

The Process of Identifying Land Rights in parts of Northern Norway: Does the Finnmark Act Prescribe an Adequate Procedure within the National Law? *

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1. Introduction

Finnmark is the northernmost county of Norway and an important section of *Sápmi*, the territory of the Sámi people.¹ The Finnmark Act 2005 (Fm. act),² a land code for Finnmark County, has initiated an ongoing process of surveying and recognizing existing rights of use and ownership in Finnmark on areas previously considered to be state-owned. This identification process is to be performed by a body called *the Finnmark Commission* (cf. Fm. act Article 29, first paragraph), while a special court, *the Land Tribunal for Finnmark*,³ is to settle any disputes arising after the Commission has investigated a “field” or specified area (cf. Fm.

* Published in *Yearbook of Polar Law*, vol 3, 2011, 423–453

1 *Sápmi* or *Samiid eanan* is the informal Sámi term for their territories covering northern and middle parts of Finland, Sweden and Norway, as well as the Kola Peninsula in Russia, where the Sámi are the indigenous people. Approximately 40,000 of a total of 50,000–80,000 Sámi live in Norway (Harald Gaski in *Store Norske leksikon*, see: <http://snl.no/samer> (accessed 10 September 2010)). Of these 13,890 are registered voters in the Sámi Parliament in Norway (2009), see: <http://www.sametinget.no/artikkel.aspx?MId1=269&AId=2962&back=1&sok=true> (accessed 10 September 2010).

2 Lov 17. juni 2005 nr. 85 om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (The Finnmark Act).

3 The term *the Uncultivated Land Tribunal for Finnmark* is often used in English translation. This term is not very suitable in a Finnmark or a Sámi context, since livelihood and cultural activities, historically not depended on cultivating of the land. The outlying land and mountainous areas are consequently Sámi cultural land. Therefore, the more neutral form *the Land Tribunal for Finnmark* is used, or in short form *the Tribunal*.

act Article 36, first paragraph). These [424] two bodies constitute a unified system to effectuate the process of mapping and clarifying existing rights.

The identification process is a result of legal developments relating to the Sámi which have led to an acknowledgment that the state ownership of so-called “unsold” or “unregistered land” in Finnmark is based on a legal opinion the Norwegian state can no longer stand within. So when the Bondevik government presented their draft of a Finnmark Act in 2003, they concluded this ownership hardly be maintained in full.⁴ The government also found that there could be “private or collective rights based on prescription or immemorial usage” of the former state land.⁵

Of great importance here is the Norwegian ratification of the United Nations’ International Labor Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries in 1990. The ratification meant that Norway incurs an obligation to identify and recognize indigenous peoples’ traditional lands (cf. the ILO Convention No.169, Article 14).

Even though the Bondevik government determined there is existing rights based on prescription and immemorial usage on the former state land, it did not propose any process to survey and recognize these rights. The government decided instead to transfer the land to an ownership body called *Finnmarkseiendommen* (the Finnmark Estate), to which the Sámi Parliament elected three board members, Finnmark county council three members, and the state one non-voting member.

The draft act was met with considerable criticism from among others, the Sámi Parliament, who argued it did not fully comply with obligations in international law to the Sámi people. As a result of this criticism, consultations were initiated between the Sámi Parliament, Finnmark County Council and the Parliamentary Standing Committee of Justice. These consultations led to extensive changes in the act. One of the most comprehensive and legally interesting changes is contained in chapter 5, which initiates a process for identifying and recognizing existing rights in previously-held “state land” in Finnmark.

The objective of this paper is to examine the process of surveying, identifying and recognizing existing rights in Finnmark. It includes a review of how and to what extent Norway currently recognizes Sámi rights to land and natural resources, according to Norway’s obligation under both international and national law. A central part of the analyses, therefore, addresses [425] procedural

4 Ot.prp. nr. 53 (2002–2003) *Om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (The Finnmark Act)*, 43.

5 *Ibid.*, 8 and 122, cf. the draft article 5. All translations of quotations are done by the author.

problems in applying the act and the clarification process. The question then arises as to whether or not the procedure as applied to Finnmark is “adequate procedure” within national legislation required by ILO Convention No. 169, Article 14 (3). The paper provides also a brief legal historical review of Sámi rights including changes in case law over the past decade.

The sources of analysis will be preparatory works and to some extent case law, supported by legal literature. About the last source, one should mention that the topic on current legal identification process in Finnmark, and problems related to it, only to a limited extent is discussed in legal literature. The theme is actualized since it is proposed similar schemes for legal identification in the Sámi areas south of Finnmark.⁶

2. Change in Legal Opinions and Case Law

2.1. A Brief Overview of the Legal History of the Sámi

Legal developments that culminated in the Finnmark Act arose from a concept of land ownership which has differed from the rest of Norway since medieval times. This in particular influences the possibilities to own and access land and natural resources and the recognition of such rights of the population of Finnmark, both Sámi and non-Sámi.⁷

The situation may be explained by the fact that northern areas came relatively late under Norwegian jurisdiction and that subsequently the state rapidly gained a dominant role as landowner.⁸ This ownership was based on a kind of *terra nullius* perception which can be called *the state land doctrine*. It ensured that the state could take supposed “ownerless” land into possession without any treaty or agreements with people that already inhabited and used the areas.

6 See: NOU 2007: 13 *Den nye sameretten*, 31–68.

7 See: Sverre Tønnesen, *Retten til jorden i Finnmark. Rettsreglene om den såkalte “Statens umatrikulerte grunn” – en undersøkelse med særlig sikt på samenes rettigheter*, (Bergen-Oslo-Tromsø: Universitetsforlaget, 1972 2nd. ed. 1979).

8 A Danish-Norwegian sole jurisdiction over Finnmark began with the Peace of Knæred in 1613 when the King of Sweden gave up all pretenses over the Sea Sami in “Nordlandenes og Vardøhus len”, see: Oscar Albert Johnsen, *Finmarkens politiske historie, aktmæssig fremstillet* (Kristiania: Dybwad, 1923), 129. The jurisdiction over central and eastern Finnmark was not clarified until the borders with Sweden (and Finland) were settled in 1751 and with Russia in 1826.

[426] The view that nomadic use of land could not form a basis of ownership was a part of this trend. The leading legal scholar Fredrik Stang expressed it in such way in 1911:

As long as people live as nomads, so long as the earth is wide enough to give all the space they need, the land is, however, not subject to ownership. Only when a tribe settles down and starts agriculture does ownership to land arise.⁹

The implication of these views was that all unsold land became state property without consideration of any private or common rights other than those which step-by-step became statutory or contained within the deeds.¹⁰ The statement of another leading scholar Nicklaus Gjelsvik, professor of property law, is characteristic of prevailing legal opinion at that time. Gjelsvik wrote in 1919 that:

. . . the state had to a large extend provided people [in Finnmark] with rights of use according to specific rules . . . Such rights of use can the state can take back at any time, without going any private parties rights to close.¹¹

This prevailing legal opinion made it difficult for local people, and especially the Sámi, to achieve recognition of their rights to hunting, fishing, grazing and other herding-related activities in specific areas based on right by prescriptions and immemorial usage.

The situation described above illustrates not only that it was almost impossible for inhabitants of Finnmark to gain acceptance of their historical rights; it also shows that peoples in Finnmark has been prevented from development of property and land rights, whereas in the southern mountains and forests some areas have become individual private property, some become joint-ownership, some became community commons, and other areas state commons. In connection with these various property categories, traditions dating back to medieval times have been developed to pass laws concerning use, access, right of acquisition, and

9 Fr. Stang, *Norsk formueret. Indledning til formuesretten* (Kristiania: Aschehoug, 1911), 3. Repeated in the editions of 1921 and 1935.

10 *Innstilling om lov og forskrifter om statens umatrikulerte grunn i Finnmark fylke* (1962), 5, states “as far back as the Norwegian saga relates all soil in actual Finnmark was regarded as state property.” See also: NOU 1993: *Rett til og forvaltning av land og vann i Finnmark*, 110, and Øyvind Ravna, “Recognition of Indigenous Peoples’ Land Rights through Modern Legislation. The Case of the Sámi People in Norway” in *Legal empowerment – a way out of poverty*, ed. Mona Elisabeth Brøther and Jon-Andreas Solberg, issue 2, Oslo: Norwegian Ministry of Foreign Affairs (2006), 65–89.

11 N. Gjelsvik, *Norsk tingsrett* (Kristiania: Nikolai Olsens boktrykkeri, 1919), 114. Repeated in the editions of 1926 and 1936.

