

3 The survey of property rights in Sámi areas of Norway—with focus on the *Karasjok* case

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1. Introduction¹

On 11 December 2019, the Finnmark Commission presented the first of two partial reports for the outlying fields in Karasjok Municipality,² a municipality with a majority of Sámi inhabitants, situated in the Inner parts of Finnmark. In this report, which chronologically is the commission's sixth, the Commission concludes that the people of Karasjok own the former assumed state land in the municipality.

The purpose of this chapter is to examine the Karasjok report, to see how the Commission anchors its findings, which significantly contradicts the five previous ones, not only because the commission for the first time concludes that the inhabitants in an investigation field collectively own the land but also because the state's previous activities as assumed landowner are assessed differently from the previous reports. The purpose is also to assess how the findings meet the requirements of international law, particularly ILO Convention No. 169 on Indigenous and tribal peoples³ and thus whether they are suitable to fulfil Norway's international obligations towards the Sámi. As both property rights and the right to enjoy the culture of a people are important human rights, the chapter will reveal how Norway relates to its human rights obligations and sustainable development in this area.

The reindeer husbandry rights are not a controversial topic in the first partial report of the Karasjok field. As in previous reports, the Commission concludes, on the basis of immemorial usage, that there is a general reindeer husbandry right established within the field of Karasjok that will not be affected by changes in land ownership.⁴ The assessment of internal reindeer husbandry rights is recently presented in the second partial report on the Karasjok Field.⁵ Reindeer husbandry rights is therefore not a topic for this chapter.

The legal sources for this analysis will primarily be the Finnmark Act, its preparatory work including the reports of the Sámi Rights committee, as well as relevant case law and international law, such as ILO Convention No. 169. The empirical material of the study is the reports of the Finnmark Commission.

2. The background of the judicial survey of Finnmark and the *Karasjok* case

The judicial survey of land rights in Finnmark, as well as the Finnmark Act itself, are results of the political development and cognitions that originated during the *Alta* case.⁶ The case encouraged the government to appoint the *Sámi Rights Committee* in 1980.⁷ During the next two decades, the Committee proposed several measures to safeguard Sámi language, culture and way of life, including a Sámi Parliament and a constitutional amendment. The next step for the Committee was to discuss the right to land and natural resources, including a draft land act for Finnmark.⁸ The draft meant that the state-owned land in Finnmark, which was found to be unlawful, should be transferred to an independent body, owned and governed by people in Finnmark. The Sámi Parliament and Finnmark County Council were to appoint an equal number of representatives to the board of the body. A survey of land rights was, however, not part of this proposal.

At the same time as the Sámi Rights Committee developed a new governance model for the state-owned land in Finnmark, the Norwegian Parliament ratified ILO Convention No. 169 (ILO 169). The ratification meant that Norway was legally bound to recognise 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 occupies, and to guarantee effective legal protection of such lands, cf. article 14 (2) and (3).

The ratification of ILO 169 was not, as other measures adopted to safeguard Sámi culture, based on proposals of the Sámi Rights Committee. The Committee considered, however, that Norway would meet the requirements on rights of ownership and possession of the Sámi over the lands which they traditionally occupy, without dividing the county into a specific Indigenous area. Based on an opinion that the inner parts of Finnmark, including *Karasjok*, were traditionally Sámi areas, while the coastal areas were mainly Norwegian,⁹ the Committee meant the obligations of the ILO 169 could be met without dividing Finnmark if the Sámi gave up 50% of their property rights of inner Finnmark in exchange for a corresponding right of shared control over coastal Finnmark. Consequently, a joint ownership body (the Finnmark Land Administration) was proposed with equal board representation of the Sámi Parliament and the County Council of Finnmark.¹⁰

In addition, the Sámi Rights Committee proposed a locally based outlying field management board to meet the requirements of the local inhabitants' impact on the use of their natural goods.¹¹ The governance of usufruct rights would then be transferred to local communities, while property rights would be controlled by the Finnmark Land Administration. This meant that usufruct rights in the Sámi municipalities were governed locally by the Sámi, while ownership rights were governed jointly by the people of Finnmark. The Sámi Rights Committee assumed that the arrangement then complied with the requirements set out in Article 14 (1) first sentence of ILO Convention No. 169.¹²

