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The Survey of Use and Ownership Rights in Finnmark – A Change of Direction?

Øyvind Ravna
The Arctic University of Norway, Tromso, Norway,
E-mail: oyvind.ravna@uit.no

Abstract

In 2008, the Finnmark Act initiated a process of surveying land rights the Sámi and others may have in Finnmark, the core Sámi area of Norway. The Finnmark Commission, which was established to conduct the survey has completed six investigations. Theassessments and conclusions in the first five reports are so similar in terms of collectiverights appears as cut from the same cloth. In December 2019, the Commission presented its sixth report, which covers the municipality of Karasjok, a communitywith a Sámi majority. This report marks a significant change from the previous ones, as the Commission for the first time concludes that the people in an investigation field own their outlying areas. This article examines how the Commission arrived at that result, pointing out that it is more an outcome of a different approach to the legal history and international law, than substantive differences in factual circumstances.

Keywords

The Judicial Survey in Finnmark – The Finnmark Commission – Property Rights – State Dispositions – ILO Convention No. 169 – Sámi Law

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[2]*

1 Introduction[1]

On 1 July 2006 the Finnmark Act came into force.[2] This meant that the lands which the Statskog sf (the State-owned Land and Forest Company) held title to at that date were transferred to the Finnmark Estate, an ownership body representing the people of Finnmark County. Due to uncertainty about the actual ownership and use rights of this land area, which amounts about 46,000 square kilometers, it was decided that these rights should be judicially surveyed and clarified.[3]

The survey of use rights and ownership rights in Finnmark, anchored in the Finnmark Act, is a result of Norway's obligations under international law towards the Sámi, especially under ILO Convention No. 169.4 It is also a result of a similar arrangement for clarifying land rights between State lands and private property holders in mountainous areas, a process that has previously taken place in other parts of Norway.5 The procedural regulations for the judicial survey are settled in the Finnmark Act, Chapter 5, which came into force by Royal Decree on 14 March 2008. On the same date, the Finnmark Commission, mandated to conduct the judicial survey, cf. section 29 (1), was established.

The Finnmark Commission has subsequently completed six investigations. The first covered *Stjernøya* and *Seiland* in the Alta fjord in Western Finnmark and was presented in March 2012. It was followed by the investigation of the area of *Nesseby kommune* (Nesseby municipality) in Eastern Finnmark, *Sørøya in* Western Finnmark, *Varangerhalvøya øst* (the municipalities of *Vadsø* and *Vardø*) and *Varangerhalvøya vest* (the municipalities of *Berlevåg* and *Båtsfjord*) as the reports for Fields 2, 3, 5 and 6 in the period 2013 to 2015, respectively.

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1 The article is partly based on my article 'Finnmarkskommisjonen justerer kursen', *Tidsskrift for eiendomsrett* (2020). Thanks to the editor(s) and the anonymous reviewer(s) for fast and professional assessment of the paper.

2 *Lov 17. juni 2005 no. 85 om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke* (Act of 17 June 2005 No. 85 Relating to Legal Relations and Management of Land and Natural Resources in the County of Finnmark (Finnmark Act)). An English translation can be found here: ‹https://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-085-eng.pdf›, visited 12 March 2021.

3 *Innst. O. no. 80 (2004–2005) Innstilling fra justiskomiteen om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke* (The Standing Committee on Justice, *The Parliamentary Bill for the Finnmark Act*), pp. 16–17.

4 *Innst. O. no. 80*, *supra* note 3, p. 15, p. 28, with reference to *ILO Convention No. 169 on Indigenous and Tribal Peoples in independent countries*, 1989 (Entry into force: 5 September 1991) Article 14 (2) and (3).

5 *Innst. O. no. 80*, *supra* note 3, p. 28, with reference to the Mountain Commission (1908–1953) and the Uncultivated Land Commission for Nordland and Troms (1985 to 2004).

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* Refers to page numbers in the published article.

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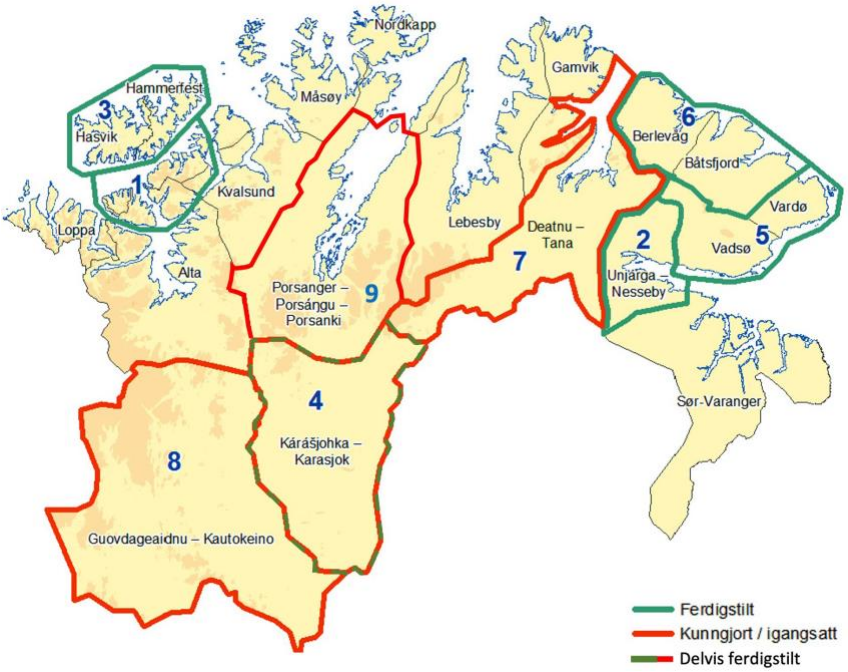
[3]

The assessments and conclusions in these five reports are so similar in terms of collective rights that what is said for the first report, essentially covers the next four. Common to all studies, except for the peculiar case of *Gulgofjord*,[6] is that collective rights are not recognized beyond what is already enshrined in the Finnmark Act and the Reindeer Husbandry Act.[7]



The Finnmark Commission has by 1 January 2021 fully completed the judicial mapping in five fields (marked with a green line on the map) and one field in parts (marked with a dashed line). It has also three fields under investigation (marked with a red line).

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6 *See Finnmark Commission, Report Field 6 Varangerhalvøya vest*, pp. 158–171, where the Commission concluded that the residents of *Gulgofjord / Vuođavuotna* had property rights to an outfield area of 30 square km. at the time the village was vacated in 1970, as well as fishing rights in a local river. As a result of the eviction, the property right was not effective anymore. The FeFo disputed both the 'sleeping' title and the fishing rights, which led to lawsuits from the relevant owners. The Uncultivated Land Tribunal for Finnmark in case utma-2017–62459 came to the conclusion that people in Gulgofjord held neither ownership rights to the disputed area nor fishing rights in the river.

7 Finnmark Act, *supra* note 2, sections 22–23; *Act of 15 June 2007 No. 40 relating to Reindeer Husbandry* (The Reindeer Husbandry Act), section 4.

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[4]

On 11 December 2019, the Commission presented the first investigation report for Field 4 (Field 4 is divided into two investigation reports, the firston property issues, the second on internal reindeer husbandry rights), whichchronologically is the Commission's sixth report.

The investigation began in 2011 and covers the outlying fields of Karasjok municipality. Karasjok is a municipality with a majority of Sámi inhabitants, situated in Inner Finnmark. In this report, the Commission concludes that the people of Karasjok own the former State land in the municipality. This report significantly contradicts the previous ones, not only because the majority of the Commission concludes that the inhabitants in the municipality collectively own the land in the field, but also because the State's previous activities as landowner are assessed differently from the previous reports.

The problem addressed in this article is to visualize the legal and factual differences between the first five reports and the Karasjok report of 2019, including assessing how the Commission justifies these differences and changing conclusions. It will also be assessed whether the differences, and consequently the last report, has the necessary legal basis in both international and national law. The article will discuss whether the amended conclusions are suitable for safeguarding both the mandate for the judicial survey and Norway's international obligations towards the Sámi in this area. Reflections are also made on the significance of the report for the further recognition and governance of thelands and natural resources in Finnmark.[8]

Reindeer husbandry rights are not a controversial topic in the first report of the Karasjok field. As in previous reports, the Commission concludes that on the basis of immemorial usage, a general reindeer husbandry right within the field of Karasjok is established that will not be affected by changes in land ownership.[9] The assessment of reindeer husbandry rights is therefore not atopic for this article.

The legal sources for the analysis will primarily be the Finnmark Act, its preparatory work as well as relevant case law and international law, such asILO Convention No. 169 ('ILO 169'). The empirical material for the study is thereports of the Finnmark Commission.

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8 In addition to the six completed investigations, the Commission has opened three more fields: Tana, Kautokeino and Porsanger.

9 *Finnmark Commission*, *Report Field 4*, *Vol. 1*, p. 216. The internal reindeer husbandry rights (between the siidas) will be assessed in the second report of the Karasjok field.

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2 The Background of the Judicial Survey of Use and Ownership Rights in Finnmark

The judicial survey of land rights in Finnmark, as well as the Finnmark Act, are results of the legal and political development and cognitions that originated during the *Alta River Hydro Power Plant* case.[10] During the case, the question arose as to whether the Sámi were indigenous peoples and thus whether Norway should join ILO Convention No. 107 ('ILO 107'),[11] precursor to ILO 169. It was then concluded that the Sámi were indigenous peoples, but that ILO 107, which was based on an integration and assimilation approach, was outdated.[12] The *Alta* case, however, encouraged the Norwegian government to appoint the Sámi Rights Committee in 1980.[13] During the next two decades, the Committee proposed a number of measures to safeguard Sámi language, culture and way of life, including a Sámi Parliament and a constitutional amendment. A draft for a land governance Act for Finnmark was an important part of the proposalin their second report,[14] where it was recommended that the State land in the area of Finnmark should be transferred to an independent ownership body, called the Finnmark Land Administration. The Sámi Parliament and Finnmark County Council were to appoint an equal number of representatives to the board of the land governance body. Locally based outfield management boards with possibilities to define and establish local common lands areas was also proposed.[15] However, a survey of land rights was not part of this proposal.

