

Collective rights in a modernizing North – on institutionalizing Sámi and local rights to land and water in northern Norway

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Abstract: The struggle by indigenous groups to have their rights acknowledged does not only take place through the action arenas of national political and constitutional processes, but also through active work through international bodies. Thus indigenous rights will often become arguments for institutional and constitutional changes in the modern world. The way such changes take place is nowadays more often through the incorporation of various forms of treaties and international charters into national legislation rather than direct negotiations between sovereign states and indigenous ‘tribes’, ‘clans’ or ethnic minority groups. However, when it comes to acknowledging the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy, these seem to be among the most difficult constitutional processes modern states can undertake. Thus they not only take much longer time than the granting of civil and political rights, but they also involve complex analytical exercises in order to understand the processes connected to the settling of indigenous land claims. This article analyses one such process in a nested and multi-tier system with parallel initiatives for institutional change.

Keywords: Collective rights, Finnmark Property, indigenous rights, Sámi rights.

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1. Introduction

Indigenous rights are often used as arguments for institutional and constitutional changes in the modern world. The way such changes take place is nowadays more often through the incorporation of various forms of treaties and international charters into national legislation rather than direct negotiations between sovereign states and indigenous tribes, clans, or ethnic minority groups (e.g. ILO Convention No. 169, 1994/97 and UN International Covenant on Civil and Political Rights, 1966/76). The struggle by indigenous groups to have their rights acknowledged does therefore not only take place through the action arenas of national political and constitutional processes, but also through active work by international bodies like the UN Working Group on Indigenous Populations (WGIP) and the International Work Group for Indigenous Affairs (IWGIA). In this nested and multi-tier system with parallel initiatives for institutional change, both civil and political rights have been granted to indigenous groups in a number of countries. However, when it comes to acknowledging 'the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy' (ILO Convention No. 169 § 14), these seem to be among the most difficult constitutional processes modern states can undertake. Thus they not only take much longer to grant civil and political rights, but they also involve complicated analytical exercises in order to understand the processes connected to the settling of indigenous land claims.

The literature on indigenous rights in northern Europe is extensive, and many scholars have addressed both the normative basis of the claims to these rights and the long legal historical evidence that can substantiate the various claims (Jebens 1986; Sandvik 1993; Berge and Stenseth 1998; Ørebech 2000; Eide 2001; Oskal 2001; Minde 2001; Føllesdal 2001; Graver and Ulfstein 2004; Jones and Schanche 2004). The bulk of this literature is based on research commissioned by the various Nordic government commissions entrusted with the difficult constitutional process of balancing the different claims. Or they are advocating certain perceptions of rights on behalf of certain groups of right holders or organised interest. Most of these perceptions point towards indigenous and local rights as collective rights and the land, lakes, fjords, and water courses to which rights are claimed as some form of traditional commons. Thus most of this research can be seen as arguments and empirical input into this long-drawn constitutional process.

On the other hand there is surprisingly little research done on the constitutional process itself and on the legal outcome of this in a governance perspective. And there is hardly any research done on the effects of the settlements to date on the various practices of local and indigenous groups in these northern areas. The reason for this is of course that the new legal reality is quite recent, and partly still unsettled. But it is also because the settlements have left large legal holes in the new institutional fabric, holes that in the coming decades have to be filled by supplementary decisions and the development of new practices.

The aim of this article is therefore to bring to the knowledge of a wider audience the potential rich research grounds that the gradual process of settlements of land claims in the European North will represent for new generations of constitutional and institutional analysts during the next 30 years. In outlining how such a research venue can be utilized by students of institutional change and students of commons it will show how institutional analysis can effectively be used to explain some critical questions in the long process of specifying and acknowledging indigenous and local rights in the European north. The bulk of the source documents and scientific articles of the European north are unfortunately in the national languages, but with increased publication in English and increased interest from international students, this situation is likely to change in the near future.

2. Land rights for indigenous peoples

Why then are the rights of ownership and possession of indigenous peoples over the lands that they traditionally occupy of such importance in recent developments of international law? As we shall see it is closely connected to the idea that historical injustice by colonizing powers can make amends by granting new rights to these groups. This has to a large extent been the motivating force behind the native land claim settlements in Alaska, Canada, New Zealand, Australia and South America during the latter part of the twentieth century. And it will most probably be an important part of the settlement of claims of the 'small peoples' of Northern Russia and Siberia in the twenty-first century. But the international treaties are in addition built on the assumption that the acknowledgement of the cultural rights of indigenous groups requires that they have some degree of control over the territory that forms the material base for their indigenous culture (re. ILO 169). This has been a strong motivating force in the processes of settling indigenous claims in the Nordic countries and in Greenland. Finally there has been a motivation on the part of the state to replace costly and unsustainable centralized governing of natural resources with more local, more legitimate, more efficient and more flexible self-governing institutions and thus decentralize some of the state's dilemmas connected with overuse of and exclusion from biological resources. In particular this relates to mountain pastures for Sámi reindeer husbandry, to hunting and salmon fishing. These latter concerns have been well known

analytical challenges to commons scholars during the last 3 decades, while the two first concerns, the 'historical injustice' and the 'material base for cultural rights', are more rarely entered into the institutional analysis.