When the Finnmark Act came into force on 1 July 2006, the lands held by the State Forest Company, were transferred to the Finnmark Land Administration, now under the name *Finnmark Estate* (FeFo). FeFo was in the same act defined 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 draft Finnmark Act. This included, among others, the local governing bodies. The Sámi Parliament did not accept the draft act due to shortcomings in international law.¹³ To strengthen the loyalty to the ILO 169, a judicial commission to identify existing rights in Finnmark was established after consultations. The locally based outfield management board with possibilities to establish local commons was, however, not included in the act. From the Sámi Parliament, it was understood that areas for local governance would be revealed as part of the judicial survey.¹⁴

The task of the judicial survey was assigned to the Finnmark Commission, which was mandated to investigate rights to land and water in 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 is anchored in ILO 169, which is sector-monistic incorporated in section 3 of the act, which reads:

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 and minorities and with the provisions of agreements with foreign states concerning fishing in transboundary watercourses.¹⁵

The Supreme Court of Norway has in the *Stjernøya* case 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'.¹⁶ In other words, ILO 169 does not precede the rules to be used to clarify the land rights on the Finnmark Estate.¹⁷

The five reports that the Finnmark Commission has completed up to December 2019 have all concluded that Finnmark Estate (FeFo) in general owns all the land areas covered by the investigations. In 2011, the Finnmark Commission selected Karasjok as investigation field no. 4. Karasjok is in the core Sámi area, which until 1751 was under Swedish jurisdiction. After almost nine years of investigations, the Commission concluded that people living in the municipality owned the land which in 2006 was transferred from the state to the Finnmark Estate. This investigation will be the subject of the further analysis in this chapter.

3. The Finnmark Commission's report for field 4 Karasjok

3.1 People in the field of study have collective property rights

The first partial report for field 4 *Karasjok* was, as already mentioned, presented on 11 December 2019. That is more than four years after the previous report,

Field 6 *Varangerhalvøya vest*, was issued. During this period the Commission has done a significant amount of work. This is not only shown by the fact that the report counts as many as 676 pages in two volumes but also evidenced by the length of the investigation, which took almost nine years. In comparison, the five previous investigations were all together completed in less than seven years.

The report concludes that people in the municipality of Karasjok are owners in common of the land, which in 2006 was transferred from Statskog SF to the Finnmark Estate. This is the first time the Commission concludes that a group of people in Finnmark enjoys collective property rights to their traditional natural resource areas.

As in previous reports, the Commission refers to the *Svartskog* case, where a local community won property rights to an outlying area in a dispute with the state. In that case, the Supreme Court describes the use in the disputed area as ‘characterized by continuity, that it has been all-encompassing, intensive and flexible’.¹⁸ The Commission assumes that this is also the situation in Karasjok. It means that the requirement for use and duration for the acquisition of property rights, was met. As in previous reports, the Commission states that the question of whether the people have collective ownership to an area, depends not only on the people’s use (according to the requirements of the concept of immemorial usage), but also on the use of others and the State’s actions.

However, in contrast to previous reports, the Commission concludes unanimously that the people in the area, for many hundreds of years, have used and possessed the natural resources in a way that essentially corresponds to having collective property rights.¹⁹ The question is thus not whether the people have acquired property rights through immemorial usage. Instead, it is a question of whether the established rights are extinguished, so that the state’s alleged ownership in the years from 1751 to 1980 has become a settled legal situation.

Furthermore, it is considered whether the local use had a basis in a legal opinion that corresponds to collective property rights, and in addition, it must be considered what significance the state’s activities have for the current legal situation. In other words, whether the activities have affected the local legal opinions in a way that has led to the original rights having changed in character or disappeared.

3.2 *The emphasis on the previous state activities*

The Karasjok report differs significantly from previous reports in terms of emphasising the state’s dispositions. In discussing these, the Finnmark Commission first shows that the UN special rapporteur on the rights of Indigenous peoples, Victoria Tauli-Corpuz, has been critical to the Commission’s conclusions weight on the state’s disposition of land and resources.²⁰ After a review of Norwegian case law, and in particular the case of HR-2018-456-P (*Nesseby*), where the Supreme Court places considerable emphasis on the state’s dispositions, the Commission finds that such dispositions must be included in the assessment in ‘an ordinary way’.²¹ 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.

