Land Reform: Formalising Sámi Land Rights in Norway

Erling Berge,
Department of Sociology and Political Science,
Norwegian University of Science and Technology, Trondheim

Introduction

Land reform is never easy, neither in Norway, nor anywhere else. To consciously design land reforms which achieve particular goals, we need a technical language which is more sophisticated than the system we want to reform. In particular, we need to understand how cultural values are embedded in rules of property rights, and to understand how behaviour adapts to and exploits property rights. Only then can we describe the system as it is and as it can be transformed.

Since the creation of the Sámi Rights Commission in 1980 the question of ownership of the lands of the Sámi Reindeer herders has been high on the political agenda. On 8 June 2005 the Norwegian parliament, Stortinget, finalised the first part in this process by enacted the Finnmark Act concerning the ownership and management of the state lands in Finnmark. It was done with support of a unanimous Sámeting, the political body of the Sámit, and had a clear majority of the county assembly behind it.

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 169.[1] The new Act would seem to have reached a reasonable compromise for solving the long standing problems of the Sámit in Finnmark. But not all problems are solved. As with all legislation revisions may prove necessary, for example in the detailed procedural rules for governing the lands. And there are Sámi reindeer herders in counties other than Finnmark. Land reforms in relation to the Sámi people are not finished.

Box 1 summarises the current status of the Sámi land question.

[1] For the full text of ILO Convention 169 see http://www.ilo.org/ilolex/english/index.htm

Reference:
Berge, E. 2005. Land Reform: Formalising Sámi Land Rights in Norway. In *Discourses and Silences. Indigenous Peoples, Risks and Resistance,* eds. Garth Cant, Anake Goodall, and Justine Inns, 87-102. Christchurch: Department of Geography, University of Canterbury.

Box 1: The Sámi land question in Norway, April 2005

In 1997 the Sámi Rights Commission finished it work by proposing new legislation for the state lands in Finnmark county to meet the demands of the Sámi people for "ownership and possession" of the "lands which they traditionally occupy". In 2003 the Norwegian government proposed legislation, the Finnmark Act, to confirm the rights of the Sámit and fulfil the Norwegian commitment to ILO convention 169. The proposal did not follow the proposal of the Sámi Rights Commission of 1997 and the Sámit denied that the proposal would meet the requirements of the ILO Convention 169 "Concerning Indigenous and Tribal Peoples in Independent Countries" requiring that such rights be recognized. May 24, 2005 the first chamber of the Norwegian Storting, the Odelsting, enacted the Finnmark Act significantly revised. The second chamber, the Lagting, seconded the enactment in its meeting 8 June, 2005.

The most significant changes introduced in the Storting are that the governing assembly of the body holding title to the land shall be elected by the county assembly and the Sámeting in equal numbers, and the creation of a special commission and court to determine rights currently existing on the lands of the new body. It is emphasised that only rights existing according to current law, in particular customary law, will be recorded. No new rights are being created. The special court will judge in case of conflicts among different stakeholders. It is also important to note that the Sámeting may institute regulations which, if approved by the Ministry, will bind the owner in evaluations of how Sámi interests are affected in cases where changes in land use are on the agenda. The same regulations will bind also public authorities in their decisions on land use. However, the law does not deal with rights to fishing in the coastal waters, nor with Sámi land rights in other counties.

It must be concluded that the Act approved on 8 June goes a long way towards solving the major problems of the Sámit demand for land ownership in Finnmark, and it may point the way towards solutions for the Sámit living south of Finnmark.

Background

The current debate traces its roots directly to a proposal to build hydro-electric power plants on the Alta River in Finnmark (Minde, 2005). During the 1970s this proposal was fought by Sámit and by environmental groups. Opposition, particularly among the Sámit, was strong and widespread and caused concern among Norwegian politicians. The plans for dams and reservoirs were modified to avoid inundating the Sámi village of Mási. But a long road and one big dam remained. In 1980 it was decided to go ahead with the reduced plan. But the fight against the development continued and culminated in 1981 with civil disobedience by a large group of activists putting themselves in front of heavy construction machinery. At the same time a court case was fought to stop the development. The civil disobedience was ended by a big police action and in 1982 the Supreme Court ruled that the decision to develop the river was legitimate. The construction went ahead, and in 1987 the power plant was opened.

