Berge, Erling. 2004. Why are property rights to land important? Diedut (3):172-189.

WHY ARE PROPERTY RIGHTS TO LAND IMPORANT?

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Introduction

In April 2003 the Norwegian government presented its proposal for enacting new rights to land and water in Finnmark[2]. The first reactions from Sámi spokespersons have been outrage. The proposal, seen from their perspective, is much worse than the 1997 proposal of the Sámi Rights Commission[3]. The Sámi feel betrayed by the Norwegian government.

In 1999 the Sámi parliament also denounced the proposal from the Sámi Rights Commission as inadequate (Sametinget 1999). A main point of disagreement was the composition of the board of the governing body for the legal owner of the ground. A majority proposed that the Sámi parliament and the county of Finnmark should appoint 4 members each. A minority proposed that the Sámi parliament should appoint 5 and the county 3. However, they all agreed that the management of the customary based use rights to resources (pasture, wildlife, fish, vegetation, etc.) should be given to the municipalities which further could delegate these to local communities ("bygd") within the municipalities. To guard the Sámi culture there were some safeguards against new developments such as a power for the Sámi parliament to postpone developments for 6 years, but basically, the same rules would govern Finnmark as in the rest of the country.

The government's proposal of 2003 is very different from the proposal of the commission. The lands and waters of Finnmark, currently owned by Statskog SF (the agent of the Norwegian state), will be transferred to an owner, "Finnmarkseiendommen", with a governing body consisting of 7 members. The Sámi parliament and the county parliament each will appoint 3 board members. The Norwegian government appoints one board member without voting rights[4]. This means that normal majority requires at least one vote from both the county and Sámi representatives. However, in case of a clean split 3-3 in the voting, for example between Sámi and county representatives, the government's board member may demand that the ministry shall decide the case. The ministry's decision will then be final. It cannot be challenged.

Unlike the 1997 proposal there is no transfer of rights to municipalities or local communities. The rights to resources are allocated to persons approximately like in state commons elsewhere in Norway with more rights for local inhabitants

[1] This is a revised version of a paper presented to the symposium "Landscape, Law and Customary Rights", Kautokeino, 26-28 March 2003. The basic argument of the paper was also present to the IASCP regional conference "Joining the Northern Commons", Anchorage, 17-21 August 2003

[2] The government claims property rights to 96% of Finnmark, about 38.000 square kilometres.

[3] The commission was appointed by the government in 1982 and delivered its final recommendations in 1997.

[4] In decisions on change in the usage of non-arable/non-settled areas a minority of two can, by referring to consequences for Sámi culture and traditions, demand that the decision is reviewed by the Sámi parliament.

than for non-locals. Existing legislation concerning the Sámi[5] is not affected; neither are customary law based rights. The Sámi parliament has particular rights to advice the governing body on how to judge the impact of management decisions on Sámi culture, economy, and society. However, the state retains particular rights to create protected areas or expropriate land for other public purposes without compensation. In the legislation on mining rights there are inserted rules for the lands of "Finnmarkseiendommen" requiring particular attention to Sámi culture and industry. And, finally, the act can at any time unilateral be changed by the Norwegian Parliament.

As the case stands today the details of the proposals may not be terribly important. The Norwegian parliament has to face two profound questions. In deciding on legislation they have to face the question of what it means to acknowledge the Sámi people as an indigenous people with their own parliament and rights to land and water according to international law. They also have to face possible reactions from the non-Sámi population to the changes in legislation required to do justice to the Sámi people.

Also the Sámi parliament needs to think through its position once more. Their need to become more explicit about what property rights the Sámi people need to be awarded if the government of Norway shall be seen by the Sámi to comply with ILO convention 169[6]. And they need to think hard about what kind of relations between Sámi and non-Sámi, or between Norway and Sápmi, they can live with in the near future.

These questions are basically political questions that have to be decided from value judgments and considerations of long term cultural and moral developments. But some parts of the questions can be clarified by informed discussion of what it means in institutional and legal terms.

