

The Finnmark Act 2005 clarification process and trial ‘within a reasonable time’¹

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Abstract: The Norwegian Finnmark Act 2005 aims to initiate a process for surveying and recognizing land rights of areas previously considered to be state-owned. This clarification of land rights involves two separate bodies: the Finnmark Commission to investigate and conclude fields, and a land tribunal to settle disputes arising from hearings by the Finnmark Commission. Together they constitute a unified system to effectuate the trial process.

In connection with the Finnmark Commission's regulations, it is stated that it is an aim to investigate the legal situation in the whole county within reasonable time. Fair trial within a reasonable time is a human right enshrined in the European Convention on Human Rights 1950 (ECHR) Article 6(1). The issue to be addressed in this paper is whether the legal clarification process conducted by the Finnmark Commission is subject to the rules of trial within a reasonable time, and if so, examine how best to prevent these processes from coming into conflict with ECHR 1950 Article 6(1).

Key words: Finnmark Act, reasonable time, ECHR, Finnmark Commission, indigenous people

1 Introduction

The Finnmark Act of 17 June 2005 No. 85 relating to legal relations and management of land and natural resources in the county of Finnmark (Fm Act 2005)² is a land code for Finnmark. Section 1 of the Act outlines the purpose of the Act, which is

to facilitate the management of land and natural resources in the county of Finnmark in a balanced and ecologically sustainable manner for the benefit of the residents of the county and particularly as a basis for Sami culture, reindeer husbandry use of non-cultivated areas, commercial activity and social life.’

¹ Thanks to Supreme Court Judge Karl Arne Utgård for inspiration and pointing out relevant case law on “land consolidation” through the article Karl Arne Utgård, ‘Jordskiftedomstolane og Den europeiske menneskerettskonvensjonen’ in Øyvind Ravna (ed) *Perspektiver på jordskifte* (Gyldendal, Oslo 2009) 163–183.

² *Lov 17. juni 2005 nr 85 om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke* (Finnmarksloven). An English translation of the Act can be found here: <http://www.ub.uio.no/ujur/ulovdata/lov-20050617-085-eng.pdf>, accessed 5 May 2011.

[185] Finnmark is the northernmost county of Norway and central part of the traditional area of the indigenous Sámi people. The land code initiates an ongoing process of surveying and recognizing existing rights of use and ownership of areas previously considered to be state-owned land, which it transfers to an entity called the Finnmark Estate.³ The identification process is to be performed by a body called the Finnmark Commission (cf Fm Act 2005 s 29 para 1), while a special court, the Land Tribunal for Finnmark,⁴ is to settle disputes arising once the Commission has investigated a field or specified area (cf Fm Act 2005 s 36 para 1). These two bodies constitute a unified system to effectuate the process of mapping and clarifying existing rights.

The Finnmark Act and the clarification process can be seen as a response to many years of struggle by the Sámi and due in part to the conflict surrounding the development of the Alta-Kautokeino watercourse in the 1970s.⁵ But the question of the right to land in Finnmark had become controversial long before the Alta conflict. Already in 1956 the Sámi Council for Finnmark stated that ‘...the Sámi live in the sure knowledge that both the mountains, the main lands and the islands along the coast, which they have had the right to use since time immemorial, had not been ownerless land, but belonged to the Sámi.’⁶

And we can go even further back in time. As far back as 1902 when the Norwegianisation policy prevailed, the State of Norway passed a land code prohibiting those who did not use Norwegian in everyday speech [186] from acquiring land from the state.⁷ This action prompted direct opposition, as expressed in 1906 through the voice of the Sámi politician and teacher Isak Saba in his rhetorical question: ‘Will not the

³ The Finnmark Estate (*Finnmarkseiendommen*, in Fm Act 2005 s 6) is defined as ‘a separate legal entity with its seat in Finnmark, which shall manage the land and natural resources, etc... as the owner in accordance with the purpose and provisions of the Act in general’. It has a board of six persons: three elected by the Sámi Parliament and three by Finnmark County Council, cf Fm Act 2005 s 7.

⁴ The term ‘Uncultivated Land Tribunal for Finnmark’ is often used in English translation. It does not reflect the Finnmark or Sámi context, since livelihood and cultural activities historically have not depended on actual land cultivation. The outlying land and mountainous areas are consequently Sámi cultural land. Therefore the more neutral form, the Land Tribunal for Finnmark, is used.

⁵ Ot prp nr 53 (2002–2003) *Om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (Finnmarksloven)* 7. The Act and the process are also a response to the implementation of ILO Convention No. 169 (1989) concerning indigenous and tribal peoples in independent countries, which we will come back to.

⁶ *Innstilling fra komiteen til å utrede samespørsmål* (The Sámi Committee, Oslo 1959) 1. The Sámi Council for Finnmark was established in 1953 by Finnmark County Council, with the Sámi politician and educator Per Fokstad as the leader. In 1964 the Sámi Council for Finnmark was replaced by the Norwegian Sámi Council.

⁷ Regulation 7 July 1902 s 1(c), issued under the Act of 22 May 1902 No 7, *om afhændelse af statens jord og grund i Finnmarkens amts landdistrikt*, s 2, quoted in Ot Prp No 20 (1901–1902) 12.

grass grow just as well on the meadow, whether you speak Norwegian or Sámi? Is it not enough that the Sámi have to buy the land that from ancient times has been their own?''⁸

About 15 years later yet another struggle arose over a draft of a new reindeer husbandry act, which contributed to the first Sámi congress held in Trondheim on February 6, 1917.⁹ Today February 6th is celebrated as the Sámi National Day. The land code adopted in 2005 is thus a result of a long struggle for recognition of Sámi land rights.

If we again move forward to the 1970s, Sámi cultural awareness was galvanized by a proposal to build a hydroelectric power plant with a dam which would flood the Sámi village of Maze. Another vital contribution was the doctoral thesis of Sverre Tønnesen, 'The Rights to the Land of Finnmark',¹⁰ wherein state ownership of unsold land was questioned. These events culminated in the Alta case at the end of the decade, which prompted the government of Prime Minister Nordli to found the Sámi Rights Committee in 1980.

