

## Legal and Normative Bases for Saami Claims to Land in the Nordic

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### Introduction

Who owns the land on which indigenous peoples live? On what basis is ownership acquired and extinguished? In the history of discourse on human rights, property has played a significant role. The right to property was essential to *John Locke's* construction of natural rights, but his conception appears to have focused primarily on individual ownership by settled agriculturalists, where land used by nomadic pastoral groups or for gathering and hunting was held to belong to no one or everyone, and which could be taken for individuals for cultivation.<sup>1</sup>

He may have been the first to articulate that view, but it may have been widespread in Europe at his time. Thus, neither he nor his subsequent protagonists of property rights seem to have been able to address seriously the collective rights of indigenous peoples to their land, however. In Australia, the whole territory was simply considered *terra nullius* when the white settlers arrived, in spite of the fact that people had lived and made use of the natural resources for some 50,000 years. Not before the famous *Mabo* case in 1992, did the High Court of Australia finally discard the doctrine<sup>2</sup> but even then with limited effect.<sup>3</sup> The initial approaches were no better in what is now called Latin America when

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<sup>1</sup> On Locke's conception of property and its consequences for the indigenous peoples, see the contribution by Nils Oskal to this volume.

<sup>2</sup> The High Court of Australia in its 1992 decision in *Mabo v. Queensland* denounced the doctrine of *terra nullius* as an 'unjust and discriminatory doctrine ... can no longer be accepted'. This decision gave rise to the Native Title Act, adopted by the Government of Australia in 1993, which established a framework and mechanism by which Aboriginal peoples in Australia could secure land rights.

<sup>3</sup> Australian Aboriginal peoples have reported to the United Nations Working Group on the rights of Indigenous Populations that they have great difficulties with the Act, and regard as unjust and ill-founded the State's asserted authority, recognized in the *Mabo* decision, to extinguish indigenous land rights. See Daes para. 31.

European settlers arrived. A somewhat more humane approach was taken by the British in North America. They resorted to at least the formality of the use of treaties for cession and thereby partial extinction of land rights, but in many cases pure conquest and ethnic cleansing took place where the European settlers expanded their control.

What is the history in the Nordic countries? Nearly half a century ago, a Saami organization in Norway proclaimed that the Saami people considered themselves to be the owner of the mountain plateau as well as those islands and inlets at the coast, which had been under their continuous use since the earliest settlements in that region. These rights, in the view of the Saami Council, do not belong only to those Saami who are reindeer herders, but also those who over a long period of time have made their income from these areas through hunting, fishing and cattle rearing.<sup>4</sup> This was one of the earliest occasions where a representative body of Nordic Saami expressly articulated their conception of the ownership relations to land, but it reflects an opinion, which among the Saami appears to have existed for centuries, not only in Norway, but throughout the Nordic countries.

The official Norwegian, Swedish and Finnish position has been quite different: Land and natural resources have been held to belong to the state, unless it has been acquired for exclusive, individual ownership by private persons.<sup>5</sup>

During the last three decades, however, there has been an intensive discussion of Saami rights, including those concerning land and water. This paper examines the evolution of that debate and its emerging legal consequences, with special attention to the normative bases of the Saami claims. Changes in Nordic policies towards the Saami have coincided in time and with parallel developments at the international level<sup>6</sup> and been affected by these.<sup>7</sup>

The greatest number of Saami (some 40,000) live in Norway. Approximately 17,000 Saami live in Sweden and around 6,400 in Finland.<sup>8</sup> Small groups of Saami are found also in Northwestern Russia. The main attention here will be focused to the developments in Norway where the majority of the Saami live.

<sup>4</sup> The statement was made by the Saami Council for Finnmark (which is the Northernmost county in Norway) in 1956, quoted by Jebens 1999 p. 394.

<sup>5</sup> See further below, section 2.

<sup>6</sup> Section 1 below.

<sup>7</sup> On the impact of international law and United Nations activities, see below in section 3.

<sup>8</sup> Estimates vary, depending on how many subjectively want to declare themselves Saami. When in earlier times the Saami were subject of discrimination many did not want to be identified as Saami. With the present, more positive policies this has changed and the number of self-declared Saami has increased. The figures above are taken from Myntti, 1998 p. 192, 221 and 305.

## 1. Recognizing the Significance of Land for Indigenous Peoples: International Developments

The right to land is among the core concerns of indigenous and tribal peoples in all parts of the world, for material as well as spiritual reasons.<sup>9</sup> The majority live in rural areas and depend on land, water or sea for their physical survival, but access to or control over land and natural resources is for the indigenous peoples also a condition for their ability to maintain and develop their own culture. Their access to land is often precarious, however, due to centuries of injustice perpetrated by dominant groups in society. The international community increasingly recognizes three interrelated factors that surfaced in the 1970s that affect access to land: The emergence of a countercurrent within social science challenging the simplistic dichotomy between modernity and primitivism,<sup>10</sup> the increasing political mobilization among indigenous peoples who were shedding their own low self-esteem resulting from generations of discrimination by the hegemonic society,<sup>11</sup> and efforts within the UN to investigate the historical patterns of discrimination against indigenous peoples and to elaborate new conceptions of their rights.

In the UN, it started with the monumental study of the problem undertaken under the auspices of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities by its member Martínez Cobo,<sup>12</sup> followed by the establishment of a Working Group on Indigenous Populations in 1982. The establishment of that working group can be considered to constitute the first formal acknowledgement by the UN of indigenous peoples.<sup>13</sup> The working group has met every year since then and has become the most important international

<sup>9</sup> See, e.g., Daes, para. 10 ff and Martínez Cobo, 1987 paras 196 and 197.

