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# Implications for Sami Rights if Sweden Ratified ILO Convention No. 169

A study on the application of certain provisions from the ILO Convention No. 169 on Sami  
conditions in Sweden

JAMM07 Master Thesis

International Human Rights Law  
30 higher education credits

Supervisor: Lee Swepston

Term: Spring 2019

# Contents

SUMMARY .....	4
SAMMANFATTNING.....	5
ABBREVIATIONS.....	6
1 INTRODUCTION.....	7
1.1 BACKGROUND.....	7
1.2 AIM AND PURPOSE .....	9
1.2.1 <i>Research Questions</i> .....	10
1.3 DELIMITATIONS .....	10
1.4 METHODOLOGY.....	11
1.5 DISPOSITION .....	13
2 HISTORICAL BACKGROUND .....	14
3 INTERNATIONAL HUMAN RIGHTS LAW WITH A FOCUS ON ILO CONVENTION NO. 169..	18
3.1 ILO CONVENTIONS Nos. 107 AND 169.....	18
3.2 OTHER INTERNATIONAL INSTRUMENTS ON HUMAN RIGHTS.....	19
3.2.1 <i>United Nations</i> .....	19
3.2.2 <i>Council of Europe</i> .....	22
3.2.3 <i>European Union</i> .....	22
4 PARTICIPATION AND CONSULTATION .....	24
4.1 PARTICIPATION AND CONSULTATION IN ILO CONVENTION No. 169 .....	24
4.2 PARTICIPATION AND CONSULTATION IN INTERNATIONAL HUMAN RIGHTS LAW.....	28
4.3 PARTICIPATION AND CONSULTATION IN SWEDISH LEGISLATION .....	31
5 ECONOMIC PARTICIPATION .....	35
5.1 LANGUAGE.....	35
5.1.1 <i>Language in ILO Convention No. 169</i> .....	35
5.1.2 <i>Language in International Human Rights Law</i> .....	36
5.1.3 <i>Sami Language in Swedish legislation</i> .....	38
5.2 EDUCATION AND VOCATIONAL TRAINING FOR SAMI PEOPLE IN SWEDEN.....	40
5.2.1 <i>Education and Vocational Training in ILO Convention No. 169</i> .....	40
5.2.2 <i>Education and Vocational Training in International Human Rights Law</i> .....	42
5.2.3 <i>Education and Vocational Training for Sami People in Swedish Legislation</i> .....	44
5.3 HANDICRAFTS AND RURAL INDUSTRIES .....	46
5.3.1 <i>Handicrafts and Rural Industries in ILO Convention No. 169</i> .....	47
5.3.2 <i>Handicrafts and Rural Industries in International Human Rights Law</i> .....	47
5.3.3 <i>Handicrafts and Rural Industries of the Sami in Swedish Legislation</i> .....	48
5.4 RECRUITMENT AND CONDITIONS OF EMPLOYMENT .....	53
5.4.1 <i>Recruitment and Conditions of Employment in ILO Convention No. 169</i> .....	53
5.4.2 <i>Recruitment and Conditions of Employment in International Human Rights Law</i> ..	54
5.4.3 <i>Recruitment and Conditions of Employment of the Sami in Swedish Legislation</i> ..	56
6 LAND RIGHTS.....	59
6.1 LAND RIGHTS IN ILO CONVENTION No. 169 .....	59
6.2 LAND RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW.....	62
6.3 LAND RIGHTS OF THE SAMI IN SWEDISH LEGISLATION .....	65
7 ANALYSIS.....	73
7.1 PARTICIPATION AND CONSULTATION .....	73
7.2 ECONOMIC PARTICIPATION .....	75
7.3 LAND RIGHTS.....	78
8 CONCLUSION .....	80
BIBLIOGRAPHY .....	82

**TABLE OF CASES** ..... 91  
**APPENDIX** ..... 92

# Summary

Sweden has received substantial criticism from several international organs on how the Sami people is treated. These international organs often recommend Sweden to ratify ILO Convention No. 169, which is the only instrument concerning indigenous peoples specifically which is open for ratification today. Several government inquiries have been conducted with the aim of improving the rights of the Sami. However, the inquiries have seldom led to any change in the legislation.

This thesis examines the effects a Swedish ratification of ILO Convention No. 169 would have on the rights of the Sami peoples. This is done by comparing certain rights enshrined in the ILO Convention No. 169 with the Swedish legislation to determine whether any measures would be needed to implement the provisions. The rights enshrined in the ILO Convention No. 169 is also compared to other international instrument on human rights that impose obligations and expectations on Sweden in these regards. This thesis specifically examines provisions on participation and consultation, language, education and vocational training, handicrafts and rural industries, recruitment and conditions of employment, and land rights.

After having examined the rights of the Sami people in Sweden in relation to the provisions in the Convention No. 169, it could be concluded that in relation to rights on education and language, the Swedish legislation appears to meet the formal requirements of the ILO Convention No. 169. Some measures to ensure the effective implementation of those rights may be needed. Regarding recruitment and conditions of employment, the Swedish legislation lacks any special measures to ensure the effective protection of the rights of the Sami people.

The most notable restriction on Sami rights is that the land rights are restricted to reindeer herding Sami people. The reindeer herders are a minority within the Sami people. Therefore, a majority of the Sami people are denied their land rights, which are closely connected to their cultural life. Regarding the rights to participate and be consulted, Sami are often given the opportunity to give their opinion through Swedish legislation. However, these opportunities do probably not amount to the level of consultation contemplated in the Convention. Lastly, a ratification of ILO Convention No. 169 entail measures to recognize the Sami land rights and to identify these lands in consultation with the Sami peoples.

# Sammanfattning

Sverige har tagit emot betydande kritik från flera internationella organ för hur de behandlar den samiska befolkningen. Denna kritik är ofta förenad med en rekommendation åt Sverige att ratificera ILO:s konvention nr. 169, vilken är det enda internationella instrument som behandlar ursprungsfolk specifikt som är öppet för ratificering idag. Flera statliga utredningar har tillsatts i syfte att stärka samers rättigheter. Dessa utredningar har dock sällan lett till några ändringar i lagen. Denna uppsats undersöker effekterna av en svensk ratificering av ILO:s konvention nr. 169 skulle ha på samers rättigheter. Det görs genom en jämförelse av de rättigheter som skyddas i ILO:s konvention nr. 169 med den svenska rätten, för att avgöra om några åtgärder behöver tas för att implementera dessa rättigheter. Rättigheterna ur ILO:s konvention nr. 169 jämförs också med bestämmelser från andra internationella instrument för mänskliga rättigheter ålägger skyldigheter eller förväntningar på Sverige. Denna uppsats undersöker ett urval av bestämmelserna i ILO:s konvention nr. 169. Bestämmelserna som undersöks rör deltagande och samråd, språk, utbildning och yrkesutbildning, hantverk och landsbygdsindustri, sysselsättning och anställningsvillkor och markrättigheter.

Efter att ha undersökt samers rättigheter i Sverige i relation till bestämmelserna i ILO:s konvention nr. 169, kan slutsatsen dras att rättigheter som rör utbildning och språk formellt verkar vara uppfyllda av svensk lagstiftning som den ser ut idag. Dock kan några åtgärder krävas för att säkerställa effektiv implementering av dessa rättigheter. Gällande sysselsättning och anställningsvillkor saknas det idag särskilda åtgärder för att säkerställa effektivt skydd för samers rättigheter.

Den mest noterbara inskränkningen för samers rättigheter är att markrättigheterna är begränsade till renskötande samer. Renskötande samer är en minoritet inom samerna. Därmed får en majoritet av samerna sina markrättigheter inskränkta, vilka är nära sammankopplade med deras kultur. När det gäller rättigheterna att delta och samråda får samerna ofta möjlighet att ge sin åsikt genom svensk lagstiftning. Däremot når dessa möjligheter att ge sin åsikt antagligen inte upp till den nivå som eftersträvas i ILO:s konvention nr. 169. Slutligen, en ratificering av ILO:s konvention nr. 169 skulle medföra åtgärder för att erkänna samernas markrättigheter samt för att identifiera dessa marker genom samråd med det samiska folket.

# Abbreviations

CCPR	Human Rights Committee
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CFR	Charter of Fundamental Rights of the European Union
CRC	Convention on the Rights of the Child
DO	Equality Ombudsman ( <i>Diskrimineringsombudsmannen</i> )
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECRML	European Charter for Regional or Minority Languages
ESC	European Social Charter
FCNM	Framework Convention for the Protection of National Minorities
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
NJA	<i>Nytt juridiskt arkiv</i> , (Publication of judgements from the Supreme Court)
Prop.	Government Bill ( <i>Proposition</i> )
RF	Instrument of Government ( <i>Regeringsformen</i> )
SOU	Swedish Government Official Reports ( <i>Statens offentliga utredningar</i> )
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties

# 1 Introduction

## 1.1 Background

The Sami people is an indigenous people located in the region of Sápmi, an area stretching across the northern parts of Norway, Sweden and Finland, and Russia's Kola Peninsula. The total population of the Sami people is estimated to 70.000 people, of which 20.000 are estimated to be located within the borders of Sweden.<sup>1</sup>

As is the case of many indigenous populations, the Sami people have a history of being victims of exploitation and discrimination. The historical interactions between the State of Sweden and the Sami people have very much affected the relationship between the two today.

The Sami was recognized as an indigenous people in 1977 by the Swedish Parliament.<sup>2</sup> As an indigenous people, the Sami enjoy special protection and rights under Swedish and international law. In 2011, the Swedish Constitution was amended to include a provision declaring that the opportunities of the Sami people to preserve and develop a cultural and social life of their own shall be promoted.<sup>3</sup> The Sami people is also recognized as a national minority in Sweden, thus covered by the legislation regarding national minorities and minority languages.

Sweden has received substantial criticism on how the Sami people are being treated in Sweden, from national as well as international organs. The criticism is often followed with a recommendation directed towards Sweden to ratify the International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (hereinafter ILO Convention No. 169).<sup>4</sup> Although there are several international human rights

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<sup>1</sup> Swedish Government Official Reports (*Statens offentliga utredningar*) (SOU) 2005:116 *Jakt och fiske i samverkan* (Hunting and Fishing in Collaboration), p. 88.

<sup>2</sup> Government Bill (*Proposition*) (Prop.) 1976/77:80 *Om insatser för samerna* (Concerning Contributions for the Sami).

<sup>3</sup> SFS 1974:152 *Regeringsformen* (Instrument of Government) (RF), Chapter 1, Section 2, sixth paragraph.

<sup>4</sup> ILO Convention (no. 169) concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383. See for example: Equality Ombudsman (DO) Report Series 2008:1 (*Diskrimineringsombudsmannens rapportserie 2008:1*) *Diskriminering av samer – samers rättigheter ur ett diskrimineringsperspektiv*, also available in English: 'Discrimination of the Sami – the rights of the Sami from a discrimination perspective', references in page number will be made to the original Swedish version, p. 14 fn. 16; The Committee on the Elimination of Racial Discrimination (CERD), 'Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden' (23 September 2013) CERD/C/SWE/CO/19-21, para. 19; Human Rights Council, 'Report of the Special Rapporteur on the rights of indigenous peoples, Addendum, The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland' (6 June 2011) A/HRC/18/35/Add.2, para. 73; The Committee on Economic, Social and

instruments containing rights owed to indigenous peoples, ILO Convention No. 169 is the only instrument concerning indigenous peoples specifically which is open for ratification today. A ratification of ILO Convention No. 169 is followed by a rigorous supervisory system to ensure its implementation.

The Swedish Government stated in 1997 that a ratification by Sweden of ILO Convention No. 169 was desirable and appointed an inquiry to examine whether or not Sweden could ratify the Convention, and if so, what legislative and other measures would be required by Sweden to comply with the Convention.<sup>5</sup> The inquiry, published in 1999, examined each provision of the ILO Convention No. 169 in relation to Swedish legislation. It concluded that Sweden already complied with the Convention on most parts. However, the Sami rights to lands would have to be strengthened.<sup>6</sup> Following the inquiry of 1999 were several government inquiries examining: the Sami right to pursue reindeer herding, which is closely related to the land rights of the Sami;<sup>7</sup> the Sami right to hunt and fish;<sup>8</sup> and the delimitation of the traditional lands of the Sami.<sup>9</sup> The governments and the Sami Parliaments of Finland, Norway and Sweden initiated work on a Nordic Sami Convention which resulted in a draft presented by a committee of experts in 2006.<sup>10</sup> The draft presented has since been subject for negotiations in delegations containing representatives from the governments and the Sami Parliaments. The Negotiation Delegations presented a proposal in 2017.<sup>11</sup> The Sami Parliamentary Council, a co-operational body of the Sami Parliaments in Finland, Norway and Sweden, submitted a petition to the three

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Cultural Rights (CESCR), ‘Consideration of reports submitted by states parties under articles 16 and 17 of the covenant’ (1 December 2008) E/C.12/SWE/CO/5, para. 15; Human Rights Committee (CCPR), ‘Concluding observations on the seventh periodic report of Sweden’ (28 April 2016) CCPR/C/SWE/CO/7, para. 39.

<sup>5</sup> Committee Directive (*Kommittédirektiv*) Dir. 1997:103 *ILO:s konvention nr 169 om ursprungsfolk och stamfolk i självstyrande länder* (ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries).

<sup>6</sup> SOU 1999:25 *Samerna – ett ursprungsfolk i Sverige, Frågan om Sveriges anslutning till ILO:s konvention nr 169* (The Sami – an Indigenous People in Sweden, the issue of Sweden’s Ratification of ILO Convention No. 169).

<sup>7</sup> SOU 2001:101 *En ny rennäringspolitik – öppna samebyar och samverkan med andra markanvändare* (A New Reindeer Husbandry Policy – Open Sami Villages and Collaboration with Other Land Users).

<sup>8</sup> SOU 2005:116 (n 1).

<sup>9</sup> SOU 2006:14 *Samernas sedvanemarken* (Customary Land of the Sami).

<sup>10</sup> Expert Committee, ‘Nordic Saami Convention’ (Sametinget, 2006), <https://www.sametinget.se/105173> (accessed 28 May 2019).

<sup>11</sup> Förhandlingsdelegationerna (The Negotiations Delegation), ‘Nordisk Samekonvention’ (Sametinget, 2017), <https://www.sametinget.se/111445> (accessed 28 May 2019).



governments proposing a few alterations.<sup>12</sup> No information has been made public on any action since.

The Ministry of Culture published, in 2017, a proposal for a new law on formalized consultation on issues relating to the Sami people.<sup>13</sup> The newspaper *Svenska Dagbladet* reported that the proposal was considered to be politically delicate and was therefore stopped from being sent to the Council on Legislation (*Lagrådet*), which was the last step before presenting the proposal to the Parliament.<sup>14</sup>

In a report to the Committee on the Elimination of Racial Discrimination (CERD) published in 2017, the Swedish Government stated that they will continue to work towards a ratification of the ILO Convention No. 169. However, it emphasizes that a ratification is ultimately a question for the Parliament to decide on.<sup>15</sup>

Despite the submission to the CERD, national media have shown the political conflicts on the issue of ratifying the Convention. Stefan Löfven, leader of the Swedish Social Democratic Party, stated in 2014 in the Sami Radio, which is part of the independent public service radio broadcaster Swedish Radio, that the party would, if they were to win the election, commence a ratification of ILO Convention No. 169, a statement which generated conflict within the party.<sup>16</sup> Following the election, Stefan Löfven became the Prime Minister of Sweden and was re-elected in 2018. No further steps have yet been taken towards a ratification of the ILO Convention No. 169.

## 1.2 Aim and Purpose

This thesis will examine Swedish legislation on Sami rights in relation to certain provisions from the ILO Convention No. 169. It will also examine which commitments Sweden has made in relation to international law and whether these correspond with the provisions in ILO Convention No. 169.

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<sup>12</sup> Samiskt Parlamentariskt Råd (Sami Parliamentary Council), 'Skrivelse från SPR till regeringarna med ändringsförslag' (Sametinget, 2018), <https://www.sametinget.se/125288> (accessed 28 May 2019).

<sup>13</sup> Ministry Publications Series (*Departementsserie*) (Ds.) 2017:43 *Konsultation i frågor som rör det samiska folket* (Consultation on Issues Regarding the Sami People).

<sup>14</sup> Fröberg, Jonas, Dahlberg, Joel, 'Samevänligt förslag har fastnat hos oenig regering' *Svenska Dagbladet* (2 July 2018) <https://www.svd.se/samevanligt-forslag-har-fastnat-hos-oenig-regering> (accessed 28 May 2019).

<sup>15</sup> CERD 'Concluding observations on the combined twenty-second and twenty-third periodic reports of Sweden' (6 June 2018) CERD/C/SWE/CO/22-23, para. 120.

<sup>16</sup> Fröberg, Jonas, Dahlberg, Joel, 'Hemlig utredning göms av regeringen: "Sprängstoff"' *Svenska Dagbladet* (17 July 2018) <https://www.svd.se/hemlig-utredning-goms-av-regeringen-sprangstoff> (accessed 28 May 2019).

The aim of the thesis is to examine whether Swedish regulation is in compliance with certain provisions of ILO Convention No. 169, and if that is not the case, what changes would need to be made in order for the Swedish regulation to conform with the Convention. By examining existing Swedish commitments to international law, conclusions may be drawn as to how a ratification would affect the international expectations on Sweden in these regards.

This thesis will draw inspiration from the government inquiry on the ratification of ILO Convention No. 169 made in 1999, although giving more consideration to other international instruments. The purpose of the thesis is to examine the situation of the rights of the Swedish Sami today in relation to the ILO Convention No. 169.

### **1.2.1 Research Questions**

To achieve the aim and purpose of this thesis, the following research questions will be examined:

How would a ratification of ILO Convention No. 169 by Sweden affect the rights of the Swedish Sami people?

- What rights and obligations does the ILO Convention No. 169 entail?
- What rights and obligations in relation to indigenous peoples are Sweden presently bound by through international instruments?
- How are the Sami people protected by Swedish legislation?

### **1.3 Delimitations**

The scope of this thesis is limited to certain provisions enshrined in the ILO Convention No. 169. The thesis will examine provisions on participation and consultation, language, education and vocational training, handicrafts and rural industries, recruitment and conditions of employment, and land rights. The limitation of the scope to only certain provisions in the Convention was necessary due to the limitations of time and length of the thesis. Therefore, the focus of this thesis will be limited to the provisions concerning economic participation. When deciding on which provisions to include, the following considerations were made. Participation and consultation are fundamental to the application of the Convention. Thus, it is imperative to examine these provisions when discussing any of the other rights enshrined in the Convention. Land rights have been considered to be the primary obstacle to a ratification of the Convention by Sweden. Without an analysis of the land rights of the Sami, the thesis would have quickly been discounted. The Swedish legislation on the rights of the

Sami people is focused on land rights. As will be discussed in the thesis, the land rights of the Swedish Sami are closely related to the right to pursue reindeer herding. However, only a minority of the Sami pursue reindeer herding. To focus only on land rights would therefore exclude examining the situation of a majority of the Sami people. Therefore, provisions on both traditional industries and recruitment and conditions of employment will be examined as well. Additionally, some important aspects enabling indigenous peoples to participate in the economy are language, education and vocational training.

The thesis will not deal with the Nordic Sami Convention any further since it is not yet adopted and negotiations on the Conventions seems to have stagnated.

The chapter on the historical background of the Swedish Sami does not in any way aim to describe the history of the Sami in its entirety, but to provide the reader with a contextual background into the relationship between the Sami and the State and why the Swedish legislation is constructed as it is today.

## 1.4 Methodology

In the writing of this thesis, legal doctrinal method will be used. Professor Claes Sandgren describes the method as having the purpose of describing the law by using generally accepted sources of law.<sup>17</sup> These sources are legislation, preparatory work, case law, and legal doctrine. When interpreting the law in Swedish courts, preparatory work has been given significant meaning while legal doctrine has been given a lesser meaning.<sup>18</sup> When examining the Swedish legislation in this thesis, the law is the starting point. To interpret the law, the preparatory work to that law is essential. In cases where the case law has influenced the application of the law in a significant way, this is presented. When there still exists some uncertainty, legal doctrine has been referred to clarify or to illustrate that the issue is discussed in the doctrine. Sandgren further states that the describing the law means to interpret and determine the law as it exists and to systematize the law in the form of rules, principles, theories, relations etc.<sup>19</sup> Sandgren writes that the systematization can either put the conclusions into a bigger context and evaluate if it is compatible with the principles and systematics of the bigger context, or take the principles and systematics of the bigger context to develop the analysis of

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<sup>17</sup> Sandgren, Claes, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation*, Fourth edition, Norstedts Juridik, Stockholm, 2018, pp. 48f.

<sup>18</sup> Kleinman, Jan, 'Rättsdogmatisk metod' in Nääv, Maria and Zamboni, Mauro (eds.), *Juridisk metodlära*, Second edition, Studentlitteratur, Lund, 2018, pp. 21, 33f.; Sandgren (n 17) pp. 45f.

<sup>19</sup> Sandgren (n 17) p. 49.

the study.<sup>20</sup> It could be said that this thesis aims to do both. It will examine if Swedish legislation is in conformity with the international treaty ILO Convention No. 169. If that is not the case, the provisions of the Convention will be analysed to examine what changes would be needed in Swedish legislation if the Convention were to be ratified.