The aim of the present paper is therefore to help Norwegians to understand why the Sámi as a people needs property rights in the meaning of the ILO convention 169 to the land. Most Norwegians will suppose that well established customary and enacted use rights will secure the foundation for the Sámi people to develop "their language, their culture, and their society" as is required by the Norwegian constitution. The assumption that seems to be made is that the Norwegian state can act as trustee for Sámi as well as for non-Sámi. The argument here is that the Norwegian state is unable to act as trustee of the Sámi like it has done for example for the farmers of Southern Norway as owner of the State commons. For the Sámi, as for other Norwegians, there is no remedy for breach of trust.

The question of why it is important to the Sámi people to get property rights to "the lands which they traditionally occupy" needs to be based on an understanding of what property rights to land, or land tenure, means in a modern capitalist society as well as in a traditional customary law society. The present discussion will not be exhaustive, but will emphasise those parts of the theme which may help us understand the situation in Finnmark.

[5] Such as the reindeer herding act and the acts on salmon fishing in the rivers of Alta, Tana, and Neiden.
[6] For the text of the convention see http://ilolex.ilo.ch:1567/english/docs/convdisp.htm

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The short version of the answer offered is that for the Sámi people property rights to their traditional lands are important because it gives them, in a capitalist society, better control of the future uses of the resources in their lands, and hence better control of their future as a people.

Property rights in general and land reforms

In contemporary society property rights give the holder the most enduring structural powers of capitalist society because capitalist society is the kind of society we live. But the fact is that in all known societies there are rights and duties with characteristics we can recognise as property rights no matter what they are called locally (Godelier 1984). The significant point about property rights is that they award the owner the maximum of protection a society can give for secure long term enjoyment of the benefits flowing from ownership and possession. In most of the world this does not amount to much. At best, the rights amount to locally acknowledged security of possession. However, in the capitalist societies of the Western world property rights mean a lot more.

Box 27.3 **An institutional definition of property rights**

Property rights provide legitimate allocation to particular owners of material or immaterial objects supplying income or satisfaction to the owner. They comprise a detailed specification of rights and duties, liberties and immunities citizens have to observe. These are partly defined by law, partly by cultural conventions, and they are different for owners and non-owners. Property rights are ultimately guarantied by the legitimate use of power.

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

Now, if this is true one might ask why governments do not reform their property rights in accordance with the theory. The answer to that may be of two kinds. One, the political economy answer, is that the ruling elite will lose their power if they try to do that. The other, more sociological answer will add that even if the ruling elite want to redefine property rights that may not be possible in the short run. Property rights are not only legal rules; they are also real world implementations (social facts) of some very deep cultural beliefs, and guide some of the most enduring practices of a society (Douglas 1986, Searle 1995). Property rights evolve as these beliefs and practices change. This may help us understand why the Sámi encounter problems in the drive to reform the property rights over “the lands which they traditionally occupy”.

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Changes in property rights occur slowly. As a rule, we will find incremental change as slow as to be almost imperceptible. Large scale "revolutionary" changes are not unknown, but come seldom and in history they are often seen at least as partial, if not complete, disasters for common people, for example the enclosure of the traditional commons in England, or the communist revolution in Russia.

More peaceful large scale change in property rights as a consciously designed policy has sometimes been tried during the last 50 years. It is found under the heading of land tenure reforms. Comprehensive evaluations are scarce but all evidence suggests that large scale reforms never achieve their goals[7].

One recent example is the land reforms of Zimbabwe. Their outcome is not yet known. But the process of change seems to have brought disaster to many, both white and black.

Another kind of property rights reform is found in the redistribution of fishing rights which has occurred in Iceland, and which is going on in Norway. Compared to Zimbabwe it seems to go more peacefully. However, we see clear winners and losers. Among the losers in Norway we find the coastal Sámi population.

More small scale and piecemeal reforms do better. Land consolidation as practiced in Western Europe has become a useful and necessary part of our societies.