<sup>10</sup> One such example is the late Helge Kleivan, a Norwegian professor of social anthropology at the University of Copenhagen, who was instrumental in redirecting attitudes and approaches of at least some anthropologists, and who was a main mover in establishing the International Working Group on Indigenous Affairs (IWGIA), located in Denmark. Another example is Rodolfo Stavenhagen, a Mexican social scientist who was also for a time head of UNESCO's social science division, and who has written extensively on the indigenous issue in South America. He coined the concept of ethno-development. Significant in the process of change were also some scholars in the field of law, some of whom are mentioned in the text below.

<sup>11</sup> North American, Nordic and Australian indigenous organizations manifested themselves with increasing strength from the 1970s onwards. The Nordic Saami organizations played a central role in the development of their international networks, including the World Council of Indigenous Peoples. South American indigenous organizations faced greater problems initially, but are now well implanted in many of the countries concerned. In the last two or three years we have also seen the emergence of indigenous organizations in Africa.

<sup>12</sup> Martínez Cobo, José R, *supra*. Most of the research for the study was carried out by Mr. Willemsen Diaz, a staff member of the then Division for Human Rights of the United Nations Secretariat with an exceptional devotion to his task. His office became a veritable and unique library of documents on indigenous affairs during the ten years it took to prepare the Cobo study.

<sup>13</sup> Burger 1998, p. 3.

forum for the discourse on the rights of indigenous peoples.<sup>14</sup> In 2000, the United Nations Commission on Human Rights in, Resolution 2000/87, recommended to the Economic and Social Council (ECOSOC) to establish, as a subsidiary body of the Council, a permanent forum on indigenous issues, to serve as an advisory body to the Council with a mandate to discuss indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights. ECOSOC did so in its Resolution 2000/22. The land rights of the indigenous peoples will undoubtedly figure prominently among the issues to be addressed by the Permanent Forum.

Of at least equal importance, if not more, is the development within the ILO. Established in 1919 for the purpose of promoting and protecting social justice through fair and decent treatment of workers, in the 1930s, the ILO started to focus on 'native' and indigenous workers who were often subject of extreme discrimination. After World War II, the organization started to look more closely at the conditions that made this extreme discrimination possible and found that one of the major problems was that the indigenous were dispossessed from their land and consequently rendered extremely vulnerable to exploitation, having nothing on which to fall back. The first study on their working and living conditions was published by ILO in 1953,<sup>15</sup> and in 1957 it adopted the first ever convention related to these peoples, the Indigenous and Tribal Populations Convention (No. 107) which, as would have been expected from a labour organization, in its first part focused on indigenous labour conditions, but in its second part addressed what for ILO might appear to be on the margin of its mandate, the question of indigenous land rights. The predominant conception was still that persons of indigenous extraction would gradually be integrated in the modern society, but in order to avoid discrimination and exploitation in the process, it was essential to address their land rights as a fallback resource. When, however, the changes in approach to the indigenous took hold in the 1970s, this also affected ILO's perspective on the priorities regarding the protection of indigenous peoples. In the 1980s, therefore, negotiations for a new and rather different convention started. It led to the adoption of the Convention on Indigenous and Tribal Peoples (No. 169). In ILO Convention No. 169, the priorities are reversed: The first substantive part deals with questions of autonomy, self-administration and land rights, and only the second part deals with labour issues including vocational training and related matters.<sup>16</sup>

<sup>14</sup> Ibid, *passim*.

<sup>15</sup> International Labour Organization: *Indigenous Populations*, Geneva 1953.

<sup>16</sup> Swebston 1998, *passim*. Swebston, now the Chief of the Equality and Human Rights coordination Branch within the ILO, was in the 1980s in charge of the office dealing with the indigenous issue and was instrumental in the preparation of ILO convention 169, where also Rodolfo Stavenhagen on behalf of Mexico played a central role.

The Sub-Commission has continued its series of studies on issues relating to the indigenous peoples. In 2000, the Chairperson of its Working Group on Indigenous Populations completed a major study on the land rights of indigenous peoples in which she examined the special relationship of indigenous peoples to their lands and territories, their resources, and the history of dispossession of the indigenous peoples as well as the contemporary efforts to resolve indigenous land issues and problems.<sup>17</sup> The study contains an extensive survey of existing literature on land rights of the indigenous peoples. She shows that there are great varieties in the land situation faced by indigenous peoples in different parts of the world, but almost everywhere there is a history of partial or total dispossession or denial of full property rights, only in recent years has a remedy been sought for this condition. The situation of the Saami in Northern Fenno-Scandinavia is no exception, even if the content and consequences of dispossession has been much less dramatic than in some other places such as Latin America.

Land dispossession combined with discrimination with racial overtones, have been the causes why indigenous peoples almost everywhere are marginalized. In the efforts to resolve indigenous land issues and problems, different types of land claims have emerged in recent years.

A fundamental distinction should be made between claims based on historical rights versus claims based on needs.<sup>18</sup> Claims based on needs require positive measures of protection by the state, while claims based on historical rights essentially depend on the recognition of their preexisting conceptions of acquired rights by the national legal order. Evolving international law regarding indigenous peoples is relevant in both of these respects.

## 2. Stages in Government Approaches to the Saami and Their Land Rights

In Norway, where the greatest number of Saami live, three stages in government policies towards the Saami can be observed: (i) Before, (ii) during and (iii) after the building of the nation state.<sup>19</sup>

<sup>17</sup> Daes 2000, *passim*.

<sup>18</sup> On this distinction and its significance, see Plant 1994 p. 8-9.

<sup>19</sup> Generally, the main epoch of the nation-state in Europe goes from about 1850 to 1945 and is characterized by two main features: A preoccupation with fears of external aggression which leads to a strong emphasis on national security, and an increasingly centralized planning and/or regulation of economic and technological development, combined with efforts to create cohesion and homogenization in culture. Assimilation is a common feature of the process. It is true that the emergence of the nation state is normally traced back to the peace in Westphalia in 1648, but the entities emerging out of that settlement cannot in any reasonable way be considered to have been nation states before the 19<sup>th</sup> century.