When interpreting international treaties in this thesis, the principles of the Vienna Convention on the Law of Treaties (VCLT) will be applied. The general rule of interpretation is enshrined in Article 31 of the VCLT. According to the first paragraph “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The ordinary meaning of the terms refers to the linguistic expression of the provision. This is confirmed in the fourth paragraph which establish the presumption that “A special meaning shall be given to a term if it is established that the parties so intended”.<sup>21</sup> The context is further specified in the second paragraphs as the whole text of the treaty, preamble, annexes, and agreements and other international law provisions adopted parallel to the treaty. The third paragraph states that together with the context, subsequent agreements, subsequent practices and relevant rules of international law shall be taken into account.

Article 32 of the VCLT contains “Supplementary means of interpretation”. It is therefore secondary to the means established in article 31 of the VCLT. Article 32 established that supplementary means of interpretation may be used in the interpretation to confirm the meaning resulting from an interpretation in accordance with article 31 or to determine the meaning when such an interpretation leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. Preparatory work of the treaty and circumstances of its conclusion are exemplified as being supplementary means of interpretation in article 32. Martin Scheinin, professor of international law and human rights, clarifies that preparatory works may be consulted already under article 31 to establish “for instance to establish in good faith what the object and purpose was, or how the ordinary meaning of the terms of the treaty was understood at the time it was drafted”. Therefore, Scheinin states that preparatory work can be used under article 32 with a decisive role if interpretation in accordance with article 31 does not give results.<sup>22</sup>

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<sup>20</sup> Sandgren (n 17) p. 78.

<sup>21</sup> Scheinin, Martin, ‘The art and science of interpretation in human rights law’, in Andreassen, Bård-Anders, Sano, H.-O. and McInerney-Lankford, Siobhán (eds.), *Research methods in human rights: a handbook*, Edward Elgar Publishing, Cheltenham, UK, 2017, p. 23.

<sup>22</sup> *ibid* pp. 24f.

If there are official translations of the Swedish legislation referred to, these have been used in order to achieve correct translation as far as possible. In cases where no official translations exist, the author of this thesis have translated to the best of her ability.

## **1.5 Disposition**

This thesis begins with providing the reader with a historic contextual background to the relationship between the Swedish Sami people and the Swedish State. Following the historical background, chapter 3 will briefly present the ILO Convention No. 169 and the other international instruments that will later be examined in the thesis. The thesis will then proceed with examining the chosen provisions of the ILO Convention No. 169, corresponding rights enshrined in other international instruments and the Swedish legislation affecting these rights. In chapter 4, the first provisions will be examined. These regard participation and consultation, as they are fundamental principles to the Convention. In chapter 5, provisions affecting economic participation will be examined. These are divided into subchapters, namely: language, education and vocational training, handicrafts and rural industries, and recruitment and conditions of employment. Chapter 6 examines indigenous land rights. When examining the rights of indigenous peoples in chapters 4-6, each subject will be presented by first reviewing the provisions enshrined in the ILO Convention No. 169, then briefly study provision in other international instruments before lastly considering the Swedish legislation. Following this review of national and international instruments, is the analysis which will discuss the presented material in light of the research questions presented above. The research questions will then be answered in chapter 8 containing the conclusions on the thesis. The provisions of ILO Convention No. 169 examined in the thesis will be provided in an appendix.

## 2 Historical Background

The dealings between the Swedish State and the Sami people began when Sweden started to colonize Norrland (the northern parts of Sweden) in the beginning of the 14<sup>th</sup> century. The State, or more accurately for that time the Crown, began to levy taxes on the Sami during the 14<sup>th</sup> and 15<sup>th</sup> centuries.<sup>23</sup> The land used by the Sami families was registered for tax purposes and became known as the Sami tax lands or, in Jämtland and Härjedalen, as the tax mountains.<sup>24</sup> When the Crown recognized the riches in these areas in the mid-16<sup>th</sup> century, the levy was increased by the double.<sup>25</sup>

In the early 17<sup>th</sup> century, the Crown was in war with Poland and in need of more income. The Sami were to pay taxes in reindeer and dry fish instead of hides, to feed the soldiers. This forced the Sami to scale up their reindeer husbandry.<sup>26</sup>

Settlers started moving into the “Lappmark” (the area traditionally used by the Sami) during the 18<sup>th</sup> century. The Crown tried to make the Lappmark appealing for settlers by promising reduced taxes. At first, the Crown protected the Sami and their way of living. However, when the economic value of the reindeer husbandry industry decreased and the economic value of farming and mining increased, the Crown started to favour the settlers over the Sami. The Sami were no longer considered to be the group which could utilise the Lappmark in the most lucrative way.<sup>27</sup> With the number of settlers increasing, so did the number of disputes before courts between settlers and Sami. Historian Lennart Lundmark describes how the local courts gradually started to pass more and more judgements in favour of the settlers. The settlers won almost all cases by the end of the 18<sup>th</sup> century.<sup>28</sup>

To further support the settlers, the Crown granted settlers in the late 18<sup>th</sup> century inheritance rights and the right to redeem crown land on which their properties were situated. Following the Sami making the Crown aware that the land left would not be enough for the reindeer grazing, the Crown allocated a number of tax mountains for the Sami. The Sami were also granted the right for their reindeers to graze during winter in areas where they traditionally

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<sup>23</sup> Lundmark, Lennart, *Så länge vi har marker: samerna och staten under sexhundra år*, Rabén Prisma, Stockholm, 1998, pp. 18ff.

<sup>24</sup> *ibid* p. 59.

<sup>25</sup> *ibid* pp. 25ff.

<sup>26</sup> *ibid* pp. 33ff. and Catomeris, Christian, *Det ohyggliga arvet: Sverige och främlingen genom tiderna*, Ordfront, Stockholm, 2004, p. 192.

<sup>27</sup> Lundmark (n 23) pp. 60ff. and 67ff. and Kvist, Roger, (ed.), *Readings in Saami history, culture and language 3*, Center for Arctic Cultural Research [Centrum för arktisk kulturforskning], Univ., Umeå, 1992, pp. 63-77.

<sup>28</sup> Lundmark (n 23) pp. 70ff.

had done so, without having to pay any fees to the owner of the land. However, when the Sami tried to fell trees on the tax mountains to sell, the Crown declared that the Sami had no right to do so. The Sami were only allowed to utilise the tax mountains for reindeer grazing, hunting and fishing and were only allowed to cut down trees for sustenance of the household.<sup>29</sup> To summarize, the settlers were granted ownership of land while the Sami were granted the right to use certain areas in certain ways.

The idea that the Sami people and the settlers, the permanent residents, could live parallel lives without interfering with each other was no longer valid. The State realised that this relationship needed to be regulated to avoid conflicts. The reindeer husbandry became the focus of the State.<sup>30</sup> The first Reindeer Grazing Act came in 1886 closely followed by a second in 1898 and a third in 1917.<sup>31</sup> The rights to reindeer husbandry were granted exclusively to the Sami. With that right followed the right to use land and water for themselves and the reindeers, the right to pasturage and forest produce, and the right to hunt and fish.<sup>32</sup> The granting of certain rights to Sami meant that the group “Sami” needed to be defined. Who could claim these rights? The “ethnic” or “genuine” Sami was considered to be a nomadic reindeer herdsman. This meant that Sami people who did not work within the reindeer husbandry industry were excluded from the rights granted exclusively to the “genuine Sami”. The majority of Sami were not reindeer herders and therefore excluded from these rights. Historian Roger Kvist points out the negative impact this excluding policy have had on the level of knowledge of Sami as a language later on. Sami women could only obtain the rights indirectly, through being married to a Sami man. Thus, the rights of the Sami women were dependent on whether their husbands were defined as Sami men.<sup>33</sup>

The early Reindeer Grazing Acts meant that the Sami tax lands and tax mountains no longer existed. Instead, the land was divided into Sami villages. The land belonged to the state but was used by the Sami people. The Acts stipulated that the rights of the Sami people are collective rights. The rights are not owed to the individual but to a Sami village. With that followed a collective responsibility to remunerate any damage caused by the reindeers.<sup>34</sup>

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<sup>29</sup> Lundmark (n 23) pp. 74f.

<sup>30</sup> For more on why the reindeer husbandry became the focus of the state see Mörkenstam, Ulf, *Om "Lapparnes privilegier": föreställningar om samiskhet i svensk samepolitik 1883-1997*, Univ., Diss. Stockholm: Univ., Stockholm, 1999, pp. 79ff.

<sup>31</sup> Reindeer Grazing Act of 1886 (1886:38) (*1886 års Renbeteslag*), Reindeer Grazing Act of 1898 (1898:66) (*1898 års Renbeteslag*) and Reindeer Grazing Act of 1917 (1917:337) (*1917 års Renbeteslag*).

<sup>32</sup> Mörkenstam (n 30) pp. 87ff.

<sup>33</sup> *ibid* pp. 92ff. and Kvist (n 27) pp. 69f.

<sup>34</sup> Mörkenstam (n 30) pp. 94f., Lundmark (n 23) p. 94 and Kvist (n 27) p. 70.

During the late 19<sup>th</sup> century, the right to vote was determined by wealth. The reindeer grazing rights were not considered to be financial assets. Therefore, the Sami people had no right to vote in neither local nor national elections.<sup>35</sup> Kvist exemplifies the weak status the civil rights of the Sami at this time with the forcible removal of Sami in the north to southern Sami villages.<sup>36</sup>

Mörkenstam, political scientist, describes the Swedish Sami Policy at this time as divided. The policy aimed to assimilate and segregate at the same time. The State wanted to assimilate the non-nomadic Sami people, since they were not viewed as “genuine Sami” people. At the same time, in order to give the Sami certain rights not owed to Swedish people, the Sami needed to be separated from the Swedish people.<sup>37</sup>

The idea of the Sami identity as nomadic reindeer herders was further institutionalized in the Reindeer Grazing Act of 1928. The Act acknowledges the heterogeneity of the Sami people by defining two categories: the nomadic reindeer herders which are owed special rights and the non-herding Sami. Through the 1928 Act, non-herding Sami is acknowledged as Sami in the political discussion. However, they continue to be marginalized since they are not entitled to the rights that are owed to the “genuine Sami” of the first category.<sup>38</sup>

After the second world war, the Swedish Sami policy did not comply with the new emerging view of how a democratic society treated minorities. International treaties and declarations were analysed from a Swedish perspective.<sup>39</sup> The ILO Convention No. 107 concerning Indigenous and Tribal Peoples, was not regarded as an issue of direct concern to the Swedish State.<sup>40</sup> Following the new view on minorities, the State becomes interested in protecting the Sami culture. The idea of what was “Sami” shifted from the nomadic lifestyle of the herders to the language and culture of the Sami people. The Sami as a people are now considered by the State to include both reindeer-herding and non-herding Sami. However, it is the Sami reindeer herder that is considered to have preserved the Sami culture best and is therefore considered to be the bearer of Sami culture. Consequently, the non-herding Sami continues to be marginalized and excluded from their rights as Sami.<sup>41</sup> The reindeer husbandry industry was considered to be underdeveloped and in need of modernization and rationalization.

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<sup>35</sup> Lundmark (n 23) pp. 94f. and Kvist (n 27) p. 70.

<sup>36</sup> Kvist (n 27) p. 70.

<sup>37</sup> Mörkenstam (n 30) pp. 98ff.

<sup>38</sup> *ibid* pp. 115ff.

<sup>39</sup> *ibid* pp. 151f.

<sup>40</sup> Prop. 1958:46 *Kungl. Maj.ts proposition till riksdagen med förslag till hälsovårdsstadga* (Proposition from the Royal Majesty to the Parliament on Healthcare Regulation), p. 20.

<sup>41</sup> Mörkenstam (n 30) pp. 155f. and pp. 166ff.



The State thereby motivates measures taken with regards to the reindeer husbandry industry as measures taken to preserve the Sami culture. These ideas were institutionalized in the Reindeer Herding Act of 1971.<sup>42</sup>

The Sami is recognized as an indigenous people in 1977 by the State.<sup>43</sup> All Sami are now considered a part of the Sami people. The Sami people as a minority group and an indigenous people, are considered to have a right to cultural autonomy.<sup>44</sup> In 1993, the Sami Parliament in Sweden was inaugurated.<sup>45</sup> The Sami Parliament is both a government authority and a body that is popularly elected by the Sami people.<sup>46</sup> The primary task of the Sami Parliament is to monitor issues concerning the Sami culture in Sweden.<sup>47</sup>

To summarize, the relationship between the State and the Sami people is because of this historical background strained. The state has viewed the land as an economic asset rather than the traditional lands of the Sami. Moreover, the division between reindeer herding Sami and non-reindeer herding Sami is in practice still there, since land rights are only owed to the reindeer herding Sami. The rights of the Sami today will further be discussed in the following thesis.

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<sup>42</sup> Mörkenstam (n 30) pp. 156ff.

<sup>43</sup> Prop. 1976/77:80 (n 2).

<sup>44</sup> Mörkenstam (n 30) pp. 211f.

<sup>45</sup> SFS 1992:1433 *Sametingslag* (Sami Parliament Act).

<sup>46</sup> Sami Parliament Act, Chapter 2, Section 2.

<sup>47</sup> Sami Parliament Act, Chapter 1, Section 1.

# 3 International Human Rights Law with a Focus on ILO Convention No. 169

## 3.1 ILO Conventions Nos. 107 and 169

ILO Convention No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries was adopted in 1957. The ILO Convention No. 107 was based on the assumption that indigenous and tribal peoples should be integrated into the national community.<sup>48</sup> After receiving severe criticism from, among other, the emerging indigenous movement, a Meeting of Experts was proposed to consider revising the ILO Convention No. 107. Indigenous members of trade unions, employers' organizations, government ministries and a few NGOs replaced the usual tripartite participants of the Meeting of Experts, which decided that the ILO Convention No. 107 should be revised to eliminate the integrationist approach.<sup>49</sup> The ILO Convention No. 169 replaced the integrationist approach with a human rights-based approach, with provisions on respect, recognition, participation and consultation.

The role of the ILO in relation to issues of indigenous peoples have been questioned. In *The ILO and the Quest for Social Justice, 1919-2009* it is stated that “many indigenous and tribal peoples are the very model of the informal economy with which the ILO has become concerned in more recent years. These instruments have provided guidance on what needs to be done to allow groups who are either outside or at the margins of national societies and economies to survive when faced with other economic and social models. In addition, both conventions deal with the fact that when these groups do enter the workforce they are almost always at the bottom of the scale, and uniquely vulnerable to abuses that are tied closely to their social situation and within the ILO's area of responsibility. and these peoples are found in most parts of the world – some 350 million in all”.<sup>50</sup>

Every state party to a convention must submit regular reports on the measures it has taken to implement the convention. Reports for the ILO Convention No. 169 must be submitted

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<sup>48</sup> ILO Convention (no. 107) concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries (adopted 26 June 1957, entered into force 2 June 1959) 328 UNTS 247, preamble.

<sup>49</sup> Rodgers, Garry, Swepston, Lee, Lee, Eddy and van Daele, Jasmien, *The International Labour Organization and the quest for social justice, 1919-2009*, International Labour Office, Geneva, 2009, p. 88.

<sup>50</sup> *ibid* pp. 85f.

every five years. The report is then examined by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR). The CEACR makes two types of comments: observations, which contain comments on fundamental questions, and direct requests, which are related to more technical questions or requests more information on a specific matter. Observations are published in the CEACR's annual report. The annual report of the CEACR is submitted to the International Labour Conference and examined by the Conference Committee on the Application of Standards. The governments are invited to respond before and provide information to the Conference Committee. The Conference Committee then draws up conclusions in which they recommend specific steps for the government. Moreover, there are special procedures for representations and complaints.<sup>51</sup>

The content of ILO Convention No. 169 will be further discussed in the following chapters of this thesis. When using the term *peoples* in the ILO Convention No. 169, it is not to be construed as having any implication as regards the rights which may attach to the term under international law.<sup>52</sup> The same applies to the text of this thesis. Furthermore, when articles of the ILO Convention No. 169 are referenced in this thesis, they can be found in the appendix. Considering that this thesis is focusing of the rights of the Sami as an indigenous peoples, “indigenous peoples” will be used as a shorthand for “indigenous and tribal peoples” when referencing the ILO Convention No. 169.

## **3.2 Other International Instruments on Human Rights**

The following text will briefly present the international instruments of human rights that will later be referred to in this thesis. The rights enshrined in these instruments will be discussed further in the following chapters. In addition to presenting the instruments, the following text will describe the legal relationship between the instruments and Sweden. For the instruments that have monitoring systems attached, these will be presented.

### **3.2.1 United Nations**

The Universal Declaration of Human Rights (UDHR) was proclaimed by the United Nations General Assembly (UNGA) on 10 December 1948.<sup>53</sup> The UDHR consists of 30 articles

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<sup>51</sup> Constitution of the International Labour Organization (adopted 1 April 1919, entered into force 28 June 1919) (ILO Constitution), arts. 24-34.

<sup>52</sup> ILO Convention No. 169, art. 1.

<sup>53</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

on fundamental rights and freedoms to be universally protected that express a common standard of achievement for all peoples and all nations.<sup>54</sup> No legal obligations derive directly from the UDHR. However, the two Covenants presented below contain many of the rights enshrined in the UDHR.

The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the UNGA on 16 December 1966.<sup>55</sup> The ICCPR is legally binding for States which have ratified it. Sweden ratified it on 6 December 1971. There are two optional protocols to the ICCPR. The First Optional Protocol to the ICCPR regulates an individual complaint process. It was adopted by the General Assembly on 16 December 1966 and ratified by Sweden on 6 December 1971. The second Optional Protocol to the ICCPR is aimed at the abolition of the death penalty. It was adopted by the General Assembly on 15 December 1989 and ratified by Sweden on 11 May 1990.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a multilateral treaty adopted by the UNGA on 16 December 1966.<sup>56</sup> The ICESCR is a legally binding treaty for the States which have ratified it. Sweden ratified the ICESCR on 6 December 1971. There is an Optional Protocol to the ICESCR adopted by the Human Rights Council on 18 June 2008, which provides for complaint procedures for individuals or groups of individuals, an inquiries procedure and an inter-state complaints procedure. However, Sweden has not ratified the Optional Protocol. Therefore, its provisions do not apply to Sweden.

The monitoring bodies for the Covenants are the Human Rights Committee (HRC) for the ICCPR<sup>57</sup> and the Committee on Economic, Social and Cultural Rights (CESCR) for the ICESCR.<sup>58</sup> Both Covenants have reporting systems where State Parties to the Covenants must submit reports to the monitoring body in periodic intervals regarding the progress of implementing the Covenants.<sup>59</sup> The monitoring bodies then study the reports and publish their concerns and recommendations in “Concluding observations”. Both bodies publish “General

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<sup>54</sup> See Preamble of the UDHR.

<sup>55</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>56</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

<sup>57</sup> ICCPR, art. 28.

<sup>58</sup> The CESCR was established to carry out the functions assigned to the United Nations Economic and Social Council in the ICESCR. Economic and Social Council ‘Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights’ (28 May 1985) Res 1985/17.

<sup>59</sup> ICCPR, art. 40 and ICESCR, art. 16.

Comments” on its interpretation of the provisions in the Covenants. In addition, the CCPR considers communication made by one State Party claiming that another State Party is violating the ICCPR, if the State Party has recognized that the CCPR have this competence.<sup>60</sup>

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted by the UNGA on 21 December 1965.<sup>61</sup> The ICERD is legally binding to States which have ratified it, which Sweden did on 6 December 1971. Similarly to the monitoring bodies of the Covenants, the Committee on the Elimination of Racial Discrimination (CERD) receives regular reports and publish “Concluding recommendations” and “thematic discussions”.<sup>62</sup> Additional mechanism of the CERD are early-warning procedure, inter-state complaints and individual complaints.

The Convention on the Rights of the Child (CRC) was adopted by the UNGA on 20 November 1989.<sup>63</sup> States parties are legally bound by the CRC under international law, and Sweden ratified the CRC on 29 June 1990. Sweden has also ratified the first two optional protocols to the CRC. However, Sweden has not ratified the third optional protocol concerning a communications procedure. The Committee on the Rights of the Child monitors the implementation of the CRC through periodic reports, resulting in “Concluding observations”, “General comments”, and organizes days of general discussion.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UNGA on 13 September 2007.<sup>64</sup> The declaration contains a comprehensive collection of the rights of indigenous peoples. However, the UNDRIP is not a legally binding instrument.

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (hereinafter Declaration on Minorities) was adopted by the UNGA on 18 December 1992.<sup>65</sup> The declaration is not legally binding.

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<sup>60</sup> ICCPR, art. 41.

<sup>61</sup> Convention on the Elimination of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

<sup>62</sup> ICERD, art 9.

<sup>63</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 43 (CRC).

<sup>64</sup> United Nations Declaration on the Rights of Indigenous Peoples UNGA RES61/295, A/RES/61/295 (adopted 2 October 2007) (UNDRIP).

<sup>65</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities UNGA RES/47/135 (adopted 18 December 1992).

The Convention against Discrimination in Education was adopted by the United Nations Educational, Scientific and Cultural Organization on 14 December 1960.<sup>66</sup> The Convention is a multilateral treaty containing legally binding provisions for its state's parties. Sweden ratified the Convention on 21 March 1968.