As a part of the 1980 decision to develop the river, the government established the Sámi Rights Commission. It had a broad mandate and proposed, as early as 1984, major reforms, notably the inclusion of Sámit in the Norwegian Constitution, and legislation to establish a Sámi Parliament (NOU 1984:18). The Sámi Parliament opened on 9 Oct 1989. The commission continued its work by looking into the land question and in 1997 it proposed legislation to (re)define the property rights of the Sámit to the lands they had been using in Finnmark. A fulcrum for the particular form of the last proposal was the existence of International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries. The Convention was signed in 1989 and Norway ratified it in 1990, the first state to do so.[2] Convention 169 replaced Convention 107 of 1957: Norway also had ratified this and it formed part of the background for the Sámi Rights Commission when it was established in 1980.

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[2]As 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 Sámit live.

The peoples referred to in Convention 169 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 Sámit in Norway were in the 1980 commission seen as an Indigenous people with rights as defined by the Convention. 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 formulation of the rights to lands in Convention 169 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 Convention 169.

The debate on land reform has been limited to "State lands of Finnmark". The State has for several centuries defined itself as the owner of more than 90 per cent of the surface of Finnmark including the core areas of the reindeer herding Sámit. Sámi property rights to these resources are described in papers by Sevatdal, Austenå, and Austenå and Sandvik, in Berge and Stenseth (eds. 1998). Basically, the rights to pasture, right-of-way, timber, firewood, fishing and hunting, in so far as they are needed to practice reindeer herding, exist independently of ownership of the ground and belong to the reindeer herders within the herding areas defined in the legislation[3]. These rights are based on custom and usage from of old. They are as secure as any property right can be in Norway.

The reindeer herding areas cover almost half the surface of Norway extending south to Lake Femund in Hedmark. Both on State lands in Finnmark and Troms and in the State commons in other counties the customary rights of the reindeer herders come close to full possession[4]. However, on private lands practice of the reindeer herding rights is determined by local customs and varies widely, particularly in the south. The potential for conflict between farmers and reindeer herders is a constant concern. Conflicts come to the surface from time to time.

In Finnmark, and the northern part of Troms, a majority of the farmers are Sámi. Their rights to pasture and other resources in the outfields are less secure than the reindeer herders, and vary according to 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 is higher. The conflicts are partly caused by competition between sheep and reindeer at critical periods in the year, and partly by reindeers encroaching on the fields and farms during the trek from winter to summer pasture along the coast. The reduction of pasture areas, for reindeer as well as sheep, by hydro-electric power development, roads, cabins and even urban areas has intensified the conflicts.

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

While the farmers of Finnmark have been affected by the increasing number of reindeer, the local fishers, many of whom also are Sámi, have been hit by the crisis in the fisheries in the

[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>.

Barents Sea and the subsequent closure of the fisheries (Nyseth and Pedersen, 2005). Their situation is shared by local fishers all along the Norwegian coast. The introduction of quotas in 1989 and the subsequent closure of the fisheries is a larger problem for small-scale fishers in Finnmark than elsewhere since the alternatives to fishing here are fewer and farther away.

The Sámit have long felt felt that many of these problems would be easier to live with if they could get property rights to the lands they now use While the current discussion about ownership of land for the Sámit have been about the ownership to the State lands of Finnmark, the real issue, interpreted in the light of Convention 169, is much wider. It could conceivably involve all the lands defined as reindeer herding areas, nearly half the surface of Norway.

But why are "ownership and possession" important? And what do we mean when we talk about ownership and possession? How do we define "the lands which they traditionally occupy"? The answers need to be based on an understanding of what property rights to land, mean in a modern capitalist society as well as in a traditional customary law society. The short answer 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 when the Sámit saw the threat which hydro-electric power development posed to their traditional ways of using the land.