(i.) Until the middle of the 19<sup>th</sup> century, the government took only a limited interest in the Saami, except in regard to religion<sup>20</sup> and tax. Before 1850 the general attitude by official Norway to the Saami was one of more or less benign neglect. There were scattered public officials towards the end of the 18<sup>th</sup> century and the first part of the 19<sup>th</sup> century who expressed views implying that in their opinion the state was the owner of the land areas used by the Saami and who to some extent acted according to that opinion,<sup>21</sup> but at no point in time did the Norwegian government formally decide to claim or acquire public ownership of the land areas concerned.

(ii.) From around 1850 a more active nation-building process was underway in Norway. The policy towards the Saami was marked by deliberate and sometimes severe assimilation policies. This coincided with a growing role of the state in the economic development of society. The state increasingly influenced and at later stages sought to determine the direction of economic development. This became even more marked with the emergence and building of the welfare state in the 20<sup>th</sup> century.

Changes in the attitude towards the Saami from about 1850 was also a result of the international environment. A controversy had emerged in the 1820s over the use by Norway-based Saami of land and water resources during their seasonal reindeer herding in Finland. Since 1809, Finland (which earlier had been part of Sweden) had become a Grand Duchy under the Russian Tsar. Arising from Finnish protests against Norwegian Saami use of pastureland and fishing grounds in Finland, Russia initiated negotiations with Sweden and Norway in 1829, but they ultimately failed. As a consequence, in 1850 the border was at the initiative of Russia closed between Norway and Finland; the traditional semi-nomadic movements could no longer include the Finnish land area.<sup>22</sup>

As a consequence of that event, the first substantial discussion in the Norwegian parliament on Saami issues was held in 1854.<sup>23</sup> From then on a growing hegemonic nationalistic approach to the Saami can be detected, affected also by a growing fear of Russia and Russian-controlled Finland. In Norwegian national security considerations, there was a perceived risk that the Saami could become a 'fifth column' in case of conflict. For this and other reasons, for almost a century a policy of forced assimilation was pursued by Norway. The Saami language was repressed in educational institutions. Norwegian Christian missionaries, encouraged by the state, sought to convert

<sup>20</sup> Norway has a state church based on the Lutheran religion. Missionary activities seeking to ensure that the Saami embrace the Lutheran religion were among the first activities of Norwegians into the Saami area. This was also the case in Sweden.

<sup>21</sup> An extensive survey has been made by Sandvik, 1993 p. 333-380.

<sup>22</sup> Pedersen, 1997, p. 84-85.

<sup>23</sup> Pedersen, 1997, p. 85-86.

the Saami not only in religious matters but also to Norwegian lifestyles. Many Norwegians living adjacent to the Saami considered themselves racially and culturally superior. Members of the Saami people were discriminated in many ways. Legal and language regulations made it almost impossible for Saami persons to purchase land, unless they could pass as ethnic Norwegians. To be identified as a Saami, then called *Lapp* or *Finn*, carried a social stigma locally.<sup>24</sup>

During this second period, after 1850, the Norwegian state explicitly asserted a right to ownership to non-registered land in Finnmark, the northernmost county of Norway, where the majority of the Saami live. In 1863, the Norwegian Parliament passed the first law based on the position that the state owned non-registered land in Finnmark. That legislation was since consistently followed for about a century, and was generally accepted in official Norwegian legal opinion and applied by Norwegian courts without testing the basis on which the asserted ownership had been obtained. Initially, it was assumed that the ownership was absolute and that any use of the land by the Saami or others was at the grace of the Norwegian state. Later, however, it was modified by accepting that the Saami had some vaguely defined user's rights to that land, which could not be taken away or denied without compensation.

Non-registered land is land that has not been separated out for private ownership and which is identified as such in the land register. The legislator or the government did not explain how the state had obtained ownership, in the private law sense of the word, to the land; it was simply taken for granted. No transfer of ownership has ever been made by the Saami. The foundation of the claim by the state ownership of these lands has never been made clear. Four possible grounds have surfaced in the discussion of the issue.<sup>25</sup> One is that the state has been the owner from time immemorial, a position that is now generally recognized to be untenable (see below). A second ground is a reference to a provision in a statute promulgated by the Danish-Norwegian King in 1687; by some interpreted to mean that all land not privately owned by individuals belongs to the state. Because the reindeer herding Saami are nomadic or semi-nomadic it was argued that they could not hold property. Since no private persons own it, the land must under this conception belong to the state. A third assertion is that whatever the origin may have been, it has become an established practice that the state owns the land, which is not in private hands. The fourth argument follows the logic of John Locke: Since individual Saami did not settle down to cultivate particular plots of land, ownership of land could not emerge. The counterarguments to these positions are examined in section 3 below.

<sup>24</sup> Eidheim 1969, *passim*.

<sup>25</sup> Jebens, Otto: '*Om eiendomsretten til grunnen i Indre Finnmark*' (On ownership of land in Inner Finnmark), Oslo: Cappelen Akademisk Forlag, 2000, contains a thorough but critical review of the alleged grounds of state ownership.

(iii.) The third stage in the policy towards the Saami starts towards the end of the 1970s, at a time when the nation-state is in decline due to international developments. One factor is the increasing role of international organization and international law, which gradually requires changes in, or outright replaces national law in many areas. Among the increasingly powerful international and transnational developments in politics and law are human rights and environmental issues. There are also other factors at work including more open economies that make entrepreneurs and the state less interested in controlling marginal natural resources in their own country compared to prospects for economic activity abroad. In the special case of Norway, the discovery and utilization of large oil and gas resources also reduced the significance of the natural resources in the Saami area. The changes implied a declining consensus on what constitutes good development, a greater acceptance of diversity and less insistence on state control.