A unanimous commission initially states that the historical sources show that the state to a small extent has acted as an owner over land and resources in the area until the end of the 19th century. The Commission finds that the surveying of property parcels that took place, the oldest dating back to 1811–1814 when ten parcels were measured and registered, were formalisations of established use.²² There are good reasons to believe that this is a correct assessment, partly because it is supported by other recent research which have shown that the land resolution of 1775, was a land subdivision and registration act rather than an act that allowed the King's land to be given for free to people in Finnmark.²³

At the same time, the assessment of the Commission deviates significantly from how the Commission has previously assessed such dispositions.

A significant number of properties were surveyed out of presumably state land after the *Land Sales Act of 1863* came into force.²⁴ After a review of these, the Commission assumes that this is mainly a survey and registration of already existing parcels²⁵ and thus not an expression of state ownership. It then assesses the period 1902 to 1965, which is the period where the next land sales act (1902), was in force. During this period, 771 plots of private properties were established in Karasjok,²⁶ which, according to the Commission, shows that the state's disposition of land and resources in Karasjok increased considerably after 1902.²⁷

The state's exercises over land that has not been surveyed and sold to individuals, however, was modest. Although the state, until 1945, leased out relatively many outlying hayfields, some of these leases were formalisations of established use. Beyond that, the state has only made a few more typical private law dispositions of the unsold land in Karasjok.²⁸

Thereafter, the Commission discusses the *opinio juris* that local people may have had. Here, too, reference is made to the *Svartskog* case, where it was not decisive that 14 persons in 1921 had entered into agreements with the state on hayfield leases, as it could not be

considered as evidence that these persons accepted that they were without rights in Svartskogen. The reason may as well be that they more easily than others accepted a demand from the authorities, or that they saw advantages in being assigned a specific plot.²⁹

Nor was it decisive that five individuals had entered into such agreements in 1928 or that contracts for logging and hay-cutting were made between individuals and the state in the 1940s.³⁰

The Finnmark Commission then assumes that also in Karasjok, someone may have considered it advantageous to have their ongoing usufruct rights formalised or to be allocated as a separate plot of land or hay field. In this respect, the Commission places significant emphasis on case law expressed in the *Svartskog* case. The opinion that the state's landowner actions have been of a modest scope, and

the way in which the local people's legal opinions have been assessed, differs significantly from previous investigations.³¹

Furthermore, the Commission discusses the uncertainty associated with the fact that the disposals were originally considered to have a basis in the king's property rights. According to older Norwegian common land law, the king was not the 'sole owner' of the commons but the rights holder together with other use rights holders.³² Based on this, the Commission finds that disposals of the commons did not necessarily take place by virtue of a property right but were the result of a right of governance, based on a royal privilege.³³

The Commission further states that 'the State dispositions over the unsold land in Karasjok were modest in content and scope and may therefore have been understood within the framework of such a privilege idea'.³⁴ 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, as well 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 ownership and possession rights'.³⁵

In an overall assessment, as mentioned by the Commission, the state's dispositions must also be held up against the local people's use and dispositions. The Commission refers here to the fact that the people of Karasjok throughout the period after 1751 have exercised a widespread, intensive and versatile use of the local outfield resources:

This use corresponds in content and scope to the use that the holder of a collective ownership right of the relevant areas will have 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 hayfields, cloudberry-picking and fishing lakes.³⁶

The Commission then finds that the land 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'.³⁷ Reference is then made to the *Svartskog* case, where the court-appointed experts stated that Svartskogen had a status as commons 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 and very active use, is rare elsewhere in the country'.³⁸ 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 dispositions, local use still has a significant scope.³⁹

Furthermore, the Commission mentions that the inhabitants did not have Norwegian as their mother tongue. It means that a large part of the people at the time did not speak Norwegian well, which must be emphasised in the assessment. Therefore, as in the Svartskog case, it must be taken into account that misunderstandings could arise in communication between Norwegians and Sámi:

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 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.⁴⁰

The Commission then points out, with the exception of forest resources, that the use, to a small extent only, has been subject to state regulations beyond what is based on public law regulatory legislation on utilisation times and tool use. After this, it cannot be assumed that the Karasjok people's lack of protests against the state's dispositions have had the character of law-extinguishing passivity.⁴¹

The Commission assesses the situation differently when it comes to the state's commercial forestry. Linguistic and other factors may, however, have contributed to the fact that dissatisfaction with the forestry administration has not been expressed, at the same time as forestry alone cannot provide a basis for the acquisition of property rights. Emphasising that the state's dispositions of land and resources in Karasjok, except for the period from 1902 and 1965, had a relatively limited scope, while the use of the local population has been continued to this day, the Commission finds it difficult to see that the state's dispositions have implied that the right of the local people from 1751 has expired. Nor can it be seen that the right significantly had changed its character.⁴²

Moreover, the Commission points out that parts of the state's disposition that have a private law character have been exercised in a way that appear as public administration. That the dispositions were a result of the state's 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 1751.⁴³

The majority of the Commission (Gauslaa, Henriksen and Magga) thereafter expresses that the state's dispositions of land and resources in the study area for a long period had a modest scope. Towards the end of the 19th century, and especially after the Land Sales Act of 1902 came into force, 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 settled legal situation or a right on a customary

basis. The dispositions have had a public law character and have not broken 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.⁴⁴

This acknowledgement leads the majority to conclude that there are not sufficient indications supporting that the state's ownership to the unsold land in Karasjok was established as a settled situation when it was transferred to the Finnmark Estate 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*.⁴⁵

The state's dispositions have consequently not broken down opinions of strong local, collective rights to land and outfield resources by the majority of people in Karasjok.

The majority further concludes that the rights lie not with the municipality as such but with everyone who at any time are registered as residents of Karasjok. These inhabitants have an equal share in the property right, regardless of residential time and ethnic origin. The majority also points out that local rights of use 'must be respected'. This means that the recognised property right must not be exercised in such way that rights holders to particular property plots for, e.g., hunting cabins or fishing places are displaced from their rights.

The Commission's minority (Andersen and Heggelund) agrees with the majority that the right in Karasjok is reminiscent of a collective property right that could be traced back to 1751. 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 established as a settled legal situation. According to the minority, this has meant that the local people's original collective right has been extinguished and replaced by the right of use that is currently regulated in the Finnmark Act. This right is governed by the Finnmark Estate, but in such a way that the Estate must respect local rights holders in Karasjok to avoid these being displaced from their traditional uses.

3.3 The importance of ILO 169 and its restorative function

In the *Stjernøya* case, the Supreme Court concluded that the ILO 169 does not regulate the substantive rules for clarifying the land rights in Finnmark. In the Karasjok investigation, the Finnmark Commission in contrast finds reason to place considerable weight on ILO 169, stating that the convention means that no particularly strict requirements can be set for the inhabitant's legal opinions for rights to be considered established. This means that

[t]he State's expressed ownership claims will not alone be enough to deprive Sámi claimants of their good faith. In order to break down established rights

by State dispositions, a relatively large amount must be required in terms of duration, firmness, and content.⁴⁶

This is repeated later in the report, where the Commission refers to ILO 169 Article 8 (1) as well as Article 26 (3) of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and expresses that these provisions mean that due regard must be put on Indigenous peoples' customs and legal opinions in national law. Consequently, no particularly strict requirements can be set for legal opinion or attentive good faith in recognising Sámi rights when applying national property law.⁴⁷

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 was all-existing in Karasjok when the area became subject to the Danish-Norwegian Crown's jurisdiction in 1751. A reason for this is that the Commission emphasises that ILO 169 Article 14 (1), first sentence, concerning the right to ownership and possession, has a *restorative function*.⁴⁸ The Commission refers to the *Nesseby* case, where the Supreme Court states that 'such a starting point must generally be correct and has support in the preparatory work for ILO Convention No. 169'. According to the Supreme Court, 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'.⁴⁹ 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 20th century until the 1970s. In this regard, the Commission states,