The investigatory work that took place under the auspices of the Sámi Rights Committee led to acknowledgement that state ownership of unsold land in Finnmark was based upon a legal opinion which the Norwegian government could no longer support. Although *Rettsgruppa* (The Law Group) under the Sámi Rights Committee in 1993 concluded that the Norwegian state owned the unsold land both by the coast and in the interior of Finnmark County, it raised a fundamental question regarding the legitimacy of this ownership, stating that it might be based on a misunderstanding that was difficult to excuse.¹¹ Ten years later, in April 2003, when the Bondevik government presented a bill for the Finnmark Act, it concluded that state ownership could no

⁸ *Sagai Muittalægje* (Sigerfjord, 1 March 1906) quoted from Steinar Pedersen, 'Statens eiendomsrett til grunnen i Finnmark – en del av den interne kolonihistorie' in Harald Eidheim (ed) *Samer og nordmenn* (Cappelen, Oslo 1999) 15–38 [37]. Isak Saba (1875–1921) was the first Sámi elected to the Norwegian Parliament (1907–1912). He is also known for having authored the text of the Sámi national anthem *Sámi soga lávlla*.

⁹ See Bård. A. Berg in *Store Norske Leksikon*, <www.sn�.no/nbl_biografi/Daniel_Mortenson/utdypning> accessed 9 April 2011.

¹⁰ Sverre Tønnesen, *Retten til jorden i Finnmark. Rettsreglene om den såkalte "Statens umatrikulerte grunn" – en undersøkelse med særlig sikte på samenes rettigheter* (Universitetsforlaget, Bergen 1972).

¹¹ NOU 1993: 34 *Retten til og forvaltning av land og vann i Finnmark* 263.

longer be maintained [187] in full.¹² It found that land in Finnmark could be subject to ‘private or collective rights based on prescription or immemorial usage’.¹³

By 1990 Norway had ratified ILO Convention No. 169 (1989) concerning indigenous and tribal peoples in independent countries. This meant the state undertook the obligation, among others, to identify and recognize indigenous peoples’ traditional lands. Even though the Bondevik government recognized that there might be rights based on prescription and immemorial usage in Finnmark, in their bill they did not propose any survey or specific process to clarify such rights.

The Bondevik bill was met with considerable criticism, in particular from the Sámi Parliament,¹⁴ who argued that it did not fully address obligations under international law. As a result the Parliamentary Standing Committee of Justice asked for an independent assessment of the bill, which Professors Geir Ulfstein and Hans Petter Graver were engaged to undertake. They concluded that government proposals on key points were insufficient to meet the requirements of ILO Convention No. 169, stating that in order for the Finnmark Act to meet ILO Convention requirements for recognition of land rights, the decision rules must be changed so that the Sámi could be secured control according to an ownership position.¹⁵

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 Standing Committee of Justice. The consultations led to rather extensive changes in the bill¹⁶ which included a new first paragraph of section 5 stating ‘the Sámi have collectively and individually through prolonged use of land and water acquired rights to land in Finnmark.’

As a result of 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

¹² Ot prp nr 53 (2002–2003) 43.

¹³ Proposal for a Finnmark Act s 5(1), see Ot prp nr 53 (2002-2003) 122.

¹⁴ Innst O Nr 80 (2004-2005) *Innstilling fra justiskomiteen om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (finnmarksloven)* 14.

¹⁵ Geir Ulfstein and Hans Petter Graver, *Folkerettslig vurdering av forslaget til ny finnmarkslov* <http://www.regjeringen.no/nb/dep/jd/dok/rapporter_planer/rapporter/2004/folkerettslig-vurdering-av-forslaget-til.html?id=278377> accessed 15 February 2011.

¹⁶ Innst O Nr 80 (2004-2005) 14 ff.

element in the Finnmark Act 2005.¹⁷ Subsequently the majority [188] proposed establishment of ‘a surveying commission and a judging tribunal to identify existing rights to land and water in Finnmark.’¹⁸ This resulted in a new chapter 5 of the Finnmark Act 2005, which outlined a trial process to clarify and determine right holders to the former state land in Finnmark. The rationale for requiring legal clarification was mainly the obligation Norway undertook in ratifying ILO Convention No. 169, particularly Article 14. One should note that the majority of the Standing Committee concluded the scheme selected was much preferable to the ordinary courts, pointing out:

Article 14(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.¹⁹

As an additional argument in favour of the proposed procedure, the majority found reason to mention similar arrangements had been made elsewhere in the country, regardless of indigenous peoples’ rights and obligations under international law.²⁰ 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 so 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 outlying fields and mountainous areas.

Fair and public hearing within a reasonable time is a human right enshrined in the European Convention on Human Rights 1950 (ECHR) Article 6(1).²¹ It is also stated that ‘one of the aim of the Finnmark Act is that the legal situation in the whole of

¹⁷ Innst O Nr 80 (2004-2005) 27.

¹⁸ Ibid 17. 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.

¹⁹ Ibid 28. This was later refuted by the Sámi Rights Committee II, in NOU 2007: 13 *Den nye sameretten* 453, where it states that there is ‘no basis whatever in ILO practice for the point of view of the majority on the Standing Committee’.

²⁰ See part 2.2 last section for similar arrangements.

²¹ Convention 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms.

Finnmark shall be investigated within a reasonable time'.²² The issue [189] of 'reasonable time' addressed in this paper can be divided into two parts: (1) examination of whether the legal clarification process in Finnmark, which does not fall directly under the Land Tribunal for Finnmark, is subject to the rules of trial within a reasonable time outlined in ECHR 1950 Article 6(1). (2) If that element of the clarification process is in fact required to comply, determine whether the process initiated for clarification and legal recognition of land rights through the Finnmark Act 2005 may possibly come into conflict with ECHR 1950 Article 6(1), and what measures may be taken to avoid such a conflict.