In this complex nested setting it is important to keep in mind that the fundamental institutions of property rights are in many respects the best connection we have between the biophysical world and the social world. The way the economic forces affect the functioning of the ecosystems, and the way the forces of nature hit back at social and economic systems, can in most cases be better explained if the evolution and diversity of property rights are included in the analysis. Thus the efficiency of the property rights is to some extent reflected in the fate of the resources in question and in their sustainable or unsustainable use (North 1990). When the indigenous land claims processes result in changes in fundamental ownership structures, the success of the settlements in creating effective institutions can thus be measured with the analytical tools developed through the use of the IAD framework on thousands of resource governing systems (Ostrom 2005). In the perspective of facilitating sustainable development in these northern regions of Europe, it is important to keep in mind that there will always have to be a balance between the three concerns mentioned above: The political need to make amends to historical injustice cannot override the need for general legitimacy of the institutional set-up. And the need for securing the material base for the traditional indigenous culture cannot override the need for resource-based economic activities upon which the local populations are depending to modernise and develop according to technological and market changes. This applies both when the institutional set-up is inherited from ancient times and when such institutions are designed afresh as part of a conscious development effort of a political and legal process. These are also challenges that are known to most institutional analysts who have worked in complex settings.

In the analysis of these kinds of multiple action arenas where actors have overlapping positions, it is not sufficient to look at the workings of a contemporary institutional set-up. As the issue of institutional change is also part of a lengthy process of constitutional development, it is important to acknowledge that the real world is infinitely more complex than the standard textbook in institutional analysis. In the crafting of new operating rules at the collective level, there is never a 'clean slate'. Rules-in-use and existing customary rights will always be made relevant in the discourse at the constitutional level, as will ancient rights with different local origins and anchoring in national and international political and legal doctrines (Ostrom 2005). Path dependency is, in these circumstances, not merely a likely outcome, but also a negotiable factor connected to material interests and belief structures (North 2005). Thus a realistic analysis of these kinds of intertwined constitutional and institutional processes will often take place in a narrow field of tension between the origin of ancient rights and the functions of granted rights.

3. International context

The European discussion on the nature of indigenous title is as old as the history of European conflicts. But it can conveniently be traced to the beginning of the age of the great colonisations and the teachings by Francesco de Vittoria around 1532, 'De Indis et de Iure Belli Relectiones' (Vittoria 1917). These teachings established the natives of an area as the rightful owners of their areas, irrespective of religion and social structure. Accordingly, wars of conquest were to be forbidden and both sovereignty and the rights to the land should remain in the hands of natives, as long as Europeans were not denied trade and missionary activity, and as long as sovereignty or land rights could be transferred in accordance with the rules in force at that time. However, history often took a different course and because of distance and limited monitoring and sanctioning capacity available to the European states, colonizers often created their own reality. For instance the conquistadores of South America could openly defy the rules of Madrid without risking life or wealth (Diamond 1999).

The British legal tradition has been especially consistent through the centuries in trying to incorporate this doctrine of indigenous people's right to land and water. Notable here is the work done by some early colonial administrators to understand the legal concepts used by the indigenous peoples themselves (Maine 1875). Despite many flaws and misinterpretations, this tradition has become an important source for the legal order of important countries with substantial indigenous groups, like Australia, New Zealand, Canada and to some extent the USA. From here, the doctrine has found its way into the core of international law and is now heavily influencing the development of institutions for rural development in other parts of the world, also in the northern parts of Scandinavia and in northern Russia. These processes of settling indigenous and local land claims are markedly different from one country to the next, and increased efforts by institutional analysts in comparative analysis of these differences can contribute to sharpening our analytical tools. The legal protection of the areas and livelihood of the aborigines of Australia is markedly different from the comprehensive treaty between the British Crown and 540 Maori chiefs (*rangatiri*) in New Zealand – for example, the Waitangi-treaty of 1840 (Cant et al. 2005). And this is again vastly different from the Annex to the early Border Treaty between the Swedish/Finnish State and the Danish/Norwegian State regarding Sámi nomadic pasturing rights of the 'Lappecodicill' from 1751 (Kingdom of Denmark/Norway 1751). And the dynamic devolution processes in the Canadian North, with its negotiation and comanagement instruments in Nunavut and Keewatan, is markedly different from the U.S. Federal Indian Law developed from the Northwest Ordinance of 1787. However, such a comparative analysis is not the purpose of this article; it suffices here to notice what is common in both international law and in most countries' incorporation of this. Indigenous groups do not lose their rights to land and water by being subjected to a state's sovereignty and they maintain a

right to some form of political representation in relation to the powers of the state (Svensson 2003).

4. Historical background

Apart from the 'Constitutions of the North', the property rights history of the north is the most crucial element in the work of an institutional analyst. Especially since the 'law of things' (*ius in re*), is characterised more by inertia than any other rules, this is where the 'path dependency' can best be observed. Here it is interesting to note that the colonisation of the arctic and subarctic regions of the planet has a number of common traits. In all the circumpolar states: Alaska (USA), Canada, Greenland (Denmark), Norway, Sweden, Finland, and Russia, we find that the colonisation was never quite complete; the indigenous groups in the harshest and most marginal regions maintained much of their lifestyle and their customary use of natural resources. This happened more often by default than by a conscious state policy intention. Both Scandinavia and Russia were characterised by an 'inner colonisation'. This meant that the dominating agricultural and commercial cultures in the southern metropolitan areas of these countries spread northwards and pushed the hunting, gathering, and nomadic cultures of the indigenous groups into more marginal areas, or assimilated them into the mainstream Norwegian, Swedish, Finnish, and Russian cultures. In Russia this process took place with the aid of the Russian Orthodox Church which established mission stations and monasteries in the north, only to be followed by the Tsar's civil and military administration, and later by Soviet-style state companies, forced settlement schemes, and Gulag work camps (Pipes 1995). The indigenous groups were left in traditional pockets, to a large extent neglected and until this day to some extent untouched by modernisation. In northern Scandinavia and Finland, the nation states themselves were active from the outset in securing both sovereignty and property rights over the northern areas and in promoting rural development, self-sufficiency and trade here in the form of agriculture based on individual proprietorship (Sandvik 1993; Niemi 1992).