If the Sámi use had ceased during this period, and there was no longer any connection between the use and the control that was originally exercised and the current situation, around 70 years could have been sufficient depending on the circumstances [for loss of property rights]. However, the wording 'traditionally occupy' in the first sentence of Article 14 (1) implies that it is no requirement that the indigenous peoples' exercise and use of authority must have been of the same scope and content as it originally was, in order to establish right to ownership and possession under Article 14.⁵⁰

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 1900-century.⁵¹ The Commission also refers to the Ministry of Justice, which prior to the ratification of ILO 169, assumed that the situation must have persisted 'until our days'.⁵²

The Commission then states that it is hardly necessary to go further into 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 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.⁵³

The Commission has found that the inhabitants, except for the forest, to a large degree have 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

[t]he unsold land in Karasjok must therefore be considered covered by the criterion ‘traditionally occupy’ in the first sentence of Article 14 (1). 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 1751.⁵⁴

The Commission further state that this also have to 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 10 years until 1980 with dispositions that have less weight due to objections to state property rights.

The fact that both the Commission and the Supreme Court has emphasised the restorative function in ILO 169 Article 14 (1), means that ILO 169 holds a significant importance not only for the Karasjok study but for the overall judicial survey of Finnmark. This may also expand the narrow interpretation set by the Supreme Court in the *Stjernøya* case in such way that ILO 169 will have a greater significance in the judicial mapping in the future than it has had so far.⁵⁵

4. A brief analysis and conclusions

In the Karasjok investigation, the Finnmark Commission has assessed both the legal situation and the legal history with a different approach than in previous investigations. Although the result is different from the outcome of the Supreme Court *Nesseby* case, there is little reason to doubt that the Commission has applied the law in compliance the framework of contemporary Norwegian law, international law and its purpose. The fact that the report’s main conclusion is presented with dissent does not change that view.

The Commission concludes that the government or the king’s officials in the past have not exercised ownership disposition, but rather public authority over the lands located in Karasjok. This is in accordance with other research and appears to be an apt finding. It is also not possible to find specific documentation that the king

of Denmark and, later, the king of Sweden was considered as owner of the land in Finnmark; beyond the position he may have as a territorial lord or royal highness, which supports the Commission's findings.

That the Commission concludes that the surveying, and registration of properties in the 19th century was a formalisation of established use, and not a transfer of property, is also in line with such a realisation.

When the minority of the Commission argues that state dispositions in the 20th century have affected local legal opinions to such an extent that the state's ownership rights have been established as a settled legal situation, it does not consider the asymmetric balance of power between state and local people and that the locals in any case continued to adhere to their own traditions and customs. In this sense, there is greater reason to emphasise the majority's conclusion that the local population retains the collective property rights they had when the Karasjok area came under Norwegian sovereignty in 1751.

Considering Norway's obligations under ILO 169 to recognise 'the rights of ownership and possession of the peoples concerned over the lands which they traditionally use', the Commission emphasises the Convention in a way that gives it practical significance for the judicial survey. At the same time, some may say that the Commission has challenged the Supreme Court's understanding of the scope of ILO 169 in the *Stjernøya* case. This application of law must, however, be considered appropriate, not least because the Supreme Court, in the *Nesseby* case, has confirmed that the right to restitution is a part of the ILO 169 article 14 (1) and thus is legally binding for Norway. The Supreme Court has in that case also stated that ILO 169 is of significance, regardless of its incorporation through Section 3, first sentence, of the Finnmark Act, both as a result of the second sentence and the general presumption principle in Norwegian law (para. 166). This means that the Commission's application of law follows the norms the Supreme Court has drawn up in the *Nesseby* case.

The Finnmark Commission's application of law has contributed in giving ILO 169 increased relevance 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 kind of precedent, also for the courts.

Furthermore, other legal questions are posed in a different way than in previous reports, as the Commission recognises the original property right for the inhabitants and asks whether this right is retained or has been extinguished by the state's presumed dispositions of ownership. In the *Nesseby* case (para. 146), the Supreme Court has considered such a question to be inappropriate. However, with the clear examination of the historical facts, this can hardly be viewed as such an approach.

