Swedish Policy and Saami Rights

FAE L. KORSMO

This year Sweden has followed the examples of neighboring Finland and Norway and created a Saami Assembly, a Saami-elected advisory body to represent the indigenous minority at the national level. Yet the inauguration of the Saami Assembly in August 1993 does not mean Sweden's fundamental policy concerning Saami rights has undergone a radical transformation. On the contrary, despite growing international pressure to recognize the status of indigenous peoples as distinct, self-governing entities with close ties to land and water, Sweden has consistently balked at real policy change.

The Saami, an autochthonous minority, number over 60,000, with about 40,000 in Norway, 15,000 in Sweden, 4,000 in Finland, and 2,000 in Russia (Kola Peninsula) (Beach 1992:19). Often identified with reindeer herding, they actually occupy many different economic niches. For years they have pressured the governments of Norway, Sweden, and Finland to recognize their age-old rights to land and water in the northern regions of these countries. Of the three countries, Norway has responded with the most complete about-face, amending the constitution to include recognition of the Saami and ratifying the International Labour Organization's Indigenous and Tribal Populations Convention. In general, indigenous peoples have taken two paths toward achieving their goals: internationally, through bodies such as the United Nations, and domestically, through constitutional change and legislation. The Saami have followed both paths, but neither has succeeded in Sweden.

The last ten years have brought one of the most contentious periods in Sweden's evolving policy toward the Saami. After eight years of study, the Saami Rights Commission had completed two major reports, one of which had provided the basis for a legislative proposal that Parliament voted down (Samerättsutredningen SOU 1989:41; SOU 1990:91; Regerings proposition 1990/91:4; Riksdagen, Protokoll 1990). Then, under the new Conservative coalition, another legislative proposal was announced. The proposal, released finally in

October 1992, drew severe criticism from Saami leaders (Regeringens proposition 1992/93:32). With regard to land tenure, hunting and fishing, and linguistic rights, the proposal seemed even less accommodating than the 1990 version. Furthermore, in the proposal, the Swedish government recommended against ratification of an important new instrument protecting the rights of indigenous populations, the International Labour Organization's Indigenous and Tribal Populations Convention. Approved by the Swedish Riksdag in December 1992, the proposal offered only one ray of hope for the Saami: the creation of the Saami Assembly. For this reason alone, the Saami supported at least part of the proposal. Why did the Swedish government fail to accommodate other Saami demands? What was behind the contention?

This paper traces the sources of conflict, examines the work of the Saami Rights Commission and the recent international challenges to Swedish Saami policy, and considers future prospects for policy change through domestic and international mechanisms.

Saami Resource Rights According to Swedish Law

In a major review of ethnoterritorial politics in the Western world, Rudolph and Thompson (1989) note that recent policy changes in many countries were introduced as settling ethnic claims, but in reality governments left an unfinished agenda. Issues raised by ethnoterritorial minorities were redefined, reshuffled, fragmented into more manageable pieces, or postponed (Rudolph and Thompson 1989: 221-240). Sweden's approach to the Saami has resulted in the same type of policy ambiguity, paying lip service to the status of the Saami as an indigenous population and holder of time immemorial rights to land and water, while avoiding the legal and political consequences of such statements. Instead, the combination of recognition and denial of Saami rights has left two competing versions of Saami status.

In the first version, the Saami are a small, privileged group entitled to hold a monopoly on reindeer herding and to use State, as well as certain private, lands for reindeer grazing. In the second version, the Saami who still live in the core areas occupied by their ancestors have inherited time immemorial rights to hunt, fish, herd, and gather. Because their time immemorial rights (*urminnes hävd*) have the nature of property rights (*särskild rätt till fastighet*), the Saami should be empowered to regulate access by both Saami and non-Saami to fish and game in those traditional areas. The first version

comes from existing statutes governing Saami resource rights, the current version found in the Reindeer Herding Act of 1971 (*Rennäringslagen*, 1971: 437). The second version comes from a 1981 Supreme Court court decision (*Skattefjällsmålet*), legal-historical research (Korpijaakko 1985a&b; Cramér 1987), and developing norms in international law (Swepston n.d.; Tennant and Turpel 1990). From the recent legislative proposal delivered to the Parliament, it is clear that Version Two has not completely replaced Version One, but has become instead a transparent overlay, and thus far devoid of content.

Version One: Privileged Reindeer Herders

The only current law devoted to defining the resource rights of the Saami is the Reindeer Herding Act of 1971. The 1971 Reindeer Herding Act specifies that

> The right to use land and water according to this law to support oneself and one's reindeer (the reindeer-herding right) belongs to the person of Saami ancestry if his father or mother or one of his grandparents had reindeer herding as a steady occupation.
>
> Under special circumstances, the county administration can grant a person with Saami ancestry the reindeer-herding right, even in cases not covered by the above paragraph (SFS 1971: 437).

In addition, all herders must belong to a Saami village organization (*sameby*). If herders spend more than fifty percent of their labor on other activities than herding, they no longer qualify for *sameby* membership (§11). The *sameby* itself cannot pursue economic ventures other than reindeer herding (§9). Finally, hunting, fishing, and wood-gathering are considered subsidiary rights (*birättigheter*) to herding, and belong only to those Saami who are members of the *sameby* (§§17, 25).

Each *sameby* has the use of summer, autumn, winter, and spring grazing lands. The Saami can claim compensation for lost access, but cannot prevent expropriation or use of the areas for purposes other than herding (§§26-34). In other words, the Saami can pursue herding, hunting, and fishing as long as the State allows them to do so.

The limitation of *sameby* membership to full-time herders and their descendants comes from the earlier reindeer herding law of 1928, discussed below. New to the 1971 law were rationalization measures such as a wage system and herding fee and, significantly, a weighted

voting system giving more power to the Saami with larger herds (§59; Beach 1981). Together, the limitation of *sameby* membership, the requirement that the *sameby* undertake only activities related to herding, the weighted voting system, and the post-World War II development of industries in the North have driven small herders from the *sameby* and away from the associated privileges of membership, including hunting and fishing. What is more, their children and grandchildren become excluded from the privileges of *sameby* membership. As Beach notes,

> Today in Sweden, there are only about 900 active reindeer herders, with families approximately 3,000 people who can, to various degrees, exercise special Saami resource rights. The State's rationalization policy for the reindeer industry advocates that the number of active herders be reduced by at least 30%. Economic pressures take their toll. Herders diminish, and in time most Saami will not only be hindered in the exercise of their Native rights, they will no longer be eligible for them at all (Beach 1986: 65).