### 3.2.2 Council of Europe

The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is a convention from the Council of Europe which entered into force on 3 September 1953.<sup>67</sup> All member states of the Council of Europe are parties to the ECHR. ECHR is directly applicable in Sweden since it has been incorporated in its entirety into Swedish legislation.<sup>68</sup> The ECHR established the European Court of Human Rights which rules on individual or State applications in which violations of the rights set out in the ECHR are alleged.<sup>69</sup>

The Framework Convention for the Protection of National Minorities (FCNM) and the European Charter for Regional or Minority Languages (ECRML) are legally binding multilateral instruments adopted by the Committee of Ministers of the Council of Europe.<sup>70</sup> Sweden ratified the FCNM and the ECRML on 9 February 2000. The Committee of Ministers of the Council of Europe and the Advisory Committee of the Council of Europe are both monitoring the FCNM and the ECRML by issuing opinions and adopting recommendations on the implementation of the treaties. The structure of the ECRML is that Part II contains general objectives and principles which apply to all of the regional and minority languages while Part III contains provisions from which each signatory state are to some extent free to choose.<sup>71</sup>

The European Social Charter (ESC) was adopted in 1961 and revised in 1996. Sweden ratified the ESC on 29 May 1998. The states parties submit a report on an annual basis which is examined by the European Committee of Social Rights

### 3.2.3 European Union

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<sup>66</sup> Convention against Discrimination in Education (adopted 14 December 1960, entered into force 22 May 1962) 429 UNTS 93.

<sup>67</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (as amended) (ECHR).

<sup>68</sup> SFS 1994:1219 *Lag om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna* (European Convention for the Protection of Human Rights and Fundamental Freedoms Act).

<sup>69</sup> ECHR, arts. 32-34.

<sup>70</sup> Framework Convention for the Protection of National Minorities (FCNM); European Charter for Regional or Minority Languages (ECRML).

<sup>71</sup> ECRML, art. 2.

The Charter of Fundamental Rights of the European Union (CFR) applies to the institutions of the European Union and its member states when implementing European Union law. The CFR is part of the Treaty of Lisbon which entered into force on 1 December 2009.

# 4 Participation and Consultation

## 4.1 Participation and Consultation in ILO Convention No.

### 169

Participation and consultation are fundamental principles of the Indigenous and Tribal Peoples Convention, and have been described as the cornerstone of the Convention.<sup>72</sup> Consultation of indigenous peoples is a tool for ensuring full participation.<sup>73</sup> When revising the Indigenous and Tribal Populations Convention, 1957 (No. 107), consultation was seen as necessary to eliminate its integrationist approach.<sup>74</sup> The Committee of Experts on the Application of Conventions and Recommendations (CEACR) has stated that consultation should be seen as essential for promoting effective and meaningful dialogue, mutual understanding and legal certainty.<sup>75</sup> The Committee has through observations on the application of the Convention expressed their view on the meaning of the Convention. This is done with consideration to the principles enshrined in the VCLT, mainly the principles of interpreting a treaty in in good faith in accordance with the purpose and object of it, considering the preparatory work of the treaty and considering all authenticated versions of the text as equally authoritative.<sup>76</sup> The Committee has made three general observations in regards to the application of the Indigenous and Tribal Peoples Convention, dealing predominantly with the issue of consultation.<sup>77</sup> The following text on provisions contained in the Convention will describe participation and consultation taking these observations into account.

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<sup>72</sup> See *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169). Handbook for ILO Tripartite Constituents*, International Labour standards Department. International Labour Organization, Geneva, 2013, p. 11.

<sup>73</sup> General Observation (CEACR) - adopted 2018, published 108th ILC session (2019), Indigenous and Tribal Peoples Convention, 1989 (No. 169) (CEACR General Observation 2019).

<sup>74</sup> Swepston, Lee, *The Foundations of Modern International Law on Indigenous and Tribal Peoples: The Preparatory Documents of the Indigenous and Tribal Peoples Convention, and Its Development Through Supervision*, Brill, 2015, p. 189.

<sup>75</sup> CEACR General Observation 2019 (n 73).

<sup>76</sup> General Observation (CEACR) - adopted 2010, published 100th ILC session (2011), Indigenous and Tribal Peoples Convention, 1989 (No. 169) (CEACR General Observation 2011); Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) arts. 5, 31, 32 and 33.

<sup>77</sup> General Observation (CEACR) - adopted 2008, published 98th ILC session (2009), Indigenous and Tribal Peoples Convention, 1989 (No. 169) (CEACR General Observation 2009); CEACR General Observation 2011 (n 76); CEACR General Observation 2019 (n 73).



According to the Convention, the government shall establish means by which indigenous peoples can freely participate at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them. The indigenous people shall have the means to participate to at least the same extent as other sectors of the population.<sup>78</sup> In addition, the government shall also establish means for the full development of indigenous peoples' own institutions and initiatives. The government shall, when appropriate, provide the resources necessary for this.<sup>79</sup> According to the CEACR, it is important that the body responsible for issues relating indigenous peoples have adequate staff and financial resources, a well-defined legal framework and decision-making power. Moreover, the CEACR states that these bodies need to have representation and participation from indigenous peoples. These bodies responsible for issues relating to indigenous peoples have taken different forms in different countries. According to the CEACR, it may be ministries or vice-ministries responsible for foreign affairs, advisory councils, coordinating bodies, independent institutions, specifically dedicated areas in most ministries and public institutions, or permanent dialogue and participation forums.<sup>80</sup>

Participation of indigenous peoples is required by the Convention when: developing coordinated and systematic action to protect their rights and guarantee their integrity;<sup>81</sup> adopting policies aimed at mitigating the difficulties experienced by them in facing new conditions of life and work;<sup>82</sup> in decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;<sup>83</sup> formulating, implementing and evaluating plans and programmes for national and regional development which may affect them directly;<sup>84</sup> improving the conditions of life and work and levels of health and education of them;<sup>85</sup> in the use, management and conservation of natural resources pertaining to their lands;<sup>86</sup> ensuring the provision of special training programmes and facilities when existing programmes of vocational training does not meet the special need of the indigenous peoples;<sup>87</sup> and when

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<sup>78</sup> ILO Convention No. 169, art. 6(1)(b).

<sup>79</sup> ILO Convention No. 169, art. 6(1)(c).

<sup>80</sup> CEACR General Observation (2019) (n 73) p. 609.

<sup>81</sup> ILO Convention No. 169, art. 2(1).

<sup>82</sup> ILO Convention No. 169, art. 5(c).

<sup>83</sup> ILO Convention No. 169, art. 6(1)(b).

<sup>84</sup> ILO Convention No. 169, art. 7(1).

<sup>85</sup> ILO Convention No. 169, art. 7(2).

<sup>86</sup> ILO Convention No. 169, art. 15(1).

<sup>87</sup> ILO Convention No. 169, art. 22(2).

ensuring that handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the indigenous peoples are strengthened and promoted.<sup>88</sup>

According to article 7, indigenous peoples shall have the right to decide their own priorities for the process of development and exercise control over their own economic, social and cultural development, to the extent possible.<sup>89</sup> The government shall prioritise the improvement of the conditions of life and work and levels of health and education of the indigenous peoples concerned when making plans for the overall economic development of the areas they inhabit. The government shall also design special projects for development in these areas to promote such improvement.<sup>90</sup> Moreover, the government shall ensure that studies are carried out to assess the impact on indigenous peoples of planned development projects, studies which are to be considered as a fundamental criteria when implementing the projects, and take measures to protect and preserve the environment of the territories which they inhabit.<sup>91</sup>

Consultation of indigenous peoples is required by the Convention when: consideration is being given to legislative or administrative measures which may affect them directly;<sup>92</sup> undertaking or permitting any programmes for the exploration or exploitation of mineral or sub-surface resources pertaining to their lands;<sup>93</sup> consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community;<sup>94</sup> studies are being made in connection with special training programmes;<sup>95</sup> establishing minimum standards for educational institutions belonging to them;<sup>96</sup> and adopting measures to teach indigenous children to read and write in their indigenous language.<sup>97</sup>

The indigenous peoples should be consulted through appropriate procedures and through their representative institutions.<sup>98</sup> These procedures need to, according to the CEACR, allow for the full expression of the opinions held by the indigenous peoples. Moreover, the consultations shall be held in a timely manner and be based on the full understanding of the issues by the indigenous peoples. The indigenous peoples consulted should have a real possibility of affecting the outcome and there should be a real possibility of achieving an

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<sup>88</sup> ILO Convention No. 169, art. 23(1).

<sup>89</sup> ILO Convention No. 169, art. 7(1).

<sup>90</sup> ILO Convention No. 169, art. 7(2).

<sup>91</sup> ILO Convention No. 169, arts. 7(3) and 7(4).

<sup>92</sup> ILO Convention No. 169, art. 6(1)(a).

<sup>93</sup> ILO Convention No. 169, art. 15(2).

<sup>94</sup> ILO Convention No. 169, art. 17(2).

<sup>95</sup> ILO Convention No. 169, art. 22(3).

<sup>96</sup> ILO Convention No. 169, art. 27(3).

<sup>97</sup> ILO Convention No. 169, art. 28(1).

<sup>98</sup> ILO Convention No. 169, art. 6(1).

agreement.<sup>99</sup> If consultation is carried out in this way, the Committee states that it could contribute to genuine dialogue and social cohesion, as well as preventing and resolving conflict.<sup>100</sup>

According to article 24 of the Constitution of the ILO, national and international employers' and workers' associations have the right to present a representation to the International Labour Office against a member state which they consider "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party". The Governing Body may appoint a Tripartite Committee to examine the representation and the response from the government, resulting in a report.<sup>101</sup> The Tripartite Committee found in their report in a case against Ecuador, that a simple information meeting was not sufficient for a consultation according to the Convention.<sup>102</sup> The Tripartite Committee came to a similar conclusion in a case against Colombia.<sup>103</sup> In a case against Argentina, the Tripartite Committee emphasized that consultation in accordance with the Convention requires actual pursuit of the objective to achieve consent. This means that processes needs to be set in motion, such as initiating a dialogue.<sup>104</sup> When adopting legislation or establishing mechanisms for consultation, it is essential to consult the indigenous peoples *before*.<sup>105</sup> This means that governments need to consult indigenous peoples prior to taking any measures to establish a procedure for consultation.

The Convention specifies that consultations shall be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.<sup>106</sup> According to the preparatory work of the Convention, it was never intended that consultations would have to result in consent or agreement. Instead, consent or

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<sup>99</sup> CEACR General Observation 2009 (n 77).

<sup>100</sup> *ibid.*

<sup>101</sup> ILO Constitution, arts. 24 and 25.

<sup>102</sup> Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL) (GB.277/18/4):(GB.282/14/2), para. 38.

<sup>103</sup> Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) (GB.276/17/1):(GB.282/14/3), para. 90.

<sup>104</sup> Report of the Committee set up to examine the representation alleging non-observance by Argentina of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Education Workers Union of Río Negro (UNTER), local section affiliated to the Confederation of Education Workers of Argentina (CTERA) (GB.297/20/1):(GB.303/19/7), para. 81.

<sup>105</sup> CEACR General Observation 2019 (n 73).

<sup>106</sup> ILO Convention No. 169, art. 6(2).

agreement is meant to be the objective of the consultation.<sup>107</sup> The only provision in the Convention that requires consent as a result is article 16(2), which requires free and informed consent in cases of relocation of indigenous peoples. However, even this is subject to conditions. Relocation is only a valid option if it is considered necessary as an exceptional measure. The article then continues to state that if consent cannot be obtained, other procedures must be followed.<sup>108</sup> Thus, the Convention does not award indigenous people absolute veto in any situation.

The Convention does not provide any provisions on the issue of self-determination as such, in the sense of the common article 1 of the ICCPR and the ICSECR. Instead, it provides provisions on participation and consultation, and on aspects of self-government. When adopting the Convention, it was considered that the issue of self-determination was not within the competence of the ILO.<sup>109</sup> For that reason, the issue of self-determination will not be discussed further in this thesis.

## **4.2 Participation and Consultation in International Human Rights Law**

### *The United Nations*

The UDHR declares in the first paragraph of article 27 that “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”. The ICCPR declares the right to take part in the conduct of public affairs, directly or through freely chosen representatives.<sup>110</sup> The ICCPR further states that persons belonging to an ethnic minority have a right to enjoy their own culture, to profess and practice their own religion and to use their own language.<sup>111</sup> The CCPR has in its *General Comment No. 23* stated that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples” and that it may include traditional activities such as hunting and fishing. The CCPR further states that “The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of

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<sup>107</sup> International Labour Conference, ‘Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), 76th Session, 1989, Report IV(2B), para.74, p. 25/12.

<sup>108</sup> ILO Convention No. 169, art. 16(2).

<sup>109</sup> International Labour Conference, ‘Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), 75th Session, 1988, Report VI(2), pp. 13f.

<sup>110</sup> ICCPR, art. 25(a).

<sup>111</sup> ICCPR, art. 27.

minority communities in decisions which affect them”.<sup>112</sup> The ICESCR enshrines the right to take part in cultural life.<sup>113</sup> The CESCR has discussed this further in *General Comment No. 21* in which it states that ”States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights”.<sup>114</sup>

The UNDRIP contains several provisions relevant to the participation and consultation of indigenous peoples. Articles 3 and 4 of the UNDRIP declares the right to self-determination. Article 5 of the UNDRIP protects indigenous peoples’ right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully in the political, economic, social and cultural life of the State.<sup>115</sup> The UNDRIP states that indigenous peoples have the right to participate in decision-making in matters which would affect their rights. The indigenous peoples participate through representatives chosen by themselves in accordance with their own procedures. In addition, the UNDRIP states that indigenous peoples have the right to maintain and develop their own indigenous decision-making institutions.<sup>116</sup>

Before adopting and implementing legislative or administrative measures that may affect indigenous peoples, States have, according to the UNDRIP, an obligation to consult and cooperate in good faith with the indigenous peoples concerned through their representative institutions to obtain their free, prior and informed consent.<sup>117</sup> Moreover, the UNDRIP states that indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. The institutions of the indigenous peoples should, as far as possible, administer economic and social programmes that affect them.<sup>118</sup>

In cases of relocation, the UNDRIP states that relocation shall not take place without free, prior and informed consent of the indigenous peoples concerned. The UNDRIP also requires an agreement on just and fair compensation and, if possible, the right to return.<sup>119</sup> Moreover, the UNDRIP requires consultation whenever measures are taken to combat

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<sup>112</sup> CCPR, CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5, para 7.

<sup>113</sup> ICESCR, art. 15(1)(a).

<sup>114</sup> CESCR, General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), 21 December 2009, E/C.12/GC/21, para 37.

<sup>115</sup> See also UNDRIP, arts. 20(1) and 34.

<sup>116</sup> UNDRIP, art. 18.

<sup>117</sup> UNDRIP, art. 19, see also article 38.

<sup>118</sup> UNDRIP, art. 23.

<sup>119</sup> UNDRIP, art. 10.

discrimination,<sup>120</sup> protect indigenous children in certain situations<sup>121</sup> and when taking decisions to approve any project affecting the lands or territories and other resources of the indigenous peoples.<sup>122</sup>

The CERD, which is the body monitoring the implementation of the ICERD, has in its *General Recommendation No. 23: Indigenous Peoples* emphasised that indigenous peoples fall within the scope of the Convention. The Committee stated in the same report that it calls in particular upon state to “Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent”.<sup>123</sup>

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities enshrines the right of persons belonging to a national minority to participate effectively in decisions at national and regional level on issues concerning them.<sup>124</sup> It further states that Minorities have a right to participate effectively in cultural, religious, social, economic and public life.<sup>125</sup>

The Convention on Biological Diversity is of certain relevance in this aspect. However, it will not be explored in this thesis for reasons of limitation of space.

### *The Council of Europe*

Article 15 of the FCNM provides an obligation upon the State to create the conditions necessary for the effective participation of persons belonging to a national minority in cultural, social and economic life and in public affairs, in particular those affecting the minority. The explanatory report to the FCNM lists measures which the state could promote in order to create these necessary conditions. Measures suggested include: consultation with the people through their representative institutions before adopting legislation or administrative measures likely to affect those people; involving them in the preparation, implementation and assessment of national and regional development plans and programmes likely to affect them directly; and effective participation in the decision-making processes and elected bodies at both national and local levels.<sup>126</sup>

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<sup>120</sup> UNDRIP, art. 15(2).

<sup>121</sup> UNDRIP, art. 17(2).

<sup>122</sup> UNDRIP, art. 32(2).

<sup>123</sup> CERD, General Recommendation No. 23: Indigenous Peoples (18 August 1997), paras. 1 and 4(d).

<sup>124</sup> Declaration on Minorities, art. 2(3).

<sup>125</sup> Declaration on Minorities, art. 2(2).

<sup>126</sup> FCNM, para. 80.

### 4.3 Participation and Consultation in Swedish Legislation

The possibility of Sami people to preserve and develop their culture and community shall be promoted, according to the Swedish constitution.<sup>127</sup> The following text will describe how this proclamation of a general aim is realised in the Swedish legislation.

The main institution of the Sami people is the Sami Parliament. There are three Sami Parliaments, in Finland, Norway and Sweden. The Swedish Sami Parliament, also known as the Swedish *Sámediggi*, was established in 1993.<sup>128</sup> The Swedish Sami Parliament is both a State administrative authority and a popularly elected representative body of the Sami people.<sup>129</sup> The Parliament consists of 31 members, appointed through elections which take place every four years.<sup>130</sup> Sami people over the age of 18 have the right to vote in the election to the Sami Parliament, and they are eligible as candidates to the Parliament.<sup>131</sup> The primary task of the Swedish Sami Parliament is to promote a vigorous Sami culture. It shall initiate activities and propose measures that promote their culture.<sup>132</sup> According to the Sami Parliament Act, the Parliament is tasked with deciding on the allocation of State subsidies, funds from the Sami Foundation and other funds intended for the common disposal of the Sami people to Sami culture and Sami organizations. The Parliament is also to appoint the members of the Sami School Board (Sameskolstyrelsen). The Sami School Board will be further dealt with in this thesis under chapter 5.2.3. The Sami Parliament shall, according to the Sami Parliament Act, participate in the development of the community and ensure that the needs of the Sami are considered. This includes the interests of the reindeer husbandry industry in the use of land and water. Moreover, the Swedish Sami Parliament is assigned to lead the work on the Sami language and provide information on Sami conditions.<sup>133</sup> The Instructions to the Sami Parliament Ordinance contains additional tasks of the Parliament.<sup>134</sup> According to the Ordinance, the Parliament is to monitor, evaluate and inform the government on developments in regards to the reindeer husbandry industry, other Sami industries, Sami culture, the minority policy and the implementation of the National Minorities and Minority Languages Act

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<sup>127</sup> RF, Chapter 1, Section 2, sixth paragraph.

<sup>128</sup> Sami Parliament Act.

<sup>129</sup> Sami Parliament Act, Chapter 1, Section 1 and Chapter 2, Section 2.

<sup>130</sup> Sami Parliament Act, Chapter 2, Section 2 and Chapter 3, Section 1.

<sup>131</sup> Sami Parliament Act, Chapter 3, Section 3 and Chapter 3, Section 8.

<sup>132</sup> Sami Parliament Act, Chapter 2, Section 1.

<sup>133</sup> Sami Parliament Act, Chapter 2, Section 1.

<sup>134</sup> SFS 2009:1395 *Förordning med instruktion för Sametinget* (Instructions to the Sami Parliament Ordinance).

(2009:724). Additionally, the Parliament shall comment on matters concerning the establishment of Sami place names, review proposals for Sami names on public maps, and comment on issues on personal names with a Sami connection.<sup>135</sup>

When preparing issues settled by the Government, necessary information and opinions shall be obtained from the public authorities concerned, as well as the local authorities concerned. Opportunity shall also be given to organisations and individuals to express an opinion. This is enshrined in the Instrument of Government, which is part of the Swedish Constitution.<sup>136</sup> This provision provides for contact with the Sami Parliament in issues that concern Sami people.

According to the National Minorities and Minority Languages Act, national minorities shall be given, by administrative authorities, the opportunity to influence decisions affecting them. National minorities shall also be consulted, as far as possible, on issues affecting them.<sup>137</sup> The Act provides that consultation entails that the administrative authority shall have a structured dialogue with the national minority so that the authority will be able to take their opinions and needs into consideration when making a decision.<sup>138</sup> Both public and local authorities fall within the scope of the obligation to consult.<sup>139</sup> Local authorities have a great freedom of action due to the local self-government enshrined in the Constitution and in the European Charter of Local Self-Government.<sup>140</sup> For this reason, and due to different situations in different regions, the procedure and form of consultation is not regulated in detail. Instead, the regulation defines consultation in more general terms, focusing on its objective.<sup>141</sup> The preparatory work to the provision on consultation in the National Minorities and Minority Languages Act states that national minorities shall be given a real possibility to influence the outcome and to participate. Authorities must create procedures of consultation which promote a mutual, equal and credible dialogue. The dialogue shall be structured. This means that the dialogues need to be planned in a way that includes that the purpose of the consultation is clear, that material is provided prior to the consultation and that the consultation is carried out systematically. The Act does not provide any obligation to take the opinions of the minorities

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<sup>135</sup> Instructions to the Sami Parliament Ordinance, Section 2.

<sup>136</sup> RF, Chapter 7, Section 2 and Chapter 7, Section 3.

<sup>137</sup> SFS 2009:724 *Lag om nationella minoriteter och minoritetsspråk* (National Minorities and Minority Languages Act), Section 5, first paragraph.