Ownership of land in contemporary capitalist society

Property rights give the holder the most enduring structural powers in capitalist societies. All societies have 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 non-capitalist societies these rights, at best, amount to locally acknowledged security of possession (de Soto 2000). However, in the capitalist societies of the Western world, property rights mean much 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 State control of the lands without individual owners. States often assumed ownership of wilderness and non-arable lands. "New nations" (including the 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 land, for private title. This "improvement" criterion for awarding title to land will, in most cases, lead to State property rights to non-arable lands (Box 2). State claims to property rights over unimproved lands led to discrimination against those Indigenous peoples who depended on pastoralism or slash and burn agriculture. Their customary rights became harder to defend in the face of fenced fields and plantations.

Indigenous and tribal peoples around the world are often found in remote areas, seen as wilderness and deemed to have low value for agriculture. Modern states often claim ownership of such lands in the sense of having a legal title (*de jure* ownership). But such areas are also covered with customary use rights for members of local communities (*de facto* ownership). Property rights to lands used by Indigenous peoples have usually remained poorly defined because, for most of modern history, these lands have been seen to contain from none to small and dispersed resources. This view is now changing. Market forces are reaching into

remote communities and exploiting previously unrecognised resources. Government interests in managing ecosystems to provide a wider range of public utilities and recreational services increase the attention given to these communities and their resources. One way or another, the existing law has to change to accommodate the shifts in priorities and practices.

The customary rights of Indigenous Peoples usually concern rights to specific material resources. But socio-cultural symbols may also be the objects of property rights in that symbols may be appropriated by individuals or subgroups for their advantage (Godelier 1984). However, symbolic values 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 2003).

Box 2: A 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 that 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 guarantied by the legitimate use of power.

The ways in which property rights are defined and protected are presumed to be essential to the dynamic of the economic and social development of all societies. Deficiencies in the definition of property rights are said by many to be an important explanation for lack of economic development (see North 1990, Ensminger 1992, de Soto 2000).

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) 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 (Box 3). 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 use them. We can call this way of thinking the *dominium plenum* position on ownership. This is the way Norwegian law thinks of property rights if nothing else is implied by contract or custom. This seems to be the way of thinking that guides ILO Convention 169. And, most significant for the present discussion, this is the way most Norwegians tend to think about Sámit claims to ownership of land and water.

What the Norwegian State "thinks" about property rights we cannot know. However, its behaviour with respect to its ownership of the lands in Finnmark conforms to the *dominium plenum* position only in certain long-term tendencies. The history of contracts and customs binds its position and channels its behaviour (NOU 1994, NOU 1997, NOU 2001). 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. Sámetinget 1999). But the impression imparted by its publicly promulgated positions does seem to conform to a *dominium plenum* way of thinking.

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

However, the *dominium plenum* way of thinking about *lands and natural resources* is not usually found in customs and traditions of Indigenous peoples. Neither is it part of the traditional Norwegian approach to land and resource ownership. 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 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 ways to specify resources and apportion rights among several and different owners. There also have 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 are found in the Common Law system developed in England[5]. Its current versatility is, in many ways, the outcome of a struggle between a customary system of rights similar to the Norwegian, and efforts to implement the *dominium plenum* position during the modernisation of the British State in the 18th century[6].

In contemporary modernisation projects an understanding of how these tools of land holding are constructed, and what their cultural foundations are, is essential. Understanding the cultural foundations is important since legal techniques can never be transferred from one culture to another without being adapted to local values and local 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 are based on distributions of rights to several and different owner interests, both individuals and groups, they are a better point of departure for modernisation than a *dominium plenum* way of thinking. Even so they need to be adapted to capitalist society.

Without going into a comprehensive outline of the property rights system for modern capitalism, we need to make a careful distinction between owner at law (legal owner) and owner at equity (equitable owner).[7]

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

[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.

1. Owner at law on behalf of herself/ himself, or
2. Owner at law (legal owner) on behalf of some beneficiary (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 between owners according to the motive or purpose for their ownership. The distinction between owner at law and owner at equity has developed within 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.