At the same time as the Sámi Rights Committee developed a new governance model for the State lands in Finnmark, and a subgroup under the Committee assessed the ownership to that land,[16] the Norwegian Parliament ratified ILO 169.

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10 *See* Environmental Justice Atlas, *Alta River Hydro Power Plant*, Norway, ‹https://ejatlas.org/conflict/alta-river-hydro-power-plant-norway›, visited 27 March 2021.

11 *ILO Convention no. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, 1957 (Entry into force: 2 June 1959).

12 *NOU1980: 53 Vern av urbefolkninger* (Official Norwegian Report: Protection of Indigenous Populations). Also in 1958, Norway considered whether to ratify ILO 107, but refrained at the time as it concluded that the country did not have such populations as the conventionaimed at protecting.

13 The Sami Rights Committee was established by the Crown Prince Regent's res. 10 October 1980, following a proposal from the Ministry of Justice, *see NOU1984: 18 Om samers rettsstilling* (Official Norwegian Report: On the Legal Position of the Sámi), p. 42.

14 *NOU1997: 4 Naturgrunnlaget for samisk kultur* (Official Norwegian Report: The Natural Basisfor Sámi Culture).

15 *Ibid.*, p. 222.

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This meant that Norway was legally obliged to recognize the rights of ownership and possession of the Sámi over the lands which they traditionally occupy, cf. Article 14 (1), to take necessary steps to identify the lands which the Sámi traditionally had occupied, and to guarantee effective protection of the Sámi rights of ownership and possession to that lands, cf. Article 14 (2).

Unlike other legislation adopted by the Parliament to safeguard Sámi culture at that time, the ratification of ILO 169 was not based on proposals of the Sámi Rights Committee. However, the Committee considered that Norway would meet the requirements in the Convention on rights of ownership and possession of the Sámi over the lands which they traditionally occupy, with- out dividing the county into a specific indigenous area. Based on an opinion that Inner Finnmark was traditionally Sámi areas, while the coastal areas were mainly Norwegian,[17] the Committee meant the obligations of the Convention could be met with a "land exchange" where the Sámi gave up 50 per cent of their ownership rights to Inner Finnmark in exchange for a corresponding right of shared control over Coastal Finnmark. Anchored in such a view, a joint ownership body (Finnmark Land Administration) was proposed with equal board representation of the Sámi Parliament and the 'Norwegian' County Council of Finnmark. A prequisite for that proposal was that the Sámi Parliament gave its consent.[18]

In addition, as mentioned, the Sámi Rights Committee proposed the establishment of a locally based outlying field management board to meet the requirements of the local inhabitants' impact on the use of their natural goods.[19] The proposed arrangement would then transfer governance of the local use rights to the peoples in the municipalities and villages, while the ownership rights would be controlled by the Finnmark Land Administration. According to the Sámi Rights Committee, this meant that the use rights in the Sámi municipalities were governed locally by the Sámi, while the owner- ship rights were governed jointly by the people of Finnmark. The Committee assumed that Norwegian law as a whole would then be in accordance with the purpose of ILO 169, and that "the type of ownership of the land in Finnmark that will be established

16 *NOU 1993: 34 Rett til og forvaltning av land og vann i Finnmark* (Official Norwegian Report: Rights and Governance of Land and Waters in Finnmark).

17 Such a view is hardly supported by actual historical realities but is rather a result of twentieth century Norwegianization politics.

18 *NOU1997: 4*, *supra* note 4, p. 222, *see* p. 90 with reference to *NOU 1997: 5 Urfolks landrettigheter etter folkerett og utenlandsk rett* (Official Norwegian Report: Indigenous Peoples' Land Rights According to International Law and Foreign Law), pp. 46–47.

19 *NOU 1997: 4*, *supra* note 4, p. 222.

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at the formation of the Finnmark land administration, will comply with the requirements set out in Article 14 No. 1 first sentence".[20]

When the Finnmark Act came into force on 1 July 2006, the lands held by Statskog (State-owned Land and Forest Company), were transferred to the Finnmark Land Administration, now under the name Finnmark Estate (Finnmarkseiendommen, 'FeFo'). The FeFo was defined in the same Act as an independent legal entity where the Sámi Parliament and Finnmark County Council each appoint three of six board members, cf. sections 6 and 7.

Significant parts of the Sámi Rights Committee's proposal were not continued by the Government in its proposal for the Finnmark Act. This included, among others, the local governing bodies. Prior to the adoption of the Act, theSámi Parliament therefore argued that the Act did not meet international law requirements and did not consent to its adoption.[21] Professors Hans Petter Graver and Geir Ulfstein were therefore appointed to make an assessment of the draft Act. They concluded that the draft Act did not meet the requirements of ILO 169 on important topics, one reason being that the Sámi not were ensured control over the land that lies in the ownership position.[22] Based on an idea to ensure greater compliance with ILO 169, the Government proposed, at the request of the Parliamentary Standing Committee on Justice, to estalish a judicial commission to identify existing rights in Finnmark.[23]

After consultations with the Sámi Parliament and Finnmark County Council, the majority of the Standing Committee of Justice assumed that survey of ownership and use rights had to be included as a key element in the Finnmark Act, and that a commission to investigate rights to land and water in Finnmark, and a special court to settle disputes concerning such rights, hadto be established.[24] This became part of the Act, cf. chapter 5. The proposal of a locally based outfield management board with the possibilities to define and establish local common lands areas, was however, not included in the Act. From the Sámi Parliament, it was supposed that areas for local governancewould be revealed as part of the judicial survey.[25]

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20 *Ibid.*, p. 93.

21 *Innst. O. no. 80*, *supra* note 3, p. 14.

22 H.P. Graver and G. Ulfstein, *Folkerettslig vurdering av forslaget til ny Finnmarkslov* (International Law Assessment of the Proposal for a New Finnmark Act), 3 November 2003.

23 Letter from the Ministry of Justice to the Parliamentary Standing Committee Justice, 14 June 2004, *see Innst. O. No. 80*, *supra* note 3, p. 64.

24 *Innst. O. no. 80*, *supra* note 3, p. 17.

25 S.-R. Nystø, former President of the Sámi Parliament, statement during testimony before the Supreme Court, case hr-2018-456-P (*Nesseby*), Vadsø, 10 October 2017, *see* Ø. Ravna, *Same- og reindriftsrett* (Gyldendal, Oslo, 2019) p. 450.

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[8]

Through the consultations, the parties also agreed upon including that "the Sámi have collectively and individually through prolonged use of land and water areas, acquired rights to land in Finnmark". According to the majority of the Standing Committee of Justice, it is "a principled and political recognitionthat such rights exist".[26]

The task of the judicial survey was assigned to the Finnmark Commission. The mandate of the Commission was to investigate rights to land and waterin Finnmark in order to "establish the scope and content of the rights held by Sámi and other people on the basis of prescription or immemorial usage or on some other basis", cf. section 5, para. 3. The mandate has a clear anchoring in the obligations Norway undertook by ratifying ILO 169.[27] The mandate is specified in section 29, para. 1, where the Commission, "on the basis of current national law, shall investigate rights of use and ownership for to the land to be taken over by the Finnmark Estate pursuant to section 49".[28] The preparatory work shows that the wording "current national law" is chosen to better reveal that Sámi customs and legal opinions must be taken into account. [29] The mandate must be seen in connection with the purpose of the Act.[30] The mandate must also be seen in connection with section 3 ofthe Act, in which ILO 169, ratified by Norway in 1990, has been sector-monistically incorporated:

> The Act shall apply with the limitations that follow from ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. The Act shall be applied in compliance with the provisions of international law concerning indigenous peoples …[31]

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26 *Innst. O. no. 80*, *supra* note 3, p. 37. The statement is in the Finnmark Act section 5, para. 1.

27 *Ibid*., p. 28. This applies in particular to Article 14 (2) and (3), which require the signatory States to identify land traditionally occupied by indigenous people and to establish adequate procedures within the national legal system to resolve land claims by these peoples.

28 By Act 21 Sept 2012 no. 66, *Lov om endringar i deltakerloven, havressurslova og finnmarksloven* (Act on Amendments to the Participant Act, the Marine Resources Act, and the Finnmark Act), the mandate was extended to include investigation of rights to fishing grounds in sea and fjord areas in Finnmark if someone raises a claim for such investigation.

29 *Innst. O. no. 80*, *supra* note 3, p. 19.

30 The purpose of the Act is to facilitate the management of land and natural resources in Finnmark in a balanced and ecologically sustainable manner for the benefit of the residents of the county and particularly as a basis for Sámi culture, reindeer husbandry, use of non-cultivated areas, commercial activity and social life, cf. Finnmark Act, *supra* note 2, section 1.

31 *Ibid.*, section 3.

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[9]

In the *Stjernøya* case the Supreme Court of Norway nonetheless concluded that the incorporation of ILO 169 is limited to precede the provisions of the Finnmark Act only, which means that ILO 169 "does not regulate the substantive rules on which the rights are to be clarified on the basis of".[32] In otherwords, ILO 169 does not take precedence over the rules to be used to clarify theland rights on the FeFo. This is confirmed in the *Nesseby* case.[33] Nevertheless, the Supreme Court emphasized the *presumption principle*.[34]

It is also worth noting that the Finnmark Commission is not a court of law. Despite the government's proposal for a judicial commission, and the central role the Commission is given in the survey, it is an investigative body.[35] Instead of issuing binding judgments, it shall submit reports on ownership and userights.[36] To the extent that the conclusions are not accepted or reconciled, they may be brought before the Uncultivated Land Tribunal for Finnmark within aperiod of one year and six months, cf. the Finnmark Act ss. 36 and 38.[37] During this period, the case cannot be brought before the ordinary courts.

3 The Finnmark Commission's First Five Reports

3.1 *The Application of the Law*

The assessments and conclusions in the five reports that the Finnmark Commission completed up to December 2019 are, as mentioned, so similarwhen it comes to collective rights that it is not necessary to go in depth oneach report. In the following, we will look at the assessments of the collective rights that Sámi and others hold on the basis of prescription and immemorial usage in these reports.