With the Saami population in Sweden estimated at 15,000-20,000, this means only a minority within a minority can practice age-old hunting and fishing rights. The "phase-out mechanism" described by Beach (1986) is one of the most destructive forces in Saami society today. First, it has split the Saami into a privileged minority class of *sameby* members and a disenfranchised majority (Ruong 1982; Cramér 1990). Second, it has hardened many Swedes to the ethnic claims of the Saami by giving the impression that the Saami already have numerous privileges and simply want more—at the expense of Swedish society (Justitiedepartementet Ds 1989: 72, *passim*). Third, the Reindeer Herding Act of 1971 has been taken as an authoritative statement of the content of Saami rights, when in fact the regulation of reindeer herding merely reflected the State's priorities for colonization and economic development in the North, as a brief history of herding regulation demonstrates (see also Cramér and Prawitz 1970; Beach 1981; Ruong 1982).

The first reindeer herding law in Sweden, passed in 1886,[1] was built on previously held assumptions that the Saami could practice their herding, hunting, and fishing undisturbed by Swedish and Finnish colonists, sent North as homesteading agriculturalists. The primary purpose of the law was to regulate conflicts between reindeer herders and farmers (Riksdagen 1886). Farmers complained that the Saami let their reindeer roam anywhere, and that the reindeer trampled their fields and ruined their hay. Saami complained that the

farmers were catching all the fish, shooting reindeer, and burning the forests to clear the land and thereby destroying the tree lichens vital to the reindeer diet during winter (Campbell 1948). To prevent such conflicts, the Swedish government instituted a collective responsibility system and organizational structure for the Saami to promote more intensive herding methods and establish liability for damages (Beach 1981).

The 1886 law divided the Saami into villages (*lappbyar*) and damage compensation areas. All Saami, whether or not they participated in herding, would be registered in a village (Beach 1992; Korsmo 1992). Overseeing the village herding practices was a sheriff (*lappfogde*). The damage compensation areas were used to establish the liability of those Saami who used the areas for reindeer that had damaged crops or meadows, when the reindeer's owner could not be determined. The 1898 amendments to the law required each village to submit a list of members and the number of reindeer owned by each member to the county administration; if the damage compensation area boundaries differed from the village boundaries, special lists covering the damage compensation areas were also required (Cramér and Prawitz 1970: 136-152). Apparently, the boundaries of the villages and the damage compensation areas eventually became one and the same (Beach 1981: 79-80).

The inscription of the Saami into the village and damage compensation units aimed toward inclusivity. The framers reasoned, the more encompassing the membership of the village, the greater the pressure for more intensive, careful herding methods and the less likely the mischief caused by unrestrained reindeer (Riksdagen, Protokoll, Första Kammaren 1886: 23). In other words, all Saami in the area, regardless of the degree of involvement in herding, would be registered.

This strategy for controlling reindeer herding in the north shifted, in the 1920s, from inclusive Saami membership in the villages to exclusive membership rules for two major reasons. First, relations with Norway had deteriorated during the process leading to and immediately after the achievement of full Norwegian sovereignty in 1905. The Swedish government gave in to Norwegian demands to reduce Swedish Saami opportunities to graze their reindeer across the border in Norwegian territory. As a result, northern Swedish reindeer pasture became overgrazed, and Swedish officials resorted to forced slaughter. Saami families who refused to comply with the policy were moved south (Marainen 1984).

Second, Sweden's own colonization and development of the North

helped to decrease the significance of reindeer herding in comparison with other growing industries. Once seen as useful suppliers of meat and dairy products to homesteaders who found themselves alone in a remote wilderness, the Saami reindeer herders now contributed little to a northern economy based on timber, mining, and hydroelectricity. Railroad construction had made Lapland's interior accessible by the early 1900s. Reindeer herding simply got in the way.

Accordingly, the decreasing area of pasture and herding's shrinking role in the northern economy led the Swedish government to attempt to limit reindeer herding through the reduction of herd and herder populations (Socialdepartementet SOU 1927: 25; Ruong 1982: 178-188). The 1928 law, a significant break with previous laws of 1886 and 1898, limited membership in the village (*lappby*) to herders and their families (Cramér and Prawitz 1970: 156, §8). Saami possessed the reindeer herding right by virtue of having had a parent or grandparent active in herding as their main occupation (§1). Only those Saami holding the reindeer herding right could exercise hunting and fishing rights (§55). If a Saami who had the reindeer herding right either left the herding occupation for something else or physically left the village, he would lose membership and thereby the ability to practice the right (Cramér and Prawitz 1970: 45-48).

During the 1960s, the commission in charge of revising the herding law (*1964 års rennäringssakkunniga*) retained the emphasis on exclusivity to reduce the number of herders, distribute the work more equally, and allow each herder to achieve a higher standard of living. The commission reasoned that the problems of poverty and small-scale, labor-intensive family operations could be solved by rationalization in the manner of agricultural reforms taken during the 1950s (Jordbruksdepartementet SOU 1968: 16). Hence, the commission focused on reorganizing the Saami village into a producer association, proposed other structural measures to improve the efficiency of reindeer herding and, much to the disappointment of the Saami, did not address property rights. The result, the currently applicable Reindeer Herding Act of 1971, remains the only statutory statement devoted to Saami resource rights.