For Northern Norway, this is clearly documented in government records from 1742 onwards, based on the Lutheran morale of 'owning, working and saving' (Schnitler 1742–45).

From 1328 to 1852 the geopolitical situation here was ambiguous and the national borders between Norway, Sweden, Finland and Russia somewhat unclear or not strictly enforced. The nomadic Sámi reindeer herders could move quite freely with their herds between the territories claimed by the separate nation states. Sometimes they were taxed in triple, i.e. by tax collectors from 3 different countries, sometimes they could avoid taxes altogether by mobility and good intelligence. However, the sedentary Sámi were gradually assimilated into the Norwegian, Swedish and Finnish culture from the 1750s onward, by means of national compulsory schooling systems, expanding religious services,

agricultural market and support systems, and a cadastre linking property rights to property taxes. For the nomadic Sámi on the other hand, the institutionalisation of heavy modernity (Bauman 2001; Beck 2002) did not start until 1852, when the borders between Norway, Sweden and Finland were finally closed to Sámi reindeer migrations, a closure that spurred the legendary Kautokeino Sámi uprising in 1852. This also became the start of a period of heavy 'Norwegianization' of the Sámi group, with total assimilation as the stated objective.

The Finnish inner colonisation was, in brief, a spontaneous migration northwards by poor Finnish peasants and peasants from 'Tornedalen'. After a series of crop failures, these overran most of the Sámi traditional areas and created a northern Finnish sedentary culture which combined farming, fishing, hunting and reindeer husbandry (Ingold 1980). In Sweden a similar expansion of peasants northwards was checked by state intervention and a special 'cultivation-border' (*odlingsgränsen*) was created between peasant land and Sámi reindeer land (Korpijakko-Labba 1994). South of this border, Swedes and Sámi alike could farm, fish and do forestry, north of the border the Sámi, and only they, could practice reindeer husbandry, fish, hunt, and collect produce from the mountains. In Norway, the state was for several hundred years the prime colonizer in the north and earlier the Danish/Norwegian kings granted themselves the property rights under the pretence that everything that was not permanently and visibly somebody's own property, belonged to the King – the *dominium directum* legal doctrine of the sovereign rulers in Europe (Tretvik and Haarstad 1996).

Already in 1693 we find that the state in its legislature and its governance consistently uses the term 'King's Ground' or 'State ground' about the land in the north, not the South Norwegian concept of the King's Commons or State Commons (Sandvik 1993). Even today this inner colonisation is the reason why the Norwegian 'Law of Mountain Commons' (*Fjelloven*) only applies to Southern Norway. Up until 2005, as much as 95 percent of the total area of the Northern Province of Finnmark, the main area for nomadic reindeer husbandry in the whole of Scandinavia, has thus been owned by the state as a sovereign owner (NOU 1997, p. 4). The early ambitions of the state were to achieve rapid development of the north by selling plots of land to settlers. Both Sámi, Norwegians, and Finnish (*kven*) who wanted to take up agriculture could purchase land individually from the state. This settlement policy accelerated from the 1750's when various support programmes were enacted and peasants from the South Norwegian Valley of Gudbrandsdalen and Østerdalen could move north and settle in 'empty' valleys in northern Norway. In valleys where only nomadic pasture rights seemed to apply the formal regulation of settlements started by a government land acquisition decision in 1775 (*Jordutvisningsresolusjonen av 27 mai 1775*). In 1863 a law for the sale of ground in Finnmark was enacted and a special agency – the State Ground Sale Office – was established to speed up individualisation and agrarian development. This law

was revised in 1902 and as late as 1965. Thus the ideas that sovereign state property rights do exist in this area goes several hundred years back in history and one would think that this would be sufficient for these to be legally entrenched (*de jure*) and thus not susceptible to change.

5. The legacy of nomadic pasture commons

For the institutional analyst to fully understand the background for the present institutionalisation of Sámi rights and the surprising transfer of state property rights to the local level in the twenty-first century, it is also important to be aware of some fundamental differences that have emerged through the centuries between the Finnish, Swedish and Norwegian system of indigenous rights. One is the codification of the right to practice reindeer husbandry, where only the Sámi in northern Norway and the Sámi in northern Sweden have this as an exclusive right for this indigenous group – and have exercised this right continuously for at least the last 500 years. While in Finland, on the other hand, every farmer settled in the north can have some supplementary reindeers. This means that the right to pasture and movement of reindeer in Norway and Sweden has a legal base anchored in ancient indigenous rights, and independent of the ownership of the ground and the contemporary reindeer husbandry legislation. In brief this means that the reindeer legislation in Norway and Sweden can be changed at the operational level without the fundamental Sámi indigenous rights to reindeer grazing and movement on the constitutional level being affected. Whereas in Finland, where there is no further legal base than the operational law, reindeer herding is today confined mostly to the farm property itself; there are no independent nomadic rights. But another important difference is the nature of the right holders. In Sweden the reindeer grazing rights are anchored in the traditional Sámi collective, the *siida* (*samebyn*). Every member of a *sameby* share in this collective right, but in practice only Sámi reindeer owners can now be members of a *sameby*, thus rendering a large number of Swedish Sámi *de facto* without this right (Korpijakko-Labba 1994).