In all the reports, it is concluded that the FeFo owns the land areas underinvestigation, with the exception of a parcel of 20,000 sq. meters in Field 1and a parcel of 7,000 square meters in Field 2, as well as an outlying area of 30sq. kilometers in Field 6.38 In addition, use rights for the local population

32 Norway's Supreme Court, case *hr-2016-2030-A*, para. 76.

33 Norway's Supreme Court, case *hr-2017-456-P*, para. 102.

34 The presumption principle means that it is assumed that Norwegian law is in accordance with international law. The courts comply with this principle by interpreting Norwegian legal provisions in accordance with Norway's obligations under international law.

35 *Innst. O. no. 80*, *supra* note 3, p. 21. Administratively, the Commission is subordinate to the Court Administration, *cf*. Regulation 16 March 2007 no. 277, *Forskrift om Finnmarkskommisjonen og Utmarksdomstolen for Finnmark*, para. 2.

36 Finnmark Act, *supra* note 2, section 33.

37 *Ibid*., sections 36 & 38.

38 For the 30 sq. kilometers, *see supra* note 6 on *Gulgofjord / Vuođavuotna.*

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for grazing livestock, cutting wood and peat, fishing, hunting and trapping, picking eggs and down and berries, are recognized. The rights are said to have an independent legal basis as the common land rights in Southern Norwayand the reindeer husbandry right in the areas where the Sámi have practicedreindeer husbandry since ancient times.[39] However, the right holders are notentitled to govern these rights, which have no greater reach than the rights thatare already enshrined in the Finnmark Act and the Reindeer Husbandry Act.[40]It is further stated that the rules in the Finnmark Act and previous Acts are not of a legislative/law-making nature, but laws that regulate the local population's original, custom-based rights, which were mainly established beforethe State began to exercise the regulations, and which are thus not acquired byprescription or immemorial age *after* the State's ownership position in the relevant parts of Finnmark had become entrenched.[41] However, the conclusions do not mean a change in the legal situation, as these rights are "codified in the Finnmark Act, and thus also covered by governance authority of the Finnmark Estate".[42]

The fact that the rights are covered by authority of the FeFo means thatthe local inhabitants cannot govern the rights.[43] If they were to do so, they must have been established by "immemorial usage or use in full prescription term that has been exercised beyond the framework currently laid down in

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39 *See e.g.*, *Finnmark Commission, Report Field 1*, p. 104 and *Report Field 2*, p. 122.

40 The Finnmark Act defines in sections 22 and 23 which rights persons residing in a municipality (in Finnmark) and in Finnmark County have, respectively. Section 22 mentions rights to a) fish for freshwater fish with nets, b) fish for anadromous salmonids with fixed gear in the sea, c) gather eggs and down, d) fell deciduous trees for domestic fuel, e) cut peat for fuel and other domestic purposes and f) remove deciduous trees for use as fence posts and poles for hay-drying racks in the reindeer husbandry and agriculture industries. Section 23 mentions rights to a) hunt big game, b) hunt and trap small game, c) fish in watercourses with a rod and line, d) pick cloudberries and e) remove timber for home crafts. In addition, farmers have grazing rights for as large a herd as can be winter-fed on the farm. For the Reindeer Husbandry Act section 4 states that "the Sámi population has on the basis of immemorial usage right to do reindeer husbandry where the Sámi from ancient times have practiced reindeer husbandry".

41 An exception is found in Field 3, Sørøya, due to the special rights conditions there in the Middle Ages and the island's position as partly proprietary estate and partly Crown Land.

42 *Finnmark Commission, Report Field*, 1, p. 104, and *Report Field 2*, p. 122. Unless otherwise stated, the translations were made by translator Linn Aase on behalf of the author. *See also* K.S. Bull, 'Finnmarksloven – Finnmarkseiendommen og kartlegging av rettigheter i Finnmark', *Lov og Rett* (2007) pp. 545–560, where it is discussed what lies in the restrictions in the Finnmark Act section 5 para. 2.

43 In the state commons, the situation is opposite, where the locals have big influence on the governance, Cf. Act 6 June 1975 no. 31, *Lov om utnytting av rettar og lunnende m.m. i statsallmenningane (Fjellova)* (Commons Lands Act), section 3 etc.

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the Finnmark Act".[44] In practice, this means that rights established before 1775 have a weaker protection against a public landowner or public regulation than rights acquired at a later time. It also means that the term 'independent legalbasis' has a more limited content than usual in Norwegian property law.

The year 1775 is considered to mark a paradigm shift, as this was the year in which the Royal Decree concerning division of land and establishing of allotments in Finnmark was adopted.[45] The Decree allegedly gave the State the opportunity to survey, register and transfer State lands as properties for individuals. This shows that the Commission, in the five first reports, bases its assumption on that the State or the Danish King was the landowner at thistime, and that the Royal Decree laid the foundation for establishing privateproperties in Finnmark.[46] With such a starting point, the division, allotment and registration of land and places for living became legal activities where the State, pursuant to presumed property rights, transferred title of land to the inhabitants for establishing agriculture and the like.[47]

The legislature's recognition that "the Sámi have collectively and individually, through prolonged use of land and water areas, acquired rights to land inFinnmark" is virtually absent in the five first investigation reports.[48] This is not due to failures in meeting the general terms for acquiring rights by prescription and immemorial usage, but due to prominence given to the presence of theState and its activities.

From a legal point of view, however, there is little reason to criticize the Finnmark Commission as its conclusions have been upheld by the Supreme Court in the case hr-2018-456-P (*Nesseby*), see in particular paragraphs 112 and 113. The Supreme Court's position in the case means that the local inhabitants' use rights, despite the fact that the rights have an independent legal basis, do not enjoy the legal protection that usually lies in such rights, for example against competing uses and landowner regulations.[49]

44 *Finnmark Commission*, *Report Field 1*, p. 104, and *Report Field 2*, p. 122 etc.

45 Kgl.res. 8. juni 1775 angaaende Jorddelingen i Finmarken samt Bopladses Udvisning og Skyldlægning sammesteds (Royal resolution concerning division of land in Finnmark and the survey and taxation of living places in the same place).

46 *Finnmark Commission*, *Report Field 1*, p. 17, and *Report Field 2*, p. 19. The three subsequent reports present quite similar findings. The King of Denmark was the sole head of State for Norway until the dissolution of the union between Denmark and Norway in 1814.

47 *See also* hr-2018-456-P (*Nesseby*) para. 135 where the first voting judge of the Supreme Court states that "as the resolution was structured, it appears in my view that it regulates the transfer [of land] and not just the registration of already existing rights".

48 Finnmark Act, *supra* note 2, section 5 para. 1.

49 Authorities and landowners generally have limited access to such rights, *see* e.g.,

3.2 *Regarding the Weight of the State's Activities*

For the first five fields, the Finnmark Commission assumes that the local inhabitants have fulfilled the use prerequisite and time requirement for recognition of property rights in accordance with the rules on immemorial usage. This is done by stating that the use corresponds with the use in the *Svartskog* case (where a local community won property rights in dispute with the State).[50] The description in that case read as follows:

> In short, the use is characterized by continuity, that it has been all-encompassing and intensive, and by flexibility. The requirement for both the scope of the use and the duration for the acquisition of property rights has subsequently been met.[51]

According to the Commission, the requirement is met "only if the use is considered isolated". In order to have property rights recognized, the use must also be assessed in the light of others' use of the area and of the State's activities. Furthermore, it must also be considered whether a clear majority of those who are part of the relevant user group has exercised their use on the basis of an opinion that the group is the owner of the area where the use has taken place, and not just that they have a right of use the area.

Although the requirement for such an opinion is not considered to be met, I will continue to concentrate on the State's actions, as they are the main reason why the local inhabitants are not recognized any property rights or rights to govern their outfield resources.

The "actions of the State" refers to ownership activities, both actually and legally, exercised by the State's land managers. Public administration and the

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NOU 2007 13, p. 398 and p. 610. On FeFo's land, it will be the opposite: it is the landowner who largely decides whether others than those entitled to use will have access to the areas, which in some cases will limit their use.

50 *Finnmark Commission, Reports:* Field 1, p. 64, Field 2, p. 65, Field 3, p. 51, Field 5, p. 54, Field 6, p. 58, with reference to *Norsk Retstidende* (a court archive journal), 2001, 1229 [1244] (The *Svartskog* case). The case is central because the Standing Committee on Justice has pointed at it as an "instruction on how traditional Sámi use should be regarded as a basis for aquation of rights", *see Innst. O. no. 80*, *supra* note 3, p. 36. The judgment concerned the question of whether the State was the owner of an outlying area of 116 km2 in Manndalen in Kåfjord municipality in Troms, a settlement with a significant Sámi population. The Supreme Court concluded that the use of the local population met the requirements for the acquisition of property rights. Despite the fact that the State had registered its title after buying the land in 1885, the requirement of good faith was considered fulfilled, which can be explained by the fact that the Supreme Court took into account Sámi culture and Sámi legal opinions. The outcome of the case was that the local people won the case due to immemorial usage.

51 *Norsk Retstidende* [Nrt] (2001) p. 1229 [p. 1244].

Published in *International Journal on Minority and Group Rights* (2022) pp.1-34 DOI:10.1163/15718115-BJA10054

exercise of judicial authority are thus not a part of action that counts. The Finnmark Commission has held these State actions in the fields of study up against similar actions described in the *Svartskog* case and concludes that they are generally more extensive in Finnmark. However, the comparison is deficient. In the *Svartskog* case, the State actively bought the future disputed property from an association established for abolition of tenancy in the area, after which the acquisition was secured by title registration.[52] Furthermore, the State has at times clearly expressed its ownership, e.g., by posters on the church hill and other frequented places. The State also issued a significant number of lease letters for outlying hayfields, at the same time as applications for the purchase of land were rejected.

In Finnmark, the State does not hold a title deed for its acquisition,[53] nor has the State ever announced its property rights in acquisition places. In addition, in the basis for the Finnmark Act is an opinion that the State has not acted as an active land manager in Finnmark.[54] However, the Finnmark Commission has found that the State has carried out significant activity by surveying properties and leasing out hayfields. Leasing of land for housing and cabins is another landowner activity exercised by the State.[55]

There is no reason to doubt the factual circumstances to which the Commission refers. Nevertheless, it can be questioned whether the State has acted to a greater extent in the investigation fields than in Svartskogen. The fact that the activities appear to be more extensive in the investigation fields may be a result of them being far larger than the Svartskogen field. The survey is also broad-based without diving into specific detailed areas, such as naturally delimited valleys and the like, and thus areas that could be compared with Svartskogen area.

