

Whither Sámi Land Rights in Norway?

Erling Berge,
Department of sociology and political science,
NTNU, Trondheim

Introduction

Since the creation of the Sámi Rights Commission in 1980 the question of ownership of the lands of the Sámi Reindeer herders have been high on the political agenda. The present paper will discuss some of the conceptual and political problems entailed by Norwegian political reality and the Sámi demand for “ownership and possession” of the “lands which they traditionally occupy” as required by ILO convention 169¹

Land reform is never easy, neither in Norway, nor anywhere else. To succeed in attempts to consciously design land reforms to achieve particular goals, one needs a technical language more sophisticated than the system one wants to reform, one needs to understand how cultural values are embedded in rules of property rights, and one needs an understanding of how behaviour adapts to and exploits property rights. Only then will it be possible to describe both the system as it is and how it can be transformed to the goal one wants to obtain.

Box 1

The Sámi land question in Norway, April 2005

In 2003 the Norwegian government proposed legislation to meet the demands of the Sámi people for “ownership and possession” of the “lands which they traditionally occupy”. The Sámi deny that the proposal will meet the requirements of the ILO convention 169 “Concerning Indigenous and Tribal Peoples in Independent Countries” requiring that such rights shall be recognized. Thus, currently the most important question for Norwegian-Sámi relations is whether the Norwegian Parliament will change the legislation enough to satisfy the Sámi demands for property rights to land.

The 2003 proposal of the Norwegian government can be read in many ways. My reading is that it confirms the assumed power of the Norwegian bureaucracy. It conforms closely to the Norwegian way of thinking about property rights to land and water. But it does not fulfil the Norwegian commitment to ILO convention 169. The proposal may yet be amended by the Norwegian parliament to satisfy the convention. At the time of writing this (April 2005) the bill is still up for discussion in the Norwegian parliament. A vote has been proposed for 24 May 2005.

However, there is still a long discussion to come, and some problems are yet to be faced, for example the processes determining the exact boundaries of the lands the Sámi traditionally have used. This process will be long and contentious. One should also think hard about how to avoid the most obvious traps in the process, such as fights about redistribution of land ownership among smaller groups of Sámi.

Background

The current debate can directly trace its roots to 1970. In 1970 it was proposed to develop the hydroelectric power potential of the Alta River in Finnmark. During the 70ies this proposal was fought both by Sámi and environmental groups. The opposition, particularly among the Sámi, was strong and widespread and caused concern among Norwegian politicians. The plans were modified to avoid inundating the Sámi village Mási, and the building of two large reservoirs was abandoned. But a long road and one big dam remained. In 1980 it was decided to go ahead with the reduced plan. The fight against the development continued and culminated in 1981 with civil disobedience by a large group of activists putting themselves in harms way in front of heavy construction machinery. At the same time a court case was

¹ For the full text of the convention see <http://www.ilo.org/ilolex/english/index.htm>>

fought to stop the development. The civil disobedience was ended by a big police action and in 1982 the Supreme Court decided the decision to develop the river was legitimate. The construction work went ahead, and in 1987 the power plant was operational.

As a part of the decision in 1980 to develop the river, the government established the Sámi Rights Commission. It had a broad mandate and proposed already in 1984 major reforms (NOU 1984:18), notably the inclusion of Sámi in the Norwegian Constitution, and separate legislation establishing a Sámi Parliament. The Sámi Parliament opened 9 Oct 1989. The commission continued its work by looking into the land question and in 1997 they proposed legislation to (re)define the property rights of the Sámi to the lands they had been using in Finnmark. A fulcrum for the particular form of the last proposal from the commission was the existence of The International Labour Organization’s Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries. The convention was signed in 1989 and Norway ratified it already in 1990 as the first state to do so². Convention 169 replaced convention 107 from 1957 which Norway also had ratified and which was part of the background for the Sámi Rights Commission when it was established in 1980.

Convention 169 says in article 14.1 that “The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.” The peoples referred to in the convention are “tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations” (article 1.1(a)). The Sámi in Norway were by 1980 recognized as an indigenous people with rights as defined by the convention. The formulation of the rights to lands in the 169 convention has a stronger emphasis on “ownership and possession” compared to the text of convention 107. The clarification is part of the problem the Norwegian government seems to have in meeting the requirements of the convention.