Alleging violation of the ECHR can be heard by national courts, see ECHR Article 13, and finally by the European Court of Human Rights (ECtHR).²³ Sources for the analysis presented here consist mainly of case law of the ECtHR, including legal literature and textbooks that discuss and analyze this case law. Comparison of the legal process initiated in Finnmark with other human rights provisions is beyond the scope of this paper. In any case, since the Finnmark clarification is reasoned in the ILO Convention No. 169, the Convention provides a framework for the discussion.

The question of 'reasonable time' has become particularly relevant because it is more than three years since the Finnmark Commission was established on 14 March 2008, and it has yet to report any conclusions. This article can thus be seen as a contribution to the discussion of frameworks which may prevent the Finnmark clarification process from conflicting with ECHR 1950 Article 6(1).

2 Is the Finnmark Commission subject to ECHR 1950 Article 6(1)?

ECHR 1950 Article 6(1) requirement for trial within a reasonable time

Before discussing the issues to be addressed, we first examine the provision. Regardless of juridical outcome, an unreasonably lengthy time to clarify and decide upon a legal dispute, in and of itself, can be considered unlawful. Through the Norwegian

²² Note to Regulation 16 March 2007 No. 277 on the Finnmark Commission and the Land Tribunal for Finnmark, s 2, page 3 of Royal Decree 16. March 2007.

²³ The European Court of Human Rights is the monitoring body for the ECHR, which can overrule and bind national courts in countries that are party to the Convention; see Jørgen Aall, *Rettsstat og menneskerettigheter*, 2nd edn (Fagbokforlaget, Bergen 2007) 83–94. Alleging violation of the ECHR can also be heard by national courts, see ECHR Article 13.

Human Rights Act of 1999,²⁴ the European Convention on [190] Human Rights was incorporated into Norwegian law with precedence over other legislation without constitutional rank. ECHR 1950 Article 6(1) contains provisions concerning the right to a fair trial. The first sentence reads as follows:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law [italics added].

Case law and interpretations by the European Court of Human Rights (ECtHR) indicate that the concept of a hearing within a reasonable time depends upon a complex assessment. David Harris and others write that there is no absolute time limit, but that reviews for both civil and criminal cases show that the assessment of reasonable time depends upon three criteria: (1) the complexity of the case, (2) the conduct of the applicant, and (3) the conduct of the case by the competent administrative or judiciary authorities.²⁵ The first of these three criteria, the legal and actual complexity, is considered the most important evaluation criterion. An additional fourth criterion of significance is considered together with the three others in a Grand Chamber hearing by the ECtHR.²⁶ This last criterion (4) concerns what is at stake for the applicant in the hearing; in a civil case what ‘good’ is under dispute.

At which particular point the calculation of reasonable time should commence is naturally of concern. In civil cases the beginning of the period is generally taken to be the initiation of court proceedings, i.e. the time the subpoena is served.²⁷ Case law from the ECtHR demonstrates exceptions to this practice, which we will discuss further.

²⁴ Lov 21. mai 1999 nr. 30 om styrking av menneskerettighetens stilling i norsk rett, s 2 and s 3.

²⁵ David Harris, Michael O’Boyle and Colin Warbrick, *Law of the European Convention on Human Rights*, 2nd edn (Oxford University Press, Oxford 2009) 279, with further references to *König v. [West] Germany*, App no 6232/73 (ECtHR, 28 June 1978); Pieter van Dijk, Fried van Hoff, Arjen van Rijn and Leo Zwaak (eds) *Theory and Practice of the European Convention on Human Rights* 4th edn (Intersentia, Antwerp-Oxford 2006) 606. Cf Erik Møse, *Menneskerettigheter* (Cappelen, Oslo 2002) 361–362.

²⁶ *Frydlender v France*, App no 30979/96 (ECtHR, 27 June 2000). See also van Dijk and others, *Theory and Practice of the European Convention*, 607, with further reference to other ECtHR case law.

²⁷ See van Dijk and others (n 25) 603; Harris and others (n 25) 278, who write: ‘In non-criminal cases, it normally begins to apply from the initiation of court proceedings ...’

[191] Is the Finnmark Commission covered by the commitments in ECHR 1950 Article 6(1)?

Before commencing the discussion of whether the clarification process in Finnmark may be in conflict with ECHR 1950 Article 6(1) concerning trial within a reasonable time, the obvious initial starting point would be to discuss whether the Finnmark Commission is indeed covered through Norway's commitment to uphold this legislation. Following the wording, Article 6 refers to 'an independent and impartial tribunal established by law'.²⁸ The term 'tribunal' reaches beyond the scope of what is considered a court of law under Norwegian legislation, where its competence rather than designation is of most significance.²⁹ Independence and the authority to pronounce a binding legal decision based on a procedure prescribed by applicable law are important criteria.

The Finnmark Commission differs significantly from a classical court of law. Of note it is empowered to examine legal questions and relations on its own initiative, independently of whether questions are under dispute or whether a claim has been raised. It also has the responsibility to shed light on a case. Furthermore, it should be emphasized the Finnmark Commission cannot pronounce judgments or make enforceable decisions. The last point, that it cannot pronounce enforceable decisions, makes the most convincing argument that the Finnmark Commission is not covered by Article 6(1).

So the Finnmark Commission process, evaluated independently according to its limited legal capacity, would probably not be covered by ECHR 1950 Article 6(1). However, in combination with the Land Tribunal for Finnmark, the Finnmark Commission forms half of a joint trial scheme, and this makes a difference. Just as the Finnmark Commission cannot settle legal disputes on its own, a dispute cannot be brought directly to the Land Tribunal for Finnmark. This means that any dispute to be heard by the Land Tribunal for Finnmark has to include processing time by the Finnmark Commission beforehand.

²⁸ That the Land Tribunal for Finnmark is covered by ECHR Article 6(1) is obvious, and need not be further discussed here.

²⁹ See Harris and others (n 25) 285–286; and Aall, (n 22) 349–352, who state that the competence of the body, and not its name/designation, is most important for the assessment.