The degree of the State's activities as landowner can thus be discussed. What does not need to be discussed, however, is whether role of

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52 *Ibid.*, p. 1229 [1232–1233], cf. *Foreningen til Ophævelse af Leilændingsvæsenet i Skjervø.*

53 I then disregard the fictitious deed that was issued when the State by the Ministry of Agriculture transferred the ownership of the land in Finnmark to Statskog sf in 1993, *see* Ø. Ravna, 'Retten til jorden i Finnmark, samenes rettigheter og forslaget til Finnmarkslov', 31:2 *Kritisk juss* (2005), pp. 200–211 [p. 205].

54 *Ot.prp. no. 53 (2002–2003)* (Proposition to Parliament), p. 13. The State's dispositions are described as moderate (Norwegian: '*tilbakeholdne*').

55 *Finnmark Commission, Report Field 1*, p. 67, and *Report Field 2*, p. 68. In the report from Field 2, p. 62, the Commission shows inter alia to an extract from the document presented by the FeFo, which shows that the State's lease practice dates back to the 1860s. This extract, which applies to measurements of approx. 210 outfield hay-mowing in the period up to 1920, has been central in the assessment of the State's dispositions, and has thus contributed to the local population not being recognized exclusive use rights in the field.

Published in *International Journal on Minority and Group Rights* (2022) pp.1-34 DOI:10.1163/15718115-BJA10054

the State, as both public authority and landowner simultaneously, has been unclear.[56] This unclarity has made it difficult for people in Finnmark to distinguish between these roles, including seeing the legal consequences of the State's dispositions. An example of such confusion is that the Chief of Police in Vadsø issued letters of lease on behalf of the State.[57] Such ambiguities and confusions could indicate less emphasis on the State's dispositions.

Although there are thorough expert reports,[58] the Commission has placed little emphasis on the legal opinions of the local people on State dispositions. Based on the significance of the State's actions, one could expect that the opinions of these actions, for example whether they were seen as ownership activities or exercise of public authority, could have been studied more thoroughly. It could also have been assessed whether the inhabitants have considered lease letters and similar documents as the establishment of tenancies, or as confirmation of a right they had, where these documents helped them in protecting the use of their traditional grass mowing, etc., against competing use.

In the *Svartskog* case, the Supreme Court concluded that 14 contracts onhayfield-leases with the State in 1921 and five correspondingly in 1928, did not disturb the good faith of the local people. Nor did the rejection of applications for land for cultivation purposes in 1935[59] dislocate that faith. Also, the degree of harvesting of outfields without lease contracts in the investigation fields of the Commission does not seem to have been assessed significantly, as it is not clear to what extent this has happened, or whether the State opposed such harvesting.[60]

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56 Ot.prp. no. 53, *supra* note 54, p. 13. *See also* Ø. Ravna, 'Rettskartleggingen i Finnmark og reglene om alders tids bruk', 128:1 *Tidsskrift for Rettsvitenskap* (2015) pp. 53–90.

57 Forpaktningsbrev (lease letter) no. 150, J.no. 6767 1901, appropriated 1 November 1901, submitted by the FeFo for the investigation of Field 2 Nesseby. The fact that the chief of police issued such property documents, which is naturally a part of the landowner's dispositions, means that recipients have not necessarily perceived this as ownership.

58 Norwegian Institute for Cultural Heritage Research (NIKU) Report 42/2011, *Felt 1 Stierdná/Stjernøya og Sievju/Seiland*; NIKU Report 43/2011 *Felt 2 Unjárgga gielda / Nesseby kommune*.

59 *Nrt*, *supra* note 51, p. 1229 [pp. 1248–1249].

60 *Finnmark Commission*, *Report Field 1*, p. 62, where it is stated: "However, there may have been some hay-mowing regardless of this", and *Report Field 2*, p. 62, where reference is made to Ø. Nilsen, *Varangersamene* (Varanger Sámi Museum, Varanger, 2009), pp. 45–46, that "not everyone had the papers in order", and H. Prestbakmo, 'The use of outfield resources in Finnmark in this century', in *NOU1994: 21*, pp. 168–169, who writes: "In Nesseby it is saidthat only a part of the hayfields was registered, but that the hay was harvested accordingto old customs", and that "an informant says that the marshes, which were important hayfields, were divided and that each had its own field without there being any registeringor measuring of it".

Published in *International Journal on Minority and Group Rights* (2022) pp.1-34 DOI:10.1163/15718115-BJA10054

The absence of both written language skills and knowledge of the Norwegian language are among the factors the Supreme Court in the *Selbu* and *Svartskog* cases emphasizes as special methodological issues, where the Court states that it must be "taken into account that in communication between Norwegians and Sámi, misunderstandings can arise because linguistic and cultural differences, which can lead people to perceive each other in a wrong way".[61] That could probably indicate less emphasis on the State's dispositions in the 1800sand early 1900s. If we go back a century, it can be shown for Nesseby, for example, that few of the municipality's inhabitants spoke Norwegian.[62] This means that Sámi culture and Sámi legal opinions, including rules on informal management of the outfields, were presumably still very much alive. Furthermore, it can be asked whether the Sámi were able to understand regulations, Acts, letters of lease and the like. Illustrative is the statement of the ethnographer Amund Helland from 1906, saying that "very few [of the Sámi] can benefit from reading a Norwegian newspaper".[63] In addition, the opinion of the time of the Sámi as an inferior culture, may indicate caution in placing heavy emphasis on the State's actions.

It could also have been studied to what extent the State acted in conflict with the interests of local people, for example by opposing requests for land leases or preventing logging for domestic use, which can be said to be a prequisite for displacing the rights of the locals.[64] It has probably happened to a small degree. Nevertheless, the Commission concludes that the State's dispositions over time have "resulted in that a right has been established for the State to control resource utilization … when this has been necessary to secure access to resources and promote orderly use".[65]

It is thus not a lack of continuity or intensity of use, which are requirements acquiring property rights, that have stood in the way of recognition of ownership rights in the investigation fields in Finnmark; they are "sufficiently long-lasting and coherent to be potentially right-establishing" in

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61 *Nrt*, *supra* note 51, p. 769 on p. 792; *Nrt*, *supra* note 51, p. 1229 on p. 1249.

62 A. Helland, *Norges land og Folk: Finmarkens Amt*, Vol. ii (Aschehoug, Oslo, 1906) p. 14, where it appears that in Nesseby municipality, including Polmak, at this time there were 1,512 inhabitants. Of these, as many as 1,262 people or 83.5 per cent were Sámi. Among these, there were only nine Norwegian speakers. Helland's description also shows that Nesseby at this time was largest Sámi settlement in Finnmark with almost as many Sámi inhabitants as Karasjok and Kautokeino total.

63 Helland, *supra* note 62, p. 150.

64 S. Tønnesen, *Retten til jorden i Finnmark* (Universitetsforlaget, Oslo) p. 183.

65 *Finnmark Commission Report Field 2*, p. 122. Repeated in *Report Field 3*, p. 93, where "established" is changed to "upheld", and in *Report Field 5*, p. 111, where "established and upheld" is used. In *Report Field 6*, p. 105, the wording in *Report Field 5* is repeated.

Published in *International Journal on Minority and Group Rights* (2022) pp.1-34 DOI:10.1163/15718115-BJA10054

all the fields studied.[66] Nor is it the use of others, but rather the *dispositions of the State* that have created an insurmountable threshold for the recognition of such rights;[67] rights of a kind where the local people themselves can govern their outfield resources. Although the Supreme Court in the case hr-2018-456-P (*Nesseby*), paras. 112–117, did not find this problematic, it can be asked whether the recognition in the Finnmark Act section 5 – that the Sámi through prolonged use of land and water areas have collectively and individually acquired rights to land in Finnmark – is met.

The Commission also sets, with reference to the *Svartskog* case, requirements for the exercise of "active management over the use of resources" in order to have rights recognized.68 Documentation of such management, which is custom based, orally communicated and limited to necessary rules on resource allocation, will in practice be very demanding, unless the area, as in the *Svartskog* case, has been the subject of a number of conflicts and disputes that leave their traces in the archives. The result is thus that the Commission for all the five fields refers to the Supreme Court's description of the management of Svartskogen, after which it points out:

> There is nothing in the material that has been provided or presented to the Commission, which indicates that the population in all or parts of [Nesseby municipality] up to our time has exercised a form of management of the local resource utilization that can be compared with this.[69]

The view that people in the investigation fields have managed their nearby natural resources to a far lesser extent than people in Manndalen, is crucial for that the right to govern the land, is not recognized in the *Nesseby* case, para. 142–149.

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66 *Finnmark Commission, Report Field 1* p. 61, *Report Field 2* p. 61, *Report Field 3* p. 46, *Report Field 5* p. 48, *Report Field 6* p. 49, where the use is upheld as "obvious … sufficient". Cf. *Report Field 1* p. 64 and *Report Field 2* p. 65, when it comes to the intensity of the use. The three subsequent reports have similar formulations.

67 *Finnmark Commission, Report Field 1,* p. 64, *Report Field 2,* p. 65 The three subsequent reports have similar formulations.

68 *Finnmark Commission, Report Field 1,* p. 66, *Report Field 2,* p. 68, *Report Field 3,* p. 54, *Report Field 5,* p. 58, *Report Field 6,* p. 64.

69 *Finnmark Commission, Report Field 2,* p. 68. Cf. *Report Field 1,* p. 67, *Report Field 3,* p. 54, *Report Field 5,* p. 58, *Report Field 6,* p. 64, where the same formulation is used.