The current proposal to change property rights of lands used by Sámi only concern the lands in Finnmark known as the “state lands of Finnmark”. The state has for several centuries defined itself as the owner of more than 90% of the surface of Finnmark including the core areas of the reindeer herding Sámi. Details about the property rights to the resources that the reindeer herding Sámi depend on can be found in papers by Sevatdal, Austenå, and Austenå and Sandvik in Berge and Stenseth (eds. 1998). Basically one can say that the rights to pasture, right-of-way, timber, firewood, fishing and hunting needed to practice reindeer herding are independent of the ownership of the ground and belong to the reindeer herders within the reindeer herding areas as these are defined in legislation³. The reindeer herding areas cover almost half the surface of Norway south to Lake Femund in Hedmark. On state lands in Finnmark and Troms and in State commons⁴ in other counties this comes close to full possession by the reindeer herders. However, on private lands the actual practice of the reindeer herding rights is determined by custom and varies widely, particularly in the south. The potential for conflict between farmers and reindeer herders is always a concern and conflicts have from time to time flared up.

²As of March 2005 only 17 countries have ratified the convention. Countries such as New Zealand, Australia, USA, and Canada have not ratified the convention; neither have other Nordic countries where Sámi live.

³ Act of 1978-06-09 nr 49 On reindeer herding

⁴ A “state commons” is a particular Norwegian specimen of the more general concept of a “commons”: an area or resource owned in common or jointly by a well delimited group of people larger than a single family household. For more information consult the International Association for the Study of Common Property, <<http://www.iascp.org>>.

In Finnmark and the northern part of Troms a majority of the farmers are Sámi. But their rights to pasture and other resources in the outfields are less secure than the reindeer herders, and it varies much by the time they got their contracts from the state. Because of this and also because of the larger number of reindeer in Finnmark, the level of conflict between farmers and reindeer herders are higher. The conflict is partly caused by competition between sheep and reindeer at critical periods in the year and partly about encroachment on the fields of the farmers during the trek from winter to summer pasture along the coast. But the reduction of pasture areas for reindeer as well as sheep due to hydro-electric development, building of roads, cabins and even urban areas has also played a role.

Often the internal conflicts among the Sámi are overshadowed by the conflict between locals and outsiders. Modern usages of nature for leisure and recreation - fishing, picking of berries, and hunting - have increased and are felt to encroach on the customary local rights. Likewise, the creation of protected areas and the protection of predators are removing powers from the customary users of the resources, particularly the reindeer herders, and vesting these in a central bureaucracy.

While the farmers of Finnmark have been affected by the increasing number of reindeers, the local fishers, many of whom also are Sámi, have been hit by the crisis in the fisheries in the Barents Sea and the subsequent closure of the fisheries. Their situation is shared by local fishers all along the Norwegian coast. But the introduction of quotas in 1989 and the subsequent closure of the fisheries may be a larger problem for small scale fishers in Finnmark than elsewhere since the alternatives to fishing here are fewer and farther away.

Currently the Sámi feel that many of these problems would be easier to live with if they could get property rights to the land areas they are using. While the current discussion about ownership of land for the Sámi is about the ownership to the state lands of Finnmark, the real issue, interpreted in the light of Convention 169, is much wider. In Norway it could conceivably involve all the lands defined as reindeer herding areas, nearly half the surface of Norway. The convention also requires that the government shall “take steps as necessary to identify the lands which the peoples concerned traditionally occupy”. In Norway this is a task yet to be done. While it is debatable whether it includes all state lands in Finnmark, there can be no doubt that it includes lands in other reindeer herding areas.

But why is “ownership and possession” important? And what do we mean when we talk about ownership and possession? The answer to the question of why it is important to indigenous peoples such as the Sámi to get property rights to “the lands which they traditionally occupy” needs to be based on an understanding of what property rights to land, or land tenure, means in a modern capitalist society as well as in a traditional customary law society. The short answer offered is that for the Sámi people property rights to their traditional lands are important because it gives them, in a capitalist society, better control of the future uses of the resources in their lands, and hence better control of their future as a people. It is no coincidence that the Sámi Rights Commission was established as a result of a fight about land use where the Sámi saw the hydro-electric development as a threat to their traditional way of using the land.

