

Recognition of Indigenous Peoples' Land Rights through Modern Legislation. The Case of the Sami People in Norway

Introduction⁴¹

The Sami are an indigenous people whose land territory, called *Sápmi* in the Sami language, through the drawing of nation state borders was split between four countries; Norway, Sweden, Finland and Russia. In all four countries the Sami have been subject to varying pressure to adopt the majority population's culture, language and livelihood

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activities, and at the same time put their own traditions aside. Rights to land and water in Sápmi have been debated and discussed for half a century. In this article I will limit myself to the conditions in Norway, which is home to the majority of the Sami people. Finnmark is the northernmost county of Norway and a central part of Sápmi.

In this article we shall look into the reasons why the Sami people's use of land did not lead to legal recognition or right of ownership until present. Thereupon we will discuss whether the Norwegian state, through adopting the Finnmark Act⁴² and transferring ownership, might be able to rectify the consequences of this long-lasting lack of recognition of Sami rights, and make a road map for property rights and real empowerment.

Historical development of the right to land in Sápmi

The development that led to Finnmark becoming part of Norway

The central parts of *Sápmi*, or the Sami land, were the last territories to be incorporated into Norway. Whilst Norway as a state is considered to have been established through the unification of the country by Harald Fairhair [Hårfagre] in AD 872, what today constitutes the county of Finnmark was not fully subjected to Norwegian sovereignty until almost 1000 years later.

We can say that Denmark-Norway got a sole jurisdiction over coastal Finnmark after the Kalmar War in 1613. All the way up until the boarder between Norway and Sweden was settled in 1751, Interior Finnmark remained a common area, where Swedish jurisdiction was largely executed. With Russia, the border was not settled before 1826.

42 Act of 17 June, 2005, No. 85, concerning legal relations and management of land and natural resources in the county of Finnmark.

In 1775, the state started meting out land to the county's population.⁴³ This has at times been viewed as the foundation for private ownership in Finnmark, and may be taken to be the start of the land sale regime, which was used to manage land in Finnmark all the way up to 2006.

The State Land Doctrine

Despite the fact that parts of Finnmark did not fully become Norwegian territory until 1826, the view quickly developed, that the Crown or the State owned all unsold land in Finnmark, without any form of encumbrance due to private land use rights. It's later mentioned as "state land doctrine".⁴⁴

Act of 22nd June 1863, on Realization of State Land in Finnmarken's Rural District (the Land Sales Act of 1863), was based on the same point of view, where new principles were introduced for land meting. The Act clearly carried in it the "state land doctrine". From then on, land meting should take place through an *organised sale*. In the liberalistic spirit of that time, the land sale was initially envisaged as an auction, selling to the highest bidder.⁴⁵ During processing in the Storting, the Bill's most pronounced liberalistic traits were removed, resulting in the establishment of relatively strict requirements for sale of land. If the sale was inconsistent with the "District's Benefit", it could not be realized. A special provision was given, forbidding sale to individuals of areas which residents or nomadic Sami needed for summer pastures.

On what background was it then that the Sami areas, and especially Finnmark, ended up with a different ownership situation than the rest

43 The "Royal Decree concerning the Partitioning of Land in Finnmark and the meting out and taxation of Settlements therein, of 27th May, 1775" (The Land Meting Decree of 1775), established the practice of meting out land to individuals.

44 In 1864 the "state land doctrine" was pleaded by the state apparatus in the form we subsequently know it. This happened in connection with a dispute over logging rights in Alta (For more details, see NOU [Norwegian Official Report] 1993: 34 p. 86 et seq)

45 NOU 1993: 34 p. 420 q. 1.

of Norway? The explanation seems to lie partly in the “Cultural Stages Doctrine”, partly in security policy considerations, and partly in the development of Norway as an independent nation. The “Cultural Stages Doctrine” can be said to have its roots in the argumentation that was used when English immigrants needed legitimacy to seize indigenous land in North America.⁴⁶ Later on it has been used in other connections, when similar circumstances were in need of legal recognition. This “doctrine” was, briefly stated, about less developed cultures and peoples having to give way to the more developed ones, which were more useful for the development of society. In legal thinking this implied that the principle “first in time, strongest claim in law” (*Prior tempore, potior jure*) was set aside. From a cultural hierarchic point of view, nomadic land use was considered primitive.⁴⁷ In practice, this meant that Sami land use had to yield to that of the sedentary Norwegian farmer, who was viewed as both more developed and of greater national importance.

Under the influence of “nation building” and an increased fear of the “danger from the east”,⁴⁸ the ban against sale, when in conflict with the “Benefit of the District”, was extended to include “National Interests” as well in the new Land Sales Act of 1902.⁴⁹ Pursuant to the Act, regulations

46 See Nils Oskal ”The moral grounds for disqualification of indigenous property rights to land and political independence” in Kirsti Strøm Bull, Nils Oskal and Mikkel N. Sara, *Reindriften i Finnmark. Rettshistorie 1852 – 1860 [Reindeer Husbandry in Finnmark. Legal History 1852 – 1860]* (2001). Oskal illustrates this with a run-through of John Locke, *Two Treatises of Government* (1690).