In summary, this chapter has shown that the Finnmark Commission in Karasjok has come to a different result compared to its previous investigations. The different result is, to some extent, more a consequence taking a different approach to the legal history and international law than substantive differences in factual circumstances of the investigation fields. This 'adjustment of course' has been necessary in order to meet Norway's obligations under international law. It has probably also

strengthened the legitimacy in the Sámi societies. Additionally, the adjustment has contributed to the alignment of the application of the rules on immemorial usage with a situation that reflects the historical realities in Finnmark, and further to the Sámi context, as it was done in the cases of *Selbu* and *Svartskog*.⁵⁶ At the same time, questions remains to be answered concerning other interest holders than the Sámi, and probably from parties in previous investigations, regarding, among others, previous practices, assessments and the predictability of the investigations.⁵⁷

5. Aftermath and legal proceedings

The Commission's conclusions have raised considerable debate both in the press and in political circles, where the contours of fronts that have been little visible since the Finnmark Act was adopted in 2005, now become more evident. A part of the picture is that the Finnmark Estate's administration has worked actively to ensure that the board of the Estate does not approve the Commission's conclusion. On 25 November 2020, however, a dissenting board of the Finnmark Estate approved the conclusions with the chairman's vote—a chairman appointed among the representatives chosen by the Sámi Parliament.⁵⁸ At the beginning of 2021, the leadership position of the board went from the Sámi side to the county council-appointed representatives, as the Finnmark Act section 7, para. 6 requires for odd-numbered years. The new appointed board, on a rather thin basis, immediately reversed its decision, which meant that Finnmark Estate no longer accepts the conclusions of the Commission.

Whether the property rights of the Karasjok inhabitants will be recognised and the titles transferred over to them is thus now a question for the courts of law to decide. In accordance with procedural rules in the Finnmark Act, the people of Karasjok must bring their claims for the Uncultivated Land Tribunal, suing the formal titleholder, the Finnmark Estate, to have a chance to have the title recognised, transferred and registered. When the deadline for filing lawsuits was reached on 11 June 2021,⁵⁹ many did so, for as many as 13 lawsuits were received. Two of them distinguished themselves with claims of collective property rights to all the land of the Finnmark Estate in Karasjok. The claims were raised by the Karasjok municipality on behalf of the municipality's inhabitants, the Karasjok Sámi Association, as well as five smaller community associations. A similar claim was put forward by the Guttorm group and two reindeer husbandry districts, claiming that it is the Sámi population in Karasjok who holds the title to the land of Finnmark Estate in Karasjok.

In addition, there were nine claims which concerned property rights to cabin grounds, traditional turf houses grounds and larger or smaller delimited property plots that were applied for. There were also claims for the right to extract wood for Sámi handicrafts and for the right to fish and outfield use that were requested.

It is an open question what the outcome of the disputes on collective property rights will reveal. The Land Tribunal chose to hear the smaller cases first. These were all concluded by the end of 2022, where the judgments in the Land Tribunal went in varying directions. One of these was appealed by the Finnmark Estate to the Supreme Court, which was unable to deal with the case.⁶⁰

In January 2023, the court proceedings in the two cases regarding collective property rights to all former state land in Karasjok were processed jointly by the Land Tribunal.⁶¹ After that, there was great anticipation attached to the outcome of the case, to whether everyone living in the Karasjok municipality, the Sámi in the municipality or the Finnmark Estate owns the former state land in Karasjok. The judgment of the Land Tribunal was presented on 21 April 2023.⁶²