12 E.g., Kong Christian Den Femtis Norske lov (King Christin 5 Norwegian Act) 15 April 1687, several Common Land Acts (1920, 1975, 1992) and several Land Consolidation Acts (1821, 1857, 1882, 1950, 1979).

dispute resolution.¹² With the exception [427] of autonomous Sámi Customary law, which rarely receives legislative approval,¹³ this has not been the case in Finnmark.

Accordingly the state's unconditional ownership opinion prevented registration and protection of acquired rights,¹⁴ which are now recognized (but not identified) in the Finnmark Act 2005. Over time the situation thus had become unclear in relation to traditional rights of use and ownership of former state land in Finnmark, and needed to be addressed both to acknowledge the historical rights of the people of Finnmark, and to fulfill obligations under ILO Convention No. 169.¹⁵

That the Sámi use of land, and the reindeer-herding Sámi use in particular, from the late 1800s until the 1960s was not considered as a basis for acquiring rights according to immemorial usage,¹⁶ forms a part of this history. Case law from the mid-1900s clearly shows that the immemorial usage of land, pastures and fishing grounds did not have any legal protection against the expansion of Norwegian farming, as exemplified in the Supreme Court sentences in the Norsk Retstidene (Nrt.)¹⁷ 1931, 57 (Dergafjell) and Nrt. 1955, 361 (Marsfjell). In the latter the Supreme Court quoted a preparatory work from the 1880s which defined the right of the "Lapps" to use "foreign property" as "a harmless beneficial right to use that does not cause the owner any positive loss".¹⁸

Although these precedent-setting cases did not occur in Finnmark, they expressed the prevailing opinion that Sámi reindeer herders could be deprived of their rights to pastures and fishery, which did apply to the situation of the Sámi in Finnmark, too. The verdict of the Frostating Court of Appeal of 14 November 1966 (Case 83/1964) is another example of this legal opinion, where it is stated:

13 See: e.g., Erik Solem, *Lappiske rettsstudier* (Oslo: Aschehoug 1933), 189. See also Øyvind Ravna, "Sámi Legal Culture – and its Place in Norwegian Law" i *Rendevous of European Legal Cultures*, Bergen 2010 s. 149–165.

14 See also: Malgosia Fitzmaurice, "The New Developments Regarding the Saami Peoples of the North," *International Journal on Minority and Group Rights* 16 (2009): 99.

15 Innst. O. no. 80 (2004–2005) *Innstilling fra justiskomiteen om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke* (finnmarksloven), 14–15 and 28.

16 Rights acquisition by immemorial usage rests on three elements: (1) There must be a certain amount of usage (2) which has taken place for a long time and (3) has occurred in good faith, see: Norsk Retstidene (cf. note 17) 2001, 769 on 788–789. More about immemorial usage in relation to Sámi reindeer husbandry, see: Gunnar Eriksen, *Alders tids bruk*, Bergen: Fagbokforlaget (2008), 314–348 and Øyvind Ravna, *Rettsutgreiing og bruksordning i reindriftsområder. En undersøkelse med henblikk på bruk av jordskiftelovgivningens virkemidler*, Oslo: Gyldendal (2008), 331–359.

17 *Norsk Retstidene* is a court report publishing the Supreme Court sentences in Norway.

18 Nrt. 1955, 361 on 363.

[428] The centuries-old exercise of use, even when it comes to fishing, trapping and hunting which the Sámi have exercised undisputed, does not go beyond the “harmless beneficial usage” that the Sámi at any time has been allowed to exercise. This kind of use cannot by prescription or immemorial usage create a distinct, separate legal basis that later legislation is not free to regulate.

Such prevailing opinion raised the threshold, not only to succeed with claims based upon prescription, but even to dare submit a claim in the first place, as evidenced by the fact only a few such lawsuits occurred concerning state land in Finnmark.¹⁹

Despite the fact that the decision cited above was set aside by the Supreme Court in the Brekken case of 1968, published in NRt. 1968, 394, it was not easy for the Sámi and other inhabitants of Finnmark to acquire rights according to prescription and immemorial usage.²⁰ For reindeer herders, although usage of land could be considered in acquiring rights, it must be *regular and intensive* enough to fulfill the terms of rights acquisition according to the rules of prescription and immemorial usage. The cases referred to in NRt. 1981, 1215 (Trollheimen), NRt. 1988, 1217 (Korssjøfjell) and NRt. 1997, 1608 (Aursund II) stand as examples of that the Supreme Court did not find the use fulfilling these requirements. In these cases the Supreme Court did not take into account the special characteristics of reindeer husbandry and Sámi use of the land. Instead the court considered the terms of intensive and continuous use for reindeer husbandry according to a standard designed for farming and agricultural use of land. Rules that under different circumstances could have qualified for land rights consideration thus became a barrier to Sámi pasture rights acquisition.

In 2001, a change in case law occurred, brought about in particular by two Supreme Court cases. Even though no cases in question were based on disputes arising in Finnmark, the legislator emphasized that these cases could serve as a kind of “best practice” that should be applied in the clarification process according

19 The author is aware of only three such published judgments, see: NRt. 1952, 1007; NRt. 1960, 810 and *Rettings Gang* 1956, 109.

20 The opinion continued its life in public administration; first in Ot.prp. nr. 53 (2002–2003), 3, it was stated that “All use over time under Norwegian law can create rights, not depending on the practitioners’ ethnic and cultural backgrounds . . . Norwegian law has never had any dogma indicating that Sámi use would have less legal effect than use by any other Norwegian citizens”.

21 Innst. O. no. 80 (2004–2005), 36, with reference to the two cases published in NRt. 2001, 769 and 2001, 1229.

to the Finnmark Act.²¹ These case law precedents are of [429] great importance and have been quoted in case law even outside Norway.²² Accordingly we next examine these landmark cases.

2.2. *The Selbu Case*

In the Selbu case (referred to in NRt. 2001, 769) the Supreme Court to a large extent set aside the interpretation of the law upon which the three above-mentioned sentences were based. This was done by emphasizing the significance of Sámi cultural features, reindeer husbandry characteristics, migration patterns and land use when assessing rights acquisition. This led to the reindeer husbandry districts of Essand and Riast-Hylling acquiring grazing rights within specified areas of the municipality of Selbu according to immemorial usage. As a plenary decision the Selbu case is an important source of law in disputes concerning Sámi land rights of acquisition and the extent of reindeer husbandry rights.²³

As such the Selbu case can guide the application of Norwegian property law, not only in disputes about reindeer pastures, but more generally on acquisition of usufructs and ownership rights in Sámi areas, including the clarification process under the Finnmark Act.

Space does not permit more in-depth analysis of the sentence, but some points deserve emphasis. Initially a united Supreme Court maintained that the Reindeer Husbandry Act (of 1978) Article 2 implies a rule of presumption which requires landowners to meet a *burden of proof*.²⁴ The owner must prove that the reindeer husbandry use has been insufficient to warrant “immemorial usage”. Immemorial usage means rights are acquired based on a certain amount

22 Hovrätten för Övre Norrland, *Berth Hägglund e. al. vs. Rans sameby, Umbyns sameby and Vapstens sameby*, 19 Sept 2007, case no. T 155–06 (Nordmaling).

23 The lawsuit was raised for Middle-Trondelag District Court in 1995 by 229 land owners since Selbu Municipality had given reindeer herders the opportunity to be heard in land matters under the Planning and Building Act. In the writ it was alleged that Essand and Riasten-Hylling reindeer husbandry district had no right to reindeer grazing on the plaintiffs’ properties. The land owner lost the district court case. Frostating Court of Appeal came under the dissent that grazing rights were acquired by immemorial use in the disputed area. Under the dissent (9 to 6), the Supreme Court in plenary came to the same conclusion. However, the dissent did not concern the acquirement of the grazing rights, but where the boundaries for the grazing rights have to be drawn, the minority would draw the boundaries somewhat more narrow for Essand reindeer husbandry district.

24 Now brought further in lov 15. juni 2007 nr. 40 om reindrif (The Reindeer Husbandry Act) article 4, second paragraph.

25 See: *supra* note 16. For further research, the concept of immemorial usage can be compared with acquisition according to the rules of *aboriginal title* in common law, with the exception of the addition of the concept of “good faith” in the Norwegian model, see John J. Borrows and Leonard I. Rotman, *Aboriginal Legal Issues*, 3rd. Ed., Victoria/Windsor: LexisNexis (2007), 253–266.

of use, over time, and in good faith.²⁵ In reindeer herding [430] been to a sufficient extent so that the land is a lawful herding area”.²⁶

The Supreme Court stated also that the right to engage in reindeer husbandry “is an independent right where the foundation is immemorial use”. Of note is the statement that “when grazing rights are acquired by immemorial usage, it will as a general rule mean that the Sámi also have acquired auxiliary rights”.²⁷ Such additional rights might include land and water rights to hunting and fishing, or in our modern times the right to use motor vehicles.