<sup>138</sup> National Minorities and Minority Languages Act, Section 5, second paragraph.

<sup>139</sup> Prop. 2008/09:158 *Från erkännande till egenmakt - regeringens strategi för de nationella minoriteterna* (From Recognition to Independency – the Government's Strategy for National Minorities), pp. 69f.

<sup>140</sup> RF, Chapter 1, Section 1, second paragraph.

<sup>141</sup> Prop. 2017/18:199 *En stärkt minoritetspolitik* (A Strengthened Minority Policy), pp. 41f.



into account. However, it is expressed in the preparatory work that this is expected of the authorities.<sup>142</sup>

The Sami Parliament was, as well as other Sami organisations, consulted in regard to the provision on consultation in the National Minorities and Minority Languages Act, in accordance with the provision enshrined in the Constitution on issues settled by the government mentioned above.<sup>143</sup>

The Forestry Act contains a provision which requires consultation with the affected Sami village before felling in an area within the year-round herding area.<sup>144</sup> The Minerals Act contains a provision which requires that the Sami village concerned shall be given a plan for any exploratory work conducted in that area. It is then possible to make objections in regards to the plan.<sup>145</sup> If an objection is made, the plans may be considered by the Chief Mining Inspector, which is to confirm the plan as long as the measures does not cause inconvenience for the concerned party of such magnitude as to outweigh the permit holder's interest in being allowed to carry out the work.<sup>146</sup> Other provisions on consultation can be found in various parts of the Swedish legislation. For example, a Sami village must be consulted in certain cases where the establishment of a business or other measure may affect their reindeer herding<sup>147</sup> and authorities, associations and individuals with a substantial interest in a proposal for a comprehensive plan of a municipality must be consulted.<sup>148</sup>

There are delegations at county level which deal with issues related to reindeer husbandry, in which reindeer herders participate. The county administrative boards of Norrbotten, Västerbotten and Jämtland county, are to have delegations that make decisions on issues related to reindeer husbandry.<sup>149</sup> These delegations consists of seven members of which three are reindeer herders. These three are appointed after consultation with the Sami Parliament.<sup>150</sup>

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<sup>142</sup> Prop. 2017/18:199 (n 141) pp. 42f.

<sup>143</sup> Dnr. Ku2017/01534/DISK *Remiss SOU 2017:60 Nästa steg? – Förslag för en stärkt minoritetspolitik* (Consultation on Next Step? – Proposal for a Strengthened Minority Policy).

<sup>144</sup> SFS 1979:429 *Skogvårdslag* (Forestry Act), Section 20. For more on the year-round herding area, see Chapter 6, Section 3.

<sup>145</sup> SFS 1991:45 *Minerallag* (Minerals Act), Chapter 3, Section 5a.

<sup>146</sup> Forestry Act, Chapter 3, Section 5d.

<sup>147</sup> SFS 1998:808 *Miljöbalk* (Environmental Code), Chapter 6.

<sup>148</sup> SFS 2010:900 *Plan- och bygglag* (Planning and Building Act).

<sup>149</sup> SFS 2017:868 *Förordning med länsstyrelseinstruktion* (Instruction for the County Administration Ordinance), Section 16.

<sup>150</sup> SFS 2017:871 *Förordning om rennäringsdelegationer* (Reindeer Husbandry Delegations Ordinance), Section 3.

As shown through the presence of provisions on consultation in various parts of Swedish legislation, the system for consultation of Sami people is integrated into laws and regulations throughout the system, and therefore difficult to overlook. The lack of collection of Sami legislation was criticized in a report published by the Organization for Economic Cooperation and Development (OECD) earlier this year, which asks for a more comprehensive framework. The report points to the lack of cohesive Sami policy making it more difficult for the Sami to participate in a meaningful way, due to their restricted resources and need to engage with different levels of government.<sup>151</sup>

The Swedish government has initiated work on developing a new act on consultation in issues of particular significance for Sami people.<sup>152</sup> The proposed act require consultation with the Sami Parliament prior to any decision being made by the government, an administrative authority, a county council or local authorities on issues of particular significance to the Sami people. Consultation with a Sami organisation or a Sami village is also required if the matter particularly concerns them.<sup>153</sup> Further, the proposed act regulates the form of the consultation. The proposed legislation would require that consultation should be timely, be held in good faith and continue until agreement or consent is reached, or until a party of the consultation proclaims that agreement or consent cannot be achieved.<sup>154</sup> The act was initially proposed to enter into force on 1 July 2018.<sup>155</sup> The proposal has been circulated for consultation.<sup>156</sup> However, following the circulation for consultation, no further steps have been taken thus far.<sup>157</sup> The earlier mentioned report published by the OECD states that the creation of a new act would not be enough. Instead, a comprehensive Sami policy is requested.<sup>158</sup>

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<sup>151</sup> Organisation for Economic Co-operation and Development (2019), 'Linking the Indigenous Sami People with Regional Development in Sweden', OECD Rural Policy Reviews, OECD Publishing, Paris. <https://doi.org/10.1787/9789264310544-en>, pp. 73f and 142f.

<sup>152</sup> Ds 2017:43(n 13).

<sup>153</sup> *ibid* p. 5.

<sup>154</sup> *ibid* pp. 6f.

<sup>155</sup> *ibid* p. 83.

<sup>156</sup> Dnr. Ku2017/01905/DISK Consultation Response Ds 2017:43 *Konsultation i frågor som rör det samiska folket* (Consultation on Issues Regarding the Sami People).

<sup>157</sup> Fröberg and Dahlberg, 'Samevänligt förslag har fastnat hos oenig regering' (n 14).

<sup>158</sup> OECD, 'Linking the Indigenous Sami People with Regional Development in Sweden' (n 151) pp. 142f.

# 5 Economic Participation

## 5.1 Language

The Sami language is in fact several languages. There are at least three Sami languages: Eastern Sami, Central Sami and Southern Sami. These three languages are then dividable into nine different dialects or varieties. Where these languages are spoken is not decided by national borders. They are spoken in different regions spread across borders.<sup>159</sup>

Not all Sami speak a Sami language. There is no official statistics on how many people speak a Sami language but according to a publication by the Institute for Language and Folklore in 2003, it is estimated that approximately 20 000 people in Sápmi speak a Sami language. In Sweden, it is estimated that approximately 7 000 people speak a Sami language. The most spoken dialect or variety of Sami language in Sweden is Northern Sami, a variety of Central Sami. Approximately 6 000 people speak Northern Sami in Sweden. Northern Sami is the most spoken variety of Sami in the entire Sápmi. It is estimated that 80-85% of all Sami speakers speak Northern Sami.<sup>160</sup>

The following subchapter will present and discuss the Swedish regulations and international obligations concerning the Sami language. Thereafter follows a discussion on the provision related to language contained in the ILO Convention no. 169. There is a close link between language in education. Education of mother tongue languages will be dealt with in chapter 5.2.

### 5.1.1 Language in ILO Convention No. 169

Article 28 of the ILO Convention No. 169 states that indigenous children “shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong”. In cases where it is not practicable, the state shall consult the indigenous people with the aim of adopting measures to achieve this objective. The second paragraph states that the Government shall take measures to ensure the opportunity to attain fluency in the national language of the country. In addition, the State shall take measures to preserve and promote the development and practice of the indigenous languages.

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<sup>159</sup> Svonni, Mikael, 'Samiska', in *Sveriges officiella minoritetsspråk: finska, meänkieli, samiska, romani, jiddisch och teckenspråk: en kort presentation.*, Svenska språknämnden, Stockholm, 31-36, 2003.

<sup>160</sup> *ibid* p. 32.

## 5.1.2 Language in International Human Rights Law

### *The United Nations*

Article 27 of the ICCPR provides that “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”. This right entails a positive obligation for the state to take measures of protection of the right. The minority group has to be able to maintain its culture, language and religion for effective enjoyment of this right. Therefore, the state may also need to take measures to protect the identity of the peoples.<sup>161</sup>

The Convention on the Rights of the Child provides in article 30 that a child belonging to a linguistic minority or who is indigenous shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language. Article 29 regulates the education of the child and provides that the education shall aim to develop respect for cultural identity, languages and values.<sup>162</sup>

Article 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities proclaims that states shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs.

Article 13 of the UNDRIP declares that indigenous peoples have the right to revitalize, use and develop their language, and transmit it to future generations. States shall according to the second paragraph of article 13 take effective measure to ensure this right, as well as ensuring that “that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means”. Article 14 of the UNDRIP declares the right to education in their own language.

### *The Council of Europe*

The ECHR is directly applicable in Sweden since it has been incorporated as a whole into Swedish legislation.<sup>163</sup> Article 14 of the ECHR states that “The enjoyment of the rights and

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<sup>161</sup> CCPR General Comment No. 23. (n 112) paragraphs 6.1 and 6.2.

<sup>162</sup> CRC, art. 29(1)(c).

<sup>163</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms Act.

freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

The FCNM contains provisions regarding the promotion of the conditions necessary to maintain and develop culture and to preserve essential elements of the identity of the minority, which includes their language.<sup>164</sup> Article 10 of the Framework Convention entails the right of every person belonging to a national minority to use freely and without interference their minority language, in private and in public, orally and in writing. The article continues to state that all parties to the convention shall endeavour to ensure conditions making it possible to use a minority language in relations between people belonging to a national minority and administrative authorities. This provision applies in areas in which national minorities traditionally live or live in substantial numbers.<sup>165</sup> The FCNM contains several provisions regarding education, including the education of minority languages.<sup>166</sup> The provisions include measures to foster knowledge of the languages, promote equal access to education and the right of every person belonging to a national minority to learn their language. The right to learn ones minority language in areas populated with a national minority includes having adequate opportunity for being taught or receiving instruction in the minority language.<sup>167</sup>

The ECRML aims to protect and promote regional and minority languages. The structure of the ECRML is presented in more detail in chapter 3.3 of this thesis. Part II consists only of article 7, which includes: recognition of the regional or minority languages as an expression of cultural wealth; respect of the geographical area of each regional or minority language; measures to promote, facilitate and encourage the use of regional or minority languages; appropriate forms and means for teaching and studying regional or minority languages; facilities for teaching and studying the regional or minority language; promotion of study and research on regional or minority languages at university; and promotion of transnational exchanges for regional or minority languages used in identical or similar form.<sup>168</sup> Additionally, the provision entails the elimination of discrimination in regards of the use of regional or minority languages and that the use of special measures to promote equality in this area are not to be regarded as discriminatory.<sup>169</sup> Furthermore, the State is to take measures to

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<sup>164</sup> FCNM, art. 5.

<sup>165</sup> FCNM, art. 10, para. 2.

<sup>166</sup> FCNM, arts. 12, 13 and 14.

<sup>167</sup> FCNM, arts. 12 and 14.

<sup>168</sup> For full list of objectives and principles, see ECRML art. 7 para. 1.

<sup>169</sup> ECRML, art. 7, para. 2.

promote mutual understanding between all the linguistic groups of the country and take the needs and wishes expressed by the people using a regional or minority language into consideration when determining policy on the subject.<sup>170</sup> Part III of the Charter contains provisions from which each signatory state are to some extent free to choose.<sup>171</sup>

### *European Union*

Article 22 of the Charter of Fundamental Rights of the European Union states that” The Union shall respect cultural, religious and linguistic diversity”.

### **5.1.3 Sami Language in Swedish legislation**

When the FCNM and ECRML were to be incorporated, five minorities were recognized. These were the Sami, the Swedish Finns, the Tornedalers, the Roma and the Jews. The languages of these minorities were considered to be minority languages. However, three of them were considered to be historical regional languages, which meant that they, according to ECRML, needed to be protected through certain measures.<sup>172</sup> They became protected through the “Minorities Language Acts” which entered into force in 2000, one regarding Sami language and one regarding Finnish and Meänkieli.<sup>173</sup> Thus, Sami people were recognized as a national minority and Sami language was recognized as a minority language.<sup>174</sup> The legislation ensured the right to use the Sami language when dealing with municipal, state, regional and local authorities and courts within the Sami administrative area.<sup>175</sup> The legislation also entailed that certain laws concerning the minorities are to be translated into the minority language.<sup>176</sup> The Minorities Language Acts are the beginning of a unified legislative framework for the protection of national minorities.<sup>177</sup>

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<sup>170</sup> ECRML, art. 7, para. 3 and 4.

<sup>171</sup> ECRML, arts. 8-14.

<sup>172</sup> Prop. 1998/99:143 *Nationella minoriteter i Sverige* (National Minorities in Sweden).

<sup>173</sup> SFS 1999:1175 *Lag om rätt att använda samiska hos förvaltningsmyndigheter och domstolar* (Act on the Right to Use Sami at Administrative Authorities and in Court) and SFS 1999:1176 *Lag om rätt att använda finska och meänkieli hos förvaltningsdomstolar och domstolar* (Act on the Right to Use Finnish and Meänkieli at Administrative Authorities and in Court).

<sup>174</sup> Prop. 1998/99:143 (n 172).

<sup>175</sup> Act on the Right to Use Sami at Administrative Authorities and in Court.

<sup>176</sup> Prop. 1998/99:143 (n 172), pp. 71f.

<sup>177</sup> *ibid* pp. 56ff.

Following the reports and recommendations from the international and national institutions, a new strategy for the continuing policy for national minorities was developed.<sup>178</sup> The new strategy included the establishment of two Sami Language Centres. These centres are to strengthen the revitalization of the Sami language.<sup>179</sup> The National Minorities Acts were replaced with a new act, the National Minorities and Minority Languages Act, in 2010.<sup>180</sup> The National Minorities and Minority Languages Act provides a general obligation to protect and promote the national minority languages.<sup>181</sup> The new act also provided the right to use Sami language outside of the Sami administrative areas in some cases.<sup>182</sup> The implementation of the minority policy is monitored by the County Administrative Board of Stockholm and the Sami Parliament according to the new strategy.<sup>183</sup>

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<sup>178</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Sweden, 25 August 2002, ACFC/INF/OP/I(2003)006; Advisory Committee on the Framework Convention for the Protection of National Minorities, Second Opinion on Sweden, Adopted on 8 November 2007, 30 January 2008, ACFC/OP/II(2007)006; Committee of Ministers, Resolution on the Implementation of the Framework Convention for the Protection of National Minorities by Sweden, 10 December 2003, ResCMN(2003)12; and Committee of Ministers, Resolution on the Implementation of the Framework Convention for the Protection of National Minorities by Sweden, 11 June 2008, CM/ResCMN(2008)4 ; Committee of Ministers, Recommendation of the Committee of Ministers on the application of the European Charter for Regional or Minority Languages by Sweden, 19 June 2003, RecChL(2003)1; Committee of Ministers, Recommendation of the Committee of Ministers on the application of the European Charter for Regional or Minority Languages by Sweden, 27 September 2006, RecChL(2006)4; Committee on the Elimination of Discrimination Against Women, 'Concluding observations of the Committee on the Elimination of Discrimination against Women: Sweden', 8 April 2008, CEDAW/C/SWE/CO/7; CERD, 'Consideration of reports submitted by States parties under article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination: Sweden', 23 September 2008, CERD/C/SWE/CO/18; DO:s rapportserie 2008:1 (n 4); SOU 2005:40 *Rätten till mitt språk - förstärkt minoritetsskydd* (The Right to My Language – Strengthened Protection for Minorities); SOU 2006:19 *Att återta mitt språk - åtgärder för att stärka det samiska språket* (Reclaiming My Language – Measures to Strengthen the Sami Language); and Ds. 2008:26 *Nationella minoritetsspråk vid domstolar och myndigheter - Ett alternativ* (National Minority Languages in Court and at Administrative Authorities).

<sup>179</sup> Prop. 2008/09:158 (n 139), pp. 116f.

<sup>180</sup> National Minorities and Minority Languages Act.

<sup>181</sup> National Minorities and Minority Languages Act, Section 4; and SFS 2009:600 *Språklag* (Language Act) Section 8. The National Minorities and Minority Languages Act broadened the scope of application by extending the Sami administrative area from four to seventeen out of the 290 municipalities in Sweden and making it possible for other municipalities to apply to be included into the Sami administrative area. National Minorities and Minority Languages Act, Sections 6 and 7. Several municipalities have applied to be included into the Sami administrative area and in 2019, a total of 25 municipalities were included see Sametinget, 'Förvaltningskommuner i det samiska området', <https://www.sametinget.se/24399> (accessed 28 May 2019).

<sup>182</sup> National Minorities and Minority Languages Act, Sections 9 and 19, and Prop. 2008/09:158 (n 139) pp. 87f.

<sup>183</sup> Prop. 2008/09:158 (n 139) pp. 47ff.

Following recommendations from the national and international monitoring systems, the Act was amended to strengthen the fundamental protection of the national minorities and national minority languages, by adopting objectives and guidelines at local and regional level, clarifying the obligation to provide information on the rights of the national minorities and expanding the right to use a minority language in written contact with authorities to include the Equality Ombudsman and the Public Employment Service.<sup>184</sup>

A report published by the Equality Ombudsman in 2008, stated that the Sami linguistic rights were not properly ensured. An example from the report is that a Sami man asked for an interpreter at an information meeting with the Government's reindeer grazing delegation since he found it difficult to fully understand the information given. He was refused an interpreter on the basis that they did not think he actually needed one. The report stated that "the Sami often feel that they are a nuisance when they demand their rights. This, in combination with the fact that the Sami are already in a exposed position, makes them speak Swedish instead. In addition, those of the Sami who demand their linguistic rights are often confronted by ignorance, prejudice and negative conceptions".<sup>185</sup>

## **5.2 Education and Vocational Training for Sami People in Sweden**

As stated in the previous chapter, education and language are closely linked. The preservation and promoting of a language is highly dependent on the language being taught to new generations and on the availability of competent teachers in the language. The following chapter will analyse the provisions in the Indigenous and Tribal Peoples Convention, international instruments of human rights and Swedish legislation regarding the education of indigenous children and peoples.

### **5.2.1 Education and Vocational Training in ILO Convention No. 169**

#### *Education*

Articles 26, 27, 28 and 29 of the Indigenous and Tribal Peoples Convention contain provisions on the education of indigenous children. It is up to the state to take measures to

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<sup>184</sup> Prop. 2017/18:199 (n 141) pp. 20f., pp. 30ff.; Advisory Committee on the FCNM, 4<sup>th</sup> Opinion on Sweden (n 178); Committee of Ministers, Recommendation of the Committee of Ministers on the application of the European Charter for Regional or Minority Languages by Sweden, 11 May 2017, CM/RecChL(2017)1.

<sup>185</sup> DO:s rapportserie 2008:1 (n 4) p. 28.



guarantee that indigenous peoples have equal opportunity with other nationals to acquire education at all levels.<sup>186</sup> Children belonging to an indigenous people shall be taught to read and write in their own indigenous language, as well as having the opportunity to become fluent in the national language. The state shall take measures to preserve and promote the development and practice of indigenous languages.<sup>187</sup> Moreover, the education of indigenous children shall aim to provide the children with the general knowledge and skills relevant to help them participate fully and on equal footing in both their own and the national community.<sup>188</sup>

The state shall, in co-operation with the indigenous peoples concerned, develop and implement educational programmes and services for those peoples. These programmes shall address the special needs of the people and incorporate their histories, knowledge and technologies, value systems and their social, economic and cultural aspirations. Members of these peoples shall be trained and involved in the formulation and implementation of the programmes with the aim to progressively transfer the responsibility to these peoples. Moreover, states shall recognize the right of indigenous peoples to establish their own educational institutions and facilities and provide them with appropriate resources.<sup>189</sup>

### *Vocational Training*

Vocational training is regulated in articles 21 and 22 of the Indigenous and Tribal Peoples Convention. Indigenous peoples should enjoy at least equal opportunities to take part of vocational training measures as other citizens do.<sup>190</sup> The government shall take measures to promote the voluntary participation of indigenous peoples in vocational training programmes of general application. If the indigenous people have special needs that are not met by the existing programmes, governments are to, with the participation of the indigenous people, provide special training programmes and facilities. When developing these programmes, the economic environment, social and cultural conditions and the practical needs of the people are to be taken into account. These programmes should be developed in co-operation and consultation with the peoples concerned, with the aim that the indigenous peoples are to gradually assume the responsibility.<sup>191</sup>

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<sup>186</sup> ILO Convention No. 169, art. 26.

<sup>187</sup> ILO Convention No. 169, art. 28.

<sup>188</sup> ILO Convention No. 169, art. 29.

<sup>189</sup> ILO Convention No. 169, art. 27.

<sup>190</sup> ILO Convention No. 169, art. 21.

<sup>191</sup> ILO Convention No. 169, art. 22.

## 5.2.2 Education and Vocational Training in International Human Rights Law

### *The United Nations*

The right to education is enshrined in article 26 of the UDHR. The right applies without any discrimination.<sup>192</sup> The right to education is also enshrined in article 13 of the ICESCR. Article 6 of the ICESCR proclaims the right to work. States are to take measures for the realization of this right, including providing vocational guidance and training programmes.<sup>193</sup> The ICESCR also contains a non-discrimination provision that prohibits discrimination on, among others, the grounds of race and colour, which includes ethnic origin.<sup>194</sup> The Convention on the Rights of the Child also contains provisions on education and non-discrimination based on ethnic origin.<sup>195</sup>

Article 7 of the ICERD states that parties undertake to adopt immediate and effective measures in the field of teaching and education to combat prejudices and promote understanding, tolerance and friendship. According to article 5 of the ICERD, parties undertake to notably guarantee the right to education and training to everyone without distinction as to ethnic origin.<sup>196</sup>

The UNDRIP contains several provisions related to education. The right of indigenous peoples to establish and control their educational systems and institutions, the right to all levels and forms of education without discrimination and access to education in their own culture and language are all enshrined in article 14 of the UNDRIP. Other provision relevant in the field of education are articles 15, 17 and 21.