47 A closely related view was that cultivation of land was a prerequisite for acquiring the right to it. Fredrik Stang (1867-1941), who was one of Norway’s most prominent legal scholars at the time, formulated this in the following manner in his *Indledning til formueretten [Introduction to Property Law]* (1911), p. 3: ”So long as the people live as nomads, so long as the land is vast enough to offer to all the space they need, the land is, however, not subject to proprietary rights. It is not until a tribe settles down and performs agriculture, that right of ownership to the land arises.”

48 Knut E. Eriksen og Einar Niemi, *Den finske fare: sikkerhetsproblemer og minoritetspolitikk i nord 1860-1940* (1981). [The Finnish danger: security problems and minority politics in the North 1860-1940]

49 Lov 22. mai 1902 nr. 7 om afhændelse af statens jord og grund i Finmarkens

were given in Decree of 7 July, 1902, where it was established that sale could only take place to Norwegian citizens, under special "consideration to advance the Settling of the District, its Tillage and other Utilisation fit Population, which can speak, read, and write the Norwegian Language and employ it for daily use." The new legislation made it impossible for the Sami to become landowners unless they adopted Norwegian agriculture and Norwegian language. Even though there hardly exist instances of these regulations being enforced, they were a beacon in the Government's view of the Sami, and the large number of Norwegian-sounding family and farm names among sedentary Sami must be regarded as a direct consequence of this policy.

The voice of the Sami politician *Isak Saba* expressed the fact that many Sami were resentful to the new law, when he asked if "the grass won't grow just as well in the meadow, whether you speak Norwegian or Sami? Isn't it enough that the Sami have to purchase the land that from time immemorial has been their?"⁵⁰ Despite his seat in the Storting, Saba's voice did not carry far enough.

Changing views on the right to land in Finnmark

After World War II, the first signs of a changed and more positive view on Sami culture, language, and livelihood activities appeared. The Sami Committee was appointed in 1956, and in 1959 it submitted its report on the fundamental aspects of the Sami's societal position. The committee emphasized the importance of mutual respect between Sami and Norwe-

amts landdistrikt § 2. [Act of 22 May, 1902, No. 7, Relating to the Sale of the State's Land and Ground in the Rural District of Finnmark County, Rt. 1]

50 Sagai Muittalægje (Newspaper in Sami language) 1 March, 1906, from Steinar Pedersen, "Statens eiendomsrett til grunnen i Finnmark – en del av den interne 'kolonihistorie'" ["The State's Right to Ownership of the Land in Finnmark – a Part of the Internal 'Colonial History'"] in Harald Eidheim (ed.) *Samer og nordmenn* (1999) p. 37. Isak Saba (1875–1921) was also the first Sami to be elected to the Storting. From 1907 to 1912, he was a representative to the Storting of Arbeiderpartiet [the Norwegian Labour Party] from Finnmark. Today, Saba is best known as the author of the lyrics to the Sami National Anthem *Sámi soga lávlla*.

gians, which must be said to be a break with the Norwegianisation policy. In 1964 the Norwegian Sami Council was appointed, upon the Sami Committee's proposal, as a consultative body on Sami issues for regional and central authorities.

The Reindeer Husbandry Act Committee of 1960 was another exponent of this changed view. In 1966, the committee submitted its proposal for a new Reindeer Husbandry Act, which carried forward a quite different view on the reindeer herding Sami's rights than what the then extant legislation expressed. The Committee expressed the opinion that "the reindeer husbandry must at least be old enough to have become a prescriptive title already before the time of the law originators."⁵¹ The committee suggested giving reindeer owners legal protection against interventions, by only allowing such interventions if the measures taken warranted expropriation or replacement, or if they implemented compensation for the losses incurred by the reindeer husbandry or individual reindeer owner.

This did not, however, make the state change its views on reindeer herding rights.⁵² Nor were any changed views expressed when the time came to reevaluate the Land Sales Act. In the preparatory work it was said that: "As far back as Norwegian history can take us, all land and ground in Finnmark proper was considered to be state property."⁵³ This was the point of departure for the legislation that should apply until the Finnmark Act entered into force on 1 July, 2006.

The first weighty academic move in the debate on the right to land in Finnmark was *Sverre Tønnesen's* doctoral thesis of 1972, aptly titled *Retten*

51 Report from the Reindeer Husbandry Act Committee (1966), p. 11.

52 See Ot.prp. No. 9 (1976–77).

53 In Innst. om lov og forskrifter om statens umatrikulerte grunn i Finnmark fylke ["Recommendations Concerning Act and Regulations Relating to Unregistered State Land in Finnmark County"] (1962) which was one of the preparatory works of the Land Sales Act of 1965, this doctrine is expressed as follows: "As far back as Norwegian history can take us, all land and ground in Finnmark proper was considered to be state property."

til jorden i Finnmark [*The Right to the Land in Finnmark*]. Tønnesen's dissertation was relatively quickly given weight by the courts. In the Varfjell-Stifjell judgement,⁵⁴ the Supreme Court, clearly inspired by Tønnesen, found that the legal circumstances in Finnmark were distinctive, "with partly unclear rules relating to the extent of the state's rights to unregistered land" (p. 498).