The Sámi have demanded property rights to the lands they traditionally occupy. On a scale of change from small to large it would seem to come on the side of large scale. How large, however, depend a bit on what the Sámi actually mean with their demand. Despite the seeming clarity of the international convention they quote, the meaning of the demand in the Norwegian context is not clear. But let us start at the beginning: how did we get to be where we are, in terms of property rights to land in Finnmark?

Current status of property rights to land in Finnmark

The details of the history behind current property rights are found in the publications from the Sámi rights commission, particularly NOU 1994:21 and NOU 1997:4.

The essence of the argument of the Norwegian state is that it has been the landlord for so long that it now has to be considered the legitimate owner of Finnmark. The origin of its position as landlord was at first the stipulation used by all states since medieval times that lands without identifiable citizens in possession (with seisin) belong to the state. This position was reinforced and also took a new direction with the liberal position that ownership rights originated with a mixing of soil and labour (the labour theory of property rights) usually attributed to John Locke (1690). The labour theory of property had for

[7] In a review of land tenure reforms in Kenya, Ensminger (1996) observes: "The literature leaves little doubt that formal land titling is not having the intended effects of increasing agricultural investment and productivity by providing greater security, or even, given its failure to replace customary norms of succession and transfer, of creating a land market. Why?"

colonial powers the convenient interpretation that nomads, hunters and fishers could not establish property rights to the lands or waters they used.

The Sámi parliament denies all validity to such arguments. On the contrary, the history of the usages of these lands by the Sámi population must surely attest to their ownership rights to the lands. The Sámi's uses of the lands should establish better title than the unjust doctrine referred to by the state. The Norwegian state should recognize the customary law realities of the Sámi's usage of natural resources.

Now the state might say: "of course, your rights to the resources you use and traditionally have been using are undeniable and secure. But the ground itself belongs to the state".

At this point the Sámi would have been thwarted if not for the international development. The Sámi parliament points to the 1989 ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, particularly Articles 14 and 15[8]. In article 14.1 it is said that "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised." This would seem both clear and unambiguous to most people. The Sámi rights commission had to conclude that the Sámi should be seen as owners of the "lands which they traditionally occupy". The political dynamite lies of course exactly in this phrase. How do we delineate these lands?

The Sámi rights commission admits only that probably the core area of the Finnmark plateau must be considered as belonging to the Sámi according to this paragraph. The arguments of the Sámi parliament are neither very clear nor consistent. Sometimes it sounds as if more than half of Norway and the Barents Sea must be considered to be lands they traditionally have used and depended on.

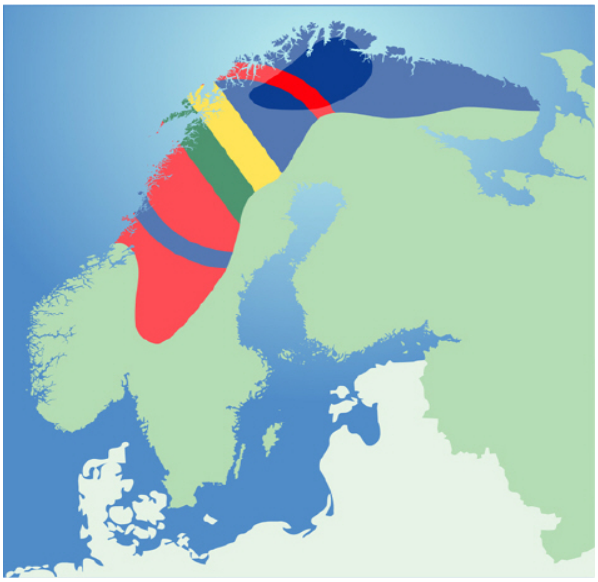

Figure 1. Sápmi covers part of four countries according to the Norwegian Sámi parliament
Source: http://www.samediggi.no/

The map of Sápmi published by the Sámi parliament gives a graphic presentation of these arguments. Even if they do not say it explicitly the implication left is that this is what they consider themselves entitled to own. Based on this reading we should not be surprised if non-ethnic Sámi living within these areas become insecure and hostile.

