145</sup> Bengtsson, 2004, p. 20.

right to use the land for husbandry must be answered in court for every specific case and land area.

### 4.3.3 To prove a customary right

Reindeer herding cannot be exercised in all areas of Sápmi but only in the areas where there is an established customary right to land use. In 1993, the notion of immemorial prescription was codified in the Reindeer Husbandry Act, after this had been found to be the basis of the right to reindeer herding in the Taxed Mountain Case.<sup>146</sup> Accordingly, for the establishment of a customary right to reindeer herding in a specific area there is a requirement of immemorial prescription (*urminneshävd*).

According to the preparatory work of the Reindeer Husbandry Act, a dispute regarding the application of the customary right shall be tried in accordance with the evidence rules for immemorial prescription.<sup>147</sup> This is the case when e.g. a landowner opposes the Sami use of land. The rules referred to in the preparatory work are the regulations in Chapter 15 of the Old Land Code of 1734. This code was abolished by the Land Code (*Jordabalken*, 1970:994), but the rules still have a formal function when it comes to the context of reindeer herding.<sup>148</sup>

The prerequisites used in the Old Land Code are based on agriculture and village settings and therefore the application of these rules on reindeer herding has been criticized. The critique is based on the fact that the Sami way of life and traditional use of resources differ in so many important aspects from agricultural use of land that the rules in the Old Land Code are not suitable to the special conditions of reindeer husbandry. The prerequisites are claimed to be harder to satisfy when it comes to herding than for agriculture and other areal industries. The right to reindeer husbandry is not like other rights to property as it has not been documented in the same manner as other property right e.g. by certificates of registration of title. Furthermore, husbandry does not leave traces in the physical environment in the same way as e.g. farming. In general, the Sami traditional use of land does not correspond to normal preconditions for establishing ownership. As a result, it is almost impossible to establish a customary right based on the rules in the Old Land Code.<sup>149</sup>

According to Swedish case-law, the special nature of the reindeer husbandry must be taken into consideration when using the evidence rules for immemorial prescription.<sup>150</sup> This was also the conclusion of the Commission on Reindeer Pasture Boundaries, which also stated that the rules of the Old Land Code fit badly with the special conditions of the

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<sup>146</sup> Bengtsson, 2004, p. 79.

<sup>147</sup> Governmental Bill (Prop. 1971:51 - *Kungl. Maj:ts proposition med förslag till rennärlingslag*) p. 158.

<sup>148</sup> Bengtsson, 2004, p. 79.

<sup>149</sup> Allard, p. 259.

<sup>150</sup> The Swedish Court of Appeal of *Nedre Norrland* (*Härjedalsmålet*, Dom 2002-02-14, T 58-96) and of *Övre Norrland* (*Nordmalingmålet*, Dom 2007-09-19, T 155-06). The landowners have appealed the so-called *Nordmalingmålet* where the Sami party manage to prove immemorial custom. The Swedish Supreme Court will try the case in February 2011.



reindeer husbandry because the Act links immemorial prescription to a people and not to real property.<sup>151</sup>

The right to reindeer herding is an autonomous right as it is just codified by the Act but it is not depending on the Act for its existence. As long as there is someone practicing the right, custom may be established and a customary right can evolve. When adapting the rules on immemorial custom to the special conditions of reindeer husbandry this could give room for the finding of new customary rights, outside the reindeer herding rights and outside the framework of the Act. Based on this argumentation, the right can be much stronger than the present Act indicates.<sup>152</sup>

#### 4.3.4 The burden of proof

As a general rule in civil law, anyone who claims something, e.g. a certain entitlement or right to property, must prove that and carries the burden of proof.<sup>153</sup> If the person shows facts in support for his/her claim, the burden of proof is transferred to the opposing party that now has to prove that the fact does not exist or that the claim for other reasons should be dismissed.

Generally, in cases concerning the Samis' special right to property, they carry the burden of proof.<sup>154</sup> Often the landowners initiate trial and so-called negative declaratory actions and because of this, the Sami village has to prove that it has used the land in such a way creating a custom and an immemorial right.<sup>155</sup> Since 1948, there is a rule of free proof examination under Swedish procedural law which means that even though documents are explicitly mentioned in the Old Land Code, proof in the form of documents is not a necessity. That part of the provision in the Old Land Code can be overlooked.<sup>156</sup> Furthermore, when it comes to ownership of land, a land certificate is not to be perceived as strict proof of ownership.<sup>157</sup>

The placing of the burden of proof on the Sami party has in a number of cases been claimed to violate the right to a fair trial under Article 6 of the ECHR, as the requirements used in national courts puts the Sami party in an impossible procedural position.<sup>158</sup> In support of this claim is firstly the fact that as legal persons, the Sami villages are not entitled to legal aid as only physical persons are so under Swedish law. Secondly, cases dealing with the

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<sup>151</sup> State Official Inquiry (SOU 2006:14), pp. 378 and 386. The Commission also concluded that immemorial prescription can arise after 1971.

<sup>152</sup> Allard, pp. 257 and 323.

<sup>153</sup> Usually that person is the so-called plaintiff and the opponent the defendant. In the Swedish Code of Judicial Procedure (*Rättegångsbalken*), Chapter 13 § 2 it is stated that an action for a declaration of whether or not a certain legal relationship exists may entertained on the merits if an uncertainty exists as to the legal relationship, and the uncertainty exposes the plaintiff to a disadvantage.

<sup>154</sup> The standard of proof for completing the burden of proof is that the fact must be *proven*, hence, a certain degree of certainty is required.

<sup>155</sup> Bengtsson, 2004, p. 81.

<sup>156</sup> *Ibid*, p. 80.

<sup>157</sup> This was established by the Swedish Court of Appeal, *Hovrätten för Övre Norrland*, in a case involving Vattenfall AB and the Sami village *Sörkaitiums*. (RH 2001:56, Dom 2000-06-22, Mål nr, Ö-344/99).

<sup>158</sup> See e.g. Swedish District Court *Östersunds Tingsrätt*, (Dom 2005-08-08, T 977-04), pp. 6-9 and the above mentioned *Härjedalsmålet*.

customary right to land have been huge financial projects, involving expertise and historical investigations with costs that Sami villages in general cannot afford and they have lacked the possibility to respond to the landowners' claims. Consequently, many cases are settled as default judgements, without any examination in the matter, as the Sami parties have not showed up in court. Thirdly and finally, cases are very lengthy as the material is so huge in these types of cases and the Sami party must sometimes move through many legal instances in order to protect its rights. In March 30 2010, the ECtHR found, in the case of *Handölsdalen Sami Village and others v. Sweden* (Application no. 39013/04), that Sweden had violated the Sami village's right to a fair trial under Article 6 § 1 of the ECHR, because of the length of the proceedings in Swedish national courts.

## 4.4 Restrictions of the right

### 4.4.1 Different types of limitations

Possible restrictions of the right to reindeer herding due to land use are primarily governed by the Act. In general, as the right is a usufruct, someone else, other than the Sami villages, owns the land used for husbandry. Typical for these cases is that there are two parties, without a contract, who use the same land areas for different purposes.

A number of situations can limit the right to reindeer herding because of activities of other Sami or by conducts of public- or private actors. Three situations are common in Sweden. The first case of restriction is when other Sami restrict the use of land e.g. when Sami from neighbouring countries use the land because of legislative actions taken by that country or because of bilateral treaties. In the middle of the 18<sup>th</sup> century, when the Swedish-Norwegian national borders were drawn, the Swedish Sami received the right to reindeer pasture in Norway. Since then, a number of reindeer pastures conventions have been concluded between Sweden and Norway and the conventions are still the contract that gives reindeer herders the opportunity to use areas across the border.

The second example of restrictions of the right is when a private landowner opposes herding on his or her property. According to Section 30 of the Act, landowners or operators of the land can take measures that are not considered a significant inconvenience for the reindeer husbandry. It is the landowner that makes the assessment whether the inconvenience is considered significant. The Sami are referred to initiate court proceedings if they make a different assessment but they must, in accordance with this provision, accept any limitation that does not represent a substantial inconvenience.<sup>159</sup> Both parties are in some regard obliged to respect to land use of the other party, but already the legislation shows, as mentioned above, that there are higher demands on the Sami. According to Section 67 of the Act, the Sami shall, when practicing reindeer herding, take into consideration other interests, public and private, and as far as possible, prevent the reindeer from moving outside Sami village grazing areas and

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<sup>159</sup> State Official Inquiry (SOU 1999:25 - *Samerna – ett ursprungsfolk i Sverige*), p. 152.

cause damage and nuisance. The preparatory work mentions nature conservation, cultural environmental care and interests of the forestry as such public interest which shall be taken into consideration.<sup>160</sup> Regarding leasing (*upplåtelse*) of land and water, it is said in Section 32 of the Act that, on the crown land above the cultivation land, which is under the state's immediate disposition, and on the reindeer grazing fjell, utility rights may be granted only if the leasing can be done without considerable inconvenience to the reindeer herding.

In this type of conflict of the use of land and water, both parties may invoke the constitutional property protection in Chapter 2 Section 18 as both the Sami and the landowner have property rights, but different kinds of right.<sup>161</sup> Furthermore, the so-called *Polluter Pays Principle* (PPP) shall be considered in assessments of the property protection in the Instrument of Government Chapter 2 Section 18.<sup>162</sup> Intrusion shall always be compensated, exempt when based on environmental and health concerns.<sup>163</sup>

The third and final situation of restriction of the right to reindeer herding that may arise is when the state or a private actor wants to use the land for another purpose than a continuous husbandry e.g. to build a power plant. The land can then be expropriated in accordance with Section 26 of the Act based on a governmental decision.

The situations of infringements due to actions taken by private landowners and the effects of bilateral treaties will not be touched upon here. In the following, the situation where the reindeer husbandry collides with other interests of land use and a balance must be made between them will be examined.

This thesis focuses on the present legal situation for the Sámi. However, when it comes to the land use in Sápmi and in order to understand the current situation, it is important to present some historical aspects and give a short historical background before going into reindeer herding as a national interest and the balance between different interests of land use.

#### **4.4.2 Historical overview of land use in the Swedish parts of Sápmi**

A precondition of being an indigenous people is to be first on place and to never have migrated to other people's territory. The concept of indigenous also indicates that some kind of colonization has taken place on the territory which the indigenous people traditionally occupy. This is what happened in Sweden. When farmers and others settled in the region today called Sápmi they considered it to be wilderness, but the region was already inhabited by the Sami.<sup>164</sup>

The period of colonization of Sápmi was between the 14<sup>th</sup> and the 20<sup>th</sup> centuries. In the initial phase of colonization, people made a living as much

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<sup>160</sup> See Governmental Bill (Prop. 1992/93:32 - *Om Samerna och samisk kultur m.m.*), pp. 123-124.

<sup>161</sup> Bengtsson, 2004, p. 113.

<sup>162</sup> Governmental Bill (Prop. 1997/98:45, del 2 – *Miljöbalk*), p. 548.

<sup>163</sup> *Ibid*, p. 513.

<sup>164</sup> Elenius, p. 57.

from hunting and fishing as from farming. Four major industries in the northern parts of Sweden grew strong and were permanently taxed: farming, hunting, fishing and reindeer husbandry.<sup>165</sup> The Swedish colonization policy was later ruled by the so-called parallel theory, meaning that the settlers and the Sami could share the region of Sápmi, each with a specialized industry – agriculture and reindeer husbandry.<sup>166</sup> Sápmi was so-called *lapps katteland*, the land where the Sami had to pay taxes to the Swedish Crown.

