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ILO Convention No. 169 and the governance of indigenous identity in Finland: recent developments

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ABSTRACT

The Sami are often described as the only indigenous people of the European Union. They inhabit an area now known as, and claimed by, Norway, Sweden, Finland and the Kola peninsula of Russia. Recent research recognises that the Sami in Sweden-Finland had a right to their lands and waters, comparable to ownership. Previously, others referred to the Sami as Lapps. In 1673 and 1695, King Carl XI approved the Settlement Bill of Lapland, which allowed non-Lapps to cross the border of Lapland to settle. This may be considered to be the beginning of colonisation, assimilation and integration. As is the case with other indigenous peoples around the globe, the Sami have been struggling for the recognition of their rights since colonisation. Discussion on indigenous Sami rights to land and waters have been going on for a long time in Finland, which is the focus of this article. Different stakeholders as well as international, national and local politics are involved when issues concerning indigenous Sami rights to use Northern lands for their traditional activities are discussed. In this context, the possible ratification of the ILO Convention 169 has been an important issue. Many of the challenges related to the ILO Convention No. 169 reflect the issues related to the subjects of the Convention or the right holders of the land rights. Currently, the question of 'who is a Sami' seems to be the most controversial issue.

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1. Introduction

The Sami are often described as the only indigenous people of the European Union. They inhabit an area now known as, and claimed by, Norway, Sweden, Finland and the Kola peninsula of Russia. Recent research recognises that the Sami in Sweden-Finland had a right to their lands and waters, comparable to ownership.¹ This area occupied by the Sami was and still is known as Lapland. Previously, others referred to the Sami as Lapps.² In 1673 and 1695, King Carl XI approved the Settlement Bill of Lapland, which allowed non-Lapps to cross the border of Lapland to settle. This may be considered to be the beginning of colonisation, assimilation and integration. As is the case with other indigenous peoples around the globe, the Sami have been struggling for the recognition of their rights since colonisation.

Discussion on indigenous Sami rights to land and waters have been going on for a long time in Finland, which is the focus of this article. Different stakeholders as well as international, national and local politics are involved when issues concerning indigenous Sami rights to use Northern lands for their traditional activities are discussed. In this context, the possible ratification of the ILO Convention 169 has been an important issue. Many of the challenges related to the ILO Convention No. 169 reflect the issues related to the subjects of the Convention or the right holders of the land rights as well as different fields of standards in different parts of the world. Currently, the question of ‘who is a Sami’ seems to be the most controversial issue.

This article refers to recent developments in Finland, especially events that took place in the spring 2015, when the Government Bill³ on the ratification of the ILO Convention No.169 was handed out to the Finnish Parliament and later postponed by the new Government 2015–2019. Also, the renewal of the Sami Act⁴ took place at the same time and raised some difficult questions related to the definition of Sami personhood in the Finnish Sami Act. These two processes were politically tied together meaning that the ratification of C 169 was dependent on the successful adoption of the Sami Act in the Parliament. However, both processes failed. Later, after the Parliamentary elections in Finland 2015, the renewal of the Sami Act was raised again in the programme of the new Government (2015–2019). Finally, after hard work and negotiations between the Ministry of Justice and the Sami Parliament, during fall 2018, the Sami Parliament members themselves voted against the Draft Government Bill⁵, a Bill which they had themselves been negotiating with the Government. The events are discussed in more detail in the chapter to shed light on recent C 169 developments in Finland and how they need to be understood in the context of specific national politics.

2. Background and some statistics

Finland is a country of about 5,5 million inhabitants with an area comparable to the size of France. Less than 200 000 people live in the northernmost part of Finland, called Lapland. Within this area, there is a special Sami Homeland area covering some 35,000 km² (Municipalities of Utsjoki, Enontekiö, Inari and the Northern part of Sodankylä, called Vuotso.) Within the area the indigenous Sami have been granted cultural autonomy, legislated by the Sami Act⁶ and governed by the special organ established for this purpose, called the Sami Parliament. The official number of Sami is based on the number of people with the right to vote in the elections of the Sami Parliament. Some 6000 (in the elections of 2015, 5795 persons in the roll) persons are registered and also their children are counted as Sami. In total this makes about 10.000 Sami in Finland.⁷ One of the biggest contemporary challenges within the Sami community is that almost 75% of these persons live outside the Sami Homeland area, in big southern cities like Helsinki, Oulu and Rovaniemi.⁸ The trend is similar in Norway and Sweden and exemplifies a more global phenomenon among the indigenous populations. In Finland, nowadays only roughly every tenth Sami practices traditional reindeer herding, which corresponds to between 800 and 900 Sami reindeer herders.⁹ The situation of the Sami languages is also weak. Only about 1950 people consider one of the three Sami languages (North-Sami, Skolt Sami and Inari Sami) to be their mother tongue.¹⁰

The contemporary Finnish Sami community can be described as going through considerable and rapid changes, where most of the people are living in urban surroundings and face severe challenges in preserving their indigenous culture. Urbanisation of indigenous peoples is a common global phenomenon and traditional livelihoods no longer play a significant role in the indigenous lifestyle, but integration into the main population is apparent.¹¹ This raises a question: ‘What makes a person indigenous?’ It is often stated that indigenous communities and their individual members draw their identity and form their world-view from specific historical and cultural contexts that include their own beliefs, social organisations, language, customs and knowledge.¹² Also, according to the views in the international law context, it is the indigenous peoples’ connection with the land and waters that distinguishes them from minorities.¹³

The ILO Convention No. 169 does not strictly define who are indigenous and tribal peoples but rather describes the peoples it aims to protect (Article 1) in a statement of coverage. Elements of indigenous peoples include: historical continuity, territorial connection, distinct social, economic, cultural and political institutions.