When the unregistered land was to be registered in 1980, it is worth noting that the Ministry of Environmental Protection, who was in charge of the land registration, in a letter to the Ministry of Justice stated that regarding the question "as to who should stand as title holder ... it would be unfortunate if the state was officially registered as title holder before the circumstances relating to ownership and land use rights to the unregistered land has been clarified more closely. We refer to, among others, the Supreme Court judgement of 6 April, 1979 (Rt. 1979 p. 498), where the grounds of the judgement refer to the fact that the extent of the state's right to the unregistered land is not clear."⁵⁵

The relationship between parts of the Sami population and the state became more complicated and difficult as a result of the Storting's decision, in 1978, to exploit the Alta-Kautokeino-watercourse. To the extent that a positive attitude had developed towards the Sami people, this industrial development showed to what limited extent this attitude was put into political practice. The big demonstrations against the development did not manage to bring about changes in the hydroelectric project. The Alta case nevertheless represented a turning point in Norwegian Sami policy, and it must be allowed to claim that it, perhaps jointly with Tønnesen's thesis, was an important reason why the Sami Rights Committee was established on 10 October, 1980. Its mandate was to give an account of the questions relating to the Sami population's legal status

54 Rt [Retts tidende; Supreme Court Law Report] 1979 p. 492,

55 Statens kartverk [Norwegian Mapping Authority], the Finnmark archives: Letter of 8 Nov, 1979, from the Ministry of Environmental Protection to the Ministry of Justice

concerning the right to and disposal and use of land and water.⁵⁶ This was the opening of the legislative work that a quarter of a century later led to the Finnmark Act. The Sami Rights Committee submitted its first report in the form of NOU [Norwegian Official Report] 1984: 18, on the legal status of the Sami. It gave a foundation for "the Sami Act" and Article 110a of the Norwegian Constitution.

The state's opinion and administrative practice did not change

Despite the fact that legal scholars and legal historians gradually lined up in broad unison behind Tønnesen's views and suggestions, and the Supreme Court through several court decisions determined that the Sami people had legally protected rights and at the same time questioned state ownership, this did not entail tangible changes in state owner disposal. The state land administration still had to relate to currently applicable law, as expressed through the Land Sales Act of 1965. However, currently applicable law is not a static entity, but often based on perceptions and decisions that change over time and thus influence the law. And this was exactly what was the case concerning the perception of the Sami's and the local population's right to the unregistered land in Finnmark. But contrary to the Courts of Justice and the legal scholars, the state's administrators of this unregistered land were rather unwilling to lend an ear to these new signals.

During the first half of the 1980's, the unregistered land was registered with the property term "state land" in the real property registry. Even though this reregistration was of a formal nature, caused by the then newly adopted Land Subdivision Act, it entailed that "state land" became formalised as property with registration traits such as registry number, property registry file, and the possibility to transfer by deed and to mortgage.⁵⁷ There was perhaps one exception: "division of property proceedings", or any other

56 NOU 1984: 18, p. 42, q. 1

57 Until 1980 properties in Finnmark had been registered according to a special system with "cadastral and registry number" in which only subdivided property had a registry use code. The registration of Finnmark was completed in 1986.

primary document, was missing due to the fact that the property had not been acquired through any form of ordinary legal transaction within the principles of contract law.

Seven years after the registration was finalised, on 11 August, 1993, the Government, represented by the Ministry of Agriculture, utilised the opportunity it had been given to transfer by deed. Despite the above mentioned official letter from the Ministry of Environment and the intention of the registration,⁵⁸ the authorisation for "state land" in Finnmark was then decided to the newly established Statskog SF. As a state enterprise the administrators of "state land" in Finnmark were no longer subject to the strict principles of free access to public records of the Public Administration Act and at the same time they were given the objective of commercial management.⁵⁹ In the long term, this implied that the population's common land was treated as capital, with requirements of interest and surplus, while the legal disputes between state and privates increased.⁶⁰ In a comprehensive scientific work on jurisprudence, the reorganisation was elucidated relative to the Sami legal position. The authors are critical to the reorganisation and conclude by saying that: "The reorganisation of the Directorate for State Forests into Statskog SF [...] in our opinion violated ILO Convention no. 169."⁶¹

58 Reference can also be made to a speech by Jens Iversen, Norwegian Mapping Authority, given in *Posisjon* 2006 (14) no. 4, where he stated that "It was not the intention that the establishment of 512 land/title numbers (in 20 municipalities) in 1986, with the code 'state land' in the property registry, should accommodate for transfer and judicial registration from the State, by the Ministry of Agriculture, to Statskog..."

59 Statskog SF was established on 18 January, 1993, by means of a reorganisation of the Directorate for State Forests. The main aim of the enterprise can be found at <http://www.statskog.no> (31.10. 2006).

60 For instance, reference can be made to Hålogaland lagmannsrett [Appeals Court], judgement of 23 March, 1999 (LH-1998-707) and Hålogaland lagmannsrett judgement and verdict of 15 September, 2004 (LH-2003-14370 / LH-2004-10944). The cases were denied brought before the Supreme Court (HR-2004-02032-U and HR-2004-02033-U).

61 Ole Ch. Borge and Kristian S. Myrbakk "Samiske rettsforhold i Finnmark

The historical legislative development must be said to have reached the end of the line when the Sami Rights Committee's legal group in the report NOU 1993: 34 took a stand as to who had ownership of "state land" in Finnmark, an issue we will return to shortly.