Ownership of land in contemporary capitalist society

Property rights give the holder the most enduring structural powers of capitalist society. In all known societies there are rights and duties with characteristics we can recognise as property rights no matter what they are called locally (Godelier 1984). The significant point about property rights is that they award the owner the maximum of protection a society can give for

secure long term enjoyment of the benefits flowing from ownership and possession of a resource. In most of the world this does not amount to much. At best, the rights amount to locally acknowledged security of possession (de Soto 2000). However, in the capitalist societies of the Western world property rights mean a lot more.

Starting with the Roman law assumption that all lands have a landlord, the medieval states tried to gain control of non-arable lands. Unclaimed lands became crown lands. In many cases the early modern states (notably Sweden, Germany, and France) introduced state ownership of forest lands, and strengthened the state control of the lands without owners. The result was often state ownership of wilderness and non-arable lands. “New nations” (including USA) have at least since 1776 routinely claimed state ownership of unimproved lands and required “improvement” (such as industrial activity or agricultural use of arable) for privatization. This “improvement” theory for awarding title to land will in most cases lead to state property rights to non-arable lands. Claiming property rights for the state to unimproved lands led to discrimination against indigenous peoples depending on pastoralism or slash and burn agriculture making their customary rights harder to defend.

Box 2

An institutional definition of property rights

Property rights provide legitimate allocation to particular owners of material or immaterial objects supplying income or satisfaction to the owner. They comprise a detailed specification of rights and duties, liberties and immunities citizens have to observe.

These are partly defined by law, partly by cultural conventions, and they are different for owners and non-owners.

Property rights are ultimately guaranteed by the legitimate use of power.

Indigenous and tribal peoples around the world will usually be found in remote areas often seen as wilderness and deemed to have low value for agriculture or traditional farming. Most such lands will be owned by the state in the sense of having a legal title to the land (de jure ownership). But they will also be covered with customary use rights for members of local communities (de facto ownership). But property rights to lands used by indigenous peoples have usually remained poorly defined, because they for most of modern history have been seen to contain from none to small and dispersed resources. This view is now changing. Market forces are reaching into remote communities changing priorities and practices. Government interests in managing

ecosystems and their services increase the attention to remote communities and their resources. One way or another existing law has to change to accommodate the changes in priorities and practices.

The customary rights of indigenous (in general all non-capitalist) cultures will usually concern rights to specific material resources. But also socio-cultural symbols may be the objects of property rights rules to the extent that a symbol may be appropriated by individuals or subgroups for their advantage (Godelier 1984). However, symbolic values will usually have higher importance as collective identity markers than as individual assets. In modern capitalist societies “the commons” are sometimes highly charged with symbolic values (Olwig 2002).

The way property rights are defined and protected are presumed to be essential to the dynamic of the economic and social development of these societies, and one important explanation for lack of economic development is by many said to be deficiencies in the definition of property rights (see e.g. de Soto 2000, North 1990, Ensminger 1992).

Property rights in everyday understanding

Our everyday conception of property is clear in its main implications. Property rights are about security of enjoyment of benefits, and freedom of action. A hypothetical opinion poll about the differences between “yours” and “mine” would reveal fairly unanimous opinions. An investigation (Snare 1972, see box below) into the meaning inherent in the everyday concept of property found that it could be described by six types of rules, three types defining the rights of the owner and three regulating the relations between an owner and non-owners. The rules will define the rights and duties, liberties and immunities of both owners and non-owners. The rules describe a very common way of thinking about property rights. Modern economic theory uses it. Property rights systems based on the model of Roman law uses it. We can call this way of thinking the dominium plenum position on ownership. It is the way Norwegian law thinks of property rights if nothing else is implied by contract or customs. It would seem that this is the way of thinking guiding the ILO convention 169. And most significant for the present discussion: we have to understand that this is the way most Norwegians will tend to think about the Sámi claim to ownership of land and water.

Box 3

The dominium plenum way of thinking about property rights

Owner rights:

1. The owner has a right to use his/her property, meaning:
 - a. It is not wrong for the owner to use it, and
 - b. it is wrong for all non-owners to interfere with the owner in his/her use of it,
2. Non-owners may use the property of the owner if and only if the owner gives permission, and
3. The owner may permanently or temporarily transfer his/her rights as defined by rules 1 and 2 to specific other persons by consent.

Relational regulations:

4. Punishment rules: regulating the cases where non-owners interfere with an owner’s use of her/his property.
5. Damage rules: regulating the cases where non-owners cause damage to someone’s property, and
6. Liability rules: regulating the cases where someone’s property through either improper use or neglect causes damage to the person or the property of some non-owner.