1. This Convention applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3. The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law (Article 1, C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169) Geneva, 76th ILC session (27 Jun 1989) Entry into force: 05 Sep 1991

The elements outlined in Article 1(1) constitute the objective criteria of the coverage of ILO Convention No. 169. According to the ILO Guide for C169, it can objectively be determined whether a specific indigenous or tribal people meets the requirements of Article 1(1) and recognises and accepts a person as belonging to their people. Article 1 (2) recognises the self-identification of indigenous and tribal peoples as a fundamental criterion.¹⁴ This is the subjective criterion of Convention No. 169, which attaches fundamental importance to whether a given people considers itself to be indigenous or tribal under the Convention and whether a person identifies himself or herself as belonging to these people. Convention No. 169 was the first international instrument to recognise the importance of self-identification.¹⁵

An important example on the implementation of Article 1 in comparison to the Finnish situation (where indigenousness is defined apparently through language, but in reality through voting register) can be found from Mexico:

According to the Government's report, Mexico's indigenous population is numerically the largest in Latin America, estimated by the 2000 National Council of Population (CONAPO) Survey at 12.7 million and made up of 62 indigenous peoples.

The CONAPO survey included questions about the indigenous languages spoken and membership of indigenous groups of at least one member of the household. The survey provided six categories in answer to the questions; the fourth of which was 'Do not speak an indigenous language and belong to an indigenous group'. However, the Government's report also indicated that the 'de-indianization' process led many indigenous persons to abandon their communities of origin, contributing to a significant loss in their indigenous languages and their ethnic identities.

Since formal censuses were first introduced in Mexico in 1895, language had been the main criterion used for identifying the indigenous population. However, since many indigenous people had lost their language, the Committee of Experts requested the Government to state whether the persons in the category 'Do not speak an indigenous language and belong to an indigenous group' enjoyed the protection afforded by the Convention.

The Committee noted that 'the application of Article 1 is not limited, as it does not include language as a criterion for defining the peoples protected by the Convention.'¹⁶

In 2002, in an observation the (ILO) Committee of Experts examined constitutional reforms of Mexico in a more detailed way in a request sent directly to the Government. The amendment to the Mexican Constitution can be considered as the most striking example of a 'legal transplant' in relation to C 169. Instead of based on language, it defines indigenous people in the following terms:

The nation has a pluricultural composition based originally in its indigenous peoples that are those that descend from the populations that inhabited the current territory of the country at the time of colonization, and which retain their own social, economic, cultural and political institutions, or part thereof. Consciousness of indigenous identity should be a fundamental criterion in order to determine to whom the provisions on indigenous peoples apply.¹⁷

In Finland, the situation is complex, also paradoxical in many ways; some of the people who live in remote areas and seek to continue traditional livelihoods in the northern part of Finland face different types of challenges to have their indigenous identity officially recognised. Such recognition is today only gained through the acceptance into the electoral roll of the Sami Parliament, a quite complicated process.¹⁸ This has to do with Finnish internal Sami politics, which differ from the Norwegian and Swedish Sami identity politics. This results in particular forms of inclusion and exclusion and are more closely analysed later in the text.

3. The renewal of the Sami Act

The current Finnish Sami Act dates back in the mid-1990s when the Finnish Sami Parliament was established. As stated earlier, a Sami person in Finland is defined under the Sami Act as a person who has the right to vote in the elections of the Finnish Sami Parliament. Section 3 of the current Act¹⁹ states that:

For the purpose of this Act, a Sami means a person who considers himself a Sami, provided:

1. That he himself or at least one of his parents or grandparents has learnt Sami as his first language; or

2. That he is a descendent of a person who has been entered in a land, taxation or population register as a mountain, forest or fishing Lapp; or

3. That at least one of his parents has or could have been registered as an elector for an election to the Sami Delegation or the Sami Parliament.

An electoral board consisting of five persons at the Finnish Sami Parliament makes a decision on membership to the electoral roll, which at the same time, constitutes the formal status and membership of a person in the Sami society in Finland.²⁰ The indigenous status of the Sami are defined in the Finnish Constitution (17§) according to which, ‘The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture ...’²¹

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- Sami is a person defined in the Sami Act (3§)
- Individuals can apply into the register every four years, few months before the Sami Parliament elections.
- An electoral board (five Sami politicians) make the decision with the possibility to rectification and then given the possibility to appeal first to the governmental body of the Finnish Sami Parliament and then, if rejected, to the Finnish Supreme Administrative Court (Electoral board at www.samediggi.fi).