Case law of the ECtHR shows that when an administrative scheme is required to reach a conclusion on a legal dispute, the time spent on such treatment is factored into the calculation of trial within a reasonable time. Van Dijk and others [192] point out that ‘if prior to the juridical proceedings another action, such as an administrative objection or a request for a formal confirmation must have been brought, the beginning is shifted to that moment’.³⁰ Harris and others are of the same opinion, writing that the period may begin to run before the writ is issued:

This has been held to be so in cases in which the applicant must exhaust a preliminary administrative remedy under national law before having recourse to a court tribunal or cases in which the applicant objects to a draft plan for land consolidation prior to a tribunal hearing.³¹

The requirement is that where national law requires an administrative procedure to be exhausted, then that period of time should be counted in the assessment.³² Accordingly calculation of reasonable time should include total time for hearings by both bodies.

An additional argument is that the Finnmark Commission could well have been assigned judiciary authority to determine disputes. Both its predecessors, the Norwegian Mountain Commission (1908-1953), and the Uncultivated Land Commission for Nordland and Troms (1985–2004), held this authority.³³ But for Finnmark the legislators chose a scheme where the first instance holds no such authority. However, it can be argued that parties to the process, either with or against their will, should receive no less protection against unreasonably long proceedings than if the investigation body had in fact been given such judiciary authority.

³⁰ Van Dijk and others (n 25) 603, with further reference to *König v. [West] Germany*, App no 6232/73 (ECtHR, 28 June 1978) paras 28 and 101.

³¹ Harris and others (n 25) 232, with further references to *König v. [West] Germany*, App no 6232/73 (ECtHR, 28 June 1978); *Schouten and Meldrum v Netherlands*, Application no. 19005/91; 19006/91 (ECtHR, 9 December 1994) para 62; *Erkner and Hofauer v Austria*, App no 9616/81 (ECtHR, 23 April 1987) para 64; and *Wiesinger v Austria*, App no 11796/85, (ECtHR, 30 October 1991).

³² See also *Møse* (n 25) 360; with reference to *Golder v. The United Kingdom*, App no 4451/70 (ECtHR, 21 February 1975) where it is stated in para 32: ‘It is conceivable also that in civil matters the reasonable time may begin to run, in certain circumstances, even before the issue of the writ commencing proceedings before the court to which the plaintiff submits the dispute’.

³³ See respectively *lov 8. August 1908 om ordning av retsforholdene vedkommende statens høifjeldsgrund m.v.*; and *lov 7. juni 1985 nr. 51 om utmarkskommissjonen for Nordland og Troms*, both s 2.

Finally the legislative statement referred above (in the Royal Decree 16. March 2007), saying that ‘the whole of Finnmark shall be investigated within a reasonable time’ is of importance. Even if it is not aimed directly at the provisions in ECHR 1950 article 6, it emphasizes a commitment to investigate and hear the cases in Finnmark within reasonable time, not only as a whole, but also in each case.

[193] When should calculation of reasonable time commence?

Given the hearing of a case by the Finnmark Commission is covered by the commitment to trial within a reasonable time, this means a position must be taken as to when calculation of ‘reasonable time’ should commence. As already mentioned, the starting point for such calculation is usually the date of the subpoena or when the writ is issued. This is impractical in regard to the Finnmark Commission, since its legal investigations are initiated through public notice and not a writ (cf Fm Act 2005 s 31 para 1). We have shown that the time taken for hearing by the Finnmark Commission should also be included, so the date the writ is issued before the Land Tribunal for Finnmark would not reflect the original starting point for the purpose of calculating reasonable time.

Perhaps the period could run from the time the Finnmark Commission announces the investigation of a field (cf Fm Act 2005 s 31 para 1), or from the time the Finnmark Commission has finished the investigation and delivers its report (cf Fm Act 2005 s 33 para 1). In support of the latter alternative, one could argue that a dispute undoubtedly would become visible from the release of the report, while it also would be *lis pendens* for alternative hearings.³⁴ But there is no support for this position in ECtHR case law. At the same time it is important to note here that the clarification process in Finnmark is unique, with both an investigation body and a land tribunal joined together into a public trial system. This situation precludes comparison with similar schemes.³⁵

However, it is possible to find ECtHR case law from procedural arrangements that do not begin with a writ, and where it is not necessary for a dispute to exist at the ac-

³⁴ See Innst O Nr 80 (2004–2005) 23, which states: ‘If the deadline is exceeded, a party may bring the case before the ordinary courts’.

³⁵ See NOU 2007: 13, 247–272 where comparable systems in other states are reviewed.

tual time when the case begins.³⁶ In *Ortner v. Austria*, where one of the questions to be heard was whether ECHR 1950 Article 6(1) had been violated in a land consolidation case due to unreasonably long proceedings, the Court stated that the land consolidation process should be considered as a whole. It was nevertheless assumed that the time ‘when a dispute arose is to be taken as a starting point for the calculation of the length of proceedings’.³⁷

[194] In the same way as in land consolidation cases, there may not necessarily be a ‘dispute’ at the time the Finnmark Commission takes the matter under investigation. A natural starting point for determining reasonable time may therefore be the moment ‘when a dispute arises’, which means when a legal conflict actually appears.

What qualifies as litigation or a legal dispute is also a matter for debate. An objection to a draft plan for land consolidation prior to a tribunal hearing is recognized as such a dispute.³⁸ In the Grand Chamber Judgment *Frydlander v France* which concerned a case of employment, the Court required that there must be a dispute over a ‘right’ that could be said to be recognized under domestic law: ‘The dispute must be genuine and serious. It may relate not only to the actual existence of a right but also its scope and the manner of its existence. Moreover, the outcome of the proceedings must be directly decisive for the civil right question.’³⁹

For hearings by the Finnmark Commission it should be relatively easy to determine when a dispute arises which meets the above-mentioned qualification. If two parties or collective groups submit a claim for ownership of the same specific area, for example by putting a tick on the form entitled ‘Notification of possible rights’,⁴⁰ such an action may already constitute a ‘dispute’. This might apply even though the form uses the phrase ‘possible rights’, but of course this would need to be explored in more detailed

³⁶ See Utgård (n 1) 166–172, who examines several Austrian land consolidation cases been found violating ECHR Article 6(1); *Erkner and Hofauer v Austria*, App no 9616/81, (ECtHR 23, April 1987); *Poiss v. Austria*, App no 9816/82, (ECtHR, 23 April 1987); *Wiesinger v Austria*, App no 11796/85 (ECtHR, 30 October 1991); *Kolb and Others v. Austria*, App nos 35021/97 and 45774/99 (ECtHR, 17 April 2003); *Ortner v. Austria*, App no 2884/04 (ECtHR, 31 May 2007).