Version Two: Holders of Time Immemorial Rights

In contrast to the view that Saami hold special privileges granted and regulated by the State through legislation such as the Reindeer Herding Act of 1971, another perspective on Saami rights maintains that the Saami possess time immemorial rights to hunt, fish, and

herd, and that these rights exist regardless of State pronouncements. The state may regulate the exercise of Saami rights from time to time, but may not diminish them except by legal means of expropriation. This perspective emerged from the major Saami interest group in Sweden, the National Association of Swedish Saami (*Svenska Samernas Riksförbund*), during the formulation of the 1971 Reindeer Herding Act, but won little credence among the commission or the government. Instead, partly due to lack of success in the legislative arena, the Saami made their case in court.

In 1981, the result of their efforts, a lengthy Supreme Court opinion in the *Taxed Mountains* case (*Skattefjällsmålet*), affirmed the Saami did indeed have a "firm right of use" that constituted a type of property right (Nytt Juridiskt Arkiv 1981: 1). The case set a record in the Swedish Supreme Court for time spent and pages written. Saami villages in Jämtland, near the Norwegian border, sued the Swedish state for a declaratory judgment recognizing Saami ownership of the mountainous areas the Saami had occupied for centuries. The Saami based their claim on occupation and specification through time immemorial, in addition to cadastral surveys made by the State for the purposes of dividing up taxable properties. Indeed, the Saami argued that the taxes paid by their ancestors to the State during the seventeenth and eighteenth centuries established Saami ownership just as tax-paying homesteaders acquired title to land through generations of exclusive use and cultivation (NJA 1981: 1, 208).

The State countered by saying that the Saami never had ownership rights to the taxed mountains, but only use of lands belonging to the Crown. Based on the mountains of historical evidence brought by both parties, the Supreme Court did not recognize outright Saami ownership of the taxed mountains, but instead established that the Saami possessed a "firm right of use" equivalent to a property right. In other words, the Saami enjoyed the same protection as property owners in cases of expropriation. Additionally, the Court ruled that, during the seventeenth century, it was quite possible for the Saami to have had land rights corresponding to homesteaders' rights, even though they did not cultivate. Prior to *Skattefjällsdomen*, cultivation, a form of specification, was accepted as the standard method for acquiring title. Specification, one of the bases of the Saami claim, meant that the occupant's use of land had increased its value. Some Saami did cultivate as homesteaders. But where they did not, state recognition of their hunting, fishing, and herding way of life in the taxed-mountains region combined with the long-standing history of Saami occupation led the Supreme Court to accept the possibility that

"nomads" who hunted, fished, gathered, and herded could indeed acquire ownership rights. To prove ownership, though, the Saami had to demonstrate that their occupation was continual, intensive, within boundaries, and in the main undisturbed by outsiders. Such conditions probably prevailed further north, according to the Court, but the documentary evidence from the Jämtland region was ambiguous (NJA 1981: 190-91).

The "firm right of use" the Court did find for the Jämtland Saami constituted a property right based on time immemorial prescription (*urminnes hävd* in Swedish, Latin *praescripto immemorialis*) and was therefore stronger than use based on contract or permission. While the Supreme Court gave little comment on the 1971 Reindeer Herding Act, its decision in *Skattefjälls* threw the distinctions between herder and non-herder, village member and non-member, privileged and non-privileged into question. If the Saami possessed time immemorial rights, then it did not matter whether one were an official member of a Saami village or a full-time reindeer herder. A Saami living in Stockholm could not easily claim a special property right further north, but a Saami living in the core area, who had been phased out of village membership, certainly could.

Further research by, among others, Hyvärinen (1989) and Korpijaakko (1985a&b) shed more light on the evolution of Saami property rights. It seemed that, throughout the 1600s, Saami property rights evolved parallel to those of other taxpayers in Sweden-Finland. Property possession in both Sweden-Finland and Denmark-Norway was traditionally accepted as a prerequisite to tax liability (Sandvik 1980; Hyvärinen 1989). The Saami property right entailed use of land and water in traditional Saami ways: hunting, fishing, gathering, and reindeer herding. Swedish courts considered these "Lapp" occupations, yet gave them the same legal status of non-Saami occupations (e.g., livestock breeding and crop cultivation) (Baer, in Beach and Swedish-MRG 1989). A Saami who could prove long-standing customary and traditional use had the right to exclude outsiders from the property under use (Korpijaakko 1985a).

In Sweden-Finland, the Saami property right fell at first to individual households but, by the late 1600s, the collective village replaced the household tax system (Hultblad 1968; Beach 1981). The official 1695 tax reform collectivized the Saami tax based on the number of households per village, but courts continued to recognize individual property rights after the 1695 reform. The transition from individual to collective property taxation was again based on Saami land-use patterns. The Saami recognized both individual and collec-

tive use. Fishing sites were more likely to be held by individual families, while certain hunting and herding areas could be collective, used by several families (Korpijaakko 1985b: 64-80, 128-135).

Despite the Court's decision in *Skattefjällsmålet* and the research establishing the historical basis of Saami property rights, many questions remained. If Saami property rights had developed parallel to tax-paying homesteaders' rights in the seventeenth and eighteenth centuries, what had happened during the nineteenth century to erode those rights? Were Saami rights individual, collective, or both? If they varied from region to region, what factors contributed to the variance? These questions seemed ideally suited for study by an ad hoc commission appointed by the Swedish government in response to Saami demands.

The Saami initially interpreted the *Skattefjälls* decision as a defeat, since they had not been awarded full title. Exhausted from a fifteen-year legal battle, they shifted their strategy from litigation to consultation. In September 1981, the National Association of Swedish Saami requested the creation of a commission to investigate the nature of Saami rights to land and water and to draft legislation to protect Saami livelihoods (Svenska Samernas Riksförbund 1981). At the same time, another Saami interest group, Same-Ätnam, requested a commission to propose a Saami "parliament" in Sweden, a representative body elected by Swedish Saami (Same-Ätnam 1981). The requests led to the creation of the Saami Rights Commission, a group of individuals appointed to launch a public inquiry and attempt to put the implications of *Skattefjällsmålet* into statutory law.