The major event affecting the turnaround was a conflict over a hydroelectric project which required the building of a sizeable dam in the Alta River. The Saami argued that the dam would destroy or weaken the utility of valuable reindeer herding areas. They also argued that the decision by the Norwegian government to build the dam was invalid due to the pre-existing rights of the Saami to the land and water affected by the project. Norwegian environmentalists were for their own reasons opposed to the dam. They joined up with the Saami to stage major demonstrations with an intensity rarely seen in Norway. Some chained themselves to rocks near the construction area, and only a police operation on a scale never seen in peacetime Norway managed to clear the demonstrators. The Norwegian government reduced somewhat the scope of the project but persisted in building the dam.

The conflict attracted broad public attention and a groundswell of sympathy towards the Saami among Norwegians and from abroad. It convinced the authorities that major changes in Saami policy were required. One reason why it had such impact was that the conflict coincided in time with the quickly growing awareness at the international level of the discrimination to which indigenous peoples had been subjected world-wide and the broadly felt need to remedy that injustice.

Due in large measure to the controversy over the Alta project, the Norwegian government had now become aware that the past 'assimilationist' and partly discriminatory policies towards Saami had to be changed. It therefore commissioned a Royal Investigation Commission to investigate the need for change regarding Saami rights, in particular the rights to natural resources and issues relating to Saami political participation and autonomy.

The Commission<sup>26</sup> was initially led by the then Professor of Law Carsten Smith, later Chief Justice of the Norwegian Supreme Court, and with

<sup>26</sup> Subsequently called *Samerettsutvalget*, 'the Saami Rights Commission'.



Norwegian and Saami experts covering a wide range of expertise. It presented its first major report in 1984.<sup>27</sup> It was a major event for the Saami. The majority of the Commission called for a break with past practices and raised doubts about the basis of state ownership of the land used by the Saami. It did not, however, directly address the rights to land and water. The general line of recommendations in the 1984 report was to call for the government to create material and political conditions for the Saami to preserve and develop their culture. Emphasis was placed on requirements to that effect contained in the evolving international law, in particular Article 27 of the International Covenant on Civil and Political Rights (see further below, under section 3). The Commission interpreted Article 27 to require positive measures to secure conditions for the preservation of Saami culture (Samerettutvalget 1984 p. 343). Based on the specific recommendations of the Commission, the Government proposed and the Parliament adopted the law of 12 June 1987 (No. 56), entitled 'the Saami law,' whose stated purpose is to ensure conditions for 'the Saami to preserve and develop their language, culture and way of life.' It provides for the establishment of a Saami parliament with advisory functions, and it significantly extended linguistic rights of the Saami people. The next year (1988) the Norwegian parliament adopted a new provision in the Constitutional Law, recognizing the existence of the Saami as a separate people in Norway.<sup>28</sup>

The first Chairman of the Saami Rights Commission, Carsten Smith,<sup>29</sup> was later appointed Chief Justice of the Supreme Court and withdrew from the Commission. The task as Chair was given to Tor Falch, a local Chief Judge (in Norwegian: *sorenskriver*).

The 1987 law did not address the issue of the rights to land and water of the Saami people, an issue which turned out to be much more controversial and therefore postponed for further study. The Commission appointed a working group of legal experts (the Law group) who presented their report in 1993.<sup>30</sup> It reiterated established Norwegian legal conceptions concerning the rights to land and water and gave less attention to the international requirements than had the 1984 report and even less to Saami customary conceptions. As a consequence, the 1993 working group report met considerable criticism from Saami organi-

<sup>27</sup> *Samerettutvalget. Om Samenes rettsstilling*, NOU 1984:18.

<sup>28</sup> The Norwegian Constitution, Article 110 a reads: 'It is the responsibility of the authorities of the State to create conditions enabling the Saami people to preserve and develop its language, culture and way of life.' (added to the constitution of 1814, on 27 May 1988).

<sup>29</sup> Carsten Smith had pointed to the abyss which separated the customary conceptions of land rights held by the Saami from the traditional Norwegian legal opinion, and recognized the need to bring Norwegian law closer to the conceptions and needs of the Saami. There were extremely few Saami trained in law at that time, and the Norwegian legal discourse was almost unintelligible to them. This was later to change as a consequence of the evolution of indigenous rights at the international level.

<sup>30</sup> NOU 1993:34: *Rett til og forvaltning av land og vann i Finnmark* (The right to and administration of land and water in Finnmark). *Statens forvaltningstjeneste*, Oslo 1993.

zations. Further work was therefore required, and the Royal Commission appointed a new working group, this time of experts in international minority and indigenous law, and collected a set of studies on developments concerning indigenous land rights in other countries. The report was published in 1997.<sup>31</sup>

The second major report by the Saami Rights Commission was presented in 1997.<sup>32</sup> Its scope is on the safeguarding of those natural resources required for the maintenance and development of the Saami culture, and with special focus on the management of land and other natural resources in the county of Finnmark; other areas will be dealt by the Commission later. In regard to land in Finnmark, the Commission proposes a compromise solution in two versions. A (small) majority of the members recommend that a joint, special management structure be set up for the use and control over natural resources in the whole of Finnmark, both those areas in which the Saami predominate, and the other areas of the country where the ethnic Norwegians predominate (pp. 547-554). Under the proposal, the institution to be set up to manage the resources is recommended to consist by one half of the members appointed by the Saami parliament and the other half by the representative body of the county (*Fylkestinget*). While this would not give the Saami exclusive control over the areas they presently occupy, they will have an important role as part managers also those parts of Finnmark which to a large extent are settled by non-Saami. Since many persons of Saami descent also live in those areas, and since access to all areas is important for Saami preservation of its culture, this compromise holds considerable attraction for many Saami, but not for all.