The electoral roll has its foundation in interviews made in the 1960s by young students in a limited area in Northernmost Lapland.²² At the time, the purpose of the interviews was to consult every inhabitant of the Sami region whose parents or grandparents spoke Sami as their first language.²³ Later, language also became the key criterion for Sami identity and status under Finnish law.²⁴ Current practices, but also problems, relate both to those interviews and to the ‘self-governing’ power of the electoral board to decide on membership. A concept of ‘group acceptance’ was invented in 2011/2015. It gave the electoral board the power to accept or decline individual applications. It has been argued that certain exclusions resulting from the process are not objectively justified. As a consequence, some persons and families have been left unfairly outside the roll causing the current debate and disagreements. The Supreme Administrative Court of Finland’s judgement of 2011, allowed one person to enter into the roll according to subsection 2 (Lapp-section) of the Act. The Finnish Sami Parliament was unsatisfied with the ruling and claimed dissolution of the judgement. The very same year, however, the Finnish Sami Parliament approved a person to the electoral roll along with his family, according to the same subsection 2. The person was close to the Chairman of the Finnish Sami Parliament; the Chairman had disqualified himself from participating in the decision-making. The Finnish Sami Parliament reasoned that, ‘... the Sami definition in the law is no longer up to date. It (the electoral roll) excludes persons who are Sami, but who have lost their Sami language due to the strong assimilation policy of the Finnish State ...’, and he therefore was to be marked into the roll along with his family. From a human rights perspective, it can be argued that the current situation violates section 6 of the Finnish Constitution, concerning equality before the law, and is therefore unbearable for the individuals who are fighting for their status and identity.²⁵

The concept of ‘group acceptance’ applied by the Finnish Sámi Parliament is derived from Article 33 of the UN Declaration on the Rights of Indigenous Peoples²⁶ which states that:

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures (Article 33 of UNDRIP, 61st session, 13.9.20017).

The recent debate in Finland about membership concerns how the definition of Sami-ness is applied in practice. The majority of representatives in the Finnish Sami Parliament have demanded changes in the legislation, seeking to adopt an even more restrictive approach (removal of the Lapp-section) and a stronger position for the right of the group, i.e. the Finnish Sami Parliament, to decide on member.²⁷ The strict approach by the Finnish Sami Parliament to reject people fulfilling the Sami definition according to the Sami Parliament Act is defended through various arguments. Sámi researcher Piia Nuorgam states that if the Sami Parliament Act is not revised, there would be too many Sami that would have voting rights in the Finnish Sami Parliament.²⁸

The minority in the parliament relies more on how the Act has been arbitrarily interpreted in practice.²⁹ The renewal of the Sámi Act between 2012 and 2014 resulted in a Government Bill³⁰ with more emphasis on group acceptance. Within this context it is relevant to refer Article 1 of the UNDRIP emphasising the rights of an individual member of the indigenous group:

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

According to Article 2 (UNDRIP):

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

And even though many indigenous peoples have customs and traditions of their own, the promotion of these rights is to be done in accordance with international human rights standards. This is also clearly stated in the Article 34 of the UNDRIP:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

In comparison to neighbouring countries, the estimated total Sami population of Norway varies between 75,000 and 100,000.³¹ Similarly, in Sweden estimations vary from 27,000 to 35,000, while only 8322 persons were registered in the Swedish Sami Parliament electoral roll in 2013.³² According to research by Torunn Pettersen, 'we are unable to know how large this population in Norway could have been if all persons with known or unknown Sami background considered themselves to be Sami and decided to join the electoral register'.³³

The majority of the politicians in the Finnish Sami Parliament argue that the Sami language and culture will be destroyed if more Sami are let into the roll solely on the

basis of subsection 2 (Lapp-section) of the Sami Act. It is argued that, the basis of a person's 'Saminess' cannot be found from old land and taxation registers, and one or a few forefathers in those registers would not make a person 'Sami'.³⁴ It is further argued by the Sami Parliament that these persons assimilated into the main population long ago, and they do not have any connections with the Sami culture. It has been estimated that more than 100,000 people would claim that they are Sami.³⁵ The minority³⁶ at the Finnish Sami Parliament argues that the language criterion is problematic. Due to the assimilationist policy of the Swedish (and later the Finnish) state and the Lutheran Church from the late seventeenth century until the early 1970s, many Sami have been forced to give up of their native language and their land rights were not recognised. It is now somewhat peculiar that the legislator has set language as a criterion for 'Saminess'. As time passes, it becomes more and more difficult to find new persons who can fulfil the language criterion. In practice, only those who are already included meet the requirement in law, since they are marked into the roll according to the subsection 3: 'That at least one of his parents *has or could have been* registered as an elector for an election to the Sami Delegation or the Sami Parliament'. Also all the future generations will fulfil the criteria only in subsection 3, since the Act does not require that a person must speak the Sami language. The dilemma becomes even more apparent when taking into account that almost 75 per cent of the Finnish Sami live outside the administrative borders of the Finnish Sami Homeland region, very few of whom speak the Sami languages.

Concrete cases reviewed by the electoral board and the Sami Parliament of Finland show the restrictive practices of membership selection.³⁷ In 1999, Arto Enojärvi, was denied Samihood, and not accepted to the electoral roll. The electoral board do not have to give reasons for rejection, if the person (according to them) does not fulfil the criteria in the 3§ of the Act on Sami Parliament. Subsequently, Mr Enojärvi moved to Norway, where he was accepted onto the Norwegian Sami electoral roll of the Sami Parliament in Norway. This example suggests that individual Sami are treated very differently within each of the Nordic countries.³⁸ In Norway, decisions on the inclusion into the roll are made by an official at the Norwegian Sámi Parliament, not by the politicians at the Sami Parliament. This is also peculiar democratic paradox in Finland where – in practice – Sami politicians are selecting the voters for the next elections. In Norway applications can be made throughout the year and it is positively recommended that people would apply into the roll. Only few complaints have emerged in recent years, mainly concerning technical matters. The biggest difference compared to Finland is, that in Norway indigenous status or identity is not connected with right to vote in the elections of the Sami Parliament.