Article 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities provides that states should take measures in the field of education to encourage knowledge of the history, traditions, language and culture of minorities. States should also provide adequate opportunities for persons belonging to a minority to gain knowledge of the society as a whole.

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<sup>192</sup> UDHR, art. 7.

<sup>193</sup> ICESCR, art. 6(2).

<sup>194</sup> ICESCR, art. 2(2) and CESCR, General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20.

<sup>195</sup> CRC, arts. 2 and 28-30, see also Committee on the Rights of the Child, General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child], 12 February 2009, CRC/C/GC/11, p. 56-63, and Committee on the Rights of the Child, 'Day of general discussion on the rights of indigenous children – Recommendations', 34<sup>th</sup> Session, (15 September – 3 October 2003), p. 19.

<sup>196</sup> ICERD, art. 5(e)(v).

### *The Council of Europe*

Article 2 of the first protocol to the ECHR contains the right to education. This right is to be ensured without discrimination on any ground, including language and association with a national minority.<sup>197</sup>

The Framework FCNM contains several provisions on education as well. The obligations contained in article 12 include promoting equal opportunities to access education, measures to foster knowledge of the language, providing adequate opportunities for teacher training and providing access to teaching materials.<sup>198</sup> The following article states the right of persons belonging to a national minority to set up and manage their own private education and training establishments.<sup>199</sup> Lastly, article 14 of the FCNM contains the right to learn one's minority language and having adequate opportunity for being taught and receiving instruction in one's minority language.

The ECRML Part II contains the objectives and principles which applies in general to all state parties.<sup>200</sup> Article 8 is enshrined in Part III of the ECRML, which contains provisions that to some extent are free to the signatory states to choose from. However, each signatory state must undertake to apply at least three sub-paragraphs from the article.<sup>201</sup> Article 8 contains provisions on: pre-school education in the minority language; primary education in and of the minority language; secondary education in and of the minority language; technical and vocational education in and of the minority language; university and other higher education in and of the minority language; adult and continuing education courses in and of the minority language; teaching of the history and culture which is reflected by the minority language; basic and further training of the teachers required to implement the chosen provisions; setting up a supervisory body to monitor the measures taken and progress achieved; and allowing, encouraging or providing teaching in or of the minority language. Article 14 of the ECRML promotes the application of existing or conclusion of new bilateral and multilateral agreements which bind States in which the same language is used to foster contacts between the users of the language in the fields of culture, information, vocational training and permanent education.

The ESC proclaims the right to vocational training in article 10.

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<sup>197</sup> ECHR, art. 14.

<sup>198</sup> FCNM, art. 12.

<sup>199</sup> FCNM, art. 13.

<sup>200</sup> ECRML, arts. 2(1) and 7.

<sup>201</sup> ECRML art. 2(2).

## *The European Union*

The right to education is enshrined in article 14 of the CFR. The right to education includes the right to have access to vocational and continuing training. The right is owed to everyone, without any discrimination based on any ground, including ethnic origin and membership of a national minority.<sup>202</sup>

### **5.2.3 Education and Vocational Training for Sami People in Swedish Legislation**

The education system in Sweden is decentralized. Municipalities have the main responsibility for education from pre-school, to compulsory schooling (years 1-9), to upper secondary school (years 10-12). A government agency called the Swedish Schools Inspectorate supervises the quality of the schools.<sup>203</sup>

The right to equal access to education is enshrined in the Education Act. The Education Act mentions the Discrimination Act for provisions of the prevention of discrimination on, among other grounds, ethnic origin.<sup>204</sup>

Municipalities that are part of the Sami administrative area, according to the National Minorities and Minority Languages Act, are to offer children, whose guardians ask for it, a place in a pre-school or other pedagogic activity where the entire or an essential part of the education is held in Sami.<sup>205</sup>

Between the first and sixth grade, there are two different types of schools with Sami education. The first type is Sami school, of which there are five today.<sup>206</sup> Although Sami schools have a Sami profile, they are not very different from other Swedish schools. Apart from the focus on Sami culture and tradition, the Sami schools must fulfil the same requirements as other Swedish school.<sup>207</sup> The children study both Sami and Swedish.<sup>208</sup> The Sami schools are run by the Sami School Board (*Sameskolstyrelsen*).<sup>209</sup> The Sami School Board is a Government

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<sup>202</sup> Charter of Fundamental Rights of the European Union (CFR), art. 21.

<sup>203</sup> SFS 2010:800 *Skollag* (Education Act), Chapter 26, Section 3.

<sup>204</sup> Education Act, Chapter 1, Section 8; SFS 2008:567 *Diskrimineringslag* (Discrimination Act), Chapter 2, Sections 5-8.

<sup>205</sup> National Minorities and Minority Languages Act, Section 17, and Education Act, Chapter 8, Section 12a and Chapter 25, Section 5a.

<sup>206</sup> Sameskolstyrelsen, <https://sameskolstyrelsen.se/> (accessed 28 May 2019).

<sup>207</sup> Education Act, Chapter 13, Section 2.

<sup>208</sup> Education Act, Chapter 13, Section 4.

<sup>209</sup> Education Act, Chapter 13, Section 24.

Agency which receives subsidies from the State.<sup>210</sup> The other type of Sami education is other Swedish schools that offer education with Sami components and education in the Sami language. These schools must enter an agreement with the Sami School Board to get permission to offer education with Sami components.<sup>211</sup> Furthermore, all students belonging to a national minority have the right to “mother tongue” teaching in their minority language. The right to “mother tongue” teaching for persons belonging to a national minority applies in both compulsory schooling and upper secondary school. However, the right only applies in upper secondary school if the student has good knowledge of the language.<sup>212</sup> There is also the possibility of learning one’s “mother tongue” language or obtaining education with Sami components through distance teaching.<sup>213</sup>

There are no Sami schools above the sixth grade. Between the seventh and the ninth grade, there are, except for “mother tongue” teaching in “ordinary” Swedish schools, only the option of Swedish schools that offer education with Sami components, as mentioned above.<sup>214</sup> There is only one upper secondary school that offers Sami programmes. It is located in Jokkmokk. The school offers one Sami programme, the Sami civics programme. The school has previously also offered a Sami vocational programme.<sup>215</sup>

Regarding higher education, there is a folk high school (*folkhögskola*, independent adult education college) in Jokkmokk called the Sami Education Centre which offers education in Sami handicrafts, Sami language and reindeer husbandry. The Sami Education Centre receives government subsidies.<sup>216</sup> Moreover, a Sami university was established in Norway in 1989 in which students from all over Sápmi study.<sup>217</sup> In Sweden, both Umeå University and Uppsala University offer education in Sami language and culture. In addition, Umeå University has a Centre for Sami Research.

To clarify, Sami vocational training is offered by the Sami Education Centre on a post-upper secondary school level. There is no hindrance for Sami to participate in other vocational

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<sup>210</sup> SFS 2011:131 *Förordning med instruktion för Sameskolstyrelsen* (Instructions for the Sami School Board Ordinance) and Prop. 2018/19:1 *Budgetpropositionen för 2019* (Budget Bill 2019).

<sup>211</sup> SFS 2011:185 *Skolförordning* (Education Ordinance), Chapter 12, Section 13-14.

<sup>212</sup> Education Act, Chapter 10, Section 7; Chapter 11, Section 10; Chapter 12, Section 7; Chapter 13, Section 7; Chapter 15, Section 19; Chapter 18, Section 19; and Education Ordinance, Chapter 4 Section 15 and Chapter 5, Section 7.

<sup>213</sup> Education Ordinance, Chapter 5a.

<sup>214</sup> Education Ordinance, Chapter 12, Sections 13-14.

<sup>215</sup> Lapplands Kommunalförbund, 'Samiska samhällsprogrammet', <http://www.lapplands.se/sv/gymnasium/Bokenskolan/program/samiska-samhallsprogrammet/> (accessed 28 May 2019).

<sup>216</sup> Samernas utbildningscentrum, <http://www.samernas.se/> (accessed 28 May 2019).

<sup>217</sup> Sámi University for Applied Sciences, <https://samas.no/en/node/298> (accessed 28 May 2019).

training provided in upper secondary school or at a higher level. However, there are no measures to especially consider Sami people in the admission process. Therefore, there is no discrimination directed towards Sami people in the system of vocational education and training. Neither are there any measures to promote the inclusion of Sami people into the general vocational education and training system.

In the latest evaluation report on the ECRML, the Committee of Experts commented on some shortcomings in the implementation. The report showed, among other things, that there is a lack of teachers at all levels, a lack of teaching materials at all levels and that universities needed to be provided with the necessary legal, administrative and financial conditions for them to fulfil their tasks.<sup>218</sup> The recommendation from the Committee of Ministers called for a comprehensive and structured approach based on the needs of the speakers and according to the situation of each of the minority languages.<sup>219</sup>

The Advisory Committee on the FCNM came to similar conclusions and recommended Sweden to take resolute measures to ensure that the set criteria of knowledge on national minorities, minority languages and the Sami as an indigenous people are actually met in practice, to ensure that the teaching materials are relevant and up-to-date, and to ensure that teachers have knowledge about national minorities.<sup>220</sup> Moreover, the Advisory Committee raised concern for the severe shortage of national minority language teachers.<sup>221</sup> In regards to the distance teaching, the Advisory Committee encouraged the authorities to pursue a digital solution to the problem of Sami people living in vast and sparsely populated areas.<sup>222</sup>

### 5.3 Handicrafts and Rural Industries

The traditional industries are often closely linked to the culture of the people. The Sami people have traditionally relied on reindeer husbandry, hunting, fishing and handicrafts to make a living. More recent sectors include food production, tourism, interpreting services, and music and media productions.<sup>223</sup>

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<sup>218</sup> Committee of Experts, European Charter for Regional or Minority Languages, Sixth report of the Committee of Experts in respect of Sweden, 1286<sup>th</sup> meeting, 10 May 2017, CM(2017)36, Chapter 3.2.2.

<sup>219</sup> Committee of Ministers Recommendation on the application of the ECRML by Sweden, 2017 (n 184).

<sup>220</sup> Advisory Committee on the FCNM, 4<sup>th</sup> Opinion on Sweden (n 178) pp. 27f.

<sup>221</sup> *ibid*, pp. 29f.

<sup>222</sup> *ibid*, pp. 31f.

<sup>223</sup> Sametinget, 'Samiska näringar', <https://www.sametinget.se/1035> (accessed 28 May 2019).

Issues on reindeer herding are closely related to issues on land rights. Moreover, issues on hunting and fishing is closely related to the right to pursue reindeer herding. Land rights and the right to pursue reindeer herding will be discussed more in depth in chapter 6.

While the close link between traditional industries and culture means that preserving and promoting the culture of a people have effects on the promotion of traditional industries, the following text will focus more on the economic aspects of those industries than their cultural values.

### **5.3.1 Handicrafts and Rural Industries in ILO Convention No. 169**

Article 23 of the Indigenous and Tribal Peoples Convention states that governments shall recognize handicrafts, rural and community-based industries, and subsistence economy and traditional activities of indigenous peoples as important factors in the maintenance of their cultures and in their economic self-reliance and development. These activities shall be strengthened and promoted by the government, with the participation of the indigenous people. Technical and financial assistance shall be provided whenever possible, upon the request of the indigenous people. When providing such assistance, traditional technologies, cultural characteristics of the people and the importance of sustainable and equitable development shall be considered.

### **5.3.2 Handicrafts and Rural Industries in International Human Rights Law**

#### *The United Nations*

The right to enjoy one's culture is enshrined in the ICCPR article 27, the ICESCR article 15 and article 2 of the Declaration on Minorities.

According to article 4(2) of the Declaration on Minorities, States shall take measures to create favourable conditions to enable persons belonging to minorities to develop their culture, traditions and customs. However, this this does not apply "where specific practices are in violation of national law and contrary to international standards".

According to UNDRIP article 5, indigenous peoples have the right to "maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State". Article 20 of the UNDRIP states that indigenous peoples "have the right to maintain and develop their political, economic and social systems or institutions, to be

secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities”. If the indigenous peoples are deprived of their means of subsistence and development, they are, according the second paragraph of the article 20, entitled to just and fair redress.

### *The Council of Europe*

Article 5 of the FCNM states that all parties are to promote the conditions necessary to maintain and develop the culture of persons belonging to national minorities, and to the preserve essential elements of their identity, including traditions and cultural heritage.

## **5.3.3 Handicrafts and Rural Industries of the Sami in Swedish**

### **Legislation**

It is declared in the Swedish Constitution that the possibility of the Sami people to preserve and develop their culture shall be promoted.<sup>224</sup> This obligation is also stated in the National Minorities and Minority Languages Act.<sup>225</sup>

In regard to Sami handicrafts, also called Duodji,<sup>226</sup> there is an association called the Sami Duodji Association (*Samesløjdstiftelsen*). The Sami Duodji Association supports and develops Sami handicrafts by promoting and spreading information about it. Moreover, the Association supports the persons working with Sami handicrafts.<sup>227</sup> The Sami Duodji Association receives funding from the Government and from the Sami Parliament. Furthermore, Sami handicrafts is a subject taught in various educational institutions. Sami schools and education in other schools with Sami components, which can also be taught through distance teaching, teach Sami culture, including Sami handicrafts.<sup>228</sup> Additionally, the Sami Education Centre, which receives funding from the Government, Jokkmokk municipality and Norrbotten County Council, offer programmes in both reindeer herding and Sami handicrafts.<sup>229</sup>

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<sup>224</sup> RF, Chapter 1, Section 2, sixth paragraph.

<sup>225</sup> National Minorities and Minority Languages Act, Section 4.

<sup>226</sup> Duodji is the Northern Sami word for handicrafts.

<sup>227</sup> Nämnden för Hemslöjdsfrågor, 'Verksamhetsbidrag', <https://nfh.se/bidrag/verksamhetsbidrag.html> (accessed 28 May 2019).

<sup>228</sup> See chapter 5.2.3 of this thesis.

<sup>229</sup> Samernas utbildningscentrum, 'Utbildningar', <http://www.samernas.se/utbildningar> (accessed 28 May 2019).



The right to pursue reindeer herding is regulated in the Reindeer Husbandry Act (1971:437). The right to pursue reindeer herding entails that one have the right to use certain land and water for the maintenance of oneself and one's reindeers.<sup>230</sup> The Reindeer Husbandry Act regulates in which geographical areas and during which time of the year these rights apply.<sup>231</sup> The right to pursue reindeer herding is owed to the Sami people and can be exercised by a member of a Swedish Sami village.<sup>232</sup> The right to pursue reindeer herding is founded on prescription from time immemorial. However, the right to pursue reindeer herding is in some areas founded on customary law. Land rights and the right to pursue reindeer herding will be further examined in chapter 6 of this thesis.

The right to pursue reindeer herding includes the right to reindeer grazing (*rätt till renbete*),<sup>233</sup> the right to build facilities and smaller buildings that are needed in the reindeer herding (*rätt till att uppföra anläggningar och mindre byggnader som behövs för renskötseln*),<sup>234</sup> the right to fell wood (*rätt till skogsfång*),<sup>235</sup> the right for passage when moving reindeers (*rätt till slyttningvägar*),<sup>236</sup> and the right to hunt and fish (*rätt till jakt och fiske*).<sup>237</sup>

The right to reindeer grazing is a collective right that entails that a Sami village may use the grazing area belonging to the village for reindeer herding, for the common needs of its members.<sup>238</sup> The County Council may decide upon a maximum number of reindeers for a Sami village. When doing so, the County Council shall consider interests such as the village's interest, the landowner's interest and the environment. The limitation of the number of reindeers a village may keep is not automatically contrary to the interest of the village. Overgrazing is a concern for all parties.<sup>239</sup> The Sami village may decide upon the maximum number of reindeers an individual member may have or impose other requirements for keeping reindeers, if it is needed to meet the requirements imposed by the County Council, or to promote reindeer

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<sup>230</sup> SFS 1971:437 *Rennäringslag* (Reindeer Husbandry Act), Section 1, for more on the exercise of the right to pursue reindeer herding see sections 15-25.

<sup>231</sup> Reindeer Husbandry Act, Section 3.

<sup>232</sup> Reindeer Husbandry Act, Section 1.

<sup>233</sup> Reindeer Husbandry Act, Section 15.

<sup>234</sup> Reindeer Husbandry Act, Section 16.

<sup>235</sup> Reindeer Husbandry Act, Sections 17-22.

<sup>236</sup> Reindeer Husbandry Act, Sections 23-24.

<sup>237</sup> Reindeer Husbandry Act, Section 25.

<sup>238</sup> Reindeer Husbandry Act, Section 15, first paragraph.

<sup>239</sup> Reindeer Husbandry Act, Section 15, 65 and 65a, and Bengtsson, Bertil, *Samerätt: en översikt*, First edition, Norstedts juridik, Stockholm, 2004, p. 48f.

herding.<sup>240</sup> The County Council may also impose other restrictions on the reindeer herding for the purpose of preserving and promoting reindeer herding.<sup>241</sup>

The extent of the right to build facilities and smaller buildings that are needed in the reindeer herding varies depending on the type of land. However, the right only applies within the grazing area of the village. Facilities that may be needed include, among other, fence for the reindeers, slaughterhouses, sheds for storage and cots.<sup>242</sup> In some cases where the establishing of a facility is intended to be permanent, the landowner assigns the location for it. If the landowner and the village does not agree on location, the County Council decides.<sup>243</sup>

The right to fell wood is limited to certain areas for certain purposes. The different purposes include timber for establishing facilities, for fuel for their own sustenance, for handicrafts and for building a house for one's family.<sup>244</sup> The right is an individual right owed to members of a Sami village. It is also a collective right for the village to fell certain trees if necessary for feeding the reindeers.<sup>245</sup> In addition, the County Council may grant permission for a Sami who is not member of any Sami village to take wood for handicrafts.<sup>246</sup> Compensation is in some cases required to the landowner for felling wood.<sup>247</sup> If needed for the preservation or regrowth of the forest, the Government or authority may impose restrictions which forbid felling of certain trees.<sup>248</sup>

The right of passage when moving reindeers is a collective right owed to Sami villages. The County Council determines the path if the Sami village requests it, if a conflict occurs or if there are special circumstances.<sup>249</sup>

The right of the Sami to hunt and fish may be exercised by a member of a Sami village.<sup>250</sup> The right may also be exercised by a member of another Sami village who temporarily finds oneself in the grazing area of the village for reasons related to reindeer herding. The right of the Sami to hunt and fish is not restricted to the purpose of their subsistence, except for in cases when the Sami is a member of another village.<sup>251</sup> This means

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<sup>240</sup> Reindeer Husbandry Act, Section 35, first paragraph.

<sup>241</sup> Reindeer Husbandry Act, Section 15, third paragraph.

<sup>242</sup> Reindeer Husbandry Act, Section 16, first and second paragraph.

<sup>243</sup> Reindeer Husbandry Act, Section 16, third and fourth paragraph.

<sup>244</sup> Reindeer Husbandry Act, Sections 17-22.

<sup>245</sup> Reindeer Husbandry Act, Section 20.

<sup>246</sup> Reindeer Husbandry Act, Section 17, second paragraph.

<sup>247</sup> Reindeer Husbandry Act, Section 21.

<sup>248</sup> Reindeer Husbandry Act, Section 22.

<sup>249</sup> Reindeer Husbandry Act, Sections 23-24.

<sup>250</sup> Reindeer Husbandry Act, Section 25, first paragraph, cf. SFS 1987:259 *Jaktlag* (Hunting Act), Section 10.

<sup>251</sup> Reindeer Husbandry Act, Section 25, second paragraph

that a member of a Sami village has the right to hunt and fish within the grazing area of the village with the purpose of selling.

The right of the Sami to hunt and fish exists alongside the hunting and fishing rights of the landowner.<sup>252</sup> As will be discussed below, this relationship have been greatly disputed. The right is limited to certain geographical areas. It is also limited in time to when the right to pursue reindeer herding exists in those areas.<sup>253</sup> Another limitation to the right is that a Sami village or a member of a Sami village cannot grant the right to hunt and fish to others, with an exception to former members of the Sami village.<sup>254</sup> It is the Government or an authority appointed by the Government, in most cases it is the County Council, which grants the right to fish and hunt to others.<sup>255</sup> The fees paid for the granting of such rights goes to the affected Sami village and to the Sami Foundation.<sup>256</sup> The right to hunt and fish on certain lands under the immediate disposal of the State may only be granted as long as it would not entail any substantial inconvenience for the reindeer herding. In addition, the granting shall not entail a burdensome intrusion upon the Sami right to hunt and fish. The granting of the entire fishing of a specific water requires consent from the Sami village concerned.<sup>257</sup> According to principles of administrative law, the concerned Sami village should get the opportunity to express their opinion in cases of granting any right of use.<sup>258</sup> The restriction on the granting of rights mentioned does not apply to all areas. Some areas are not protected by these provisions. Neither does the restrictions state that they apply to privately owned land. However, according to Bengtsson, professor and former Justice of the Supreme Court, certain principles of the Reindeer Husbandry Act should apply in these cases even though it is not expressed in the Act. Namely, the landowner may not take any measures that would entail substantial inconvenience for the reindeer herding. Nonetheless, some winter grazing lands are not protected at all in cases of granting rights to hunt and fish.<sup>259</sup>

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<sup>252</sup> Hunting Act, Section 10.