In the 1630's and 40's, silver- and iron ore was found in Sápmi and the Swedish state's interest for mining turned in its direction.<sup>167</sup> That was the beginning of the mining industry in the north of Sweden.<sup>168</sup>

Until the 17<sup>th</sup> century, the Sami had a very strong right to their lands without any restrictions. Through legislative action, the so-called wilderness in the north of Sweden, became *Lappland* - the King's and the Crown's land (*kronomark*) and hence, owned by the Swedish state.<sup>169</sup> The Sami's ability to claim ownership of the land was thereby excluded. This also has to do with the relative concept of ownership and the prevailing opinion that the land use of nomads has not been sufficient to give title to land subjected to herding activity.<sup>170</sup> The land (*lapps kattelandet*) went from being areas connected to specific rights of the Sami to become state property and the Sami rights adherent to these areas were expropriated by the Swedish state.<sup>171</sup>

In the 18<sup>th</sup> – 19<sup>th</sup> centuries, Sweden had a segregating culture and economic policy. In the 19<sup>th</sup> century, the reindeer herding practice was affected by stricter governmental regulations due to modernization and hope of economic wealth. This time was colored by the idea of a hierarchical development approach. According to this approach, industrialization was the highest stage of culture while herding and other activities connected to nature, as nomadism, was considered primitive and least developed.<sup>172</sup> This government ideology of so-called social Darwinism motivated that the Sami herders' needs should give way when they conflicted with those of non-Sami agricultural settlers.<sup>173</sup>

In order to make the state owned land more productive it was privatized through so-called state disposal and became the land of settlers. The Sami lost the right to great areas traditionally used for reindeer herding.<sup>174</sup> The disposal of the state did not take due account of Sami interests and when forest areas, which the indigenous community until that

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<sup>165</sup> Ibid, p. 59.

<sup>166</sup> Elenius, p. 63.

<sup>167</sup> In 1634 in *Nasafjäll* and in 1646 in *Svappavara*. See Elenius, p. 67.

<sup>168</sup> Today, the biggest mines in Sápmi are located in Boliden, Storliden and Kiruna. The Kiruna mine has expanded and the state owned LKAB's iron ore mining is causing cracks in the ground. Parts of the town of Kiruna must now be moved.

<sup>169</sup> Korpijaakko-Labba, p. 37.

<sup>170</sup> Ibid, pp. 47-48.

<sup>171</sup> Elenius, p. 249.

<sup>172</sup> Ibid, p. 87.

<sup>173</sup> Riseth, J, "Sami Reindeer Management in Norway: Modernization Challenges and Conflicting Strategies. Reflections upon the Co-management Alternative" In: Jentoff, S, et al. (eds), *Indigenous Peoples – Resource Management and Global Rights*, Eburon, 2003, p. 229.

<sup>174</sup> Elenius, pp. 91-92.

time had used, turned into private land the Sami was displaced further and the priority of farming before herding led to the Sami being displaced to poorer soils. This resulted in increased poverty among them.<sup>175</sup>

With the Reindeer Husbandry Act from 1886, reindeer herding should be carried out collectively in administrative units (*lappbyar*) under the County Office and the decisive power was moved from the individual Sami to the collective. The customary right to reindeer herding was established and was defined as a Sami right but the legislation affecting the Sami, e.g. the Act from 1886, was still governed by a paternalistic approach towards the Sami and they were not considered suitable to take care of their own interests. The State had the decisive power in all Sami concerns.

In the second half of the 20<sup>th</sup> century the Swedish policy towards the Sami was divided. On one hand, the Sami culture was acknowledged in what had become a more multicultural society. On the other hand, less deliberation was taken to the Sami in matters concerning land use in Sápmi and their indigenous status was ignored by the state authorities. The modernization of the reindeer management from the 1960s, with an expanded use of herding technology e.g. snow mobiles and helicopters, led to an increase of potential control for the herders but also higher production costs for the industry.<sup>176</sup> The subsistence minimum of reindeer management increased, the costs were covered by enlarging the herds which in its turn led to the creation of need for more land.<sup>177</sup>

In the beginning of the 1970s, infrastructure for electricity and telecommunication was almost entirely constructed and managed by government agencies and other publicly owned entities. The intention was to provide good public service and there was no real profit behind expansion in the north parts of Sweden.<sup>178</sup> The situation change in the 1980's – 90's with the emergence of new forms of ownership due to liberalization, privatization and corporatization and today the electricity- and telecommunication network is operated mainly by private entities with strong financial interests.<sup>179</sup>

The combination of Sami land use becoming more and more extensive and the fact that Sami property protection was weak made it vulnerable to competing land-use. The modernization during the 20<sup>th</sup> century created so-called land fragmentation of the reindeer herding areas – agricultural settlements, railways, roads, mines, water- and wind power, modern forestry, tourism and other disturbing activities cut up the land and destabilized the reindeer management because it became more and more difficult for the reindeer to follow their natural annual migration cycle.<sup>180</sup> Today, migration between pastures is frequently conducted by the help of trucks to make it more efficient. However, this type of migration imposes extra costs in comparison with the traditional animal movement conducted on land. The ultimate effect of land fragmentation in the reindeer herding

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<sup>175</sup> Ibid, p. 93.

<sup>176</sup> Riseth, p. 233.

<sup>177</sup> Ibid.

<sup>178</sup> Bonde, p. 39.

<sup>179</sup> Ibid.

<sup>180</sup> Riseth, p. 234.

areas caused by modernization is a marginalization of the nature-based and indigenous livelihoods.<sup>181</sup>

### 4.4.3 National interest in reindeer husbandry

#### 4.4.3.1 A national interest and traditional livelihoods

The traditional occupation of the Sami, reindeer herding, is considered a state concern as it is a prerequisite for a vital Sami culture. Therefore, some areas considered to be of special importance for reindeer husbandry are protected as of national interest (*riksintresse*) under Chapter 3 Section 5 of the Environmental Code. Neither the Code nor its preparatory work gives a definition of what constitutes a national interest but it is the responsibility of the national sectoral authorities to specify which areas are of national interest.<sup>182</sup> The Swedish Board of Agriculture (*Jordbruksverket*) is the authority deciding which areas for reindeer husbandry are in national interest. The Board's decision is not legally binding but is normatively strong in concrete situations of permit applications. But, the licensing authorities, which are the Provincial Office, the Environmental Court, the Environmental Court of Appeal and the Government, can make other evaluations. In the end these authorities make the final decision.<sup>183</sup>

However, as the decision is not legally binding there is a legal uncertainty already at this stage as the authority's decision may be questioned when an individual case in the area is examined. The legal uncertainty is also clear when the balance between conflicting national interests is dealt with.

Even though not defined in the Code, areas of national interest for reindeer herding have been summarized in doctrine as so-called core areas and strategic areas.<sup>184</sup> Core areas mean areas where reindeer are kept stationary for pasture, mating and calving. Strategic areas mean areas with difficult passages and head trails with associated break pastures.<sup>185</sup>

As a national interest, reindeer husbandry is rather unique. This is because the right to reindeer herding, which enables the reindeer husbandry, has effects also for private law regulations. To show consideration for social effects is common in e.g. consumer legislation but not under other circumstances but this is however clearly the case when it comes to special situations of the Sami's relation to the landowners.<sup>186</sup> Furthermore, the right to reindeer herding, especially grazing, is of great importance from an environmental point of view. The practice contributes to some typical ecological risks such as overgrazing, without equivalents in other types of utility rights. The Reindeer Husbandry Act provides that the husbandry shall be carried out with regard to the preservation of the natural grazing areas and their long-term production ability, in order to give a sustainable and good return meanwhile keeping the biological pluralism. This also gives the

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<sup>181</sup> Ibid.

<sup>182</sup> Spiliopoulou-Åkerman, p. 37.

<sup>183</sup> Ebbesson, J, *Miljörätt*, Andra upplagan, Iustus Förlag, Uppsala, 2008, p. 78.

<sup>184</sup> Spiliopoulou-Åkerman, p. 39.

<sup>185</sup> Ibid..

<sup>186</sup> Bengtsson, 2003, p. 239.

civil law relations a special feature as one party, in this case the Sami, have to take into consideration the public law obligations.<sup>187</sup>

The Swedish state has the overall responsibility that the reindeer management is carried out in a way that gives a reasonable number of reindeer herding corporations a secure income. The Government has stated that reindeer husbandry is a precondition for the Sami culture, the preservation of which must be guaranteed, that there must be fundamental prerequisites for the industry in each Sami village e.g. access to migratory routes, calving land, grazing areas and to take into account the functional relationships that must exist between the different compartments.<sup>188</sup>

According to the Environmental Code Chapter 3 Section 5, land and water areas relevant to the reindeer husbandry shall be protected, as far as possible, against measures that significantly impede the exercise of the reindeer husbandry. The concept “as far as possible” is unclear, but seems to mean that a balance must be made between the protected interest and conflicting interests, with regard to practical and financial implications as the protection gives.<sup>189</sup> Space should be provided to socio-economic considerations, including regional policy and employment policy interests, but economic considerations may not compromise the values that the rule seeks to protect except when an overall assessment shows that it promotes a generally good management of natural resources.<sup>190</sup>

According to the second part of the same provision, areas that are of national interest for the reindeer husbandry *shall* be protected against measures mentioned in the first section.<sup>191</sup> This means that when an area is of national interest for the reindeer husbandry there is a strict protection against actions which significantly impedes the husbandry in accordance with Chapter 3 Section 5 of the Code. The concept of *significantly impedes* refers to measures with lasting negative impact on the current interest or measures that temporarily have large negative effects and the provision intends to exclude actions with trivial impact on the husbandry.<sup>192</sup> As measures which can significantly hamper the industry are not allowed in these areas, no balancing of conflicting interests must be made. However, as the expression *significantly impedes* is rather unclear, predictability is poor and in a conflict between different national interests there are obvious interpretation problems.<sup>193</sup> As the following will show, the Sami continuously come out as the losing side of most interpretations.

#### **4.4.3.2 Features of the husbandry**

Reindeer herding differs from other uses of land as it is extensive in its nature. For the husbandry it is more important that the general conditions for the practice are preserved than to protect certain land areas against every

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<sup>187</sup> Bengtsson, 2003, p. 240.

<sup>188</sup> Government Bill (Prop. 1985/86:3 – *Med förslag till lag om god hushållning*), p. 57.

<sup>189</sup> Spiliopoulou-Åkerman, p. 39.

<sup>190</sup> Governmental Bill (Prop. 1997/98:45 - *Miljöbalk*) p. 30.

<sup>191</sup> Emphasis added by the author.

<sup>192</sup> Governmental Bill (Prop. 1997/98:45 - *Miljöbalk*) pp. 30-32.

<sup>193</sup> Spiliopoulou-Åkerman, p. 39.

single intrusion.<sup>194</sup> This fact may have motivated that the protection from intrusion for the right to reindeer herding has been constructed differently than other property rights.<sup>195</sup> However, the Sami villages have little power over their usufruct, particularly in relation to other rights holders. This leads to the conclusion that the right to reindeer herding is designed in a way that results in a weak protection for the Sami over the land they use in their practice. To see any protection requires an analysis of overlapping and interacting laws.<sup>196</sup>

Reindeer management is important for the maintenance of the Sami culture. A precondition of the right to reindeer herding is that the right includes access to certain land. Sufficient land must be accessible all year round in order to fulfill the needs of the reindeer husbandry and in order to keep this land productive, over grazing must be avoided.<sup>197</sup> Threats against the reindeer herding industry are both internal and external threats. Property rights provide protection against intrusion from other industries and are necessary but they are not sufficient to protect the land required for a tenable reindeer herding industry.<sup>198</sup> The internal threats will not be the subject in the following presentation but it is important to mention them in this context.