Notes

- 1 The chapter is in parts developed from Øyvind Ravna, ‘The Survey of Use and Ownership Rights in Finnmark—A Change of Direction?’ (2021) 29(2) *International Journal on Minority and Group Rights* 316–49 <<https://doi.org/10.1163/15718115-bja10054>>. Thanks to the anonymous reviewers for useful comments.
- 2 *Finnmark Commission, Report Field 4* (2019) Vol 1–2.
- 3 ILO Convention No. 169 concerning Indigenous and Tribal People in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991, and ratified by Norway 20 June 1990) 1650 UNTS 383 (ILO Convention No. 169).
- 4 *Finnmark Commission* (n 1) Vol 1, 216.
- 5 *Finnmark Commission, Report Field 4 Interne rettsforhold i reindriften* (Internal legal Relations in Reindeer Husbandry) (2022) Vol 1–3.
- 6 See Environmental Justice Atlas, ‘Alta River Hydro Power Plant, Norway’ (31 January 2020) <<https://ejatlas.org/conflict/alta-river-hydro-power-plant-norway>> accessed 27 September 2022.
- 7 The Sámi Rights Committee was established by the Crown Prince Regent’s Res 10 October 1980, following a proposal from the Ministry of Justice, see *NOU 1984: 18 Om samers rettsstilling* (Official Norwegian Report: On the Legal Position of the Sámi) 42.
- 8 *NOU 1997: 4 Naturgrunnlaget for samisk kultur* (Official Norwegian Report: The Natural Basis for Sámi Culture).
- 9 Such a view is hardly supported by actual historical realities but is rather a result of 20th-century Norwegianisation politics (author’s note).
- 10 *NOU 1997: 4* (n 7) 222, see also 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) 46–47.
- 11 *NOU 1997: 4* (n 7) 222.
- 12 *ibid* 93.
- 13 *Innst. O. nr. 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) 14. The Sámi Parliament were at large supported by Hans Petter Graver and Geir Ulfstein, *Folkerettslig vurdering av forslaget til ny Finnmarkslov* (International Law Assessment of the Proposal for a New Finnmark Act) 3 November 2003.
- 14 Sven-Roald Nystø, former President of the Sámi Parliament, statement during testimony before the Supreme Court of Norway, HR-2018-456-P (Nesseby); see Øyvind Ravna, *Same- og reindriftsrett* (Gyldendal 2019) 450.
- 15 The translation is provided by Ministry of Justice and Public Security. Also, see *Innst. O. nr. 80* (n 12) 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. Sector-monistic incorporation means that ILO 169 is not incorporated to Norwegian law generally but in particular acts only, as the Finnmark Act.
- 16 Supreme Court of Norway, HR-2016-2030-A, para 76.

- 17 Supreme Court of Norway, HR-2017-456-P, para 102. Nevertheless, the court emphasised the *presumption principle*, which assumes that Norwegian law should be interpreted in accordance with Norway's obligations under international law.
- 18 *Finnmark Commission* (n 1) Vol 1, 154, with reference to *Norsk retstidende* 1229 (1944). Translated by the author here and elsewhere unless otherwise noted.
- 19 *ibid* 118, 154.
- 20 *ibid* 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 (9 August 2016) UN Doc A/HRC/33/42/Add.3, paras 23–24. The Special Rapporteur anchored her position in the UNDRIP, Article 26 (3) and ILO Convention No. 169, Article 8 (1).
- 21 *Finnmark Commission* (n 1) Vol 1, 186.
- 22 *ibid* 190.
- 23 Øyvind Ravna, 'Den tidligere umatrikulerte grunnen i Finnmark: Jordfelleskap fremfor statlig eiendom?' (2020) 133 *Tidsskrift for Rettsvitenskap* 219; cf. Kongelig Resolution 8 June 1775 ang. Jorddelingen i Finmarken samt Bopladses Udvisning og Skyldlægning sammesteds.
- 24 *Act of 22 June 1863 on the Disposal (Sale) of State land in the Rural districts of Finnmark*. The *Finnmark Commission* (n 1) Vol 1, 166, points 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'.
- 25 *Finnmark Commission* (n 1) Vol 1, 164.
- 26 *ibid* 168. Of these, there were 160 land lease plots. Also, parts of these plots are considered as subdivisions from previously established plots, typically as a result of inheritance settlements.
- 27 *ibid* 170.
- 28 *ibid* 198.
- 29 *Finnmark Commission* (n 1) Vol 1, 198, with reference to *Nrt* (Norsk Retstidende) 1229 (1248).
- 30 *ibid* 1249, 125.
- 31 Øyvind Ravna, 'Rettskartleggingen i Finnmark og reglene om alders tids bruk' (2015) 128(1) *Tidsskrift for Rettsvitenskap* 53, 78–79, where assessments of the kind made here are now in demand in the case of Field 2 Nesseby.
- 32 *Finnmark Commission* (n 1) Vol 1, 198, with reference to Thor Falkanger, *Allmenningssrett* (Universitetsforlaget 2009) 46.
- 33 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. It is just as likely that what took place was the division/allotment of community land, and not disposals, see Øyvind Ravna, 'Den tidligere umatrikulerte grunnen i Finnmark: Jordfelleskap fremfor statlig eiendom?' (2020) 133 *Tidsskrift for Rettsvitenskap* 219.
- 34 *Finnmark Commission* (n 1) Vol 1, 199, with reference to Håvard Steinsholt, 'Oreigning' in Per Kåre Sky, Hans Sevatdal and Erling Berge (eds), *Eigedomshistorie. Hovudlinjer i norsk eigedomshistorie frå 1600-talet fram mot nåtida* (Universitetsforlaget 2017) 374–82, the Commission (at 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 17th century and did not have immediate effect'.
- 35 *Finnmark Commission* (n 1) Vol 1, 43, 205, with reference to *Ot.prp. nr. 53 (2002–2003)* 88.
- 36 *ibid* 201.
- 37 *ibid* 204.
- 38 *ibid*, with reference to *Nrt* (n 28) 1229 (1243).
- 39 *Finnmark Commission* (n 1) 4 Vol. 1, 204. Here, the Commission clearly deviates from previous assessments, see the quotation in conclusion in section 3.2.