<sup>253</sup> Reindeer Husbandry Act, Section 25, cf. Section 3 on year-round herding areas and winter grazing lands.

<sup>254</sup> Reindeer Husbandry Act, Section 31

<sup>255</sup> Reindeer Husbandry Act, Sections 32-33 and SFS 1993:384 *Rennäringsförförordning* (Reindeer Husbandry Ordinance), Section 2.

<sup>256</sup> Reindeer Husbandry Act, Section 34 and Reindeer Husbandry Ordinance, Section 6.

<sup>257</sup> Reindeer Husbandry Act, Section 32, cf. Section 25.

<sup>258</sup> Bengtsson (n 239), p. 63, and NJA 1981 s. 1, Taxed Mountain Case (*Skattefjällsmålet*) p. 177.

<sup>259</sup> Bengtsson (n 239), pp. 65f. and Reindeer Husbandry Act, Section 30.

The Reindeer Husbandry Ordinance contains provisions on the granting of State land in certain areas.<sup>260</sup> These provisions have been criticised for providing a weak protection for the Sami. The Ordinance states that the right to non-vocational hunt of small game and fishing with certain gear *shall* be granted by the State as long as it does not entail considerable inconvenience for the reindeer herding, a burdensome intrusion upon the Sami right to hunt and fish, or have a detrimental effect on the environment, tourism or other interests.<sup>261</sup> This means that persons interested in this has a right, rather than an opportunity, to be granted the right.<sup>262</sup> Furthermore, the Ordinance prescribes that the right shall be granted free of charge to certain persons.<sup>263</sup>

The right of the Sami to hunt and fish is different from when someone has hunting and fishing rights in accordance with the Hunting Act and the Fishing Act. According to the Hunting Act, the owner of the property has the hunting rights (*jakträtt*) for the land that belongs to the property. The owner of the hunting rights can grant the right to hunt to others.<sup>264</sup> The difference lies in the different terms. The owner of the property owns the hunting rights while the Sami has a right to hunt (*samernas rätt att jaga*). The land used by the Sami is not owned by the Sami. Similar rules apply to fishing rights.<sup>265</sup>

A case regarding whether the Sami village of Girjas or the State have the hunting and fishing rights within the grazing area of the village, and regarding whether the Sami village of Girjas or the State have the right to decide over the granting of hunting and fishing rights in that area, have been settled by the Gällivare District Court and the Court of Appeal for Northern Norrland.<sup>266</sup> Both the District Court and the Court of Appeal found that the Girjas Sami village has the exclusive right to hunt and fish in relation to the State. The Court of Appeal found the Girjas Sami village to have better right to hunt small game and fish within the area than the State. Furthermore, the Court found that the State had no right to hunt small game or to fish within the area, consequently having no right to grant the right to hunt and fish to others. However, the Court of Appeal found that the Sami village did not have the right to grant the

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<sup>260</sup> Reindeer Husbandry Ordinance, Sections 2-8.

<sup>261</sup> Reindeer Husbandry Ordinance, Section 3.

<sup>262</sup> Bengtsson (n 239), p. 64.

<sup>263</sup> Reindeer Husbandry Ordinance, Section 5.

<sup>264</sup> Hunting Act, Section 10.

<sup>265</sup> SFS 1993:787 *Fiskelag* (Fishing Act), Section 3, fifth paragraph and Section 9, Prop.1986/87:58 *Om jaktlag, m.m.* (Concerning Hunting Legislation) p. 45; Bengtsson (n 239), p. 50f.

<sup>266</sup> Gällivare District Court case no. T 323-09, judgement 2016-02-03 and Court of Appeal for Northern Norrland case no. T 214-16, judgement 2018-01-23.

right to hunt and fish to others, without consent from the Government.<sup>267</sup> The Supreme Court has granted review permit in regards to the right of the Sami village to hunt of small game and fishing within its area and in regards to the right to grant these rights to others.<sup>268</sup> The hearing is expected to begin in September later this year (2019).

## 5.4 Recruitment and Conditions of Employment

### 5.4.1 Recruitment and Conditions of Employment in ILO Convention No. 169

Article 20 of the Indigenous and Tribal Peoples Convention, 1989 (No. 169) contains obligations in regard to recruitment and conditions of employment. The first paragraph states that “Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general”.<sup>269</sup>

Furthermore, the government is obligated to prevent discrimination between workers belonging to an indigenous people and other workers. This obligation applies in particular in regards to admission to employment, measures for promotion and advancement, equal remuneration for work of equal value, medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, housing, the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.<sup>270</sup>

According to the third paragraph of the provision, the government shall take measures to ensure the enjoyment of the protection afforded by national law and practice to workers in general for workers belonging to an indigenous people working in the same sectors. Measures shall also be taken to ensure that workers belonging to an indigenous people are fully informed of their rights under labour legislation and of the means of redress available to them. Moreover,

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<sup>267</sup> Gällivare District Court case no. T 323-09 (n 266), for a deeper analysis of the case see Brännström, Malin, 'Samiska markrättigheter i förändring? – Hovrättens dom i Girjas-målet väcker frågor om innebörden av rättigheter till fast egendom', in *Juridisk Publikation* 25-47, vol. 1, 2018

<sup>268</sup> Supreme Court case T 853-18.

<sup>269</sup> ILO Convention No. 169, art. 20(1).

<sup>270</sup> ILO Convention No. 169, art. 20(2).

the government shall take measures to ensure that workers belonging to an indigenous people are not subjected to working conditions that are hazardous to their health or to coercive recruitment systems, as well as ensuring that those peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from harassment.<sup>271</sup>

According to article 20(4) of the Convention, particular attention shall be paid to the establishment of adequate labour inspection services in areas where indigenous peoples undertake wage employment. This is according to the CEACR a fundamental measure to take to eliminate problems of serious abuse against indigenous peoples in the workplace.<sup>272</sup>

## **5.4.2 Recruitment and Conditions of Employment in International Human Rights Law**

### *The United Nations*

The right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment are enshrined in UDHR. Moreover, the UDHR acknowledges the right to equal pay for equal work, the right to just and favourable remuneration and the right to form and join trade unions.<sup>273</sup> Sweden has, as a state party to ICERD, undertaken to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of equality before the law, with emphasis on the enjoyment of the rights mentioned above.<sup>274</sup> In regards to other conditions of employment, the UDHR proclaims the right to rest and leisure. This right concerns hours of work and paid leave.<sup>275</sup> The rights mentioned above contained in the UDHR are further enshrined in articles 6,7 and 8 of the ICESCR.

The UNDRIP contains provisions similar to those in the ILO Convention No. 169. The UNDRIP protects the right of indigenous peoples to fully enjoy all labour rights applicable, without discrimination in regard to, among other things, labour conditions, employment and salary. Furthermore, the UNDRIP states that governments shall, in consultation and cooperation with indigenous people, take specific measures to protect indigenous children from exploitation, hazardous work and interference with the child's education, health or development.<sup>276</sup>

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<sup>271</sup> ILO Convention No. 169, art. 20(3).

<sup>272</sup> CEACR General Observation 2019 (n 73).

<sup>273</sup> UDHR, art. 23.

<sup>274</sup> CERD, art. 5(e)(i).

<sup>275</sup> UDHR, art. 24.

<sup>276</sup> UNDRIP, art. 17.

### *The Council of Europe*

The right to freedom of association is enshrined in the ECHR. This includes the right to form and join trade unions.<sup>277</sup> The right to freedom of association is also protected in the FCNM.<sup>278</sup> The ESC contains numerous provisions related to conditions of employment. These provisions include the right to work,<sup>279</sup> to just conditions of work,<sup>280</sup> to safe and healthy working conditions,<sup>281</sup> to fair remuneration,<sup>282</sup> to organise,<sup>283</sup> and the right to bargain collectively.<sup>284</sup>

### *The European Union*

The CFR proclaims that everyone has the right to freedom of association. As mentioned above, this right implies the right to form and join trade unions.<sup>285</sup> Moreover, the CFR contains provisions regarding: workers' right to information and consultation within the undertaking;<sup>286</sup> right of collective bargaining and action;<sup>287</sup> right of access to placement services;<sup>288</sup> protection in the event of unjustified dismissal;<sup>289</sup> fair and just working conditions;<sup>290</sup> and prohibition of child labour and protection of young people at work.<sup>291</sup> Additionally, the Council of the European Union has adopted several directives related to equal treatment and conditions of employment.

### *The International Labour Organization*

Sweden has ratified all eight ILO fundamental conventions: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration

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<sup>277</sup> ECHR, art. 11.

<sup>278</sup> FCNM, art. 7.

<sup>279</sup> European Social Charter (ESC), art. 1.

<sup>280</sup> ESC, art. 2.

<sup>281</sup> ESC, art. 3.

<sup>282</sup> ESC, art. 4.

<sup>283</sup> ESC, art. 5.

<sup>284</sup> ESC, art. 6, see further ESC, arts. 7-31.

<sup>285</sup> CFR, art. 12.

<sup>286</sup> CFR, art. 27.

<sup>287</sup> CFR, art. 28.

<sup>288</sup> CFR, art. 29.

<sup>289</sup> CFR, art. 30.

<sup>290</sup> CFR, art. 31.

<sup>291</sup> CFR, art. 32.

Convention, 1951 (No. 100); and Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

Sweden has ratified a total of 94 Conventions and 4 Protocols, including the fundamental conventions, of which 66 are in force. Conventions, other than the fundamental conventions, ratified by Sweden include: the Labour Inspection Convention, 1948 (No. 81), the Forty-Hour Week Convention, 1935 (No. 47), the Employment Service Convention, 1948 (No. 88), the Holidays with Pay Convention, 1978 (No. 132), the Occupational Safety and Health Convention, 1981 (No. 155), and the Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168).

### **5.4.3 Recruitment and Conditions of Employment of the Sami in Swedish Legislation**

The Constitution of Sweden proclaims that the public institutions are to combat discrimination of persons on grounds of gender, colour, national or ethnic origin, linguistic or religious affiliation, disability, sexual orientation, age or any other circumstance related to the individual.<sup>292</sup> The Constitution also includes fundamental rights and freedoms, including freedom of association.<sup>293</sup> Furthermore, the Constitution proclaims the right to take industrial action.<sup>294</sup>

The system of labour regulations in Sweden is rigorous. The two central acts in Swedish labour law are the Employment Protection Act,<sup>295</sup> regulating the individual labour law with a focus on the employment contract, and the Employment (Co-Determination in the Workplace) Act,<sup>296</sup> regulating the collective labour law with a focus on the collective agreement. The latter containing provisions on the right of association and the right of negotiation.<sup>297</sup> Other labour laws include the Work Environment Act,<sup>298</sup> the Working Hours

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<sup>292</sup> RF, Chapter 1, Section 2.

<sup>293</sup> RF, Chapter 2, Section 1, fifth paragraph.

<sup>294</sup> RF, Chapter 2, Section 14.

<sup>295</sup> SFS 1982:80 *Lag om anställningsskydd* (Employment Protection Act).

<sup>296</sup> SFS 1976:580 *Lag om medbestämmande i arbetslivet* (Employment (Co-Determination in the Workplace) Act).

<sup>297</sup> Employment (Co-Determination in the Workplace) Act, Sections 7-9 and Sections 10-17.

<sup>298</sup> SFS 1977:1160 *Arbetsmiljölagen* (Work Environment Act).



Act,<sup>299</sup> the Annual Leave Act,<sup>300</sup> the Parental Leave Act<sup>301</sup> and the Unemployment Insurance Act.<sup>302</sup>

Neither indigenous peoples nor national minorities have any acts or provisions concerning them in particular in the labour legislation. The Sami people have the same protection through labour legislation as other Swedish persons have. Therefore, the discrimination regulation is important. As previously mentioned, the Swedish Constitution contains a provision on combating discrimination on the ground of ethnic origin. Furthermore, the Discrimination Act contains provisions on discrimination in working life in particular. The purpose of the act is to combat discrimination and in other ways promote equal rights and opportunities regardless of, among other grounds, gender or ethnicity.<sup>303</sup> The Discrimination Act regulates direct discrimination, indirect discrimination, inadequate accessibility, harassment, sexual harassment and instructions to discriminate.<sup>304</sup> Discrimination is prohibited for an employer towards an employee, someone enquiring about or applying for work, someone applying for or carrying out a traineeship, and someone who is available to perform work or is performing work as temporary or borrowed labour.<sup>305</sup> The act contains an obligation of employers to investigate and take measures against harassment. Moreover, the Discrimination Act contains provisions on the prohibition of discrimination in regards to labour market policy activities and employment services not under public contract,<sup>306</sup> discrimination related to the starting and running of a business,<sup>307</sup> housing,<sup>308</sup> health and medical care and social services,<sup>309</sup> social insurance system and unemployment insurance.<sup>310</sup> The third chapter of the Discrimination Act contains provisions on active measures, including the employer taking measures to prevent sexual harassment,<sup>311</sup> to promote equal distribution of women and men in

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<sup>299</sup> SFS 1982:673 *Arbetstidslag* (Working Hours Act).

<sup>300</sup> SFS 1977:480 *Semesterlag* (Annual Leave Act).

<sup>301</sup> SFS 1995:584 *Föräldraledighetslag* (Parental Leave Act).

<sup>302</sup> SFS 1997:238 *Lag om arbetslöshetsförsäkring* (Unemployment Insurance Act), for more on Swedish labour law, see for example Gellner, Lars & Sydolf, Lars, *Swedish labour law = Svensk arbetsrätt: engelsk och svensk text*, Norstedts juridik, Stockholm, 2008.

<sup>303</sup> Discrimination Act, Chapter 1, Section 1.

<sup>304</sup> Discrimination Act, Chapter 1, Section 5.

<sup>305</sup> Discrimination Act, Chapter 2, Section 1.

<sup>306</sup> Discrimination Act, Chapter 2, Section 9.

<sup>307</sup> Discrimination Act, Chapter 2, Section 10.

<sup>308</sup> Discrimination Act, Chapter 2, Sections 12-12c.

<sup>309</sup> Discrimination Act, Chapter 2, Sections 13-13b.

<sup>310</sup> Discrimination Act, Chapter 2, Sections 14-14b.

<sup>311</sup> Discrimination Act, Chapter 3, Section 6.

different types of work,<sup>312</sup> and to discover, remediate and prevent unfair gender differences in pay.<sup>313</sup> The Equality Ombudsman supervises the adherence of the Discrimination Act.<sup>314</sup>

In 2008, the Equality Ombudsman published a report on Discrimination of the Sami.<sup>315</sup> According to the report, degrading treatment of Sami workers is not unusual. The Sami experienced discrimination based on their ethnic origin both during the recruitment process and in the workplace. Sami people have described how they have been exposed to discrimination when in contact with the Swedish Public Employment Service. The report contains accounts from Sami people which, for instance, have been advised to look for work in sectors such as tourism, despite them having university degrees making them competent for other, more qualified jobs. According to the report, several Sami felt as certain jobs, positions and promotions are unattainable to them as a person belonging to the Sami people. In addition, the Equality Ombudsman writes that several people have, during interviews for positions in local authorities and county administrative boards, been asked if they are Sami or own reindeer. If they own reindeer, or are Sami, they have been questioned whether this would impact their impartiality and loyalty to the employer.<sup>316</sup>

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<sup>312</sup> Discrimination Act, Chapter 3, Section 7.

<sup>313</sup> Discrimination Act, Chapter 3, Sections 8-10.

<sup>314</sup> Discrimination Act, Chapter 4, Section 1, also SFS 2008:568 *Lag om Diskrimineringsombudsmannen* (Ombudsman against Ethnic Discrimination Act).

<sup>315</sup> DO:s rapportserie 2008:1 (n 4).

<sup>316</sup> *ibid*, pp. 31f.

# 6 Land Rights

## 6.1 Land Rights in ILO Convention No. 169

The Indigenous and Tribal Peoples Convention contains several provisions regarding land rights. According to the Convention, the government shall respect the special importance for the cultures and spiritual values of the indigenous peoples of their relationship with the lands and territories which they occupy or otherwise use. The government shall particularly respect the collective aspects of the relationship.<sup>317</sup> The recognition of land areas is the foundation for the economic, social and cultural undertaking and future survival of the indigenous peoples.<sup>318</sup>

Furthermore, the Convention provides that the government shall recognize the rights of indigenous peoples of ownership and possession over the lands they traditionally occupy.<sup>319</sup> According to the CEACR, recognising ownership and possession of lands on the grounds of traditional occupation is essential for the land rights system required by the Convention. States parties to the Convention have taken measures such as including the rights of ownership and possession in their constitution, establishing land titling programmes and adopting land restitution plans for internally displaced persons. Nonetheless, this continues to be an issue in many countries.<sup>320</sup> When drafting the ILO Convention No. 169, the phrasing that ultimately became “Rights to ownership and possession” were extensively discussed.<sup>321</sup> It is important to note the plural form of “rights”, indicating that it is not one right. The article is designed to be applicable to different situations in different countries. The intention of the ILO Convention No. 169 is not to deprive the indigenous peoples of their strongest possible right to lands.<sup>322</sup> The rights to ownership and possession does not mean that the Convention requires that indigenous peoples have full title to their traditional lands, although recognition of ownership rights will always fulfil the requirements of the Convention.<sup>323</sup> Two government inquiries have drawn the conclusion, based on statements made in a guide to the ILO Convention No. 169, that the minimum level of rights required by the convention is the rights to possession and use,

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<sup>317</sup> ILO Convention No. 169, art. 13(1).

<sup>318</sup> Swepston, Lee and Tomei, Manuela, *Indigenous and tribal peoples: a guide to ILO convention no. 169*, International Labour Office, Geneva, 1996, p. 15.

<sup>319</sup> ILO Convention No. 169, art. 14(1).

<sup>320</sup> CEACR General Observation 2019 (n 73).

<sup>321</sup> Swepston, Lee, *The Foundations of Modern International Law on Indigenous and Tribal Peoples*, (n 74) pp. 243ff.

<sup>322</sup> Swepston and Tomei, *Indigenous and tribal peoples: a guide to ILO convention no. 169* (n 318) p. 18.

<sup>323</sup> Direct Request to Norway (CEACR) - adopted 1995, published 82nd ILC session (1995), Indigenous and Tribal Peoples Convention, 1989 (No. 169) paragraph 17.

provided that these rights are guaranteed a strong enough protection to ensure their continuance.<sup>324</sup>

The Convention continues to proclaim that the government shall take measures in appropriate cases to safeguard the right of indigenous peoples to use lands to which they have traditionally had access for their subsistence and traditional activities, though not exclusively occupied by them.<sup>325</sup> According to the above-mentioned guide to the Convention, this provision needs to be read in the context of article 23. Article 23 states that traditional activities shall be recognized, strengthened and promoted. This means that the right to use these lands for activities such as grazing, hunting and fishing should be protected, safeguarded, when these lands are developed.<sup>326</sup> The Convention states that the government should pay particular attention to the situation of nomadic peoples and shifting cultivators in this respect.<sup>327</sup>

The first and second sentence of article 14.1 regulates different types of situations, the first sentence “lands which they traditionally occupy” and the second sentence “lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities”. This indicates that the rights owed in those situations are different as well, the first sentence recognizing the “rights of ownership and possession” and the second sentence recognizing the right to use. Thus, recognizing the right to use is not sufficient for land which indigenous peoples traditionally occupy. This further supports the conclusion drawn above that the Convention requires, at least, recognition and strong protection of the rights to possession and use of lands traditionally occupied by indigenous peoples.

The use of the term “lands” in the Convention covers the total environment of the areas occupied or otherwise used by the indigenous peoples.<sup>328</sup> The Committee has exemplified what is included in this as lands used for hunting, fishing or religious and cultural rituals.<sup>329</sup>

According to the Convention, the government needs to identify lands traditionally occupied by indigenous peoples and guarantee *effective* protection of their rights of ownership and possession.<sup>330</sup> Effective protection requires actual, practical protection.<sup>331</sup> Additionally, the

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<sup>324</sup> SOU 1999:25 (n 6) p. 122; SOU 2006:14 (n 9) p. 442f; Swepston and Tomei, *Indigenous and tribal peoples: a guide to ILO convention no. 169* (n 318) p. 18.

<sup>325</sup> ILO Convention No. 169, art. 14(1).

<sup>326</sup> Swepston and Tomei, *Indigenous and tribal peoples: a guide to ILO convention no. 169* (n 318) p. 19.

<sup>327</sup> ILO Convention No. 169, art. 14(1).

<sup>328</sup> ILO Convention No. 169, art. 13(2).

<sup>329</sup> CEACR General Observation 2019 (n 73).

<sup>330</sup> ILO Convention No. 169, art. 14(2).