The alternative model proposed is to open up for a purely Saami-controlled management of the natural resources in those parts of Finnmark occupied almost exclusively by Saami, which is to operate separately but parallel to the joint management structure (pp. 555-563). The Saami-controlled management structure would be open for those municipalities (*kommuner*) that decide to join it. The assumption is that those municipalities in which there is a strong majority of Saami would opt to join.

No final decision has been made at the time of writing (January 2001), but the signals from the government indicate that it will go for the first model rather than the second.

During the last decades all three Nordic countries have established special Saami Parliaments, largely with advisory functions. These parliaments are now deeply involved in the evolution of the policy concerning Saami rights to land and water.

<sup>31</sup> NOU 1997:5.

<sup>32</sup> *Samerettsutvalget* 1997.

### 3. The Legal Bases of Saami Claims to Land

The claim by the Nordic states to ownership of land continuously used by Saami has been challenged both by Saami groups and by recent contributors to legal doctrine on the subject.<sup>33</sup> Two grounds have been used for the challenge: First, that Saami ownership was established centuries ago and has never been properly transferred to the state and therefore under a proper application of domestic law in the countries concerned the Saami rights to the land in question should be recognized. Second, that modern international law requires recognition of Saami ownership to the land they occupy. To some extent these two grounds reinforce each other and will be examined in turn.

#### 3.1. *The Claim of Original and Continued Ownership*

As mentioned in the introduction, the Saami are convinced that they are the earliest inhabitants of what they call the 'Saamiland,' spanning sizeable parts of Northern Fenno-Scandinavia. It covers much of the interior of the county of Finnmark, some other areas in Northern Norway, and parts of northern Finland and Sweden. It is argued that the Saami had acquired rights to land as a result of their continuous occupation and use. In areas where they have had exclusive use, the ownership should properly be ascribed to the Saami. In other areas with a more mixed population and use, they claim at least to have rights based on time immemorial access to pasture land for their reindeer or to other traditional usages of natural resources. It is further argued that these acquired rights have not been legitimately extinguished by the Norwegian state.

Recent historical research has convincingly shown that Saamis in the 17<sup>th</sup> and 18<sup>th</sup> centuries had established an exclusive usage of some of the land areas now disputed. The usage was so firm and consistent that some have equated with ownership.<sup>34</sup> The rights were not individualized, but collectively enjoyed by the semi-nomadic Saami who used the land for reindeer herding, hunting and fishing. Doubts have therefore been raised as to whether their use and possession could be equated with ownership in the modern sense,<sup>35</sup> but it could be seen as a right which ultimately would lead to ownership in the modern conception of that term in international indigenous law, particularly as expressed in the ILO Convention 169 (see further below).

<sup>33</sup> The Saami can draw on important research by several Nordic authors. The first scholarly criticism of the alleged ownership by the state was published by a Norwegian lawyer, Sverre Tønnesen (1972). It has since been further developed by Otto Jebens (1999). Important contributions have been made also by Bertil Bengtson (1990).

<sup>34</sup> The historical usage by and rights of the Saami up to the middle of the 18<sup>th</sup> century has been documented by a Finnish scholar, Kaisa Korpijaakko (1994).

<sup>35</sup> Sandvik 1993 p. 356.

An event of major political significance for the Saami people took place in 1751. Up to that time, the national boundaries in the territory where most of the Saami lived had not been clearly settled and demarcated. Part of the northernmost territories had until 1751 not been under the explicit jurisdiction of any nation state. In 1751 the boundaries between the two countries were readjusted and demarcated, thereby establishing or consolidating their respective sovereign authority over territories in which Saami people lived. A treaty was adopted between Sweden (of which at that time Finland formed a part) and Norway (which at that time was united with and part of Denmark), settling the boundaries between Sweden and Norway in the northernmost region of Scandinavia.

The treaty contained an annex whose significance has generated extensive discussion.<sup>36</sup> While the purpose of the main treaty of 1751 was to settle the question of the boundaries between the states, the annex, the Lapp Codicil, sought to regulate the consequences of the new boundaries for the Saami populations.<sup>37</sup>

The Lapp Codicil has sometimes been referred to as the 'Magna Carta' of the Saami population. Some authors have argued that it contains elements that confer private ownership on the Saami.<sup>38</sup> Others have disagreed. Sandvik has argued that the Codicil conferred ownership on the state.<sup>39</sup>

Both positions are probably untenable. The Lapp Codicil does not address the question of property over land. It deals mainly with public law issues arising from the drawing of the new boundaries, not with private law issues such as the rights over land. The main public law issue is the transfer or adjustment of territory and thereby of sovereignty and jurisdiction; from this follows arrangements concerning nationality of the inhabitants on each side of the borders, their rights to move across the borders in connection with the reindeer herding, taxation and related matters.

Establishing sovereignty over a territory does not in itself mean that the state becomes the owner of land in the private law sense of property rights. Admittedly, sovereignty can give the state a right to establish for itself private property in land if there are not other prior rightful owners. This would imply that the territory is held to have been '*terra nullius*,' in the sense that it belonged to no one, when the state asserted its ownership. That this was not the case before 1751 has become rather clear from the historical research of Kaisa Korpijaakko-Labba as well as from the work of Otto Jebens and Steinar

<sup>36</sup> *Samerettsutredningen* 1984 p. 166-199, NOU 1997:5 p. 73-78.

<sup>37</sup> The name Lapp codicil comes from the fact that Saamis at that time in Norwegian and Swedish language were called '*Lapper*', 'Lapps' in English, but that name is not accepted by the Saamis, and the official name in both languages is now Saami.

<sup>38</sup> See e.g., statements by Tomas Cramer, *Samerettsutredningen* 1984 p. 180.

<sup>39</sup> Sandvik, 1993 p. 358-359.

Pedersen. The nature of the acquired right to use of the territory was such that it could not belong to anyone else, also not by the state.