Source: Snare 1972:202-4

Of course, what the Norwegian state “thinks” about property rights we cannot know, but its behaviour within its ownership of the lands in Finnmark can be said to conform to the dominium plenum position only in certain long term tendencies. The history of contracts and customs binds its position and channels behaviour (NOU 1994, NOU 1997). Neither is it entirely clear how the Sámi parliament thinks about ownership of its traditional lands despite its frequent references to ILO convention 169 (see e.g. Sametinget 1999). But the impression imparted by its publicly promulgated positions does seem to conform to a dominium plenum way of thinking.

However, the dominium plenum way of thinking about *lands and natural resources* is usually not found in customs and traditions of indigenous peoples, and neither is it part of the traditional Norwegian approach to land and resource ownership. In fact, no modern society could function if this was a dominant approach to land ownership. Despite the hegemonic

position of the dominium plenum way of thinking about land ownership in popular culture and economic theories, the legal realities in modern capitalist societies are very different.

Property rights to land in modern law

A modern society requires that there are ways of specifying resources and dividing rights among several and different owner interests. There also has to be ways of sharing and co-managing resources and benefits within groups of differing sizes and interests. The most versatile tools for achieving this is found in the Common Law system developed in England⁵. Its current versatility is in many ways the outcome of the struggle between a customary system of rights holding similar to the Norwegian and the effort to implement the dominium plenum position in the modernisation of the British state during the 18th century⁶.

In contemporary modernisation projects an understanding of how these tools of land holding are constructed and what their cultural foundations are, will be essential. Understanding the cultural foundations is important since experience shows that legal techniques can never be transferred from one culture to another without being adapted to the local values and conceptions of property. There is a close link between property rights in action and cultural values and ways of thinking (Godelier 1984, Douglas 1986, Ensminger 1992, Searle 1995).

Because traditional or customary systems of thinking about resources and rights at the outset are based on distributions of rights to several and different owner interests, both individuals and groups, they will in most cases be a better point of departure for modernisation than a dominium plenum way of thinking. But even so they need to be adapted to capitalist society.

Without going into a comprehensive outline of the property rights system for land holding of modern capitalism we need to look briefly at two important kinds of distinctions: the difference between owner at law (legal owner) and owner at equity (equitable owner)⁷, and the basic classification of resources. The classification of resources we shall return to below.

The powers of ownership are different according to whether the owner is

- Owner at law on behalf of herself/ himself, or
- Owner at law on behalf of some beneficiary (legal owner).

The beneficiary is the owner at equity. The utility of the distinction between owner at law and owner at equity is based on the legal ability to distinguish and discriminate owners according to the motive or purpose for their ownership. The distinction between owner at law and owner at equity developed with the trust institution. The distinction is tied to the roles of trustee and beneficiary. A trustee is owner at law, and in a land trust the trustee owns the lands on behalf of the beneficiary. The only important rule for the trustee is that all management and owner decisions have to be done with the best interest of the beneficiary as goal. Corresponding to this the beneficiary is given the remedy of legal action for breach of trust. If the beneficiary feels that the trustee does not have the best interest of the beneficiary as a goal the beneficiary can take the trustee to court for breach of trust. This is straightforward in England and in other countries where the trust institution has been adopted.

⁵ Its history is fascinating, see e.g. Thompson 1975, Simpson 1986, Neeson 1993.

⁶ On the question of landholding and modernisation of the state see Scott 1998

⁷ The terminology might be simplified. However, the terms used here are technical terms defined for example in Black 1990 6th edition.

The owner who owns at law on behalf of herself is the ordinary owner encountered in the dominium plenum position on ownership. This is the kind of owner we usually think of in Norway when we speak of ownership.

Ownership implies in English jurisprudence title to the lands and full rights of management including the rights of alienation (ownership at law) but not necessarily possession or enjoyment of benefits which belong to the owner(s) at equity. In Norwegian jurisprudence, on the other hand, ownership implies full rights of possession, use and enjoyment as well as rights of management including the right to alienate unless contract or custom dictates otherwise.