³⁷ *Ortner v. Austria*, App no 2884/04 (ECtHR, 31 May 2007) para 23.

³⁸ *Erkner and Hofauer v Austria*, App no 9616/81, (ECtHR, 23 April 1987) para 13 and 64, where the period was counted from the time the applicant objected to a draft plan for land consolidation prior to a tribunal hearing.

³⁹ *Frydlander v. France*, App no. 30979/96 (ECtHR, 27 June 2000) para 27. See Utgård (n 1) 167.

⁴⁰ The form can be downloaded and printed from the Finnmark Commission website, <http://www.domstol.no/upload/FINN/Skjema/Melding_om_mulig_rettighet.pdf> accessed 14 April 2011.

hearings. Similarly a dispute could arise if two parties submitted mutually exclusive claims for land or other usufruct rights in the same area.

At the same time, this means that although controversy concerning the right to land and waters in Finnmark has endured for decades, and clarification and law bill preparation have taken a great deal of time, these efforts will not affect the assessment of whether the requirement for trial within a reasonable time has been violated in a specific case.

Not totally irrelevant is the fact that the preparation of the land rights clarification process has already taken so long that many of the older generation of rights holders with substantial knowledge of Sámi customs and other [195] legalities in Finnmark have passed away. This leaves at least a moral commitment for the Norwegian authorities to ensure an effective and timely process in the future.

It is possible too that taking an unreasonably long time before a specific case is heard may conflict with other provisions for the protection of Sámi culture, for example as in the Norwegian Constitution Article 110a, the International Covenant on Civil and Political Rights Article 27 and ILO Convention No. 169.⁴¹ Here we remind legislators of the pressing need for legal clarification of Sámi reindeer herders' winter pastures,⁴² and the ensuing negative consequences on Sámi culture and livelihood of having to live with legal uncertainty, lack of recognition in law, community tension, and ongoing legal disputes. This situation may be impacted by ECHR 1950 Article 6(1) since the member states are obliged to organize the judicial process in such a way that prevents unreasonable delay. The issue is further discussed in the next section.

⁴¹ See also Susann Skogvang, *Samerett*, 2nd edn (Universitetsforlaget, Oslo 2009) 245, with reference to ILO Convention No. 169 requirement for identification and recognition of indigenous rights, where she points out that 'there must be some requirements for progress in the mapping work for the convention to provide an effective shield. Finnmark Commission should therefore give priority to the traditional Sami areas, reindeer industry's rights and other fields where there are Sami right holders'.

⁴² See Øyvind Ravna, 'Hensynet til samisk språk og kultur ved organiseringen av domstolen' (2009) 69 *Kart og Plan* 205–215. See e.g. also <www.nrk.no/kanal/nrk_sami_radio/1.7268224> accessed 14 April 2011, where the police confirm sabotage of a reindeer-herding fence system.

3 What factors could cause the clarification process in Finnmark to violate ECHR 1950 Article 6(1)?

Factors considered by the ECtHR

Having established that the Finnmark Commission process is covered by ECHR 1950 Article 6(1) and that the time for trial within a reasonable time runs from when the dispute occurs during the Commission process, we next examine under what circumstances the hearing may violate Article 6(1). Since there is no case law available from the Finnmark Commission as yet, we cannot assess an actual case. However, it is possible to examine reasonable time assessment factors set up by the European Court of Human Rights, and compare their case law and other requirements with the Finnmark clarification process. As we have seen, case law [196] of the Court in relation to reasonable time emphasizes (1) case complexity, (2) the behavior of the applicants, (3) the conduct of the case by the competent administrative or judiciary authority, and (4) what is at stake for the parties. The behavior of the applicants in relation to the Finnmark process is not yet possible to assess, but we can to some extent examine the three other factors generally.

3.1 The complexity of the case

Although there is no case law from the Finnmark Commission/Land Tribunal for Finnmark as yet or from the European Court of Human Rights on procedural arrangements directly comparable, some guidance can be found in ECtHR case law from certain land consolidation cases heard by the Court. As mentioned in supra note 36, Karl Arne Utgård has analyzed the concept of reasonable time under ECHR 1950 Article 6(1) in relation to such cases. The cases he discusses, which mainly are from Austria, are considered to be complex and with many parties, as may be the situation in Finnmark. The land consolidation cases, like the Finnmark Commission cases, do not begin with a dispute. In that regard comparison with Finnmark is also relevant, since calculation of reasonable time for both runs from the time when the dispute arises.

The standard assessment itself of whether reasonable time has been exceeded, in addition to actual case time spent, is reflected in the complexity of the case and its handling by the authorities. This is also the situation in land consolidation cases heard

by the European Court of Human Rights,⁴³ where these factors must be assessed in light of the circumstances of the actual case.