The Finnmark Act and its legislative history

The Sami Rights Committee and ownership to "State Land" in Finnmark

The actual preparatory work on a new act on the management of land in Finnmark, started in September 1984 when the Sami Rights Committee established a working group consisting of highly qualified legal specialists, subsequently referred to as the *Rights Group*, to investigate the legal circumstances. Thus, parallel to the process that led to Statskog SF attaining warranted ownership of the land in Finnmark, the Sami Rights Committee was carrying out an investigation to find out who was the rightful landowner. Conveniently for Statskog SF, the majority of the Rights Group concluded that the state was landowner both in the interior and outer parts of Finnmark. Relative to the fact that the state had not been the owner before 1751, it was stated that "[in] Norwegian law, it is a fact that what once was right, does not necessarily have to be right now – relating to ownership as well as other rights issues. This applies even if the change is not based on agreement or clearly expropriational or legislative decisions, but is rooted in misunderstandings."⁶² Almost apologetically, it was stated that even though the misunderstanding at the time when it occurred was difficult to excuse, the rule still applies. At the same time, the Rights Group did not rule out that local societies might have acquired the right of use of certain resources in accordance

og Statskog SF" Tidsskrift for rettsvitenskap årgang 111 ["Sami legal position in Finnmark and Statskog SF", *Journal for Legal Science*, annual volume 111], 1998, pp. 182–285, on page 280.

62 NOU 1993: 34 *Rett til og forvaltning av land og vann i Finnmark*, [*The right to and management of land and water in Finnmark*], p 266 q. 2 and p. 263 q. 1, respectively.

with the rules for immemorial usage, local customary law or “established circumstances”.

In light of the above, the Sami Rights Committee’s second report, NOU 1997: 4, must be viewed as a proposal to rectify this misunderstanding, which had led to state ownership. The report argued in favour of local management, with the establishment of local land use areas based on traditional outlying land use.⁶³ In these areas, the local population should have special land use privileges in preference to other inhabitants of the same municipality. The proposal was based on the argument that such a local land use system could be viewed as a modern *siida* system [*siida* is historically a Sami local community] which would open up for local management of clearly defined rights for the local population.

The Sami Rights Committee also substantiated the proposed local land use system on the basis of universal principles of customary law, which imply that so long as the inhabitants of a local community have been making relatively intensive and long-lasting use of the benefits of outlying land adjacent to their community, believing that they have rights that correspond to this use, there may have been established local customary rights which may have precedence over universal legislation. The Committee proposed that the local land use areas should be established by commissions with local insight, with the Land Consolidation Court⁶⁴ as court of appeal. It was argued that “[the] Land Consolidation Court has long experience with concrete delimitations, and therefore stands out as the natural review body. Furthermore, a boundary delimitation case pursuant to the Land Consolidation Act [...] seems to be the most obvious format for such a process [...]”.

63 NOU 1997: 4 *Naturgrunnlaget for samisk kultur*, [*The natural foundation for Sami culture*], p. 239 ff

64 *Jordskifteretten* [the land consolidation court] is a special court which works with reallocation, severance, and consolidation. It has gradually developed into a specialised ‘land court’, dealing with boundary disputes and other disputes over land rights.

The Government Bill: Proposition to the Odelsting, No. 53 (2002 – 2003)

When the Government presented its Bill in the form of Proposition to the Odelsting no. 53 (2002 – 2003), it was pronounced that this would form the basis of a new land management scheme “in which the people of Finnmark themselves attain owner disposal and take on the responsibility for managing these resources, while the state withdraws from its role as landowner in Finnmark.” The proposal was meant to eliminate any possible doubt that the state’s ownership had been an obstacle to acquiring independent rights. It was also stated “that any and all land use over time may lead to rights, independently of the users’ ethnic and cultural background.” Even though there had been periods when forms of discrimination – such as language requirements (see section 2.2 above) – had been practiced, it was declared that there had never been a dogma in Norwegian law stating that Sami land use should have less legal rights effect than the land use of other Norwegian citizens.

The Sami Rights Committee’s proposal, that Sami and other local rights should be *de facto* recognised through the establishment of local land use areas, was, however, left out. The Bill met heavy opposition.⁶⁵ County Council politicians feared that the Sami, due to the composition of the governing board of the proposed estate enterprise, would have too much influence. Sami sources pointed out that the Sami Rights Committee’s work had not been followed up, and that the Bill did not satisfy Norwegian international law obligations towards the Sami.⁶⁶ In May, 2003, the Sami Parliament plenary assembly rejected the Bill, against three votes. It demanded considerable changes to the Bill, and the initiation of consultations: “where the aim of these consultations must be to estab-

65 I have previously pointed this out in “Forslaget til ‘Finnmarkslov’ og bygdefolks rettigheter” [The draft ‘Finnmark Act’ and the local population’s rights” in *Kritisk juss* [Critical Law] No. 1, 2004, pp. 35 – 57, where there are also references to the referred quotes.

66 Former Sami Parliament President and then head of the United Nations Permanent Forum on Indigenous Issues, *Ole Henrik Magga*, in *Sagat* for 5 April, 2003, declared that the draft Act violated Norwegian and international law.

lish a legislative basis, which also the Sami Parliament could endorse". In October 2003 the UN Special Rapporteur on Indigenous Issues, Rodolfo Stavenhagen, came to Finnmark on an invitation from the Sami Parliament.