Traditional reindeer management has three fundamental features, that is, the land, the herd and the personnel.<sup>199</sup> Land refers to the different pastures and the required seasonal movement between them. Herd refers to the reindeer and their natural behavior to search for seasonal specified nutrition and their capacity to manage long seasonal migrations. Personnel refers to the members of the indigenous people, the Sami, a people with an ancient culture where reindeer herding is a central element. Traditional reindeer management is subjected to a number of challenges and dilemmas e.g. to have sufficient and productive land, to have herd control in a production system, to live of the land, how to deal with the dilemma of conflicts between land access and land protection and finally, how to stay in business.<sup>200</sup> It is also a stated wish from the Swedish State's side to preserve the Sami culture, including the reindeer management and the herding. Hence, it is a state concern that the cultural heritage of the Sami can continue and that there is a viable husbandry.<sup>201</sup> The Sami Parliament shall, according to the Sami Parliament Act (*Sametingslagen*, 1992:1433) Chapter 2 Section 1 Subsection 4, work for a vital Sami culture and initiate activities and propose measures to promote this culture. Its duties includes, in particular, to participate in community planning and to monitor that Sami

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<sup>194</sup> Unlike the situation of indigenous peoples in some other countries where the particular land used has religious and cultural significance.

<sup>195</sup> Bengtsson, 2003, p. 246.

<sup>196</sup> Spiliopoulou-Åkerman, p. 28.

<sup>197</sup> Riseth, p. 232.

<sup>198</sup> Ibid.

<sup>199</sup> Riseth, pp. 231-232.

<sup>200</sup> Ibid, p. 231.

<sup>201</sup> There is e.g. a state allowance for the benefit of the reindeer husbandry which the Sami Parliament has the main responsible for, the appropriation (*anslag*) *Främjande av rennäringen*. 45:1.

<sup>201</sup> Bengtsson, 2003, p. 240.



needs are taken into account including reindeer herding interests in the exploitation of land and water.

#### **4.4.3.3 The Environmental Code and sectoral legislation**

Sápmi is of importance for a number of so-called national interests, such as the care for nature and cultural environments, outdoor life, mineral findings and land and water areas particularly suitable for energy production. These are described as national interests in the Environmental Code (*Miljöbalken*, 1998:808), Chapter 3 Sections 6-8. The purpose of protecting these are e.g. to allow for future extraction of substances and raw materials deemed valuable from a socio-economic point of view and these areas shall be protected as far as possible from actions which significantly complicate the availability of these natural resources. Therefore, the main modern disturbances of the reindeer husbandry today are the construction of hydroelectric power plants, forestry, mining and tourism, each will be presented below.<sup>202</sup>

The Reindeer Husbandry Act consists of environmental requirements and real property legislation. In situation of competing interests of land and claims related to use of land, other instruments than the Act become applicable. These can be summarized to mean that the protection and well-being of the indigenous community is referred to arguments and proceedings related to the practical use of natural resources.<sup>203</sup> These instruments further regulate under what circumstances the reindeer husbandry and right to reindeer herding can be restricted. These instruments are primarily the already mentioned Environmental Code and the Plan- and Building Act (*Plan- och Bygglagen*, 1987:10).

The Environmental Code shall be applied parallel to sector statutes and it provides the minimum requirements for environmental protection. According to the Code, in order to safeguard environmental concerns, Environmental Impact Studies must be a part of the decision base. Furthermore, when deciding on planning, permissions and dispensation formalized consultation is key.<sup>204</sup> Permits are required for almost every activity that can disturb the environment or cause the exploitation of natural resources and infringe the right of property owners.

#### **4.4.3.4 Main disturbances of the reindeer husbandry**

##### **4.4.3.4.1 Hydroelectric power plants**

The expansion and development of hydropower, as wind and water power, inevitably lead to intrusions on the reindeer herding right as they compete for the same areas in Sápmi.

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<sup>202</sup> Inside the framework of this thesis, these different activities will be called *disturbances* as they collide with the right to reindeer herding and affect the indigenous rights of the Sami. This is not to say that they are *disturbing* in themselves or that they lack any positive effects and properties.

<sup>203</sup> See e.g. Scheinin, p. 160.

<sup>204</sup> Ebbesson, p. 24.

Motivated by environmental concerns, the establishment of wind-farms is exempted from the prohibition of new establishment in bare mountains (*fjällen*).<sup>205</sup> Court precedence has also showed that wind power is given priority before reindeer herding. In Chapter 4 Section 6 of the Environmental Code, special protection from exploitation is granted to rivers in the bare mountain.

#### 4.4.3.4.2 Forestry

Since ancient times, the forests in Sápmi have been used for reindeer pasture. But, these forests are also woodlands and of strong pecuniary interest for the forestry to exploit. As a consequence of rationalized methods, both in forestry and in reindeer husbandry, the conflicts between forest owners and companies and reindeer herders have increased.<sup>206</sup>

To safeguard the interests of the Sami, there are special regulations on the relationship between the reindeer husbandry and the forestry industries when it comes to felling. In Section 20 of the Forestry Act (*Skogsvårdslagen*, 1979:429) it says that, before felling takes place in year-round grazing areas, the Sami village concerned shall be given the opportunity to participate in joint consultation. Furthermore, in Section 21 it is stated that permission from the Swedish Forest Agency (*Skogsstyrelsen*) is needed for the felling on forest land with adverse regeneration conditions or on protected forest land. When forest owners are applying for such permission they shall describe planned measures to satisfy reindeer husbandry interests.<sup>207</sup> However, in practice, the Forest Agency has never refused permission for such felling.<sup>208</sup> This may be because of the condition of a high degree of intrusion in Section 21, that the operation must *prevent* the reindeer husbandry before not receiving permission. When reindeer herding is carried out, certain consideration for other interests is prescribed, whilst the forestry only needs to adjust when apparently demanded with regard to the reindeer husbandry. This does not appear as a more far reaching demand.

In the Forestry Act Section 31 there are requirements for the forest companies to co-operate with the Sami. It states that forest management measures are to take account to essential reindeer husbandry requirements. If landowners have taken measures that have hampered the reindeer husbandry e.g. closed or substantially hindered access to migration routes or scared the reindeer, damages may be received.<sup>209</sup>

#### 4.4.3.4.3 Mining

Mining has a huge impact on the environment and consequently, permission is always required for its operation which follows from both the Environmental Code Chapter 6 Section 7 and the Minerals Act (*Minerallagen*, 1991:45) Chapter 2, Chapter 4 Section 1 and Chapter 5. The

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<sup>205</sup> With the bare mountains means the mountain region above the treeline.

<sup>206</sup> Bengtsson, 2004, p. 61.

<sup>207</sup> The Forestry Act, Section 16 and 21.

<sup>208</sup> There are no decisions from the Swedish Forest Agency concerning such permits.

<sup>209</sup> Bengtsson, 2004, p. 62.

official body issuing permits for prospecting is the Mining Inspectorate of Sweden (*Bergsstaten*).

Mining companies must prepare an Environmental Impact Study in accordance with the Environmental Code Chapter 6 Section 1 and Chapter 9 on hazardous activities. According to Chapter 17 Section 1 of the Mineral Act, the right to reindeer herding is, under the Act, a special right to property. Hence, the Sami are explicitly mentioned as property owners in the Mineral Act when it comes to acceptance of the working plan for exploration permits (*undersökningstilstånd*). As property owners they are entitled to compensation for damage or intrusion under Chapter 7. An exploration permit shall be subject to conditions which are necessary to protect public interests or individual rights. Furthermore, it shall be united with conditions that the permit holder can secure compensation under Chapter 7.

Although a property owner, the Sami party is a weak party in cases concerning mineral processing. It has been revealed that the Sami parties are sometimes not even consulted and are denied the role of plaintiffs and national values, such as reindeer herding, are set aside for economic and socio-eco-profit.<sup>210</sup> In a review of completed Environmental Impact Studies, in connection with mining development on reindeer grazing land, it shows that there are deficiencies in the reviewed studies in relation to the description of the environmental impact of the reindeer husbandry.<sup>211</sup> The Chief Mine Inspector (*Bergmästaren*) is free to determine which acts of intrusion entail so great inconvenience that it outweighs the permit holder's interest to carry out the work. As the Chief Mine Inspector already at the giving of permit for the investigation should take into account public interests or individual rights and impose conditions on the permit, once the permit is given it becomes much more difficult to later impose conditions through changes in the work plan.<sup>212</sup>

#### 4.4.3.4.4 Tourism

As agriculture is discontinued and residents are becoming scarcer in many places in the mountain areas, the competition of interests is less prominent in these areas in Sweden today. Forest companies are required to work with the Sami. In the bare mountain areas, it is primarily tourism that claims the same natural resources as the Sami while conflicts in the forest lands are still manifest.<sup>213</sup> The freedom to roam (*Allemansrätten*) and the strong economic growth in Sweden, which manifested itself in increased leisure for the Swedish population, also contributes to the large bare mountain-tourism. Today, there is an increased construction of tourism facilities inside of Sápmi and tourism has come to cause intrusion in the reindeer herding when

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<sup>210</sup> Spiliopoulou-Åkerman, S, Talah, M, *Samernas rätt till deltagande och samråd – Fysisk planering och infrastruktur*, Svenska Avdelningen av Internationella Juristkommissionen, 2007, pp. 40-41.

<sup>211</sup> Torp, E, *Renskötselrätten och rätten till naturresurserna – Om rättslig reglering av mark- och resursanvändning på renbetesmarken i Sverige*, Universitetet i Tromsø, Avhandling för graden dr. juris, 2008, p. 282.

<sup>212</sup> See the Minerals Act, Chapter 3 Sections 5 and 5a together with Chapter 2 Section 10.

<sup>213</sup> Bengtsson, 2003, pp. 234-235.

the tourist facilities directly or indirectly disturb the husbandry. In a recent case the question arose whether a decision on planning permission for building a wild-life place in an area of national interest for the reindeer husbandry should have been preceded by a so-called detailed plan (*detaljplan*).<sup>214</sup> The Supreme Administrative Court of Sweden found that given the building's limited scale and simpler design its use cannot be deemed to have significant impact on the surrounding area. In this case, in the view of the Court, no detailed plan could be required before giving a planning and building permission. This had the effect that the Sami, as property owners, did not have a say before the construction regarding the possible effects on the reindeer herding in the area, although this area was identified as of national interest for the reindeer husbandry. The Sami was therefore deprived the opportunity to obtain clarity in the future development of the operation on the site.

#### **4.4.4 The balance between different national interests**

##### **4.4.4.1 The balance test**

At the same time as national interests for reindeer husbandry should be protected from intrusions, areas containing deposits of substances and minerals that are of national interest shall be protected, along with areas of special importance for construction of hydroelectric power plants, for the forestry and for the outdoors life.

A municipality in Sápmi must in its physical planning and infrastructure take the Sami right to reindeer herding into consideration as, in relation to the planned construction, the interest of reindeer husbandry must be respected by the municipalities. This follows from Chapter 4 Section 1 and 5 the Plan and Building Act. This provision must be coordinated with the Reindeer Husbandry Act, as the right to reindeer herding is codified therein. According to the Plan and Building Act, the Sami villages are property owners and because of this, they should be notified in cases of interference into the land areas they use for husbandry.<sup>215</sup> However, there are no legal principles in these Acts requiring consultation to take place in instances where the Sami rights or interests of land and natural resources are at stake.<sup>216</sup> The selection of sites must however be made with cooperation of representatives of the Sami and interest organisations. In the Taxed Mountain Case, the Swedish Supreme Court found that it follows by general principles of administrative law that

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<sup>214</sup> The parties in the case were Gabne Sami Village and Adventure Lapland Kiruna-Gällivare AB. Supreme Administrative Court of Sweden (*Regeringsrätten*), (Dom 2010-01-27, Mål nr 2860-07, 2863-07).