The difference between England and Norway lies in the generality of conditions for separate allocations of the rights of possession and enjoyment. At first blush there may not appear to be much of a difference. Also in Norway we may separate possession and enjoyment. However, in Norway it will have to be done by contract in each case, and enforcement will be according to the letter of the contract, not according to what is the best interest of the one who is granted rights of enjoyment and/ or possession. In Norway we do not have the distinction between owner at law and owner at equity. This distinction is at the core of the English trust institution. But this is a distinction difficult to enforce in most cultures. It requires both a cultural understanding of the distinction and a well developed judicial system able and willing to enforce it. In most countries where ILO convention 169 might be applied the cultural and legal foundation to apply the trust institution would be missing.

Resource ownership in modern capitalist societies

In discussing property rights for the purposes of resource management, resources can usefully be divided into 5 types. The first three types of resources, the ground, the specific material resources, and the remainder are usually included in discussions of who owns what, and are routinely recognized by mature legal institutions. The two other types are more in the line of resources in the process of being created.

The Ground (sometimes called the soil) meaning the abstract bounded area. This category emerged from the work of the land surveyors in the period where the modern state was developed (see e.g. Scott 1998, Kain and Baigent 1992).

The Specific material resources embedded in the ground, attached to the ground, or flowing over the ground. In general there are limits on how far into the ground and how far above the ground the rights reach. These are the resources of practical use and economic value at any particular time in a society, such as timber, pasture, right-of-way, minerals, fresh water, firewood, fishing and hunting rights, soil fertility, ability to accommodate housing developments, strategic location in relation to communication lines, etc. It comprises any specific use of a resource with a socially recognized value.

The Remainder, meaning the future interest in resources that not yet have been discovered or that not yet are capable of being exploited. The remainder do not exist here and now. It is about the many possibilities of the unknown future. Looked at from a dynamic perspective it may be argued that of all the resources the remainder is the strategically most important. It may involve the discovery of some specific material resource not known to be in the area before, or new technology may make it possible to extract or exploit known but inaccessible resources. In such cases there are well known rules for how to handle it, for example through permission for development. Thus newly discovered “gold” will immediately be redefined as a specific resource. But sometimes genuinely new resources are discovered. This is usually a process taking a long time and requiring development of new rules and regulations at the

societal level. For example, the income potential of the waterfalls was not understood until hydro-electric power generation became possible. After the technological breakthrough, the ones who owned the remainder in an area where waterfalls were found were entitled to collect an income flow from its usage (or, alternatively, to decide to preserve the waterfall undisturbed). But during this development a whole new branch of legislation and regulation was invented. In most cases a person holding rights to the remainder will have a privileged position in such a process. Ownership of the remainder can be said to be the hub of capitalist landholding. The one who controls the newly discovered and valuable items that were not on any previous list of “specific material resources of an area” - the owner of the remainder - will hold a key power in deciding on the future of that area.

In the dominium plenum position on ownership it is assumed that the owner of the ground, the remainder, and the specific material resources, is one and the same legal person. For land holdings of some size (above the size of a housing lot) this is seldom if ever the case in the real world. Legislation may for example reserve ownership for the state of archaeological finds, or discoveries of mineral oil or minerals with specific weight above some threshold. Even if one could imagine that the dominium plenum unity of ownership actually was the case in a country one would soon rediscover that there are a multiplicity of interests in different resources on the same ground, and with that comes the need for management systems able to accommodate, articulate and adjudicate the different interests. This is aptly illustrated in the development of environmental regulations.

Today one might say that in addition to the three resource classes defined above, two additional types of resources will increasingly affect property rights. These are

Eco-system services are the valuable goods provided by the ecosystem located in one area to adjacent lands. The ability of an ecosystem to produce a continuous flow of material resources such as fresh water, wildlife, and timbers are also now being called ecosystem services (MEA 2005)⁸. By maintaining the ecosystem of a particular area in a particular state of functionality, the lands around it is provided with various valuable goods such as clean fresh water, increased security against flooding, land slides, and avalanches, less soil erosion, improved local climate, valuable components of biodiversity, etc. Even serving as a sink for pollution may be counted as a valuable eco-system service. The recognition that eco-system services are valuable resources for society can be said to emerge from the work of scientists in our time (Dasgupta 2001) and has led to new types of regulations affecting existing property rights. Previously these goods were unrecognized. Now they are valued and enter into the motivations and management systems of various stakeholders. They become part of the property rights system whether recognized as such or not. They can be seen as emerging from the remainder held by the land owners to become a new common resource the land owners cannot dispose of freely (Berge 2005). One approach to preserving valued eco-system services have been to create protected areas. It is significant to note that according to the 2003 proposal on enacting new property rights to the state land of Finnmark, the new owner of the lands and waters of Finnmark will have to grant land for national parks without compensation if the Norwegian parliament decides to create a park on their land (Ot.prp.nr 53 (2002-2003, page 146, §18). The creation of National Parks has in Norway so far occurred mostly on state owned lands because of concern for the constitutional requirement of just compensation. But as the diversity of collective values and goods associated with parks and protected areas are