In 2004 the ILO expert committee concluded that the Act did not fulfil the minimum standard for recognition of indigenous rights of ILO Convention No. 169.⁶⁷ As a result of the doubt that was raised as to whether the Bill was in accordance with Norwegian international law obligations vis-à-vis the Sami, the Justice Committee appointed two independent legal experts (Geir Ulfstein and Hans P. Graver) to assess the Bill relative to international law. They concluded that the administrative regime prescribed by the Act was not in accordance with international law.⁶⁸ A government appointed expert (Carl August Fleischer), on the other hand, arrived at the opposite conclusion.⁶⁹

One of the reasons why the Bill was met with criticism can be linked to expectations being set quite high after the Sami Rights Committee had been working for so long, and at the same time the Sami had become more conscious of their rights. One must also be permitted to say that there was a striking lack of coherence between the Sami Rights Committee's recommendations and the Bill. One of the most important objections was precisely the fact that the government did not pursue the Sami Rights Committee's proposal to establish the local population's rights. The Bill also failed to take a stand on what rights the people of Finnmark had, thus *de facto* not recognising these at all. That the government argued in favour of the state's rights on the basis that the state's ownership arose

67 CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Norway (ratification: 1990) Published: 2004. See document No. (ilolex): 062004NOR169 especially section 16 and 19 (<http://www.ilo.org/ilolex/27.10.06>)

68 See Hans Petter Graver and Geir Ulfstein *Folkerettslig vurdering av forslaget til ny Finnmarkslov [Assessment, relative to international law, of the new draft Finnmark Act]* of June 11, 2004, (<http://odin.dep.no/jd/27.10.06>).

69 See e.g. Report No. 44 to the Storting, (2004-2005), Relating to the Sami Parliament's Activities in 2004, Section 2.2.3.

as a result of misunderstandings, where any rights to the population of Finnmark appeared not as concessions but as awards, obviously also served as a provocation.

The Finnmark Act

As a result of the criticism against the Bill, consultations were held between the Justice Committee, the Sami Parliament, and Finnmark County Council after the international law assessment. It can be argued that this established a new constitutional practice in Norway, and that it is of great significance to indigenous peoples' possibility to influence decision taking processes.⁷⁰ The consultations have led to relatively substantial changes being taken into the Bill that was presented to the Justice Committee in May, 2005.⁷¹ However, the main concept of the government's proposition – that ownership to the land, which today belongs to Statskog SF, be transferred to an independent body named *Finnmarkseiendommen* [the Finnmark Estate] – remains in force.

In the following, I will go through the Finnmark Act, highlighting those changes that were introduced during consultations. They primarily consist in a changed composition of the governing board, the rules for processing changes in use of outlying land, and the implementation of ILO Convention No. 169 in the Act. It was also an essential demand from the Sami Parliament, among others, that acquired rights should be established by an identification committee. This has been taken into account.

70 In accordance with international law, the consultation obligation is included in ILO Convention No. 169, art. 6.

71 Innst. O. No. 80 (2004-2005) *Innstilling fra justiskomiteen om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (finnmarksloven)* [The Justice Committee's report on the Act relating to legal relations and management of land and natural resources in the county of Finnmark (Finnmark Act)]

The Finnmark Act has six chapters.

- Chapter 1 gives general provisions for the understanding and application of the Act.
- Chapter 2 gives provisions for the new land management body, Finnmarkseiendommen inter alia relating to the composition of the board and case processing.
- Chapter 3 gives provisions for management of renewable resources, such as e.g. hunting, fishing and wood chopping.
- Chapter 4 addresses fishing in the Tana and Neiden watercourses. It says that "the Finnmark Act will not make encroachments into existing rights to fishing in these watercourses".
- Chapter 5 gives provisions for the two new bodies – the Finnmark Commission and the Land Tribunal for Finnmark.⁷²
- Chapter 6 gives provisions for entry into force of the Act, including the transfer of land from Statskog to Finnmarkseiendommen.

If we want to look more closely at specific issues that were of special significance during consultations, it is natural to start with Section 1, in which the objects clause was changed so that the management of land and natural resources should be to the benefit of the county's population and "especially as a foundation for Sami culture, reindeer husbandry [...]”, whereas the "general public" was left out. Section 3, which grants precedence to international law, is perhaps of greater practical interest. It establishes that the Act applies with the restrictions that follow from ILO Convention No. 169, and that the Act should be applied in accordance with provisions of international law relative to indigenous peoples and minorities. Even though ILO Convention No. 169 was ratified by Norway already in 1990, this is the first time it has been given precedence over Norwegian legislation. Section 5 now establishes that the Sami collectively and individually have acquired rights to land in Finnmark through

72 The English translation of the Finnmark Act uses the term "The Uncultivated Land Tribunal for Finnmark". The term "uncultivated land" is not very suitable in a Sami context, since Sami livelihood activities and culture were, historically, primarily performed in this outlying land, which is consequently Sami "cultural land". Therefore the more neutral "Land Tribunal for Finnmark" is used.

long-lasting use of land and water, and that the Act does not encroach on rights which the Sami and others have acquired through prescription or immemorial usage. This too is a very important “signal provision”. At the same time it is of practical significance since it limits Finnmarkseiendommen’s authority over its “own” land.