In Norwegian reindeer herding legislation, these rights now belong to a more modern entity mirroring a firm and known as the ‘operational unit’ (*driftsenhet*), which by the state is authorised to operate within a certain ‘reindeer district’, which again is part of a larger ‘Sámi reindeer area’. The indigenous collective reindeer rights in Norway thus reside in the socially constructed ‘Sámi reindeer areas’, with its area council representing broader societal interests. In Sweden these collective rights are anchored in an institution linked directly to ancient Sámi lineage based collectives, and for the institutional analyst it might be interesting to link this to the fact that Sweden has not felt the same urge to ratify the ILO convention no 169: The reindeer district in Norway (the level beneath the area) has a governing board, composed of representatives of the operational units in the district, thus representing mainly the private interests of the reindeer owners and operating more like a corporation

than a political body. Despite these modern ‘firm-like’ institutions at the operational level, there is now widespread agreement that the ‘reindeer-commons’ rights of Finnmark are still valid – even after 300 years of state ownership. The idea that all rights of management and use of resources located within the same area should be held by the person of the King, the *dominium plenum*, was not really valid. Thus these pasturing rights may in some ways be classified as a ‘long-enduring commons’ and the contemporary institutionalisation of Sámi and Local rights can in some ways be viewed as a surfacing of the underlying ‘real’ property rights of this commons (Bjørklund 1986).

The above mentioned industrial age institutions for the reindeer industry in Norway have to some extent produced an individualisation of the *de facto* reindeer grazing rights in Norway. In many respects, it is the combination of state responsibility for the total grazing resources in Finnmark and the persistent individualization of grazing rights that has produced the recurrent overgrazing of reindeer pastures in this northern province. For many years this overgrazing was portrayed as a typical example of the classic ‘Tragedy of the Commons’, and the conventional tools of privatisation was applied; aggressive slaughter strategies, downsizing of herds, and increased fencing (Jentoft 1998). But this strategy also led to confusion regarding succession of reindeer owning within the traditional Sámi family structure and frustration in face of a poorly implemented downsizing of the total number of reindeer. The downsizing often took place as a government buyout of small operational units from the industry; this in turn implied that an increasing number of Norwegian Sámi are *de facto* excluded from partaking in reindeer husbandry, while the big reindeer owners after a while increased the size of their herds.

But regardless of the poor management of the reindeer industry in Finnmark, the Norwegian High Court has made it clear that the legal base for Sámi reindeer husbandry is still ancient indigenous use – rather than the contemporary law – and that the right to reindeer grazing is a collective right which every Sámi has a part in. This lack of correspondence between the institutional map of indigenous rights as shared collective rights and the factual situation on the ground with individual owners overgrazing and ‘herder cannibalism’ has reduced the legitimacy of the state governance of the reindeer industry and thereby also of the ability of the state to secure a sustainable use of the state owned land in the north. This has contributed to, but does not alone explain the present process of institutionalising Sámi and local rights in the north.

Here it is important to understand how the institutions of a single nation will always be nested in the international community and in international law. In the age of ‘light and fluid modernity’ (Bauman 2001) the European nation states are no longer preoccupied with national homogeneity. After the end of the cold war, we also found that the borders in the north became more open and that frequent crossing does not represent a risk to national security. Thus, the larger geopolitical environment in the north has through the last decade allowed for important institutional changes. Still, the process of institutionalising

Sámi rights in the north has been part of a deep, lengthy and often painful constitutional process that at times has shaken the nation. It is convenient to identify the start of this process to 1978, when there was a great political battle over the plans for construction of a hydroelectric dam across the Alta River – one of the legendary salmon rivers of Europe, with an accompanying inundation of large areas of Sámi traditional grazing land. The dam was forced through by the political establishment, but the political process showed that the state could not do what it wanted with its own property. The price it had to pay was the formation of a Royal Sámi Rights Commission (*Samerettsutvalget I*), which was ‘to map all unclear aspects of the property rights and user-rights regarding ground use (land and water) in the northern province of Finnmark, and to propose local governance arrangements that would accommodate the needs of all the groups inhabiting this area’ (NOU 1997, p. 4). It took this Commission 17 years to complete its work, and another 8 years for the Norwegian Government and Parliament (*Storting*) to make the final decisions. Along the way, a number of fundamental constitutional changes were made, among them an amendment to the Norwegian Constitution that explicitly states that the Norwegian nation is based on two ‘peoples’, and the Sámi Act of June 12 1987 whose §1.2 states that ‘The Sámi people shall have its own national Sámi assembly, elected by and among the Sámi people’.

The contemporary outcome of the process is that the property rights to all ‘state ground’ in this northern province by 1st July 2006 was transferred to a newly constructed local owner-body, the Finnmark-property (*Finnmarkseieendommen–FEFO*), the construction of which naturally carries all the traits of a political compromise (Norwegian Parliament 2005; Innst. O. Nr.80 (2004–2005)).