In 2015 the Finnish Supreme Administrative Court in Helsinki recognised 93 people as Sami, against the express wishes of the Sami Parliament even leading a previous Sami Parliament Chairman to resign from the Sami electoral roll. The current Chair of the Sami Parliament Tiina Sanila-Aikio said the decision put 'the cultural self-government of the Sami people in Finland under threat' (YLE News 13.1.2016). Erika Sarivaara, a Sami language and culture lecturer at the University of Lapland, was one of those people accepted to the Sami list back in 2015 (News now Finland 27.9.2018). Having lived and worked in Norway, she says the attitude of Sami politicians there is markedly different than in Finland.

‘The Sami Parliament in Norway is working hard to get more people on the voting register. They are making videos, they are calling people, come join us, then we are stronger. They are actively looking for people to come, especially from the assimilated areas’ says Sarivaara. In communities in Norway when someone finds out they have Sami roots they are celebrating. They are supporting Saminess and the revitalisation of culture and language’ she tells News Now Finland. In Finland, Sámi areas were historically much more extensive than they are now, with language being one of the first things to die out as traditional land for reindeer herders and fishing communities were reduced over the course of generations, down to just three main municipalities today. (News now Finland 27.9.2018.)

While Sarivaara’s grandparents didn’t speak any Sami language, she says her mother’s family still work as reindeer herders, wear traditional Sami clothes, and have a strong Sami identity.

‘I grew up in the forest area with my parents, we always knew we were Sami’ she says (Erika Sarivaara).

Now (2018) that the Sami Parliament has rejected the draft legislation – it was a split vote, there are some members of parliament who support it – the bill is effectively dead in the water.

‘The committee, consisting of the three parliamentary groups that form the Government, representatives of the Sami Parliament and experts, did thorough work and negotiated the content of the proposal in detail during its mandate. Unfortunately in the end the proposal was not accepted by the Sami Parliament’ says Johanna Hautakorpi, Ministerial Adviser at the Ministry of Justice.³⁹

In Finland, the exceptional practice also shows that the electoral board has approved some persons to the roll for the same reasons that they have declined others. A Supreme Administrative Court judgment of 2011 allowed one person to enter into the roll according to subsection 2 (Lapp-section) of the act. The Finnish Sami Parliament contested the ruling and called for its annulment of the judgment. The very same year, however, the Finnish Sami Parliament approved a person to the electoral roll along with his family, according to the same subsection 2. The person was close to the Chairman of the Finnish Sami Parliament; the Chairman had disqualified himself from participating in the decision-making.⁴⁰ The Finnish Sami Parliament reasoned that:

‘... the Sami definition in the law is no longer up to date. It (the electoral roll) excludes persons who are

Sami, but who have lost their Sami language due to the strong assimilation policy of the Finnish State ...’, and he therefore was to be marked into the roll along with his family.⁴¹

In late 2018, once again, new legislation covering the relationship between the Sami Parliament and the Finnish state was put on ice, after politicians in Inari (the Sami Parliament) voted against it. The breakdown in the legislative process highlights an apparent lack of understanding from the Finnish establishment of the red lines in Sami society dealing with highly sensitive issues of identity. It has also brought back to the surface lingering divisions within Finland’s small Sami population about who is a ‘true’ Sami and who can be considered members of the tight-knit community. Under current legislation the Finnish Supreme Administrative Court has the ultimate say. Many Sami politicians wanted the same arrangement as Norway has, where the Sami Parliament in Kárásjohka, not the

Norwegian state, is the final arbiter. In the most simple terms, the issue is sensitive because many Sami people think that only other Sami should have a say in Sami affairs. They want their own parliament to have the power to specifically define who is Sami and who is not.

The next Sami Parliamentary elections will be held in the fall of 2019. Some experts have said recently that the ongoing legal dramas and negotiations about who is Sami and who is not, detracts attention from other work the Sami Parliament could more usefully be doing.

'I want to protect our earth, our land. I love the language. But when it comes to identity I am liberal, I am open to different kind of Sami. I think the more we are, the stronger we are' says Erika Sarivaara in a phone interview from Lapland. It's a waste of time and resources to fight against another people. We have to fight together to save our language, and save our land. We have bigger issues to deal with like climate change. We have many challenges, and now the resources are going to this fight, and it's such a damaging conflict.⁴²

To conclude this section Sami indigenoussness in Finland is commonly understood to be defined through Sami language. This is considered problematic, as the Sami were previously subject to policies of assimilation, and authorities did not consider the Sami languages worth preserving. The authorities even periodically prohibited the teaching of Sami language in schools. Therefore, many Sami lost their native tongue. Once the Sami languages were seriously threatened by extinction, the other attributes of Sami identity had to be identified and fostered. Unfortunately, due to assimilation policies, many Sami have mixed feelings about their identity. Within this context a group of people, identifying themselves as Sami and who are of Sami descent, but do not have the official Sámi status are seeking their juridical status. Erika Sarivaara call them non-status Sami⁴³ This means that they are not registered as voters in the Sami parliament for one reason or another. According to the research findings of Erika Sarivaara, the non-status (not marked into the electoral roll) Sami who speaks the Sámi language, their identity and location within Sami society is diverse. These results reflect former studies of Sami identity, in which there appears variability of Sami identity. Part of the Sámi identify themselves as Sami, others not. In Finland, due to the fact that a Sami person is defined under the Sami Act of Finland, the entry into the electoral register of the Finnish Sami Parliament constitutes the only formal legal recognition. Some people wish this formal registration, while for others it is less important.

