



ROYAL NORWEGIAN MINISTRY OF
LOCAL GOVERNMENT AND MODERNISATION

The Office of the High Commissioner of Human
Rights The Expert Mechanism

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Contribution from Norway to EMRIPs report: the Right to Land under the UN Declaration on the Rights of Indigenous Peoples: A Human Rights Focus

Reference is made to the letter of 21 October 2019 from the Office of the United Nations High Commissioner for Human Rights where all Permanent Missions of the United Nations were invited to contribute to the report of the Expert Mechanism on the Right to Land under the UN Declaration on the Rights of Indigenous Peoples: A Human Rights Focus.

The Norwegian authorities would like to thank the Office of the High Commissioner of Human Rights for its efforts in preparing annual studies on the rights of indigenous peoples, and for the invitation to contribute to the next study on the rights to land under the UN Declaration on the Rights of Indigenous Peoples.

The Norwegian Ministry of Local Government and Modernisation is pleased to submit the following information on the topic:

On a general level, the rights of the Sami are protected by the Norwegian Constitution, as well as by several statutory laws, including the international human rights conventions incorporated into domestic legislation through the 1999 Human Rights Act.

The rights of use or ownership

The Sami population's traditional use of territory for reindeer herding can indisputably constitute basis for property rights by way of immemorial usage («alders tids bruk»), either in the form of rights of use or ownership. Access to land is essential for the reindeer husbandry to be able to continue with the nomadic mode of operation.

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Through extensive case-law, the Supreme Court of Norway has held that the assessment of whether property rights have been established, must make due regard to Sami traditions and legal opinion, most recently in the Supreme Court's judgment of 28 September 2016 (HR-2016-2030-A) and its plenary judgment of 9 March 2018 (HR-2018-456-P). This is also recognized in section 4 first paragraph of the 2007 Reindeer Husbandry Act. The Act, in section 4 third paragraph explicitly holds that compensation for expropriation of reindeer herding rights is awarded based on the same principles as other property rights (here rendered in office translation):

«Interferences in Sami reindeer herders' reindeer herding rights shall be compensated in accordance with general expropriation law».

The Sami enjoy the additional protection of both Section 108 of the Norwegian Constitution and of the International Covenant on Civil and Political Rights (ICCPR) Article 27. Both provisions give the Sami a right to enjoy their own culture, including the traditional use of land.

According to Section 105 of the Norwegian Constitution any person who is compelled to surrender their movable or immovable property, including rights of use, for public use shall «receive full compensation from the Treasury». This includes expropriation.

Not every measure that has an impact on reindeer herding rights necessarily entails a right to compensation. Like other holders of rights of use, Sami reindeer herders have a duty to adapt ("tilpasningsplikt"). They must accept some reorganisation of their operations to facilitate measures that are in the public interest. Furthermore, if the impact can be alleviated through compensatory or adaptive measures, no right to compensation arises. For an expropriation measure to give rise to a right to compensation, the interference must exceed a minimum threshold ("tålegrense"). However, the threshold is low, and in most cases where a given measure directly affects Sami reindeer husbandry, the reindeer herders will have a right to compensation.

Expropriation to protect Sami reindeer pastures

The Reindeer Husbandry Act of 2007 includes provisions that give the Norwegian Government authority to expropriate land to protect the Sami reindeer pastures. This provision has been used several times to ensure Sami reindeer husbandry grazing rights.

The Planning and Building Act is the central legislation applying to administration of land in the reindeer pasture areas.

Zoning plans

According to the Planning and Building Act from 2008, both the County Governor and the Sami Parliament may object to planning proposals for the purpose of safeguarding national or regional interests. In the act, in section 3-1, it is stated that ensuring the natural resource

base for Sami culture, economic activity and society ("sikre naturgrunnlaget for samisk kultur, næringsutøvelse og samfunnsliv") is a duty and should be taken into account in all planning.

An objection to a zoning-plan must be justified and be submitted as soon as possible. It shall include a description of the legislation that form the basis for the objection.