In the context of *international law* the Sámi parties did argue that the International Covenant on Civil and Political Rights of 1966 (ICCPR) Article 27 and ILO Convention No. 169, which, respectively, are incorporated and ratified into Norwegian law, must be applied. In this regard the first voting judge,²⁸ representing the majority is quoted below as follows:

I find it not necessary to go into detail on the two conventions, the relationship between them, and the application in dispute between the private parties. The way I see it, the Norwegian laws on immemorial usage based on traditional Norwegian legal sources, and with the adaptation to be done for reindeer herding, is sufficient to state grazing rights in the disputed area.²⁹

Concerning other norms decided by the court, we have already seen that in relation to intensity and continuity of use the court stated that special conditions with regard to reindeer husbandry had to be taken into consideration when assessing the existence of grazing rights. Terms of acquisition may thus be adapted to Sámi use of the area. The nomadic Sámi way of life meant that terms which applied to other domesticated grazing animals and associated land rights acquisition were not necessarily transferable to reindeer husbandry. Specifically the first voting judge highlighted:

... that reindeer husbandry demands huge areas and that land use varies from year to year depending on weather, wind and quality of the pastures. Thus it cannot be demanded that reindeer graze in a specific area every year. Both for this reason and because of the Sámi nomadic way of life, interruption of use cannot hinder acquisition of rights even though it is of considerable length.³⁰

26 NRt. 2001, 769 on 788.

27 This is proposed statutory by the Sámi Rights Committee II, see: NOU 2007: 13, 51.

28 In The Norwegian Supreme Court the first voting judge is the judge who pronounces the first vote/proposal for judgment. In case he/she represents the majority, or if the court is unanimous, this is the judgment.

29 NRt. 2001, 769 on 791.

30 NRt. 2001, 769 on 789.

[431] The Supreme Court also interpreted the rules on good faith in relation to immemorial usage and corrected older written sources for culturally specific opinions of the Sámi that might influence on the evaluation of the land right questions. It also assessed the use of oral presentations as evidence, since continuity of the Sámi culture is based upon traditions passed down orally through generations.

2.3. *The Svartskog Case*

The Svartskog case (referred to in NRt. 2001, 1229) differed from the Selbu case although both dealt with disputes concerning land rights. The main differences were that the Sámi party consisted of settled Sámi, and the dispute dealt with property rights, not beneficial rights. The dispute stood between the state and a local community in Manndalen in the municipality of Kåfjord in Troms County, where the locals mostly are of Sámi origin. The subject matter concerned 116 square kilometers of outlying fields registered as state property, but used by the local community as a kind of common.

Even though the state land in question was registered with a title, the court sustained the claim of ownership by the local community, thus establishing an exception both in Norwegian law and legal history. The fact that this case is comparable to the situation in many local Sámi communities, greatly enhancing its potential legal relevance for the process of mapping land rights throughout the County of Finnmark.

Possession of the property by the state was not marked by any visible delineation since a planned fence was never erected. This fact was emphasized by the Supreme Court as a reason why there was no necessity to examine the land register. Such examination is usually done to confirm the holding of land in “good faith” when claiming land by prescription in Norwegian law.

State authorities raised an out-of-court dispute and even threatened the locals with legal action, but remained unsuccessful in forcing them away from their “good faith”. Warnings at the Church hill, threats with police action and that the state could prove some of the locals had knowledge of formal state ownership did not deter the community.

Studies of the grounds of the judgment may give the impression the Supreme Court, considered against other case law and preparatory works, seems to have gone to great lengths to explain that good faith was present in relation to acquiring property rights. But the evaluation of good faith in this case may also be understood as an attempt to recognize and honor the oral Sámi tradition and compensate for any lack of fluency in the Norwegian language or familiarity with Norwegian law and legal culture.

In close connection with linguistic and cultural differences to the concept of property rights, it is important to understand how the Sámi characterize [432] such rights. In Sámi tradition one is careful to use the term “property rights”, regardless of the extent of use, as for example in the case of the locals living in Manndalen when the court of first instance found no legal basis to award more than logging and grazing rights. The first voting judge on the Supreme Court emphasized that the all-inclusive usage of land and natural resources must have greater legal consequence when he declared:

Had similar usage been practiced by those of another origin, would it have indicated that they believed they owned the area. The Sámi, who constitute the majority of the inhabitants of Manndalen, with their collective and shared use of resources do not have a tradition of thinking about ownership or exclusive rights to property . . . Should acquisition of property rights by immemorial usage be cured oft because there are many examples where they have spoken about rights to use instead of property rights, would their disposal practices, which correspond to the exercise of property rights, be put to disadvantage compared to the population in general.³¹

3. Preparatory Work and Legislative History of the Finnmark Act

3.1. *The Draft of the Sámi Rights Committee for Recognition of Existing Rights*

During the 1900s Norway established two important judicatory Commissions to determine the boundaries of state property in mountainous areas. These are the Mountain Commission (1908–1953) and Uncultivated Land Commission for Nordland and Troms (1985–2004).³²

Finnmark was not included in the mandate of these Commissions because of the previously-mentioned opinion about the absolute ownership of the unsold land by the state.³³ When the last of these Commissions was established in 1985 there was also opposition from the Sámi to such establishment. The investigation of Sámi rights to “land and water” in Finnmark was therefore left to *the Sámi Rights Committee*.³⁴ But the Committee did not assess actual ownership and

31 N Rt. 2001, 1229 on 1252. The interpretation of both the Selbu and Svartskog Case is developed by Gunnar Eriksen, *Alders tids bruk* (see note 16), 314–348 and Gunnar Eriksen, “Samiske sedvaner og bruk av naturressurser før og etter Selbu- og Svartskogdommene”, *Kritisk juss* 30 (2004), 289–304.

32 The Commissions under Land Consolidation Act[s] 12 Oct. 1857 and 13 March 1882 must also be mentioned.

33 See e.g.: Ot.prp. nr. 59 (1984–85) *Om lov om utmarkskommisjon for Nordland og Troms*, 13–14.

34 The Sámi Rights Committee was appointed in October 1980 and worked up to 1997. A renewed Committee, the Sámi Rights Committee II, was appointed in June 2001.

rights of use acquired by the Sámi and others on the [433] land, at the time considered as state property.

Instead it proposed an act for management of the land in Finnmark whereby the title should be transferred from the State Forest Company (Statskog SF) to an independent ownership body called the *Finnmark grunnforvaltning* (Finnmark Estate Management). This body should be controlled by a board appointed in part by Finnmark County Council and in part by the Sámi Parliament.

The Sámi Rights Committee also proposed a governance model in which local people would be assured influence over resource management through locally-appointed “outfields boards”. It further suggested that community common land should be clarified and determined, based on local traditions which could be considered as a kind of “modern *siida* system”.³⁵

In addition the Committee also made a proposal for a procedure to clarify such commons. Although at the time the Commission for Nordland and Troms was at the peak of its productivity, the Committee proposed no corresponding mechanism to clarify the properties and land rights in Finnmark. Instead it suggested that the community commons should be determined by a committee appointed for each municipality. This was justified by the fact that such clarification demanded local knowledge.³⁶

Even though the Committee also undertook a general discussion of the legal basis for natural resources in Finnmark, it did not investigate the rights of ownership and use for specific groups in designated areas. The legal standing of land rights and ownership of state-held land in Finnmark at that time thus remained unresolved.

3.2. *The Draft of the Bondevik Government*

The question of Sámi rights to natural resources in Finnmark was controversial. Six years after the Sámi Rights Committee submitted its recommendations, the Bondevik government finally presented a bill. As we have seen, the government filed forward the proposal to transfer the ownership to a body controlled by the Sámi Parliament and the Finnmark County Counsel. But it omitted the Sámi Rights Committee proposal for local, community management of outlying fields. This

35 NOU 1997: 4 *Naturgrunlaget for samisk kultur*, 241. A *siida* in earlier times was a Sámi community which managed a physically-determined territory, see: Erik Solem, *Lappiske rettsstudier* (Oslo: Aschehoug 1933), 81–84. Today the concept is used for a family-related working unit in reindeer husbandry, see: the Reindeer Husbandry Act, Articles 51 to 56.