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4 The Finnmark Commission's Report for Field 4 Karasjok

4.1 *People in the Field of Study Have Collective Property Rights*

On 11 December 2019, the Finnmark Commission presented the first report for Field 4 *Karasjok*. Chronologically, this is the Commission's sixth report.It has been presented more than four years after the previous report, Field 6 *Varangerhalvøya vest*, which was published in October 2015. During this period, one of the Commission's members resigned and was replaced by another, atthe same time as the Commission has done a significant amount of work. This is shown not only by the fact that the report numbers as many as 676 pages in two volumes, but also by the fact that the investigation, which began in 2011, took almost nine years. In comparison, the five previous studies were – all together – completed in less than seven years. The discussions within the Commission are also assumed to have been more extensive, as the main conclusion was handed down for the first time by dissent (three to two).

In the first report for Karasjok, it is concluded that the people living in the municipality, in common, are owners of the land, which in 2006 was transferred from Statskog sf the FeFo. This is the first time the Commission concludes that people in Finnmark have collective property rights to their traditional natural resource areas.

As in previous reports, the Commission refers to the *Svartskog* case, in which the Supreme Court describes its use in the dispute area as "characterized by continuity, that it has been all-encompassing, intensive and flexible".[70] It meant that the requirement for both the use and the duration for the acquisition of property rights consequently had been met. The Commission assumes that this description also is adequate for the local population's use of land in Karasjok with regard to continuity and flexibility. Also, as in previous reports, the Commission points out that the question of whether the population has collective ownership or use rights to the area depends not only on the population's use, but also on the use of others and the State's actions.

However, in contrast to previous reports, it is assumed, unanimously, that the people in the area, for many hundreds of years have used and possessed the natural resources in the area in a way that essentially corresponds to having collective property rights.[71] The question is thus not whether the people should "have their property rights to an area

70 *Finnmark Commission, Report Field 4, Vol. 1*, p. 154, with reference to *Nrt*, *supra* note 51, p. 1229 [p. 1244].

71 *Ibid.*, p. 118 and p. 154.

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recognized".[72] It is instead a question of whether the established rights are retained, or whether the State's alleged ownership in the years from 1751 to 1980 has become a settled legal situation.

Furthermore, it must be considered whether the local use has had a basis ina legal opinion that corresponds to collective property rights or use rights, andin addition, it must be assessed *what significance the State's actions* have for the current legal situation. In other words, whether the actions have affected the local legal opinions in a way that has led to original local rights having changedin character or disappeared. This suggests a somewhat more nuanced view of the significance of the State's actions than in previous investigations.

4.2 *The Emphasis on State Dispositions*

The Karasjok report differs significantly from previous reports in terms of the assessment of the State's dispositions. In discussing these, the Finnmark Commission first points out that the UN Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, has been critical to the Commission's conclusions in the first five fields. It is revealed that she assumes that the "conclusions seem to have been motivated by the State's active and extensive disposition of land and resources in the investigated fields which is seen to have precluded property or usage rights for the local population", stating, as a result, that "the State's earlier dispositions as the claimant of propertyrights in Finnmark cannot be considered to create law in order to support continued ownership of land".[73]

After a review of Norwegian case law, and in particular the case of HR-2018-456-P (*Nesseby*) where the Supreme Court, without referring to the UN Special Rapporteur, places considerable emphasis on the State's dispositions, the Commission finds that such dispositions must be included in the assessment in "an ordinary manner".[74] More specifically, "a broad assessment must be made where 'the local population's actions and opinions' are held up against the State's (and others') dispositions". With such a starting point, the Commission assesses the State's dispositions in Field 4.

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72 As expressed in *Finnmark Commission, Report Field 2*, p. 65.

73 *Finnmark Commission, Report Field 4 Vol. 1* p. 184, with reference to Report of the Special Rapporteur on the rights of indigenous peoples on the human rights situation of the Sámi people in the Sápmi region of Norway, Sweden and Finland, a/hrc/33/42/Add.3, 9 August 2016, para. 23 and 24. The Special Rapporteur anchored her position in the UNDRIP, Article26 (3) and ILO 169, Article 8 (1).

74 *Finnmark Commission, Report Field 4, Vol. 1*, p. 186.

Published in *International Journal on Minority and Group Rights* (2022) pp.1-34 DOI:10.1163/15718115-BJA10054

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As shown, the Commission has assumed that when the area became subject to the Danish-Norwegian Crown in 1751, the people in the area had a rightthat essentially corresponds to collective ownership. Thus, the question was whether *this right is retained*, or if the State's dispositions and assumed ownership from 1751 until 1980 means that the State was the owner when the land wastransferred to the FeFo in 2006.[75] This is, moreover, a question the Supreme Court has previously rejected as non-apt in the *Nesseby* case.[76]

A unanimous Commission initially states that the historical sources show that the State has only to a small extent acted as an owner over land and resources in the area of today's Karasjok municipality from 1751 until the end of the nineteenth century. The Commission here states that the surveys thatthen took place, the oldest dating back to 1811–1814 when ten property parcelsin Ávjovárri/Karasjok were measured and registered, were mainly formalizations of established use.

A significant number of properties were surveyed out of presumably State land after the Act of 22 June 1863 on the Disposal of State Land in the Rural Districts of Finnmark (the 1863 Land Sales Act) came into force.[77] After an in-depth review of these, the Commission assumes that this is mainly a survey and registration of already established properties,[78] and thus not expression of State ownership. It then assesses the period 1902 to 1965, which is the period where the next "land sale Act", the Act of 22 May 1902 on the Disposal of State Land in the Rural Districts of Finnmark, was in force. During this period, 771 plots of private properties were established in Karasjok,[79] which accoring

75 *Finnmark Commission, Report Field 4 Vol. 1*, p. 118 and p. 218.

76 In the case hr-2018-456-P (*Nesseby*), para. 146, the Supreme Court states that this is not an appropriate question "neither legally nor on the basis of the factual circumstances in the case". The Supreme Court's position was based on the fact that the Uncultivated Land Tribunal of Finnmark, in case *2014–164739* (23 January 2017) item 8.3, answered negatively to the question (raised in item 3), "if the State, as the Finnmark Commission has come to, through these actions [dispositions of the land and as a regulatory power through legislation and administrative acts] took over the right to control and govern the usufruct rights related to the outfield resources in the dispute area".

77 *Finnmark Commission, Report Field 4 Vol. 1* p. 166, where it is pointed out that in "the meager 40 years the 1863 Act regulated the land surveys, 144 properties were established in Karasjok that can be found in today's land register". The Commission mentions that the 1863 Act is the first time that "State land" is used in a Norwegian law. *Report Field 4 Vol. 1*, p. 165, with further reference to G. Sandvik in NOU1993: 34 pp. 334–380 [p. 337].

78 *Finnmark Commission, Report Field 4 Vol. 1*, p. 164.

79 *Ibid*., p. 168. Of these, 160 were land lease plots. Also, parts of these plots are considered as subdivisions from previously established plots, typically as a result of inheritance settlements.

Published in *International Journal on Minority and Group Rights* (2022) pp.1-34 DOI:10.1163/15718115-BJA10054

to the Commission shows that the State's disposition of land and resources inKarasjok increased considerably after 1902.[80]

The State's exercise over land that has not been surveyed and sold to individuals, was however modest. Although the State until 1945 leased out relatively many outlaying hayfields, some of these leases are considered to be formalizations of already established use. Beyond that, the State hasonly made a few more typical private law dispositions of the unsold land in Karasjok.[81]

Thereafter, the Commission discusses *the legal opinion* the local population may have had about the use. Here, too, reference is made to the *Svartskog* case, where it was not of decisive importance that 14 persons in 1921 had entered into agreements with the State on hayfield leases, as according to the Supreme Court, could not be "considered as evidence that these persons accepted that they were without rights in Svartskogen. The reason may just as well be that they more easily than others accepted a demand from the authorities, or thatthey saw advantages in being assigned a specific plot".82 Nor was it of decisive importance that five individuals had entered into such agreements in 1928, or that in the 1940s, contracts for logging and hay-cutting were made betweenindividuals and the State.[83]

The Finnmark Commission then assumes that also in Karasjok, someone may have considered it advantageous to have their ongoing use formalized or to be allocated a separate plot of land or hayfield. The fact that the lease fees were relatively low may have contributed to the fact that such formalizationdid not constitute a major monetary burden. By this, the Commission places significantly greater emphasis on case law expressed in the Svartskog case in the Karasjok Report than in previous investigations.[84] The opinion that the State's landowner-related actions have been of a modest scope, and the way in which the local people's legal opinions have been assessed, thus differs significantly from previous investigations.[85]

Furthermore, the Commission discusses the uncertainty associated with thefact that the State's land disposals were originally considered to have a

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80 *Ibid.*, p. 170. Further discussed in section 5.3 below.

81 *Ibid.*, p. 198.

82 *Finnmark Commission, Report Field 4 Vol. 1*, p. 198, with reference to *Nrt*, *supra* note 51, p. 1229 [p. 1248].

83 Ibid., [pp. 1249 and 1251].

84 Cf. what has been reviewed in section 3.2.

85 Cf. Ravna, *supra* note 56, pp. 78–79, where assessments of the kind made here are now in demand in the case of Field 2 Nesseby.

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basis in the Crown or the King's private property rights. The Commission here arguesthat according to older Norwegian common land law, the King was not the 'sole owner' of the commons, but a right holder together with other use right holders.[86] Based on this, the Commission assumes that disposals of common land did not necessarily take place by virtue of an original property right, but were the result of a right of governance based on a royal privilege.[87]

The Commission further states that "the State dispositions over the unsold land in Karasjok were modest in content and scope and may there-fore have been understood within the framework of such a privilege idea".[88] Furthermore, the Commission states that in recent times, doubts have been raised about the State's ownership to parts of the land in Finnmark, such as when the mandate of the Sámi Right Committee was formulated in 1980, aswell as in the preparatory work for the Finnmark Act, which States that at least "parts of Inner Finnmark" are areas to which "the Sámi are entitled to owner- ship and possession rights".[89]

In an overall assessment, the State's dispositions must be held up against thelocal population's use and dispositions. The Commission refers here to the fact that the people of Karasjok throughout the period after 1751 have exercised an extensive, intensive, and versatile use of the local outfield resources:

> This use corresponds in content and scope to the use that the holder ofa collective ownership right of the relevant areas will have

86 *Finnmark Commission*, *Report Field 4 Vol. 1*, p. 198, with reference to T. Falkanger, *Almenningsrett* (Universitetsforlaget, Oslo, 2009) p. 46.