For some, the restrictive membership governance of the official Sami community causes the feeling of injustice amongst affected people. The current situation also potentially violates section 6 of the Finnish Constitution, concerning equality before the law, and is therefore considered unbearable for the individuals who are fighting for their status and identity. Important questions can be raised in the context of the so-called Finnish non-status Sami. What is the legal status of these persons if they are not included in the electoral roll of the Finnish Sami Parliament? Is their exclusion *reasonably* and *objectively* justified for the sake of the Sami community?⁴⁴

4. Attempt to ratify C 169 during the Spring 2015

The ratification of the ILO Convention No.169 concerning the rights of indigenous peoples has been debated in Finland/ Lapland ever since it was drafted in 1989.⁴⁵ The

official reason why Finland has not ratified the Convention yet, is that national legislation does not comply with some of the Articles of the Convention, mainly with the land right articles (13–19). Article 14, for example, requires states to recognise the ownership and possession of the peoples concerned to their traditionally occupied lands. This has been considered challenging and been debated ever since the first Sami Parliament elections in 1999.

Ratification of C 169 was on the agenda of the Finnish government between 2011 and 2015 following strong pressure from the Sami Parliament and different international human right bodies. Under the Finnish approach, there have been expectations that difficult situation of the land rights of the Sami could be facilitated by ratifying the Convention, instead of only trying to find national solutions for land rights like for example in Canada, Australia or New Zealand. It is worth noting that in Finland no Sami has ever taken a legal action against the Finnish State to make land claims. In comparison, in Sweden, the courts have received several cases and shown a more favourable attitude to the issue of Sámi rights than the legislature has. This is exemplified in three preeminent decisions by the Supreme Court in the *Taxed Mountain Case* (1981), the *Nordmaling Case* (2011) and a very recent one the *Girjas Case* (2016)⁴⁶ There is no equivalent to such litigation in Finland.

However, in the spring of 2015 the Ministry of Justice in Finland drafted a Government Bill on C 169, which contained an ‘explanation’ in regard to Article 14, which practically meant that Sami rights to land were left outside the ratification (and implementation) process. The ‘explanation’ resembled a reservation, which is not possible to do in relation to C 169. The approach can be considered as contradictory to previous discussion as the land rights were considered the most important issue for the Sami in the whole Convention. It was also the reason why Finland had not ratified the Convention earlier. The political arrangement suggesting ratification without recognising the rights under Article 14 was set-up by Minister of Justice Anna-Maja Henriksson together with the Sami Parliament leadership, mainly with its President Klemetti Näkkäljärvi. The clause related to Article 14 would have left state lands untouched, while the Sami rights to participate on decision-making in the Sami homeland area would have been increased. This approach was somewhat surprising, since land rights have been the reason why the ratification process was previously stalled. The model or agreement between the Sami Parliament leadership and Minister of Justice was also to have more restrictive Sami definition built into the new Sami Act (the Sami Parliament requirement). The ratification of C 169, in turn, required the Sami to abandon their rights to lands and waters (government requirement). However, the agreement containing the ‘explanation’ was described as part of the Parliament committee hearings almost unanimously as a reservation. Minister of Justice consulted the case, inter alia, with an ILO retired expert (Lee Swepston) the model or agreement, however, and for him it looked good⁴⁷ According to Minister Henriksson:

Swepton has seen this explanation, and he has also given the opinion that this explanation is valid for ILO. (YLE Sapmi 8.12.2014)

He (Swepton) has said (to Minister Henriksson) that:

‘This type of explanations, that reflect a national consensus on how the agreement is understood and applied internally, as well as the parties’ plans for its implementation, are not

exceptional. Although it has no legal significance internationally, it is not insignificant. The meaning of the explanation is more ratifying state's internal [political] issue. And English, he said: 'That looks good to me. (YLE Sapmi 8.12.2014)

The Ministry of Justice described the 'explanation' as a *politically binding national solution*. However, Professor of international law, Martin Scheinin has argued that the Sami Parliament was pressured by the government to accept the explanation in regard to C 169 and its land right provisions. According to him, this is not an 'explanation' but a proviso/reservation, which accordingly renders it legally null and void because it is not possible to make reservations for C 169. The Parliament voted against the new Sami Act with 162 votes against 28. This meant that a more restrictive definition of a Samihood was not accepted. As explained earlier, this was a prerequisite for the Sami Parliament to proceed further with the ratification of C 169. Because of the agreement between Minister of Justice and the Sami Parliament leadership, ratification of C 169 was not possible anymore.

These events took place in the last week of functions of the Finnish Parliament right before the new elections were held. The Sami Parliament, in turn, wants to concentrate more on the *Nordic Sami Convention* and the *Truth and Reconciliation Process*.⁴⁸ This is a process launched and funded by the Prime Minister's Office together with the Sami Parliament. Truth commissions or truth and reconciliation commissions refer to processes of investigating injustices that have taken place in history and uncovering the truth (i.e. what has happened) in order to prevent such injustices from occurring again.⁴⁹ On 24th January 2019 the Finnish Government withdraw (from the Parliament) the Government Bill (264/2014) on the ratification of the ILO Convention No.169 in joint understanding with the Sami Parliament. From now on, the case is closed, until the new Government of summer 2019.