36 The Sámi Rights Committee also proposed the land consolidation court would be the appeal body, since the procedure to determine boundaries under Articles 88 and 89 of the Land Consolidation Act seemed the most natural “process form” when it came to delineation questions.

was justified in that outfield resources should [434] be managed uniformly, not to “harm a desired and appropriate allocation of resources in their entirety”.³⁷

The Sámi Rights Committee proposal to clarify common areas could be considered as an attempt to survey and recognize the rights over “land and water”.³⁸ Although the government in the draft Article 5 acknowledged that “Sámi and others have acquired rights by prescription and immemorial usage”,³⁹ the proposal of clarification was omitted from the bill, too. No other suggestions were made to identify such rights. The government aim was rather “to make good arrangements for the rights and the management of land and water in Finnmark by law rather than by dispute resolution in the courts”.⁴⁰ Accordingly it did not put forward any proposals or procedures to conduct such clarification.

The bill was met with considerable criticism, including from the Sámi Parliament,⁴¹ who argued that the bill was not fully in accordance with obligations under international law. As a result the Parliamentary Standing Committee of Justice asked for an independent assessment of the proposed act, which Professors Geir Ulfstein and Hans Petter Graver were engaged to undertake. They concluded that the government proposals on key points were insufficient to meet ILO Convention No. 169. In relation to Article 14, it was stated:

Should the Finnmark Act meet ILO Convention requirements for recognition of land rights, the decision rules must be changed so that the Sámi are secured the control according to an ownership position. If this is not relevant for the entire county, the special Sámi areas need to be identified with a view to ensuring the Sámi the control and rights to these areas.⁴²

The criticism, in particular the requirement for the bill to comply with international human rights law, initiated consultations between the Sámi Parliament, Finnmark County Council, and the Parliamentary Standing Committee of Justice.

3.3. *The Draft of the Parliamentary Standing Committee of Justice*

The consultations between the Sámi Parliament, Finnmark County Council, and the Standing Committee of Justice led to rather extensive changes in

37 Ot.prp. nr. 53 (2002–2003), 98–99.

38 See Jon Gauslaa, “Lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (finnmarksloven)” (Gyldendal rettsdata), note 3.

39 Ot.prp. nr. 53 (2002–2003), 106.

40 *Ibid.*, 97.

41 Innst. O. nr. 80 (2004–2005), 14.

42 Geir Ulfstein and Hans Petter Graver, *Folkerettslig vurdering av forslaget til ny finnmarkslov*, search on www.regjeringen.no (accessed 15 October 2010).

[435] the bill,⁴³ which included a new first paragraph of Article 5 stating “the Sámi have collectively and individually through prolonged use of land and water acquired rights to land in Finnmark”. That statement was said to represent an important principle and final political recognition that such rights exist.⁴⁴

Due to these consultations the majority of the Standing Committee of Justice, with the exception of the members from the Progress Party and the Socialist Party, acknowledged that the identification of existing rights must be included as a key element in the Finnmark Act.⁴⁵ The majority, after that, proposed establishing of “a surveying commission and a judging tribunal to identify existing rights to land and water in Finnmark”.⁴⁶ Both entities contain elements of previous commissions, however, there are clear differences between the scheme chosen for Finnmark and former regimes, both in their rationale and how the clarification is arranged procedurally.

We might also note that the Socialist Party member of the committee supported clarification of ownership and rights of use in Finnmark, but at the same time pointed out that the important process relating to the establishment of a commission should be better investigated and secured democratic treatment.⁴⁷ He then suggested that the case should be sent back to the government which had to develop terms of a mandate and regulations for a commission and court to identify land rights in Finnmark. The majority did not find reason to follow up the proposal from the Socialist Party member, and it chose instead to put forward the proposal as it was for identifying existing rights to land and water in Finnmark, even though preparatory work had not been sufficiently carried out.

The majority briefly debated its choice of clarification model. The only discussion found was a debate as to whether the rights identification process involved a privatization of the former state land in Finnmark. It was argued that this was not the case. It was also pointed out that if cases were handled by the ordinary courts, the result of clarification would be the same, although important procedural differences were identified. They were: (1) The cases would be prolonged in time; (2) One would not get such an overall view as [436] in the proposal;

43 Innst. O. nr. 80 (2004–2005), 17–27. See also: Øyvind Ravna, “Finnmarksloven er vedtatt. Om de vesentligste endringene i loven i forhold til regjeringens lovforslag i Ot.prp. nr. 53 (2002–2003)”, *Kart og Plan* 65 (2005).

44 Innst. O. nr. 80 (2004–2005), 37.

45 *Ibid.*, 27.

46 *Ibid.*, 17.

47 *Ibid.*, 18 where it was stated: that “the importance of the work on the identification and clarification of rights to use and ownership in an entire county, requires the existence of preparatory work and hearings... It is important that the part of the Finnmark Act which most people come to have personal dealings with, the Commission to clarify their rights, if any, is secured by an ordinary legislative procedure”.

(3) The ability to resolve cases through mediation would not be the same; (4) The ordinary courts would not have the special competence of the commission and the tribunal.⁴⁸

The rationale for the requested legal clarification scheme is, as already mentioned, found in ILO Convention No. 169, Article 14 (3). One should note that the majority meant that the scheme selected was much preferable to the ordinary courts:

Article 14, paragraph 3 further states that adequate procedures should be secured in the national legal system to settle legal claims related to land from the concerned people. In other words, it is clearly not acceptable under international law to hand over to the ordinary courts the question of which and the extent of rights acquired in Finnmark.⁴⁹

As an additional argument for the proposed arrangement, the majority found reasons to mention that there had been similar arrangements, regardless of indigenous people's rights and obligations under international law, elsewhere in the country.⁵⁰

The reasoning of the Standing Committee of Justice for proposing the identification process was thus in part due to Norway's international legal obligations to the Sámi, and in part that the people of Finnmark should not be put in a worse position than people elsewhere in the country when it came to legal clarification of the status of outlying fields and mountainous areas. Both are presumably honorable reasons. At the same time one should note the contrast between the proposal of the Sámi Rights Committee and the Standing Committee's proposal in terms of procedure for legal clarification. According to the draft of the Sámi Rights Committee, the local population should be allowed broad influence, whereas the Standing Committee's proposal meant cases would be resolved by highly-qualified lawyers in the majority without any requirement for local knowledge other than two members with "strong affiliation" to Finnmark (cf. Finnmark Act, Article 29, second paragraph). While the Sámi Rights Committee model was based on bottom-up input, the Standing Committee maintained the opposite view.

Since the Sámi Rights Committee had proposed a rather different model of legal clarification, it is worth noting that the Standing Committee discussed no models other than the one adopted. This concern is further supported by the fact

48 *Ibid.*, 28.

49 *Ibid.*, 28. This was later refuted by the Sámi Rights Committee II, in NOU 2007: 13, 453, here it states that there is "no basis whatever in ILO practice for the point of view of the majority on the Standing Committee".

50 See: part 3.1 above, first section.

that the final arrangement incorporated many elements from the [437] Commission of Nordland and Troms, which itself was met with wide criticism from the Sámi organizations, and not least from the Commission of the Structure of District and City Courts.⁵¹

4. The Survey and Recognition of Land Rights in the Finnmark Act

4.1. A Brief Overview of Procedural Law Required for the Finnmark Commission

The Finnmark Commission is established pursuant to the Finnmark Act, first paragraph of Article 29.⁵² Its mandate is to investigate the rights of use and ownership of areas taken over from the state by the *Finnmark Estate*, according to current national legislation. Examination of reindeer husbandry rights is performed only upon demand by any person with a legal interest.⁵³

The Commission is not a court of law and thus is considered as a kind of administrative body. The Commission's report can in any case only be charged by bringing the matter to the Land Tribunal. Although the Commission is not a court, the provisions against bias of the courts do come into effect (cf. Fm. act Article 46, first paragraph).

As we have seen, the Finnmark Commission was not included in the government bill, but came in under the consultations. Creation of the Commission must as mentioned be seen as a following-up of obligations in international law to which Norway is bound by ILO Convention No. 169, both to consult indigenous peoples under Article 6, paragraph 1 (a), to take steps as necessary to identify land traditionally occupied by indigenous people, and to establish adequate procedures within the national legal system to settle land claim of indigenous peoples under Article 14 (2) and 14 (3). The latter aim to facilitate the clarification process in relation to the Sámi, who for the most part are locals living in villages and reindeer-herders. This holds not only for the formal process, but also for the application of substantive law, including the use of legal sources.