Attempts To Reconcile Rights with Privilege

The Swedish Saami Rights Commission suffered from personal and philosophical disagreements, a lack of enthusiasm on the part of the central government, and a great degree of skepticism on the part of the Swedish Saami (Korsmo 1992). The very directives for the Commission, written first under the center coalition of Thorbjörn Fälldin and again under the Social Democrats who returned to power in late 1982, seemed to bind any proposals regarding Saami land and water rights to the existing Reindeer Herding Act. The directives explicitly denied the power of the Commission to give the Saami a veto right over proposed land-use measures in Saami areas, such as logging, hydroelectric dams, or tourist facilities. Moreover, the Commission was to avoid giving any constitutionally based powers of decision-making to the Saami (SOU 1989: 41, 416-417). Instead, the

tasks of the commission included an overview of reindeer herding law, a feasibility study of a Saami "parliament," and a proposal to enhance the Saami languages.

No doubt the Commission could have interpreted its mandate in a wider sense, taking advantage of existing historical research and proposing a complete overhaul of Swedish Saami policy (Beach and Swedish-MRG 1989). But the Chairman sensed there was little political support for such an approach and instead emphasized the goal of practical policy recommendations (Wängberg 1990a). However, the inherent conflict between the two versions of Saami ethnicity, described above, made even the most unimaginative practical proposals difficult to achieve. The two areas impinging on Saami rights to land and water, reindeer herding and Saami fishing rights, will be considered in turn.

Land Use Conflicts and the Reindeer Herding Right

The Saami Rights Commission surveyed existing law and found that the Saami had little protection for hunting, fishing, and herding rights. The Reindeer Herding Act of 1971, described above, allowed the goverment to prohibit herding in areas required for other purposes, an open-ended paragraph that referred to expropriation law (and the duty to pay compensation), but did not bind the government to it (§26). Another section (§30) prohibited anyone who owned or used areas in the "year-round" reindeer pasture lands from changing their use patterns in such a way as to cause considerable inconvenience (*avsevärd olägenhet*) for the conduct of reindeer herding.[2] Similarly, the State could issue permits (e.g., hunting and fishing) on State lands used by the Saami, if the permitted activities did not inconvenience herding (§32).

The State, in other words, maintained a great degree of flexibility in determining land and water use in the North, leading the National Association of Swedish Saami to demand a veto right, or at least the power of delay, over resource-use decisions in Saami-occupied areas. The Chairman and the Secretariat of the Commission sympathized with the Saami position and attempted to incorporate a decision-making procedure into existing law to give the Saami guaranteed input (Samerättsutredningen 1987).

According to the National Association of Swedish Saami, logging was one of the activities most destructive to reindeer herding. Accordingly, the Commission focused on the timber industry, a vital source of employment in the North and an important export for

Sweden. The net export value of the timber industry counted for about 5 percent of the total GNP and 20 percent of the country's total export income during the 1980s (Skogsstatistisk Årsbok 1990). Taking on the timber industry, then, in defense of reindeer herding, the Commission proposed a system of mandatory negotiations with the affected Saami village for *any* planned exploitation in year-round pasture and large-scale logging operations in the winter pasture areas. If consultation failed to produce an agreement satisfactory to the Saami village, the Saami could appeal to the to-be-created Saami Parliament. The Saami Parliament, in turn, could recommend to the appropriate agency not to approve the logging operation (Samerättsutredningen 1987).

A far cry from a veto, even the proposed mandatory participation of the Saami in decision-making drew sharp criticism from logging interests and local land-owners. The members of parliament on the Commission, two Social Democrats and one Center party representative, refused to support the plan, and the Commission secretaries went back to the drawing board. As a result, the Commisson's final proposal for land-use conflicts and reindeer herding, published in 1989, incorporated mandatory consultation with the Saami village, but permitted logging operations to proceed in the absence of approval by the Saami village. Consultation, in other words, was a mere formality (SOU 1989: 41).

Saami Fishing Rights

Despite the lack of success in strengthening the legal status of the Saami village in land-use decisions, the Commission did have a chance to reconcile the conflict between the reindeer-herding privilege and Saami property rights. First, the Commission attempted to incorporate the implications of *Skattefjälls* into existing law. Second, the Commission took on the problem of the Saami who had been excluded from village membership, but continued to practice (precariously and sometimes illegally) their age-old fishing rights. Unfortunately, the Commission's approach to the two problems created a confused Version Two and enshrined Version One.

First, to implement the Supreme Court decision in *Skattefjälls*, the Commission proposed revising the Reindeer Herding Act to state that (all) the Saami possessed a time immemorial right to use land and water for their needs (reindeer herding, hunting, and fishing) and that this "reindeer herding" right constituted a type of property right (SOU 1989: 41, 90). Nevertheless, the Commission left intact the

provisions for restricting Saami village membership to full-time herders and their families, as well as the requirement of membership (and therefore full-time herding status) to practice hunting and fishing rights (SOU 1989: 41, 91-92). In other words, all Saami possessed time immemorial rights to land and water (a dubious statement), but, since the passage of the 1928 reindeer herding law, only a few were allowed to practice their rights.

The absurdity of such a position become clear when the Commission took up the problem of "fisher-Saami." One of the Social Democrat members of the Commission represented a district in northern Sweden where a small group of Saami made part of their living from fishing but did not have village membership (Häll 1990). Their legal situation was tenuous, for they relied on the State for permission to continue their livelihood. (Neither the Saami village nor individual Saami village members had the right, according to the Reindeer Herding Act, to grant their hunting and fishing rights to others.) By the 1980s, the fisher-Saami numbered perhaps 100, in part because dams and reservoirs had forced fisher-Saami from their homes along the river systems. Because they were not official members of the Saami villages, the fisher-Saami seldom received any compensation for their losses; without membership, they had no legal standing (Beach 1992).

As a side issue, then, the Commission examined the plight of the fisher-Saami, considering three possible solutions. First, open membership in the Saami village to non-herders. But the Commission rejected this option, since opening the Saami village to fisher-Saami would require changing the purpose and organization of the village as a producer association for reindeer products. Second, grant the fisher-Saami free fishing licenses for life. But the Commission rejected this, too, since many of them already had virtually free licences, and such a measure would do nothing to give the fisher-Saami legal status. Third, give the county authority to grant fishing rights to those fisher-Saami who lived in a Saami village area and who depended on fishing for part of their livelihood. The Commission preferred this option, since it would raise the legal status of fisher-Saami who depended on the income (Samerättsutredningen SOU 1990: 91, 192-196).