Section 7 establishes that the governing board of Finnmarkseiendommen shall consist of six persons; three appointed by the County Council and three by the Sami Parliament. The board member without voting rights, which was proposed appointed by the government, has been removed.

How the board was to solve internal dissent concerning changes in the use of land, was a topic of discussion. Section 10 states that “Finnmarkseiendommen shall assess the significance a change will have for Sami culture, reindeer husbandry, use of outlying land, commercial activity, and societal life. The Sami Parliament’s guidelines shall be followed in the assessment of Sami interests.” Decisions concerning changes in the use of outlying land are based on rather complicated voting rules, pursuant to which a demand may be made for the matter to be placed before the Sami Parliament.⁷³ However, the state still has the final say when disputed decisions, concerning property which is no longer theirs, have to be made. If the Sami Parliament does not ratify the decision of the majority or fails to process the matter within a reasonable time, a collective majority of the board may demand that the matter be placed before the King, who shall decide whether the decision shall be approved. Such approval of the decision has the same effect as such a decision by the board. It is also worth noting that special voting schemes are prescribed if a proposal only applies to the Sami administrative area,⁷⁴ or only to the remainder of Finnmark, a practice which is explained on the basis

73 In Section 10, second paragraph, it says that “changes in the use, require the support of at least four board members if the whole minority bases its opinion on considerations for Sami culture, reindeer husbandry, use of outlying land, commercial activity, and societal life assessed on the basis of the guidelines of the Sami Parliament. If the majority consists of four or less, a collective minority may during the board meeting demand that the matter be placed before the Sami Parliament.”

74 The municipalities of Karasjok, Kautokeino, Nesseby, Porsanger and Tana.

of the requirements of ILO Convention No. 169, Article 14, relating to "recognition" of indigenous peoples' land rights.

Another contentious issue in the debate has been the general public's rights. In Ot.prp. No. 53 (2002 – 2003) the government suggested that the general public's right to renewable resources should be fixed by law. This was supported by the Norwegian Labour Party and the Norwegian Association of Hunters and Anglers, which throughout parts of the legislative process lobbied to secure statutory rights to hunt in Finnmark for hunters from other parts of the country. It is worth noting that the Sami Parliament and the County Council majority have now obtained approval that such rights should not be given legal protection. In relation to this, we can say that the Act is based on three "levels of rights". Level 1 is the municipality's population, which has the right to certain resources; e.g. gathering eggs and down, and limited logging. Level 2 is the county's population, which has the right to hunt and fish and pick cloudberry. Level 3 is the "general public", which has access to small game hunting, angling and cloudberry picking for their own household.

The Sami Rights Committee, in NOU 1997: 4, proposed that it should be possible to establish local land use areas based on the local community's traditional use. In Ot.prp. No. 53 (2002-2003) this was left out.⁷⁵ This was met with broad criticism. The Justice Committee attached importance to the criticism, thus opening up for one of the Act's most exciting chapters, i.e. the provision concerning the establishment of the *Finnmark Commission* (Section 29), which at the same time is a real acceptance of the principle that the Sami and other local residents in Finnmark have obtained rights through immemorial usage, etc. This Commission shall, on the basis of current national law, investigate rights of use and ownership to the land Finnmarkseiendommen takes over from the state.

75 I have discussed this in "The right to the land in Finnmark, Sami rights, and the draft Finnmark Act" in *Kritisk juss* [Critical Law], No. 2, 2005, pp. 200 - 211.

A special court, the Land Tribunal for Finnmark (Section 36), shall also be established, to consider disputes over rights that arise after the Finnmark Commission has investigated a field, e.g. in such matters where individuals or groups that claim to have rights pertaining to civil law, do not find acceptance for this with the Commission, or if Finnmarkseiendommen rejects the Commission's conclusions. The Land Tribunal shall consist of a chairman, a vice-chairman, and three permanent members, appointed by the King. Decisions of the Land Tribunal are subject to a limited appellate system, as they may only be appealed to the Supreme Court.

Clarification of legal circumstances in Finnmark

The process of rights identification and rights reinstatement was started when Statskog SF transferred the authority over the previously unregistered land to "Finnmarkseiendommen" on 1 July, 2006. The legal circumstances are now next in line for clarification by the Finnmark Commission, which is stipulated to be operative from 1 January, 2007. The Commission shall itself establish which fields to investigate, and in which order. It may omit to investigate rights that are clearly inappropriate for investigation by the Commission, and is itself responsible for obtaining sufficient information concerning the legal circumstances, cf. Section 32. The Commission shall investigate fields that it determines and delimits itself. After this, the Commission shall submit a report which shall contain information about: a) who, in the view of the Commission, are owners of the land, b) what land use rights exist, in the Commission's view, and c) the circumstances on which the Commission bases its conclusions. Finnmarkseiendommen shall assess the Commission's conclusions. To the extent that Finnmarkseiendommen agrees with the Commission that other parties hold rights, it is obliged to state this in writing, and ensure that the right is officially registered or, if appropriate, bring the matter before the *Land Consolidation Court* pursuant to Section 45 (for boundary marking on the ground and fixing of coordinates).