5. Conclusion

Despite the large number of indigenous peoples, there is no universally recognised definition of indigenous peoples in international law. However, some broad characteristics are generally accepted. Indigenous peoples are described as the disadvantaged descendants of those peoples who inhabited a territory prior to colonisation or the formation of the present State. The term 'indigenous' is defined by characteristics that relate to the identity of a particular people in a particular area, and that distinguish them culturally from other people or peoples. When, for example, immigrants from Europe settled in the Americas and Oceania, or when new States were created after decolonisation in Africa and Asia, certain peoples were marginalised and discriminated against because their language, their religion, their culture and entire way of life were different and perceived as inferior by the dominant society (See for example <http://www.iwgia.org/> for a listing of indigenous peoples). This reflects the challenges related to the coverage of C 169.

Scholars differ as to the definition of indigenous people. Some distinguish between the indigenous people of the New World and the Old World. The Special Rapporteur to the UN Economic and Social Council Sub-Commission on Prevention of Discrimination and Protection of Minorities defined indigenous peoples as follows:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that have developed on their territories, consider

themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. (Cobo, José-Martinez, 1986)

Today, many indigenous peoples are still excluded from society, and in some cases even deprived of their rights as equal citizens of a State. Nevertheless, they are determined to preserve, develop and transmit their ancestral territories and their ethnic identity to future generations. Self-identification as an indigenous individual and acceptance as such by the group is an essential component of indigenous peoples' sense of identity. Their continued existence as peoples is closely connected to any possibility that they may have to influence their own fate and to live in accordance with their own cultural patterns, social institutions and legal systems.

The situation related to Sami identity in Finland and the right to be marked into the electoral roll of the Sami Parliament is diverse and complex issue. It is important to define indigenous peoples in a manner that allows these peoples and persons the possibility to enjoy their inherent rights as the (descendants of the) original inhabitants of a particular territory. Paragraph 26.1 of Agenda 21 of the United Nations Conference on Environment and Development, adopted by a consensus of Member States, noted the inseparability of cultural distinctiveness and territory from the concept of 'indigenous': 'Indigenous people and their communities have a historical relationship with their lands and are generally descendants of the original inhabitants of those lands.'⁵⁰

In Finland, there are disagreements about the identity issue especially at the local level, but tensions are also present at the national and international level. One could argue, that the Samihood in Finland is based on interviews made in the 1960s among some people; and on 'group acceptance' which do not follow the international human right standards. The situation is unfortunate and unequal. At the moment, the general discussion on indigenous peoples position and rights is heavily concentrated on the definition of Samihood and identity questions, while other issues get less attention. Culture and language revitalisation, the situation of the urban Sami, future of youth and children, and those who still practice traditional livelihoods would certainly need concrete and rapid actions to preserve their traditions and identity. Positive events are already happening, but a more comprehensive policy approach along the lines of C 169 would appear relevant. The ratification is, once again, on the agenda of the current Government (2019–2023).

By studying various situations in different countries provides diverse and similar approaches, which could perhaps be useful for Finland's situation. However, the basic assumption is that no uniform, but tools from many different cases and approaches, can be found. Sometimes not even far away.

6. Epilogue

After completing this article, in spring 2019, the Finnish Sami Parliament started to once again prepare for new elections, and it seems that the Electoral Committee has gone further in its activities. In the run-up to the Sami Parliament elections in fall 2019, it has removed at least the majority of those persons (97) registered by the Supreme Administrative Court in 2011 and 2015 (decision made 1.7.2019). This has been justified by the

statements of the UN Commission on Human Rights (2nd February 2019).⁵¹ However, the UN Committee on the Elimination of Racial Discrimination has previously taken the opposite view. This is a body similar to the Human Rights Committee. One can argue that it is not possible to start by relying solely on statements which support specific policy objectives best for each situation.

Now among those removed from the electoral roll are the Sami politicians currently sitting in the Sami Parliament (Mr. Kari Kyrö for example), who have received a mandate from their people but whose right to stand as a candidate and to vote is now being denied. This is in stark contrast to the rule of law. None of these measures have been discussed in the General Assembly of the Sami Parliament, which has 21 members. However, some members of the Sami Parliament and people in the Sami community object to such a policy. In August 2019 the Supreme Administrative Court gave its ruling to return all the removed persons into the register.⁵²