⁸ MEA (2005:80) defines “Ecosystem services are the benefits people obtain from ecosystems. These include provisioning, regulating, and cultural services that directly affect people and the supporting services needed to maintain other services.” The definition is maybe too general to be completely useful.

recognized, ways of managing such values on private lands have to be found. Including rules such as the one proposed would seem a reasonable way of safeguarding the common interest of all Norwegians. However, in general, to maintain the legitimacy of the rules, the question of just compensation for current landowners will have to be dealt with.

Socio-cultural symbols vested in a landscape (often attached to amenity and heritage sites)⁹ belong to what traditional cultures value in the land, but have usually been neglected by the property rights systems of modern economies. Socio-cultural symbols vesting in land are created and sustained by the local culture but they are now increasingly being taken over by national and international bureaucracies (e.g. the creation of a list of world heritage sites).

It is the main argument here that the strategic and dynamic powers inherent in property rights to the remainder are the main reason why ownership of land and water is important to the Sámi people. Their rights to the specific material resources needed to exercise their industry found in the lands they occupy are secure and have been so for a long time. But as new resources are merging the chances of survival and successful modernisation of the Sámi culture are much better if they collectively, as a people, can control the remainder. In the struggle against the development of the hydro-electric power of the Alta River they experienced this lack of control of the remainder. The fact that the Norwegian state was owner at law of the ground and remainder removed one possible source of opposition against the development. The Sámi could effectively oppose it only to the extent that the development affected significantly their existing specific material resources involved in reindeer herding. The long term repercussions could not be considered.

If we accept that control of the remainder is important to the future, why cannot the state - or Statskog SF as the state's instrument for land ownership - manage the remainder as trustee for the Sámi people as they do for local populations with rights in the state commons of southern Norway?

The Norwegian state as trustee and owner at law

For the lands in Finnmark one can take as a point of view that the state has been in the position of trustee and owner at law while the Sámi people have been the beneficiary. In the English legal system the Sámi could have taken the State to court for breach of trust if they found that there were reasons to suspect that the state had not taken due consideration of the interests of the Sámi. The court could have found the state in breach of trust, and, having broken their moral and ethical commitments to the beneficiary, the trusteeship could have been ended and transferred to some other body.

In the Norwegian legal system, as in most legal systems, this is impossible. In Norway the trust institution is not fully developed. We do have elements of it. The state commons of Norway are defined by the facts that the state owns the ground and remainder while a well defined group of farms owns the traditional specific material resources needed for the farming activities. In its management of the state commons it seems reasonable to say the Norwegian state is in a position similar to that of trustee. However, the force that keeps the state straight is not the legal system. It is political power. Only continuous political pressure from local communities and close links between the state bureaucracy and rural society during the 19th

⁹ Property rights to socio-cultural symbols other than those that vest in land are of course also very important, but fall outside the discussion here.

and early 20th century can explain the particular reforms of the legislation of commons in 1857, 1863¹⁰, and later, as well as the work of the Mountain commission (working from 1909 to 1953¹¹) in defining the boundaries delimiting state commons from private property. The state commons would seem to have been the model for thinking about land rights for the Sámi. Thus, the argument of the Norwegian state in the discussions of convention 169 was not about the meaning of ownership, it was about the meaning of lands. The Norwegian state wanted to equate property rights to the use of the specific resources the Sámi traditionally had used with property rights to land.

The property rights to the resources the Sámi traditionally had used in their reindeer herding were well defined and secured in the Reindeer Herding Act of 1933. Seen from a purely legal point of view they were structurally similar to the rights of the farmers in the state commons. Defining these rights as “the lands they traditionally occupy” would fit perfectly with the Norwegian legal and cultural understanding of land ownership. For the Sámi it could have been ownership at equity if Norway had a complete trust institution. But it has not. And both the ILO convention and the Sámi parliament have denied that ownership of the use rights of the specified material resources of the lands will be sufficient.