87 Whether 'disposal' is an apt term can be questioned, and to the extent that it was, it was certainly an expression of a royal privilege (here the Commission could advantageously have referred to Christian 5's Norwegian Law of 1687, Art. 3-12-4 which gave the King authority for such management (control), where it was stated that "The King's Bailiff shall not lease out any place in the commons unless it is, by lawful inspection, found that it in time may be cultivated to tax estate"). It is just as likely that what took place was the division/allotment of the community land, and not disposals, *see* Ø. Ravna, 'Den tidligere umatrikulerte grunnen i Finnmark: Jordfellesskap fremfor statlig eiendom?' ['The previously unregistered land in Finnmark: Land community rather than state property?'], *Tidsskrift for Rettsvitenskap* (2020) pp. 219–263.

88 *Finnmark Commission, Report Field 4 Vol. 1*, p. 199, with reference to H. Steinsholt, *Oreigning*, Ch. 13 in H. Sevatdal, P.K. Sky and E. Berge (Eds.), *Eigedomshistorie*. *Hovudliner i norsk eigedomshistorie frå 1600-talet fram mot nåtida* (Universitetsforlaget, Oslo, 2017) pp. 374–382), the Commission (at p. 32) shows to that: "At this time the Royal Power could quite freely intervene in private rights. The idea of expropriation compensation, for example, was not formulated until the end of the seventeenth century and did not have immediate effect".

89 *Finnmark Commission, Report Field 4 Vol. 1*, p. 43 and p. 205, with reference to *Ot.prp. no. 53 (2002–2003)*, p. 88.

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> exercised. It also appears that the population has exercised a significant degree of self-management with the utilization of resources, in that various internal distribution schemes have been in place, among other things for hay-fields, cloudberry-picking and fishing lakes.[90]

It is then assumed that the use of the people of Karasjok has been dominant until the first decades after World War ii: "During this period, the population, with the exception of the use of the forest [for logging], also exercised significant control over local resource utilization."[91] Reference is then made to the *Svartskog* case, where the court-appointed experts stated that Svartskogen had the status of "common land for all residents in Manndalen and which people have mainly managed on their own. The way this has happened, without any formal governance, and with extensive use over time and still very active use, is rare elsewhere in the country."[92] The Commission then states:

> The population of Karasjok has at least previously managed the local resource utilization in a comparable way. Although the State gradually became established and the population has complied with the State's dis-positions, local use still has a significant scope.[93]

Furthermore, the Commission points out that the inhabitants did not have Norwegian as their mother tongue. It means that a large proportion of the people at this time did not speak Norwegian well, which must be emphasized in the assessment. It is then said that in the *Svartskog* case it was taken into account that in communication between Norwegians and Sámi, misunderstandings could arise because of linguistic and cultural differences, which in turn could lead to people perceiving each other in a wrong way.[94] Similar considerations can be made for Karasjok, where the majority of the population did not have Norwegian as their mother tongue:

> It can therefore not be considered decisive that the Karasjok population has applied for purchase or lease of land in accordance with the various land sales acts or entered into other contracts with the State. This is not

90 *Ibid.*, p. 201.

91 *Ibid.*, p. 204.

92 *Ibid.*, p. 204, with reference to *Nrt*, *supra* note 51, p. 1229 [p. 1243].

93 *Finnmark Commission, Report Field 4 Vol. 1*, p. 204. Here, the Commission clearly deviates from previous assessments, *see* the quotation in conclusion in section 3.2 *supra*.

94 *Finnmark Commission, Report Field 4 Vol. 1*, p. 198, with reference to *Nrt*, *supra* note 51, p. 1229 [p. 1243]. *See Nrt*, *supra* note 51, p. 769 (*Selbu*).

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> necessarily an acceptance of the State's land ownership. It may rather have been a consequence of the fact that a precondition for farming, was to apply for the purchase or lease of land.[95]

It is then pointed out that, with the exception of forest resources, the use has to a small extent been subject to State regulations beyond what is based on public law regulatory legislation on utilization times and tool use. After this, it cannot be assumed that the Karasjok people's lack of protests against the State's dis-positions have the character of right-effacing passivity.[96]

The Commission assesses the situation differently when it comes to the State's commercial forestry. Linguistic and other factors may, however, according to the Commission, have contributed to the fact that dissatisfaction with this forestry has not been expressed, at the same time as forestry alone cannot provide a basis for the acquisition of property rights. However, it is assumed that it must also be borne in mind that the State's dispositions of land and resources in Karasjok, with the exception of the years between 1902 and 1965, had a relatively limited scope, while the use of the local population has been continued to this day. Thus, the Commission finds it "difficult to see that the State dispositions may have meant that the right of the local population in 1751 has lapsed. Nor can it be seen that the rights in a significant or appreciable degree have changed its character".[97]

Moreover, the Commission points out that the State dispositions, which by their nature have a private law character, have been exercised in a way that has character of public administration. That the dispositions were a result of State assimilation policy also weakens their weight:

> It must therefore be assumed that the State's dispositions when the Sámi Law Committee was established in 1980 had not broken down the local legal opinions that had been established in Karasjok when the area became subject to Danish-Norwegian Crown's exclusive jurisdiction in 1751.[98]

The majority of the Commission (Gauslaa, Henriksen and Magga) thereafter assumed that the State's dispositions of land and resources in the study area have had a modest scope for a long period of time. Towards the end

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95 *Finnmark Commission, Report Field 4 Vol. 1*, p. 198.
96 *Ibid.*, p. 202.
97 *Ibid.*, p. 202.
98 *Ibid.*, p. 203.

Published in *International Journal on Minority and Group Rights* (2022) pp.1-34 DOI:10.1163/15718115-BJA10054

of the nineteenth century, and especially after the 1902 Land Sales Act came intoforce, the State's dispositions became somewhat larger:

> However, they have not had a content that has been able to establish the State's property rights as a fixed legal situation or a right on a customary basis. The dispositions have had a public law character and have not bro- ken down the legal opinions of a strong local collective right. Nor have they helped to establish a sufficiently broad acceptance of the State as a private landowner by the local population.[99]

This recognition leads the majority to conclude that there are not sufficient indications supporting that the State's ownership to the unsold land inKarasjok was established as a fixed legal situation when it was transferred to the FeFo on 1 July 2006:

> This amassment of property is therefore not subject to the Finnmark Estate's property right under the Finnmark Act, but is *collectively owned by the local population in Karasjok*.[100]

When asked whether the State's dispositions have broken down opinions of strong local, collective rights to land and outfield resources, the majority gives the same answer as the Uncultivated Land Tribunal of Finnmark in the *Nesseby* case. As mentioned, this is a question the Supreme Court in plenary did not find to be a relevant issue for the *Nesseby* case.[101]

The majority further concludes that the rights do not lie with the municipality as such, but with everyone who at any time have been a registered resident of Karasjok, so that these have an equal share in the property right regardless of residential time and ethnic origin. The majority also points out that localrights of use "must be respected". This means that the recognized property right must not be exercised in such way that local rights holders are displacedfrom these areas.

The Commission's minority (Andersen and Heggelund) agree with the majority that in 1751 a right was established in Karasjok that is reminiscent of a collective property right. However, the State's later dispositions in the form of property sales, leases and other transactions, have affected the local legal opinions to such an extent that the State's ownership rights have been

99 *Ibid.*, p. 218.
100 *Ibid.*, p. 218 (highlighted by the Commission).
101 *See* section 4.2 and *Finnmark Commission, Report Field 4, Vol. 1*, p. 186.

Published in *International Journal on Minority and Group Rights* (2022) pp.1-34 DOI:10.1163/15718115-BJA10054

established as a settled legal relationship. According to the minority, this has meant that the local population's original collective right has changed its char- acter and has been replaced by the right of use that is currently regulated inthe Finnmark Act. This right is governed by the FeFo, but in such a way that the Estate must take into account the local rights holders in Karasjok to avoid these being displaced from their traditional uses.

4.3 *On the Importance of ILO 169 and its Restorative Function*

As shown above, the Supreme Court has concluded that ILO 169 does not regulate the substantive rules for clarifying the land rights in Finnmark. In the Karasjok investigation, the Finnmark Commission nevertheless finds reason to place considerable emphasis on ILO 169, stating that ILO 169 means that no particularly strict requirements can be set for the inhabitants' legal opinions in order for rights to be considered established. This means that:

> The State's expressed ownership claims will not alone be enough to de- prive Sámi claimants of their good faith. In order to break down established rights by State dispositions, a relatively large amount must be re- quired in terms of duration, firmness and content.[102]

This is repeated later in the report, where the Commission refers to ILO 169 Article 8 (1), cf. also UNDRIP Article 26 (3), and states that these provisions mean that due regard must be put on indigenous peoples' customs and legal opinions in national law. This means that in the application of national property law, no particularly strict requirements can be set for legal opinion or cautious good faith in order to recognize Sámi rights, i.e., the good faith requirements of internal law must be practiced relatively mildly.[103]

The Commission also uses ILO 169 to support other parts of its conclusions. As shown, the Commission has assumed that the State's dispositions had not broken down the local rights that were established in *Karasjok* when the area became subject to Danish-Norwegian Crown's exclusive jurisdiction in 1751. A reason for this is that the Commission emphasizes that ILO 169 Article 14 (1), first sentence, on the right to ~~(ownership)~~ownership and possession, has *a restorative function*.[104] Reference is made here to the *Nesseby* case, where the Supreme Courtstates that "such a starting point must generally be correct and has supportin the preparatory work for ILO Convention No. 169". According to the Court,

102 *Finnmark Commission, Report Field 4, Vol. 1,* p. 186.

103 *Ibid.*, p. 204.