To what extent the Commission will solve this through negotiations and mediation, or if clarification must come through trials, only the future

will show. In the proposed regulations for the Finnmark Commission, it has been suggested that the Commission may also mediate in legal issues it has not investigated.⁷⁶

Will Sami historical rights be recognised as a result of the Finnmark Act?

Title transfer to "Finnmarkseiendommen" is insufficient as a recognition of the Sami's right to own their land

The Finnmark Act and the transfer of ownership from the state to the residents of Finnmark is a long step in the right direction when we talk about the Norwegian state's willingness to fulfil its obligations pertinent to international law, and to recognise Sami land use and ownership rights. We must, however, realise that as a result of the politically polarised process that led to the Finnmark Act – in which apparently also the legislature experienced a shortage of time – the Act may not have been given the comprehensive preparation it should have had in its final phase. There is a long distance, both in time and in material contents, between the bipartite Bill, which was sent out for comments after NOU 1997: 4 had been presented, and the Act, which found its final form after Innst. O. No. 80 (2004–2005) had been processed in the Storting. Whether or not a new round of comments should have been implemented at a later stage, I choose not to address, since the formal consultation practice was followed.

The actual process of rights reinstatement was, as mentioned, started when Finnmarkseiendommen became owner of the previous "state land" on 1 July, 2006. This was just a small, but formally important step in the initial stages of the process. At present, the process has not come much further than this. The new land administration body retained the staff and management from the old state enterprise, and the administration

⁷⁶ Consultation paper from the Ministry of Justice and the Police, dated 28 June, 2006, cf. the draft Section 6, second paragraph.

is still located in Vadsø, not in Laksely, as both the Sami Parliament and the board of Finnmarkseiendommen have determined that it should be. Due to these circumstances, the transfer has so far hardly been noticeable for Finnmark's population. Nor has it contributed to strengthening the feeling of ownership in the average Finnmark resident, that the new board distinguished itself by introducing fees for case processing and meting out land, and by keeping board meetings closed to the public.

The Finnmark Act should, as mentioned, be applied in accordance with ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. Article 14 implies that Norway has taken on the responsibility to recognise the Sami people's right to own and possess those lands which they traditionally occupy, and furthermore that the authorities should take necessary measures to identify the lands which this people traditionally occupies, and guarantee effective protection of their rights of ownership and possession. These two points are reflected in Section 5 of the Finnmark Act.

In accordance with Article 14, adequate procedures shall be established within the national legal system to resolve land claims by indigenous peoples. Whether the system that is now established to take care of this, in Chapter 5 of the Finnmark Act, is appropriate, is still difficult to discuss, since there is as yet no extant practice or any other instances to refer to. We must, however, question the composition of the Commission, where emphasis has principally been placed on legal expertise, despite the Justice Committee majority's statement that "it is very important that the Commission not only consist of practitioners of law, and for it to have legitimacy within the entire population". Other professional and local knowledge does not seem to be given any priority worth mentioning.

Whether the system with a Commission and a specialised Tribunal with limited access to appeal, is more appropriate than processing in the ordinary Courts of Justice, enforced with the necessary expert lay judges, has not been discussed to any significant extent beyond the statement that the majority finds it "clearly not acceptable relative to international law to leave it up to the ordinary courts to decide which and how extensive

rights have been acquired in Finnmark.”⁷⁷ This last statement must be said to be a harsh criticism of our legal system concerning international law issues.

It is not without reason that there is a great deal of anticipation regarding how the rights identification process will be carried out. Sverre Tønnesen, 35 years ago⁷⁸, pointed out that the Finnmark Common Land was not one Common Land, but ”would, in legal terms, best be considered as several Common Lands, largely governed by the same general regulations.”⁷⁹ In my opinion, these are still weighty words, which those who are set to clarify the rights circumstances should bear in mind. A central issue is whether the process prescribed by the Finnmark Act, will be able to provide recognition and acceptance of rights to those who through historical land use have acquired such rights, be it local societies, kinship groups, *siidas* or individuals. This also includes the question whether the holders of rights will get to influence the management and administration of land and natural resources on a level that is in proportion to their legal stature. Even though the rules for board composition in Section 7 of the Finnmark Act, according to which the Sami Parliament appoints half of Finnmarkseiendommen’s board members, could be viewed as a result of recognition of the Sami people’s right to ownership and possession of their lands, collectively and individually, these regulations are hardly sufficient to say that the claim for Sami rights to ownership of their lands is fulfilled both pertinent to international and domestic law.

77 Innst. O. No. 80 (2004–2005), p. 28, q. 2

78 Sverre Tønnesen’s doctoral thesis of 1972, aptly titled *Retten til jorden i Finnmark* [*The Right to the Land in Finnmark*]

79 Tønnesen (1972), pp. 312–313

The execution of the rights identification process is of decisive importance

It is important that the rights which different groups of people in Finnmark – Sami as well as Norwegian – are entitled to, according to Section 5 of the Finnmark Act, are not confused with a public law access to practice management and administration. It is hardly the intention of the Act that the Sami Parliament should become co-owner of Finnmarkseiendommen at the expense of Sami who have acquired rights on the basis of immemorial usage.⁸⁰ This is also how we must understand the Justice Committee majority's statement that "land where Finnmarkseiendommen stands as owner of [may] in reality be owned by others, or there might exist land use rights for third parties on the same land".⁸¹ The extent of such ownership and land use rights can only be determined pursuant to a thorough and diligent mapping of rights and land use circumstances.