Important reasons for this are the lack of political power of the Sámi and the fact that the legal system of Norway does not afford the Sámi the remedy of legal action for breach of trust. In a modern capitalist society this will leave the Sámi vulnerable to economic powers they have no way of countering.

Since the Sámi people lack political clout in the Norwegian parliament as well as the political good will and understanding of a majority of the non-Sámi population, the relations between the state and the Sámi are usually left to the bureaucrats. The social dynamic of bureaucracies left to their own internal processes is an interesting topic, but not on the agenda here. It must be sufficient to observe that even in following the most well meaning intentions to help and do good, well educated professionals are hard put to listen to some types of clients and some types of demands, and in some types of situations they have great problems taking seriously the wishes of their clients. In the long run the relations between such professional bureaucracies and their clients tend to deteriorate. It seems to have happened between the Sámi and at least some sections of the state bureaucracy, particularly in relation to land management.

The Sámi as beneficiaries of the land trust the state can be seen as having taken upon itself, seem to feel that their trust has been broken. Without ordinary legal remedies and political power to instruct the state bureaucracy, their one course of action came with the globalisation process and the integration of the Norwegian state into the global development of moral and ethical standards for modern states, in this case, particular the ILO convention 169. In the process which this convention has generated, basic questions for the Sámi people ought to be: “Can the Norwegian state be trusted to fulfil its fiduciary duties towards the Sámi?”

In the foreseeable future there is no reason to think that the state will not act in the best interest of the Sámi (as judged by the bureaucrats). And there is no reason to doubt that the bureaucrats that fashioned the current proposal for new rights to land and water in Finnmark believe the new rules will serve the Sámi well and balance the rights of the Sámi and the rights of the non-Sámi in a reasonable way. In the short run there will be no significant difference between the new and the current situation. But in the history of a people without

¹⁰ Act of 12 October 1857 on forest commons, Act of 22 June 1863 on forestry

¹¹ Act of 9 April 1954 rescinded Act of 8 August 1908 creating the commission

political power trusting in the good will of the state for the foreseeable future may arguably be called a rather short term perspective. But what is the alternative?

If the state in the long run cannot be trusted to act as trustee in the best interest of the Sámi the only feasible alternative within the Norwegian state is private property (meaning that the owner rights are not controlled by the central or local state). Some private body will have to be owner and manager of the lands of the Sámi. In the choice between trusting the state and trusting the property rights institution it should be kept in mind that property rights change more slowly than the character of a state. By transferring the property rights from a politically sensitive state bureaucracy and over to the private property rights system for example as some kind of commons, the Sámi will in principle get exactly the same power over and protection of their property rights as any other Norwegian group of people. The court system protecting property rights in southern Norway will also be bound to protect the property rights of the Sámi. The only requirement is that these property rights are seen to conform to property rights elsewhere in Norway. In other words, the property rights of the Sámi people must be seen to conform to established ways of thinking about property rights in Norway. Only if they do that, will private property rights to land and water be an improvement over the current situation.

If the property rights of the Sámi become too different, too special, or are seen to rely on ideas and values alien to the ideas and values supporting the property rights in the rest of Norway, our legal system will not work reliably in protecting their property rights. For example, it may be conjectured that individual property rights, or property rights which discriminate local inhabitants, based on ethnic origin, will be anathema and in the long run introduce difficulties in the practice of Sámi property rights that are bound to lead to political repercussions.

Conclusion

To follow up effectively on the potential for change in the current international and national political climate it is necessary to understand both how the Norwegian people think about property rights in general, and what kind of legal constructions that will be possible within the Norwegian political system. Thus, from the line of argument presented here, it would seem more constructive for the Sámi parliament to emphasize that the new rights they are looking for are collective ownership of ground and remainder. If more is demanded it probably will fit badly the Norwegian way of thinking about collective property rights. It should also be emphasised that ownership of ground and remainder do not have to affect possession of, access to, or uses of specified resources at specified locations whether these rights are based on contract or custom. Such a solution will give the Sámi control of the remainder, and it will, as far as I can judge, satisfy ILO Convention 169.

The kind of property rights to land and water the Sámi eventually gets will be very important to Sámi society. But the consequences will be long range. New dilemmas will appear. That is about the only sure thing.

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