- 40 *ibid* 198.
- 41 *ibid* 202.
- 42 *ibid*.
- 43 *ibid* 203.
- 44 *ibid* 218.
- 45 *ibid* (highlighted by the Commission).
- 46 *ibid* 186.
- 47 *ibid* 204; United Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA A/RES/61/295 (UNDRIP).
- 48 Also referred to as *the right to restitution*.
- 49 *Finnmark Commission* (n 1) Vol 1, 203; cf. *Nesseby* (n 13) para 173. The restorative function is also referred to as *the right to restitution*. Its significance in Norwegian law is analysed in Øyvind Ravna, ‘Restitusjon og gjenoppretting i norsk urfolksrett’ (2020) 59 *Lov og Rett* 566.
- 50 *Finnmark Commission* (n 1) Vol 1, 204, with reference to ILO, *Indigenous & Tribal Peoples’ Rights in Practice—A Guide to ILO Convention No. 169* (2009) 94–95.
- 51 *ibid* 204, with reference to *NOU 1997: 5*, 49–50.
- 52 *ibid* with reference to *St. prp. nr. 102 (1989–90)* (Proposition to Parliament) 6.
- 53 *ibid*.
- 54 *ibid*.
- 55 It can also be mentioned that Uncultivated Land Tribunal, in UTMA-2017–62459 (Gul-gofjord), found no room to modify the good faith requirement to emphasise the state’s dispositions to a lesser extent, or to emphasise 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).
- 56 *Nrt* (n 28) 769, 1229, respectively.
- 57 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).
- 58 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, Vol 1).
- 59 According to the Finnmark Act section 38, ‘Disputes may be brought before the Uncultivated Land Tribunal by means of written summonses at the latest one year and six months following submission of the report of the Finnmark Commission. The Tribunal is one year and six months following submission of the report of the Finnmark’.
- 60 The Land Tribunal of Finnmark, *UTMA-2021–87806* and The Supreme Court of Norway, *HR-2022-2155-U*.
- 61 *The Land Tribunal of Finnmark, UTMA-2021–86077 og UTMA-2021–086497*.
- 62 On 21 April 2023, after the editorial work on this anthology was completed, the Land Tribunal of Finnmark presented its judgment. The majority of the Tribunal (3 to 2) concluded that ‘the property right to the area in Karasjok municipality that was transferred to the Finnmark Estate upon the entry into force of the Finnmark Act, and which has not previously been sold to private individuals or which, as a result of the legal survey under the Finnmark Act, is or will be clarified belongs to others, belongs collectively to everyone who at any time has a registered residential address in the Karasjok municipality, and in such way that these have an equal share in the court’.