For the Finnmark Act to lead to a successful fulfilment of obligations vis-à-vis the Sami people, regarding ownership of the land to which they have historical rights, certain requirements have to be placed on the Commission. Rights of a private nature, both individual and collective ones, should be charted and determined in such a way that later on no doubt can be raised as to whether the obligations were actually fulfilled. The collective nature of rights to use, and ownership, in Finnmark's outlying land raises special challenges when it comes to determining rights holders' influence on management and administration. For ownership and land use rights to be real, the rights holders must get a share of the profit this property yields. This means that collective rights should be settled in a manner that is sufficiently precise and decisive to determine

80 Norway's international law obligations vis-à-vis the Sami must instead imply that the land use that has been practiced shall be recognized and be given legal status, as stated in NOU 1997: 5 *Urfolks landrettigheter etter folkerett og utenlandsk rett*, [Indigenous land rights according to international law and foreign law], p. 34. This may imply a certain degree of autonomy within both legislative and administrative authority. This authority should, naturally, be placed with the Sami people's elected Assembly, the Sami Parliament.

81 Innst. O. No. 80 (2004–2005), p. 18, q. 2

the rights holders' ideal shares in such a way that distribution of expenses and income, including responsibilities vis-à-vis third party interests, may be determined.

The Finnmark Act does not give indications of how rights holders, such as members of a local society or a *siida*, should look after rights that are of a financial nature, after the Finnmark Commission has identified them. In my opinion, this is a weak point in the Act. There are many similarities between the "Finnmark Common Land" and other common lands, and it is therefore relevant to look to the common land legislation – which does have solutions to such questions, where local or state common lands are involved.⁸² Seen in relation to the detailed set of regulations the state has adopted for common land rights holders, this appears to point to a legislative differential treatment in disfavour of Finnmark's population. The Local Common Land Act can probably be given direct application if the Commission arrives at the conclusion that Local Common Lands actually exist. If the Commission concludes that Finnmarkseiendommen is Common Land Proprietor, but that local societies have common land rights, questions will arise concerning extended or analogue application of the Mountain Act and the State Common Land Act.

In addition to the above, extensive rules related to land use will have to be prescribed for implementation in accordance with the regulations of the Land Consolidation Act, in order to render complex ownership relations, which might be uncovered, more serviceable. This could, in a natural way, include joint solutions relative to disposal and sale of hunting and fishing rights. It could also include rules for cost and income sharing, in so far as this cannot be deduced directly from established rights circumstances. It is thus a paradox that the planned rights identification process does not include the Land Consolidation Court's role in determining local land use areas, as proposed by the Sami Rights Committee. Nor

⁸² Cf. Act of 6 June, 1975, No. 31, relating to utilisation of rights and privileges, etc., in the state common lands (The Mountain Act), Act of 19 June, 1992 No. 59 relating to local common lands, and Act of 19 June, 1992, No. 60, relating to logging, etc., in the state common lands.

has any other form of land consolidation competence been included.

The right to practice reindeer husbandry is a land use right that is independent of who the landowner is, cf. Section 9, first paragraph of the Reindeer Husbandry Act. Consequently, it should not make a difference if a legal clarification were to result in a higher rate of private owner disposal. However, actual practice, inter alia from the South Sami areas, indicates that in real life this is not the case; land use conflicts arise much more easily where there is a private landowner.⁸³ Finnmarkseiendommen and the Finnmark Commission will have to take this into account as well, when they carry out the rights identification.

If the Commission concludes that the Sami people and others do have established rights on Finnmarkseiendommen's land, and at the same time does not introduce regulations that allow the rights holders to exert influence on the management and administration of the Common Land on a level that relates to their share in it, then, in my point of view, this implies that Article 5 of the Finnmark Act is set aside. Leaving management and administration to Finnmarkseiendommen would, as I see it, neither be in accordance with international law, nor with the principles that form the basis of Domestic Law.

Concerning recognition of the right the population of Finnmark has to Finnmark's land, it might be appropriate to refer once again to Tønnesen's eminent and still valid '*de lege ferenda*' views. Besides reinstating the population of Finnmark as rightful owners of Finnmark's land, he suggested a transition to a system "such that local Common Land Boards, elected by the entitled ones themselves, decide over all the rights that the land yields [...] The Common Land Boards should assume all authority of decision over woodlands as well as hunting grounds, salmon fishing grounds [...] etc. The proceeds from the subletting of these must go to the Common Land Chest [...]". Since there existed sufficiently strong groups of Sami

83 A number of such disputes have gone all the way to the Supreme Court, cf. Rt. 1892 p. 411, Rt. 1897 p. 759, Rt. 1931 p. 57, Rt. 1955 p. 361, Rt. 1968 p. 394, Rt. 1988 p. 1217, Rt. 1997 p. 1608, and Rt. 2001 p. 769.

descent in Finnmark, this would contribute to real Sami influence, and at the same time the Sami “would gain decisive influence over the development in those communities in which there is still something to be found that is typically Sami, namely in the interior local communities.”



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