The owner who owns at law on behalf of herself or himself is the ordinary owner encountered in the *dominium plenum* position. 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 dictate 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 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 distinction is difficult to enforce in most cultures. It requires 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 foundations for a trust institution are absent.

Resource ownership in modern capitalist societies

In discussing property rights for the purposes of resource management, resources can usefully be divided into five types (Box 4). 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 recognised. Ecosystem services concerns the public values generated by well functioning ecosystems in mountains, forests, wetlands, and water bodies. Socio-cultural symbols vested in a landscape give sites of importance to a wide array of stakeholders. Legal institutions able to define and protect such resources are not yet well developed.

Box 4: Types of Resources

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 (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 below or above the ground the rights reach. These are the resources of practical use and economic value such as timber, pasture, right-of-way, minerals, fresh water, firewood, fishing and hunting rights, soil fertility, and sites for housing or strategic locations for communication lines. They comprise any specific use of a resource with a socially recognized value.

The Remainder, meaning the interest in resources not yet discovered or not yet capable of being exploited. They do not exist here and now but are possibilities for the unknown future. From a development perspective the remainder is strategically the 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. There are well known rules for how to handle this, for example through permission for development. Usually it takes time and requires 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, to preserve the waterfall undisturbed. But during the 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. Ownership of the remainder can be said to be the hub of capitalist landholding. The one who controls the newly discovered and valuable items - the owner of the remainder - will hold a key power in deciding on the future of that area.

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 is also now being called ecosystem services (MEA 2005); [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." Their definition is maybe too general to be completely useful.]. 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.

Socio-cultural symbols vested in a landscape (often attached to amenity and heritage sites) 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). [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.]

In the *dominium plenum* position on ownership it is assumed that the owner of the ground, the specific material resources, and the remainder, 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 will, for example, often reserve ownership for the State of archaeological finds, or discoveries of mineral oil or minerals. Even if the dominium plenum system of ownership actually was the introduced in a country we would soon rediscover that there is a multiplicity of interests in different resources on the same ground. 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 regulations to protect and manage the environment.

Today, in addition to the first three resource classes defined in Box 4, the two additional types of resources, ecosystem services and socio-cultural symbols, will increasingly affect property rights. The recognition that eco-system services are valuable resources for society has emerged 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 these goods are valued and enter into the motivations and management systems of various stakeholders. Recognised or not, they become part of the property rights system. They emerge from the remainder to become a new common resource that landowners cannot dispose of freely (Berge, 2005).

One approach to preserving valued eco-system services is to create protected areas. The creation of National Parks in Norway has previously 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 wilderness areas are recognized, ways of managing such values also on private or communal lands have to be found.

This task might be easier if both the state and the landowners were clearer in their distinctions between the role of specific resources, ground, and remainder in allocating rights and duties to stakeholders. Safeguarding collective goods such as ecosystem services do not have to affect ownership of ground and will diminish the value of the remainder only to the extent it also prohibits sustainable use. If use is permitted and several land owners or stakeholders are involved, the difficult question is to use development permissions to encourage a just distribution of increases in amenity values due to the regulations.

The main argument here is 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 livelihood, found in the lands they occupy, have been secure for a long time. But as new resources emerge, the chances of survival and successful modernisation of Sámi culture will be improved if they, collectively as a people, can control the remainder. Their struggle against the development of the hydro-electric power of the Alta River took place because 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 Sámit could effectively oppose it only to the extent that the development affected significantly their existing specific material resources involved in reindeer herding. The longer term repercussions could not be considered under existing law.

If we accept that control of the remainder is important to the future of Sámit and Sámi reindeer management, why cannot the State, locally and nationally, manage the remainder as trustee for the Sámi people? Some would say this is already done in southern Norway for the commons held by the State and used by the local farmers.