104 Also referred to as *the right to restitution.*

Published in *International Journal on Minority and Group Rights* (2022) pp.1-34 DOI:10.1163/15718115-BJA10054

this means that "it will not be decisive whether the State or others for a certain period have controlled areas that previously have been possessed by the indigenous population".[105] Due to the factual circumstances in the *Nesseby* case, where the State's dispositions allegedly had lasted "for several hundred years", the Supreme Court abstained from going further into the restorative function. The Commission has found that the State's dispositions in *Karasjok* are not as long-lasting as in *Nesseby*, and that the dispositions that are relevant to include as an expression of ownership, took place in the period from the early twentieth century until the 1970s. The Commission further on states:

> If the Sámi use had ceased during this period, and there was no longer any connection between the use that was originally exercised and the current situation, around 70 years after the circumstances could have been sufficient (for loss of property rights). However, the wording "traditionally occupy" in the first sentence of Article 14 (1) implies that it is not a requirement that the indigenous peoples' exercise and use must have been of the same scope and content as it originally was, in order to establish right to ownership and possession under Article 14.[106]

In addition to the ILO Guide of 2009, the Commission refers to the Sámi Rights Committee's International Law Group to substantiate the statement. The International Law Group assumed that in order to fulfil the condition of "traditionally occupy" it would be sufficient "if the use invoked as a basis for the right" had existed a few years into the twentieth century.[107] The Commission also refers to the Ministry of Justice, which prior to Norway's ratification of ILO 169, assumed that the situation must have persisted "until our days".[108]

The Commission then states that it is hardly necessary to go further into to this:

> In the same way as in the question of whether there is a settled legal situation or a formation of customary law, this [the question of

105 *Finnmark Commission, Report Field 4 Vol. 1*, p. 203, cf. *hr-2018-456-P* para. 173. The restorative function is also referred to as the *right to restitution.* Its significance in Norwegian law is analyzed in Ø. Ravna, 'Restitusjon og gjenoppretting i norsk urfolksrett', *Lov og Rett* (2020) pp. 566–579.

106 *Finnmark Commission, Report Field 4 Vol. 1*, p. 204, with reference to ILO, Indigenous & Tribal Peoples' Rights in Practice – A Guide to ILO Convention No. 169 (2009) pp. 94–95.

107 *Finnmark Commission, Report Field 4 Vol. 1*, p. 204, with reference to *NOU1997: 5*, pp. 49–50.

108 *Finnmark Commission, Report Field 4 Vol. 1*, p. 204, with reference to *St. prp. no. 102 (1989–90)*, (Proposition to Parliament), p. 6.

Published in *International Journal on Minority and Group Rights* (2022) pp.1-34 DOI:10.1163/15718115-BJA10054

> property rights] will depend on an overall assessment. However, it is clear that the use of the Karasjok population has been dominant until the first decades after World War II.[109]

The Commission has found that the inhabitants, except of the forest, to a large degree controlled the local resources. Furthermore, the Commission states that the local legal opinions that the right to land and outfield resources lies with the local population and not with the State, are still strong. According to the Commission, this means that:

> The unsold land in Karasjok must therefore be considered covered by the criterion "traditionally occupy" in the first sentence of Article 14 (1) first sentence. The restorative function of the provision must mean that around 70 years of relatively extensive exercise of State control from around 1900 will not be sufficient for the State's dispositions of land and resources to have broken down the right that existed in 1751.[110]

It is further stated that this must also be the result if, in addition to the State's dispositions in this period, one includes more than 40 years with fairly limited exercise before 1900, and barely ten years until 1980 with dispositions that have less weight due to objections to State property rights. The Commission further states that when the question of the State's ownership of a traditional indigenous area is established as a fixed situation or on a customary basis, a relatively large amount must be required before it can be assumed that the indigenous peoples' legal opinion has been broken down and replaced by an acceptance of State ownership:

> As the majority in the Law Group [of the Sámi Rights Committee] also assumes, there must, as a general rule, be a *"unanimous opinion"* of a legal situation from both sides over a long period of time as a basis for a fixed legal situation … in Karasjok, there has not been such a unanimous legal opinion for a sufficiently long time.[111]

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109 *Finnmark Commission, Report Field 4 Vol. 1*, p. 204.

110 *Finnmark Commission, Report Field 4 Vol. 1*, p. 204.

111 *Ibid.*, p. 204, with reference to *NOU1993: 34*, p. 264 (highlighted by the Commission).

Published in *International Journal on Minority and Group Rights* (2022) pp.1-34 DOI:10.1163/15718115-BJA10054

[28]

5 Discussion

5.1 *The Actual Legal History*

In the Karasjok investigation, the legal history is subject to a more thorough and questioning analysis than in previous studies, which may be due to the fact that the Commission has gradually been able to make use of the historian who was employed in 2013. For example, the Sámi siida systems of the sixteenth, seventeenth and eighteenth centuries, is reviewed, where it is pointed out that "the inhabitants of the Sámi Coastal areas [which sorted under the Danish-Norwegian Crown] largely had exclusive right to various resources in their areas".[112] It is then stated that "the Swedish legislation, case law and administrative practice contributed … to the legal development in Inner Finnmark from around 1550 to 1750 being different than on the coast". However, the differences between Danish-Norwegian and Swedish sovereignty do not seem to have a decisive influence on the assessment of the actual historical conditions. The Commission also asks the very relevant question of whether the King's alleged disposals of common land for living places and for agrarian use, actually took place by virtue of original ownership of the disposed land, where it more than suggests that the disposals were rather a result of a right of governance based on royal privilege.[113]

The historical review has among other things led to an acknowledgment that the State's activities as landowner have been less extensive than previously assumed. This is not only a result of the fact that the study area was for a long time under Swedish jurisdiction; it is just as much a result of the work that has been put into the investigation, which has revealed that the State's dispositions have consisted to a small extent of ownership actions. The result is thus relevant outside Field 4 and has helped to fill gaps in previous studies. In contrast to the five previous reports, it is also assumed that the local population had rights that can be compared with ownership rights in the seventeenth and eighteenth centuries. This means, as shown, that the Commission asks whether this right is retained, not whether the local population, through use in good faith, has acquired such a right.

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112 *Finnmark Commission, Report Field 4 Vol. 1*, p. 31, with reference to A. Kristensen, 'Samiske sedvaner og rettsoppfatninger – med utgangspunkt i studier av tingbøkene fra Finnmark for perioden 1620–1770', in *NOU2001: 34*, pp. 33–37 and pp. 47–48.

113 *Finnmark Commission, Report Field 4 Vol. 1*, pp. 198–199. *See also supra* note 87, where reference is made both to the legal basis for the King's right to govern, and to the fact that it was probably land division/allotment, rather than disposal, that took place.

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5.2 *The Emphasis on the State's Dispositions vs. the Local People's Resource Management*

Moving to the legal assessments, there has been a change both in terms of the weight of the State dispositions that have been documented in the period from 1751 until today, and in the assessment of the local people's informal resource management. Although the Commission, as a starting point, says the State's dispositions shall be assessed in 'an ordinary way', it emphasizes the criticism it has been met with for the previous investigations,[114] and thus moderates the weight it has previously placed on the State's dispositions. In the five first reports, the State dispositions and the State's previous ownership actions were decisive for the fact that collective property rights or the right to control natural resources were not recognized for the inhabitants in the investigated fields. The Karasjok report reduces the relevance of these dispositions, by considering them to a lesser extent as ownership exercises. It means that these dispositions and actions are given notably less legislative significance. Although in the period 1811 to 1814, ten property parcels in Ávjovárri/Karasjok were measured, taxed and registered, which is early in a Finnmark context, this is not emphasized as State ownership actions, but as a formalization of established use. There is no reason to assume that this is an incorrect assessment.[115] At the same time, this is an assessment that deviates significantly from how such dispositions have been assessed previously.

The State's dispositions after 1863 are also considered more critically. Although 144 property plots have been surveyed and registered in the Karasjok field in the period from 1863 to 1902 (under the 1863 Land Sales Act), this is considered as a formalization of established use rather than transactions representing State ownership. The surveying and registration under the 1902 Land Sales Act, numbering 770 cases in the period between 1902 and 1965, are in turn emphasized to a limited extent as a result of the restorative function or the restitution rule in ILO 169 Article 14.

The fact that there is a greater focus on the State's absent exercise of private-law disposition over land that *has not* been registered on individuals, reveals a change in perspective. When the Commission declares that the State's dispositions in Karasjok are not as long-lasting as in the

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114 *See Finnmark Commission, Report Field 4 Vol. 1*, p. 118 and p. 218; cf. Ravna, *supra* note 56, pp. 78–79 and *Report of the Special Rapporteur on the rights of indigenous peoples on the human rights situation of the Sami people in the Sápmi region …,* 9 August 2016, paras. 23 and 24.

115 *See supra* note 87.

Published in *International Journal on Minority and Group Rights* (2022) pp.1-34 DOI:10.1163/15718115-BJA10054

Nesseby or the Varanger fields, for example, it is a result of changed assessments rather than an actual historic reality.

Thus, it is not only the evidence assessments that have changed. Also, the legal questions are posed in a different way as the Commission recognizes theoriginal rights for the inhabitants and asks whether this right is retained, or if the State's dispositions and assumed property rights from 1751 to 1980 meansthat the State was landowner until the land was transferred to the FeFo. As mentioned, the Supreme Court has previously considered such a question to be inappropriate. However, with the clear examination of the historical facts inthe case, this can hardly be viewed as an incorrect approach.

The Finnmark Commission has also declared that the State's dispositions after 1980 are irrelevant. This is reasoned by the fact that in 1980, the questions were raised about the State's property rights (and the Sámi Right Committee was appointed), which constitutes a *time-barring circumstance* that will "form an external framework for which state dispositions it is relevant to include in the assessment of the current legal situation". For the previous fields, no suchcircumstance has been set up.

The Commission further finds that the local population in Karasjok has exercised a significant degree of self-management, which the Commission has not found in previous fields, despite similar nature use and resource distribution. For Field 5 *Varangerhalvøya øst*, such local custom-based management was reduced to "amicable arrangements" and "informal distribution arrangements". In addition, it is emphasized that the population to a considerable extent has been Sámi-speaking, which is also the case in Field 2 *Nesseby*, with-out corresponding weight being added.

With the reduced weight of the State's dispositions, an important counter to recognizing the inhabitant's collective property rights is removed. The reducedweight is only to a small extent a result of that State's dispositions in fact has been significantly smaller in Field 4 than in the previous fields, but rather thatthey have been assessed in other ways and then to a lesser extent as ownershipactions. And by at the same time recognizing the local resource management as actual management, the Commission is able to identify local ownershipactions and local ownership opinions that indicates that the local people were owners of their nearby outlying areas when they were transferred to the FeFo in 2006. Below we will see that the application of ILO 169 also makes a contribution to this.