[8] For a discussion see NOU 1997:5, pages 31-52

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However other arguments would seem more modest. The Sámi parliament also says that they want to emphasis that regarding the management of ground and usufructs from these lands there should not be any discrimination based on ethnic origin among individuals living in the same area (Sametinget 1999: page 119-120). But these assurances are not so well, and not so often, promulgated as the initial sweeping statements and the map.

And it cannot be denied. The map of Sápmi does have a factual historical story to tell. The Sámi languages, for example, are roughly distributed as in figure 2.

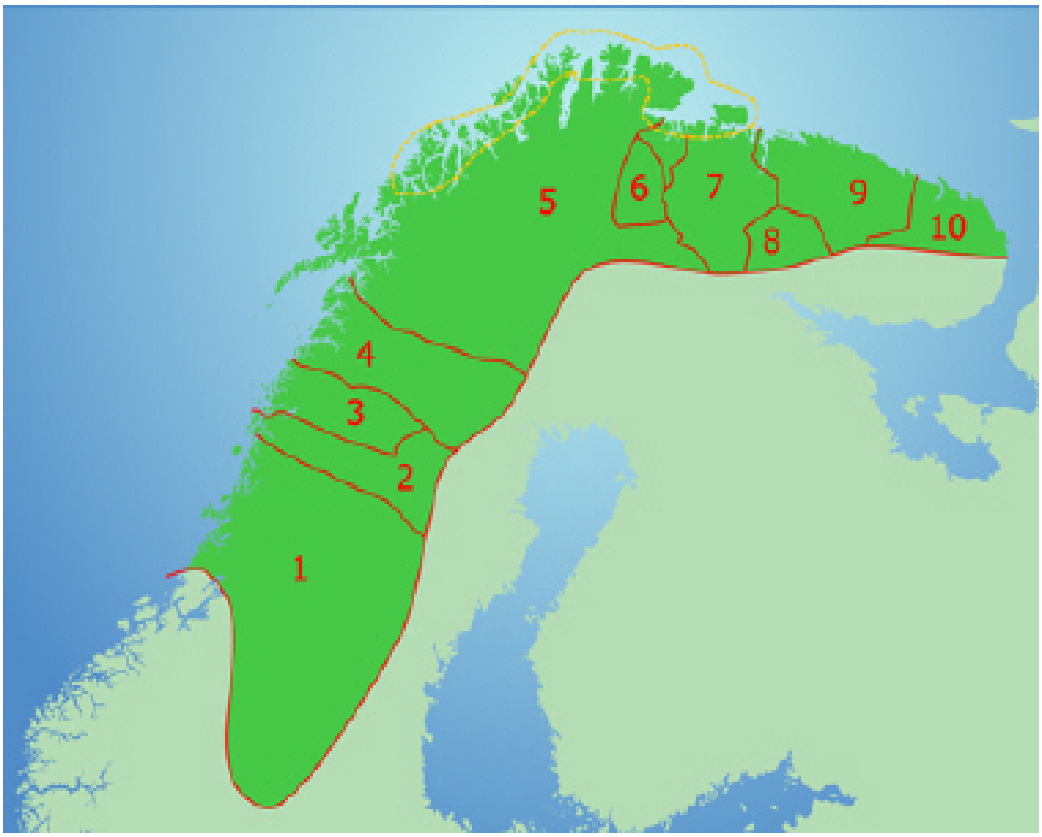

Figure 2 The distribution of the Sámi languages according to the Norwegian Sámi parliament
Source: http://www.samediggi.no/ See also Nickul 1977.

Likewise, the Reindeer herding areas are basically coterminous with the map of Sápmi lands in Norway (Figure 3).

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Figure 3 Reindeer herding areas (Berge 1998:8)

Thus there is at least some historical connection between the map of Sápmi and the idea that these are the lands they traditionally occupy.

In considering the question of whether this maximal claim to property rights according to ILO convention 169 will be feasible within the Norwegian state, and even desirable as seen from the Sámi point of view, we are led back to the question: why are property rights important?

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Property rights defined

Our everyday conception of property is clear in its main implications. Property rights are about security of enjoyment of benefits, and freedom of action. An hypothetical opinion poll about the differences between "yours" and "mine" would reveal fairly unanimous opinions.