The Norwegian State as trustee and owner at law

The State commons of Norway are defined by the facts that the State owns the ground and remainder while a well defined group of farmers own the specific material resources needed for farming. In its management of the State commons, the Norwegian State is in a position similar to that of trustee. However, in Norway the trust institution is not fully developed. The force that has kept the State straight is not the legal system. It is the political power of local communities and the historically close links between state bureaucracy and rural society. Only continuous political pressure from these sources can explain the reforms of the legislation on commons in 1857 and 1863[8], and the work of the Mountain commission which worked from

[8] Act of 12 October 1857 on forest commons, Act of 22 June 1863 on forestry

1909 to 1953 to delimit the State commons from private property[9]. Since about 1960 the power of rural communities has waned considerably, and the values guiding the legal development is now increasingly drawn from an urban society. Thus the State commons provided a model for thinking about land rights for Sámit, but now guided by urban values.

When the Norwegian State joined in discussions of Convention 169 it emphasised the meaning of lands rather than the meaning of ownership. Sámi property rights to resources traditionally used for reindeer herding were well defined and secured by customary law and confirmed by the Reindeer Herding Act of 1933[10]. From a legal perspective they can be seen as structurally similar to the rights of the farmers in the State commons. Defining these rights as “the lands they traditionally occupy” fit perfectly with the Norwegian legal and cultural understanding of land ownership.

From this perspective, the State can be seen as trustee and owner at law for the lands of Finnmark while the Sámi people have been the beneficiary. But, as already observed, Norway does not have the trust institution. Furthermore, the Sámi people lack the political clout in the Norwegian Parliament that the farmers of southern Norway have enjoyed. And since they also lack the political goodwill and understanding of a majority of the non-Sámi population, the relations between the State and the Sámit are usually left to the bureaucrats. In the long run the relations between a professional bureaucracy and their clients tend to deteriorate. This has happened between the Sámit and some sections of the Norwegian State bureaucracy, particularly in relation to land management.

The Sámit, as beneficiaries of the management of State lands in Finnmark, feel that the implied trust has been broken. Lacking legal remedies and political power to influence the State bureaucracy, they took advantage of the participation of the Norwegian State in the global development of moral and ethical standards for modern states, in this case, ILO Convention 169. But neither ILO Convention 169 nor the Sámi Parliament accept that ownership of the use rights to specified material resources of the lands is sufficient protection.

Conclusion

If the State does not have a legal obligation to act as trustee in the best interest of the Sámit and the Sámit lack power to instruct the state bureaucracy, the only feasible alternative within the Norwegian State is private property. Some private or corporate body, other than the central or local state, will have to be owner and manager of the lands of the Sámit. In the choice between trusting the State and trusting the property rights institution it is underlined that property rights guaranteed by a mature legal system change more slowly than the character of a State. By transferring property rights to land from a politically sensitive state bureaucracy to the private property rights system (for example as some kind of commons) the Sámit will, in principle, get the same power over, and protection of, their property rights as any other Norwegian group. The court system protecting property rights in southern Norway will be able to protect the property rights of the Sámit as long as these property rights are seen to conform to property rights elsewhere in Norway.

The Act on Finnmark of 24 May 2005 seems to fulfil these requirements. The new Act defines the new owner of the state lands in Finnmark as a private body owned by two public bodies, the Finnmark county assembly and the Sámi parliament. The Act provides procedures for determining the rights of use and possession to any part of the resources found in these lands for all the people of Finnmark, not only the Sámit. The legal construction is in many ways similar to a state commons in other parts of Norway except that in relation to the

[9] Act of 9 April 1954 rescinded Act of 8 August 1908 creating the commission
[10] Current version from 1978: Act of 1978-9 June No 49: On reindeer herding

Norwegian state it is a private body. Thus the rights of the people of Finnmark are defined and structured in a way resembling those from other parts of the country. Thus it may be concluded that the Sámi rights now are governed by the same system of property rights as other Norwegians enjoy.

Twenty five years to develop a single act may seem a long time. In reality it is not. It is comparable to the time used in earlier reforms of land ownership. The intimate links between culture and property rights makes it necessary to use time to understand the various interests at stake and reach the necessary compromises. Land reform will never be easy.

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