5.3 *The Weight of ILO 169 and its Restorative Function*

In the Karasjok investigation, as opposed to previous investigations and the conclusions of the Supreme Court in the *Stjernøya* case, the

Published in *International Journal on Minority and Group Rights* (2022) pp.1-34 DOI:10.1163/15718115-BJA10054

Finnmark Commission finds reason to place considerable emphasis on ILO 169. This gives rise to some considerations.

The Finnmark Commission has emphasized ILO 169 as an interpretive factor, and thus as an argument for adapting the requirements of *opinio juris* and good faith to an international law standard. At least as important, is the fact that the Commission has emphasized the *restorative function* (or right to restitution) in ILO 169 Article 14 (1), which is a consequence of the Supreme Court's confirmation in the *Nesseby* case that ILO 169 should be understood in such way in Norwegian law, and which contributes to reducing the importance of the State's dispositions in the twentieth century. Overall, this means that ILO 169 holds significant importance for the judicial survey of the Karasjok field.

The confirmation of the Supreme Court contributes to expanding the narrow framework set by the Supreme Court in the *Stjernøya* case.[116] This may establish a practice whereby ILO 169 will have a greater significance in the judicial survey in the future than it has had so far.

It is not directly clear whether the Finnmark Commission has applied ILO 169 pursuant to the Finnmark Act section 3 first sentence, or to the presumption principle in Norwegian law.[117] This is unlikely to have any practical significance, and in both cases, the Commission seems to have applied the ILO Convention in a way that Norway's obligations under Article 14 (1) of the ILO Convention have been met.

5.4 *The Significance of Swedish Sovereignty Before 1751*

Inner Finnmark was under Swedish jurisdiction until 1751. This is one of the factors that most clearly distinguishes the Karasjok field from other traditional Sámi areas that have been investigated, such as the Field 2 Nesseby and the Gulgofjord area in Field 6. The Commission emphasizes this difference by pointing out that "the inhabitants of the Sámi Coastal areas [which sorted under the Danish-Norwegian Crown at that time] largely had exclusive right to various resources in their areas".[118] It then states that "the Swedish legislation, case law and administrative practice contributed … to that the legal

116 It can also be mentioned that Uncultivated Land Tribunal, in *utma-2017–62459*, 10 October 2018 (Gulgofjord), found no room to modify the good faith requirement to emphasize the State's dispositions to a lesser extent, or to emphasize the principle of restitution – despite different facts such as the coastal Sámi population in the area, like the people in Karasjok, fulfilling the condition of "traditionally occupy" in ILO 169 Article 14 (1).

117 For the presumption principle, *see supra* note 34.

118 *Finnmark Commission, Report Field 4 Vol. 1*, p. 31, with reference to A. Kristensen, 'Samiske sedvaner og rettsoppfatninger – med utgangspunkt i studier av tingbøkene fra Finnmark for perioden 1620–1770', in *NOU2001: 34*, pp. 33–37 and pp. 47–48.

Published in *International Journal on Minority and Group Rights* (2022) pp.1-34 DOI:10.1163/15718115-BJA10054

development in Inner Finnmark from around 1550 to 1750 was different than on the coast".

However, the Commission has not to an appreciable extent anchored its conclusion in that the Karasjok area has been subject to Swedish supremacy until 1751. Nevertheless, it can be assumed that the somewhat less observed activity of the State possibly can be explained in such a way, but without it being intrusively visible. At the same time, it must be asked whether the conclusions are a result of the field being located in Inner Finnmark, and that emphasis has been placed on the traditional notion that this is a core Sámi area – in contrast to the coast, where the Sámi settlements have been assimilated into Norwegian culture. The Finnmark Act and FeFo are precisely rooted in such an understanding, which is evident from the Sámi Rights Committee's discussion in NOU1997: 4 and the proposal for a joint board for a Finnmark Land Administration with equal representation for the Sámi Parliament and Finnmark County Council, see section 2 above.

There is, however, no evidence to support that this has motivated the Commission. The situation, which the Finnmark Commission itself has helped to uncover in the Karasjok investigation, is that even though Coastal Finnmark has been under Norwegian supremacy longer than Inner Finnmark, the State's landowner dispositions are not older there than in Karasjok. In general, it is unlikely that such dispositions took place anywhere in Finnmark before 1863,[119] and to the extent they took place later on, it this was on a thin or inadequate legal basis.

6 Concluding Remarks

In the Karasjok investigation, the Finnmark Commission has assessed the legal history in a more nuanced way compared to previous investigations. Although the result is different from previous investigations (and in the Supreme Court's *Stjernøya* and *Nesseby* cases), the Commission has in my view applied the legal rules clearly within the framework of current Norwegian law and the mandate the Commission has been given. The fact that the report's

119 The first land sale in Finnmark took place pursuant to the Act of 22 June 1863 on the Disposal of the State Land in the Finnmark Land district, which is also the first Act to use the term 'state land', *see* G. Sandvik, 'State land in Finnmark. A historical perspective', in *NOU1993: 34 Right to and management of land and water in Finnmark*, pp. 334–380 [p. 337]. The land division resolution of 1775 probably initiated land division/allotment (dissolution of community land) and not land sale, *see supra* note 87.

Published in *International Journal on Minority and Group Rights* (2022) pp.1-34 DOI:10.1163/15718115-BJA10054

main conclusion is presented with dissent does not change my opinion. The Commission emphasizes Norway's obligations under ILO 169 to recognize "the rights of ownership and possession of the peoples concerned over the lands which they traditionally" in a way that gives the ILO Convention actual and realistic significance for the judicial survey. At the same time, this may look like the Commission has challenged the Supreme Court's understanding of scope of ILO 169 in the *Stjernøya* case.

However, the Supreme Court has confirmed the restorative function; thatthe right to restitution forms part of the ratified ILO 169 (Article 14) and thus isa part of Norwegian law. The Supreme Court has also stated that ILO 169 is of significant importance regardless of the incorporation through the Finnmark Act, both as a result of the Finnmark Act section 3 second sentence and the general presumption principle. This means that the Commission's application of law follows the norms the Supreme Court has drawn up in the *Stjernøya* and*Nesseby* case.

The Finnmark Commission's application of law has contributed in giving ILO 169 increased relevance and significance for judicial survey, as assumed by the majority in the Parliamentary Standing Committee of Justice when the Finnmark Act was adopted. In this way, the Commission may, perhaps to the same extent as the Supreme Court, have helped to establish a follow-up practice, also for the courts.

The adjustment of the course of the Commission has also been necessaryin order to contribute to Norway's obligations under international law in this area. It has probably also strengthened the legitimacy of the Commission in Sámi societies. Additionally, the adjustment has contributed to the rules onimmemorial usage being applied more in line with a situation that reflectsthe historical realities in Finnmark, and further to a Sámi context, as has been done in the cases of *Selbu* and *Svartskog*.[120] At the same time, questions are raised from other interest holders than the Sámi, and probably from parties in previous investigations, among others about previous practice, the assessments, and the predictability of the investigations.[121]

The challenges posed by the conclusion of the Commission lie at the political and administrative level. Although the Parliament has assumed that all theformer State land in Finnmark will not necessarily be owned by the FeFo

120 *Nrt supra* note 51, (2001) p. 769 and p. 1229, respectively.

121 *See* e.g., *The Director [of the Finnmark Estate]'s assessment of the Finnmark Commission's Report for Field 4 Karasjok (Vol. 1)* 25 November 2020, ‹https://www.fefo.no/_f/p1/id28a2b64-a31a-4f03-91ee-dc1b829c3927/fefo-karasjok-feltet-horing-l265179.pdf›, visited on 12 March 2021.

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after the judicial survey has been completed,[122] they have not proposed or adopted schemes for the management of outlying fields that will not be held by the FeFo. Although this is inside the private law sphere, and there exist examples of good governance from other areas,[123] it will require steady hands from the landowners who get their rights recognized, from the FeFo, and probably also from both local and regional politicians as well as the legislature.[124]

There may be reasons to ask whether these steady hands are present. The Commission's conclusions have already aroused considerable debate in the press and in political circles, and the contours of fronts that have been little visible since the Finnmark Act was passed in 2005, are now evident. A part of the picture is that the FeFo's administration has worked actively to ensure that the board of the FeFo does not approve the Commission's conclusion.[125] On 25 November 2020, however, a dissenting board approved the conclusions with the chairman's vote – a chairman appointed among the representatives chosen by the Sámi Parliament.[126] At the beginning of 2021, the leadership position of the board went to the county council-appointed representatives, cf. the Finnmark Act section 7, para. 6. The new board then immediately overturned the decision, which means that the FeFo no longer accepts conclusions of the Commission for Field 4.

Whether the property rights of the Karasjok inhabitants will be recognized and the titles transferred, is thus an open question. To have the title recognized and registered, the people of Karasjok must bring the dispute before the Uncultivated Land Tribunal, suing the FeFo. Thereafter, it is an open question what the outcome will be – as the Norwegian courts in recent years have not been particularly willing to see legal issues from an indigenous side. For that reason, I have added the question mark in the title – "a change of direction?" –of this article.

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122 *Innst. O. no. 80*, *supra* note 3, p. 18.

123 There are both practices and law to be found in the mountain boards of the southern common lands' administration and in the Sámi Rights Committee's proposal (*NOU1997: 4*) which were not continued by the Bondevik government and thus never submitted to Parliament. Furthermore, reference can also be made to the management of Svartskogen, where people in Manndalen in Kåfjord municipality won the title to their common land, and which they have later managed in a good and sustainable way.

124 On 25 November, the board of FeFo in case 75/2020, with the chairman's double vote, decided to agree with the Finnmark Commission's main conclusion. The decision was reversed on 25 January 2021.

125 *See supra* note 108.

126 Protocol of the board meeting of the Finnmark Estate 25–26 November 2020, case 75/2020, 'FeFos behandling av Finnmarkskommisjonens rapport for felt 4-Karasjok, bind 1' (FeFo's processing of the Finnmark Commission's Report for Field 4 – Karasjok, Volume 1).