The Codicil neither confers land rights on Saamis, nor does it deprive them of any pre-existing rights they might have. There was nothing in the Codicil that can be interpreted by its own language to reduce the rights of possession, which the Saami people had already established within the national territory in which they were now nationals.<sup>40</sup>

The question remains as to what the government could do, and what it actually did, regarding existing but non-registered private law property relations established by collective use of the territory. The second part of the question is more easily answered than the first.

As noted above, the issue was not seriously addressed before the 1850s. In so far as Norway is concerned, Steinar Pedersen and Otto Jebens have shown that there are no clear indications that the state itself asserted private ownership over non-registered land before 1850<sup>41</sup> (as distinct from statements by individual public officials, who hardly had any competence to make such a decision). Soon after 1850, however, this changed, as described in section 2 above. From that time on the Norwegian state and its highest authorities took the position that it was inherent in the sovereignty over the territory that the state also owned the land, except from that part which had been transferred to settled, individual owners. This view was now expressed both by the executive, legislative and adjudicative branch, but without explaining why it could be done.

Could the state legitimately do so? This raises intriguing normative question. A first question is whether it violated Norwegian constitutional law, as established by the Norwegian Constitution in 1814. Section 105 of that Constitution is intended to serve as a protection of private ownership by establishing two conditions that the state has to fulfill. Private property can be taken (expropriated) only when the need of the state so requires, and full compensation must be paid to the owner. When the owner claims that these conditions are not fulfilled in a particular case, he can demand that it be tested in the courts. The courts, however, have taken the same position as the executive and the legislative branch of the state; that the state indeed was or had become the owner of unregistered land, but individual Saamis have user's rights which could give rise to a right to compensation if measures were adopted by the state, which weakened or abolished the possibility to use particular parts of the land.

<sup>40</sup> Note the use of the word 'national' rather than 'citizen'. The concept of 'citizen' in its modern, functional sense did not emerge until after the French revolution. The word 'national' in its use here has no ethnic meaning, it indicates to which state the person 'belongs', whose subject he or she is. For details of the relationship between ethnic nationality, state nationality and citizenship, see Eide: Citizenship p. 91-99.

<sup>41</sup> Pedersen, 1997, p. 78-90 and Jebens p. 294-303.

Thus, generally speaking, the institutions of the Norwegian legal order, the executive, the parliament, and the courts, have all taken it for granted that the state could assert ownership of these lands.

This gives rise to an intriguing question: Can it be argued that the Norwegian laws on this matter are invalid, even when found by Norwegian courts to be in conformity with the constitution? To make that claim is to break with fundamental conceptions of positive law, by introducing something akin to natural law, or to rely on international law on the subject.

For positivists, arguments based on natural law are rejected out of hand. International law is different since it is also a form of positive law, but traditionally it has been considered not to be directly applicable in Norwegian, Swedish or Finnish law. All of these countries have primarily relied on the dualist doctrine, seeing national and international law as entirely different legal systems. The international law of human rights has in recent years somewhat changed this conception. Norwegian courts have slowly and carefully developed a presumption principle of interpretation of national law: Where the text of the law leaves several options of interpretation open, it will be presumed that the legislator wanted to be in compliance with international (human rights) law, and therefore the court chooses that interpretation which best complies with international human rights law requirements. Where, however, the domestic (Norwegian) law is clear in regard to the issue at hand, the court applies it even if it leads to a violation of international law.<sup>42</sup>

Generally speaking, however, Nordic authorities prefer to act in accordance with international law requirements and particular with human rights law. If it can be convincingly shown that a certain approach or act violates international law, the governments will more often than not seek to remedy the situation.<sup>43</sup>

This is why international human rights law has become so important in the land claims issues in recent years. Three aspects have been addressed: The principle of non-discrimination, the rights of minorities, and the specific rights of tribal and indigenous peoples. To these we now turn.

<sup>42</sup> The approach of the Nordic countries to international law has been examined in Scheinin 1996 and specifically for Norway in Helgesen 1982 and in Smith and Smith 1982.

<sup>43</sup> In 1994, a new addition was made to the Norwegian Constitution (§ 110 C) which reads: *It is the responsibility of the authorities of the State to respect and ensure human rights. Specific provisions for the implementation of treaties hereof shall be determined by law.* In a law adopted in 1999 (21.5.1999 No. 30) called 'the Human Rights Law,' three international conventions were made directly applicable in Norway with priority over other Norwegian statutory laws. The three conventions were the International Convention on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

3.2. *The Claim of Respect for Ownership Based on International Law of Non-Discrimination Applied to Property.*

At some stage in the past, when land was abundant, it belonged to no one. When land became scarce, a process of demarcation started. The process was initially quite informal but gradually developed in more formal ways. Customary rights to land emerged out of historical possession and use of the land. As legal orders developed, demarcation of land was formally registered in some places, but not in all. In early times when persons selected a part of unused and unclaimed land and started to settle and farm there, their right to exclusive ownership to that piece of land was gradually recognized as a valid right to be respected and protected under domestic law.<sup>44</sup> The argument is made that it would constitute discrimination to deny the validity of the ownership originated in exclusive use by the Saami<sup>45</sup> when the ownership of plots of land based on original and exclusive use by ethnic Norwegians, Swedes, or Finns, has been accepted in the past.<sup>46</sup> The right to property is important both in international human rights law and in national legal systems, and so is the principle of non-discrimination and equality before the law.

There is general consensus that the Saami, at least in Norway, in the early part of the 20<sup>th</sup> century were subject to discrimination regarding their possibility to have their ownership recognized and registered. Under the Universal Declaration's Article 2, everyone is entitled to enjoy their human rights without distinction based on race, ethnicity, etc. The human rights referred to include Article 17 on the right to property alone or in association with others. Admittedly, there can be some doubts as to whether the Universal Declaration is legally binding under international law, but the International Convention on the Elimination of Racial Discrimination Article 5 (d) (v) is undoubtedly binding as international law on all Nordic countries. That provision requires that the state guarantee equality to all before the law in the right to own property.