Notes

1. Joono Tanja and Joono Juha, *The Historical Basis of Saami Land Rights in Finland and the Application of the ILO Convention No. 169 (Yearbook of Polar Law: Brill, Volume 3, 2011)*; Korpiaakko-Labba Kaisa, *Saamelaiden oikeusasemasta Ruotsi-Suomessa : oikeushistoriallinen tutkimus Länsi-Pohjan Lapin maankäyttöoloista ja -oikeuksista ennen 1700-luvun puoliväliä*. (Lapin korkeakoulun oikeustieteellisiä julkaisuja nr 3, Helsingfors 1989); Joono Juha, *Ikimistoinen oikeus – tutkimus Lapin alkuperäisistä maa- ja vesioikeuksista*. (Erweko Oy, Juridica Lapponica 46, Oulu 2019).
2. Indigenous peoples of Northern Fennoscandia were previously called Lapps. Lapp is an old exonym. Historically, it is closely associated with the term Lapland (Lapponia in Latin), used for the area.
3. PeVM 13/2014 vp – HE 264/2014 vp. PERUSTUSLAKIVALIOKUNNAN MIETINTÖ 13/2014 vp.
Hallituksen esitys eduskunnalle itsenäisten maiden alkuperäis- ja heimokansoja koskevan yleissopimuksen hyväksymisestä sekä laeiksi yleissopimuksen lainsäädännön alaan kuuluvien määräysten voimaansaattamisesta ja Metsähallituksesta annetun lain muuttamisesta.
4. Government Bill (HE) 167/2014 vp. Hallituksen esitys eduskunnalle laeiksi saamelaiskäräjistä annetun lain ja rikoslain 40 luvun ja 11§:n muuttamisesta.
5. Draft Government Bill 18.6.2018, Hallituksen esitys eduskunnalle laeiksi saamelaiskäräjistä annetun lain ja rikoslain 40 luvun 11 §:n muuttamisesta, LUONNOS (Draft).
6. Laki Saamelaiskäräjistä (The Sámi Act), 17.7.1995/974.
7. Veli-Pekka Lehtola, Sámi Professor: ‘In Finland the total number of Sami is well known, since all the Sami are marked into the electoral roll’, Interview in *Lapin Kansa* (local newspaper) 21.1.2016.
8. Sami Parliament Plan of Action and Finance 2016–2019.
9. One has to bear in mind that you are considered a reindeer herder even if you own just one reindeer, so in reality the figure is even lower for those get their main income from reindeer herding.
10. Statistics Finland 2019, ‘Hyvää saamelaiden kansallispäivää’. <http://www.stat.fi/tietotrendit/blogit/2019/hyvaa-saamelaiden-kansallispaiavaa>.
11. Paul Pedersen and Torill Nyseth, ‘Urban Sámi Identities in Scandinavia: Hybridities, Ambivalences and Cultural Innovation’, *Acta Borealia* 31, no. 2 (2014): 131–51.
12. See more Poverty and Exclusion among Urban Children, *Innocenti Digest* (2003, March 14).
13. See for example: *How do minorities differ from indigenous peoples?* ‘Indigenous peoples are distinct ethnic communities who are the first inhabitants of a geographical region, and whose identities and cultures are inextricably linked to the land on which they live and

- the natural resources on which they depend.’ <https://www.minorityrightscourse.org/mod/page/view.php?id=1591>.
14. *Indigenous and Tribal Peoples’ Rights in Practice: A guide to ILO Convention No. 169. Programme to Promote ILO Convention No. 169* (PRO 169) (International Labour Standards Department, 2009).
 15. Ibid.
 16. ILO, Committee of Experts. Direct Request (CEACR) – adopted 2005, published 95th ILC session (2006).
 17. Ibid.
 18. Sarivaara Erika, ‘Statuksettomat saamelaiset Paikantumisia saamelaisuuden rajoilla’ (Non-Status Sámi Locations within Sámi Borderlands) (PhD diss., Sámi Allaskuvla, DIEDUT 2/2012)
 19. Act on Sámi Parliament, 17.7.1995/974.
 20. Joona Tanja, ‘The Finnish Sámi Definition and Its Application’, in *Indigenous Rights in Scandinavia, Autonomous Sami Law*, ed. Christina Alard and Susann Skogvang (Juris Diversitas, Ashgate, 2015).
 21. Finnish Constitution 11.6.1999/731.
 22. Nickul Erkki, ‘Suomen saamelaiset vuonna 1962. Selostus Pohjoismaiden saamelaisneuvoston suorittamasta väestötutkimuksesta’ (Masters Thesis, Helsinki, 1968).
 23. Ibid.
 24. Act on Sami Delegation 1973 s 1 para 2.
 25. The legal praxis from 2007 shows a decision for demand for rectification to the electoral board of the Finnish Sami Parliament. A person was asking for his right to be marked into the roll as his sister and brother had been. The electoral board declined his demand for rectification, because his approval ‘would be involuntary assimilation of indigenous peoples to the main population.’ Electoral board of the Sami Parliament of Finland. An excerpt of the minutes 17 April 2007.
 26. (UNDRIP), 61st session, 13.9.20017.
 27. Ministry of Justice, Reports and Statements 55/2013, 30.10.2013.
 28. NRK Sapmi, 12.3.2015. Forsker: – Samene frykter at altfor mange blir med i samemanntallet. Translation: Researcher: – The Sami fear that too many can be enlisted in the Finnish Sami election roll. <http://www.nrk.no/sapmi/1.12255983>.
 29. An interview of Anu Avaskari, an Inari-Sami and member of the Sami Parliament, who expresses her view on discrimination by the Sami themselves. Inarinsaamelainen: Pahinta on kun oma kansa syrjii. Finnish Broadcasting Company (YLE). http://yle.fi/uutiset/inarinsaamelainen_pahinta_on_kun_oma_kansa_syrjii/6586220
 30. Government Bill (HE) 167/2014 vp.
 31. Different estimations can be found. For example, see at <http://www.thefreelibrary.com>; <http://nordicway.com>; www.samediggi.no; www.samediggi.se; www.samediggi.fi
 32. Statistik sameröstlängden, <http://www.sametinget.se/6434>.
 33. See more, for example, Torunn Pettersen and Margitt Brustad, ‘Same Sámi? A comparison of self-reported Sámi ethnicity measures in 1970 and 2003 in selected rural areas in northern Norway’, *Ethnic and Racial Studies* 38, no. 12 (2015): 2071–89.
 34. Klemetti, Näkkäljärvi, Chair of the Sámi Parliament: Saamelaismääritelmä on nyt saamelaisyhteisön odotusten mukainen. Finnish Broadcasting Company (YLE) (30 October 2013). http://yle.fi/uutiset/nakkalajarvi_saamelaismaaritelma_on_nyt_saamelaisyhteison_ odotusten_mukainen/690878
 35. An interview by Tapani Leisti at the Finnish Broadcasting Company 8.10.2011 (YLE http://yle.fi/uutiset/khon_uusi_tulkinta_saamelaisuudesta_kuohuttaa/5436701; *Helsingin Sanomat* ‘Minä olen saamelainen – ja minä myös’ (<http://www.hs.fi/paivanlehti/sunnuntai/Min%C3%A4+olen+saamelainen++ja+min%C3%A4+my%C3%B6s/a1341032243214> 1.7.2012).
 36. Members of the Finnish Sami Parliament, Mr Pentti Valle, Mrs Anu Avaskari and Mr Antti Sujala, have publicly expressed their dissenting opinion to the majority decisions of the Finnish Sami Parliament concerning the preparation of the new Sami Act of Finland, and