<sup>331</sup> Swepston and Tomei, *Indigenous and tribal peoples: a guide to ILO convention no. 169* (n 318) p. 19.

government shall establish procedures within the national legal system to resolve land claims by indigenous peoples.<sup>332</sup> These procedures must give the indigenous peoples a real possibility to obtain the right to return to their traditional lands which they have been relocated from or, if it is not possible to restore, compensation for their lost lands.<sup>333</sup>

Article 15 of the Convention concerns resources pertaining to the lands occupied or otherwise used by the indigenous peoples. The first paragraph protects the rights of indigenous peoples in relation to natural resources pertaining to their lands. These rights shall be specifically safeguarded. These rights include the right to participate in the use, management and conservation of these resources.<sup>334</sup> The second paragraph concerns cases in which the State still has the ownership of mineral or sub-surface resources in these lands. In these cases, the government shall establish and maintain procedures to consult the indigenous peoples concerned. The purpose of the consultation is to ascertain whether and to what degree the interests of the indigenous peoples would be prejudiced. The consultation should take place prior to any undertaking or permitting of programmes for the exploration or exploitation of mineral or sub-surface resources pertaining to lands which are occupied or otherwise used by indigenous peoples. Whenever possible, indigenous peoples shall participate in the benefits of any programmes for the exploration or exploitation of mineral or sub-surface resources in those lands. Moreover, the indigenous peoples should receive fair compensation for any damages they may sustain as a result of such activities.<sup>335</sup> When ratifying the Convention, States have to undertake consultations with indigenous peoples concerned with already existing explorations or exploitations of mineral or sub-surface resources. Hence, the Convention applies to activities already initiated and to activities that will be initiated in the future.<sup>336</sup>

Article 16 of the Convention contains provisions on removal, relocation and the right to return. Initially, the article states that indigenous peoples shall not be removed from the lands which they occupy.<sup>337</sup> In cases where relocation of indigenous peoples is considered necessary as an exceptional measure, it can only occur if the indigenous peoples have given their free and informed consent. In cases where such consent cannot be obtained, relocation may only take place following appropriate procedures. Appropriate procedures must be established by

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<sup>332</sup> ILO Convention No. 169, art. 14(3).

<sup>333</sup> Swebston and Tomei, *Indigenous and tribal peoples: a guide to ILO convention no. 169* (n 318) p. 19.

<sup>334</sup> ILO Convention No. 169, art. 15(1).

<sup>335</sup> ILO Convention No. 169, art. 15(2).

<sup>336</sup> Swebston and Tomei, *Indigenous and tribal peoples: a guide to ILO convention no. 169* (n 318) p. 20.

<sup>337</sup> ILO Convention No. 169, art. 16(1).

national laws and regulation and provide the opportunity for effective representation of the indigenous peoples concerned.<sup>338</sup> As soon as the grounds for relocation cease to exist, indigenous peoples have the right to return to their traditional lands if possible.<sup>339</sup> If such return is not possible, the indigenous peoples shall be provided with lands equal in legal status and quality to the land they were relocated from and suitable for the needs of the peoples, or compensation in money or in kind if preferred by the peoples. Such compensation in lands or in money shall primarily be determined by an agreement. If that is not possible, it shall take place through appropriate procedures.<sup>340</sup> Relocated indigenous peoples have the right to be fully compensated for any resulting loss or injury.<sup>341</sup>

The government shall, according to the Convention, respect established procedures within the indigenous peoples for transmitting land rights among members of the peoples.<sup>342</sup> Whenever consideration is given to the capacity of the indigenous peoples to alienate their lands or otherwise transmit their rights outside of the community, the indigenous peoples shall be consulted.<sup>343</sup> The government shall prevent any exploitation of the customs or lack of understanding of the laws of the indigenous peoples, to secure their ownership, possession and use of land.<sup>344</sup>

The Convention also contains provisions on establishing penalties for unauthorised intrusion upon or use of indigenous lands<sup>345</sup> and on adopting national agrarian programmes to secure equal treatment of the indigenous peoples.<sup>346</sup>

## 6.2 Land Rights in International Human Rights Law

### *The United Nations*

Common article 1 of the ICCPR and the ICESCR proclaim the right of all peoples to self-determination. The right to self-determination entails the right to freely pursue their economic, social and cultural development. The right to enjoy one's culture is enshrined in

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<sup>338</sup> ILO Convention No. 169, art. 16(2).

<sup>339</sup> ILO Convention No. 169, art. 16(3).

<sup>340</sup> ILO Convention No. 169, art. 16(4).

<sup>341</sup> ILO Convention No. 169, art. 16(5).

<sup>342</sup> ILO Convention No. 169, art. 17(1).

<sup>343</sup> ILO Convention No. 169, art. 17(2).

<sup>344</sup> ILO Convention No. 169, art. 17(3).

<sup>345</sup> ILO Convention No. 169, art. 18.

<sup>346</sup> ILO Convention No. 169, art. 19.

Article 27 of the ICCPR and Article 15(1)(a) of the ICESCR. There is a close link between cultural life and lands, as is stated by both CCPR and CESCR in general comments.<sup>347</sup>

The right of indigenous peoples to self-determination and to freely pursue their economic, social and cultural development is also enshrined in the UNDRIP. The UNDRIP further states that indigenous peoples have the right to autonomy or self-government in matters relating to their international and local affairs.<sup>348</sup> Article 26 of the UNDRIP enshrines the right of indigenous peoples to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. The article continues in the second paragraph to state that indigenous peoples have the right to “own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired”. The third paragraph of article 26 declares that these lands, territories and resources shall be recognized and protected by the State.

Article 8 of the UNDRIP declares the right of indigenous peoples and individuals not to be subjected to forced assimilation or destruction of their culture. In its second paragraph, the article urges states to provide effective mechanisms for prevention of, and redress for: “Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities”; “Any action which has the aim or effect of dispossessing them of their lands, territories or resources”; “Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights”; “Any form of forced assimilation or integration”; and “Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them”. Article 10 of the UNDRIP regards forced removal of indigenous people. The UNDRIP states that indigenous peoples shall not be forcibly removed from their lands or territories. The article continues to state that relocation of indigenous peoples requires free, prior and informed consent, as well as an agreement on just and fair compensation. Furthermore, the article states that indigenous peoples shall have the option to return, if possible. Article 20 of the UNDRIP enshrines the rights to “maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities”. In the second paragraph, the article states that

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<sup>347</sup> CCPR General Comment No. 23 (n 112); CESCR General Comment no. 21 (n 114).

<sup>348</sup> UNDRIP, arts. 3 and 4.

indigenous peoples are entitled to just and fair redress in cases where they are deprived of their means of subsistence and development.

Furthermore, articles 25-30 and 32 of the UNDRIP contain provisions directly related to the lands of the indigenous peoples. Article 25 protects the right to maintain and strengthen the spiritual relationship indigenous peoples have with their traditionally owned or otherwise occupied and used lands, territories, waters and other resources. For article 26, see above. Article 27 concerns the process of recognition by States of lands, territories and resources, and provides for the participation of indigenous peoples in this process. Article 28 concerns the right to indigenous peoples to redress in cases where their lands, territories and resources have been confiscated, taken, occupied, used or damaged without the free, prior and informed consent of the indigenous people. Article 29 concerns the right to conservation and protection of the environment and the productive capacity of their lands, territories or resources. Article 30 concerns military activity on indigenous peoples' lands or territories. Lastly, article 32 declares the right of indigenous peoples to determine and develop priorities and strategies for the development or use of their lands, territories and other resources. Prior to approving any projects affecting these lands, territories or resources, States shall consult and cooperate in good faith with the indigenous peoples concerned. The article particularly emphasizes the need for consultation when it concerns mineral, water or other resources. In its third paragraph, the article states that States shall provide effective mechanism for just and fair redress for any such activities, and for appropriate measures to mitigate adverse environmental, economic, social, cultural or spiritual impact.

The CERD has in its *General Recommendation No. 23* stated that the deprivation of indigenous peoples' human rights and fundamental freedoms threatens the preservation of their culture and their historical identity. The CERD particularly pointed to the loss of lands and resources of indigenous peoples to colonists, commercial companies and State enterprises as an important factor.<sup>349</sup> Considering this, it stated that "The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and

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<sup>349</sup> CCPR General Comment No. 23 (n 112) para. 3.



prompt compensation. Such compensation should as far as possible take the form of lands and territories”.<sup>350</sup>

### *Council of Europe*

Article 1 of the Protocol to the ECHR entails the protection of property. It ensures the peaceful enjoyment of one’s possessions and that one shall not be deprived of one’s possessions except in the public interest.

Article 14 of the ECHR prohibits any discrimination in relation to rights and freedoms enshrined in the ECHR, including the protection of property enshrined in its Protocol.

## **6.3 Land Rights of the Sami in Swedish Legislation**

As previously mentioned, the Instrument of Government, which is part of the Swedish Constitution, proclaims that the possibility of the Sami peoples to preserve and develop their culture and community shall be promoted.<sup>351</sup> The preparatory work to this provision explains that “culture” should be given a broad interpretation. Further, the preparatory work states that reindeer herding is to be considered an important part of the traditional Sami way of life.<sup>352</sup>

The land rights of the Sami peoples in Sweden are closely connected to the right to pursue reindeer herding (*renskötselrätt*). The right to pursue reindeer herding entails that one has the right to use certain land and water for the maintenance of oneself and one’s reindeer. The right is founded on prescription from time immemorial (*urminnes hävd*). The right is regulated in the Reindeer Husbandry Act and belongs to the Sami people.<sup>353</sup> Who is to be considered a Sami is not defined by law. However, if a person is considered to be Sami according to the Sami Parliament Act, that person are also to be considered to be Sami when applying the Reindeer Husbandry Act.<sup>354</sup> Further, the Reindeer Husbandry Act states that the right to pursue reindeer herding may be exercised by a person who is a member of a Sami village.<sup>355</sup> A member of a Sami village is, according to the Reindeer Husbandry Act: a Sami who is participating in the reindeer herding within the grazing area of the village; a Sami who

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<sup>350</sup> CCPR General Comment No. 23 (n 112) para. 5.

<sup>351</sup> RF, Chapter 1, Section 2, sixth paragraph.

<sup>352</sup> Prop. 1975/76:209 *Om ändring i regeringsformen* (Concerning Changes in Instrument of Government) p. 138.

<sup>353</sup> Reindeer Husbandry Act, Section 1.

<sup>354</sup> Prop. 1992/93:32 *Om samerna och samisk kultur m.m.* (Concerning the Sami and Sami Culture) pp. 92f. and 182, and Sami Parliament Act, Chapter 1, Section 2.

<sup>355</sup> Reindeer Husbandry Act, Section, third paragraph, cf. section 6.

has participated in reindeer herding within the grazing area of the village and has had this as their permanent vocation and has not proceeded to another main vocation; a spouse or child still living at home to a Sami considered a member or a surviving spouse or a underage child to a deceased member.<sup>356</sup>

The right to pursue reindeer herding includes the right to reindeer grazing,<sup>357</sup> the right to build facilities and smaller buildings that are needed in the reindeer herding,<sup>358</sup> the right to log wood,<sup>359</sup> the right of passage when moving reindeers<sup>360</sup> and the right to hunt and fish.<sup>361</sup> There are some additional rights that are not enshrined in the Act, such as the right to use gravel for subsistence.<sup>362</sup> These rights are further discussed under chapter 5.3.

As will be described below, the right to pursue reindeer herding is restricted to certain geographical areas. These areas are divided between Sami villages in distinct village areas by the Sami Parliament.<sup>363</sup> A Sami village has the status of a legal person that can acquire rights and obligations.<sup>364</sup> A Sami village shall manage the right to pursue reindeer herding within the grazing area of the village. A Sami village is not allowed to operate any other economic activity other than reindeer herding.<sup>365</sup> The village represents its members in issues concerning the right to pursue reindeer herding or the common interest of the members within the reindeer husbandry.<sup>366</sup> As stated earlier, the right to pursue reindeer herding is connected to membership of a Sami village. It is up to the Sami village to decide upon membership. However, if someone is denied membership, the Sami Parliament may grant that person membership to a village, if there are special circumstances.<sup>367</sup>

The right to pursue reindeer herding is protected in the Instrument of Government. It is protected as a right to trade or practice a profession which, according to the Instrument of Government, can only be restricted to protect pressing public interests and never solely in order to further the economic interests of a particular person or enterprise. However, the same provision states that the right of the Sami peoples to pursue reindeer herding is regulated by

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<sup>356</sup> Reindeer Husbandry Act, Section 11.

<sup>357</sup> Reindeer Husbandry Act, Section 15.

<sup>358</sup> Reindeer Husbandry Act, Section 16.

<sup>359</sup> Reindeer Husbandry Act, Sections 17-22.

<sup>360</sup> Reindeer Husbandry Act, Sections 23-24.

<sup>361</sup> Reindeer Husbandry Act, Section 25.

<sup>362</sup> Taxed Mountain case NJA 1981 s. 1 (n 258) pp. 245f.

<sup>363</sup> Reindeer Husbandry Act, Sections 6-7.

<sup>364</sup> Reindeer Husbandry Act, Sections 1, first paragraph.

<sup>365</sup> Reindeer Husbandry Act, Section 9.

<sup>366</sup> Reindeer Husbandry Act, Section 10, second paragraph.

<sup>367</sup> Reindeer Husbandry Act, Sections 11-12.

law.<sup>368</sup> This means that the right to pursue reindeer herding is not in conflict with the right to trade or practice a profession.<sup>369</sup> The right to pursue reindeer herding is also protected as a property in the Instrument of Government.<sup>370</sup>

The right to pursue reindeer herding is restricted to certain geographical areas, the reindeer herding area (*renskötselområdet*). The reindeer herding area is divided into two different types: the “year-round herding areas” (*året-runt-markerna*), in which reindeer herding may be pursued all times of the year, and the “winter grazing land” (*vinterbetesmarkerna*), in which reindeer herding may only be pursued from 1 October to 30 April.<sup>371</sup> There are also Sami villages with the right to pursue reindeer herding outside of these areas through so called concession.<sup>372</sup> The year-round herding areas are described in greater detail than the winter grazing land is in the Reindeer Husbandry Act. The right to pursue reindeer herding applies to land owned both by the State and private actors. The relationship between the landowner and the Sami is regulated differently, depending on whether it concerns year-round herding areas or winter grazing lands. The landowner of year-round herding areas may not take any measures that would entail substantial inconvenience for the reindeer herding.<sup>373</sup> In the year-round herding areas owned by the State, it is not allowed to grant the right to use the land to others if it would entail substantial inconvenience for the reindeer herding. When it comes to granting the right to hunt or fish to other, this must not entail a burdensome intrusion upon the Sami right to hunt and fish.<sup>374</sup> There are no restrictions on measures that the landowner may take in the winter grazing land in relation to the Sami right to reindeer grazing or to hunt and fish in the Reindeer Husbandry Act. However, the Act provides for compensation whenever suspension of the right to pursue reindeer herding causes damage or inconvenience on the reindeer herding or the right to hunt and fish.<sup>375</sup>

The Forestry Act (1979:429) contains provisions regarding considerations of the owner of land with forest in which reindeer herding takes. The owner shall take reindeer herding into consideration by adjusting the size and location of the harvesting site, leaving groups of trees and constructing forest roads when it is apparently needed for the reindeer herding.<sup>376</sup>

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<sup>368</sup> RF, Chapter 2, Section 17.

<sup>369</sup> Prop 1993/94:117 *Inkopporering av Europakonventionen och andra fri- och rättighetsfrågor* (Incorporation of European Convention on Human Rights) p. 22.

<sup>370</sup> RF, Chapter 2, Section 15.

<sup>371</sup> Reindeer Husbandry Act, Section 3.

<sup>372</sup> Reindeer Husbandry Act, Sections 85-89.

<sup>373</sup> Reindeer Husbandry Act, Section 30.

<sup>374</sup> Reindeer Husbandry Act, Section 32.

<sup>375</sup> Reindeer Husbandry Act, Section 28.

<sup>376</sup> Forestry Act, Section 31.

Furthermore, the Act provides that consultation shall be held with affected Sami village before a felling within the year-round herding area.<sup>377</sup> Felling in the year-round herding area is not permitted if it entails such a substantial loss of feed that the possibility of herding the number of reindeers allowed would be affected or if it makes customary keeping and moving of the reindeer herd impossible.<sup>378</sup>

When the State if granting rights other than the use of natural resources, a fee shall be charged, provided that there are not any special reasons against taking a fee. The fee shall be given divided equally between the Sami Foundation and to the affected Sami village.<sup>379</sup> When granting rights to use natural resources, the State shall give compensation for any damage or inconvenience on the reindeer herding caused by it.<sup>380</sup>

The right to pursue reindeer herding is, according to the Reindeer Herding Act, founded on prescription from time immemorial.<sup>381</sup> This means that the right exists regardless of the existence of the Act. The Act was amended to include this provision after it was established by the Swedish Supreme Court in the Taxed Mountain case (*Skattefällsmålet*).<sup>382</sup> However, following the Supreme Court judgement in the Nordmaling case,<sup>383</sup> it was made clear that only the right to pursue reindeer herding in the year-round herding areas is founded on prescription from time immemorial. The right to pursue reindeer herding in the winter grazing lands was found to be dependent on customary law instead.<sup>384</sup>

The Instrument of Government state that “The property of every individual shall be so guaranteed that no one may be compelled by expropriation or other such disposition to surrender property to the public institutions or to a private subject, or tolerate restriction by the public institutions of the use of land or buildings, other than where necessary to satisfy pressing public interests”.<sup>385</sup> The provision continues to provide for full compensation if a person is compelled to surrender property by expropriation. The Government may, according to the Reindeer Husbandry Act, expropriate land for purposes given in the Expropriation Act.<sup>386</sup>

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<sup>377</sup> Forestry Act, Section 21.

<sup>378</sup> Forestry Act, Section 13b, see also Sections 16 and 18b.

<sup>379</sup> Reindeer Husbandry Act, Section 34, first paragraph and Reindeer Husbandry Ordinance, Section 6.

<sup>380</sup> Reindeer Husbandry Act, Section 34, second paragraph.

<sup>381</sup> Reindeer Husbandry Act, Section 1, second paragraph.

<sup>382</sup> Taxed Mountain case, NJA 1981 s. 1 (n 258).

<sup>383</sup> NJA 2011 s. 109, Nordmaling case (*Nordmalingsmålet*).

<sup>384</sup> Allard, Christina, 'Nordmalingsmålet: Urminnes hävd överspelad för renskötselrätten?' in *Juridisk Tidskrift*, 117-128, vol. 23, 2011, p. 117.

<sup>385</sup> RF, Chapter 2, Section 15.

<sup>386</sup> Reindeer Husbandry Act, Section 26 and SFS 1972:719 *Expropriationslag* (Expropriation Act), Chapter 2.

When deciding on expropriation, the Government have the possibility to prescribe measures to prevent damage or inconvenience for the reindeer herding.<sup>387</sup> If the reindeer herding or the right to hunt and fish is damaged or inconvenienced, the Sami have a right to be compensated.<sup>388</sup>

The exploration and exploitation of deposits of minerals is regulated in the Minerals Act and in the Minerals Ordinance. According to the Mineral Ordinance, the Sami Parliament shall have the opportunity to give an opinion on applications for exploration permits relating to an area used for reindeer herding.<sup>389</sup> However, the Minerals Act states that the Chief Mining Inspector, which is the authority granting exploration permits and exploitation concessions, may determine an application for the granting of an exploration permit without giving any concerned party other than the applicant the opportunity to express their opinion.<sup>390</sup> Holders of reindeer herding rights are considered in the Minerals Act to have special right to a property.<sup>391</sup> Affected holders of special rights have the opportunity to submit objections to plans of operation. In the case of it concerning the reindeer herding area, it would be the Sami village affected that would have that opportunity.<sup>392</sup> Furthermore, the permit holder shall translate the plan of operation into Sami.<sup>393</sup> A plan of operations becomes valid if no objections are raised or if the permit holder and the objector reach an agreement on the content of the plan.<sup>394</sup> However, if agreement cannot be established, it is ultimately up to the Chief Mining Inspector to decide.<sup>395</sup> The Sami Parliament shall be informed of various decisions concerning areas used for reindeer herding.<sup>396</sup> According to the Minerals Act, “Exploration permits shall have conditions attached, as are necessary for the protection of public interests or private rights, as well as conditions requiring the permit holder to furnish security for compensation”.<sup>397</sup> When it comes to exploitation, the Minerals Act states that concessions *shall* be granted if “a deposit has been found which in probability may be utilized on a financial basis” and “the location and

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<sup>387</sup> Reindeer Husbandry Act, Section 27.

<sup>388</sup> Reindeer Husbandry Act, Section 28.

<sup>389</sup> SFS 1992:285 *Mineralförordning* (Minerals Ordinance) Section 3, fourth paragraph.

<sup>390</sup> Minerals Act, Chapter 8, Section 1.

<sup>391</sup> Minerals Act, Chapter 17, Section 1, first paragraph.

<sup>392</sup> Minerals Act, Chapter 3, Section 5a.

<sup>393</sup> Minerals Act, Chapter 3, Section 5b, cf. National Minorities and Minority Languages Act, Section 6.

<sup>394</sup> Minerals Act, Chapter 3, Section 5c.

<sup>395</sup> Minerals Act, Chapter 3, Section 5d.

<sup>396</sup> Minerals Ordinance, Sections 6, 8, 9b and 22 and Minerals Act, Chapter 3, Section 5c.