6. Institutionalising Sámi and local rights

For an institutional analyst, this 30-year process is a unique example of a constitutional process with major implications for fundamental institutional arrangements in a modern nation. It might also have some repercussions for other nations struggling with the same kind of questions, notably Sweden, Finland, Canada, New Zealand and Australia – and further down the road also Russia. The major considerations in this constitutional process have been of two different kinds: One has been to make amend the injustice done towards the Sámi people from the Norwegian State through the centuries, both the forced assimilation policies from 1850–1970 (Norwegianization) and the state initiated encroachment of sedentary farmers on Sámi lands. The other consideration was the need of a small country like Norway to adhere strictly to international law and to conventions and treaties, and also those on cultural rights and indigenous peoples. On the first account, research often fails to give good answers on whether historical injustice can be repaired by various institutional measures and compensations to later generations. On the other

account, International Conventions (Especially ILO Conventions 107 and 169) started to impact on Norwegian legislation already in the 1970s. The Sámi Rights Commission gave its first report in 1984, proposing far-reaching reforms in the field of civil and political rights. This formed the basis for a specific Sámi law in 1987 which established separate political rights for Sámi as a distinct people and created a special Sámi parliament (*Sametinget*) in Karasjok. A new clause was then enacted in the Norwegian Constitution (110a) (1988), wherein the State takes upon it to 'create favourable conditions for the Sámi people to secure and develop its language, its culture, and its society.' This is interpreted to mean that the State of Norway is founded on the territory of two peoples: the Norwegians and the Sámi and from this day the Sámi is viewed as a 'State-constituting people', a position which is fundamentally different from other minorities in Norway.

According to the Sámi Parliament, the entry of the Sámi people in the Norwegian constitution also 'means that the historical rights of the Sámi, their ancient use of lands and the Sámi perceptions of rights – and everything else in a culture that forms the basis for contemporary law, for legal protection and resource management, shall constitute the basis for future legal development and governance – in the same way as the historical rights of the Norwegians, their ancient use of lands and the Norwegian perceptions of rights has been through the last centuries' (Sámi Parliament Plenary 3/99, Case # 32/99). Thus, through these lengthy constitutional processes, international conventions have been incorporated into Norwegian Law – in much the same way as modern EU-law is also becoming national law in the EU and EEA member states. Following this, the Sámi Parliament also interpret the transformation of e.g. the ILO-convention 169 into Norwegian Law in a way which implies that any changes in the property rights system of the ground in the Northern Province of Finnmark now need the consent of the Sámi Parliament. Or else it would be a breach of the Conventions that Norway has joined (Sámi Parliament Plenary 3/99, Case # 32/99).

Both the Sámi Rights Commission (NOU 1997, p. 4), a specialist group of experts on international law (NOU 1997, p. 5), and a specialist group on Sámi customs and perceptions of rights (NOU 2001, p. 34), agree that the institutional arrangements governing property rights and resource use in Finnmark were no longer satisfactory in view of the recent changes in both the Norwegian constitution and in the political rights of Sámi. These arrangements were in modern times based on a law from 1965 on the State's 'unmatriculated' ground in Finnmark. This was not an absolute property right as were the pretensions of the seventeenth century Danish-Norwegian kings. The *de facto* role of the state as owner of these public lands that was formed through several hundred years had never been clearly defined *de jure* in relation to the rights of the many users of the area. We have already mentioned that the nomadic reindeer herding rights now are regarded as separate ancient rights independent of who is the owner of the ground. In addition, other groups had during a long period

exercised their customary rights in relation to this area, for hunting, for fishing, for berry picking, etc., partly independent of the ground owner (Jones and Schanche 2004). In addition, both for pastures and other resources, the state was in later years not considered a successful range manager in this respect. This not only demanded a change in constitutional processes, but also the ambiguity of the rights on the ground and the resulting management difficulties made the old institutions for owning and governing the ground in Finnmark ripe for a dramatic change (Kingdom of Norway 2003).

In looking for solutions, the state chose to start afresh and create a completely new owner of all public land and water in this Northern Province (Norwegian Parliament 2005; Innst. O. Nr.80 (2004–2005)). This can to some extent be explained by the diverse attitudes regarding an ideal or preferred solution from the 3 important groups of players on this northern field:

1. The first group is the Sámi Parliament, the predominantly Sámi municipalities in 'Inner Finnmark' and the Sámi organisations. They wanted the indigenous Sámi rights – both collective, familial, and individual rights – to be strengthened through this innovation, and an acknowledgement of the Sámi's '... rights of ownership and possession of the ... lands which they traditionally occupy' (ILO Convention No. 169 § 14).
2. The second group is the Provincial Council of Finnmark. 'Outer Finnmark' is predominantly Norwegian coastal municipalities and provincial public bodies and organizations. They were generally against a strengthening of ethnic Sámi rights as such, but were positive to increased local governance of the huge land and water resources of Finnmark Province.
3. The third group are mainly the central ministries and their sector agencies. They were mainly concerned that whatever the chosen solution, the state should not lose all its control over the ground in Finnmark; infrastructure development of national importance must not be hindered and the State's authority to enact National Parks should not be curtailed.

The balanced outcome of the political struggle was a newly constructed owner-body that tried to balance all these different considerations. Although this was more politics than institutional design, the parliament was somewhat helped in doing this by a doctrine developed by the first chairman of the Sámi Rights Commission, the former chief justice of the Norwegian Supreme Court, Carsten Smith. This *lex Smith*, stated that when indigenous Sámi rights are made applicable in an area, those rights shall apply to all inhabitants of that area, irrespective of ethnic identity. In many ways it is this doctrine, also put forward by the Sámi Rights Commission, that has made the present compromise possible at all.

In short, the new law passed by Parliament (Finnmarksloven-Innst. O. nr. 80 2004–2005), implies the creation of a new and independent owner-body to which the Norwegian state has transferred all its property rights to land, lakes and rivers that were formerly owned by the state and managed by the State

Forest Company (Statskog). It is thus an independent legal entity separate from the state itself. This body, *Finnmarkseiendommen* (FEFO—The Finnmark Property), will have a governing board with equal number of members (3) from the Sámi Parliament and from the Provincial Council of Finnmark (3). So far these board members have been appointed on the basis of a mixture of competence and political affiliation. The Sámi Parliament does according to this law have the power to ‘decide guiding principles for how the effects for Sámi culture, reindeer husbandry, land-use, industry and society resulting from changes in the use of land and water on the property shall be judged’ (Norwegian Parliament 2005; Innst. O. Nr.80 (2004–2005)).