Of particular interest, the European Court of Human Rights specifically goes into the time spent in previous land consolidation cases where the Court has found that ECHR 1950 Article 6(1) has been violated. In *Ortner v. Austria*, the European Court of Human Rights refers to *Kolb and Others v. Austria*, which concerned land consolidation proceedings lasting between seven years and eight months, and ten years and four months, respectively.⁴⁴

[197] Although clearly progress will vary from case to case, case law indicates that unnecessary delay could easily be categorized as a factor under the control of the competent authority, which can lead to violation of ECHR 1950 Article 6(1).⁴⁵ Utgård concludes by pointing out that in land consolidation cases heard by the European Court, they are consistently recognized to be complex, involving many parties and public authorities. In spite of the complexity of the cases, and the period of time running from when the dispute first arises, many cases heard before the ECtHR have been found *not* to have been heard within a reasonable time, and so in violation of ECHR 1950 Article 6(1). According to Utgård, cases found in violation had in general *lasted eight to nine years*.⁴⁶

The complexity of land consolidation cases means one can anticipate a protracted timeline for such cases. In relation to the Finnmark Commission, comparative analysis on levels of complexity of the cases is of interest. As stated by Utgård, there is a gen-

⁴³ See for example *Ortner v. Austria*, App no 2884/04 (ECtHR, 31 May 2007) para 3, where the Court clearly emphasized ‘the complexity of the case, the conduct of the applicant and the relevant authorities’ as factors for evaluating the reasonableness of the length of proceedings, referring to the principle Grand Chamber case *Frydlander v. France*, App no. 30979/96 (ECtHR, 27 June 2000).

⁴⁴ *Ortner v. Austria*, App no 2884/04 (ECtHR, 31 May 2007) para 32, with reference to *Kolb and Others v. Austria*, App nos. 35021/97 and 45774/99 (ECtHR, 17 April 2003) para 50, where the proceedings lasted seven years and eight months as regards the first applicant, ten years and four months as regards the second applicant and nine and a half years as regards the third and fourth applicants.

⁴⁵ *Ortner v. Austria*, App no 2884/04 (ECtHR, 31 May 2007) para 33, where the Court emphasizes an inactive period of three years and eight months. See also *Handölsdalen Sami Village and Others v. Sweden*, App no 39013/04 ((ECtHR, 30 March 2010), which among others concerns trial within a reasonable time in relation to pasture rights of Sámi reindeer herders. In the case, EMD not surprisingly found that the trial period of 13 years and 7 months, violated the ECHR 1950 article 6 (1). One of the reasons was unnecessary delay, see para 65–66. For more about the case, see T Koivurova, ‘Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospect’ (2011) 18 *International Journal on Minority and Group Rights* 1–37 [17–20].

⁴⁶ Utgård (n 1) 171, cf supra note 36.

eral opinion by the Court that the land consolidation cases heard by the ECtHR are highly complex. In *Wiesinger v. Austria*, the Court recognizes:

...that land consolidation is by its nature a complex process, affecting the interests of both individuals and the community as a whole. Here, the consolidation scheme concerned a large number of landowners and covered an area of approximately 172 hectares (...). An additional factor of complexity was the recent construction in the area of a network of link roads to a main road, which caused the position of a number of landowners to be revised.⁴⁷

In *Erker and Hofauer v. Austria*, the court stated that ‘any land consolidation is by its nature a complex process’, even before addressing particularly complicated issues such as ‘proper valuation of parcels of land to be surrendered and to be received in exchange’, stating that:

[198] The difficulties inherent in such an assessment are often exacerbated by farmers’ traditional attachment to their fields and meadows. Furthermore, the operation is designed to increase the profitability of holdings and develop the infrastructure of the area concerned; it therefore affects the interests not only of individuals but also of the community as a whole.⁴⁸

Even if the legal clarification process in Finnmark in some areas can be compared with a land consolidation process, it clearly differs on the issue of substantive fields. While the land consolidation process aims to create more appropriate properties, the clarification process in Finnmark primarily aims to identify rights of use and ownership of the land. The land consolidation process also includes non-legal, substantive assessments, such as property valuation, property design and exchange of parcels.

Although the processes are different, both can be assumed to have a relatively high degree of complexity. Further comparison of the different kinds of complexity would not be helpful before the Commission has completed some cases, but one may con-

⁴⁷ *Wiesinger v Austria*, App no 11796/85, (EctHR, 30 October 1991) para 55.

⁴⁸ *Erkner and Hofauer v. Austria*, App no 9616/81, (ECtHR, 23 April 1987) para 67.

clude that it would probably take a lot before the complexity of the Finnmark Commission cases exceed the complexity of the land consolidation cases in Austria.

The conduct of the case by the competent authority, including proper organization of the proceedings

The third factor (see 3.1) emphasized by the ECtHR is the conduct of the case by the competent authority, in our analysis first and foremost by the Finnmark Commission. In large part, the proceedings of the Finnmark Commission will be determined by provisions in the Finnmark Act 2005, designed to allow a rather wide variety of alternatives to handle procedural requirements. For example Fm. Act 2005 s 32 para 1 states that the Commission ‘may in the manner it finds appropriate’ obtain information and examine the parties to study the fields under investigation, which could significantly impact the time involved.

A tradition of relatively heavy use of external investigators and researchers by the Commission is already established.⁴⁹ They obtain information on land usage, customs and the general opinion of law before the Finnmark Commission considers [199] the question of law and rights. On the one hand this may contribute to the matter being more thoroughly investigated, but on the other hand it may prolong the term of proceedings in a case. Such investigations may take more time than if the Finnmark Commission itself participates to a greater extent in the hearing at an earlier stage in the process.

In close connection with the conduct of the case by the competent authority, is the way the judicial process is organized, both legally and actually. Proper organization of the process is a state responsibility, including ensuring that the proceedings do not take unreasonable time.⁵⁰ This is discussed in many cases by the ECtHR, including the Grand Chamber case *Frydlender v. France*, where it was stated:

The Court reiterates that it is for the Contracting States to organise their legal system in such a way that their courts can guarantee to everyone the right to a final de-

⁴⁹ See <<http://www.domstol.no/no/Enkelt-domstol/Finnmarkskommisjonen/Sakkyndige>> accessed 4 April 2011, where it is given an overview of such investigations.

⁵⁰ Utgård (n 1) 172.

cision within a reasonable time in the determination of his civil rights and obligations...⁵¹

In relation to the indigenous Sámi people, this responsibility is strengthened by ILO Convention No. 169 Article 14(3), stating that ‘Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned’.