An investigation into the meaning inherent in the everyday concept of property found that it could be described by six types of rules (Snare 1972): three defining the rights of the owner and three regulating the relation between an owner and non-owners:

Owner rights:

1. The owner has a right to use his property, meaning:
a) It is not wrong for the owner to use his property, and
b) it is wrong for all non-owners to interfere with the owner in his use of his property,

2. Non-owners may use the property of the owner if and only if the owner gives his permission, and

3. The owner may permanently or temporarily transfer his rights as defined by rules 1 and 2 to specific other persons by consent,

Relational regulations:

4. Punishment rules: regulating the cases where non-owners interfere with an owner's use of his property.

5. Damage rules: regulating the cases where non-owners cause damage to someone's property, and

6. Liability rules: regulating the cases where someone's property through either improper use or neglect causes damage to the person or the property of some non-owner.

We have to understand that this is the way most people will tend to think about the Sámi claim to ownership of land and water. This is also a very commons way of thinking about property rights. Modern economic theory uses it. Property rights systems based on the model of Roman law uses it. We can call this the dominium plenum position on ownership. It is the way Norwegian law thinks of property rights if nothing else is implied by contract or customs. Also it would seem that this is the way of thinking guiding the ILO convention 169.

Of course, what the Norwegian state actually "thinks" about property rights we cannot know, but its behaviour within its ownership of the lands in Finnmark can be said to conform to the dominium plenum position only in certain long term tendencies. The history of contracts and customs binds its position and channels behaviour.

Neither is it entirely clear how the Sámi parliament thinks about ownership of its traditional lands despite its frequent references to ILO convention 169. But the impression given by its most publicly promulgated position does seem to conform to a dominium plenum position.

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

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

Property rights to land in modern capitalism

A modern society requires that there are ways of specifying resources and dividing rights among several and different owner interests. There also has to be ways of sharing and co-managing resources and benefits within groups of differing sizes and interests. The most versatile tools for achieving this is found in the Common Law system developed in England[9]. Its current versatility is in many ways the outcome of the struggle between a customary system of rights holding similar to the Norwegian and the effort to implement the dominium plenum position in the modernisation of the British state during the 18th century[10].

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

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

However, if one wants to attempt consciously designed land reforms one needs to have a technical language more sophisticated than the system one wants to reform, and one needs to understand how cultural values are embedded in the rules of property rights. Only then will it be possible to describe both the system as it is and how it can be transformed to the goal one wants to obtain.

Without going into a comprehensive outline of the property rights system for land holding of modern capitalism we need to look briefly at two

[9] Its history is fascinating (see e.g. Thompson 1975, Simpson 1986, Neeson 1993).
[10] On the question of landholding and modernisation of the state see Scott 1998

important kinds of distinctions: the difference between owner at law and owner at equity[11], and the basic classification of resources. The classification of resources we shall return to below.

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

- Owner at law on behalf of herself/ himself, or
- Owner at law on behalf of some beneficiary.

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

The owner who owns at law on behalf of herself is the ordinary owner encountered in the dominium plenum position on ownership. This is the kind of owner we usually think of in Norway when we speak of ownership. One might perhaps guess that this is the way the bureaucrats of Statskog SF think about their ownership of Finnmark. However, this is unlikely: they follow their own bureaucratic traditions, and bureaucratic traditions die hard. However, the Norwegian political and cultural climate is certainly pushing most Norwegians in such ways. Statskog SF may follow.

Common law land holding and ILO convention 169

To illustrate the difference between Norway and England we could for example speculate on why ILO in their the revision of convention 107 from 1957 found it necessary to change the expression "**The right of ownership**, collective or individual, **of the members** of the populations concerned over the lands which these populations traditionally occupy shall be recognised." to "**The rights of ownership and possession of the peoples** concerned over the lands which they traditionally occupy shall be recognised."