<sup>397</sup> Minerals Act, Chapter 2, Section 10.

nature of the deposit do not make it inappropriate to grant the applicant the concession applied for”.<sup>398</sup> The Minerals Act also regulates compensation in cases of damage and encroachment.<sup>399</sup>

The Environmental Code (1998:808) states that “Land and water areas that are important for reindeer husbandry [...] shall, to the extent possible, be protected against measures that may significantly interfere with the operation of these industries”. It continues to state that areas that are of national interest for the purposes of reindeer husbandry shall be protected against such measures.<sup>400</sup> It is stated in the preparatory work that there must be fundamental prerequisites for reindeer husbandry industry in each Sami village. Namely, each village shall have guaranteed access to lands, both year-round herding areas and winter grazing land, that are essential for pursuing reindeer herding. However, the protection for the reindeer herding is not absolute in relation to other opposing interests.<sup>401</sup>

To summarize, legislation regulating the Sami right to land can be found in various different acts. This makes it difficult to get full view of the legislation.

In 2002, the Swedish Government appointed an inquiry to clarify which lands the Sami peoples traditionally occupy and which lands the Sami peoples traditionally had access for their subsistence and traditional activities although not exclusively occupied by them. The inquiry was to decide these areas in light of the provisions in the ILO Convention No. 169. In addition, the inquiry was to determine the area of the “winter grazing land” provided in the Reindeer Husbandry Act.<sup>402</sup> However, it is important to note that a determination of whether or not the right to pursue reindeer herding exists in a particular land area only has legal force if it is done through a court ruling.<sup>403</sup> In cases concerning the persistence of reindeer herding in an area, and thereby if the right to pursue reindeer herding exists in that area, the burden of proof lies upon the Sami villages. This follows from the principle that the burden of proof lies upon the party making the claim.<sup>404</sup> The Boundary Delimitation Committee, appointed by the Government to carry out the inquiry found that any land that could be considered to have been traditionally occupied by the Sami would be within the year-round herding area. Within that area, the Committee created five different categories of land. Firstly, the Committee concluded that there may be some limited area in which Sami would, through a court decision, be considered

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<sup>398</sup> Minerals Act, Chapter 4, Section 2.

<sup>399</sup> Minerals Act, Chapter 7.

<sup>400</sup> Environmental Code, Chapter 3, Section 5.

<sup>401</sup> Prop. 1985/86:3 *Med förslag till lag om hushållning med naturresurser m.m.* (With Suggestions for Legislation on Households and Natural Resources), p. 57 and Prop. 1992/93:32 (n 354) p. 104f.

<sup>402</sup> SOU 2006:14 (n 9), p. 77.

<sup>403</sup> *ibid* p. 26.

<sup>404</sup> *ibid* p. 397.

to be the owner of. If that is the case, the Committee finds that the Sami should be recognized as having formal ownership over these areas.<sup>405</sup> The second category identified by the Committee was state owned land which is exclusively used by the Sami. The Committee suggests that this land should be considered to be traditionally occupied by the Sami if the utilization of the land by the Sami has been moderately intense.<sup>406</sup> The third category is state owned land on which rights have been granted to other than the Sami. The Committee states that it is difficult to determine whether such land should be considered to be land traditionally occupied by the Sami or land to which the Sami have traditionally had access to. The Committee suggests that each of these territories need to be analysed.<sup>407</sup> The fourth category was identified as State-owned land on which commercial forestry or other business has been conducted. The Committee suggest that the classification of that land in relation to ILO Convention No. 169 is dependent on whether the business or the Sami reindeer herding, hunting and fishing is considered to be the dominant in the particular area.<sup>408</sup> The last category is privately owned land within the year-round herding area. The Committee considers this to be land which the Sami traditionally have used with others.<sup>409</sup> In regard to the winter grazing land, the Committee considered it to be land traditionally used with others.<sup>410</sup>

The solution proposed by the Boundary Delimitation Committee differs from the solution proposed in the inquiry of 1999.<sup>411</sup> The 1999 inquiry concluded that the year-round herding areas that are owned by the state could be considered to be land that the Sami traditionally occupied, in reference to article 14 of the Convention, and that year-round herding areas that are privately owned and the winter grazing land could be considered to be land that the Sami traditionally had access for their subsistence and traditional activities although not exclusively occupied by them. However, the inquiry found that the right to pursue reindeer herding was not as strongly protected as required by the Convention and therefore needed to be strengthened.<sup>412</sup> The inquiry suggested that the protection against restrictions on the right to pursue reindeer herding should be strengthened by not allowing any measures that would entail minor inconvenience to the reindeer herding or Sami right to hunt and fish. Moreover, the inquiry suggested that the Sami should have the right to give their opinion on such measures

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<sup>405</sup> SOU 2006:14 (n 9), pp. 457f.

<sup>406</sup> *ibid* p.459.

<sup>407</sup> *ibid* p. 459f.

<sup>408</sup> *ibid* p. 460.

<sup>409</sup> *ibid* p. 460.

<sup>410</sup> *ibid* p. 431.

<sup>411</sup> SOU 1999:25 (n 6).

<sup>412</sup> *Ibid* p. 145.

prior to them being taken. The Sami should, according to the inquiry, have the right to try these measures in an impartial instance competent in issues relating to reindeer herding and the Sami right to hunt and fish. Another measure that the inquiry suggests is to give the Sami Parliament the right to give their opinion prior to any decisions being made in regard to establishing areas of national interest in accordance with the Environmental Code and in regard to allowing for exploitation of land and water in such area. Furthermore, the inquiry came to the conclusion that the Sami needed have the right to dispose of their right to hunt and fish, by have the right to grant it to others, in order for the right to pursue reindeer herding to correspond to the requirements in the Convention on the rights to ownership and possession.<sup>413</sup>

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<sup>413</sup> SOU 1999:25 (n 6), p. 159.



# 7 Analysis

## 7.1 Participation and Consultation

When comparing the international instruments under chapter 4.2 to the provisions on participation and consultation in ILO Convention No. 169, there are both differences and similarities. The ICCPR, the ICESCR, the ICERD and the UNDRIP provide that free, prior and informed consent shall be obtained before deciding on, or implementing, any measures which may affect the indigenous people. The UNDRIP is not legally binding and the provisions on free, prior and informed consent in ICCPR, ICESCR and ICERD derive from general comments which, though not directly binding, are considered authoritative for the interpretation of the Covenants. Meanwhile, the ILO Convention No. 169 does not require consent as a result, only as the objective of the consultation. The ILO Convention No. 169 has developed the procedure of consultation further and in more detail. Thus, a ratification of the ILO Convention No. 169 by Sweden would not entail another level of expectation from the international community regarding consideration of the interests of indigenous peoples as concerns outcomes. However, it would entail a binding legal obligation on consultation.

The right of indigenous peoples to decide upon their own priorities for the process of development and exercise control over their own economic, social and cultural development is provided for in the Sami Parliament Act stating that one of the tasks of the Sami Parliament is to allocate State subsidies, funds from the Sami Foundation and other funds intended for the common disposal of the Sami people. Moreover, the fact that the Sami Parliament receives State subsidies indicates that the Government provides means for the development of the institution and initiatives of the Sami, as well as provide for adequate staff and financial resources. However, this is relative in relation to how much the Sami Parliament receives in State subsidies. It could also be argued that the limitation of the scope of the mandate of the Sami Parliament restricts its full development. The limitation of the scope being the lack of direct decision-making power.

To what extent is the Sami Parliament participating? The Sami Parliament is both a popularly elected body of the Sami people and an administrative authority that shall promote a vigorous Sami culture. The Sami Parliament shall participate in the development of the community and ensure that the needs of the Sami are considered. The Sami Parliament, as well as other organisations, must be given the opportunity to express their opinion in the preparation

of issues settled by the Government. They are also to be given the opportunity to influence decisions taken by administrative authorities that affects them. They shall according to the National Minorities and Minority Languages Act be consulted as far as possible on such issues. The purpose of the consultation is that the administrative authorities shall be able to take their opinions into account when making a decision. They shall have a real possibility to influence the outcome. However, there is no obligation in the act on the administrative authority to actually consider what the Sami Parliament thinks.

These are all instances where the Sami people may participate. However, when these are compared to the requirements on consultation in the ILO Convention No. 169, it is highly doubtful that these would be considered to be in conformity with them. While the opportunities to give their opinion may be held in a timely manner, thus prior to the decision, they do not have the objective of achieving agreement or consent. The possibility to influence a decision is not the same as having the objective to reach an agreement. Furthermore, to give one's opinion is not equivalent to establishing a dialogue. In the procedure on issues settled by the Government, the Sami Parliament is only one of many bodies to which a proposal is referred for consideration. The opinion expressed by the Sami Parliament is not required to be especially considered in relation to the other opinions. Moreover, while a consultation conducted in accordance with the National Minorities and Minority Languages Act is in fact a dialogue, the fact that the authority may disregard the opinion of the Sami Parliament altogether means that the possibility of reaching an agreement is limited. The principle of local self-government will further diminish the possibility of the Sami Parliament to affect the outcome.

The principle of local self-government limits the extent to which indigenous peoples can participate in all levels of decision-making. On the other hand, Sami people have the same right to vote in elections pertaining to all levels of government as other citizens do.

Sami villages have the possibility to make their opinion heard according to provisions in both the Forestry Act and the Minerals Act. However, the consultation according to the Forestry Act is limited to certain areas within the reindeer herding area and the possibility to object provided for in the Minerals Act does not ultimately lead to a consultation but to a consideration made by a third party, the Chief Mining Inspector, of the inconvenience of the Sami on one hand and the interest of the permit holder on the other.

The Sami people is both participating and being represented through the delegations at county level deciding on issues related to reindeer herding, since three out of seven members of the delegation are reindeer herders themselves. Moreover, these three are appointed following consultation with the Sami Parliament.

The proposal for a new act on consultation in issues of particular interest of the Sami people provides for a procedure and objective that seems to be in accordance with ILO Convention No. 169. However, consultation on the local level might in practice be limited by the principle of local self-government.

## **7.2 Economic Participation**

The international obligations of Sweden in regard to language rights provides protection exceeding the required protection in the ILO Convention No. 169, especially considering the FCNM and the ECRML. As a consequence of that, Swedish legislation already provides the protection and measures required by the ILO Convention No. 169. A ratification of ILO Convention No. 168 would not require any changes in Swedish legislation. However, the report from the Equality Ombudsman shows that measures to ensure the implementation of this legislation are needed. Moreover, the example in the report shows how the denial of language rights may lead to implications in the enjoyment of other rights, such as land rights.

In the event of a ratification, the supervisory system of the ILO Convention No. 169 would put additional pressure on the Swedish Government to continue to adhere in practice to the provisions and further ensure the effective application of these provisions.

Regarding education and vocational training, there are many international instruments of relevance to Sweden which contain provisions on the equal opportunity with other nationals to acquire education on all levels. Some international instruments contain provisions on equal opportunity to take part in vocational training, namely the UNDRIP, the ESC and the CFR. Provisions on the right to be taught one's indigenous language and measures to preserve and promote such language is mainly found in the FCNM and the ECRML. Both the UNDRIP and the FCNM contain provisions on the establishing of educational institutions under the responsibility of the indigenous people or the minority. Compared to these international instruments, the ILO Convention No. 169 contains a more comprehensive collection of the rights of indigenous peoples to education and vocational training. Most provisions on education and vocational training in the ILO Convention No. 169 are also enshrined in the other international instruments. However, the ILO Convention No. 169 contains provisions in regard to vocational training to a greater extent.

The educational system in Sweden seems to meet the requirements of the ILO Convention No. 169 formally. For instance, distance teaching seems to be a good solution to ensure teaching of the Sami language even with the Sami people being spread over vast

geographical areas. However, as indicated by the supervisory bodies of the ECRML and the FCNM, the rights may not be effectively ensured due to shortcomings in the implementation of the legislation. Such shortcomings include, for instance, the lack of teachers and teaching materials.

The system for vocational training that takes into account the special needs of the Sami is limited. The special needs of the Sami include knowledge in Sami handicrafts and reindeer herding. The fact that Sami vocational training was previously offered at upper secondary school-level but is not anymore, suggests that the State has not taken sufficient measures to ensure that the special needs of the Sami are met. Furthermore, there is a lack of measures to promote voluntary participation in vocational training programmes of general application.

The subsidies from the State to the Sami School Board and the Sami Education Centre are to be considered measures taken by the State. The aim in the ILO Convention No. 169 for the indigenous people to assume responsibility over educational and vocational training programmes may be considered met.

The recognition in the Swedish Constitution that the possibility of the Sami people to preserve and develop their culture shall be promoted includes the reindeer herding of the Sami. As has been shown in this thesis, the Sami right to pursue reindeer herding is connected to many other important rights of the Sami, primarily their land rights and their right to hunt and fish. This recognition may be considered to meet the requirement set in the first sentence of article 23 of the ILO Constitution No. 169. However, the situation gets complicated when it comes to the second sentence of article 23 in the ILO Convention No. 169, requiring actual measures to strengthen and promote the traditional activities of the indigenous people. This indicates that more than a formal recognition is needed. The State needs to show actual respect towards these traditional activities by taking measures to promote and strengthen them. The most substantial issue is the restrictions on the right to pursue reindeer herding, and thereby follows the other rights including, most importantly, the right to hunt and fish. The right to pursue reindeer herding is restricted to reindeer-herding members of Sami villages, with the exceptions of granting the right to a former member of the village to hunt and fish to a certain extent and that a Sami person who is not member of a Sami village may be granted permit from the County Council to take wood for handicrafts. Therefore, Sami people who are not a member of a Sami village are excluded from all rights relating to reindeer herding. Thus, they are excluded from the land rights of the Sami. Considering that the reindeer herding Sami is a minority within the Sami people, a majority of the Sami people are excluded from most rights related to their traditional lands, which in turn is closely related to their culture. Therefore, most Sami people

does not have the right to hunt and fish or to take wood for handicrafts without obtaining a permit from the County Council. This division between reindeer herding Sami and non-reindeer herding Sami is a serious limitation of their rights. The division stretches back in history to when the State had ideas of the “genuine Sami”.

Considering the rights of the reindeer herding Sami, the rights to use the lands are limited through various restrictions. The most notable restrictions are that the rights to use lands are limited to certain areas and that the Sami people do not have the right to dispose of these rights by granting them to others. However, it should be noted that the fees from the granting of such rights is paid to the Sami village concerned and to the Sami Foundation.

Although the county delegation responsible for issues relating to reindeer herding consist of three reindeer herders out of the total of seven members, legislation states that the right to non-vocational hunting of small game and fishing with certain gear shall be granted as long as it does not entail considerable inconvenience for the reindeer herding, a burdensome intrusion upon the Sami right to hunt and fish, or have a detrimental effect on the environment, tourism or other interests.

There are some restrictions to granting other types of hunting and fishing, such as that it should not entail substantial inconvenience for the reindeer herding or entail burdensome intrusion upon the Sami right to hunt and fish. However, these restrictions only apply to certain lands under the immediate disposal of the State. Other traditional lands are not explicitly protected by the law.

The outcome of the Girjas case may have substantial bearing on these rights in the future. Nevertheless, a clear legal framework should be the aim.

In regard to international instruments, the FCNM is the only legally binding instrument with a similar provision. Looking at the United Nations system, ILO Convention No. 169 is the only binding instrument on this subject.

Sweden has a rigorous system of labour laws. However, there is no labour legislation concerning indigenous peoples or minorities in particular. To ensure equal protection for all, the discrimination legislation is especially important. However, the report from the Equality Ombudsman indicates that effective protection is not achieved. The ILO Convention No. 169 require the State to adopt special measures in co-operation with the indigenous peoples concerned to ensure effective protection. In the event of a ratification, Sweden would need to, in consultation with the Sami people, adopt such special measures to ensure the effective protection of the Sami in situations concerning recruitment and conditions of employment. There is no equivalent provision enshrined in any legally binding international instrument.

## 7.3 Land Rights

As mentioned above in the analysis regarding handicrafts and rural industries, a fundamental weakness in the protecting of Sami land rights is that the land rights of the Sami are closely connected to reindeer herding. Thus, excluding a majority of the Sami from their rights to land.

If Sweden was to ratify the ILO Convention No. 169, the State would have to recognize the rights of the Sami to ownership and possession over lands which they traditionally occupy. The minimum level of rights the State need to recognize seems to be the rights to possession and use, along with guaranteeing effective protection to ensure their continuance. However, the application of ILO Convention No. 169 should result in as strong rights to land as possible in the specific situation.

In the event of a ratification, the State is required to take steps to identify the lands the indigenous peoples traditionally occupied. The conclusions from the Boundary Delimitation Committee shows that there are lands which through recognition of their rights would be granted ownership or possession. However, the considerations made by the Committee might not be in total agreement with what view of ILO Convention No. 169. The main issue would be that the Committee stated that all privately-owned land was excluded from being considered traditionally occupied by the Sami. The ILO Convention No. 169 does not make a distinction on whether the land is owned by the state or if it is privately owned land. In the event of a ratification, a rigorous consultation procedure should be initiated with the Sami in which the aim is to reach an agreement on the classification of each land area. The State would also need to establish procedures to resolve land claims in accordance with the ILO Convention No. 169.

After recognizing the land rights of the Sami, the State would need to take measures to safeguard the right to use land with the Sami traditionally has had access to, though not exclusively occupied by them. The restrictions imposed on the landowner through various legislative acts must then be reconsidered. The restriction on the Sami to not have the right to grant the rights to other may also be reconsidered. When reconsidering these restrictions, consultation should be held with the Sami in accordance with the ILO Convention No. 169.

Regarding the rights in relation to natural resources pertaining to Sami lands, the current legislation enshrined in the Environmental Code does not allow for Sami participation in the use, management and conservation of resources. In the event of a ratification, this would need to be changed.

Regarding sub-surface resources and minerals, the practice of being allowed the opportunity to give one's opinion or submit objections to plans of operation are not to be considered equal to the procedures of consultation required in the ILO Convention No. 169. There needs to be a dialogue with the objective to achieve agreement or consent. If Sweden ratifies the ILO Convention No. 169, procedures for consultations in accordance with the Convention need to be established.

The issue of removal from lands which are occupied by the Sami, the Swedish law provides a protection strong enough to be considered to adhere to the requirements of the ILO Convention No. 169. However, a procedure for consultation should be established.

Lastly, in regards to respecting established procedures for transmitting rights within the Sami peoples and consultation when consideration is given to their capacity to alienate their lands or otherwise transmit their rights outside their own community, the Sami land rights are based on prescription from time immemorial or customary law and are owed to members of a Sami village. It is up to the Sami village, or in certain cases the Sami Parliament, to decide on membership. Therefore, the State does not make these decisions. For that reason, no changes are required in Swedish legislation on this matter in the event of a ratification.

## 8 Conclusion

When considering the Sami rights to participate and be consulted, the principle of local self-government makes it difficult to ensure such rights on all levels of decision-making. The procedures for consultation and the objective of such procedures is incomplete in relation to the ILO Convention No. 169. There are opportunities to be heard, but this probably does not amount to the level of consultation contemplated in the convention. The new proposed act on consultation seems to conform with Convention No. 169. In the event of a ratification of the Convention, Sweden would have to make changes in the consultation procedure, primarily focusing on establishing a dialogue and that the objective of that dialogue should be an agreement or consent.

Regarding language rights, no legislative measures seem to be required in the event of a ratification. However, measures to ensure the effective implementation of the legislation may be needed. The same could generally be said about the educational system in Sweden. It seems to meet the formal requirements of the ILO Convention No. 169. However, measures are needed to ensure the effective implementation of the rights, especially in relation to the right to be taught the Sami language. Moreover, measures are needed to promote voluntary participation in vocational training programmes of general application.

In the event of a ratification, the Swedish State would need to make changes in the legislation on the right to pursue reindeer herding in order to reinforce the economic rights of Sami other than the minority of reindeer herders. This would promote the economic self-reliance and development of the Sami, as well as their traditional industries.

Despite the rigorous system of labour laws in Sweden, there are no special measures to ensure the effective protection of the rights of the Sami people in situations of recruitment and conditions of employment. Such special measures would be needed in the event of a ratification of the ILO Convention No. 169.

When it comes to Sami land rights, the State will be required to take many measures to conform to the ILO Convention No. 169. The most notable changes would be the recognition of Sami land rights and to identify these lands in consultation with the Sami peoples. Additionally, the procedures for participation and consultation needs to be established throughout the system of land rights.

To sum it all up, a ratification of the ILO Convention No. 169 would entail measures most importantly to ensure that the rights of the Sami is not limited to the minority of reindeer



herding Sami. Moreover, measures to ensure recognition of the land rights of the Sami should be prioritized.

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# Appendix

## Article 6

1. In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

## Article 7

1. 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, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

## Article 13

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

## Article 14

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

traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

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

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

#### Article 15

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

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities and shall receive fair compensation for any damages which they may sustain as a result of such activities.

#### Article 16

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

#### Article 17

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

#### Article 18

Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

#### Article 19

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

- (a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
- (b) the provision of the means required to promote the development of the lands which these peoples already possess.

#### Article 20

1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.

2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:

- (a) admission to employment, including skilled employment, as well as measures for promotion and advancement;
- (b) equal remuneration for work of equal value;
- (c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;
- (d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.

3. The measures taken shall include measures to ensure:

- (a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;
- (b) that workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances;
- (c) that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;
- (d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.

4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

#### Article 21

Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

#### Article 22

1. Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.

2. Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.

3. Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organisation and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.

#### Article 23

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.

2. Upon the request of the peoples concerned, 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.

#### Article 26

Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

#### Article 27

1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.

2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.

3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

#### Article 28

1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.

2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.

3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

Article 29

The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.