It is also necessary to mention the United Nations Declaration on the Rights of Indigenous Peoples of 2007. Although this is a declaration and not a binding treaty, Norway’s vote to adopt it does carry obligations to comply with the contents of the declaration, especially since the cabinet minister responsible has stated the ‘UN Declaration on the Rights of Indigenous Peoples is in line with government policy towards the Sami people’.⁵² Its Article 40 requires ‘prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights’. This is a commitment to organize legal proceedings in such way that they not be unduly lengthy where indigenous peoples are concerned.

[200] Considering the various steps involved and time required, one may question whether the legal clarification process in Finnmark is properly organized by law. As discussed above, certain provisions allow the authorities freedom to determine themselves how they will proceed, including how much time and resources they will spend on investigation, which may prolong cases. But even if the Finnmark Commission ‘puts on spikes and sprints off’, the Finnmark Act 2005 contains time-consuming provisions. This may be explained in part by the fact that the Finnmark Act 2005 Chapter 5, which regulates the legal clarification process in Finnmark, was not considered by any law committee or legal professional body beforehand, but was developed in the final days of negotiations between the Parliamentary Standing Committee of Justice, the Finnmark County Council and the Sámi Parliament. The process of survey and recognition of land rights, designed with two different bodies rather than one judiciary

⁵¹ *Frydlender v. France*, App no. 30979/96 (ECtHR, 27 June 2000) para 45.

⁵² See <<http://www.regjeringen.no/nb/dep/ad/pressemeldinger/2007/111.html?id=480895>> accessed 28 January 2011.

body, by that fact alone clearly consumes additional time. The Finnmark Commission and the Land Tribunal for Finnmark have a far more comprehensive and less precise mandate than previous comparable commissions, and that may also contribute to increased processing time.⁵³

After the Finnmark Commission has issued its report with legal recommendations concerning the fields investigated (cf Fm Act 2005 s 33 para 1), the Finnmark Estate has to assess the Commission's conclusions. That can be time-consuming too, since the Fm Act 2005 s 34 para 1 says that a decision to accept a conclusion stating that others hold rights to the areas investigated must be put before the Sámi Parliament and the Finnmark County Council for consideration according to Fm Act 2005 s 10 para 6.

The Finnmark Act 2005 s 35 also allows for mediation *after* the Commission has concluded a field. If the mediation does not result in an agreement between the litigants, the Act permits a period of *one year and six months* to bring the case further to the Land Tribunal for Finnmark (cf *ibid* s 38 para 1), counted from the submission of the report of the Commission. And where appropriate, the Land Tribunal can reconcile cases, which means that it takes even more time to finish the first submitted cases. Finally, decisions by the Land Tribunal for Finnmark can be brought before the Norwegian Supreme Court of Justice (cf *ibid* s 42).

[201] Overall a prudent time estimate for assessment of a single field could easily take between five and ten years. Questions can legitimately be raised as to how this timeline might affect those who are entitled to usufructs and ownership rights on the Finnmark Estate, and how well it complies with the requirement for trial within a reasonable time in relation to ECHR 1950 Article 6(1).

What is at stake for the applicant, including the significance of legal protections of indigenous people's culture

As mentioned above,⁵⁴ what is at stake for the parties involved is another factor taken into consideration by the ECtHR. Cases that impact the culture, industry and livelihood of the parties, or where the parties' way of life is challenged, have more at stake

⁵³ The Mountain Commission and Uncultivated Land Commission for Nordland and Troms had a mandate to decide whether the land was state-owned land, the boundaries between state and privates, and which usufruct rights rested on the state land. The clarification process in Finnmark has no such limitation.

⁵⁴ See section 2.1, including *supra* note 26.

than leisure-related rights cases. This means that in cases related to clarification of the right to reindeer husbandry, agriculture, livelihood and commercial fishing, the period for hearings and proceeding within a reasonable time is shorter than for cases related to game hunting and angling. However, because industry and livelihood cases are more complex than leisure pursuit cases, the actual difference in the period of reasonable time may not be as significant as might be supposed.

As well as recognizing Sámi cultural issues that may be at stake, the competent authority must consider the fact that the Sámi, by virtue of being indigenous people and a minority, enjoy legal protection according to international obligations as well as Norwegian domestic law. The international human rights law protecting indigenous peoples' culture and land rights; ILO Convention No. 169 Article 14 and the International Covenant on Civil and Political Rights Article 27, clearly indicate that states have a particular responsibility to clarify land rights of indigenous people such as the Sámi in Finnmark. The Norwegian Constitution Article 110(a) also addresses this responsibility.

The legal clarification process of Finnmark is reinforced by the commitment of the State of Norway to international treaties protecting indigenous peoples' land rights and culture. This means that such rights in relation to ECHR 1950 Article 6(1) and the concept of reasonable time, should allow them priority - in selection of investigation fields and timely processing - by both the Finnmark Commission and Land Tribunal for Finnmark.⁵⁵

4 [202] Summing up

Case law from the European Court of Human Rights shows that clarification processes like the one conducted by the Finnmark Commission are covered by the European Convention on Human Rights 1950 Article 6(1). This obligation demands that legal proceedings or hearings in a particular case should be processed within a reasonable time. What constitutes reasonable time will vary from case to case, based on an assessment of its complexity, the conduct of the applicants, the handling of the case by

⁵⁵ See also Susann Skogvang at supra note 41.

the competent authorities, and what is at stake for the applicants. Reasonable time in such cases is calculated from the time a genuine dispute arises.

Whether a particular case in the Finnmark clarification process will extend beyond the understanding of reasonable time according to ECHR 1950 Article 6(1) it is too early to say. Reasonable time must be determined for each case individually, and no cases have yet been concluded or alleged to violate the provision. Although no cases from the Commission to date have been completed, it may be reasonable to examine under what circumstances the trial process chosen for clarification of land rights in Finnmark may come into conflict with ECHR 1950 Article 6(1) for several general reasons: (1) Both the Finnmark Commission and the Land Tribunal for Finnmark have a wider mandate than comparable commissions, and yet at the same time have far less guidance from preparatory works, case law and customary law. (2) The procedural legislation selected for the clarification process is complicated and time-consuming in itself. (3) Trial will be challenging because it deviates from general civil procedure requirements in several areas, such as principle of party disposes, including rules on subpoena and collection of necessary information to investigate the case (which in ordinary civil procedure falls to the parties). (4) The fact that two distinct legal bodies (the Finnmark Commission and the Land Tribunal for Finnmark) must remain strictly independent of one another and yet still constitute a unified system is challenging, and will undoubtedly prolong case processing time.