<sup>215</sup> However, different municipals have interpreted these rules differently e.g. Krokoms municipal is accused to frequently left the Sami out of the construction planning processes. This is now a case for the DO see District Court of Östersund (Östersunds Tingsrätt, T 243-08).

<sup>216</sup> Allard, p. 255-256

matters of granting usufruct may not be settled without the Sami village or other persons concerned having been consulted in the matter.<sup>217</sup>

National interests can themselves be, as demonstrated with regard to the disturbances described above, against the interests and aims of the Code, This is the case with e.g. industry-, mineral- and energy production.<sup>218</sup> These measurements often have huge impact on the environment and carry with them other hazardous activities. In the Environmental Code there are four factors that must be taken into consideration when balancing different national values; ecological-, social- and socio-economic factors and these must be weighed against each other in a way that promotes overall good management of the natural resources. If there is conflict between two national interests, preference shall be given to the purpose that supports long-term management of soil, water and the natural environment, according to the Code, Chapter 3 Section 10. The balance test is basically the same as under Chapter 3 Section 1 and hence, founded on good management of natural resources with a long-term view and the balance-test should be made in accordance with the Code's goals and include ecological, social, cultural and socio-economical considerations together with regard to Sweden's international commitments.<sup>219</sup>

Not only grazing land is of interest for the husbandry. As it is an excessive use of land, calving sites, sacred places or areas of intellectual significance and distinguish pastures<sup>220</sup> are also of utmost importance for a functioning husbandry. There are also indicators, as mentioned above, to consider the social impacts and aspects alike when assessing the interest of the reindeer husbandry. In order for the areas of intrusion not to be described too narrowly in the Environmental Impact Study, when considering the Sami's interests, a holistic approach is desirable.

#### **4.4.4.2 In practice**

To begin with, the consultation conducted under the Plan and Building Act has no specific formal requirements, which makes it difficult to examine to what extent the consultation to be held is taken into account.<sup>221</sup>

Furthermore, there is an absence of ruling by the precedents courts in relation to Chapter 3 Section 10 in the Environmental Code and the specific rule has never been applied in cases involving the balance against reindeer husbandry. Furthermore, the question whether or not an area is of national interest for the reindeer husbandry can remain unanswered also in relation to decision in cases where a position in question is crucial for the outcome of the decision.<sup>222</sup> The provision on areas of national interest for reindeer husbandry has proved to be difficult to apply for administrative authorities and there are serious doubts whether the rule in question provides such a

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<sup>217</sup> The Taxed Mountain Case, p. 178.

<sup>218</sup> Ebbesson, p. 77.

<sup>219</sup> Åkerman-Spiliopoulou, p. 40.

<sup>220</sup> These are areas where marking of the reindeer is made and where reindeer with different owners are separated from each other.

<sup>221</sup> Åkerman-Spiliopoulou, p. 29.

<sup>222</sup> See Torp, p. 286.

protection that the legislature had intended.<sup>223</sup> Three cases will demonstrate the practice in Swedish courts.

In a recent case from the Supreme Administrative Court of Sweden (*Regeringsrätten*), concerning judicial review, an exploitation concession permit was granted in an area of national interest for reindeer husbandry.<sup>224</sup> The Court referred to preparatory work when stating that relatively limited measures can also significantly hinder the reindeer husbandry and violate the rule in the Environmental Code Chapter 3 Section 5.<sup>225</sup> However, the Court stated that the reindeer husbandry is not protected against any and all intrusions. As the mine in question exploited only a small part of the whole reindeer herding area the Court found that, although there can be some negative effects for the reindeer husbandry, the permit does not conflict with the Environmental Code or international customary law.<sup>226</sup>

In another case also concerning judicial review the Court touched upon the difference between Section 32 in the Act and Chapter 3 Section 5 in the Environmental Code.<sup>227</sup> The Court stated that the provision in the Code focus on the damage the reindeer husbandry as a public interest will suffer from an action, while Section 32 in the Act is aimed at the impairment tenure of a usufruct (*nyttjanderättsupplåtelse*) impose on the specific Sami village's reindeer management.<sup>228</sup> In this case, the Court found that such a limited intrusion is allowed within the regulation in Section 32.

In a case from the Environmental Court of Appeal (*Miljööverdomstolen, MÖD*), which concerned a permit for mountain take (*bergstäkt*), the Environmental Protection Agency (*Naturvårdsverket*) designated an area as national interest for nature conservation and outdoor recreation at the same time as the Geological Survey of Sweden (*Sveriges Geologiska Undersökning*) classified the area as a national interest for materials extraction.<sup>229</sup> The Court gave permission for mountain take on the basis that the operation would not *significantly* damage the nature conservation and outdoor recreation.<sup>230</sup> In the Court's view, these somewhat conflicting interests could coexist.

Another problem linked to the balance test and to what is considered significantly damage/hinder for the reindeer herding is that the Sami village area often reaches over more than, at least, one municipal. The cumulative effect of different restrictions and intrusions in the village's reindeer grazing areas is therefore ignored as each municipal will only pay attention to physical planning under its local responsibility, within the own municipality.<sup>231</sup> It is said that within the current system on the use of natural resources, there is no limit to the number and extent of infringements that a

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<sup>223</sup> Torp, p. 299.

<sup>224</sup> (Dom 2010-04-01, Mål nr 1680-08).

<sup>225</sup> The preparatory work in question is the Governmental Bill (Prop. 1985/86:3 – *Med förslag till lag om hushållning med naturresurser m.m.*), p. 161.

<sup>226</sup> See the case (Dom 2010-04-01, Mål nr 1680-08), p. 9.

<sup>227</sup> See the case (Dom 2010-04-14, Mål nr 430-10).

<sup>228</sup> *Ibid*, p. 5.

<sup>229</sup> Environmental Court of Appeal (MÖD 2006:49).

<sup>230</sup> Emphasis added by the author.

<sup>231</sup> Allard, p. 480.

Sami village must accept, which is obviously unsatisfactory for the reindeer husbandry.<sup>232</sup> Furthermore, the provisions in the Plan and Building Act give the authorities and courts very limited potential to consider previous infringements of the Sami village's pasture areas when deciding on permission of a new activity.<sup>233</sup>

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<sup>232</sup> Torp, p. 302.

<sup>233</sup> Ibid.

# 5 A comparison to the right to reindeer herding in Norway

## 5.1 The definition of the right

The central legislation regulating the right to reindeer herding in Norway is the Law on Reindeer Herding (*Lov om reindrift*, 2007-06-15 nr 40)<sup>234</sup>. In general, it is public law legislation with clear public law features regulating the relationship between the Sami people of Norway and the public authorities. However, it also consists of regulations on the legal relationship between individuals. There are e.g. rules on consequences of divorces and transfer of responsibility as unit leader, that is to say, civil law regulations.<sup>235</sup> However, the Sami have a relatively broad discretion to regulate their internal affairs.<sup>236</sup>

Chapter 1 Section 2 provides the aim and purpose of the Law, which is to enable an ecologically, economically and culturally sustainable reindeer husbandry based on the Sami culture, traditions and customs, for the reindeer herding population and society as a whole. In contrast to Swedish law, the law in Norway is based on environmental concern, even though the importance of the reindeer herding economy and the cultural life of the Sami also is emphasised. To fulfil this aim, the legislation shall give the basis for an appropriate organisation and management of the reindeer herding. Reindeer herding shall furthermore be preserved as a fundamental element for Sami culture and community and Chapter 1 Section 3 provides that the Law shall be used in accordance with international law on indigenous peoples and minorities. The development and practice of the industry shall ensure the economic and social conditions of its practitioners, while assuring their rights.<sup>237</sup>

By the Law it follows that the right to reindeer herding (*reindriftsretten*) is a property right as well as a usufruct. The right consists of two elements, reindeer herding as a business and reindeer herding as a usufruct to land. These two elements constitute prerequisites for each other and are not seen as two different types of rights, which in some regard is the case in Sweden.

The right is based on the principle of *alder tids bruk*, the Norwegian equivalent to the Swedish immemorial prescription, *urminnes hävd*,

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<sup>234</sup> In order not to confuse this legislation with its Swedish namesake, the author of this thesis has chosen to call this act *the Law on reindeer herding*. From now on it will be referred to as the Law. As no official translation of the instrument exists, the translations are made by the author of this thesis.

<sup>235</sup> See e.g. the Law Chapter 2 Sections 14 and 15.

<sup>236</sup> Bengtsson, 2004, p. 74.

<sup>237</sup> *Ibid.*



expressed in the Law Chapter 1 Section 4.<sup>238</sup> The conditions for *alder tids bruk* are not statutory as in Sweden but arise from practice.<sup>239</sup> Finally, the right to reindeer herding is an autonomous right also in Norway, which exists regardless of contract and is not created by or dependant on law. The right cannot be repealed and is hence, indefinite.

Chapter 3 of the Law gives a detailed description of the content of the right. In principle, it includes the right to graze, to reside and move with the herd, to make fences and facilities necessary for herding, to collect firewood and timber in the grazing areas and finally the right to hunting, trapping and fishing in these areas.<sup>240</sup> The hunting- and fishing rights in Sweden are connected to the right to reindeer herding in a way that has no equivalent in Norway. In Swedish legislation, all these rights represent elements in the reindeer herding right, while in Norway they can be assessed separately.<sup>241</sup>

## 5.2 The holder of the right

The Sami population has, based on immemorial prescription, the right to practice reindeer herding in the Sami reindeer grazing area.<sup>242</sup> The right to reindeer herding in Norway is a collective right, just like in Sweden. The rights and duties are mainly to individuals but the practice of reindeer herding is a clear collective right, as will be confirmed below. The right is an exclusive right reserved for the Sami and is only to a very limited extent transferable.

Chapter 2 Section 9 says that only persons who have a right to a reindeer-mark (*reinmerke*) have the right to own reindeer in the grazing area. Right to reindeer-mark belongs to persons of Sami origin who, when the Law entered into force, had reindeer herding as main occupation or had parents or grandparents with reindeer herding as their main occupation.<sup>243</sup> Furthermore, according to Section 9 Subsection 2, a requirement for owning reindeer is that the reindeer are part of a so-called share, *siidaandel*. A share means a family group or individuals that are part of a *siida* and are engaged in reindeer husbandry, under the leadership of one person, of spouses or of cohabitants.<sup>244</sup> Within the meaning of the Law, a *siida* is a group of reindeer owners carrying out herding in specific areas.<sup>245</sup> The leader of the *siida* must reside in Norway. He or she decides who may own reindeer and how many animals each member of the *siida* may have. The herding is carried out in so-called operating units (*driftsenheter*), that is to say a herd of reindeer.

A *siida* is similar to a Swedish Sami village but is smaller in size and does not function as a legal person. It is not an economic association but

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<sup>238</sup> In contrast to Sweden, *alder tids bruk* can establish ownership for the Sami, see Bengtsson, 2004, p. 74. Norway ratified the ILO Convention No. 169 with the motivation that a strongly motivated right of use can be equal to ownership.

<sup>239</sup> However, there are rules of custom (*hevd*) in *Hevdsloven*, 1966-12-09 nr 01. Custom can only establish an usufruct and not ownership of property, as *alder tids bruk* can.