The establishment of the Commission can also be seen as a direct result of the Fm. act Article 5 that recognizes the Sámi and other inhabitants have acquired rights on the Finnmark Estate.

51 See: NOU 1999. 22 *Domstolene i første instans*, 59–60.

52 The Finnmark Commission was appointed by Royal Decree of 14 March 2008. For a commentary on the act, see note 38.

53 Forskrift (regulation) 16. mars 2007 nr. 277 om Finnmarkskommisjonen og Utmarksdomstolen for Finnmark, Article 5. Rights to salmon fishing in the rivers of Tana and Neiden are not included; cf. the same regulation (no. 277) article 6.

[438] The Commission consists of five members where the majority is lawyers with qualifications as judges (cf. Fm. act Article 29, second paragraph). The act does not set any requirement for local or other knowledge beyond the fact that “at least two members shall be resident in or otherwise have a strong affiliation to the county of Finnmark”. Members are appointed by the King but it is assumed that the Sámi Parliament and the Finnmark County Council and others will be permitted to comment on the composition.⁵⁴ The actual composition can be said to reflect a political balancing act with great emphasis placed upon correct ethnopolitical distribution.

In contrast to the Uncultivated Land Commission for Nordland and Troms, the process for the Finnmark Commission does not begin with a claim, suit or other party subpoena. The Finnmark Commission can neither be assigned investigation fields by central authorities, as was the Mountain Commission, but shall itself determine which fields it will investigate and the sequence of treatment (cf. Fm. act Article 30, first paragraph). The same provision states, among other things, that consideration shall be placed on “natural and appropriate delimitation of the field as regards extent and legal and historical context and the need to clarify the legal relations”. Based on experience from the three first cases which have been taken for treatment,⁵⁵ it can be said that the Commission has placed greater emphasis on natural and appropriate delimitation rather than the need for clarification.

The Commission can omit consideration of cases “that are clearly inappropriate for investigation by the Commission” (cf. Fm. act Article 30, third paragraph). For such a decision, emphasis should be put on the category of the right and its legal basis. The majority of the Standing Committee has pointed out that this assessment must be compared with the background and purpose of the rights mapping process:

... e.g. a right based on immemorial usage will normally fit better than a right based on contract. Uncultivated areas will normally be better suited for investigation than a right to rent or lease ground.⁵⁶

It was further stated that the Commission primarily shall investigate rights of use and ownership that are based on long-term and traditional use. But the mandate cannot be limited to this: “According to the majority’s opinion, it is

54 Innst. O. nr. 80 (2004–2005), 19.

55 The Commission has so far (31/12/2010) undertaken three fields for processing. These are Stierdna-Sievju/Stjernøya-Seiland (field 1), Unjarga/Nesseby (field 2), and Sállan / Sørøya (field 3). Fields 1 and 3 consist of islands in the Alta Fjord, while field 2 is a municipality in eastern Finnmark.

56 Innst. O. nr. 80 (2004–2005), 19.

[439] therefore difficult in a precise way to specify in more detail the legal relations the Commission shall examine”.

The Finnmark Commission has responsibility for case illumination (cf. Fm. act Article 32, first paragraph). The act further states that “the Commission may in the manner it finds appropriate obtain statements, documents and other material and conduct surveys and investigations, etc. concerning actual and legal circumstances that may be significant for the Commission’s conclusions”. However, this does not prevent the parties themselves from explaining the facts or the evidence to the Commission. Representatives for interest groups may also be appointed to follow the working of the Commission. The cost shall be covered by the state (cf. Fm. act Article 32, third paragraph).

4.2. *Some Questions related to the Substantive Effect of the Law*

In relation to application of the law we note that the majority of the Standing Committee of Justice emphasized that the surveying of rights should be based upon “current national law”. The term “national” instead of “Norwegian” was chosen to “better point out that consideration must be given to Sámi customs and sense of justice”.⁵⁷ This means that Sámi customs and customary law must be taken under consideration as substantive law within the framework of ILO Convention No. 169, Article 8. Although the objective of this paper is not to analyze the weight of Sámi customs in contradiction to Norwegian statutory law,⁵⁸ it does deserve some remarks. Where indigenous people’s customary law stands in contrast to other sources of law, the Sámi Rights Committee has found that the weight of such law must be determined by the quality of the custom. The Committee does not preclude such customary law be given greater weight than customary law among the majority population, but rather concludes that:

Customary law will not take unconditional precedence when in conflict with internal laws, nor in questions of law that do not apply fundamental legal principles.⁵⁹

Two recent cases, *Selbu* and *Svartskog* (in Rt. 2001, 759 and Rt. 2001, 1229, respectively) reviewed here in section 2, are important sources when Sámi

⁵⁷ *Ibid.*

⁵⁸ For further reading, see Susann Skogvang, Samerett, Oslo: Universitetsforlaget (2009), 65–93 and Øyvind Ravna, “Sámi Legal Culture – and its Place in Norwegian Law”. See note 13.

⁵⁹ NOU 2007: 13, 222.

[440] land rights are to be clarified. The majority of the Standing Committee stated that:

Assessment of evidence in the recent case law has been satisfactory. Modern Norwegian case law, particularly the Selbu and Svartskog cases, have given instruction on how traditional Sámi use shall be considered as a basis for acquisition. These will be important sources of law for the Commission and Court.⁶⁰

The Committee actually went so far as to discuss whether this “recent case law” should be codified in the Finnmark Act, but did not make this proposal since it would mean that statutory provisions and not case law would be the sources in the identification process. This shows in any event that these cases represent important sources of law in answering substantive questions about when rights are to be acquired.

The majority also pointed out that in the assessment of whether rights exist, and if so to what extent they do, reasonable results have to play a certain role.⁶¹ This may indicate that policy considerations could also be a relevant source of law.

Finally, the UN Declaration on the Rights of Indigenous Peoples should be mentioned briefly, which in Article 40 states that the settlement of disputes relating to indigenous peoples shall take into account “the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights”.

4.3. *The Finnmark Commissions Report and Response of the Parties*

The Finnmark Commission is required to submit a report on the legal situation after investigating a field. The report must contain information about (a) who, in the view of the Commission, are owners of the land, (b) what rights of use exist in the Commission’s view, and (c) the circumstances on which the Commission bases its conclusions (cf. Fm. Act, Article 33). The Commission cannot refuse to consider an ownership dispute, for example, by concluding that it is other than the Finnmark Estate who is the owner of a particular piece of land:

In such a case the Commission must decide what result has the best basis in law. It is not acceptable to conclude that the Finnmark Estate is not the owner of the area in question without also indicating who is assumed to be the owner.⁶²

60 Innst. O. nr. 80 (2004–2005), 36.

61 *Ibid.*, 36.

62 *Ibid.*, 21.

[441] The Finnmark Estate shall without undue delay assess the conclusions of the Commission (cf. Fm. act Article 34, first paragraph). This is natural and necessary since the Finnmark Estate holds the title to the lands examined by the Commission and is otherwise regarded as the landowner and thus party to the investigation. The Standing Committee of Justice has held that the Finnmark Estate is more than an ordinary landowner and party:

Since the Finnmark Estate will assume title to all land held today by Statskog SF [State Forest Company], the Finnmark Estate will manage land to which others can hold rights. This suggests, according to the majority opinion, that the Finnmark Estate must have commitments in the identification process beyond what can be termed as ordinary party commitments.⁶³

The Finnmark Estate has thus an obligation to actively consider the Commission's report. To the extent the Finnmark Estate agrees that others have rights on the Finnmark Estate, it is obliged to confirm and without undue delay attend to the rights to be registered or brought before the land consolidation court for marking of the boundaries. Through agreement, negotiated consensus, or unilateral declaration, the process will then terminate at this stage (cf. Fm. act Article 34, second paragraph).

But private parties have no obligation to act on the report of the Commission. We note that the majority of the Standing Committee of Justice in practice assumed the opposite when it stated "if the parties do not want to put the question to rest by bringing it to the Land Tribunal, they can allow the Finnmark Estate to continue to manage the grounds without cutting off the possibility of raising the issue at some future point in time".⁶⁴ That statement virtually proposes leaving the legal issues *unresolved* and nearly sustain speculation in waiting to put forward a claim of strategic reasons. Such reasons can be assuming that prescription period not yet is reached; future change in the interpretations of the law gives better possibilities, or other circumstances that may later work to one's benefit. Likewise parties can wait if they would prefer the matter be dealt with by the ordinary courts instead of the Tribunal.