There are two interesting changes in the wording. One is the change from "members of the populations" to "peoples". This implies a subtle shift in

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

emphasis from thinking of individual rights first to thinking of collective or public rights first. It is a people that shall have recognition of its rights of ownership and possession not individual persons. The second interesting change is the addition of "possession" to "rights of ownership".

An interpretation of the shift from "ownership" to "ownership and possession" might start by noting one important difference between land ownership in English jurisprudence and "land ownership" outside the area where the English trust institution have been instituted (such as in Norwegian jurisprudence). Ownership implies in English jurisprudence[12] title to the lands and full rights of management including the rights of alienation (ownership at law) but not necessarily possession or enjoyment of benefits which may belong to the owner at equity. In Norwegian jurisprudence, on the other hand, ownership implies full rights of use and enjoyment as well as rights of management including the right to alienate unless contract or custom dictates otherwise.

Table 1 Complementary bundles of rights as defined by the trust institution

	Trust ownership				Ordinary ownership
Elements of ownership rights	Trustee	Beneficiary (beneficial use) "Cestui que trust"	Possessor (managerial use) Manager		Ownership on behalf of oneself gives the full bundle of rights
Access	$(X_{1a})+$	$(X_{2a})+$	(X_{3a})	=	X_a
Subtraction	$(X_{1s})+$	$(X_{2s})+$	(X_{3s})	=	X_s
Management	$(X_{1m})+$	$(X_{2m})+$	(X_{3m})	=	X_m
Exclusion	$(X_{1e})+$	$(X_{2e})+$	(X_{3e})	=	X_e
Alienation	X				X

The difference between England and Norway lies in the possibility for separate allocations of the rights of possession and enjoyment. At first blush there may not appear to be much difference. Also in Norway we may separate possession and enjoyment. However, in Norway it will have to be done by contract in each case, and enforcement will be according to the letter of the contract, not according to what is the best interest of the one who is granted rights of enjoyment and/ or possession. In Norway we do not have the distinction between owner at law and owner at equity. This distinction is at the core of the English trust institution. However, the distinction is difficult to enforce in most cultures. It requires both a cultural understanding of the

[12] For a survey of English land law see Lawson and Rudden 1982

distinction and a well developed judicial system able and willing to enforce it. In most countries where ILO convention 169 might be applied the cultural and legal foundation to apply the trust institution would be missing.

If and how much this has affected the original formulation of article 14 in Convention 107 and the reformulation in 169 is not known. However, it might be a reasonable guess that the addition of the clause "possession" in formulation in 169 to larger degree than the formulation in 107 is a self-conscious effort to guard against a possible misuse of the trust institution. It is not known that this was the reasoning behind the change, but it is at least one way of arguing that the change was reasonable and necessary. For the application to Norway the change cannot be seen to make any difference at all. "Ownership of lands" or "ownership and possession of lands" means the same if nothing else is agreed to by the owner.

Thus the argument of the Norwegian state in the debate of the new paragraph of ILO convention 169 was not about the meaning of ownership, it was about the meaning of lands. The Norwegian state wanted to equate property rights to the use of the specific resources the Sámi traditionally had used with property rights to land. This would be analogous to the situation for the farming populations in southern Norway in state commons, and also a fairly straight follow up of the approach used since the enactment of the Reindeer Herding act in 1933. It would fit perfectly with the Norwegian legal and cultural understanding of land ownership where in many cases of collective or group rights the state can be seen as taking a role comparable to that of a trustee. But both the ILO convention and the Sámi parliament have denied that this will be sufficient. Technically one may say that one reason for this is that the legal system of Norway does not give the Sámi the remedy of legal action for breach of trust. And in capitalist society that will leave the Sámi vulnerable to economic powers they have no way of countering. To understand why this may be so, we have to consider how resource ownership is organised in modern capitalist societies.

Resource ownership in modern capitalist societies

In discussing property rights for the purposes of resource management, resources can usefully be divided into 5 types:

- **The Ground** (sometimes called the soil) meaning the abstract bounded area. This category emerged from the work of the land surveyors in the period where the modern state was developed (see e.g. Scott 1998, Kain and Baigent 1992).
- **The Specific material resources** embedded in the ground, attached to the ground, or flowing over the ground (in general there are limits on how far into the ground and how far above the ground the rights reach).