<sup>240</sup> The Law, Chapter 3 Sections 19 – 26.

<sup>241</sup> Bengtsson, 2003, p. 236.

<sup>242</sup> The Law, Chapter 1 Section 4.

<sup>243</sup> The Law, Chapter 5 Section 32.

<sup>244</sup> The Law, Chapter 2 Section 10.

<sup>245</sup> The Law, Chapter 6 Section 51.

must hold annual meetings and work for the economic benefit of its members e.g. establish funds.<sup>246</sup> Both individuals and families can be part of an operating unit, but clearly all herding activities require membership in a herd. Like in Sweden, the exercise of the right is conditioned.

There is no definition of who is considered Sami in Norwegian legislation. Sami origin is first and foremost a question of self-identification according to the Sami Act (*Sameloven*)<sup>247</sup> Chapter 2 Section 2-6.<sup>248</sup>

The Constitution of the Kingdom of Norway (*Grunnloven*, 2005) Section 110 a. provides that it is the responsibility of the State to create the conditions enabling the Sami people to develop its language, culture and way of life. This provision is a policy statement and creates obligations for the state, firstly the Government and the Parliament of Norway, to take actions. The provision is also a creator of legal limitations for legislation.<sup>249</sup> The constitutional protection of Sami culture in Sweden, provided in the Instrument of Government Chapter 1 Section 2 p. 5, is a program goal and does not stipulate any individual rights. In contrast, Section 110 a. in the Norwegian Constitution directly requires lawmakers and authorities to take immediate measures with the aim of promoting the cultural life of the Sami. Hence, this is a more concrete measure of protection of the Sami culture.

The Sami right to reindeer herding has, both in Sweden and Norway, a special place in the civil law system. The right is not only a business right governed by public law, it is a factual civil right that may be enforced through the courts and is covered by the Constitutional protection of property.<sup>250</sup> In this way, there is a rights protection and this protection is for something more concrete than the culture of the indigenous people e.g. the property right protection shall apply on the right to reindeer herding in the same way as for land ownership.<sup>251</sup> This was established in the Swedish Taxed Mountain Case and the same principle is valid in Norway.<sup>252</sup> However, in a number of cases in Norway, the property protection has applied to the reindeer herding as such and not to the individual reindeer owner of which follows that the industry is holder of the right to land.<sup>253</sup> This indicates that the Sami collective in Norway is the population and not the Sami village as in Sweden. This does however not mean that herding is only a business right in Norway.

Regarding the Sami population as a whole, there is one major difference between the two states and that is the fact that Norway has ratified the ILO Indigenous and Tribal Peoples Convention and Sweden has not. One of the most important features of that Convention is consultation and an obligation for state authorities to negotiate with the peoples

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<sup>246</sup> See Sections 51 – 56.

<sup>247</sup> Full name: *Lov om Sametinget og andre samiske rettsforhold (sameloven)*, 1987-06-12-nr 56. Author's translation.

<sup>248</sup> Most Sami live in Norway, approximately 50,000 persons.

<sup>249</sup> A, Fliflet, *Grunnloven: Kommentarutgave*, Universitetsforlaget, Oslo, 2005, p. 461. Author's translation.

<sup>250</sup> Bengtsson, 2003, pp. 236-237.

<sup>251</sup> Compare to Section 110a in the Constitution of Norway and Chapter 1 Section 2 Subsection 4 in the Swedish Instrument of Government.

<sup>252</sup> Bengtsson, 2003, p. 238.

<sup>253</sup> *Ibid*, pp. 238-239.

concerned. In comparison to Sweden, Norway is considered better in consulting their Sami population when it comes to new legislation that affects them, their traditional occupations and their lands and territories, as the Sami Parliament in Norway has a stronger role than the Swedish Sami Parliament.<sup>254</sup> There is no obligation under Swedish legislation for state authorities to negotiate with the Sami Parliament when taking measures that may directly affect the status of the Sami as an indigenous people.

## 5.3 The geographical scope

### 5.3.1 Reindeer herding areas

Section 2 of the Law provides that the regulations of the Law are applicable to the reindeer grazing areas that the government decides. According to Section 4, the Sami population have the right to carry out reindeer herding in the Sami reindeer herding areas.<sup>255</sup> Inside these areas there is, according to this provision, a presumptive right to reindeer herding, within the framework of the law, if nothing else follows by special legal relationships. Section 4 does not itself answer the question what areas the reindeer herding Sami have used traditionally, but the areas mentioned in the provision are considered the outer limits of these areas.<sup>256</sup> The closer consideration of this question will therefore depend on specific assessments of the conditions in each area and is closely connected to the question of the legal basis of the right to reindeer herding.

Comparable to the Swedish summer- and winter pasture areas are the so-called *-sommersiida* and *vintersiida*, that is areas where the siida and the operating units carry out reindeer husbandry during different parts of the year. In contrast to Sweden, there are no large and coherent year-round areas. Reindeer grazing areas are areas mixed together with other land uses.<sup>257</sup> One exception to this rule is the so-called *Finnmark* and the Finnmark Act (*Finnmarksloven*) which will be discussed below.

A special complication when it comes to the geographical scope of the right is that the Sami land use changes in different parts of the country. Conditions vary not only between the Swedish year-round and winter pastures, and in the case of Norway between the inner Finnmark and the rest, but also between different parts of the country. This also affects the rights the Sami have traditionally had in different parts of the country.<sup>258</sup> In the Taxed Mountain Case, it is assumed that the Sami right to land and water would change and probably be stronger in northern Sweden than in the mountains in Jämtland, which the judgement concerned.

Section 11 of the Law provides that the right to reindeer herding applies in the mountains and other outlying land, with some exceptions for

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<sup>254</sup> Feiring, B, (editor), *Indigenous & Tribal Peoples' rights in practice - A guide to the ILO Convention No. 169*, International Labour Organization, 2009, p. 73.

<sup>255</sup> These are the counties Finnmark, Troms, Nordland, Nord-Trøndelag, Sør-Trøndelag and Hedmark, where the reindeer herding Sami traditionally have carried out husbandry.

<sup>256</sup> State Official Inquiry (NOU 2007:13 – *Den nye sameretten*), pp. 384-385.

<sup>257</sup> Bengtsson, 2004, pp. 74-75.

<sup>258</sup> Bengtsson, 2003, p. 234.

protected areas. The right to hunting, trapping and fishing, exists on the State commonage and other government land where the practitioners reside temporarily, under the same conditions as for other citizens, according to Section 14. Hunting is limited to small game. Hunting and fishing on privately owned land requires special legal basis e.g. *alder tids bruk*. The right to reindeer herding applies regardless of who owns the land. The state uses rules on fixed legal relationships as grounds for ownership of the areas in question and an actual condition under an adequate time period may establish ownership even if use in the strict sense has not occurred.<sup>259</sup>

### 5.3.2 The Finnmark

In 2005, the Finnmark Act (*Finnmarksloven*, 17-06-2005)<sup>260</sup> was adopted. The Act was the result of the Sami Rights Committee's conclusions and recommendations and is based on the notion that the areas where the Sami can claim use and ownership rights should be identified. The Act transferred the right to land and water to the inhabitants in the Finnmark County and the right to ownership and management over the natural resources to an agency called the Finnmark Estate, which is a private landowner. According to Act, the Sami are considered to have, through traditional use of land and water areas, acquired individual and collective ownership in the Finnmark County. The Act gives them greater influence in the administration of the property in the County. The Finnmark Estate must comply with all laws and regulations that govern the management of natural resources. The Act does not cover fishing in salt water and mining.

### 5.3.3 Custom and the burden of proof

In the case known as *Selbusaken*<sup>261</sup> the Court found that, the conditions were met by the Sami party to establishing an immemorial right. The conditions consists of three elements which are a certain use of land, lasting for a long time and carried out in good faith.<sup>262</sup> It is the overall assessment of these three elements that determine whether a right has emerged or not. How troublesome the use of land is for the landowner and the need of practice on the land of the one invoking *alder tids bruk* may also be taken into account in the assessment.<sup>263</sup>

Unlike in Sweden, the burden of proof in cases concerning land use is the landowners, meaning that they have to prove that there is no right to reindeer herding on the land in question.<sup>264</sup> However, what is needed from the landowners is only preponderance of probability that the use of land has

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<sup>259</sup> Bengtsson, 2004, p. 75.

<sup>260</sup> Full name: *Lov om rettsforhold og forvaltning av grunn og naturressuser i Finnmark fylke*.

<sup>261</sup> NRt 2001 s. 769.

<sup>262</sup> NRt 2001 s 769, p. 788

<sup>263</sup> Ibid. p. 789.

<sup>264</sup> State Official Inquiry (NOU 2007:13) p. 386.

lacked sufficient scale to make the land lawful herding area.<sup>265</sup> The landowners can then claim a better right.

## 5.4 Restrictions of the right

### 5.4.1 Different types of limitations

It is inevitable that modern land use in forestry and reindeer husbandry brings with it conflicts of interests between the parties. In Norway, reindeer husbandry competes with other industries in the whole reindeer herding area outside the Finnmark.<sup>266</sup> Generally, the situation for reindeer husbandry is very similar in Norway and Sweden as intrusions in the grazing areas are the same and raises the same problems.

The rule in Section 63 of the Law and Section 30 of the Swedish Reindeer Husbandry Act, dealing with restrictions on the husbandry based on actions taken by landowners and other land users are similar. According to Section 63 of the Law, landowners or other users of the land may not exploit their property in a way involving substantial harm or inconvenience to the reindeer husbandry practice. It is considered allowed for the landowners to actually restrict the land use of the Sami as they have some freedom to encroach in the usufruct through e.g. land reclamation.<sup>267</sup> *Substantial harm* in Section 63 will mean slightly less harm than *significant inconvenience* in the Swedish legislation. In this regard, the Swedish Act provides a weaker protection from intrusion than its Norwegian counterpart does.

In cases of intrusion through expropriation and similar measures, the affected Sami, with some tolerance, have a right to compensation. In Norwegian law, there is a clear difference between expropriation and disposal restrictions (*rådighetsbegrensninger*). The former but not the latter will trigger compensation, unless they will have the same effects as a full surrender of property.<sup>268</sup>

The Sami may adapt the grazing to some extent when the intrusion is based on individual and public interests.<sup>269</sup> Damage liability between the parties are more stringent for the Sami, who basically have a strict liability according to the Law Sections 25-26, while the landowner is responsible only for negligence.

Concerning limitations of the reindeer herding due to bilateral treaties see Section 4.4.1.

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<sup>265</sup> See e.g. *Selbusaken* (NRt 2001 s. 769), p. 788. Author's translation.

<sup>266</sup> Bengtsson, 2003, p. 234.

<sup>267</sup> Bengtsson, 2004, p. 76.

<sup>268</sup> State Official Inquiry (NOU 2007:13 – *Den nye sameretten*), p. 359.

<sup>269</sup> See e.g. NRt 1975 s. 1029 (*Rössågadomen*) and NRt 2001 s. 1578.