- especially the Sami definition. YLE Saame 27.6.2014. Saamelaiskäräjät hyväksyi saamelaiskäräjälain ja saamelaismääritelmän kompromissiratkaisun. http://yle.fi/uutiset/saamelaiskara-jat_hyvaksyi_saamelaiskarajalain_ja_saamelaismaaritelman_kompromissiratkaisun/7325294.
37. An excerpt of the minutes 17 April 2007 Dno 113/D.m.3.1.; see also ‘Saminess belongs to me’, *Luoteis-Lappi* 28.8.2014. The legal praxis from 2007 shows a decision for the demand for rectification to the electoral board of the Finnish Sami Parliament. A person was asking for his right to be marked into the roll as his sister and brother had been. The electoral board declined his demand for rectification, because his approval ‘would be involuntary assimilation of indigenous peoples to the main population’.
 38. Arto Enojärvi, Sami only in neighbouring country, Norway, *Luoteis-Lappi* 28.8.2014.
 39. Sarivaara Erika, News now Finland, Frozen: *Sámi Parliament Vote Exposes Deep Divisions on Identity and Rights* 27.9.2018. <https://newsnowfinland.fi/politics/frozen-sami-parliament-vote-exposes-deep-divisions-on-identity-and-rights>.
 40. Statement for the Electoral board of the Sami Parliament 22 December 2011 by Heikki J. Hyvärinen.
 41. Sami Parliament minutes 31.5.2011.
 42. Sarivaara Erika, News Now Finland, Frozen: *Sámi Parliament vote exposes deep divisions on identity and rights* 27.9.2018. <https://newsnowfinland.fi/politics/frozen-sami-parliament-vote-exposes-deep-divisions-on-identity-and-rights>.
 43. Sarivaara, Erika, *Statuksettomat saamelaiset Paikantumisia saamelaisuuden rajoilla (Non-Status Sámi Locations within Sámi Borderlands)* (Phd diss., Sámi Allaskuvla, DIEDUT 2/ 2012).
 44. See legal practice from the Human Rights Committee: *Ivan Kitok v. Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988); *Sandra Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981).
 45. At the moment 23 ratifications, mainly in South and Latin America. From the Nordic countries, Denmark and Norway have ratified the Convention.
 46. Bengtson Bertil, ‘Reforming Swedish Sami Legislation: A Survey of the Arguments’, in *Indigenous Rights in Scandinavia, Autonomous Sámi Law*, ed. Christina Allard and Susann Skogvang (Ashgate Publishing, 2015).
 47. YLE Sapmi 8.12.2014 Ratifiointiehdotuksen selitysoisa epäilyttää kansanedustajia. http://yle.fi/uutiset/osasto/sapmi/ilo_169_ratifiointiehdotuksen_selitysoisa_epailyttaa_kansanedustajia/7674739. 8.12.2014.
 48. Saamelaiskäräjien toimintasuunnitelma. Saamelaiskäräjien vuoden 2019 toimintasuunnitelma on kunnianhimoinen. At <https://www.samediggi.fi/category/uutiset/>.2019.
 49. Juuso Anni-Kristiina, ‘Truth and Reconciliation Process Concerning Sami Issues Report on Hearings’. Prime Minister’s Office 12.7.2018, <http://urn.fi/URN:ISBN:978-952-287-684-3>.
 50. Report of the United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3–14 June 1992.
 51. Klemetti Näkkäläjävi et al. represented by the Saami Arvuut Organization, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2950/2017, Distr.: General* 1 February 2019; *Tiina Sanila-Aikio* (represented by counsel, Mr. Martin Scheinin) Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2668/2015, Distr.: General* 1 February 2019.
 52. Supreme Administrative Court, KHO – saamelaiskäräjien vaalilautakunnan vaaliluettelosta poistamat henkilöt on palautettava luetteloon (Those removed from the electoral roll have to be returned into the roll) 1.8.2019, https://www.kho.fi/fi/index/ajankohtaista/tiedotteet/2019/08/kho-saamelaiskarajienvaalilautakunnanvaaliluettelostapoistamathenkilotonpalautettavaluetteloon_0.html.

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