In their reasoning for the establishment of this two-pronged legal procedure, the Standing Committee of Justice among others, stated that hearings by ordinary courts would be more time-consuming than this process, and 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’. In retrospect [203] the validity of these statements is open to debate, however, such a discussion is outside the limits of this paper.⁵⁶

⁵⁶ The Sámi Rights Committee had proposed a very different clarification process (see NOU 1997: 4 *Naturgrunlaget for samisk kultur* 246 ff). It is worth noting that the legislators did not evaluate or discuss any other arrangement before reaching their conclusion, including the appropriateness of establishing both an investigation commission as well as a tribunal.

Indications are that the Finnmark Commission, appointed 14 March 2008, will spend more time investigating its first field than any previous comparable commission arrangement,⁵⁷ something that is worrying. In particular, in *Field 1, Stierdná/Stjernøya and Sievju/Seiland*, the Commission took over litigation originally brought before the Alta District Court. That the parties chose to move the hearing of the case from the District Court to the Commission will of course not imply that the time before the Commission announced the case is to be factored into the processing time. However, there is no doubt that the dispute existed when taken over for hearing by the Finnmark Commission, and that is now (in May 2011) more than two years ago. And the Finnmark Commission report, only the first link in a complex chain leading to a final decision, is still some way off.

The European Court of Human Rights has ruled that eight to nine years of processing time violates the provision of trial within a reasonable time for land consolidation cases in Austria. Whether by extension this would apply to the clarification process in Finnmark, it may be speculative to conclude at this time, since there is no relevant practice yet. But since the comparable land consolidation cases are highly complex with a large number of parties, and where land planning and valuation are key elements in the process, we certainly cannot rule out that this will be the case in Finnmark; especially since trial in a reasonable time should be sought particularly where right to exercise culture, livelihood and traditional way of life is at stake.

5 [204] Some proposals *de lege ferenda*

The Finnmark Commission is most likely covered by the ECHR. It is difficult to give any direct advice how to prevent violation of the Convention, beyond that the Commission must be aware of the assessments ECtHR has done in relation to the land consolidation cases from Austria, and that long proceeding time can lead to that the Finn-

⁵⁷ The Finnmark Commission can be compared with the *Mountain Commission* and the *Uncultivated Land Commission of Nordland and Troms*. From when the Mountain Commission Act was adopted (8 August 1908 No 6), it took two years and four months to its first sentence on 1 December 1910. The Uncultivated Land Commission, established through the Act 7 June 1985 No 51, took nearly five years before its first sentence on 26 April 1990. It must be noted though that the process was based on subpoena, which in this case was filed 12 January 1987, thus taking three years and three months before the sentence. We can also compare the advisory committee *Utvalget for Statseiendom for Nordland and Troms*, appointed 11 June 1971, which submitted its first report, NOU 1974: 8 *Tromsdalstindområdet*, on 18 December 1973.

mark clarification process will come in the same situation as the Austrian land consolidation cases.

In considering what the law ought to be (*de lege ferenda*), the legislators might address the lengthiness of the procedural legislation, as pointed at in section 3.3 of this paper, including establishing a shorter deadline for bringing cases before the Land Tribunal for Finnmark. Another option would be to give the Finnmark Commission judiciary authority so that the process could conclude with an enforceable decision using only one body.⁵⁸ There may be conflict between achieving resolution within a reasonable time, and the necessity for proper investigation and an effective appeal system. Even though interests may conflict, the legislators here as in other legal processes must balance the goal of trial within a reasonable time with achieving a fair and effective remedy.

In cases of alleged violation, we must assume that also the Norwegian courts, to the extent they have to hear the case, see *supra* note 23, are well prepared both to examine the claim, but also to evaluate if the procedural legislation can be justified within the framework of trial within a reasonable time out of current law.⁵⁹

Finally, the concerns raised above do not mean that Norway does not recognize Sámi rights to land and natural resources under the human right provisions. These initial difficulties primarily result from uncoordinated and inadequate preparatory work rather than failure to uphold the aim of ILO Convention No. 169. The Finnmark Act 2005 is internationally recognized by the UN Special Rapporteur on the rights of indigenous people, James Anaya, ‘as an important protection 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’.⁶⁰ But [205] Anaya also expresses some reservation, stating that since ‘the process for identifying rights to land

⁵⁸ More about this, see Øyvind Ravna, ‘Rettsvirkning av rettskartleggings- og anerkjennelsesprosessen i Finnmark, (2011) 50 *Lov og Rett* 220–240.

⁵⁹ See Jens Edvin Skoghøy, ‘Nasjonal skjønnsmargin etter EMK’ (2011) 50 *Lov og Rett* 189–190, who states: ‘Whether an ... infringement [of the right to a fair trial] can be defended in a democratic society, have the courts a good qualification to re-examine’ [190]. Opposite for ECHR legislation based more on political issues.

⁶⁰ James Anaya, ‘*The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland*’, Report on the situation of human rights and fundamental freedoms of indigenous people, 12 January 2011, <http://unsr.jamesanaya.org/docs/countries/2011_report_sami_advance_version_en.pdf>, accessed 14 April 2011 para 44.

under the Finnmark Act is currently underway, the adequacy of the established procedure is not yet known'.⁶¹

In sum this means that there is certainly room for legislative improvement, in which both Norwegian legislators and Sámi representatives should participate, to ensure that the Finnmark clarification process embodies ILO Convention No. 169 Article 14(3), with 'Adequate procedures ... within the national legal system'. In light of the length of time it has taken to prepare for the clarification process, our legislative authorities have a special responsibility to ensure that the coming trials will be heard within a reasonable time.

⁶¹ Ibid para 49.