The new law also clarifies the relation to the legal base for acquiring independent property rights in Finnmark. Thus this law does not change private and collective rights that are based on active contemporary use, traditional use or ancient user rights. Such rights can be tied to diverse subjects like individuals, families, *siidas* or clans, communities, villages, municipalities, reindeer districts, community-commons, and state-commons. It also clarifies that the centuries of state ownership have not jeopardised the development of local property rights through long and enduring use. Consequently, the new owner body has inherited the same ambiguity between public ownership and real collective and individual property rights as the state experienced during the previous 300 years. After one year of operation, there are strong voices that hold that FEFO is just a ‘custodian’ of the property rights to land and water in Finnmark, and not a real ‘owner’ (Sagat 2007). In many ways this is correct, as FEFO according to the law cannot sell out parts of its property in the same way as a true Commons cannot be alienated. But the law has provisions for a special *Finnmarkskommisjon*, which during the next 20 years will undertake factual mapping and make proposals for formal recognition of existing user-rights and owner-rights of various kinds to the board of the *Finnmarkseiendommen*. This commission is also supplemented with a special court (*Utmarksdomstol*) which will decide in cases of disagreement. These supplementary bodies started their work in July 2007 and will most probably work at a slow pace and will over time be an important arena for institutional development on the ground in this northern province.

For students of CPR-dilemmas, some interesting aspects of the institutional set-up of the new owner-body will be its future practice regarding the use of certain local resources. The fundamental principle in the law here is that collective rights can exist alongside individual rights and that both individual rights and collective rights should be allowed to develop in a dynamic fashion. Thus a municipality can give individuals or groups of individuals in a local community whose livelihood is depending on the use of certain local resources, the right to utilize these for a period of 10 years at a time. The new body, *Finnmarkseiendommen*, can craft general guidelines for the municipalities. In working out these kinds of local practices, several such guidelines are now being tested out in a new ‘Strategic Plan for 2007–2010’ (FEFO 2007). This

task will be challenging because these rights regimes will have to be developed within a general three-tier system of rights to mountains and forests in Norway. For *Finnmarkseiendommen* the Norwegian Parliament has assumed that the underlying rights structure will be more local than in the rest of the country – something like the following:

- Public rights: Everyone will have the right, against paying a fee, to hunt and catch small game, and to do sports fishing in water and rivers with rod or hand-line. Everyone will in this case not only be all Norwegian citizens, but on certain conditions, also visitors to Norway.
- Regional Commons rights: All inhabitants in the Province of Finnmark will have the right to big game hunting, cloudberry gathering, and the gathering of wood for traditional woodcraft.
- Local Commons rights: All inhabitants of a municipality will have the right to fish for lake fish with nets, to catch anadromeous fish in the sea with fixed gear, and to collect birds' eggs and down. They will also have the right to cut deciduous forest for firewood needs in one's own house as well as taking fencing materials for agriculture and reindeer husbandry and to collect turf for fire and other needs.

(Norwegian Parliament 2005; Innst. O. Nr.80 (2004–2005)).

7. Challenges ahead

The new owner-body has a considerable freedom to vary the access to and harvest from these various resources and thus to decide the distribution of rights among the inhabitants of the province according to the overall availability of resources and the local demand for such user rights. The devolution of these kinds of decisions within the realm of political ecology is in many ways a novelty in Northern Norway, where hunters and leisure fishers have been used to the state as the guarantor of constant and uniform rights for most parts of the country. Thus they are in line with modern principles of adaptive ecosystem governance for increased resilience in Socioecological Systems (Ostrom 2005). But these prospects of increased institutional diversity create reduced predictability for visiting hunters and sport-fishers: this is therefore one of the grounds for persistent strong opposition to the whole law from the national organised hunting and leisure fishing interests.

The law also gives FEFO the flexibility to limit or expand the harvest of renewable resources according to the resource situation in a particular year or even in a particular season. This means that hunting periods can be varied from year to year and from district to district, and that different limitations (i.e. bag limits) can be imposed at short notice. Such considerations are meant to be in line with good ecosystem management principles and adhering to different EU-frame directives for good governance (i.e. the Water Directive). This can result in bringing more of the *de facto* resource rights home to the local level, as

hunting parties from abroad or from Southern Norway will have greater difficulties in incorporating Finnmark in their long term plans with this kind of seasonal uncertainty regarding starting dates and expected harvest. But there are also provisions in the law that the new owner-body can outsource the management of particular resources in particular areas to local organisations and corporations for a period of 10 years, again increasing the potential for commercialisation based on outsiders and their long term planning needs. Such commercial utilisation of certain resources of a local commons is known to lead to conflicts and its success will depend heavily on the construction of the local enterprise or organisation that obtains such a concession.

The new owner-body will also be under pressure to accommodate widely diverging interests in the local communities of Finnmark. There has recently been a demand from the reindeer industry that the use of dogs during the autumn hunting should be prohibited, as the dogs can easily disturb the important mating season of the reindeer. This would virtually put a stop to outside hunters, as most of them are hunting with dogs. Consequently, these proposals have been met with protests from those community members, many of whom are also reindeer owners, who earn good money from catering and transport of outside hunters (FEFO 2007).