According to the Fm. act Article 35, parties that do not agree with the Commission's conclusions or who need assistance to have the conclusions set out in binding agreements, can ask the Finnmark Commission for mediation. This obligation ceases when the deadline to submit the dispute before the Land Tribunal has expired. If the dispute is not brought to the Tribunal, it is assumed that the result

⁶³ *Ibid.*, 21.

⁶⁴ *Ibid.*, 21.

is accepted between the parties and that it should be ensured through an agreement and subsequent boundary-marked. We [442] note that the majority of the Standing Committee of Justice required active participation from the Finnmark Estate at this stage without having to go to the Tribunal:

Where there are demands for adjustments according to the Commission's conclusions, or the Finnmark Estate sees that there may be room for mediation, it is assumed that it will relate actively to the other parties and will participate in the negotiations. This is not directly stated in the act, but is a prerequisite for the law (cf. also note to Article 36).⁶⁵

We also note that disputes are assumed to be resolved according to Sámi traditions. The majority of the Standing Committee here refers to the Sámi Parliament, which has emphasized that "conflicts as far as possible and in line with Sámi traditions shall be resolved through negotiations and not through court proceedings. The majority completely supports such a procedural approach".⁶⁶

4.4. *The Land Tribunal for Finnmark*

Matters not resolved through negotiations and agreements can be brought before the Land Tribunal for Finnmark. It has a mandate to settle rights disputes that arise after the Finnmark Commission has investigated a field (cf. Fm. act Article 36, first paragraph).⁶⁷ The Tribunal shall consist of five members, where the chairman, vice-chairman and one other member shall fulfill the requirements for Supreme Court judges. There is no demand for any local or other special knowledge by the members, not even a connection to the county of Finnmark.

General civil procedural rules apply in the same way for the Finnmark Tribunal as they did for the Uncultivated Land Commission for Nordland and Troms, so far as they are applicable, and nothing else is specified in the act (cf. Article 46, second paragraph). Also like the Commission for Nordland and Troms, there are a number of special procedural rules. As we have already seen there are particular rules on arbitration, where the Finnmark Commission is given a role in mediation. However, the mediation is not compulsory,⁶⁸ which means that legal proceedings

65 *Ibid.*, 22.

66 *Ibid.*, 21.

67 The tribunal must also be seen as part of Norway's obligation under Article 14 of the ILO Convention No. 169. The Tribunal is not yet established (31/12/2010). However, as the Commission has still to submit its first report, the current status of the Tribunal is not problematic.

68 Innst. O. nr. 80 (2004–2005), 22.

can take place once the [443] Commission has submitted its report. The Tribunal is not assumed to carry out court mediation or other forms of mediation.

According to the Fm. act Article 36, the Tribunal can hear disputes about the rights that arise after the Finnmark Commission has investigated a field. It emerges either from the wording of the article or from the preparatory work if there is a hindrance for settling substantive issues in a field that has not yet been examined by the Commission. A period of one year and six months is set to bring the dispute before the Tribunal. This period runs from when the Commission has submitted its report (cf. Article 38, first paragraph). The deadline is assumed to be long enough to allow the Finnmark Estate time to consider the report and to give the parties time to negotiate. It is clear that the interests of the Sámi responding to their nomadic use of nature may also require an extended period of time.⁶⁹ The preparatory work does not discuss the effect of a long deadline in relation to the requirement for trial within a reasonable time. The deadline is neither exhaustive. The Tribunal may deal with matters that come in at a later stage if not all cases in a field have been brought to conclusion and if it finds the case appropriate for such consideration (cf. Article 38, second paragraph).

The Tribunal has exclusive jurisdiction like the Uncultivated Land Commission for Nordland and Troms (cf. Article 36, third paragraph), which means that cases that fall under the Tribunal cannot be brought before the ordinary courts or the land consolidation courts except in specified circumstances. Such circumstances occur when the Tribunal has dismissed a case pursuant to Article 39 (see below) or the deadline for bringing proceedings before the Tribunal has expired. The exclusive competence means that *lis pendens* in a certain case occurs when the deadline for bringing the matter before the Tribunal takes to run, i.e. after the Commission has submitted its report.⁷⁰ In fact exclusive competence will block lawsuits by the ordinary courts until the last item in an investigation field is processed.

Matters that are “found inappropriate for consideration” by the Tribunal may be dismissed in whole or in part (cf. Article 39, first paragraph). Such rejection can be done *ex officio* and it cannot be appealed (cf. Article 39, second paragraph). The plaintiff, however, shall be allowed to respond before dismissal occurs. When it comes to matters that are not suitable for treatment, it is comparable to what questions the Finnmark Commission can refuse to investigate, pursuant to Fm. act Article 30, third paragraph. The threshold for rejecting a claim is somewhat lower,

⁶⁹ *Ibid.*, 23.

⁷⁰ *Ibid.*, 23.

since it is not required [444] “that the case [is] obviously not suitable for treatment”.⁷¹ Although an appeal cannot be posed against rejection of the Court rulings, the majority of the Standing Committee of Justice means that the interests of the plaintiff are met since he is allowed to respond to before the Tribunal settle the question. The majority also states that the Tribunal should “be able to concentrate on the major and fundamental issues, so that minor matters, such as . . . adjusting the boundaries between two properties, or interpretation of contracts for the sale of property, could be left to the ordinary courts or land consolidation courts”.

The judgments of the Tribunal can be appealed directly to the Supreme Court (cf. Fm. act, Article 42). The majority points out that a “similar solution was selected for the decisions from the Commission for Nordland and Troms”.⁷² This procedure means that presumably only a minority of the appeals will be heard since the Supreme Court is not an ordinary court of appeal, but rather a Court for settling questions of principle with broad significance outside the concerned parties. The Supreme Court can neither make on-site inspections nor examine witnesses.

5. Some Problems in Applying the Identification and Recognition Process

5.1. Substantive Law Issues

The legal process chosen to survey, identify and recognize existing rights of use and ownership in Finnmark deviates significantly from ordinary civil procedure and former commission procedures in Norway. This contributes in making the identification process demanding in relation to both substantive and procedural law. *Substantively* it is challenging not only because the Commission and Tribunal have a far wider mandate than comparable commissions, but also because they have little guidance from preparatory works or case law. That process occurs in a part of the country, or in a culture, where property law traditions have lower standing than elsewhere, also adds to the difficulty.⁷³

⁷¹ *Ibid.*, 23.

⁷² *Ibid.*, 25.

⁷³ There are some arrangements in other comparable countries which might be mentioned. In Sweden there had been a boundary commission (*Gränsdragningskommissionen*) and a hunting and fishing rights investigation (*Jakt- och fiskerättsutredningen*) surveying Sámi land rights in the early 2000's, see: NOU 2007: 13, 251–254. But there have still not been passed any acts upon these investigations. The situation in Greenland might be of interest, since Denmark has ratified ILO Convention No. 169, and since a Greenlandic-Danish self-government commission was appointed in 2004, see: NOU 2007: 13, 260–262.

[445] Because the Finnmark Act has few constraints, and few sources and precedents to depend upon, *predictability* can become problematic. Consequently, it can be difficult for the parties including their qualified counsels to predict the result of a certain case. While the previous commissions in Norway just had to investigate whether the state owned the land, the boundaries between state and private land, and what rights of use existed on the land belonging to the state, the legal issues to be investigated in Finnmark have no such limitations. Here the Commission and Tribunal have to examine the whole bundle of rights and resources that might be found on what today is the Finnmark Estate, which might include community commons, “Finnmark” commons, joint-ownership and Sámi siidas. A substantial segment will probably consist of relatively complicated disputes between private parties. Even if the legislators have indicated that the Finnmark Estate to “a very modest degree will be mapped as private, individual plots on uncultivated land”,⁷⁴ this statement must be considered mainly as a normative political expression, which does not make the duty any less demanding.

But there *are* guidelines indicating norms as to how the legal issues may be resolved. The landmark *Selbu* and the *Svartskog* cases set standards for how the rules on immemorial usage are to be applied to Sámi land claims. Sámi customary law is also an important source of law because of Norway’s ratification of ILO Convention No. 169, the emphasis that is placed on such sources in the preparatory work for the Finnmark Act, and the allowances shown to Sámi legal culture we have come to expect from Norwegian legal culture. But case law indicates it will take time to establish norms for clarifying and ensuring the quality of customary law.⁷⁵

Greenland, however, differs remarkably from the conditions in Finnmark by the fact that indigenous Inuit people make up the 89 percent of Greenland’s 57,000 inhabitants (2006). New Zealand has to be mentioned, too, because of the *Waitangi Tribunal*. This is not a court, but a permanent commission of inquiry to assess whether and how the Waitangi Treaty of 1842 is upheld, see: NOU 2007: 13, 265–267, Christina Allard, *Two Sides of the Coin*, Lulå: Luleå University of Technology (2006), 78–81 and Valmaine Toki, “Indigenous Peoples’ Fisheries Rights – A comparative perspective between Maori and the Sami”, *Arctic Review on Law and Politics* 1 (2010): 54–81. To consider arrangements in other states are interesting for comparison. That the frame of this article is the identification process in Finnmark, and the fact that the Finnmark commission shall base its investigation on current national law, see part 4.2, first section, makes it not natural to go deeper into arrangements in other countries at the moment. When the draft Nordic Saami Convention is adopted, and we get a more similar policy in the Nordic countries, this will probably be different.