## 5.4.2 Sectoral legislation and reindeer herding

In the Norwegian Plan- and Building Act (*Plan- og bygningsloven*, 2008-06-27 nr 71)<sup>270</sup> Chapter 5 Section 4, concerning participation in physical planning, is stated that the Sami Parliament (*Sametinget*) has the authority to submit objections to such plan on issues of significant importance for Sami culture or livelihoods. It is also an overall responsibility for the authorities in the planning under the Act to secure the natural resource base for Sami culture, livelihoods and community.<sup>271</sup> Furthermore, according to the Act Chapter 11 Section 8, special Consideration Zones (*hensynssoner*) shall be established, which include areas for the reindeer husbandry. In the municipal construction plan for how to use land, so-called purpose areas (*arealformål*) for the reindeer herding shall be taken into consideration and, to the extent necessary, be specified in the plan.<sup>272</sup> This is also the case for so-called development plans, which also must include purpose areas for the reindeer herding.<sup>273</sup>

In the Mining Act (*Mineralloven*, 2009-06-19 nr 101)<sup>274</sup> it is stated that the management and use of mineral resources under this Act, in order to fulfil its objectives, shall take into consideration the natural resource base for the Sami culture, business and society.<sup>275</sup> In cases of investigations of possible exploitation in the Finnmark it is provided in Section 17 that, to a reasonable extent, the examiner shall provide information on Sami interests directly affected in the area to be examined. A permit may be refused if the consideration to Sami interests is against the application to be granted. At the assessment, substantial emphasis shall be on the consideration of Sami culture, reindeer herding, livelihood and society. If permission is granted following the application, there may be additional conditions to satisfy these concerns.<sup>276</sup>

## 5.4.3 The balance test

There is not an equivalent in Norway to the Swedish balancing test as expressed in the Swedish Environmental Code. However, the participation of the Sami Parliament in the physical planning process can be seen as a way of weighing the different and competing interests against each other in a conflict on how to use the land area in question.

In general, there is no protection against the exercise of competing land use in Norway, as long as it is a proper use of land, as it may be in the interests of governmental authorities to open up for new and lawful, use of land.<sup>277</sup> In some cases, the new disposal may hamper the existing users'

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<sup>270</sup> Author's translation.

<sup>271</sup> See the introductory provision in Chapter 3 Section 1 concerning the tasks and considerations under the law.

<sup>272</sup> Chapter 11 Section 7.

<sup>273</sup> Chapter 12 Section 5.

<sup>274</sup> Full name: *Lov om erverv og utvinning av mineralressurser*.

<sup>275</sup> Chapter 1 Section 2 (b). There is no official translation of this instrument. Author's translation.

<sup>276</sup> Section 17, Subsection 3.

<sup>277</sup> State Official Inquiry (NOU 2007:13) p. 375.

disposal so much that they may be entitled to compensation, if their use has a type and a scale that makes it logical to put it aside with the exercise of a right.<sup>278</sup> Government agencies will still be subject to certain limitations, not only in the case of physical planning, but also in relation to different forms of competing land use, which can be derived from Section 100 a in the Norwegian Constitution.<sup>279</sup>

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<sup>278</sup> Ibid.

<sup>279</sup> Ibid.

# 6 Analysis

## 6.1 The Sami right to traditional occupations as a national minority and an indigenous people

### 6.1.1 The right to traditional occupations in international human rights law

The right to traditional livelihoods for indigenous peoples is explicitly stated and provided by the Indigenous Peoples Declaration and the ILO Convention No. 169. The Declaration is only binding in the parts that constitute customary international law and *jus cogens* rules. The ILO Convention No. 169 is the main instrument on the subject and provides what actions ratifying states need to take to provide an adequate protection for their indigenous and tribal peoples. The Declaration and the Convention are mutually reinforcing as they touch upon the same subject and issues.

Traditional occupation is not mentioned in any of the other international instruments presented above and not even the term indigenous peoples or people are mentioned. However, there are various rules of relevance to minorities protection and most of these regulations are applicable to indigenous peoples as well e.g. the minority culture protection in the ICCPR, the Framework Convention and the in-principle-protection of lifestyle in Article 8 of the ECHR. According to the Human Rights Committee, Article 27 of the ICCPR applies to the traditional way of living and traditional occupations which is part of the minority culture.<sup>280</sup> This is also true concerning the ECHR and its Additional Protocols, as confirmed by the European Commission, although these instruments do not explicitly mention minorities.<sup>281</sup>

The right to work is expressed in both the UDHR and the ICESCR. The right includes the right for everyone to the opportunity to gain his or her living by work freely chosen e.g. through traditional livelihoods and occupations. Together with the prohibition of racial discrimination in the CERD, it is a fundamental obligation of States Parties to eliminate discrimination in the enjoyment of the right to work. Implicitly, the ILO Convention No. 122 provides a right to work as it is stated in Article 1 Section 2, that States policies shall ensure that every worker can, among other things, use his or her skills in a job for which he or she is well suited.

The right to protection of one's property is expressed in the UDHR, the CERD and the First Additional Protocol to the ECHR. The right to protection of property has a land use dimension and hence, these rules are of relevance for indigenous peoples making their living of the natural resources available on their traditional territories. Restrictions of the right to property

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<sup>280</sup> See Section 2.2.1.3.

<sup>281</sup> See Section 3.1.1. and 3.1.2.



require that, in accordance to the European system, the decisions makers strike a fair balance between the individual interest right and the national concern, and that compensation is given for loss of property.

As demonstrated above, there are various human rights set forth in a number of different international instruments concerning the right to traditional occupation. Just like the right to e.g. self-determination, the right to traditional occupation consists of various elements and various human rights. The components of the right to practice traditional occupations are e.g. non-discrimination, cultural integrity, ownership and use of land and natural resources and self-government. These elements are dependent on each other, inseparable and are mutually reinforcing. In this way, like a patchwork, they construct a right to traditional occupations.

## **6.1.2 Sweden's obligations**

There is no clear line between the right to culture and the right to traditional occupation. Some indigenous peoples are defined through their traditional occupations, but their livelihoods are also linked to cultural expressions and ceremonies. In the case of the Sami, the traditional industry/business/occupation, the reindeer husbandry, is considered to be the bearer of culture. That is why it is specially regulated in national law and subjected to monopoly. According to the Human Rights Committee, Article 27 of the ICCPR shall be understood as protection for indigenous peoples' traditional livelihoods. Hence, this is a protection of the Sami traditional lifestyle and their use of natural resources for the maintenance of themselves and their reindeer. The ECHR and the ECtHR follow the same line. Article 8 of the ECHR provides a protection for indigenous individuals' traditional lifestyles and hence, their traditional livelihoods and occupations. Sweden is bound to both these conventions. As a cultural expression and a traditional lifestyle, reindeer herding is clearly protected by international human rights standards. The traditional occupation of the Sami in Sweden is also protected by international labour law. The right to work is a fundamental human right and non-discrimination is a core labour right and a right of *erga omnes*.

Furthermore, Sweden is obliged not to discriminate against its national minority and indigenous people, in its legislation or practice, in authority or judicial decision. This follows by the ICCPR Articles 2 and 26, the CERD, the ILO Convention No. 111, the ECHR Article 14 and its Additional Protocol No. 12 and finally, the Framework Convention. The Sami shall have the right to equal enjoyment of all human rights and fundamental freedoms in these instruments. As a national minority and indigenous people they are also entitled to special protection in accordance with the protection against discrimination in order to safeguard the right to equal enjoyment.

The usufruct of land is considered a special right to real estate and the Sami right to reindeer herding is protected as a property right both under national as well as international law. The scope of this thesis prevents an answer to the question whether the Sami are being compensated enough, or at all, when restrictions of their right to reindeer herding is made. However, it is clear that compensation must be made when property is expropriated or

when the right to protection of property is limited. This follows by e.g. the First Additional Protocol and the EU Charter.

Sweden has not ratified the Convention No. 169. Hence, the right to protection of the reindeer husbandry as a traditional livelihood and the Sami right to use natural resources are not covered by the content of that convention. However, as provided above, various human rights laid down in other international instruments, as the right to a minority culture; the right to work which is freely chosen; the right to protection of property; prohibition of discrimination etc. constitute elements of the right to traditional occupations. Taken together, they provide for a protection of the right to practice traditional occupations. As Sweden has ratified these other conventions, they create obligations for Sweden to guarantee and promote this right.

### **6.1.3 The Swedish policy of land use and its correspondance to international standards**

Identifying areas of national interest for reindeer herding is a strategy of the Swedish Government stated to protect the Sami culture. The policy stipulates non-interference between reindeer husbandry and competing interests of land use in areas appointed to be of special importance for the reindeer husbandry. However, this policy, which at first glance seems to be in accordance with international standards on indigenous peoples' rights to land, has proven to lack value for the maintenance of the Sami culture and livelihoods. The balance test seems to be avoided by Swedish Courts that determine the issues before they have to go into the balancing of different national interests. It is not applied in practice and therefore has proved to be a lame protection for the reindeer husbandry. The provision in Chapter 3 Section 10 in the Environmental Code will not arise as the courts make their decisions before ever moving into that sphere, as exemplified by the three cases.<sup>282</sup> Decisions concerning restrictions of land use, which affects the reindeer husbandry and inevitably the right to reindeer herding, do not take the unique and special features of the reindeer husbandry into consideration. Reindeer husbandry is, in the eye of the decision maker, only another form of use of natural resources. In these proceeding, the indigenous status of the Samis, their right to self-determination and culture, and other more far-reaching claims, are not considered. In order to receive protection, the Sami party is referred to seek it elsewhere and are, on top of that, forced to appeal all governmental decisions that violate their right to traditional occupations and all other rights connected to that.

A genuine right is supposed to be guaranteed by the State. In that sense, the right to reindeer herding is reduced to a national interest among others by the legislator when regulated in sectoral legislation, without any consideration of its special nature and the fact that its practitioners are an indigenous people. Consequently, there is more consideration of economic and political values than for international human rights standards. The use

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<sup>282</sup> See Section 4.4.4.2.

of special rules for the Sami then appears motivated by national economical reasons. Safeguarding the interests of landowners, forestry, agriculture and tourism is regarded as more important and valuable than reindeer herding. However, this latter perspective cannot motivate infringements of a constitutionally protected utility right or a discriminatory construction of legal rules.

Regarding the restrictions of rights, in this case the lifestyle of the Sami, the right provided in Article 8 of the ECHR can only be restricted in accordance with the grounds mentioned in Article 8(2). These grounds can be the starting point when examining whether the Swedish policy correspond to international standards.

Possibly the restrictions made on the Sami right to land are in accordance with law - the Act, the Minerals Act etc. – and perhaps some restrictions of the right can be claimed to have a legitimate aim e.g. that the number of animals are limited to avoid overgrazing for the benefit of the reindeer industry as a whole. However, the restriction of the right to reindeer herding cannot simply be deemed necessary in a democratic society. Although it can be the will of a democratic society to decide that indigenous peoples have no special rights compared to others, these restrictions are discriminatory. Sweden has stipulated a special right for the Sami in national legislation but Sweden do not follow its own laws. The right to reindeer herding is not a right in its fullest sense, it is reminiscent more of an advantage that is given, not a guarantee. When each case of restrictions of land use must be fought separately in processes on natural resources, there is a risk that the Sami will lose their entire right to reindeer herding as the reindeer herding areas become more and more fragmented. Based on this, the restrictions of reindeer herding made in Swedish legislation must be questioned and criticised from a human rights and labour rights point of view. The types of restrictions that the herding Samis' are subjected to cannot fall within Sweden's margin of appreciation because the size of the margin depends on the balancing on competing rights.<sup>283</sup> Moreover, the interferences with the indigenous right to traditional occupation do not appear proportionate.

The right to reindeer herding under national legislation does not give the Sami a sufficient protection for their traditional occupation. The Sami lose almost every case concerning land use in Sápmi as the practice in Sweden shows that their traditional livelihoods must give way for modernization and more "profitable" use of the natural resources in Sápmi. This happens both on the merits of these cases but also because the Sami do not have the financial means to fight these cases, which in itself is discriminatory and can qualify as a violation of Article 6 of the ECHR. The fragmentation of the reindeer herding areas, which is the effect of all lost cases, is a denial of the Sami people's right to work.