To this we must add the fact that the price for hunting and fishing licences will be set by the new owner-body, within certain limits set by the law. The price for outsiders can at maximum be double the price that locals have to pay. As a major part of its income is generated from such licences, its pricing policy will be an important part of its decision-making agenda. Usually outsiders are willing to pay higher prices for hunting and fishing and this will again tend to stimulate the new-owner body to keep the resources open for public and regional users. Thus the mixture and diversity of property rights regimes and pricing regimes throughout the Province is expected to become considerably more complex than under the former uniform state governance system.

As purposely designed in the law, the future development of this system for multi-tier governance of local resources is quite open to change dynamics, and is likely to be influenced both by individual enterprise, by conscious collective action and by party politics. For scholars interested in in-depth studies of collective choices of all kinds, it will thus as a full-scale governance experiment be an exceptionally rich field for in-depth studies in many years to come. Already after 1 year of operation there are strong voices that hold that the Finnmark Law should have been written as a Commons Law more akin to the Mountain Law of Southern Norway. To a large extent, this future is impossible to predict, just as nobody in the tumultuous year of 1978 could have predicted the virtual abolition of state ownership of this Northern Province by 2005. What adds a dynamic element to the basket of institutional study tasks is a second governance experiment that was launched at the end of 2007, when the Royal Commission for rights to land and water for the Sámi areas in Norway south of Finnmark (Samerettsutvalget II) delivered their report to the

Norwegian government after 6 years of work (NOU 2007: 13 Vol. A& B). The title of this report is 'The New Sámi Legislation', referring to the fact that the proposed laws here take the development of Sámi rights a step further than did the 'Finnmarksloven'. In these areas the Sámi are in definite minority and the rights of some of the Norwegian farming communities here dates back at least a thousand years. Many of these were Commons Rights, which were also usurped by the sovereign Kings in the seventeenth century. Thus, there are two historical injustices to make amend, and the Commission proposes a legal framework that thus creates a new Commons. This is not the same Commons that were lost to both Sámi and Norwegians around 1751 (NOU 2007, p. 14), but like the Finnmark Property, a new legal construction to which the State will transfer its property rights. The proposed Law of the Hålogaland Commons (*Hålogalandsallmenningen*) is however written more as a Commons Law than the Finnmark Law. It is for the whole of 2008 on a public hearing, after that it is expected that the lawmaking work of the Government and the Parliament – and the consultations with the Sámi Parliament will take another 4–5 years. And after an act is passed, a commission that will register and acknowledge indigenous and local collective and individual rights on the Commons will probably have to work for at least another 25 years. Thus there will also in the areas south of Finnmark be a generous study field for institutional and constitutional analyses for many years to come.

But some even more profound questions of these evolutionary processes should be addressed in the years to come. Most of these are connected to the increased potential for local collective choice that this reform could enable the people of Finnmark and the Sámi areas south of Finnmark to undertake, thus potentially enabling them to solve some long standing resource governing problems themselves and thus increasing their self-governing capacity (Sandberg 2008). We have above briefly mentioned the problems in the reindeer industry of Norway, in short characterized by individualisation of operations, exclusion of an increasing number of Sámi from this core-activity of Sámi culture, and widespread ecosystem decline resulting from state-subsidised fencing, over-mechanisation, and poor herding practices. These problems are much a result of a dominating trend in the evolution of property rights in the western world during the last 250 years, which is characterized by a transformation of community allocations into private property and market allocations, and always with the active state as the prime guarantor of individual property rights as against more primordial collectives. As an important reason for the final transfer of state property rights to new local owner-bodies after 300 years, more precisely the demise of the reindeer industry, it is expected that the collective aspects of the indigenous Sámi rights will become more prominent in the future. However, the situation here is also quite open: On the one hand the new legal tools now at hand for both the Sámi parliament, the Provincial Council, and for the new owner-body, can enable a re-collectivisation of large reindeer pasturing areas, a removal of all fences and the establishment of a 'collectively rational' pasture

management system. On the other hand, the private property rights to winter grazing areas and to scarce migration corridors of the different operational units are on the verge of being entrenched and the pressure exercised by the most powerful reindeer owning families to protect these can also lead in the opposite direction – to a massive self-privatisation of the large pasturing areas.

At the time of the action at the Alta dam, it was unimaginable that the institutional development we have witnessed during the last 30 years should take place. And again, despite recent great advances in the field of institutional and constitutional analysis, it is also virtually impossible to predict what the situation will be after yet another 30 years. That is what makes this field so interesting for new generations of institutional analysts.

Literature cited

- Bauman, Z. 2001. *The Individualized Society*. Cambridge: Polity Press.
- Beck, U. -G. 2002. *Individualization: Institutionalized Individualization and its Social and Political Consequences*. London: Sage.
- Berge, E. and N. -C. Stenseth, eds. 1998. *Law and the Governance of Renewable Resources*. Oakland: ICS Press.
- Bjørklund, I. 1986. Sámi Reindeer Pastoralism as an Indigenous Resource Management System in Northern Norway – a Contribution to the Common Property Debate. *Development and Change* 21:75–86.
- Cant, G., A. Goodall, and J. Inns, eds. 2005. *Discourses and Silences. Indigenous Peoples, Risks and Resistance*. Christchurch, NZ. University of Canterbury.
- Diamond, J. 1999. *Guns, Germs and Steel – The fates of Human Societies*, New York: W.W. Norton & Company.
- Eide, A. 2001. Legal and Normative Bases for Sámi Claims to Land in the Nordic, in *International Journal on Minority and Group Rights* 8(2):127–149.
- FEFO (Finnmarkseinedommen) 2007, Strategisk Plan 2007–2010. Passed 20th March 2007.
- Føllesdal, A. 2001. On Sámi Claims to Land and Water. *International Journal on Minority and Group Rights* no 8(2):103–106.
- Graver, H. and G. Ulfstein. 2004. The Sámi People's Rights to land in Norway. *International Journal on Minority and Group Rights*, no 11(4):337–377.
- ILO Convention: No 107 – concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries. Adopted on 26 June 1957 by the General Conference of the International Labour Organisation at its 40th session: *entry into force* 2nd June 1959. This Convention was replaced 1989 by ILO Convention No. 169.
- ILO Convention: No. 169 – concerning Indigenous and Tribal Peoples in Independent Countries. Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session; *entry into force* 5 September 1991.