These are the resources of practical use and economic value at any particular time in a society.

- **The Remainder,** meaning the future interest in resources not yet discovered or not yet capable of being exploited. This can be said to be the hub of capitalist landholding.

These three types of resources are usually included in discussions of who owns what, and are routinely recognized by legal institutions.

In the dominium plenum position on ownership it is assumed the owner of the ground, the remainder, and the specific material resources, is one and the same legal person. This is seldom if ever the case in the real world. And if one could imagine that this actually was the case in a country one would soon rediscover the multiplicity of interests in different resources on the same ground, and with that the need for management systems able to accommodate and articulate the different interest. This is aptly illustrated in the development of environmental regulations.

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

- **Eco-system services** such as water control, disaster mitigation, local climate control, biodiversity, etc. The viewpoint that these are valuable resources for society can be said to emerge from the work of scientists in our time[13].
- **Socio-cultural symbols** vested in a landscape (often attached to amenity and heritage sites). These belong to what traditional cultures value in the land, but have usually been neglected by the property rights systems of modern economies.

Eco-system services are usually managed through government regulations. Socio-cultural symbols are created and sustained by the local culture but now increasingly taken over by national and international bureaucracies.

Of these 5 resources "the remainder" may seem a bit odd to most people. But looked at from a dynamic perspective it may be argued that of the five classes of resources the remainder is the most important because the remainder includes all that which is not yet reality, all that which is yet to be discovered. The person or persons who control the remainder control the future.

For example, the income potential of the waterfalls was not understood until hydro-electric power generation became possible. After the technological breakthrough, the one who owned the remainder in an area where waterfalls were found were entitled to collect the income flow or to decide to preserve the waterfall undisturbed.

[13] It is significant to note that according to the 2003 proposal of the government, the new owner of the lands and waters of Finnmark have to grant land for national parks without compensation if the Norwegian parliament decides to create a park on their land.

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One can also say that during the last 40-50 years eco-system services has started to emerge from the remainder. Previously they were unrecognized. Now they are valued and enter into the motivations and management systems of various stakeholders. They become part of the property rights system whether recognized as such or not. In many ways we can see them emerging as a common resource the land owner cannot dispose of freely.

It is the main argument here that the dynamic powers of property rights to the remainder are the main reason why ownership of land and water is important to the Sámi people. The chances of survival and successful modernisation of the Sámi culture are much better if they collectively, as a people, can control the remainder.

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

The state as trustee and owner at law

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

In the Norwegian legal system, as in most legal systems, this is impossible. In Norway the trust institution is not fully developed. We do have elements of it. Despite the fact that the state claim ownership over the remainder it seems reasonable to say that in such constructions as state commons in southern Norway the state is in a position similar to that of trustee. However, the force that keeps the state straight is not the legal system. It is political power. Only continuous political pressure from local communities and close links between the state bureaucracy and rural society during the 19th and early 20th century can explain the particular reforms of the legislation of commons in 1857, 1863[14], and later, as well as the work of the Mountain commission from 1909 to 1953[15].

Since the Sámi people lack political clout in the Norwegian parliament as well as the political good will and understanding of the ordinary Norwegian population, the relations between the state and the Sámi are usually left to the bureaucrats. The social dynamic of bureaucracies left to their own internal processes is an interesting topic, but not on the agenda here.

[14] Act of 12 October 1857 on forest commons, Act of 22 June 1863 on forestry
[15] Act of 9 April 1954 rescinded Act of 8 August 1908 creating the commission

It must be sufficient to observe that even in following the most well meaning intentions to help and do good, bureaucrats are hard put to listen to some types of clients, and in some types of situations they have great problems taking seriously their wishes. Bureaucrats are professionals, and professionals know best. That is inherent in a professional worldview. Sometimes the professional opinion coincides with their client's interests, often, it seems, they do not. In the long run the relations between such bureaucracies and their clients tend to deteriorate. It seems to have happened between the Sámi and at least some sections of the state bureaucracy, particularly in relation to land management.