74 Innst. O. nr. 80 (2004–2005), 28.

75 See: e.g., NRT. 2001, 1116 and NRT. 2008, 1789. See also Susann Skogvang, “Hjertesukk om hjertestikk”, *Tidsskrift for Strafferett* (2009): 372–389.

[446] The legal clarification process has no requirement for local knowledge, neither among the members of the Commission nor among the members of the Tribunal. This may be viewed as a concern due to the nature both of procedural and substantive law. Local knowledge is important for reaching a correct and reasonable result *de facto* acceptable to all parties. It is also important for parties to know their peers have contributed to the decision. Sámi customs, customary law and legal traditions are little-taught in law schools today, so local knowledge is, therefore, of paramount importance.

The people of Finnmark are not given equal influence over local resource management as was proposed by the Sámi Rights Committee, and as holders of a right in the state commons in Southern parts of Norway.⁷⁶ Thus, holders of local knowledge and their representation on both the Commission and Tribunal offer importance for reaching lasting, balanced, and impartial decisions.

5.2. *Procedural Law Issues*

Procedurally clarification will be challenging for several reasons: the principle of party disposition is not implied, the appeals go directly to the Supreme Court, some force of law problems may be present, and finally two separate bodies have been created, which together constitute a unified system but at the same time must remain strictly independent of one another. Such procedural model may also make trial within a reasonable time difficult.

Achievement of an effective remedy of appeal and trial within a reasonable time can be seen as conflicting interests, but both these requirements must be met according to Article 6 of the European Convention on Human Rights (ECHR). Space does not permit discussion of the remedy of appeal here. Instead we focus on the requirement for trial within a reasonable time, the principle of party disposition, and legal efficacy.

5.2.1. *ECHR Article 6 and the Requirement for Trial within a Reasonable Time*

The ECHR Article 6 (1) requires trial within a reasonable time which means that a dispute must end within a certain period of time. To assess whether the provision has been violated, practice from *the European Court of Human Rights* (ECtHR) shows that this depends upon three criteria: the complexity of the case, the

⁷⁶ See: NOU 1997: 4, 196–326, which proposed local boards modeled on the Act of 6 June 1975 No. 31 Om utnytting av rettar og lunnende m.m. i statsallmenningane (the Mountain Act). See also: the same Act Chapters II and III and Øyvind Ravna, "Jordbrukeres rettsstilling under finnmarksloven, sammenliknet med andre liknende forvaltningsordninger" *Tidsskrift for eiendomsrett* 6 (2010), 29–69.

behavior of the applicant, and the handling of the case by [447] the administrative and judicial authorities.⁷⁷ Van Dijk et al. also point out a fourth criterion: the importance of what is at stake for the parties.⁷⁸

What constitutes a reasonable time for a disputed clarification case in Finnmark in general is difficult to say, since both the complexity, the behavior of the parties, and what is at stake will vary from case to case. One may presume that important cases impacting culture and livelihood, such as the right to reindeer herding, might be violated faster than leisure-related rights such as game hunting and angling.

It can be questioned whether the Commission *is covered* by ECHR Article 6, since the provision is aimed at *courts of law*. One might assume that it is, since the Commission and the Tribunal form a unified system: a case cannot be brought directly before the Tribunal, just as a dispute cannot be settled by the Commission. Although the Commission formally does not settle disputes, it does take positions on such issues. The basis for determining the time limit usually is the writ. But the ECtHR looks on the reality rather than formal national concepts, which means that the deadlines have to be calculated from initiation of a prior administrative case.⁷⁹ Therefore, the situation is that when national law requires an administrative procedure to be executed, this is taken into consideration in the time requirement.

Although we cannot expand upon cases in Finnmark, the process so far shows that cases will take time, and from other comparable ECtHR practice, warning lights is already on the way to start flashing.⁸⁰ The ECHR also contains provisions on the protection of property in Protocol 1 Article 1. Whether freezing of land use for an extended period could lead to a violation might also have been discussed here, but the topic is beyond the scope of this paper.

It can also be asked whether *the waiting period* before the dispute is heard

77 David Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights, 2nd ed.*, Oxford: Oxford University Press (2009), 279, and Pieter van Dijk, Fried van Hoff, Arjen van Rijn and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights, 4th ed.*, Antwerpen – Oxford: Intersentia (2006), 606.

78 van Dijk et al., *Theory and Practice of the European Convention*, 607, with further reference to ECtHR practice.

79 Jørgen Aall, *Rettsstat og menneskerettigheter, 2nd ed.*, Bergen: Fagbokforlaget (2007), 366, and van Dijk et al., *Theory and Practice of the European Convention*, (see: note 77) 603, with further reference to ECtHR practice.

80 See: e.g., Karl Arne Utgård, "Jordskiftedomstolane og Den europeiske menneskerettskonvensjonen," in *Perspektiver på jordskifte*, ed. Øyvind Ravna, Oslo: Gyldendal (2009), 163–183 who analyze trial within reasonable time according to ECHR Article 6 for land consolidation cases from Austria treated by ECtHR, pointing out (on 171) that cases *lasting from eight to nine years* was found in violation with the provision had in general.

may represent a disproportionate burden for the people of Finnmark, that it may violate international law standards like the ILO Convention requirement [448] for recognition of the rights of indigenous people, or the rights of minorities to enjoy their culture according to Article 27 of the International Convention on civil and political rights. This question of timeliness is particularly relevant when Sámi culture or livelihood interests are at stake. *Susann Skogvang* states that the ILO Convention No. 169 is of importance for the Commission's priorities of investigation fields, as it only requires identification and recognition of Sami rights, not rights of others:

There must be some requirements for progress in the process for the convention to provide effective protection. The Finnmark Commission should therefore give priority to the traditional Sámi areas, reindeer herders rights, and other fields where it is Sami legal claims.⁸¹

In its selection of investigation fields, the Commission has so far put greater emphasis on natural and appropriate delimitation than the need for clarification. In relation to the clearly-stated need for clarification on reindeer winter pastures in Finnmark, and the ensuing negative consequences for Sámi culture and livelihood of having to live on land in the midst of legal disputes, one might question the priorities of the Commission. To avoid any possible violation of law and in recognition of the Sámi culture and way of life already burdened with among others, climactic and commercial pressures, the Commission may wish to consider giving priority to such cases. This argument is also supported by Article 40 of the UN Declaration on the Rights of Indigenous Peoples.

5.2.2. *The Principle of Party Disposition*

The paper does not discuss whether it is a thought-through idea that the responsibility for case illumination, including the implementation of external investigations, fall to the Commission. Instead we here will examine whether the provision that gives the Commission the access to determine the investigation fields by itself, regardless of party subpoena or other dispositions, also raises questions in relation to the principle of party disposition. It might be mentioned here that the model chosen was greatly criticized by the Ministry of Justice in the preparatory work of the Act on the Uncultivated Land Commission for Nordland and Troms, where it was referred to as “a highly unusual divagation from the otherwise applicable in civil proceedings”.⁸² It was stated there that it should depend upon the

81 *Susann Skogvang, Samerett*, see note 58, 245.

82 Ot.prp. nr. 59 (1984–85) *Om lov om utmarkskommisjon for Nordland og Troms*, 18 (Act adopted 7 June 1985 No. 51), 18.

parties involved whether or not they want to use the legal system, i.e. whether they would sue, carry the case and take remedies, etc. The people of Finnmark are deprived of this [449] aspect of party subpoena, and must participate in the process whether they like it or not to safeguard their interests. This is one side of the case which in itself may be process-driven. Such deviation from party disposition also means that rights holders in areas not taken under investigation have little influence over the waiting period by raising lawsuits that must be treated chronologically.