- Ingold, T. 1980. *Hunters, pastoralists and ranchers: reindeer economics and their transformations*, Cambridge: Cambridge University Press.
- Jebens, O. 1986. Sámi Rights to Land and Water in Norway. *Nordic Journal of International Law* 55:46–52.
- Jentoft, S. 1998. *Allmenningens komedie*, Oslo: Ad Notam – Gyldendal.
- Jones, M. and A. Schanche, eds. 2004, Landscape, Law, and Customary Rights, in *DIEDUT*, Kautokeino: Nordic Sámi Institute.
- Kingdom of Norway 2003; Ot.prp.nr 53 (2002–2003), Om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (Finnmarksloven), Oslo: Government Printer.
- Kingdom of Denmark/Norway. 1751; Lappecodisillen – Første Codicill og Tillæg til Grendse-Tractaten imellem Kongerigerne Norge og Sverrig Lapperne betreffende (Lappekodisillen) – <http://www.lovdatab.no/all/nl-17511002-000.html>.
- Korpijakko-Labba, K. 1994. *Om Samernas Rättsliga ställning i Sverige-Finland*, Helsinki, Juristförbundets Förlag.
- Maine, H. 1875, *Lectures on the Early History of Institutions*, London: John Murray Ltd.
- Minde, H. 2001. Sámi Land Rights in Norway: A test case for Indigenous Peoples. *International Journal on Minority and Group Rights* no 8(2):107–125.
- Niemi, E. ed. 1992. *Pomor: Nord-Norge og Nord-Russland gjennom tusen år*, Oslo: Gyldendal.
- North, D. C. 1990. *Institutions, Institutional Change and Economic Performance*, Cambridge, Cambridge University Press.
- North, D. C. 2005. *Understanding the Process of Economic Change*, New York: Princeton University Press.
- Norwegian Parliament 2005; Innst. O. Nr.80 (2004–2005), Innstilling fra Justiskomiteen om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (Finnmarksloven).
- NOU 1997: 4 Naturgrunnlaget for samisk kultur, Oslo: Government Printer.
- NOU 1997: 5 Urfolks landrettigheter etter folkerett og utenlandsk rett, Oslo: Government Printer.
- NOU 2001: 34 Samiske sedvaner og rettsoppfatninger, Oslo: Government Printer.
- NOU 2007: 13, Bind A & B, Den nye sameretten, Oslo: Government Printer (with an English summary).
- NOU 2007: 14, Samisk Naturbruk og rettssituasjon fra Hedmark til Troms, Oslo: Government Printer.
- Oskal, N. 2001. Sedvaner og Rettsdannelse – Noen rettsfilosofiske refleksjoner over spørsmålet om særlige samiske rettigheter, mimeo, Bodø December 2001.
- Ostrom, E. 2005, *Understanding Institutional Diversity*, New York: Princeton University Press.

- Pipes, R. 1995. *Russia under the old regime*, London: Penguin.
- Sagat (Sámi Newspaper) 2007: Ett år med Finnmarkseiendommen, 3. July 2007.
- Sandberg, A. 2008. *Constituting a New Order in the European North* in Filippo Sabetti, Barbara Allen, and Mark Sproule-Jones, eds., *The Practice of Constitutional Development: Vincent Ostrom's Quest to Understand Human Affairs*. Lanham, MD: Lexington Books.
- Sandvik, G. 1993. Statens grunn i Finnmark. Et historisk perspektiv, in NOU 1993: 34, Vedlegg 1, pp. 334–380, Oslo: Government Printer.
- Sámi Parliament, Norway, Plenary Protocoll 3/1999, Case # 32/99 Samerettstutvalgets instilling NOU 1997:4, Naturgrunlaget for samisk kultur. Karasjokk.
- Schnitler, P. 1742–1745, Major Peter Schnitlers grenseeksaminasjonsprotokoller, Bind, 1 & 2, v/ Kristian Nissen og Ingolf Kvammen, Oslo: Kjeldeskriftfondet.
- Svensson, T. G. 2003. 'On Customary Law: Inquiry into an Indigenous Rights Issue', *Acta Borealia*, 20:2, 95–119.
- The United Nations 1966; UN international covenant on civil and political rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, *entry into force* 23 March 1976, in accordance with Article 49.
- Tretvik, A. M. and K. Haarstad. 1996. Bønder, Jord og Rettigheter: rapport fra agrarhistorisk symposium, Trondheim, Skriftserie fra Historisk Institutt, NTNU.
- Vittoria, F. [1532] 1917. *De Indis et de Ivre Belli Relectiones*, Ed. Ernest Nys. Trans. John Pawley Bate. Washington: Carnegie Institute, 1917.
- Ørebech, P. 2000. The Fisheries Customary Participation Rights – The Coastal Sámi of Finnmark, in (Norwegian) in NOU 2001:34, Oslo, Government Printer.