Topics of particular conflict in the municipal master plans have been matters relating to securing habitats for reindeer and Sami populations. There is an increased awareness to implement measures to safeguard Sami peoples' rights to enjoy their culture. It is written in the guidelines "National expectations regarding municipal and regional planning" that the county and municipal authorities must ensure the natural resource base for Sami culture and ensure their participation.

The Finnmark Act

A significant part of the Norwegian Sami population live in Finnmark. The act relating to legal relations and management of land and natural resources in the geographic area Finnmark (*Finnmark Act*) was adopted by the Parliament in 2005. In order to fulfill the purpose of the Act, the Act provides for three new bodies: the Finnmark estate, the Finnmark Commission and the Uncultivated Land Tribunal.

In accordance with the Finnmark Act, the Finnmark estate (*Finnmarkseiendommen/ Finnmarkkuopmodat*) was in 2006 transferred the right of ownership of the land that was previously held and administered by the State (through Statskog SF). This constituted about 95 per cent of the land in Finnmark. The Finnmark estate is governed by a board consisting of six persons. Troms and Finnmark County Council and the Sami Parliament each elect three members, each with a personal deputy. The members and deputies must all reside in Finnmark. A special procedure is established in Section 10 for cases where a minority of at least two board members finds that the proposed decision of the majority would be in conflict with the guidelines of the Sami parliament. These guidelines lay down principles on how the effects on Sami interests of changes in the use of uncultivated land is to be assessed. In these cases, the minority may collectively demand that the matter is placed before the Sami Parliament. If the Sami Parliament does not ratify the decision of the majority or does not consider it within reasonable time, the majority may request the King (i.e. the government) to decide on the matter.

Section 6 and section 21 of the Act task the Finnmark Estate with managing the renewable resources on its land, in compliance with the purpose of the Act and within the framework of relevant national legislation. Section 22 to 27 concern the use of different natural resources, entitling different groups to varying degrees of resource exploitation depending on their place of residence within or outside Finnmark.

The rights conferred in section 22 to 27 do not interfere with rights that have been "acquired by Sami and other people through prescription or immemorial usage", including rights held by reindeer herders on such a basis or pursuant to the Reindeer Herding Act. This is established in Section 5, which in general terms also declares that "[t]rough prolonged use of

land and water areas, the Sami have collectively and individually acquired rights to land in Finnmark". The section specifically provides that "[i]n order to establish the scope and content of the rights held by Sami and other people on the basis of prescription or immemorial usage or on some other basis, a commission shall be established to investigate rights to land and water in Finnmark and a special court to settle disputes concerning such rights".

The Finnmark commission

The Finnmark commission was established in 2008. Pursuant to section 30, the commission decides on the fields for investigation and the order of investigation, taking into account the "natural and appropriate delimitation of the field as regards extent and legal and historical context and the need to clarify the legal relations." The commission has currently concluded the investigation of five fields and is in the process of investigating three more. After investigating a field, section 33 requires the Commission to issue a report containing information on its view on who are the owners of the land, what rights of use that exist and the circumstances on which the Commission base its conclusions.

Disputes concerning the findings of the Finnmark Commission may be brought before the Uncultivated Land Tribunal, which is established pursuant to section 36. Matters pertaining to the jurisdiction of the Uncultivated Land Tribunal may only in certain circumstances be brought before other courts. Decisions of the tribunal may be appealed directly to the Supreme Court.

Land rights south of Finnmark

The legal position of the Sami as regards land south of Finnmark, was one of the topics considered by the Sami Rights Committee, which was appointed by Royal Decree in 2001 and delivered its report 2007. The government is still in the process of considering the follow-up to the recommendations of the committee concerning land rights.