While local hunting and fishing groups in the North opposed the proposal and wondered whether the Saami had any time immemorial fishing rights at all, others criticized the proposal with avoiding the issue of *rights* and substituting *need* as a criterion for privilege. Beach (1992) and the then Swedish Ombudsman against Ethnic Discrimin-

ation, Peter Nobel, faulted the Commission's proposal for dealing with the present needs of a few Saami rather than the rights of the majority of Saami who were not members of a Saami village (Justitiedepartementet 1991: 81-158). Beach (1992) and a group of Saami who were not village members but lived in Saami core areas (*Landsförbundet Svenska Samer*, or LSS) proposed instead a reorganization of the Saami village, based on history and tradition and in keeping with time immemorial rights, where the reindeer-herders would still constitute a Saami village as a sub-unit of the wider Saami community (*samemenighet*). Members of the community who had time immemorial hunting and fishing rights would be able to exercise them, but would not infringe on the sub-unit's reindeer-herding operations. Reindeer herders would belong to the sub-unit as well as the wider community, and the wider Saami community, not the Swedish state, would regulate access to natural resources in Saami territory (Beach 1992; Landsförbundet Svenska Samer 1990).

Needless to say, there was little evidence of enthusiasm for this idea among the civil servants specializing in Saami legislation, the members of the Saami Rights Commission, or representatives of the newly installed Conservative government. Most thought it unrealistic, and some sensed that the major Saami organization representing herders' interests, the National Association of Swedish Saami, would reject it outright (Börjesson 1990b; Eliason 1990b; Wängberg 1990b; Dau 1991; Örnstedt 1991).

In sum, then, the Saami Rights Commission offered minor changes to the existing Reindeer Herding Act of 1971, but did not overturn the idea that the Saami possess privileged access to natural resources by virtue of State recognition. Economic interests, such as the timber industry, as well as local land-owners in the North, fought attempts to empower the Saami villages. The results of such opposition can be seen in the latest legislation of December 1992, a document which not only rejects the mandatory consultation suggested by the Saami Rights Commission, but also deletes the equation of Saami rights with a type of property right and ignores the proposed provisions for the fisher-Saami (Regeringens proposition 1992/93: 32).

In a political system described as reformist and consensual, the recent efforts to revise Saami resource policy evidence instead stagnation and confrontation (Castles 1976; Heclo and Madsen 1987). In a comprehensive welfare state supporting notions of equal results and solidarity, capital and individual property owners blocked initiatives toward enhanced minority rights (Therbjörn 1986; Sainsbury 1991). The Saami, throughout the hundred years of

reindeer-herding legislation, have been made into a producer group, but one that has become inessential to the economy. In fact, the reindeer-herding privilege seems wildly out of proportion to the number of Saami supported by herding and the role herding plays in the northern economy.

Efforts at the national level to reconcile Version One with Version Two, then, have ended up supporting the notion of privilege and therefore drawing the ire of both Saami and non-Saami. As Sweden becomes even more integrated into the international community through organizations such as the European Community, will the transnational arena become more salient to ethnoterritorial minority concerns? Certainly the Swedish Saami have already sought redress at the international levels. The following section will assess the outcome of these efforts.

International Law

During the past decade, indigenous groups like the Saami have become more active at the international level. They have participated in non-governmental organizations such as the Nordic Saami Council, the Inuit Circumpolar Conference, the World Council of Indigenous Peoples, and in fora such as the United Nations Working Group on Indigenous Populations. As well, individuals and groups have used human rights instruments to forward claims against nation-states.

A Swedish Saami, Ivan Kitok, took his complaint to the United Nations Human Rights Committee. Kitok had been a reindeer herder and active member of the Sörkaitum Saami village. Due to declining fortunes, he left herding for several years and worked for state agencies. When he decided to return to herding, he asked to re-enter his old Saami village as a member, but the Saami village turned him down. The weighted voting system, whereby the large herders dominate, worked against Kitok (Beach 1985: 22-23).

After his failure to re-enter the Sörkaitum village, Kitok appealed to the United Nations Human Rights Committee, claiming that the Swedish State's exclusion of most non-herders from village membership violated Article 27 of the International Covenant on Civil and Political Rights, which guarantees members of ethnic minorities the right to enjoy their own culture. While the Human Rights Committee did not find for Kitok, it did point out that the principle of exclusion operating in the case must be shown to be reasonable and necessary for a minority's well-being.[3]

In a similar challenge to the Reindeer Herding Act, Tage Östergen,

Per Martin Israelsson, and Tomas Stångberg took their case to the Council of Europe's Human Rights Commission in 1984.[4] Östergren, a Saami with ancestral ties to the land of the Vapsten Saami village, nonetheless was not an official member of Vapsten under the Reindeer Herding Act of 1971. He regarded himself as a member, however, and went moose hunting with his companions, Israelsson and Stångberg, to challenge existing law (Beach 1985). While Israelsson and Stångberg were acquitted, Östergren, who had shot four moose, was convicted of illegal hunting and served one month in prison. The Court of Appeal agreed with the district court that the defendents indeed had ancestral rights, but they were not allowed to exercise them under the Reindeer Herding Act of 1971.[5] In other words, the court found Östergren in violation of the law, rather than the law in violation of Östergren's rights.