The counterargument from the perspective of established Norwegian legal practices is that whereas Norwegians (and other Nordic) settlers and farmers obtained ownership based on individual and exclusive use, the Saami way of life in which hunting, gathering and reindeer herding were the most important elements, relied on collective rather than individual use of land and water. Their use of the land would be equivalent to the use of the commons (in Norwegian

<sup>44</sup> Norway was united with Denmark from 1319 to 1814, but there were separate laws for the two countries. When Norway from November 1814 was brought into a union with Sweden (which lasted to 1905), Norway had already established and maintained its own legislative Parliament, making laws for application in Norway.

<sup>45</sup> As pointed out by Nils Oskal (see note 1 above), John Locke's restricted concept of property may have contributed to the non-recognition of land ownership by non-agriculturist indigenous peoples.

<sup>46</sup> NOU 1997:5 p. 53-54.

*almemming*) and while user's rights have been recognized in relation to the land held in common, the state has been considered to have the residual ownership rights to such lands.

There are two weaknesses in that argument. One is that whereas the Norwegian use of the commons was only a supplement to their main source of living, which was the private piece of land owned by each farmer, the lands collectively used by the Saami constituted the full and whole basis of their livelihood. The reasoning drawn from the law concerning the split between the users' rights and the owners' rights in the area of the commons (*almenningsrett*) should, it is argued, not be applied to the land of the Saami who live under different conditions. The second weakness of the argument is that Article 5 (d) (v) of the Convention on the Elimination of Racial Discrimination refers to property owned alone or *in association with others*. Collective ownership is therefore not excluded.

If it is accepted that past refusal to recognize the rights of ownership acquired through the use by the Saami since time immemorial constituted a pattern of racial or ethnic discrimination, this should be redressed by now restoring those rights.

### 3.3. *International Law on the Protection of Minorities*

Article 27 of the International Covenant on Civil and Political Rights provides that in states where ethnic, religious or linguistic minorities exist, persons belonging to such minorities 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. The Saami obviously qualify as an ethnic group, and is therefore entitled to enjoy its own culture. All the Nordic states have ratified the Covenant on Civil and Political Rights and are therefore legally bound by its provisions.

Article 27 has played an important role in the argument for a Sami right to the land they traditionally have used as a basis for their living. The Human Rights Committee<sup>47</sup> has observed, in its General Comment on Article 27, that '*[culture] manifests itself in many forms, including a particular way of life associated with the use of land resources, specially in the case of indigenous peoples ... The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.*'<sup>48</sup>

<sup>47</sup> The Human Rights Committee is a monitoring body composed of independent experts, operating within the framework of the United Nations, set up to review and promote the implementation by states party to the International Covenant on Civil and Political Rights.

<sup>48</sup> General Comment No. 23, para. 7. The General Comments of the Committee are found on the website of the UN High Commissioner for Human Rights (<http://www.unhchr.ch/>) and in UN Doc. HRI/GEN/1/.



Article 27 can in part serve as a barrier against deprivation of land rights which have been historically acquired by particular indigenous peoples. It can also be seen as a requirement for the state to take positive measures to provide the indigenous peoples with land that has already been taken from them. The Sami Rights Commission has found that Article 27 requires protection of the material conditions necessary for the preservation of Saami culture,<sup>49</sup> but the committee did not expressly state that this would require include Saami ownership to land. In Finland Article 27 has also been interpreted to provide some protection of Saami rights, but without explicit reference to land ownership (Hyvärinen p. 106).<sup>50</sup>

#### *3.4. International Law on the Rights of Indigenous Peoples: ILO Convention 169*

The only 'hard' international law on the rights of indigenous peoples is ILO Convention 169. It has a potentially revolutionary impact on the relationship between the indigenous and non-indigenous peoples in so far as land rights are concerned. Due to its significance Article 14 of that convention must be quoted here in full:

##### *Article 14*

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

This provision goes to the heart of the controversies concerning Saami land rights, and give rise to fundamental conceptual issues in law. It deals with land rights under two categories: (1) lands which the Saami traditionally occupy, and (2) lands which are not exclusively occupied by the Saami but to which they have traditionally have had access. It can be seen as an application of a maxim which goes back to Roman law; *uti possidetis iuris* meaning that the one or those who has the possession has the right over it unless the opposite can be proved. The burden of proof is on the side claiming that possession in a given case is not based on and/or has not given rise to ownership.

<sup>49</sup> *Samerettsutvalget* 1984 p. 285.

<sup>50</sup> In both Finland and Norway, the International Covenant on Civil and Political Rights now has direct applicability in domestic law, in Norway due to the Human Rights law adopted in 1999.

The first sentence of Article 14 provides that, in regard to lands which Saami traditionally occupy, their rights to ownership and possession shall be recognized. The words, *ownership* and *possession* are not synonymous. 'Ownership' is a legal relationship, and its content has traditionally been determined by national law. 'Possession' is predominantly a factual relationship, but which can be given legal consequences: If someone lawfully possesses something, they cannot be dispossessed unless particular legal grounds exist.

The word 'occupy' in the first sentence of Article 14 implies a near-exclusive use of the land. Where such exclusive use exists, the ownership and possession of that land by the users shall be recognized. Where the Saami are not the exclusive users, the second sentence of Article 14 comes into play: In these cases the Saami cannot demand ownership or possession, but shall not be denied access to the areas they have traditionally used for their livelihood. Thus, Article 14's second sentence provides for a limited user's rights, but Article 14 refers to a comprehensive ownership right.