The Mineral Act

The Norwegian Mineral Act regulates commercial exploration, search and extraction of mineral resources in Norway. The Act has its own provisions for Finnmark to safeguard Sami interests. These provisions say, for example that in assessing whether mineral projects should be authorized in this area, the importance of Sami culture, reindeer husbandry and social life must be given significant weight. The Mineral Act also provides for an increased landowner tax (of 0,25 per cent) for the extraction of the state`s minerals in Finnmark. The provision is intended to safeguard Norway`s obligations under Article 15 of the ILO Convention 169, and the purpose is to give indigenous people in this areas a right to participate in the benefits of mineral activities.

Consultations

The Authorities and the Sami Parliament formalized an agreement on Procedures for Consultations in 2005. The procedures are developed according to the obligation to consult, stated in ILO Convention No. 169 article 6. The agreement is a tool to ensure that work on matters that may affect the Sami is carried out in a satisfactory manner. Central Government authorities may also be obliged to consult with other Sami interest groups besides the Sami

parliament. This applies in particular to matters that directly affect Sami land use such as reindeer husbandry.

The proposal in the report from the Sami Rights Committee II concerning statutory regulation of the right to consultation in matters that may directly affect Sami interests is followed up by the government. The government has sent a draft bill on a public hearing, with a deadline for comments 29 February 2020. The draft bill further strengthens and clarifies the Sami people's right to consult in matters that may affect them directly. The Sami Parliament and the organization for Norwegian reindeer herders are consulted in this process.

Case law

In the following, please find a short summary of relevant recent court cases where Sami land rights are recognized and enforced, for your information.

Femund sijte (HR-2018-872-A)

The case concerns claims for damages for reindeer caused by reindeer entering farmland. The Supreme Court concluded that the objective liability of the reindeer owners had not led to any discrimination as a result of animal species or type of industry. The Supreme Court also concluded that the compensation rules in the Reindeer husbandry Act had to be supplemented with the general provisions of the Damages Act. Reindeer owners' responsibility can therefore be reduced because of the farmer's involvement or by easing.

Sara (HR-2017-2428-A and Complaint to the Human Rights Committee)

The case concerns indirect land rights. Sara had been ordered to reduce the number of reindeer, and the Supreme Court found that the order was justified. The need for reduction came from limited grazing resources.

This case has been brought to The Human Rights Committee, as an individual complaint the committee has not made a final decision on the matter.

Reinøy (HR-2017-2247-A)

A zoning plan allowed road construction that would affect reindeer husbandry in the area. The Supreme Court considered whether the measure violated ICCPR Article 27, but concluded that the concrete interventions were well below the threshold for what, in accordance with the Human Rights Committee's practice, constitutes a breach of ICCPR Article 27.

Jåma (pending in the UN Committee on the Elimination of Racial Discrimination)

The case concerns the effect of a wind power plant in the reindeer grazing area. According to our information, the complainants have been awarded compensation from the developer. The complaint to CERD concerns allegations of discrimination. It has to be decided on a case-by-case basis whether reindeer herding interests or the development of wind energy shall be given priority. Wind power production will always mean trade-offs with other public and private interests, and there are several examples where Norwegian authorities have decided not to license wind parks out of concern for Sami reindeer herding interests.

Talma sameby (Borgarting Court of Appeal, decision no. LB-2017-97958-2)

The case concerns allegations from a Swedish group of Sami who claimed that they had grazing rights in Norway. The group has grazing rights in Norway based on the 1972 act on Swedish reindeer herding in Norway and Norwegian reindeer herding in Sweden, and the question in the trial was whether the group had grazing rights in Norway that goes beyond the rights provided by the Act. The court concluded that the group did not have the right to graze based on immemorial usage or any other legal basis than the said Act.

Saarivouma sameby (pending in Hålogaland Court of Appeal – case no. 19-068920ASD-HALO)

The case mainly concerns similar issues as the Talma case. In addition, the group has demanded compensation from the Norwegian state due to allegations that the Swedish group is being displaced in favour of Norwegian herding groups.

We hope this contribution will prove useful in the upcoming work of the Expert Mechanism to prepare a report on the rights to land.

Yours sincerely

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