After the Supreme Court denied review, Östergren and his legal counsel, former ombudsman and legal counsel to the National Association of Swedish Saami, Tomas Cramér, decided to appeal to the European Court of Human Rights. An appeal to the Court is a two-step process. Individuals, groups, and states bring complaints before the European Commission of Human Rights, and the Commission investigates the matter thoroughly, perhaps even reaching a resolution, before deciding on its admissibility to the Court.[6]

Cramér based the appeal to the European Commission on procedural inequities experienced by Östergren, Israelsson, and Stångberg during the trial, and the discriminatory nature of the Swedish policy embodied in the Reindeer Herding Act of 1971 (Articles 6 and 14 of the European Convention on Human Rights). First of all, the lower court had appointed a public defender for the Saami, but he knew little of the complex history of Vapsten. One of the major reasons Östergren, Israelsson, and Stångberg had been excluded from membership in the Vapsten Saami village had been the forced relocation of northern Saami and their herds from Karesuando to the Vapsten area in the 1920s. Not only did the newcomers bring more pressure to bear on the resources of the area, but cultural and linguistic differences between the northern and southern Saami groups caused antagonism between the indigenous Saami and the newly arrived Saami (Beach 1985: 25-26). Many local herders were forced to abandon herding; therefore, they and their descendants lost village membership and the "reindeer herding right," with associated hunting and fishing rights. This complex history sheds light on Östergren's dilemma and on the ongoing hostility between the current members of Vapsten and the local Saami with ancestral rights

to Vapsten territory, but few people understood the significance.

The public defender deferred to Tomas Cramér who had represented the Saami since 1962. Cramér asked to be named public defender, but the Appeals Court refused to do so, since the defendants had already consulted him on a private basis. Additionally, the Appeals Court deemed irrelevant the evidence on the northern relocations to Vapsten and the ancestral, time immemorial rights of the defendants.[7]

According to Cramér, these procedural oversights during appeal not only left intact the lower court's ruling against Östergren, but in effect condemned him to a "life sentence which—without expropriation—denies him his time immemorial right regardless of Saami village membership" (Cramér 1991). The European Commission did not see it that way, reasoning that fines and one month in prison did not constitute a severe sentence. The Commission ruled Östergren's case inadmissable to the European Court of Human Rights, finding that the procedural inequities alleged under Article 6 of the Convention[8] were largely due to the defendants' own conduct.

The rule of inadmissability illustrates a catch-22 of international law. According to the Court, the appellant bringing the case must have exhausted all legal remedies in his or her home country, but at the same time, the rules require the appellant to bring suit within six months of the act in question. Therefore, in order to satisfy the rules of the court, Östergren needed to have raised his complaint to the Court six months after the enactment of the 1971 Reindeer Herding Act. Had he done so, however, he would not have exhausted the domestic legal remedies, particularly since the *Skattefjälls* case dragged on from 1966 to 1981.

Unfortunately, as the Kitok and Östergren cases show, the Saami are caught in a double bind. In their own country, they face a system of law, regulations, and implementing agencies set up for the express purpose of overseeing and protecting the conduct of reindeer herding, hunting, and fishing. This system is based on the assumption of limited carrying capacity, so that any suggestion of extending the sphere of rights-holders strikes fear in anyone who competes for and/or regulates access to a shrinking resource base. Outside Scandinavia, the degree of harm to the Saami appears relatively small. After all, Kitok (like others, both Saami and Swede, living in the North) could legally *own* reindeer, as long as they were kept in a village-member's care and he did not herd them himself. Östergren spent only one month in prison. Additionally, cases like Kitok's and Östergren's are probably riddled with the personal and familial animosities of local disputes. What possible relevance could human

rights principles and norms have?

While the two cases have left intact the restrictive provisions of the Reindeer Herding Act of 1971, another international challenge has pitted the Swedish government against the Saami. In 1989, the International Labour Conference adopted the Indigenous and Tribal Populations Convention (ILO Convention No. 169),[9] revising its earlier Indigenous and Tribal Populations Convention (No. 107) of 1957. The new convention provides for the cultural autonomy of indigenous populations and their participation in decision-making. It also encourages governments to safeguard rights to natural resources. Norway and several other states have ratified the convention, but the Swedish government hesitates to do so, primarily because of Article 14 which states:

> 1. 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....
>
> 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights to ownership and possession.

During the negotiations leading to the convention, the Swedish delegate urged the term "use" rather than "ownership and possession" (Arbetsmarknadsdepartementet 1989). Needless to say, the negotiations on this and other points were highly contentious (Swepston, n.d.). Both the outgoing Social Democratic government and the new Conservative government in Sweden recommended against ratification because of the perceived problems with Article 14 (Proposition 1992/93: 32, 57-58). Yet there is no question that, due to Norway's ratification, the Swedish government will be subject to continual pressure to make Swedish law comply with the terms of the ILO Convention.

Analysis and Conclusion

As an economic interest and occupational category, the Saami in Sweden have been forced to surrender to more vital national industries. With respect to logging in particular, the Saami are relatively powerless to stop infringement of their rights (Bengtsson

1990). The lawyers on the Saami Rights Commission recognized this and attempted to add protections to the Reindeer Herding Act. But because they were simply firming up a privilege, they found themselves in a logical bind: how could all Saami possess rights to land and water, while only a few had the privilege of exercising them? Furthermore, from a practical standpoint, the Chairman and Secretariat had little political support for their ideas.

Perhaps it is too late to overhaul the Reindeer Herding Act and replace Version One with Version Two. Not even the most enthusiastic legal historian would call for another lawsuit like the immense, time-consuming *Taxed Mountains* case, as Supreme Court Justice Bertil Bengtsson (1990: 203) writes. So far, the only step toward overcoming the transformation of a civil right into an occupational privilege for a few is through the creation of the Saami Assembly in Sweden. The Saami in both Norway and Finland have representative assemblies that have at least an advisory role in policy-making (Tonstad 1987; Sillanpaa 1992).

Originally, the Saami Rights Commission called for the Saami Assembly to function as participant in resource-use decisions as they affected the Saami. To give the Assembly some authority, then, they proposed to organize it as a state agency (*statlig myndighet*). But at the same time, the Assembly would be an elected body representing Swedish Saami, a unique construction in Swedish law. As the politicians on the Commission pared down the role of the Saami in decision-making, there was less reason to constitute the Saami Assembly as a state agency. Yet the Commission retained the state-agency status of the proposed Saami Assembly in its published report, and both government proposals by the Social Democrats and the Conservative coalition followed suit (Regeringens propositionen 1992/93: 32). As the government noted its legislative proposal, the Saami Assembly is not designed as an instrument of self-determination, nor should it compete with the Swedish Parliament or local governments (Proposition 1992/93: 32, 35).