This is not uncontested, however. A controversy has arisen which is of particular importance for Norway, since only Norway among the Nordic countries has ratified ILO Convention 169. When the convention was submitted to the Norwegian Parliament for consent to its ratification, the Norwegian translation of Article 14 was somewhat misleading. The words 'the lands which they traditionally occupy' was translated to '*de landområder hvor de tradisjonelt lever*' which in English would mean 'where they traditionally live, but the point with the formulation 'which they traditionally occupy' was a stronger one: 'the land which they possess or have control over'. The point was to single out the areas where the collectivity of indigenous people living in that area had an almost exclusive use of it, and for that reason their right to ownership and possession should be recognized. When the first sentence of Article 14 in translation is rendered as 'where they traditionally live,' it gave rise to an official Norwegian interpretation of Article 14, which is a weaker one than what was intended. When the government submitted the Convention to the Parliament for consent to the ratification, the government argued that Article 14 first sentence only required recognition of a strong user's right, not property.

It is rather clear from the preparatory work with the ILO Convention 169, however, that what was intended was exactly ownership, not users' rights.<sup>51</sup> The question then arises what legal consequences arise from the likelihood that the Parliament has somewhat misunderstood what it has consented to. The answer should be unambiguous: Unless a reservation has been made at the time of ratification, the normal rules of interpretation of treaties apply, as set out in the Vienna Convention on the Law of Treaties (1969) paragraphs 31 and 32. A mis-

<sup>51</sup> A more detailed discussion of this point, with references to the preparatory work, can be found in NOU 1997:5 p. 34-35 (section written by Jens Edvin A. Skoghøy, now a Justice of the Supreme Court of Norway).

understanding by the Parliament is irrelevant under international law for the interpretation of the treaty.

There are some areas, particularly in the interior parts of Finnmark, Norway, which have consistently been under the near-exclusive control or possession by Saami, and where therefore the implication of Article 14 is that their ownership should be recognized. Through the Saami parliament, they might consent to forego full ownership if they get something significant in return. This is what is presently proposed by the Norwegian (Royal) Saami Rights Commission (1997) when it recommended that a joint, special management structure be set up for the use and control over natural resources in the whole of Finnmark (pp. 547-554). For the institution managing the resources it is recommended that half of the members shall be appointed by the Saami parliament and the other half by the representative body of the county (*Fylkestinget*). While this would not give the Saamis exclusive control over the areas they presently occupy, they will have an important role as participants in the managements also of those parts of Finnmark to which they need access but which to a large extent are settled by Non-Saamis. The outcome remains uncertain, however.

### 3.5. *Swedish and Finnish Situation*

#### *The Swedish Situation*

The question of Saami rights to land was the subject of a major court case in Sweden, the *Skattefjäll* case also known as the 'taxed mountain case'. The Swedish court did not exclude that the Saami could be owner of some areas used by them, but they did not have ownership over the particular land claimed by them in that case, because their use of that territory had not been sufficiently intensive. The Court concluded, however, that their user's rights constituted immemorial rights and should be respected and protected.<sup>52</sup>

Some Saami have exclusive rights to reindeer herding in certain specified areas, and this is now generally considered as a special form of ownership. While this is not explicitly stated in the Swedish reindeer herding law (SFS 1971:437, *Rennäringslagen*, 18<sup>th</sup> June 1971), it is held to be an underlying premise of that law (Wängberg 1997 p. 98). But there is a special approach in Sweden: The right to reindeer herding belongs solely to those Saami who live in defined Saami villages (*Samebyer*). Saami persons who do not live in those villages are not entitled to engage in reindeer herding. Some 2,500 Saami live in these villages, which means that the majority of the 17,000 Saami in Sweden fall outside this legislation and have no special rights.

<sup>52</sup> Orton p. 97-98, Jebsen p. 153-164, Samerettsutvalget 1984 p. 210-212.

*The Finnish Situation*

The traditional opinion in Finland has also been that the state owns that land used by the Saami, which is not owned by individual settlers, whether these are Saami or non-Saami. This opinion has been shaken by the studies carried out by Kaisa Korpijaakko-Labba, and there is currently considerable doubt about the ownership question. A committee established by the government concluded in 1990 that there was not a sufficient legal basis for the claim of state ownership (Hyvärinen p. 106 with references). The government and the Parliament has yet to draw the consequences of that conclusion. The task to carry out further study on Saami rights to land and water was in 1993 transferred to the Saami Parliament.

**4. Concluding Remarks**

Considerable soul-searching modifications have taken place during the last two decades in the official approaches in the Nordic countries to Saami rights. It has been affected both by developments in international law and by the emergence of a revised, less ethnocentric legal history.

The outcomes are still uncertain, however. It is also not entirely clear what approach will provide for the best form of justice for the Saami people as a whole. A point which has not been discussed in this article, but which both Saami organizations and the Nordic governments must consider, is that only a minority among the Saami still live from their traditional reindeer herding. In Norway it is generally assumed that only 10 per cent do so, and in Sweden only some 2,500 Saami persons live in the Saami villages (*Samebyar*) and can lawfully make use of the special rights to reindeer herding, which means that the overwhelming majority live outside and make their living from activities similar to those of the ethnic Norwegians or Swedes surrounding them.

The rights of those other Saami are not solved by recognition of the land areas used by the reindeer herders unless a more inclusive approach is found. It is in this regard that the proposal of the Norwegian (Royal) Saami Rights Commission, referred to in section 2 above, is particularly interesting: It proposes to set up a management arrangement for the whole of Finnmark where the Saami are likely to be in a majority position since half of the members are to be elected by the Saami Parliament and the other half by the county assembly and where both Norwegians and Saami are represented, including those Saami who are not reindeer herders.

More generally, there is a tendency to overlook the problems of those persons of indigenous origins who no longer live collectively together in the traditional areas of the people concerned. In the future discussions of the rights of the indigenous peoples this issue has to be addressed, and will certainly be done so by the Saami Rights Commission in Norway and similar bodies in the other Nordic countries.

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