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<sup>283</sup> See Section 3.1.1.

## 6.2 Possible changes and improvements

### 6.2.1 Consultation and economic sustainability

Even though Sweden has a policy to balance competing interests of land use in Sápmi the trend is still that modern usage of land is allowed to interfere with the Samis' traditional usage. The principles of consultation and economic sustainability that the Human Rights Committee has developed, when it comes to the question of what can justify such interferences, are not respected by Sweden.<sup>284</sup> The principles mean that states shall through their administrative or judicial decisions, secure active participation of cultural minorities, especially when their culture is based and dependent on the natural resources that is the subject for new decisions by the governmental authorities. According to the Human Rights Committee, decision makers must put great emphasis on the minority culture and its economic base in order not to violate Article 27. The decisions of governmental authorities cannot be based on arguments relating to the financial interests of the majority without the economic sustainability of the indigenous community being assessed.<sup>285</sup>

There may be a change coming in Sweden. In a recent case, concerning appeal of a permit for expropriation under the Minerals Act, the County Court referred to Article 27 and, based on this minority protection, they considered the total interference and the cumulative effect of such a grant for the Sami village.<sup>286</sup> The Court found that there was a risk of disregard of the requirement for effective consultation with the Sami village and hence a risk of violating the right in Article 27. The Court added conditions of consultation to the decision on the expropriation permit. However, what the Human Rights Committee has stated is that all intrusions and their cumulative effect for the Sami reindeer herding are crucial for assessments under Article 27. If a new intrusion, taken together with previous interventions would constitute a denial of the cultural protection in Article 27 these new actions shall not be taken without an inquiry of their effects. In this recent Swedish case, and in a number before that, the Courts can be claimed to add conditions on consultation too late in the process. When a permit has already been granted, which will result in actions further limiting the reindeer husbandry through fragmentation of the reindeer herding areas, conditions will only limit the harm. But the trend is clear – reindeer herding must stand back for more economically beneficial use of land in Sápmi.

There is however proof of practice in Swedish County Courts pointing in the direction pointed out by the Committee, e.g. in another case the Court found that a decision on an expropriation permit was not correct as it was not preceded by an investigation that showed what changes could be

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<sup>284</sup> See Section 2.2.1.3.

<sup>285</sup> See e.g. the comments of the Human Rights Committee and the article by Martin Scheinin.

<sup>286</sup> County Court in Norrbotten (*Länsrättens i Norrbottens läns Dom 2009-04-28, Mål nr 1616-06*).

expected to the reindeer herding.<sup>287</sup> This is the sort of consideration that is needed together with further understanding of the special nature of the reindeer husbandry as an industry, its extensive use of land and special features.

## 6.2.2 Grass is greener on the other side?

As mentioned in the introduction, foreign law can be a source of inspiration in the search for solutions to legal problems. In this case, the situation in Norway, as this was the comparison object, stands as a model for possible changes and improvements. But one should know that the Sami population is much bigger in Norway and the modern history of these two nations is very different. The situation of the Sami in Norway has a stronger political force. Therefore, it is not easy to draw any concrete conclusions of what pros and cons there are in the respective systems. What functions in one system may not function in another. However, inspiration for improvements can be found across the border.

In Norway, Government agencies are, due to Section 100 a. of the Norwegian Constitution, limited in their actions in cases of physical planning and in relation to different forms of competing land use as lawmakers and authorities are directly required to take actions to promote the Sami culture.<sup>288</sup> The reindeer herding in Norway is protected by a constitutional duty on authorities. As the deference rules in Swedish legislation when it comes to land use, in the Environmental Code, the Minerals Act etc., have proved inadequate to protect the Sami rights, a similar provision could improve the situation. If not through a constitutional duty, at least a requirement of promoting Sami right and their culture can be imposed by legislation, statements of national policy, effective government coordination and consultation. This could be one step in the right direction in order for Sweden to fulfil its international obligations.

The outcome of the legal practice and use of the balance test in cases of land use in the overwhelming majority of cases ends to the disadvantage of Sweden's indigenous people. The balance test can give the impression to be advantageous for the Sami as their extensive use of land has a very small impact on the environment, in comparison to the more intensive use from forestry, mining industries etc. and therefore it should be given preference. However, what one may think is the core of the Environmental Code, the environment, seems to be given little consideration in comparison to the economic interests. The balance test will not help the Sami to keep their culture and their right to their traditional occupation unless it is used. Existing law and regulations could be adequate if correctly applied, taking full consideration of Sami interests and to environmental factors.

In Norway, there are *hensynsoner* for reindeer herding, similar to the areas appointed to be of national interests for reindeer husbandry in Sweden. However, there is no similar phenomenon to the balance test. Instead, in order to safeguard Sami rights, the Sami Parliament participate in the

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<sup>287</sup> *Länsrätten i Norrbottens län* Dom 2005-09-20, Mål nr 692-04.

<sup>288</sup> See Section 5.4.3.

physical planning process. The Sami Parliament in Norway is considered to have more power than the Swedish one. Because of this, Norway is considered to be better in consulting its Sami population. A possible change and a way of improvement is therefore for Sweden to give the Sami Parliament more power in all matters concerning the use of land and water of importance for their traditional occupation. This is a possible way for the Swedish Government to fulfil its international obligations and secure consultation and cooperation with the Sami in indigenous issues and to lessen the uneven burden imposed by requiring each decision to be contested in a court of law. When the governmental authorities give permits for construction, exploitation, exploration etc., these permits should always be subject to conditions taking due account to the traditional occupation of the Sami and the special features of their right to reindeer herding. In this way, there can be room for more than one kind of land use in the area.

The creation of a similar County Estate like in the Norwegian Finnmark would be the ultimate recognition of the Swedish Samis' traditional occupation. It would give them control over the land, water and all natural resources they need for practicing their indigenous rights. The possibility to create such a county estate is a question that needs to be further investigated and the question of whether or not it is possible cannot be answered inside the framework of this thesis, but can be a subject for future research.

The ILO Convention No. 169 has been ratified by twenty states including Norway and Denmark. In order to be able to work with these questions with the best methods currently available, Sweden needs to ratify this Convention, as it is the main instrument providing guidance on the subject. Since the Swedish State's official inquiry regarding whether or not Sweden should ratify the Convention No. 169, the Commission on Reindeer Pasture Boundaries has made a tremendous work in its report specifying and clarifying some of the uncertainties that motivated reservations in 1999. The arguments that were made then, in support of not ratifying the Convention, have less force today.

The situation of the Sami in Sweden and the problems related to land use in Sápmi are not unique. These disputes exist everywhere in the world where there are indigenous peoples with a traditional use of natural resources. In some states these situations focus on ownership of the land in question, in other cases the question is about self-determination, but the broader agenda of the indigenous peoples and the national minorities are the same. In view of this, and the fact that the Sami is Europe's indigenous people, more pressure can and should be put on Sweden from the European Council and the European Union to adapt to internationally recognised regulations. Sweden can make a change and it is time for a change in Sweden.

## 7 Final conclusions and future research

The land fragmentation of the reindeer herding areas in Sweden is a denial of the Sami people's right to work and the right to free choice of work, as traditional occupation has the same legal protection internationally as formal employment. Even though Sweden claims not to be bound by any rule providing the Samis' right to their traditional occupations, the interdependence of different human rights, constructs a protection similar to the content of the right to traditional occupation. These rights are, the right to protection of property, the right to enjoyment of culture together with others in a minority community, the right to a certain lifestyle connected to nature, the right to family life and finally the right not to be discriminated against, especially when it comes to the right to work, which is a core labour right and an erga omnes rule. These rights make a patchwork, they overlap each other and fill in each other's gaps. These components create a protection of the Sami right to traditional occupation that Sweden cannot deny anymore.

The policy used today, which is claimed to give the Sami a protection from intrusion on certain areas of special importance for their industry, is without any value for the Sami and lacks legal worth. In order to protect their right to traditional occupation they are referred to proceedings concerning the use of natural resources. In these proceedings the natural interests of reindeer husbandry appear at the bottom of the national interests list. Restrictions of the reindeer herding areas are a restriction of the Sami use of land, which affects their right to reindeer herding and reindeer husbandry. In Sweden, the right to reindeer herding is given to the Sami people, but this right is limited in so many regards that it can be questioned if it can be called a right and how long the Sami will be able to carry out husbandry. The Act and the Environmental Code could provide an adequate protection if applied on the situations concerning the use of natural resources. The Sami rights could be safeguarded if full consideration was given to their interests in cases on land use. When each restriction and limitation due to disturbances of the reindeer husbandry must be fought individually, the overreaching problem is ignored. Continued land fragmentation will most likely lead to the end of reindeer herding for the Sami people.

A number of other serious problems connected to the Sami right to reindeer herding were discovered during the work on this thesis. Firstly, the Sami hunting- and fishing rights are subjected to equal disadvantages as the right to herding. These problems must, just like the right to reindeer herding, be addressed and further investigated in order to guarantee the indigenous rights of the Swedish Sami.

Another problem found during this research on the subject of reindeer herding is gender issues. Most material available in this area of law has a male perspective and a male terminology. Sami women and female children

may experience other difficulties and obstacles within the community as well as in their contact with government agencies and exploration companies. These difficulties and obstacles must also be made visible in order to correct them and overcome the problem. This demands further research on gender related problems.

Thirdly, representation has proved to be a very complicated issue. Before making the Sami Parliament stronger and politically powerful, like in Norway, internal problems must first be solved.<sup>289</sup> There must be collaboration within the Sami Parliament and if/when there are internal problems, the Parliament must have the ability to work them out. Otherwise, if the Sami Parliament will not function, another institution must be shoulder its responsibility and work for the common interests and for the preservation of the Sami culture. All work on these issues must be founded on true and democratic representation.

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<sup>289</sup> E.g. On May 26, 2010, the board of the Swedish Sami Parliament resigned because of internal lack of cooperation and because the board were no longer in majority.



# List of sources

## Treaties and other relevant instruments

The ILO Convention No. 111, Discrimination in Respect of Employment and Occupation, 1958

The ILO Convention No. 122, Employment Policy Convention, 1964

The ILO Convention No. 169, Indigenous and Tribal Peoples Convention, 1989

International Labour Organization Declaration on Fundamental Principles and Rights at Work

Convention on the Elimination of all Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965

The International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 September 1966

The International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966

The Statute of the International Court of Justice, adopted at San Francisco on 26 June 1945

The Universal Declaration of Human Rights, adopted and proclaimed by the United Nations General Assembly 217 A (III) of 10 December 1948

The United Nations Declaration on the Rights of Indigenous Peoples, adopted on September 13, 2007

## European Council

Additional Protocol No. 1, protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (ETS No. 155)

Additional Protocol No. 12, opened for signature on 4 November 2000 and entered into force on 1 April 2005

Convention for the protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Rome, 4.XI.1950

Explanatory Report on the Framework Convention for the Protection of National Minorities, H (1995) 010

The Framework Convention for the Protection of National Minorities, opened for signature by the Committee of Ministers of the Council of Europe on 1 February 1995 and entered into force on 1 February 1998

### **European Union**

The Council Directive 2000/43/EC on anti-discrimination

The Charter of fundamental rights of the European Union, 2000/C 364/01

The Treaty of Amsterdam, amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, signed 2 October 1997 and entered into force on 1 May 1999

The Treaty of Lisbon, amending the Treaty of the European Union, the Treaty establishing the European Community, signed by the EU member states on 13 December 2007 and entered into force on 1 December 2009.