Critics argued that the Saami Assembly should be modeled on more independent organizations, such as the municipal assemblies (*kommunfullmäktige*) or interest groups that have been granted a certain amount of authority, such as the Swedish Lawyers' Association (*Sveriges Advokatsamfund*). In that way, the Saami Assembly could act independently of the State (Ombudsmannen 1989: 17-18; Landsförbundet Svenska Samer 1989: 26-27). As it stands now, the proposed Saami Assembly will be yet another official *remissinstans*, or source of input into policy decisions.

Ironically, the government responded to such criticism by pointing out the constitutional impossibility of creating such an unprecedented authority (Riksdagens snabbprotokoll 1992/93: 45, p. 18). First, the government rejected the Saami Rights Commission's idea of including special constitutional recognition for the Saami, then the constitution becomes a barrier to any decision-making authority for the Saami Assembly.

Another problem with the proposed Saami Assembly has to do with the criteria for electors. Sweden has no official definition of Saami ethnicity, so the Saami Rights Commission had to come up with criteria for eligible voters. The Commission proposed three: (1) a Saami language as the voter's first language; (2) a Saami language as the first language of the elector's parents or grandparents; or (3) the previous registration of the elector's parents for a Saami Assembly election (Samerättsutredning SOU 1989: 41). The most recent legislation mirrors these criteria, except substitutes "home" language for "first" language (Prop 1992/93: 32, 35). Because of past assimilation policies, many Saami no longer speak their own language at home; it is possible that the previous two generations also lost their language. The implication of the third criterion is that, over time, the number of qualified Saami electors will decrease. In the first election for Norway's Saami Assembly, turnout was low. It is almost certain that less than 100 percent of the eligible Swedish Saami will participate in the election. The application of these three criteria, then, constitutes yet another "phase-out" mechanism (Beach and Swedish-MRG 1989; Ombudsmannen 1989: 18-19).

Despite its status as a state agency and the limited criteria for electors, the Saami Agency represents the only opportunity for moving away from an occupational privilege to a notion of ethnic rights, since Saami from all areas of the country will be represented. Although its influence is bound to be limited at first, the Saami Assembly will at least enjoy a certain legitimacy at home and abroad.[10]

This article has shown that the two mechanisms of constitutional change and international pressure have achieved only minimum results for the Saami of Sweden. Despite the good-faith efforts of the Saami Rights Commission, the Saami have been forced to compete as an economic interest battling other, more vital interests such as the logging industry. Given the current official definition of the Saami as privileged reindeer herders, it is understandable that few are willing to listen to talk of Saami rights.

The international arena, too, offers a limited opportunity for

change. The United Nations declared 1993 the year of indigenous peoples, in recognition of those distinct societies that have never had a choice about the states in which they live (Barsh 1993). Yet this decision may meet with skepticism and indifference when newspapers report the horror and suffering caused by nationalism and interethnic strife in places like the former Yugoslavia. The international arena is, after all, composed of nation-states whose governments are more concerned about problems of macroeconomics and national security than the status of a tiny minority.

The challenge for the Saami of Sweden is to use the limited powers of the new Saami Assembly to transform their own relationship to the state. This promises to be an exciting, if time-consuming, chapter in Saami history.

Fae L. Korsmo is a professor in the Department of Political Science and Justice at the University of Alaska Fairbanks.

Acknowledgements

The author would like to thank the American-Scandinavian Foundation for its generous financial support and the reviewers for their helpful comments and suggestions.

Endnotes

1. "Lag angående de svenska Lapparnas rätt till renbete i Sverige," in Cramér and Prawitz 1970: 129-135.

2. The distinction between year-round and winter pasture is important for a legal reason. During the typical mountain-style herding cycle, the reindeer move from the inland mountains toward the coast to the forested lowlands for the winter. Usually the herds are broken up into smaller groups for winter grazing, so they are more easily managed. Because much of Lapland's settlement and economic development has occurred in the winter pastures, these tend to be the "bottleneck" for a herder. In addition, much of the winter lands are privately owned, rather than State-owned. In the year-round pastures, high in the mountains, above the treeline, the reindeer are less hindered by civilization. The Saami have had less competition for the mountainous areas, or year-round pastures, and their rights are stronger there (Bengtsson 1987, 1990).

3. *Kitok v. Sweden*, CCPR/C/33/D/197/1985, 10 August 1988. See also

Diskrimineringsombudsmannen 1989: 10.

4. "Application Made by the Saami to the Secretary General, Council of Europe, Strasbourg," Tomas Cramér, counsel, 20 October 1984.

5. Dom nr DB 1138, Mål nr B 243/83, Hovrätten för Övre Norrland, 1984-12-19.

6. "Den Europeiska Konventionen om de mänskliga rättigheterna: Översättning av konventions- och protokollstexterna." Stockholm: Institut för offentlig och internationell rätt, 1983.

7. European Commission of Human Rights, "Decision as to the Admissibility of Application No. 13572/88 by Tage Östergren and others against Sweden," 1 March 1991.

8. Article 6, paragraph 3 (c) and (d) provides:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him...." *Ibid.*, p. 5.

9. "Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries," adopted by the Conference at its seventy-sixth session, Geneva, 27 June 1989.

10. Norway's Saami Parliament has established a certain legitimacy by demanding regional fishing rights for all residents of northern Norway, not just the Saami. *Norway Times*, 15 October 1992, p. 10.

References

Arbetsmarknadsdepartementet. 1989. *ILO: Internationella arbetskonferensens 76:e möte*. Stockholm.

Barsh, Russel. 1993. Speech delivered before Rural Student Services, University of Alaska Fairbanks, 9 February.

Beach, Hugh. 1981. *Reindeer Herd-Management in Transition*. Uppsala Studies in Cultural Anthropology. Stockholm: Almqvist & Wiksell.

--------. 1985. "Moose Poaching or Native Minority Right: A Struggle for Definition in Swedish Saamiland." *Nord nytt* 26:17-38.