The Sámi as beneficiaries of the land trust the state can be seen as having taken upon itself, seems to feel that their trust has been broken. However, in the Norwegian legal system they have no ordinary remedies. Neither do they have political power to instruct the state bureaucracy. Their one course of action came with the globalisation process and the integration of the Norwegian state into the global development of moral and ethical standards for modern states, in this case, particular the ILO convention 169. In the process which this convention has generated, basic questions for the Sámi people ought to be: "Can the Norwegian state be trusted to fulfil its fiduciary duties towards the Sámi?" or "Can we trust the state to hold the land in a way benefiting the Sámi people in the long run?"

In the foreseeable future there is no reason to think that the state will not act in the best interest of the Sámi (as judged by the bureaucrats). And there is no reason to doubt that the bureaucrats that fashioned the current proposal for new rights to land and water in Finnmark believe the new rules will serve the Sámi well and balance the rights of the Sámi and the rights of the non-Sámi in a reasonable way. In the short run there will be no significant difference between the new and the current situation. But in the history of a people trusting in the good will of the state for the foreseeable future is a rather short term perspective.

So what is the alternative? If the state in the long run cannot be trusted to act as trustee in the best interest of the Sámi the only alternative is the private property (meaning that the owner rights are not controlled by the central or local state). Some private body will have to be owner and manager of the lands of the Sámi.

In the choice between trusting the state and trusting the property rights institution it should be kept in mind that property rights change more slowly than the character of a state. By transferring the property rights from a politically sensitive state bureaucracy and over to the private property rights system, the Sámi will in principle get exactly the same power over and protection of their property rights as any other Norwegian group of people. The court system protecting property rights in southern Norway will also be bound to protect the property rights of the Sámi. This they both can and will do as long as these property rights are seen to conform to property rights

elsewhere in Norway. In other words, the property rights of the Sámi people must be seen to conform to established ways of thinking about property rights in Norway. Only if they do that, will property rights to land and water be an improvement over the current situation.

If the property rights of the Sámi become too different, too special, or are seen to rely on ideas and values alien to the ideas and values supporting the property rights in the rest of Norway, our legal system will not work reliably in protecting their property rights.

For example, it may be conjectured that individual property rights, or property rights which discriminate local inhabitants, based on ethnic origin, will be anathema and in the long run introduce difficulties in the practice of Sámi property rights which is bound to lead to political repercussions.

Conclusion

To follow up effectively on the potential for change in the current international and national political climate it is necessary to understand both how the Norwegian people think about property rights in general, and what kind of legal constructions that will be possible within the Norwegian system. Thus, from the line of argument presented here, it would seem more constructive for the Sámi parliament to emphasis that it is ownership of ground and remainder they are looking for, and that ownership of ground and remainder do not have to affect possession of, access to, or uses of specified resources at specified locations whether these rights are based on contract or custom.

The 2003 proposal of the Norwegian government can be read in many ways. My reading is that it confirms the assumed power of the Norwegian bureaucracy. It conforms closely to the Norwegian way of thinking about property rights to land and water. But it does not fulfil the Norwegian commitment to ILO convention 169. This shows most clearly in the ability of the Ministry to make final decisions in cases where the governing board of the owner is split 3-3, and also in the right to designate National Parks and expropriate land without compensation.

I believe both the Norwegian government and the Sámi parliament needs to rethink their positions and discuss what kinds of rules will serve their long term goals best. Hopefully there still is a long discussion to come, and some problems are yet to be faced. For example: the processes determining the exact boundaries of the lands the Sámi traditionally have used, particularly outside of Finnmark. By all counts this process will be long and contentious. Understanding the distinction between ground, remainder and specific resources will help. One should also think hard about how to avoid the most obvious traps in the process, such as fights about redistribution of land ownership among smaller groups of Sámi.

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There can be no doubt that property rights to land and water will be important to Sámi society. But the consequences will be long range. They will be based on legal technicalities and not easy to anticipate. New dilemmas will appear. That is about the only sure thing.

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