### **The Human Rights Committee**

The Human Rights Committee, concluding observations on the report of Sweden, 7 May 2009 (CCPR/C/SWE/CO/6)

The Office of the High Commissioner for Human Rights, CCPR General Comment No. 18: Non-discrimination, 1989-11-10. Thirty-seventh session, 1989

General Comment No. 23: The Rights of Minorities (Art.27) (CCPR/C/21/Rev.1/Add.6, 1994)

General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declarations under article 14 of the Covenant (CCPR/C/21/Rev.1/Add.6, 1994)

### **The Committee on Economic, Social and Cultural Rights**

General Comment No. 18 (Thirty-fifth session) adopted on 24 November 2005, The right to work. Article 6 of the ICESCR, E/C.12/GC/18, 6 February 2006

### **The Committee on the Elimination of Racial Discrimination**

General Recommendation XXIV (Fifty-fifth session, 1999): Concerning Article 1 of the Convention, A/54/18 (1999) 103

General Recommendation XXIII (Fifty-first session, 1997): Indigenous Peoples. A/52/18, Annex V

Report of the Committee on the Elimination of Racial Discrimination, U.N. Doc. A/49/18, at 30 (1994) concerning the hunting rights applicable in Sápmi (Sami land)

### **The International Labour Organization**

*Indigenous & Tribal Peoples' Rights in Practice – A guide to the ILO Convention No. 169*, International Labour Standards Department, 2009.

*Rules of the game: A brief introduction to International Labour Standards*, International Labour Office, 2005.

### **Swedish legislation and official publications**

Diskrimineringslag (2008:567)

Jordabalk (1970:994)

Minerallag (1991:45)

Regeringsformen (1974:152)

Rennäringslag (1971:437)

Rättegångsbalk (1942:740)

Sametingslag (1992:1433)

Skogsvårdslag (1979:429)

### **Preparatory work**

Ds. 2009:40

Vissa samepolitiska frågor.

Prop. 1971:51

Kungl. Maj:ts proposition med förslag till rennäringslag

Prop. 1973:90

Grundlagspropositionen

Prop. 1975/76:209

Om ändring i regeringsformen

Prop. 1976/77:80

Om insatser för samerna.

Prop. 1985/86:3

Med förslag till lag om hushållning.

Prop. 1992/93:32	Om Samerna och samisk kultur m.m.
Prop. 1997/98:45	Miljöbalk
Prop. 1998/99:143	Nationella minoriteter i Sverige.
SOU 1999:25	Samerna – ett ursprungsfolk i Sverige
SOU 2001:101	En ny rennäringspolitik
SOU 2002:70	Sametingets roll i det svenska folkstyret
SOU 2006:14	Samernas sedvanemarker
SOU 2008:125	En reformerad grundlag
SOU 2008/09:158	Från erkännande till egenmakt – regeringens strategi för de nationella minoriteterna

### **The Discrimination Ombudsman**

DO:s Rapportserie 2008:1 (eng)	Discrimination of the Sami – the rights of the Sami from a discrimination perspective
--------------------------------	---

### **National Union of the Swedish Sami People**

Dnr Jo2009/2535, Jo2009/3203	Jörgen Jonsson, Svenska Samernas Riksförbund. Yttrande över Ds. 2009:40. From <a href="http://www.sapmi.se/0912%20slutversion.pdf">http://www.sapmi.se/0912%20slutversion.pdf</a> <a href="http://www.sapmi.se">www.sapmi.se</a> (2010-03-17)
------------------------------	---

### **Foreign Official Publications**

#### **Norwegian legislation and official publications**

Lov om rettsforhold og forvaltning av grunn og naturressureser i Finnmark Fylke, 17-06-2005 (Finnmarksloven)

Hevdsloven, 1966-12-09, nr 01

Lov om erverv og utvinning av mineralressurser, 2009-06-19 nr 101 (Mineralloven)

Lov om reindrift, 2007-06-15 (Reindrifstloven)

Lov om Sametinget og andre samiske rettsforhold, 1987-06-12-nr 56  
(Sameloven)

NOU 2007:13 Bind A

Den nye sameretten

### Internet sources

The ILO official homepage

[www.ilo.org](http://www.ilo.org)

Norwegian legislation

[www.lovdatab.no](http://www.lovdatab.no)

The Sami Parliament official homepage [www.sametinget.se](http://www.sametinget.se)

The National Union of the Swedish  
Sami People official homepage

[www.sapmi.se](http://www.sapmi.se)

# Bibliography

## Journals

- Allard, Christina m.fl.: "Samernas rättigheter försvagas", in *Dagens Nyheter* 2009.11.10.
- Larsson, Sara & Linna, Katri: "Samepolitik utan samisk insyn", in *Svenska Dagbladet*, 2010.01.10.  
From [http://www.svd.se/opinion/brannpunkt/samepolitik-utan-samisk-insyn\\_4064265.svd](http://www.svd.se/opinion/brannpunkt/samepolitik-utan-samisk-insyn_4064265.svd) (2010-03-17).

## Literature

- Allard, Christina: *Two sides of the coin: Rights and Duties*, Luleå University of Technology, Doctoral Thesis 2006:32.
- Anaya, S. James: *International Human Rights and Indigenous Peoples*, Aspen Publishers, 2009.
- Bengtsson, Bertil: *21 uppsatser*, Lund: Juristförlaget, 2003.
- Bengtsson, Bertil: *Samerätt – en översikt*, Stockholm: Norstedts Juridik, 2004.
- Bercusson, Brian: *European Labour Law*, Second edition, Cambridge: Cambridge University Press, 2009.
- Bernitz, Ulf m.fl.: *Finna rätt: Juristens källmaterial och arbetsmetoder*, tionde upplagan, Stockholm: Norstedts Juridik, 2008.
- Bogdan, Michael: *Komparativ rättskunskap*, andra upplagan, Stockholm: Norstedts juridik, 2003.
- Bonde, Fredrik: "Vad är rättvis ersättning när mark tas i anspråk med tvång?" I: Åhman, Karin, red., *Åganderätten*:

- Dess omfattning och begränsningar*, Iustus Förlag, Uppsala, 2009, s. 31 ff.
- Ebbesson, Jonas: *Miljö rätt*, Andra upplagan, Uppsala: Iustus Förlag, 2008.
- Ekenberg, Stefan: *The power of recognition: The limitation of Indigenous Peoples*, Luleå University of Technology, Doctoral Thesis 2000:14.
- Elenius, Lars: *Nationalstat och minoritetspolitik: Samer och finskspråkiga minoriteter i ett jämförande nordiskt perspektiv*, Luleå: Studentlitteratur, 2006.
- Feiring, Birgitte (editor): *Indigenous & Tribal Peoples' rights in practice - A guide to the ILO Convention No. 169*, International Labour Organization, 2009.
- Fiflet, Arne: *Grunnloven: Kommentartext*, Oslo: Universitetsforlaget, 2005.
- Holmberg, Erik och Stjernquist, Nils: *Vår författning*, trettonde upplagan, Stockholm: Norstedts juridik, 2003.
- Jacobs & White: *The European Convention on Human Rights*, Fourth Edition, Oxford University Press, 2006.
- Kaufmann, Christine: *Globalisation and Labour Rights – The Conflict Between Core Labour Rights and International Economic Law*, Studies in International Trade Law Volume 5, Hart Publishing, Portland, 2007.
- Korpijaakko-Labba, Kaisa: *Om samernas rättsliga ställning i Sverige-Finland*, Helsingfors: Juristförbundets förlag, 1994.
- Mörkenstam, Ulf: *Om "Lapparnes privilegier": Föreställningar om samiskhet i svensk samepolitik 1883-1997*, Stockholm: Stockholms

- Universitet, Statsvetenskapliga institutionen, 1999.
- Nowak, Manfred: *U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2<sup>nd</sup> revised edition*, N.P. Engel Publisher, 2005
- Riseth, Jan Åge: "Sami Reindeer Management in Norway: Modernization Challenges and Conflicting Strategies. Reflections upon the Co-management Alternative" In: Jentoff, Svein (eds), Minde, Svein, & Nilsen, Ragnar, *Indigenous Peoples – Resource Management and Global Rights*, Eburon, 2003.
- Rodgers, Gerry, et al. (editor): *The International Labour Organization and the Quest for Social Justice, 1919-2009*, International Labour Organization, 2009.
- Seth, Torsten: *Svensk Internationell Arbetsrätt*, Lund: Studentlitteratur, 2009.
- Scheinin, Martin: "The right to enjoy a distinct culture: Indigenous and competing uses of land" pp. 159-222. In: Orlin, Theodore S., et al. (editor): *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach*, Åbo: Institute for Human Rights, Åbo Akademi University, 2000.
- Spiliopoulou-Åkerman, Sia och Talah, Miriam: *Samernas rätt till deltagande och samråd – Fysisk planering och infrastruktur*, Svenska Avdelningen av Internationella Juristkommissionen, 2007.
- Thornberry, Patrick: *Indigenous Peoples and Human Rights*, New York: Machester University Press, 2002.



Torp, Eivind:

*Renskötselrätten och rätten till  
naturresurserna – Om rättslig  
reglering av mark- och  
resursanvändning på  
renbetesmarken i Sverige.*

Avhandling för graden dr. juris,  
Det juridiske fakultet, Universitetet  
i Tromsø. Tromsø: 2008.

# Table of Cases

Sweden

## **The Swedish Supreme Court**

NJA 1981 s. 1 *Skattefjällsmålet*

## **The District Court**

Östersunds Tingsrätt, T 243-08 (pending in court)

Östersunds Tingsrätt, Dom 2005-08-08, T 977-04

## **The Swedish Court of Appeal**

Hovrätten för Nedre Norrland, Dom 2002-02-15, T 58-96  
*Härjedalsmålet*

Hovrätten för Övre Norrland, Dom 2007-09-19, T 155-06  
*Nordmalingmålet*

RH 2001:56

## **The Environmental Court of Appeal**

MÖD 2006:49

## **The Supreme Administrative Court of Sweden**

Dom 2010-01-27, Mål nr 2860-07, 2863-07

Dom 2010-04-01, Mål nr 1680-08

Dom 2010-04-14, Mål nr 430-10

Norway

## **The Norwegian Supreme Court**

NRt 1975 s. 1029 *Rössågadomen*

NRt 2001 s. 769 *Selbusaken*

NRt 2001 s. 1578 *Seiland-dommen*

## Court of Justice of the European Communities

*European Parliament v. Council of European Union*, Case C-540/03, 27 June 2006

## European Commission on Human Rights

*Konkama and others v. Sweden*, Application No. 27033/95, (1996)

*G. and E. v. Norway*, Application Nos. 9278/81 and 9415/81, (1983)

## European Court of Human Rights

*Belgian Linguistic Case*, Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968

*Muonio Saami Village v. Sweden*, Application No. 28222/95, 15 February 2000

*Noack and others v. Germany*, Application No. 46346/99, 25 May 2000

## Human Rights Committee

*Kitok v. Sweden*, views of the Human Rights Committee, July 27, 1988, Communication No. 197/1985, U.N. Doc. A/43/40

*Lubicon Lake Band v. Canada*, views of the Human Rights Committee, March 26, 1990, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990)

*I Länsman and others v. Finland*, Communication No. 511/1992, Human Rights Committee Final, CCPR/C/51/1

*Sandra Lovelace v. Canada*, views of the Human Rights Committee, July 30, 1981, Communication No. 24/1977, U.N. Doc. CCPR/C/OP/1 at 83 (1984)