--------. 1986. "The Phase-Out Clause in Minority Rights Legislation: A Comparison of Swedish and Alaskan Methods." *Nordic Journal of International Law* 55: 64-67.

--------. 1992. "Den svenska samepolitiken." *Invandrare och Minoriteter*, ed. D. Schwarz. Nr. 2. April.

Beach, Hugh and Swedish MRG. 1989. *A Summary of MRG's Second Discussion Day Concerning the Saami*. Stockholm: Swedish Minority Rights Group.

Bengtsson, Bertil. 1987. *Statsmakten och äganderätten*. Stockholm: SNS Förlag.

--------. 1990. "Samernas rätt och statsmakten." *Nordisk Administrativt Tidsskrift* 71 (2): 195-208.

Castles, Frances G. 1976. "Policy Innovation and Institutional Stability in Sweden." *British Journal of Political Science* 6: 203-216.

Cramér, Tomas and Gunnar Prawitz. 1970. *Studier i renbeteslagstiftning*. Stockholm: P.A. Norstedt & Söners förlag.

Dau, Hans. 1991. Interview with author. Stockholm, 11 December.

Eliason, Marianne. 1990a. Interview with author. Stockholm, 22 February.

--------. 1990b. Interview with author. Stockholm, 5 September.

Häll, Karl-Erik 1990. Interview with author. Gällivare, 24 August.

Heclo, Hugh and Henrik Madsen. 1987. *Policy and Politics in Sweden: Principled Pragmatism*. Philadelphia: Temple University Press.

Heuman, Sigurd. 1990. Telephone interview with author. Stockholm, 27 June.

Hultblad, Filip. 1968. *Övergång från nomadism till agrär bosättning i Jokkmokks socken*. Stockholm: Almqvist & Wiksell/Gebers.

Hyvärinen, Heikki. 1989. "Lapprätten—ett eget samiskt rättssystem?" In *Lappcodicillen av 1751 - Var det Samernas Magna Charta? Diedut*, nr. 1. Guovdageaidnu (Kautokeino): Sami Instituhtta.

Jordbruksdepartementet. 1968. *Renmärkningen i Sverige*. SOU 1968:16. Stockholm.

Korsmo, Fae L. 1992. "Termination or Empowerment? Native Rights and Resource Regimes in Alaska and Swedish Lapland." Ph.D. Dissertation, University of New Mexico.

Korpijaakko, Kaisa. 1985a. *Samerna och jordäganderätten I. Diedut*. Guovdageaidnu (Kautokeino): Sami Instituhtta.

--------. 1985b. *Samerna och jordäganderätten II. Diedut*. Guovdageaidnu (Kautokeino): Sami Instituhtta.

Justitiedepartementet. 1989. *Remissyttranden över Samerättsutredningens betänkanden.* Ds 1989:72. Stockholm.

--------. 1990. *Remissyttranden över Samerättsutredningens slutbetänkande.* Stockholm.

Landsförbundet Svenska Samer. 1990. "Med anledning av promemoria om fiskesamer och andra utövare av traditionella samiska näringar utanför renskötseln."

Marainen, Johannes. 1984. *Förflyttningar i Sapmi.* Umeå: Svenska Samernas Riksförbund.

Nytt Juridiskt Arkiv I. Stockholm: P.A. Norstedt & Söners.

Ombudsmannen mot etnisk diskriminering. 1989. *Remissyttrande över betänkandena SOU 1986:36 och SOU 1989:41.* Stockholm, 20 October.

Örnstedt, Bjarne. 1990a. Interview with author. Stockholm, 1 March.

--------. 1990b. Interview with author, Stockholm, 23 August.

--------. 1991. Interview with author. Stockholm, 12 December.

Regerings proposition 1992/93:32: *Samerna och samisk kultur.*

Riksdagens snabbprotokoll 1992/93:45, Stockholm.

Rudolph, Joseph R. and Robert J. Thompson. 1989. *Ethnoterritorial Politics, Policy, and the Western World.* Boulder, CO: Lynne Rienner.

Ruong, Israel. 1982. *Samerna i historien och nutiden.* Stockholm: BonnierFakta.

Sainsbury, Diane. 1991. "Analyzing Welfare State Variations: The Merits and Limitations of Models Based on Residual-Institutional Distinction." *Scandinavian Political Studies* 14,1: 1-30.

Same-Ätnam. 1981. Letter to the Government of Sweden. Department of Justice D. Nr. 2356-81. Stockholm.

Samerättsutredningen. 1987. "Skyddet för rennäringen— överväganden och förslag." Draft, PM 17. Göteborg, April.

--------. 1989. *Samerätt och sameting.* SOU 1989:41. Justitiedepartementet, Stockholm.

--------. 1990. *Samerätt och samiskt språk.* SOU 1990:91. Justitiedepartementet, Stockholm.

Sillanpaa, Len. 1992. "The Development of Sami Assemblies in Fennoscandia: Toward Aboriginal Self-Government." Ottawa: Department of Indian and Northern Affairs.

Skogsstatistisk årbok 1990. Jönköping: Skogsstyrelsen.

Socialdepartementet. 1927. "Förslag angående de Svenska Lapparnas Rätt till Renbete i Sverige." SOU 1927:25. Stockholm.

Svenska Samernas Riksförbund. 1981. Letter to the Government of Sweden. Department of Justice, D. Nr. 2357-81. Stockholm, 21 September.

Swepston, Lee. n.d. "A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989." Draft.

Tennant, C.C. and M. E. Turpel. 1990. "A Case Study of Indigenous Peoples: Genocide, Ethnocide and Self-Determination." *Nordic Journal of International Law* 59:287-319.

Terbjörn, Göran. 1986. "Neo-Marxist, Pluralist, Corporatist, and Statist Theories in the Welfare State." In *The State in Global Perspective*, Ali Kazancigil, ed. Paris: UNESCO.

Tonstad, Per Lars. 1987. "Norsk samepolitikk etter Altasaka." *Syn og Segn* 3: 195-201.

Wängberg, Hans-Åke. 1990a. Interview with author. Stockholm, 24 January.

--------. 1990b. Interview with author. Stockholm, 4 September.