The Finnmark Act, Article 32, first paragraph, gives the Commission broad powers to “obtain statements, documents and other material and conduct surveys and investigations”. When external investigators interview rights holders and others who may have information or claims, and put forward their written materials to the Commission, this practice may raise important concerns about the principles of adversarial representation and party disposition. One may ask whether legislators had envisioned that the investigative work would be put out to tender to the extent it is at present, since neither the provision nor the preparatory work so indicate.

More or less in connection with the absence of party disposition, the procedural law chosen may emerge to increase the process and raise the level of the conflict. On a relatively simple form named “Message about Possible Rights” which can be printed off from the Commission’s website,⁸³ there is little binding to initiate a claim for rights of use and ownership of land by putting a cross or two on the form. Even if parties make a claim out of uncertainty, or perhaps as a poorly thought-out scheme to acquire land, the Commission must investigate each claim and invite counterparties to respond. The Commission has decided to publish claims on its website, which is required for disclosure and to raise public awareness. But ill-considered claims can also provoke corresponding demands from neighbors or other users. For example, reindeer herders in the fields under investigation have claimed ownership on several occasions for no well-founded reason. Likewise locals have indicated that they will make claims of ownership to insure against reindeer territory expansion.⁸⁴

5.2.3. *Force of Law or Legal Efficacy*

Force of law or the *legal efficacy* of the current scheme is another issue to be analyzed. As we have seen the Finnmark Estate is obliged to actively consider the Commission’s report and to the extent that it agrees that others have rights, state

83 See: <http://www.domstol.no/DATemplates/FileList.aspx?id=23941&epslanguage=NO> (accessed 06 December 2010).

84 See: the Sámi newspaper *Ságat*, 27 August 2010, 6–7.

them, and “without undue delay” ensure that the right is officially registered (cf. Fm. act Article 34, first and second paragraph). Such [450] registration does not provide any force of law, but only ensures a contractual effect. Aspects of formal and substantive law of such agreements can then later be brought before the courts.

It is also assumed that the Finnmark Estate shall take legal action when it disagrees with the conclusions of the report, and when mediation is not successful. However, if a private party disagrees with the conclusions of the report, he or she may choose to remain passive, either for strategic reasons or because the conclusions are associated with a legal uncertainty that makes it difficult to conclude an agreement while not crystallizing a legal dispute. The only way to achieve both formal force of law and other legal effects is for the Finnmark Estate to bring the case to the Tribunal. However, one may question whether the Finnmark Estate can do such action, as the lawsuit requires a *dispute concerning rights* (cf. Fm. act Article 36, first paragraph). Likewise it is unfortunate if the Finnmark Estate has to take out a writ on a legal question it does agree upon and does not want to contest. If the Commission were a court of law and the Tribunal a pure court of appeal, such legal force issues would rarely arise. Such a court of appeal could also actively inspect the disputed areas on-site and examine witnesses itself, which is important for proper appeal handling.⁸⁵

6. Conclusions

Since the establishment of the Mountain Commission at the beginning of the 1900s, the perception has been that the kind of legal clarification discussed in this paper cannot be handled by ordinary courts. Most recently the majority of the Standing Committee of Justice in their draft on the Finnmark Act stated that it is “not acceptable under international law to hand over the question of which and to what extent rights are acquired in Finnmark to the ordinary courts.”⁸⁶ Paradoxically, however, three former Commission schemes were discontinued after ministries or legal committees assumed that such issues would be handled by ordinary courts or land consolidation courts.⁸⁷ This was done for all these arrangements after it was clearly stated there was no further need for them.

Those who have argued for special commissions have made expertise and proper application of the law, including obligations under international law, to a

85 The question on *legal efficacy* is analyzed in Øyvind Ravna, “Rettsvirkningen av rettskartleggings- og anerkjennelsesprosessen i Finnmark”, *Lov og Rett* 50 (2011), 220–240.

86 Innst. O. nr. 80 (2004–2005), 28.

87 The schemes are mentioned in part 3.1, first section, including note 32.

matter of choice of court. In the opinion of the author, competent and [451] proper application of the law here, as elsewhere, first and foremost is a matter of legal craftsmanship, economy, and predictable legislation. Although we do not discuss whether other instances, e.g. courts of law, should handle the clarification process, it can be argued as the Structure Commission for the Courts has done, that the ordinary courts, or for that matter the Land Consolidation Courts assuming they are provided adequate resources, could resolve these issues without problems. The benefits are obvious: access to an established legal infrastructure with well-established procedural rules, including an appeal system that ensures that the case could be heard by two court bodies.

The author will not discuss the arguments of the Standing Committee of Justice for adopting the current procedural system (see part 3.3). However, it can easily be argued that the three arguments about proceeding time, mediation and special competence, all could be secured just as well in other ways. That the overall review is best secured with the approved scheme, however, is probably the case.

The question of the economy of the process, and perhaps especially if there should be an option to strengthen the ordinary courts instead, could also have been discussed. The issue of whether special processing of reindeer husbandry rights is adequate procedure within national law is likewise not dealt with in this article.⁸⁸

Space does not permit a long *de lege ferenda* discussion. However, the review shows that people in Finnmark, both Sámi and non-Sámi alike, probably would gain from amendments of the Finnmark Act. To ensure trial within a reasonable time the legislation could be changed to set a shorter period of time to bring cases before the Tribunal. Likewise the total portfolio of cases could be treated more quickly if it were possible for the Commission to work in two parallel departments.

Transferring the Commission to a *court of law* could also be taken into consideration, as this would benefit the appeals system, use of time, and provide the opportunity to obtain enforceable decisions. The Tribunal could then function as a purely appellate body. With such amendments, cases should naturally also start with a writ or a lawsuit, with the Finnmark Estate and those who appoint its board, the Sámi Parliament, and Finnmark County Council playing an active role. Both the Commission and Tribunal could also be composed of a larger proportion of qualified lay persons with knowledge of local conditions and Sámi customs.⁸⁹

88 See: *supra* note 53.

89 Transferring the Commission to a court of law also raises other issues, e.g., a question of independence, see: ECHR Article 6 and the Norwegian Constitution Article 22 and 88. However, this is not a topic to be analyzed in this paper.

[452] Finally, and in spite of the criticism raised above, the author emphasizes that this review illustrates that Norway *is recognizing* Sámi rights to land and natural resources, both under international and national law. This was recently pointed out by the UN special rapporteur on indigenous Peoples rights, *James Anaya*, who states that

The Finnmark Act of 2005 in Norway offers important protections for the advancement of Sami rights to self-determination and control over natural resources at the local level, setting an important example for the other Nordic countries.⁹⁰

At the same time he also expresses certain reservation when he points out that since “the process for identifying rights to land under the Finnmark Act is currently underway, the adequacy of the established procedure is not yet known”.⁹¹

Such reservation is relevant, as we have seen, there are difficulties both of substantive and procedural nature in the current process. But these difficulties cannot be ascribed as absence of recognition or failure to uphold the aim of ILO Convention No. 169, but either as a result from uncoordinated and inadequate preparatory work of the act.

In relation to that and to the problem addressed for this paper, it has to be mentioned that the Sámi Rights Committee II has stated that “it can be concluded that the Finnmark Act system as a whole clearly must be considered to meet the requirements of ILO Convention No. 169, Articles 14 (2) and 14 (3)”.⁹² Despite the shortcomings of the act, there is no reason to renounce such statements, i.e. that the Finnmark Act does not prescribe an adequate procedure within national law. That can at least not be done before one has evaluated some results of the clarification process.

This paper can, after the analysis above, in any case also be seen as a request for further research. It can likewise be seen as a request for legislative authorities to ensure that the bodies required for the process of clarification are supported with the necessary legal framework and resources to make proper investigations and reach conclusions within a reasonable time.

This emphasizes that there is significant capacity to improve the Finnmark Act, and it is clearly possible to establish a process that *better* meets the requirements

90 James Anaya, *The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland*, see: http://unsr.jamesanaya.org/docs/countries/2011_report_sami_advance_version_en.pdf, paragraph 44 (accessed 20 February 2011).

91 *Ibid.*, Paragraph 49.

92 NOU 2007: 13, 452. The Committee has also pointed out that the process “is assumed to be ‘in line with Norwegian objectives to loyalty to achieving the purpose of the Convention’ ”.

of the ILO Convention than the current act as it stands. That improvement **[453]** is a job for our legislators and contributing state bodies, in partnership with the Sámi and other locals. Consequently, they all have a duty to ensure the identification process, which began with the adoption of the Finnmark Act in 2005, and which needs to be carried out in a satisfactory and predictable manner for the benefit of the people of Finnmark, Sámi and non-Sámi alike.